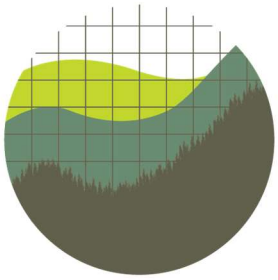


Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

Institute for Policy Integrity
New York University School of Law
139 MacDougal Street, Third Floor
New York, New York 10012

November 18, 2020

To: Bureau of Land Management, Colorado State Office
Subject: Protest to the Colorado December 2020 Competitive Oil and Gas Lease Sale: Northwest District, Docket No. DOI-BLM-CO-050-2020-0037-EA; Royal Gorge Field Office, Docket No. DOI-BLM-CO-F020-2020-0041-EA

Via ePlanning and e-mail to blm_co_leasesale@blm.gov

The Institute for Policy Integrity at New York University School of Law ("Policy Integrity")[1] respectfully submits the following protest to the Bureau of Land Management's December 2020 Competitive Oil and Gas Lease Sale in Colorado. In this lease sale, BLM intends to offer 42 parcels totaling 47,445 acres in the Kremmling, Little Snake, and Royal Gorge Field Offices.[2] **Policy Integrity protests the inclusion of all parcels in the lease sale**. (For the sake of completeness, all 42 parcels are listed by serial number in an appendix to this document).

As discussed in Policy Integrity's comments at the proposal stage—and detailed further below—BLM's consideration of these lease sales violates the National Environmental Policy Act ("NEPA") in numerous ways, and does not comport with the agency's requirements to consider multiple uses and ensure fair market value under the Mineral Leasing Act ("MLA") and Federal Land Policy and Management Act ("FLPMA").

[1] This document does not purport to represent the views, if any, of New York University School of Law.

[2] *See* BLM LITTLE SNAKE & KREMMLING FIELD OFFICES, ENVIRONMENTAL ASSESSMENT FOR THE DECEMBER 2020 COMPETITIVE OIL & GAS LEASE SALE 21–22 (DOI-BLM-CO-050-2020-0037-EA) (2020) [hereinafter "Kremmling EA"] (offering 17 parcels totaling 13,468 acres in the Kremmling and Little Snake Field Offices); BLM ROYAL GORGE FIELD OFFICE, , ENVIRONMENTAL ASSESSMENT FOR THE DECEMBER 2020 COMPETITIVE OIL & GAS LEASE SALE 5 (DOI-BLM-CO-F020-2020-0041-EA) [hereinafter "Royal Gorge EA"] (offering 25 parcels totaling 33,977 acres of split-estate land in the Royal Gorge Field Office).

BLM Fails to Respond to Policy Integrity's Comments on the Proposed Lease Sale

Policy Integrity submitted the same two sets of comments to each Environmental Assessment evaluating BLM's proposal for this lease sale: one that discussed the agency's failure to account for multiple uses, option value, and the fair market value of the proposed parcels,[3] and another that criticized the agency's cursory treatment of the proposal's climate impacts.[4] Yet BLM barely responds to these comments, and frequently disregards them altogether.

Of the four sets of comments filed by Policy Integrity (i.e., the same two sets of comments filed to each Environmental Assessment), BLM acknowledges only one set: Policy Integrity's comments on multiple uses, option value, and fair market value for the Royal Gorge Field Office parcels.[5] BLM does not respond to either set of Policy Integrity's comments on the consideration of climate impacts and the social cost of greenhouse gases, nor does it respond to Policy Integrity's comments on multiple uses, option value, and fair market value for the parcels located in the Kremmling and Little Snake Field Offices.[6] And while the points raised by Policy Integrity were sometimes duplicated in comments by other organizations to which BLM responded, many of the points were unique. Therefore, BLM does not take many of the issues raised in Policy Integrity's comments into consideration in finalizing this lease sale.

BLM's failure to consider or respond to Policy Integrity's comments is unlawful. Applicable regulations provide that the agency preparing an assessment under NEPA "shall consider substantive comments timely submitted during the public comment period,"[7] and, in the final assessment "shall discuss any responsible opposing view that was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised."[8] Numerous courts have echoed these requirements and set aside agency assessments that did not adequately respond to public comments.[9]

---

[3] Inst. for Poly' Integrity, Comments on the Draft Environmental Assessment for the Proposed December 2020 Competitive Oil and Gas Lease Sale (Sept. 14, 2020) [hereinafter "Policy Integrity Primary Comments"]. These comments are appended hereto.

[4] Inst. for Poly' Integrity, Comments on Failure to Monetize Greenhouse Gas Emissions in the Environmental Assessments for the December 2020 Colorado Oil and Gas Lease Sale (Sept. 14, 2020) [hereinafter "Policy Integrity Comments on Greenhouse Gas Emissions"]. These comments are also appended hereto.

[5] *See* Royal Gorge EA at 97–108 (intermittently responding to Policy Integrity's comments).

[6] *See generally* Kremmling EA, Attachment F (providing comment responses yet not alluding to Policy Integrity or its comments).

[7] 40 C.F.R. § 1503.4(a). Although this section was recently revised by the Council on Environmental Quality as part of a series of sweeping amendments to the NEPA regulations, the requirement to respond to comments predated that revision and was largely unaffected by it. Policy Integrity does not concede the legality of those recent amendments.

[8] *Id.* § 1502.9(c).

[9] *See, e.g.*, *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 537 (8th Cir. 2003) ("[R]egulations impose upon an agency preparing an FEIS the duty to assess, consider, and respond to all comments[.]"); *Oregon Nat. Res. Council v. Marsh,* 52 F.3d 1485, 1490 (9th Cir. 1995), *as amended on denial of reh'g* (June 29, 1995) ("An agency preparing an EIS has a duty to assess, consider, and respond to *all* comments,

While BLM's failure to even consider Policy Integrity's comments is unlawful by itself, that failure is particularly pronounced because our comments raised numerous critical issues that, if properly considered, would bear heavily on the agency's determination to proceed with the lease sales. We detail those issues—and BLM's continued failure to take them into account—in the remainder of this document.

BLM Fails to Account for Multiple-Use Values and Disregards Numerous Recreation and Wildlife Conservation Conflicts

BLM fails to respond to the comments submitted by Policy Integrity regarding the responsibility to account for multiple-use values under FLPMA and, specifically, disregards numerous recreation and wildlife conservation conflicts. These conflicts are particularly pronounced in the Kremmling and Little Snake Field Offices, which do not respond to Policy Integrity's comments on this issue.

For instance, as noted in our comments, Parcels 60, 63, 64, 65, 67, 68, 69, 70, and 5986 in the Kremmling Field Office are in close proximity to (within about four miles of) the Arapaho National Wildlife Refuge ("Refuge").[10] And several of these parcels directly border the Refuge. The purposes of the Refuge are: (1) to provide inviolate sanctuary for migratory birds, (2) to provide suitable fish- and wildlife-dependent recreation, and (3) for the development, advancement, management, conservation, and protection of fish and wildlife resources.[11] The Refuge is a key breeding ground for waterfowl in the state of Colorado and provides important habitat for migratory birds.[12] The greater sage-grouse is a year-round resident of the Refuge,[13] and wintering elk, moose, northern river otters, and American beavers also call this area home. In addition, the Refuge supports at least 40 species of neotropical songbirds such as the yellow warbler, song sparrow, Lincoln sparrow, and willow flycatcher.[14]

Leasing parcels directly adjacent and within close proximity to the Refuge poses multiple-use conflicts that BLM must further assess in order to comply with FLPMA and NEPA. Moreover, BLM would be better served by deferring leasing each of these parcels altogether, in light of multiple-use and sage-grouse habitat effects, as described in more detail in Parts I.B. and II of Policy Integrity's comments.[15] In fact, many of these conflicts have been apparent for more than a

---

even those relating to environmental factors not mentioned during the scoping process."). NEPA regulations also require agencies to publish "summaries and responses" of all comments in an appendix. 40 C.F.R. § 1502.19.

[10] *See* Policy Integrity Primary Comments at 3–6.

[11] FISH & WILDLIFE SERVICE, *Arapaho National Wildlife Refuge—Colorado*, https://www.fws.gov/mountain-prairie/refuges/arp.php.

[12] FISH & WILDLIFE SERVICE, *About the Refuge: Wildlife & Habitat*, https://www.fws.gov/refuge/Arapaho/wildlife_and_habitat/index.html.

[13] FISH & WILDLIFE SERVICE, *About the Refuge: Endangered and Threatened Species*, https://www.fws.gov/refuge/Arapaho/wildlife_and_habitat/endangered_and_threatened_species.html.

[14] FISH & WILDLIFE SERVICE, *About the Refuge: Riparian Habitat*, https://www.fws.gov/refuge/Arapaho/wildlife_and_habitat/riparian_habitat.html.

[15] *See* Policy Integrity Primary Comments at 6–11.

decade: the Arapaho National Wildlife Refuge Comprehensive Conservation Plan, released in 2004, states that lands outside of the Refuge represent valuable wildlife habitat and are "of interest" to the Refuge.[16] The Plan proposed to purchase private lands outside the Refuge in order to prevent minerals extraction, as "[m]inerals extraction may destroy wildlife habitats, and prevent goals and objectives from being met."[17] The Plan focused on private lands and did not anticipate that BLM would open up federal lands immediately surrounding the Refuge to oil and gas development. BLM fails to respond to our comments on the value of the Refuge and the need to cancel or defer the leasing of parcels in such close proximity to it.

In addition, parcels 60, 63, 64, 65, 67, 68, 69, 70, and 5986 are located along important aquatic resources for fish, wildlife, and recreation. Leasing these parcels could have detrimental effects on the "Gold Medal" trout fishing waters of the North Platte River, as designated by the Colorado Wildlife Commission.[18] Brook, brown, and rainbow trout thrive in the North Platte River, offering some of the best trout fishing in the West.[19] Any potential impact to water quality or other disruption from oil and gas activities could threaten the river's "Gold Medal" trout fishing designation and the outdoor recreation economy that it supports. Again, BLM fails to respond to Policy Integrity's comments about potential conflicts in these areas, and the need to consider deferring these parcels. Indeed, the parcels in close proximity to the Refuge, North Platte River, Walden Reservoir, Canadian River, and the rivers' tributaries have significant value for outdoor recreation, tourism, and wildlife protection that must be considered more closely. According to a 2017 report, fishing, hunting, and wildlife watching in Colorado together produce over $5 billion of annual economic output and support nearly 40,000 jobs within the state.[20]

Finally, all of the parcels offered in the Kremmling and Little Snake Field Offices are located in sage-grouse habitat. As Policy Integrity detailed in Part I.B of our comments, BLM cannot proceed with leasing in sage-grouse habitat until it develops a compliant, transparent approach to prioritizing any future leasing and development outside sage-grouse habitat.[21] Leasing in sage-grouse habitat without such an approach conflicts with both FLPMA's multiple-use mandate and a federal court order instructing BLM to comply with the 2015 Sage-grouse Plans.[22]

---

[16] FISH & WILDLIFE SERVICE, COMPREHENSIVE CONSERVATION PLAN: ARAPAHO NATIONAL WILDLIFE REFUGE 24–25 (2004), https://www.fws.gov/mountain-prairie/refuges/completedPlanPDFs_A-E/arp_2004_ccpfinal_all.pdf.

[17] *Id*. at 25.

[18] Erin Sendor, *Colorado's Gold Medal Fishing Waters*, COLORADOINFO, https://www.coloradoinfo.com/blog/colorado-gold-medal-fishing-waters.

[19] *Id*.

[20] SOUTHWICK ASSOCIATES FOR COLORADO PARKS AND WILDLIFE, *The 2017 Economic Contributions of Outdoor Recreation in Colorado* 7 (July 23, 2018), https://cpw.state.co.us/Documents/Trails/SCORP/2017EconomicContributions_SCORP.pdf.

[21] *See* Policy Integrity Primary Comments at 6–9.

[22] *See* BLM, RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN AMENDMENTS FOR THE ROCKY MOUNTAIN REGION, INCLUDING THE GREATER SAGE-GROUSE SUB-REGIONS 1-25 (2015), https://perma.cc.A4XK-JDGE; *W. Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319, 1335 (D. Idaho 2019) ("The BLM is enjoined from implementing the 2019 BLM Sage-Grouse Plan Amendments for Idaho, Wyoming, Colorado, Utah, Nevada/Northeastern California, and Oregon, until such time as the Court can adjudicate the claims on the merits. The 2015 Plans remain in effect during this time.").

It is difficult to see how BLM prioritizes non-habitat lands in this sale, as those Plans require, when every single parcel offered in the Kremmling and Little Snake Field Offices sits within priority habitat management areas ("PHMAs") or general habitat management areas ("GHMAs").

BLM's decision to defer Parcel 6156 due to sage-grouse conflicts,[23] while commendable, highlights the concerns with leasing the remaining parcels in the Kremmling and Little Snake Field Offices, as many of those parcels exhibit similar sage-grouse conflicts. For instance, Parcel 60 is 95% within a PHMA, has no adjacent leases, and has five leks within four miles, including two within two miles. Parcel 61 sits entirely within a PHMA and has five leks within four miles. Parcel 63 is 99% within a PHMA, nearly six miles from the closest producing well, and has two leks in the vicinity. Parcel 64 is within four miles of four different leks and is entirely within either a PHMA or GHMA. And Parcel 68 is also entirely within either a PHMA or GHMA, is five miles from the nearest producing well, and has four leks within four miles.[24] Given their importance as sage-grouse habitat, BLM should have considered deferring these parcels for the same reason that it deferred Parcel 6156. Instead, the agency offers no reason why these parcels are any less valuable as sage-grouse habitat.

In sum, BLM violates FLPMA's multiple-use mandate by offering numerous tracts for lease that have low or only moderate development potential, yet have other valuable public uses that are equally important (if not more so) under federal law. In light of its multiple-use mandate and the low expected return from leasing in this economic environment, as described further below, BLM should have considered the option of a far more tailored lease sale that avoids multiple-use conflicts, as 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.

Relying on Resource Management Plan-Based Stipulations Is Insufficient to Protect Wildlife and Other Multiple Uses, and Violates NEPA and FLPMA

Despite the considerable wildlife conservation conflicts in this lease sale, BLM brushes aside these conflicts by relying on stipulations and the possibility of additional protections when Applications for Permit to Drill ("APDs") are considered. The agency concludes that these measures will "ensure that resources and uses are protected," and concludes that, due to the possibility of future action on this front, any "attempt at more detailed analysis of cumulative impacts at the leasing stage would be too speculative to be useful."[25]

This reliance on future stipulations is inadequate and cannot free BLM from considering the impacts of this lease sale on wildlife conservation. Indeed, land-use stipulations are subject to

[23] Kremmling EA at 22.

[24] *Id.* Attachment H.

[25] *Id.* at 14 ("Planning-area-specific protections are applied at the leasing stage through RMP-based stipulations attached to each parcel. The BLM then uses project specific NEPA analysis at the APD stage to tailor additional protection to ensure that resources and uses are protected. Any attempt at more detailed analysis of cumulative impacts at the leasing stage would be too speculative to be useful to the decision-maker."); *accord* Royal Gorge EA at 100, 106 (stating that key impacts such as effects on groundwater resources and terrestrial wildlife "would be assessed at the Application for Permit to Drill (APD) Stage").

numerous waivers, exemptions, and modifications.[26] And even if they remain in place, development on adjacent or nearby non-federal parcels could still lead to many detrimental effects. It is far more logical—and in fact required under 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.

BLM's reliance on the ADP application to resolve any wildlife conservation conflicts is particularly problematic because that process rarely allows for public comment. Indeed, BLM has "generally not involved the public when considering operator requests for exceptions to lease and permit requirements," and the public is "seldom" given an opportunity to comment "particularly if the exception criteria are outlined in the land use plan."[27] Since the APD application phase does not allow for public comment, the lease sale stage presents the best opportunity for BLM to examine site-specific conflicts.[28] BLM must therefore give such conflicts full consideration when assessing whether to proceed with leasing these parcels.

The Recent, Record-Breaking Wildfires in this Area Have Caused Severe and Uncertain Impacts to Wildlife in the Region, Weighing Strongly Against Leasing Any Nearby Parcels at This Time

Authorizing this leasing is particularly problematic at this time because, among other reasons, wildfires have recently ravaged northern Colorado, with impacts on wildlife that are currently difficult to ascertain.[29] BLM should not further threaten wildlife habitat before it has an opportunity to study the impacts of those fires on wildlife in and near the Refuge, as well as wildlife that use migration corridors throughout the entire region.

The attached map shows the proximity of the recent East Troublesome and Cameron Peak wildfires to the parcels being offered for lease as well as important wildlife and conservation

---

[26] *See, e.g.*, BLM, COLORADO GREATER SAGE-GROUSE CONSERVATION PLAN G-1 (2015) ("Use or occupancy of the land surface for fluid mineral exploration or development is prohibited to protect GRSG and GRSG habitat. In areas open to fluid mineral leasing with NSO stipulations, fluid mineral leasing activities are permitted, but surface-disturbing activities cannot be conducted on the surface of the land unless an exception, modification, or waiver is granted."); *id.* at G-2 ("An exception exempts the holder of the lease from the stipulation on a one-time basis. A modification changes the language or provisions of a stipulation due to changed conditions or new information either temporarily or for the term of the lease. A modification may or may not apply to all other sites within the leasehold. A waiver permanently exempts the surface stipulation for a specific lease, planning area, or resource based on absence of need, such as a determination that protection of winter use is unnecessary for maintenance or recovery of a species.").

[27] U.S. Gov't Accountability Off., *Oil and Gas Development: Improved Collection and Use of Data Could Enhance BLM's Ability to Assess and Mitigate Environmental Impacts* 20 (2017).

[28] *See id.* (explaining that, because public comment is rarely permitted at the APD stage, "organizations provide the majority of their input when BLM is developing its resource management plans or identifying lease parcels for sale").

[29] The Cameron Peak wildfire, which began in mid-August, has burned more than 208,000 acres of land. The East Troublesome wildfire, which began in mid-October, has burned more than 193,000 acres of land. Stephen Miller, *'This Season is Off the Charts': Colorado Fights the Worst Wildfires in Recent History,* THE GUARDIAN (Oct. 30, 2020) ("Since May, wildfires have scorched more than 624,000 acres in Colorado, killing at least two people, razing more than 550 structures, causing damage estimated at upwards of $195m.").

lands.[30] As that map shows, the wildfires burned important wildlife habitats and migration corridors, including habitat for pronghorn, elk, and mule deer, along with pronghorn migration corridors. The leased parcels in the Northwest District, which are not far from these affected habitats, could therefore become more critical wildlife habitat for local populations of these species. Indeed, wildfires can have severe and unpredictable impacts on local fauna,[31] and without study further study it appears premature to conclude that these lease sales will not significantly affect critical habitat.

There is thus considerable option value to delaying these lease sales so that BLM may further evaluate their impact on local wildlife. Option value is the informational value of delaying a decision.[32] 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. And courts have held that agencies must assess option value when considering mineral leasing.[33] As Policy Integrity detailed in Part II.B of its comments, the option value is high in this lease sale given the considerable uncertainties involving resource conflicts and economic conditions (the latter of which is detailed further below).[34] The fact that recent wildfires have severely affected the landscape and necessitate further study of the lease sale's impacts on local wildlife increases this option value and further counsels delay.

BLM's reliance on outdated information and failure to assess the impacts of recent wildfires on local fauna violates NEPA as well. Under NEPA, an agency cannot rely on outdated information and must reconduct its analysis when more recent information renders its original

---

[30] Map: Colorado December Lease Sale Parcels in Proximity to East Troublesome and Cameron Peak Wildfires, attached.

[31] U.S. Dep't of Agriculture, *Wildland Fire in Ecosystems: Effects of Fire on Fauna* 1 (2000) ("The extent of fire effects on animal communities generally depends on the extent of change in habitat structure and species composition caused by fire.").

[32] *See generally* Policy Integrity Primary Comments at 7 ("The informational value of delay is known as 'option value,' and it has long been considered a relevant factor for federal leasing and mineral decisions by agencies, courts, and economists. 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. For instance, it may be advantageous for BLM to further defer some or all of these leases, pending more comprehensive environmental information, completion of a relevant cultural or scientific study, or more community input. If BLM learns of 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 the land is already leased due to the length of the lease and the possibility that the land's character will be irreparably changed through resource extraction.").

[33] *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 610 (D.C. Cir. 2015) (recognizing that there is a "tangible present economic benefit to delaying the decision to drill for fossil fuels to preserve the opportunity to see what new technologies develop and what new information comes to light," and explaining that this option value "can be quite substantial, especially for tracts that are only marginally profitable at current prices" and so yield little present economic benefit if leased now).

[34] *See* Policy Integrity Primary Comments at 11–16 ("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 the lease sale stage by offering only high-potential lands with limited multiple-use conflicts, if any, in lease sales, and deferring other parcels that pose potential resource conflicts.").

analysis outdated.[35] Such is the case here. Given that record-setting wildfires ravaged the region after BLM published notice of its proposed lease sale—and BLM does not address the effect of these wildfires on local wildlife habitat in its final environmental assessments—the agency must defer these lease sales so that it may further study the issue and reassess the lease sales in light of any new information.

Recent Market Declines and the Likelihood of Speculative Leasing Threaten BLM's Ability to Ensure Receipt of Fair Market Value for These Parcels

As Policy Integrity detailed in Part II.C of our comments,[36] BLM's failure to consider option value or current market conditions means that the agency is unlikely to receive fair market value for these parcels as required by FLPMA.[37] BLM fails to sufficiently respond to these comments, and, accordingly, remains unlikely to obtain fair market value.

For one, BLM's own data and projections indicate that expected drilling on these parcels is likely to be limited. Of the 25 parcels set to be leased in the Royal Gorge Field Office, BLM considers all but two to have "very low" development potential, with another parcel considered "low" potential.[38] Indeed, although BLM offers 24 parcels for lease in Las Animas County, "no oil has been produced in the county since 2014," and "there has been no Federal oil production in the county since 2003."[39] Given the very low development potential of these lands, BLM strikingly admits that "[a]s a practical matter, the difference in potential air quality impacts between the No Action and proposed action is minimal."[40] The parcels in the Kremmling and Little Snake Field Office may also see little drilling. No new wells have been drilled in the Little Snake Field Office since 2016, while in the Kremmling Field Office no new wells have been drilled this year.[41] And expressions of interest from the oil and gas industry in the Kremmling Field Office "have been primarily concentrated in … low or no potential areas"—suggesting that here, too, developers may be interested in the lands for speculative purposes.[42]

It is also important to consider the development potential of these lands against two critical backdrops. First, it is very common for developers to purchase leases cheaply for speculative

[35] *See, e.g.*, *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (finding NEPA analysis insufficient when it rested on information that was "too outdated," and concluding that "the lack of up-to-date evidence … prevented the [agency] from making an accurate cumulative impact assessment of the Project"); *Seattle Audubon Soc'y v. Espy,* 998 F.2d 699, 704–05 (9th Cir.1993) (overturning an agency decision when it rested on "stale scientific evidence").

[36] *See* Policy Integrity Primary Comments at 16–24.

[37] 43 U.S.C. § 1701(a)(9).

[38] Royal Gorge EA at 18–19.

[39] *Id.* at 38; *see also id.* at 18 ("The Las Animas County parcels are located in areas with minimal oil and gas development and there are currently no producing well in the general vicinity.").

[40] *Id.* at 38.

[41] Kremmling EA at 30.

[42] BLM KREMMLING FIELD OFFICE, PROPOSED RESOURCE MANAGEMENT PLAN AND FINAL ENVIRONMENTAL IMPACT STATEMENT 3-187 (2015).

purposes, and then sit on the land without drilling throughout the lease term, depriving the public of 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.[43] In Colorado alone, nearly 1.2 million leased acres were sitting idle,[44] and on average over the last five years only 52% of leased lands in the state are held by production.[45] 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.[46] 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.[47] Given the fact that royalties make up the vast majority of federal revenue from the oil-and-gas leasing program,[48] leasing lands that are unlikely to yield any drilling—and thus any royalties—fails to produce fair market value.

Second, global oil prices have plunged as the economy has contracted due to the COVID-19 pandemic. The price of crude oil is currently about 40 percent lower than it was at the beginning of 2020[49]—a trend that numerous forecasters believe will continue for years or even decades.[50] That has substantial impacts on BLM's ability to obtain revenue from lease sales. For one, as oil companies have seen profits decline, BLM has been granting unprecedented numbers of requests from producers to reduce royalty payments, lowering the return that the government receives from drilling.[51] Moreover, energy developers have cut back on their drilling in recent months.

---

[43] *Compare Oil and Gas Statistics*, BUREAU OF LAND MGMT. tbl. 2, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics, *with id.* tbl. 6.

[44] *Id.*

[45] Royal Gorge EA at 40.

[46] Congressional Budget Office, *Options for Increasing Federal Income from Crude Oil and Natural Gas on Federal Lands* 2 (2016), https://perma.cc/SEM7-PNA5.

[47] *Oil and Gas Statistics*, BUREAU OF LAND MGMT tbl. 11, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics. As these statistics show, BLM made 14,080,439 acres available for lease during calendar years 2013–2016, with 3,275,780 of those acres—roughly 23 percent—receiving bids. During calendar years 2017–2018, BLM made 16,857,751 acres available for lease, with 2,281,123 of those acres—just 13.5 percent—receiving bids.

[48] *Natural Resources Revenue Data*, U.S. DEP'T OF THE INTERIOR, https://revenuedata.doi.gov/ (last visited Nov. 12, 2020) (reporting that royalties make up $6.7 billion of the $7.2 billion in total revenues—which equates to over 83 percent—from the natural resources leasing program thus far in fiscal year 2020).

[49] *Petroleum & Other Liquids*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/dnav/pet/hist/RWTCD.htm (last visited Nov. 10, 2020).

[50] Laura Hurst & Amanda Jordan, *BP Writes Off Billions as Covid Redraws Rules of Oil Demand*, Bloomberg (June 15, 2020), https://www.bloomberg.com/news/articles/2020-06-15/bp-sees-quarterly-charges-write-offs-of-up-to-17-5-billion (reporting that BP has "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"); Int'l Monetary Fund, *World Economic Outlook Update* (June 2020), https://www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020 (projecting only a modest rebound in oil prices toward "about 25 percent below the 2019 average").

[51] *Oil & Gas Royalty Relief – Data and Analysis*, TAXPAYERS FOR COMMON SENSE, https://www.taxpayer.net/energy-natural-resources/federal-royalty-relief-data-analysis-2/ (last visited Nov. 10,

Nationwide, there are currently just 300 operational oil and gas rigs, according to data compiled by Baker Hughes—a decline of nearly two-thirds from the 851 rigs that were operational a year ago.[52] This sharp decline in drilling indicates that the parcels in these sales may be unlikely to see any drilling in the near- or medium-term future, thus depriving the federal government of *any* royalties (even reduced-rate royalties) that it would receive from productive lands. Federal royalty collections from natural resources leasing are currently down 25 percent compared to last year.[53]

Despite these downward trends, BLM brushes aside the importance of current market conditions in assessing the lease sale, stating that "[d]evelopment is still occurring on Federal lands despite the pandemic and the low commodity prices" and that the agency "cannot predict which applicant is interested in development in the near term versus speculative investment in federal leases."[54] While it is true that *some* development is still occurring, that development is substantially reduced from pre-pandemic levels. Moreover, available data and forecasts allow BLM to reasonably estimate that drilling will be limited in light of current and projected market conditions. It is not rational for BLM to close its eyes to these obvious facts.

The Royal Gorge Field Office's responses to Policy Integrity's comments indicate that it does not understand option value and is not approaching these lease sales in a rational manner. With respect to the low potential of the leased lands, BLM states that it "does not base its leasing decisions on the relative oil and gas potential of particular lands," because "[c]lassifications of oil and gas potential may change over time as new technologies develop and new oil and gas discoveries are identified."[55] And the agency disregards the effect of current market conditions because "markets for all commodities fluctuate over time."[56] But as detailed above and in Policy Integrity's comments, this uncertainty increases option value and is a reason to delay the lease sale until further information is known.

Indeed, oil and gas developers lease lands with low potential for the very purpose of obtaining them cheaply in the hopes that market or technological developments make exploration more lucrative.[57] In other words, buyers are considering option value—as rational economic actors do when assessing market value. BLM's failure to account for uncertainty allows these developers

---

2020) (explaining that, BLM has granted royalty relief to more than 500 oil-and-gas leases since March covering 343,000 acres of federal land, with some of these reductions reducing the royalty rate from 12.5 percent all the way down to 0.5 percent); *see also* Will Englund & Dino Grandoni, *Oil Companies Drilling on Federal Land Get Break on Royalties. Solar and Wind Firms Get Past-Due Rent Bills.*, WASH. POST (May 20, 2020), https://www.washingtonpost.com/business/2020/05/20/blm-royalty-relief/.

[52] *Rig Count Overview & Summary Count*, BAKER HUGHES (last visited Nov. 10, 2020), https://perma.cc/N6ZW-ZF7V.

[53] *Natural Resources Revenue Data*, U.S. Dep't of the Interior, https://revenuedata.doi.gov/ (last visited Nov. 12, 2020).

[54] Kremmling EA at 29.

[55] Royal Gorge EA at 99.

[56] *Id.* at 106.

[57] Eric Lipton & Hiroko Tabuchi, *Energy Speculators Jump on Chance to Lease Public Land at Bargain Rates*, N.Y. TIMES (Nov. 27, 2018), https://www.nytimes.com/2018/11/27/business/energy-speculators-public-land-leases.html.

to obtain a windfall if exploration does become more lucrative. Instead, BLM would obtain better value if it only leased lands with high potential (and few multiple-use conflicts) that would sell for a high premium and yield large royalties. Thus, the very reasons that BLM provides for moving ahead with the lease sale are, in fact, reasons to delay.

In short, BLM's misguided consideration of market conditions and option value makes it unlikely that the agency will receive fair market value for these sales, supplying one more reason that BLM should defer all parcels from the lease sale.

BLM Fails to Meaningfully Consider Potentially Substantial Climate Impacts, and Its Justifications for Rejecting the Social Cost of Greenhouse Gases Ring Hollow

Despite projecting that the lease sales may result in the emission of up to 24 million metric tons of carbon-dioxide equivalent in total downstream emissions,[58] BLM fails to assess the incremental impact of those emissions on climate change. Yet as Policy Integrity detailed in its comments on climate impacts—and as numerous federal courts have confirmed[59]—merely reporting total emissions without further assessment is insufficient under NEPA.[60] Moreover, Policy Integrity's comments explained that an available tool—the social cost of greenhouse gases[61]—would enable BLM to assess the incremental climate impacts from the lease sale by providing an estimate of economic and social damages resulting from projected emissions.[62] While BLM does not acknowledge these comments in either Environmental Assessment, it does respond

[58] *See* Royal Gorge EA at 46 (projecting 13.62 million metric tons in downstream emissions under the high reasonable foreseeable development scenario); Kremmling EA at 40 (projecting 9.29 million metric tons from Kremmling Field Office parcels and 1.51 million metric tons from Little Snake Field Office parcels). Policy Integrity does not endorse the accuracy of these projections. Indeed, as detailed above, significant evidence, including recent trends in the oil-and-gas sector, indicates that drilling on these parcels may be limited throughout the duration of the proposed leases.

[59] *See, e.g.*, *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1216–17 (9th Cir. 2008) (rejecting analysis under NEPA when agency "quantifie[d] the expected amount of [carbon dioxide] emitted" but failed to "evaluate the incremental impact that these emissions will have on climate change or on the environment more generally," noting that this approach impermissibly failed to "discuss the *actual* environmental effects resulting from those emissions" or "provide the necessary contextual information about the cumulative and incremental environmental impacts" that NEPA requires); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014) ("Beyond quantifying the amount of emissions relative to state and national emissions and giving general discussion to the impacts of global climate change, [the agencies] did not discuss the impacts caused by these emissions."); *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1096–99 (D. Mont. 2017) (rejecting the argument that the agency "reasonably considered the impact of greenhouse gas emissions by quantifying the emissions which would be released if the [coal] mine expansion is approved, and comparing that amount to the net emissions of the United States"); *California v. Bernhardt*, No. 4:18-CV-05712-YGR, 2020 WL 4001480, at *36 (N.D. Cal. July 15, 2020) ("Mere quantification [of greenhouse gas emissions] is insufficient.").

[60] *See* Policy Integrity Comments on Greenhouse Gas Emissions at 1–3.

[61] *See* Interagency Working Group on the Social Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis* (2010).

[62] *See* Policy Integrity Comments on Greenhouse Gas Emissions at 3–5.

to comments from other organizations on the social cost of greenhouse gases by offering multiple excuses for failing to apply this methodology. But BLM's justifications are misguided.

First, BLM incorrectly asserts that the social cost of greenhouse gases is inappropriate for project-level decisionmaking because it was developed for regulatory analysis.[63] While it is true that the social cost of greenhouse gases was developed for rulemaking, there is no reason to limit its application to other contexts. The social cost of greenhouse gases measures the marginal cost of *any* additional unit of a greenhouse gas emitted into the atmosphere. The type of government action that precipitates that unit of emissions—whether a regulation, project approval, lease sale, or anything else—does not affect the marginal climate damages caused by its emissions. Indeed, the social cost of greenhouse gases has been used by numerous federal agencies in environmental assessments under NEPA.[64]

Nor is the BLM correct to suggest that use of the social cost of greenhouse gases is inappropriate because this NEPA assessment is not a cost-benefit analysis.[65] Even if other impacts are not monetized, using the social cost of greenhouse gases is the best method to assess the significance of a project's climate impacts as NEPA requires. Indeed, NEPA regulations acknowledge that when monetization of particular costs or benefits is "relevant to the choice among alternatives," that analysis can be presented alongside "any analyses of unquantified environmental impacts, values, and amenities."[66] The regulations also instruct agencies to apply "research methods generally accepted in the scientific community" to assess a proposal's impacts when scientific methods preclude a complete assessment of all impacts.[67]

BLM also states that the social cost of greenhouse gases "does not add any information about the actual impacts of a project on the biophysical environment or economic conditions."[68] But this is simply false. The social cost of greenhouse gases methodology calculates how the emission of an additional unit of greenhouse gases affects atmospheric greenhouse concentrations, how that change in atmospheric concentrations changes temperature, and how that change in temperature incrementally contributes to the social and economic damages caused by climate

[63] Kremmling EA at 42; Royal Gorge EA at 108–09.

[64] For example, in 2017, the Bureau of Ocean Energy Management called the social cost of greenhouse gases "a useful measure to assess the benefits of CO_2 reductions and inform agency decisions," and applied the metric in an environmental impact statement. BOEM, DRAFT ENVIRONMENTAL IMPACT STATEMENT—LIBERTY DEVELOPMENT PROJECT IN THE BEAUFORT SEA, ALASKA 3-129, 4-50 (2017). More generally, agencies have used the Interagency Working Group's social cost of greenhouse gases estimates not only in scores of rulemakings but also in NEPA analyses for resource management decisions. *See* Peter Howard & Jason Schwartz, *Think Global: International Reciprocity as Justification for a Global Social Cost of Carbon*, 42 Columbia J. Envtl. L. 203, 270–84 (2017) (listing all uses by federal agencies through July 2016).

[65] Kremmling EA at 42–43.

[66] 40 C.F.R. § 1502.22.

[67] *Id.* § 1502.21(c)(4).

[68] Kremmling EA at 42; *accord* Royal Gorge EA at 108.

change.[69] The tool therefore captures the factors that actually affect public welfare and assesses the degree of impact to each factor, whereas simply estimating the volume of emissions cannot.

Finally, BLM argues that comparing emissions from this lease sale to total U.S. or global emissions is a rational method that satisfies NEPA.[70] However, BLM's comparison illustrate the opposite, as the agency uses these comparisons to treat the emissions from these lease sales as effectively meaningless, whereas application of the social cost of greenhouse gases would reveal that they are significant. For the parcels in the Kremmling and Little Snake Field Offices, for instance, BLM states that emissions are "dwarfed by the large number of comparable national and subnational contributors."[71] But comparisons to national emission figures inappropriately make significant effects appear relatively trivial. The mere fact that climate change is a global phenomenon does not mean that individual projects cannot themselves have substantial climate effects, nor does it absolve agencies of their obligation under NEPA to assess those impacts.[72] Percentage comparisons can be misleading and can be manipulated by the choice of the denominator.[73] Without further analysis, therefore, BLM lacks a reasonable basis to conclude that the emissions from this proposal are insignificant.

Accordingly, BLM's justifications for not applying the social cost of greenhouse gases are meritless, and the agency's assessment of climate impacts is insufficient under NEPA.

BLM Fails to Consider a Sufficient Range of Alternatives

In light of all the issues discussed above, BLM should have considered alternatives that deferred many of the leased parcels. Instead, the agency claims that the "range of [considered] alternatives is sufficient for the BLM to consider the potential impacts of leasing and make an informed decision whether to offer to lease all, none, or some of the parcels."[74] As Policy Integrity argued in its prior comments, this is insufficient under NEPA.

Indeed, case law confirms that BLM's analysis of alternatives here is insufficient. BLM analyzes only three alternatives for the Kremmling and Little Snake Field Offices: the no-action alternative, the originally proposed action, and the selected (or "preferred") alternative, which differs from the proposed action only by the removal of a single, 240-acre parcel.[75] Thus, the

---

[69] Interagency Working Group on the Social Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis* 5 (2010).

[70] Royal Gorge EA at 108.

[71] Kremmling EA at 41; *see also* Royal Gorge EA at 47 (trivializing lease sale's emissions by presenting them as just 0.071% of federal and 0.011% of nationwide oil and gas emissions).

[72] *California*, 2020 WL 4001480, at *36 ("[F]raming sources as less than 1% of global emissions is dishonest and a prescription for climate disaster." (citation omitted)).

[73] *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1032 (5th Cir. 2019) (explaining that even a seemingly "very small portion" of a "gargantuan source of [harmful] pollution" may nevertheless "constitute[] a gargantuan source of [harmful] pollution on its own terms").

[74] Kremmling EA at F-14; *accord* Royal Gorge EA at 97.

[75] Kremmling EA at 22.

preferred alternative represents less than a 2 percent difference from the proposed action in terms of total acreage. But as the U.S. Court of Appeals for the Ninth Circuit Court has explained, an analysis that considers the "no action alternative along with two virtually identical alternatives" is insufficient.[76] Notably, the acreage difference between the two analyzed action alternatives in that case (141 acres) is similar to the difference here.[77]

BLM's analysis of alternatives for the Royal Gorge Field Office is even more troubling. There, the agency assesses only two alternatives: the no-action alternative and the selected plan. By failing to consider a "middle ground compromise between the absolutism of the outright leasing and [the] no action alternative[]," BLM violates NEPA.[78] Accordingly, BLM's failure to consider a full range of alternatives—including more limited alternatives with deferred leasing—violates NEPA.

CONCLUSION

For all the foregoing reasons, BLM's analysis of the lease sale is deficient, and proceeding with the lease sale would violate FLPMA, the MLA, and NEPA. **Policy Integrity therefore protests the inclusion of all parcels in this lease sale.**

Respectfully,

Jayni Hein, Natural Resources Director
Max Sarinsky, Attorney

Institute for Policy Integrity
max.sarinsky@nyu.edu

Attached:

1) Map: Colorado December Lease Sale Parcels in Proximity to East Troublesome and Cameron Peak Wildfires

2) Inst. for Poly' Integrity, Comments on the Draft Environmental Assessment for the Proposed December 2020 Competitive Oil and Gas Lease Sale (Sept. 14, 2020)

3) Inst. for Poly' Integrity, Comments on Failure to Monetize Greenhouse Gas Emissions in the Environmental Assessments for the December 2020 Colorado Oil and Gas Lease Sale (Sept. 14, 2020)

[76] *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999).

[77] *See id.*

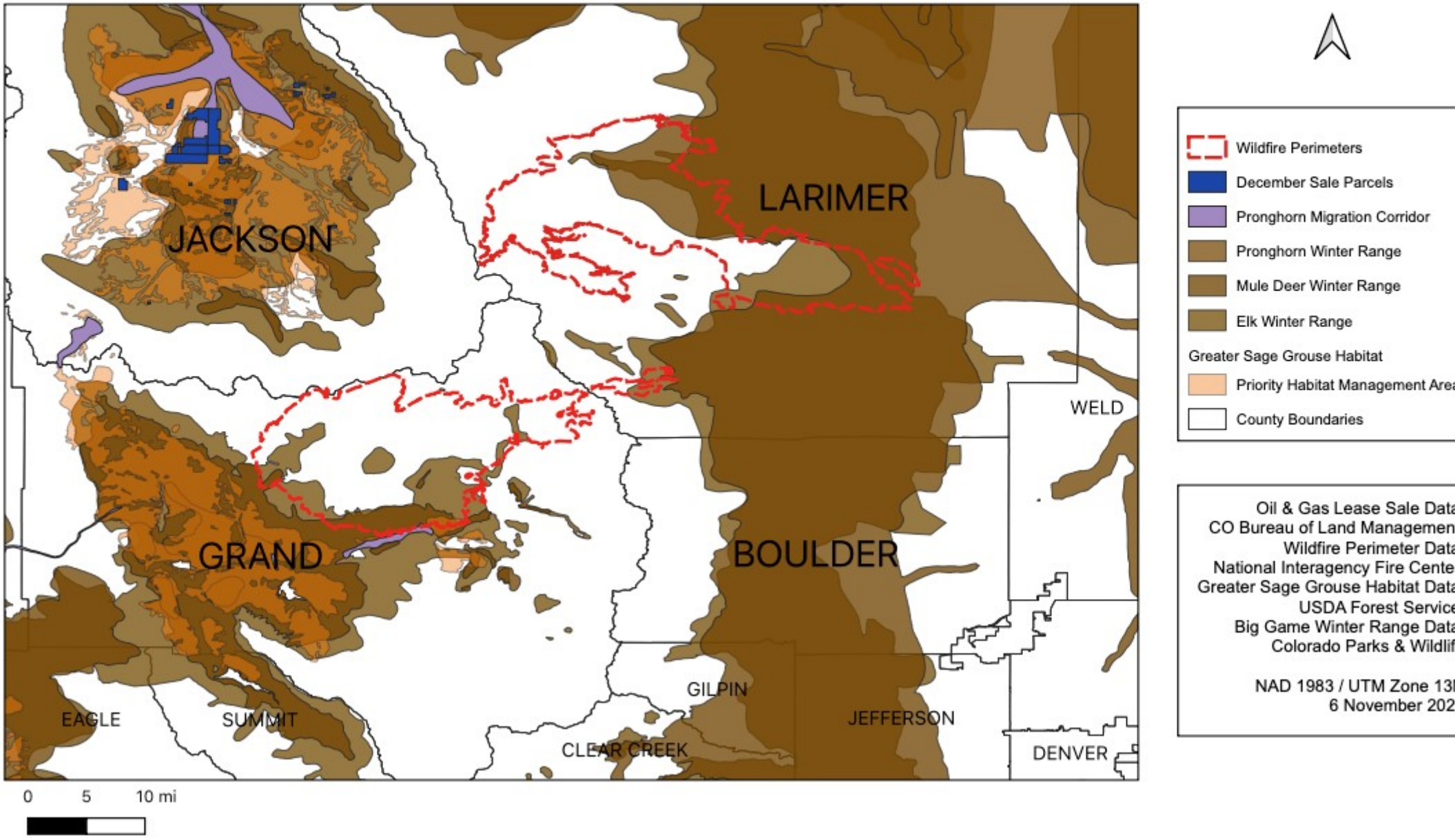
[78] *Wilderness Society v. Wisely*, 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007); *see also New Mexico ex. rel. Richardson v. BLM*, 565 F.3d 683, 710-11 (10th Cir. 2009) (BLM violated NEPA when it failed to consider alternative of not opening specific lands to leasing in a land use plan that "are extraordinary in their fragility and importance as habitat").

Appendix—List of Protested Parcels by Serial Number

COC 079946
COC 079947
COC 079948
COC 079949
COC 079950
COC 079951
COC 079952
COC 079953
COC 079954
COC 079955
COC 079956
COC 079957
COC 079958
COC 079959
COC 079960
COC 079961
COC 079962
COC 079963
COC 079964
COC 079965
COC 079966
COC 079967
COC 079968
COC 079969
COC 079970
COC 079971
COC 079972
COC 079973
COC 079974
COC 079975
COC 079976
COC 079977
COC 079978
COC 079979
COC 079980
COC 079981
COC 079982
COC 079983
COC 079984
COC 079985
COC 079986
COC 079987

Attachment 1

Colorado December Sale Parcels in Proximity to East Troublesome and Cameron Peak Wildfires

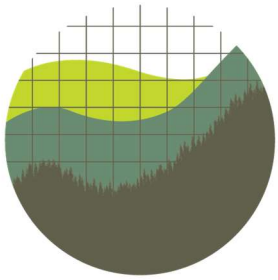


Wildfire Perimeters
December Sale Parcels
Pronghorn Migration Corridor
Pronghorn Winter Range
Mule Deer Winter Range
Elk Winter Range
Greater Sage Grouse Habitat
Priority Habitat Management Area
County Boundaries

Oil & Gas Lease Sale Data
CO Bureau of Land Management
Wildfire Perimeter Data
National Interagency Fire Center
Greater Sage Grouse Habitat Data
USDA Forest Service
Big Game Winter Range Data
Colorado Parks & Wildlife

NAD 1983 / UTM Zone 13N
6 November 2020

Attachment 2



Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

September 14, 2020

To: Bureau of Land Management, Colorado State Office
Subject: Comments on the Draft Environmental Assessment for the Proposed December 2020 Competitive Oil and Gas Lease Sale, Docket Nos. DOI-BLM-CO-N050-2020-0037-EA and DOI-BLM-CO-F020-2020-0041-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 December 2020 Competitive Oil and Gas Lease Sale in Colorado. In this proposed lease sale, BLM Colorado is contemplating offering 18 parcels consisting of 13,708 acres located in BLM's Kremmling and Little Snake Field Offices,[2] and 25 parcels consisting of 33,978 acres of split estate land in BLM's Royal Gorge Field Office.[3]

Many of the tracts that would be offered for lease are located in areas valuable for recreation, wildlife, environmental conservation, and tourism. Moreover, many of these tracts have low or moderate oil and gas development potential, yet pose myriad multiple-use conflicts.

In these draft Environmental Assessments (EAs), 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). If BLM proceeds with the lease sale without correcting these errors, its decision would be arbitrary and capricious.

Specifically, in these EAs:

- BLM fails to properly account for multiple-use values, in violation of FLPMA;

[1] This document does not purport to represent the views, if any, of New York University School of Law.

[2] BLM WHITE RIVER, LITTLE SNAKE, AND KREMMLING FIELD OFFICES, PRELIMINARY ENVIRONMENTAL ASSESSMENT FOR THE DECEMBER 2020 COMPETITIVE OIL & GAS LEASE SALE 23 (Docket No. DOI-BLM-CO-N050-2020-0037-EA) (2020) [hereinafter "Kremmling EA"].

[3] BLM ROYAL GORGE FIELD OFFICE, ENVIRONMENTAL ASSESSMENT FOR THE DECEMBER 2020 COMPETITIVE OIL & GAS LEASE SALE 16 (Docket No. DOI-BLM-CO-F020-2020-0041-EA) (2020) [hereinafter "Royal Gorge EA"].

- 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, particularly in popular recreation and scenic areas, including areas close to national parks, and in important wildlife habitats;
    - BLM should have analyzed the option of deferring some of these parcels, 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 by failing to obtain "fair market value" for these parcels;

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

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

Enacted in 1976, FLPMA directs that federal land management adhere to the principles of multiple use and sustained yield.[4] 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."[5] 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."[6]

BLM must manage its lands for a variety of uses, not primarily for oil and gas development.[7] One of the stated goals of FLPMA is to "preserve and protect certain public lands in their natural condition."[8] As the Tenth Circuit has held, "[i]t is past doubt that the

[4] 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)).

[5] *Id*. § 1702(c).

[6] *Id*. § 1732(b).

[7] *Id*. § 1712(c)(1).

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

principle of multiple use does not require BLM to prioritize development over other uses."[9] The Court further noted, "[a] parcel of land cannot both be preserved in its natural character and mined."[10]

A. BLM Disregards Numerous Recreation and Wildlife Conservation Conflicts

In this lease sale, BLM proposes to offer large amounts of land—including land with low and moderate oil and gas potential—for oil and gas leasing. The parcels that BLM does expect to be exploited will require access roads and related infrastructure that could have adverse effects on the scenic, environmental, and recreational values of the area. However, the EAs fail to take the requisite "hard look" at these effects, as NEPA requires,[11] and fail to properly account for multiple use values, as required by FLPMA.[12]

For instance, Parcels 60, 63, 64, 65, 67, 68, 69, 70, and 5986 in the Kremmling Field Office are in close proximity to (within about 4 miles of) the Arapaho National Wildlife Refuge (Refuge). And several of these parcels directly border the Refuge. The Refuge is situated in an intermountain glacial basin in north-central Colorado, known locally as North Park. This basin is surrounded by Mt. Zirkel Wilderness and Park Range to the west, Rabbit Ears Range to the south, Never Summer Mountain to the southeast, and the Medicine Bow Mountains to the east and north. The purposes of the Refuge are: (1) to provide inviolate sanctuary for migratory birds, (2) to provide suitable fish- and wildlife-dependent recreation, and (3) for the development, advancement, management, conservation, and protection of fish and wildlife resources.[13] The Refuge is a key breeding ground for waterfowl in the state of Colorado and provides important habitat for migratory birds.[14] The greater sage-grouse is a year-round resident of the Refuge,[15] and wintering elk, moose, northern river otters, and American beavers also call this area home. In addition, the Refuge supports at least 40 species of neotropical songbirds such as the yellow warbler, song sparrow, Lincoln sparrow and willow flycatcher.[16]

Leasing parcels directly adjacent, and within close proximity, to the Refuge poses multiple use conflicts that BLM must further assess in order to comply with FLPMA and NEPA. Moreover, BLM would be better served by deferring leasing each of these parcels

---

[9] *New Mexico Ex. Rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009).

[10] *Id*. (quoting *Rocky Mtn. Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 738 n. 4 (10th Cir. 1982)).

[11] *Marsh v. Oregon Natural Resources Coun*cil, 490 U.S. 360, 374 (1989).

[12] 43 U.S.C. § 1701(a)(7).

[13] FISH & WILDLIFE SERVICE, *Arapaho National Wildlife Refuge—Colorado*, https://www.fws.gov/mountain-prairie/refuges/arp.php.

[14] FISH & WILDLIFE SERVICE, *About the Refuge: Wildlife & Habitat*, https://www.fws.gov/refuge/Arapaho/wildlife_and_habitat/index.html.

[15] FISH & WILDLIFE SERVICE, *About the Refuge: Endangered and Threatened Species*, https://www.fws.gov/refuge/Arapaho/wildlife_and_habitat/endangered_and_threatened_species.html.

[16] FISH & WILDLIFE SERVICE, *About the Refuge: Riparian Habitat*, https://www.fws.gov/refuge/Arapaho/wildlife_and_habitat/riparian_habitat.html.

altogether, in light of multiple-use and sage-grouse habitat effects, as described in more detail in Parts I.B. and II, below. In fact, many of these conflicts have been apparent for more than a decade; indeed, the Arapaho National Wildlife Refuge Comprehensive Conservation Plan, released in 2004, states that lands outside of the Refuge represent valuable wildlife habitat and are "of interest" to the Refuge.[17] The Plan proposed an action to purchase private lands outside of the Refuge in order to prevent minerals extraction, as "minerals extraction may destroy wildlife habitats, and prevent goals and objectives from being met."[18] The Plan focused on private lands and did not anticipate that BLM would open up federal lands immediately surrounding the Refuge to oil and gas activities.

In addition, parcels 60, 63, 64, 65, 67, 68, 69, 70, and 5986 are located along important aquatic resources for fish, wildlife, and recreation. Leasing these parcels could have detrimental effects on the "Gold Medal" trout fishing waters of the North Platte River, as designated by the Colorado Wildlife Commission.[19] Brook, brown, and rainbow trout thrive in the North Platte River, offering some of the best trout fishing in the West.[20] Any potential impact to water quality or other disruption from oil and gas activities could threaten the river's "Gold Medal" trout fishing designation and the outdoor recreation economy that it supports.

Indeed, the parcels in close proximity to the Arapaho National Wildlife Refuge, North Platte River, Walden Reservoir, Canadian River and the rivers' tributaries have significant value for outdoor recreation, tourism, and wildlife protection that must be considered more closely. According to a 2017 report, fishing, hunting, and wildlife watching in Colorado together produce over $5 billion dollars of economic output annually, and support nearly 40,000 jobs within the state.[21]

Further, many of the proposed parcels in the Kremmling and Little Snake Field Offices overlap with areas that contain migration corridors or high priority big game winter habitats for the State of Colorado. Elk, pronghorn antelopes, mule deer, and numerous other big game species have "[h]igh economic and recreational value" in the Kremmling Field Office,[22] and as BLM explained in its 2015 Resource Management Plan for this area, "[c]ritical winter ranges for elk, mule deer, and pronghorn antelope are essential to the

---

[17] FISH & WILDLIFE SERVICE, COMPREHENSIVE CONSERVATION PLAN: ARAPAHO NATIONAL WILDLIFE REFUGE 24-25 (Sept. 2004), https://www.fws.gov/mountain-prairie/refuges/completedPlanPDFs_A-E/arp_2004_ccpfinal_all.pdf.

[18] *Id*. at 25.

[19] Erin Sendor, *Colorado's Gold Medal Fishing Waters*, COLORADOINFO.COM, https://www.coloradoinfo.com/blog/colorado-gold-medal-fishing-waters.

[20] *Id*.

[21] SOUTHWICK ASSOCIATES FOR COLORADO PARKS AND WILDLIFE, *The 2017 Economic Contributions of Outdoor Recreation in Colorado* 7 (July 23, 2018), https://cpw.state.co.us/Documents/Trails/SCORP/2017EconomicContributions_SCORP.pdf.

[22] BLM KREMMLING FIELD OFFICE, PROPOSED RESOURCE MANAGEMENT PLAN AND FINAL ENVIRONMENTAL IMPACT STATEMENT 3-60 to -61 (2015) [hereinafter "Kremmling RMP"].

survival of these species in the [region]."[23] Yet many of the parcels in this proposed lease sale would encumber the habitats of these species. For instance, Parcels 70, 71 and 72 are in an elk migration corridor. Parcels 38 and 46 are in pronghorn migration corridors. And Parcels 60, 63, 65, 67, 68, 5986 and 6156 overlap with migration corridors and crucial winter range various big game species such as pronghorn, Rocky Mountain Bighorn Sheep, mule deer, white-tailed deer, elk, and moose. Moreover, all of the acreage in these parcels that overlaps with sage-grouse habitat should not be included in this lease sale at all, as discussed in Part I.B, below.

The parcels abutting the Walden Reservoir—numbers 63, 67, and 69—could impair that site's frequent and valuable use for recreation, bird watching, wildlife protection, fishing, and hunting. The Walden Reservoir is one of the few locations in Colorado where birds such as American White Pelican, Black Tern, and Franklin's and California Gulls breed.[24] In addition, two parcels are within three miles of the Medicine Bow-Routt National Forest. Leasing and development of parcels 71 and 72 could threaten the scenic, recreational, and wildlife-protection values of the Medicine Bow-Routt National Forest, which provides year-round recreation opportunities for thousands of people, as well as wildlife habitat, timber, forage for livestock, and a water for irrigation and domestic use.[25]

Parcels 37, 62, 70, 71, 72, 5984, and 5986 are also within roughly 20 miles of Rocky Mountain National Park, one of the most visited national parks in the country, encompassing protected mountains, forests and alpine tundra.[26] But BLM has not analyzed any potential effects on recreation, wildlife protection, or habitat inside or near the national park associated with this proposed lease sale.

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 these EAs 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 0 to 20 miles of national parks, wildlife refuges, national forests, sensitive habitat, and/or parcels with important recreational and scenic value to Colorado or the United States. BLM should individually analyze, and consider deferring, each of these parcels.

Unfortunately, leasing even low-potential lands often prevents conservation of environmentally valuable areas and interferes with recreation and other uses that BLM

---

[23] *Id.* at 3-66.

[24] COLORADO BIRDING TRAIL, *Walden Reservoir*, https://coloradobirdingtrail.com/site/walden-reservoir/.

[25] NATIONAL FOREST FOUNDATION, *Medicine Bow and Routt National Forests*, https://www.nationalforests.org/our-forests/find-a-forest/medicine-bow-and-routt-national-forests.

[26] ESTES PARK, COLORADO, *Rocky Mountain National Park*, WWW.VISITESTESPARK.COM, https://www.visitestespark.com/rocky-mountain-national-park/.

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.[27] Land management for wilderness characteristics entails closure to mineral resource production, motorized vehicles, timber production, and roads.[28] 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.[29] Yet in the past, the presence of mineral leases has foreclosed BLM from managing parcels for wilderness characteristics.[30] In several resource management plans (RMPs) issued by BLM Colorado, the presence of mineral leases prevented the protection, preservation, or maintenance of wilderness characteristics. For example, in the Colorado River Valley RMP, BLM decided against managing lands for protection of wilderness characteristics in the Grand Hogback citizens' wilderness proposal unit based specifically on the presence of oil and gas leases, even though the leases were non-producing.[31] Similarly, in the Grand Junction RMP, BLM stated that undeveloped leases on low-potential lands had effectively prevented management to protect wilderness characteristics.[32] The presence of leases can also limit BLM's ability to manage for other important, non-wilderness values, like renewable energy projects and wildlife conservation.

B. BLM Must More Carefully Assess Leases in Sage-Grouse Habitat for Multiple Use Conflicts and Consider Deferring Parcels on That Basis

The proposed lease sale includes parcels in greater sage-grouse habitat, including parcels: 37, 38, 46, 60-65, 67-72, 5984, 5986 and 6156 (all of the parcels proposed for lease in the Kremmling and Little Snake Field Offices). BLM cannot proceed with leasing in sage-grouse habitat until it develops a compliant, transparent approach to prioritizing any future leasing and development outside sage-grouse habitat. Doing so would conflict with both FLPMA's multiple use mandate and a federal court order instructing BLM to comply with the 2015 Sage-grouse Plans.

---

[27] 43 U.S.C. § 1711.

[28] *See, e.g.,* BLM, GRAND JUNCTION DRAFT RESOURCE MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT, 4-256 to 258 (2012), https://perma.cc/Y6A6-KMDC.

[29] BLM, MANUAL TRANSMITTAL SHEET 6310—CONDUCTING WILDERNESS CHARACTERISTICS INVENTORY ON BLM LANDS (PUBLIC) 6-10 (2012), https://www.blm.gov/or/plans/rmpswesternoregon/files/lwci-manual.pdf.

[30] *See* Jayni Hein et al., *Look Before You Lease* 12 (2020), https://policyintegrity.org/files/publications/Option_Value_Report.pdf.

[31] BLM, Proposed Colorado River Valley RMP 3-135 (2015).

[32] BLM, Proposed Grand Junction Proposed RMP 4-289 to -290 (2015) (stating, "133,900 acres of lands with wilderness characteristics have been classified as having low, very low, or no potential…While there is not potential for fluid mineral development in most of the lands with wilderness characteristics units, the majority of the areas, totaling 101,100 acres (59 percent), are already leased for oil and gas development…").

The 2015 Sage-grouse Plans were reinstated by federal court order in 2019.[33] Pursuant to the 2015 Record of Decision for the Rocky Mountain Region RMP, BLM must:

> prioritize oil and gas leasing and development outside of identified PHMAs [priority habitat management areas] and GHMAs [general habitat management areas]. This is to further limit future surface disturbance and encourage new development in areas that would not conflict with [the greater sage-grouse]. This objective is intended to guide development to lower conflict areas and as such protect important habitat and reduce the time and cost associated with oil and gas leasing development by avoiding sensitive areas, reducing the complexity of environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation.[34]

The 2015 Colorado Greater Sage-grouse Plan echoes this directive, including the following objective:

> Priority will be given to leasing and development of fluid mineral resources, including geothermal, outside PHMA and GHMA. When analyzing leasing and authorizing development of fluid mineral resources, including geothermal, in PHMA and GHMA, and subject to applicable stipulations for the conservation of [the greater sage-grouse], priority will be given to development in non-habitat areas first and then in the least suitable habitat for [the greater sage-grouse].[35]

BLM has honored these requirements in some previous lease sales by prioritizing oil and gas leasing in parcels that did not contain sage-grouse habitat while deferring parcels that did. And when BLM has sought under the Trump administration to "render[] the prioritization requirement into a mere procedural hurdle" by failing to actually look to "non-sage-grouse habitat," rather than habitat areas, for development—as it did in a series of lease plans and sales in Montana and Wyoming—courts have struck down this approach as violating the 2015 Sage-grouse Plans.[36] In this proposed lease sale, however, BLM

---

[33] *W. Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319, 1335 (D. Idaho 2019) ("The BLM is enjoined from implementing the 2019 BLM Sage-Grouse Plan Amendments for Idaho, Wyoming, Colorado, Utah, Nevada/Northeastern California, and Oregon, until such time as the Court can adjudicate the claims on the merits. The 2015 Plans remain in effect during this time.").

[34] BLM, Record of Decision and Approved Resource Management Plan Amendments for the Rocky Mountain Region, Including the Greater Sage-grouse Sub-Regions 1-25 (Sept. 2015), https://perma.cc.A4XK-JDGE.

[35] Colorado Greater Sage-grouse Conservation Plan 2-14 (2015) [hereinafter "2015 Colorado Sage-grouse Plan"]. The 2019 ROD and Approved Resource Management Plan Amendments also did not change this requirement. *See* Northwest Colorado Proposed RMP Amendment and Final EIS at ES-6 (including "Prioritization of fluid mineral leases outside of PHMA and GHMA" in a list of "Issues and Resources Not Carried Forward for Additional Analysis"); Northwest Colorado Greater Sage-Grouse 2019 ROD and ARMPA at 1-4 ("This RMPA retains the majority of the allocations, objectives, and management decisions in the above mentioned plans, including the changes made in 2015.").

[36] *Montana Wildlife Fed'n v. Bernhardt*, No. CV-18-69-GF-BMM, 2020 WL 2615631, at *9 (D. Mont. May 22, 2020); *W. Watersheds*, 417 F. Supp. 3d at 1335.

repeats this error by rendering the prioritization process a mere procedural formality, failing to engage in a careful substantive review or actually prioritize non-habitat areas.

Indeed, in a five-page attachment buried at the back of the Kremmling EA, BLM reveals that all 18 parcels assessed in that environmental statement sit entirely or primarily within PHMA and GHMA—the opposite of the types of lands that BLM has espoused to prioritize.[37] Indeed, five of the parcels in this proposed sale are at least 95% within PHMAs, while a majority of another eight parcels sit within PHMAs. In total, the 18 parcels assessed in the Kremmling and Little Snake Field Offices are within two miles of 14 leks (areas where sage-grouse congregate and breed), and within four miles of an additional 48 leks.[38] In short, leasing of these parcels would substantially interfere with protection of sage-grouse habitat—an important multiple use that has been recognized by BLM in previous plans and lease sales.

BLM alleges that it has complied with the applicable sage-grouse plans because it has granted "[p]riority …. to leasing and development of fluid mineral resources, including geothermal, outside PHMA and GHMA," and that the nominated parcels would be subject to certain stipulations for sage-grouse protection.[39] But it is hard to see how BLM prioritizes non-habitat lands in this sale when every single nominated parcel in the Kremmling and Little Snake Field Offices sit within PHMAs and GHMAs—the very areas that should get low priority under binding BLM plans—and the agency does not even consider the option of deferring these parcels from the lease sale. Moreover, while BLM treats lease stipulations as a panacea to protect sage-grouse habitat, these stipulations are subject to various waivers, exemptions, and/or modifications that may limit their efficacy.[40]

Moreover, while BLM assesses such factors as the percentage of each parcel within PHMAs and GHMAs, distance from leks and the closest well, and drilling potential,[41] this analysis overlooks the option of deferring numerous key parcels for sage-grouse protection. For one, while BLM alleges that all 18 parcels have "high" development potential, maps compiled from agency data indicate that at least three of the parcels—

---

[37] Kremmling EA Att. H.

[38] *Id.*

[39] *Id.*

[40] *See, e.g.*, 2015 Colorado Sage-grouse Plan, *supra* note 35 at G-1 ("Use or occupancy of the land surface for fluid mineral exploration or development is prohibited to protect GRSG and GRSG habitat. In areas open to fluid mineral leasing with NSO stipulations, fluid mineral leasing activities are permitted, but surface-disturbing activities cannot be conducted on the surface of the land unless an exception, modification, or waiver is granted."); *id.* at G-2 ("An exception exempts the holder of the lease from the stipulation on a one-time basis. A modification changes the language or provisions of a stipulation due to changed conditions or new information either temporarily or for the term of the lease. A modification may or may not apply to all other sites within the leasehold. A waiver permanently exempts the surface stipulation for a specific lease, planning area, or resource based on absence of need, such as a determination that protection of winter use is unnecessary for maintenance or recovery of a species.").

[41] *Id.*

numbers 61, 62, and 5984—are actually in low-potential regions.[42] Moreover, while BLM identifies one parcel—number 6156—as "low priority" for leasing based on "[t]he quality of habitat paired with the inaccessibility to federal minerals," the agency does not actually consider the option of deferring this parcel.[43]

Additionally, while numerous additional parcels in this lease sale feature similar characteristics as number 6156, BLM does not address why they are not likewise considered "low priority," nor does BLM consider deferring them from the lease sale due to clear multiple-use conflicts. For instance, Parcel 60 is 95% within a PHMA, has no adjacent leases, and has five leks within four miles, including two within two miles. Parcel 61 lies outside the high-potential drilling area, sits entirely within a PHMA, and has five leks within four miles. Parcel 63 is 99% within a PHMA, nearly six miles from the closest producing well, and has two leks in the vicinity. Parcel 64 is within four miles of four different leks and is entirely within either a PHMA (83% of parcel by acreage) or GHMA (17%). And Parcel 68 is also entirely within either a PHMA (84%) or GHMA (16%), is five miles from the nearest producing well, and has four leks within four miles.[44] BLM should individually analyze, and consider deferring, each of these parcels.

In sum, BLM violates FLPMA's multiple-use mandate by offering numerous tracts for lease that have low or only moderate development potential, yet have other valuable public uses that are equally important (if not more so) under federal law. In light of its multiple-use mandate and the low expected return from leasing in this economic environment as described in Part III, below, BLM should have considered the option of a far more tailored lease sale that avoids multiple-use conflicts, as 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 EAs Fail 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 EAs fail 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

---

[42] *Compare id. with* Upcoming Oil and Gas Lease Sales, https://wilderness.maps.arcgis.com/apps/webappviewer/index.html?id=bedd5928d60b417f829f6d1fc5bfdda0 (overlaying proposed parcels with BLM development potential estimates); *see also* Reasonably Foreseeable Development, 2008-2027 Oil and Gas Activities in the Kremmling Field Office 50, https://eplanning.blm.gov/public_projects/lup/68543/88589/106099/KFO_RFD_with_TC_AND_SIGNATURE_PAGE_01232012.pdf.

[43] Kremmling EA Att. H.

[44] *Id.*

evaluate all reasonable alternatives," so as to "provid[e] a clear basis for choice among the options."[45] The agency must also analyze alternatives that are, in fact, distinct.[46]

First, in addition to the "no action" alternative, the EAs should have analyzed one or more environmentally-protective development scenarios that would offer fewer tracts for lease, particularly in sage-grouse habitat and popular recreation or scenic areas, including those close to the Refuge, national forests, and national parks. Second, the EAs should have analyzed the option of deferring some of these parcels, especially those that have low and moderate 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.

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.

A. Considering a Deferred Leasing Alternative Is Required by FLPMA and MLA

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.[47] 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 and secure the public's right to obtain "fair market value" for its resources.[48]

As BLM has explained in agency guidance, the agency seeks to "assure receipt of fair market value … for oil and gas leases, rights, or properties" pursuant to FLPMA.[49] While this entails a formal evaluation of fair market value in some circumstances, for most oil-and-gas leases the agency has a policy to eschew such an analysis and "rel[y] instead on competition to assure [fair market value]."[50] But relying on competition alone is insufficient to assure fair

---

[45] 40 C.F.R. § 1502.14.

[46] *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").

[47] 43 U.S.C. §§ 1701(a)(8)–(9).

[48] *See* Jayni Foley Hein, *Federal Lands and Fossil Fuels: Maximizing Social Welfare in Federal Energy Leasing*, 42 HARV. ENVTL. L. REV. 1 (2018); Michael Livermore, *Patience Is an Economic Virtue: Real Options, Natural Resources, and Offshore Oil*, 84 U. COLO. L. REV. 581 (2013).

[49] BLM, ECONOMIC EVALUATION OF OIL AND GAS PROPERTIES HANDBOOK (H-3070-2) ch. I-A, https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_h3070-2.pdf [hereinafter "Economic Evaluation Handbook"].

[50] *Id.*

market value when so many BLM leases are sold non-competitively for the minimum bid price (see Part II.C, below), when market conditions are depressing both auction prices and royalty proceeds (see *id.*), and when BLM refuses to consider option value (i.e., the economic value of delay) and the possibility of various alternate uses. 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."[51] 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."[52]

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 EAs lack any meaningful evaluation of the timing of the proposed sale or detailed consideration of deferring particular parcel sales. BLM's 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.

B. 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.[53]

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

[51] 30 U.S.C. § 187.

[52] *Boesche v. Udall*, 373 U.S. 472, 481 (1963).

[53] *See* Hein et al., *supra* note 30, at 17.

the lease sale stage by offering only high-potential lands with limited multiple-use conflicts, 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.[54] 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.[55] 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 these EAs.

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.[56] 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.[57] 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.[58]

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

---

[54] Livermore, *supra* note 48, at 585, 589.

[55] *Id*.

[56] *Id*.

[57] U.S. BUREAU OF OCEAN & ENERGY MGMT., 2017-2022 OUTER CONTINENTAL SHELF OIL AND GAS LEASING DRAFT PROPOSED PROGRAM at 5-20, 8-3 to 8-19 (2015), https://perma.cc/8AU3-7MS4.

[58] *Id.* at 8-2, 8-12 to 8-14.

contamination from oil and gas activity.[59] 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.[60] Most recently, BLM Utah removed over fifty parcels in the Moab region from its September 2020 oil and gas lease sale after commenters raised concerns about harm to recreation, wildlife, tribal resources, and the low drilling potential of the nominated parcels.[61] Additionally, the combination of market factors and Covid-19 led BLM, as well as the state governments of Colorado and Utah, to defer a number of scheduled oil and gas lease sales.[62]

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:

> . . . 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.[63]

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 v.*

---

[59] *See* Hein at al., *supra* note 30, at 23.

[60] *Id*. at 28–29.

[61] BLM, SEPTEMBER 2020 COMPETITIVE OIL AND GAS LEASE SALE ENVIRONMENTAL ASSESSMENT (2020), https://eplanning.blm.gov/public_projects/2000028/200369968/20023793/250029997/2020-08-11-Sept2020-DOI-BLM-UT-000-2020-0004-EA_Final.pdf.

[62] *See, e.g*., *Colorado Oil and Gas Lease Sales*, BLM COLORADO, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/colorado (cancelling the scheduled June 2020 oil and gas lease sale); *Utah Oil and Gas Lease Sales*, BLM UTAH, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/utah (deferring the June 2020 oil and gas lease sale to September 2020); *New Mexico Oil and Gas Lease Sales*, BLM NEW MEXICO, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/new-mexico (deferring May 2020 lease sale to August 2020); *Oil & Gas Auction Information and Results*, COLO. STATE LANDS BOARD, https://docs.google.com/document/d/1A8yfmfXmcMtx802wRxktdSuzkFeCrF5tE9XT8ms3Qa0/edit (cancelling the August 2020 lease sale and moving all nominations to November 2020); *SITLA 2020 Competitive Mineral Lease Offering Schedule*, UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION, https://trustlands.utah.gov/wp-content/uploads/2020/06/2020-Mineral-Lease-Offering-Schedule-Revised.pdf (deferring January, April, and July 2020 oil and gas parcels to future lease sales).

[63] U.S. FOREST SERVICE, HUMBOLDT-TOIYABE NF NEWS: FOREST SUPERVISOR SIGNS THE DECISION FOR RUBY MOUNTAINS OIL AND GAS AVAILABILITY LEASING ANALYSIS (May 7, 2019), https://content.govdelivery.com/accounts/USDAFSR4/bulletins/24378ae.

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."[64] The Court was even more explicit about the need to consider option value in *Center for Sustainable Economy v. Jewell*, explaining that an agency may "act[] irrationally in failing to [consider] the informational value of delay," and highlighting the Department's "qualitative analysis of the benefits of delaying leasing" as satisfying this standard.[65] 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."[66] FLPMA's "fair market value" determination applies to oil-and-gas lease sales, as BLM has previously acknowledged,[67] and so requires assessment of option value when nominating parcels for lease.

In line with this past agency practice and federal case law, environmental, social, and economic uncertainty support waiting as long 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 EAs 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 EAs 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 high market 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;

---

[64] 668 F.2d 129, 1319–20 (D.C. Cir. 1981).

[65] 779 F.3d 588, 610 (D.C. Cir. 2015).

[66] *Id.*

[67] Economic Evaluation Handbook, *supra* note 49. *See also* Kremmling EA at 14, Royal Gorge EA at 13 (alleging that auctions for oil-and-gas leases "contribute[] to sale prices that accurately reflect fair market value at the time of sale").

- 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 Kremmling EA describes how NSO stipulations would be applied to any leases for the protection of sage-grouse habitation, aquatic wildlife, and cultural resources.[68] Yet 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 such stipulations. But, NSO stipulations are subject to numerous waivers, exemptions, and modifications, as stated in the Kremmling RMP and 2015 Colorado Sage-grouse Plan.[69] And even if they remain in place, development on adjacent or nearby non-federal parcels could still lead to many detrimental effects. 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 study 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 the eighteen parcels in the Kremmling Field Office that are given priority for deferral under the 2015 Greater Sage-Grouse Approved Resource Management Plan Amendment.[70]

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. Many of the parcels offered in this lease sale have low or moderate potential for oil and gas, yet pose potential multiple-use conflicts. Moreover, as detailed further below, long-term uncertainty about the economics of oil and gas drilling has caused many developers to show reluctance to invest heavily in new parcels. Yet the mere presence of leased tracts on BLM lands often forecloses BLM managing those areas for wilderness values, important wildlife habitat, Areas of Critical Environmental Concern, 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

[68] Kremmling EA at 9, 19–21.

[69] Kremmling RMP, *supra* note 22; 2015 Colorado Sage-grouse Plan, *supra* note 35 at G-1.

[70] *See id.* Att. H (identifying eighteen parcels).

recreational values and limited oil and gas potential. Because BLM has failed to do so here, the EAs do not take the requisite "hard look" at environmental effects and do not evaluate reasonable alternatives, in violation of NEPA.[71]

C. 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 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 leased parcels while depriving the public of the enjoyment of those lands. This outcome is particularly likely in the present moment, as recent the economic downturn and long-term trends in the oil-and-gas sector make it especially unlikely that BLM will derive "fair market value" from the proposed sale.

Long-Term Leasing Trends Indicate that BLM Is 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.[72] In Colorado alone, nearly 1.2 million leased were sitting idle,[73] and "on average over the last five years only 52% of leased lands [in the state] are held by production."[74] 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.[75] These trends are being

---

[71] *See, e.g., Marsh*, 490 U.S. at 374.

[72] *Compare Oil and Gas Statistics*, BUREAU OF LAND MGMT. tbl. 2, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics, *with id.* tbl. 6.

[73] *Id.*

[74] Royal Gorge EA at 39; Kremmling EA at 36.

[75] CONGRESSIONAL BUDGET OFFICE, *Options for Increasing Federal Income from Crude Oil and Natural Gas on Federal Lands* 2 (2016), https://perma.cc/SEM7-PNA5 [hereinafter "CBO Report"].

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.[76]

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."[77] Second, although there is frequently "little evidence that much oil or gas 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."[78] In other words, buyers are considering option value—as rational economic actors do when assessing market value.[79] Indeed, developers appear to be taking advantage of BLM's willingness to offer low-potential lands for bargain prices in the area encompassing this proposed sale: As BLM explained in its 2015 RMP for the Kremmling Field Office, expressions of interest from the oil and gas industry within the field office "have been primarily concentrated in … low or no potential areas"—a seemingly counterintuitive anomaly that can be explained only by the fact that developers consider option value while BLM does not. BLM continues that trend in this proposed sale, failing 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 and wildlife protection.

---

[76] *Oil and Gas Statistics*, BUREAU OF LAND MGMT tbl. 11, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics. As these statistics show, BLM made 14,080,439 acres available for lease during calendar years 2013–2016, with 3,275,780 of those acres—roughly 23 percent—receiving bids. During calendar years 2017–2018, BLM made 16,857,751 acres available for lease, with 2,281,123 of those acres—just 13.5 percent—receiving bids.

[77] CTR. FOR AM. PROGRESS, *Oil and Gas Companies Gain by Stockpiling America's Federal Land* 3 (2018), https://www.americanprogress.org/issues/green/ reports/2018/08/29/455226/oil-gas-companies-gainstockpiling-americas-federal-land/; *see also* TAXPAYERS FOR COMMON SENSE, *Gaming the System: How Federal Land Management in Nevada Fails Taxpayers* 4 (2019), https://www.taxpayer.net/wp-content/uploads/2019/07/TCS-Nevada-Federal-Oil-Gas-Report_-July-2019.pdf ("Certain companies and interests take advantage of the low acquisition and ownership costs for federal leases to amass sizeable lease holdings . . . . Their aim is to profit by re-selling some fraction of the leases to major producers who might want to take a gamble and actually explore for oil and gas reserves on the federal land.").

[78] Eric Lipton & Hiroko Tabuchi, *Energy Speculators Jump on Chance to Lease Public Land at Bargain Rates*, N.Y. TIMES (Nov. 27, 2018), https://www.nytimes.com/2018/11/27/business/energy-speculators-public-land-leases.html.

[79] As BLM explained in its 2015 Resource Management Plan for the Kremmling Field Office, expressions of interest from the oil and gas industry within the field office "have been primarily concentrated in … low or no potential areas." Kremmling RMP, *supra* note 22 at 3-187.

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.[80] 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.[81] 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.[82] 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.[83] 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.

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.[84] During that time, over 25 percent of the parcels that were leased competitively yielded just the $2 per acre minimum bid.[85] Just in Colorado from 2007–2017, more than 200,000 acres were leased for a low bid of under $10 per acre, with another 61,000 acres were leased noncompetitively.[86] 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.[87] In an extraordinary

---

[80] 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 75, 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.

[81] 30 U.S.C. § 226(b)(1)(B).

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

[83] 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).

[84] CBO Report, *supra* note 75, at 2.

[85] *Id.* at 18.

[86] TAXPAYERS FOR COMMON SENSE, *Locked Out: The Cost of Speculation in Federal Oil and Gas* Leases 3 (2017) https://www.taxpayer.net/energy-natural-resources/locked-out-the-cost-of-speculation-in-federal-oil-and-gas-leases/.

[87] Lipton & Tabuchi, *supra* note 78. 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

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.[88]

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 limited development potential could sell for a much greater future price if later discovered to have higher 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 lands with limited potential from this lease sale could also increase the bids for higher potential lands both here and 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.

BLM's Own Data Indicates that Drilling on Most of These Parcels Will Likely be Limited, Reducing the Possibility that the Agency Receives "Fair Market Value" and Further Underscoring the Requirement to Consider Delay

In light of the BLM's track record of awarding many parcels that receive low bids and yield little production, there is considerable reason to believe that most of the proposed parcels will not be put to productive use or yield significant revenue if sold in this lease sale. Indeed, BLM's own estimates in these EAs reveal that the majority of the nominated parcels will see little if any drilling, with the majority of the land remaining unproductive.

Of the 25 parcels proposed for lease in the Royal Gorge Field Office, all but two are considered to have "very low" development potential, with another parcel considered "low" potential.[89] Just 1% of the total acreage assessed in the Royal Gorge EA is considered high

---

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." *Now Is the Time to Press Pause on Oil and Gas Leasing*, TAXPAYERS FOR COMMON SENSE (Mar. 17, 2020), https://www.taxpayer.net/energy-natural-resources/time-to-press-pause-on-oil-and-gas-leasing/.

[88] *Taxpayers Lose in Noncompetitive Montana Lease Sale*, TAXPAYERS FOR COMMON SENSE (Nov. 27, 2018), https://www.taxpayer.net/energy-natural-resources/taxpayers-lose-in-noncompetitive-montana-lease-sale/.

[89] Royal Gorge EA at 18.

potential.[90] All of the parcels in Las Animas County proposed for lease (assessed in the Royal Gorge EA) are considered by BLM to be "very low" or "low" potential.[91] Indeed, although BLM offers 24 parcels for lease in Las Animas County, "no oil has been produced in the county since 2014," and "there has been no Federal oil production in the county since 2003."[92] Given the very low development potential of these lands, BLM strikingly admits that "as a practical matter the difference between the no action and proposed action are not that dissimilar."[93] In other words, BLM admits that there will be no or very little drilling on the vast majority of parcels for lease in the Royal Gorge Field Office.

Development potential in the Kremmling and Little Snake Field Offices may be somewhat higher, but there is reason to believe that it, too, is limited. According to BLM's reasonable foreseeable development estimates, the 18 parcels assessed in this lease sale could produce as few as 10 wells throughout the course of the proposed leases (with a high-end estimate of 65 wells).[94] While both field offices have had a fair amount of drilling historically, no new wells have been drilled in the Little Snake Field Office since August 2016, while in the Kremmling Field Office no new wells have been drilled this year.[95] And as noted above, expressions of interest from the oil and gas industry in the Kremmling Field Office "have been primarily concentrated in … low or no potential areas"—suggesting that here, too, developers may be interested in the lands for speculative purposes with limited drilling intentions.[96] Indeed, while BLM characterizes all 18 parcels from these two field offices as having "high" potential, maps compiled from agency data indicate that at least three of the parcels—numbers 61, 62, and 5984—are in fact in low potential regions.[97]

If recent history is any guide, moreover, BLM is unlikely to obtain substantial revenue for those lands. For instance, in the most recent BLM Colorado State Office lease sale, held this past March, only nine of the twenty available parcels sold, with six of those parcels going for less than $5 per acre. The average bid per acre was just $6.35, netting

---

[90] *Id.* at 37.

[91] *Id.*

[92] *Id.* at 37; *see also id.* at 17 ("The Las Animas county parcels are located in minimal oil and gas development in the surrounding area and there are currently no producing well in the general vicinity.").

[93] *Id.* at 37.

[94] Kremmling EA at 36.

[95] *Id.* at 31.

[96] Kremmling RMP, *supra* note 22 at 3-187.

[97] *Compare* Kremmling EA Att. H *with* Upcoming Oil and Gas Lease Sales, https://wilderness.maps.arcgis.com/apps/webappviewer/index.html?id=bedd5928d60b417f829f6d1fc5bfdda0 (overlaying proposed parcels with BLM development potential estimates); *see also* Reasonably Foreseeable Development, 2008-2027 Oil and Gas Activities in the Kremmling Field Office 50, https://eplanning.blm.gov/public_projects/lup/68543/88589/106099/KFO_RFD_with_TC_AND_SIGNATURE_PAGE_01232012.pdf.

BLM only $83,000 for more than 10,000 acres leased.[98] Notably, several of the unsold parcels from that sale—such as parcel numbers 79,822, 79,824, and 79,825[99]—are within a few miles of the currently proposed parcels in the Royal Gorge Field Office.[100] The prior Colorado lease sale, held in September 2019, was not too much better: Only 49 of the 73 available parcels were leased in that sale, with an average bid of $12.58 per acre. In total, BLM obtained approximately $601,000 in total revenue for over 42,000 acres leased.[101] And in the sale before that, in June 2019, the average parcel sold for just $7.82 per acre, with eight of the 17 parcels sold for minimum bids.[102]

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. Proceeding with the lease sale in the face of this evidence would violate BLM's obligations to ensure that the public receives "fair market value" for oil-and-gas leases.

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 $36.87 per barrel as of September 8, 2020, according to data from the U.S. Energy Information Administration, which represents a drop of nearly 40 percent since the start of 2020.[103] And although oil prices have somewhat rebounded since reaching unprecedented depths in April—

---

[98] Summary of March 26, 2020 Sale, BLM Colorado State Office, https://eplanning.blm.gov/public_projects/nepa/1501731/20015361/250020503/Sale_Results_March2020.pdf.

[99] *Id.* at 3.

[100] Upcoming Oil and Gas Lease Sales, https://wilderness.maps.arcgis.com/apps/webappviewer/index.html?id=bedd5928d60b417f829f6d1fc5bfdda0.

[101] Summary of Sept. 26, 2019 Sale, BLM Colorado State Office, https://eplanning.blm.gov/public_projects/nepa/121040/20004618/250005475/Sale_Results_Sept2019.pdf.

[102] Summary of June 27, 2019 Sale, BLM Colorado State Office, https://eplanning.blm.gov/public_projects/nepa/119117/175852/214216/Sale_Results_June2019.pdf.

[103] *Petroleum & Other Liquids*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/dnav/pet/hist/RWTCD.htm.

including one day in which prices were negative[104]—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."[105] Likewise, the International Monetary Fund projects only a modest rebound in oil prices toward "about 25 percent below the 2019 average."[106] And the latest forecast from the U.S. Energy Information Administration similarly projects that oil prices and consumption will remain well below their pre-pandemic levels for the foreseeable future.[107]

Due in large part to these declines in oil prices, energy developers have cut back on their drilling in recent months. Nationwide, there are currently just 256 operational oil-and-gas rigs, according to data compiled by Baker Hughes—a decline of more than 70 percent from the 898 rigs that were operational a year ago.[108] Colorado is one of many states that has seen a sharp decline in drilling over the past year, with just five rigs currently operational versus 27 a year ago (a decline of over 80 percent).[109] This sharp decline in drilling both in Colorado and nationwide indicates that the proposed parcels—even those alleged to have higher development potential—may be unlikely to see any drilling in the near- or medium-term future, thus depriving the federal government of *any* royalties (even reduced-rate royalties) that it would receive from productive lands.

Not only does decreased long-term oil prices and reduced drilling mean that the government will receive lesser royalty payments than it would likely obtain in a more robust market, 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. Recent lease sales evince this trend. As noted above, Colorado's March 2020 lease sale netted limited revenues and many unleased parcels. Results for the Utah lease sale in March 2020 were similarly poor, with only four of the 22 parcels sold for above the minimum bid.[110] In Montana, similarly, the March 2020 lease sale netted an average bonus of just $5.47 per acre, with seven of the eight leased parcels going

---

[104] *Id.*

[105] Laura Hurst & Amanda Jordan, *BP Writes Off Billions as Covid Redraws Rules of Oil Demand*, Bloomberg (June 15, 2020), https://www.bloomberg.com/news/articles/2020-06-15/bp-sees-quarterly-charges-write-offs-of-up-to-17-5-billion.

[106] INT'L MONETARY FUND, *World Economic Outlook Update* (June 2020), https://www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020.

[107] *Short-Term Energy Outlook*, U.S. ENERGY INFO. ADMIN., ("Although the 2021 forecast level is 1.6 million b/d more than EIA's forecast 2020 consumption, it is 0.4 million [barrels per day] less than the 2019 average.").

[108] Rig Count Overview & Summary Count, BAKER HUGHES, https://perma.cc/NA7P-WG9P.

[109] *Rig Count Summary*, BAKER HUGHES, https://bakerhughesrigcount.gcs-web.com/na-rig-count.

[110] March 10, 2020 Oil & Gas Lease Sale Results, BLM Utah State Office, https://eplanning.blm.gov/public_projects/nepa/1501633/20014476/250019567/Mar2020SaleResults.pdf.

for under $10 per acre.[111] In this economic climate, not even *considering* option value and delayed leasing fails to secure fair market value for the public and is arbitrary and capricious.[112]

Recent royalty-payment reductions compound this trend and supply the second reason that BLM is especially unlikely to obtain fair market value at this moment. Specifically, since the spring, BLM has been granting unprecedented numbers of requests from oil and gas producers to reduce royalty payments from their already-low levels,[113] effectively allowing operators to set their own reduced rates.[114] Specifically, under guidance that BLM issued in April, developers could apply for royalty-rate reductions so long as their leases were "uneconomic at the current royalty rate, but would be economic with a royalty rate reduction." Under this policy, BLM 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.[115] Oil companies have been taking advantage: Since March, BLM has granted royalty relief to more than 500 oil-and-gas leases covering 343,000 acres of federal land,[116] with many of these reductions drastically reducing the royalty rate.[117] Since royalty rates are currently so low—and might remain so for the foreseeable future—BLM may 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. As BLM has previously recognized in agency guidance, "royalty streams … are part of market value" and should be considered when assessing a parcel's fair price.[118] Yet BLM pays this issue virtually no attention for

---

[111] Results of Competitive Oil and Gas Lease Sale Tuesday, March 24 2020, BLM Montana State Office, https://www.blm.gov/sites/blm.gov/files/Comp%20Sale%20Results%2003_24_2020.pdf.

[112] *See, e.g.*, *supra* notes 64-67 and accompanying text.

[113] *See supra* notes 77-80.

[114] *See* BLM, REGULATORY AND PROCESS INFORMATION FOR ONSHORE OIL AND NATURAL GAS SUSPENSIONS AND ROYALTY RATE REDUCTION APPLICATIONS DUE TO COVID-19 IMPACTS, https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/covid-royalty-rate-reduction-guidance.

[115] Rachel Frazin, *Land Management Bureau Lessens Requirements for Oil and Gas Royalty Cut Requests*, THE HILL (June 18, 2020), https://thehill.com/policy/energy-environment/503411-land-management-bureau-alters-guidance-for-royalty-cuts-prompting. In June, 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" and removing the requirement that the lease "would be economic with a royalty rate reduction." *Id.*

[116] *Oil & Gas Royalty Relief – Data and Analysis*, TAXPAYERS FOR COMMON SENSE, https://www.taxpayer.net/energy-natural-resources/federal-royalty-relief-data-analysis-2/.

[117] *See generally* Will Englund & Dino Grandoni, *Oil companies drilling on federal land get break on royalties. Solar and wind firms get past-due rent bills.*, WASH. POST. (May 20, 2020), https://www.washingtonpost.com/business/2020/05/20/blm-royalty-relief/.

[118] Economic Evaluation Handbook, *supra* note 49, ch. I.B.

this lease sale. While BLM appears to recognize that "the pandemic and the low commodity prices" have the potential to depress the market, it brushes this concern aside by noting that "[m]arkets for all commodities fluctuate over time" and stating that some "[d]evelopment is still occurring on Federal lands."[119] Furthermore, the agency states that lease auctions produce "sale prices that accurately reflect fair market value at the time of sale, regardless of market conditions"—recognizing, in effect, that depressed markets such as the current climate produce limited revenues.[120] Finally, the agency admits that it "does not attempt to 'time' the lease of public lands for minerals development to any particular set of market conditions"—but, of course, private developers *do* time lease purchases and will pay less for resources when market conditions so dictate, so BLM is effectively ceding any economic advantage it had to private developers at the public's expense.[121] This failure to even consider the economic option value associated with delaying lease sales runs counter to the federal court decisions in both *California v. Watt* and *Center for Sustainable Economy v. Jewell*.[122]

For all of the reasons outlined above, BLM's disregard for the currently depressed market is arbitrary and irrational. BLM is incorrect to suggest that low bid prices and deflated royalty rates represent the "fair market value" of a parcel simply because this is the price that an oil-and-gas auction yields at the present moment. As detailed above, this limited and circular analysis overlooks the other beneficial uses that are being forgone by leasing the land—an important consideration in assessing the fair value of the property=. BLM's aversion to considering market conditions when assessing its leasing priorities is not a rational way to manage federal lands to ensure that the public receives fair market value.

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.

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

[119] Royal Gorge EA at 13; Kremmling EA at 14. As noted above, development has declined substantially over the past year. *See supra* notes 105–06 and accompanying text.

[120] Royal Gorge EA at 13; Kremmling EA at 14.

[121] *Id.*

[122] *See California v. Watt*, 668 F.2d at 1319–20; *CSE v. Jewell*, 779 F.3d at 610.

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,

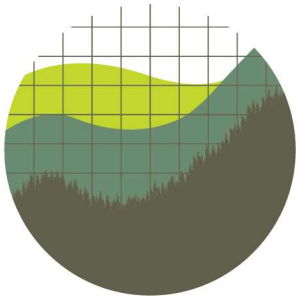
Jayni Hein, Natural Resources Director
Max Sarinsky, Attorney

Institute for Policy Integrity
jayni.hein@nyu.edu

Attachments:

1) BLM, Economic Evaluation of Oil and Gas Properties Handbook (H-3070-2)
2) CONGRESSIONAL BUDGET OFFICE, *Options for Increasing Federal Income from Crude Oil and Natural Gas on Federal Lands* (2016)
3) CTR. FOR AM. PROGRESS, *Oil and Gas Companies Gain by Stockpiling America's Federal Land* (2018)
4) FISH & WILDLIFE SERVICE, COMPREHENSIVE CONSERVATION PLAN: ARAPAHO NATIONAL WILDLIFE REFUGE 24-25 (Sept. 2004)
5) Jayni Hein*, Federal Lands and Fossil Fuels: Maximizing Social Welfare in Federal Energy Leasing*, 42 HARV. ENVTL. L. REV. 1 (2018)
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)
10) TAXPAYERS FOR COMMON SENSE, *Gaming the System: How Federal Land Management in Nevada Fails Taxpayers* (2019)
11) TAXPAYERS FOR COMMON SENSE, *Locked Out: The Cost of Speculation in Federal Oil and Gas Leases* (2017)
12) U.S. BUREAU OF OCEAN & ENERGY MGMT., 2017-2022 OUTER CONTINENTAL SHELF OIL AND GAS LEASING DRAFT PROPOSED PROGRAM (2015)

Attachment 3



Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

September 14, 2020

To: Bureau of Land Management, Colorado State Office

Subject: Comments on Failure to Monetize Greenhouse Gas Emissions in the Environmental Assessments for the December 2020 Colorado Oil and Gas Lease Sale (DOI-BLM-CO-F020-2020-0041-EA, DOI-BLM-CO-050-2020-0037-EA)

The Institute for Policy Integrity at New York University School of Law ("Policy Integrity")[1] respectfully submits comments on the Bureau of Land Management's ("BLM") two draft Environmental Assessments for the proposed December 2020 oil and gas lease sale in Colorado.[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity regularly submits comments to federal agencies on the social cost of greenhouse gases and assessments under the National Environmental Policy Act ("NEPA").

In these Environmental Assessments, BLM projects that the proposed lease sales will result in more than 24 million metric tons of carbon-dioxide equivalent in total downstream emissions under the high reasonable foreseeable development scenario.[3] Yet without assessing the impact of these emissions on climate change and the health and welfare harms caused by climate change such as mortality or property damage, BLM nonetheless concludes that such emissions are insignificant.[4] This cursory and conclusory

[1] This document does not purport to represent the views, if any, of New York University School of Law.

[2] Royal Gorge Field Office, Environmental Assessment for the December 2020 Competitive Oil & Gas Lease Sale (Docket No. DOI-BLM-CO-F020-2020-0041-EA) (Aug. 2020) [hereinafter "Royal Gorge EA"]; White River Field Office, Little Snake Field Office & Kremmling Field Office, Preliminary Environmental Assessment for the December 2020 Competitive Oil & Gas Lease Sale (Docket No. DOI-BLM-CO-050-2020-0037-EA) (Aug. 2020) [hereinafter "Kremmling EA"].

[3] *See* Royal Gorge EA at 45 (projecting 13.62 million metric tons in downstream emissions); Kremmling EA at 41 (projecting 9.29 million metric tons from Kremmling Field Office parcels and 1.51 million metric tons from Little Snake Field Office parcels). Policy Integrity does not endorse the accuracy of these projections. Indeed, as Policy Integrity explains in separate comments filed to these same Environmental Assessments, significant evidence, including recent trends in the oil-and-gas sector, indicates that drilling on these parcels may be limited throughout the duration of the proposed leases.

[4] Finding of No Significant Impact for Kremmling EA 1 (Aug. 2020) (concluding that proposed lease sale "would not have a significant effect on the quality of the human environment, individually, or cumulatively

assessment does not satisfy BLM's obligation under NEPA to meaningfully assess the significance of environmental harms including effects on climate change. And the agency disregards an available tool—the social cost of greenhouse gases—that allows for such an assessment.

Mere quantification of greenhouse gas emissions is insufficient under NEPA without an assessment of the harm that those emissions will cause. NEPA requires "hard look" consideration of beneficial and adverse effects of each alternative option for major federal government actions. The U.S. Supreme Court has called the disclosure of impacts the "key requirement of NEPA," and held that agencies must "consider and disclose the *actual environmental effects*" of a proposed project in a way that "brings those effects to bear on [the agency's] decisions."[5] The "impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires," and it is arbitrary and capricious not to "provide the necessary contextual information about the[se] cumulative and incremental environmental impacts."[6]

The tons of greenhouse gases emitted by a project are not the "actual environmental effects" that must be assessed under NEPA. Rather, the actual effects are the incremental climate impacts caused by those emissions, including property lost or damaged by sea-level rise, coastal storms, flooding, and other extreme weather events, and human health impacts including mortality from heat-related illnesses and changing disease vectors like malaria and dengue fever.[7] Simply quantifying emissions is not enough: By calculating only the tons of greenhouse gases emitted, an agency fails to meaningfully assess the actual incremental impacts to property, human health, productivity, and so forth.[8] To provide an analogous

---

with other actions in the general area"); *accord* Finding of No Significant Impact for Royal Gorge EA 1 (Aug. 2020).

[5] *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 96 (1983) (emphasis added).

[6] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008); *see also id*. ("[T]he fact that climate change is largely a global phenomenon that includes actions that are outside of [the agency's] control . . . does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming.").

[7] For a more complete discussion of actual climate effects, including air quality mortality, extreme temperature mortality, lost labor productivity, harmful algal blooms, spread of West Nile virus, damage to roads and other infrastructure, effects on urban drainage, damage to coastal property, electricity demand and supply effects, water supply and quality effects, inland flooding, lost winter recreation, effects on agriculture and fish, lost ecosystem services from coral reefs, and wildfires, see EPA, *Multi-Model Framework for Quantitative Sectoral Impacts Analysis: A Technical Report for the Fourth National Climate Assessment* (2017); U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment* (2017); EPA, *Climate Change in the United States: Benefits of Global Action* (2015); Union of Concerned Scientists, *Underwater: Rising Seas, Chronic Floods, and the Implications for U.S. Coastal Real Estate* (2018).

[8] *See, e.g.*, *Ctr. for Biological Diversity*, 538 F.3d at 1216–17 (rejecting analysis under NEPA when agency "quantifie[d] the expected amount of [carbon dioxide] emitted" but failed to "evaluate the incremental impact that these emissions will have on climate change or on the environment more generally," noting that this approach impermissibly failed to "discuss the *actual* environmental effects resulting from those emissions" or "provide the necessary contextual information about the cumulative and incremental environmental impacts" that NEPA requires); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014) ("Beyond quantifying the amount of emissions relative to state and national emissions and giving general discussion to the impacts of global climate change, [the agencies] did not discuss the impacts caused

example, just quantifying the acres of timber to be harvested or the miles of road to be constructed does not constitute a "description of *actual* environmental effects," even when paired with a qualitative "list of environmental concerns such as air quality, water quality, and endangered species," when the agency fails to assess "the degree that each factor will be impacted."[9]

BLM's limited justification for declaring insignificant the greenhouse gas emissions from this proposed lease sale does not pass muster. Specifically, the agency highlights that emissions from this lease sale—or from "any single geographic subunit … or source"—are "dwarfed by the large number of comparable national and subnational contributors."[10] However, comparisons to national emission figures inappropriately make highly significant effects appear relatively trivial. The mere fact that climate change is a global phenomenon does not mean that individual projects cannot themselves have substantial climate effects, nor does it absolve agencies of their obligation under NEPA to assess those impacts.[11] As the U.S. Court of Appeals for the Fifth Circuit observed, even a seemingly "very small portion" of a "gargantuan source of [harmful] pollution" may nevertheless "constitute[] a gargantuan source of [harmful] pollution on its own terms."[12] In other words, percentage comparisons can be misleading and can be manipulated by the choice of the denominator. Without further analysis, therefore, BLM lacks a reasonable basis to conclude that the emissions from this proposal are insignificant.

BLM's failure to meaningfully consider the impact of the greenhouse gas emissions from the proposed lease sale on climate damages is particularly arbitrary and irrational because an available and widely-used tool—the social cost of greenhouse gases—allows for precisely such an assessment. The social cost of greenhouse gases methodology calculates how the emission of an additional unit of greenhouse gases affects atmospheric greenhouse concentrations, how that change in atmospheric concentrations changes temperature, and how that change in temperature incrementally contributes to the above list of social and economic damages.[13] The social cost of greenhouse gases tool therefore captures the factors that actually affect public welfare and assesses the degree of impact to each factor, in ways that just estimating the volume of emissions cannot. In fact, various agencies

---

by these emissions."); *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1096–99 (D. Mont. 2017) (rejecting the argument that the agency "reasonably considered the impact of greenhouse gas emissions by quantifying the emissions which would be released if the [coal] mine expansion is approved, and comparing that amount to the net emissions of the United States"); *California v. Bernhardt*, No. 4:18-CV-05712-YGR, 2020 WL 4001480, at *36 (N.D. Cal. July 15, 2020) ("Mere quantification [of greenhouse gas emissions] is insufficient.").

[9] *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004) ("A calculation of the total number of acres to be harvested in the watershed is . . . not a sufficient description of the actual environmental effects that can be expected from logging those acres.").

[10] Kremmling EA at 42; *accord* Royal Gorge EA at 46.

[11] *California*, 2020 WL 4001480, at *36 ("[F]raming sources as less than 1% of global emissions is dishonest and a prescription for climate disaster." (citation omitted)).

[12] *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1032 (5th Cir. 2019).

[13] Interagency Working Group on the Social Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis* 5 (2010).

(including Department of the Interior subagencies) have used the social cost of greenhouse gases to assess a project's climate impacts under NEPA.[14]

Applying the social cost of greenhouse gases is straightforward and provides information that would be very useful to BLM's assessment here. Specifically, using the central value identified by the federal Interagency Working Group on the Social Cost of Carbon, the methodology reveals that the proposed lease sale would cause nearly $1.4 billion in total climate harms.[15] This substantial cost helps disclose the intensity and significance of the Project's climate impacts pursuant to NEPA and would bear heavily on assessing whether the lease sale would have significant environmental impacts.

BLM's few excuses for not applying the social cost of greenhouse gases are meritless. The agency's first reason—that the tool was developed for cost-benefit analyses of proposed rules and not specifically for NEPA assessments[16]—is inapposite. Indeed, there is nothing in the development of the social cost of greenhouse gases that limits its application to other contexts. The social cost of greenhouse gases measures the marginal cost of *any* additional unit of a greenhouse gas emitted into the atmosphere. The type of government action that precipitated that unit of emissions—whether a regulation, project approval, granting of a permit, or anything else—does not affect the marginal climate damages caused.

Nor is BLM correct to suggest that the use of the social cost of greenhouse gases would effectively and inappropriately turn NEPA assessments into cost-benefit analyses.[17] Even if other impacts are not monetized, using the social cost of greenhouse gases is the best method to assess the significance of a project's climate-related impacts as NEPA requires. Applicable regulations acknowledge that when monetization of costs or benefits is "relevant to the choice among environmentally different alternatives," that analysis can be presented alongside "any analyses of unquantified environmental impacts, values, and amenities."[18] In other words, contrary to BLM's suggestion, the inability to monetize some

---

[14] *See, e.g.*, Bureau of Ocean Energy Mgmt., Final Environmental Impact Statement of Cook Inlet Planning Area Oil and Gas Lease Sale 244 (BOEM 2016-069) (Dec. 23, 2016); *see also* Peter Howard & Jason Schwartz, *Think Global: International Reciprocity as Justification for a Global Social Cost of Carbon*, 42 Colum. J. Envtl. L. 203, 270–84 (2017) (listing all uses by federal agencies through mid-2016, including numerous NEPA assessments).

[15] The 2016 Interagency Working Group's central estimate of the social cost of carbon for year 2025 emissions is $46 in 2007$. Interagency Working Group on the Social Cost of Carbon, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis* 4 (2016). Adjusted for inflation, that equals approximately $57 in 2019$. 24.41 million metric tons of CO2e* $57 = $1.391 billion. In a proper cost benefit analysis, that calculation of costs from year 2025 emissions would be discounted back to present value.

[16] Kremmling EA at 42–43. The Royal Gorge EA contains no discussion of the social cost of greenhouse gases.

[17] *See id*. at 43.

[18] 40 C.F.R. § 1502.23. Under a recently-finalized rule from the Council on Environmental Quality set to take effect today, this subsection of the Code of Federal Register was not substantively altered but was renumbered to 40 C.F.R. § 1502.22. Policy Integrity in no way concedes the legality of these amendments, but simply mentions them here for the sake of clarity.

impacts should not preclude the monetization of other impacts—like climate damages—that can be readily monetized. This is especially so since applying the social cost of greenhouse gases requires simple arithmetic (multiplication) once BLM has quantified a project's emissions.

Policy Integrity hereby attaches its June 2020 comments on BLM's draft Environmental Assessment for the Lila Canyon mine lease modifications—submitted jointly with seven other groups—which provides further detail on the social cost of greenhouse gases and rebuts additional arguments that BLM has offered against the methodology in prior determinations. As the attached comments further explain, and as detailed above, it would be arbitrary and capricious for BLM to proceed with the lease sale without further analysis of its climate impacts, which the social cost of greenhouse gases would facilitate.

Sincerely,

Jayni Hein, Natural Resources Director
Iliana Paul, Policy Analyst
Max Sarinsky, Attorney
Jason A. Schwartz, Legal Director

Attached:

Joint Comments on the Failure to Monetize Greenhouse Gas Emissions in the Draft Environmental Assessment for the Lila Canyon Mine Lease Modifications (DOI-BLM-UT-G020-2018-0039-EA)