

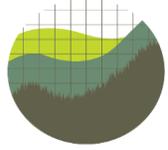
Institute *for*
Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

Public Lands and Option Value: Information and Strategy Webinar



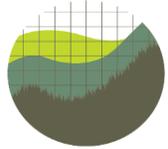
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Institute for Policy Integrity at New York University School of Law



Agenda

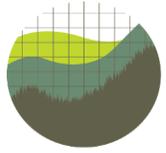
- 1) Policy Integrity & option value
- 2) What is option value?
- 3) Option value in Resource Management Plans
- 4) Option value at the lease sale stage
- 5) Policy considerations across administrations
- 6) Questions and discussion





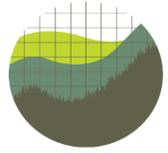
Policy Integrity & Option Value

- **Comments in Interior proceedings**
 - Comments on fossil fuel lease sales, Resource Management Plans, Offshore Drilling Programs
 - Ex. Comments to BLM Utah Re: Draft Environmental Assessment for Proposed September 2020 Competitive Oil and Gas Lease Sale (July 9, 2020)
 - Ex. Comments on Bureau of Ocean Energy Management's (BOEM) five-year plans for offshore drilling
- **Reports & Articles**
 - Hein et al., *Look Before You Lease: Reducing Fossil Fuel Dominance on Public Lands by Accounting for Option Value* (2020) ([link](#))
 - Michael Livermore, *Patience is an Economic Virtue*, 84 Colo. L. Rev. 581 (2013) ([link](#))
- **Litigation: Center for Sustainable Economy v. Jewell (D.C. Cir. 2017)**
 - Led to option value analysis in agency's subsequent five-year plans for offshore leasing



Introduction to Option Value

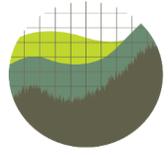
- **Option value is the informational value gained by delaying a decision**
 - The greater the irreversibility and uncertainty, the higher the option value
- **Examples of consideration of option value:**
 - Markets for real options (e.g. financial options)
 - Behavior of fossil-fuel developers in leasing and sitting on public lands
 - Federal government's approach to offshore leasing
- **Natural resource decisions involve high option value due to uncertainties and the irreversibility of drilling:**
 - “**More is learned with the passage of time:** Technology improves. Drilling becomes cheaper, safer, and less environmentally damaging. ... Development of energy efficiencies and renewable energy sources reduces the need to rely on fossil fuels. As safer techniques and more effective technologies continue to be developed, the costs associated with drilling decline. **There is therefore 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.**” *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 610 (D.C. Cir. 2015).



Sources of Uncertainty in Onshore Leasing

- **Economic:** Resource prices in the United States and in global energy markets; information on the cost of drilling in the region and bringing those resources to market.
- **Environmental:** Environmental conditions and risks from drilling including local pollution, habitat effects, endangered species effects, and greenhouse gas emissions.
- **Land-Use:** Competing uses of the public lands, including recreational activities, preservation, wildlife protection, renewable-energy development, cultural and tribal use, and tourism.
- **Technological:** Safety, pollution-capture, and other drilling technologies.
- **Legal:** Laws and regulations governing drilling and development on public lands, air pollution, endangered species, and other environmental concerns such as fuel-economy standards that affect demand for fossil fuels.

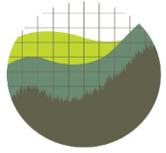
Despite the considerable uncertainty involved in onshore leasing, BLM does not even consider option value in its leasing program.



Option Value & Resource Management Plans (RMPs)

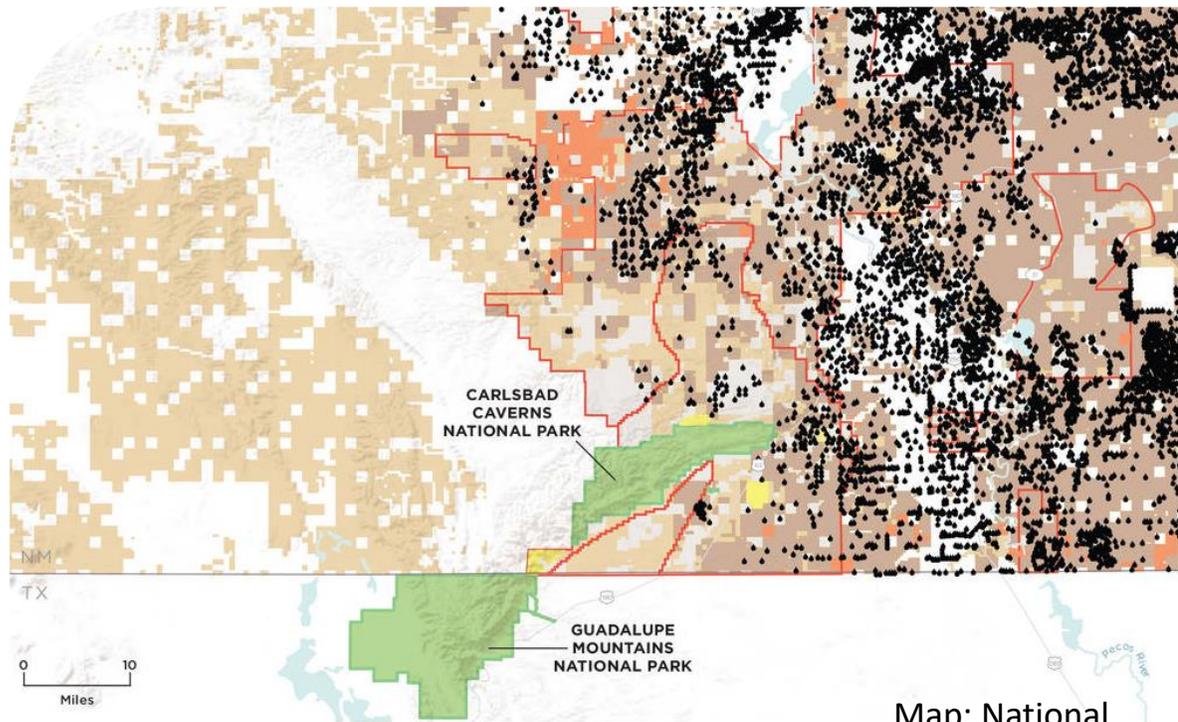
Federal Land Policy and Management Act (FLPMA) and Option Value:

- BLM must manage public lands for multiple uses; must earn fair market value (FMV)
 - In developing land use plans, Interior shall: use multiple use framework; give priority to designation/protection of areas of critical environmental concern (ACECs); consider present and potential uses of the public lands; consider relative scarcity of the values involved; weigh long-term benefits to the public against short-term benefits. 43 U.S.C. § 1712(c).
 - “It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses.” *New Mexico Ex. Rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009)
- **Key argument at RMP stage:** BLM should not tie up all/most land in RMP for extractive uses; must designate some land for other priority uses – conservation, recreation, renewable energy.
- **Good argument where:** multiple use or ESA-related conflicts are present; known or uncertain environmental risks and sensitivities; little land left for non-extractive uses
 - Ex: Carlsbad RMP: areas susceptible to sinkhole collapse, groundwater contamination
 - Also good argument when lands have low fossil fuel development potential yet multiple-use conflicts



Case Study: Carlsbad RMP

Overview: In 2018, BLM proposed opening an additional 86,000 acres for oil and gas extraction in the BLM Carlsbad, New Mexico RMP. Its preferred alternative makes 98% of the area open to leasing. Several uncertainties and risks associated with drilling in this area, including groundwater contamination, sinkhole formation due to drilling activities, and impacts on nearby national parks, including Carlsbad Caverns.



Map: National
Parks Conservation
Association

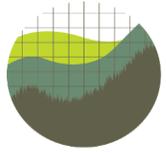
Relevant Option Value Considerations

Multiple-Use Conflicts: **High**

Risks & Environmental Uncertainty: **High**

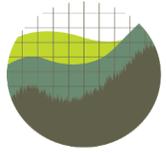
Production Potential: **Medium to High**

- Under these conditions, option value is high and strongly counsels towards designating less acreage in the RMP for leasing.
- Also weighs towards more protective criteria and stipulations for any acreage that is made available in an RMP.



Option Value & RMPs: NEPA Context

- **NEPA Process: Can advocate for more limited oil, gas, and coal land use designations as alternatives that agency must consider in NEPA process**
 - BLM sometimes only analyzes limited number of alternatives, including the preferred option and the “No Action” alternative. But, case law suggests this can be inadequate:
 - 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.” *New Mexico Ex. Rel. Richardson v. BLM*, 565 F.3d 683, 710-11 (10th Cir. 2009)
 - BLM violated NEPA by failing to consider a reasonable range of RMP alternatives. *Wilderness Workshop v. United States BLM*, 342 F. Supp. 3d 1145, 1166–67 (D. Colo. 2018) (“...a reasonable alternative would be to consider what else may be done with the low and medium potential lands if they are not held open for leasing.”)
- **NEPA also requires EISs and EAs to take a “hard look” at adverse environmental effects**
 - Ex: BLM Colorado lease sale [comments](#): noted parcels adjacent to Arapaho National Wildlife Refuge, yet little to no analysis of potential adverse effects and multiple-use conflicts
- **Outdoor recreation and tourism**
 - Can cite revenue and jobs from these activities; engage local officials. Esp. apt where BLM touts economic value of leasing.

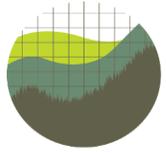


Option Value & Leasing

- **Lease sales are also subject to NEPA analysis and allow for many of the same types of arguments:**
 - Multiple-use arguments for land-use conflicts, particularly for parcels with low potential
 - Failure to consider alternative of deferring many of the parcels

Arguments that BLM will not obtain “fair market value,” while relevant at the RMP stage, can be particularly powerful at the lease sale stage when they can be sensitive to current market conditions.

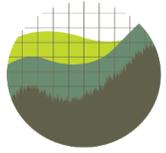
- **Fair Market Value:** FLPMA requires BLM to manage lands to obtain “fair market value.” But revenues from non-producing parcels are typically minimal:
 - Value from initial sale: \$435 application fee + bonus bid for a competitive lease (\$2/acre minimum, often less than \$10/acre) or nothing for a noncompetitive lease
 - \$1.50/acre lease amount per year that land sits idle. If land is developed, developer typically pays a royalty of 12.5% of revenues (split between the federal and state government), although royalty rates are sometimes reduced



Option Value & Leasing: Current Conditions

- **Current economic conditions stand to greatly limit leasing revenues, and emphasize the importance of option value.**
 - Global oil demand has dropped sharply in the past six months, leading to a decline in prices.
 - Many recent lease sales have had poor results, with limited and low bidding.
 - Oil companies have responded to substantially reducing drilling, limiting royalty revenue.
 - Royalty revenues are even further reduced by the relief that BLM has offered to hundreds of applicants from the normal 12.5% rate.
- **The leasing frenzy of the Trump administration already meant that more parcels were sitting idle and leases were selling especially cheaply.**
 - The percentage of acres receiving competitive bids has always been low, but reached incredible lows in recent years. In 2017, under 7% of all offered acreage leased competitively.
 - Even leases that receive bonus bids are often going at or near the minimum \$2/acre bid

Current economic conditions underscore the need to consider option value. With the oil market so depressed, the case for delay is especially strong.



Case Study: Moab Leasing Proposal

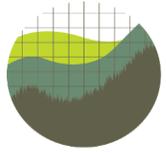
Overview: BLM sought to lease 87,000 acres of land in the Moab region in its September 2020 oil-and-gas lease sale, on parcels bordering Canyonlands and Arches National Parks. The proposal was scrapped after fierce opposition.



Relevant Option Value Considerations

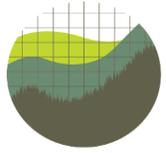
Multiple-Use Conflict Potential: **High**
Expected Production: **Low to Moderate**
Current Market Conditions: **Poor**

- Under these conditions, option value was high and strongly counselled delay.
- The argument for deferral is less obvious when there are fewer land-use conflicts or higher production potential, but should remain strong so long as market conditions are weak or oil companies continue to engage in speculative leasing.



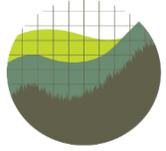
Policy Considerations Across Administrations

- Potential Biden Administration
 - May see pause in all fossil fuel lease sales, per campaign statements
 - May see overall GHG emissions reduction target for public lands
 - Potential for RMP revisions. Opportunity to emphasize:
 - The need to protect non-extractive land use values: conservation, carbon sink value, renewable energy development
 - Using RMPs to meet GHG emissions goals, like cap or net-zero emissions goal
 - Likely much more receptive to environmental sensitivities or risks
 - Ex. Potential for new regulations re: land use planning
 - Ex. Drilling in ANWR: could re-open NEPA process due to deficiencies
- Potential Trump Administration
 - Has not been receptive to fair market value arguments, to-date
 - Continue strong comments on all RMPs, lease sales, regulatory rollbacks
 - Consider new litigation re: FLPMA multiple use, FMV, & NEPA



General Comment Tips

- Cite statutes, regulations, or other sources of authority (NEPA, FLPMA, MLA)
 - Also cite favorable case law (*CSE v. Jewell*, *New Mexico*, *Wilderness Workshop*, etc.)
- Can also make Administrative Procedure Act (APA) claims where agency is acting arbitrarily or capriciously
- Be *specific* about what the agency did wrong or failed to consider
 - What are the sources of conflict?
 - Does the proposed action directly conflict with other agency priorities or state/local priorities?
 - Is there a reason for uncertainty? Does the agency or public lack relevant information?
- Comment at all stages of the process: scoping (if any), draft RMP/EIS, proposed lease sale/draft EA, and lease sale protest.
 - Ex. Propose a specific alternative that the agency failed to consider.



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