



PUTTING THE PUBLIC FIRST: A PRINCIPLED VISION FOR OIL & GAS DEVELOPMENT ON OUR PUBLIC LANDS



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OVERVIEW

Public lands exist for the benefit of all present and future Americans. That democratic notion is enshrined in a multitude of federal laws, which collectively promote the balanced consideration and protection of public lands and the various resources they contain.¹ For example, the Federal Land Policy and Management Act (FLPMA) states that public lands must support “a combination of balanced and diverse resource uses that will best meet the present and future needs of the American people.”² When read in conjunction with other federal laws, such as the National Environmental Policy Act and National Historic Preservation Act, which require the government to evaluate and seek public input before taking actions that could harm natural or cultural resources, it becomes clear that protecting the interests of the public must come first when evaluating whether or not to permit development on federal public lands.

Yet, over the past year, the idea that public lands exist for the benefit of the American people and a wide range of uses has been steadily eroded, as the Administration has increasingly targeted public lands for oil and gas development in the name of “energy dominance.”³ This dramatic shift in national policy threatens not only our national parks, hunting and fishing grounds, farms and ranches, tribal cultural resources, and outdoor recreation areas, but also the democratic principles that are supposed to guide management of our public lands and constrain the impulse to prioritize oil and gas development above all else.

Now more than ever, with the growing demands on our public lands and emergence of new revenue sources for western communities, including renewable energy and the \$887-billion outdoor recreation industry,⁴ we need a principled vision for oil and gas development on our public lands. One that incorporates basic principles about transparency, public participation, and meaningful and adequate tribal consultation, the protection of our lands and waters, fair compensation for taxpayers, reducing pollution and climate impacts, and preventing the monopolization of our lands and resources by the oil and gas industry.

¹ See, e.g., Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 et seq.; National Forest Management Act, 16 U.S.C. §§ 1600 et seq.; National Historic Preservation Act, 54 U.S.C. §§ 300101 et seq.; National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.; Antiquities Act of 1906, 54 U.S.C. §§ 320301 et seq.; Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001, et seq.; Archaeological Resources Protection Act, 16 U.S.C. §§ 470dd et seq.; National Park Service Organic Act, 54 U.S.C. §§ 100101 et seq.

² 43 U.S.C. § 1702(e).

³ <https://www.doi.gov/pressreleases/department-interior-releases-energy-burdens-report>

⁴ <https://outdoorindustry.org/resource/2017-outdoor-recreation-economy-report/>

Principle #1: Guarantee transparency and fully involve the public, tribal nations, Latino communities, and other stakeholders in the decision-making process for oil and gas development

As the popularity and economic importance of our public lands grows with each passing year, so too must efforts to involve the public and engage with stakeholders. Decisions about whether, where, and how public lands should be developed must, to the maximum extent possible, maintain a focus on the broader public interest, including, but not limited to, maintaining robust wildlife herds, preserving the sanctity of tribal cultural landscapes and resources, and enhancing outdoor recreation opportunities, rather than the much-narrower goals of the oil and gas industry. This can only be accomplished through meaningful consultation, conducted early and often with the public, tribal nations, and other stakeholders. Further, the decision-making process must be as transparent as possible and permit equal access to decision-makers.

Yet, in October 2017, the Department of the Interior (DOI) released a report identifying potential burdens on domestic energy development.⁵ Among the so-called “burdens” specifically identified in the report were important aspects of public participation in oil and gas development decisions.⁶ Consistent with this finding and direction from DOI to eliminate such “burdens,” the Bureau of Land Management (BLM) updated its approach to planning for oil and gas leasing so that public participation in the NEPA process for proposed oil and gas leases, notice to split-estate landowners, and other public input steps are now discretionary.⁷ Additional direction, such as the President’s “Executive Order Expediting Environmental Reviews for Infrastructure Projects,” would further reduce the public’s role in decisions related to oil and gas development.⁸ Many of the new federal policies were adopted with little to no public involvement but with close coordination with the oil and industry.⁹



⁵ https://www.doi.gov/sites/doi.gov/files/uploads/interior_energy_actions_report_final.pdf

⁶ *Id.* at 16–17.

⁷ <https://www.blm.gov/policy/im-2018-034>.

⁸ <https://www.whitehouse.gov/presidential-actions/executive-order-expediting-environmental-reviews-approvals-high-priority-infrastructure-projects/>

⁹ <http://westernpriorities.org/not-in-their-wildest-dreams/>

Principle #2: Balance oil and gas development with the protection of other resources, including tribal cultural resources, national parks and other wild places, and outdoor recreation, as well as ranches, farms, and other split-estate lands

In evaluating proposals to develop public lands, federal officials must take into consideration the many activities and uses for which they were intended by Congress. No single activity or use has a de facto priority over another. Consequently, there should be no presumption in favor of opening lands to leasing. Instead, oil and gas activities should be limited to places where conflicts with other uses can be avoided, and there is a reasonable likelihood of producing oil or gas. We need to establish, through meaningful and adequate consultation with tribal nations, the public, and other stakeholders, clear goals for how the leasing program will meet “the present and future needs of the American people” and the overarching multiple-use principles of FLPMA.¹⁰ The leasing process cannot allow the oil and gas industry to dictate where and when leasing takes place, but must instead reflect the outcomes of meaningful collaboration and consultation with tribal nations, the general public, and other stakeholders.¹¹

Recent federal actions, however, have increasingly prioritized oil and gas development over other public interests.¹² This change in federal policy is in direct conflict with long-overdue oil and gas reforms adopted by DOI several years ago that emerged from an extensive internal review of the onshore leasing program and sought to refocus the BLM on its multiple-use mission.¹³ Federal courts have also found that the BLM must not favor or prioritize oil and gas interests over other multiple-uses, thus rejecting a flawed, but long-standing, federal practice that gave preferential treatment to oil and gas development on public lands.¹⁴ However, the BLM has been ordered to revert to this practice and move forward with oil and gas leasing in areas that fall under land use plans that date-back to the 1980s and 1990s,¹⁵ as well as in areas where significant conflicts with wilderness values,¹⁶ wildlife habitat,¹⁷ tribal cultural resources,¹⁸ private property,¹⁹ outdoor recreation areas,²⁰ and national parks are known to exist.²¹



¹⁰ 43 U.S.C. § 1702(c).

¹¹ See, e.g., Ann Berkley Rodgers, Aaron Sims, and Gregory Smith, Defending the National Historic Preservation Act, Law 360 (Oct 30, 2017), <https://www.law360.com/articles/979301> (challenging the notion of “streamlining” the consultation process under the National Historic Preservation Act in light of energy development).

¹² <https://www.doi.gov/pressreleases/department-interior-releases-energy-burdens-report>

¹³ <https://www.americanprogress.org/issues/green/reports/2013/12/18/81291/a-turning-point-for-the-bureau-of-land-management/>.

¹⁴ See, e.g., N.M. ex rel. Richardson v. Bureau of Land Management, 565 F.3d 683, 710 (10th Cir. 2009) (“It is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses.”); https://www.eenews.net/features/documents/2009/10/08/document_pm_01.pdf.

¹⁵ <https://www.blm.gov/policy/im-2018-034>.

¹⁶ http://action.suwa.org/site/News2?news_iv_ctrl=1&page=NewsArticle&id=5886; <https://www.alaskapublic.org/2018/03/08/trump-official-says-interior-aims-to-move-pretty-quickly-on-arctic-refuge-oil-development/>.

¹⁷ <https://www.hcn.org/issues/50.2/energy-and-industry-more-oil-and-gas-development-slated-for-prime-sage-grouse-habitat>.

¹⁸ http://www.santafenewmexican.com/news/local_news/oil-and-gas-lease-sale-near-chaco-canyon-spurs-numerous/article_7c2ecd6e-5f3b-51aa-ae08-9ebb2197d96c.html

¹⁹ http://billingsgazette.com/news/state-and-regional/montana/livingston-residents-protest-blm-s-march-oil-and-gas-lease/article_c5e0dd36-62f3-5087-a337-c748f3e41e9b.html.

²⁰ <https://www.oars.com/blog/no-drilling-near-dinosaur-national-monument/>.

²¹ <https://medium.com/westwise/photos-drilling-americas-heritage-e860fd17363b>.

Principle #3: Ensure taxpayers receive a fair share from production of publicly-owned oil and gas resources

Americans must receive “fair market value” whenever oil and gas is produced from public lands.²² This means that the federal government must routinely evaluate and strengthen its fiscal policies – including royalty rates, rental rates, and minimum bids – to ensure that taxpayers, and not private interests, are the primary beneficiaries of public lands development. In the same vein, taxpayers should not be held responsible for clean-up costs when oil and gas companies go out of business or refuse to fulfill their reclamation obligations. Reclamation bonds – a taxpayer insurance policy – should be regularly updated to reflect increases in reclamation costs once the oil and gas stop flowing at development sites.

Yet, DOI has not updated its fiscal policies in decades, and is showing no inclination to do so anytime soon. While DOI established a Royalty Policy Committee in March 2017 to evaluate these fiscal policies, the Committee is composed largely of oil and gas industry representatives and does not reflect the broader viewpoints on public lands management that are needed to ensure that taxpayers are being fairly compensated.²³ Also, despite soaring oil production on public lands,²⁴ the Committee has yet to offer recommendations regarding increased royalty rates, rental rates or minimum bids, all of which have not been updated in several decades.²⁵ Nor has the Committee offered any solutions to the widening gulf between oil and gas reclamation costs and bonds held by the federal government, which exceed \$6 billion, according to a recent nonpartisan report.²⁶



²² 43 U.S.C. § 1701(a)(9).

²³ <https://www.doi.gov/rpc>

²⁴ <https://www.onrr.gov/About/production-data.htm>.

²⁵ https://www.washingtonpost.com/national/health-science/interior-panel-weighs-lower-royalty-payments-for-offshore-oil-gas-drilling/2018/02/25/85e0ec14-18cd-11e8-92c9-376b4fe57ff7_story.html?utm_term=.d7ec9800f09e.

²⁶ <http://westernpriorities.org/bondingreport/>.

Principle #4: Reduce pollution and address the climate impacts of oil and gas development

In recent years, our understanding of how public lands oil and gas development is contributing to our warming planet and harming air and water quality has come into sharper focus.²⁷ We must continue to refine and use that knowledge to make smarter decisions about whether and how we allow oil and gas development on public lands. We must also increase our efforts to prioritize renewable energy development on public lands where conflicts with other interests can be avoided or minimized. Finally, we must support front-line communities most threatened by the effects of climate change, as well as those that will begin to transition away from an economic dependence on fossil fuels development.

The Trump Administration's ongoing and sweeping efforts to eliminate federal regulations and streamline the development process is undermining the urgent need to address climate impacts and protect air and water quality. We are greatly concerned that the elimination of federal policies that require agencies to completely and thoughtfully consider environmental impacts when evaluating oil and gas projects ignores the significant contribution these projects make to the warming of our planet and air and water quality. We are also concerned by the Administration's FY 2018 and FY 2019 budget proposals that would defund planning and permitting for renewable energy development and programs that assist fossil fuels-dependent communities in the western United States, while bolstering funding for oil and gas development.



²⁷<https://wilderness.org/press-release/new-report-details-hidden-climate-impacts-fossil-fuel-development-us-public-lands>

Principle #5: Prevent the oil and gas industry from monopolizing public lands and minerals owned by all Americans

If administered faithfully, the BLM's multiple-use mission should naturally frustrate the monopolization of public lands and minerals by any one industry or activity. Because no single use may predominate, including oil and gas development, all uses can and should exist on a level playing field. Accordingly, where drilling has been vetted and deemed appropriate through an open and transparent review process, the public has a right to expect that oil and gas companies will diligently and responsibly develop their holdings, and not just hoard the leases for years on end as is too often the case now.²⁸ And taxpayer advocates have found that positive steps should be taken to discourage speculation by oil and gas companies that lack the inclination or ability to pursue development and to ensure that other public lands uses and users are not locked out,²⁹ including tribal and traditional cultural activities, backcountry outfitters and ranching, and so that private landowners can freely use their split-estate lands.

We are concerned that the Administration's overriding focus on energy development will ultimately allow oil and gas companies to monopolize the use of our public lands. In 2017, for example, the BLM offered over 11 million acres of public lands for oil and gas leasing – a land mass larger than the states of New Hampshire and Massachusetts combined³⁰ – including in many areas with minimal to no development potential. Only a fraction of those offerings actually sold, however, and many leases went for the minimum bid of \$2.00/acre, which strongly suggests that they were purchased for speculative reasons.³¹ Indiscriminate leasing of this kind will only limit the range of other activities that can take place on public lands, as the BLM frequently refuses to manage for the protection and enhancement of other resources when lands are leased for oil and gas development.³²



²⁸ <https://wilderness.org/blog/land-hoarders-oil-and-gas-companies-are-stockpiling-your-public-lands>

²⁹ <https://www.taxpayer.net/energy-natural-resources/locked-out-the-cost-of-speculation-in-federal-oil-and-gas-leases/>

³⁰ http://www.statemaster.com/graph/geo_lan_acr_tot-geography-land-acreage-total

³¹ <https://www.taxpayer.net/energy-natural-resources/locked-out-the-cost-of-speculation-in-federal-oil-and-gas-leases/>

³² Colorado River Valley Proposed Resource Management Plan (2014) at Chapter 3, p. 3-135, available at https://eplanning.blm.gov/epl-front-office/projects/lup/68506/90704/109012/01_CRVFO_ROD_ARMP_FINAL_6-12-15.pdf.