

April 15, 2021

SUBMITTED VIA E-MAIL: energyreview@ios.doi.gov

The Honorable Deb Haaland
Secretary of the Interior
1849 C Street
Washington, D.C. 20240

Dear Secretary Haaland:

Thank you for the opportunity to provide recommendations on the Interior Department's review of the federal onshore oil and gas program. We wholeheartedly support this review, as the onshore program requires sweeping, top-to-bottom reform – to eliminate an entrenched, institutional preference for development, to elevate the role of conservation and other uses, and to create a more sustainable and predictable revenue stream for American taxpayers. Further, over the years, the Government Accountability Office, the Department of the Interior's Inspector General, and many others have repeatedly called-on the Interior Department (DOI) to undertake fundamental reforms to the onshore program.

At the outset, we wanted to encourage DOI to proceed as expeditiously as possible with the review process. Doing so will go a long way toward resolving whatever uncertainty has emerged since President Biden issued Executive Order 14008, and will also allow DOI to focus its time and energy on implementing reforms that are adopted through this review process. Accordingly, we believe that DOI should promptly initiate a programmatic environmental impact statement (EIS) process and rulemaking to revise BLM's oil and gas regulations. This should not be the sole vehicle for reforming the program, however, as DOI has existing and wide-ranging authority to make meaningful change outside of the rulemaking process (e.g., through policy guidance).

Turning to our substantive recommendations, we respectfully request that DOI consider taking the following actions, nearly all of which DOI has the authority to carry out administratively. We also encourage DOI to explore opportunities to codify reforms through changes to the Mineral Leasing Act (MLA) and other federal laws, including by working with members of Congress who are sponsoring oil and gas reform legislation.¹

¹ See, e.g., Fair Returns for Public Lands Act, 117th Cong. (2021) (strengthening the onshore program's fiscal framework, introduced by Sens. Rosen and Grassley); End Speculative Oil and Gas Leasing Act of 2021, S. 607, 117th Cong. (2021) (prohibiting leasing on low and no potential public lands, introduced by Sen. Cortez Masto); Restoring Community Input and Public Protections in Oil and Gas Leasing Act of 2021, H.R. 1503, 117th Cong. (2021) (reforming several aspects of the onshore program, introduced by Rep. Levin); Ending Taxpayer Welfare for Oil and Gas Companies Act, H.R. 1517, 117th Cong. (strengthening the onshore program's fiscal framework, introduced by Rep. Porter); Leasing Market Efficiency Act, S. 4223, 116th Cong. (2020) (ending noncompetitive leasing, introduced by Sen. Tester); Oil and Gas Bonding Reform and Orphaned Well Remediation Act, S. 4642, 116th Cong. (2020) (strengthening the onshore program's bonding framework and funding orphaned well clean-up, introduced by Sen. Bennet).

- 1. Establish a new mandate for the onshore program:** BLM has traditionally administered the onshore program as if leasing and development were required.² However, federal courts have consistently ruled otherwise and held that oil and gas development is not the dominant use of public lands and must be weighed against other valid uses, including recreation, fish and wildlife conservation, and renewable energy development.³

Recommendation: DOI should establish a new mandate for the onshore program that affirmatively recognizes oil and gas leasing as a discretionary action that should be authorized only when consistent with multiple use and sustained yield principles.

- 2. Guarantee robust public participation and tribal consultation:** Public participation and tribal consultation are essential and required components of the decision-making process for oil and gas activity on public lands. After the Trump Administration tried to make public participation optional for leasing decisions, a federal court ruled that “the public involvement requirements of FLPMA and NEPA cannot be set aside in the name of expediting oil and gas lease sales.”⁴

Recommendation: BLM should amend its oil and gas leasing regulations to require robust public participation and tribal consultation during the leasing and permitting process. BLM should look to IM 2010-117 for guidance; however, robust public participation and tribal consultation should be mandatory, not optional, for all leasing and permitting decisions.

- 3. Limit the quantity and scope of competitive sales:** The MLA does not require quarterly/regular lease sales. This is clear from its text, which says that public lands “may be leased” and that DOI has broad authority to declare lands “ineligible” and “unavailable” for leasing.⁵

Recommendation: BLM should revise its oil and gas regulations to clarify that lease sales are not required and that it has broad authority to declare lands ineligible and unavailable for

² See, e.g., Testimony from Michael Nedd, Deputy Director, Operations, BLM, to the U.S. House Committee on Natural Resources, Subcommittee on Energy and Mineral Resources (Mar. 12, 2019) (leasing “required by the Mineral Leasing Act.”); Memorandum from DOI Inspector General, to Robert Abbey, Director, BLM 6 (Dec. 29, 2009) (“Kent Hoffman [Utah’s Deputy State Director for Lands and Minerals] and the BLM USO Natural Resource Specialist both commented that BLM is required by law to hold a quarterly lease sale.”), available at https://www.doioig.gov/sites/doioig.gov/files/BLM-Lease-Report_508.pdf.

³ See, e.g., *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 710 (10th Cir. 2009) (“It is past doubt that the principle of multiple use does not require BLM to prioritize [oil and gas] development over other uses;”) *Nat’l Mining Ass’n v. Zinke*, 877 F.3d 845, 872 (9th Cir. 2017) (“Nor does [multiple use] preclude the agency from taking a cautious approach to assure preservation of natural and cultural resources.”).

⁴ *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1076 (D. Idaho 2020).

⁵ 30 U.S.C. § 226(a), (b)(1)(A); see also *Udall v. Tallman*, 380 U.S. 1, 4 (1965) (“The Mineral Leasing Act . . . left the Secretary discretion to refuse to issue any lease at all on a given tract.”); *W. Energy Alliance v. Salazar*, 709 F.3d 1040, 1044 (10th Cir. 2013) (“The MLA, as amended by the Reform Act of 1987, continues to vest the Secretary with considerable discretion to determine which lands will be leased.”); *McDonald v. Clark*, 771 F.2d 460, 463 (10th Cir. 1985) (“It is clear that the Secretary has broad discretion in this area. While the statute gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory.”); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988) (“We have held that the [MLA] ‘allows the Secretary to lease such lands, but does not require him to do so. . . . The Secretary has discretion to refuse to issue any lease at all on a given tract.’ Thus refusing to issue the Deep Creek [oil and gas] leases . . . would constitute a legitimate exercise of the discretion granted to the Interior Secretary under that statute.”).

leasing. It may also be advisable to obtain a Solicitor's Opinion on the MLA's quarterly sale provision and BLM's authority to declare lands ineligible and unavailable for leasing.

- 4. Switch to a "formal" nomination process:** BLM has existing regulatory authority to employ a "formal" lease nominations process, which would allow BLM to strategically identify lands that are suitable for nomination.⁶ Under the "informal" nominations process, which has been used since passage of the Federal Onshore Oil and Gas Leasing Reform Act in 1987, anyone can anonymously nominate any parcel of public land for leasing. As a consequence, over 110 million acres of public lands were nominated between 2011 and 2020, a land mass larger than the State of California.⁷ Over the same period, just 11.4 million acres of leases received bids, underscoring the speculative nature of most lease nominations and the waste and inefficiency of the "informal" nominations process.⁸

Recommendation: BLM should consider using the "formal" nominations process set forth in its existing regulations. Further, BLM should revoke Instruction Memorandum (IM) 2014-004, which authorizes anonymous lease nominations, and issue a new policy that requires anyone nominating public lands for leasing to disclose their identity as well as the identities of third parties who they are representing.

- 5. Develop and employ resource "screens:"** BLM does not routinely screen nominated leases against criteria that are designed to eliminate conflicts with other uses and resources and to maximize taxpayer returns. The Federal Land Policy and Management Act and the MLA both authorize the use of screens, including "to prevent unnecessary or undue degradation" and "for the safeguarding of the public welfare."⁹

Recommendation: BLM should amend its leasing regulations to require the adoption of nationwide and state-specific screens that should be employed to eliminate and reduce conflicts with other uses and resources. These screens should be reevaluated and revised on an ongoing basis, but should include a prohibition on leasing lands with low or no oil and gas potential.

- 6. Ensure the public interest is served by noncompetitive leasing:** Noncompetitive leases are rarely developed – in fact, GAO recently found that just 1 percent of noncompetitive leases issued between 2003 and 2009 entered production.¹⁰ Even when undeveloped, these leases can and do burden other uses by limiting land use planning options and discouraging conservation designations.¹¹

Recommendation: BLM should amend its oil and gas regulations to require a "public interest" determination prior to issuing noncompetitive leases. This determination should

⁶ 43 C.F.R. § 3120.3-1.

⁷ BLM, Expressions of Interest By Calendar Year, available at <https://www.blm.gov/programs-energy-and-minerals-oil-and-gas-oil-and-gas-statistics>.

⁸ BLM, Acreage Offered at Competitive Lease Sale Auctions Since January 1, 2009, available at <https://www.blm.gov/programs-energy-and-minerals-oil-and-gas-oil-and-gas-statistics>.

⁹ 43 U.S.C. § 1732(b); 30 U.S.C. § 187.

¹⁰ GAO, Onshore Competitive and Noncompetitive Lease Revenues (Nov. 2020), available at <https://www.gao.gov/assets/gao-21-138.pdf>.

¹¹ The Wilderness Society, No Exit: Fixing the BLM's Indiscriminate Energy Leasing (June 2016), available at <https://www.wilderness.org/sites/default/files/media/file/Report-No%20Exit-Fixing%20BLM%20Leasing.pdf>.

inform whether applicants for noncompetitive leases are “responsible” and “qualified” under 30 U.S.C. § 226(c)(1), and should evaluate such factors as the applicant’s ability to undertake development and compliance history, including whether the applicant has a history of failing to make rental or other payments. BLM should also create and maintain a publicly-accessible portal for noncompetitive lease offers (pre- and post-sale), and provide the public with at least 30 days to review and comment on noncompetitive lease offers.

- 7. Strengthen the onshore program’s fiscal framework:** The onshore program’s fiscal framework is woefully outdated, does not guarantee a fair return to taxpayers, and fails to discourage speculators from hoarding idle, undeveloped leases. In fact, the onshore royalty rate of 12.5% has not changed in over 100 years, while rental rates and minimum lease bids are also decades-old.¹² This has resulted in billions in lost revenues.¹³ Further, because the program’s fiscal framework is so weak – rental rates, which are supposed to incentivize development, increase from just \$1.50/acre to \$2.00/acre after 5 years – speculators are able to stockpile hundreds of idle leases without ever putting them into production.¹⁴

Recommendation: BLM should strengthen the onshore program’s fiscal framework by amending its oil and gas regulations to increase the royalty rate, rental rates, and minimum lease bids. In doing so, BLM should look to recent legislation from Senators Rosen and Grassley, as well as reports from CBO and GAO, for guidance. Also, BLM can likely increase rates – in particular, the royalty rate – on a lease-by-lease basis. Thus, BLM should issue a policy directive that requires the use of increased rates.

- 8. Strengthen the onshore program’s bonding and reclamation framework:** The existing regulatory framework for inactive and orphaned wells is completely inadequate, as it lets industry shift millions in clean-up costs to taxpayers and fails to protect public lands, waters, and nearby communities from the impacts of aging and abandoned infrastructure. According to GAO, BLM has collected just \$204 million in reclamation bonds from industry,¹⁵ even though reclamation costs for all of the wells on federal lands could exceed \$6 billion.¹⁶ GAO and DOI’s Inspector General have both repeatedly advised BLM to

¹² GAO, Raising Federal Rates Could Decrease Production on Federal Lands but Increase Federal Revenue (June 2017), available at <https://www.gao.gov/assets/gao-17-540.pdf>.

¹³ Taxpayers for Common Sense, Royally Losing: Higher Royalties on State and Offshore Oil and Gas Production Reap Billions More than Drilling on Federal Lands (Feb. 2020), available at <https://www.taxpayer.net/wp-content/uploads/2020/02/TCS-Royally-Losing-2020.pdf>.

¹⁴ Taxpayers for Common Sense, The Cost of Speculation in Federal Oil and Gas Leases (Oct. 2017) (identifying four characteristics of speculation), available at https://www.taxpayer.net/energy-natural-resources/locked-out-the-cost-of-speculation-in-federal-oil-and-gas-leases/#_ftn1; Center for American Progress, How Cheap Federal Leases Benefit Oil and Gas Companies (Aug. 2018), available at <https://www.americanprogress.org/issues/green/reports/2018/08/29/455138/cheap-federal-leases-benefit-oil-gas-companies/>.

¹⁵ GAO, Bureau of Land Management Should Address Risks from Insufficient Bonds to Reclaim Wells (Sept. 2019), available at <https://www.gao.gov/assets/gao-19-615.pdf>.

¹⁶ Center for Western Priorities, Reclaiming Oil and Gas Wells on Federal Lands: Estimate of Costs (Feb. 2018), available at <https://westernpriorities.org/wp-content/uploads/2018/02/Bonding-Report.pdf>; see also National Wildlife Federation & Public Lands Solutions, Inactive Oil & Gas Wells on Federal Lands & Minerals: Potential Costs and Conflicts (Mar. 2021) (identifying over \$1 billion in reclamation costs for 8,050 long-term inactive wells on federal lands), available at https://publiclandssolutions.org/wp-content/uploads/2021/03/03-17-21_Inactive-Oil-and-Gas-Wells-on-Federal-Lands-and-Minerals-Report.pdf.

strengthen its oversight of inactive and orphaned wells, including by increasing bond amounts to reflect the actual costs of reclamation.¹⁷

Recommendation: BLM should amend its oil and gas regulations to eliminate or minimize the use of blanket bonds and require that bonds be based on the full costs of plugging, abandonment, and reclamation. Further, BLM should issue new policies that increase oversight of inactive wells and limit the ability of operators to indefinitely delay final reclamation. Finally, BLM should work with Congress to obtain funds to clean-up orphaned wells and to authorize a user fee to cover additional reclamation costs, as recommended by GAO.

- 9. Limit participation by speculators and bad actors:** BLM has broad authority to limit participation in the leasing process to “responsible qualified” bidders and cannot issue leases to companies that are violating “reclamation requirements and other standards . . . for any prior lease. . . .”¹⁸ Yet, BLM does little to scrutinize the compliance records or development intentions/capabilities of participants in the oil and gas leasing process, which allows speculators and bad actors to freely obtain new leases.

Recommendation: BLM should amend its oil and gas regulations to establish criteria for determining “responsible qualified” bidders and to prohibit or limit participation by companies that violate reclamation and other environmental protection standards and fail to make rental and other required payments. Further, BLM should publicly post and regularly update the list of “Entities in Noncompliance with Reclamation Requirements of Section 17(g) of MLA,” which it is supposed to maintain under Handbook 3120-1 (Competitive Leases).¹⁹

- 10. Strengthen oversight of lease suspensions:** According to a recent GAO report, BLM is not providing “consistent and effective oversight” of lease suspensions.²⁰ As a result, there are hundreds of leases that have been suspended for over a decade and that are not generating any revenues for taxpayers. In many cases, the original basis for these suspensions has long since gone away. These suspended leases also inhibit multiple-use management by saddling public lands with long-term, idle leases.²¹

¹⁷ GAO, Bonding Requirements and BLM Expenditures to Reclaim Orphaned Wells (Jan. 2010), available at <https://www.gao.gov/assets/gao-10-245.pdf>; GAO, BLM Needs a Comprehensive Strategy to Better Manage Potential Oil and Gas Well Liability (Feb. 2011), available at <https://www.gao.gov/assets/gao-11-292.pdf>; DOI Office of the Inspector General, BLM Oil and Gas Bonding Procedures (Sept. 2012), available at <https://doioig.opengov.ibmcloud.com/sites/doioig.gov/files/BLM%20Oil%20and%20Gas%20Bonding%20Procedures.pdf>; DOI Office of the Inspector General, Bureau of Land Management’s Idle Well Program (Jan. 2018), available at https://www.doioig.gov/sites/doioig.gov/files/FinalEvaluation_BLMIdleWells_011718.pdf; GAO, Bureau of Land Management Needs to Improve Its Data and Oversight of Potential Liabilities (May 2018), available at <https://www.gao.gov/assets/gao-18-250.pdf>; GAO, Bureau of Land Management Should Address Risks from Insufficient Bonds to Reclaim Wells (Sept. 2019).

¹⁸ 30 U.S.C. § 226(b)(1)(A), (g).

¹⁹ BLM, H-3120-1 – Competitive Leases Appendix 4-1 (Feb. 2013), available at https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_h3120.pdf.

²⁰ GAO, BLM Could Improve Oversight of Lease Suspensions with Better Data and Monitoring Procedures (June 2018), available at <https://www.gao.gov/assets/gao-18-411.pdf>.

²¹ The Wilderness Society, Land Hoarders: How Stockpiling Leases is Costing Taxpayers (Dec. 2015), available at <https://www.gao.gov/assets/gao-18-411.pdf>.

Recommendation: BLM should amend its oil and gas regulations to require NEPA compliance and public participation prior to granting lease suspensions. Further, BLM should establish criteria to govern the evaluation of suspension applications, which should place the burden of justifying suspensions on applicants, particularly in cases where leases are nearing their expiration dates.

Conclusion

Thank you again for the opportunity to provide these recommendations. We look forward to engaging with DOI as this important process moves forward.

Sincerely,

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