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Too Open for Business? Strengthening Long-Term Protections for Federal Lands

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TOO OPEN FOR BUSINESS? STRENGTHENING LONG-TERM PROTECTIONS FOR FEDERAL LANDS

RACHEL RICHMAN* & CADMUS WANG*

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I. INTRODUCTION

“Save a piece of country like that intact, and it does not matter in the slightest that only a few people every year will go into it. That is precisely its value . . . We simply need that wild country available to us, even if we never do more than drive to its edge and look in. For it can be a means of reassuring ourselves of our sanity as creatures, a part of the geography of hope.” –Wallace Stegner¹

In 2016, President Obama, using his authority under the Antiquities Act, designated 1.35 million acres of federal land in southeast Utah a National Monument.² This land became known as Bears Ears National Monument.³ Bears Ears featured classic Southwestern landscapes, including pristine sandstone canyons, mesas, ancient human dwellings, and artifacts with tribal significance.⁴ Five tribes, the Navajo, Hopi, Zuni, Northern Ute, and Ute Mountain, have significant cultural ties to the land.⁵ In the words of Malcolm Lehi, a member of the Ute Mountain Ute tribe, “[a]t Bears Ears we can hear the voices of our ancestors in every canyon and on every mesa top.”⁶ Native American tribes applauded the Bears Ears National Monument designation, believing that the action would protect these resources from the increasing pressure for resource extraction and other exploitative activities.⁷

Unfortunately, shortly after President Trump took office in early 2017, he directed Interior Secretary Ryan Zinke to review national monument designations with an eye toward fostering more development on these federal lands.⁸ In December of that year, President Trump then announced plans to reduce the size of Bears Ears National Monument.⁹ Trump’s administration ultimately reduced the size of Bears Ears National Monument by 85 percent.¹⁰ No longer designated a national monument area, these excluded lands and resources once again became vulnerable to private exploitation.¹¹ Less than two years after President Obama had

1. Greg Christensen, *What Wallace Stegner Taught Me About the Bears Ears*, MEDIUM (Oct. 10, 2017), <https://medium.com/@happygrc/what-wallace-stegner-taught-me-about-the-bears-ears-1058dceb3dcd> (describing the Bears Ears National Monument lands).

2. See Ethel Branch & Daniel Cordalis, *The Unlawful Reduction of Bears Ears National Monument: An Executive Overreach*, 49 No. 5 ABA TRENDS 4, 4 (2018).

3. *Id.*

4. See Michael Nordskog, *Tribes, Environmental Groups Sue Trump over National Monument Purge*, 38 No. 11 WESTLAW J. ENVTL. 1, 1 (2017).

5. See Charles Wilkinson, “At Bears Ears We Can Hear the Voices of Our Ancestors in Every Canyon and on Every Mesa Top”: The Creation of the First Native National Monument, 50 ARIZ. ST. L.J. 317, 318 (2018).

6. *Id.* at 325.

7. *Id.* at 319.

8. See Michael Greshko et al., *A Running List of How President Trump is Changing Environmental Policy*, NAT’L GEOGRAPHIC (Mar. 15, 2019), <https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/>.

9. See Hannah Nordhaus, *What Trump’s Shrinking of National Monuments Actually Means*, NAT’L GEOGRAPHIC (Feb. 2, 2018), <https://news.nationalgeographic.com/2017/12/trump-shrinks-bears-ears-grand-staircase-escalante-national-monuments/>.

10. *See id.*

11. *Id.*

protected them under a national monument designation, a new president had reopened the lands for business and once again placed their long-term security in serious doubt. This dramatic reversal begs a critical question: how could federal laws be restructured to better protect precious public lands resources against the short-sighted whims of powerful politicians and the corporations who support them?

This Article argues that the federal government's fiduciary duty to protect public lands necessitates the creation of a more stable policy structure that places more stringent limits on executive authority over natural resource management. Part I of this article provides a general background on the laws that have historically protected public lands and the recent trends around the management of these resources. Part II frames the federal government's recent pendulum swings in public lands management through an academic lens to help explain these trends and their costs to society and to identify general strategies for addressing this problem. Part III proposes specific statutory changes capable of greatly increasing stability and better promoting the most imperative goals of federal public lands management. By strengthening and clarifying the statutory regime that governs federal land management officials' activities, policymakers could greatly increase the long-term security of the nation's precious public lands.

II. HISTORY OF PUBLIC LANDS MANAGEMENT

An overview of the United States' federal public land management structure and its history highlights the troubling nature of recent developments in this area of environmental policy. Federal public lands are lands that are owned and controlled by the U.S. federal government.¹² Four federal agencies manage the public lands: the Bureau of Land Management (BLM), the National Park Service, the Bureau of Reclamation—all of which are within the Department of Interior ("Interior")—and the U.S. Forest Service, which is within the Department of Agriculture.¹³ As of 2017, the federal government held title to 744.1 million acres of land and 801.3 million acres of minerals.¹⁴

The most significant recent changes to the federal government's governance approach have involved public lands and onshore resources managed by the Interior, which includes national parks, national forests, national wildlife refuges, national conservation areas, national monuments, wildernesses, national historical sites, national memorials, national battlefields, national recreation areas, wild and scenic rivers, national seashores and lakeshores, and national trails.¹⁵ The Interior has a statutory duty to manage these lands for the benefit of all current and future generations of Americans.¹⁶ The following subsections provide a brief overview of public land law throughout U.S. history, outline the National Environmental Policy

12. See Rebecca W. Watson & Nora Pincus, *Hot Topics on Public Lands at the End of Obama Era*, 36 ENERGY & MIN. L. INST. 5, 126 (2015).

13. See *id.*

14. U.S. Dep't of Interior, Bureau of Land Mgmt., *Public Land Statistics 2017*, at 7 (2018).

15. See *America's Public Lands Explained*, U.S. DEP'T INTERIOR: BLOG (June 13, 2016), <https://www.doi.gov/blog/americas-public-lands-explained>.

16. 43 U.S.C. § 1732(a) (2018).

Act's requirements for federal agency action and how they impact the management of public lands, and describe some disturbing recent trends in public land management.

A. Historical Policy Approaches to Public Land Use Management

As commentators Rebecca Watson and Nora Pincus have aptly explained, the history of U.S. public land management is arguably divisible into four eras that are each defined by their own unique guiding principle: the acquisition era, disposition era, retention era, and management era.¹⁷ The shifts in policy across these eras reflect the shifts in the priorities of the federal government, and in each era Congress passed legislation to further the government's land management goals.

During the first of these eras, the acquisition era, the federal government's primary goal was the acquisition of land.¹⁸ In 1781, the first public lands were created when the state of New York ceded to the federal government its claim to lands extending to the Mississippi that had not yet been settled by Europeans.¹⁹ Then, from 1781 to 1867, the federal government acquired roughly 1.8 billion acres of land.²⁰ During this era, the U.S. Constitution became the law of the land and the Property Clause ensured that Congress would have control over the regulation of public lands.²¹

Once the federal government had acquired an abundance of land, the primary focus of U.S. public land policy shifted from acquiring additional land to dispensing portions of existing public land to private parties.²² Federal policymakers knew that convincing settlers to homestead and developing the nation's vast remote lands could drive economic growth, and so they enacted legislation designed to promote westward expansion.²³ The Homestead Act granted fee simple title to 160 acres of land to any citizen or intended citizen, if they improved the land.²⁴ Improving the land under this statute consisted of building a dwelling or cultivating crops on the land.²⁵ Congress also enacted statutes granting title to minerals or other resources to settlers willing to develop them.²⁶ The General Mining Act, enacted in 1872, allowed citizens and potential citizens to explore and purchase lands found to have

17. See Watson & Pincus, *supra* note 12, at 126–36.

18. See *id.* at 127–28.

19. See U.S. Dep't of the Interior, *supra* note 14, at 1.

20. *Id.*

21. See Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining "The Public" in Public Lands Law*, 48 ENVTL. L. 311, 319 (2018). The Property Clause grants exclusive authority to Congress, and therefore any authority of the President or executive agencies, is authority that was expressly delegated to them from Congress. *Id.*

22. See Watson & Pincus, *supra* note 14, at 128–32.

23. See *id.* The federal government was also motivated to sell public lands to private owners because it brought revenue to the government. See Bruce R. Huber, *The Fair Market Value of Public Resources*, 103 CALIF. L. REV. 1515, 1530–32 (2015). This policy also furthered national defense because often there were conflicts with Native Americans at the frontiers, and settlement was seen as a defense from their attack. *Id.*

24. See Leigh Raymond & Sally K. Fairfax, *Fragmentation of Public Domain Law and Policy: An Alternate to the Shift-to-Retention Thesis*, 39 NAT. RESOURCES J. 649, 713 (1999).

25. See Watson & Pincus, *supra* note 12, at 129–30.

26. See *id.* at 128–31.

mineral deposits.²⁷ The Homestead Act and the General Mining Act are just two examples of the many statutes enacted during this time under which the federal government purposefully conveyed title to a wealth of federal public lands and other resources, receiving little or nothing in return.²⁸

Then, in the early twentieth century, the focus of public lands management shifted again as federal agencies sought primarily to retain and manage the lands and resources that remained in the federal government's control.²⁹ During this era, Congress enacted laws promoting the federal government's retention of fee title to public lands and mere leasing of lands or their mineral rights to private citizens.³⁰ The Supreme Court acknowledged the federal government's authority to take this approach in the case *Light v. United States*.³¹ Specifically, the *Light Court* found that "the federal government could retain public lands for broad national benefits . . . indefinitely,"³² acknowledging that "public lands of the nation are held in trust for the people."³³ Other legislation enacted during this era allowed the government to more heavily regulate public land uses and created new revenue streams to the government through new leasing and other arrangements.³⁴ Private stakeholders operating during this era favored these changes because they provided more stabilized access to resources.³⁵

Statutes enacted during this "retention" era of public lands management included the Taylor Grazing Act and the Mineral Leasing Act (MLA).³⁶ Congress enacted the Taylor Grazing Act in 1934 "to stabilize the livestock industry and protect the rights of sheep and cattle growers from interference."³⁷ It authorized the Secretary of the Interior to create grazing districts from unreserved parcels of land in the public domain, which were then managed by the Interior.³⁸ Landowners and homesteaders were able to apply for permits to have their animals graze on

27. See 30 U.S.C. § 22 (2018). See also Watson & Pincus, *supra* note 12, at 129. The General Mining Law and other mining statutes enacted during this era encouraged development and a "use it or lose it" attitude. Raymond & Fairfax, *supra* note 24, at 714–15.

28. Other statutes include the Coal Lands Act, the Stock-Raising Homestead Act, the Enlarged Homestead Act, the Northwest Ordinance of 1787, the Lands Acts of 1796 and 1800. See Watson & Pincus, *supra* note 12, at 130–31.

29. See Raymond & Fairfax, *supra* note 24, at 650. Some historians believed this shift to a policy of retention was enacted to address the greed and waste created by the previous era of disposition. *Id.* at 655–56. However, Raymond and Fairfax argue that this narrative leaves out many other aspects of the story. *Id.*

30. See Watson & Pincus, *supra* note 12, at 130.

31. *Light v. United States*, 220 U.S. 523, 536–37 (1911).

32. See Watson & Pincus, *supra* note 12, at 127.

33. *Id.* at 128.

34. See Huber, *supra* note 23, at 1536; see also Watson & Pincus, *supra* note 12, at 132–34.

35. See Huber, *supra* note 23, at 1536.

36. See Watson & Pincus, *supra* note 12, at 132–33.

37. *Faulkner v. Watt*, 661 F.2d 809, 812 (9th Cir. 1981).

38. See 43 U.S.C. § 315 (2018).

the land.³⁹ Similarly, in 1920 Congress enacted the MLA, which allows citizens to lease mineral rights on federal lands through a competitive leasing process.⁴⁰

During this period, the federal government also began enacting legislation aimed at setting aside certain selected public lands for recreation and conservation.⁴¹ Congress enacted the Forest Reservation Amendment to the General Revision Act, the Forest Management Act, and the National Park Service Organic Act, which were primarily focused on preventing overuse and preserving certain sections of forest.⁴² Congress' enactment of such conservation-oriented statutes during this era is evidence that the federal government was beginning to recognize that public lands had multiple important uses and were not merely assets to be exploited. This shift in attitudes eventually led the nation into the most recent public land era: the management era.

Since the 1970s, the federal government's primary focus with regard to public lands has been that of managing these lands for multiple uses.⁴³ This management-centered era emerged from a shift in public opinion in the U.S. toward greater concern for environmental protection and conservation.⁴⁴ In response to this shift, the federal government embraced a more holistic approach to public lands management. This new approach is visible in the Congress' 1976 enactment of the Federal Land Policy Management Act ("FLPMA"). FLPMA mandated that the Secretary of the Interior manage public lands for "multiple use and sustained yield."⁴⁵ The statute emphasized the importance of ensuring future generations had access to resources. Although the FLPMA still allowed relatively high rates of resource extraction, it exemplified a broader trend toward a greater emphasis on sustainability and less on extraction of resources. Indeed, Congress enacted many of the nation's primary federal environmental statutes during the same decade that it enacted the FLMPA.⁴⁶ Most notably, the National Environmental Policy Act ("NEPA") effectively requires federal agencies to conduct certain environmental assessments before taking a wide range of actions involving federal public lands.⁴⁷ The following subsection describes NEPA and its impacts on public land management.

B. Federal Public Lands and NEPA

NEPA is perhaps the most famous environmental legislation in the U.S. and greatly impacts the nation's approach to managing federal public lands. Signed into law by President Nixon on January 1, 1970, NEPA is the nation's most far-reaching

39. See *id.*

40. See Raymond & Fairfax, *supra* note 24, at 740. Raymond and Fairfax call into question the actual control retained by the federal government under the Mineral Leasing Act. *Id.* They argue the federal government gave away much of the "bundle of sticks" although they do acknowledge that under the statute the federal government retains the potential to exert more control over the minerals leased. *Id.*

41. See Watson & Pincus, *supra* note 12, at 133–34.

42. See *id.*

43. See U.S. DEP'T OF THE INTERIOR, *supra* note 14, at 1.

44. See *id.*

45. 43 U.S.C. § 1732(a) (2018).

46. See Watson & Pincus, *supra* note 12, at 133–36.

47. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2018).

congressional act aimed at protecting the natural environment.⁴⁸ The declared purpose of NEPA is:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish the Council of Environmental Quality.⁴⁹

i. History of NEPA

From the late 1960s through the 1970s, there was a period of increased interest in environmental conservation in the U.S. known colloquially as the “environmental revolution.”⁵⁰ In the decades preceding the environmental revolution, the U.S. had seen the gradual degradation of its pristine natural environment and wildlife.⁵¹ There were concerns about the health of the nation’s waterways. Many were being used as open sewers, emitting foul smells and a few even occasionally caught on fire.⁵² There were also concerns about ambient air quality, as major cities like Los Angeles were dealing with unprecedented air pollution.⁵³ Insecticides such as DDT were likewise in wide use, and there were growing concerns about the potential health impacts of such substances on humans and wildlife.⁵⁴ In the midst of this, the publication of Rachel Carson’s book, “*Silent Spring*,” and a culmination of other factors fueled an unprecedented environmental movement.

Under the Nixon administration, the U.S. saw the enactment of several environmental statutes that still have broad impacts on today’s environmental landscape.⁵⁵ These acts included NEPA, the Endangered Species Act and extensive amendments to the Clean Air Act and Clean Water Act.⁵⁶ Collectively, these new laws marked a substantial change in the federal government’s role in environmental conservation, including on public lands.

ii. NEPA Requirements

48. *Id.*

49. *Id.*

50. See Lynn E. Blais, *The Legitimate Reach of the Environmental Revolution*, 37 HARV. J.L. & PUB. POL’Y 13, 14 (2014).

51. See *id.* at 14–15.

52. See *id.* at 15.

53. See *id.*

54. See *id.*

55. See Blais, *supra* note 50, at 13–14.

56. See *id.* at 14.

Although the overarching goal of NEPA was to declare a national policy that encourages productive harmony between man and the environment, the statute also sets forth specific environmental protection requirements that government agencies must strictly follow.⁵⁷ NEPA requires that when a federal agency commences any “major federal action significantly affecting the quality of the human environment” the agency must produce a detailed report describing:

i) the environmental impact of the proposed action, ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, iii) alternatives to the proposed action, iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁵⁸

An Environmental Impact Statement (EIS) is a written statement addressing the five aforementioned requirements for a given government action.⁵⁹ EISs are required under NEPA only when the proposed government action is deemed “major” and has the potential to “significantly affect” the environment.⁶⁰ This statutory language affords the relative federal agency some discretion when deciding whether producing an EIS is necessary. In some instances, an agency can claim that the proposed government action is not “major” or that it will not “significantly affect” the environment.⁶¹

When there is uncertainty over whether a proposed government action will “significantly affect” the environment, the federal agency involved may choose to conduct a preliminary inquiry called an “Environmental Assessment.”⁶² An Environmental Assessment provides a rudimentary assessment of the proposed government action and helps the federal agency decide whether a full EIS is required.⁶³ If the Environmental Assessment shows that there is a likelihood that the proposed government action will significantly affect the environment, then the relative federal agency is required to produce a full EIS, submit it for public comment, and encompass those public comments in the final version of its EIS.

Although NEPA’s environmental review requirements help to promote environmental protection on public lands, they also afford wide discretion to agencies that is increasingly interfering with that goal. For example, when producing an EIS, the relative federal agency must use the “best evidence” or “best

57. See S. REP. NO. 91-296, at 2 (1969).

58. Dominic A. Cossi, *Getting Our Priorities Straight: Streamlining NEPA to Hasten Renewable Energy Development on Public Land*, 31 PUB. LAND & RES. L. REV. 149, 154 (2010).

59. See *id.*

60. See *id.*

61. See *id.*

62. See *id.*

63. See *id.* The requirements under NEPA are strictly procedural. Cossi, *supra* note 58, at 154. The goal of the NEPA requirements is to have the federal agencies take an informed look at their proposed action. *Id.* at 155. There are no substantive guarantees under NEPA, only procedural requirements. *Id.* While the goal is to ensure informed decision making by federal agencies, NEPA still grants the agency wide discretion on how to produce the EIS along with the final determination. *Id.*

science available.”⁶⁴ This statutory language gives the federal agency some discretion, as there are continued debates over what constitutes the best science available and opinions on such questions have often changed with changes in presidential administrations. For example, under the Trump administration, federal agencies are less likely to consider climate change science in connection with environmental review.⁶⁵ In contrast, President Trump and multiple members of his administration have openly questioned climate change science and shown far less interest in requiring the consideration of it in the context of an EIS.⁶⁶

iii. NEPA Judicial Review

Unfortunately, courts’ strong deference to federal agencies in the NEPA review process is increasingly undermining the effectiveness of the statute as a tool for environmental protection. The case of *Protect Our Communities Foundation v. Jewell* illustrates courts’ tendency to defer to agency expertise when judging the adequacy of an EIS.⁶⁷ In *Jewell*, the plaintiffs challenged the construction of a wind farm based on NEPA, the Migratory Bird Treaty Act, and the Bald and Golden Eagle Protection Act.⁶⁸ The *Jewell* court determined that “compliance with NEPA involves the application of a ‘rule of reason,’ which involves the ‘pragmatic judgment whether the EIS’s form, content, and preparation foster both informed decision-making and informed public participation.”⁶⁹ However, the critical takeaway from *Jewell* is that the “reviewing court will not ‘substitute its judgment for that of the agency.’”⁷⁰ In short, courts afford agencies significant discretion when making judgments in areas that they perceive involve complex scientific issues requiring agency expertise, so long as agencies’ decisions seem based on rational analysis. This deferential approach to judicial review frees agencies to make informed decisions without a constant threat of deep judicial scrutiny into specialized subject matters. However, such deferential review can also effectively insulate agencies in ways that jeopardize the overarching goals of NEPA and related statutes.

iv. NEPA Public Comment Mandate

When implemented correctly, NEPA ensures that government agencies take an informed look, encompassing public concerns, when deciding to lease public lands. A critical part of the EIS requirement under NEPA is the opportunity for the public to be heard on the proposed action.⁷¹ This public comment mandate would

64. Cossi, *supra* note 58, at 154.

65. Thein T. Chau, Implications of the Trump Administration’s Withdrawal of the Final CEQ Guidance on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, 30 GEO. ENVTL. L. REV. 713, 714 (2018).

66. See John C. Dernbach, *Lawyering as if Tomorrow Matters*, 86 UMKC L. REV. 759, 764 (2018).

67. See *Protect Our Cmty. Found. v. Jewell*, 825 F.3d 571, 578 (9th Cir. 2016).

68. *Id.* at 577–88.

69. *Id.* at 579 (quoting *Churchill Cty. v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001)).

70. *Id.* at 583 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

71. See *Public Lands*, PROTECT NEPA, <https://protectnepa.org/public-lands/> (last visited Nov. 7, 2019).

ideally allow private citizens to work with the government to produce land use plans that at least consider the interests of all stakeholders. These federally mandated public comment forums contribute to the transparency of federal actions and increases the likelihood that government agencies will be held accountable for their management of public lands. Unfortunately, some recent proposals to streamline NEPA requirements would significantly reduce the public's ability to be heard on public land leasing decisions.⁷²

v. NEPA Procedural Pitfalls

Although an underlying goal of NEPA is to ensure a productive harmony between Americans and their natural environment, the practical implementation of the statute sometimes falls short in furthering that goal. As stated above, NEPA requires that a federal agency prepare an EIS when its proposed action will "significantly affect" the environment.⁷³ The Center of Environmental Quality (CEQ) has defined "significantly affect" as encompassing two facts: context and intensity.⁷⁴ Context "delimits the scope of the agency's action, including the interests affected." "Intensity relates to the degree to which the agency action affects the locale and interests identified in the context of the inquiry."⁷⁵ Like other statutory phrases highlighted above, this language affords federal agencies significant discretion when determining whether a proposed action significantly affects the environment and thus triggers an EIS requirement.

If a federal agency finds that its proposed action would have no significant effect on the environment, it can issue a "finding of no significant impact" (FONSI).⁷⁶ An agency may issue a FONSI only if it can show that there will be no environmental effects from the action at issue or that the environmental affects will be adequately mitigated.⁷⁷ However, there are certain loopholes that agencies can use to avoid ultimately implementing mitigation measures.⁷⁸ Likewise, courts often defer to federal agencies' issuance of a FONSI unless the conclusions of the agency's experts clearly contradict those of opposing parties.⁷⁹ This additional layer of federal agency discretion is another avenue for agencies potentially shield themselves from NEPA litigation through the use of experts that align with their views.

vi. History of Streamlining NEPA for Renewables

The Obama administration's efforts to streamline NEPA review process for renewable energy projects has unfortunately made the process more vulnerable to further streamlining for less-deserving types of activities. The Obama

72. See Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).

73. See Cossi, *supra* note 58, at 154.

74. Sierra Club v. U.S. Fish & Wildlife Serv., 235 F. Supp. 2d 1109, 1129 (D. Or. 2002).

75. *Id.*

76. See Constance E. Brooks, *Avoiding NEPA Pitfalls*, 2006 No.1 RMMLF-INST Paper No. 11 (2006).

77. See *id.*

78. See *id.*

79. See *id.*

administration streamlined NEPA requirements to expedite the permitting process for renewable energy projects on public lands.⁸⁰ The administration's goal was to fast-track renewable energy development on public lands, and many supporters at the time applauded the move as a valuable way to create new "green collar" jobs.⁸¹ Now, however, it appears that streamlining NEPA requirements for those projects may have had an ancillary effect of making it easier for the Trump Administration to similarly argue for NEPA review streamlining for other forms of public lands leasing. Interestingly, some experts argue that NEPA requirements could theoretically be streamlined, but still include the necessary requirements to protect the environment.⁸² Now, it seems as if the Trump Administration is using a similar strategy to streamline NEPA requirements for leasing public lands for fossil fuel or minerals extraction. The following subsection discusses the leasing process and recent efforts to streamline it in ways that could jeopardize long-term conservation goals.

C. The Leasing Process

Federal laws and regulations currently governing the leasing process for public lands arguably create excessive discretion for agencies in ways that can lead to the overexploitation of public land resources. Congress has delegated authority to the Interior to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of the Mineral Leasing Act."⁸³ Under this authority, the Interior has implemented regulations for oil, gas, and coal leases on public lands.⁸⁴ This is among the Interior's most important tasks, as they manage more than 23,657 active onshore oil, gas, and coal leases.⁸⁵ Because of the quantities of resources involved, the potential environmental impacts of the agency's leasing decisions are also critically important. For instance, experts have estimated that between 349 and 492 gigatons of potential carbon dioxide emissions are contained in fossil fuels on public lands.⁸⁶

In connection with leasing activities on onshore public lands, the Interior typically produces a document entitled a "Resource Management Plan."⁸⁷ Resource Management Plans are "land use plan[s] that describe[] broad multiple-use direction for managing public lands administered by the BLM."⁸⁸ The Resource

80. See Watson & Pincus, *supra* note 12, at 125.

81. See Cossi, *supra* note 58, at 160.

82. *Id.* at 168.

83. See Jayni Foley Hein, Federal Lands and Fossil Fuels: Maximizing Social Welfare in Federal Energy Leasing, 42 HARV. ENVTL. L. REV. 1, 10 (2018).

84. See *id.*

85. See *id.*

86. See Thomas R. Delahanty, Executive Authority to Keep it in the Ground: An Administrative End to Oil and Gas Leasing on Federal Land, 35 UCLA J. ENVTL. L. & POL'Y 145, 147 (2017).

87. See Hein, *supra* note 83, at 11.

88. *What is an RMP?*, Subsection of *Winnemucca District Resource Management Plan*, U.S. DEP'T INTERIOR BUREAU LAND MGMT., <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=47537> (Sept. 8, 2016 12:51 P.M.).

Management Plan communicates to private fossil fuel companies which federal lands are eligible for resource extraction.⁸⁹

After the government identifies specific parcels of public land as being appropriate for resource extraction, private fossil fuel companies “nominate” parcels they are interested in leasing.⁹⁰ Upon receiving nominations, the Interior then produces either an Environmental Assessment or Environmental Impact Statement.⁹¹ Then, the agency sells the lease rights at auction to the highest bidder.⁹² Under federal law, the terms of any oil, gas or coal extraction lease must be sold competitively and ensure that U.S. citizens receive “fair market value” for the use of public lands for resource extraction.⁹³

One controversial issue involving the Interior’s current leasing process is what some argue are stagnant minimum bids and royalty rates.⁹⁴ The Interior does not systematically review the fiscal terms for oil and gas leases on public lands.⁹⁵ Interestingly, some of the fiscal terms at which the federal government leases public lands for resource extraction have not been changed since the 1920s.⁹⁶ The Interior uses two methods to determine the “fair market value” of public land leases.⁹⁷ The first approach uses historical pricing methods, comparing past mineral leases to judge whether a current bid is adequate.⁹⁸ The second approach for determining “fair market value” uses the projected revenue stream overtime.⁹⁹ However, both these approaches may be vulnerable to exploitation and result in the government receiving below “fair market value” for public land leases.¹⁰⁰ One major drawback of both approaches is that all calculations used to determine the “fair market value” are confidential.¹⁰¹ The public has no ability to analyze how the Interior calculated the fair market value of leasing public lands, and whether externalities are taken into consideration.¹⁰² The first approach is also vulnerable to a cyclical result of accepting bids that are less than fair market value.¹⁰³ If the Interior wishes to receive “fair market value” for the nation’s precious natural resources, it should amend the fiscal terms of the lease to account for externalities, inflation, improved technology, and updated science.

i. A Recent Shift in Public Lands Policy

89. See Hein, *supra* note 83, at 11.

90. *Id.*

91. *Id.*

92. *Id.*

93. Pursuant to The Mineral Leasing Act of 1920 and the Federal Coal Leasing Amendments of 1976, leases for oil, gas, and coal extraction on public lands must be sold competitively. See *id.* at 13.

94. See *id.* at 17.

95. See Hein, *supra* note 83, at 12.

96. See generally U.S. Gov’t Accountability Office, Coal Leasing: BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide More Public Information (2013), <https://www.gao.gov/assets/660/659801.pdf>.

97. See Hein, *supra* note 83, at 15.

98. See *id.*

99. See *id.*

100. See Huber, *supra* note 23, at 1517–18.

101. See Hein, *supra* note 83, at 15.

102. *Id.*

103. *Id.* at 21.

The most troubling recent trend in public lands policy in the U.S. is its migration away from conservation principles and toward a focus on increased exploitation for short-term gain. Throughout time, federal public lands management policies have grown increasingly protective of non-extractive uses of public lands and of the lands' long-term conservation.¹⁰⁴ President Obama utilized the federal statutory scheme for public lands to advance progressive environmental goals by limiting mineral leasing, promoting renewable energy development on public lands and enacting other policies with an ultimate goal of mitigating climate change.¹⁰⁵ Of course, President Trump has shifted the nation's public lands management policies in the opposite direction.¹⁰⁶ At the World Economic Forum in 2017, President Trump declared that America was "open for business."¹⁰⁷ Since he has taken office he has followed through and, arguably, made America's public lands more open for business with fossil fuel companies than they have been in decades. Many in Congress seem to support at least some public lands conservation, as evidenced by the introduction of a bill in early 2019 that would designate 1.3 million acres as wilderness, block mining around Yellowstone, and continue the federal Land Water Conservation Fund.¹⁰⁸ Unfortunately, although there is overwhelming support for this bill and President Trump is expected to sign it into law, the bill only impacts less than 1% of the land owned by the federal government and has been criticized for not going far enough to ensure meaningful conservation.¹⁰⁹ On the whole, the direction of federal public lands management undeniably took a major turn over the past few years. The following subsection discusses President Obama's policies related to federal public lands and highlights the drastic changes made under President Trump's administration.

ii. Recent Changes in the Leasing Process

Different administrations have had varied approaches to the leasing of public lands in the U.S., but the policy reversals evident over the past few years in this area have arguably been more dramatic than ever before. In 2016, President Obama announced in his State of the Union address that he planned to "push to change the way we manage our oil and coal resources, so that they better reflect the costs they impose on taxpayers and our planet."¹¹⁰ Soon after his address, the Interior issued a moratorium on coal leasing, claiming that the moratorium would protect the environment and better allow the government to manage coal leases on public

104. See Hein, *supra* note 83, at 26.

105. See *id.* at 2.

106. See *id.* at 3.

107. Donald J. Trump, *President of the U.S., Address at the World Economic Forum Annual Meeting* (Jan. 26, 2018), <https://www.weforum.org/agenda/2018/01/president-donald-trumps-davos-address-in-full-8e14ebc1-79bb-4134-8203-95efca182e94/>.

108. See Susan Mason & Paul Smith, *Congress is Finally Funding and Protecting Public Lands - but it's not Enough*, THE HILL (Mar. 8, 2019, 1:00 PM), <https://thehill.com/opinion/energy-environment/433225-congress-is-finally-funding-and-protecting-public-lands-but-its>.

109. See *id.*

110. Barack Obama, President of the U.S., 2016 State of the Union Address (Jan. 13, 2016), <https://perma.cc/7TGJ-SEJ7>.

lands to ensure taxpayers were getting a fair return.¹¹¹ The moratorium, which was originally implemented for a duration of three years, aimed to give the government time to align its environmental objectives with federal land leasing.¹¹² Specifically, the Obama administration hoped to create a comprehensive plan under which the federal government could lease public lands for fossil fuel extraction while also helping to reduce greenhouse gas emissions.¹¹³

However, shortly after President Trump took office, he issued an executive order in March of 2017 effectively lifting the coal moratorium implemented under the Obama administration.¹¹⁴ The executive order required agencies to review all regulations burdening the development of natural resource and suspend, revise, or rescind unduly burdensome regulations.¹¹⁵ The executive order discontinued the use of master lease plans, threatened public comment opportunities, and did not require officials to visit the proposed lease sites.¹¹⁶ Pursuant to this executive order, the BLM released an Instruction Memorandum expediting the leasing process.¹¹⁷

The federal government's current public lands leasing framework could fail to ensure that leases are sold in a competitive market. Large private fossil fuel companies regularly nominate tracts of public land that are adjacent to their existing oil, gas, and coal operations.¹¹⁸ This is a considerable advantage for these fossil fuel companies, as they already have the infrastructure in place to mine that specific area. Unfortunately, this leads to uncompetitive auctions where other companies simply can't match the price and remain profitable. A 2013 study by the U.S. Government Accountability Office (GAO) showed that 90 percent of public land lease auctions had only one bidder.¹¹⁹ Additionally, the Energy Policy Act of 2005 contributed to the noncompetitive nature of public land leases.¹²⁰ The Act granted the BLM the authority to expand the portion of land leased for existing coal leases from 160 to 960 acres.¹²¹ The practical consequence of this Act is that private companies with existing coal leases could increase the amount of public land they could mine, without competitive opposition from other companies. Interestingly, the BLM approved 45 lease modification requests from 2010 to 2013.¹²² The current government framework for leasing public lands casts serious doubt on whether the government is receiving fair market value in exchange for the nation's precious public land resources. Moreover, these below-market lease rates are even less likely to ensure that lessees are internalizing the significant environmental and intergenerational costs of their extraction activities on federal lands.

111. See Blumm & Jamin, *supra* note 21, at 349.

112. See *id.* at 350.

113. See *id.* at 349–50.

114. See Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

115. See *id.*

116. See *id.* Master Leases are aimed to keep leases away from pristine national parks and other environmentally sensitive areas.

117. Bureau of Land Mgmt., Instruction Memorandum No. 2018-034, Updating Oil and Gas Leasing Reform - Land Use Planning and Lease Parcel Reviews (2018).

118. See Hein, *supra* note 83, at 13.

119. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 96.

120. See Hein, *supra* note 83, at 13.

121. *Id.*

122. *Id.*

iii. Recent Changes to the NEPA Process

To make matters even worse, recent attempts to streamline the NEPA review process as a means of promoting economic development could make public lands even more vulnerable to overexploitation. In August of 2017, President Trump issued an executive order directing federal agencies to “apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible” when making determinations regarding proposed federal action.¹²³ Shortly after Trump’s executive order, the Interior instituted a 150 page limit for most EISs and ordered that nearly all NEPA reviews be completed within one year of their commencement.¹²⁴ The goal of the Interior was to reduce the paperwork associated with leases for public lands, but the actual effect potentially threatens the protection of those lands. Under this new page limit and time restriction, government agencies become more likely to make decisions regarding the leasing of public lands without adequate information and may not be able to sufficiently examine alternatives to the proposed government action.

The Trump administration’s attempts to streamline NEPA requirements could also hinder the public citizens’ ability to participate in federal leasing matters. Public notice and comment are critical to ensure that local citizens who will be directly affected by a proposed government action have an opportunity to be heard. Without a forum for mandated public comment, decisions about the leasing of public lands will be made by politicians and private parties detached from the actual effects of their proposed action. In the short run, the Trump administration’s streamlining of NEPA requirements may benefit private businesses interested in federal public lands leases. However, such changes are likely to also impose significant harms on others, including future generations.

iv. Potential Consequences

If each new presidential administration is able to implement public lands management policies that are vastly different from those under previous administrations, such inconsistency could severely undermine the long-term preservation of these precious resources. President’s Trump’s current policies could lead to costly environmental degradation, irreversibly harming public land resources, and facilitating broader environmental problems such as global warming. Federal oil and gas lease sales increased by 86 percent from 2016 to 2017, evidencing a sharp policy reversal in how the nation manages these resources.¹²⁵

123. See Blumm & Jamin, *supra* note 21, at 364.

124. *Id.*

125. See Darryl Fears, *Trump Administration Tears Down Regulations to Speed Drilling on Public Land*, WASHINGTON POST (Feb. 1, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/02/01/trump-administration-tears-down-regulations-to-speed-drilling-on-public-land/?utm_term=.a95365e5179c. There has been speculation about whether these oil and gas resources will ever even be developed, however the Trump administration has made clear they will not

Public lands include some of the most beautiful places in the U.S. Given that these lands hold many resources that are crucial to the long-term prosperity and quality of life for millions of current and future Americans, greater stability is needed in the policy structures designed to protect and manage them.

III. FRAMING THE PROBLEM

As the Trump administration's recent actions have aptly demonstrated, strong safeguards are needed to prevent any single presidential administration from unilaterally dismantling public lands protections to the detriment of future generations. This Part II makes a case for adding such increased safeguards to better protect the long-term conservation of the nation's public land resources. Although the federal executive branch traditionally has broad powers in most regulatory contexts, the federal government's fiduciary duty to protect public lands arguably justifies the imposition of heightened restrictions on the executive's ability to weaken or abandon existing policies designed to protect those lands.

Under trust law, a fiduciary is an entity that holds title to property and has a duty to manage the property for the benefit of the trustees or beneficiaries.¹²⁶ In the context of public lands management, the Interior is effectively a fiduciary holding title to all public lands for the benefit of the trustees, which are present and future generations of Americans.¹²⁷ This conception of the federal government's role in public lands management is consistent with the public trust doctrine, which has been generally applied in similar contexts at the state government level. Legal rules that constrain the executive branch's power to enact policies inconsistent with this fiduciary duty, are a reasonable and legitimate means of preventing presidential administrations from taking shortsighted actions inconsistent with this important fiduciary role.

Broad delegations of regulatory power to the Interior have allowed the Trump administration to enact policies that arguably deviate too far from the primary purposes of those laws. The Trump administration's "open for business" approach to federal public resource management focuses heavily on promoting short-term economic gain, without due regard for long-term environmental, health and economic consequences. As the following materials suggest, the public trust doctrine and related conceptions of governments' roles in relation to public natural resources suggest that public land management is inherently different than other types of executive duties and warrants special treatment under the law. Principles

stand in the way of development. Mark K. DeSantis, *Oil and Gas Companies Gain by Stockpiling America's Federal Land*, *CTR. FOR AM. PROGRESS* (Aug. 29, 2018, 12:01 AM), <https://www.americanprogress.org/issues/green/reports/2018/08/29/455226/oil-gas-companies-gain-stockpiling-americas-federal-land/> (arguing that President Trump's policies have created perverse incentives; they have incentivized oil and gas companies to acquire as many leases as possible, and merely hold them as an asset so they can list the lease on their balance sheet, which immediately improves their financial health).

126. RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. LAW INST. 2003).

127. See Hein, *supra* note 83, at 23 (stating the Department of Interior is a steward for the public lands under the Federal Land Policy Management Act). See also Mary Christina Wood, *Advancing the Sovereign Trust of the Government to Safeguard the Environment for Present and Future Generations*, 39 ENVTL. L. 91 (2009) (analyzing the fiduciary duty encoded in environmental statutes such as NEPA, ESA, and others).

from the academic literature, including those related to addressing externality problems, intergenerational inequities, and political rent-seeking problems, similarly support the placement of unique constraints on presidential power to safeguard federal public lands.

A. Public Lands Deserve Special Protection

As the public trust doctrine suggests, government's relationship to public lands is unique and thus arguably warrants distinctive treatment under the law. Placing specialized importance on public trust resources, the doctrine recognizes governments' fiduciary duty to manage public lands for the benefit of all Americans. As the following subsections argue, this duty is materially different from those owed in relation to most other government-regulated industries and justifies the use of special constraints to ensure its long-term stability.

i. The Specialized Importance of Public Trust Resources

As the common law's public trust doctrine has long suggested, governments have a special duty to preserve and protect public lands and other public natural resources.¹²⁸ The public trust doctrine is a state common law doctrine with roots in English common law.¹²⁹ Historically in the U.S., this included land held by the state governments, which was of value to the broader public.¹³⁰ Although the common law's public trust doctrine does not apply directly to federal lands, the principles supporting it emphasize the unique importance of public lands generally and of the government's duty to preserve and protect them. The public trust doctrine's core ideas are highlighted in the U.S. Supreme Court case *Illinois Central Railroad v. Illinois*.¹³¹ The *Illinois Central* court famously held that a state cannot grant title to submerged lands under navigable water to a private entity because the title held by the state "is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."¹³²

In his 1970 article, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, Professor Joseph L. Sax argued for an expansion of the public trust doctrine from one focused on the inalienability of certain public natural resources to a doctrine that could be used to promote the long-term preservation

128. See Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393, 405 (2009).

129. *Alec L. v. Jackson*, 863 F.Supp.2d 11, 13 (D.D.C. 2012) (finding Public Trust Doctrine is a creature of state common law); see also James L. Huffman, *Why Liberating the Public Trust Doctrine is Bad for the Public*, 45 ENVTL. L. 337, 348 (2015). Legal scholars such as Richard Epstein and Charles Wilkinson have argued that the Public Trust Doctrine has roots in the constitution, *id.* at 354–56, but the Court in *Alec L. v. Jackson* rejected any constitutional foundation of the Public Trust Doctrine, *Alec L.*, 863 F.Supp.2d at 15–16.

130. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892).

131. *Id.*

132. *Id.* at 452.

of those resources.¹³³ He characterized the doctrine as a “principle [which] holds that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace.”¹³⁴ Under Sax's characterization of the doctrine, governments held the duties of a trustee in their long-term preservation of public lands for the benefit of present and future generations.¹³⁵

Concededly, in the years following Sax's re-imagining of the public trust doctrine, attempts at expansion of the doctrine have been limited. The doctrine has rarely been applied to resources beyond navigable waters and has not been applied to expressly impose such duties on the federal government.¹³⁶ The Supreme Court recently held that the public trust doctrine is a state common law doctrine and that federal statutes displaced any federal common law claims based upon it.¹³⁷

However, it remains true that the nation and its present and future citizens and governments have a vested long-term interest in the public lands and that governments arguably thus hold a duty with regard to those resources. Public lands are irreplaceable, and allowing excessive exploitation of them could cause irreversible environmental damage. Even though the public trust doctrine does not presently impose an express duty on the Interior to protect federal public lands, it does generally highlight governments' responsibility to manage such lands for the long-term benefit of society. The public trust doctrine could provide a normative standard to limit agency discretion and fill gaps in the regulatory regime implemented by the Interior under its authority pursuant to existing public land management statutes.¹³⁸ It might also provide principles supporting revisions to existing federal lands management statutes that place clearer and stronger duties on the Interior with respect to the preservation of such lands.¹³⁹

ii. Interior's Statutory Duty to Protect Public Lands Differentiates Public Land Development from Other Types of Federal Regulation

133. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1970).

134. *Id.* at 484. Sax advocated for more judicial intervention to protect public trust resources when administrative agencies were failing to protect the environment, human health, and safety. *Id.* Currently, BLM and the Interior are disregarding the impact of expediting fossil fuel leases on public lands. See U.S. Dep't of the Interior, Office of Inspector General, Letter on Cancellation of NAS Mountaintop Removal Mining Study (June 7, 2018). Therefore, Sax would argue that courts should intervene utilizing the public trust doctrine to limit the executive department's recent actions.

135. Sax, *supra* note 1333, at 484.

136. The doctrine has been expanded to include: water related recreational uses, aesthetic value of rivers, and preservation of flora and fauna on public trust land, *D.C. v. Air Fla., Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984), and a municipally owned beach to protect recreational uses, *Van Ness v. Borough of Deal*, 393 A.2d 571, 573 (N.J. 1978). One notable expansion of the Public Trust Doctrine occurred in the case *National Audubon Society v. Superior Court*, where the Supreme Court of California held that the public trust doctrine should be considered in reconsidering the allocation of water rights. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 732 (Cal. 1983).

137. *Alec L. v. Jackson*, 863 F.Supp.2d 11, 15 (D.D.C. 2012). In this case, the plaintiffs argued the climate was a public trust resource, and the EPA breached their fiduciary duty to protect the climate by not acting aggressively enough to prevent climate change. *Id.* at 12. The court found that because the Clean Air Act empowered the EPA to set limits on air pollutants such as greenhouse gases, the court could not act for the agency and there was no public trust doctrine claim. *Id.* at 17.

138. See Babcock, *supra* note 1288, at 405.

139. See discussion *infra* Part III.

Several existing federal public land management statutes already declare, or at least imply, that the Interior holds a duty to protect public lands for current and future generations. The FLPMA, MLA, and Federal Coal Leasing Amendments Act all articulate specific federal government duties related to the preservation of public lands.¹⁴⁰ NEPA further clarifies the Interior's duty by declaring that it is the "continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."¹⁴¹

The FLPMA arguably specifically obliges the Interior to act as a fiduciary holding title to public lands for the benefit of all Americans. The FLPMA mandates that the Secretary of the Interior "manage the public lands under the principles of multiple use and sustained yield . . ." ¹⁴² Under the statute, this requires that the resources be managed to meet "the present and future needs of the American people" and requires the Interior to consider "the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical value[] . . ." ¹⁴³ This language imposes a clear duty on the Interior to ensure public lands are managed so that future generations will be able to continue enjoying the resources and benefits associated with them. Unlike a commercial private property owner focused on optimizing relatively short-term financial gains, the Interior must consider the multiple potential uses for a resource and overall impacts on future generations when managing the public lands.¹⁴⁴

Some other primary statutes that govern public lands management do not as clearly articulate the Interior's duties but still suggest that the Interior should act as a steward over federal public lands. The MLA grants the Secretary of the Interior the authority to include in mineral leases, provisions necessary to safeguard the public welfare.¹⁴⁵ Still, even this language suggests that the Interior has a heightened duty compared to that of ordinary private landowners in that it must consider potential impacts on all citizens.

In many industries, changes in presidential administrations lead to policy changes within federal agencies. Under the Administrative Procedure Act ("APA"), courts generally uphold such regulatory changes so long as they are not arbitrary and capricious.¹⁴⁶ When a federal agency rescinds a policy, its decision must be supported by reasoned decision-making.¹⁴⁷ However, when agencies change

140. See Hein, *supra* note 83, at 35–36. Additionally, the Outer Continental Shelf Leasing Act ("OCSLA") encodes a duty on the Interior to manage offshore federal resources; however, this paper is examining only the onshore public lands. 43 U.S.C. § 1344 (2018).

141. 42 U.S.C. § 4331(a) (2018).

142. 43 U.S.C. § 1732(a) (2018).

143. 43 U.S.C. § 1702(c) (2018).

144. See Hein, *supra* note 83, at 24.

145. 30 U.S.C. § 187 (2018).

146. 5 U.S.C. § 706 (1966); *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983).

147. *State Farm*, 463 U.S. at 51–52.

regulations they do not need to provide evidence that the new regulation is better than the old one.¹⁴⁸ To meet the APA's arbitrary and capricious standard agencies must merely acknowledge they are changing the regulation and consider reliance interests that would be impacted by the change.¹⁴⁹ And the Supreme Court has suggested in dicta that, in some regulatory areas such as automobile safety, policy changes based on changes in an administration are not troublesome.¹⁵⁰

However, the federal government owes no significant long-term duty to future generations in the context of automobile regulation and does owe such a duty in its management of public lands.¹⁵¹ Public lands policy changes can alter the quantity and quality of fossil fuels on public lands, the scenic value of public lands, or numerous other resources that necessarily impact future generations.¹⁵² Accordingly, it is uniquely important that changes in public lands management remain at least somewhat stable from administration to administration. As will be discussed in section III.A.2., *infra*, this justifies the implementation of a unique set of constraints on the federal executive's discretion in the management of public lands.

B. Externality Problems Complicate Federal Land Management

The externality problems inherent in public lands management are one reason that clear and stable rules are important in this regulatory area. Negative externalities can be simply defined as "costs an actor imposes on third parties."¹⁵³ In situations under which an actor does not bear the full costs of her actions, it is unlikely the actor will sufficiently weigh costs external to her in the decision-making process, leading to excessive participation in the activity at issue.¹⁵⁴ In the context of public lands management, individual presidential administrations arguably have inadequate incentives to weigh the full social costs associated with fossil fuel extraction activities on public lands. The following subsections highlight externality problems within federal public lands management and suggest potential means of making individual presidential administrations more fully internalize the long-run social costs of their decisions affecting federal lands.

i. Externalities in Public Land Management

148. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

149. *Id.*

150. In *State Farm*, in a concurring opinion written by Justice Rehnquist, and joined by Chief Justice Burger, Justice Powell and Justice O'Connor, Justice Rehnquist stated that "a change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations[,] [a]s long as the agency remains within the bounds established by Congress . . ." 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).

151. One might argue that the government has the duty to protect the safety of current Americans using motor vehicles, or a duty to protect children from hearing expletives. Even if we assume that those duties exist, the federal government does not hold title over all automobiles or have ownership interest in televisions or TV networks.

152. See Hein, *supra* note 83, at 3.

153. Lisa Grow Sun & Brigham Daniels, *Mirrored Externalities*, 90 NOTRE DAME L. REV. 135, 137 (2014).

154. See *id.*

Under the existing federal public lands management regime, a single presidential administration is not incentivized or required to consider the full costs of its agencies' decisions. For example, the Trump administration has supported its decision to open up more public lands for fossil fuel extraction by claiming that this approach is "all upside."¹⁵⁵ And proponents of streamlining the federal lands leasing process have often cited the need to reduce the federal budget deficit as justification for their proposed actions.¹⁵⁶ Valuable resources are stored in public lands, and the extraction of those resources can often produce short-term economic growth. Members of Trump's administration have suggested that opening up more public lands for business has no adverse repercussions and only results in "more jobs, more revenue[], more wealth, higher wages, and lower energy prices."¹⁵⁷

However, a deeper look into the effects of leasing public lands for resource extraction reveals that current federal policymakers are effectively ignoring the many significant costs of such activities. Fossil fuel extraction on public lands can pollute the nation's air and water, create increased greenhouse gas emissions, and deplete finite assets.¹⁵⁸ The federal government has leased both onshore and offshore public lands to private companies for fossil fuel extraction, often with very little consideration of these significant costs.¹⁵⁹ Under existing federal leasing structures, public land lessees can often externalize many of the environmental costs of their activities onto American citizens.¹⁶⁰ These negative externality problems tend to lead to over-exploitation of public natural resources over the short run.¹⁶¹

ii. Internalizing Externalities in Public Lands Management

To promote more optimal levels of resource extraction on public lands, the Interior would need to amend its review process to better ensure that the full social costs of such activities to present and future citizens do not outweigh their short-term benefits. Ideally, the agency could compel lessees to internalize more of the negative externalities associated with fossil fuel extraction on public lands through higher minimum bids and royalty rates that accounted for consequent environmental and health costs. In microeconomics terms, such higher royalty rates would act as a sort of Pigouvian tax, helping lessees to internalize more of the costs of activities occurring on leased federal lands.¹⁶² The Interior could then invest much of the additional revenue generated from these higher rates into programs aimed at addressing some of the environmental costs of such activities.

155. See Hein, *supra* note 83, at 3.

156. See Blumm & Jamin, *supra* note 21, at 367.

157. See Hein, *supra* note 83, at 3.

158. See *id.* at 2.

159. Michael Burger, A Carbon Fee as Mitigation for Fossil Fuel Extraction on Federal Lands, 42 COLUM. J. ENVTL. L. 295, 296 (2017).

160. *Id.* at 301.

161. See Hein, *supra* note 83, at 3.

162. See *id.* at 18.

The Bureau of Ocean Energy Management (“BOEM”), conducts a cost-benefit analysis when deciding whether to lease lands on the Outer Continental Shelf with some features that modestly take this approach.¹⁶³ The Outer Continental Shelf Lands Act requires the BOEM to analyze not only the economic impacts of leasing offshore lands, but also the environmental and social costs.¹⁶⁴ Essentially, the BOEM compares the economic benefits of the proposed action and mitigates those benefits with the foreseeable costs. After taking into consideration all the costs associated with leasing offshore lands, the BOEM then compares those results to a “no leasing” course of action.¹⁶⁵

While the BOEM’s cost-benefit analysis framework is helpful when dealing with the problem of externalities, there are also drawbacks to this type of analysis. One obvious shortcoming of it is the difficulty of accurately assigning monetary value to social and environmental costs. For example, it is difficult to confidently value the loss of a species. The inability of government officials to agree on what constitutes the best available science also contributes to this problem.¹⁶⁶ Still, expressly requiring the Interior to account for environmental costs when negotiating federal extraction lease rates could potentially help to address externality problems in the leasing of public lands. Regardless, these inherent externality problems make public lands management warrant the use of strong safeguards to limit inefficient behavior in this regulatory area.

C. Myopic Policymaking and Intergenerational Equity

The myopic tendencies of American voters and the government officials who serve them with regard to public lands provide further justification for special safeguards to promote greater long-term policy stability. Myopic behavior can be defined as “seeking short-term profit regardless of long-term consequences.”¹⁶⁷ Myopic tendencies can create challenges within the business world, causing managers to focus too intently on pleasing current shareholders and not enough on how current actions might affect the long-term health of a business.¹⁶⁸ For instance, a current manager might take actions that are focused too heavily on bringing current earnings reports in line with quarterly projections, and not enough on furthering long-run goals.¹⁶⁹ Such problems arise partly because of existing

163. *Id.* at 28.

164. *Id.*

165. *Id.*

166. Travis O. Brandon, *Fearful Asymmetry: How the Absence of Public Participation in Section 7 of the ESA Can Make the “Best Available Science” Unavailable for Judicial Review*, 39 HARV. ENVTL. REV. 311, 315 (2015).

167. Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 267 (2012).

168. See Natalie Mizik & Robert Jacobson, *The Cost of Myopic Management*, HARV. BUS. REV., July–Aug. 2017, <https://hbr.org/2007/08/the-cost-of-myopic-management>.

169. For example, myopic tendencies created by existing incentive structures or bounded rationality can cause managers to fire employees or excessively reduce budgets for research and innovation in an effort to reduce short-term costs, even if such actions are likely to have significant negative long-term consequences. See Lynne L. Dallas & Jordan M. Barry, *Long Term Shareholders and Time-Phased Voting*, 40 DEL. J. CORP. L. 541, 560 (2016).

incentives structures surrounding managers or because a manager does not expect to still be with her company when the long-run negative consequences of short-sighted actions become apparent.¹⁷⁰

The current administration's decision to significantly increase private industrial development on public lands is a similar example of myopic decision-making. Politicians, like managers of a business, tend to be more focused on the interests of current voters and stakeholders than on future stakeholders who have yet to be born. The U.S. economy may likely get a short-term boost from a significant increase in the extraction activities on public lands, but the administration is arguably not adequately weighing the long-term consequences of this adjusted approach to federal lands management. Such myopic behavior is unsurprising because, like business managers, today's political leaders will likely be out of office by the time the full consequences of their short-sighted resource management actions are realized. These tendencies are yet another reason why policymakers need to better insulate federal lands management laws from the short-term whims of present-day politicians.

As other scholars have suggested, the term "intergenerational equity" arguably incorporates both the legal standard that all generations are equal and the moral principle that no generation should be held above another.¹⁷¹ When the federal government issues a lease for fossil fuel extraction on federal lands, the lessee secures lease rights and the government secures a stream of lease payment revenues, but millions of other present and future Americans are also affected.¹⁷² As Trump administration actions highlighted above suggest, agencies do not always have sufficient incentives to fully weigh costs to future generations in lease negotiations and arguably have too much discretion to undervalue those costs. Accordingly, promoting intergenerational equity in the federal leasing context requires that there be deep-rooted standards in place to ensure that present decision-makers adequately consider the rights and needs of future generations.¹⁷³

Legal rules in some other countries are much more effective at ensuring that current policymakers adequately weigh their decisions' impacts on future generations. For example, in 1993 a young group of Filipino minors successfully sued the Filipino government on its own behalf and the behalf of future generations.¹⁷⁴ The Supreme Court of the Philippines ultimately upheld the current citizens' claim on behalf of future generations, finding that "every generation has a responsibility to the next to preserve the rhythm and harmony [of nature] for the full enjoyment of a balanced and healthful ecology."¹⁷⁵ Of course, such concepts are not presently recognized under U.S. federal law.

170. See Mizik, *supra* note 1688.

171. James C. Wood, *Intergenerational Equity and Climate Change*, 8 GEO. INT'L ENVTL. L. REV. 293, 295 (1996).

172. See *infra* Section I.D.3.

173. Wood, *supra* note 1711, at 299.

174. *Id.* at 324–25.

175. *Oposa v. Factoran*, 224 S.C.R.A. 792, 802–03 (July 30, 1993) (Phil.). See Wood, *supra* note 172, at 324.

Some state law regimes are also better-equipped than the federal lands management regulatory structure for deterring myopic decision making and promoting intergenerational equity. For instance, certain provisions in Pennsylvania's constitution expressly recognize the importance of protecting the state's natural resources for generations to come. Article 1, § 27 of the Pennsylvania Constitution reads:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.¹⁷⁶

This state constitutional provision arguably requires Pennsylvania's current generation of leaders to act as trustees and require currently living Pennsylvanians to bear costs reasonably necessary to ensure that future generations' interests in the state's natural resources are adequately protected. Although no such provisions are present in the U.S. Constitution, Congress could incorporate language into public lands management statutes that expressly embraces the same principles. Such language might constrain federal agencies' discretion to allow excessive exploitation of federal public resources for short term economic or political gain.

D. Public Choice Theory and Public Lands Management

Public choice theory provides additional insights into the recent shift in federal public lands management policies and how Congress and other policymakers might address those shifts. Public choice theory is a positive economic theory that seeks to explain the behavior of government actors and individuals in the political sphere.¹⁷⁷ It challenges the assumption that government actors are acting for the public good and instead operates under the assumption that political outcomes are a result of self-interested individual behavior.¹⁷⁸ While it does not offer normative prescriptions, public choice theory is useful because an accurate description of a problem that is impairing policymaking can provide insights on how to address it.¹⁷⁹

This subsection draws from public choice theory concepts to highlight possible reasons why the nation's federal lands management statutes such as the FLPMA and MLA delegate such broad legislation to agencies and to offer some ideas for

176. PA. CONST. art. 1, § 27.

177. See Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 416-17 (1994).

178. See William Dubinsky, Book Review, 90 MICH. L. REV. 1512, 1513 (1992) (reviewing DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991)). See also JERRY L. MASHAW, *GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 11* (Yale Univ. Press, 1997) (stating that public choice theory seeks to "understand political outcomes as a function of self-interested individual behaviors").

179. See Blumm, *supra* note 1777, at 416 (stating that public choice theory does not offer normative aspirations); See, e.g., Mashaw, *supra* note 1788, at 1 (stating that public choice theory is useful because "our vision of what is guides our approach to what ought to be").

how these broad delegations might be corrected. These materials also highlight how rent-seeking behavior involving the fossil fuel industry may be undermining certain goals of federal lands management statutes and identifies some possible means of limiting such behavior and its consequences.

i. Explaining (and Ultimately Correcting) Excessively Broad Legislative Delegations

Congress's delegation of very broad discretion to the Interior in its management of public lands under the FLPMA and MLA is more fully understood when viewed through the lens of public choice theory. Such broad delegations may have been an effective way for Congress to balance competing political pressures it faced when it enacted the bills: pressures to respond to a growing environmental movement and to simultaneously promote greater energy independence.

Under a public choice theory framework, reelection is a driving motivation for self-interested legislators and winning reelection requires the broad support of relevant constituents.¹⁸⁰ Within this familiar framework, rationally self-interested legislators seek to satisfy important stakeholders and avoid angering other constituents in efforts to increase their likelihood of reelection. As highlighted within the public choice literature, legislators typically appease their constituents through two types of actions: writing or voting in favor of certain legislation, or putting visible pressure on federal agencies in the executive branch to act in ways that favor their constituents.¹⁸¹ When legislators enact a bill that appeases a particular stakeholder group but gives broad discretion to an agency to ultimately implement the new law, such legislators can potentially have the best of both worlds. By enacting this type of broad-delegation bill, a legislator can get kudos from the stakeholders who championed it yet empower a federal agency to actually implement the bill in ways that avoid angering the constituents who'd opposed it.¹⁸²

In the context of public lands, both the FLPMA and MLA purport to be environmental conservation statutes yet contain very broad delegations to the Interior that empower the agency to serve the interests of the resource extraction industry. The FLPMA delegates to the Secretary of the Interior the authority to manage public lands under the principles of "multiple use and sustained yield."¹⁸³ However, the definitions of "multiple use" and "sustained yield" seem to promote opposite values. "Multiple use" emphasizes the importance of taking a holistic approach. It requires the Secretary to consider the:

long-term needs of future generations for renewable and nonrenewable resources including but not limited to recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values . . . and not necessarily to the

180. See Dubinsky, *supra* note 1788, at 1513.

181. See *id.*

182. See Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 96 MICH. L. REV. 1746, 1761 (1998) (reviewing JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997)).

183. 43 U.S.C. § 1701 (2018).

combination of uses that will give the greatest economic return or the greatest unit output.¹⁸⁴

In contrast, “‘sustained yield’ means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources.”¹⁸⁵ Read in combination, it is unclear whether the Secretary should prioritize preservation, extraction or another mentioned use. The Secretary is left with the power to decide which use to prioritize.¹⁸⁶

This confusing statutory language is more easily explained within the framework of public choice theory: legislators who enacted it may have sought to appease constituents concerned about environmental issues while also appeasing the fossil fuel industry. FLPMA became a law in 1976, during a time when the environmental movement was strong yet there was intense concern about the United States’ energy security.¹⁸⁷ In a nod to both interests, Congress enacted a statute purporting to promote the preservation of public lands for future generations that actually led to increased fossil fuel extraction on those lands.

The MLA similarly grants broad discretion to the Interior regarding fossil fuel leasing on public lands.¹⁸⁸ It states that lands “which are known or believed to contain oil or gas deposits *may* be leased by the Secretary.”¹⁸⁹ This has been interpreted to mean that the Secretary has broad authority to determine if lands will even be put up for auction, effectively deputizing the agency to make the hard decisions.¹⁹⁰ This broad grant of authority to the Interior Secretary has led to significant uncertainty and instability in federal mineral leasing. Since the enactment of the statute, the federal government has placed moratoria on such leases on multiple occasions. Most recently, President Obama’s administration placed a moratorium on coal leases under the MLA.¹⁹¹ President Trump then ended the moratorium shortly after taking office and replaced it with a policy of expediting fossil fuel leases.¹⁹² The broad delegations to the Interior set forth in the FLPMA and MLA may have benefited the legislators who enacted those provisions, but such

184. *Id.* at § 1702(c).

185. *Id.* at § 1702(h).

186. Legislative History indicates that it was Congress’ intention to leave choices to the “whims of the Secretary” in order to allow for flexible management of the resources. *Management of National Resource Lands: Hearing on S.507 Before the S. Subcomm. on Env’t. and Land Res.*, 94th Cong. 92 (1975) [hereinafter *Hearing on S.507*].

187. See Martin V. Melosi, *Energy and Environment in the United States: The Era of Fossil Fuels*, 11 ENVTL. REV. 167, 177–80 (1987) (discussing the often-contradictory views of environmentalism and energy production in the 1960s and 1970s). The legislative history of FLPMA offers evidence that the purpose of the broad delegation was also to allow for flexible management of public lands. *Hearing on S.507*, *supra* note 1866.

188. See Michael Burger & Jessica Wentz, *Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review*, 41 HARV. ENVTL. L. REV. 109, 118 (2017).

189. 30 U.S.C. § 226(a) (2018) (emphasis added).

190. *Udall v. Tallman*, 380 U.S. 1, 4 (1965) (stating that the Mineral Leasing Act gave “the Secretary discretion to refuse to issue any lease at all on a given tract.”). See also Burger & Wentz, *supra* note 1888, at 118.

191. See Jason Scott Johnston, *Regulatory Carrots and Sticks in Climate Policy: Some Political Economic Observations*, 6 TEX. A&M L. REV. 107, 115 (2018).

192. Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

delegations now only facilitate uncertainty and dramatic policy swings with each change in presidential leadership.

ii. Statutorily Limiting Federal Agencies' Discretion to Promote Stability in Land Management

Placing greater statutory constraints on the Interior and BLM would help to reduce the wide political pendulum swings that presently afflict federal public lands management in the United States. By promoting greater stability, narrower statutory delegations would help to ensure that federal agencies manage federal lands more consistently across presidential administrations and would ultimately better protect these public resources.¹⁹³

Ideally, statutory delegations of authority to federal agencies involved in public lands management would more clearly articulate an overarching goal centered on long-term preservation and protection.¹⁹⁴ There is some evidence that such approaches have proven successful at the state government level. For instance, one study examining management plans for state owned lands in Michigan found that replacing multiple-use mandates with a dominant-use mandate significantly reduced the exploitation of public resources.¹⁹⁵ Among other things, the study noted that the management plan for an area called the Pigeon River Forest contained a multiple-use mandate, and the land was subsequently opened for oil drilling.¹⁹⁶ In contrast, the Sand Lakes Quiet Area's management plan stated that the dominant use of the site was non-motorized recreational uses, and drilling never resulted there because it was deemed incompatible with the primary purpose articulated in the statute.¹⁹⁷ In the case of FLPMA, its broad multiple-use mandate was originally intended to allow for flexible management of resources and not to promote the drilling of fossil fuels on public lands, but the mandate itself did not clearly evidence those intentions. Narrowing the mandate would make Congress's intent clearer and would help ensure the land is used as Congress intended and not overexploited.

More specific and clearly defined statutory mandates would also make federal land management policy more stable and thereby promote more efficient levels of private investment.¹⁹⁸ For example, there is some evidence that uncertainty about administrative priorities in forest management policy has prevented some stakeholders from investing in the development of forest resources.¹⁹⁹ Limiting

193. Cf. Rossi, *supra* note 1822, at 1751. Many public choice theorists are anti-delegation and antiregulation and believe when Congress delegates authority to agencies they are abdicating their legislative duties. *Id.* They argue this abdication is bad because it disempowers the electorate. *Id.* See also David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 *ECOLOGICAL L.Q.* 545, 606–07 (1997).

194. See Karen L. Ferguson, *This Land is Our Land: Private Interests in Public Lands*, 2 *MICH. L. & POL'Y REV.* 187, 247–48 (1997).

195. *Id.* at 248.

196. *Id.*

197. *Id.*

198. See Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 *J. ENVTL. L. & LITIG.* 223, 268 (2004).

199. *Id.* at 269.

federal agencies' discretion over public lands management decisions could give markets greater long-term certainty about how the government would conduct such management, ultimately leading to greater levels of private investment.

iii. Recognizing and Addressing the Fossil Fuel Industry's Rent-Seeking Behavior

Public choice theory's literature relating to rent-seeking behavior offers additional insights into the challenges facing federal lands management and how to address them. As interest group theory would predict, the fossil fuel industry's substantial and direct interest in public land management policies incentivizes them to engage in rent-seeking behavior and ultimately results in suboptimal policy decisions. Special interest groups receive concentrated benefits when governments enact or adopt policies that favor them, and this prospect of concentrated benefits often incentivizes such groups to engage aggressively in rent-seeking behavior.²⁰⁰

Rent-seeking behavior occurs when an industry acts through lobbying or other efforts to induce government intervention in the market for the industry's own benefit.²⁰¹ Rent-seeking may benefit certain specific industry stakeholders, but it usually results in a net loss to the public at large.²⁰² In contrast to the concentrated benefits at stake for a special interest group, the costs to the general public are often diffused and more attenuated. Accordingly, individual citizens have weaker incentives to engage in rent-seeking behavior and are less able to act collectively to do so because of various collective action problems.²⁰³

In the context of public lands, fossil fuel companies are a powerful special interest group that stands to receive large and heavily concentrated economic gains from favorable policy decisions. In fiscal year 2016, oil and gas development on lands managed by BLM contributed \$42 billion to the American economy.²⁰⁴ The sheer size and financial wealth of the oil and gas industry makes it comparatively easy and appealing for these companies to engage in rent-seeking behavior.

Rent-seeking behavior in public lands management today is most visible at the federal government level, where fossil fuel industry stakeholders seek to influence government action by lobbying the President and Congress. The oil and coal industries contributed heavily to President Donald Trump's campaign in hopes

200. See Blumm, *supra* note 1777, at 417.

201. See *id.* (defining rent-seeking behavior as industry's "attempt[s] to obtain economic benefits for themselves through government intervention in the market on their behalf").

202. See Dubinsky, *supra* note 1788, at 1514–15.

203. See Blumm, *supra* note 1777, at 418. Cf. Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards*, 63 ADMIN. L. REV. 99, 151 (2011) (discussing imbalanced participation by different interest groups in the EPA's rulemaking, stating, "[t]he regulatory state may be influenced heavily by regulated parties, with little to no counterpressure from the public interest.>").

204. *BLM Oil and Gas Lease Sales Generate \$360 Million in 2017*, U.S. DEP'T. OF THE INTERIOR: BUREAU OF LAND MGMT. (Jan. 31, 2018), <https://www.blm.gov/press-release/blm-oil-and-gas-lease-sales-generate-360-million-2017>.

that he would enact policies that would promote the industry.²⁰⁵ Upon taking office, President Trump rewarded these lobbying efforts by reversing multiple Obama-era land management policies and appointing many former oil and gas industry lobbyists to high positions within the Interior—actions that have undoubtedly benefited these industries.²⁰⁶

In contrast, the adverse impacts of increased extraction activities on public lands under the Trump-era regulatory regime are diffused across all Americans and even future Americans. Opening more public lands to resource extraction often effectively prioritizes that use above numerous other statutorily-recognized uses that involve a diffused set of individuals.²⁰⁷ Moreover, a major downstream effect of increased fossil fuel development is the burning of fossil fuels, which creates air pollution and contributes to climate change in ways that impose modest costs on millions or perhaps billions of humans.²⁰⁸ Climate change's impacts are not only diffused across all of America but are diffused across time because future generations will likely suffer its impacts more than the current generation.²⁰⁹ Scientists predict that increased warming could cause sea level rise, species extinction, and risks related to food security, water supply, and human health.²¹⁰

The diffused costs spread among each individual American from the impacts of increased extraction activities on public lands are generally not sufficient to incentivize most individuals to act. In contrast, the concentrated benefits at stake for fossil fuel companies incentivize them to aggressively seek to influence policy at

205. See Ben Lefebvre, *Oil Group to Lobby President After Stay at Trump Hotel*, POLITICO (Mar. 14, 2018, 8:25 PM), <https://www.politico.com/story/2018/03/14/trump-hotel-trade-416293>. The American Petroleum Institute has heavily lobbied President Trump. They have hosted events at his hotel. *Id.* Their efforts have not been in vain; in 2017 The Guardian reported that the Trump administration had granted most of the American Petroleum Institute's policy wish list. Oliver Milman, *'No Shame': How the Trump Administration Granted Big Oil's Wishlist*, GUARDIAN (Dec. 12, 2017, 6:00 PM), <https://www.theguardian.com/us-news/2017/dec/12/big-oil-lobby-get-what-it-wants-epa-trump-pruitt>.

206. See Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (revoking Executive Order 13653 of November 1, 2013, three Presidential Memoranda, rescinding two Reports of the Executive Office, rescinding the Council of Environmental Quality's "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews," Secretary's Order 3338, as well as many other executive documents detailing policies and guidelines). Ryan Zinke, former Secretary of the Interior, recently stepped down from the position in the midst of multiple ethics scandals; David Bernhardt who also has ties to the oil and gas industry, is currently serving as acting Secretary of the Interior. Emily Holden, *Former Fossil Fuels Lobbyist to Head Interior Department as Zinke Exits*, GUARDIAN (Dec. 16, 2018, 7:52 AM), <https://www.theguardian.com/us-news/2018/dec/16/david-bernhardt-ryan-zinke-lobbyist-interior-department>. Zinke has been called "a shameless handmaiden for the special interests." Nancy Pelosi (@SpeakerPelosi), TWITTER (Dec. 15, 2018, 10:32 AM), <https://twitter.com/SpeakerPelosi/status/1073994264185577474>.

207. Federal Land Policy and Management (FLPMA) specifically lists uses for public lands to include, though not limited to: "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values . . . and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output." 43 U.S.C. § 1702(c) (2018).

208. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5° at 11 (2018), https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf.

209. See *id.* (predicting temperature will rise 1.5° above pre-industrial levels sometime between 2030 and 2052).

210. See *id.* at 10–11.

various levels of government. In fact, between 2000 and 2016 the fossil fuel industry spent 10 times more on climate change lobbying than environmental organizations.²¹¹ One potential consequence of this mismatch is the overexploitation of public lands.

Innovative changes to the federal statutory scheme governing public lands could better limit the fossil fuel industry's influence on regulators in public lands policy. In Federalist 10, James Madison acknowledged that the "[c]auses of faction cannot be removed, and that relief is only to be sought in the means of controlling its effects."²¹² In other words, there will always be special interest groups, so policymakers must design regulatory structures to minimize rent-seeking behavior and its effects. For instance, in the context of public land leasing the competitive market has not functioned properly.²¹³ This is because incumbent resource users have learned how to suppress competitive pressures and tailor the process to their needs.²¹⁴ Comprehensive reforms that better prevent such manipulation over the long run will be needed to address these challenges and promote a more efficient and sustainable approach to public lands management.

IV. PROPOSED SOLUTIONS

The unique importance of the federal government's duty to preserve and protect public lands warrants the creation of a more stable and insulated policy structure that more effectively limits executive discretion in this regulatory area. Because public lands are owned in common by all Americans yet are susceptible to excessive exploitation by individual companies and politicians for short-term gain, federal agencies should not have the same discretion in managing these lands as they have in governing many other industries. The current federal statutory framework delegates excessively broad authority to the Interior to manage the nation's public lands, which has resulted in unstable and inefficient policies. These broad delegations encompass such a wide range of policy approaches that the approaches of public land management officials often swing widely from presidential administration to administration. Such broad delegations also make these federal agencies susceptible to rent-seeking behavior in the public lands management context. This Part III describes how a new comprehensive, overarching statute could be designed to better address these risks.

A. Potential Solution: A Comprehensive Overarching Public Lands Statute

211. See Robert J. Brulle, *The Climate Lobby: A Sectoral Analysis of Lobbying Spending on Climate Change in the USA, 2000 to 2016*, 149 *CLIMATIC CHANGE* 289, 301 (2018).

212. *THE FEDERALIST NO. 10*, at 75 (James Madison) (Clinton Rossiter ed., 1961) (emphasis in original).

213. Most coal lease sales only have one bidder. See generally U.S. Gov't Accountability Office, *Coal Leasing: BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide More Public Information* (2013).

214. See *supra* Section II.D.3.

A new comprehensive, overarching federal statute governing the management of public lands could potentially help to address the various problems that presently afflict federal public land management. Ironically, the Federal Land Policy Management Act was originally enacted with a similar goal of making federal public land management more focused and concise.²¹⁵ Prior to the enactment of FLPMA, there were 3,000 public land laws, many of which were contradictory.²¹⁶ The current statutory scheme is much more concise than that system, but even greater precision would alleviate some of the problems that are currently plaguing it.²¹⁷ Specifically, federal public land policy would be more stable and less susceptible to special interests if Congress were to enact statutory changes that: (1) create a dominant policy goal of “preserving the ecological integrity of public lands” to accompany the existing goals of “multiple use and sustained yield management,”²¹⁸ (2) mandate a higher standard of review for agency changes to public lands policies, and (3) ensure that federal lands lease payments were high enough to ensure that lessees internalized the broader environmental and other social costs of their activities.

i. Modifying the “Multiple Use and Sustained Yield” Mandate

One way of improving federal lands management would be to add a new, expressly dominant policy goal of “preserving the ecological integrity of public lands” to the FLPMA’s existing “multiple use and sustained yield” mandate. The “multiple use and sustained yield” mandate alone has proven to be an ineffective mandate for managing public lands because it is susceptible to a wide range of interpretations and thus allows for equally wide policy changes each time a new president takes office. The existing mandate does have merit and deserves to remain intact because it encourages agencies to take a holistic approach to management and allow for mining in some circumstances. However, adding to it a dominant policy goal such as that of “preserving ecological integrity” could help to cabin the Interior’s discretion and thereby make public land management more stable and effective at its primary goals.²¹⁹

Ecological integrity has been defined elsewhere in the U.S. Code to mean “a landscape where ecological processes are functioning to maintain the structure, composition, activity, and resilience of the landscape over time.”²²⁰ Such an ecological integrity mandate is already guiding the management of the national

215. *Hearing on S. 507, supra* note 1866.

216. *Id.*

217. Although the currently-proposed John D. Dingell, Jr. Conservation, Management, and Recreation Act, conserves over one million acres as wilderness, it does not address the issues addressed in this paper. *See* Mason & Smith, *supra* note 108.

218. 43 U.S.C. § 1732(a) (2018).

219. *See supra* Section II.D.2. for a discussion on why limiting agency discretion will create more stable policies and prevent the exploitation of public lands by special interest groups.

220. 16 U.S.C. § 460nnn(5) (2018).

parks, military parks, monuments, and seashores.²²¹ If this mandate were extended to all public lands, it would narrow agencies' primary focus onto the long-term maintenance of federal public land resources and facilitate a more consistent policy for all public lands. Such an additional mandate would likewise align the overall statutory mandate more closely with the federal government's duty to manage public lands for the benefit of all present and future generations of Americans.

An even clearer definition of "ecological integrity" in connection with such a new mandate might even further strengthen its positive effects on federal public land management policy. For instance, Canada's National Parks Act defines "ecological integrity" as ". . . a condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and abundance of native species and biological communities, rates of change and supporting processes."²²² It might be beneficial to incorporate components of the Canadian definition into the new U.S. definition because it includes additional details, such as the distinction between biotic and abiotic resources, and acknowledges natural rates of change.²²³ Including these additional details in the definition would make the delegation of authority to agencies under this new statute narrower than under FLPMA.

Some may argue that such a narrow delegation would not give the Interior sufficient flexibility in its management of public lands. Certainly, the Interior needs flexibility to effectively address specific circumstances in the wide range of localities it manages across the U.S. Moreover, some public choice theorists argue that broad delegations better serve the public good by allowing for interest group competition.²²⁴ And allowing agencies to exercise more discretion might arguably make decision-making more democratic in some contexts if it allows for more direct communication with the public during the rulemaking process.²²⁵ Still, others might argue that although executive agencies are apolitical, they are also directly accountable to a president who has the power to remove agency department heads at will and direct policy. Based on this, such theorists have argued that statutory schemes that grant broad delegations to the executive branch may actually enhance the general welfare.²²⁶

However true such counterarguments may be in other situations, they are highly questionable in the unique context of federal public lands management. In the context of public lands, Congress' broad "multiple-use sustained yield" mandate has already clearly produced suboptimal policy outcomes. A "multiple-use and sustained yield" approach that gives wider discretion to agencies has not worked in part because of the rent-seeking problems highlighted above, which are far from democratic.²²⁷ Furthermore, a mandate "preserving ecological integrity"

221. *See id.*

222. *Ecological Integrity*, PARKS CANADA, <https://www.pc.gc.ca/en/nature/science/conservation/ie-ei> (last visited Nov. 24, 2019).

223. *Id.*

224. *See Blumm, supra* note 1777, at 419.

225. Direct communication is available through notice and comment rulemaking, which required under the APA for most legislative rules. 5 U.S.C. § 553 (2018).

226. *See Rossi, supra* note 1822, at 1764–65.

227. *See supra* Section II.D.3.

would encourage land managers to consider the specific ecology of a location and thereby allow for flexibility while still limiting the executive branch's authority to make major policy decisions—such as whether to expedite leasing or place moratoria on leases. Accordingly, narrowing the scope of agency authority in this unique circumstance seems more likely to ensure that the public lands are managed for the benefit of both present and future generations of Americans.

ii. Higher Standard of Review when Public Lands Policies are Changed or Revoked

A new statutory regime for public lands management should also require a higher standard of review when agencies propose to revoke or change a public lands management policy. Under the APA, reviewing courts must set aside agency action that is arbitrary and capricious, and there is no higher standard for changing or rescinding rules.²²⁸ A higher standard of review mandated by federal statute could require agencies to explain why their new policy enables them to meet their statutory duty to protect the public lands better than does the existing policy.²²⁹ This would require agencies to do more than supply a reasoned analysis, address reliance interests, and announce that they are changing the rule.²³⁰ It would require them to clearly articulate why this new change strengthens their fulfillment of their primary duty to promote ecological integrity.

Such a higher standard of review could weaken special interest groups' ability to influence policy making through rent-seeking behavior. Presumably, such a new standard would also make it more difficult for a newly-elected president to swiftly water down existing public lands policies for short-term political gain.

iii. Review and Amend Fiscal Terms of Leases

Any novel statutory regime to promote more efficient and stable federal lands management should also include specific provisions aimed at improving the nation's outmoded leasing system. The current leasing structure for public lands for fossil fuel extraction is both inadequate and outdated. Some of the fiscal terms under which federal agencies lease public lands for resource extraction have not been amended, nor reviewed since the 1920s.²³¹ This has enabled many private companies to pay sub-optimally low rents and royalty rates for public resources, to the detriment of taxpayers and broader society. Congress needs to finally review and update these fiscal terms to enable them to adapt over time to changes in inflation, energy production technology, and modern science on climate change but only in ways that would further promote environmental conservation. Such updates to the terms of public lands leases could also be structured to compel lessees to internalize more of the broader social costs of their fossil fuel production.

228. 5 U.S.C. § 706(2)(A) (2018); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009).

229. This is referring to the statutory duty to act as a fiduciary, which would be created through the "ecological integrity" mandate. See *supra* Section III.A.1.

230. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (listing these requirements for when an agency changes a rule).

231. See Hein, *supra* note 833, at 12.

One straightforward means of improving federal leasing laws would be to eliminate the broad existing loopholes that lessees currently use to discount their royalty rate payments. Under the current framework, the Secretary of the Interior has wide discretion to reduce or eliminate royalty payments “whenever in [his or her] judgment it is necessary to do so in order to promote development, or whenever in [his or her] judgment the leases cannot be successfully operated under the terms provided therein.”²³² Through its rent-seeking behavior, the fossil fuel industry is often able to take advantage of these loopholes and pay artificially low royalty rates for public mineral resources. Limiting the Interior’s discretion to discount rates would help to mitigate this problem.²³³

V. CONCLUSION

The nation’s public natural resources hold tremendous value for current and future generations. Protecting these resources from the short-sighted whims of government officials and industry giants is crucial to their long-term security and should be a clear and dominant goal of modern public lands management laws. Unfortunately, the current federal lands management framework is ill-equipped to protect America’s precious public land resources from overexploitation. Existing public lands statutes grant broad authority to the executive branch, enabling fossil fuel industry interests to exert excessive influence over policy decisions in ways that jeopardize conservation of these resources and harm the general population. The federal government’s duty to conserve public lands for the benefit of present and future generations requires the creation of a more stable policy structure with provisions that place unique limits on executive authority. Specifically, a new comprehensive public land management statute is needed that introduces an overarching policy goal of “preserving ecological integrity,” imposes higher review standards for agency policy changes, and modernizes the federal land leasing process to better account for the externalities of fossil fuel extraction activities. Such changes would promote greater intergenerational equity, require the Interior to act more intently as a fiduciary in its management of public lands, and limit the discretion of the executive branch to prevent wide pendulum swings in public lands management policy. The long-term stability of America’s public lands requires a comprehensive set of actions that account for the full costs of leasing public lands and uses the best available science. Only through such changes will it be possible to ensure that the nation’s precious public land and mineral resources will be adequately conserved for the benefit of future generations.

232. *Id.* at 57.

233. Therefore, such a strategy would insulate the agency from undue influence of special interest groups. Some scholars have argued that insulating agencies from industry results in inefficient outcomes because it deprives the agency of valuable market knowledge they would otherwise receive. See Dubinsky, *supra* note 1788, at 1514 (stating that Farber and Frickey did not believe that rent-seeking would result in an economically inefficient outcome all of the time). See also Laurence Tai, *Harnessing Industry Influence*, 68 ADMIN. L. REV. 1, 10 (1996). However, in the context of mining of public lands, fossil fuel industry has exploited agencies and the current framework has created an inefficient outcome.