

# ARTICLES

## THE TRUMP PUBLIC LANDS REVOLUTION: REDEFINING “THE PUBLIC” IN PUBLIC LAND LAW

BY

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*The Trump Administration’s efforts to comprehensively dismantle Obama-era policies had special force in federal public land management. The disassembling included a substantial reduction in the size of national monuments, a jettisoning of protections for sage grouse habitat, and a widespread fostering of fossil fuel-friendly policies, such as ending leasing moratoria, attempting to revoke methane emission controls, and a scuttling hydraulic fracturing regulation. Congress was a willing partner in this deregulatory campaign, eliminating revised land-planning regulations, authorizing oil leasing in the Arctic National Wildlife Refuge, and threatening to codify in statutes the Administration’s regulatory rollbacks in order to make them more permanent. Collectively, these initiatives amounted to the most substantial rollback in public lands protections in American history.*

*This Article surveys these events in the early days of the Trump Administration. The effect was to attempt to revolutionize public land law in arguably undemocratic terms, as there was little evidence of widespread public support for the rollbacks of land protections or the championing of fossil fuel developments. The agenda also included persistent calls in both the Administration and in Congress for more state and local control over federal public land management.*

*We think that the Trump revolution reflected an attempt to fundamentally redefine the public in public land law and policy,*

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*narrowing the focus of governmental concern largely to those producing commodity production, especially fossil fuels. The long-term consequences are disturbing in terms of their potential costs and who will be saddled with paying them.*

*Appendices to the Article detail the use of presidential authority to establish national monuments over the past four decades and a “restoration agenda” of action items that might inform a post-Trump administration.*

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## I. INTRODUCTION

The Trump Administration’s natural resources policies promise to be the most revolutionary since the Harding Administration,<sup>1</sup> if not before. Pronouncing climate change to be a “hoax,”<sup>2</sup> President Trump quickly

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<sup>1</sup> The Harding Administration’s Interior Secretary, Albert Fall, was convicted of bribery in the infamous Teapot Dome scandal. *See infra* note 217 and accompanying text.

<sup>2</sup> Edward Wong, *Trump Has Called Climate Change a Chinese Hoax. Beijing Says It Is Anything But.*, N.Y. TIMES (Nov. 18, 2016), <https://perma.cc/9LB4-CKFJ>. The Trump transition team quickly targeted several documents on climate change and carbon regulation. *See* Kevin Bogardus & Sean Reilly, *Trump Transition Targeted Climate Records*, E&E NEWS: GREENWIRE (Sept. 25, 2017), <https://perma.cc/8MGX-JGG8> (discussing efforts made by Trump’s transition team to acquire specific documents and their subsequent denial); Oliver Milman, *US Federal Department Is Censoring Use of Term ‘Climate Change,’ Emails Reveal*, GUARDIAN (Aug. 7, 2017), <https://perma.cc/AF7P-EMSL> (discussing a series of emails between staff members at the U.S. Department of Agriculture’s National Resources Conservation Service suggesting that

approved several controversial oil pipelines<sup>3</sup> and rescinded numerous conservation regulations.<sup>4</sup> The Administration also conducted review of

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“climate change adaption” be replaced by “resilience to weather extremes”; the phrase “reduce greenhouse gases” be replaced by “build soil organic matter, increase nutrient use efficiency”; and “sequester carbon” be replaced by “build soil organic matter”); *see also* Adam Federman, *Interior Department Scrubs Climate Change From Strategic Plan*, INVESTIGATIVE FUND (Oct. 25, 2017), <https://perma.cc/UZT6-ZQGY> (discussing a leaked U.S. Department of the Interior strategic plan to exploit public lands for oil and gas development); Christa Marshall, *Senior Officials Ordered Removal of ‘Climate Change’—Emails*, E&E NEWS: GREENWIRE (Dec. 11, 2017), <https://perma.cc/7PXK-VHGJ> (discussing a U.S. Department of Energy official’s request to scrub the words “climate change” from research abstracts to satisfy the Trump Administration’s proposed budget request).

<sup>3</sup> *See* Timothy Cama, *Trump Approves Keystone Pipeline*, HILL (Mar. 24, 2017), <https://perma.cc/LAY6-GHJZ>; Amy Harder & Christopher M. Matthews, *Trump Administration Gives Final Approval for Dakota Access Pipeline*, WALL STREET J. (Feb. 7, 2017), <https://perma.cc/3XV3-9P8B>. A federal court ruled that in approving the Dakota Access Pipeline, the U.S. Army Corps of Engineers violated the National Environmental Policy Act (NEPA) by failing to adequately assess potential oil spill risks, environmental justice concerns, and effects on tribal hunting and fishing rights. However, the court refused to enjoin the pipeline’s continued operation pending NEPA compliance. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 16-1534 (JEB), 2017 WL 4564714, at \*12 (D.D.C. Oct. 11, 2017).

<sup>4</sup> *See* David J. Hayes, *Trump’s Rush to Drill on Public Land Is the Opposite of ‘America First,’* WASH. POST (Feb. 22, 2018), <https://perma.cc/QD9R-UAE3> (discussing the Trump Administration’s reversion to “a fossil fuel-is-king approach” pursued by the second Bush Administration, which recklessly offered oil and gas leases on the “doorstep of sensitive landscapes” near Arches and Canyonlands National Parks, Dinosaur National Monument, and Nine-Mile Canyon without conducting site visits or consulting managing agencies or the public; the Obama Administration consequently pursued reforms like “master leasing plans” that would reflect the views of local, state, tribal, and federal officials as well as require site visits, multidisciplinary decision-making processes, and public participation; however, the Trump Administration quickly jettisoned master leasing plans, resuming the Bush Administration’s wholesale commitment to energy dominance, including offshore and Arctic leasing and leasing throughout sage grouse habitat, even though in 2016 more than half of the twenty-seven million acres under lease to the oil and gas industry lay idle.); *see also* Timothy Cama, *Trump to Repeal Obama Fracking Rule*, HILL (Mar. 15, 2017), <https://perma.cc/8737-W5T8> (identifying various environmental regulations that President Trump targeted early in office, including fracking regulations, greenhouse gas emissions standards for cars, the Clean Power Plan, and the coal-leasing moratorium for federal lands). *See generally infra* notes 273–280 and accompanying text (discussing efforts to dismantle fracking regulations on public lands).

In the first twelve months of the Trump Administration, the *New York Times* counted some sixty-seven environmental regulations under siege: thirty-three overturned, twenty-four more cutbacks in progress, and ten rollbacks stalled, mostly due to court actions. Nadja Popovich et al., *67 Environmental Rules on the Way Out Under Trump*, N.Y. TIMES, <https://perma.cc/KFH3-B4CR> (last updated Jan. 31, 2018) (listing all the targeted rules). According to a report by *Public Citizen*, the Trump Administration withdrew a record number of 457 rulemakings in its first six months of office, mostly from the Interior and Health and Human Services Departments. Maxine Joselow, *Trump Has Rolled Back More Rules Than Any President—Watchdog*, E&E NEWS: GREENWIRE (Nov. 28, 2017), <https://perma.cc/C7HF-2WL7>. Among the rules withdrawn were fifteen endangered species listings and a plan to protect Florida’s Biscayne Bay. *See id.* (discussing *Public Citizen’s Congress Watch* report that illustrated the amount of rules President Trump has reversed); *see* Coral Davenport, *Trump’s Environmental Rollback Were Fast. It Could Get Messy in Court*, N.Y. TIMES (Jan. 31, 2018), <https://perma.cc/YCZ5-R2CX> (suggesting that the Trump Administration’s exemption of Florida from the opening up of the offshore to oil and gas leasing was vulnerable to legal challenge, and that North Carolina would challenge the initiative if it were not granted a similar exemption);

national monuments that led President Trump to attempt to reduce the acreage of Bears Ears National Monument by 85% and Grand Staircase-Escalante National Monument by nearly one-half, with a number of other monuments apparently slated for reductions in the future.<sup>5</sup>

At the outset, however, it is important to recognize that the Trump public lands revolution requires, in significant measure, the assent of Congress, which possesses the ultimate constitutional authority over public land management.<sup>6</sup> Any executive authority must be delegated by Congress.<sup>7</sup> Congress exercised that constitutional authority in early 2017 when, through the formerly obscure Congressional Review Act<sup>8</sup> (CRA), it somewhat surprisingly vetoed an update of the Bureau of Land Management's (BLM) thirty-five-year-old regulations governing the approval of federal land plans.<sup>9</sup> This veto was a reminder of the fact that effectuating the Trump revolution will require a partnership between the President and his cabinet and

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also noting challenges to shrinking the Utah monuments, the rollback of sage grouse protections in federal land plans, and a challenge by the State of California to rescinding the hydraulic fracking regulation).

Two commentators have suggested that President Trump's hostility to environmental regulations is a consequence of a systematic undervaluing or ignoring of the environmental benefits provided by those regulations. Cale Jaffe & Steph Tai, *Trump's Disdain for Environmental Regulations Stems from His Misunderstanding*, SLATE (May 11, 2017), <https://perma.cc/6BFG-3ZA7>. But in addition to undervaluing the benefits of environmental regulation, the Trump Administration has also systematically undervalued the costs of fossil fuel mining and drilling, evident in its effort to eliminate consideration of the social cost of carbon. *See infra* discussion Part IV.D; *see also The Hidden Costs of Fossil Fuels*, UNION CONCERNED SCIENTISTS, <https://perma.cc/F9QV-4MA9> (last revised Aug. 30, 2016) (discussing hidden costs of extraction, transporting, burning, and disposal).

<sup>5</sup> *See infra* notes 31–32 and accompanying text (discussing the Trump executive order on national monuments); 37, 65 and accompanying text (discussing the diminishment of Bears Ears and Grand Staircase-Escalante); 90–136 and accompanying text (discussing Cascade-Siskiyou National Monument, slated for review). Promoting local control over federal public lands is a persistent theme both in the Trump Administration and Congress. *See infra* note 166 and accompanying text (noting the position of the Western Governors' Association favoring state concerns over national concerns); 178 and accompanying text (discussing the Western Governors' Association's claim that they are co-regulators of federal public lands); 314 and accompanying text (suggesting that empowering state and local officials' influence over public lands serves the interests of local economic elites); *see also* Jonathan Thompson, *The Danger of Local Hands on Public Lands*, HIGH COUNTRY NEWS (Mar. 2, 2018), <https://perma.cc/4RN9-DL5U> (warning against managing the reduced national monuments with committees dominated by local interests due to personal financial interests, suggesting that such conflicts of interests "are an unavoidable part of life in small, rural communities").

<sup>6</sup> U.S. CONST. art. IV, § 3, cl. 2 (quoted *infra* note 38).

<sup>7</sup> *See infra* notes 38–39 and accompanying text (discussing the Property Clause).

<sup>8</sup> 5 U.S.C. §§ 801–808 (2012); *see infra* note 168 and accompanying text. The GOP repealed at least fourteen Obama rules using the CRA, which had been used only once before 2017. *See* Stephen Dinan, *GOP Rolled Back 14 of 15 Obama Rules Using Congressional Review Act*, WASH. TIMES (May 15, 2017), <https://perma.cc/H7UQ-BXGF>. Recently, the Government Accountability Office announced that BLM land plans are subject to the CRA, which could lead to congressional vetoes of land plans opposed by local members of Congress. *See* U.S. GOV'T ACCOUNTABILITY OFF., B-238859, TONGASS NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN AMENDMENT 1 (2017), <https://perma.cc/2ZV4-LBXG>.

<sup>9</sup> *See infra* notes 168–172.

Congress. Credit or blame for the revolution will not therefore be the President's alone.

Failure to understand the limits of executive authority over public lands may, however, undermine implementation of some parts of the Trump revolution. In particular, presidential authority to revoke or diminish national monuments is far from clear and has drawn serious legal challenges.<sup>10</sup> Although secretarial authority does exist to revise land plans or to revoke regulations like the Interior Department's fracking rule, that authority is fettered by the sometimes overlooked substantive requirement of the Administrative Procedure Act<sup>11</sup> (APA) that such changes must be rational and consistent with applicable environmental laws.<sup>12</sup> These requirements have sometimes proved to be surprisingly difficult judicial hurdles.<sup>13</sup> And while Congress has delegated considerable discretion to the Secretary of Interior to increase mineral leasing and to the Secretary of Agriculture to increase timber sales,<sup>14</sup> those actions also must comply with environmental laws like the National Environmental Policy Act<sup>15</sup> (NEPA) and the Endangered Species Act<sup>16</sup> (ESA), which have proved to be stumbling blocks to other deregulatory efforts affecting public land management.<sup>17</sup> However, the Trump revolution also promised a partial dismantling of

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<sup>10</sup> See *infra* notes 37–50, 65–66 and accompanying text.

<sup>11</sup> 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521.

<sup>12</sup> See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (“Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.”).

<sup>13</sup> See *infra* note 17.

<sup>14</sup> See Mineral Leasing Act, 30 U.S.C. §§ 181–287 (2012) (delegating mineral leasing authority to the Secretary of the Interior); see also Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §§ 528–531 (2012); National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)) (delegating timber-sale authority to the Secretary of Agriculture); 36 C.F.R. § 200.3(b)(1)(2) (2017) (explaining the Forest Service-related functions delegated to the Secretary of Agriculture). Timber sale increases also occurred as a consequence of the so-called Healthy Forests Restoration Act of 2003, 16 U.S.C. §§ 6501–6591, discussed *infra* note 297.

<sup>15</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

<sup>16</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544; see Daniel J. Rohlf, Professor of Law, Lewis & Clark Law Sch., Presentation at the Environmental Law Symposium: Environmental Law Under Trump (Apr. 6, 2018) (explaining a proposal to change a regulation implementing section 4(d) of the statute to reduce protection for threatened species).

<sup>17</sup> See, e.g., *W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1305 (D. Idaho 2008) (successfully challenging an attempt to water down grazing regulations on BLM lands), *aff'd in part and remanded*, 632 F.3d 472 (9th Cir. 2011); *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006) (successfully challenging the so-called “State Petitions Rule” for roadless area protection of Forest Service lands), *aff'd*, 575 F.3d 999 (9th Cir. 2009); *Nw. Ecosystem All. v. Rey*, 380 F. Supp. 2d 1175, 1197–98 (W.D. Wash. 2005) (successfully challenging a government attempt to eliminate the “survey and manage” rules of the Northwest Forest Plan); *Fund For Animals v. Norton*, 294 F. Supp. 2d 92, 96–97, 114–15 (D.D.C. 2003) (successfully challenging an attempt by the Secretary of the Interior to overturn a ban on snowmobiles in Yellowstone National Park), *enforcement denied*, 390 F. Supp. 2d 12 (D.D.C. 2005).

NEPA, and Congress seemed prepared to dilute NEPA's application to public land developments as well.<sup>18</sup>

The Trump revolution's threat to substantially increase fossil fuel production from federal lands will increase use-monopolies, since mineral leasing is often incompatible with wildlife and water-quality protection.<sup>19</sup> Revising land plans to allow for more leasing and diminish sage grouse protection would reflect the ascendancy of states' rights in public land law, at least where the plans serve local commodity production interests.<sup>20</sup> These results would carry some significant democratic irony, since the rural economic interests arguably served by these developments are vastly outnumbered by urban preservationist concerns in western cities, and the West is the most urbanized region of the country.<sup>21</sup>

This Article considers the Trump revolution in public land law from three primary perspectives. First, we examine the Trump attack on the national monuments, which is arguably grounded on a mistaken assumption of presidential authority under the Constitution's Property Clause. Second, we explain the demise of revised BLM planning regulations and the impending revisions of Federal Land Policy and Management Act<sup>22</sup> (FLPMA) land plans affecting sage grouse, for they reveal an Administration which considers parts of the public—those with substantial local clout in rural areas—to be more important than the more numerous recreational and preservationist community that public lands serve. Third, we assess measures affecting leasing of public lands for fossil fuel production, where the Trump Administration's policies will have their most immediate effects.

Although President Trump signaled some time ago that he did not support public land sales,<sup>23</sup> he made no promise not to despoil them. He seems to be prepared to make public land mineral leasing and the creation of accompanying use-monopolies on public lands the centerpiece of his version of energy dominance.<sup>24</sup> This Article concludes that if the Trump revolution's efforts to increase commodity production on federal public lands succeed, the result will mark a fundamentally undemocratic redefinition of "the public" in public land law.

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<sup>18</sup> See *infra* notes 298–300 and accompanying text.

<sup>19</sup> *Effects on Resources*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/87AM-FZWS> (last updated Nov. 10, 2016).

<sup>20</sup> See Scott Streater, *States Meet with Zinke Panel on Changes to Federal Plans*, E&E NEWS: GREENWIRE (July 12, 2017), <https://perma.cc/YRU6-VBH4>.

<sup>21</sup> See *infra* note 33 and accompanying text (describing overwhelming public sentiment favoring retention of national monuments); see also RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 184, 391 (1991) (describing how the West became the most urbanized region of the country beginning in the 1880s); William M. Salka, *Urban-Rural Conflict Over Environmental Policy in the Western United States*, 31 AM. REV. PUB. ADMIN. 33, 34 (2001).

<sup>22</sup> Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1787 (2012).

<sup>23</sup> Reena Flores, *Donald Trump: Don't Hand Federal Lands to States*, CBS NEWS (Jan. 23, 2016), <https://perma.cc/NW5P-8ZWT>.

<sup>24</sup> See Tom DiChristopher, *Trump Wants America To Be 'Energy Dominant.' Here's What That Means*, CNBC (June 28, 2017), <https://perma.cc/6H9F-E8HF>.

## II. ATTACKING NATIONAL MONUMENTS

The Antiquities Act of 1906<sup>25</sup> authorizes the President to establish national monuments on federal lands to protect significant natural, cultural, or scientific features.<sup>26</sup> Over the years, nearly every president since Theodore Roosevelt has invoked the statute to protect federal lands of historical, scientific, and ecological interest.<sup>27</sup> Monuments have been as large as the Grand Canyon and have protected fish habitat as well as historic objects, both of which have been upheld by the United States Supreme Court.<sup>28</sup> Some Antiquities Act reservations proved to be controversial, as in the case of Jackson Hole.<sup>29</sup> Many more have been spectacular successes, evidenced by their frequent subsequent ratification by Congress as national parks.<sup>30</sup> No court has ever invalidated a monument proclamation for being in excess of the authority Congress delegated in the 1906 statute.

Despite the significant conservation achievements of the Antiquities Act, President Trump issued Executive Order 13792 in April 2017, directing

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<sup>25</sup> 54 U.S.C. §§ 320301–320303 (Supp. II 2015). For the definitive legal study of the statute's first century, see Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473 (2003).

<sup>26</sup> 54 U.S.C. § 320301(a)–(b) (“The President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments . . . [and] may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”).

<sup>27</sup> Sixteen presidents have used the Antiquities Act to designate 157 national monuments. *See infra* app. (listing all monuments proclaimed since 1978); *see also* Jayni Foley Hein, *Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, 48 ENVTL. L. 125, 126–27 (2018); Olivia B. Waxman, *The Real History of the Law Behind President Trump’s Executive Order on National Monuments*, TIME (Apr. 26, 2017), <https://perma.cc/3W56-9GSJ>. For a detailed history of the Antiquities Act, see THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION (David Harmon et al. eds., 2006).

<sup>28</sup> *See, e.g.*, *Cappaert v. United States*, 426 U.S. 128, 147 (1976) (upholding the Devil’s Hole National Monument and its fish protection purpose); *Cameron v. United States*, 252 U.S. 450, 457–58 (1920) (upholding the designation of the Grand Canyon National Monument, in a suit by former Territorial Representative and future Senator Ralph Cameron).

<sup>29</sup> *See* Lisa Raffensperger, *The Highs and Lows of the Antiquities Act*, NAT’L PUB. RADIO (May 23, 2008), <https://perma.cc/KMQ8-47KH>. The Jackson Hole National Monument, proclaimed by President Franklin Roosevelt in 1943, was bitterly opposed by local cattle ranchers, who, heavily armed and led by Hollywood actor Wallace Beery, protested by driving over 500 cattle across the monument without a federal permit just months of the establishment of the monument. Nonetheless, within seven years Congress incorporated the monument into Grand Teton National Park. *See* DOUGLAS BRINKLEY, *RIGHTFUL HERITAGE: FRANKLIN D. ROOSEVELT AND THE LAND OF AMERICA* 544–48 (2016); Michael C. Blumm, *The Nation’s First Forester-in-Chief: The Overlooked Role of FDR and the Environment*, 33 J. LAND USE & ENVTL. L. 25 (2017) (reviewing BRINKLEY, *supra*).

<sup>30</sup> Michael Blumm & Hillary Hoffmann, Op-Ed, *Obama’s National Monument Designations Were Lawful, Not Land Grabs*, L.A. TIMES (Jan. 23, 2017), <https://perma.cc/NK8H-TFWK>; Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, NAT’L PARK SERV., <https://perma.cc/R3BB-A6F6> (last modified Mar. 5, 2005). Some fifty-two national monuments are now national parks. *See infra* note 88 and accompanying text.

Interior Secretary Ryan Zinke to review monuments over 100,000 acres established during the previous twenty years and those created or expanded “without adequate public outreach and coordination with relevant stakeholders” that “may also create barriers to achieving energy independence, restrict public access to and use of Federal lands, burden State, tribal, and local governments, and otherwise curtail economic growth.”<sup>31</sup> The executive order did instruct the Secretary to act “consistent with law,” and the text of the Antiquities Act includes none of the directives contained in the Trump executive order.<sup>32</sup>

Secretary Zinke proceeded to evaluate twenty-seven monuments; his review generated some two million public comments, 98% of which were opposed to making any changes to them.<sup>33</sup> Despite the overwhelming public opposition to reducing their size, Secretary Zinke recommended downsizing several monuments.<sup>34</sup> In October 2017, the Interior Department released its

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<sup>31</sup> See Exec. Order No. 13,792, 82 Fed. Reg. 20,429, 20,429 (May 1, 2017) (signed Apr. 26, 2017). The President’s order was riddled with inaccuracies and erroneous assumptions. See Jonathan Thompson, *Fact-Checking Trump’s Antiquities Act Order*, HIGH COUNTRY NEWS (Apr. 26, 2017), <https://perma.cc/8P4W-L7GU> (pointing out errors in the order and in statements by its chief congressional supporter, Senator Orrin Hatch (R-Utah), concerning public participation, local involvement, effects on school financing, “locking away” one-quarter of the land of San Juan County, and allegedly putting over 265 million acres of land under federal control). The largest newspaper in Utah called upon Senator Hatch to retire in part due to his role in diminishing the monuments, claiming that the actions had “no constitutional, legal or environmental logic.” Andr Chung, Editorial, *Why Orrin Hatch Is Utahn of the Year*, SALT LAKE TRIB. (Dec. 25, 2017), <https://perma.cc/S6QA-FMDY> (citing Hatch’s role in the tax bill and his “utter lack of integrity” and noting that “man of the year” could be for ill deeds as well as good ones).

<sup>32</sup> Exec. Order No. 13,792, 82 Fed. Reg. at 20,430 (“The final report shall include recommendations for such Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out the policy set forth in section 1 of this order.”).

<sup>33</sup> See generally Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment, 82 Fed. Reg. 22,016 (May 11, 2017); Jennifer Yachnin, *Public Comments Flood Interior as Deadline Nears*, E&E NEWS PM (July 10, 2017), <https://perma.cc/4MF9-XEXR>. Although the Department of the Interior announced that the public submitted about 1.3 million comments, environmental groups claimed there were more than 2.5 million comments. See Valerie Volcovici, *U.S. Interior Department Receives Over 2 Million Comments on Monument Review*, REUTERS, July 11, 2017, <https://perma.cc/X8ZW-5DZY>.

<sup>34</sup> Secretary Zinke’s report of August 2017 contained no specifics released to the public about which monuments would have their boundaries reduced. But reports later surfaced indicating that the Secretary recommended at least three monuments for boundary reduction: Bears Ears, Cascade-Siskiyou, and Grand Staircase-Escalante (proclaimed by President Clinton in 1996). See Juliet Eilperin & Darryl Fears, *Interior Secretary Recommends Trump Alter at Least Three National Monuments, Including Bears Ears*, WASH. POST (Aug. 24, 2017), <https://perma.cc/SR6C-TU6X>. Later, reports indicated that as many as six monuments would be downsized. See, e.g., Kate Schimel & Rebecca Worby, *Details Emerge on Proposed Monument Cutbacks*, HIGH COUNTRY NEWS (Aug. 24, 2017), <https://perma.cc/Y8XV-B7AL>; Jennifer Yachnin, *Zinke Recommends Shrinking as Many as 6 Sites*, E&E NEWS: GREENWIRE (Sept. 18, 2017), <https://perma.cc/9DFH-FVTN> (also including Gold Butte National Monument in Nevada as well as two marine monuments slated for downsizing and recommending management changes to four other monuments). President Trump’s proclamations of December 4, 2017, however, only



final report on energy burdens, another response to the Trump executive order.<sup>35</sup> The report called for agency initiatives to alleviate or eliminate agency actions inhibiting energy development, and perhaps unsurprisingly, recommended a long list of policies to facilitate development of oil and gas.<sup>36</sup> On December 4, 2017, President Trump proceeded to slash the size of Bears Ears National Monument by 85% and cut the size of Grand-Staircase Escalante by nearly one-half.<sup>37</sup>

Presidential authority over public lands involves the Constitution's Property Clause, which allocates *exclusive* authority to Congress and doesn't mention executive authority.<sup>38</sup> The Supreme Court has uniformly held that the Property Clause is "without limitation."<sup>39</sup> Thus, presidential authority over public lands must be the product of delegations from Congress. Congress included no grant of presidential authority to revoke or substantially diminish national monuments in the Antiquities Act.<sup>40</sup>

Whether one president may revoke a monument proclaimed by his predecessor was raised in 1938 by Franklin Delano Roosevelt (FDR) concerning the Castle-Pinckney National Monument in South Carolina, established by Calvin Coolidge a decade before.<sup>41</sup> Attorney General Homer Cummings, in a formal opinion, instructed FDR that he lacked revocation

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reduced the size of the Bears Ears and Grand Staircase-Escalante Monuments. *See infra* notes 37, 65 and accompanying text.

<sup>35</sup> *See* U.S. DEP'T OF THE INTERIOR, FINAL REPORT: REVIEW OF THE DEPARTMENT OF THE INTERIOR ACTIONS THAT POTENTIALLY BURDEN DOMESTIC ENERGY 3 (2017), <https://perma.cc/56HK-V77W>.

<sup>36</sup> *Id.* at 4–5.

<sup>37</sup> *See* Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 8, 2017) (signed Dec. 4, 2017); Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 8, 2017) (signed Dec. 4, 2017); *see* Jennifer Yachnin, *Trump Slashes 2 Utah Sites*, E&E NEWS: GREENWIRE (Dec. 4, 2017), <https://perma.cc/S7K6-U67V> (discussing the President's plan to divide Bears Ears, formerly 1.35 million acres, into two smaller sites (the Indian Creek Unit, with 72,000 acres, and the Shash Jaa Unit, with 130,000 acres) and to divide Grand Staircase-Escalante into three smaller units (the Grand Staircase Unit, with 210,000 acres; the Kaiparowitz Unit, with 551,000 acres; and the Escalante Canyons Unit, with 243,000 acres)); *see also infra* note 65 and accompanying text.

<sup>38</sup> U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917) ("Not only does the Constitution commit to Congress the power 'to dispose of and make all needful rules and regulations respecting' the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in land belonging to the United States be acquired." (citation omitted)).

<sup>39</sup> *See, e.g.*, *United States v. City & County of San Francisco*, 310 U.S. 16, 29–30 (1940); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840); *see also* Michael C. Blumm & Olivier Jamin, *The Property Clause and Its Discontents: Lessons from the Malheur Occupation*, 43 *ECOLOGICAL L.Q.* 781, 798–805 (2016) (discussing the Supreme Court's Property Clause interpretations).

<sup>40</sup> The language of the statute, *supra* note 26, authorizes the President to declare or reserve monuments but not to modify or revoke them.

<sup>41</sup> Proclamation No. 1713, 43 Stat. 1968 (1924).

authority.<sup>42</sup> The Cummings opinion reflected the Constitution's allocation of authority between the executive and legislative branches, examining public land statutes Congress enacted during the Antiquities Act's era—including the 1897 Organic Act<sup>43</sup> for national forests and the 1910 Pickett Act<sup>44</sup> for lands outside national forests—in which revocation authority was specifically granted to the executive.<sup>45</sup> The opinion contrasted these statutes with the Antiquities Act, which included no express revocation authority.<sup>46</sup> Since the Supreme Court has repeatedly ruled that the Property Clause gives Congress plenary authority over federal public lands,<sup>47</sup> executive authority over public lands must be authorized by Congress. With no express authority for revocation in the Antiquities Act, the Attorney General was justified in concluding that the President lacked that authority.

The question of the President's ability to modify monument boundaries was not at issue in the Cummings opinion, and presidents later did modify several monuments, including FDR's modification of the Grand Canyon and Olympic monuments,<sup>48</sup> and John F. Kennedy's modification of Bandelier

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<sup>42</sup> See Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 186–87 (1938). For some reason, the Cummings' opinion is not available on the Department of Justice's website, which usually contains all Attorney General opinions.

<sup>43</sup> Act of June 4, 1897, ch. 2, 30 Stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473–482, 551 (2012)).

<sup>44</sup> Act of June 25, 1910, ch. 421, 36 Stat. 847 (repealed 1976).

<sup>45</sup> Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 58 (2017); see Mark Squillace, *The Looming Battle over the Antiquities Act*, HARV. L. REV. BLOG (Jan. 6, 2018), <https://perma.cc/T9TF-5R6D> (discussing past controversies over the use of the Antiquities Act in some detail); see also Sean B. Hecht & John Ruple, Opinion, *Congressional Attack on National Monuments Ignores America's Conservation History*, HILL (Oct. 16, 2017), <https://perma.cc/YNR2-AVDM> (criticizing H.R. 3990, a bill that would make it harder for presidents to create new monuments and expressly authorize reductions in size as being grounded on the mistaken belief that Congress never intended the Antiquities Act to authorize protection of “natural geographic features” when the historical record shows otherwise); Adam M. Sowards, *Reckoning with History: The Antiquities Act Quandary*, HIGH COUNTRY NEWS (Feb. 22, 2018), <https://perma.cc/P5JT-EUQ2> (discussing controversies over the Jackson Hole monument and Alaska monuments).

<sup>46</sup> Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. at 188 (noting that both statutes not only authorized the President to withdraw public lands for particular purposes but also gave the President authority to revoke and/or modify the withdrawals); Squillace et al., *supra* note 45, at 58 (“Unlike the Pickett Act and the Forest Service Organic Administration Act, the Antiquities Act withholds authority from the President to change or revoke a national monument designation.”); see also ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS 3–4 (2016), <https://perma.cc/QJ6B-HWY8>.

<sup>47</sup> U.S. CONST. art. IV, § 3, cl. 2 (language reprinted *supra* note 38); see *supra* notes 38–39 and sources cited therein (Supreme Court interpretations).

<sup>48</sup> See Proclamation No. 2393, 3 C.F.R. § 32 (Supp. 1940) (excluding approximately 71,854 acres from the Grand Canyon National Monument). Today the national park comprises more than 1.2 million acres. NAT'L PARK SERV., 2016 PARK PROFILE 1, <https://perma.cc/L55K-LTE6> (last visited Apr. 7, 2018). FDR transferred the Olympic Monument to the National Park Service in 1933, and it became a national park in 1938. FDR then extended the park boundaries in both 1940 and 1943. See GUNNAR O. FAGERLUND, OLYMPIC NATIONAL PARK (1954), <https://perma.cc/9NLY-X74S> (ebook). FDR's role in establishing national monuments was

monument.<sup>49</sup> But in 1976, in FLPMA Congress seemed to foreclose any implied presidential authority to revoke or modify the boundaries of national monuments.<sup>50</sup>

Presidents Clinton and Obama invoked the Antiquities Act with some frequency. Clinton established nineteen monuments, the most controversial of which was the Grand Staircase-Escalante in 1996.<sup>51</sup> The state government in Utah, if not its populace, has sought a recession of that monument and

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considerable. See BRINKLEY, *supra* note 29, at app. C (cataloguing the twenty-nine national monuments and parks (the latter all approved by Congress) during FDR's Administration).

<sup>49</sup> See Proclamation No. 3539, 3 C.F.R. § 62 (Supp. 1963) (adding one parcel of land and excluding another at Bandelier National Monument).

<sup>50</sup> See *id.* § 1714(j) (“The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments under the [Antiquities Act].”); see also *infra* notes 72–76 and accompanying text. The legislative history makes clear that section 204(j) was part of a plan to constrain executive branch withdrawal authority, and instead exclusively reserve to Congress the power to modify or revoke monument legislations. For a detailed explanation of the legislative history, see Squillace et al., *supra* note 45, at 60–64. The House Report describing section 204 explained that:

With certain exceptions, [the bill] will repeal all existing law relating to *executive authority* to create, modify, and terminate withdrawals and reservations. It would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, Indian reservations, certain defense withdrawals, and withdrawals for National Wild and Scenic Rivers, National Trails, and for other “national” recreation units, such as National Recreation Areas and National Seashores. *It would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act* and for modification and revocation of withdrawals adding lands to the National Wildlife Refuge System.

H.R. REP. NO. 94-1163, at 9 (1976) (emphasis added).

<sup>51</sup> Proclamation No. 6920, 3 C.F.R. § 64 (1997); see also Robert B. Keiter, *The Monument, the Plan, and Beyond*, 21 J. LAND RESOURCES & ENVTL. L., 521, 521–22 (2001). Studies show that although the Grand Staircase-Escalante designation may have cost about 600 coal mining jobs and about \$100 million in state and local tax revenue, the overall economic effect on the local communities was largely positive. See Phil Taylor, *Grand Staircase-Escalante Winners and Losers*, E&E NEWS: GREENWIRE (July 14, 2016), <https://perma.cc/QEL9-76SH> (also noting that 45% of Utah voters think the monument was a good thing, compared to 25% who said it was a bad thing. Businesses have experienced a 15%–20% growth since the creation of the monument. From 2001 to 2014, service jobs increased from 4,002 to 5,682; while farming, logging, manufacturing and mining jobs remained flat.); see also Blumm & Hoffmann, *supra* note 30 (noting that nearby population increased by 8%, jobs by 38% and real per capita by 30% in the years since the designation of Grand Staircase-Escalante, citing a study by Headwaters Economics).

gaining control over it for the last two decades.<sup>52</sup> Those efforts often rested on shaky legal grounds.<sup>53</sup>

Somewhat surprisingly, the Bush Administration defended the Clinton monuments, and uniformly succeeded.<sup>54</sup> No president has in fact attempted to rescind his predecessor's monument decisions, perhaps a reflection of the fact that FLPMA banned the executive from revoking or substantially modifying existing national monuments.<sup>55</sup> FLPMA did not attempt to curtail the President's authority to establish national monuments, and over the last four decades presidents have done so with some frequency.<sup>56</sup> We focus on two monument proclamations of President Obama: Bears Ears in southeastern Utah and Cascade-Siskiyou in southwestern Oregon and northern California.

### A. Bears Ears National Monument

In late 2016, President Obama established Bears Ears National Monument in southeastern Utah, a 1.35 million-acre area of deep sandstone canyons, desert mesas, and meadow mountaintops, constituting some of the

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<sup>52</sup> Rick Bowmer, *Strong Emotions Reignited on 20th Anniversary of Utah Monument*, CBS NEWS (Sept. 18, 2016), <https://perma.cc/4UU6-WJLF>. Mining companies have long tried to develop coal mining projects in the Kaiparowitz Plateau, where the Southern California Edison Company proposed building a 3,000 megawatt coal-fired electric plant in the 1970s. See Heidi McIntosh, Commentary, *Utah May Be Trading a Dinosaur Wonder for a Coal Mine*, SALT LAKE TRIB. (Aug. 24, 2017), <https://perma.cc/D5X5-MAK8>; Grace Lichtenstein, *Utah Eager for Big Power Plant*, N.Y. TIMES (Aug. 3, 1975), <https://perma.cc/C7U5-PCYR>.

<sup>53</sup> See Blumm & Jamin, *supra* note 39, at 816–17 (explaining that Utah's arguments based on "equal sovereignty" and "equal footing" had little judicial prospect, given the long history of Supreme Court decisions rejecting to expand the scope of these doctrines). See generally John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499 (2018) (providing a comprehensive history of public lands law, concluding that arguments for unconstitutionality reflect an incomplete, defective understanding of U.S. legal and political history; an extremely selective, skewed reading of numerous Supreme Court decisions and federal statutes; a misleading assertion that states have very limited governing authority over activities taking place on U.S. public lands; and even a misuse of the dictionary).

<sup>54</sup> See, e.g., *Tulare County v. Bush*, 306 F.3d 1138, 1140–42 (D.C. Cir. 2002) (rejecting the argument President Clinton did not identify "objects of historic and scientific interest" in establishing the Giant Sequoia National Monument); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1133–38 (D.C. Cir. 2002) (dismissing a suit challenging six western monuments designated by President Clinton).

<sup>55</sup> See Squillace et al., *supra* note 45, at 60–68; see also *infra* notes 72–76 and accompanying text. Some analysts who have claimed that the president does in fact have authority to modify or revoke monuments either ignore FLPMA, see JOHN YOO & TODD GAZIANO, AM. ENTER. INST., PRESIDENTIAL AUTHORITY TO REVOKE OR REDUCE NATIONAL MONUMENT DESIGNATIONS 1, 10, 19 (2017), or question whether courts will rely on the clear legislative history, see James R. Rasband, *Stroke of the Pen, Law of the Land?*, in PROCEEDINGS OF THE 63RD ANNUAL ROCKY MOUNTAIN MINERAL LAW INSTITUTE § 21.03 (Rocky Mountain Mineral Law Found., Special Inst. 2017) (concluding that the President lacks authority to revoke monuments but may modify their boundaries); Richard H. Seamon, *Dismantling Monuments 47–49* (Sept. 2, 2017) (unpublished manuscript), <https://perma.cc/UX78-ZCZW>.

<sup>56</sup> See Squillace, *supra* note 25, at 505–13; see also *infra* app.

most significant cultural landscapes in the United States.<sup>57</sup> According to the proclamation:

Abundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts provide an extraordinary archaeological and cultural record that is important to us all, but most notably the land is profoundly sacred to many Native American tribes, including the Ute Mountain Ute Tribe, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation, and Zuni Tribe.<sup>58</sup>

There is evidence of native habitation in the area as far back as 13,000 years ago.<sup>59</sup>

In 2015, an intertribal coalition of nearby tribes petitioned the President to use his Antiquities Act authority to protect the area, and President Obama's 2016 proclamation established an unprecedented intertribal commission to advise the federal management agencies—the U.S. Forest Service and the Bureau of Land Management—on a plan to govern the monument.<sup>60</sup> However, under Trump's 2017 executive order, the Secretary of Interior reviewed some twenty-seven large national monuments established during the previous two decades—including Bears Ears—which allegedly were created or expanded without adequate public involvement, restrict public access, or curtail energy production or economic growth.<sup>61</sup> Although none of these criteria are evident in the Antiquities Act,<sup>62</sup> and the Secretary received over 685,000 public comments in favor of maintaining the 2016

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<sup>57</sup> See generally Proclamation No. 9558, 3 C.F.R. § 402 (2017) (signed Dec. 28, 2016).

<sup>58</sup> The Bears Ears 2016 proclamation was almost lyrical:

Rising from the center of the southeastern Utah landscape and visible from every direction are twin buttes so distinctive that in each of the native languages of the region their name is the same: Hoon'Naqvut, Shash Jáa, Kwiyaqatu Nukavachi, Ansh An Lashokdiwe, or "Bears Ears." For hundreds of generations, native peoples lived in the surrounding deep sandstone canyons, desert mesas, and meadow mountaintops, which constitute one of the densest and most significant cultural landscapes in the United States.

*Id.*

<sup>59</sup> *Id.*; see Stephen Nash, *At Bears Ears in Utah, Heated Politics and Precious Ruins*, N.Y. TIMES (July 25, 2017), <https://perma.cc/S2NH-A4NH>; Charles Wilkinson, *The Proposed Bears Ears National Monument*, COLO. PLATEAU ADVOCATE MAG., <https://perma.cc/EP3L-WDFB> (last visited Apr. 7, 2018) (discussing the history of Bears Ears and the monument proposed by the coalition of Indian tribes).

<sup>60</sup> Mathew Gross, *Tribes Formally Present Bears Ears Proposal to Obama Administration*, S. UTAH WILDERNESS ALLIANCE, <https://perma.cc/N4ZD-FA3S> (last visited Apr. 7, 2018). For an insightful examination of the role of the tribal coalition in proposing the Bear Ears monument, see Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. (forthcoming 2018), <https://perma.cc/3HA5-LJ9H> (also explaining how conservation laws like the Antiquities Act historically divested tribes of their lands and resources—the "dark side of conservation history").

<sup>61</sup> See *supra* notes 31–36 and accompanying text (discussing Trump's executive order and ensuing actions).

<sup>62</sup> The Antiquities Act never mentioned "adequate public outreach," "energy independence," "curtail economic growth," or any other criteria presented by President Trump in the executive order. See 54 U.S.C. §§ 320301–320303 (Supp. II 2015).

monument,<sup>63</sup> in his August 2017 report to the President, Secretary Zinke recommended diminishing Bears Ears' boundaries by an uncertain amount.<sup>64</sup>

President Trump proceeded to substantially reduce the size of both Bears Ears and Grand Staircase-Escalante Monuments in December 2017, in a proclamation signed in the Utah state capitol that eliminated some two million monument acres, claiming that the cuts were "so important for states' rights," and that distant bureaucrats in Washington, D.C. "don't know your [sic] land, and . . . don't care for your land like you do."<sup>65</sup> Although there

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<sup>63</sup> Virginia Cramer, *More Than 685,000 Comments Submitted in Support of Bears Ears National Monument in Less Than 15 Days*, SIERRA CLUB (May 25, 2017), <https://perma.cc/JVW5-JM7E>.

<sup>64</sup> See *supra* note 34 and accompanying text. Zinke's report charged that "modern uses" of the Antiquities Act have not "clearly and consistently defined [the] objects" to be protected and objected to the protection of viewsheds and watersheds as beyond the statutory authority, apparently as not being "objects of historic and scientific interest." Memorandum for the President from Ryan K. Zinke, Sec'y of the Interior, on the Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act 6-7 (Dec. 5, 2017), <https://perma.cc/2SXQ-TLBZ> [hereinafter Zinke Report] (claiming that landscape designations unnecessarily restrict traditional land uses like "grazing, timber production, mining, fishing, hunting, recreation, and other cultural uses").

Zinke was particularly concerned about potential grazing restrictions (even though he acknowledged that it was "uncommon" for monument proclamations to prohibit grazing), restrictions on motorized vehicle access, "a perception by private inholders that their land is also encumbered by monument designations" that might "limit access to their land and economic activity outside of their lands" (without providing any examples), and the apparently outsized influence of "well-funded" non-governmental organizations favoring monument designations, which contributed some 2.6 million comments, far outnumbering "local voices." *Id.* at 7-9. He even suggested that monuments created problems for access to and protection of tribal sacred sites and "wood gathering to be undertaken by motorized vehicles," ignoring the fact that a coalition of tribes proposed the Bears Ears monument. *Id.* at 9. Zinke also maintained that the Bear Ears monument "contains many objects that are common or otherwise not of particular scientific interest." *Id.* at 10. He faulted the expanded Cascade-Siskiyou monument for containing an alleged 30% private lands within its "exterior boundary," for including a "substantial number" of federal Oregon and California lands managed by BLM (claiming these lands were set aside for "permanent forest production," but see *infra* notes 104-111 and accompanying text), for grazing buy-outs (failing to explain that these were from willing sellers), and for limiting off-road vehicles (complaining about the lack of suitable roads, due to a lack of maintenance). *Id.* at 11.

<sup>65</sup> Remarks on Signing Proclamations Affecting Prior Designations Under the American Antiquities Act of 1906 in Salt Lake City, Utah, 2017 DAILY COMP. PRES. DOC. 1 (Dec. 4, 2017); see Jennifer Yachnin, *Shrinking Sites Vital for States' Rights—Trump*, E&E NEWS: GREENWIRE (Dec. 4, 2017), <https://perma.cc/C62J-SBD9> (quoting Trump); Yachnin, *supra* note 37 (quoting Trump); see also *supra* note 37 and accompanying text (detailing Trump's proclamation). Within days of the Trump proclamation, it appeared likely that the operator of the nation's only uranium processing mill would file new uranium mining claims in the area. See Jennifer Yachnin, *Former Bears Ears Land Could Be Open for Uranium Mining*, E&E NEWS: GREENWIRE (Dec. 11, 2017), <https://perma.cc/ND5S-YLBD> (citing a *Washington Post* story). For a summary of the long and sorry story of uranium mining on tribal lands nearby, especially on the Navajo reservation, see generally Jacqueline Keeler, *Trump's Message for Tribes: Let Them Eat Yellowcake*, HIGH COUNTRY NEWS (Dec. 12, 2017), <https://perma.cc/UX7A-EZ8W> (noting that the Utah legislature claimed that the monument would destroy the uranium industry in the state, presumably out of fear that the monument plan would restrict hauling of uranium through the monument to and from the White Mesa Uranium Mill). Senator Bishop, a strong opponent of the Bears Ears designation, announced plans to fast-track legislation that would codify President Trump's

is little question that Congress may revoke or diminish monuments, the authority of a president to do so is open to serious legal question.<sup>66</sup>

First, there is the 1938 Cummings opinion, rejecting presidential revocation authority because the Antiquities Act lacked an express grant of that authority.<sup>67</sup> Until 2017, all presidents since 1938 had abided by the opinion; no president has attempted to revoke a monument in the years since. As the definitive executive interpretation on presidential revocation authority, it is hard to justify action inconsistent with its reasoning. At a minimum, it would seem that the attorney general would have to revoke the eighty-year old opinion before attempting to justify revocation of a monument to a court.

Second, the 1976 enactment of FLPMA signaled the official end of the federal land disposition era,<sup>68</sup> as Congress declared that the nation would

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massive reduction of the monument. *See* Kellie Lunney, *Bears Ears Bill Markup Will Happen Before Feb. 14 — Bishop*, E&E NEWS DAILY (Jan. 10, 2018), <https://perma.cc/7R22-BD6M>. Tribal leaders denounced the Republican plans as marking “a return to the 1800s when the United States would divide tribes and pursue its own objectives by cherry-picking tribal members it wanted to negotiate with.” Jennifer Yachnin & Kellie Lunney, *Cuts to Bears Ears Signal ‘Return to the 1800s’ — Tribal Leaders*, E&E NEWS PM (Jan. 9, 2018), <https://perma.cc/W3HJ-RELH>.

<sup>66</sup> On the day of Trump proclamations reducing the size of Bears Ears and Grand Staircase-Escalante, ten environmental groups filed suit, and five tribes followed with a separate suit. *See* Jennifer Yachnin, *Lawsuits Begin After Trump Pares 2 Sites*, E&E NEWS PM (Dec. 4, 2017), <https://perma.cc/PA5G-SAKB>. In all, environmentalists and tribes filed five separate suits in the federal District Court for the District of Columbia, three challenging the Bears Ears diminishment and two challenging the Grand Staircase-Escalante diminishment. *See* Courtney Tanner, *Here’s a Breakdown of the 5 Lawsuits Filed Against Trump That Challenge His Cuts to 2 Utah National Monuments*, SALT LAKE TRIB. (Dec. 11, 2017), <https://perma.cc/VRS8-9UQ7>; *see also* Hillary Hoffmann, *Grand Staircase-Escalante and Bears Ears National Monuments Litigation*, ENVTL. L. PROF. BLOG (Dec. 5, 2017), <https://perma.cc/6K3D-NQ3U> (describing the claims made in three of the suits).

The legal case against diminishing or revoking monuments is sketched in several analyses. *See, e.g.*, Nicholas Bryner et al., *President Trump’s National Monument Rollback Is Illegal and Likely To Be Reversed in Court*, LEGAL PLANET (Dec. 4, 2017), <https://perma.cc/JBE4-W55P>; *see also* BRUCE FEIN & W. BRUCE DELVALLE, *DISTORTING THE ANTIQUITIES ACT TO AGGRANDIZE EXECUTIVE POWER—NEW WINE IN OLD BOTTLES 3* (2017), <https://perma.cc/Y7SH-MLUM> (claiming that President Trump’s rollback of the monuments was unconstitutional because the Property Clause of the Constitution requires an explicit delegation from Congress with intelligible standards); ROBERT ROSENBAUM ET AL., *ARNOLD & PORTER KAYE SCHOLER, THE PRESIDENT HAS NO POWER UNILATERALLY TO ABOLISH OR MATERIALLY CHANGE A NATIONAL MONUMENT DESIGNATION UNDER THE ANTIQUITIES ACT OF 1906*, at 1, 15 (2017), <https://perma.cc/8ZL3-BMXB>; Jake Bullinger, *Trump Will Have a Hard Time Shrinking the Monuments*, OUTSIDE (Sept. 8, 2017), <https://perma.cc/RSC9-GPC7> (discussing reasons why shrinking four national monuments slated for reductions will be legally problematic); Squillace et al., *supra* note 45, at 59–64 (construing section 204 of FLPMA); *infra* note 73 and sources cited therein. Former Secretary of Interior Bruce Babbitt, who was involved in the Grand Staircase-Escalante monument proclamation, charged that Congress had approved the monument boundaries in a complex land exchange agreement under which Congress authorized a \$50 million payment to the state of Utah and granted the state some 145,000 acres while adding roughly 400,000 acres of state land to the monument. *See* Jennifer Yachnin, *Bruce Babbitt Dings Trump Admin Over Review*, E&E NEWS: GREENWIRE (Aug. 29, 2017), <https://perma.cc/NMF2-RZPB>.

<sup>67</sup> *See supra* notes 38–46 and accompanying text.

<sup>68</sup> Large-scale disposition of public lands actually ended with the enactment of the 1934 Taylor Grazing Act, 43 U.S.C. §§ 315 to 315o-1 (2012), and the ensuing executive orders by

largely retain its federal public lands.<sup>69</sup> A primary purpose of FLPMA was to reassert Congress's Article IV authority to control the management of federal lands, so it expressly repealed the President's implied authority to withdraw lands from the operation of public land statutes.<sup>70</sup> This reassertion of congressional control included the revocation of numerous public land statutes—but not the Antiquities Act.<sup>71</sup> A fair reading of FLPMA suggests that any presidential action concerning Article IV federal property must be the product of express congressional delegation, not, as in the case of modification or revocation of national monuments, implied from congressional silence.

Third, in section 204(j) of FLPMA, in somewhat confusing language, Congress expressly forbade the modification or revocation of national monuments.<sup>72</sup> That provision refers to “the Secretary” because, in an early version of the bill that ultimately became FLPMA, the House of Representatives would have reassigned the authority to declare national monuments from the President to the Secretary.<sup>73</sup> After Congress abandoned that effort, section 204(j) should have been amended to reflect that fact, but in a drafting error it was not.<sup>74</sup> However, the legislative history makes quite

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President Roosevelt. See GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 96 (7th ed. 2014).

<sup>69</sup> 43 U.S.C. § 1701(a)(1) (declaring that “the public lands be retained in Federal ownership, unless as a result of [FLPMA’s land-planning processes], it is determined that disposal of a particular parcel will serve the national interest”).

<sup>70</sup> Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976) (repealing “the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (*U.S. v. Midwest Oil Co.*, 236 U.S. 459)”).

<sup>71</sup> *Id.* § 702 (repealing laws relating to “homesteading and small tracts”); *id.* § 703 (repealing relating to disposals); *id.* § 704 (repealing statutes related to withdrawals); *id.* § 705 (repealing statutes relating to the “administration of public lands”).

<sup>72</sup> 43 U.S.C. § 1714(j) (quoted *supra* note 50).

<sup>73</sup> See Squillace et al., *supra* note 45, at 59–63. There are several other recent analyses concluding that the President lacks authority to modify or revoke monuments. In addition to the articles cited *supra* note 66, see, e.g., PAMELA BALDWIN, CONG. RESEARCH SERV., RS20647, *AUTHORITY OF A PRESIDENT TO MODIFY OR ELIMINATE A NATIONAL MONUMENT* (2000), <https://perma.cc/R65C-FLSV> (agreeing that the best interpretation of FLPMA was that it removed the President’s authority to modify or revoke monuments); Bruce Fein, *The Antiquities Act of 1906: No President Is Licensed to Revoke National Monuments*, WASH. TIMES (Aug. 1, 2017), <https://perma.cc/9VYA-A7CR> (giving a surprising conclusion from a conservative legal analyst); see also Jedediah Purdy, *Whose Lands? Which Public? Trump’s National Monument Proclamations and the Shape of Public-Lands Law* 48–49 (Duke Law Scholarship Repository, Working Paper, 2018), <https://perma.cc/LLJ4-W9TA> (concluding that construing the Antiquities Act to authorize presidential power to diminish or abolish national monuments would be “a dramatic anomaly in public-lands law,” and therefore should be considered to be ultra vires, as such actions are reserved to Congress; also noting that the Trump proclamations are throwbacks to an era of “opportunism and favoritism” in the allocation of public resources); Robert B. Keiter et al., *Shrinking and Altering National Monuments: Experts Assess Interior Secretary Zinke’s Proposals*, CONVERSATION (Sept. 27, 2017), <https://perma.cc/7TW9-J544>. Contrary views are expressed in the sources cited *supra* note 55.

<sup>74</sup> See Squillace et al., *supra* note 45, at 64 n.37 (“But whether the reference to the Secretary in Section 204(j) was a drafting error, or simply a clarification about the limits of the Secretary’s power under Section 204(a) does not really matter because either interpretation is consistent



clear that Congress intended to restrict presidential authority.<sup>75</sup> Section 204(j) thus not only adopted the Cummings Attorney General’s opinion but also extended the restriction on presidential authority to monument modifications.<sup>76</sup>

Consequently, whether President Trump possesses the authority to reduce the size of Bears Ears by 85%, thereby undermining the historic and scientific objects and values for which it was proclaimed, is hardly clear. The President’s claim that the size of the monument violated the Antiquities Act language restricting monuments to “the smallest area compatible with the proper care and management of the objects to be protected”<sup>77</sup> has no successful judicial precedent and considerably contrary authority.<sup>78</sup> And since the Obama proclamation deleted some 550,000 acres from that proposed by the tribes, the President was obviously sensitive to the statutory language of the “smallest area compatible.”<sup>79</sup>

President Trump’s allegation that the establishment of Bears Ears took place with a lack of public involvement in the process is belied by the fact that local tribes proposed the monument, and its proclamation established an unprecedented inter-tribal council to influence the monument’s plan, which its federal land managers will develop.<sup>80</sup> The public process leading to the Bears Ears designation was clearly in excess of what the Antiquities Act

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with the conclusion that Congress intended to reserve for itself the power to modify or revoke national monuments.”).

<sup>75</sup> See H.R. REP. NO. 94-1163, at 9 (1976) (quoted *supra* note 50).

<sup>76</sup> In addition, amendments to the National Park Service Organic Act, 54 U.S.C. §§ 100101, 100301–100303, 100751–100753, 102101 (Supp. II 2015), announced that those national monuments managed by the National Park Service are united with national parks under “cumulative expressions of a single national heritage.” *Id.* § 100101(b)(1)(B). The protection, management, and administration of the system of parks and monuments must “be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress.” *Id.* § 100101(b)(2).

<sup>77</sup> 54 U.S.C. § 320301(b).

<sup>78</sup> See, e.g., *Cameron v. United States*, 252 U.S. 450, 463–64 (1920) (approving over 1.2 million of acres for Grand Canyon National Park). The Alaska monuments proclaimed by President Carter all involved considerably larger areas. See *infra* app. They were judicially upheld in *Alaska v. Carter*, 462 F. Supp. 1155, 1165 (D. Alaska 1978) and *Anaconda Copper Co. v. Andrus*, No. A79-161, 1980 U.S. Dist. LEXIS 17861, at \*9–10 (D. Alaska 1980).

<sup>79</sup> 54 U.S.C. § 320301(b). President Obama’s decision to cut down 550,000 acres from the original proposal was in response to political opposition and sought to make the designation compatible with the “smallest area compatible language” by keeping some lands open to uranium mining. See Jonathan Thompson, *Was the Bears Ears Designation a Victory?*, HIGH COUNTRY NEWS (Jan. 23, 2017), <https://perma.cc/S4W2-5LM6>.

<sup>80</sup> Proclamation No. 9558, 82 Fed. Reg. 1139, 1143 (Jan. 5, 2017) (“The Bears Ears area has been proposed for protection by members of Congress, Secretaries of the Interior, State and tribal leaders, and local conservationists for at least 80 years.”); Gross, *supra* note 60. In stark contrast, President Trump’s proclamation modifying Bears Ears mentions no cooperation or participation by tribal leaders or the public, focusing almost exclusively on the “smallest area compatible” language of the Antiquities Act. See *generally* Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 8, 2017).

requires.<sup>81</sup> The fact that there was some local opposition to the Bears Ears designation does not mean that there was no effort at public outreach.<sup>82</sup> In any event, no court has ever ratified a monument diminishment by a president.<sup>83</sup>

Finally, although not relevant to the authority of the President to rescind or modify a monument, claims that monuments damage local economies are inconsistent with available evidence. For example, opposition to the designation of the Grand Staircase-Escalante National Monument in 1996 was based on fears that the monument would prove to be economically costly, but a recent study showed that in the two decades following the proclamation the neighboring counties experienced a 13% growth in population, a 24% increase in jobs, and a 17% rise in per capita income.<sup>84</sup> Moreover, the Utah Tourism Bureau trumpets the so-called

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<sup>81</sup> See Phil Taylor, *Meet the Advisers Driving Obama's Monuments Agenda*, E&E NEWS: GREENWIRE (May 25, 2016), <https://perma.cc/7B77-TL3Z>. The Antiquities Act requires no public participation prior to designation, and the fact that the statute empowers the President to declare monuments has led courts to conclude that the public processes required by NEPA are inapplicable to monument designations. See WYATT, *supra* note 46, at 2 (noting NEPA applies to the actions of federal agencies, but not the President). Although the Antiquities Act requires no public processes prior to designation, Secretary Zinke promised widespread public involvement prior to recommending any changes to monument boundaries, a promise he did not keep. See Zoë Carpenter, *After Promising a 'Fair Hearing' on Monuments, Secretary Zinke Shuts Out the Public*, NATION (May 18, 2017), <https://perma.cc/5DLJ-CG9A>. Zinke claimed at the signing proclamations in Salt Lake City that they gave “rural America a voice—in giving the great state of Utah a voice—on how and when and what and why we love our lands and giving the local voice back to America.” Yachnin, *supra* note 66 (also describing suits filed by environmental groups and Indian tribes challenging the proclamations and praise of the reductions from the National Cattlemen’s Beef Association and the Public Lands Council).

<sup>82</sup> Secretary Zinke’s criticisms of the public involvement leading to the Bears Ears designation included an allegation that an elected county commissioner from San Juan County, a Native American, should have been included in the inter-tribal council created by the proclamation, reflecting a shocking lack of understanding of tribal sovereignty from the federal trustee. The fact that a county commissioner is a tribal member does *not* mean she represents her tribe. Tribal representatives are selected by tribes, as explained in comments of thirty-two law professors to Secretary Zinke on his effort to shrink the boundaries of Bears Ears. Letter from Sarah Krakoff, Professor, Univ. of Colo. Law Sch., et al., to Ryan Zinke, Sec’y of the Interior (July 7, 2017), <https://perma.cc/7JGQ-KK2C>.

<sup>83</sup> The only diminishments of national monuments were accomplished pre-FLPMA and went unchallenged. See Squillace et al., *supra* note 45, at 65–68.

<sup>84</sup> HEADWATERS ECON., GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT: A SUMMARY OF ECONOMIC PERFORMANCE IN THE SURROUNDING COMMUNITIES (2017), <https://perma.cc/BVJ7-DHC4>; see also Brian Maffly, *With Redraw of Bears Ears, Grand Staircase Looming, Utah State University Study Says National Monuments Are Neither Economic 'Boon nor Bane'*, SALT LAKE TRIB. (Aug. 23, 2017), <https://perma.cc/4MZ6-DPHM> (explaining a study by Utah State University economists); Kate Schimel & Rebecca Worby, *Details Emerge on Proposed Monument Cutbacks*, HIGH COUNTRY NEWS (Aug. 24, 2017), <https://perma.cc/6AN7-RCFH> (reporting slightly different figures than those mentioned in the text: a population increase in the counties bordering Grand-Staircase-Escalante since 2001 of 13%; an increase in jobs of 24%, with “[s]ervice jobs, such as doctors, lawyers, retail workers and tour guides, outnumbering non-service jobs, like those in mining and agriculture, four to one”). Interestingly, Secretary Zinke seemed to recognize the economic stimulus monument status can provide in other contexts. For example, he recommended to the President that lands in the Lewis and Clark National Forest in northwest Montana be designated as the Badger-Two Medicine national monument to

“Mighty 5”<sup>85</sup> national parks in the state, which attract several million tourists a year.<sup>86</sup> Four of those five national parks were converted by Congress from national monuments.<sup>87</sup> In all, Congress has converted fifty-two national monuments into national parks, a reflection of their widespread economic benefits.<sup>88</sup> The Bears Ears monument is much more likely to attract visitors in excess of what the underfunded federal managing agencies can effectively regulate than damage the local economy due to its monument status.<sup>89</sup>

### *B. Cascade-Siskiyou National Monument*

In 2000, President Clinton designated the Cascade-Siskiyou National Monument in southern Oregon as the nation’s first (and, thus far, only) national monument to preserve biodiversity of an area the proclamation

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generate local economic development and foster cultural understanding of the area as a sacred site of the Blackfeet Nation. See Brady McCombs, *Where Protected Lands Stand After National Monument Review*, ASSOCIATED PRESS, Dec. 6, 2017, <https://perma.cc/FM6F-ENTM>. Oddly, the Blackfeet Nation, allegedly the principal beneficiary of the Zinke proposal, is lukewarm about it. See Matthew Brown, *Tribe Wary of Monument in Montana as Others Reduced by Trump*, SPOKESMAN-REV. (Dec. 9, 2017), <https://perma.cc/E4MK-ABAM> (explaining that the tribe never sought national monument status for the land but wanted co-management status, as the Obama Administration’s proclamation of Bears Ears promised).

<sup>85</sup> The Mighty 5 is a registered trademark. THE MIGHTY 5, Registration No. 4,443,252.

<sup>86</sup> *The Mighty 5: Utah’s National Parks*, UTAH OFF. TOURISM, <https://perma.cc/M73R-P3EV> (last visited Apr. 7, 2018).

<sup>87</sup> Congress converted Zion, Arches, Capitol Reef, and Bryce Canyon from national monuments to national parks. See Robert B. Keiter, Op-Ed, *National Parks Have Evolved, and Bears Ears Would Be Part of That Evolution*, SALT LAKE TRIB. (Aug. 27, 2016), <https://perma.cc/MME7-3URT>. According to a white paper produced by the nonprofit group, Public Land Solutions, retaining the Bears Ears monument could prove to be an economic boon for San Juan County, fueled by a surge in tourism. PUB. LANDS SOLS., ECONOMIC DEVELOPMENT PLANNING FOR CULTURAL TOURISM IN BEARS EARS NATIONAL MONUMENT 3, <https://perma.cc/7D58-BSHQ> (last visited Apr. 7, 2018); see also Jennifer Yachnin, *Outdoor Retailer Plans Utah March to Support Bears Ears*, E&E NEWS: GREENWIRE (Apr. 20, 2017), <https://perma.cc/F9T7-6ULL> (also noting that an outdoor-retailer group, Outdoor Retailer, supported a protest march against diminishing Bears Ears); see also Maxine Joselow, *For Patagonia CEO, Monument Fight’s a Moral Issue*, E&E NEWS: GREENWIRE (Nov. 17, 2017), <https://perma.cc/V5VQ-CG9S> (highlighting that Patagonia, another outdoor-retailer group, has announced plans to challenge the reduction of Bears Ears in court).

<sup>88</sup> *Trump Urged to Undo Obama’s National Monuments*, ENV’T NEWS SERV. (Dec. 5, 2016), <https://perma.cc/Z36U-XYKW>. Among the conversions were the Grand Teton National Park, which includes the former Jackson Hole National Monument, attracting almost five million visitors a year. Robinson Meyer, *Obama Conserved 1.3 Million Acres in Utah—Can Trump Undo That?*, ATLANTIC (June 14, 2017), <https://perma.cc/J5WF-CCQ5>; see also *2016 Visitation Sets Record*, NAT’L PARK SERV. (Jan. 18, 2017), <https://perma.cc/M5Q5-24DS>. See generally John Freemuth, *How the Antiquities Act Has Expanded the National Park System and Fueled Struggles Over Land Protection*, CONVERSATION (June 7, 2016), <https://perma.cc/C7GG-D6CE> (discussing controversies over Jackson Hole, seventeen Alaska monuments, and the Grand Staircase-Escalante National Monument).

<sup>89</sup> Monuments generally preserve pre-existing uses. In the case of Bears Ears, President Obama’s proclamation made clear that existing water rights, grazing permits, public access, oil and gas leases, and pipelines would not be disturbed. See Proclamation No. 9558, 82 Fed. Reg. 1139, 1143–45 (Jan. 5, 2017).

described as a “biological crossroads” serving to link several rich ecosystems.<sup>90</sup> But the size of the monument made it difficult to fulfill its purpose, and in 2015, eighty-five scientists recommended that the monument be expanded in order to fulfill its purpose.<sup>91</sup> Two years later, after extensive public involvement and support from local governments and both Oregon senators,<sup>92</sup> President Obama nearly doubled the size of the monument,<sup>93</sup> reasoning that the expansion was necessary to fulfill the monument’s purpose.<sup>94</sup>

The Obama proclamation drew the attention of Secretary Zinke, who suggested a reduction in its boundaries, and generated several lawsuits from the timber industry and the Oregon and California (O&C) Counties.<sup>95</sup> These

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<sup>90</sup> Proclamation No. 7318, 3 C.F.R. § 98 (2001). The monument lies in the “corridor where the Cascade, Klamath-Siskiyou, and Klamath mountains converge. It is home to an enormous number of native species of fish, frogs, moths, butterflies, and plants.” Leah Sottile, *The Fight for Cascade-Siskiyou National Monument*, OUTSIDE (Sept. 13, 2017), <https://perma.cc/RW7X-7L5E>. Efforts to conserve the region began in the 1980s. *See id.*

<sup>91</sup> *See* BUREAU OF LAND MGMT., FACT SHEET AND Q&A: CASCADE-SISKIYOU NATIONAL MONUMENT EXPANSION, <https://perma.cc/67J9-ABRU> (last visited Apr. 7, 2018).

<sup>92</sup> *See id.* (“In 2011, 15 scientists, primarily from the local area, raised concerns that the existing boundaries of the monument would be insufficient to preserve the biological diversity for which the monument was established, and proposed an expansion of the monument’s boundaries. In 2015, 70 additional scientists endorsed the proposal in an open letter.”).

<sup>93</sup> The original 2000 monument was 65,000 acres; the 2017 expansion added 47,000 acres. *Id.* The Association of Oregon and California (O&C) Counties challenged the expansion, claiming that 40,000 of the 48,000 acres overlap with land regulated under the Oregon and California Revested Lands Sustained Yield Management Act of 1937 (OCLA), 43 U.S.C.A. § 2601 (Westlaw through Pub. L. No. 115-140). *See* Karina Brown, *Oregon Counties Fight Expansion of National Monument*, COURTHOUSE NEWS SERV. (Feb. 16, 2017), <https://perma.cc/REN8-FX9M>.

<sup>94</sup> Proclamation No. 9564, 82 Fed. Reg. 6145, 6148 (Jan. 18, 2017). Senator Jeff Merkley’s office reported a 3:1 ratio of public support for the monument. Press Release, Jeff Merkley U.S. Senator for Or., Merkley, Wyden Weigh in on Cascade-Siskiyou National Monument Review (July 5, 2017), <https://perma.cc/B3XG-UZLA>. Congressman Greg Walden, the only Republican in the Oregon delegation, opposed the monument expansion. Press Release, Rep. Greg Walden 2d Dist. of Or., Greg Walden Statement on President Obama’s Unilateral Expansion of the Cascade-Siskiyou National Monument (Jan. 13, 2017), <https://perma.cc/YT2C-44TD>. On August 13, 2017, three well-known scientists wrote an op-ed explaining that over 220 scientists wrote Secretary Zinke, urging no changes to the monument’s boundaries and explaining the monument’s biodiversity and its importance as “a vital connecting zone between the Klamath-Siskiyou ecoregion to the west and the Cascades to the east, providing a crucial corridor in the Pacific Northwest for the movement of many . . . species.” Michael Parker et al., Opinion, *Scientists Urge No Changes to Cascade-Siskiyou National Monument*, OREGONIAN (Aug. 13, 2017), <https://perma.cc/9T8W-VAKW>. As of this writing, Secretary Zinke had announced no diminishment, although he had promised a reduction. *See* Andrew Theen, *Cascade-Siskiyou National Monument Would Shrink Under Trump Administration Plan*, OREGONIAN (Aug. 24, 2017), <https://perma.cc/H3D5-DKVZ>.

<sup>95</sup> Zinke’s report to the President on monuments called for reducing the effects of the Cascade-Siskiyou monument on over an alleged 52,000 acres of private inholding and preserving timber production on 17,000 acres of O&C lands. *See* Yachnin, *supra* note 34. The lawsuits include: Complaint, *Am. Forest Res. Council v. United States*, No. 1:17-cv-00441 (D.D.C. Mar. 10, 2017) [hereinafter *Am. Forest Res. Council* Complaint]; Complaint, *Murphy Co. v. Trump*, No. 1:17-cv-00285-CL, 2017 WL 979097 (D. Or. Feb. 17, 2017) [hereinafter *Murphy* Complaint]. The O&C Counties number eighteen, with most O&C lands situated in southwestern Oregon. *See Who We Are and What We Care About*, ASS’N O&C COUNTIES,

suits are distinct from the challenges to the President's authority to revoke or substantially modify national monuments because they claim that the monument is inconsistent with the Oregon and California Lands Act<sup>96</sup> (OCLA), a 1937 statute governing lands that reverted in the federal government following fraudulent land sales that violated the terms of a 19th century railroad grant.<sup>97</sup> The timber industry and the O&C counties claim that the President lacked authority to include lands subject to the OCLA in a national monument.<sup>98</sup> Proving their case will require them to successfully argue that the OCLA presents "an irreconcilable conflict" with the Antiquities Act.<sup>99</sup>

The challengers allege that the OCLA withdrew land for timber production and is therefore a timber-dominant federal statute.<sup>100</sup> There is considerable evidence that the statute is not, and is in fact a multiple-use act—actually, the first federal statutory ratification of multiple use<sup>101</sup>—that is entirely compatible with a national monument.

The timber industry and the counties claim that a 1940 Interior Solicitor's opinion that recommended that O&C lands not be included in the Oregon Caves National Monument because of the OCLA,<sup>102</sup> and also on a

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<https://perma.cc/M6F6-Q8W9> (last visited Apr. 7, 2018). These counties are the beneficiaries of failed 19th century railroad grant land that saw the same 2.2 million acres return to the federal government and are now governed in part by the OCLA. See BUREAU OF LAND MGMT., OVERVIEW OF THE OREGON AND CALIFORNIA (O&C) GRANT LANDS ACT OF 1937, <https://perma.cc/4TBW-WFK8> (last visited Apr. 7, 2018). The counties have relied on the generous local share of federal timber sales (50% of timber receipts) under the OCLA to have the lowest property tax rates in Oregon—and have rejected several attempts to raise property taxes after timber sales declined and federal compensatory support evaporated. *Id.*; Jeff Mapes, *Oregon's Economically Pressed Timber Counties Once Again Contemplate Loss of Federal Aid*, OREGONIAN (Dec. 15, 2014), <https://perma.cc/W2W5-8MME>. The decline in commercial timber sales was largely due to the operation of the federal Northwest Forest Plan, probably the largest ecosystem management plan in the world, which the Clinton Administration developed in 1994 in response to concerns over the effects of federal timber sales on endangered spotted owls and salmon. See generally Michael C. Blumm & Tim Wigington, *The Oregon & California Railroad Grant Lands' Sordid Past, Contentious Present, and Uncertain Future: A Century of Conflict*, 40 B.C. ENVTL. AFF. L. REV. 1, 5, 31 (2013).

<sup>96</sup> Oregon and California Revested Lands Sustained Yield Management Act of 1937 (OCLA), 43 U.S.C.A. § 2601 (Westlaw through Pub. L. No. 115-140).

<sup>97</sup> See Blumm & Wigington, *supra* note 95, at 20–22.

<sup>98</sup> See *Am. Forest Res. Council* Complaint, *supra* note 95, at 2, 6; *Murphy* Complaint, *supra* note 95, at 4.

<sup>99</sup> See *infra* note 125 and accompanying text.

<sup>100</sup> *Am. Forest Res. Council* Complaint, *supra* note 95, at 10; *Murphy* Complaint, *supra* note 95, at 2.

<sup>101</sup> Multiple-use had been practiced by the U.S. Forest Service for three decades prior to the OCLA, since the days of Gifford Pinchot. See JOHN FEDKIW, MANAGING MULTIPLE USES ON NATIONAL FORESTS, 1905–1995: A 90-YEAR LEARNING EXPERIENCE AND IT ISN'T FINISHED YET (1998), <https://perma.cc/6DWR-Z523> (ebook). But Congress did not codify multiple use on national forest lands until the Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. § 528–531 (2012); see GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 34:47 (2d ed. 2017) (observing that "the [OCLA] is a direct precursor of current multiple use legislation").

<sup>102</sup> U.S. Dep't of the Interior, Office of the Solicitor, Opinion Letter (Mar. 9, 1940) (on file with author) [hereinafter DOI Solicitor's 1940 Opinion].

1990 decision of the Ninth Circuit, referring to the OCLA as dominant-use legislation.<sup>103</sup> However, close examination of the statute and its interpretation reveals that a court would be unlikely to conclude that the OCLA prevented the enlargement of the Cascade-Siskiyou National Monument.

The OCLA calls for “permanent forest production” from “sustained yield” forestry to provide “a permanent source of timber supply” and also for “protecting watersheds, regulating stream flow, and contributing to the economic stability of the local communities and industries, and providing recreational facilities.”<sup>104</sup> Thus, the text of the statute establishes five purposes for O&C lands: forest production, watershed protection, streamflow regulation, economic stability, and recreation. Consequently, on its face the statute embraces multiple use, not dominant use.

Yet the 1940 Solicitor’s opinion declared that putting O&C lands into the Oregon Caves National Monument would have been inconsistent with the OCLA.<sup>105</sup> Although the challengers to the Cascade-Siskiyou National Monument cite this opinion in their lawsuits,<sup>106</sup> the contemporary effect of the opinion is quite questionable in light of ensuing Solicitor and court opinions.

Just a year later, in 1941, the Solicitor opined that that the O&C lands should be managed on the same multiple-use basis as national forest lands.<sup>107</sup> Then, in 1943, the Solicitor construed the statutory language of “permanent forest production . . . [and] providing a permanent source of timber supply” to mean that timber harvest could be limited by sustained-yield plans that reflected the OCLA’s watershed and recreational purposes.<sup>108</sup> A 1958 opinion proceeded to uphold long-term recreational leases as consistent with the OCLA.<sup>109</sup> A 1979 opinion interpreted the statutory language of “permanent forest production” to mean neither commercial forestry nor dominant use, deciding that “there is no reason to conclude that recreation is always subordinate” to other statutory purposes.<sup>110</sup>

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<sup>103</sup> *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1184 (9th Cir. 1990) (“BLM did not err in construing the [OCLA] as establishing timber production as the dominant use.”).

<sup>104</sup> OCLA, 43 U.S.C.A. § 2601 (Westlaw through Pub. L. No. 115-140).

<sup>105</sup> DOI Solicitor’s 1940 Opinion, *supra* note 102.

<sup>106</sup> *See Am. Forest Res. Council* Complaint, *supra* note 95, at 13; *Murphy* Complaint, *supra* note 95, at 4.

<sup>107</sup> *See Applicability of Mining Laws to Revested Oregon and California and Reconveyed Coos Bay Grant Lands*, 57 Interior Dec. 365, 369, 374 (Aug. 25, 1941) (concluding that the O&C lands were not subject to earlier mining laws, and pointing out the similarities between the National Forest Act of 1897 and the OCLA).

<sup>108</sup> *See Necessity for Competitive Bidding in Sale of Timber on Oregon and California Revested Lands*, 58 Interior Dec. 414, 415, 418 (Apr. 24, 1943) (stating the statute requires timber to be cut on a sustained-yield basis and recommending against competitive bidding when that would conflict with sustained-yield management).

<sup>109</sup> U.S. Dep’t of the Interior, Office of the Solicitor, Opinion Letter on Applicability of the Public Works Act of September 3, 1954 (68 Stat. 1146; 43 U.S.C. 931c) to O & C Lands (Jan. 24, 1958) (on file with author).

<sup>110</sup> U.S. Dep’t of the Interior, Office of the Solicitor, Opinion Letter on Technical Revisions of Earlier Opinions Concerning Bureau Management of O&C Lands 2 (Aug. 27, 1979).

A 1981 Solicitor's opinion concluded that maintaining proper old-growth was consistent with the multiple-use objectives of the OCLA and affirmed that Congress intended the O&C lands to be managed by contemporary principles of ecology and conservation, explaining that "[i]t is clear not only from the language of the Act itself, but also from the legislative history that the O&C [Act] is a conservation measure requiring a form of multiple use management."<sup>111</sup> This long series of Interior Solicitor opinions suggests that the 1940 opinion's interpretation that the OCLA is inconsistent with the Antiquities Act has not withstood the test of time.

The opponents of the Cascade-Siskiyou National Monument expansion also rely on a 1990 decision of the Ninth Circuit in *Headwaters v. BLM*,<sup>112</sup> a case challenging the Wilcox Peak timber sale on O&C land for violating NEPA by not preparing a supplemental environmental impact statement (EIS) after new evidence showed that northern spotted owls inhabited the area.<sup>113</sup> In a split decision, the Ninth Circuit upheld the district court and ruled that BLM's decision not to undertake a supplemental EIS was not unreasonable in light of the information available to the agency at the time the sale was proposed.<sup>114</sup> After the owl was subsequently listed as a threatened species under the ESA,<sup>115</sup> BLM suspended the timber sale contract on the proposed sale.<sup>116</sup> But after biological consultation under the ESA approved the timber harvest, including the incidental take of two of the listed owls, the agency authorized the sale, a decision later upheld by the Interior Board of Land Appeals.<sup>117</sup>

Although the issue in *Headwaters* concerned the timber sale's NEPA compliance, the appeals court proceeded to opine on the purpose of the OCLA, suggesting that despite the statutory language concerning watershed, streamflow, and recreation, the Act's purpose reflected timber-dominance.<sup>118</sup> The court did so apparently on the assumption that multiple-use and

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<sup>111</sup> U.S. Dep't of the Interior, Office of the Solicitor, Opinion Letter on Review of BLM Policy Statement for Multiple Use Management of the Oregon and California Railroad and Coos Bay Wagon Road Revested Lands (O&C Lands) (Sept. 8, 1981) (on file with author).

<sup>112</sup> 914 F.2d 1174 (9th Cir. 1990), *aff'g* [1989] 19 Env'tl. L. Rep. (Env'tl. Law Inst.) 21,159 (D. Or. May 3, 1989); *see* Complaint at 7–8, *Ass'n of O&C Ctys. v. Trump*, No. 1:17-cv-00280 (D.D.C. filed Feb. 13, 2017).

<sup>113</sup> *Headwaters*, 914 F.2d at 1176. The owl had not been listed under the ESA at the time of the suit. *See generally* Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990) (to be codified at 50 C.F.R. pt. 17).

<sup>114</sup> *Headwaters*, 914 F.2d at 1180. The district court allowed *Headwaters* to supplement the record with expert testimony on the threat that the proposed sale had on the owls nearby, but the Ninth Circuit majority ignored that testimony. *See* Michael C. Blumm & Jonathan Lovvorn, *The Proposed Transfer of BLM Timber Lands to the State of Oregon: Environmental and Economic Questions*, 32 LAND & WATER L. REV. 353, 369 n.92 (1997).

<sup>115</sup> Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. at 26,194.

<sup>116</sup> *See* Blumm & Lovvorn, *supra* note 114, at 369 n.91. The dissenting judge would have remanded the NEPA claim to the district court for reconsideration in light of the owl's listing. *Headwaters*, 914 F.2d at 1185–86 (Ferguson, J., dissenting).

<sup>117</sup> *See* *Headwaters, Inc.*, 122 Interior Dec. 362 (IBLA 1992).

<sup>118</sup> *Headwaters*, 914 F.2d at 1183.

sustained-yield are inherently contradictory, an assumption seemingly contradicted by express language of the Multiple Use-Sustained Yield Act,<sup>119</sup> the National Forest Management Act<sup>120</sup> (NFMA), and FLPMA.<sup>121</sup> Moreover, the legislative history of the OCLA suggests that the overriding purpose of the statute was to conserve forest resources to support economic stability, not to promote dominant-use timber production.<sup>122</sup>

Ensuing case law also called into question the alleged conflict between the OCLA and the Antiquities Act. For example, in *Portland Audubon Society v. Babbitt*,<sup>123</sup> a case decided after the listing of the northern spotted owl, the Ninth Circuit affirmed a district court decision, ruling that there was no conflict between complying with the OCLA and complying with NEPA, even if NEPA compliance led BLM to reduce its timber sales below the 500 million board-feet mentioned in the OCLA.<sup>124</sup> The court concluded that nothing in the OCLA authorized a NEPA exemption.<sup>125</sup> Subsequently, the Ninth Circuit upheld Judge Dwyer's decision rejecting the timber industry's argument that the OCLA exempted BLM from compliance with the Northwest Forest Plan's harvest restrictions.<sup>126</sup> If the OCLA provides no exemption from the Northwest Forest Plan—an administratively approved plan<sup>127</sup>—there should be little doubt that the 1937 statute provides no exemption from the Antiquities Act.

The timber industry's suit challenging the inclusion of O&C lands in the Cascade-Siskiyou monument claims that a provision of the 1937 OCLA exempts the lands from the Antiquities Act. That provision, never codified in the U.S. Code, states: "All Acts or parts of Acts in conflict with [the OCLA]

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<sup>119</sup> Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §§ 528–531 (2012).

<sup>120</sup> National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (amending Forest and Rangeland Renewable Resource Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974)).

<sup>121</sup> The Multiple Use-Sustained Yield Act, governing national forest lands, calls upon the Secretary of Agriculture to "administer the renewable surface resources of the national forests for multiple use and sustained yield" purposes. *Id.* § 529. NFMA declares that national forest lands "shall be maintained . . . to secure the maximum benefits of multiple use, sustained yield management." *Id.* § 1601(d)(1). FLPMA states the Secretary of Interior "shall manage the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a) (2012).

<sup>122</sup> See Deborah Scott & Susan Jane M. Brown, *The Oregon and California Lands Act: Revisiting the Concept of "Dominant Use,"* 21 J. ENVTL. L. & LITIG. 259, 289 (2006).

<sup>123</sup> 998 F.2d 705, 709 (9th Cir. 1993).

<sup>124</sup> *Portland Audubon Soc'y*, 998 F.2d at 709; see 43 U.S.C.A. § 2601 (Westlaw through Pub. L. No. 115-140) (stating that BLM shall determine and declare the annual productive capacity for the O&C lands and shall sell an amount not less than "one-half billion feet board measure").

<sup>125</sup> The district court determined that only "an irreconcilable conflict" in statutory authority would authorize a NEPA exemption. *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489, 1507 (D. Or. 1992), *aff'd*, 998 F.2d 705 (9th Cir. 1993). The Ninth Circuit distinguished the *Headwaters* holding that NEPA did not require a supplemental EIS on the Wilcox Peak timber sale from the claim in *Portland Audubon*, which concerned the adequacy of BLM programmatic EISs on its land plans. *Portland Audubon Soc'y*, 998 F.2d at 709.

<sup>126</sup> *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1403–04 (9th Cir. 1996) (upholding the applicability of all federal conservation laws to O&C lands), *aff'g* *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1314 (W.D. Wash. 1994).

<sup>127</sup> *Id.* at 1403.



are hereby repealed to the extent necessary to give full force and effect to [the OCLA].”<sup>128</sup> The industry maintains that the language of the OCLA referring to “permanent forest production” and “sustained yield” forestry preempts the application of the Antiquities Act to O&C lands.<sup>129</sup> But, as explained above, as the nation’s first multiple-use statute, the OCLA’s purposes are not inconsistent with the Antiquities Act.<sup>130</sup> And as a general repealer which does not expressly mention the Antiquities Act, the provision is one that courts will strictly construe,<sup>131</sup> making it unlikely that the reviewing court would find the kind of “irreconcilable conflict” necessary to exempt the O&C lands from the Cascade-Siskiyou monument.<sup>132</sup> Moreover, the repealer would necessarily apply also to the 1920 Migratory Bird Treaty Act,<sup>133</sup> which courts have applied to O&C lands more than once.<sup>134</sup> This case law makes clear that the OCLA did not withdraw the O&C lands from the operation of other federal conservation laws. So, even under the *Headwaters* decision’s questionable determination of the “dominant use” nature of the OCLA, that characterization means little in terms of managing the O&C lands, since they are not exempted from other statutes like NEPA, the ESA, and the Migratory Bird Treaty Act.<sup>135</sup> Nor should a court conclude that the OCLA provides an exemption from the application of the Antiquities Act in the case of the proclamation expanding the Cascade-Siskiyou National Monument.<sup>136</sup> If the President proceeds to diminish the Cascade-Siskiyou, there clearly will be an opportunity for courts to reconcile the two statutes.

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<sup>128</sup> OCLA, Pub. L. 75-405, 50 Stat. 874, 876 (1937); see Gregory C. Sisk, *Lifting the Blindfold from Lady Justice: Allowing Judges to See the Structure in the Judicial Code*, 62 FLA. L. REV. 457, 486 (claiming that uncodified provisions are “secret law” that contradict the internal morality of the laws so “as to not truly count as law at all”); see also *id.* at 486 n.158 (“Most uncodified provisions enacted as part of new legislation are innocuous or auxiliary clauses that are operative primarily for a short period after enactment . . .”).

<sup>129</sup> *Murphy* Complaint, *supra* note 95, at 3–5.

<sup>130</sup> See *supra* note 104 and accompanying text (the OCLA’s purposes include watershed protection, streamflow regulation, and recreation).

<sup>131</sup> See *Blackfeet Tribe of Indians v. Groff*, 729 F.2d 1185, 1188 n.5 (9th Cir. 1982) (“Generally, the presence of a general repealer is not considered a strong indication that all prior law on the subject is meant to be repealed.”); see also *Hess v. Reynolds*, 113 U.S. 73, 79 (1885) (a general repealer has been construed to “impl[y] very strongly that there may be acts on the same subject which are not thereby repealed”).

<sup>132</sup> See *supra* note 125 (quoting *Portland Audubon Soc’y*, 795 F. Supp. 1489, 1507 (D. Or. 1992), *aff’d*, 998 F.2d 705 (9th Cir. 1993)).

<sup>133</sup> 16 U.S.C. §§ 703–712 (2012).

<sup>134</sup> *Portland Audubon Soc’y v. Lujan*, 884 F.2d 1233, 1240–42 (9th Cir. 1989) (holding that plaintiffs could bring an Migratory Bird Treaty Act claim with regard to timber harvest decisions made on OCLA lands); see also *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438 (1992) (explaining that federal agencies could satisfy their Migratory Bird Treaty Act obligations in the management of O&C lands so as not to “kill” or “take” any northern spotted owl, or “so as not to violate the prohibitions of subsections (b)(3) and (b)(5)” of the Migratory Bird Treaty Act).

<sup>135</sup> See *Headwaters*, 914 F.2d 1174, 1184 (9th Cir. 1990); *Portland Audubon Soc’y*, 795 F. Supp. at 1493, 1506.

<sup>136</sup> Shrinking the Cascade-Siskiyou’s boundaries would suffer from some of the same legal difficulties discussed above concerning Bears Ears. See *supra* notes 66–83 and accompanying text. Secretary Zinke’s draft report suggested that reducing the monument’s size would “reduce

## III. RESISTING “LANDSCAPE” FEDERAL LAND PLANNING

Perhaps the chief characteristic of modern public land law is comprehensive land planning.<sup>137</sup> Yet despite the wholesale congressional commitment to federal land planning for over four decades,<sup>138</sup> there remains significant resistance to the effect of land plans. This resistance is due to the fact that land planning’s chief virtue—distancing the federal land planners from the regulated community and providing planners with legislative-type authority—is also its chief vice in the eyes of certain public land users, particularly those extracting public land resources like minerals, who are more comfortable with local managers unburdened by having to act consistent with land plans approved by the Secretary.<sup>139</sup> This aversion to public land planning manifested itself in the wake of the Republican success in the 2016 presidential election, but in truth, resistance has been longstanding.

Shortly after the 1976 congressional endorsement of land planning in both FLPMA and NFMA,<sup>140</sup> land plans suffered a serious setback when then-Interior Secretary James Watt questioned the environmental studies of rangeland conditions, undertaken by BLM due to a court order.<sup>141</sup> Claiming that they were based on “faulty science,” Watt announced that the studies would not be used in FLPMA land plans to curtail grazing-damaged federal rangelands.<sup>142</sup> Subsequently, the Ninth Circuit upheld a district court

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impacts” on an alleged 52,000 acres of private inholdings and ensure timber production on nearly 17,000 acres of O&C lands. See Zinke Report, *supra* note 64, at 11–12. The report to the President claimed that the monument’s 2000 proclamation banned motor vehicles, *id.* at 11, but that was in error, as the proclamation forbade only off-road vehicles. See Proclamation 7318, 3 C.F.R. § 98 (2001); Emily Benson, *In Monuments Report, a Skewed View of Protections*, HIGH COUNTRY NEWS (Sept. 19, 2017), <https://perma.cc/6KVF-T3P7>.

<sup>137</sup> A knowledgeable commentator considers land planning to be an essential component of modern land management “organic” statutes. Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 *ECOLOGY L.Q.* 457, 510–11 (2002).

<sup>138</sup> In 1976, Congress endorsed land planning in both the FLPMA and NFMA. See FLPMA, 43 U.S.C. § 1701(a)(2) (2012) (“[T]he national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts.”); NFMA, 16 U.S.C. § 1604(a) (2012) (“[T]he Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.”). Congress also expanded comprehensive planning to the national wildlife refuge system in 1997. See Fischman, *supra* note 137, at 538–40. The National Park Service had long engaged in land planning for parks and monuments without express congressional directive. See COGGINS & GLICKSMAN, *supra* note 101, §§ 16:1–16:5.

<sup>139</sup> See Phil Taylor, *Locals Tell Lawmakers That Federal Agencies Ignore Them*, E&E NEWS DAILY (Apr. 29, 2016), <https://perma.cc/6UC6-XHUX>.

<sup>140</sup> See 43 U.S.C. § 1712 (requiring BLM land plans); 16 U.S.C. § 1604 (requiring Forest Service land plans).

<sup>141</sup> Nat. Res. Def. Council, Inc. v. Morton, 388 F. Supp. 829, 841 (D.D.C. 1974) (requiring individual EISs on FLPMA land plans authorizing grazing), *aff’d*, 527 F.2d 1386 (D.C. Cir. 1976).

<sup>142</sup> See George Cameron Coggins & Doris K. Nagel, “*Nothing Beside Remains*”: *The Legal Legacy of James G. Watt’s Tenure as Secretary of the Interior on Federal Land and Law Policy*,

decision that refused to order BLM to curb grazing despite demonstrably poor rangeland conditions in western Nevada.<sup>143</sup> Two decades later, the Supreme Court refused to require BLM to undertake mitigation promised in a land plan governing a wilderness study area in San Rafael, Utah after unexpectedly large increases in off-road vehicle traffic damaged the area.<sup>144</sup>

So controversy over federal land planning is not exactly breaking news. However, the ferocity of the opposition to revisions to BLM's planning regulations was startling. Less surprising perhaps was a promised rollback in land-planning protections for sage grouse, although those protections had widespread acceptance and public support when approved in 2015 in an effort to ward off an ESA listing.<sup>145</sup> We focus on both issues.

### A. *The Demise of BLM Planning 2.0*

Unlike the Forest and Park Service lands, land planning came late to the BLM lands. The 1964 Classification and Multiple Use Act,<sup>146</sup> a temporary statute, inaugurated BLM land use planning.<sup>147</sup> So when Congress enacted FLPMA, BLM regulations already called for land plans to protect “natural and cultural resources” on the 245 million acres of federal land that BLM manages.<sup>148</sup> FLPMA's land plans thus were building on an existing planning framework.

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17 B.C. ENVTL. AFF. L. REV. 473, 540–41 (1990). Watt described his mission as to “fight in the courts those bureaucrats and no-growth advocates who create a challenge to individual liberty and economic freedoms.” Elizabeth Drew, *A Reporter at Large: Secretary Watt*, NEW YORKER, May 4, 1981, at 104, 108.

<sup>143</sup> Nat. Res. Def. Counsel, Inc. v. Hodel, 819 F.2d 927, 930 (9th Cir. 1987), *aff'g* Nat. Res. Def. Council, Inc. v. Hodel, 624 F. Supp. 1045 (D. Nev. 1985) (affirming BLM's Reno District land plan); *see also* Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1099–100 (9th Cir. 2003) (refusing to enjoin Forest Service plans for the Apache-Sitgreaves National Forest in Arizona that allocated all available forage to livestock, and none to wildlife, despite clear overgrazing and a failure to monitor in the past).

<sup>144</sup> Norton v. S. Utah Wilderness All., 542 U.S. 55, 60, 72 (2004) (“[W]ill do’ projections of agency action set forth in land use plans—are not a legally binding commitment . . .”); *see* Michael C. Blumm & Sherry L. Bosse, Norton v. SUWA and the *Unraveling of Federal Public Land Planning*, 18 DUKE ENVTL. L. & POL’Y F. 105, 123 (2007).

<sup>145</sup> *See, e.g.*, Press Release, Nat’l Audubon Soc’y, The Greater Sage-Grouse Will Avoid “Endangered” Status Due to Herculean Land Conservation Effort (Sept. 22, 2015), <https://perma.cc/2FKZ-PQ2N>.

<sup>146</sup> Classification and Multiple Use Act of 1964 (CMUA), Pub. L. No. 88-607, 78 Stat. 986.

<sup>147</sup> The CMUA was part of three public land statutes enacted in 1964, which also included the Public Land Law Review Commission Act of 1964, Pub. L. No. 88-606, 78 Stat. 983 (authorizing a comprehensive review of public land law and policy), and the Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§ 1131–1136 (2012)). The CMUA brought multiple-use planning to BLM lands through what were called “management framework plans” which, once approved, governed land use decisions well beyond the expiration of the CMUA in 1976. *See* COGGINS & GLICKSMAN, *supra* note 101, § 16:18.

<sup>148</sup> *See supra* note 147 and sources cited therein; *see also* Resource Management Planning, 81 Fed. Reg. 89,580, 89,582 (Dec. 12, 2016) (to be codified at 43 C.F.R. pt. 1600) (“BLM manages more than 245 million acres of land . . .”).

Regulations implementing FLPMA's land plan directives were surprisingly controversial. After many iterations,<sup>149</sup> BLM finally approved plan regulations in 1983, seven years after the statute passed.<sup>150</sup> These regulations, now over thirty-five years old, governed a couple of generations of FLPMA land plans. But they were criticized for lacking early public involvement in the planning process, failing to require decisions based on best available science, and a too-narrow planning framework that often failed to consider the full effects of land plans on adjacent non-federal lands.<sup>151</sup>

The 2016 rule that BLM promulgated aimed to modernize land use planning and provide more transparency in the decision-making process.<sup>152</sup> The agency announced that the rule, called "BLM Planning 2.0," would "make its land use planning more accessible to the public, more responsive to the changing conditions on the public lands, and more efficient,"<sup>153</sup> improving the agency's "ability to respond to environmental, economic and social changes in a timely manner."<sup>154</sup> BLM Director Neil Kornze explained that, "Under the current system, it takes an average of eight years for the BLM to finish a land use plan."<sup>155</sup> Because of this slow planning process, community priorities often evolved, and on-the-ground conditions changed between the beginning of the planning process and the end, sometimes making land plans outdated before their completion.<sup>156</sup>

BLM claimed that the new rule would facilitate early public involvement by encouraging participation during the planning process, providing the public with opportunities to submit data and information early and to review key planning documents, including a preliminary statement of purpose and need as well as preliminary alternatives and their rationale.<sup>157</sup> The agency thought that public involvement at an early stage of plan development would become easier due to an "upfront planning assessment" that would evaluate environmental, ecological, social, and economic conditions in the planning area.<sup>158</sup> This early planning assessment would look

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<sup>149</sup> See Karin P. Sheldon & Pamela Baldwin, *Areas of Critical Environmental Concern: FLPMA's Unfulfilled Conservation Mandate*, 28 COLO. NAT. RESOURCES ENERGY & ENVTL. L. REV. 1, 22–25, 30 (2017) (discussing BLM's efforts to promulgate plan regulations during 1976–1983).

<sup>150</sup> See generally Planning, Programming, Budgeting; Amendments to the Planning Regulations; Elimination of Unneeded Provisions, 48 Fed. Reg. 20,364 (May 5, 1983) (to be codified at 43 C.F.R. pt. 1600).

<sup>151</sup> See BUREAU OF LAND MGMT., LAND USE PLANNING—FINAL RULE QS & AS, <https://perma.cc/H63Q-RSLZ> (last visited Apr. 7, 2018).

<sup>152</sup> See Press Release, Bureau of Land Mgmt., BLM Finalizes Rule to Make Land Use Plans More Responsive to Community Needs (Dec. 1, 2016), <https://perma.cc/9977-9TNK>.

<sup>153</sup> *Id.*

<sup>154</sup> BUREAU OF LAND MGMT., FACT SHEET: BLM'S PROPOSED PLANNING RULE, <https://perma.cc/Q5LA-6VBJ> (last visited Apr. 7, 2018).

<sup>155</sup> Press Release, Bureau of Land Mgmt., *supra* note 152.

<sup>156</sup> See *id.*

<sup>157</sup> Resource Management Planning, 81 Fed. Reg. 89,580, 89,629, 89,631 (Dec. 12, 2016) (to be codified at 43 C.F.R. pt. 1600).

<sup>158</sup> *Id.* at 89,629.

broadly at landscape features of a planning area.<sup>159</sup> But this landscape view alarmed commodity users.<sup>160</sup>

BLM acknowledged that the 1983 regulations failed to use the best available science and claimed that the new planning rule would improve the agency's ability to use high-quality information when developing plans to implement future actions.<sup>161</sup> For better clarity, the Planning 2.0 rule would distinguish between mandatory plan components—with which all future decisions must be consistent—and optional strategies that were not components of the plan itself but which could influence its implementation.<sup>162</sup>

One concrete example of reform in BLM's 2016 regulations was the requirement to identify important areas for fish and wildlife early in the plan-development process to avoid and minimize conflicts with other land uses.<sup>163</sup> The agency would identify wildlife migration corridors and areas of critical environmental concern early in the planning process, no doubt a principal source of the ensuing political opposition.<sup>164</sup> The 2016 regulations would also have facilitated landscape-level planning, of critical importance in responding to ecological threats such as climate change, as landscape planning aims to encourage adoption of conservation priorities across jurisdictions and across many resources in an effort to create a single, collaborative conservation effort that can also meet stakeholder needs.<sup>165</sup>

Critics claimed that the Planning 2.0 rule reduced the authority of county commissioners and other local land managers, as commodity producers seemed to equate landscape-level planning with environmental restrictions. A letter from the Western Governors' Association to Congress objected to the rule's potential to favor national objectives over state interests.<sup>166</sup> Republican senators later proceeded to claim (without evident justification) that the new "rule would have harmed grazing, timber, energy development, mineral production, and even recreation on federal lands."<sup>167</sup>

The new rule was short-lived, as Congress passed a joint resolution in March 2017, which President Trump signed, revoking the rule under the then seldom-used CRA.<sup>168</sup> Despite the 2016 rule's efforts to increase public

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<sup>159</sup> *See id.*

<sup>160</sup> *See* 163 CONG. REC. S1610–16 (daily ed. Mar. 7, 2017) (statement of Rep. Murkowski), <https://perma.cc/G9A6-JD4A>.

<sup>161</sup> Resource Management Planning, 81 Fed. Reg. at 89,580, 89,645–46.

<sup>162</sup> *Id.* at 89,646–48.

<sup>163</sup> *Id.* at 89,626.

<sup>164</sup> *Id.*

<sup>165</sup> *See* COGGINS & GLICKSMAN, *supra* note 101, § 16:21.

<sup>166</sup> Chelsea Harvey, *Congress's Latest Target for Reversal: An Obama Attempt to Modernize How We Manage Public Lands*, WASH. POST (Feb. 15, 2017), <https://perma.cc/K79X-KNQQ>.

<sup>167</sup> *Murkowski Secures Repeal of BLM Planning 2.0 Rule*, U.S. SENATE COMMITTEE ON ENERGY & NAT. RESOURCES (Mar. 7, 2017), <https://perma.cc/L57N-PP4Y>.

<sup>168</sup> The CRA, enacted in 1996 as part of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (codified as amended at 5 U.S.C. §§ 801–808; 15 U.S.C. § 657; 42 U.S.C. §§ 1383e, 1320b-15), and successfully invoked just once prior to the Trump Administration (concerning a Clinton Administration Labor Department rule on ergonomics), authorizes Congress to pass a joint "resolution of disapproval" by expedited process (requiring

participation in federal land planning, especially early in the process, the President's press secretary characterized BLM Planning 2.0 rule as centralizing federal land management that would dilute the concerns of local citizens.<sup>169</sup> The revocation, supported by the oil and gas and mining industries and opposed by environmental groups and the outdoor recreation industry,<sup>170</sup> now prohibits the agency from promulgating any "substantially similar rule" in the future without congressional approval.<sup>171</sup> So the agency's land plans will continue to be governed, at least for the time being, by regulations now thirty-five years old.<sup>172</sup>

The same day that Congress nullified the Planning 2.0 rule, Secretary Zinke directed BLM within six months to "identify and implement" planning

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a majority vote of both houses of Congress) overriding any administrative regulation promulgated within sixty legislative days (meaning, in the case of Obama Administration regulations, any regulation promulgated in May 2016 or later) if a new Congress acts within sixty legislative days of its submission to both Houses of Congress and the Comptroller General. 5 U.S.C. § 801(a)(1)(A) (2012). If signed by the President, the regulation is not only revoked but no regulation "in substantially the same form" may be promulgated unless approved by Congress. 5 U.S.C. § 801(b)(2). Among the fourteen regulations revoked by CRA procedures in 2017 were two other rules promulgated by the Interior Department: 1) the so-called stream protection rule governing mountain-top mining (Pub. L. No. 115-5, 131 Stat. 10), and 2) a rule limiting non-subsistence takes of wildlife in Alaska national wildlife refuges (Pub. L. No. 115-20, 131 Stat. 86).

According to the Heritage Foundation, the effects of the CRA may extend to regulations promulgated before 2016 if they were not submitted to Congress for review. Paul Larkin, *This Little-Used Tool Could Help Congress Undo Years of Government Overreach*, HERITAGE FOUND. (Feb. 15, 2017), <https://perma.cc/5GHM-9LLK> (advocating a kind of "eternal" congressional vetoes). Although a recent study by the Administrative Conference of the United States found that rules submitted between 2012 and 2014 almost invariably complied with the CRA. *See Hearing on Rulemakers Must Follow Rules, Too: Oversight of Agency Compliance with the Congressional Review Act Before the Subcomm. on Regulatory Reform, Commercial, and Antitrust Law* 4 (2017), <https://perma.cc/GQ9H-96XB> (statement of Rena Steinzor). The Government Accounting Office recently concluded that both the 2016 amendments to the Tongass National Forest plan and the Eastern Interior Resources Management Plan (for four Bureau of Land Management plans in eastern Alaska) were "rules" subject to CRA review. U.S. GOV'T ACCOUNTABILITY OFF., B-238859, TONGASS NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN AMENDMENT 8 (2017), <https://perma.cc/XC3M-SKUB>; U.S. GOV'T ACCOUNTABILITY OFF., B-329065, EASTERN INTERIOR RESOURCE MANAGEMENT PLAN 7 (2017), <https://perma.cc/W4J9-T39C>.

<sup>169</sup> See Kellie Lunney, *Trump Signs Resolution Repealing BLM Planning 2.0 Rule*, E&E NEWS PM (Mar. 27, 2017), <https://perma.cc/J849-TY2G>. The bill passed both houses largely on party lines. *Id.*

<sup>170</sup> Supporters of revoking BLM Planning 2.0 included the American Petroleum Institute, the American Exploration & Mining Association, the Independent Petroleum Association of America, the Public Lands Council, and the National Association of Counties. *Id.* Opponents included the Outdoor Industry Association, the National Parks and Conservation Association, the Wilderness Society, and the Center for Western Priorities. *Id.*

<sup>171</sup> 5 U.S.C. § 801(b)(2); see *supra* note 168 and sources cited therein; see also Harvey, *supra* note 166.

<sup>172</sup> Planning, Programming, Budgeting; Amendments to the Planning Regulations; Elimination of Unneeded Provisions, 48 Fed. Reg. 20,364 (May 5, 1983) (to be codified at 43 C.F.R. pt. 1600). Secretary Zinke has announced his intention to revise the land-plan regulations. See Scott Streater, *BLM Starts Bid to Revamp Land-Use Planning, NEPA Reviews*, E&E NEWS: GREENWIRE (July 5, 2017), <https://perma.cc/J6FJ-8NW3>.

revisions to eliminate “redundancies and inefficient processes” and create a planning process that “1) takes less time, 2) costs less money, and 3) is more responsive to local needs.”<sup>173</sup> Zinke complained that BLM plans cost \$48 million annually and require more than 5,000 NEPA documents—money and time he claimed could be better spent on “completing work on the ground and creating economic opportunities”; he promised to better “incorporate the views and ideas of our state and local partners.”<sup>174</sup> Zinke’s critics observed that BLM Planning 2.0 rule aimed at precisely those same goals and pointed to the wasted taxpayer dollars in scrapping an effort to replace an outdated 1983 rule that the Secretary conceded needed reform.<sup>175</sup>

So it seems as if a “BLM Planning 3.0” may be in the offing. Whether the CRA requires congressional approval to ensure that any new effort is a “substantially similar rule” to the one vetoed by Congress is unclear.<sup>176</sup> What does seem clear is that such a new initiative will be aimed at facilitating oil and gas and coal projects by streamlining the NEPA and land-planning processes.<sup>177</sup> The effect likely will be an elevation of the role of state and local governments and commodity users in federal land planning, in effect redefining “the public” in public land planning and management, or at least “the public” that matters to the federal government.<sup>178</sup>

### B. Revising Sage Grouse Plans

The sage grouse “is a large, rounded-winged, ground-dwelling bird” that features “a long, pointed tail . . . [and] yellow combs over the eyes.”<sup>179</sup> Although its lifespan averages just over a year, some birds have been found

<sup>173</sup> Memorandum from Ryan Zinke, Sec’y of the Interior, to Acting Director, Bureau of Land Mgmt. (Mar. 27, 2017), <https://perma.cc/7AQ7-RM8Y>.

<sup>174</sup> *Id.*

<sup>175</sup> See Scott Streater, *Zinke Orders BLM ‘Back to the Drawing Board’ on Land Use, NEPA*, E&E NEWS PM (Apr. 18, 2017), <https://perma.cc/4V66-3QDV> (quoting Greg Zimmerman, deputy director of the Denver-based Center for Western Priorities: “They’ve abused the Congressional Review Act, wasted taxpayer dollars, and now are admitting the BLM planning process needs reform after all.”).

<sup>176</sup> See *supra* notes 168–171 and accompanying text.

<sup>177</sup> See Streater, *supra* note 175.

<sup>178</sup> The Western Governors’ Association has a particularly ambitious plan to elevate themselves into positions of “co-regulators” of federal public lands. See Scott Streater, *Western Governors Press Trump to Grant States More Input*, E&E NEWS: GREENWIRE (May 17, 2017), <https://perma.cc/9BF4-G63A> (explaining the governors’ aspirations not only in federal land planning concerning mitigation requirements that could affect state and private lands, but also in having the federal government use “state science” in rulemaking and defer to state regulation of hydraulic fracturing). However, state and local plans have only a limited role in federal land planning. See, e.g., Michael C. Blumm & James A. Fraser, “Coordinating” with the Federal Government: Assessing County Efforts to Control Decisionmaking on Public Lands, 38 PUB. LAND & RESOURCES L. REV. 1, 4, 32, 39–40 (2017).

<sup>179</sup> *Greater Sage-Grouse – Species Information*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/FA49-J3ZJ> (last modified Nov. 28, 2017); see also Tay Wiles, *The West’s Iconic Bird Is Caught Up in Trump’s Energy Plans*, HIGH COUNTRY NEWS (Aug. 8, 2017), <https://perma.cc/8AWH-JE5A>.

to survive up to ten years in the wild.<sup>180</sup> The sage grouse cannot subsist in areas without sagebrush; the bird nests under sagebrush in the western United States at elevations ranging from 4,000 to over 9,000 feet.<sup>181</sup> Because of its utter dependence on sagebrush and its extensive range,<sup>182</sup> some commentators have suggested that the sage grouse may be the arid West's equivalent of the northern spotted owl,<sup>183</sup> whose ESA listing revolutionized timber harvesting in the Pacific Northwest.<sup>184</sup> Consequently, after first denying an ESA listing,<sup>185</sup> the federal government decided, after court intervention,<sup>186</sup> that the sage grouse was in fact eligible for protection under the ESA, but it declined to list because of other species priorities.<sup>187</sup> In the wake of this "warranted but precluded" decision,<sup>188</sup> avoiding an ESA listing became a high priority for western state governments as well as the federal government.

Sage grouse habitat covers 165 million acres in ten western states, more than half of which is located on federal land, but that acreage is only roughly half of what used to exist, due largely to housing and oil and gas

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<sup>180</sup> *Greater Sage-Grouse – Species Information*, *supra* note 179.

<sup>181</sup> *Id.*

<sup>182</sup> *See id.* ("The historic range of the greater sage-grouse included Washington, Oregon, California, Nevada, Idaho, Montana, Wyoming, Colorado, Utah, South Dakota, North Dakota, Kansas, Oklahoma, Nebraska, New Mexico, Arizona, and the Canadian provinces of British Columbia, Alberta, and Saskatchewan."). However, the bird has now "disappeared from Nebraska, Kansas, Oklahoma, New Mexico, Arizona, British Columbia and Saskatchewan." *Id.*

<sup>183</sup> *See, e.g.*, Darryl Fears, *Why Sage Grouse Could Become the Next Spotted Owl*, WASH. POST (Aug. 18, 2015), <https://perma.cc/62WR-PKTZ>.

<sup>184</sup> "In 1989, logging on federal lands accounted for more than half of Oregon's harvest. As of 2008, it fell to less than 10 percent" as a result of the spotted owl listing. Scott Learn, *Northern Spotted Owl Marks 20 Years on Endangered Species List*, OREGONIAN (June 25, 2010), <https://perma.cc/X8KG-9F92>.

<sup>185</sup> *See generally* Endangered and Threatened Wildlife and Plants; 12-Month Finding for Petitions to List the Greater Sage-Grouse as Threatened or Endangered, 70 Fed. Reg. 2244 (Jan. 12, 2005) (to be codified at 50 C.F.R. pt. 17).

<sup>186</sup> *W. Watersheds Project v. Fish & Wildlife Serv.*, 535 F. Supp. 2d 1173, 1187 (D. Idaho 2007) (concluding that an earlier decision not to list the bird was arbitrary).

<sup>187</sup> The *Western Watersheds* court ordered the agency to reconsider the decision not to list the species. *Id.* at 1176. Eventually, the U.S. Fish and Wildlife Service found that the sage grouse's situation warranted a listing, but that the listing was "precluded by higher priority listing actions." *See* Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions To List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered, 75 Fed. Reg. 13,910, 13,910 (Mar. 23, 2010) (to be codified at 50 C.F.R. pt. 17).

<sup>188</sup> Under the ESA petition process, after the filing of a petition to list a species, the appropriate Service has ninety days to determine whether available evidence warrants a listing. KRISTINA ALEXANDER, CONG. RESEARCH SERV., R41100, WARRANTED BUT PRECLUDED: WHAT THAT MEANS UNDER THE ENDANGERED SPECIES ACT (ESA) 1 (2010), <https://perma.cc/AZX3-2SC2>. The Service must decide whether or not listing is warranted, or if listing is "warranted but precluded." *Id.* A finding of "warranted but precluded" means that some species are a higher priority for protection under the ESA than others. Although a "warranted but precluded" determination must be updated annually to indicate expeditious progress in listing the higher priority species, 16 U.S.C. § 1533(b)(3)(C)(i) (2012), in practice this status can last indefinitely. *See* ALEXANDER, *supra*, at 2.



developments.<sup>189</sup> Between 2007 and 2013, the population of sage grouse plummeted by an estimated 56%, to roughly 400,000 birds in 2015.<sup>190</sup>

In 2010, the United States Fish and Wildlife Service determined that the sage grouse warranted listing under the ESA due to destruction of its habitat, but the listing was precluded by higher priorities.<sup>191</sup> The threat of an ESA listing was sufficiently real to prompt western states to develop sage grouse habitat protection plans they thought would impose restrictions on land development activities at lower costs than protections resulting from an ESA listing.<sup>192</sup> This coordinated state effort in turn encouraged the federal government to amend ninety-eight BLM and Forest Service land plans in 2015 to protect more than seventy million acres of sage grouse habitat, in what was widely described as an unprecedented habitat-conservation effort.<sup>193</sup> As a keystone species, protecting the sage grouse's habitat would also redound to the benefit of other species like mule deer and pronghorn.<sup>194</sup> These federal and state habitat-protection plans convinced the government

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<sup>189</sup> See Darryl Fears, *The Western Sagebrush Is a Backdrop in Every Epic Cowboy Movie. Can It Be Saved?*, WASH. POST (Sept. 2, 2015), <https://perma.cc/HB3K-RLY4> (quoting Ken Rait of the Pew Charitable Trusts). Invasive species like cheatgrass and juniper trees as well as wildfires have also contributed to the decline in sagebrush. See Jim Urquhart & Elizabeth Chuck, *The \$5.6 Billion Bird: How Will the Sage Grouse Fight End?*, NBC NEWS (Sept. 22, 2015), <https://perma.cc/S5EZ-NXAF>.

<sup>190</sup> See Fears, *supra* note 189 (citing a Pew Charitable Trust study and noting that half of the sage grouse population resides in Wyoming).

<sup>191</sup> Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions To List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered, 75 Fed. Reg. at 13,910. The Fish and Wildlife Service originally denied environmentalists' petition to list the bird in 2005. See Endangered and Threatened Wildlife and Plants; 12-Month Finding for Petitions To List the Greater Sage-Grouse as Threatened or Endangered, 70 Fed. Reg. 2244, 2244 (Jan. 12, 2005) (to be codified at 50 C.F.R. pt. 17). But a federal court ordered the agency to reconsider. *W. Watersheds Project*, 535 F. Supp. 2d at 1176.

<sup>192</sup> See Christy Goldfuss et al., *Unprecedented Collaboration to Save Sage-Grouse Is the Largest Wildlife Conservation Effort in U.S.*, WHITE HOUSE: PRESIDENT BARACK OBAMA (Sept. 22, 2015), <https://perma.cc/73KH-7E46>; Amanda Jahshan, *DOI, BLM Release Sage Grouse Guidance*, NAT. RESOURCES DEF. COUNCIL (Sept. 1, 2016), <https://perma.cc/MRC5-594B>.

<sup>193</sup> See *id.* The Interior Department described the plan amendments as:

An unprecedented, landscape-scale conservation effort across the western United States has significantly reduced threats to the greater sage-grouse across 90 percent of the species' breeding habitat and enabled the U.S. Fish and Wildlife Service . . . to conclude that the charismatic rangeland bird does not warrant protection under the Endangered Species Act . . . . This collaborative, science-based greater sage-grouse strategy is the largest land conservation effort in U.S. history.

Press Release, U.S. Dep't of the Interior, Historic Conservation Campaign Protects Greater Sage-Grouse (Sept. 22, 2015), <https://perma.cc/4W2C-EQSY>; see also Daniel J. Rohlf, Opinion, *Don't Toss Out Cooperation in the West's Sage Country: Rohlf*, RENO GAZETTE J. (Dec. 8, 2017), <https://perma.cc/M22F-2ZZH>.

<sup>194</sup> See Press Release, U.S. Dep't of the Interior, *supra* note 193; see also *Greater Sage-Grouse*, U.S. DEP'T AGRIC., <https://perma.cc/X4Z9-4AYS> (last visited Apr. 7, 2018).

that an ESA listing was unnecessary so long as the amended land plans produced their promised habitat protection.<sup>195</sup>

The land plan amendments approved by the Obama Administration had bipartisan support, notably from the Republican governors of Nevada and Wyoming.<sup>196</sup> The amendments' habitat protection reflected best available science, including buffer zones around nesting and breeding areas (leks) and established a tiered habitat-management scheme that identified the best sage grouse habitat for protection (protecting the highest priority areas as "sagebrush focal areas" and second-priority areas as "priority habitat management areas").<sup>197</sup> The amendments also promised close monitoring and established "density" and "disturbance" that limited cumulative habitat disturbance in prime habitat areas to 3% in most areas and 5% in Wyoming.<sup>198</sup>

When the federal sage grouse plan amendments went into effect in September 2015, the amendments were widely hailed as the largest collective wildlife conservation effort ever undertaken, the fruits of an unprecedented federal–state collaborative conservation effort.<sup>199</sup> Although the amendments enjoyed some bipartisan support, they were opposed by the oil and gas industry,<sup>200</sup> and a coalition of Nevada counties and mining companies convinced a court that BLM violated NEPA when it added sage grouse focal areas in Nevada that were not included in the draft plan amendments.<sup>201</sup>

The advent of the Trump Administration promised a new day, and in June 2017, Secretary Zinke issued a secretarial order calling for a "Sage-

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<sup>195</sup> Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Greater Sage-Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59,858, 59,858 (Oct. 2, 2015) (to be codified at 50 C.F.R. pt. 17).

<sup>196</sup> See Juan Carlos Rodriguez, *Sage Grouse Plan Review Threatens Delicate Compromise*, LAW360 (June 21, 2017), <https://perma.cc/A7QF-M8KK> (noting that Idaho and Utah opposed the federal plan).

<sup>197</sup> See, e.g., U.S. FOREST SERV., GREATER SAGE-GROUSE RECORD OF DECISION FOR IDAHO AND SOUTHWEST MONTANA, NEVADA AND UTAH 39–40 (2015), <https://perma.cc/DKG2-N8PN> (providing the proposed amendments for several conservation areas). The federal emphasis on protecting sage grouse habitat built on Wyoming's groundbreaking "core sage grouse area" strategy. See Scott Streater, *Senate Dems Pump Zinke for Details on Federal Review*, E&E NEWS PM (July 13, 2017), <https://perma.cc/UN8C-RYH8>.

<sup>198</sup> See U.S. FOREST SERV., GREATER SAGE-GROUSE RECORD OF DECISION FOR NORTHWEST COLORADO AND WYOMING 31, 99 (2015), <https://perma.cc/X8AK-ULH7>.

<sup>199</sup> See Goldfuss et al., *supra* note 192 (providing the claims of the Secretaries of Agriculture and Interior); see also Darryl Fears, *Decision Not To List Sage Grouse as Endangered Is Called Life Saver by Some, Death Knell by Others*, WASH. POST (Sept. 22, 2015), <https://perma.cc/RDU7-JLAE> (noting that some conservationists like the National Audubon Society supported the decision not to list, while others, like Defenders of Wildlife, criticized the amended federal land plans for failing to protect winter habitat and to account for the effects of climate change).

<sup>200</sup> See Matthew Brown, *Oil, Gas Industry Challenges Efforts to Protect Sage Grouse*, SPOKESMAN-REV. (May 12, 2016), <https://perma.cc/GP2J-V427>.

<sup>201</sup> *W. Exploration, LLC v. U.S. Dep't of the Interior*, 250 F. Supp. 3d 718, 727 (D. Nev. 2017), *appeal docketed* No. 17-16220 (9th Cir. June 13, 2017); see Scott Streater, *Court Ruling Fuels Uncertainty Over Conservation Plans*, E&E NEWS: GREENWIRE (Apr. 4, 2017), <https://perma.cc/SSFG-7UJB> (observing that the judge did not enjoin the use of the focal areas pending NEPA compliance through a supplemental analysis on the plan amendments).

Grouse Review Team” to report on the 2015 land plan amendments and make recommendations for change, mainly to accommodate mining and oil and gas interests.<sup>202</sup> The ensuing report included numerous proposed changes, the chief of which was to back off from making habitat protection the vehicle for sage grouse recovery and to rely instead on population figures.<sup>203</sup> Critics charged that reliance on population numbers, which vary widely from year to year, do not reflect the best available science.<sup>204</sup> The Republican governor of Wyoming even maintained that a population-based strategy would undermine the certainty that the oil and gas and mining industries sought.<sup>205</sup>

Other changes called for by the Zinke sage grouse report, many of which paralleled positions of the Western Energy Alliance,<sup>206</sup> included reducing development restrictions in focal and priority habitat areas, removing the Fish and Wildlife Service’s authority to approve energy project waivers in those areas, using population targets to judge the overall health of the sage grouse population, and a captive breeding program to boost

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<sup>202</sup> Ryan Zinke, Sec’y of the Interior, Order No. 3353, Greater Sage-Grouse Conservation and Cooperation with Western States (June 7, 2017); see Wiles, *supra* note 179. With the Trump Administration backing away from sage grouse conservation efforts, “[a] coalition of environmental groups . . . filed an administrative appeal to stop [BLM] from executing oil and gas leases on three parcels in Utah . . . within or near priority habitat for the greater sage grouse.” See Scott Streater, *Greens Appeal BLM Leasing of Parcels in Prime Habitat*, E&E NEWS PM (Oct. 31, 2017), <https://perma.cc/77S2-4SL7>.

<sup>203</sup> Memorandum from Kathleen Benedetto & John F. Ruhs, Co-Leads, Dep’t of the Interior Sage-Grouse Review Team, Bureau of Land Mgmt., on Response to Secretarial Order 3353, at 10–11 (Aug. 4, 2017), <https://perma.cc/43GV-F8JP>. The report’s reliance on population figures instead of habitat protection stood in contrast to the Forest Service’s pronounced preference for habitat assessments in complying with NFMA’s diversity requirement in its timber sales. See, e.g., *Inland Empire Pub. Land Council v. U.S. Forest Serv.*, 88 F.3d 754, 759–61 (9th Cir. 1996) (deferring to the Forest Service’s preference for relying on habitat acreage); see also *Lands Council v. McNair*, 537 F.3d 981, 992 (9th Cir. 2008) (en banc) (deferring to Forest Service scientific modeling and ruling that NFMA does not require site-specific, on-the-ground analysis).

<sup>204</sup> Scott Streater, *Zinke Review Team Calls for Big Changes to Obama-Era Plans*, E&E NEWS (Aug. 7, 2017), <https://perma.cc/ZT47-XJNR>.

<sup>205</sup> See Scott Streater, *2nd Republican Governor Questions Zinke Plan Revisions*, E&E NEWS PM (Aug. 23, 2017), <https://perma.cc/YXF9-MDJU>; see also Scott Streater, *Wyo. GOP Governor ‘Concerned’ About Zinke Plan Revisions*, E&E NEWS: GREENWIRE (Aug. 8, 2017), <https://perma.cc/WAV8-EJ8E> (reporting that Wyoming governor Matt Mead had expressed concern over the Zinke report’s focus on population targets and captive breeding). A leading Wyoming newspaper editorialized against the Zinke rollback as inconsistent with years of collaborative work, scientific evidence, and the position of the Wyoming governor. Editorial, *Respect Local Compromise on Sage Grouse*, CASPER STAR-TRIB. (Nov. 19, 2017), <https://perma.cc/AGZ5-FCZK>.

<sup>206</sup> See Scott Streater, *Interior Panel Echoed Industry Wish List in Revising Plans*, E&E NEWS PM (Aug. 17, 2017), <https://perma.cc/95DZ-Q964> (reporting that the oil and gas industry got thirteen of its fifteen concerns addressed in the Zinke report, according to a representative of the Western Values Project). The Western Values Project proceeded to file a Freedom of Information Act, 5 U.S.C. § 552 (2012), suit, seeking correspondence between the Zinke Interior Department and the oil and gas lobby. See Scott Streater, *Email Release Aims to Thwart Sage Grouse Collusion Claims*, E&E NEWS PM (Oct. 25, 2017), <https://perma.cc/FRY4-FTZH> (also discussing the release of dozens of email exchanges between the oil and gas lobby’s Western Energy Alliance and the Interior Department in the wake of the filing of the lawsuit).

numbers.<sup>207</sup> Although many questioned the scientific basis of these proposed reforms,<sup>208</sup> they had no immediate effect, since they must be implemented by individual plan amendments after a public process.<sup>209</sup> Reductions in sage

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<sup>207</sup> See Tay Wiles, *Interior Overhauls Sage Grouse Conservation*, HIGH COUNTRY NEWS (Aug. 24, 2017), <https://perma.cc/YM35-MJPH>. A lawyer representing energy producers noted that the Trump “executive order on energy independence says we want to have more development of oil and gas on federal land, [yet the BLM sagebrush guidance issue in the wake of the 2016 plan amendments] really do make energy development a lower priority where there are sage grouse habitat areas.” See Rodriguez, *supra* note 196 (quoting Wayne Whitlock). However, a recent seven-state analysis released by Back Country Hunters & Anglers found that 71% of areas having medium to high energy development potential fall outside priority sagebrush areas, and that 79% of the acreage in priority sagebrush areas have low to zero energy potential. See Jennifer Yachnin, *Key Habitat Rarely Overlaps with Energy Potential—Report*, E&E NEWS: GREENWIRE (June 13, 2017), <https://perma.cc/53JJ-QABE> (discussing a report prepared by Western Ecosystems Technology). Given the relatively minor likely effect on the energy industry, the chief beneficiary of the rollback in sage grouse protection would seem to be grazers.

<sup>208</sup> See Scott Streater, *Zinke’s ‘Innovative Ideas’ Order May Not Help Birds—Report*, E&E NEWS: GREENWIRE (July 31, 2017), <https://perma.cc/RVP5-ZTVS> (discussing a white paper by the Western Association of Fish and Wildlife Agencies (WAFWA) that recommended that the sage grouse plans not be significantly altered and noting that “[p]opulation-level management actions to benefit sage-grouse don’t provide benefits to other sagebrush-dependent species” like pygmy rabbits, which could lead to an ESA listing for that species, and discussing a separate white paper by WAFWA that questions reliance on captive breeding due to adverse effects on wild-breeding populations); *Secretary of the Interior Zinke Undercuts BLM Sage Grouse Conservation Plan*, OR. NAT. DESERT ASS’N, <https://perma.cc/C2GW-XY3G> (last visited Apr. 7, 2018) (criticizing the Secretary’s order calling for review of the sage grouse strategy for failing to employ best available science, for encouraging “piecemeal management,” for dismantling protections in the very best sage grouse habitats, for abandoning the 2015 plans, which had broad-based political support to favor the mining and oil and gas industries, and for wasting the public money spent on years of habitat science and planning); Rohlf, *supra* note 193 (objecting to Secretary Zinke’s sage grouse plan as a “unilateral bid to blow up years of cooperative effort in sage grouse country to benefit a single industry [the oil and gas industry] as an extraordinarily bad idea”); see also Editorial, *supra* note 205 (noting the opposition of the Republican governor of Wyoming (home of 37% of the remaining sage grouse habitat), Matt Mead, to undoing a decade of collaborative conservation efforts).

<sup>209</sup> The public process left quite a bit to be desired, however, as BLM lost close to 100,000 comments due to “a technical error,” including not a single comment from National Wildlife Federation members. Dino Grandoni, *The Energy 202: Almost 100,000 Comments Missing from Federal Sage Grouse Conservation Report*, WASH. POST (Mar. 9, 2018), <https://perma.cc/4QCE-D5BK>; see also Scott Streater, *BLM Blames Missing Comments on ‘Technology Breakdown’*, E&E NEWS: GREENWIRE (Mar. 12, 2018), <https://perma.cc/H998-J2DF>.

Moreover, in October 2017, BLM announced it was terminating protection for 10 million acres of sage grouse habitat to allow for energy development and grazing, since allegedly neither would pose a significant threat to the sage grouse. See Matthew Daly, *Feds Remove Protections for 10M Acres of Sage Grouse Habitat*, U.S. NEWS & WORLD REP. (Oct. 5, 2017), <https://perma.cc/TT69-VCL8>. And even before the comment period closed on revising the land plans, BLM issued revised instructional memoranda (IMs) that removed sage grouse protections. The most significant of these was the oil and gas IM, which instructed BLM field staff that they no longer needed to prioritize leasing in non-sage grouse areas before leasing in sage grouse habitats. See Scott Streater, *BLM No Longer Aiming to Prevent Drilling in Key Habitat*, E&E NEWS: GREENWIRE (Jan. 2, 2018), <https://perma.cc/FG4X-FKYT> (also discussing reduced protections in a grazing IM and an adaptive management IM). The position drew the ire of five Democratic senators. See Scott Streater, *Senate Dems Question Zinke on Sage Grouse Rollbacks*, E&E NEWS PM (Feb. 7, 2018) (citing a letter from Michael Bennet (Colo.), Chris Van

grouse protections could lead to reconsideration of the decision not to list the bird under the ESA.<sup>210</sup> Yet in April 2018, a leaked version of a draft EIS on the BLM's revised sagebush plans for Wyoming may signal the road ahead, as it called for 1) removing protections for priority sage grouse habitat; 2) eliminating sage grouse focal area designations; 3) allowing states to adjust BLM habitat management areas without triggering the plan amendment process; 4) deferring to states on habitat management; and 5) expanding the use of categorical exclusions in carrying out NEPA implementation.<sup>211</sup> Even before such plan amendments take effect, an environmentally hostile Congress could use the appropriations process to defund implementation of the 2015 plan amendments<sup>212</sup> and to exempt the sage grouse from ESA

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Hollen (Md.), Dianne Feinstein (Cal.), Jeff Merkley (Or.), and Tom Udall (N.M.); see also Scott Streater, *Interior Set to Overhaul Sage Grouse Plans*, E&E NEWS PM (Sept. 28, 2017), <https://perma.cc/G8ZA-CTN6> (discussing the Interior Department's promise of amendments to ninety-eight federal land plans to remove protection for sage grouse focal areas, which the Obama Administration plans considered "essential for the species' survival"); see also Scott Streater, *BLM Reopens Plans, Cancels 10M-Acre Mining Ban*, E&E NEWS PM (Oct. 5, 2017), <https://perma.cc/J5B9-LGBW> (noting that Interior expected the forthcoming changes to significantly alter the plans; also reporting that the agency let a two-year mining moratorium on ten million acres of prime sage grouse habitat expire and killed an EIS on mining's effect on sage grouse habitat on the ground that future mining would not be "a significant threat to sage grouse habitat," and quoting the acting BLM director to the effect that the mining withdrawal amounted to "a complete overreach").

The Chair of the House Committee on Natural Resources claimed an Obama Administration initiative to extend the mining withdrawal for twenty years violated FLPMA, asserting that the reason cited for the withdrawal—that Congress was considering legislation to protect sage grouse habitat—was untrue. Letter from Rob Bishop, Chairman of House Comm. on Nat. Res., to Sonny Perdue, Sec'y of Agric., & Ryan K. Zinke, Sec'y of the Interior (Sept. 28, 2017), <https://perma.cc/K6MN-8X3S>. Even before amending the BLM and Forest Service land plans, BLM called for plan amendments to allow cattle grazing throughout sage grouse habitat in the nearly century-old Craters of the Moon National Monument and Preserve in central Idaho. See Keith Ridler, *US Cattle Grazing Plan for Idaho National Monument Approved*, IDAHO NEWS (Aug. 11, 2017), <https://perma.cc/W8QZ-STR8>. BLM also proceeded to conduct an oil and gas lease sale in northwest Utah potentially harming an isolated population of sage grouse that BLM considers to be in "serious decline." See Scott Streater, *BLM Leases Parcels in Key Grouse Habitat Despite Protests*, E&E NEWS: GREENWIRE (Sept. 13, 2017), <https://perma.cc/MMJ4-CE9M> (noting that several environmental groups protested the sale affecting the habitat of a grouse population which had declined 40% over the previous four years). Further, BLM held a 15,000-acre oil and gas sale in northwest Utah in habitat occupied by the Sheeprocks population of sage grouse, a population suffering "serious decline" according to the agency. See *id.*

<sup>210</sup> See Streater, *supra* note 208. The reason for denying the ESA listing was the availability of regulatory alternatives like those in the amended land plans, although the Fish and Wildlife Service promised to revisit the listing issue in 2020. Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions To List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered, 75 Fed. Reg. 13,910, 13,986–88 (Mar. 23, 2010) (to be codified at 50 C.F.R. pt. 17); see also U.S. FISH & WILDLIFE SERV., 2020 GREATER SAGE-GROUSE STATUS REVIEW, <https://perma.cc/K3YZ-KGTR> (last visited Apr. 7, 2018). Congress might also attempt to rescind the 2015 sage grouse plans under the CRA, explained *supra* note 168, since it is not clear that they were submitted for congressional or comptroller review.

<sup>211</sup> See Scott Streater, *BLM Plans Overhaul of Wyo. Sage Grouse Safeguards—Leaked Doc*, E&E NEWS: GREENWIRE (Apr. 16, 2018), <https://perma.cc/EM5W-Z7HD>.

<sup>212</sup> See S. REP. NO. 114-281, at 14 (2016) (proposing to use an appropriations act to defund measures relating to sage grouse habitat). If Congress was actually concerned about reducing

protections,<sup>213</sup> reminders of how much of the Trump revolution in public lands depends on congressional action.

#### IV. FOSTERING FOSSIL FUEL DEVELOPMENT

The Trump revolution's most immediate effects will not occur in the form of revised land plans or shrinking the size of national monuments but in on-the-ground actions like issuing mineral leases for fossil fuel extraction. In 2017, there was quite a bit of action signaling that the Trump Administration would emphasize mineral leasing of fossil fuels on federal lands as the centerpiece of its energy policy.<sup>214</sup> Although this promise was a considerable change from the previous Administration, U.S. oil and gas production did in fact increase during the Obama Administration, although there was a slight decrease on production from federal lands.<sup>215</sup> At the same time, the Obama Administration imposed moratoria on coal and frontier offshore oil and gas leasing.<sup>216</sup>

The Trump Administration's change in course was hardly the first time a new administration had attempted to increase fossil fuel production from federal lands. In the 1920s, the infamous Tea Pot Dome scandal—involving uncompetitive leases of naval petroleum reserves in Wyoming and

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the costs of public land management, it could reduce subsidies for federal grazers by increasing fees to comparable private land leases. In 2014, the federal grazing program cost \$144 million on grazing programs, but the fees earned the government only \$19 million. See Andrew Gulliford, Opinion, *Privatize Public Lands? Start with Grazing Fees*, HIGH COUNTRY NEWS (May 10, 2016), <https://perma.cc/2V99-X4JT>; see also CHRISTINE GLASER ET AL., COSTS AND CONSEQUENCES: THE REAL PRICE OF LIVESTOCK GRAZING ON AMERICA'S PUBLIC LANDS 1 (2015), <https://perma.cc/E4Q2-G7KM> (study for the Center for Biological Diversity).

<sup>213</sup> See Nick Sobczyk, *Sage Grouse, Chemicals Amendments Await NDAA Debate*, E&E DAILY (Aug. 4, 2017), <https://perma.cc/M2E8-YWZ5> (discussing an amendment to the National Defense Authorization Act by Senator Mike Lee (R-Utah) that would forbid the Fish and Wildlife Service from listing the sage grouse until at least 2027).

<sup>214</sup> See Exec. Order No. 13,783, 82 Fed. Reg. 16,093 16,096 (Mar. 31, 2017); Mike Lee & Edward Klump, *States Will Shape Drilling Plan—Zinke*, E&E NEWS: GREENWIRE (Mar. 6, 2018), <https://perma.cc/E8BL-5HB9> (noting that Secretary Zinke suggested that revenue from increased drilling could help address the "\$13 billion maintenance backlog [in] national parks and national wildlife refuges").

<sup>215</sup> Although the number of new leases on federal lands did decrease under Obama, his Administration was still issuing a significant amount of leases. See *Oil Production on Federal Lands Slightly Above Its FY 2010 High*, INST. FOR ENERGY RES. (July 7, 2016), <https://perma.cc/U4VR-9CPU>. In 2015, oil production on federal lands was 0.8% more than its 2010 high, and oil production on private and state lands was 113% higher in 2015 than in 2010. *Id.*

<sup>216</sup> Sally Jewell, Sec'y of the Interior, Order No. 3338, Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program (Jan. 15, 2016). Obama's moratoria have since been taken down from the Secretary of Interior's website. See Press Release, U.S. Dep't of the Interior, Secretary Jewell Launches Comprehensive Review of Federal Coal Program (Jan. 15, 2016), <https://perma.cc/ZUP2-S8AZ>; Press Release, U.S. Dep't of the Interior, Interior Department Announces Next Step in Offshore Oil and Gas Leasing Planning Process for 2017–2022 (Mar. 15, 2016), <https://perma.cc/W2X3-G499>; see also Darryl Fears & Juliet Eilperin, *President Obama Bans Oil Drilling in Large Areas of Atlantic and Arctic Oceans*, WASH. POST (Dec. 20, 2016), <https://perma.cc/DN93-48X2>.

California—produced what some considered to be the greatest scandal in American politics before Watergate, which saw Secretary of Interior Albert Fall convicted of accepting oil company bribes.<sup>217</sup> A half-century later, President Reagan’s Interior Secretary, James Watt, brought about another mineral leasing scandal when he issued coal leases in the Power River Basin in Montana and Wyoming at below-market value, although he was not convicted of anything but poor judgment.<sup>218</sup>

Even compared to this history of corruption, the ambitions of the Trump Administration in reorienting public lands management in the service of energy production, especially fossil fuel leasing, were fairly breathtaking. Here, we focus on several issues, including rescinding the leasing moratoria, attempting to scuttle the methane anti-waste rule, eliminating a rule controlling hydraulic fracturing on federal lands, revoking a rule establishing a metric measuring the social cost of carbon, and a so-called effort to “streamline” NEPA reviews.

### *A. Rescinding the Coal and Offshore Oil and Gas Leasing Moratoria*

Although nearly a half-million acres were under federal coal lease in 2015, producing roughly 40% of the nation’s coal and nearly \$1.3 billion in government revenues,<sup>219</sup> the Obama Administration imposed a moratorium on coal leasing in early 2016.<sup>220</sup> According to President Obama, the moratorium would enable the government to better manage the coal-leasing program in order to ensure a fair return to taxpayers and to minimize adverse effects on the planet.<sup>221</sup> These issues were to be analyzed in a

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<sup>217</sup> See, e.g., Bryan Craig, *Making the Teapot Dome Scandal Relevant Again!*, U. VA. MILLER CTR. (Apr. 11, 2017), <https://perma.cc/V6Z5-2ASC>; Adam B. Sowards, *Reckoning with History: Interior’s Legacy of Bad Behavior*, HIGH COUNTRY NEWS (Jan. 3, 2018), <https://perma.cc/CD9Y-MBPJ> (discussing the scandals of both Albert Fall and James Watt).

<sup>218</sup> See, e.g., Nat’l Wildlife Fed’n v. Burford, 871 F.2d 849, 856–57 (9th Cir. 1989) (finding no statutory violation in adopting a new “entry level bid” system allowing alleged below fair-market value leases). An earlier report to Congress concluded that the government “probably offered excessive amount of Federal coal reserves in a declining market and this, in turn, probably lessened the prospect of receiving fair market value.” *Report of the Commission on Fair Market Value Policy for Federal Coal Leasing: Hearing Before the S. Comm. on Energy and Nat. Res.*, 98th Cong. 150 (1984). At the very least, the Interior Department made serious errors in judgment in its procedures for conducting the 1982 Powder River lease sale and failed to provide a sound rationale for many of its actions.

<sup>219</sup> See Valerie Volcovici, *U.S. Halts New Coal Leases on Federal Land, First Review in Decades*, YAHOO! (Jan. 15, 2016), <https://perma.cc/77NP-3D73>. States share in the revenues produced by the coal-leasing program. See, e.g., Bill Chappell, *U.S. Announces Moratorium on New Coal Leases on Federal Lands*, NAT’L PUB. RADIO (Jan. 15, 2016), <https://perma.cc/L964-9MLK> (noting that Wyoming’s share in 2014 was \$555 million from 102 leases on over 200,000 acres).

<sup>220</sup> See generally Jewell, Order No. 3338, *supra* note 216.

<sup>221</sup> See Volcovici, *supra* note 219. On the planetary effects, see Uma Outka, *State Lands in Modern Public Land Law*, 36 STAN. ENVTL. L.J. 147, 164–65 (2017) (noting that scientific studies indicate that to meet international climate goals of keeping global temperatures from rising 2°C, the United States would have to forego use of over 95% of its coal reserves, 9% of its oil reserves, and 6% of its gas reserves until 2050).

programmatic EIS on the leasing program, primarily centered in Wyoming, Colorado, New Mexico, and Utah.<sup>222</sup> The moratorium, expected to last three years, aimed to square federal land leasing with the commitments the United States made to reduce carbon emissions in the Paris agreement on climate change, implemented through the President's Clean Power Plan.<sup>223</sup>

The Trump Administration wasted little time in tearing down these commitments, signing an executive order in March 2017 that called for lifting the moratorium on coal leasing and dismantling the Clean Power Plan.<sup>224</sup> The former could be immediately implemented by the Secretary of the Interior, as could a "simplification" of oil and gas leasing procedures, including killing the use of master leasing plans which helped keep leases away from national parks and other environmentally sensitive areas, shortening the protest period for lease challenges, not requiring site visits to lease sites, and not deferring leases during the amendment of land plans.<sup>225</sup> But the latter would require rulemaking or an amendment to the Clean Air

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<sup>222</sup> See Notice of Intent To Prepare a Programmatic Environmental Impact Statement To Review the Federal Coal Program and To Conduct Public Scoping Meetings, 81 Fed. Reg. 17,720, 17,1720–21 (Mar. 30, 2016).

<sup>223</sup> See *What Is the U.S. Commitment in Paris?*, COLUM. U. EARTH INST. (Dec. 11, 2015), <https://perma.cc/LQF7-TSSH> (observing that the United States promised the international community to reduce carbon emissions 26–28% below 2005 emissions by 2025 and to use its "best efforts" to reduce by 28%); see also U.S. ENVTL. PROT. AGENCY, EPA FACT SHEET: CLEAN POWER PLAN, <https://perma.cc/9UK5-PEX8> (last visited Apr. 7, 2018) (promising to cut carbon emissions from the power sector—roughly one-third of greenhouse gas emissions—by 30% from 2005 levels).

<sup>224</sup> See Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,096, (Mar. 31, 2017) ("The Secretary of the Interior shall take all steps necessary and appropriate to amend or withdraw Secretary's Order 3338 dated January 15, 2016 . . . and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338. The Secretary shall commence Federal coal leasing activities consistent with all applicable laws and regulations."). For an examination of the federal government's persistent failure to obtain fair market value for its public coal resources, see generally Mark Squillace, *The Tragic Story of the Federal Coal Leasing Program*, NAT. RESOURCES & ENV'T, Winter 2013, at 29. Of course, President Trump proceeded to withdraw the United States from the Paris Accord on June 1, 2017, stating that "the Paris Accord would undermine [the U.S.] economy," and "put [the U.S.] at a permanent disadvantage." Remarks Announcing United States Withdrawal from the United Nations Framework Convention on Climate Change Paris Agreement, 2017 DAILY COMP. PRES. DOC. 1, 5 (June 1, 2017). *But see* Jonathan Thompson, *The Trump Administration's False Coal Stats, Explained*, HIGH COUNTRY NEWS (June 7, 2017), <https://perma.cc/ZX5E-7AH5> (providing a history of the coal industry's decline and analogizing the decline to the demise of the British chimney sweep profession). The lifting of the coal-leasing moratorium drew suits from four states, environmentalists, and the Northern Cheyenne Tribe. See Ellen M. Gilmer, *4 States Take Aim at Trump's Coal Leasing Revival Effort*, E&E NEWS: ENERGYWIRE (May 10, 2017), <https://perma.cc/LZD9-DYJ9> (noting that the states—California, New Mexico, New York, and Washington—filed their suit in the District of Montana, while the environmentalists and the tribe filed in the District of Columbia District Court).

<sup>225</sup> See Scott Streater, *BLM Axes Obama-Era Oil and Gas Leasing Reforms*, E&E NEWS PM (Feb. 1, 2018), <https://perma.cc/7BZY-3K3X> (discussing the so-called "instruction memorandum" on oil and gas leasing and noting that eliminating master leasing plans was a response to President Trump's Executive Order 13783, Promoting Energy Independence and Economic Growth, calling for rescinding all rules and policies that "unnecessarily encumber" U.S. energy production).



Act.<sup>226</sup> However, ending the moratorium was unlikely to materially increase federal coal leasing, which has been in decline because of market conditions occasioned by utilities switching to cheaper natural gas.<sup>227</sup>

After boosting federal oil and gas leasing for years,<sup>228</sup> the Obama Administration decided in 2016 to withdraw some 125 million acres of offshore lands in the Arctic and the Atlantic Oceans from leasing, invoking a seldom-used provision of the Outer Continental Shelf Lands Act<sup>229</sup> (OCSLA).<sup>230</sup> The Trump Administration acted quickly to reverse the withdrawal in another executive order, issued in April 2017.<sup>231</sup> Environmental groups, including the first-ever suit filed by the League of Conservation Voters, objected, claiming that—as in the case of the Antiquities Act—the President lacked authority to rescind the OCSLA

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<sup>226</sup> 42 U.S.C. §§ 7401–7671q (2012); see Nathan Rott & Merrit Kennedy, *Trump Takes Aim at a Centerpiece of Obama's Environmental Legacy*, NAT'L PUB. RADIO (Mar. 28, 2017), <https://perma.cc/XTL2-UQGQ>; *What Is the Clean Power Plan, and How Can Trump Repeal It?*, N.Y. TIMES (Oct. 10, 2017), <https://perma.cc/6KPR-TXM9> (noting that if Congress does not amend the statute to scuttle the Clean Power Plan, EPA could still do so through amended rules).

<sup>227</sup> See Dylan Brown, *Leasing Demand Slumped in Year After the Trump Administration Lifted the Moratorium*, E&E NEWS: GREENWIRE (Apr. 2, 2018), <https://perma.cc/46ES-J245> (explaining that when the administration scuttled the moratorium, there were applications for 2.8 million tons of coal, which by April 2018 declined to 1.9 billion tons; of the 40 million tons leased during the previous year, only one had been blocked by the moratorium, and that during the same period, companies withdrew applications for 901 million tons); Rott & Kennedy, *supra* note 226; see also Dylan Brown, *Trump Scrapped Leasing Moratorium, but Demand Has Shrunk*, E&E NEWS: GREENWIRE (Aug. 29, 2017), <https://perma.cc/3NK5-6ESU> (noting that two-thirds of the coal under current lease is on hold, waiting for better market conditions); Dylan Brown, *Interior Admits Error in Bernhardt Op-Ed*, E&E NEWS PM (Feb. 1, 2018), <https://perma.cc/7KNZ-XJBR> (observing that nationwide demand for coal leases shrunk after the moratorium was lifted, with leases withdrawn containing roughly ten times as much coal as approved or newly submitted leases). Four states (California, New York, New Mexico, and Washington), along with environmental groups and the Northern Cheyenne Tribe, filed suits against Interior Secretary Zinke's lifting of the moratorium, claiming NEPA violations. See Ellen M. Gilmer, *States Sue Trump Admin for Ending Lease Moratorium*, E&E NEWS PM (May 9, 2017), <https://perma.cc/P7RT-MWY4>.

<sup>228</sup> See Robert Rapier, *The Irony of President Obama's Oil Legacy*, FORBES (Jan. 15, 2016), <https://perma.cc/NK2L-ULM6> (noting U.S. oil production grew each year during Obama's presidency, increasing by 88% between 2008 and 2015); see also *supra* note 215 and accompanying text.

<sup>229</sup> 43 U.S.C. §§ 1331–1356a (2012).

<sup>230</sup> *Id.* § 1341(a) (authorizing the President to “withdraw from disposition any of the unleased lands of the outer Continental Shelf”); see Emily Yehle, *Trump Lifts Obama's Ban as Greens Promise Legal Assault*, E&E NEWS: GREENWIRE (Apr. 28, 2017), <https://perma.cc/EPM2-YSLV> (explaining that the Obama withdrawal included the entire Chukchi Sea, much of the Beaufort Sea, and canyons in the Atlantic Ocean—125 million acres in all).

<sup>231</sup> See Exec. Order No. 13,795, 82 Fed. Reg. 20,815, 20,816 (May 3, 2017) (signed Apr. 28, 2017). Secretary Zinke responded by identifying numerous regulations ripe for amending in order to encourage oil, gas, and coal leasing on federal public lands, stating that Interior would streamline permitting and repeal Obama “job killing regulations.” Pamela King, *Zinke Casts Wide Net in Energy Rule Review*, E&E NEWS: ENERGYWIRE (Oct. 26, 2017), <https://perma.cc/BER3-WTXQ>; see also Jonathan Thompson, *The Big Public Land Sell-Out*, HIGH COUNTRY NEWS (Jan. 31, 2018), <https://perma.cc/65WE-TFBY> (suggesting that Zinke's leasing reforms amounted to a “de facto privatization scheme”).

withdrawal.<sup>232</sup> Congress also rolled back nearly four decades of conservation measure protecting the Arctic National Wildlife Refuge as part of tax reform in December 2017.<sup>233</sup>

The executive order lifting of the off-shore moratoria aimed to revise the five-year leasing plan and reconsider all marine protected areas in order

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<sup>232</sup> See Hein, *supra* note 27, at 136; Brittany Patterson, *Green Groups Sue Over Trump's Executive Order*, E&E NEWS: GREENWIRE (May 3, 2017), <https://perma.cc/2MYQ-AFVJ> (noting that previous presidents have modified previous OCSLA withdrawals, but none has ever revoked one, and claiming that revocation authority lies exclusively with Congress under the Property Clause); Amanda Reilly, *LCV Files Its First-Ever Lawsuit, Challenging Trump on Drilling*, E&E NEWS PM (May 3, 2017), <https://perma.cc/DH8X-V525>. A bill passed by the House Natural Resources Committee, on a 19–14 vote on November 8, 2017, the “Strengthening the Economy with Critical Untapped Resources to Expand (SECURE) American Energy Act,” H.R. 4239, 115th Cong. (2017), would not only reverse the Obama moratorium, but also prohibit the Interior Department from enforcing the Obama Administration’s ban on Arctic drilling, revoke the President’s authority to establish marine national monuments, prohibit the Interior Department from enforcing federal regulation of hydraulic mining on federal lands in states with regulations, and prevent BLM from hindering energy development on nonfederal lands with “unnecessary permits and additional federal environment reviews.” See Kellie Lunney, *Panel Passes Major Energy Development Bill*, E&E NEWS: GREENWIRE (Nov. 8, 2017), <https://perma.cc/JE28-AUQA>.

<sup>233</sup> The tax bill passed the Senate on a party-line 51–48 vote, calling for two leases sales within the refuge within the next ten years, the first within four years. See Brittany Patterson, *The Refuge Is Almost Open for Business. What Happens Next?*, E&E NEWS: CLIMATEWIRE (Dec. 20, 2017), <https://perma.cc/7JCC-WU8J>. Although Alaskan politicians celebrated the opening of the refuge to drilling as a victory, as the state government will share in half the resulting revenues, environmental groups and the Gwich’in people (who hunt caribou, the calving habitat of which will be disturbed by drilling) vowed to oppose oil development in the “courts, corporate boardrooms and in Congress where, over time, we will seek to restore protection for this crown jewel of our National Wildlife Refuge System.” See Margaret Kriz Hobson, *In Alaska, State Leaders Take a Long-Awaited Victory Lap*, E&E NEWS: ENERGYWIRE (Dec. 22, 2017), <https://perma.cc/L9TF-SZU3> (noting that Secretary Zinke thought federal leases unlikely for another ten years, due to environmental reviews and permitting, and that some industry analysts question the eagerness of oil companies to drill, given the expense). On the use of the budget process to avoid a certain Senate filibuster, see Anthony Adragna, *Republicans Eye Budget Process for ANWR Opening*, POLITICO (Sept. 26, 2017), <https://perma.cc/KX8J-UMKD>. Senate Democrats unsuccessfully opposed drilling in the Article National Wildlife Refuge (ANWR). See Kellie Lunney, *Senate Dems to Oppose Drilling in Refuge During Budget Debate*, E&E NEWS PM (Oct. 17, 2017), <https://perma.cc/U9AA-JUWU>. The House of Representative’s fiscal year 2018 budget blueprint, which narrowly passed, called for opening up ANWR to drilling. See George Cahlink & Kellie Lunney, *House Backs Blueprint to Kick-Start ANWR Fight, Tax Overhaul*, E&E NEWS: GREENWIRE (Oct. 26, 2017), <https://perma.cc/LA5R-E69Z> (reporting that the House voted 216–212 in favor of the budget blueprint and also alleging that ANWR drilling would raise \$1 billion toward the \$1.5 trillion deficit increase due to the Republican tax bill). On the Trump Administration’s plans for ANWR, see Christopher Solomon, *Opinion, America’s Wildest Place Is Open for Business*, N.Y. TIMES (Nov. 10, 2017), <https://perma.cc/W55B-66U6>; see also Graham Lee Brewer, *Indian Country News: Alaska Is Open for Drilling*, HIGH COUNTRY NEWS (Jan. 6, 2018), <https://perma.cc/GVV5-SAZB>; Margaret Kriz Hobson, *Review for Drilling in ANWR Starting in Weeks—Bernhardt*, E&E NEWS: GREENWIRE (Mar. 8, 2018), <https://perma.cc/M4JZ-WKKH> (noting that an environmental review scoping process for leasing ANWR for oil and gas drilling would begin soon in the wake of the Alaska congressional delegation’s successful amendment to the 2018 tax bill that ended the forty-year ban on ANWR leasing).

to “open[] it up.”<sup>234</sup> The Trump Administration’s nominee as Assistant Secretary for Land and Minerals Management called for expediting federal oil and gas permitting, even though the interest of oil and gas companies for such expensive and risky projects remains questionable.<sup>235</sup> This promise echoed a “priority work list” drafted by BLM administrators calling for easing of the NEPA process and a streamlining of leasing and permitting, consistent with the BLM priority of “Making America Safe Through Energy Independence.”<sup>236</sup>

Ending the moratoria and expediting oil and gas development may be the Administration’s priorities, but actually expanding fossil fuel production may prove problematic. For example, NEPA requires federal agencies to examine the indirect and cumulative effects of their actions which increase greenhouse gas emissions.<sup>237</sup> Recently, the federal District Court for the District of Montana ruled that a plan to modify a federal mine plan in the Bull Mountains to considerably expand coal mining violated NEPA by not considering the costs associated with greenhouse gas emissions the expanded plan would produce.<sup>238</sup> Interpreting NEPA to require a fair and

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<sup>234</sup> See Yehle, *supra* note 230 (discussing a rewrite of the federal off-shore leasing plan for 2017–2022).

<sup>235</sup> See Michael Doyle, *Lands Nominee Pledges to Speed Oil and Gas Permits*, E&E NEWS: GREENWIRE (Sept. 7, 2017), <https://perma.cc/6PEZ-PQM7> (discussing the congressional testimony of Joseph Balash); Brittany Patterson & Zack Colman, *Trump Opens Vast Waters to Oil Firms. But Will They Come?*, E&E NEWS: CLIMATEWIRE (Jan. 5, 2018), <https://perma.cc/GBD5-AZ58>. The lukewarm industry reaction to expanded leasing was evident in December 2017 when the Administration’s offer of leases to 10.3 million acres in the Alaskan Arctic generated bids on only 1% of the tracts. Even in the Gulf of Mexico there appeared to be little enthusiasm, for a March 2018 lease sale of 15,000 tracts produced offers on just 10%. Carolyn Kormann, *Ryan Zinke’s Great American Fire Sale*, NEW YORKER (Apr. 14, 2018), <https://perma.cc/CH5Y-6RMM>.

<sup>236</sup> See Scott Streater, *BLM ‘Priority’ List Pushes Drilling, Wall—Leaked Docs*, E&E NEWS: GREENWIRE (Apr. 10, 2017), <https://perma.cc/7DJQ-MZY6>. The Administration also targeted a 2010 Obama leasing reform that made it more difficult to lease land around federally protected areas and allowed the BLM to keep energy development away from national parks and other environmentally sensitive areas. See Scott Streater, *Key Obama-Era Leasing Reform To Get the Ax*, E&E NEWS: GREENWIRE (Oct. 27, 2017), <https://perma.cc/D95D-FWL4>. At the end of 2017, the Interior Department “quietly” rescinded more Obama-era climate change regulations in an effort to remove “potential burdens” to energy development. Elizabeth Shogren, *Interior Revokes Climate Change and Mitigation Policies*, HIGH COUNTRY NEWS (Jan. 4, 2018), <https://perma.cc/7ALC-GGJ6>.

<sup>237</sup> 40 C.F.R. §§ 1508.7–.8 (2017). In *Western Organization of Resource Councils v. Zinke*, No. 15-5294 (D.C. Cir. argued Mar. 23, 2018), a coalition of environmental groups challenged the Interior Department’s failure to update a 1979 programmatic EIS on national coal leasing. See Ellen M. Gilmer, *Court Corners Trump Admin on Coal’s Climate Impacts*, E&E NEWS: ENERGYWIRE (Mar. 26, 2018), <https://perma.cc/Y55R-7EAP> (explaining the D.C. Circuit’s general resistance to the administration’s oral argument that it did not need to update the analysis, and that environmentalists could not challenge its failure to do in individual coal lease sales).

<sup>238</sup> *Mont. Env’tl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1093, 1101, 1103 (D. Mont. 2017) (finding regulatory violations and ruling inadequate an environmental assessment on the modified plan). On the obligation of agencies to consider both “upstream” (e.g., mining of fossil fuels) and “downstream” (e.g., combustion of fossil fuels) in their proposals in order to comply with NEPA, see generally Michael Burger & Jessica Wentz, *Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review*, 41 HARV. ENVTL. L. REV. 109 (2017).

balanced assessment of the proposal, the court faulted the government for not attempting to monetize economic costs associated with the expanded mine, while at the same time monetizing the expected economic benefits.<sup>239</sup> If widely adopted, this NEPA gloss could impose a substantial judicial impediment to the Trump Administration's mineral leasing ambitions.<sup>240</sup>

Another NEPA-imposed roadblock could result from a Tenth Circuit decision deciding that a BLM EIS on four Powder River Basin coal leases in Wyoming violated the statute, rejecting the so-called "perfect substitute" theory of demand.<sup>241</sup> Under that theory, since BLM expected overall demand for coal to increase (when the EIS was written in 2010), implementing a "no action" alternative would have no consequential effect on demand or price, and no effect on the attractiveness of other forms of energy or coal's share of the energy mix.<sup>242</sup> BLM has invoked this so-called "perfect substitute" theory as a centerpiece of its coal-leasing decisions since at least 2012.<sup>243</sup> The Tenth Circuit's decision called into question how the coal-leasing program can comply with NEPA going forward.

In March 2018, the Montana District Court ruled against a plan to open more than 15 million acres of public land in Montana and Wyoming to fossil fuel extraction, concluding that the government violated NEPA by failing to adequately consider how the oil, gas, and coal development would damage the climate and other environmental resources.<sup>244</sup> The decision reinforced how NEPA could throw a substantial roadblock to the Trump Administration's plans to dramatically increase fossil fuel production from public lands.<sup>245</sup>

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<sup>239</sup> *Mont. Env'tl. Info. Ctr.*, 274 F. Supp. 3d at 1097–97 (citing *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008)). The court decided that the accompanying environmental assessment failed to consider the levels of uncertainty and controversy involved in the project. *Id.* at 1091–93.

<sup>240</sup> See, e.g., Scott Streater, *BLM May Offer Lease Next to Theodore Roosevelt National Park*, E&E NEWS: GREENWIRE (Aug. 30, 2017), <https://perma.cc/DD46-62RW> (discussing a 120-acre parcel in western North Dakota park adjacent to the national park under consideration for leasing); see also Elizabeth Shogren, *Drilling Threatens Dinosaur National Monument—Again*, HIGH COUNTRY NEWS (July 24, 2017), <https://perma.cc/DS2R-T7U3> (discussing a Trump Administration proposal to lease lands abutting the national monument and within view of the visitors' center).

<sup>241</sup> *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1232–33 (10th Cir. 2017). BLM relied on a 2008 study by the Energy Information Administration. *Id.* at 1227 n.2.

<sup>242</sup> *Id.* at 1236 (concluding that BLM's theory had no support in the record and relied on irrational assumptions).

<sup>243</sup> See Ellen M. Gilmer, *Court Spurns BLM's 'Irrational' Approach to Climate Review*, E&E NEWS: GREENWIRE (Sept. 15, 2017), <https://perma.cc/C7LA-YEQP>.

<sup>244</sup> See *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. 4:16-cv-00021-BMM (D. Mont. Mar. 26, 2018).

<sup>245</sup> See Neela Banerjee, *Judge: Trump Admin. Must Consider Climate Change in Major Drilling and Mining Lease Plan*, INSIDE CLIMATE NEWS (Mar. 26, 2018), <https://perma.cc/WG85-UGBY> (noting that the area contained an estimated "10.2 billion tons of coal and the possibility of 18,000 new oil and gas wells"). The Trump Administration's NEPA streamlining efforts, discussed *infra* Part IV.E, would not seem to affect judicial interpretations requiring the downstream effects of federal leasing on the climate.

### B. Scuttling the Methane Anti-Waste Rules

Methane, the main ingredient in natural gas, is also a potent greenhouse gas.<sup>246</sup> Flaring methane and pipeline leaks therefore not only wastes a valuable energy resource, but also imposes serious climate change damage.<sup>247</sup> Consequently, the Obama Administration promulgated rules governing both federal and non-federal lands to restrict the flaring and leaking of natural gas.<sup>248</sup> The rules aimed to both reduce greenhouse gas emissions and the waste of natural gas.<sup>249</sup> They were patterned after requirements imposed by the states of Colorado and North Dakota, two leading mining jurisdictions,<sup>250</sup> so it was somewhat of a surprise when federal regulation became so controversial.

Although opponents charged that the federal methane regulations required duplicative paperwork and applied a “one-size fits all” mentality,<sup>251</sup> it was hard not to characterize the opposition as involving some largely

<sup>246</sup> “[M]ethane doesn’t linger as long in the atmosphere as carbon dioxide, [but] it is initially far more devastating to the climate because of how effectively it absorbs heat. In the first two decades after its release, methane is 84 times more potent than carbon dioxide.” *Methane: The Other Important Greenhouse Gas*, ENVTL. DEF. FUND, <https://perma.cc/5YG3-AUTG> (last visited Apr. 7, 2018).

<sup>247</sup> See Univ. of Reading, *Effect of Methane on Climate Change Could Be 25% Greater Than We Thought*, PHYS.ORG (Jan. 10, 2017), <https://perma.cc/TUM5-2DYJ> (citing a study by scientists at the Department of Meteorology at the University of Reading in the United Kingdom and at the Center for International Climate and Environmental Research in Oslo, Norway). Worldwide, about 3.5% of gas is flared, the equivalent of emissions from 77 million cars. See Uwe Lauber, Opinion, *Stop Burning Flare Gas*, HANDELSBLATT GLOBAL (Nov. 9, 2017), <https://perma.cc/589S-FMSZ>; Jeff Tollefson, “Flaring” Wastes 3.5 Percent of the World’s Natural Gas, SCI. AM. (Jan. 12, 2016), <https://perma.cc/U6BZ-SMRN>; see also Alexandra E. Teitz & Amanda Cohen Leiter, Opinion, *Wasting Natural Gas on Public Lands*, HILL (Feb. 24, 2018), <https://perma.cc/9N8T-8M2R> (noting that the Government Accounting Office estimated that about 40% of wasted natural gas “could be cost-effectively captured and put to productive use”).

<sup>248</sup> In 2016, the EPA and the BLM promulgated separate regulations intended to control methane flaring. Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008, 83,008 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, and 3170) (BLM rule emphasizing the waste of public resources and the loss of royalty income); Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824, 35,840–41 (June 3, 2016) (to be codified at 40 C.F.R. pt. 60) (EPA rule emphasizing the dangers posed by methane pollution); see RICHARD K. LATTANZIO, EPA’S AND BLM’S METHANE RULES (2017), <https://perma.cc/TPX5-UKTU>; see also BUREAU OF LAND MGMT., FACT SHEET—METHANE WASTE PREVENTION RULE (2016), <https://perma.cc/5K5W-9T9H>.

<sup>249</sup> Companies sometimes flare methane for safety and well-testing reasons but often because they lack pipeline capacity to market the gas. *Flaring*, W. ENERGY ALLIANCE, <https://perma.cc/TU5B-ZSDF> (last visited Apr. 7, 2018). U.S. companies lose the equivalent of \$1.5 billion annually through flaring and pipeline leaks, \$330 million from gas leased on public lands. *Federal Rules Seek to Reduce the Costly Waste of Methane Gas*, ENVTL. DEF. FUND, <https://perma.cc/TU5B-ZSDF> (last visited Apr. 7, 2018).

<sup>250</sup> See Cally Carswell, *The Contradictions at the Heart of the Fight Over Methane Rules*, HIGH COUNTRY NEWS (Feb. 7, 2017), <https://perma.cc/J8JU-57YC> (observing that leaky equipment wastes 1.5% of gas on average, and that between 2009 and 2014 flaring wasted enough gas to heat 5.1 million homes for a year; Colorado’s rules reduced leakage rates by 75%, while North Dakota’s rules reduced flaring from 36% to 10%).

<sup>251</sup> See *id.* (quoting Kathleen Sgamma of the Western Energy Alliance).

unregulated states—like New Mexico and Utah—seeking to maintain a competitive advantage over the states with methane regulation.<sup>252</sup> Interstate economic competition affected by environmental regulation is hardly an unprecedented phenomenon;<sup>253</sup> thus, perhaps this opposition was predictable.

The Republican Congress responded to the opposition of part of the oil and gas industry<sup>254</sup> to these restrictions by attempting to use the CRA to veto the regulation, as it had accomplished in the case of the BLM Planning 2.0 rule.<sup>255</sup> Surprisingly, Congress came up short, on a 49–51 vote, when Republican Senators John McCain (R-Ariz.), Lindsay Graham (R-S.C.), and Susan Collins (R-Me.) broke ranks and voted against the rule’s revocation.<sup>256</sup> That left the rules in the hands of the Trump Administration, which attempted to delay implementation of the United States Environmental Protection Agency (EPA) methane rule applicable to new sources in order to consider industry concerns, without going through the formalities of rulemaking.<sup>257</sup> This effort did not pass judicial muster in the District of Columbia Circuit, which ruled that the agency lacked authority to “pause” the EPA rule without complying with APA procedures.<sup>258</sup>

The Trump Administration also sought to suspend key parts of the BLM rule, restricting venting and flaring of methane on public and tribal lands, without going through public review prescribed by the APA.<sup>259</sup>

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<sup>252</sup> See *id.*; see also W. ENVTL. LAW CTR. & W. ORG. OF RES. COUNCILS, FALLING SHORT: STATE OIL & GAS RULES FAIL TO CONTROL METHANE WASTE 2–3 (2016), <https://perma.cc/6S9B-K4GN>.

<sup>253</sup> See Peter Navarro, *The Politics of Air Pollution*, 59 PUB. INT. 36, 40–41 (1980) (portraying the interstate competition over the mining of low-sulfur coal due to the Clean Air Act’s requiring eastern utilities to install scrubbers or switch to low-sulfur coal, inducing the utilities to switch from eastern deep-mined coal to western strip-mined coal).

<sup>254</sup> In September 2017, Exxon Mobil announced a program of methane controls involving making pipeline repairs, monitoring operations for leaks, and replacing leaky equipment. As the nation’s largest producer of natural gas, the program could serve as an example for an industry in which many gas producers have resisted methane controls as being too costly and burdensome. See Clifford Krauss, *Exxon Aims to Cut Methane Leaks, a Culprit in Global Warming*, N.Y. TIMES (Sept. 25, 2017), <https://perma.cc/Y8WG-8493>.

<sup>255</sup> See *supra* note 168 and accompanying text.

<sup>256</sup> See Juliet Eilperin & Chelsea Harvey, *Senate Unexpectedly Rejects Bid to Repeal a Key Obama-Era Environmental Regulation*, WASH. POST (May 10, 2017), <https://perma.cc/6R5U-TLVB>.

<sup>257</sup> Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay, 82 Fed. Reg. 25,730, 25,731 (June 5, 2017) (to be codified 40 C.F.R. pt. 60).

<sup>258</sup> *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017) (holding that the agency could reconsider the methane rule, but only so long as “the new policy is permissible under the statute . . . , there are good reasons for it, and . . . the agency *believes* it to be better” (omissions in original) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))). Interestingly, EPA Administrator Scott Pruitt has acknowledged methane as an air pollutant and acknowledged that during flaring and leaking it wastes a valuable energy resource, although it appears likely that he supports only industry-backed voluntary emissions reductions. See Scott Waldman, *The Greenhouse Gas Pruitt Worries About*, E&E NEWS: CLIMATEWIRE (Jan. 23, 2018), <https://perma.cc/ST6Z-AG3C>.

<sup>259</sup> See Ellen M. Gilmer, *Advocates Push Court To Revive Stalled BLM Methane Rule*, E&E NEWS: ENERGYWIRE (Sept. 26, 2017), <https://perma.cc/XZ22-7ZKA> (noting that the Trump

Environmental groups and the states of California and New Mexico challenged that suspension in the federal District Court for the Northern District of California, the same court which earlier rejected an Interior Department attempt to stall an Obama-era rule recalculating mineral royalties owed to the federal government, but the Administration later promulgated a final rule delaying the effect of the Obama rule by a year.<sup>260</sup> If the challengers are successful, the existing methane rule on public lands will remain in effect until the Interior Department can promulgate a replacement rule satisfying the APA and other federal laws.<sup>261</sup> The Trump Administration

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Administration had maintained that section 705 of the APA, 5 U.S.C. § 705 (2012), authorized the suspension, arguing that the APA provision allows for postponing the compliance dates of rules that have already gone into effect).

<sup>260</sup> Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58,050, 58,050 (Dec. 8, 2017) (to be codified in 43 C.F.R. pts. 3160 and 3170), *discussed in* Pamela King & Ellen M. Gilmer, *BLM Finalizes Delay for Methane Rule*, E&E NEWS: GREENWIRE (Dec. 7, 2017), <https://perma.cc/6FWT-EDV3>. The effort to suspend the rule was judicially rejected in *Becerra v. U.S. Department of the Interior*, 276 F. Supp. 3d 953, 964 (N.D. Cal. 2017) (ruling that section 705 of the APA applies only to postponing a rule that has yet to take effect, not to ones already in effect).

An Interior-assembled royalty committee, the Royalty Policy Committee, to advise the agency concerning repeal of Obama's royalty reforms, was stacked in favor of industry, according the ranking members of the House Natural Resources Committee and the Energy and Mineral Resources Subcommittee. *See* Pamela King, *2 House Dems Blast Membership of Royalty Panel*, E&E NEWS: GREENWIRE (Sept. 6, 2017), <https://perma.cc/LB5D-DAPQ> (discussing a letter from Raúl Grijalva (D-Ariz.) and Alan Lowenthal (D-Cal.)). The Committee recommended reducing the offshore royalty rate from 18.75% to 12.5%, which the director of the Government Accountability Office criticized as "not the result of rigorous analysis." *See* Pamela King, *Research Lacking on Fair Return from Reduced Royalty Rate*, E&E NEWS: CLIMATEWIRE (Mar. 8, 2018), <https://perma.cc/9TPM-68CV>. Senator Maria Cantwell (D-Wash.), the ranking member of the Senate committee, pilloried the Trump Interior Department's approach to regulating the fossil fuel industry as a large-scale waste of taxpayer dollars:

You [Interior Associate Deputy Secretary Jim Cason] stated at your confirmation hearing that you wanted to get a fair return for the taxpayer. And since then, the Department had reinstated the outdated low-price coal leasing. You guys have tried to suspend the methane rule, leaving millions of dollars on the table as far as royalties. You have suspended the royalty valuation rule, by your own estimates, giving back \$75 million a year to oil and gas and coal companies. The Secretary has created the Royalty Policy Committee stacked with partisan members, without a single public interest voice.

*Full Committee Hearing to Examine the Permitting Processes at DOI and FERC for Energy and Resource Infrastructure Projects: Hearing Before S. Comm. on Energy & Nat. Res.*, 115th Cong. (2017) (statement of Sen. Maria Cantwell, Ranking Member, Energy & Nat. Res. Comm.). The royalty rate issue is now in the Northern District of California, as the states of California and New Mexico have charged that the reduction violated the APA by failing to adequately justify the reversal. *See* Ellen M. Gilmer, *Long Slog Ahead for the Legal Battle over Obama Royalties Rule*, E&E NEWS: ENERGYWIRE (Jan. 30, 2018), <https://perma.cc/8DBU-ET5T> (explaining that the court set a briefing schedule that will consume most of 2018).

<sup>261</sup> *See, e.g.*, Robinson Meyer, *The First Court Victory for Environmentalists Under Trump*, ATLANTIC (July 5, 2017), <https://perma.cc/4CZ6-QGML> (explaining that EPA is "free to begin the process of rewriting the methane rule," despite the court decision). BLM proposed a new methane rule on February 22, 2018, that would rescind the Obama Administration rule promulgated in November 2016. *See* Waste Prevention, Production Subject to Royalties, and

and parts of the industry seem unaware that a failure to restrict avoidable methane emissions could become the Achilles' heel of natural gas as a transition energy source.<sup>262</sup> However, large investors are well aware of this threat, and their efforts to urge the incumbent Administration to enforce methane restrictions may receive a better reception than those from the environmental community or affected states.<sup>263</sup>

### *C. Eliminating the Hydraulic Fracturing Rule*

Hydraulic fracturing (fracking) is an enhanced oil and gas recovery technique which stimulates well production by forcing pressurized water and other thickening agents underground into fossil fuel reservoirs, fracturing rock formations. The process creates cracks in deep-rock formations through which natural gas, petroleum, and brine will flow more freely. Although fracking has become more commonplace (and controversial) recently, due largely to new horizontal drilling technology allowing increased access to oil and gas resources, it has been commercially employed since 1950.<sup>264</sup> Fracking is controversial because it risks ground and surface water contamination, air and noise pollution, as well as triggering earthquakes.<sup>265</sup> Still, fracking has clearly revolutionized natural gas

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Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924 (Feb. 22, 2018) (to be codified at 43 C.F.R. pts. 3160 and 3170); Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (to be codified at 43 C.F.R. pts. 3100, 3160, and 3170). A group of law professors opposed the Trump proposal, charging that it would be inconsistent with BLM's statutory obligations and constitute irrational decision making by 1) not fulfilling the agency's obligations under the Mineral Leasing Act to "prevent waste," 2) failing to prevent "unnecessary or undue degradation" under FLPMA, 3) defining "waste" in an irrational and incoherent fashion in violation of the APA, 4) relying on an irrational cost-benefit analysis that failed to employ best available scientific and economic information, and 5) failing to ensure that the government receives royalties from avoidable losses of methane in oil and gas well operations. Comments of Sixty-Four Law Professors on Proposed Rule on Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, and Related Regulatory Impact Analysis (Apr. 23, 2018), <https://perma.cc/BK97-9KA8>.

<sup>262</sup> See, e.g., Clifford Krauss, *Future of Natural Gas Hinges on Stanching Methane Leaks*, N.Y. TIMES (July 11, 2016), <https://perma.cc/GS3A-SKEM>.

<sup>263</sup> See Benjamin Hulac, *Investors to Trump EPA: Don't Freeze Obama Methane Rule*, E&E NEWS: CLIMATEWIRE (Aug. 9, 2017), <https://perma.cc/JJF2-XY4U> (discussing comments by a group of sixty-six investors with \$270 billion in assets, stating that methane emissions "constitute a clear and measurable harm not only to the climate, but also to investors who have positioned their portfolios with these regulations in mind" and urging "implementation now").

<sup>264</sup> John Manfreda, *The Origin of Fracking Actually Dates Back to the Civil War*, BUS. INSIDER (Apr. 14, 2015), <https://perma.cc/J2PG-6B7A> ("After achieving experimental success in 1949, fracking quickly became commercialized."); see also *What Is Hydraulic Fracturing?*, INDEP. PETROLEUM ASS'N AM., <https://perma.cc/8PNK-QN4M> (last visited Apr. 7, 2018) (explaining that since the Truman Administration the industry has drilled more than 1.2 million fracked wells).

<sup>265</sup> Maria Beatrice Magnani et al., *Discriminating Between Natural Versus Induced Seismicity from Long-Term Deformation History of Intraplate Faults*, SCI. ADVANCES, Nov. 24, 2017, at 1, e1701593; Mark Schrope, *Fracking Outpaces Science on Its Impact*, ENV'T YALE, <https://perma.cc/BMX7-Z9NY> (last visited Apr. 7, 2018).



supplies—being used in roughly 90% of all natural gas wells sunk in the last dozen years<sup>266</sup>—and, in the process, encouraged a considerable amount of fuel switching away from coal burning, with consequential climate benefits.<sup>267</sup>

State regulation of fracking has been inconsistent; some states have imposed moratoria on fracking in order to establish an adequate regulatory regime.<sup>268</sup> The federal government, arguably with sufficient regulatory authority,<sup>269</sup> has made no attempt to regulate fracking on non-federal lands to protect water quality. But on federal lands, including lands held in trust for Indian tribes, the Obama Administration promulgated fracking regulations in 2015,<sup>270</sup> responding to the fact that roughly 90% of new federal wells in 2013 employed fracking.<sup>271</sup> These rules aimed to ensure that: 1) wells on federal land are properly constructed to protect water supplies, 2) fluids flowing back to the surface as a result of fracking are managed in an environmentally responsible manner, and 3) chemicals used in fracking fluids are publicly disclosed.<sup>272</sup> A coalition of petroleum producers, along with the states of Wyoming and Colorado and the Ute Tribe of the Uintah and Ouray Reservation, challenged the rule as being in excess of BLM statutory authority.<sup>273</sup>

The federal District Court for the District of Wyoming agreed, ruling that Congress failed to delegate authority to BLM to regulate fracking, relying on a 2005 amendment to the Safe Drinking Water Act<sup>274</sup> (SDWA) that removed EPA’s authority to regulate fracking under that statute.<sup>275</sup> Although

<sup>266</sup> AM. CHEM. SOC’Y, THE SCIENCE AND TECHNOLOGY OF HYDRAULIC FRACTURING 1 (2016), <https://perma.cc/RJC2-L6K5> (“Hydraulic fracturing was invented in the 1940s and is now used in more than 90 percent of U.S. drilling operations.”).

<sup>267</sup> Chris Mooney, *Why Natural Gas Is Catching Up to Coal in Powering U.S. Homes*, WASH. POST (Oct. 14, 2015), <https://perma.cc/K2GL-GVN5>. In 2003, coal supplied 51% of U.S. electricity while natural gas only supplied 17%. *Id.* But in 2015, for the first time, natural gas surpassed coal in April—and again in July—with natural gas producing 35% and coal 34.9%. *Id.*

<sup>268</sup> New York, Vermont, and Maryland have all banned fracking. See Jon Hurdle, *With Governor’s Signature, Maryland Becomes Third State to Ban Fracking*, STATEIMPACT (Apr. 4, 2017), <https://perma.cc/EY4Y-Q6LN>.

<sup>269</sup> EPA has long refused to use its Clean Water Act authority to regulate groundwater pumping and pollution, despite demonstrable adverse effects on surface water, leaving regulation to the less comprehensive Safe Drinking Water Act and its underground injection control program. For criticism, see Michael C. Blumm & Steven M. Thiel, *(Ground)Waters of the United States: Unlawfully Excluding Tributary Groundwater from Clean Water Act Jurisdiction*, 46 ENVTL. L. 333 (2016) (explaining that regulating groundwater affecting surface water quality is consistent with the purpose and text of the Clean Water Act).

<sup>270</sup> Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128, 16,128 (Mar. 26, 2015) (to be codified at 43 C.F.R. pt. 3160). The regulations were promulgated after BLM proposed regulations in 2012 and revised proposed regulations in 2013, the latter receiving some 1.35 million comments. See *id.* at 16,131.

<sup>271</sup> *Id.* at 16,131.

<sup>272</sup> *Id.* at 16,128.

<sup>273</sup> See *Wyoming v. U.S. Dep’t of the Interior*, Nos. 2:15-CV-041-SWS, 2:15-CV-043-SWS, 2016 WL 3509415, at \*2–3 (D. Wyo. June 21, 2016), *vacated*, *Wyoming v. Zinke*, 871 F.3d 1133 (10th Cir. 2017).

<sup>274</sup> 42 U.S.C. §§ 300f to 300j–26 (2012).

<sup>275</sup> *Wyoming*, 2016 WL 3509415, at \*10 (citing 42 U.S.C. § 300h(d)(1)(B)(ii)).

the 2005 amendment made no mention at all of BLM or the government's proprietary interest in managing federal public lands, the court concluded that Congress's removal of EPA from fracking regulation also eliminated BLM's authority over federal public lands under the Mineral Leasing Act<sup>276</sup> and FLPMA, reading the exclusion of SDWA authority as a rejection of all federal authority over fracking regulation on private lands.<sup>277</sup> The upshot is that BLM's proprietary authority over federal lands is considerably less than a private landowner's.

The government appealed to the Tenth Circuit, which declined to issue a definitive ruling on BLM's authority. The court instead dismissed the case on the ground that the Trump Administration was in the process of rescinding the regulation.<sup>278</sup> However, since the appeals court vacated the district court's decision, the effect could have revived the 2015 rule.<sup>279</sup> But the Trump Administration promulgated a rescission in late 2017, which prompted legal challenges.<sup>280</sup>

#### *D. Revoking the Cost of Carbon Rule*

In 2008, in a case involving the federal fuel economy standards for cars, the Ninth Circuit ruled that the government could no longer fail to account

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<sup>276</sup> 30 U.S.C. §§ 181–287 (2012).

<sup>277</sup> *Wyoming*, 2016 WL 3509415, at \*10 (“[I]t makes no sense to interpret the more general authority granted by the [Mineral Leasing Act] and FLPMA as providing the BLM authority to regulate fracking when Congress has directly spoken to the ‘topic at hand’ in the 2005 [amendment]. . . . If [an] agency regulation is prohibited by a statute specifically directed at a particular activity, it cannot be reasonably concluded that Congress intended regulation of the same activity would be authorized under a more general statute administered by a different agency.”). However, BLM's constitutional role in managing the federal estate, authorized by Article IV of the Constitution (*see supra* notes 38–39), is quite distinct from EPA's regulatory role over non-federal lands under Article I's Commerce Clause.

<sup>278</sup> *Wyoming*, 871 F.3d at 1137.

<sup>279</sup> *See* Ellen M. Gilmer, *Court Punts on Fracking Authority but May Revive Rule*, E&E NEWS PM (Sept. 21, 2017), <https://perma.cc/P43T-67NE>.

<sup>280</sup> Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Recession of a 2015 Rule, 82 Fed. Reg. 61,924, 61,924 (Dec. 29, 2017) (to be codified at 43 C.F.R. pt. 3160) (rescinding the 2015 rule); *see* Ellen M. Gilmer, *Fracking Rule Fracas: The Next Round*, E&E NEWS: ENERGYWIRE (Jan. 2, 2018), <https://perma.cc/F3LL-ADFH> (discussing promised suits alleging violations of the APA, FLPMA, the Mineral Leasing Act, and NEPA); Ellen M. Gilmer, *Fracking Rule May See Jumbled Comeback as Court Tosses Case*, E&E NEWS: ENERGYWIRE (Sept. 22, 2017), <https://perma.cc/M9FA-RC9H> (discussing the confusion the result of the court's decision caused). In July 2017, BLM proposed to rescind the 2015 fracking rule on the ground that it would create “unjustified” compliance costs of between \$32 million and \$45 million for the oil and gas industry. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Recession of a 2015 Rule, 82 Fed. Reg. 34,464, 34,464, 34,466 (July 25, 2017) (to be codified at 43 C.F.R. pt. 3160); *see* Pamela King, *BLM Looks to ‘Existing Authorities’ in Bid to Rescind Fracking Rule*, E&E NEWS: ENERGYWIRE (July 25, 2017), <https://perma.cc/7Q5C-NS2F> (explaining a claim by the Western Energy Alliance that “99.9 percent of all [fracking] wells on federal lands were drilled in states that updated their fracking rules recently” and claiming that “[t]here's no regulatory gap”); W. STATES WATER COUNCIL, ADDRESSING WATER NEEDS AND STRATEGIES FOR A SUSTAINABLE FUTURE (2017), <https://perma.cc/KJD9-EEPX> (reporting that the Western States Water Council supported the withdrawal of BLM's fracking rule).

for climate change in assessing the costs and benefits of regulations.<sup>281</sup> The Obama Administration eventually developed a unified method of accounting for carbon emissions in cost-benefit analyses, essentially converting emissions into dollars, in order to better evaluate the full effect of government actions.<sup>282</sup> The government tweaked the formula over the years, and the price was \$36 per ton of carbon dioxide (CO<sub>2</sub>) emissions at the outset of the Trump Administration.<sup>283</sup>

In February 2017, the House Committee on Science, Space, and Technology held a hearing in which the Republican subcommittee chair roundly criticized the social cost of carbon for being “enormously high,” based on an “outdated economic model,” and inconsistent with the Office of Management and Budget’s guidelines for cost-benefit analysis.<sup>284</sup> President Trump proceeded to issue his executive order on energy independence a month later, in March 2017, disbanding the interagency working-group responsible for development of the social cost of carbon metric.<sup>285</sup> Just a week later, EPA proposed to withdraw the 2015 social cost of carbon rule.<sup>286</sup> EPA Administrator Scott Pruitt explained that the rule was unnecessary

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<sup>281</sup> *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1202–03 (9th Cir. 2008) (Fletcher, B., J.) (deciding that the government’s standards were arbitrary because they failed to account for carbon emissions).

<sup>282</sup> See Elizabeth Shogren, *How Do We Define Climate Pollution’s Cost to Society?*, HIGH COUNTRY NEWS (Jan. 27, 2016), <https://perma.cc/BU5V-6VFH>.

<sup>283</sup> Howard Shelanski & Maurice Obstfeld, *Estimating the Benefits from Carbon Dioxide Emissions Reductions*, WHITE HOUSE: PRESIDENT BARACK OBAMA (July 2, 2015), <https://perma.cc/B8V2-YXPP>; see Rachel Cleetus, *The Social Cost of Carbon Underscores an Obvious Fact: Climate Change is Costly*, UNION CONCERNED SCIENTISTS (Feb. 28, 2017), <https://perma.cc/GH9G-YVU9>. Some analysts criticized the \$36 per ton figure as being “far too low because the models the government uses assume that the global economy will continue to grow over the next 200 to 300 years, even in the face of extreme climate change.” See Shogren, *supra* note 282 (citing University of Chicago economist, David Weisbach). Although the current social cost of carbon is around \$42 per ton, an October 2017 study suggested that a global price on carbon would have to be over \$100 per ton to limit sea-level rise to two feet by the end of the century. See Arianna Skibell, *Study Doubles Sea-Level Rise Estimate Due to Coal Use*, E&E NEWS: GREENWIRE (Oct. 27, 2017), <https://perma.cc/DA66-NWS5>.

<sup>284</sup> See *At What Cost? Examining the Social Cost of Carbon: Joint Hearing Before the Subcomms. on Env’t & Oversight of the H. Comm. on Sci., Space & Tech.*, 115th Cong. 4 (2017) (statement of Andy Biggs, Chairman, H. Subcomm. on Env’t). However, a November 2017 report by the National Academies of Sciences, Engineering and Medicine concluded that the estimated social cost of carbon pollution on agriculture had been underestimated, and the correction led to a doubling in the estimated total social costs. See Chelsea Harvey, *Should the Social Cost of Carbon Be a Lot Higher?*, E&E NEWS: CLIMATEWIRE (Nov. 22, 2017), <https://perma.cc/HWK7-32ZP> (concluding that earlier estimates of a net benefit to agriculture of about \$2.70 per ton were erroneous, and that the actual effect was a negative \$8.50 per ton).

<sup>285</sup> See generally Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

<sup>286</sup> See Review of the Clean Power Act, 82 Fed. Reg. 16,329, 16,329 (Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60). EPA also withdrew proposed model carbon trading rules as well as rules that would have rewarded states complying with its Clean Power Plan. See Review of the Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, 82 Fed. Reg. 16,330, 16,330 (Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60); Review of the 2016 Oil and Gas New Source Performance Standards for New, Reconstructed, and Modified Sources, 82 Fed. Reg. 16,331, 16,331–32 (Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60).

since, he asserted, unlike China and India “we can burn coal in a clean fashion.”<sup>287</sup>

Despite this withdrawal of the social cost of carbon rule, Republicans in Congress sought to bar EPA and the United States Department of Energy from using the social cost of carbon in regulating methane or other greenhouse gases in any action in the so-called Transparency and Honesty in Energy Regulations Act.<sup>288</sup> The proponents claimed to be happy with the Trump revocation but wanted to ensure against any changes of heart by future administrations.<sup>289</sup>

Even with this administrative and legislative activity, the Office of Management and Budget’s Office of Information and Regulatory Affairs has continued to study how to estimate the monetary damage of greenhouse gas emissions consistent with the Trump executive order on energy independence.<sup>290</sup> This persistence is likely due to the fact that failing to account for the costs of carbon could frustrate the Trump Administration’s plans to expand fossil fuel extraction. Courts have faulted agencies’ failure to examine climate change costs, at the same time they extol the benefits of fossil fuel extraction, as NEPA violations.<sup>291</sup> Contemporaneously, the non-

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<sup>287</sup> Rod Kuckro, *Pruitt Dodges on Health Impacts of Killing Carbon Rule*, E&E NEWS (Apr. 3, 2017), <https://perma.cc/4RUN-TP3L> (also quoting Pruitt as saying, “We shouldn’t have this commitment by the U.S. government to say that fossil fuels are bad, renewables are good. . . . The U.S. EPA and the U.S. government should not pick winners and losers.”). The effects of the withdrawal of the rule led the Forest Service to approve an expansion of the Arch Coal company’s West Elk coal mine in a western Colorado roadless area in December 2017. Dylan Brown, *Forest Service Advances Colo. Mine Expansion*, E&E NEWS: GREENWIRE (Dec. 15, 2017), <https://perma.cc/4CDG-MWNQ>. A BLM approval on the same day authorized a lease modification of the King II coal mine in southwestern Colorado west of Durango, Colorado, giving GCC Energy five to seven more years to mine. Dylan Brown, *BLM Approves 2 Colo. Mine Expansions*, E&E NEWS PM (Dec. 15, 2017), <https://perma.cc/S4B7-27T9> (noting that the two Colorado approvals will affect over 20,000 acres and save over 300 jobs, at least temporarily); see also Dylan Brown, *Trump’s Chosen Regulator an Unabashed Coal Booster*, E&E NEWS: GREENWIRE (Dec. 11, 2017), <https://perma.cc/PQ2M-ADWW> (discussing Steven Gardner, the Trump Administration’s choice to head the Office of Surface Mining Reclamation and Enforcement, who described mining as simply “accelerated erosion,” has questioned human-induced climate change, and has staunchly defended mountain-top coal mining).

<sup>288</sup> H.R. 3117, 115th Cong. (2017); see Nick Sobczyk, *Lawmakers Revive Social Cost of Carbon Bill*, E&E DAILY (June 30, 2017), <https://perma.cc/NE3Y-QALK>. A number of climate-denial groups, such as the American Energy Alliance, the Competitive Enterprise Institute, the Tea Party Nation, the Campaign for Liberty, Heritage Action, and Americans for Tax Reform, supported the bill. Arianna Skibell, *Groups Take New Shot at Social Cost of Carbon*, E&E NEWS: GREENWIRE (July 28, 2017), <https://perma.cc/XTG4-7UP2>.

<sup>289</sup> See Skibell, *supra* note 288 (describing the groups’ concerns that administrations abuse related measures in an attempt to peruse political agendas on climate change). The congressional bar to using the social cost of carbon could come in an appropriations bill. Arianna Skibell, *Appropriators Aim to Bar Carbon Metric in Rulemaking*, E&E NEWS PM (July 11, 2017), <https://perma.cc/28EP-2XBX>.

<sup>290</sup> Hannah Hess, *OIRA Works Quietly on Updating Social Cost of Carbon*, E&E NEWS: GREENWIRE (June 15, 2017), <https://perma.cc/JQF7-NP3Z>.

<sup>291</sup> See *supra* notes 237–245 and accompanying text; see also Amanda Reilly, *Trump Killed Obama Carbon Reviews, but Courts Still Want Them*, E&E NEWS: GREENWIRE (Sept. 1, 2017), <https://perma.cc/3NMY-HLAT> (explaining the recent case law, discussed *supra* notes 237–240 and accompanying text).

profit Resources for the Future wisely announced that it would work to reform and update the social cost of carbon, using the best available science, which the Trump Administration seems eager to ignore or jettison.<sup>292</sup>

### *E. Streamlining the National Environmental Policy Act*

NEPA, the nation's environmental charter, often criticized for its lack of substantive effect,<sup>293</sup> may prove to be a bulwark against the Trump Administration's deregulatory agenda. NEPA requires federal agencies to evaluate proposed actions, consider reasonable alternatives, and disclose its assumptions and expectations publicly before taking action.<sup>294</sup> If the NEPA process works, the result is a kind of democratization of agency decision making, giving the public opportunities to participate in decision making affecting public resources.

NEPA has in fact had a considerable effect on federal mineral leasing.<sup>295</sup> For example, a recent study of oil and gas leasing in the Mountain West concluded that the NEPA process reduced adverse environmental effects, particularly when the agency considered a broad range of alternatives.<sup>296</sup> Not surprisingly, reducing the range of alternatives analysis has long been a goal of the regulated community, which has occasionally prevailed upon Congress to reduce the scope of alternatives an agency must consider.<sup>297</sup>

The Trump Administration wasted little time in attempting to “streamline” NEPA. The President issued an executive order in August 2017

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<sup>292</sup> See Hannah Hess, *Think Tank Takes on Cost-of-Carbon Project Dumped by Trump*, E&E NEWS: GREENWIRE (June 9, 2017), <https://perma.cc/GUM4-HPQ2> (aiming to reform social cost of carbon estimates to reflect the best available science on the damage from CO<sub>2</sub> emissions causing sea-level rise, ocean acidification, droughts, flooding, and extreme heat). Nonetheless, the House Natural Resources Committee, on an 18–15 vote, proceeded to approve a bill that would prohibit federal agencies from considering carbon, methane, and nitrous oxide in regulatory cost-benefit analysis. See Kellie Lunney & Dylan Brown, *Panel OKs Bills to Ax Social Cost of Carbon, Coal-Lease Bans*, E&E NEWS: GREENWIRE (Nov. 30, 2017), <https://perma.cc/FT29-P9X7> (also noting that the same committee voted, 17–12, to prevent any future coal-leasing moratorium).

<sup>293</sup> See, e.g., Brian LaFlamme, *NEPA's Procedural Requirements: Fact or Fiction?*, 7 MO. ENVTL. L. & POL'Y REV. 16, 16 (1999); Sarah Langberg, Note, *A “Full and Fair” Discussion of Environmental Impacts in NEPA EISs: The Case for Addressing the Impact of Substantive Regulatory Regimes*, 124 YALE L.J. 716, 722 (2014).

<sup>294</sup> NEPA, 42 U.S.C. § 4332(C) (2012); see also Langberg, *supra* note 293, at 720–22 (explaining the functions and goals of NEPA).

<sup>295</sup> See *supra* notes 238–245 and accompanying text (discussing recent NEPA cases involving fossil fuel developments on public lands).

<sup>296</sup> John Ruple & Mark Capone, *NEPA—Substantive Effectiveness Under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 39, 39, 50–51 (2016).

<sup>297</sup> Notably, in the Healthy Forests Restoration Act of 2003, 16 U.S.C. §§ 6501–6591c (2012), Congress reduced the scope of alternatives to the proposed action and the “no action” alternative in an effort to speed federal timber harvests. Jesse B. Davis, Comment, *The Healthy Forests Initiative: Unhealthy Policy Choices in Forest and Fire Management*, 34 ENVTL. L. 1209, 1238–39 (2004).

directing agencies to “apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible” when evaluating infrastructure projects.<sup>298</sup> Two weeks later, citing a need to reduce “paperwork,” the Interior Department imposed a page limit of 150 pages (300 pages for “unusually complex projects”) and called for completing NEPA reviews within one year.<sup>299</sup> While it is hard to argue with the Interior directive to agencies to “focus on issues that truly matter rather than amassing unnecessary detail,” the result seems to predetermine the amount of information necessary to evaluate the effect of government proposals on public resources and may reduce the range of alternatives at the heart of the NEPA process.<sup>300</sup>

NEPA is at the center of the Trump Administration’s plan for \$200 billion in new federal spending on infrastructure projects, allegedly paid for by cuts in the federal budget.<sup>301</sup> The Administration proposes to significantly

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<sup>298</sup> See Exec. Order No. 13,807, 82 Fed. Reg. 40,463, 40,468 (Aug. 24, 2017) (aptly titled “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects”).

<sup>299</sup> See Michael Doyle, *Order Limits Most NEPA Studies to a Year, 150 Pages*, E&E NEWS (Sept. 6, 2017), <https://perma.cc/8226-DJH5> (discussing an August 31, 2017, memo from Interior Deputy Secretary David Bernhardt); see also Robin Bravender, *Trump CEQ Rolls Out Plans for Swift NEPA Reviews*, E&E NEWS PM (Sept. 14, 2017), <https://perma.cc/T42T-6LSC> (noting the Council on Environmental Quality referred to the NEPA process as “fragmented, inefficient and unpredictable”). Earlier, on March 27, 2017, the same day that the President signed the congressional resolution revoking BLM’s Planning 2.0 rule (see *supra* note 168 and accompanying text), Secretary Zinke took aim at the NEPA process in an internal memorandum, calling for “reducing duplicative and disproportionate analyses,” finding “proper accounting of timeframes, delays, and financial cost of NEPA analyses,” and seeking unspecified “opportunities to avoid delays caused by appeals and litigation.” Streater, *supra* note 175.

<sup>300</sup> Ryan Zinke, Sec’y of the Interior, Order No. 3355, Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807 (Aug. 31, 2017); see 40 C.F.R. § 1502.14 (2017) (declaring that alternatives are the heart of the NEPA process). A preview of curbing NEPA to promote extractive uses on federal public lands may be the so-called Resilient Federal Forests Act, H.R. 2936, 115th Cong. (2017), which passed the House on November 1, 2017, on a vote of 232–188, and which—allegedly to prevent wildfires—would expand categorical exclusions and restrict alternatives analysis, in order to promote timber harvests, including clear cuts. See Eric Biber, *Public Lands Watch: Resilient Federal Forests Act*, LEGAL PLANET (Nov. 12, 2017), [legal-planet.org/2017/11/12/public-lands-watch-resilient-federal-forests-act/](http://legal-planet.org/2017/11/12/public-lands-watch-resilient-federal-forests-act/). These reforms seemed remarkably similar to and built upon the Healthy Forests Restoration Act of 2003. See Davis, *supra* note 297, at 1233–35.

<sup>301</sup> WHITE HOUSE, INFRASTRUCTURE LEGISLATIVE OUTLINE (2018), <https://perma.cc/THB9-UQTP>; see Nick Sobczyk, *Trump Proposes Sweeping Changes to NEPA*, E&E NEWS: GREENWIRE (Feb. 12, 2018), <https://perma.cc/JVE2-YAYG>; see also Juliet Eilperin & Michael Laris, *White House Plan Would Reduce Environmental Requirements for Infrastructure Projects*, WASH. POST (Jan. 26, 2018), <https://perma.cc/9WA6-UA8N> (discussing the White House’s plan to reduce “needless, duplicative review” by paring environmental analysis to “a few simple pages,” allow agencies to piggyback on other agencies’ environmental analysis, forbid other agencies from commenting on the proposals of other agencies, and limit the ability of EPA to evaluate EISs of other agencies). In April 2018, a dozen federal agencies signed a memorandum of agreement to speed approvals for infrastructure projects, including the Interior, Energy, Transportation, and Agriculture Departments and EPA. See Nick Sobczyk, *Agencies Sign Agreement to Speed Permitting*, E&E NEWS: GREENWIRE (Apr. 9, 2018), <https://perma.cc/NPE3-86JP> (noting that environmentalists claim that speeding permitting of infrastructure project was already possible

overhaul the NEPA process, promising “streamlining” amendments to the Council on Environmental Quality’s (CEQ) NEPA regulations.<sup>302</sup> The plan, among other things, aims to 1) establish new deadlines for environmental reviews;<sup>303</sup> 2) expand the use of “findings of no significant impact” to eliminate environmental reviews;<sup>304</sup> 3) narrow the consideration of alternatives—the heart of the environmental review process;<sup>305</sup> 4) expand the delegation of NEPA responsibilities to the states;<sup>306</sup> and 5) reduce the role of federal agencies ability to comment on proposals, which have played a critical role in the judicial interpretation of NEPA.<sup>307</sup> It is hardly clear how these abrupt changes in the forty-year-old CEQ regulations—which were based largely on judicial interpretations of the statute—would be judicially received. The infrastructure plan also includes a number of proposals that would require statutory changes to the Clean Air Act, the Clean Water Act,<sup>308</sup> the Endangered Species Act, and the federal statute of limitations.<sup>309</sup>

These substantial promised changes to NEPA implementation, if they pass judicial muster, would have revolutionary effects on public land management, since often NEPA provides the only available mechanism to

under existing agency procedures, and maintaining that the agreement was a diversion from the real issue: a lack of federal money for infrastructure projects).

<sup>302</sup> WHITE HOUSE, *supra* note 301, § 3006 (requiring CEQ to amend its regulations “to streamline NEPA” to “reduce the time and costs associated with the NEPA process” and “increase efficiency, predictability and transparency in environmental reviews”). The President has claimed that deregulation is as important to the Trump agenda as tax cuts and claimed that the Administration blocked or delayed twenty-two rules for every new one issued. *See* Maxine Joselow, *Trump Says Deregulation ‘As Important’ As Tax Cuts*, E&E NEWS: PM (Apr. 16, 2018), <https://perma.cc/4JRD-ESGQ>. On May 3, 2018, the Council on Environmental Quality announced an advanced notice of proposed rulemaking to amend the NEPA regulations. *See* Nick Sobczyk, *White House Plots to Update NEPA Guidelines*, E&E NEWS PM (May 7, 2018), <https://perma.cc/3RWZ-ZHBT>.

<sup>303</sup> WHITE HOUSE, *supra* note 301, § 3000. Secretary Zinke has promised EISs of less than 150 pages, completed within one year. *See* Doyle, *supra* note 299.

<sup>304</sup> WHITE HOUSE, *supra* note 301, § 3009; *see also supra* note 299 and accompanying text.

<sup>305</sup> WHITE HOUSE, *supra* note 301, § 3005 (recommending reducing the required “all reasonable alternatives” to “legally, technically and economically feasible” alternatives); *see* 40 C.F.R. § 1502.14 (2017) (alternatives are “the heart” of the EIS process).

<sup>306</sup> WHITE HOUSE, *supra* note 301, §§ 3201–3202.

<sup>307</sup> *Id.* §§ 3001, 3008, 3012 (transportation planning); *id.* § 3013 (mitigation banking). On the important role played by agency comments in judicial interpretations of NEPA compliance, *see* Michael C. Blumm & Marla Nelson, *Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation*, 37 VT. L. REV. 5 (2012).

<sup>308</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012); *see* Eilperin & Laris, *supra* note 301 (discussing what appears to be a promise to seek an amendment to section 404 of the Clean Water Act to eliminate EPA’s veto authority concerning Corps permits, a seldom exercised power but one that has a significant effort on the exercise of the Corps’s permit discretion). *See generally* Michael C. Blumm & Elisabeth Mering, *Vetoing Wetland Permits Under Section 404(c) of the Clean Water Act: A History of Inter-Federal Agency Controversy and Reform*, 33 UCLA J. ENVTL. L. & POL’Y 215 (2015) (discussing the section 404(c) veto authority and examining all thirteen vetoes EPA issued over the past forty-six years).

<sup>309</sup> *See* WHITE HOUSE, *supra* note 301, § 3007 (calling for an amendment to section 309 of the Clean Air Act); *id.* §§ 3101–3107 (calling for various amendments to the Clean Water Act); *id.* §§ 3110–3116 (calling for various amendments to the Endangered Species Act); *id.* § 3403 (calling for change to the statute of limitations for infrastructure projects).

obtain judicial review of the actions of public land managers. “Streamlining NEPA” in this fashion amounts to cutting out the public and federal, state, and local agencies from the environmental review process and reducing the role of public participation in the NEPA process. Undemocratizing public land law in this manner may be the most significant long-term effect of the Trump revolution in public land law.

## V. CONCLUSION

Neither President Trump nor Secretary Zinke has called for selling off public lands, a sentiment common among the current generation of Utah politicians.<sup>310</sup> But both seem determined to chart a substantial privatization of public land law in pursuit of “energy dominance.”<sup>311</sup> Their regulatory and management rollbacks are not just aimed at federal land protections instituted by the Obama Administration; they also seek to challenge national monument protections invoked on a bipartisan basis for over a century and to redefine multiple-use principles of similar vintage.<sup>312</sup>

The Trump revolution quickly discarded landscape planning due to a perceived (and unsubstantiated) conflict with the ability of local land managers to authorize extractive uses.<sup>313</sup> Extractive public land users oppose broad-based planning because of its focus on public resources instead of specific proposals to use public resources. Similarly, empowering state and local officials to influence public land managers serves the needs of local economic elites.<sup>314</sup> The effect is to elevate certain privileged public land

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<sup>310</sup> See Rich Landers, *Utah Politicians Shamelessly Continue Federal Land Grab Effort*, SPOKESMAN-REV. (Mar. 8, 2017), <https://perma.cc/3BMN-QKYY>.

<sup>311</sup> Peter Behr & Pamela King, *Trump, Still in Search of Energy Dominance*, E&E NEWS: ENERGYWIRE (Nov. 8, 2017), <https://perma.cc/N2YE-UFQS>; Mark Hand, *Trump's Road to 'Energy Dominance' Excludes Clean Energy*, THINK PROGRESS (June 29, 2017), <https://perma.cc/VU6W-PDWR>.

<sup>312</sup> See *infra* app. (presidents' consistent use of monuments); see also *supra* notes 101, 104, 111, 119–121, 130 and accompanying text (multiple use). It may be time to reconsider the meaning of multiple use to ensure that it is not interpreted to conflict with the long history of antimonopoly policies on public lands. See generally Michael C. Blumm & Kara Tebeau, *Antimonopoly in American Public Land Law*, 28 GEO. ENVTL. L. REV. 155 (2016). Multiple use should not be a mechanism to enshrine the hegemony of local commodity interest elites.

<sup>313</sup> See *supra* notes 166–172 and accompanying text.

<sup>314</sup> See *supra* notes 139, 166–167, 177–178 and accompanying text. On the role of the Alaska congressional delegation in opening up ANWR to oil and gas drilling, fostering clearcutting of roadless areas in the Tongass National Forest, and promoting mining over the objections of salmon harvesters and native groups, see Editorial, *The Looting of America's Public Lands*, N.Y. TIMES (Dec. 9, 2017), <https://perma.cc/L5VQ-CTAS>. A leading candidate to head BLM, Wyoming-based property rights attorney Karen Budd-Falen, promised to “advocate for local government involvement.” See Jennifer Yachnin, *Potential Chief Vows to Push Local Input, Reduce Monuments*, E&E NEWS: GREENWIRE (Nov. 22, 2017), <https://perma.cc/BR4E-JZAG>. She also suggested that local grazers might have private property rights in their grazing allotments, a position flatly inconsistent with the text of the Taylor Grazing Act, 43 U.S.C. § 315b (2012) (grazing permits convey no “right, title, [and] interest” to federal public lands). See Jennifer Yachnin, *Ranchers Make 'Good Arguments' for Ownership—BLM Candidate*, E&E NEWS: GREENWIRE (Nov. 29, 2017), <https://perma.cc/LTF7-DN9L>. Interestingly, the Trump revolution's



users—especially fossil fuel producers—over non-extractive users, providing them a kind of monopoly position.<sup>315</sup> The result is to unsettle public land policy more drastically than any administration since Theodore Roosevelt, supposedly Secretary Zinke’s role model, whose substantial legacy Zinke has appeared to utterly disregard.<sup>316</sup>

The Trump revolution might be defended on the ground that public lands must be transformed into energy producers to combat a national energy crisis. If such a crisis exists, however, it is due to the country’s need to transition to safe energy to combat climate change and its ominous disastrous effects.<sup>317</sup> But the Trump/Zinke policies are the polar opposite of sound, safe energy policies.<sup>318</sup> They might be—and sometimes are—defended on grounds of federal deficit reduction.<sup>319</sup> But, for example, efforts to increase grazing on federal lands<sup>320</sup> will produce no material improvement on revenues from a program that costs over \$100 million dollars annually and has done so for generations.<sup>321</sup> And while mineral lease sales may produce

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efforts to empower states do not apparently extend to California’s efforts to impose a state right of first refusal over federal public land sales. Complaint, *United States v. California*, Case 2:18-cv-00721 (E.D. Cal. Apr. 2, 2018) (seeking injunctive relief against the state).

<sup>315</sup> The scuttling of landscape planning, discussed *supra* Part III.A, should be viewed as a successful effort to resist making public land planning more oriented toward public resources and their interrelationships with each other in advance of proposed developments and focus attention on specific projects like grazing permits and mineral leases that have interested proponents. See *supra* note 139 and accompanying text.

<sup>316</sup> See John Freemuth, Opinion, *Interior Secretary Zinke Invokes Teddy Roosevelt as Model, but His Public Land Policies Don’t*, OREGONIAN (Sept. 27, 2017), <https://perma.cc/5ZJR-QBC3>. On Theodore Roosevelt’s formidable conservation legacy, see generally DOUGLAS BRINKLEY, *THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA* (2009). The *New York Times* editorial board presciently observed that the Trump Administration has parroted ideas popular within the Republican Party since the George W. Bush Administration. Editorial, *supra* note 314 (noting that Trump appointees employ “a virtual copy of the thinking that prevailed among George W. Bush’s policymakers 15 years ago, many of whom have emerged like creatures from the crypt to occupy key positions in the Trump administration”). A significant difference is, however, that the Congress now seems to share much of the Trump Administration’s view of public land policies.

<sup>317</sup> See Ken Caldeira et al., *Climate Sensitivity Uncertainty and the Need for Energy Without CO<sub>2</sub> Emission*, 299 SCIENCE 2052, 2053–54 (2003); Brad Plumer, *Looking for Trump’s Climate Policy? Try the Energy Department*, N.Y. TIMES (May 25, 2017), <https://perma.cc/7W57-577E>.

<sup>318</sup> From an economic as well as from a scientific perspective, the Trump policies are characterized by uncertainty and contradictions, ignoring the decline of coal driven resource marketplace and the fact that his executive orders have created considerable industrial uncertainty in the regulatory framework. See Chris Ross & Ramanan Krishnamoorti, *Energy Policy Under the Trump Administration: Uncertainty, Opportunity and Risk*, FORBES (Apr. 11, 2017), <https://perma.cc/YZ7C-3MEF>; see also Plumer, *supra* note 317.

<sup>319</sup> See Brad Plumer & Coral Davenport, *Trump Budget Proposes Deep Cuts in Energy Innovation Programs*, N.Y. TIMES (May 23, 2017), <https://perma.cc/Q5Q2-W98H> (describing how the Trump budget claims it will raise about \$36 billion over the next 10 years by selling off major American energy resources and infrastructure and opening up areas of public land for oil and gas drilling).

<sup>320</sup> See *supra* note 212 and accompanying text.

<sup>321</sup> Over a decade ago, the Government Accountability Office reported that the cost of grazing on federal lands cost the government roughly \$120 million per year. U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-869, *LIVESTOCK GRAZING: FEDERAL EXPENDITURES AND RECEIPTS*

increased oil and gas revenues,<sup>322</sup> if those revenues were balanced against the increased costs imposed by their destabilizing effects on climate, mineral leasing would also be exposed as a money-loser.<sup>323</sup> Moreover, the Trump Administration seems remarkably uninterested in increasing federal royalties from mineral leasing.<sup>324</sup> So deficit reduction can hardly explain these radical and ongoing changes in public land policy.

In some respects, the Trump public lands revolution may be understood as a product of political dynamics. Non-coastal western senators are predominantly Republicans, and many collect large political action committee funds from public land-dependent industries. The funders and their beneficiaries are nearly uniformly supportive of increased grazing, mining, drilling, and logging.<sup>325</sup> In signing his executive order instituting the monuments' review, President Trump was effusive in his praise of Senator Orrin Hatch (R-Utah), an anti-monument warrior who once compared an earlier Interior secretary to the sheriff of Nottingham because he tried to improve the ecological condition of federal rangelands.<sup>326</sup> The Trump Administration has aimed to please western senators like Hatch, although falling short of meeting their pleas to gift federal public lands to the states.<sup>327</sup>

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VARY, DEPENDING ON THE AGENCY AND THE PURPOSE OF THE FEE CHARGED (2005), <https://perma.cc/52R3-R84J>.

<sup>322</sup> See *supra* note 214 and accompanying text.

<sup>323</sup> See Stephen Leahy, *Hidden Costs of Climate Change Running Hundreds of Billions a Year*, NAT'L GEOGRAPHIC (Sept. 27, 2017), <https://perma.cc/22LW-EUR7> ("In the coming decade, economic losses from extreme weather combined with the health costs of air pollution spiral upward to at least \$360 billion annually, potentially crippling U.S. economic growth."); see also ROBERT WATSON ET AL., UNIVERSAL ECOLOGICAL FUND, *THE ECONOMIC CASE FOR CLIMATE ACTION IN THE UNITED STATES*, at ii (2017), <https://perma.cc/S9KT-J3GS>.

<sup>324</sup> See *supra* note 260 and accompanying text; see also Eric Levitz, *Trump Moves to Increase Subsidy for Coal Mining on Federal Lands*, N.Y. MAG. (Aug. 7, 2017), <https://perma.cc/H2DB-DSYK>; *Trump Administration Reduces Royalty Rates in First U.S. Oil, Gas Lease Sale*, REUTERS, July 13, 2017, <https://perma.cc/9TGX-UFKC>.

<sup>325</sup> See generally Editorial, *The Looting of America's Public Lands*, N.Y. TIMES (Dec. 9, 2017), <https://perma.cc/64WQ-XMLE> (calling out the Trump Administration for decimating the Utah national monuments without any known oil and gas deposits but with demonstrable "magnificent landscapes and priceless Native American artifacts"; criticizing support for congressional revocation of protections for the Arctic National Wildlife Refuge, containing at best just over a year of national oil consumption; regretting resumption of industrial logging of the Tongass National Forest in southeast Alaska; opposing support for the Pebble copper mine in southwest Alaska, which threatens Bristol Bay's largest-in-the-world sockeye salmon runs; and protesting the Administration's effort to roll back sage grouse protections, despite the collaborative approach that led to them).

<sup>326</sup> See Remarks on Signing an Executive Order on Review of Designations Under the Antiquities Act and an Exchange with Reporters, 2017 DAILY COMP. PRES. DOC. 1 (Apr. 26, 2017); see also GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 76 (6th ed. 2007) (discussing Hatch's claim).

<sup>327</sup> See Kirk Siegler, *Push to Transfer Federal Lands to States Has Sportsmen on Edge*, NAT'L PUB. RADIO (Jan. 5, 2017), <https://perma.cc/X66M-CX9V> (noting a widespread fear among hunters that states might sell public lands to private parties who could restrict public access). A study of Utah public lands found 54% of the 7.5 million acres the federal government conveyed to the state are now closed to public access. See Scott Streater, *Federal Transfers to Utah Would Shut Public Out—Report*, E&E NEWS PM (May 22, 2017), <https://perma.cc/C2EC-2B2K> (discussing a report by the Wilderness Society). In an effort to ensure that Secretary Zinke kept

Moreover, Congress seems ready to codify several Trump Administration initiatives to ensure their permanence, which—along with judicial appointments<sup>328</sup>—could prove to be the Trump Administration’s real long-term legacy.<sup>329</sup>

Perhaps the Trump revolution in public land law is simply the unfortunate byproduct of a toxic combination of partisan redistricting, overrepresentation of rural westerners in both Congress and the electoral college, the enormous advantages that extractive industries have in a political process dependent on large campaign contributors, and voter suppression efforts in urban districts.<sup>330</sup> These powerful influences on 21st century American life are unlikely to abate anytime soon. If they are permanent elements of the American political landscape, the ongoing fundamental redefinition of the “public” in public land law is likely to be long-term, producing results overwhelmingly opposed by the majority of the American public land owners.<sup>331</sup> In addition to the widespread environmental

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his promise not to sell off federal lands, sportsmen organizations have joined with environmental groups on a petition for regulations that would prohibit the sale or transfer of federal lands without congressional approval. See Jennifer Yachnin, *Groups Petition Zinke for Rule Against Selling Federal Acres*, E&E NEWS PM (Nov. 16, 2017), <https://perma.cc/M6JW-RCVK>; see also Brad Plumer, *After a Massive Backlash, a Republican Yanks His Bill to Sell Off Public Lands*, VOX, <https://perma.cc/B45Z-RX4J> (last updated Feb. 2, 2017).

<sup>328</sup> On the underpublicized, long-term effect of the Trump judiciary, see John D. Lesly & John D. Echeverria, Opinion, *The Trump Judiciary Threatens Federal Public Lands*, HILL (Nov. 28, 2017), <https://perma.cc/VH6B-RUBF>.

<sup>329</sup> See, e.g., Kellie Lunney, *Utah Lawmakers Offer Bills Reinforcing Trump’s Cuts*, E&E NEWS: GREENWIRE (Dec. 5, 2017), <https://perma.cc/K2E7-V7LJ> (discussing bills sponsored by John Curtis (R-Utah) and Chris Stewart (R-Utah) that would essentially ratify the Trump monument rollbacks in Utah); Jennifer Yachnin, *Bishop Says Bill Will ‘Appeal to Everybody’ as Dems Slam It*, E&E NEWS PM (Oct. 11, 2017), <https://perma.cc/PB3J-HWNY> (describing a bill to sharply reduce the President’s Antiquities Act authority by discussing proposed procedural and substantive limitations that may be imposed); see also Rebecca Worby, *In Congress, an Effort to Curtail National Monuments*, HIGH COUNTRY NEWS (Oct. 18, 2017), <https://perma.cc/6LD6-AS9R> (describing a House Natural Resources Committee-approved bill that would limit the size of national monuments the President could establish to one square mile unless approved by Congress and state and local governments, depending on the size of the proposal, and would also codify the President’s ability to modify monuments, as President Trump has attempted with Bears Ears and Grand Staircase-Escalante).

<sup>330</sup> E.J. DIONNE, JR., ET AL., ONE NATION AFTER TRUMP: A STUDY OF THE TRENDS BEHIND HIS RIDE: A GUIDE FOR THE PERPLEXED, DISILLUSIONED AND THE NOT-YET DEPORTED 5 (2017) (“Our system is now biased against the American majority because of partisan redistricting (which distorts the outcome of legislative elections), the nature of representation in the United States Senate (which vastly underrepresents residents of larger states), the growing role of money in politics (which empowers a very small economic elite), the workings of the Electoral College (which is increasingly out of sync with the distribution of our population), and the ability of legislatures to use a variety of measures, from voter ID laws to the disenfranchisement of former felons, to obstruct the path of millions of Americans to the ballot box.”).

<sup>331</sup> See, e.g., *supra* note 33 and accompanying text (explaining public opposition to shrinking or abolishing national monuments); see also Kirk Johnson, *Siege Has Ended, but Battle over Public Lands Rages On*, N.Y. TIMES (Apr. 14, 2017), <https://perma.cc/E6SK-4ZQW>. Sixty-eight percent of western voters polled “said they prioritized protecting water, air and wildlife with opportunities for recreation on public land,” while 22% prioritized increased production of fossil fuels, and about two-thirds of voters opposed more coal mining. See Bruce

damage visited upon lands owned by the public, the lessons are disturbing ones for American democracy.

The part of the public now dominant in the current political dynamic is increasingly defined by those providing campaign and other political contributions, which do not include the majority of the American owners of these lands. Although the maladies described above afflict American democracy in general, their pernicious effects on the proprietary legacy of all Americans seem especially pronounced and regrettable, since the bill will be paid disproportionately by those who cannot yet vote and those yet unborn. Neither are able to protect their public property interests from the ongoing assault on their heritage by the Trump Administration and its congressional allies.

## APPENDIX 1—NATIONAL MONUMENTS ESTABLISHED SINCE 1978

Monument's Name	State	Date	President	Acreage
Admiralty Island	Alaska	1978	Jimmy Carter	1.1 million
Aniakchak	Alaska	1978	Jimmy Carter	488,000
Becharof	Alaska	1978	Jimmy Carter	1.2 million
Bering Land Bridge	Alaska	1978	Jimmy Carter	3.5 million
Cape Krusenstern	Alaska	1978	Jimmy Carter	560,000
Denali	Alaska	1978	Jimmy Carter	3.9 million
Gates of the Arctic	Alaska	1978	Jimmy Carter	8.2 million
Kenai Fjords	Alaska	1978	Jimmy Carter	570,000
Kobuk Valley	Alaska	1978	Jimmy Carter	1.7 million
Lake Clark	Alaska	1978	Jimmy Carter	2.5 million
Misty Fjords	Alaska	1978	Jimmy Carter	2.3 million
Noatak	Alaska	1978	Jimmy Carter	5.9 million
Wrangell-St. Elias	Alaska	1978	Jimmy Carter	11 million
Yukon-Charley Rivers	Alaska	1978	Jimmy Carter	1.7 million
Yukon Flats	Alaska	1978	Jimmy Carter	10.6 million
Grand Staircase-Escalante	Utah	1996	Bill Clinton	1.7 million
Vermillion Cliffs	Arizona	2000	Bill Clinton	293,000
President Lincoln and Soldier's Home	D.C.	2000	Bill Clinton	2.3
Ironwood Forest	Arizona	2000	Bill Clinton	128,900
Hanford Reach	Washington	2000	Bill Clinton	195,000
Cascade-Siskiyou	Oregon/ California	2000	Bill Clinton	100,000
Canyons of the Ancients	Colorado	2000	Bill Clinton	164,000
Giant Sequoia	California	2000	Bill Clinton	327,769
Grand Canyon-Parashant	Arizona	2000	Bill Clinton	1 million
California Coastal	California	2000	Bill Clinton	8,778

Agua Fria	Arizona	2000	Bill Clinton	71,100
Governors Island	New York	2001	Bill Clinton	22
Virgin Islands Coral Reef	Virgin Islands	2001	Bill Clinton	12,708
Upper Missouri River Breaks	Montana	2001	Bill Clinton	377,346
Sonoran Desert	Arizona	2001	Bill Clinton	486,149
Pompeys Pillar	Montana	2001	Bill Clinton	51
Minidoka Internment	Idaho	2001	Bill Clinton	72.75
Kasha-Katuwe Tent Rocks	New Mexico	2001	Bill Clinton	4,148
Carrizo Plain	California	2001	Bill Clinton	204,107
Northwestern Hawaiian Islands (renamed Papahanamokuakea)	Hawaii	2006	George W. Bush	582,781
African Burial Ground	New York	2006	George W. Bush	One-third acre
WWII Valor in the Pacific	Hawaii	2008	George W. Bush	6,310
Marianas Trench	Northern Mariana Islands and Guam	2009	George W. Bush	95,216
Pacific Remote Islands	Hawaii	2009	George W. Bush	495,189
Rose Atoll	American Samoa	2009	George W. Bush	13,451
Fort Monroe	Virginia	2011	Barack Obama	325.21
César E. Chavez	California	2012	Barack Obama	10.5
Chimney Rock	Colorado	2012	Barack Obama	4,726
Fort Ord	California	2012	Barack Obama	14,651
Charles Young Buffalo Soldiers	Ohio	2013	Barack Obama	5,965
First State	Delaware	2013	Barack Obama	1,108
Harriet Tubman Underground Railroad	Maryland	2013	Barack Obama	11,750
Rio Grande del Norte	New Mexico	2013	Barack Obama	242,555
San Juan Islands	Washington	2013	Barack Obama	970
San Gabriel Mountains	California	2014	Barack Obama	346,177

Organ Mountains-Desert Peaks	New Mexico	2014	Barack Obama	496,330
Basin and Range	Nevada	2015	Barack Obama	704,000
Waco Mammoth	Texas	2015	Barack Obama	7.11
Berryessa Snow Mountain	California	2015	Barack Obama	330,780
Browns Canyon	New Mexico	2015	Barack Obama	21,586
Pullman	Illinois	2015	Barack Obama	One-quarter acre
Honouliuli	Hawaii	2015	Barack Obama	123
Bears Ears National	Utah	2016	Barack Obama	1.35 million
Northeast Canyons and Seamounts	Massachusetts	2016	Barack Obama	4,913
Katahdin Woods and Waters	Maine	2016	Barack Obama	87,563
Stonewall	New York	2016	Barack Obama	One-tenth acre
Belmont-Paul Women's Equality	Washington, D.C.	2016	Barack Obama	One-third acre
Castle Mountain	California	2016	Barack Obama	20,920
Sand to Snow	California	2016	Barack Obama	154,000
Mojave Trails	California	2016	Barack Obama	1.6 million
Reconstruction Era	South Carolina	2017	Barack Obama	16
Freedom Riders	Alabama	2017	Barack Obama	6
Birmingham Civil Rights	Alabama	2017	Barack Obama	Nine-tenths acre

APPENDIX 2— TWENTY-EIGHT RESTORATION MEASURES FOR A POST-TRUMP  
ADMINISTRATION ERA<sup>332</sup>

## A. FEDERAL LAND PRESERVATION

- Restore National Monument diminishments
- Restore diminishment of other federal land designations, such as lands designated as part of the National Lands Conservation System
- Restore Arctic National Wildlife Refuge protections from oil and gas development

## B. FEDERAL FISCAL RESPONSIBILITY

- Increase grazing fees (just reduced, even though the prior fees were below market rate)
- Impose federal royalty rates that reflect fair market value for federal oil and gas and coal on federal and Indian lands
- Restore methane control and anti-waste rules (for both the Department of Interior and EPA)

## C. FEDERAL LAND OWNERSHIP AND PLANNING

- Claim federal ownership of groundwater on federal lands (like ownership of oil & gas); issue regulations controlling hydraulic fracturing with federal groundwater
- Investigate what the Congressional Review Act forbids in terms of revised BLM planning regulations
- Restore executive orders on consideration of climate impacts in federal property, real estate, etc. actions

## D. FEDERAL LEASING

- Restore Master Leasing
- Don't lease in a declining a declining market
- Restore principle that leases of sensitive lands are improper if there are available less damaging alternatives
- Evaluate the “downstream effects” of leasing of fossil fuels on climate change

## E. WILDLIFE PROTECTION ON FEDERAL LANDS

- Restore sage grouse protections that were included in the 2015 RMP amendments
- Increase the species listed as “species of conservation concern” in Forest Plan revisions occurring under the 2012 NFMA regulations
- Emphasize protection of bighorn sheep where there is risk of contact between a bighorn population and domestic sheep grazing on federal land

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<sup>332</sup> Compiled by the panel on public lands at *Environmental Law's* Symposium on the Trump Administration and Environmental Law, held at Lewis & Clark Law School on April 6, 2018. Panel members included Laurie Rule (Advocates for the West), Sandra Zellmer (Alexander Blewett III School of Law at the University of Montana), and Michael Blumm.



- Stop the border wall, which threatens nearly 100 endangered and threatened species and would destroy large swaths of national monuments, wildlife refuges, and tribal lands. The Department of Interior has jurisdiction over about 39% of the entire U.S.-Mexico border (nearly 177 miles of the border in Arizona).
- Reinstate Interior’s rule that banned certain predator hunting practices in Alaska’s national wildlife refuges, including killing wolves and pups in their dens, shooting bears from aircraft and at bait stations, and using steel-jaw leg-hold traps. The Obama/Jewell rule was an early victim of the Congressional Review Act, which the President signed in March 2017.

#### F. BIODIVERSITY

- Reverse the Migratory Bird Treaty Act interpretation under the new Solicitor’s Opinion and go back to interpreting the law as covering unintentional take of migratory birds; the U.S. Fish and Wildlife Service should also develop a permitting scheme that allows for incidental take of migratory bird—but requires steps to minimize and mitigate this incidental take
- Phase out use of lead ammunition on all federal land
- Reverse efforts to weaken or abandon federal commitments to protecting sage grouse and their habitat; the federal government should once again play a leadership role in protecting sage grouse on federal land, and should encourage the states to implement their sage grouse conservation commitments.
- Abandon (or reverse) efforts to overturn the Fish and Wildlife Service’s “blanket 4(d) rule” under the ESA; species listed as threatened should presumptively enjoy the same protections under section 9 as species listed as endangered; the Fish and Wildlife Service should have to justify special 4(d) rules as necessary to advance recovery of threatened species.
- The Department of Interior should restore its compensatory mitigation policy adopted under the Obama Administration; this policy emphasizes avoidance of adverse effects, as well as compensatory mitigation to reach a “no net adverse impact” goal.

#### G. NEPA

- Restore the mitigation guidance the Department of Interior has eliminated
- Deemphasize categorical exclusions and BLM’s determinations of NEPA Applicability (DNAs) that agencies use to avoid NEPA procedures
- Promulgate a federal cost-of-carbon rule (to avoid NEPA violations)
- Revise Council on Environmental Quality (CEQ) regulations to reflect the last forty years of NEPA decisions to codify the above measures and others; much more emphasis on the content and process of environmental assessments (EAs) and the circumstances under which categorical exclusions are suitable
- Restore CEQ NEPA guidance on climate change impacts