

# Subcommittee on Energy and Mineral Resources

Paul Gosar, Chairman

Hearing Memorandum

June 27, 2017

To: All Subcommittee on Energy and Mineral Resources Members

From: Majority Committee Staff – Kate Juelis  
Subcommittee on Energy and Mineral Resources (x5-9297)

Hearing: Oversight hearing entitled “*Examining Access to Oil and Gas Development on Federal Lands.*”

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The Subcommittee hearing will take place on **June 29, 2017, at 10:00am, in 1324 Longworth House Office Building**. This hearing will review the status of oil and gas leasing and drill permitting processes on federal lands.

## **Policy Overview:**

- The Bureau of Land Management (“BLM”) leases federally owned minerals for the purposes of responsible oil and gas development. At the conclusion of Fiscal Year (“FY”) 2016, the BLM oversaw 40,143 onshore leases throughout the states of New Mexico, Utah, Wyoming, Nevada, Idaho, Colorado, North Dakota, South Dakota, Montana, Alaska, and California. This is the lowest number of federal leases since the BLM began publishing records in FY1985.<sup>1</sup> Federal lands and subsurface mineral estates are owned by all Americans, and a key mission of the Department of the Interior is to responsibly manage and develop our nation’s resources. Development of these resources helps our country achieve energy independence and security, and contributes to a vibrant, diversified economy.
- In recent years, duplicative and costly bureaucratic policies have discouraged operators from leasing federal minerals. Development on private and state lands eclipsed that on federal land, causing taxpayers to lose out on critical fee and royalty revenues. Between FY2010 and FY2015, federal crude production fell from 36% of total crude production to 21%. Meanwhile, crude production on non-federal lands more than doubled.<sup>2</sup>
- A combination of factors, including lack of administrative and staff resources, has resulted in permitting delays of up to 300 days in New Mexico.<sup>3</sup> In contrast, the New Mexican oil and gas regulating body, the New Mexico Oil and Gas Conservation Division, processes permit

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<sup>1</sup> BUREAU OF LAND MANAGEMENT, OIL AND GAS STATISTICS, <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics> (last visited June 23, 2017).

<sup>2</sup> Marc Humpheries, US Crude Oil and Natural Gas Production in Federal and Nonfederal Areas (CRS Report Congressional Research Service, R42432) (Washington, D.C., Congressional Research Service), (2016).

<sup>3</sup> Briefing by Ken McQueen, Cabinet Secretary of the Energy, Minerals and Natural Resources Department of New Mexico, to majority staff, H. Comm. Natural Resources (June 8, 2017).

to drill within eight days.<sup>4</sup> Meanwhile, at the federal level, the BLM is presently faced with a backlog 3,000 drilling permits.<sup>5</sup>

- A careful analysis of the regulations directing the leasing and drill permitting process reveals considerable inefficiencies that effectively discourage development of federal oil and gas resources. These delays are much to the detriment of our national energy security and economic prosperity.
- The extensive and duplicative reviews required under the National Environmental Policy Act (“NEPA”) throughout the leasing and drill permitting process significantly delay oil and gas production on federal lands.

**Invited Witnesses:**

*Ms. Katharine MacGregor*  
Deputy Assistant Secretary  
Land and Minerals Management  
Department of the Interior  
Washington, DC

*Mr. Ryan Flynn*  
Executive Director  
New Mexico Oil and Gas Association  
Santa Fe, New Mexico

*Dr. Laura Nelson*  
Governor’s Energy Advisor  
Utah Governor’s Office of Energy Development  
Salt Lake City, Utah

*Mr. Mark Squillace*  
Professor of Law, Natural Resource Law  
University of Colorado, Boulder  
Colorado Law School  
Boulder, Colorado

**Background:**

*Statutory Authorities*

The federal government owns and manages nearly half of the land in the American West.<sup>6</sup> This includes an extensive subsurface mineral estate that contains an estimated 5.3

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<sup>4</sup> Briefing by Ryan Flynn, Executive Director of the New Mexico Oil and Gas Association, to majority staff, H. Comm. Natural Resources (June 12, 2017).

<sup>5</sup> Pamela King, 3K Drilling Permit Applications Await BLM Approval. E&E News (May 17, 2017). <https://www.eenews.net/energywire/2017/05/17/stories/1060054641>

billion barrels of proven onshore federal oil reserves, and 69 trillion cubic feet of proven onshore dry gas reserves. The BLM administers 700 million acres of federal onshore subsurface minerals on behalf of the American people.<sup>7</sup>

In the lower 48 contiguous states, the BLM’s oil and gas program is primarily authorized by the Mineral Leasing Act of 1920 (“MLA”). This law allows the Secretary of the Interior, through the BLM, to lease nearly all federal lands containing hydrocarbons, with the federal government maintaining the reversionary interest in the subsurface estate.<sup>8</sup> Under the MLA, the BLM is authorized to conduct both competitive and noncompetitive bids during lease sales, and to collect annual rental fees and royalty payments based on production from the leased acreage. The Energy Policy Act of 2005 (“EPAct05”) provided additional structure to the process, and included a “pilot program” designed to facilitate the drill permitting process.<sup>9</sup>

In addition to the previously mentioned authorities governing energy production on federal lands, the National Environmental Policy Act (“NEPA”) serves as an umbrella for coordinating compliance with dozens of federal, state, tribal, and local laws.<sup>10</sup> Specifically, agencies must prepare a detailed document, referred to as an Environmental Impact Statement (“EIS”), for every federal action that significantly impacts the quality of the human environment.<sup>11</sup>

The NEPA process can be very expensive and time consuming for private entities seeking permits under the process. According to the U.S. General Accounting Office, the average time to complete an EIS under NEPA is over four and one-half years.<sup>12</sup> In addition, NEPA has become a magnet for litigation, with hundreds of NEPA-related lawsuits against the federal government filed or opened each year.<sup>13</sup>

As noted below, NEPA reviews are triggered early in the leasing process. These requirements impose substantial environmental review requirements at multiple levels of the leasing and drilling process.<sup>14</sup> NEPA may require: (1) an environmental impact statement to identify the general area to be leased; (2) either an environmental assessment (“EA”) or an EIS to review specific parcels of land considered appropriate for leasing; (3) an EA as part of an Application for Permit to Drill (“APD”); (4) an EIS if the EA in the APD determines there is a

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<sup>6</sup> Carol Hardy Vincent, Federal Land Ownership: Overview and Data (CRS Report R42346)(Washington, D.C.: Congressional Research Service, 2014),p.1

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Linda Luther, The National Environmental Policy Act: Background and Implementation (CRS Report RL33152) (Washington, DC: Congressional Research Service, 2005), 28, <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33152.pdf>.

<sup>11</sup> 40 C.F.R. § 1502.

<sup>12</sup> See p. 14, GAO Report: “National Environmental Policy Act: Little Information Exists on NEPA Analyses” <http://www.gao.gov/assets/670/662546.pdf>.

<sup>13</sup> Though the GAO in a recent report found little agency litigation data, CEQ found at least 70 NEPA lawsuits filed against Department of the Interior agencies, NOAA, Forest Service, and U.S. Army Corps in FY 2013 alone. (See: [https://ceq.doe.gov/legal\\_corner/docs/2013%20NEPA%20Litigation%20Survey%20\(without%20dispositions\).pdf](https://ceq.doe.gov/legal_corner/docs/2013%20NEPA%20Litigation%20Survey%20(without%20dispositions).pdf) ).

<sup>14</sup> U.S. Environmental Protection Agency, Background for NEPA Reviewers: Crude Oil and Natural Gas Exploration, Development, and Production (1992).

significant impact; and (5) an additional EA, and possible EIS, if the leaseholder intends to establish an additional drill site in the same parcel of land.<sup>15</sup>

Once all NEPA requirements are met as part of the APD process, the BLM has discretion to determine whether a public comment period, which may last up to 30 days, is needed.<sup>16</sup> Once completed, the BLM may then revisit all NEPA documentation in order to address any substantive comments from the public comment period.<sup>17</sup> There is no time limit for this management level review process which has the potential to trigger a full scale EIS if a significant impact is found.<sup>18</sup>

Aside from these structural delays, the threat of litigation can force all parties involved in preparing NEPA evaluations to go beyond basic NEPA requirements for fear their initial review will be found insufficient when challenged in court. These additional steps can not only create time delays but place applicants at a financial disadvantage as they are forced to prepare for a standard which could ultimately be determined in court.

### *Multiple Use Mandate*

The BLM is challenged to balance responsible oil and gas production on federal lands against other interests, pursuant to the BLM's multiple use mandate set out in the "Federal Land Policy and Management Act of 1976" (FLPMA).<sup>19</sup> United States Code Title 43, Section 1701 (7) requires public land use planning to "...be on the basis of multiple use and sustained yield..."<sup>20</sup> Administering property as diverse and valuable as the American West is no small feat, and the BLM's oil and gas leasing program incorporates numerous perspectives and interests as leases are planned, sold, and produced.

A complex leasing and drill permitting process has arisen from these laws and regulations, and has become so burdensome that the time and cost discourages investment in federal lands. This comes at the expense of the American taxpayer, who is precluded from realizing the returns on leasing federal property.

### *Onshore Federal Mineral Receipts: Revenue Generation and Distribution*

The Office of Natural Resources Revenue (ONRR) is responsible for collecting revenues from bonuses, fees, and royalties generated by leasing and production on federal lands, and then disburses these amounts to states, a reclamation fund, and the U.S. Treasury pursuant to the MLA. Federal onshore leases may be conducted through either a competitive or noncompetitive bidding process. In competitive lease sales, the highest bonus bid wins the lease. Then, a rental payment is assessed on a per-acre basis.<sup>21</sup> The rental payments are made annually in order to

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<sup>15</sup> *Id.*

<sup>16</sup> 43 CFR § 3162.3-1

<sup>17</sup> *Id.*

<sup>18</sup> See *id.*

<sup>19</sup> 43 CFR 3000-3100

<sup>20</sup> 43 USC 1701 (7)

<sup>21</sup> Marc Humpheries, *Mineral Royalties on Federal Lands, Issues for Congress* (CRS Report R43897) (Washington, DC: Congressional Research Service, 2015),

<http://www.crs.gov/Reports/R43891?source=search&guid=73a2be4c146240dfaf637a4f525a1fcc&index=0>

maintain the lease. Once production from the lease occurs, a royalty payment is assessed as a percentage of production. The current onshore royalty rate is 12.5% of production, which is low in comparison to royalty percentages on private lands. There have been numerous efforts in the past to increase the royalty rate on federal lands, but doing business in these areas comes with additional cost burdens, including the bonus and rental payments, as well as regulatory and permitting costs.

Revenues generated by the leasing and production on federal lands are then disbursed by ONRR according to the MLA.<sup>22</sup> Of all amounts received from “sales, bonuses, royalties...,” 50% is disbursed to the State in which the lease was located, less 2% for administrative costs, with the exception of Alaska. 40% is deposited into the “Reclamation Fund”, which is a source of funding for water and irrigation projects throughout the West. The U.S. Treasury retains the remaining 10% of mineral leasing receipts.<sup>23</sup> Between 2005 and 2014, gross income from onshore oil and gas development averaged \$3 billion, before distribution to states.<sup>24</sup>

States receiving a share of federal production revenues rely on this income to fund state programs and initiatives, such as K-12 public schools.<sup>25</sup> A drop in oil prices and procedural delays can push states to the brink of a budget crisis, as was the case in New Mexico in early 2017.<sup>26</sup> Following a \$145 million lease sale in the Permian Basin, litigious groups submitted two protests that delayed a \$70 million payment to the state. Submitted by the Center for Biological Diversity and WildEarth Guardians, the protests totaled over 1,200 pages and were submitted in May 2016, in anticipation of a lease sale scheduled for the following July. Congressman Steve Pearce (NM-2) expressed concern over the delay, highlighting his state’s precarious financial position and the effect the withheld funds would have on all New Mexicans.<sup>27</sup> While the BLM is required to respond to protests before issuing the payments collected by the lease sales, the state would have closed its fiscal year with less than half a percent in reserves.<sup>28</sup>

### *Designating Lands: Initiating the Leasing and Permitting Process*

The federal oil and gas leasing process involves numerous entities and allows many opportunities for public commentary. Because of the many stakeholders in the federal mineral leasing process, a highly formulaic process has developed to ensure that lands are managed in accordance with the BLM’s multiple use mandate. The process begins with a Resource Management Plan (“RMP”), a long term, “landscape-level” plan that identifies land open for hydrocarbon development. The RMPs contain a NEPA required EIS, that identifies and attempts to resolve surface conflicts. An RMP may place specific restrictions on surface occupation and

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<sup>22</sup> 30 USC Section 191

<sup>23</sup> Ibid., Note 22.

<sup>24</sup> Options for Increasing Federal Income From Crude Oil and Natural Gas on Federal Lands, (Washington, DC: Congressional Budget Office, April 2016), [https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil\\_and\\_gas\\_options-2.pdf](https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil_and_gas_options-2.pdf)

<sup>25</sup> Briefing by John Andrews, Associate Director, Trust Lands Administration, State of Utah School and Institutional Trust Lands Administration, to majority staff, H. Comm. Natural Resources (June 8, 2017).

<sup>26</sup> Maddy Hayden, *BLM Pays State \$70 Million Owed from Sept Lease Sale*, Current-Argus, June 20, 2017, <http://www.currentargus.com/story/news/local/new-mexico/2017/06/20/blm-pays-state-70-million/412887001/>

<sup>27</sup> Id.

<sup>28</sup> *BLM Nearing Issuance of Oil and Gas Leases; Agency Completing Review of Environmental Protests to Roswell Sale*, Roswell Daily Record, April 6, 2017, <http://rdmnews.com/wordpress/blog/2017/04/06/blm-nearing-issuance-of-oil-and-gas-leases-agency-completing-review-of-environmental-protests-to-roswell-sale/>

use. Local communities and other stakeholders are given several opportunities to provide comments on the RMP and anticipated leasing.<sup>29</sup> The BLM noted that the nature of public comments at all stages of the planning, leasing, and permitting process have changed over time, and have become increasingly less area and project specific. Rather, comments tend to focus on broad, political justifications for precluding oil and gas development, such as international commitments to climate change initiatives.<sup>30</sup> The RMP process takes between eight to fifteen years to complete, and dictate leasing areas for two decades.<sup>31</sup>

In 2010, the BLM implemented the Master Leasing Plan (“MLP”) process to identify and attempt to resolve environmental and usage conflicts at a “finer scale” than RMPs. The MLP process is essentially a narrowed RMP, performed on previously analyzed and approved lands, that requires a completely new NEPA-directed environmental analysis.<sup>32</sup> Many local stakeholders are concerned that MLPs may be used as another regulatory tool to block development, under the guise of environmental stewardship.<sup>33</sup> As of March 2016, the BLM had completed eight MLPs. This year’s time consuming process is another source of uncertainty for potential operators, and has the effect of precluding development for numerous uses.

Once an RMP and/or MLP is completed, potential lessees are invited to nominate specific parcels for leasing by filing an Expression of Interest (“EOI”). This step of the process requires the BLM to determine whether the nominated parcels are approved for oil and gas development and comply with the RMP, MLP, and applicable environmental, archaeological, and cultural preservation laws. The BLM performs another EA, and opens the project to another round of public comment. Often, when the BLM receives protests against specific parcels, the BLM withdraws nominated parcel without providing an explanation.<sup>34</sup>

Last year, for instance, the BLM approved for auction only 15% of nominated parcels in the state of Nevada.<sup>35</sup> No explanation was provided for the deferrals. In Colorado, protests to parcels adjacent to “wilderness study area” in Mesa County have prompted the BLM to defer 1,560 acres from leasing. While only Congress can designate wilderness areas, the protests claim the adjacent land demonstrates “wilderness characteristics.”

The BLM relies on a loose interpretation of Sec. 201. [43 U.S.C. 1711] (a), which states that it can maintain an inventory of public lands, but may not use this inventory to “change or prevent change of the management or use of public lands.”<sup>36</sup> Across the West, the number of

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<sup>29</sup> Bureau of Land Management, *Plans in Development: Carlsbad Resource Management Plan*,

<https://www.blm.gov/programs/planning-and-nepa/plans-in-development/new-mexico/carlsbad-rmp>

<sup>30</sup> Briefing by Meagan Gins, Senior Legislative Specialist, U.S. Department of the Interior, Bureau of Land Management, to majority staff, H.Comm. Natural Resources, (June 22, 2017).

<sup>31</sup> Briefing by Kathleen Sgamma, President of Western Energy Alliance, to majority staff, H. Comm. Natural Resources, (June 6, 2017).

<sup>32</sup> *Recent Management of Oil and Gas Lease Sales By the Bureau of Land Management: Hearing before the House Committee on Oversight and Government Reform*, 114<sup>th</sup> Congress (March 23, 2016) (statement of Neil Kornze, Director, BLM

<https://oversight.house.gov/wp-content/uploads/2016/03/Kornze-BLM-Statement-3-23-Oil-and-Gas-Leasing.pdf>)

<sup>33</sup> Jonathan Romeo, *BLM Tightens Process for Gas Well Leases in Southwest Colorado*, The Durango Herald, Sept. 25, 2016, <https://durangoherald.com/articles/101343>

<sup>34</sup> *Id.*, Note 32.

<sup>35</sup> Henry Brean, *Latest BLM Oil and Gas Lease Auction in Central Nevada Draws Protest*, Las Vegas Review-Journal, May 24, 2017, <https://www.reviewjournal.com/local/local-nevada/latest-blm-oil-and-gas-lease-auction-in-central-nevada-draws-protest/>.

<sup>36</sup> *Sec. 201. [43 U.S.C. 1711] (a)*

nominated parcels approved for leasing decreased by 66% between FY2008 and FY2012.<sup>37</sup> Congress or the BLM must provide assurance and clarity to this process to prevent huge swaths of land from excluding the public.

*Obstacles to Leasing of Federal Lands*

At the end of FY2016, the BLM oversaw a total of 40,143 leases across the country.<sup>38</sup> This is the lowest number of federal leases since FY1985. MLA stipulates that “[l]ease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary.”<sup>39</sup> According to the Western Energy Alliance, the BLM has repeatedly cancelled or failed to hold the required lease sales.<sup>40</sup> The table below illustrates the BLM’s lease sale record over the last two years.

The Law v. Reality									
Quarterly BLM Lease Sales Actually Held									
	2015				2016				Outcome
	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4	
Required By Law	√	√	√	√	√	√	√	√	8 of 8
Colorado	√	√		√		√		√	5 of 8
Montana		√				√		√	3 of 8
New Mexico			√	√			√		3 of 8
North Dakota	√		√		√	√	√		5 of 8
Oklahoma			√			√			2 of 8
Texas			√						1 of 8
Utah	√	√				√		√	4 of 8
Wyoming	√	√	√	√		√	√	√	7 of 8

Figure I- BLM Lease Sales by State, 2015-2016<sup>41</sup>

Even in areas where there are available “eligible lands”, the BLM maintained that it had ultimate discretion in offering or postponing lease sales.<sup>42</sup> While there are many economic factors that play into an operator’s decision to invest in a federal lease, many are concerned with these trends, and strongly advocate enforcement of BLM holding quarterly lease sales.

Both competitive and noncompetitive lease sales are conducted by the BLM. To secure a competitive lease, the lessee must submit the highest “bonus bid” for the parcel. Leases are held both in person at the local BLM office, and online in many cases. The bonus amount is collected by ONRR.

<sup>37</sup> Leasing, WESTERN ENERGY ALLIANCE, <https://www.westernenergyalliance.org/knowledge-center/land/onshore-development/leasing> (last visited June 22, 2017).

<sup>38</sup> BUREAU OF LAND MANAGEMENT, OIL AND GAS STATISTICS, <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics> (last visited June 23, 2017).

<sup>39</sup> 30 USC 226

<sup>40</sup> *Lawsuit Challenges BLM’s Failure to Hold Oil and Natural Gas Lease Sales*, WESTERN ENERGY ALLIANCE, August 11, 2016, <https://www.westernenergyalliance.org/press-room/lawsuit-challenges-blm-failure-hold-oil-natural-gas-leases-sales>

<sup>41</sup> Id.

<sup>42</sup> Ellen M. Gilmer, *Industry to BLM: Lease Sales are Not Optional*, E&ENews, August 12, 2016, <https://www.eenews.net/energywire/stories/1060041530>

Geophysical operations on federal lands may be conducted by a bonded operator, whether or not the land is leased. Depending on the lease status of the land, a Notice of Intent (“NOI”) or Sundry Notice to perform geological and geophysical operations and surface disturbance surveys may be required. Post-work inspections confirming that all NOI stipulations have been met, complete the process.<sup>43</sup>

#### *Applications for Permit to Drill (APD)*

To initiate the drilling process, the leaseholder must submit either a Notice of Staking (“NOS”) or an APD. The NOS is a formal request for an onsite inspection prior to an APD filing. The BLM, operator, and any other involved agencies schedule an onsite inspection to identify specific resource concerns to be addressed in the subsequent APD. The location of the proposed well and access roads must be staked out by the lessee prior to the inspection.

An APD includes numerous components, including a surface use plan of operations, drilling plan, certified well plan, evidence of bond coverage, and operator certification, as well as any other information, as required by surface use or lease stipulations. If more than one well is proposed on the lease, a Master Development Plan is required. Upon receipt of a completed APD, the local BLM office initiates a 30-day comment period. An onsite inspection is held to discuss the proposal, and to identify and resolve specific concerns. Certain conditions for approval may be placed on the permit, and surface owners may be engaged to ameliorate any concerns. An environmental review, as required by NEPA, is again conducted on the parcel, typically completed by a third party contractor at the cost of the operator.<sup>44</sup>

#### *Securing Surface Use*

The mineral lessees are obligated to work in good faith with a private surface owner before entering and staking the land, and the BLM must invite the surface owner to initial and final reclamation inspections.<sup>45</sup> When operating on Indian lands, additional approval measures may be taken to protect unique cultural resources and specific environmental requirements. Depending on the tribe, ordinances governing surface use may affect oil and gas operations. Tribes and the Bureau of Indian Affairs (“BIA”) may also recommend conditions of approval to an APD, as it is considered the “surface management agency.” Operators have reported extreme delays while engaging the BIA on Rights of Way (“ROW”) issues.

To ensure pipeline and equipment access to the drill site, the BLM or Forest Service (“FS”) must authorize ROW or Special Use Authorizations (“SUA”) to access and construct the supportive infrastructure. The BLM and FS review surface applications as components of the APD. When infrastructure is sited on or crosses Indian lands, additional steps are required to complete the permitting process. The APD applicant is required to work with surface owners and federal agencies with a stake in the land to complete all approvals.

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<sup>43</sup> Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development: The Gold Book, Fourth Edition, The Bureau of Land Management (2007), p. 5.

<sup>44</sup> Leigh Black Irvin, *BLM Outlines Drilling Permit Process on Federal Lands*, The Farmington Daily Times, May 27, 2017, <http://www.daily-times.com/story/money/industries/oil-gas/2017/05/27/blm-outlines-drilling-permit-process-federal-lands/101753030/>

<sup>45</sup> Id., Note 44, 11-12.



## *APD Process and Uncertainty Discouraging Production*

The APD process is incredibly burdensome, costly, uncertain, and time consuming for lessees and discourages production on federal lands. At the conclusion of FY2016, the BLM approved 2,184 APDs, the lowest number since FY2000.<sup>46</sup> Approving an application takes BLM offices an average of 220 days, though statutorily, they are required to complete the review within 30 days.<sup>47</sup> Permitting times depend on the location and administrative capacity of the specific BLM field office. The BLM's Carlsbad, New Mexico office takes 300 days, on average, to approve a drilling permit, while the state's Farmington office can process a permit in 60 days. In contrast, the Oil Conservation Division of New Mexico permits drilling applications on state lands in 8 days.<sup>48</sup> In order to schedule and execute drilling operations, operators need time to reserve drilling rigs and a work crew. The months-long discrepancy between permitting times is considered a major business risk.

Frustrations with the APD process, and other factors such as pushes for royalty rate increases and additional environmental stipulations, have caused many operators to pursue development on private or state lands. It is abundantly clear that operators prefer a more reliable regulatory environment that allows them to plan both operations and financial investments throughout the life of the wells. There are many factors that influence the decision to lease and produce on federal lands, including commodity price, geologic formations, and rig availability. However, these factors do not fully explain the discrepancy between operating on federal lands versus private or state lands. Production on non-federal lands has soared over the last decade, and the federal share of total U.S. crude production fell from 36% in FY2010 to 21% in FY2015.<sup>49</sup>

Congress and other stakeholders have previously attempted to overhaul the permitting process, including codifying the Federal Onshore Oil and Gas Leasing Act of 1987 which amended the MLA and provided clarity regarding the leasing process.<sup>50</sup> More recently, EPAAct05 authorized additional resources to BLM offices in an attempt to resolve the same permit backlog problems we face today. EPAAct05 established a "pilot program" which allowed increased funding for specific BLM field offices. This effort was generally successful, and Congress ultimately made the pilot program permanent through the National Defense Authorization Act of in 2015. APD fees were increased to \$9,500 in an attempt to again resolve the backlog of APDs, but applicants have not yet seen an increase in permitting times.<sup>51</sup> It is critical that Congress and the BLM seriously evaluate the permitting process, and determine whether funding increases are truly effective at resolving the underlying structural problems.

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<sup>46</sup> Ibid., Note 1.

<sup>47</sup> P.L. 109-58 S. 366 (p)(2)

<sup>48</sup> Ibid, Note 3.

<sup>49</sup> Ibid, Note 5.

<sup>50</sup> Oil and Gas Law and Taxation, 4<sup>th</sup> Edition (Hornbook Series) Richard Hemmingway, Owen Anderson, John Dzienkowski, John Lowe, Robert Peroni, David Pierce. P. 633.

<sup>51</sup> Briefing with Mallori Miller, Director of Government Relations, Independent Petroleum Association of America, to majority staff, H. Comm. Natural Resources, June 2, 2017.

## *Opportunities for Improvement*

Interior Secretary Ryan Zinke addressed some of these concerns at a House Committee on Natural Resources hearing held on June 22, 2017. When asked how he planned to ameliorate permitting challenges, Secretary Zinke discussed three initiatives. First, the President's proposed FY18 budget increases funding to the BLM for the purposes of adding administrative and staff resources to field offices. Second, the Secretary appointed a "counselor" to examine the permitting process, and to specific ways to conduct aspects of the permit reviews simultaneously. Finally, Secretary Zinke proposed modifying applications for new wells on preciously approved basins, stating that the BLM shouldn't consider a subsequent well in the same formation as "though it was the first well ever drilled."<sup>52</sup> There are many ways to implement common sense solutions to facilitate the APD process, and to provide operators with confidence in leasing and producing on federal lands.

A number of broader federal land management debates create uncertainty for those looking to invest in private lands. Highly contentious issues, such as Sage Grouse endangered species listing debates, the establishment of national monuments, and wilderness study designations sow uncertainty among those who want certainty and fair dealing when it comes to operating on federal lands. These questions affect oil and gas development on federal lands and the resulting federal revenues, and will take considerable political effort to resolve.

States directly feel the impacts of the BLM's grinding leasing and permitting process. As previously mentioned, state oil conservation departments are capable of approving drilling permits on both state and private lands in a matter of days. To relieve some of the pressure on BLM offices, New Mexican Governor Susana Martinez, offered state permitting resources to process federal APDs.<sup>53</sup> There have been many calls to give states an increased role in oil and gas permitting on federal lands within their borders.<sup>54</sup> Allowing states to assume some of the leasing and permitting responsibilities will not only make the processes more efficient, but will further ensure that states receive revenues from production within their borders.

## *Conclusion*

Access to oil and gas development on federal lands decreased significantly during the previous administration. While falling oil and gas prices affect interest in leasing and drilling, the Obama administration's policies complicated the process to the point of discouraging development. The current Administration inherits the challenging task of processing the backlog of APDs, among other issues, but is uniquely positioned to effect meaningful, commonsense change to this process.

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<sup>52</sup> *Examining the Department of the Interior's Spending Priorities and the President's Fiscal Year 2018 Budget Proposal: Hearing Before the House Committee on Natural Resources, 115<sup>th</sup> Congress, (2017)* (Statement of Secretary Ryan Zinke, Secretary of The Department of the Interior)

<sup>53</sup> *Ibid*, Note 3.

<sup>54</sup> Briefing by Mike Smith, Executive Director of the Interstate Oil and Gas Compact Commission, to majority staff H. Comm. Natural Resources, May 23, 2017.