

# CRS Report for Congress

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## **Leasing and Permitting for Oil and Gas Development on Federal Public Domain Lands**

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# Leasing and Permitting for Oil and Gas Development on Federal Public Domain Lands

## Summary

A variety of statutes and agency regulations govern leasing and permitting for oil and gas development on federal lands. This report first explains the legal framework for oil and gas leasing and development on federal “public domain” lands, which involves an overview of the following:

- laws and regulations affecting which public domain lands are potentially subject to oil and gas leasing;
- development of Resource Management Plans;
- competitive and noncompetitive oil and gas leasing processes;
- terms and conditions of oil and gas leases; and
- the process surrounding applications for permits to drill.

Second, this report assesses how the recently enacted Energy Policy Act of 2005 (P.L. 109-58) will affect preexisting oil and gas development laws. The third section of the report analyzes selected judicial and administrative decisions regarding what steps federal environmental laws require agencies to take before issuing leases for coalbed methane leases. Coalbed methane is a type of natural gas that is trapped in coal seams by water pressure.

This report will be updated as developments warrant.

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# Leasing and Permitting for Oil and Gas Development on Federal Public Domain Lands

## Introduction

A variety of interrelated statutes and agency regulations govern leasing and permitting for oil and gas development on federal lands. The national mining and minerals policy fosters and encourages the following activities:

private enterprise in ... the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries [and] the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs.<sup>1</sup>

The Bureau of Land Management (BLM) — part of the U.S. Department of the Interior — manages most federal mineral development and is largely responsible for implementing this policy.<sup>2</sup> BLM also manages a large amount of federal lands. Federal land in the National Forest System (NFS) is under the jurisdiction of the Forest Service, which is part of the U.S. Department of Agriculture. The Forest Service plays a role in authorizing mineral development on NFS lands.

This report addresses the leasing and permitting of onshore, federal public domain lands. “Public domain lands” encompass lands obtained “by treaty, conquest, cession by States, and [certain] purchase[s].”<sup>3</sup> The historical distinction between public domain lands and other federal lands is reflected in the different statutes that apply to the different types of lands.

This report first analyzes the legal framework for oil and gas leasing and permitting on federal public domain lands managed by BLM and the Forest Service. Second, this report assesses how the recently enacted Energy Policy of 2005 affects these laws. Finally, this report analyzes selected judicial and administrative decisions regarding what steps federal environmental laws require agencies to take before issuing coalbed methane leases. Coalbed methane is a type of natural gas that is trapped in coal seams by water pressure; it is leased separately from the coal.

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<sup>1</sup> 30 U.S.C. § 21a (2000).

<sup>2</sup> See Secretarial Order 3087, Dec. 2, 1982, as amended Feb. 7, 1983 (48 Fed. Reg. 8983).

<sup>3</sup> Thomas Donaldson, *The Public Domain* 10 (William N. Parker ed., Johnson Reprint Corp. 1970) (1884).

## The Legal Framework for Oil and Gas Leasing

At the dawn of the twentieth century, private entities could explore, develop, and purchase federal public domain lands containing oil with relative ease. The federal government permitted mineral exploration of such lands without any charge. Oil could be developed as a placer mineral.<sup>4</sup> Full ownership of oil lands “could be obtained for a nominal amount.”<sup>5</sup> However, Congress’s enactment of the Mineral Lands Leasing Act of 1920 (MLLA) ended the private acquisition of title to federal oil lands by authorizing the Secretary of the Interior (Secretary) to issue permits for exploration and to lease lands containing oil and gas and other defense-related minerals.<sup>6</sup> The first section of this report details the legal framework for such oil and gas leasing.

### Public Domain Lands Subject to Leasing for Oil and Gas Development

“Public domain lands” encompass lands obtained “by treaty, conquest, cession by States, and [certain] purchase[s].”<sup>7</sup> The historical distinction between public domain lands and other federal lands is reflected in the different statutes that apply to the various types of lands. The scope of this report does *not* encompass “acquired lands,” which are lands “granted or sold to the United States by a State or citizen.”<sup>8</sup>

The MLLA authorizes the Secretary to lease oil and gas deposits and onshore public domain lands containing oil and gas deposits, with the federal government retaining title to the lands.<sup>9</sup> This leasing authority applies to National Forest System (NFS) lands that are reserved from the public domain, and to most reserved subsurface mineral estates.<sup>10</sup> However, it excludes numerous categories of lands such as national parks and monuments, as well as lands in incorporated cities, towns, and

<sup>4</sup> Oil Placer Act, ch. 216, 29 Stat. 526 (1897) (authorizing the issuance of patents that conveyed full title to lands containing oil under Federal placer-mining laws), *repealed by* Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 4373 (1920). *See also* The Rocky Mountain Mineral Law Foundation, *Law of Federal Oil and Gas Leases*, § 2.05 (2004).

<sup>5</sup> *See Pan Am. Petroleum & Transp. Co. v. United States*, 273 U.S. 456, 486 (1927) (internal citation omitted). *See also* The Rocky Mountain Mineral Law Foundation, *supra* note 3, § 2.05.

<sup>6</sup> Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 4373 (1920), codified at 30 U.S.C. § 181 *et seq.*

<sup>7</sup> Donaldson, *supra* note 4, at 10.

<sup>8</sup> *Id.* Statutory provisions addressing oil and gas development on lands *not* covered by this report include the following: 25 U.S.C. § 391 *et seq.* (2000) (Indian lands); 30 U.S.C. §§ 351-60 (acquired lands); and 43 U.S.C. § 1331 *et seq.* (mineral leases on submerged lands in the Outer Continental Shelf). In addition, for information regarding U.S. offshore oil and gas development, see CRS Report RL31521, *Outer Continental Shelf Oil and Gas: Energy Security and Other Major Issues*, by (name redacted).

<sup>9</sup> 30 U.S.C. § 181.

<sup>10</sup> *See id.*

villages.<sup>11</sup> Areas within the National Wilderness Preservation System cannot be leased, but valid rights existing as of 1984 are preserved.<sup>12</sup> In sum, all public lands subject to the Secretary's authority under MLLA "which are known or believed to contain oil or gas deposits may be leased by the Secretary."<sup>13</sup>

However, the Secretary of the Interior cannot issue any lease for National Forest System lands reserved from the public domain if the Secretary of Agriculture objects.<sup>14</sup> In addition, the U.S. Forest Service has issued separate regulations governing certain aspects of leasing and permitting for oil and gas development on lands within its jurisdiction.

The Secretary is also authorized to withdraw public lands managed by BLM so that some or all potential land uses are proscribed on those lands.<sup>15</sup> A withdrawal involves "withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program."<sup>16</sup> However, limitations on the Secretary's withdrawal authority exist.<sup>17</sup> For example, Congress can make withdrawals, and the Secretary may not modify or revoke a congressional withdrawal.<sup>18</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> 16 U.S.C. § 1133(d)(3) (2000) ("Subject to valid rights then existing, effective January 1, 1984, the minerals in lands designated . . . as wilderness areas are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto.").

<sup>13</sup> 30 U.S.C. § 226(a).

<sup>14</sup> *Id.* § 226(h).

<sup>15</sup> 43 U.S.C. § 1714 (2000).

<sup>16</sup> *Id.* § 1702(j).

<sup>17</sup> *Id.* § 1714; 43 C.F.R. § 2300.0-3(a) (2004).

<sup>18</sup> 43 U.S.C. §§ 1701(a)(4), 1714(j); 43 C.F.R. § 2300.0-3(a).

## Development of Resource Management Plans

### U.S. Department of the Interior

The BLM manages approximately 262 million acres of public lands under the Federal Land Policy and Management Act of 1976 (FLPMA).<sup>19</sup> The Secretary of the Interior must develop and revise “land use plans” for the public lands — officially known as Resource Management Plans (RMPs) — that consider the present and potential future uses for public lands managed by BLM.<sup>20</sup> These RMPs serve as the initial determinant of which lands may be subject to leasing. All activities performed on these lands must be consistent with the RMPs.<sup>21</sup> Thus, an RMP must allow oil and gas development in an area in order for it to take place there.<sup>22</sup>

The Secretary generally must apply “multiple use” and “sustained yield” principles when developing RMPs.<sup>23</sup> “Multiple use” principles involve judiciously managing lands in a manner that takes into account the environmental, historical, and natural resource values of the lands and prevents their permanent impairment.<sup>24</sup> “Sustained yield” means maintaining “high-level annual or regular periodic output of the various renewable resources of the public lands.”<sup>25</sup> In addition, the Secretary is required to provide opportunities for the public and various levels of government to participate in the development of RMPs.<sup>26</sup> This can include procedures such as holding public hearings, when appropriate.<sup>27</sup> Regulations require the preparation of an Environmental Impact Statement (EIS) or an Environmental Assessment (EA) when producing an RMP.<sup>28</sup>

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<sup>19</sup> P.L. 94-579, 90 Stat. 2744 (1976), codified at 43 U.S.C. §§ 1701-1782.

<sup>20</sup> 43 U.S.C. § 1712; 43 C.F.R. pts. 1600, 1610.

<sup>21</sup> 43 C.F.R. § 1610.5-3, 1601.0-5.

<sup>22</sup> *See id.*

<sup>23</sup> 43 U.S.C. §§ 1701(a)(7), 1732(a). An exception applies in circumstances “where a tract of such public land has been dedicated to specific uses according to any other provisions of law [in which case] it shall be managed in accordance with such law.” 43 U.S.C. § 1732(a).

<sup>24</sup> *Id.* § 1702(c).

<sup>25</sup> *Id.* § 1702(h).

<sup>26</sup> *Id.* § 1712(f).

<sup>27</sup> *Id.*

<sup>28</sup> *See* 43 C.F.R. § 1601.0-6. Development of an RMP is a “major Federal action significantly affecting the quality of the human environment”; thus, NEPA requires the preparation of an Environmental Impact Statement (EIS). *Id.*; *see* 42 U.S.C. § 4332(2)(C). NEPA also requires BLM to take a “hard look” at the environmental impacts of significant proposed actions. 42 U.S.C. § 4332(2)(C). If it is unclear whether a proposed action will have significant environmental effects, the agency may prepare an Environmental Assessment (EA). 40 C.F.R. § 1501.3. Based on the EA, an agency may issue a finding of no significant impact (FONSI), thereby concluding the NEPA process, or it may determine that preparation of an EIS is necessary. *Id.* § 1508.13. An EIS must address numerous

(continued...)

The Secretary's mandate to formulate and revise RMPs extends to all BLM-managed public lands, no matter how they had been classified before the enactment of FLPMA in 1976.<sup>29</sup> The land use provisions also apply to lands that had previously been withdrawn.<sup>30</sup> In addition, FLPMA requires that public lands within BLM's jurisdiction be inventoried and identified on a continuing basis.<sup>31</sup>

### U.S. Forest Service

The Forest Service also manages its lands under multiple use and sustained yield policies.<sup>32</sup> It develops land management plans for NFS lands by considering the desired conditions, objectives, suitability of areas for various uses, and other criteria.<sup>33</sup> As with the Department of the Interior's planning process, the laws governing Forest Service land management and implementation require public notification and opportunities for public participation.<sup>34</sup> When analyzing Forest Service lands for potential leasing, the Forest Service classifies lands into three categories:

- (1) lands that will be “[o]pen to development subject to the terms and conditions of the standard oil and gas lease form”
- (2) lands that will be “[o]pen to development but subject to constraints that will require the use of lease stipulations”
- (3) lands that will be “[c]losed to leasing, distinguishing between those areas that are being closed through exercise of management direction, and those closed by law, regulation, etc.”<sup>35</sup>

The Forest Service must also comply with the National Environmental Policy Act of 1969 (NEPA) when analyzing NFS lands for potential leasing.<sup>36</sup> Once the Forest Service has completed its analysis of which NFS lands will be available for

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<sup>28</sup> (...continued)

issues, including the environmental impact of the proposed action, alternatives to the proposed action, and any irreversible commitments of resources which would be involved if the proposed action takes place. 42 U.S.C. § 4332(2)(C).

<sup>29</sup> 43 U.S.C. § 1712(a).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* § 1711.

<sup>32</sup> Multiple Use-Sustained Yield Act, P.L. 86-517, 74 Stat. 215 (1960), codified at 16 U.S.C. §§ 528-32.

<sup>33</sup> 16 U.S.C. § 1604; 70 Fed. Reg. 1023 (Jan. 5, 2005) (to be codified at, *inter alia*, 36 C.F.R. §§ 219.5, 219.7).

<sup>34</sup> 16 U.S.C. §§ 1604(d), 1612; 36 C.F.R. § 219.9.

<sup>35</sup> 36 C.F.R. § 228.102(c).

<sup>36</sup> 16 U.S.C. § 1604(g); 36 C.F.R. § 228.102(a).



leasing, it notifies BLM of its decisions.<sup>37</sup> Forest Service authorization for BLM to lease specific lands may follow.<sup>38</sup>

## The Competitive Leasing Process

The MLLA authorizes both competitive and noncompetitive leasing procedures. Usually lands go through the competitive leasing process first. When BLM posts a list of lands available for competitive leasing, private entities may respond by submitting nominations for parcels to be auctioned.<sup>39</sup> No unit being auctioned can exceed 2,560 acres, except in Alaska, where the maximum unit acreage is 5,760 acres.<sup>40</sup> In addition, each unit must be “as nearly compact as possible.”<sup>41</sup>

The Secretary must provide forty-five days notice before offering public lands for leasing, including a thirty-day period for receiving public comments after notice is published in the Federal Register.<sup>42</sup> Competitive bidding must be held on a quarterly basis in each state where public lands are available for leasing.<sup>43</sup> The Secretary may also authorize additional opportunities for bidding if he considers them to be necessary.<sup>44</sup>

Once the public notice requirements have been satisfied, the public lands are offered for competitive leasing through an oral auction.<sup>45</sup> A national minimum acceptable bid of \$2 per acre applies to the auction.<sup>46</sup> Any bids for less than the national minimum bid must be rejected.<sup>47</sup> A competitive bid constitutes a legally binding commitment and cannot be withdrawn.<sup>48</sup> The MLLA requires the Secretary to accept the highest bid from a responsible qualified bidder whose bid meets or exceeds the national minimum acceptable bid.<sup>49</sup>

The winning bidder at a competitive auction must submit the following payments on the day of sale, unless otherwise specified: (1) the minimum bonus bid of \$2 per acre; (2) the first year’s rental payment; and (3) a \$75 per parcel

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<sup>37</sup> 36 C.F.R. § 228.102(d).

<sup>38</sup> *Id.* § 228.102(e).

<sup>39</sup> *See* 43 C.F.R. § 3120.3-1.

<sup>40</sup> 30 U.S.C. § 226(b)(1).

<sup>41</sup> *Id.*

<sup>42</sup> 43 C.F.R. §§ 3120.3, 3120.4-2; *see* 30 U.S.C. § 226(f).

<sup>43</sup> 30 U.S.C. § 226(b)(1).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* § 226(b)(1)(B); 43 C.F.R. § 3120.1-2.

<sup>47</sup> 30 U.S.C. § 226(b)(1).

<sup>48</sup> 43 C.F.R. § 3120.5-3(a).

<sup>49</sup> 30 U.S.C. § 226(b)(1).

administrative fee.<sup>50</sup> Then, the balance of the bonus bid, if applicable, is due within ten working days.<sup>51</sup> The lease is issued within sixty days of payment of the remainder of the bonus bid.<sup>52</sup> The lease is also conditioned upon a royalty payment of at least 12.5% in amount or value of the production that is removed or sold from the lease,<sup>53</sup> unless the Secretary suspends, waives, or reduces the royalty.<sup>54</sup>

## The Noncompetitive Leasing Process

If no bids are received at a competitive bidding auction — or if all bids submitted are for less than the national minimum acceptable bid — the land will be offered for noncompetitive leasing within thirty days.<sup>55</sup> This noncompetitive leasing remains available for two years after the competitive bidding auction.<sup>56</sup>

The first qualified person who applies for a noncompetitive lease and pays the \$75 application fee is entitled to receive the lease without having to competitively bid.<sup>57</sup> All noncompetitive offers received during the first business day after the last day of the competitive auction are considered to have been submitted simultaneously; in such cases, a lottery determines the lease winner.<sup>58</sup> Unlike competitive bids, noncompetitive offers may be withdrawn by the offeror within sixty days of filing the offer if no lease has yet been signed on the government's behalf.<sup>59</sup> As with competitive leases, a noncompetitive lease is conditioned upon payment of a 12.5% royalty in amount or value of the oil or gas removed or sold from the lease.<sup>60</sup> Additionally, there are minimum and maximum acreage limitations for noncompetitive leases.<sup>61</sup> If these criteria are met, BLM will issue the lease within sixty days of the Secretary identifying a qualified applicant.<sup>62</sup>

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<sup>50</sup> 43 C.F.R. § 3120.5-2.

<sup>51</sup> *Id.*

<sup>52</sup> 30 U.S.C. § 226(b)(1).

<sup>53</sup> *Id.*

<sup>54</sup> *See id.* § 209.

<sup>55</sup> *Id.* § 226(b)(1), (c).

<sup>56</sup> *Id.*; 43 C.F.R. § 3120.6.

<sup>57</sup> 30 U.S.C. § 226(c)(1).

<sup>58</sup> 43 C.F.R. § 3110.2(a).

<sup>59</sup> *Id.* § 3110.6.

<sup>60</sup> 30 U.S.C. § 226(c)(1). As mentioned above, the Secretary may suspend, waive, or reduce rentals or royalties under certain conditions. *See, e.g.*, 30 U.S.C. § 209.

<sup>61</sup> *See* 43 C.F.R. § 3110.3.

<sup>62</sup> 30 U.S.C. § 226(c)(1).

If no application for a noncompetitive lease is submitted during the two years that the land is available for noncompetitive leasing, the process for leasing the land will again be a competitive oral auction.<sup>63</sup>

NEPA applies to the competitive and noncompetitive leasing processes, possibly requiring preparation of a supplemental EIS (SEIS) or a new EA or EIS, unless reliance on old documents is sufficient or the agency issues a FONSI.<sup>64</sup>

## Lease Terms and Conditions

### General Statutory Restrictions

In addition to the processes affecting *where* leasing can take place (discussed above), general restrictions on leasing address *who* can lease and *how much* land they can lease. First, public lands containing oil and gas deposits may only be leased to U.S. citizens, associations of U.S. citizens, corporations organized under U.S. laws or the laws of any State, and municipalities.<sup>65</sup> In addition, citizens of a country that denies similar privileges to U.S. citizens and corporations may not control any interest in federal leases.<sup>66</sup> Second, no entity is permitted to own or control oil or gas leases (including options for such leases) under MLLA in excess of 246,080 acres in any one State other than Alaska.<sup>67</sup> Other aggregate acreage limitations include limitations pertaining to options<sup>68</sup> and to combined direct and associational/corporate stockholder interests.<sup>69</sup>

### Payment Terms: Royalties and Rentals

Leases are conditioned upon payment to the Government of a royalty of at least 12.5% in amount or value of oil or gas production that is removed or sold from the leased land.<sup>70</sup> Leases subject to rates in effect after December 22, 1987 must generally pay a 12.5% royalty, but this percentage can increase if a lease is cancelled because of late payments and then reinstated.<sup>71</sup> The Secretary also has the power to reduce the royalty on a noncompetitive lease if he deems it equitable to do so or if

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<sup>63</sup> 30 U.S.C. § 226(c)(2)(A).

<sup>64</sup> See *Spiller v. White*, 352 F.3d 235 (5th Cir. 2003); *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983); 40 C.F.R. §§ 1502.9, 1502.20, 1504.1; 43 C.F.R. § 3101.1-3.

<sup>65</sup> 30 U.S.C. § 181.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* § 184(d)(1); 43 C.F.R. § 3101.2-1. For Alaska, the limit is 300,000 acres in the northern leasing district and 300,000 acres in the southern leasing district, of which no more than 200,000 acres may be held under options in each of the two leasing districts. 30 U.S.C. § 184(d); 43 C.F.R. § 3101.2-1.

<sup>68</sup> 30 U.S.C. § 184(d)(2).

<sup>69</sup> *Id.* § 184(e)(1).

<sup>70</sup> *Id.* § 226(b)(1).

<sup>71</sup> See 43 C.F.R. § 3103.3-1(a).

circumstances could “cause undue hardship or premature termination of production” absent such a reduction.<sup>72</sup> For oil and gas leases, the royalty must be paid in value unless the Department of the Interior specifies that a royalty payment-in-kind is required.<sup>73</sup> Once the royalty has been paid, the Secretary is required to sell any royalty oil or gas “except whenever in his judgment it is desirable to retain the same for the use of the United States.”<sup>74</sup>

In addition to royalties, leases are conditioned upon payment of annual rentals.<sup>75</sup> Generally, the rental rate for the first five years of a lease is \$1.50 per acre per year, with the rate increasing to \$2 per acre for each additional year of the lease.<sup>76</sup> However, there is some variation in rental amounts for certain specific categories of lands.<sup>77</sup> For leases issued after December 22, 1987, a minimum royalty in lieu of the rental is due once oil or gas has been discovered on the leased land.<sup>78</sup> The amount of this minimum royalty is equal to the annual rental that would otherwise have been due.<sup>79</sup> Perhaps most important, rental payments are not due on acreage for which royalties or minimum royalties are being paid, “except on nonproducing leases when compensatory royalty has been assessed in which case annual rental as established in the lease shall be due in addition to compensatory royalty.”<sup>80</sup>

The Secretary is authorized to waive, suspend, or reduce rentals and royalties under certain conditions.<sup>81</sup> Money received from royalties and rentals is initially paid into the U.S. Treasury.<sup>82</sup> Fifty percent of the funds then go to the State where the land or mineral deposit is located.<sup>83</sup> Forty percent of the funds are allocated into the Reclamation Fund under the Reclamation Act of 1902 for projects that provide water to arid Western states.<sup>84</sup> Because Alaska is not served by the Reclamation Fund, 90 percent of the funds collected from federal leases in Alaska are allocated to the State of Alaska.<sup>85</sup>

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<sup>72</sup> 30 U.S.C. § 188(i)(1).

<sup>73</sup> 30 C.F.R. §§ 202.100, 202.150.

<sup>74</sup> 30 U.S.C. § 192.

<sup>75</sup> *Id.* § 226(d).

<sup>76</sup> *Id.*; 43 C.F.R. § 3103.2-2(a). The rental payment for the first year of the lease must be included with each competitive bid or noncompetitive lease offer. 43 C.F.R. § 3103.2-1.

<sup>77</sup> *See* 43 C.F.R. § 3103.2-2; *see also* 30 U.S.C. § 226(d).

<sup>78</sup> 43 C.F.R. § 3103.3-2(a); *see also* 30 U.S.C. § 226(d).

<sup>79</sup> 43 C.F.R. § 3103.3-2(a); *see also* 30 U.S.C. § 226(d).

<sup>80</sup> *Id.* § 3103.2-2(c); *see also* 30 U.S.C. § 226(d).

<sup>81</sup> *See, e.g.*, 30 U.S.C. § 209.

<sup>82</sup> *Id.* § 191(a).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See id.*

### Length of Leases, Extensions, and Cancellations

The primary term for competitive and noncompetitive leases is ten years.<sup>86</sup> Leases can be extended because of, *inter alia*, drilling operations or oil or gas production. The existence of an approved cooperative plan can also affect extensions.

First, a lease will be extended for two years because of *drilling* if three criteria are satisfied:<sup>87</sup>

- (1) actual drilling operations began before the end of the primary lease term;
- (2) actual drilling operations are being “diligently prosecuted”<sup>88</sup> at the end of the primary lease term; and
- (3) rental was timely paid.

Second, a lease that meets these criteria will be extended “so long as oil or gas is being *produced* in paying quantities.”<sup>89</sup> A lease that has been extended because of production does not terminate simply because production stops, as long as the lessee starts reworking or drilling operations within sixty days after production ceases and conducts them with reasonable diligence during the non-productive period.<sup>90</sup> Furthermore, if a lease initially extended because of drilling begins yielding oil or gas in paying quantities during the two-year drilling extension, the lease can be extended again.<sup>91</sup>

Finally, lessees may collectively adopt and operate under a cooperative or unit plan for a particular area if the Secretary considers such a plan to be in the public interest.<sup>92</sup> All leases subject to such a plan will be extended if any of the leases covered by the plan qualify for a drilling or production extension.<sup>93</sup>

Any MLLA lease can be cancelled or forfeited if the lessee fails to comply with MLLA provisions, the lease’s provisions, or regulations promulgated pursuant to

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<sup>86</sup> *Id.* § 226(e).

<sup>87</sup> *Id.*; 43 C.F.R. § 3107.1. Other regulations regarding the continuation, extension, and renewal of leases are set forth in 43 C.F.R. § 3107.1 *et seq.*

<sup>88</sup> “Actual drilling operations shall be conducted in a manner that anyone seriously looking for oil or gas could be expected to make in that particular area, given the existing knowledge of geologic and other pertinent facts.” 43 C.F.R. § 3107.1.

<sup>89</sup> 30 U.S.C. § 226(e); 43 C.F.R. § 3107.2-1 (emphasis added).

<sup>90</sup> 30 U.S.C. § 226(i); 43 C.F.R. § 3107.2-2.

<sup>91</sup> *See* 30 U.S.C. § 226(e).

<sup>92</sup> *Id.* § 226(m).

<sup>93</sup> *Id.*; 43 C.F.R. § 3107.3-1.

MLLA.<sup>94</sup> In some situations the Secretary has the authority to cancel the lease, but some circumstances require a judicial proceeding to cancel the lease.<sup>95</sup> In addition, MLLA provides for *automatic* termination “upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities.”<sup>96</sup> However, the Secretary may reinstate automatically terminated leases in some cases.<sup>97</sup>

## Applications for Permits to Drill

### U.S. Department of the Interior

Operators<sup>98</sup> must submit an Application for a Permit to Drill (APD) for each oil or gas well.<sup>99</sup> Without an approved APD, operators cannot begin drilling operations or cause surface disturbances that are preliminary to drilling.<sup>100</sup> In fact, the APD process must begin at least thirty days prior to the commencement of operations.<sup>101</sup>

A complete APD must include the following:<sup>102</sup>

- a drilling plan;
- a surface use plan of operations, including drillpad locations and plans for reclaiming the surface;
- evidence of bond coverage;
- Form 3160-3; and
- any other information that may be required.

Once BLM receives an APD, it must post information for public inspection for at least thirty days before it may act on the APD.<sup>103</sup> Another pre-approval requirement is that BLM must prepare an environmental record of review or an

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<sup>94</sup> 30 U.S.C. § 188(a); 43 C.F.R. § 3108.3(a), (b).

<sup>95</sup> *See* 43 C.F.R. § 3108.3(a), (b).

<sup>96</sup> 30 U.S.C. § 188(b).

<sup>97</sup> *See id.* § 188(c)-(e), (g), (j).

<sup>98</sup> “Operator means any person or entity including but not limited to the lessee or operating rights owner, who has stated in writing to the authorized officer that it is responsible under the terms and conditions of the lease for the operations conducted on the leased lands or a portion thereof.” 43 C.F.R. § 3160.0-5.

<sup>99</sup> *Id.* § 3162.3-1(c); *see* 43 U.S.C. § 1732(b).

<sup>100</sup> 43 C.F.R. § 3162.3-1(c).

<sup>101</sup> *Id.* § 3162.3-1(d).

<sup>102</sup> *Id.* § 3162.3-1(d), (f).

<sup>103</sup> 30 U.S.C. § 226(f); 43 C.F.R. § 3162.3-1(g).

environmental assessment.<sup>104</sup> Based on these documents, BLM decides whether an EIS is required.<sup>105</sup> Additionally, an adequate bond or other financial arrangement is required before the operator begins any surface-disturbing activities.<sup>106</sup>

Within five working days of the end of the public notice period, BLM must choose one of four options:<sup>107</sup>

- (1) approve the application as submitted;
- (2) approve the application with modifications and/or conditions;
- (3) disapprove the application; or
- (4) delay final action.

BLM must approve a surface use plan of operations addressing proposed surface-disturbing activities before a permit to drill on lands BLM manages may be granted.<sup>108</sup> BLM and the Forest Service have proposed joint regulations regarding surface use plans of operations.<sup>109</sup>

## U.S. Forest Service

An approved surface use plan of operations addressing proposed surface-disturbing activities is also required before a permit to drill on NFS lands may be granted and before any surface-disturbing operations may begin.<sup>110</sup> The operator must submit its proposed surface use plan of operations to BLM as part of its APD.<sup>111</sup> When the proposal pertains to NFS lands, BLM forwards the proposed surface use plan of operations to the Forest Service.<sup>112</sup>

The level of detail required in a proposed plan varies depending upon the “type, size, and intensity of the proposed operations and the sensitivity of the surface resources that will be affected by the proposed operations.”<sup>113</sup> When evaluating a proposed surface use plan of operations, the Forest Service must ensure that the proposal is consistent with the “approved forest land and resource management plan”

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<sup>104</sup> 43 C.F.R. § 3162.5-1(a).

<sup>105</sup> *Id.*

<sup>106</sup> 30 U.S.C. § 226(g).

<sup>107</sup> 43 C.F.R. § 3162.3-1(h).

<sup>108</sup> 30 U.S.C. § 226(g).

<sup>109</sup> On July 27, 2005, BLM and the Forest Service published a joint proposed rule that would revise an existing Onshore Oil and Gas Order. “The revised Order would address the submittal of a complete [APD],” including drilling plans and surface use plans of operations. *See* 70 Fed. Reg. 43,349 (proposed July 27, 2005) (to be codified at 36 C.F.R. pt. 228 and 43 C.F.R. pt. 3160).

<sup>110</sup> 30 U.S.C. § 226(g); 36 C.F.R. § 228.106(a).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* § 228.106(c).

for that area of land.<sup>114</sup> During the evaluation process, the Forest Service must also comply with NEPA, as well as appropriate Forest Service regulations and policies.<sup>115</sup> In addition, the Forest Service can require that the operator increase the amount of its bond if it “determines [that] the financial instrument held by [BLM] is not adequate to ensure complete and timely reclamation and restoration” of the NFS lands.<sup>116</sup>

Ultimately, the Forest Service must decide among four options:<sup>117</sup>

- (1) approve the plan
- (2) approve the plan “subject to specified conditions”
- (3) disapprove the plan
- (4) delay the plan because additional time is needed to reach a decision

Once it has made its decision regarding the proposed surface use plan of operations, the Forest Service forwards the decision to BLM.<sup>118</sup>

## **Analysis of the Energy Policy Act of 2005**

In August 2005, the Congress passed and the President signed the Energy Policy Act of 2005 (2005 EPACT).<sup>119</sup> This comprehensive law touches upon many aspects of U.S. energy regulation, and among its provisions were several changes to the law governing federal oil and gas leases on public domain lands. This section of the report highlights selected provisions from the 2005 EPACT relating to these topics. It also addresses selected provisions that were included in either the House or Senate bill, but were *not* included in the final legislation. The topics addressed by this section can be classified into four categories: (1) streamlining and expediting oil and gas development processes; (2) a NEPA-related provision; (3) the Arctic National Wildlife Refuge; and (4) miscellaneous provisions.

### **Streamlining and Expediting Oil and Gas Development Processes**

The 2005 EPACT requires the Secretary of the Interior and the Secretary of Agriculture to enter into a memorandum of understanding regarding issues such as the establishment of procedures to “ensure timely processing” of oil and gas lease

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<sup>114</sup> 16 U.S.C. § 1604(i); 36 C.F.R. § 228.107(a)(2).

<sup>115</sup> 36 C.F.R. § 228.107(a); *see* 16 U.S.C. § 1604(g).

<sup>116</sup> 36 C.F.R. § 228.109(a).

<sup>117</sup> *Id.* § 228.107(b).

<sup>118</sup> *Id.* § 228.107(d).

<sup>119</sup> P.L. 109-58, 119 Stat. 594 (Aug. 8, 2005) (hereinafter 2005 EPACT).



applications, surface use plans of operation, and APDs.<sup>120</sup> This memorandum must also ensure that lease stipulations are consistently applied and are “only as restrictive as necessary to protect the resource for which the stipulations are applied.”<sup>121</sup>

The Secretary of the Interior — in consultation with the Secretary of Agriculture when NFS lands are involved — must also conduct an internal review of Federal onshore oil and gas leasing and permitting practices and subsequently submit a report to Congress detailing steps to improve the process.<sup>122</sup> The Secretary of the Interior is also required to establish a Federal Permit Streamlining Pilot Project.<sup>123</sup>

Under the 2005 EPACT, the Secretary of the Interior is required to ensure expeditious compliance with 42 U.S.C. § 4332(2)(C), which is the NEPA provision that requires the preparation of an EIS for major Federal actions that significantly affect the quality of the human environment.<sup>124</sup> More specifically, the Secretary of the Interior must propose regulations containing deadlines for making decisions on RMPs, lease applications, surface use plans of operations, and APDs.<sup>125</sup> The 2005 EPACT also requires the Secretary of Agriculture to “ensure expeditious compliance with all applicable environmental and cultural resources laws.”<sup>126</sup>

## NEPA-Related Provision

The 2005 EPACT establishes that certain actions taken by either the Secretary of the Interior or by the Secretary of Agriculture (when NFS lands are involved) “shall be subject to a rebuttable presumption that the use of a categorical exclusion under [NEPA] would apply if the activity is conducted pursuant to [MLLA] for the purpose of exploration or development of oil or gas.”<sup>127</sup>

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<sup>120</sup> 2005 EPACT § 363 (to be codified at 42 U.S.C. § 15922); *see also* H.R. 6, 109th Cong. §§ 344, 2024 (2005); Senate Amendment to H.R. 6, 109th Cong. § 343 (2005).

<sup>121</sup> 2005 EPACT § 363 (to be codified at 42 U.S.C. § 15922); *see also* H.R. 6, §§ 344, 2024; Senate Amend. to H.R. 6, § 343.

<sup>122</sup> 2005 EPACT § 361; *see also* H.R. 6, § 2022; Senate Amend. to H.R. 6, § 341.

<sup>123</sup> 2005 EPACT § 365 (to be codified at 42 U.S.C. § 15924); *see also* H.R. 6, § 2026; Senate Amend. to H.R. 6, § 344.

<sup>124</sup> 2005 EPACT § 362 (to be codified at 42 U.S.C. § 15921); *see also* H.R. 6, § 2023; Senate Amend. to H.R. 6, § 342.

<sup>125</sup> 2005 EPACT § 362 (to be codified at 42 U.S.C. § 15921); *see also* H.R. 6, § 2023; Senate Amend. to H.R. 6, § 342.

<sup>126</sup> 2005 EPACT § 362 (to be codified at 42 U.S.C. § 15921); *see also* Senate Amend. to H.R. 6, § 342.

<sup>127</sup> 2005 EPACT § 390. Those activities are as follows:

- (1) Individual surface disturbances of less than 5 acres so long as the total surface disturbance on the lease is not greater than 150 acres and site-specific analysis in a document prepared pursuant to NEPA has been previously completed.

- (2) Drilling an oil or gas well at a location or well pad site at which drilling has

(continued...)

The House bill had included a provision that differed from the NEPA provision adopted by the Conference Committee. The House bill had declared that certain actions that the Secretary of the Interior takes “for the purpose of exploration or development of a domestic Federal energy source” are not subject to the NEPA provision requiring the preparation of an EIS.<sup>128</sup> Exempted actions would have included drilling an oil or gas well where drilling had previously occurred and drilling an oil or gas well “within a developed field for which an approved land use plan or any environmental document prepared pursuant to [NEPA] analyzed such drilling as a reasonably foreseeable activity.”<sup>129</sup>

## Arctic National Wildlife Refuge (ANWR)

One much-debated difference between the House and Senate energy bills had been the House bill’s provisions requiring the Secretary of the Interior to establish a competitive oil and gas leasing program in the Arctic National Wildlife Refuge (ANWR).<sup>130</sup> The 2005 EPACT does *not* include these provisions. However, several of the key ANWR provisions under the House bill are detailed in the following paragraph, and may be relevant to future legislative proposals.

Under the House bill, ANWR lands would have been available for leasing to any person qualified to obtain a lease under MLLA.<sup>131</sup> Bids would have been submitted as sealed competitive bids.<sup>132</sup> Two unique ANWR provisions in the House bill included (1) a provision requiring the first lease sale to be for at least 200,000 acres, with additional sales to be conducted as long as there is sufficient interest in development<sup>133</sup> and (2) a provision directing that the State of Alaska would receive 50 percent of ANWR leasing revenues, with the remainder being divided between a

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<sup>127</sup> (...continued)

occurred previously within 5 years prior to the date of spudding the well.

(3) Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within 5 years prior to the date of spudding the well.

(4) Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within 5 years prior to the date of placement of the pipeline.

(5) Maintenance of a minor activity, other than any construction or major renovation or a building or facility. *Id.*

<sup>128</sup> H.R. 6, § 2055 (referring to the NEPA provision codified at 42 U.S.C. § 4332(2)(C)).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* § 2203.

<sup>131</sup> *Id.* § 2204 (referring to the MLLA provision codified at 30 U.S.C. § 181).

<sup>132</sup> *Id.*

<sup>133</sup> *See id.* § 2204.

Coastal Plain Local Government Impact Aid Assistance Fund and miscellaneous receipts within the U.S. Treasury.<sup>134</sup>

## Miscellaneous Provisions

Miscellaneous relevant provisions contained in the 2005 EPACT include the following:

- The Secretary of the Interior must reduce the royalty rate for oil and gas production on “marginal properties” (i.e., leases or units producing less than a specified amount), under certain conditions.<sup>135</sup>
- The Secretary of the Interior may reinstate leases that were terminated because of the lessee’s failure to timely pay the rental amount due, under certain modified conditions.<sup>136</sup>
- The Secretary of the Interior must determine that receiving royalties in-kind would provide greater or equal benefits than receiving royalties in-value before accepting any royalties in-kind.<sup>137</sup>
- The Secretary of the Interior must conduct a study regarding split estates.<sup>138</sup>
- The Secretary of Energy must conduct a study of petroleum and natural gas storage capacity and operational inventory levels.<sup>139</sup>

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<sup>134</sup> *See id.* §§ 2209, 2212(d).

<sup>135</sup> 2005 EPACT § 343 (to be codified at 42 U.S.C. § 15903); *see also* H.R. 6, § 2003; Senate Amend. to H.R. 6, § 313.

<sup>136</sup> 2005 EPACT § 371 (to be codified at 30 U.S.C. § 188 note); *see also* Senate Amend. to H.R. 6, § 348.

<sup>137</sup> 2005 EPACT § 342 (to be codified at 42 U.S.C. 15902); *see also* H.R. 6, § 2002; Senate Amend. to H.R. 6, § 312.

<sup>138</sup> 2005 EPACT § 1835; *see also* H.R. 6, § 2051; Senate Amend. to H.R. 6, § 1321.

<sup>139</sup> 2005 EPACT § 1801; *see also* H.R. 6, § 1601; Senate Amend. to H.R. 6, § 1319.

## Recent Litigation Surrounding Coalbed Methane Leasing

Coalbed methane (CBM) is a natural gas that is trapped in coal seams by water pressure. Developers extract CBM by pumping water into coal seams to decrease the water pressure, thereby releasing the CBM.<sup>140</sup> In the second half of the 1990s, CBM production “increased dramatically to represent a significant new source of natural gas for many Western states.”<sup>141</sup> In 1999, the Supreme Court held that CBM could be leased separately from coal.<sup>142</sup> Recently, environmental groups, developers, and BLM have litigated issues surrounding what actions constitute compliance with FLPMA and NEPA in the context of CBM development. These issues have developed through several cases adjudicated by federal courts and the Interior Board of Land Appeals (IBLA), which is part of the U.S. Department of the Interior.

### The *Pennaco* Decision

In one prominent case, environmental groups challenged a BLM decision to issue CBM leases to Pennaco, an energy developer.<sup>143</sup> When it auctioned the leases, BLM relied on two documents to purportedly satisfy NEPA requirements:<sup>144</sup>

- (1) an RMP and EIS that were prepared before the leases were issued, but did *not* specifically address CBM extraction (“the Buffalo RMP/EIS”)
- (2) a draft EIS (DEIS) that was prepared after the leases were issued, but did address the potential environmental impacts of CBM development (“the Wyodak DEIS”)

The BLM also determined that the Pennaco leases conformed with the Buffalo RMP, thus satisfying FLPMA.<sup>145</sup> However, environmental groups alleged that the environmental impacts from CBM development were different than the impacts from conventional oil and gas development.<sup>146</sup> Thus, they argued that BLM did not take

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<sup>140</sup> *Frequently Asked Questions: Coalbed Methane*, Montana State University Department of Land Resources and Environmental Sciences, at [<http://waterquality.montana.edu/docs/methane/cbmfaq.shtml>] (last modified July 18, 2005).

<sup>141</sup> *Coal Bed Methane Primer: New Source — Environmental Implications*, ALL Consulting and the Montana Board of Oil and Gas Conservation, at [<http://bogc.dnrc.state.mt.us>] (Feb. 2004).

<sup>142</sup> *See Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 877-80 (1999) (stating that “[t]o the extent Congress had an awareness of it, there is every reason to think it viewed the extraction of CBM gas as drilling for natural gas, not mining coal”).

<sup>143</sup> *Pennaco Energy, Inc. v. U.S. Dep’t of the Interior*, 377 F.3d 1147 (10th Cir. 2004).

<sup>144</sup> *Id.* at 1152.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1152-53.

the requisite “hard look” at the potential environmental impacts of issuing the Pennaco leases.<sup>147</sup>

The Interior Board of Land Appeals sided with the environmental groups by finding that NEPA had not been satisfied and remanding to BLM for “additional appropriate action.”<sup>148</sup> The IBLA found the Buffalo RMP/EIS to be inadequate because it did not specifically address CBM development, which the IBLA considered to be significantly different than the conventional development analyzed by the Buffalo RMP/EIS.<sup>149</sup> For example, the IBLA concluded that water production resulting from CBM extraction is significantly greater than water production from conventional oil and gas development and that CBM development posed unique air quality concerns.<sup>150</sup> Further, the IBLA explained that the Wyodak DEIS did not satisfy NEPA because it was a post-leasing analysis.<sup>151</sup> In particular, because it was a post-leasing analysis, the Wyodak DEIS “did not consider reasonable alternatives available in a leasing decision, including whether specific parcels should be leased [and] appropriate lease stipulations.”<sup>152</sup> Although the IBLA’s decision was reversed by a federal district court,<sup>153</sup> the Tenth Circuit Court of Appeals agreed with the IBLA.<sup>154</sup> In *Pennaco Energy, Inc. v. United States Department of the Interior*, the Tenth Circuit held that “the IBLA gave due consideration to the relevant factors and that the IBLA’s conclusion was supported by substantial evidence in the administrative record.”<sup>155</sup>

## Other CBM-Related Decisions

*Pennaco* appears to be the key Circuit Court decision on the merits of a case applying FLPMA and NEPA to CBM development in this context. However, a variety of other judicial and administrative decisions have addressed similar issues. These cases often turn on fact-intensive, case-by-case determinations. Several such decisions are briefly summarized below.

In *Northern Plains Resource Council, Inc. v. United States Bureau of Land Management*, BLM had amended an RMP and prepared an EIS to address the

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<sup>147</sup> *Id.*

<sup>148</sup> *Wyoming Outdoor Council*, 156 I.B.L.A. 347, 359 (U.S. Dep’t of the Interior Apr. 26, 2002).

<sup>149</sup> *Id.* at 358.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 358-59.

<sup>152</sup> *Id.*

<sup>153</sup> *Pennaco Energy, Inc. v. U.S. Dep’t of the Interior*, 266 F. Supp. 2d 1323, 1330-31 (D. Wyo. 2003).

<sup>154</sup> *Pennaco*, 377 F.3d at 1162.

<sup>155</sup> *Id.* at 1156.

impacts of oil and gas leasing in several areas.<sup>156</sup> These documents analyzed and allowed small-scale exploratory CBM drilling.<sup>157</sup> However, they stated that “further environmental studies would have to be completed before commercial production would be allowed.”<sup>158</sup> Years later, after receiving APDs for the covered land, BLM completed EAs and made FONSIIs for numerous CBM wells.<sup>159</sup> Based on the FONSIIs, BLM approved the APDs without preparing an EIS.<sup>160</sup> BLM later recognized the energy industry’s intention to engage in full-field CBM development on some land, prompting it to prepare a new statewide EIS and proposed RMP amendments addressing the environmental impacts of large-scale CBM development.<sup>161</sup> The United States District Court for the District of Montana rejected the plaintiff’s argument that the original RMP and EIS were inadequate, thus violating FLPMA and NEPA.<sup>162</sup> It held that the disputed APDs were all for test wells and thus fell within the scope of the exploratory drilling contemplated by the original documents.<sup>163</sup> Further, the court explained that once BLM had begun preparing a new EIS to address full-field development, “it was not required to halt lease sales, as long as [the leases] were in conformance with the existing plan.”<sup>164</sup> The Ninth Circuit Court of Appeals affirmed this decision on procedural grounds because the plaintiff’s challenge was barred by the statute of limitations.<sup>165</sup>

In subsequent litigation, the same plaintiff challenged the new statewide EIS and proposed RMP amendments, which authorized full-field CBM development in some areas.<sup>166</sup> The United States District Court for the District of Montana agreed with one of the plaintiff’s two primary arguments.<sup>167</sup> It held that BLM should have considered a “phased development alternative” as an alternative to full-field CBM

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<sup>156</sup> *N. Plains Res. Council, Inc. v. U.S. Bureau of Land Mgmt.*, 298 F. Supp. 2d 1017, 1020 (D. Mont. 2003).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 1020-21.

<sup>159</sup> *Id.* at 1021.

<sup>160</sup> *Id.*

<sup>161</sup> *See id.*

<sup>162</sup> *Id.* at 1019, 1022-24.

<sup>163</sup> *Id.* at 1023.

<sup>164</sup> *Id.* at 1024.

<sup>165</sup> *N. Plains Res. Council v. U.S. Bureau of Land Mgmt.*, 107 Fed. Appx. 166 (9th Cir. 2004).

<sup>166</sup> *N. Plains Res. Council v. U.S. Bureau of Land Mgmt.*, 2005 U.S. Dist. LEXIS 4678 at \*6 (D. Mont. Feb. 25, 2005).

<sup>167</sup> *See id.* at \*29, \*33.

development.<sup>168</sup> However, it also held that BLM was justified in conducting two separate studies of the area, rather than conducting one larger study.<sup>169</sup>

In *San Juan Citizens' Alliance v. Babbitt*, plaintiffs argued that BLM had acted arbitrarily and capriciously — thus violating NEPA — by approving CBM wells at twice the density that was contemplated by existing environmental documents.<sup>170</sup> Prior to approving the challenged CBM wells, BLM had issued a statewide EIS as well as preparing an EA and making a FONSI for a smaller area within the state.<sup>171</sup> However, the plaintiffs claimed that BLM should have either created a new EIS or a supplemental EIS (SEIS) to sufficiently address the cumulative environmental impacts of the existing wells combined with the impacts of the newly approved wells.<sup>172</sup> Plaintiffs asserted that new information shedding light on the environmental impacts of CBM development had become available since the issuance of the original documents.<sup>173</sup> Plaintiffs also argued that BLM had violated FLPMA by approving CBM development that allegedly did not conform to the RMP.<sup>174</sup> The defendants moved to dismiss, and the United States District Court for the District of Colorado denied the motion.<sup>175</sup>

Several IBLA decisions also address similar issues. In the 2003 matter of *Wyoming Outdoor Council*, the IBLA ruled that BLM had not taken the NEPA-mandated “hard look” at water quality issues associated with CBM development in one area.<sup>176</sup> The IBLA found the BLM’s water quality analysis to be inadequate because it was based on only one CBM well sample and neither of BLM’s EAs addressed “any deleterious impact of CBM discharge water due to its chemical composition.”<sup>177</sup> The IBLA also found that BLM should have considered the cumulative environmental impacts of the new wells combined with some nearby wells that met “the geographical proximity test for inclusion in a cumulative impacts analysis.”<sup>178</sup>

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<sup>168</sup> *Id.* at \*29.

<sup>169</sup> *Id.* at \*33. One study addressed land in Wyoming, while the other addressed land in Montana. *Id.* at \*31. The court stated that the timing of the two proposals varied, the scope of the studies differed, and that CBM was being developed at significantly different paces in the two states. *Id.* at \*33-34.

<sup>170</sup> *San Juan Citizens' Alliance v. Babbitt*, 228 F. Supp. 2d 1224, 1226-27 (D. Colo. 2002).

<sup>171</sup> *Id.* at 1227.

<sup>172</sup> *Id.* at 1226.

<sup>173</sup> *Id.* at 1228.

<sup>174</sup> *Id.* at 1226.

<sup>175</sup> *Id.* at 1233. It appears that this case was not further litigated after this ruling.

<sup>176</sup> *Wyoming Outdoor Council*, 158 I.B.L.A. 155, 163 (U.S. Dep’t of the Interior Jan. 9, 2003).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 173-74.

In the 2004 matter of *Western Slope Environmental Resource Council*, the IBLA stated:

[T]he appropriate time for considering the potential impacts of oil and gas exploration and development is when BLM proposes to lease public lands for oil and gas purposes because leasing, at least without [no surface occupancy stipulations], constitutes an irreversible and irretrievable commitment to permit surface-disturbing activity.<sup>179</sup>

The IBLA went on to hold that the appellants had not proven that the environmental impacts of CBM development *in the disputed area* would be different from the impacts of conventional oil and gas development.<sup>180</sup> Even though the unique environmental impacts of CBM had been recognized in some cases, the IBLA emphasized that the appellants had not met their burden of proof in this particular case.<sup>181</sup> Evidence indicated that the disputed coalbeds were located far beneath the surface and that there was a “lack of transmissivity of the coal.”<sup>182</sup> According to the IBLA, this evidence suggested that CBM extraction in this area would not produce a large amount of water, thus limiting the environmental impacts that would occur.<sup>183</sup>

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<sup>179</sup> *W. Slope Env'tl. Res. Council*, 163 I.B.L.A. 262, 285 (U.S. Dep't of the Interior Oct. 28, 2004).

<sup>180</sup> *Id.* at 289-290.

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

<sup>182</sup> *Id.* at 286, 289.

<sup>183</sup> *Id.* at 286.



## List of Acronyms

<b>2005 EPACT</b>	Energy Policy Act of 2005
<b>ANWR</b>	Arctic National Wildlife Refuge
<b>APD</b>	Application for a Permit to Drill
<b>BLM</b>	Bureau of Land Management
<b>CBM</b>	Coalbed methane
<b>DEIS</b>	Draft Environmental Impact Statement
<b>EA</b>	Environmental Assessment
<b>EIS</b>	Environmental Impact Statement
<b>FLPMA</b>	Federal Land Policy and Management Act of 1976
<b>FONSI</b>	Finding of No Significant Impact
<b>IBLA</b>	Interior Board of Land Appeals
<b>MLLA</b>	Mineral Lands Leasing Act of 1920
<b>NEPA</b>	National Environmental Policy Act of 1969
<b>NFS</b>	National Forest System
<b>RMP</b>	Resource Management Plan
<b>SEIS</b>	Supplemental Environmental Impact Statement

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