

# BACKGROUND

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## Right Reforms for Accessing U.S. Outer Continental Shelf Resources and Unleashing U.S. Energy Production

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### Abstract

*The Department of the Interior (DOI) recently issued its draft National Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2019–2024. The proposal lists 47 potential lease sales off the coasts of Alaska, and in the Pacific, the Atlantic, and the Gulf of Mexico, and would make more than 90 percent of the total federal acreage available for exploration and development. These changes stand in stark contrast to the Obama Administration’s last order, which placed all but 6 percent of the OCS off-limits. The Trump Administration’s move to increase access to America’s energy resources is a step in the right direction. It would help make power more affordable for families, generate thousands of new jobs, and provide more economic diversity for coastal states. However, Congress and the Administration should go even further to comprehensively reform the leasing program by eliminating the five-year leasing process so as to enable the energy industry to respond more quickly to rapidly changing market conditions, correcting current liability laws to properly assess costs for accidents, and empowering states to oversee the environmental review and permitting process for offshore energy production.*

According to new projections from the International Energy Agency, the United States is on pace to overtake Saudi Arabia and Russia as the world’s top oil producer.<sup>1</sup> In fact, in November 2017 the U.S. crude oil supplies surpassed 10 million barrels per day, breaking a record high from nearly half a century ago.<sup>2</sup> America’s energy dominance in both oil and natural gas production is occurring despite policies that have made off-limits an abundance of resources.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3297>

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### KEY POINTS

- The Department of Interior’s draft National Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2019–2024 proposes 47 lease sales—the greatest number of lease sales in history. This would make over 90 percent of the total federal offshore acreage available for exploration and development, in stark contrast to the current acreage of a mere 6 percent.
- In 2016, the Bureau of Ocean Energy Management projected that the OCS holds approximately 90 billion barrels of oil and 328 trillion cubic feet of gas of undiscovered, technically recoverable resources.
- Concerns of coastal states over possible environmental risks and negative impacts on other sectors of the economy may be overstated. However, these concerns do illustrate the need to involve states with the decision-making process for offshore energy production.
- The energy market is dynamic, but the federal government’s approach to managing it is constrained. Congress should reform the leasing process, eliminate the five-year planning program, and give states control over the environmental review and permitting of projects.

At present, 94 percent of the Outer Continental Shelf is off-limits for resource production. Thus, an opportunity to harvest almost 100 billion barrels of oil and over 300 trillion cubic feet of gas is going begging. A new draft proposal from the Trump Administration's Department of Interior has the potential to undo the effects of the Obama Administration's parting shot at stifling natural resource extraction.

The Department of the Interior recently issued its Draft Proposed Program (DPP) for the leasing of federal lands under the National Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2019–2024. The OCS encompasses 1.76 billion energy-rich acres of submerged, federal- and state-owned land off America's coasts.<sup>3</sup> The draft is a welcome departure from the Obama Administration's 2017–2022 OCS program, which made an abundance of offshore acreage off-limits to energy production. In contrast, the DOI's DPP would make more than 90 percent of the total federal acreage available, which includes 98 percent of the undiscovered, technically recoverable oil and gas resources in the OCS.<sup>4</sup> The draft lists 47 potential lease sales in the Arctic, Pacific, and Atlantic oceans and in the Gulf of Mexico. The DPP is the first part of a multiyear, multi-step process that comprises several public comment periods.

The new draft is a step in the right direction, as the policies that guide energy development off America's coasts are in need of comprehensive reform. The current five-year schedule for the programs is a prime example of misguided governance and ignores market realities—such as how companies actually invest in energy and the unpredictability of future energy prices. Decisions for leasing have had more to do with political concerns than market demand and have increasingly centralized the review and approval process within the federal government.

Congress and the Administration should capitalize and improve on the positive efforts of the DPP by:

- Allowing states complete control over the environmental review and permitting of projects and collection of a greater percentage of the royalty revenues;
- Updating current law relevant to offshore drilling to properly assess risk and liability costs for potential accidents and spills;
- Eliminating the five-year oil and gas leasing program and creating a system that permits extraction in accord with market demand, not a government-mandated plan; and
- Collaborating with states and the energy industry to create a system that is more flexible and adaptable to price changes.

These steps, in conjunction with opening access to the abundance of offshore resources, would provide the opportunity to increase energy production, which would result in lower energy bills for households and businesses. As the U.S. improves access to its energy resources, the economy will grow and jobs will increase,<sup>5</sup> and federal and state governments would benefit immensely from the increased revenues from royalties, rents, bonus bids, and overall economic activity.

### **History of Offshore Resource Production in the U.S.**

Offshore resource development occurred well before the DOI developed the prescriptive five-year programs. Beginning in 1954, the federal government conducted oil and gas lease sales in federal waters,

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1. News release, "Record Oil Output from US, Brazil, Canada and Norway to Keep Global Markets Well Supplied," International Energy Agency, March 5, 2018, <https://www.iea.org/newsroom/news/2018/march/record-oil-output-from-us-brazil-canada-and-norway-to-keep-global-markets-well-.html> (accessed March 12, 2018).

2. U.S. Department of Energy, Energy Information Administration, "Petroleum & Other Liquids: U.S. Field Production of Crude Oil," February 28, 2018, <https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS2&f=M> (accessed March 6, 2018).

3. Institute for Energy Research, "Outer Continental Shelf," <http://instituteforenergyresearch.org/topics/policy/ocs/> (accessed March 7, 2018).

4. News Release, "Secretary Zinke Announces Plan For Unleashing America's Offshore Oil and Gas Potential," U.S. Department of the Interior, January 4, 2018, <https://www.doi.gov/pressreleases/secretary-zinke-announces-plan-unleashing-americas-offshore-oil-and-gas-potential> (accessed February 12, 2018).

5. For more information, see Kevin D. Dayaratna and Nicolas D. Loris, "Turning America's Energy Abundance into Energy Dominance," Heritage Foundation *Backgrounder* No. 3258, November 2, 2017, [https://www.heritage.org/sites/default/files/2017-11/BG3258\\_1.pdf](https://www.heritage.org/sites/default/files/2017-11/BG3258_1.pdf).

encompassing more than 3,000 tracts.<sup>6</sup> Companies extracted the resources through directional drilling by building piers and manmade islands.<sup>7</sup> However, offshore energy production in the OCS dates back much further than the mid-twentieth century. Offshore oil and gas operations in California began in 1896;<sup>8</sup> in 1938, Pure Oil and Superior Oil Company built and operated the first offshore rig in the Gulf off the coast of Louisiana.<sup>9</sup>

However, as offshore drilling grew, so too did federal government involvement.

### Legislative and Administrative Action

- In 1946, the U.S. Attorney General and the U.S. Solicitor General filed a case against the State of California and claimed the federal government has ownership rights of the seabed and vast quantities of resources beneath it.<sup>10</sup>
- In 1947, the Supreme Court ruled that California had no entitlement under the Equal Footing Doctrine and that national defense and foreign relations outweighed the interests of the states.<sup>11</sup> The same ruling applied to Louisiana and Texas, consequently nullifying existing state-administered energy leases.
- In 1953, Congress passed the Submerged Lands Act (SLA), granting state rights to natural resources (which include oil, gas, minerals, and seafood, as well as other marine and plant life) for three nautical miles off the coast.<sup>12</sup> Texas and the west coast of Florida have ownership rights extending nine nautical miles for historical reasons.<sup>13</sup> Title II of the SLA not only grants the states the title to the resources but also authorizes the states to manage and develop them.
- Also passed in 1953, the SLA and the Outer Continental Shelf Leasing Act (OCSLA) (Title III) established federal government jurisdiction of minerals and resource development beyond the limit of state jurisdiction.<sup>14</sup> The OCSLA authorized the DOI to offer leases for energy development through a competitive auction process, taking into account environmental concerns, state and local input, and other “national needs.”<sup>15</sup>
- In 1978, Congress amended the OCSLA to create a more comprehensive leasing program that “will best meet national energy needs for the five-year period following its approval or re-approval.”<sup>16</sup> The amended OCSLA requires the DOI to consider numerous factors when drafting the leasing plan, including:
  - Geological conditions,
  - Resource estimates,
  - Environmental risks,
  - Market conditions, and
  - State laws.

6. Laura B. Comay, Marc Humphries, and Adam Vann, “The Bureau of Ocean Energy Management’s Five-Year Program for Offshore Oil and Gas Leasing: History and Proposed Program for 2017-2022,” Congressional Research Service *Report for Congress*, No. 44504, May 23, 2016, <http://www.fas.org/sgp/crs/misc/R44504.pdf> (accessed January 25, 2018).

7. *Ibid.*

8. California Department of Conservation, Division of Oil, Gas, and Geothermal Resources, “Oil and Gas Production: History in California,” [ftp://ftp.consrv.ca.gov/pub/oil/history/History\\_of\\_Calif.pdf](ftp://ftp.consrv.ca.gov/pub/oil/history/History_of_Calif.pdf) (accessed January 25, 2018).

9. American Oil and Gas Historical Society, “Offshore Petroleum History,” <https://aoghs.org/offshore-history/offshore-oil-history/> (accessed January 25, 2018).

10. *United States v. California*, 332 U.S. 19 (1947).

11. *Ibid.*

12. A nautical mile is 6,080.2 feet or approximately 1.15 miles. The exceptions to the three-nautical-mile rule are Florida and Texas, which have boundaries of nine nautical miles. See Submerged Lands Act, 43 U.S.C. §§ 1301-1315.

13. U.S. Commission on Ocean Policy, “Primer on Ocean Jurisdictions: Drawing Lines in the Water,” *An Ocean Blueprint for the 21st Century*, July 22, 2004, [https://govinfo.library.unt.edu/oceancommission/documents/full\\_color\\_rpt/000\\_ocean\\_full\\_report.pdf](https://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/000_ocean_full_report.pdf) (accessed January 25, 2018).

14. 43 U.S.C. §§ 1331 et seq.

15. *Ibid.*

16. *Ibid.*

Moreover, the OCSLA also includes consultation requirements from:

- Interested federal agencies,
- The Attorney General in consultation with the Federal Trade Commission,
- Affected states, and
- Local governments.<sup>17</sup>

Although the law provides an opportunity for congressional review, the DOI can implement the program without approval from Congress.

- In 1982, Congress included a provision to prohibit offshore oil and gas development in the majority of the OCS, with the exception of the Gulf Coast and parts of Alaska. The congressional moratorium expired with the passage of the Fiscal Year 2009 appropriations bill.<sup>18</sup>
- Passed in 1990, the Oil Pollution Act (OPA), as amended, governs liability for onshore and offshore oil and gas operations.<sup>19</sup> The OPA is a milestone in the U.S.'s long legislative history in addressing the liability of oil spills. The Limited Liability Act of 1851 first addressed oil spill liability.<sup>20</sup> Since then (and prior to the OPA), a number of federal and state laws changed clean-up procedures and assigned financial responsibility for economic and environmental damages any spill or discharge caused.

- Passed in 2006, the Gulf of Mexico Energy Security Act (GOMESA) allocates a portion of the offshore royalty revenues collected to coastal restoration and protection and stipulates that Louisiana, Texas, Alabama, and Mississippi collect 37.5 percent of all qualified OCS revenues.<sup>21</sup> GOMESA also prohibits oil and gas leasing 125 miles off the Florida coastline in the Eastern Planning Area and a section of the central planning area until 2022.<sup>22</sup>

### **Executive Branch Action**

- The Carter Administration issued the first offshore, multi-year planning program, which took effect in 1980. At that time, the Carter Administration supported expanded offshore drilling. When Democratic President Jimmy Carter made his 1979 energy speech, he said, "We will step up exploration and production of oil and gas on federal lands."<sup>23</sup> Consequently, the Department of the Interior proposed 36 lease sales.<sup>24</sup> However, environmental activist organizations sued, arguing that the plan did not meet OCSLA requirements.<sup>25</sup>
- Under the Reagan Administration, Secretary of the Interior James Watt approved a revised five-year program (1982–1987) that activists again challenged, but this time the courts rejected their claims. The Administration's first five-year program proposed 41 lease sales and held 23.<sup>26</sup> In the subsequent 1987–1992 program under Secretary of the Interior Don Hodel, the DOI proposed 42 lease sales and conducted 17.<sup>27</sup>

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17. *Ibid.* The Bureau of Ocean Energy Management must also consider a state's coastal zone management program established under the Coastal Zone Management Act of 1972. See U.S. Department of Commerce, Office for Coastal Management, National Oceanic and Atmospheric Administration, "The National Coastal Zone Management Program," <https://coast.noaa.gov/czm/> (accessed February 12, 2018).

18. Democratic Policy Committee, "Background on Offshore Drilling and Moratoriums," [https://www.dpc.senate.gov/files\\_energybill/background\\_offshore.pdf](https://www.dpc.senate.gov/files_energybill/background_offshore.pdf) (accessed March 12, 2018).

19. 33 U.S.C. § 2701 et seq. (1990).

20. 46 U.S.C. §§ 30501–30512.

21. 43 U.S.C. §§ 1331.

22. *Ibid.*

23. President Jimmy Carter, "Energy Address to the Nation," April 5, 1979, <http://www.presidency.ucsb.edu/ws/?pid=32159> (accessed January 25, 2018).

24. Comay, Humphries, and Vann, "The Bureau of Ocean Energy Management's Five-Year Program for Offshore Oil and Gas Leasing."

25. *California v. Watt*, 668 F.2d 1290 (D.C. Cir. 1981).

26. Comay, Humphries, and Vann, "The Bureau of Ocean Energy Management's Five-Year Program for Offshore Oil and Gas Leasing."

27. *Ibid.*

- The George H. W. Bush Administration, through an executive order, issued a presidential ban on the majority of the OCS territory, but issued 12 lease sales under its 1992–1997 plan.<sup>28</sup>
- The Clinton Administration continued the executive moratorium and held another 12 lease sales from 1997–2002.<sup>29</sup>
- Under the George W. Bush Administration, the DOI conducted 15 lease sales before its first program expired in 2007.<sup>30</sup> In 2008, President Bush allowed the executive moratorium on large parts of the OCS to expire.<sup>31</sup> In the 2007–2012 five-year program, the Secretary of the Interior Dirk Kempthorne scheduled 21 lease sales.
- In 2010, the Obama Administration revised and resubmitted the plan. Only 11 lease sales were held.<sup>32</sup> The Administration imposed a drilling moratorium on deepwater production and implemented tougher regulations for offshore energy production in 2016, and in its 2012–2017 plan, issued 10 lease sales.<sup>33</sup> The Obama Administration’s 2017–2022 plan, which made less than 6 percent of the total acreage available, did more to stifle conventional energy production than encourage it.<sup>34</sup>

### **Developing the Offshore Leasing Program**

Because the development of the five-year program is comprehensive and includes multiple public comment periods, merely drafting and finalizing the plan is a two- or three-year process. For instance, the most recent finalized offshore leasing program under the Obama

Administration for 2017–2022 began with a Request for Information in June 2014; former Interior Secretary Sally Jewel approved the program in January 2017.<sup>35</sup>

The Bureau of Ocean Energy Management (BOEM) is responsible for developing the plan. Concurrent with but separate from the five-year leasing program, BOEM must also conduct a Programmatic Environmental Impact Statement (PEIS).<sup>36</sup> The PEIS assesses the economic, environmental, and social impacts of the entire leasing program. The law also requires National Environmental Policy Act (NEPA) reviews for the pre-lease sale, exploration, development, and production of offshore resources.<sup>37</sup> The Bureau of Safety and Environmental Enforcement (BSEE) is the lead agency for safety and environmental protection in the OCS.

### **The 2019–2024 Proposal**

Released in January, the DOI’s draft for 2019–2024 would replace the current plan—issued by the Obama Administration—and significantly increase the potential to expand offshore domestic supplies. The Obama Administration’s plan precluded energy exploration off the East Coast, West Coast, coast of Alaska, and in parts of the Gulf of Mexico.

The new draft, prepared for and administered by BOEM, proposes to conduct 47 lease sales (19 off the coast of Alaska, 12 in the Gulf of Mexico, 9 in the Atlantic, and 7 in the Pacific) over the five-year time frame.<sup>38</sup> In offering the greatest number of lease sales in history, BOEM would make more than 90 percent of OCS acreage available. That acreage captures more than 98 percent of the undiscovered, technically recoverable oil and gas resources in the Outer Continental Shelf.<sup>39</sup>

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28. Ibid.

29. Ibid.

30. Ibid.

31. Without the votes to override a veto, the congressional moratorium expired in 2008 as well.

32. Comay, Humphries, and Vann, “The Bureau of Ocean Energy Management’s Five-Year Program for Offshore Oil and Gas Leasing.”

33. Ibid.

34. Ibid.

35. U.S. Department of the Interior, Bureau of Ocean Energy Management, “2017–2022 OCS Oil and Gas Leasing Program,” <http://www.boem.gov/Five-Year-Program-2017-2022/> (accessed January 25, 2018).

36. As required by the National Environmental Policy Act (NEPA).

37. Comay, Humphries, and Vann, “The Bureau of Ocean Energy Management’s Five-Year Program for Offshore Oil and Gas Leasing.”

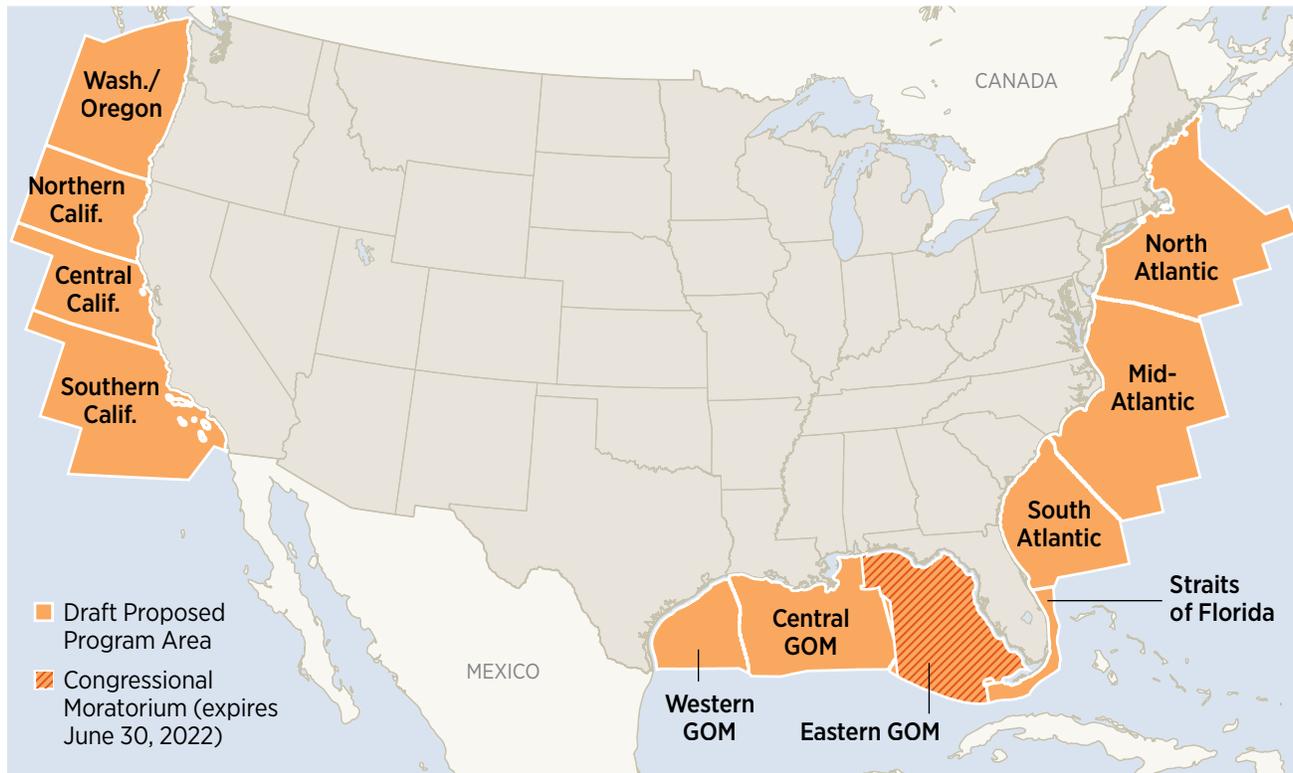
38. U.S. Department of the Interior, Bureau of Ocean Energy Management, “2019–2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Plan,” January 2018, <https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/> (accessed January 25, 2018).

39. News Release, “Secretary Zinke Announces Plan For Unleashing America’s Offshore Oil and Gas Potential.”

MAP 1

## U.S. Outer Continental Shelf, Oil and Gas Leasing Areas, 2019–2024

The Bureau of Ocean Energy Management is currently developing a new Continental Shelf Oil and Gas Leasing Program that would replace the existing 2017–2022 program.



**NOTES:** GOM—Gulf of Mexico. Map shows available leasing areas, excluding Eastern GOM which would become available at the conclusion of its congressional moratorium on June 30, 2022.

**SOURCE:** Bureau of Ocean Energy Management, “Draft Proposed Program Areas, Sale Years, and Potential Exclusion Areas: Lower 48 States,” <https://www.boem.gov/National-Program-Learn/#regionalmaps> (accessed March 8, 2018).

BG3297 heritage.org

BOEM projects that 89.9 billion barrels of oil and 327.5 trillion cubic feet of gas of undiscovered, technically recoverable resources are in the OCS.<sup>40</sup> These estimates may be significantly underestimating the reserves, as they are several years old and could change quickly once companies have an opportunity to determine the resource potential. Currently, however, 94 percent of federal offshore acreage is off-limits to development.<sup>41</sup>

### Economic Diversity and Economic Potential for Coastal States

Offshore energy production has the potential to boost and diversify coastal states’ economies. Some states have expressed concerns regarding the offshore drilling’s impact on other important sectors of their economy, particularly tourism. However, offshore resource production and other industries can work in harmony.

40. U.S. Department of the Interior, Bureau of Ocean Energy Management, “Assessment of Undiscovered Oil and Gas Resources of the Nation’s Outer Continental Shelf, 2016,” <https://www.boem.gov/2016-National-Assessment-Fact-Sheet/> (accessed February 12, 2018).

41. News Release, “Secretary Zinke Announces Plan for Unleashing America’s Offshore Oil and Gas Potential.”

Louisiana is the poster child for a state that benefits from an abundance of offshore natural resources but also has strong industries in seafood and tourism. With more than 80 percent of waterborne U.S. rigs being off Louisiana's coast,<sup>42</sup> and with oil and gas production in the Gulf Coast region accounting for approximately 18 percent of oil production and 4 percent of natural gas production in the U.S.,<sup>43</sup> the state has generated significant economic benefits. The energy industry contributes tens of billions of dollars annually to the economic welfare of the state and is a critical part of the state's culture and way of life. In 2014, the industry generated \$44 billion for the state economy and another \$36 billion when including related infrastructure and refining activity.<sup>44</sup>

In addition to energy production, seafood and tourism industries stand out as significant contributors to Louisiana's economy. Louisiana represents 30 percent of the commercial fishing for the continental United States and is a substantial producer of shrimp, oysters, crawfish, and crabs.<sup>45</sup> Many of the seafood businesses are smaller, family-owned operations that have a long and rich history. Annually, the industry creates \$2.4 billion in economic growth for Louisiana.<sup>46</sup> In 2016, 46.7 million people visited Louisiana, generating \$16.8 billion.<sup>47</sup>

These industries work in harmony. Every year, residents of the Gulf region come to Morgan City, Louisiana, to celebrate the lifeblood of the region's economy: seafood and oil. The Louisiana Shrimp

and Petroleum Festival's website emphasizes "the unique way in which these two seemingly different industries work hand-in-hand culturally and environmentally in our area."<sup>48</sup> The festival is a tradition that dates back more than 80 years. Even the adverse effects of the Deepwater Horizon oil rig accident did not disrupt the harmony of the state economy. In many respects, the spill strengthened the bond between the oil and seafood industries, with shrimpers and fishers alike extremely vocal in support of lifting the offshore drilling ban after the spill.<sup>49</sup> At the time, Harlon Pearce, owner of one of the largest seafood processors in the state and Chair of Louisiana's Seafood Promotion and Marketing Board, said, "I am not in favor of the moratorium. You've got to be down here to see and feel what I'm telling you. It's our brothers, uncles, and cousins that are working in the oil industry."<sup>50</sup> Ewell Smith, executive director of the Board, said, "If you've seen Grand Isle or those [other fishing communities], you've seen how much oil and gas and seafood coexist in this state."<sup>51</sup>

The Rigs to Reef program is an example of how energy businesses operating in the Gulf help the environment. The program converts old rig platforms into artificial reefs.<sup>52</sup> The reefs provide enormous ecological benefits, as a typical eight-legged structure provides habitat for 12,000–14,000 fish.<sup>53</sup> The more than 470 platforms that serve as artificial reefs in the Gulf are inviting for both anglers and divers.<sup>54</sup>

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42. Louisiana Economic Development, "Louisiana's Energy Advantages," <https://www.opportunitylouisiana.com/key-industries/energy> (accessed February 12, 2018).

43. News Release, "Secretary Zinke Announces Plan For Unleashing America's Offshore Oil and Gas Potential."

44. The Louisiana Mid-Continent Oil and Gas Association and the Louisiana Association of Business and Industry, "Request for Information on 2019–2024 Outer Continental Shelf Oil & Gas Leasing Program," August 17, 2017, [http://labi.org/assets/images/media/LMOGA\\_LABI\\_Comments\\_OCS\\_Five\\_Year\\_Program\\_Final3589.pdf](http://labi.org/assets/images/media/LMOGA_LABI_Comments_OCS_Five_Year_Program_Final3589.pdf) (accessed January 25, 2018).

45. *Ibid.*

46. Louisiana Seafood, "The Backstory," <http://www.louisianaseafood.com/industry> (accessed February 12, 2018).

47. The Louisiana Mid-Continent Oil and Gas Association and the Louisiana Association of Business and Industry, "Request for Information on 2019–2024 Outer Continental Shelf Oil & Gas Leasing Program."

48. Louisiana Shrimp and Petroleum Festival, "History," <http://www.shrimppetroleum.org/history> (accessed January 25, 2018).

49. Josh Harkinson, "Oil Rigs and the Fishermen Who Love Them," *Mother Jones*, June 24, 2010, <https://www.motherjones.com/environment/2010/06/oil-rigs-moratorium-louisiana-fishermen/> (accessed March 6, 2018).

50. *Ibid.*

51. *Ibid.*

52. U.S. Department of the Interior, Bureau of Safety and Environmental Enforcement, "Rigs to Reefs," <https://www.bsee.gov/what-we-do/environmental-focuses/rigs-to-reefs> (accessed February 12, 2018).

53. *Ibid.*

54. *Ibid.*

California, which has more than two dozen offshore platforms off its coasts, is considering implementing a similar program.<sup>55</sup>

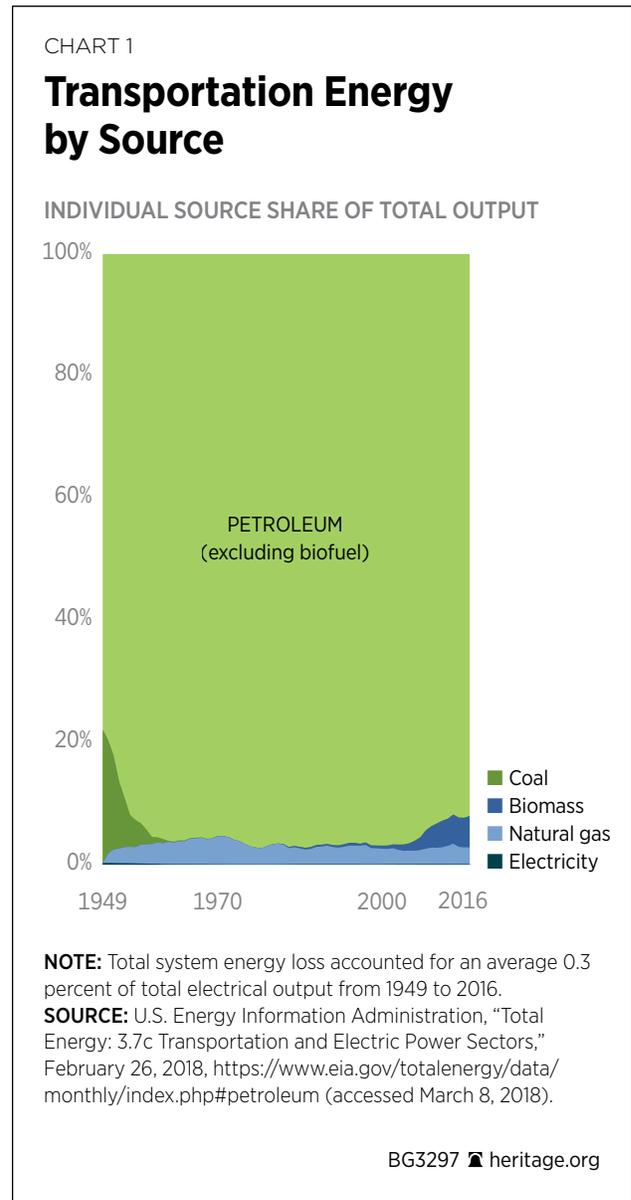
With the abundance of energy off America's coastline, other states should imitate the symbiotic relationship between the energy industry and other critical sectors of the economy in Louisiana.

### Appropriately Evaluating the Risk of Offshore Drilling

Petroleum and natural gas accounted for 92 percent of all transportation fuel use in 2016.<sup>56</sup> They are also used as components of products like fertilizers, plastics, cosmetics, medicine, electronics, and cleansers. Even with oil's ubiquity in the economy, the environmental risk is quite small. According to the American Petroleum Institute and others, "more than 99.9995% of the oil produced, refined, stored, and transported in the United States reaches its destination safely and without incident."<sup>57</sup>

**Incentives for Safety.** The clean-up costs, penalties, and liability payments of the Deepwater Horizon accident of 2010 is a prime example of why companies have a strong incentive to protect against accidents. As of January 2018, the Deepwater Horizon spill has cost BP approximately \$65 billion.<sup>58</sup> To put that into perspective, a nation whose gross domestic product equaled the costs of that spill would rank 72nd out of the 198 countries the World Bank measured for 2016.<sup>59</sup> The industry has strong financial and public perception reasons to strive for safety improvements continuously, thereby resulting in more innovative approaches to safety and preparedness.

Before the Deepwater Horizon accident, decades of operations in the Gulf with tens of thousands of wells drilled resulted in relatively little spilling.<sup>60</sup> Out of the sources of oil adrift in the world's waters,



only 1 percent is a result of drilling extraction.<sup>61</sup> Sixty-three percent of the oil comes from natural

55. Nuala Sawyer, "California's Defunct Oil Rigs May Become Thriving Ocean Reefs Under New Legislation," *San Francisco Examiner*, February 17, 2017, <http://www.sfoxaminer.com/californias-defunct-oil-rigs-may-become-thriving-ocean-reefs-new-legislation/> (accessed March 6, 2018).

56. U.S. Energy Information Administration, "Energy Use for Transportation," May 17, 2017, [https://www.eia.gov/energyexplained/?page=us\\_energy\\_transportation](https://www.eia.gov/energyexplained/?page=us_energy_transportation) (accessed January 25, 2018).

57. American Petroleum Institute, National Ocean Industries Association, and IAGC, "Unlocking America's Offshore Energy Opportunity."

58. Ron Bousso, "BP Deepwater Horizon Costs Balloon to \$65 Billion," Reuters, January 16, 2018, <https://www.reuters.com/article/us-bp-deepwaterhorizon/bp-deepwater-horizon-costs-balloon-to-65-billion-idUSKBN1F50NL> (accessed January 25, 2018).

59. The World Bank, "Gross Domestic Product 2016," World Development Indicators, <https://data.worldbank.org/data-catalog/GDP-ranking-table> (accessed January 25, 2018).

60. Ibid.

61. Ibid.

seepage.<sup>62</sup> Offshore energy production occurs safely, not just in the Gulf of Mexico, but all around the world. As of February 2018, 800 offshore rigs (which include the three most common styles of drilling rigs: jack-ups, semisubmersibles, and drillships) are in operation around the globe, with a marketed utilization rate of 71.4 percent.<sup>63</sup>

The Deepwater Horizon accident was an exceptional and isolated incident, not a result of any systemic problem associated with offshore oil and gas operations. Catastrophic incidents are rare, spills are minimal, and injury rates are low compared to other industries.<sup>64</sup> While the industry and the federal government could have taken measures to lessen the likelihood of a blowout and more effectively respond to the spill, the accident did not necessitate the six-month moratorium and an even longer de facto moratorium on drilling in the Gulf of Mexico. The Office of Inspector General (OIG) concluded that the DOI—in its report recommending a moratorium on drilling—had misrepresented the endorsement of the scientists and experts on its independent commission. Specifically, the OIG report noted,

The scientists and industry experts expressed concern that the Executive Summary to the 30-Day Report—which contained a policy decision by the Secretary of the Interior to recommend a 6-month moratorium on deepwater exploratory drilling—was worded in a manner that implied that the experts peer reviewed and supported this policy decision, when in fact they had neither reviewed nor supported such a policy decision and had never been asked to do so.<sup>65</sup>

Nevertheless, in response to Deepwater Horizon, the industry imposed new safety and regulatory standards on itself and created the Center for

Offshore Safety. The Center, which focuses specifically on safety in the Outer Continental Shelf, develops and shares best practices, compiles safety performance metrics, and identifies ways to improve operations.<sup>66</sup>

**A Broken Risk-and-Liability System.** Notwithstanding the industry's safe operations and the historically minimal risk posed from offshore extraction, the current system for evaluating and pricing risk is in need of improvement. One of the highly debated issues that went unresolved after the Deepwater Horizon spill was the Oil Spill Liability Trust Fund (OSLTF). Under current law, the responsible party must pay all clean-up costs but is directly responsible for *no more than* \$75 million in liability costs, no matter how extensive the damage.

These liability costs include those incurred by individuals, businesses, and communities who suffer economically because of the oil spill, whether it be hotel owners from decreased tourism or seafood producers. For a single incident, the federal government pays out additional liability costs above \$75 million and up to \$1 billion through the OSLTF, financed by a nine-cent-per-barrel tax on imported and domestic oil.<sup>67</sup> Costs in excess of \$1 billion could be borne by the taxpayer. The federal government collects about \$500 million per year with this tax and the reserve holds nearly \$5.7 billion.<sup>68</sup> (Congress allowed the tax to expire at the end of 2017, but the Senate has introduced tax extenders legislation that would reinstate it.)

The current system does not sufficiently align risk and liability with a company's action or with individual behavior. Instead, it starts with an extremely low liability cap and then forces all participants to contribute to a government-mandated trust fund to pay for damages. The result is a system that socializes risk by spreading the costs

62. Ibid.

63. Statista, "Number of Offshore Rigs Worldwide from 2010 to 2017," <https://www.statista.com/statistics/307146/number-of-offshore-rigs-worldwide/> (accessed January 25, 2018).

64. National Ocean Industries Association, "Safety and Response & Containment Systems," <http://www.noia.org/offshore-energy/safety/> and <http://www.noia.org/offshore-energy/safety/response-containment-systems/> (accessed March 6, 2018).

65. U.S. Department of the Interior, Office of Inspector General, "Report of Investigation—Federal Moratorium on Deepwater Drilling Case No. PI-PI-10-0562-1," p. 1, November 9, 2010, <http://thehill.com/images/stories/blogs/energy/doireport.pdf> (accessed January 25, 2018).

66. Center for Offshore Safety, "About the Center for Offshore Safety," <http://www.centerforoffshoresafety.org/About> (accessed January 25, 2018).

67. 33 U.S.C. § 2701 et seq. (1990).

68. Jonathan L. Ramseur, "Oil Sands and the Oil Spill Liability Trust Fund: The Definition of 'Oil' and Related Issues for Congress," Congressional Research Service Report for Congress, No. 43128, February 15, 2017, <https://fas.org/sgp/crs/misc/R43128.pdf> (accessed January 25, 2018).

across the entire industry, divorcing behavior from financial risk and ignoring the role of risk and liability in market realities.

Simply raising the cap without more comprehensive reform would fail to fix the systemic problems. A new approach is needed, one that better empowers risk assessors to evaluate all offshore operations, holds operators fully liable for their actions, and guards against frivolous lawsuits.

### **Current Five-Year Plans Ignore Market Realities**

Oil and gas production is a time-consuming and capital-intensive operation. A company must win the lease sale or acquire the mineral rights, obtain the permits, conduct seismic surveys, build the necessary infrastructure, and drill and case the well. The entire process can take multiple years and the oil and gas industry makes investments considering multiple time horizons. However, the current five-year planning process is not the way commercial energy investments should be (let alone *are*, in reality) determined.

By taking a static approach to dynamic energy markets, the federal government's current policy disregards how markets function. Energy markets are exceedingly complex and prices play a critical role by efficiently allocating resources to their highest valued use. Investment decisions change as prices change. Oil prices can fluctuate significantly from one month to the next, let alone over a five-year window. For example (after adjusting for inflation):

- From 2007–2008, the price of oil increased from \$66 per barrel to \$94 per barrel.
- From 2008–2009, the price dropped to \$56 dollars per barrel, before increasing to \$74 per barrel in 2009–2010.
- From 2011–2013, the price increased to above \$94 per barrel.
- From 2014–2015, the price decreased from \$87 per barrel to \$44 per barrel.

- By 2016, significant increases in supply and less-than-projected demand pushed the price down to \$38 per barrel.<sup>69</sup>

Businesses should be able to respond to price and market changes more efficiently rather than waiting on a lengthy planning process and specific lease-sale schedule. As energy companies plan for the near- and long-term, the federal government should conduct lease sales if a commercial interest exists and it does not jeopardize national security. It is incumbent upon the company to develop the resources safely and responsibly.

### **The Problem of Federal Ownership and Public/National Interest Determinations**

Oil and gas production is booming in some regions of the U.S., while the rate of production in others has slowed or even decreased. The divergent trajectories in production primarily boil down to one word: ownership. Much of the growth is occurring on private and state-owned lands. Despite the tremendous abundance of oil and gas beneath federal lands and off America's coasts, oil and gas output on federally owned lands has been mostly stagnant or declining. Companies operating in the U.S. have been the world's largest producers of oil and natural gas for six years; as a result, the nation is reaping the tremendous economic benefits that such large-scale production generates. This success emerged organically from innovation in the private marketplace to unlock energy resources formerly thought inaccessible rather than from any specific government policy to promote these technologies and processes.

The OCSLA's congressional declaration of policy states that the Outer Continental Shelf is a "vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."<sup>70</sup> The phrase "held by the federal government for the public" is at the crux of the problem. The federal government should not hold mineral rights for the public.

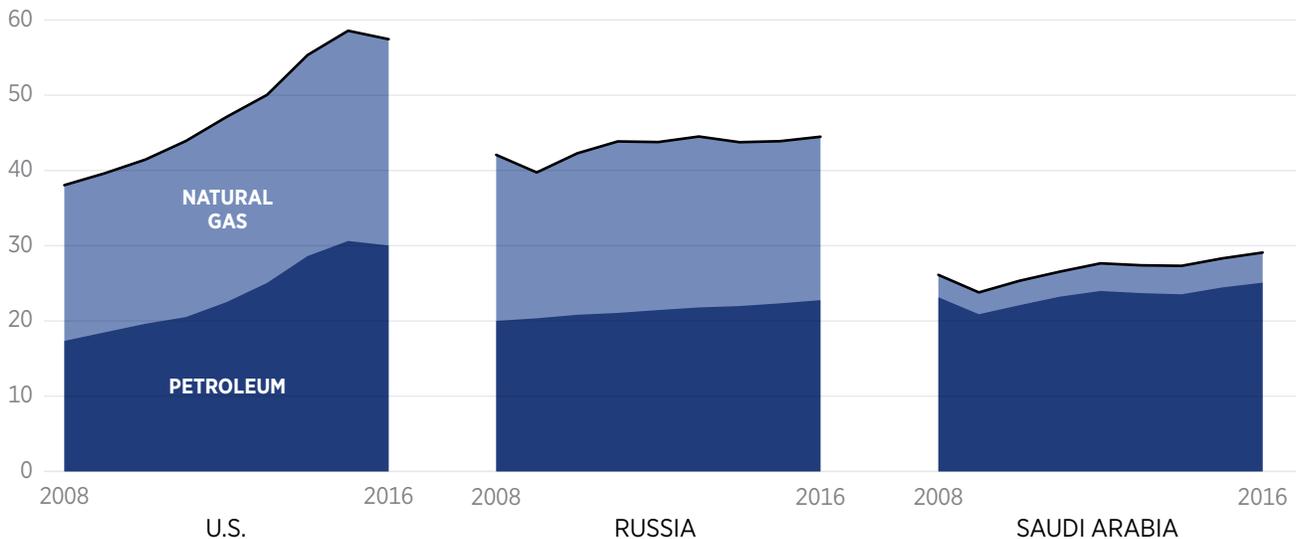
69. See U.S. Energy Information Administration, "U.S. Crude Oil First Purchase Price," January 2, 2018, [https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=F000000\\_\\_3&f=A](https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=F000000__3&f=A) (accessed January 25, 2018).

70. 43 U.S.C. § 1332.

CHART 2

## U.S. Still Top Producer of Petroleum and Natural Gas

IN QUADRILLIONS OF BRITISH THERMAL UNITS



**SOURCE:** U.S. Energy Information Administration, "United States Remains the World's Top Producer of Petroleum and Natural Gas Hydrocarbons," June 7, 2017, <https://www.eia.gov/todayinenergy/detail.php?id=31532> (accessed March 8, 2018).

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The establishment of national needs, national interest, or public interest determinations is broadly problematic for energy development and projects. Decisions that should be left to the private sector and determined by price signals are instead left to the federal government. For instance, national and public interest determinations have been manipulated into pretexts to obstruct energy development and energy infrastructure.<sup>71</sup>

Unlike air or national security, minerals are not a public good. Public goods are non-rival and non-excludable. A non-rival good can be consumed at extremely low rates of marginal cost. Non-excludable goods are goods that people cannot be easily prevented from consuming. The energy that people use to light their schools, heat their homes, and move their vehicles is excludable and rival. For example, Katie cannot have access to gasoline unless she pays for it. Moreover, when Katie pur-

chases a gallon of gas, that gallon cannot be simultaneously consumed by Michael. Natural resources like oil and natural gas are privately produced and privately consumed.<sup>72</sup> Just as the federal government does not make public or national interest determinations for the clothes its citizens purchase, neither should it do so for the energy they produce and consume.

Another serious problem with public interest and national interest determinations is concentrating the decisions in the hands of government officials and regulators. No concrete definitions exist for national or public interest determinations, which introduces subjectivity into the determination. For example, the Natural Gas Act empowers the federal government to reject the import or export of natural gas to non-free trade agreement countries if that import or export is not "consistent with the public interest."<sup>73</sup> However, the law never specifies what

71. For more information on this, see Nicolas D. Loris, "Removing Restrictions on Liquid Natural Gas Exports: A Gift to the U.S. and Global Economies," Heritage Foundation *Background* No. 3232, July 27, 2017, <https://www.heritage.org/sites/default/files/2017-07/BG3232.pdf>.

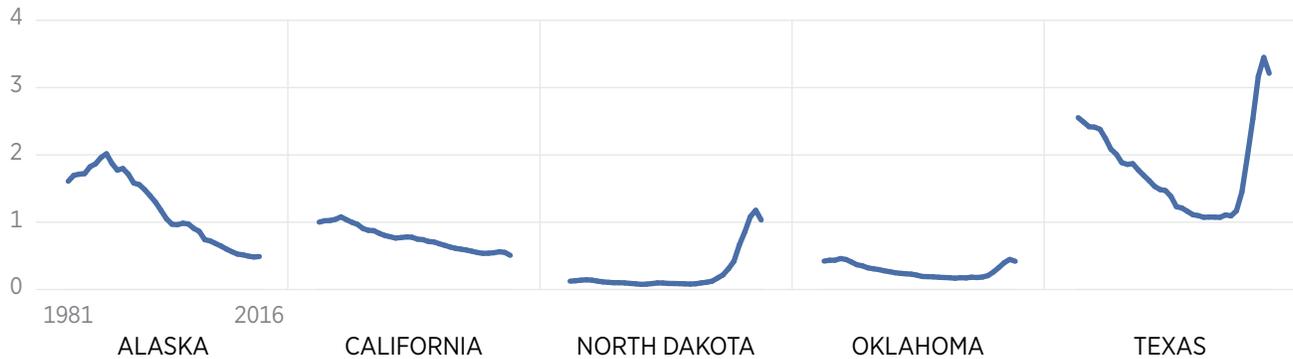
72. Environmental statutes and regulations internalize the negative externalities associated with the burning of conventional fuels.

73. 15 U.S. Code § 717b.

CHART 3

## Top 5 Oil Producing U.S. States

IN MILLIONS OF BARRELS PER DAY



**SOURCE:** U.S. Energy Information Administration, "Petroleum and Other Liquids," [https://www.eia.gov/dnav/pet/pet\\_crd\\_crpdn\\_adc\\_mbbldpd\\_a.htm](https://www.eia.gov/dnav/pet/pet_crd_crpdn_adc_mbbldpd_a.htm) (accessed March 8, 2018).

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criteria should be considered when addressing the public interest. The State Department contends with similar opaqueness for the national interest determination when deciding on cross-border pipelines. Moreover, the OCSLA gives no outline or detail for what the DOI should consider "national needs."

The vagueness of these considerations allows government officials to make decisions that properly belong to companies in the private sector. Rather than meeting certain criteria, these determinations empower regulators to arbitrarily make that determination for the rest of the nation. Government officials will not always make determinations on whether to develop resources based on the public interest or even objective, transparent science; instead, they may base them on their own subjective values.

The Obama Administration's decision to reject the Keystone XL pipeline is a clear example of such subjectivity. In 2008, TransCanada applied to build a pipeline that would connect a major oil production region in Canada to U.S. Gulf Coast refineries. Because the project crosses the U.S. border, Trans-

Canada had to submit an application to the U.S. Department of State, with the Secretary of State making a national interest determination and the ultimate decision coming from the President.<sup>74</sup> An integral part of that process was the environmental impact statement. Despite the Obama Administration's own environmental assessment that the Keystone XL pipeline was environmentally safe and would not contribute significantly to climate change (something President Obama said would be critical for the national interest decision), Secretary John Kerry and Obama rejected the public interest determination of the Keystone XL pipeline.<sup>75</sup>

The Obama Administration's revised 2017–2022 leasing plan is also evidence of such subjectivity. Private actors, incentivized by profit or other motives, will know much better than regulators in Washington as to where, when, and why drilling should take place. That does not preclude the need for an environmental review and permitting process, or consideration of national security impacts, but the permitting process should not be embed-

74. Executive Order No. 13337 designates the Secretary of State to receive applications for "the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country." Executive Order No. 13337 of April 30, 2004, "Issuance of Permits with Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States," *Federal Register*, Vol. 69, No. 87 (May 5, 2004), pp. 25299 and 25301.

75. Nicolas Loris, "More than Six Years Later, Keystone XL Is Still a Good Idea," Heritage Foundation *Backgrounder* No. 4327, January 8, 2015, [http://thf\\_media.s3.amazonaws.com/2015/pdf/1B4327.pdf](http://thf_media.s3.amazonaws.com/2015/pdf/1B4327.pdf).

ded in a five-year planning process that outlines where companies may produce energy in accord with a subjective, extremely vague public interest determination.<sup>76</sup>

## The Importance of Energy Production and Federalism

The outcome of a January 2018 meeting between Secretary of the Interior Ryan Zinke and Florida Governor Rick Scott (R) raises an important question about federalism and states' rights in the context of energy production. Florida currently has a legislative ban on oil and gas production off the Florida coast until 2022.<sup>77</sup> Shortly after the DOI released the new DPP, Secretary Zinke met with Governor Scott. Afterward Zinke tweeted that Florida would have no new oil and gas platforms off its coast, citing Governor Scott's position that the Sunshine State is heavily dependent on tourism for its economy.<sup>78</sup> The announcement prompted policymakers in other coastal states to request their own exemptions.<sup>79</sup> Secretary Zinke expressed intent to meet with all the relevant governors and the proposal entered the 60-day public comment period.<sup>80</sup> Although the Secretary's comment was not a formal action, it triggered an important discussion over federalism and the importance of state input.

Federal ownership and control of minerals offshore (and onshore) have taken decision rights away from states. Both economically and environmentally, states have proven to manage energy development prudently. For example, where states have authority over applications for permits to drill and conduct environmental reviews, oil and gas production has soared.<sup>81</sup> Energy companies have capitalized on the wealth of resources on private- and state-owned lands.<sup>82</sup> The energy industry and consumers alike benefit from most of the shale oil and shale gas—from which much of the domestic production is coming—not being under federal control.<sup>83</sup>

However, federal regulations and federal land ownership have rendered vast quantities of recoverable oil and natural gas onshore and offshore either inaccessible or costlier to extract.<sup>84</sup> Permitting energy extraction on federally owned land will result in even more oil and gas extraction and create jobs in areas that may not otherwise see such economic growth. On average, the federal processing of an application for permit to drill (APD) in the last year of the Obama Administration was 257 days, while state processing is typically 30 days or less.<sup>85</sup>

State control, local governance, and private-sector participation would result in more accountable, effective management. While the federal govern-

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76. Nor does it mean that state regulatory regimes will always make sound policy decisions. New York's ban on hydraulic fracturing and Florida's request for an exemption are examples of that.
  77. Laura B. Comay, "Five-Year Program for Federal Offshore Oil and Gas Leasing: Status and Issues in Brief," Congressional Research Service *Report for Congress*, No. 44692, January 8, 2018, <http://plus.cq.com/pdf/crsreports-5247017.pdf?1> (accessed January 25, 2018).
  78. Jennifer A. Dlouhy, "About-Face Tweet on Florida Drilling May Backfire on U.S. Agency," Bloomberg, January 10, 2018, <https://www.bloomberg.com/news/articles/2018-01-10/about-face-tweet-on-florida-drilling-may-backfire-on-u-s-agency> (accessed January 25, 2018).
  79. David Weigel, Darryl Fears, and John Wagner, "Decision to Exempt Florida from Offshore Drilling Prompts Bipartisan Uproar," *The Washington Post*, January 10, 2018, [https://www.washingtonpost.com/politics/decision-to-exempt-florida-from-offshore-drilling-prompts-bipartisan-uproar/2018/01/10/1f5befa4-f625-11e7-beb6-c8d48830c54d\\_story.html?utm\\_term=.810b0cc528fd](https://www.washingtonpost.com/politics/decision-to-exempt-florida-from-offshore-drilling-prompts-bipartisan-uproar/2018/01/10/1f5befa4-f625-11e7-beb6-c8d48830c54d_story.html?utm_term=.810b0cc528fd) (accessed January 25, 2018).
  80. *Ibid.*
  81. Marc Humphries, "U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas," Congressional Research Service *Report for Congress*, No. 42432, June 22, 2016, <https://fas.org/sgp/crs/misc/R42432.pdf> (accessed January 25, 2018).
  82. Institute for Energy Research, "Energy Production on Federal Lands Lags Behind Private and State Lands," July 21, 2015, <http://instituteeforenergyresearch.org/analysis/energy-production-on-federal-lands-lags-behind-private-and-state-lands/> (accessed March 6, 2018).
  83. U.S. Department of Energy, Energy Information Administration, "Maps: Exploration, Resources, Reserves, and Production," <https://www.eia.gov/maps/maps.htm> (accessed March 7, 2018).
  84. Mark Green, "Expanding Offshore Access Is Key to U.S. Energy Security," *Energy Today*, May 1, 2017, <http://energytomorrow.org/blog/2017/05/01/expanding-offshore-access-key-to-us-ener> (accessed January 25, 2018).
  85. News Release, "Zinke Signs Secretarial Order To Streamline Process For Federal Onshore Oil And Gas Leasing Permits," U.S. Department of the Interior, July 6, 2017, <https://www.doi.gov/pressreleases/zinke-signs-secretarial-order-streamline-process-federal-onshore-oil-and-gas-leasing> (accessed March 6, 2018).

ment can simply shift the costs of mismanagement to federal taxpayers, states have powerful incentives for better management of resources on federal lands. State governments can be more accountable to the people who will directly benefit from wise management decisions, especially as it pertains to natural resource management. According to a 2015 Property and Environment Research Council report, “On average, states generate more revenue per dollar spent than the federal government on a variety of land management activities, including timber, grazing, minerals, and recreation.”<sup>86</sup>

Moreover, incentives to invest in and steward the environment are stronger when people have direct ownership and responsibility.<sup>87</sup> The Bureau of Land Management (BLM) and Forest Service (FS) lands lost \$4.38 per acre from 2009–2013, while trust lands in four western states earned \$34.60 per acre.<sup>88</sup> In terms simply of recreation, states again do a better job of making a return on their investment. Idaho and Montana averaged \$6.86 per dollar spent on recreation on state trust lands; in contrast, the BLM earned \$0.20 and the FS \$0.28 per dollar spent, resulting in a net loss.<sup>89</sup> While states and local communities may not always make perfect decisions, the best environmental policies are site- and situation-specific.

Transferring decision rights to states and the private sector could lead to an industry that is more responsive to price changes. According to a working paper from Utah State University economist Eric C. Edwards,

Even though 99% of federal drilling permits are eventually approved, bureaucratic delay imposes costs through delay and dampening. Drilling response is slower, and thus wells on federal lands do not respond to high oil and gas prices as

quickly as private lands. These delays also lead to lower overall price responses—fewer overall wells drilled in response to price increases. Our findings indicate that the potential for improving the responsiveness of federal lands to price signals could be achieved through a reduction in delay in the BLM permitting process.<sup>90</sup>

While the study examines federal lands, similar logic could apply to federal waters.

Remedying this situation could compensate states appropriately through expanded royalty revenue collection. Drilling off states’ coasts and allowing them a larger share of the royalty revenue would encourage more state involvement in drilling decisions. Offshore drilling would also promote state and local government participation in allocating funds, helping to close deficits, enabling coastal restoration and conservation, and using funds for schools.

More financial stake and control over the regulatory process would encourage states to seriously consider the economic benefits and minimal risk associated with offshore energy production. In fact, as recently as 2013, both Democratic Senators from Virginia offered legislation to open parts of the Atlantic to offshore development.<sup>91</sup> A critical component of their legislation was to ensure Virginia received royalty revenues similar to states in the Gulf Coast region. States may choose not to develop offshore oil, gas, wind, or ocean energy projects, and forego the economic benefits increased energy production brings.

## Reforms for Congress and the Administration

The federal government’s approach to offshore energy needs comprehensive reform. Congress should amend the Outer Continental Shelf Lands

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86. Holly Fretwell and Shawn Regan, “Divided Lands: State vs. Federal Management in the West,” Property and Environment Research Center, PERC Public Lands Report, March 2015, Figure 1, [http://www.perc.org/sites/default/files/pdfs/150303\\_PERC\\_DividedLands.pdf](http://www.perc.org/sites/default/files/pdfs/150303_PERC_DividedLands.pdf) (accessed March 12, 2018).

87. For more information, see Nicolas D. Loris, “Chapter 5: Economic Freedom, Energy, and Development,” *2015 Index of Economic Freedom* (Washington, DC: The Heritage Foundation and Dow Jones & Company, Inc., 2015), <https://www.heritage.org/index/pdf/2015/book/chapter5.pdf>.

88. Fretwell and Shawn Regan, “Divided Lands: State vs. Federal Management in the West.”

89. *Ibid.*

90. Eric C. Edwards, Trevor O’Grady, and David Jenkins, “The Effect of Land Ownership on Oil and Gas Production: A Natural Experiment,” Working Paper, December 2016, <https://papers.sioe.org/paper/2022.html> (accessed January 25, 2018).

91. News Release, “Sens. Warner and Kaine Submit Legislation to Expand Offshore Energy Leases,” Office of Senator Mark R. Warner, May 22, 2013, [https://www.warner.senate.gov/public/index.cfm/pressreleases?ContentRecord\\_id=3508f696-8280-47d2-97aa-356ec3050f9b](https://www.warner.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=3508f696-8280-47d2-97aa-356ec3050f9b) (accessed January 25, 2018).

Act and Submerged Lands Act to authorize states to oversee commercial development of offshore energy consistent with protecting any national security needs. Furthermore, Congress should modify the Oil Pollution Act of 1990 to protect taxpayers and accurately assign risk for offshore energy activities. Specifically, Congress and the Administration should:

■ **Eliminate the five-year planning process.**

The current five-year planning process ignores how businesses operate in the face of rapid market and technological changes. Through legislation, Congress should eliminate the five-year plans and authorize the DOI to conduct lease sales if interest for development exists while weighing the consultation with heavily impacted states in offering those lease sales. Such a reform would allow the safe development of energy off America's coasts while empowering state stakeholders. Removing the lengthy and unnecessary planning process would create a system that is more responsive both to price changes and to the needs and interests of states. Bidding on the leases would not be exclusive to energy companies but open to all parties. If an organization wanted to bid on the lease for the purposes of environmental preservation, they would be permitted to do so. The permitting would also need to meet any Department of Defense requirements.

■ **Transfer permitting authority to states.**

After eliminating the five-year planning process, Congress and the Administration should overhaul the offshore leasing process by amending the OCSLA and SLA and transferring the environmental review and permitting process to the states. After the DOI issues the lease, the winning bidder would submit its exploration plan to the state for approval. The state regulatory program would be sufficient in lieu of federal requirements (e.g., from the Clean Air Act and the National Environmental Policy Act). To sup-

port their reviews, state regulators can request technical or safety expertise from the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement and use previous DOI environmental assessments. In addition, state regulators could work in conjunction with the Environmental Protection Agency and the U.S. Coast Guard to assess environmental impact and maritime safety and security. If a state deems it in its best interest to move forward with the DOI conducting the environmental review, the state could grant that authority to the DOI.<sup>92</sup> For instance, companies operating in the Gulf Coast may have familiarity and prefer to stick with the federal process.

■ **Increase royalty revenue for states.**

With the exception of Alaska, states receive 50 percent of the revenues generated by onshore oil and natural gas production on federal lands.<sup>93</sup> Congress should apply this allocation offshore as well, including for current operations in the Gulf of Mexico. If Congress successfully transfers the permitting and environmental review to the states, the states should receive an even larger share of the royalty revenue collected.

■ **Remove the liability cap and implement an industry-funded, privately managed insurance program.**

Now is the time for comprehensive reform of the oil spill liability system. The Oil Spill Liability Trust Fund's per-barrel tax expired at the end of 2017. Congress should amend the Oil Pollution Act of 1990 and establish an insurance and claims process that fully assigns risk of offshore oil and gas operations to the responsible party. The new system should fully compensate victims, protect taxpayers, and shield companies from frivolous lawsuits. Companies could meet the liability requirements through individual private insurance or voluntary insurance pools, or by some other means, including the pledging of company assets and pooling of resources among

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92. A state could develop a more rigorous environmental review and permitting process but could not "freeze out" companies. Several federal constitutional restrictions cabin a state's exercise of its sovereign power to enforce its laws to in-state conduct or out-of-state conduct with a direct in-state effect. The Commerce Clause expressly empowers Congress to regulate interstate commerce and also impliedly limits the states' regulatory power over that subject under the "Dormant Commerce Clause."

93. Elizabeth Malm, "Federal Mineral Royalty Disbursements to States and the Effects of Sequestration," The Tax Foundation, *Fiscal Fact Sheet* No. 371, May 30, 2013, <https://files.taxfoundation.org/legacy/docs/ff371.pdf> (accessed January 25, 2018).

individual companies. The private pool would foster incentives to accurately assess risk and protect taxpayers.<sup>94</sup>

## Conclusion

The Trump Administration's new Draft Proposed Program for leasing more Outer Continental Shelf property is a welcome sign that domestic energy production could be entering a bright new era. For decades, excessive regulations and bureaucratic inefficiencies have stymied oil and gas production and prevented the full effects of the energy boom. It can take anywhere from five to 10 years for a company to move from approval to production, with no guarantee that the permit obtained will lead to successful crude oil production.<sup>95</sup> Much of this is due to regulatory red tape and federal control over resource production. However, while the Department of the Interior's proposal is a step in the right direction, it is only one step. Congress and the Trump Administration should reform the entire leasing process so that offshore energy cannot be held hostage to the poor policies of previous administrations. Eliminating the five-year planning process and empowering states to manage offshore resource production would create a system that permits industry to better respond to changing market conditions. A more dynamic, dominant energy sector would provide a tremendous economic boon to coastal states while protecting the environment and providing affordable power for all American families and businesses.

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94. For more on this topic, see Nicolas D. Loris, Jack Spencer, and James Jay Carafano, "Oil Spill Liability: A Plan for Reform," Heritage Foundation Backgrounder No. 2446, August 2, 2010, <https://www.heritage.org/coal-oil-natural-gas/report/oil-spill-liability-plan-reform>.

95. American Petroleum Institute, "Offshore Leasing, Exploration, and Development Process," 2013, <http://www.api.org/-/media/Files/Oil-and-Natural-Gas/Exploration/Offshore/Offshore-Process-Feb-2013.pdf> (accessed January 25, 2018).