Constraining Federal Policy Whiplash on Public Lands

*Helen Lober**

Public lands in the United States are primarily administered by four federal agencies that enjoy broad management discretion under both Chevron *deference from courts and generous statutory mandates. While this discretion can promote flexibility and allow agencies to apply their expertise, deference to agencies is a double-edged sword. It also leads to policy whiplash. Whiplash occurs when agencies quickly reverse course on policy decisions, often in response to changing political tides. It has become ubiquitous in our modern political system, and land management agencies that must balance conflicting land use goals or follow multiple-use mandates are especially vulnerable to these policy swings. In the public lands context, whiplash appears in varied circumstances, from energy leasing on BLM lands, to road construction in National Forests, to snowmobile use in National Parks.*

This Note argues that frequent policy reversals are not a built-in requirement of democracy. Instead, whiplash harms both environmental and economic interests by making it more difficult to create stable public lands policy. The Note then explores potential solutions. It outlines some legislative options that could help limit whiplash despite current Congressional gridlock. Next, this Note suggests that courts may be able to mitigate policy whiplash. First, courts could make it harder for land management agencies to change their minds. Second, the major questions doctrine has a potential silver lining in this context; it could limit the agency discretion that creates whiplash, if the doctrine applies in the first place.

DOI: https://doi.org/10.15779/Z38BN9X430

* JD, University of California, Berkeley School of Law, 2023. Thank you to Professors Robert Infelise and Holly Doremus for their thoughtful comments, guidance and encouragement throughout the writing process. I would also like to thank the editorial staff of *Ecology Law Quarterly* for their invaluable feedback.

INTRODUCTION

Public lands serve critical environmental, economic, cultural, recreational, and historical purposes. They are also extensive. The federal government manages 28 percent of total U.S. land: roughly 640 million acres.[1] Four federal agencies administer over 600 million of those acres.[2] Three of these agencies, the Bureau of Land Management (BLM), the Fish and Wildlife Service, and the National Park Service (NPS) are housed under the U.S. Department of the Interior (Interior). The Forest Service falls under the U.S. Department of Agriculture.

These agencies often wield broad authority over public lands management. Their discretion derives from both statutory frameworks and from court doctrines like *Chevron* deference, which requires federal courts to defer to agency interpretations of ambiguous statutes if those interpretations are reasonable.

Delegating decision-making to agencies can promote regulatory flexibility and capitalize on agency expertise and specialization. But this deference cuts

1. CONG. RSCH. SERV., FEDERAL LANDS AND RELATED RESOURCES 1 (2023), https://crsreports.congress.gov/product/pdf/R/R43429.
2. *Id.*

both ways. *350 Montana v. Haaland*, a case where Interior approved a mine expansion while failing to properly evaluate the project's environmental harms, illustrates how broad agency discretion can contribute to vacillating federal policy on public lands.[3] This case is one example of many—policy whiplash is particularly prevalent in the public lands context.

This Note first argues that for public lands, contrary to perceptions that policy whiplash is inherent to the democratic process, policy whiplash is not a feature, but a bug: a flaw in our democracy that harms both environmental and economic interests by encouraging regulatory instability. In other words, sharp swings in public lands policy, especially those connected to changes in administrations, are problematic, not a built-in requirement of a democratic government. The Note then explores potential ways to limit agency discretion on public lands to promote more stable policy. Agencies are unlikely to heavily limit their own discretion, but both Congress and the courts have potential to limit whiplash and bring balance to the public lands arena.

I. THE SUPREME COURT'S SHIFTING VIEWS ON AGENCY DEFERENCE

A. Development of the Major Questions Doctrine

Traditionally courts have given agencies like BLM, the Forest Service, and NPS broad discretion to interpret ambiguous statutes. This framework is known as *Chevron* deference.[4] The *Chevron* decision received little attention when first released,[5] but has since become one of the most well-known cases in administrative law.[6] *Chevron* deference requires that courts defer to an agency's interpretation of a statute if the statute is ambiguous and the agency's interpretation is reasonable.[7] The doctrine allows federal agencies, not courts, to fill in the blanks when Congress is silent or ambiguous on a subject.

But over time, the doctrine has become clouded with ambiguities as the Supreme Court limited its application and developed exceptions.[8] One recent complication is the major questions doctrine. The major questions doctrine directs courts to limit agency discretion when an agency's statutory interpretation

3. *See* 350 Montana v. Haaland, 29 F.4th 1158, 1163 (9th Cir. 2022).

4. James Kunhardt & Anne Joseph O'Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS (Aug. 18, 2022), https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/.

5. Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 276–77 (2014).

6. Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REG. NOTICE AND COMMENT BLOG (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/.

7. Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 842–44 (1984).

8. VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., CHEVRON DEFERENCE: A PRIMER, SUMMARY (2017), https://sgp.fas.org/crs/misc/R44954.pdf ("Application of the Chevron doctrine in practice has become increasingly complex.").

involves questions of major "economic and political significance."[9] Because Congress does not "hide elephants in mouseholes,"[10] Congress must clearly authorize these kinds of sweeping agency actions. However, the Court has not yet defined the doctrine's contours, and has inconsistently applied it within the *Chevron* context.[11]

Nonetheless, the Supreme Court has signaled increased interest in the major questions doctrine in recent years. Although the Court rejected the Environmental Protection Agency (EPA)'s implied invocation of the major questions doctrine in *Massachusetts v. EPA*,[12] recent cases signal the Court is starting to view the doctrine more favorably.[13]

Collectively, these cases create ambiguity about how courts will apply the doctrine in the future, and they do not directly explain the doctrine's relationship to the *Chevron* or nondelegation doctrines.[14]

B. West Virginia v. EPA

Recently, *West Virginia v. EPA* indicated that the Supreme Court may be poised to embrace the major questions doctrine more wholeheartedly.[15] This case has inspired widespread concern, especially in the environmental community, that the major questions doctrine will severely constrain agencies' ability to regulate.[16]

In *West Virginia*, the major questions doctrine explicitly appeared in a Supreme Court majority opinion for the first time.[17] The Court used the doctrine to strike down the Clean Power Plan and held that Congress did not grant EPA

9. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

10. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

11. CONG. RSCH. SERV., THE SUPREME COURT'S "MAJOR QUESTIONS" DOCTRINE 2 (2022) ("The Court has arguably applied the major questions doctrine in ad hoc manner, with cases applying the doctrine at different points in the *Chevron* two-step analysis or, at times, as a reason to not engage in that analysis.").

12. Massachusetts v. EPA, 549 U.S. 497, 511–12, 528–35 (2007).

13. In *King v. Burwell*, the Court found that whether the Affordable Care Act's tax credits were available on Federal Exchanges was a question of "deep 'economic and political significance'" that Congress had not delegated to the Internal Revenue Service. King v. Burwell, 576 U.S. 473, 485–86 (2015). In *Alabama Association of Realtors v. Department of Health and Human Services*, the Court blocked enforcement of the Centers for Disease Control and Prevention's eviction moratorium because the action had vast economic and political significance and therefore required a clear statutory basis. Alabama Ass'n of Realtors v. Dep't of Health and Human Servs., 141 S. Ct. 2485, 2489–90 (2021). In *National Federation of Independent Business v. OSHA*, a concurring opinion by Justice Gorsuch mentioned the major questions doctrine and argued that the Occupational Safety and Health Administration was addressing "a question of vast national significance" without congressional authorization. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

14. *See* CONG. RSCH. SERV., *supra* note 11, at 2.

15. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

16. *See, e.g.*, Lisa Heinzerling, *Climate Change in the Supreme Court*, 386 NEW ENG. J. MED. 2255, 2256 (2022) ("In Chevron's place, the conservative justices have installed a powerful and — for public health and the environment — dangerous new approach to statutory interpretation.").

17. Jonathan H. Adler, *West Virginia v. EPA: Some Answers about Major Questions*, CATO SUPREME COURT REVIEW 37, 37 (2022).

authority to set emissions caps via generation shifting.[18] Generation shifting requires plants to shift electricity production from higher-emitting sources to lower-emitting sources.[19] EPA claimed authority to do this under Clean Air Act section 111. But the Court explained that it was "'highly unlikely that Congress would leave' to 'agency discretion' the decision of how much coal-based generation there should be over the coming decades."[20] Instead, Congress would likely have intended to make this decision itself.[21] According to the Court, it certainly would not have delegated this power through the Clean Air Act's section 111, which the Court described as a "backwater"[22] and "gap-filler" provision.[23] In short, "a merely plausible textual basis for the agency action" was not enough, and EPA could not point to "clear congressional authorization" to regulate via generation shifting.[24] Further, Congress had "considered and rejected" the Clean Power Plan several times.[25]

Although the Court directly stated "[t]his is a major questions case,"[26] it did not clarify exactly what defines a major question. During oral argument, Chief Justice John Roberts acknowledged "there's some disagreement about how to apply" the doctrine and stated that courts might consider whether the agency action is "kind of surprising."[27] In the opinion, the Court "referred to at least half a dozen different and apparently nonexhaustive factors . . . including the economic and political significance of the relevant issues."[28]

One commentator concluded that the outcome of *West Virginia* "could be a federal government with little ability to tackle many of the biggest issues society faces."[29] Although the case could have serious implications both inside and outside the environmental sphere, future applications of the doctrine for public land management are still unpredictable, because the majority opinion failed to clarify guidelines or principles for application of the doctrine.

C. The Nondelegation Doctrine

An even more extreme separation-of-powers principle lurks in the shadows of the major questions doctrine. The nondelegation doctrine would permit courts

18. *West Virginia*, 142 S. Ct. at 2610, 2616.
19. *Id.* at 2603.
20. *Id.* at 2613.
21. *Id.*
22. *Id.*
23. *Id.* at 2601.
24. *Id.* at 2609.
25. *Id.* at 2614.
26. *Id.* at 2610.
27. Transcript of Oral Argument at 83:16–25, 84:1–12, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (No. 20-1530); Heinzerling, *supra* note 16, at 2256.
28. Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, ATLANTIC (July 26, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/.
29. *Id.*

to invalidate laws that impermissibly delegate legislative power to the executive branch. *J.W. Hampton, Jr. & Co. v. United States* outlined the "intelligible principle" standard that still governs nondelegation today.[30] The Court held that Congress was allowed to delegate power to the president to adjust tariffs on imported goods through the Tariff Act of 1922 because Congress had provided an "intelligible principle" to guide the executive branch's discretion.[31]

The doctrine has a complicated history,[32] but the Supreme Court has not used it to strike down a federal law since 1935.[33] In *Panama Refining Co. v. Ryan*, the Court found Congress could not delegate the power to prohibit the transport of petroleum produced in excess of state limits under the National Industrial Recovery Act.[34] The Court found Congress gave the president "unlimited authority to determine the policy" and did not provide appropriate guiding standards.[35] It also held that there were "limits of delegation which there is no constitutional authority to transcend."[36]

The nondelegation doctrine may be poised to make a comeback. Justice Gorsuch has stated that "for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine."[37] One scholar argued that the conservative Supreme Court justices are hinting that "the Court should define legislative power . . . by looking at the importance of the relevant policy issues."[38] Further, Justice Gorsuch's concurring opinion in *National Federation of Independent Business v. OSHA*, joined by Justice Thomas and Justice Alito, emphasized the limited powers of the federal government and further claimed that if the statute in question had clearly given OSHA the power to impose a vaccine or testing mandate on employers with at least one hundred workers, the "law would likely constitute an unconstitutional delegation of legislative authority."[39]

In short, *West Virginia* has signaled a potential end to the *Chevron* era. At the very least, it has created substantial uncertainty about how much discretion agencies can expect from the Court going forward. Although this development is concerning given our current reliance on the administrative state that blossomed under *Chevron*, there are benefits to limiting agency discretion in the context of land management policy.

30. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).
31. *Id.*
32. *See generally* Kurt Eggert, *Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary*, 24 CHAP. L. REV. 707 (2021).
33. Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV'T L.J. 379, 380 (2021).
34. Panama Refining Co. v. Ryan, 293 U.S. 388, 405–06, 433 (1935).
35. *Id.* at 415.
36. *Id.* at 430; *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935).
37. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).
38. Heinzerling, *supra* note 28.
39. *National Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

II. WHEN AGENCY DISCRETION IS PROBLEMATIC: 350 MONTANA V. HAALAND

Delegating decision-making to agencies has significant benefits, but it can also lead to counterproductive instability. In addition, it is arguably undemocratic.[40]

350 Montana v. Haaland illustrates how agency discretion can play a role in policy whiplash, leading to problematic environmental outcomes. In this case, environmental groups challenged Interior's approval of a coal mine expansion in south-central Montana, arguing that Interior violated the National Environmental Policy Act (NEPA).[41]

NEPA requires that federal agencies "take a hard look at the environmental consequences of their actions."[42] To determine whether an agency complied with NEPA, courts use the Administrative Procedure Act's (APA) "governing standard."[43] Courts must set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[44]

Here, Interior's Office of Surface Mining Reclamation and Enforcement ignored evidence of the environmental costs of the mine's greenhouse gas (GHG) emissions. Plaintiffs argued that Interior acted "arbitrarily and capriciously" because the agency quantified the socioeconomic benefits of the mine expansion but failed to use the social cost of carbon metric to quantify the costs.[45] The social cost of carbon metric calculates GHG damages by estimating the dollar cost of each additional ton of carbon dioxide released into the atmosphere.[46]

A drawn-out process followed, where Interior completed several environmental assessments (EAs), and repeatedly issued findings of no significant impact. The third EA directly acknowledged "dozens of sobering and unchallenged observations concerning the effects of global warming and climate change on the environment."[47] Still, Interior found that the mine expansion would have no significant impacts on the climate or environment.[48]

Eventually, the divided Ninth Circuit held that Interior violated NEPA. Interior's third EA did not provide "a convincing statement of reasons to explain why the Mine Expansion's impacts are insignificant."[49] Although Interior

40. *See, e.g.*, Yascha Mounk, *The Undemocratic Dilemma*, 29 J. OF DEMOCRACY 98, 101–02 (2018) ("[I]n a growing number of policy areas, elected legislators have been supplanted as the key decision makers by 'independent agencies' with the authority to formulate policy, entities that are remarkably free from oversight either by the legislature or by the elected head of government. Once established, these bodies take on a life of their own, gaining the authority to design, implement, and at times even enforce broad rules in such key areas as finance and environmental protection.").

41. 350 Montana v. Haaland, 29 F.4th 1158, 1163–65 (9th Cir. 2022).

42. 350 Montana v. Bernhardt, 443 F. Supp. 3d 1185, 1191 (D. Mont. 2020) (quoting Neighbors of Cuddy Mtn. v. Alexander, 303 F.3d 1059, 1070 (9th Cir. 2002)).

43. *350 Mont. v. Haaland*, 29 F.4th at 1168.

44. *Id.*

45. *Id.* at 1165.

46. *Id.* at 1175.

47. *Id.* at 1166.

48. *Id.* at 1167.

49. *Id.* at 1174.

claimed the impact would be "minor," it did not cite any scientific evidence that supported this conclusion.[50] The Ninth Circuit concluded that Interior's third EA relied on an "opaque comparison," "hid the ball," and "frustrated NEPA's purpose."[51]

However, the Court made clear that Interior was not required to use the social cost of carbon metric to evaluate the mine expansion's impact on remand.[52] The decision stated that Interior must use a methodology that satisfies NEPA by providing high quality information and accurate scientific analysis but explained it would not prescribe "a specific metric for the agency to use."[53] The Court did not vacate Interior's approval of the mine expansion or require Interior to prepare an Environmental Impact Statement (EIS).[54] After the Ninth Circuit remanded to the District Court, Interior's Office of Surface Mining Reclamation and Enforcement decided on its own to prepare an EIS to address the Court's concerns, a process expected to take about twenty months.[55] Subsequently, the District Court vacated Interior's approval of the mine, explaining that "it is not a foregone conclusion" that the agency will reach the same decision after properly preparing an EIS.[56] Interior opposed vacatur, arguing that "equities favor maintaining the status quo" while the EIS is completed.[57]

The Ninth Circuit intervened to limit some of Interior's discretion in *350 Montana*, but the agency retains significant flexibility and appears free to uphold its approval of the mine expansion, as long as it uses a more comprehensive EIS analysis to do so. Although discretion within the NEPA context is its own beast, the analysis in *350 Montana* reflects a larger trend in which courts provide agencies with excessive leeway that leads to policy whiplash. Further, this broad agency discretion is not limited to coal leasing—agency power to define policy on public lands allows for whiplash in all aspects of land management.

III. WHIPLASH IS A BUG, NOT A FEATURE

Policy whiplash occurs when agencies quickly reverse course on policy decisions, often in response to a new presidential administration. Policy whiplash is distinct from the more moderate changes agencies make over time in response to shifting societal values, and it is also distinct from the occasional rapid change that happens in response to a new scientific advancement. Instead, whiplash refers to the phenomena of *frequent* policy changes. It is primarily produced by changing political tides.

---

50. *Id.* at 1170.
51. *Id.* at 1174.
52. *Id.* at 1176.
53. *Id.*
54. *Id.* at 1177.
55. 350 Montana v. Haaland, No. CV 19-12-M-DWM, 2023 WL 1927307, at *3, *4 (D. Mont. Feb. 10, 2023).
56. *Id.* at *5, *8.
57. *Id.* at *9.

The executive branch has taken on an increasingly important policymaking role as a result of congressional gridlock.[58] Presidents now "rely on federal agencies to further their agendas."[59] But overreliance on administrative law results in policy instability, which can make it difficult for agency staff and members of the regulated community to plan for compliance. Unpredictability also potentially harms environmental interests. Unsurprisingly, lands "protected primarily by executive action . . . are most vulnerable to a change in executive policies."[60] *Chevron* deference is at the heart of these back-and-forth policy shifts.[61] Allowing agencies to change their minds and reinterpret regulations with relative ease allows for more frequent policy reversals.

Although policy whiplash is not new, it is becoming more common in many contexts.[62] Many people have critiqued the Trump administration's aggressive rollbacks and repeals of previous regulations as "norm-breaking," but other commentators have argued that the Biden administration has used the same strategies, sometimes even more aggressively, to undo Trump's legacy.[63] These aggressive strategies may now be "part of the standard transition plan for a new president," because continued congressional gridlock encourages administrations to use agencies to make policy, and because the Trump administration both highlighted the utility of these tactics and began to normalize them.[64]

Why is whiplash so problematic? Policy whiplash makes it more difficult to create reasonable, stable public lands policy. This regulatory instability is counterproductive for both environmental and industry interests. Both sides would benefit from enduring regulation that is not subject to dramatic change every few years.

First, adjusting regulations often consumes significant time and resources. Agencies must follow certain procedures to issue, amend, and repeal agency rules. The APA, various statutes, executive orders, and individual agency rules all impose requirements on the rulemaking process. For example, in notice-and-comment rulemaking, agencies usually must issue notice of a proposed rulemaking, provide opportunity for public comment, and respond to those

58. Jonathan S. Masur, *Regulatory Oscillation*, 39 YALE J. ON REG. 744, 749 (2022).

59. Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 270 (2019).

60. John D. Leshy, *Public Land Policy After the Trump Administration: Is This a Turning Point?*, 31 COLO. NAT. RES., ENERGY & ENV'T L. REV. 472, 477 (2020).

61. Masur, *supra* note 58, at 755.

62. Philip A. Wallach, *The Pendulum is the Pits: Can the United States Make Enduring Regulations?*, BROOKINGS CTR. ON REGUL. AND MKTS. (Dec. 21, 2020), https://www.brookings.edu/research/the-pendulum-is-the-pits-can-the-united-states-make-enduring-regulations/ ("Regulation itself has . . . become a far more partisan issue.").

63. Bethany A. Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 YALE J. ON REG. 1100, 1102–03 (2022).

64. *Id.* at 1154.

comments, a time-consuming process which can take years.[65] If controversial, rulemakings can lead to litigation, another enormous investment required by agencies.

The Trump administration rolled back almost 100 environmental rules alone in four years.[66] EPA implemented the "bulk" of these rollbacks,[67] which ranged from reversing pesticide bans to rescinding the Clean Power Plan.[68] One author noted that the Trump administration often "delayed or suspended existing rules with little attention to legal authority, process, or reason giving," even though this disregard for administrative law subjected them to legal risk.[69]

The Biden administration is now attempting to undo many of these rollbacks. These frequent reversals waste agency time and resources, regardless of which administration is in place. For example:

> In terms of the climate-related regulations that the previous administration has rolled back, and the additional environmental regulations that could have been implemented by a different administration, EPA has lost more than four years. As the new administration comes in, it will take time to develop a new record to support climate-related regulation. And the new rules will have to go through formal proposal, take comments, respond to those comments, and then become a final rule. And there may even be a court review after that. So it may be a delay of at least six years—maybe even more—associated with the four-year interlude of the Trump administration.[70]

If agencies must spend all their time revoking or reinstating the previous administration's rules, it becomes increasingly difficult to make forward progress and implement policies that are not simply reactionary.

Environmental interests are further harmed because it is almost impossible to put the genie back in the bottle. Several commentators have argued that regulatory flip-flops are especially problematic in the climate change context because they delay the urgent action needed to prevent GHG releases and erode confidence in U.S. leadership, making it difficult for other countries to trust the United States to commit to international agreements.[71] However, whiplash can

---

65. *See generally* OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

66. Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html.

67. *Id.*

68. Cayli Baker, *The Trump Administration's Major Environmental Deregulations*, BROOKINGS (Dec. 11, 2020), https://www.brookings.edu/blog/up-front/2020/12/15/the-trump-administrations-major-environmental-deregulations.

69. Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13, 15–16 (2018).

70. Arthur G. Fraas & Richard D. Morgenstern, *How Permanently Can One Presidential Administration Impact Environmental Policy?*, RESOURCES FOR THE FUTURE (Feb. 25, 2021), https://www.resources.org/archives/how-permanently-can-one-presidential-administration-impact-environmental-policy/.

71. Masur, *supra* note 58, at 748, 754; Albert C. Lin, *Climate Policy Buffers*, 39 YALE J. ON REG. 699, 715, 717 (2022).

have serious consequences in other public lands contexts too. Once land is mined or drilled, these on-the-ground environmental impacts cannot be undone. Once a road or pipeline is partially built, the initial impacts to the landscape are not reversible. Discussing the Roadless Rule, one author explained, "[i]t only takes one road to end an area's roadlessness."[72] Another author critiqued the current system, explaining that roads "cannot be built and then removed after every four-year election cycle."[73]

Policy whiplash on public lands does not always lead to on-the-ground impacts. In the Tongass National Forest, despite policy swings, "[f]ortunately, the bulldozers and chainsaws have not yet come to the roadless sections."[74] But even in these cases, "[w]hatever the policy or legal merits of any of these rules, this is no way to make policy in the world's leading economy."[75] Further, the longer these battles continue, the likelier it is that some on-the-ground impacts will eventually occur.

Although policy whiplash often creates delay and environmental groups sometimes use delay strategically,[76] this is ultimately not an effective method for environmental protection. Advocates should use delay as a secondary approach to prevent severe environmental harms, not as the main strategy. When it comes to federal energy policy, delay tactics will not allow the United States to meet crucial climate and emissions goals.[77] The United States is already failing to implement climate action that will sufficiently limit global temperature increases,[78] and further delay will only cause additional harm. Instead of relying on policy whiplash to create delay, implementing more stable environmental policy, even if it involves difficult compromises, could both allow for proactive regulation, and serve to insulate those regulations from hostile administrations.

Whiplash is also problematic for members of the regulated community, and as a result, may hurt the economy. Partially built pipelines or roads are economically wasteful. For example, although 8 percent of the Keystone pipeline

72. Monica Voicu, *At a Dead End: The Need for Congressional Direction in the Roadless Area Management Debate*, 37 ECOLOGY L.Q. 487, 513 (2010).

73. Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENV'T L. & LITIG. 223, 281 (2004).

74. Ken Rait, *The Roadless Rule Is Good for the Tongass National Forest—and the Economy*, PEW (Jan. 12, 2021), https://www.pewtrusts.org/en/research-and-analysis/articles/2021/01/12/the-roadless-rule-is-good-for-the-tongass-national-forest-and-the-economy.

75. Wallach, *supra* note 62.

76. For example, environmental groups use litigation and protests to slow or stop the construction of pipelines. *See* Erik Ortiz, *Atlantic Coast Pipeline Canceled After Years of Delays, Accusations of Environmental Injustice*, NBC NEWS (July 6, 2020), https://www.nbcnews.com/news/us-news/atlantic-coast-pipeline-canceled-after-years-delays-accusations-environmental-injustice-n1232987.

77. *See* Masur, *supra* note 58, at 748.

78. Benjamin Storrow, *Hope Dims that the U.S. Can Meet 2030 Climate Goals*, SCIENTIFIC AMERICAN (July 8, 2022), https://www.scientificamerican.com/article/hope-dims-that-the-u-s-can-meet-2030-climate-goals/; Press Release, UN Climate Change, Climate Plans Remain Insufficient: More Ambitious Action Needed Now (Oct. 26, 2022), https://unfccc.int/news/climate-plans-remain-insufficient-more-ambitious-action-needed-now.

was constructed, the project is now permanently cancelled.[79] Flip-flopping regulations lead to stranded assets and discourage future investments. While environmentalists may view challenges to oil and gas development positively, frequent regulation changes also harm the kind of development necessary for the green transition, such as investment in renewable energy transmission lines.[80] Overall, "regulatory uncertainty is the bane of sound planning and long-term capital investments, of the sort that are crucial in the power sector and others."[81] For example, when President Trump's attempt to roll back the Obama-era methane rules was challenged in court, oil and gas companies and some states argued that the rule's burden "is even worse now . . . because they spent most of last year assuming that the Trump administration's initial efforts to sideline the rule would succeed."[82] Judge Skavdahl, an Obama appointee, concluded that it did not make sense to require oil and gas companies to comply with the old rule "when the agency is in the middle of crafting a broader revision of the rule that would roll back the key provisions opposed by industry."[83] Doing so "provides minimal public benefit, while significant resources may be unnecessarily expended."[84]

Finally, not all the impacts of whiplash are tangible. Rapid policy changes can harm agency legitimacy and public confidence in agency expertise, as well as the federal government's relationship with states.[85]

The phenomenon of policy whiplash has become so embedded in our system that many commentators and observers contend this is just how government functions. Some would argue that policy whiplash is a feature, not a bug, of the American political system. The dissent in *Organized Village of Kake v. U.S. Department of Agriculture* argued that the political pendulum is "simply the way the modern political process works."[86] In addition, policy that changes along with presidential administrations may reflect the will of the people. However, one scholar has noted that elections involve a complex web of issues

79. Melissa Denchak & Courtney Lindwall, *What Is the Keystone XL Pipeline?*, NAT. RES. DEF. COUNCIL (Mar. 15, 2022), https://www.nrdc.org/stories/what-keystone-pipeline; Reuters Fact Check, *Though Keystone XL Pipeline Had Secured Most of its Funding, It Was Only 8% Constructed*, REUTERS (Mar. 12, 2021), https://www.reuters.com/article/factcheck-keystonepipelinexl-builtandpai/fact-check-though-keystone-xl-pipeline-had-secured-most-of-its-funding-it-was-only-8-constructed-idUSL1N2LA2SQ.

80. Additional electrical transmission lines are badly needed. *See* Catherine Clifford, *Why It's So Hard to Build New Electrical Transmission Lines in the U.S.*, CNBC CLIMATE POLICY (Feb. 21, 2023), https://www.cnbc.com/2023/02/21/why-its-so-hard-to-build-new-electrical-transmission-lines-in-the-us.html.

81. Wallach, *supra* note 62.

82. Ellen M. Gilmer, *Methane Whiplash: Enviros Prep Appeal as Court Ices Rule*, E&E NEWS (Apr. 5, 2018), https://www.eenews.net/articles/methane-whiplash-enviros-prep-appeal-as-court-ices-rule/.

83. *Id.*

84. *Id.*

85. Lin, *supra* note 71, at 714–16.

86. Organized Vill. of Kake v. U.S. Dept. of Agric., 795 F.3d 956, 980 (9th Cir. 2015) (Smith, J., dissenting).

that make accountability difficult to attain, and in recent years presidents sometimes fail to win the popular vote.[87] Further, "[w]hile we ought to expect some kind of policy pendulum that tracks changes in partisan control of the White House, the truth is that things have not always been this volatile."[88] Presidential administrations have increasingly come to rely on "unilateral executive actions,"[89] leading to more frequent policy changes. While some swings may be inherent in a democratic society based around elections, Part IV illustrates how frequent these shifts have become.[90] In addition, we cannot afford to allow overly strong policy whiplash when it erodes faith in potential for legislative reform, a key requirement of a healthy democracy. In a reinforcing loop, undoing a previous administration's regulatory programs causes administrations to focus on unilateral executive actions that redesign existing regulations to fit within political preferences.[91] This takes away resources from the difficult but necessary process of working towards bipartisan policies (in both the executive and legislative branches) that will last longer than four years.

IV. POLICY WHIPLASH ON PUBLIC LANDS

More than ever, federal lands are a political football. The following Subparts outline the way policy whiplash plays out in decisions about energy leasing, road construction and logging, and snowmobile use in National Parks. Although whiplash is widespread, certain land management agencies are especially prone to it. In contrast to agencies which have one primary purpose, like NPS's mandate of conservation, BLM and the Forest Service are more vulnerable to the whiplash phenomenon because they have to balance conflicting land use goals. BLM manages large tracts of land under a multiple-use, sustained-yield mandate that requires the agency to account for "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values."[92] The agency must protect the often-conflicting interests of preservation and development of natural resources. The Forest Service's statutory mandates similarly require it to manage land within its control for multiple uses.[93]

87. Lin, *supra* note 71, at 713.
88. Wallach, *supra* note 62.
89. *Id.*
90. *See infra* Part IV.
91. Wallach, *supra* note 62.
92. Federal Land Policy and Management Act, 43 U.S.C. § 1702(c).
93. National Forest Management Act of 1976, 16 U.S.C. § 1604(e)(1); Multiple Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528–529.

A. Energy Leasing

1. Coal

350 Montana v. Haaland is part of a larger history of unstable coal policy across recent presidential administrations. The Biden administration has sent mixed messages about coal policy, on the heels of President Trump's attempt to reverse Obama-era regulations that discouraged coal leasing on federal lands.

The Obama administration attempted to shift federal energy policy away from coal.[94] The Clean Power Plan established national limits on carbon emissions from power plants for the first time.[95] In 2016, Secretary of the Interior Sally Jewell announced that Interior would pause new coal leasing while it reviewed the federal coal program to ensure fair return to taxpayers and appropriate accounting of the program's impact on the environment.[96]

But the Trump administration quickly changed course on coal policy. In 2017, Secretary of the Interior Ryan Zinke ended the Obama-era moratorium on coal leasing, after it had been in place for only fourteen months.[97] Secretary Zinke also declared "the war on coal is over."[98] He finalized the sale of a 6,175 acre coal lease in Utah that contained 56 million tons of coal,[99] and approved a lease for 9.2 million tons of coal in Wyoming.[100] Although environmental groups challenged this reversal of the Obama-era moratorium and BLM was eventually required to review the action under NEPA, the agency found there would be no

94. *See* Robinson Meyer, *Obama's Big New Move on Coal*, ATLANTIC (Jan. 15, 2016), https://www.theatlantic.com/technology/archive/2016/01/coal-obama-federal-land/424422/.

95. Press Release, White House, Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants (Aug. 3, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards.

96. Press Release, U.S. Dep't of the Interior, Secretary Jewell Launches Comprehensive Review of Federal Coal Program (Jan. 15, 2016), https://www.doi.gov/pressreleases/secretary-jewell-launches-comprehensive-review-federal-coal-program.

97. The Order instituting the coal moratorium was signed on January 15, 2016, and the Order revoking the moratorium was signed on March 29, 2017. Secretarial Order No. 3338, Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program (Interior Jan. 15, 2016), https://www.doi.gov/sites/doi.gov/files/elips/documents/archived-3338_-discretionary_programmatic_environmental_impact_statement_to_modernize_the_federal_coal_program.pdf; Secretarial Order 3348, Concerning the Federal Coal Moratorium (Interior Mar. 29, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/so_3348_coal_moratorium.pdf.

98. Ken Silverstein, *Trump's Interior Department Says the 'War On Coal' Is Officially Over*, FORBES (Mar. 29, 2017), https://www.forbes.com/sites/kensilverstein/2017/03/29/trumps-interior-department-says-the-war-on-coal-is-officially-over/?sh=2bb2b773d270.

99. Press Release, Bureau of Land Mgmt., Secretary Zinke Issues Lease for 56 Million Tons of Coal in Central Utah (Mar. 15, 2017), https://www.blm.gov/press-release/secretary-zinke-issues-lease-56-million-tons-coal-central-utah.

100. Dylan Brown, *Trump scrapped leasing moratorium, but demand has shrunk*, E&E NEWS (Aug. 29, 2017), https://www.eenews.net/articles/trump-scrapped-leasing-moratorium-but-demand-has-shrunk/.

significant environmental impact and doubled down on its original decision to end the moratorium.[101]

In some ways, the Biden administration acquiesced to Trump-era coal policy. The new administration "functionally supported the Trump administration policy by continuing to process applications for new leases and defending the policy in court."[102] Then, in April 2021, Secretary Haaland issued Secretary's Order 3398, which rescinded the Zinke order, but did not reinstate the Jewell coal leasing moratorium.[103] In August 2022, the moratorium was formally reinstated by a U.S. district court after environmental groups sued to challenge BLM's NEPA analysis.[104] The judge ruled that BLM must complete a more comprehensive NEPA review of Zinke's order before new coal leasing on federal lands could resume.[105]

On one hand, the implementation, reversal, and reinstatement of the coal leasing moratorium may have had minimal impact in practice.[106] The U.S. power sector is moving away from coal on its own for economic reasons like shifts in natural gas prices.[107] Although the Clean Power Plan never went into effect, coal use has dropped dramatically and the plan's 2030 target has already been met.[108] However, the speed at which the sector moves away from coal will impact how much environmental damage is done.[109] The see-saw described above only slows the process. While coal production will likely continue to drop over time for economic reasons, "the pace of change may well be the ballgame" when it comes to climate.[110] Thus, stable coal leasing moratoriums and other regulatory policies

101. Bobby Magill & Ellen M. Gilmer, *Interior Lifts Moratorium on Federal Coal Leasing*, BLOOMBERG LAW (Feb. 26, 2020).

102. *Coal Leasing Moratorium Opens Door to a Cleaner Energy Future*, EARTHJUSTICE (Aug. 23, 2022), https://earthjustice.org/brief/2022/coal-leasing-moratorium-opens-door-to-a-cleaner-energy-future.

103. *See* Secretarial Order No. 3398, Revocation of Secretary's Orders Inconsistent with Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Interior Apr. 16, 2021), https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3398-508_0.pdf.

104. Citizens for Clean Energy v. U.S. Dep't of the Interior, No. 4:17-cv-00030-BMM, 2022 WL 3346373, at *1, *7 (D. Mont. Aug. 12, 2022).

105. *Id.* at *6.

106. *See* Brown, *supra* note 100.

107. *Id.*

108. Jeff McMahon, *Coal Is Collapsing Faster Than Ever, Leaving U.S. Power Cleaner*, FORBES (May 11, 2020), https://www.forbes.com/sites/jeffmcmahon/2020/05/11/carbon-intensity-of-us-power-plunges-as-coal-collapses-faster/?sh=278b6e78264c; Eric Schaeffer & Tom Pelton, GREENHOUSE GASES FROM POWER PLANTS, 2005-2020: RAPID DECLINE EXCEEDED GOALS OF EPA CLEAN POWER PLAN at 1 (2021), https://environmentalintegrity.org/wp-content/uploads/2021/02/Greenhouse-Gases-from-Power-Plants-2005-2020-report.pdf; Niina H. Farah, *How the High Court Ruling Changes EPA and Clean Electricity*, E&E NEWS (July 1, 2022), https://www.eenews.net/articles/how-the-high-court-ruling-changes-epa-and-clean-electricity.

109. Steven Mufson, *The U.S. Is Ditching Coal. The Supreme Court Ruling Won't Change That.*, WASH. POST (July 1, 2022), https://www.washingtonpost.com/climate-environment/2022/07/01/supreme-court-epa-coal-climate-change.

110. *Id.* (quoting Richard Lazarus).

that stay in place for the long haul are crucial to ensure the transition away from coal happens as quickly as possible.

2. Oil and Gas

The oil and gas industry has also experienced policy swings. First, leasing decisions that affect which onshore and offshore lands are available for oil and gas development have been affected as administrations change. For example, President Obama withdrew submerged lands off the coast of Alaska and in parts of the North Atlantic from new oil and gas development using the Outer Continental Shelf Lands Act.[111] This withdrawal affected over 118 million acres of offshore areas.[112] Although presidents may not have authorization to reverse withdrawals under the Outer Continental Shelf Lands Act,[113] in 2017 President Trump issued an executive order that attempted to revoke the Obama-era withdrawals anyway.[114] A court held that the portions of the executive order that revoked the previous withdrawals were invalid, but the decision was eventually vacated for procedural reasons.[115]

Since President Biden has entered office, the "landscape of federal leasing has been rapidly evolving on a monthly basis."[116] On inauguration day, Interior issued Secretarial Order 3395, which limited its own authority to issue lease authorizations for sixty days.[117] A week after inauguration, President Biden issued Executive Order 14008 to address the climate crisis.[118] The order directed

111. Press Release, White House, Presidential Memorandum—Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing (Dec. 20, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/12/20/presidential-memorandum-withdrawal-certain-portions-united-states-arctic; Press Release, White House, Presidential Memorandum—Withdrawal of Certain Areas off the Atlantic Coast on the Outer Continental Shelf from Mineral Leasing (Dec. 20, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/12/20/presidential-memorandum-withdrawal-certain-areas-atlantic-coast-outer; Darryl Fears & Juliet Eilperin, *President Obama bans oil drilling in large areas of Atlantic and Arctic oceans*, WASH. POST (Dec. 20, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/20/president-obama-expected-to-ban-oil-drilling-in-large-areas-of-atlantic-and-arctic-oceans.

112. Press Release, U.S. Dep't of the Interior, Secretary Jewell Applauds President's Withdrawal of Atlantic and Arctic Ocean Areas from Future Oil and Gas Leasing (Dec. 20, 2016), https://www.doi.gov/pressreleases/secretary-jewell-applauds-presidents-withdrawal-atlantic-and-arctic-ocean-areas-future.

113. *See* League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013, 1030–31 (D. Alaska 2019), *vacated and remanded sub nom.* 843 Fed. Appx. 937 (9th Cir. 2021).

114. Exec. Order No. 13795, 82 Fed. Reg. 20815 (Apr. 28, 2017).

115. On appeal, the Ninth Circuit vacated the *League of Conservation Voters* decision as moot. League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013 (D. Alaska 2019), *vacated as moot*, 843 Fed. Appx. 937 (9th Cir. 2021).

116. Garrett Kral et al., *Analysis: US Federal Leasing Strategy Will Continue to Evolve*, OFFSHORE (Oct. 12, 2022), https://www.offshore-mag.com/regional-reports/us-gulf-of-mexico/article/14284179/hunton-andrews-kurth-llp-analysis-us-federal-leasing-strategy-will-continue-to-evolve.

117. Secretarial Order No. 3395, Temporary Suspension of Delegated Authority (Interior Jan. 20, 2021), https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3395-signed.pdf.

118. Exec. Order No. 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Jan. 27, 2021).

Interior to pause oil and gas leasing on public lands and offshore waters "[t]o the extent consistent with applicable law."[119] This would give the federal government time to review the country's oil and gas leasing policies.

Secretary Haaland also reversed previous policy on several specific oil and gas issues. In April 2021, she revoked orders that promoted oil and gas leasing (Secretarial Order 3350), opened up areas in Alaska's National Petroleum Reserve for development (Secretarial Order 3352), and directed BLM to expedite the permitting process and to hold quarterly lease sales (Secretarial Order 3354).[120] She also created a Climate Task Force to implement "the review and reconsideration of Federal oil and gas leasing and permitting practices in light of the Department's broad stewardship responsibilities over the public lands and in offshore waters."[121]

A series of lawsuits quickly followed Interior's pause on oil and gas leasing.[122] The U.S. District Court for the Western District of Louisiana issued a preliminary injunction in June 2021 that stopped enforcement of the pause and required Interior to continue lease sales.[123] The Fifth Circuit threw out the injunction for lack of specificity and remanded to the district court.[124] One day later, the district court again invalidated the pause on new drilling on federal lands and waters in thirteen states, ruling that the leasing moratorium was beyond the president's authority.[125] In September 2022, the U.S. District Court for the District of Wyoming found in a different case that Interior's postponement of first-quarter 2021 lease sales was not arbitrary, capricious, or an abuse of discretion.[126] The Wyoming order cited a string of oil and gas leasing cases dating back to 2019 and noted that "[f]rustratingly, this case illustrates the continued ping ponging from one executive administration to the next, confirming the administrative state we find ourselves in today."[127]

As a further complication, the Biden administration itself appears to be reversing course on some elements of oil and gas policy. Thus, whiplash occurs not only between different presidential administrations, but even within a single administration. The 2022 Inflation Reduction Act requires Interior to hold oil

119. *Id.*

120. Secretarial Order No. 3398, Revocation of Secretary's Orders Inconsistent with Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Interior Apr. 16, 2021), https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3398-508_0.pdf.

121. Secretarial Order No. 3391, Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-Making Process (Interior Apr. 16, 2021), https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3399-508_0.pdf.

122. *See* Western Energy Alliance v. Biden, No. 21-CV-13-SWS, 2022 WL 18587039, at *1 n.2 (D. Wyo. Sept. 2, 2022).

123. Louisiana v. Biden, 543 F.Supp.3d 388, 395–396, 419 (W.D. La. 2021), *vacated and remanded* 45 F.4th 841 (5th Cir. 2022).

124. Ellie Borst, *Judge Revives Block on Biden Leasing Pause*, E&E NEWS (Aug. 19, 2022), https://www.eenews.net/articles/judge-revives-block-on-biden-leasing-pause/.

125. *Id.*

126. *Western Energy Alliance*, 2022 WL 18587039, at *13.

127. *Id.* at *1 n.2.

and gas auctions in the Gulf of Mexico and Alaska.[128] The Act also ties Interior's ability to lease public lands for renewable energy development to requirements that Interior lease certain amounts of public land for oil and gas development.[129] This appears to be a shift from President Biden's initial pause on all new oil and gas leasing, although it is true that the pause was not intended to be permanent. In April 2022, Interior announced it would offer roughly 144,000 acres for oil and gas leasing, which was 80 percent less than the roughly 733,000 acres that were previously nominated.[130] Whiplash within a single administration may be especially harmful because it could allow a president to take credit for pausing offshore drilling and then quietly change course to assuage oil and gas interests.

3. Methane Rules

BLM's methane rules have also been subject to policy whiplash. BLM's current policies for venting and flaring natural gas are contained in a Notice (NTL-4A) that is now over forty years old.[131] Under the Obama administration, BLM issued a 2016 Rule which replaced NTL-4A and addressed the burn or release of natural gas on federal and Indian lands.[132] However, because of litigation challenges by industry and several states, BLM did not fully implement the rule.[133] Then in 2018, the Trump administration published a new rule, "effectively rescinding the 2016 Rule."[134] The 2018 Rule was challenged in court by environmental groups and a different group of States, but then another U.S. district court vacated the remaining 2016 rule, with the result that NTL-4A continues to regulate this issue.[135] In November 2022, under President Biden, BLM published yet another new proposed rule addressing venting, flaring, and leaks on public lands.[136]

B. The Roadless Rule

Policy whiplash also occurs in the public lands context outside of the energy leasing world. The Forest Service policy on road building is one example. The Forest Service has significant discretion over the lands it manages, despite a variety of statutes that implement planning requirements and multi-use mandates

128. Nichola Groom & Josie Kao, *U.S. Sets March Date for Gulf of Mexico Drilling Auction*, REUTERS (Oct. 20, 2022), https://www.reuters.com/markets/us/us-sets-march-date-gulf-mexico-drilling-auction-2022-10-20/.

129. Inflation Reduction Act § 50265, 43 U.S.C. § 3006 (2022).

130. Press Release, U.S. Dept. of the Interior, Interior Department Announces Significantly Reformed Onshore Oil and Gas Lease Sales (Apr. 15, 2022), https://www.doi.gov/pressreleases/interior-department-announces-significantly-reformed-onshore-oil-and-gas-lease-sales.

131. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation, 87 Fed. Reg. 73,588 (proposed Nov. 30, 2022).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

on the agency. This discretion, along with changing political tides, led to the Roadless Rule saga.

At the end of the Clinton administration, the Forest Service published the Roadless Area Conservation Rule (the 2001 Rule).[137] The 2001 Rule limited road construction and logging in 58.5 million acres of undeveloped national forest land nationwide, including in the Tongass National Forest.[138]

For years afterwards, the 2001 Rule caused controversy and uncertainty as roadless area regulations shifted with administrations and faced legal challenges. After the Bush administration took over, implementation of the 2001 Rule was delayed multiple times.[139] Then in 2005, the Forest Service adopted a new rule that was more favorable to development (the State Choice Rule, or 2005 Rule).[140] State governors could now petition the Secretary of Agriculture to request state specific rules for roadless area management.[141] Various lawsuits ensued.[142] In 2006, a district court reinstated the Clinton-era 2001 Rule until appropriate NEPA review was conducted.[143]

During this process, Alaska, along with several other states, requested state-specific roadless policies. Alaska first asked for an exemption from the 2001 Rule in 2003. The Bush administration temporarily exempted the Tongass National Forest from the 2001 Rule in a settlement,[144] but a court later overturned this exemption.[145] In 2018, Alaska asked the U.S. Department of Agriculture for a state-specific roadless rule, and in 2020 the Forest Service published a new rule that again exempted the Tongass National Forest from the 2001 Rule.[146] Then under President Biden, the Department of Agriculture announced it was planning to repeal the 2020 Rule.[147] In January 2023, the Biden administration repealed the Rule and restored protections to 9.37 million acres

137. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3243 (Jan. 12, 2001).

138. *Id.*

139. 2001-2006 ROADLESS AREA CONSERVATION POLICY CHRONOLOGY, WILDERNESS SOC'Y, https://www.sierraforestlegacy.org/Resources/Conservation/LawsPoliciesRegulation/KeyForestServicePolicy/Roadless/Roadless-WildernessSocietyChronology.pdf (last updated Dec. 15, 2006).

140. *See generally* Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005).

141. ANNE A. RIDDLE & ADAM VANN, CONG. RSCH. SERV., FOREST SERVICE INVENTORIED ROADLESS AREAS 6 (2020).

142. *Id.* at 6–8.

143. California ex rel. Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 883, 913–19 (N.D. Cal. 2006).

144. Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136 (Dec. 30, 2003).

145. *See* Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska, 86 Fed. Reg. 66,498 (proposed Nov. 23, 2021).

146. *Id.*

147. Press Release, U.S. Dept. of Agric., USDA Announces Steps to Restore Roadless Protections on Tongass National Forest (Nov. 19, 2021), https://www.usda.gov/media/press-releases/2021/11/19/usda-announces-steps-restore-roadless-protections-tongass-national.

of roadless areas in Tongass National Forest, "the largest intact tract of coastal temperate rainforest on earth."[148]

The role of national politics as a driver of the Roadless Rule story is obvious. In one Ninth Circuit case, both the majority and dissent explicitly recognized that changing administrations contributed to the U.S. Department of Agriculture's reversal on the Roadless Rule between 2001 and 2003.[149]

As the Forest Service see-sawed, Congress eventually introduced the Roadless Area Conservation Act, codifying the 2001 Roadless Rule. The Act passed the House in 2022,[150] but has not yet passed the Senate.

C. Snowmobile Use in National Parks

Snowmobile use in national parks has also been subject to dramatic policy swings. Snowmobiling in national parks was first allowed in 1963, and, as snowmobile use became more popular, NPS issued Yellowstone's first official winter-use policy in 1968.[151] Concerns grew about the impact of snowmobiles on park resources, and NPS eventually prepared an EIS addressing snowmobile use and trail grooming. This was the beginning of a decades-long conflict over appropriate snowmobile use in the parks.

Take Yellowstone National Park as an example. At the end of the Clinton administration, NPS issued the 2001 Snowcoach Rule, which phased out snowmobiling in Yellowstone and called for elimination of almost all snowmobile use by the 2003–2004 winter season.[152] The Bush administration immediately stayed the Clinton-era rule and issued a new rule in 2003 that allowed snowmobile use in the park. According to one author, this reversal "seemed merely to reflect a shift of the political tides."[153] Advocates challenged the rule in court, and in *Fund for Animals v. Norton*, the District Court for the District of Columbia was "faced with the review of an agency decision that amounts to a 180 degree reversal from a decision on the same issue made by a previous administration."[154]

---

148. Press Release, U.S. Dep't of Agric., Biden-Harris Administration Finalizes Protections for Tongass National Forest (Jan. 25, 2023), https://www.usda.gov/media/press-releases/2023/01/25/biden-harris-administration-finalizes-protections-tongass-national.

149. Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 968, 979–80 (9th Cir. 2015).

150. Press Release, U.S. Representative Ruben Gallego, Passed: Legislation to Address Drought and Protect Americans from Wildfires with Gallego Provisions (Aug. 1, 2022), https://rubengallego.house.gov/media-center/press-releases/passed-legislation-address-drought-and-protect-americans-wildfires.

151. *Winter Use Planning and Litigation*, NAT'L PARK SERV., https://www.nps.gov/yell/learn/management/winter-use-planning-and-litigation.htm (last updated Sept. 19, 2019); Michael D. Snyder, Statement Before The Subcommittee On National Parks Of The House Committee On Resources, On Snowmobile Use In The National Park System (Apr. 12, 2005), https://www.doi.gov/ocl/nps-snowmobile-use.

152. Special Regulations, Areas of the National Park System, 66 Fed. Reg. 7260 (Jan. 22, 2001).

153. Hillary Prugh, *To Sled or Not To Sled: The Snowmobiling Saga in Yellowstone National Park*, 11 HASTINGS ENV'T L.J. 149, 152 (2005).

154. Fund for Animals v. Norton, 294 F. Supp. 2d 92, 105 (D.D.C. 2003).

After fifteen years, in 2013 NPS finally issued a rule that "established long-term management of winter use in Yellowstone"[155] and regulated oversnow vehicles by limiting snowmobile and snowcoach use to a certain number of groups each day.[156] Although NPS ultimately issued a rule that appears to have long-term staying power, it came after years of wasted efforts. Further, the rule remains vulnerable to a future administration that wishes to make dramatic changes.

V. POTENTIAL SOLUTIONS TO WHIPLASH

This Part explores potential ways to stabilize public lands whiplash within the legislative, executive, and judicial branches.

A. Legislative Approaches

Congress could stabilize public lands whiplash by passing new laws. Laws passed by Congress enjoy a legitimacy that agency rules and regulations lack. Legislation is also often harder to undo than agency policy.[157] Due to political gridlock, Congress is unlikely to make sweeping changes to well-known federal statutes anytime soon. But, according to one author, "the sense that legislation is impossible to push through threatens to become a self-fulfilling prophecy."[158] Although comprehensive legislation addressing especially polarizing issues like climate change seems highly unlikely,[159] issues like public land acquisition and conservation tend to be more bipartisan.[160] The Inflation Reduction Act and other recent bills affecting public lands indicate that Congress is capable of improving public lands policy in important ways.

155. *Winter Use Management*, NAT'L PARK SERV., https://www.nps.gov/yell/learn/management/winter-use-management.htm (last updated Nov. 22, 2022); Scott Kirkwood, *Winter Wonderland*, NAT'L PARKS CONSERVATION ASS'N (2014), https://www.npca.org/articles/1024-winter-wonderland.

156. NAT'L PARK SERV, *supra* note 155.

157. *See* Dallas Burtraw, *Is Regulation or Legislation More Durable? With Climate Policy, the Answer Is Not So Simple*, RESOURCES FOR THE FUTURE BLOG (Dec. 28, 2020), https://www.resources.org/common-resources/is-regulation-or-legislation-more-durable-with-climate-policy-the-answer-is-not-so-simple/.

158. Wallach, *supra* note 62.

159. Masur, *supra* note 58, at 749.

160. "[A]lmost nine out of 10 Americans believe it is 'quite important' or 'extremely important' that the federal government protect and maintain natural lands. More than 80 percent believe that doing so is 'patriotic', and seven out of 10 said they would describe themselves as 'conservationists.' A 2019 poll surveying voters in the western states found that more than two-thirds – a majority of both Republicans and Democrats – believe that conservation on public lands should be a government priority." James Horrox, *Finding Common Ground in an Age of Division: How Conservation Bridges the Partisan Divide*, FRONTIER GROUP (Sept. 8, 2020), https://frontiergroup.org/articles/finding-common-ground-age-division-how-conservation-bridges-partisan-divide.

1. The Inflation Reduction Act

The Inflation Reduction Act, if supplemented with additional legislative changes, could limit energy policy whiplash by heavily incentivizing a certain type of energy policy.

Among other goals, the Inflation Reduction Act aims to "spur investment in clean energy through tax incentives, grants, and other funding mechanisms."[161] The Act's tax incentives and investment programs could have important on-the-ground impacts by helping consumers access clean energy, providing tax credits to manufacturers who produce wind, solar and clean energy minerals, and encouraging both private and government investment in a range of clean energy projects.[162] The Act also directs Interior to move forward with several oil and gas lease sales and updates BLM's oil and gas leasing program, "including increasing the minimum royalty rate, minimum bid, and rental rates; assessing a fee for the filing of Expressions of Interest (EOIs); and eliminating non-competitive leasing."[163] Additionally, the Act states that Interior and the Bureau of Ocean Energy Management cannot issue rights-of-way on federal lands for wind and solar development unless the agencies also hold oil and gas lease sales covering certain amounts of land.[164] Because the Act only requires Interior to offer the land for sale, not to actually sell it, the pro-development impact of this section may be less significant than environmental advocates fear.[165] Further, many of the updates to fees and royalties in the oil and gas leasing program, along with the end of non-competitive leasing, will increase the cost of oil and gas development and could reduce industry's desire to acquire new leases.[166] However, many environmental groups oppose the Act's investment in fossil fuels in the first place, along with its failure to properly address environmental justice concerns.[167]

---

161. *The Inflation Reduction Act's Implications for Biden's Climate and Environmental Justice Priorities*, HARV. L. SCH., ENV'T AND ENERGY L. PROGRAM (Aug. 12, 2022), https://eelp.law.harvard.edu/2022/08/ira-implications-for-climate-ej-priorities.

162. *See generally* THE WHITE HOUSE, BUILDING A CLEAN ENERGY ECONOMY: A GUIDEBOOK TO THE INFLATION REDUCTION ACT'S INVESTMENTS IN CLEAN ENERGY AND CLIMATE ACTION (2023), https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf; Bella Isaacs-Thomas, *What the Inflation Reduction Act Does for Green Energy*, PBS (Aug. 17, 2022), https://www.pbs.org/newshour/science/what-the-inflation-reduction-act-does-for-green-energy.

163. Press Release, U.S. Dep't of the Interior, Interior Department Moves Forward with Leasing Provisions Mandated in Inflation Reduction Act (Oct. 6, 2022), https://www.doi.gov/pressreleases/interior-department-moves-forward-leasing-provisions-mandated-inflation-reduction-act.

164. Inflation Reduction Act § 50265, 43 U.S.C. § 3006 (2022).

165. Romany M. Webb, *Surprise: Inflation Reduction Act Makes Oil and Gas Development on Federal Land Less Attractive*, SABIN CENTER CLIMATE LAW BLOG (Aug. 17, 2022), https://blogs.law.columbia.edu/climatechange/2022/08/17/surprise-inflation-reduction-act-makes-oil-and-gas-development-on-federal-land-less-attractive/.

166. *Id.*

167. Rebecca Hersher, *The Spending Bill Will Cut Emissions, but Marginalized Groups Feel They Were Sold Out*, NPR (Aug. 17, 2022), https://www.npr.org/2022/08/17/1117725655/the-spending-bill-will-cut-emissions-but-marginalized-groups-feel-they-were-sold.

In the future, Congress could further increase fees under the oil and gas program, or augment agency authority to license solar and wind rights-of-way by reducing the amount of land that must be offered for oil and gas leasing in return. Over time, these changes could reduce whiplash by heavily incentivizing a certain type of energy policy, making change through subsidies which are often less controversial than more coercive regulatory rules.

However, leasing and energy policy issues are particularly contentious because they implicate climate change. A recent survey found that the public was split on the Biden administration's climate policies: "49% of U.S. adults say the Biden administration's policies on climate change are taking the country in the right direction, while 47% say these climate policies are taking the country in the wrong direction."[168] As a result, significant legislative change seems unlikely in this arena. For example, it seems highly improbable that Congress will ban new oil and gas leasing or rewrite BLM's guiding principles to explicitly promote renewable energy. Still, the Inflation Reduction Act suggests legislative solutions could limit whiplash by incentivizing certain policies and disincentivizing others.

2. Other Recent Public Lands Bills

Several other recent laws have potential to limit public lands whiplash, highlighting that wilderness designations and conservation funding can often still find broad support on both sides of the aisle.

In 2019, Congress passed the John D. Dingell Jr. Conservation, Management, and Recreation Act, marking "a rare moment of national agreement."[169] The House passed the bill with a 363-62 vote; the Senate with a 92-8 vote.[170] President Trump signed the Act, which designated over one million acres of new wilderness, created national monuments, increased recreation access to public lands, and reauthorized the Land and Water Conservation Fund, which funds public land acquisition.[171]

In 2020, another major lands bill was passed. The Great American Outdoors Act, the "single largest investment in public lands in U.S. history," created a

168. Brian Kennedy, Alec Tyson & Cary Funk, *Americans Divided Over Direction of Biden's Climate Change Policies*, PEW RSCH. CENTER (July 14, 2022), https://www.pewresearch.org/science/2022/07/14/americans-divided-over-direction-of-bidens-climate-change-policies.

169. Charles Babington, *In Bipartisan Move, Congress Passes the Largest Conservation Bill in a Decade*, PEW TRUST MAG. (Oct. 11, 2019), https://www.pewtrusts.org/en/trust/archive/fall-2019/in-bipartisan-move-congress-passes-the-largest-conservation-bill-in-a-decade.

170. *John D. Dingell, Jr. Conservation, Management, and Recreation Act: Actions Overview*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/senate-bill/47/actions.

171. *Bipartisan Bill Signed to Protect Wilderness, Boost Conservation Programs*, WILDERNESS SOCIETY BLOG (Mar. 12, 2019), https://www.wilderness.org/articles/blog/bipartisan-bill-signed-protect-wilderness-boost-conservation-programs; *John D. Dingell, Jr. Conservation, Management, And Recreation Act*, BUREAU OF LAND MGMT., https://www.blm.gov/about/laws-and-regulations/dingell-act (last visited May 3, 2023); *Land and Water Conservation Fund*, BUREAU OF LAND MGMT., https://www.blm.gov/programs/land-and-water-conservation-fund (last visited May 3, 2023).

National Parks and Public Land Legacy Restoration Fund to address overdue maintenance needs on public lands and provided permanent funding for Land and Water Conservation Fund.[172]

Bills like this can limit whiplash by allowing a democratically-elected legislature to insulate certain public lands from debates about energy leasing, snowmobile use, or road construction and logging. The Dingell Act indicates that there is still political appetite to designate lands under the most protective wilderness standard, and the Great American Outdoors Act suggests bipartisan support for the conservation projects funded by the Land and Water Conservation Fund.[173] The bills are also striking examples of bipartisan legislation during a time when Congress is highly polarized on most national issues.[174] Public lands have long provided common ground for Americans on both sides of the political aisle, with one scholar noting that "for nearly all of the nation's history, the protection movement has been fundamentally bipartisan."[175] These bills offer some hope for a return to that bipartisan history.

Finally, bills that specifically address controversial issues could curb instability. For example, although the Roadless Area Conservation Act mentioned in Part IV has yet to pass the Senate, it could stabilize endlessly changing roadless policy.

B. Executive Branch Approaches

Although it may seem counterintuitive to expect agencies to regulate themselves, there is evidence that long-term staff acted as a stabilizing force as the Trump administration attempted to aggressively reverse Obama-era environmental policy. Agencies can "defend their own . . . interests" and "less visible institutional players—civil servants and bureaucrats—can exercise discretion in both the interpretation and enforcement of institutional rules and norms."[176] Agencies primarily resisted Trump-era reversals by ensuring accurate information was "available for the courts, other institutions, and the public to evaluate and use."[177] For example, long-serving agency staff included important scientific and economic information in Trump-era regulatory documents that paved the way for future regulatory challenges.[178] One scholar notes that EPA included data about the negative health impacts of the Affordable Clean Energy

172. *Great American Outdoors Act*, DEP'T OF INTERIOR, https://www.doi.gov/about-gaoa (last visited May 3, 2023).

173. *See Land and Water Conservation Fund*, DEP'T OF INTERIOR, https://www.doi.gov/lwcf (last visited May 3, 2023).

174. *See* Drew Desilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/.

175. JOHN D. LESHY, DEBUNKING CREATION MYTHS ABOUT AMERICA'S PUBLIC LANDS 22 (2018).

176. Elizabeth Bomberg, *The Environmental Legacy of President Trump*, 42 POL'Y STUD. 628, 633 (2021).

177. Lin, *supra* note 71, at 724–25.

178. *Id.*; Bomberg, *supra* note 176, at 633.

Rule that became part of the rulemaking record although it was not included in the final rule.[179]

C. Judicial Approaches

In addition to Congress, courts may be able to mitigate policy whiplash. First, courts could implement stricter review of agency policy reversals. Second, the major questions doctrine has potential to limit the agency discretion that contributes to continually reversed regulations, if the doctrine applies in the first place.

1. Judicial Review When Agencies Change Their Minds

Courts could limit public lands whiplash by making it harder for land management agencies to change their minds. Although agencies already must justify revocations of rules or policies, in practice this standard is not especially demanding. Courts will usually give deference to changed agency interpretations as long as the agency provides a reasoned explanation for the new interpretation.[180]

The Supreme Court has held that an agency that rescinds or revokes a regulation must "supply a reasoned analysis for the change."[181] In *FCC v. Fox*, the Court clarified that there is no "heightened standard" of review when agencies reverse course.[182] The Court explained that an agency usually must "display awareness that it *is* changing position" and show "good reasons for the new policy."[183] But the agency does not need to show that the reasons justifying the new policy are "better" than the reasons justifying the old one.[184] A "more detailed justification" is only required in certain circumstances, like when the new policy relies on facts that contradict the facts underlying the old policy or when the old policy has created important reliance interests.[185]

In one case that was part of the drawn-out litigation around the Roadless Rule, the Ninth Circuit found that the Forest Service violated the APA by failing to give a reasonable explanation for its decision to reverse course in 2003 and exempt the Tongass National Forest from the Roadless Rule. In the opinion, the court noted that "[e]lections have policy consequences. But, *State Farm* teaches that even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation."[186] Although one author has argued that this decision set a "dangerous precedent" by replacing

179. Lin, *supra* note 71, at 724–25.
180. *See* F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 514–16 (2009).
181. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).
182. *F.C.C.*, 556 U.S. at 514.
183. *Id.* at 515.
184. *Id.*
185. *Id.* at 515–16.
186. Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 968 (9th Cir. 2015).

agency discretion with judicial discretion,[187] given the current state of policy whiplash, judicial intervention could institute valuable guardrails on agency decision-making. Ideally, such intervention would be limited to procedural issues and not extend to substance.

Unlike the Ninth Circuit, the Eighth Circuit in *Mausolf v. Babbitt* did not require an especially robust explanation for agency reversals under the APA.[188] The Eighth Circuit deferred to NPS's rapidly changing decisions about snowmobile use in Voyageurs National Park. The Voyageurs National Park enabling legislation gave the Secretary of the Interior permission to allow snowmobiling in the park. In 1991, NPS issued regulations allowing snowmobiling on most lake surfaces and some trails, but by 1992 the agency had already reversed this decision and severely limited snowmobiling in the park to protect gray wolves.[189] The court found the administrative record was "sufficient to provide a rational foundation" for the NPS's new decision, despite the agency's reliance on anecdotal observations and a lack of "definitive" evidence.[190]

Instead of making it harder for agencies to change their minds, courts could also limit the degree of discretion agencies have in the first place. This is where the major questions doctrine comes into play.

2. The Major Questions Doctrine

The major questions doctrine limits agency discretion to interpret ambiguous statutes and, as a result, could curb policy whiplash on public lands. For the major questions doctrine to apply to an agency setting public lands policy, a court would have to find that the question is one of major economic or political significance and that Congress has not clearly authorized the agency's actions. If Congress speaks clearly to a policy issue, the major questions doctrine does not apply.

This Subpart discusses whether the major questions doctrine could apply to agency decisions regarding energy leasing on public lands. To start, it will briefly outline the statutes delegating leasing authority to land management agencies.

BLM's oil and gas leasing authority comes from several statutes. BLM determines what lands are eligible for oil and gas leasing through resource management plans, which guide the agency's land management decisions. The land use planning process is regulated under BLM's organic statute, the Federal Land Policy and Management Act of 1976 (FLPMA), and "requires extensive collaboration with local, state and tribal governments, the general public, local user groups and various industries on how the Federal lands will be used and

187. Katherine Reynolds, *Alternative Reasoning: Why the Ninth Circuit Should Have Used NEPA in Setting Aside the Tongass Exemption*, 43 ECOLOGY L.Q. 381, 405, 410 (2016).

188. *See* Mausolf v. Babbitt, 125 F.3d 661, 665, 667–69 (8th Cir. 1997).

189. *Id.* at 664.

190. *Id.* at 669–70.

protected during both the landscape level cumulative and site-specific NEPA processes."[191]

FLPMA's congressional declaration of policy recognizes both environmental protection and extractive use as land management goals.[192] As one author notes, the Act then "established a statutory framework for governing the uses of BLM land" to try to resolve this "inherent conflict."[193] The statute's text directs the agency to manage land resources for "multiple-use and sustained yield."[194] The text also authorizes the Secretary of the Interior to "promulgate rules and regulations to carry out the purposes of this Act."[195] The Secretary must inventory all public lands and develop land use plans. In doing so, the Secretary must, among other goals, "consider present and potential uses of the public lands" and "weigh long-term benefits to the public against short-term benefits."[196]

Once BLM has determined what lands are available for leasing, BLM's specific authority for leasing oil and gas comes from the Mineral Leasing Act of 1920, as amended (MLA), and the Mineral Leasing Act for Acquired Lands of 1947, as amended (MLAAL**)**. Later, the Federal Onshore Oil and Gas Leasing Reform Act of 1987 amended the MLA and directed that "[l]ease sales shall be held for each State where eligible lands are available at least quarterly and more frequently if the Secretary of the Interior determines such sales are necessary."[197] In short, the Secretary of the Interior has "broad authority to determine lands that are eligible and available for leasing."[198]

The MLA and MLAAL also grant Interior authority to lease coal.[199] BLM interacts with several other federal agencies around coal leasing, including Office of Surface Mining Reclamation and Enforcement, which oversees mine permitting and reclamation. Coal lease sales "traditionally occur based on industry interest."[200]

---

191. *Land Use Planning and NEPA Compliance*, BUREAU OF LAND MGMT., https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/land-use-planning (last visited May 2, 2023).

192. Federal Land Policy and Management Act, 43 U.S.C. § 1701(a)(8), (a)(12).

193. Roger Flynn, *Daybreak on the Land: The Coming of Age of The Federal Land Policy and Management Act of 1976*, 29 VT. L. REV. 815, 819 (2005).

194. 43 U.S.C. § 1712(c)(1).

195. *Id.* § 1740.

196. *Id.* § 1712(c)(5), (c)(7).

197. Neil Kornze, *Statement of Director: Recent Management of Oil and Gas Lease Sales by the Bureau of Land Management*, DEP'T OF INTERIOR (Mar. 23, 2016), https://www.doi.gov/ocl/blm-lands-leasing.

198. Press Release, U.S. Dep't of the Interior, Interior Department Announces Significantly Reformed Onshore Oil and Gas Lease Sales (Apr. 15, 2022), https://www.doi.gov/pressreleases/interior-department-announces-significantly-reformed-onshore-oil-and-gas-lease-sales.

199. In addition, FLPMA's Resource Management Plans identify areas that can be considered for coal leasing in the first place. Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 201; Mineral Leasing Act for Acquired Land of 1947, as amended, 30 U.S.C. § 351; Federal Land Policy and Management Act, 43 U.S.C. § 1712.

200. *To Examine Energy Development on Federal Lands, Focusing on the Current Status of The Department of the Interior's Onshore Oil and Gas Leasing Program*: *Hearing Before Senate Comm. on*

As demonstrated above, Congress provided Interior with coherent guidance about how to exercise its energy leasing discretion. This contrasts with the Court's discussion of the Clean Air Act in *West Virginia*, where the statutory directives were unclear. In *West Virginia*, the Court was concerned that EPA had "'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'"[201] It was not plausible that Congress had given EPA the authority to adopt a framework that would "force a nationwide transition away from the use of coal" under a provision like section 111.[202] Instead, a "decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[203]

But when it comes to managing public lands, Interior is not, on the face of it, expanding its regulatory authority when it makes leasing decisions; it has been exercising wide discretion on this matter for decades. Further, Interior is not setting energy policy under a narrow, gap-filler provision, but instead under the major statutory provisions and mandates of FLPMA, MLA, and MLAAL.[204] If Interior's governing statutes clearly authorize it to set and change energy policy, this would not be an elephant through a mousehole, but an elephant through an elephant-hole. As a result, the major questions doctrine may not even apply to the energy leasing context.

However, although FLPMA, MLA and associated statutes do give Interior broad discretion to lease lands and manage energy policy, it is not obvious that Congress was clearly authorizing the agency to repeatedly open and close lands to leasing under political pressure. Instead, as a former BLM Director noted, under FLPMA, Interior should "make decisions that are balanced and forward looking."[205] Although the agency may use its discretion to strike a balance between competing uses of public lands (including mineral extraction, protection of wildlife and environment, and recreation), striking a balance does not mean swinging back and forth between wildly different land-management policies. Further, there is still a great deal of uncertainty surrounding the scope of the major questions doctrine. There is only one majority opinion discussing the doctrine (*West Virginia*). How or if the Court will expand the doctrine remains unclear. Legally sound or not, the Court could find that a seemingly clearcut statute like FLPMA is ambiguous regarding delegation of authority.

Energy and Nat. Res., 117th Cong. 3 (Apr. 27, 2021) (statement of Nada Wolff Culver, Deputy Dir. of Pol'y and Programs, Bureau of Land Mgmt.).

201. West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

202. *Id.* at 2616.

203. *Id.*

204. Federal Land Policy and Management Act, 43 U.S.C. § 1701; Mineral Leasing Act of 1920, 30 U.S.C. § 201; Mineral Leasing Act for Acquired Lands of 1947, 30 U.S.C. § 351.

205. Neil Kornze, A Foreword by the Director, Federal Land Policy and Management Act of 1976, as amended (2016).

If these statutes do not clearly authorize Interior to set and frequently change energy policy, then the major questions doctrine will probably apply because energy policy issues are very likely to have major economic and political significance. It is not hard to imagine a court deciding that agency decisions about leasing oil, gas and coal on public lands hold great economic and political weight. One author has argued that "[n]early every nationwide agency regulation has deep economic and political significance."[206] Decisions about U.S. energy policy impact the economy by affecting jobs, domestic oil and coal production, and gas prices. The oil and gas industry supports "nearly 8 percent of our nation's Gross Domestic Product."[207] Energy decisions also have political significance because they are tied to national and international debates about GHG emissions and climate change.

Although many environmental advocates perceive the major questions doctrine as a threat to progressive reform, if the doctrine applies to agency decisions about energy policy, a silver lining is that this doctrine could limit inappropriate agency discretion. The United States needs stable energy policy.[208] Agencies should not be frequently opening and closing public lands to oil, gas, and coal leasing, altering methane rules, or reversing roadless policy in National Forests.[209] The major questions doctrine could limit agency flip-flopping on important questions and promote stability that benefits both the environment and the economy. While in an ideal world, this would be Congress's job, courts may have to step in under the current state of political gridlock.[210]

Of course, applying a new structure of judicial oversight to public lands management would raise many questions. If courts step in to limit agency discretion, will they simply freeze the last administration's policies in place? Another concern: does the major questions doctrine simply trade agency discretion for judicial discretion, given that there is no clear test for when an agency decision counts as a major question? While these are potential issues, preferably court intervention would encourage or force Congress to act, a dynamic that has played out in the past.[211] Further, given current political polarization, if Congress does create new public lands policy it is likely to be

206. Harvey L. Reiter, *Expanding 'Major Questions Doctrine' Risks Regulatory Stability*, BLOOMBERG LAW (July 12, 2022), https://news.bloomberglaw.com/environment-and-energy/expanding-major-questions-doctrine-risks-regulatory-stability.

207. OIL & NATURAL GAS CONTRIBUTION TO U.S. ECONOMY FACT SHEET, AM. PETROLEUM INST. (2018), https://www.api.org/news-policy-and-issues/taxes/oil-and-natural-gas-contribution-to-us-economy-fact-sheet.

208. Masur, *supra* note 58 at 754–55.

209. *See supra* Part III.

210. *See* Rob Garver, *Experts See Gridlock, Dysfunction Likely in Incoming Congress*, VOA NEWS (Nov. 16, 2022), https://www.voanews.com/a/experts-see-gridlock-dysfunction-likely-in-incoming-congress/6838134.html.

211. Rachel M. Cohen & Marcia Brown, *Congress Has the Power to Override Supreme Court Rulings. Here's How.*, THE INTERCEPT (Nov. 24, 2020), https://theintercept.com/2020/11/24/congress-override-supreme-court/ (providing examples of times Congress decided to override Supreme Court rulings).

relatively bipartisan and therefore unlikely to lock in the policy pendulum on one extreme.[212] Another complication is that if the major questions doctrine applies to land management and energy policy decisions, it will apply to all sorts of unrelated agency actions as well. Even if the doctrine has a silver lining in the public lands context, it may cause serious problems for environmental regulation in other areas.

If the Court does *not* apply the major questions doctrine to agency decisions about energy leasing, bigger problems may lie ahead. Several Supreme Court justices have signaled increasing openness to the constitutionally related, but far more problematic, nondelegation doctrine. As discussed in Part I, this doctrine prevents Congress from delegating broad lawmaking authority to agencies under a separation of powers justification.[213] The Supreme Court has limited the doctrine for decades, allowing for the development of the modern administrative state.[214] But Justice Gorsuch, Chief Justice Roberts, Justice Thomas, Justice Alito, and Justice Kavanaugh have each expressed varying degrees of interest in reviving nondelegation.[215] An embrace of this doctrine would represent "a radical break with constitutional practice and could entail the wholesale repudiation of modern American governance."[216] The implications would extend far beyond the context of public lands.

If Congress intended to delegate to agencies the type of far-reaching discretion that allows policy whiplash, the major questions doctrine would not apply because FLPMA and other land management statutes would clearly authorize the agency's broad authority. But even in cases where there is clear congressional intent, the current Supreme Court could still find that FLPMA is an unconstitutional delegation of power.

As with the major questions doctrine, the nondelegation doctrine is relatively undeveloped in modern case law. Older cases indicate that when striking down a delegation of power, the Court will consider whether an intelligible principle, "circumstances or conditions," or a policy, standard or rule sufficiently governs the delegation, as well as the overall "range of discretion" delegated.[217] Further, there are "limits of delegation which there is no constitutional authority to transcend."[218] Although it is hard to predict how the Supreme Court might apply these factors today, if Congress clearly authorized Interior to make important decisions about federal energy policy, it is possible the current Court could view this as an inappropriate delegation of congressional

212. *See supra* Part V.A.

213. *See supra* Part I.

214. *See* Bulman-Pozen, *supra* note 59, at 274.

215. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUMBIA L. REV. 277, 279, 287 (2021).

216. *Id.* at 278.

217. Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935).

218. *Panama Refining Co.*, 293 U.S. at 430.

lawmaking authority. Although federal public lands policy would benefit from more limited agency discretion, this alternative of striking down FLPMA altogether would be devastating to land management agencies and result in a total absence of regulation on federal lands. In this way, applying the major questions doctrine to land management agencies could actually prove critical to the agencies' long term viability. Narrowing the scope of agency power could make it less likely that the nondelegation doctrine will be applied to wipe out agencies' statutory authority altogether.

CONCLUSION

Land management agencies like BLM, the Forest Service, NPS and the Fish and Wildlife Service exercise enormous control over the public lands that they hold in trust for the American people. Policy whiplash as administrations change is not new, but it has become increasingly prevalent in the public lands context. Energy leasing on BLM lands, road construction in National Forests, and snowmobile use in National Parks highlight these dramatic policy shifts. Although whiplash may appear inherent to the democratic process at first blush, it ultimately harms environmental interests, economic interests, and agency legitimacy. Although solutions that curb whiplash are hard to come by in a country characterized by an increasingly polarized electorate, this Note suggests several avenues to consider within the legislative, executive, and judicial branches.