As the Senate takes up the House's version of the reconciliation bill, I wanted to briefly summarize the main provisions that relate to public lands – in part so readers can be aware of the state of play as to what might (or might not) come to pass in the Senate. The bill as passed by the House can be found here.

Overall, most of the relevant provisions relate to leases for fossil fuel development, particularly oil and gas. Some other provisions are part of long-term battles over flashpoint projects (such as oil and gas development in the Arctic National Wildlife Refuge), examples of the ping-pong governance that I have described before.

Section 80101 of the bill would require BLM to issue quarterly oil and gas leases in all states with land available for oil and gas development, and provides that land eligible for oil and gas development is any land not prohibited from such development under federal law or land-use plans. It also provides that at least fifty percent of lands nominated for leasing should be put up for lease. And it prohibits imposition of any restrictions in leases on drilling or development that are not based on the existing land-use plan.

These provisions appear to be efforts to constrain any Presidential reluctance to lease federal lands for oil and gas, or to use leasing terms as tools to restrict the impacts of drilling. They do, on the margins, reduce executive discretion as to whether to lease lands or not. But that is not really an issue now, given the current policy preferences of this Administration, and it is possible that in a future Administration, a future Congress could use reconciliation to remove these provisions. (And in any case, it's hard to see how these provisions would truly restrict Presidential discretion in oil and gas leasing.) In addition, given the current weakness in the US oil and gas industry, it's not clear what demand there would be for additional oil and gas development.

Section 80103 allows holders of federal oil and gas leases to bypass federal permitting processes for commingling of production form federal and non-federal wells. Such a situation can occur when the federal lease is part of an existing state oil and gas development plan (such as unitization) that covers oil and gas development on both federal and nearby private lands. To bypass that permitting process, the lease holder must pay a $10,000 fee. It also allows federal oil and gas leaseholders to bypass approval processes for permits to drill additional oil and gas wells on their leases if they pay a $5,000 fee and self-certify they are compliant with the relevant regulations. This latter provision creates the potential for abuse by leaseholders who may want to expedite development without assuring

compliance with relevant regulations to protect the environment, health, or safety.

Section 80104 provides similar provisions in which a leaseholder can pay a $5,000 fee and avoid any federal permitting for drilling an oil and gas well when the well is within a state oil and gas development plan area, and is located on land in which the federal government owns less than 50 percent of the mineral rights and does not own the surface. Such situations can exist where federal and non-federal lands are interspersed, but the oil and gas field crosses property borders. In those situations, the state may impose regulations to manage development of the oil and gas resource. In addition, there are a range of circumstances where the federal government sold or gave away the rights to the surface, but kept mineral rights. More intrusively, the provision also prohibits the federal government from using an approval power it has for an oil and gas facility on lands without federal surface ownership and less than 50 percent federal mineral estate ownership to regulate the impacts of that drilling. This is a potentially significant reduction of federal power to regulate oil and gas development on adjoining non-federal lands that might affect federal resources such as national parks.

Section 80121 reissues leases in the Arctic National Wildlife Refuge of Alaska that were cancelled by the Biden Administration. These leases were controversial at the time because of both their potential environmental impacts as well as the climate impacts of production. It exempts the reissuance from compliance with any environmental laws. (The cancellation is also the subject of litigation, with a district court holding that the cancellation exceeded executive authority.)

Sections 80141 to 80142 attempts to restart coal leasing (which had generally been paused under the Biden Administration). It requires publication of environmental review and lease sales within 90 days of applications for coal leases, and requires lease sales for at least 4,000,000 acres of federal lands. The deadline provision may not be effective given that the provision cannot waive environmental review (though other provisions might do so!). And it is not clear if there is market demand for the lease sales proposed in the bill.

Section 80151 is the provision that allows project sponsors to avoid judicial review of NEPA reviews if they pay a fee – I've written about it before.

Section 80171 requires regular sales for offshore oil and gas leases, similar to Section 80101 – the timetable extends to 2040 for lease sales. It also restricts the ability of the agency to impose different lease stipulations, locking in stipulations

from lease sales in February 2020. And it stipulates the compliance with a biological opinion for oil and gas leases in the Gulf of Mexico satisfies all ESA compliance for these leases going forward – which could be problematic given the likelihood of changed circumstances between now and then. It seems likely that events will intervene in the interim (similar to the onshore oil and gas lease provisions), including a different President or a different Congress changing the law.

Section 80181 imposes fees for renewable energy projects on federal lands. It purports to consider the lost revenue from rangeland grazing fees from lands used for renewable development, and charges a fee based on that amount, multiplied by a percentage between 10 and 100 (with solar always paying 100% of the cost), times an inflation adjustment over time.

Finally Sections 80307 to 80309 mandate increased production of timber (including 25 percent increases on National Forest and BLM lands) from federal lands – though it excludes areas protected as roadless, and requires compliance with existing forest plans.

Overall, these provisions are an example of the response of a partisan Congress to ping-pong governance. Republicans, who are suspicious of executive discretion to minimize fossil fuel production in a future administration, seek to try and tie the hands of that future administration. The result is a detailed set of provisions that are not particularly relevant for this administration (except perhaps to constrain ESA and NEPA judicial challenges to projects), and may not apply to future administrations should control of Congress change. (Of course, a Democratic Congress might respond in different, but parallel ways, to ping-pong governance, such as efforts to constrain an administration’s efforts to approve fossil fuel projects.) It’s not clear this solves the ping-pong problem, since change in Congressional control would moot the issue. And the cost of this approach is that the legislation will hamstring flexibility for adjusting public lands policy to future changed circumstances.