



Testimony

Before the Subcommittee on Energy
and Mineral Resources, Committee on
Natural Resources, House of
Representatives

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HELIUM STEWARDSHIP ACT OF 2013

Bureau of Land Management Needs More Information to Fully Implement the Act

Statement of Anne-Marie Fennell, Director,
Natural Resources and Environment

Chairman Lamborn, Ranking Member Lowenthal, and Members of the Subcommittee:

I am pleased to be here today to discuss our April 2015 report¹ regarding the Department of the Interior's (Interior) Bureau of Land Management's (BLM) implementation of the Helium Stewardship Act of 2013.² Helium is an important nonrenewable natural resource with a variety of federal and private uses. These uses include national security applications, scientific research, medical instruments, and manufacturing. For many of its uses, helium has no substitute. The federal government has been extensively involved in the production, storage, and use of helium since the early 20th century. During the 1960s and 1970s, Interior purchased about 34 billion cubic feet of helium from private crude helium producers.³ Subsequently, the Helium Privatization Act of 1996 required Interior to offer nearly all of this crude helium for sale.⁴ As of the end of fiscal year 2013, roughly 9 billion cubic feet of crude helium remained in federal ownership. In October 2013, the Helium Stewardship Act of 2013 was enacted; the act is intended to complete the privatization of the federal helium reserve in a competitive market fashion that ensures stability in the helium markets, while protecting the interests of American taxpayers, among other things. BLM is responsible for implementing the 2013 act.

The federal government stores its reserve of crude helium in a naturally occurring underground reservoir near Amarillo, Texas. This reservoir also holds the crude helium that private companies have purchased from BLM. After companies purchase crude helium, BLM stores and then delivers the helium from the reservoir through a pipeline to four private companies that are connected to it, in accordance with storage contracts the agency has with the companies.⁵ These companies are commonly referred to as

¹GAO, *Bureau of Land Management: More Information Needed to Implement the Helium Stewardship Act of 2013*, [GAO-15-394](#) (Washington, D.C.: Apr. 16, 2015).

²Pub. L. No. 113-40, 127 Stat. 534 (2013), *codified at* 50 U.S.C. §§ 167-167q.

³Crude helium is a gas containing approximately 50 percent to 85 percent helium.

⁴Pub. L. No. 104-273, 110 Stat. 3315 (1996).

⁵The storage contracts govern the storage, withdrawal, and delivery of helium from the federal reservoir and associated fees. The current contracts will expire at the end of fiscal year 2015.

“refiners” since they receive the crude helium from BLM and refine it.⁶ Nine other companies—commonly referred to as “nonrefiners”—have either purchased small volumes of crude helium from BLM or have expressed an interest in buying federal crude helium. The nonrefiners, however, cannot receive crude helium directly because they are not connected to the pipeline. Instead, each nonrefiner must enter into an agreement with a refiner, whereby the refiner accepts delivery of the crude helium and processes it on the nonrefiner’s behalf at an agreed upon price. This practice is referred to as “tolling.”

The Helium Stewardship Act of 2013 changed the federal helium program by, among other things, introducing several new provisions. The act establishes a phased process through fiscal year 2021 for Interior to dispose of the remaining helium in the federal helium reserve. The process includes competitive auctions in addition to noncompetitive sales for disposing of helium in the reserve. The act requires BLM to conduct each auction using a method that maximizes revenue to the federal government.⁷ The act also contains a tolling provision, which states that as a condition of sale or auction to a refiner during the first two phases,⁸ the refiner must make excess refining capacity available at commercially reasonable rates to persons who acquire helium from BLM after the act’s enactment.⁹ However, the act does not require a refiner to toll if the refiner and a nonrefiner do not agree on terms for tolling.

In July 2014, BLM held its first-ever competitive auction for crude helium, offering about 93 million cubic feet of the helium that it planned to make available for delivery in fiscal year 2015 to qualified bidders, both refiners and nonrefiners. Two weeks later, in August 2014, in two noncompetitive sales, BLM sold the remaining helium that was to be made available for delivery in fiscal year 2015 and a portion of the helium to be made

⁶Refined helium has a varying purity of 99.99 percent to 99.9999 percent helium.

⁷50 U.S.C. § 167d(b)(6).

⁸The act establishes four phases: Phase A is a transition period of helium sales; Phase B introduces competitive auctions in addition to sales; and the remaining phases provide for continued access to federal users and eventual disposal of assets, respectively. 50 U.S.C. § 167d(a)-(d).

⁹50 U.S.C. § 167d(b)(8)(B). The act does not define excess refining capacity or commercially reasonable rates.

available for delivery in fiscal year 2016. Those two noncompetitive sales offered more than 1 billion cubic feet of crude helium to refiners.¹⁰

My testimony highlights the key findings of our April 2015 report on BLM's implementation of the Helium Stewardship Act of 2013 and includes updated information concerning actions BLM has taken since the report's issuance.¹¹ Specifically, I will discuss (1) the outcomes of BLM's helium auction and sales held during the summer of 2014, (2) BLM's administration of the act's tolling provision, and (3) upcoming decisions BLM faces as it continues implementing the act.

For our April 2015 report, we reviewed the 2013 act and documentation of BLM's completed and planned implementation actions, including a July 2014 *Federal Register* notice of BLM's implementation of the auction and two sales held in the summer of 2014 and a draft of BLM's new storage contract.¹² We interviewed officials from BLM's federal helium program and Interior's Office of the Solicitor, as well as representatives from 12 of the 13 companies that registered with BLM to participate in the July 2014 auction, including refiners and nonrefiners.¹³ We reviewed BLM's documentation of the results of the auction and sales. We assessed the potential effects of BLM's July 2014 *Federal Register* notice on refiners as they prepared to participate in the auction by comparing the volumes of helium that refiners were likely to receive in fiscal year 2015—based on the agency's formula for delivering helium contained in the notice—with the volumes of helium refiners received prior to fiscal year 2015. We also reviewed the reporting forms that BLM used to collect information from refiners about their refining capacity and tolling agreements and examined the information that refiners submitted in these forms during fiscal year 2014. Our April 2015 report includes a detailed explanation of the methods used to conduct our work. For this testimony,

¹⁰BLM sold 835 million cubic feet of helium to be made available for delivery in fiscal year 2015 and 250 million cubic feet of helium to be made available for delivery in fiscal year 2016 in a one-time advance sale, for a total of 1,085 million cubic feet. The sales were noncompetitive because BLM established a specific amount that each of the four participating refiners would receive in each of the sales. These amounts were based on the refiners' percentage share of the total estimated refining capability in 2000.

¹¹[GAO-15-394](#).

¹²79 Fed. Reg. 42808 (July 23, 2014).

¹³One company did not respond to our interview request.

Refiners Bought All Helium Offered at Auction and Sales Held during the Summer of 2014 for Higher Than Expected Prices

we reviewed two sources of updated information from June 2015 that Interior provided us: a *Federal Register* notice stating BLM's proposal for the fiscal year 2016 helium auction and sale, and a letter from Interior to us containing the department's response to the recommendations in our April 2015 report.¹⁴ The work on which this testimony is based was performed in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

As detailed in our April 2015 report,¹⁵ in the summer of 2014, refiners purchased all the helium offered in BLM's first-ever competitive helium auction at higher than expected prices. Two refiners purchased all 93 million cubic feet of helium that was auctioned at an average price of \$161 per thousand cubic feet—significantly above the prices offered by most other bidders. BLM set the minimum starting bid for each lot at \$100 per thousand cubic feet. At one point during bidding, the auction price rose as high as \$180 per thousand cubic feet. We observed that participants who did not win at the auction stopped bidding when prices reached from \$105 to \$130 per thousand cubic feet (see fig. 1).¹⁶ Most of the representatives of refiners and nonrefiners we interviewed stated that the auction prices were too high for crude helium, especially during a time of global excess of helium supplies. BLM and some representatives of nonrefiners and a refiner, however, said the auction was a success for the federal government since it generated about \$15 million in revenue, an

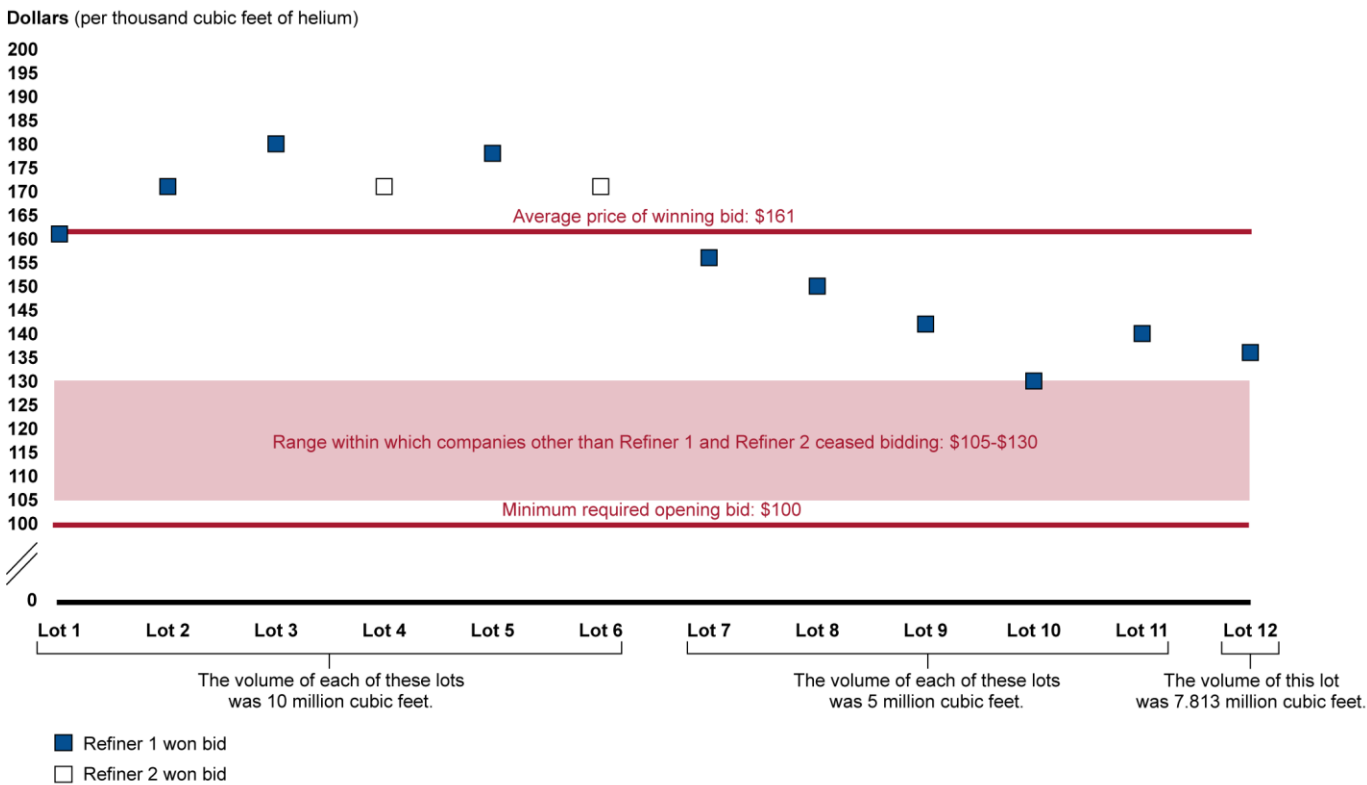
¹⁴The updated information is from Interior's Notice of Proposed Action for the crude helium sale and auction for fiscal year 2016 delivery, published in the *Federal Register* on June 12, 2015 (80 Fed. Reg. 33548), and a June 15, 2015, letter to GAO from Interior containing the department's response to the recommendations in our April 2015 report.

¹⁵[GAO-15-394](#).

¹⁶We observed a recording of the July 2014 auction to determine the range within which companies other than the two winning bidders stopped bidding. Because the video camera did not capture every bid made in every lot, the range is based on our best estimate of the bidding that took place. In addition, in interviews, we asked the representatives of refiners and nonrefiners that participated in the auction about their recollections of the bidding.

amount that a senior helium program official said exceeded the agency's expectations.

Figure 1: Results of the Bureau of Land Management's July 2014 Auction of Helium to be Delivered in Fiscal Year 2015



Source: GAO analysis of Bureau of Land Management data. | GAO-15-734T

Note: The range within which companies other than the two winning bidders stopped bidding is primarily based on our observation of a recording of the July 2014 auction. Because the video camera did not capture every bid made in every lot, the range is based on our best estimate of the bidding that took place. In addition, in interviews, we asked the representatives of refiners and nonrefiners that participated in the auction about their recollections of the bidding.

In interviewing BLM officials and representatives of refiners and nonrefiners and reviewing BLM's planned implementation actions, we identified multiple, possible explanations for why refiners won all the auctioned helium for higher than expected prices. These explanations included:

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- **Refiners may have been more willing to pay higher prices at the auction since their costs for refining crude helium are lower than those of nonrefiners.** According to representatives of nonrefiners, the costs of purchasing auctioned helium and turning it into refined helium are lower for refiners than nonrefiners because refiners do not have to pay another company to refine their helium, a situation that gives refiners an advantage at the auction.
 - **Nonrefiners may not have bid higher at the auction because they did not know the costs and delivery terms for tolling.** Representatives of nonrefiners we interviewed said that few tolling agreements were in place prior to the auction. Those agreements would have specified the rates for tolling any helium they purchased and provided details on when, where, and how purchased helium would be delivered.
 - **Changes to the way BLM proposed to deliver helium purchased at the auction may have provided an incentive to refiners to purchase as much helium at the auction as possible.** BLM had announced before the auction that it would reserve some of its pipeline delivery capacity in fiscal year 2015 for helium purchased at the auction.¹⁷ Based on our review of BLM's July 2014 *Federal Register* notice, purchasing helium at the auction would have allowed refiners to take advantage of the new delivery method and maximize volumes of helium they would receive through the pipeline.

After the auction, BLM sold more than 1 billion cubic feet of helium in two sales that were restricted to refiners, a departure from the agency's prior practice of offering a small portion of sales to nonrefiners.¹⁸ Since nonrefiners were not eligible to participate in the sales and were outbid at

¹⁷BLM described its fiscal year 2015 delivery formula in its July 2014 *Federal Register* notice. The formula gave first priority to delivery of helium intended for federal users, and then provided for delivery of (1) helium purchased by refiners at sales; (2) helium purchased by refiners prior to the act's enactment and stored in the federal reservoir; (3) helium purchased by refiners or nonrefiners at the auction; and (4) helium purchased by nonrefiners in the Phase A sales. 79 Fed. Reg. 42808, 42813 (July 23, 2014).

¹⁸In the past, BLM divided sale volumes into two portions, one offered to refiners, and one offered first to nonrefiners. For example, in sales held in January and May 2014 under the first phase of the act, BLM offered 10 percent of the total volume of helium that it made available for sale to nonrefiners, and the refiners were offered 90 percent of the total volume, excluding helium for federal users. BLM officials said they changed this approach based on their interpretation of the 2013 act.

the auction, nonrefiners purchased none of the federal helium that BLM made available for delivery in fiscal year 2015. As a result, the number of companies purchasing helium from BLM for delivery in fiscal year 2015 compared with fiscal year 2014 decreased from eight to four.

In Administering the Tolling Provision, BLM Does Not Have Full Assurance That Refiners Are Satisfying It

In our April 2015 report,¹⁹ we found that BLM had taken steps to help improve reporting by refiners by clarifying one of the key terms in the tolling provision, but the agency did not have full assurance that refiners were satisfying the provision. The tolling provision requires refiners, as a condition of sale or auction, to make excess refining capacity available at commercially reasonable rates to certain nonrefiners. BLM officials told us that they considered signed tolling agreements between refiners and other parties, as well as refiners' attempts to negotiate tolling agreements that did not result in signed agreements, to be evidence of refiners' satisfying the tolling provision. This is because, if a refiner and nonrefiner do not agree on terms for tolling, the act does not require the refiner to toll.

BLM has collected some information about refiners' signed tolling agreements and refiners' attempts to negotiate tolling agreements, but the agency has not obtained all relevant information about refiners' efforts. In a July 2014 *Federal Register* notice, BLM directed refiners to report information about tolling agreements that they entered into during the preceding year by completing a tolling report form. However, refiners inconsistently reported information about their signed tolling agreements on these forms. For example, not all refiners reported the rates they charged for tolling. According to BLM officials, a representative of one refiner said that the refiner did not report the rate because the act does not require refiners to disclose information about agreements covering less than 15 million cubic feet of helium.²⁰ Officials we spoke with from

¹⁹GAO-15-394.

²⁰The representative was referring to a different provision in the act, the disclosure requirement, not the act's tolling provision. Under the disclosure requirement, all storage contract holders must report, among other things, the volumes and prices of all crude and pure helium purchased, sold, or processed in qualifying domestic helium transactions. 50 U.S.C. § 167d(b)(8)(A). Qualifying domestic helium transactions are any agreement entered into or renegotiated during the preceding 1-year period in the United States for the purchase or sale of at least 15 million cubic feet of crude or pure helium to which any storage contract holder is a party. 50 U.S.C. § 167(10).

Interior's Office of the Solicitor said that BLM could not require refiners to report information about signed tolling agreements for less than 15 million cubic feet in a *Federal Register* notice. BLM officials said they expect that many signed tolling agreements will be for less than 15 million cubic feet since nonrefiners typically accept delivery of helium in 1 million cubic feet increments. As a result, BLM officials said that having information about tolling agreements for smaller volumes from all refiners, including rates, would provide BLM with a better understanding of refiners' efforts to satisfy the tolling provision.

In addition, BLM requested that refiners report information about attempts to negotiate tolling agreements that did not result in signed agreements. According to officials with the Office of the Solicitor, the act does not require refiners to report this information, so reporting is voluntary. As a result, the refiners' responses to BLM's request were inconsistent. For example, some refiners reported that they had attempted to negotiate agreements but did not report details about the volume or rates offered.

Officials from the Office of the Solicitor said BLM may need to issue a rule to require refiners to report on their signed agreements for less than 15 million cubic feet and their attempts to negotiate tolling agreements that do not result in signed agreements. But BLM officials said they do not intend to issue a rule, in part, because it is a time-consuming process that might delay future auctions and sales. However, options may be available for the agency to shorten the rulemaking process if, for example, the conditions for issuing an interim final rule without first issuing a proposed rule for public notice and comment have been satisfied.²¹ Until refiners

²¹Under the Administrative Procedure Act, agencies are generally required to publish a notice of proposed rulemaking and provide the public with an opportunity to comment on proposed regulations prior to issuing a final rule. However, a notice of proposed rulemaking and opportunity for public comment are not required when an agency can for good cause find, and explain, that the notice and public procedure are impracticable, unnecessary, or contrary to the public interest. If BLM can find good cause for not publishing the notice and undertaking the public procedure, then it can issue an interim final rule requiring refiners to report on their tolling agreement negotiations and agreements to toll less than 15 million cubic feet. In addition, the Administrative Procedure Act generally requires agencies to delay the effective date of their final regulations until 30 days after their publication unless agencies can for good cause find, and explain, the basis for not delaying the effective date in the rulemaking. If BLM can find good cause for making the final rule effective upon publication, it can more quickly issue a rule requiring the refiners to report on their tolling agreement negotiations and agreements to toll less than 15 million cubic feet.

consistently provide information about signed agreements to toll less than 15 million cubic feet of helium and about their attempts to negotiate tolling agreements, BLM cannot determine the extent to which refiners are satisfying the tolling provision by making excess capacity available at commercially reasonable rates. To provide the agency with better information to support its decisions when implementing the act, in our April 2015 report,²² we recommended that the Secretary of the Interior direct the Director of BLM to issue a rule—perhaps an interim final rule if BLM finds there is good cause to do so, given the time constraints—to require refiners to report information about (1) signed agreements to toll less than 15 million cubic feet of helium and (2) their attempts to negotiate tolling agreements that do not result in signed agreements.

In written comments on a draft of our report, Interior did not agree with this recommendation and stated that existing mechanisms are providing BLM with sufficient information for the agency to administer the tolling provision, and that BLM is not in a position to develop a rule due to reduced resources, current workloads, and other high priority rulemakings and initiatives in which the agency is engaged. Also, Interior stated that the expense and time necessary to undertake a rule outweighed any immediate benefit. Interior said that the federal helium program would likely be nearing its conclusion by the time such a rule is in place.

Subsequent to the issuance of our April 2015 report,²³ in a June 2015 letter addressing our recommendations, Interior further stated that to address concerns we raised in our report, BLM plans to collect information on tolling and tolling agreements through *Federal Register* notices. Interior stated that the *Federal Register* notice for the fiscal year 2016 auction and sale will include a request for refiners to voluntarily report tolling agreements for less than 15 million cubic feet and information about efforts to negotiate tolling agreements that were not successful. The letter stated that BLM believes making such requests in *Federal Register* notices will be an effective means of collecting this information.

²²GAO-15-394.

²³GAO-15-394.

As we stated in our report, we do not agree that existing mechanisms, including requests made in *Federal Register* notices, are providing or will provide BLM with the information it needs to be assured that refiners are satisfying the tolling provision. Under BLM's approach, refiners' reporting of certain information—specifically, signed agreements to toll less than 15 million cubic feet and their attempts to negotiate tolling agreements that did not result in signed agreements—remains voluntary, and not all refiners provided this information to BLM when the agency previously requested it. It is unclear how BLM would achieve a different result from future information requests under its proposed approach.

We recognize that Interior and BLM must consider current workloads and other priorities when determining how to expend limited resources. However, if BLM does not issue a rule to require refiners to report this information, the agency cannot determine the extent to which refiners are making excess capacity available at commercially reasonable rates. Even if BLM cannot shorten the rulemaking process by, for example, issuing an interim final rule, the agency will continue implementing the act through fiscal year 2021, and the administration of the tolling provision could affect nonrefiners' participation in the auctions. We continue to believe that undertaking a rulemaking is necessary so that BLM can have better assurance that refiners are satisfying the tolling provision through fiscal year 2021.

BLM Faces a Number of Decisions As It Continues to Implement the Act

BLM faces a number of decisions about its continued implementation of the act, including decisions related to its upcoming fiscal year 2016 helium auction and sale.²⁴ On June 12, 2015, after we issued our April 2015 report,²⁵ BLM published a Notice of Proposed Action in the *Federal Register* that outlined its proposal for holding the fiscal year 2016 auction and sale in August 2015.²⁶ The notice stated that after a public comment period, BLM plans to issue a final notice before holding the fiscal year 2016 auction and sale.

²⁴The fiscal year 2016 auction and sale is of the total volume of helium BLM will make available for delivery in fiscal year 2016, minus the volume of privately owned helium in storage that BLM will deliver and the helium the agency already sold in the one-time fiscal year 2016 advance sale held in August 2014.

²⁵[GAO-15-394](#).

²⁶80 Fed. Reg. 33548 (June 12, 2015).

Regarding the fiscal year 2016 auction, BLM officials face a decision about how the agency will choose a method to conduct the auction, among other decisions. BLM's summer 2014 auction was conducted live and in-person in Amarillo, Texas, and the agency broadcast the auction in real time over the Internet for public viewing. According to the June 2015 Notice of Proposed Action published in the *Federal Register*, BLM intends to use the live auction method for the fiscal year 2016 auction as well, but according to Interior's June 2015 letter, the method BLM selects will be announced in the final *Federal Register* notice. The act requires BLM to conduct each auction using a method that maximizes revenue to the federal government.²⁷ As stated in our report,²⁸ representatives from some of the refiners and nonrefiners that participated in the auction told us they had concerns about BLM's auction method. For example, a representative from one nonrefiner questioned whether holding a live auction where bids are offered sequentially would yield the highest revenues.

BLM officials told us they considered multiple auction methods when initially choosing the live auction for the summer 2014 auction, but that they did not assess the auction methods based on maximizing revenue. Instead, they determined which method would be most logistically practical to administer. For example, they told us that they were concerned about holding an Internet-based auction because they did not want potential technological difficulties to disrupt the auction or prevent a company from participating. However, BLM economists told BLM helium program officials and us that there are several academic studies on different auction methods Interior used in the past. These methods included sealed-bid auctions and auctions where all lots were auctioned simultaneously rather than sequentially. BLM economists said that these academic studies could help identify an auction method that maximizes revenue.

As of the issuance of our April 2015 report, however, BLM helium program officials had not evaluated the various methods. Without assessing each method based on revenue generation, we found that BLM would not have reasonable assurance that the live auction method will maximize revenue, as required by the act. As a result of this finding, we

²⁷50 U.S.C. § 167d(b)(6).

²⁸[GAO-15-394](#).

recommended that the Secretary of the Interior direct the Director of BLM to assess auction methods based on revenue generation, using available information, and select a method that would maximize revenue for the upcoming helium auction. In comments on our draft report, Interior concurred with this recommendation. Subsequent to the issuance of our report, BLM published its Notice of Proposed Action in June 2015 in the *Federal Register*, stating the agency's intent to hold a live auction for fiscal year 2016. Three days later, Interior stated in its June 2015 letter addressing our recommendations that BLM's economists were evaluating various auction methods to determine which is most appropriate to maximize revenue. The letter stated that BLM will base its selection of an auction method for the fiscal year 2016 auction on this evaluation and will provide details on the selected method in the final *Federal Register* notice.

Chairman Lamborn, Ranking Member Lowenthal, and Members of the Subcommittee, this completes my prepared statement. I would be pleased to answer any questions that you may have at this time.

GAO Contact and Staff Acknowledgments

If you or your staff members have any questions about this testimony, please contact me at (202) 512-3841 or fennella@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Other individuals who made key contributions to this testimony include Jeff Malcolm (Assistant Director), Cheryl Arvidson, Carol Bray, Cheryl M. Harris, Josie H. Ostrander, Leslie Kaas Pollock, Dan Royer, and Jeanette Soares.

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