

2023 LANDSCAPE DISCUSSION ON



ENERGY LAW & POLICY IN THE ROCKIES

BakerHostetler



Oil & Gas: Permitting Reform

October 13, 2023

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10th Annual Landscape Discussion



Send Some Good Thoughts . . .



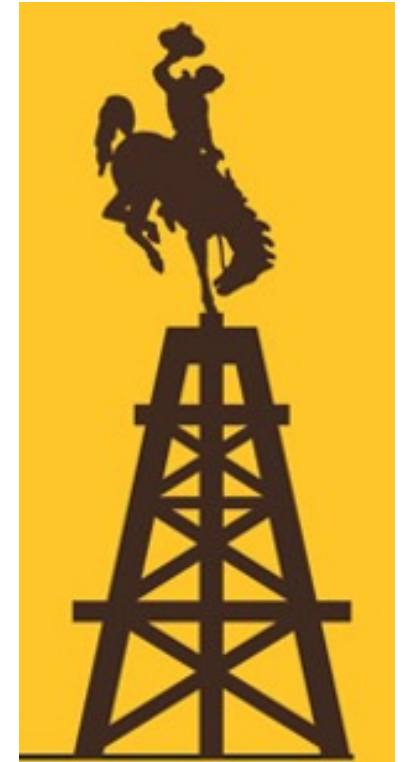
Where Are We Going?

- Why is it necessary?
- What is on the table?
- What should be on the table?

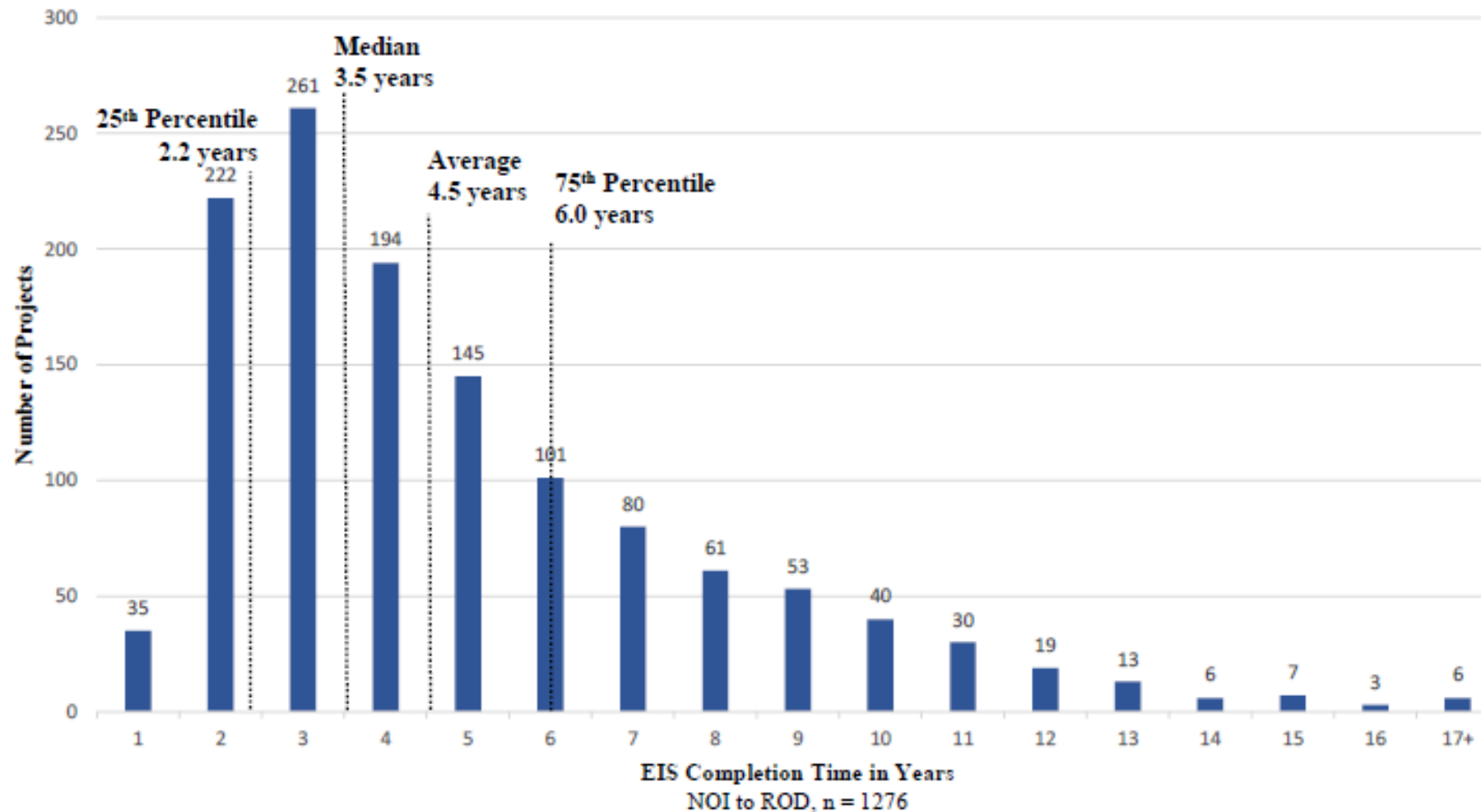


Why is it necessary?

- Delay
- Litigation Risk

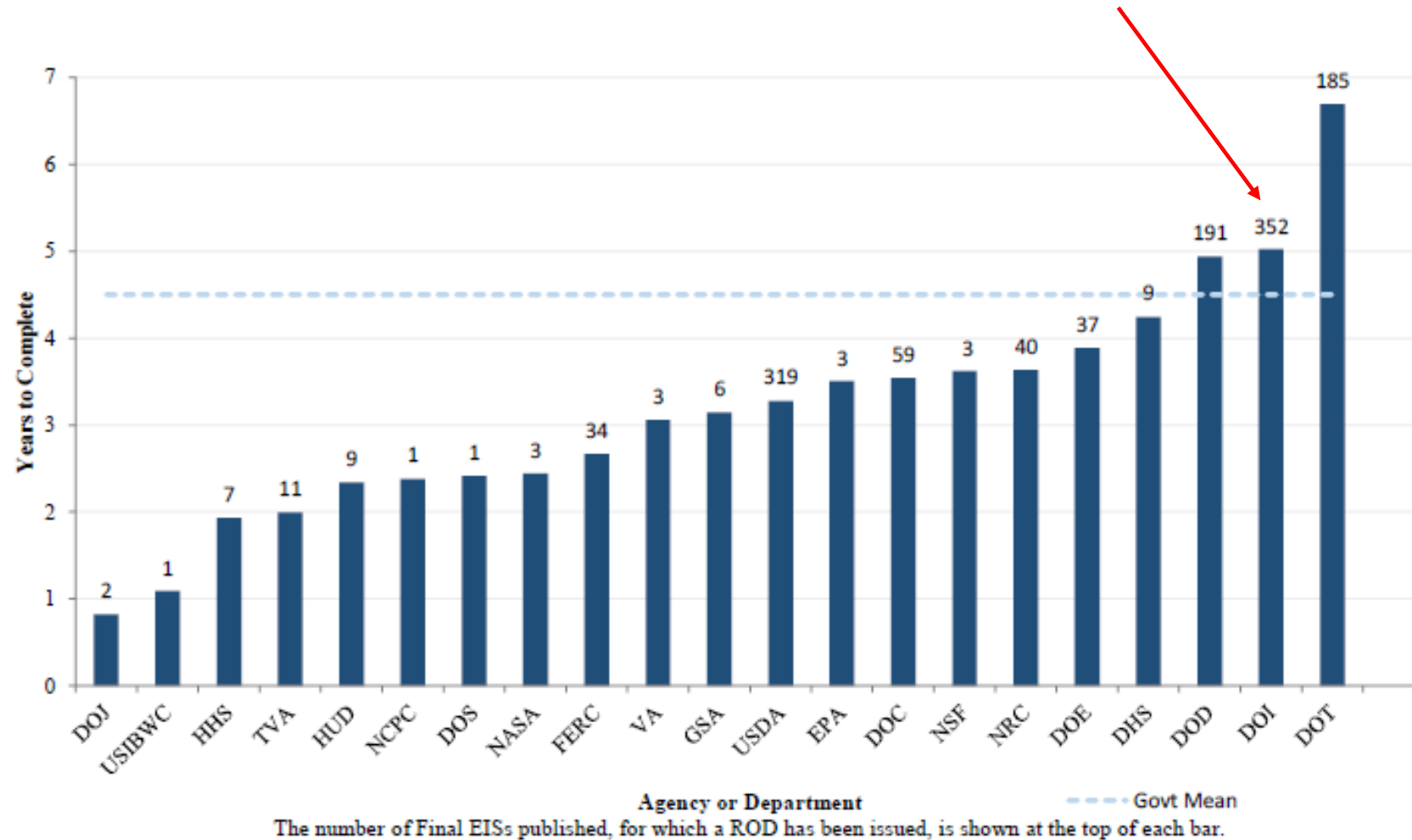


Distribution of EIS Completion Time (NOI to ROD)
All EISs Completed 2010-2018



Source:
<https://ceq.doe.gov/nepa-practice/eis-timelines.html>

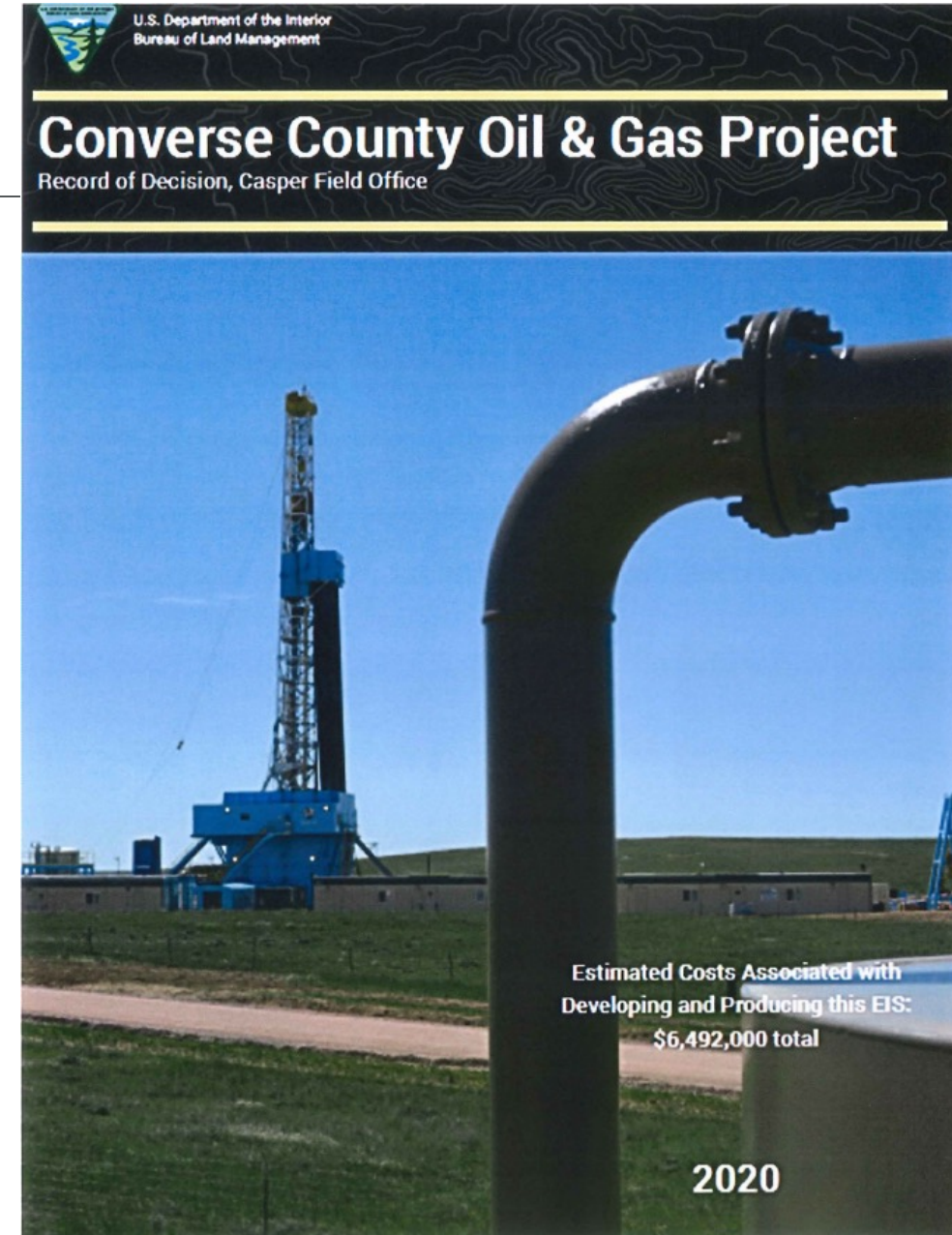
Average Completion Time (NOI to ROD)
All EISs Completed 2010 - 2018, by Department



Source:
<https://ceq.doe.gov/nepa-practice/eis-timelines.html>

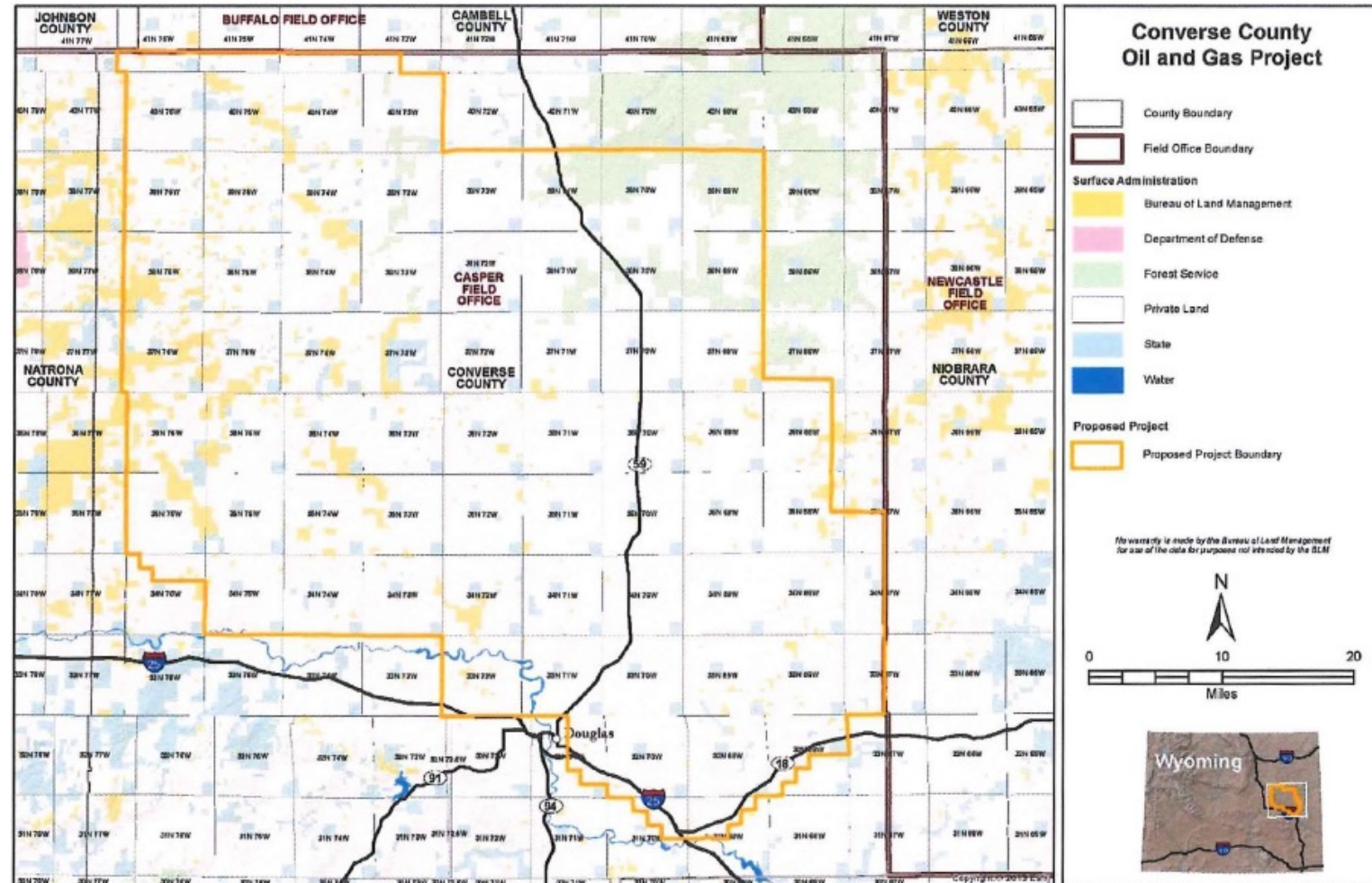
A Case Study

- Covers 1.5mm acres
- Surface
 - ~83% Private
 - ~7% State of Wyoming
 - ~6% BLM
 - ~4% USFS
- Minerals
 - ~64% BLM

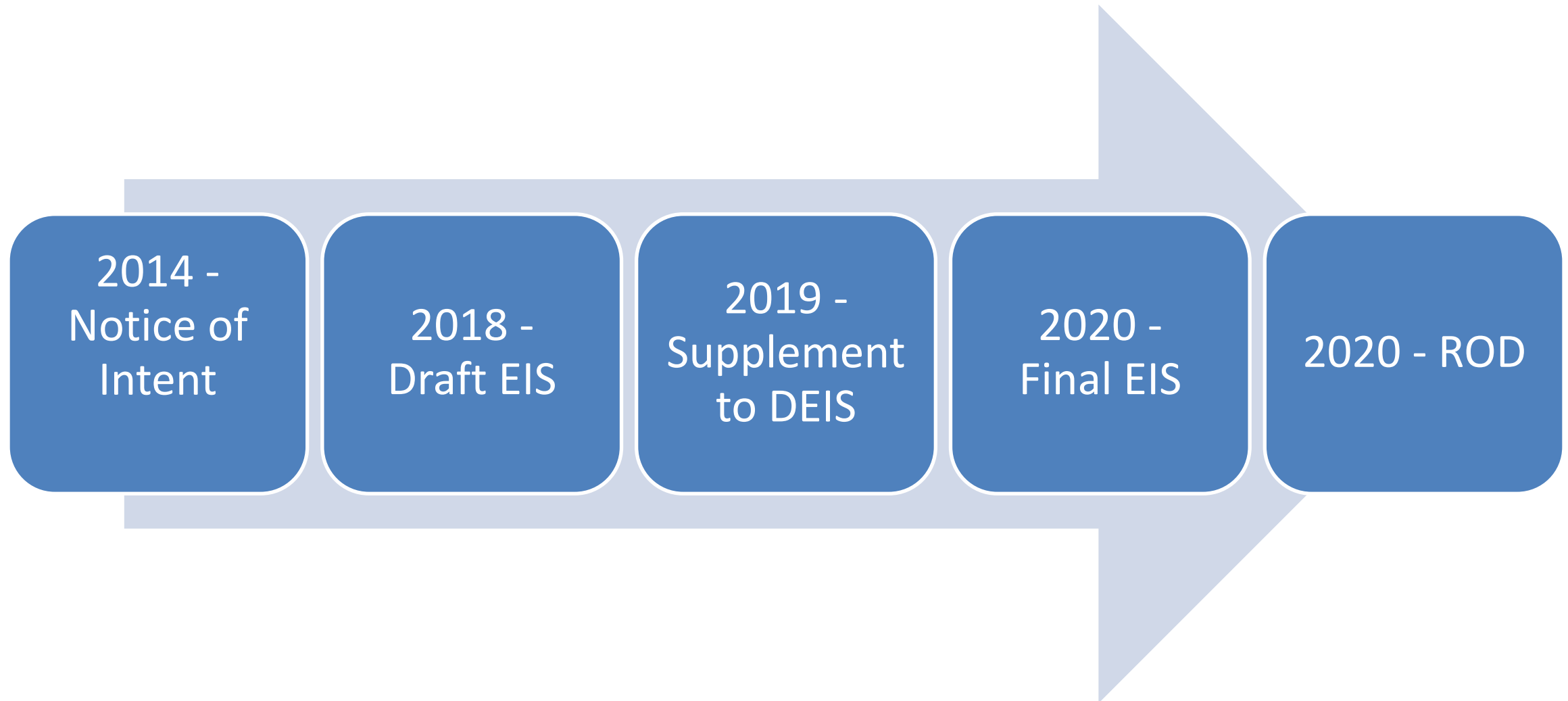


A Case Study

- Up to 5,000 wells over a 10-year period
- Many, if not most, drilled in fee/fee/fed scenarios

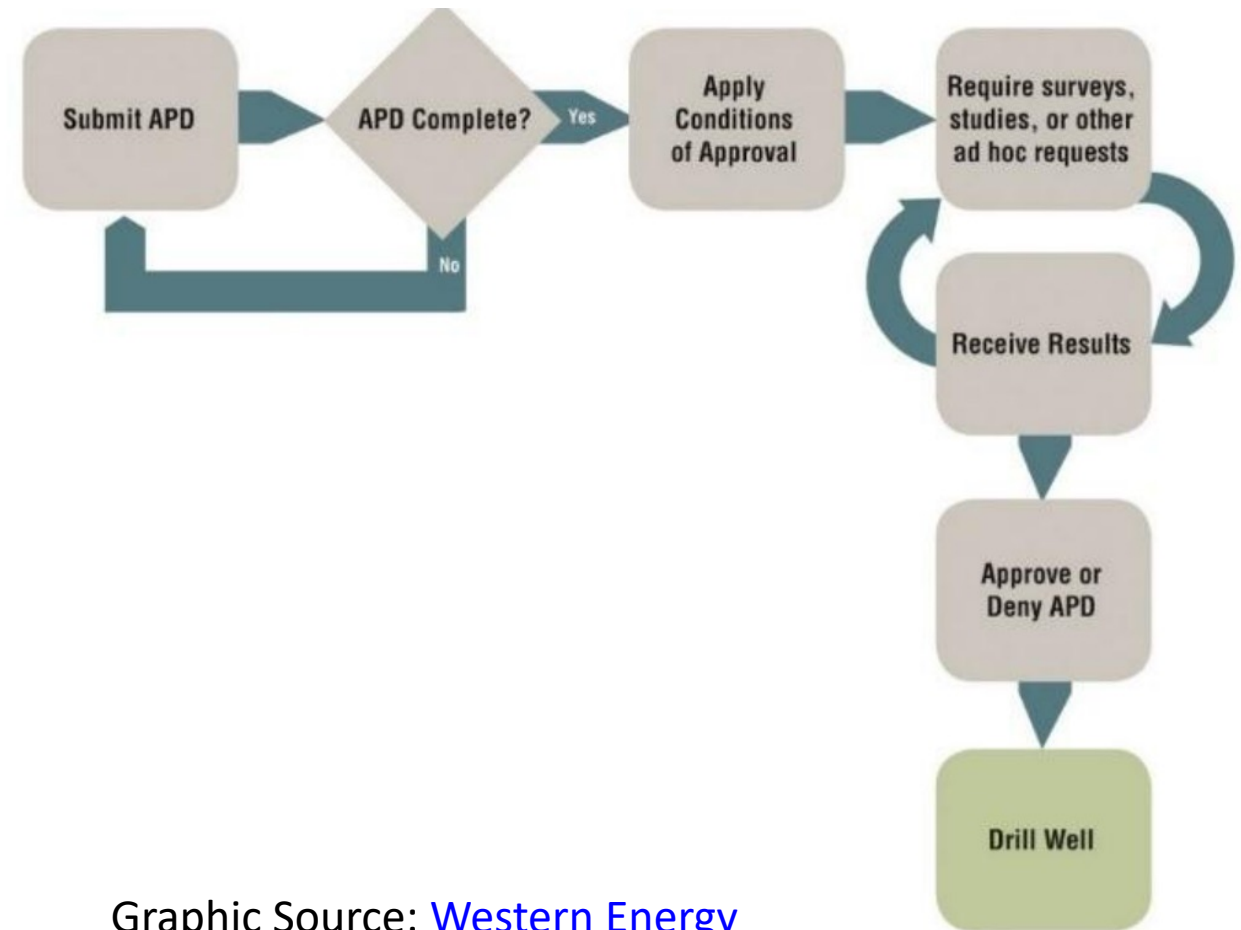


Converse County Oil and Gas Project



Not Just Project-Level Approval

- APD level as well
- EPA Act 2005 Timeframes (30 U.S.C. § 226(p))
 - 10 days
 - APD complete or not
 - 30 days
 - Issue APD or defer the decision, specifying
 - Operator next steps
 - Necessary agency actions

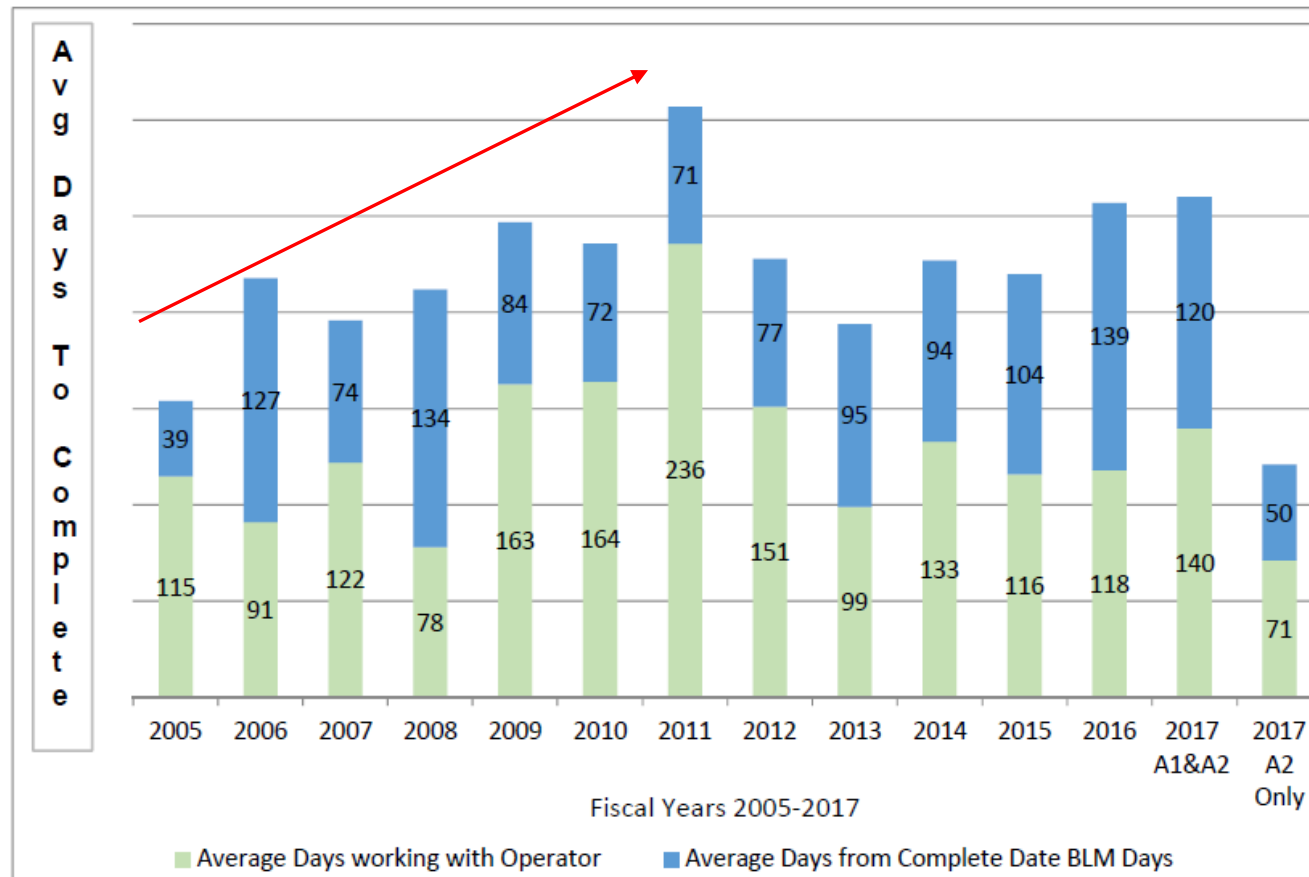


Graphic Source: [Western Energy Alliance](#)

Table 12 Time to Complete an Application for Permit to Drill (APD) Federal and Indian

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017 A1&A2	2017 A2 Only
Average Days working with Operator	115	91	122	78	163	164	236	151	99	133	116	118	140	71
Average Days from Complete Date BLM Days	39	127	74	134	84	72	71	77	95	94	104	139	120	50
Totals	154	218	196	212	247	236	307	228	194	227	220	257	260	121

% Increase in days 1%
 % Decrease in BLM days 14%

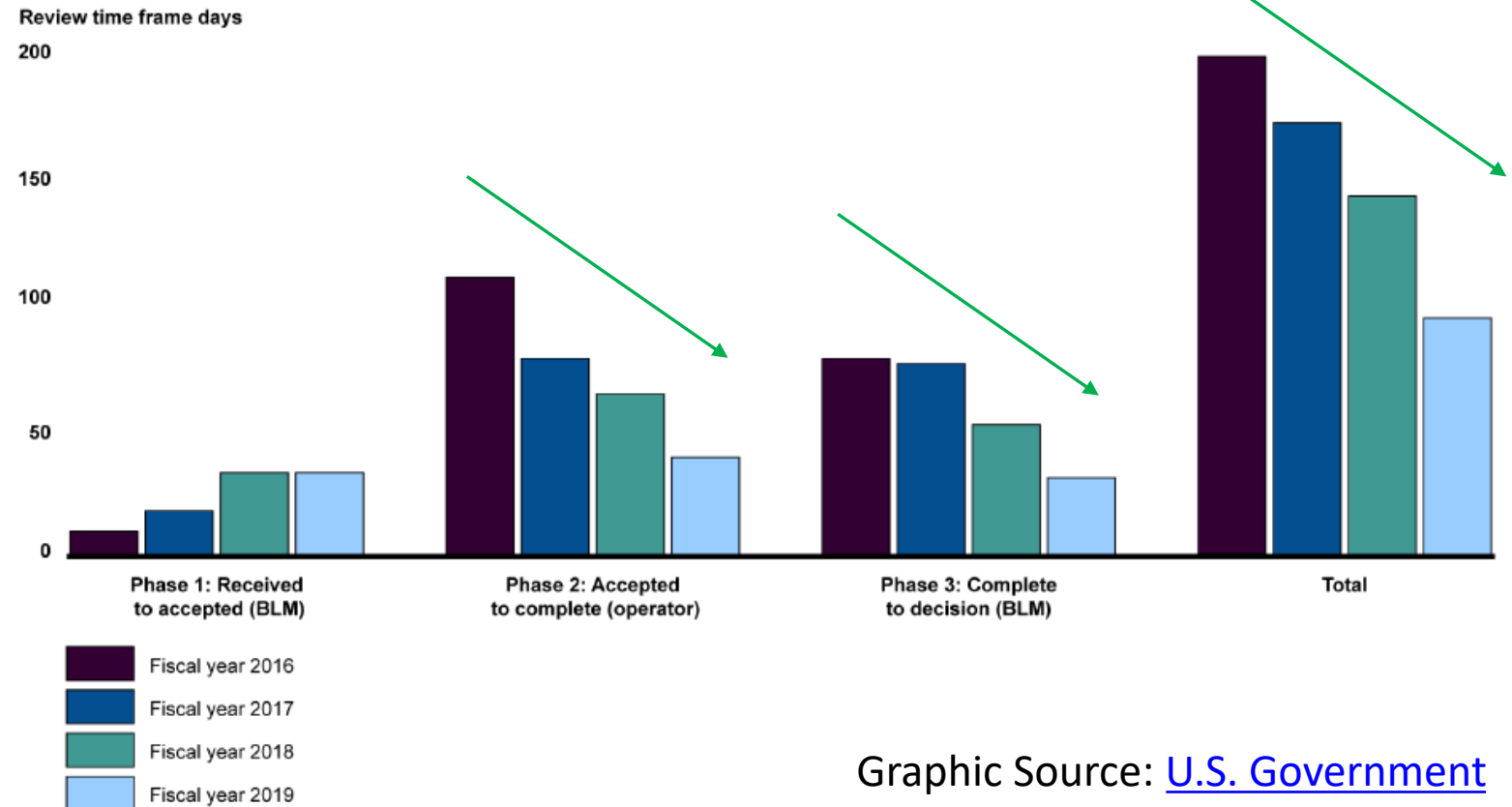


Graphic Source: [Bureau of Land Management](#)

Not Just Project-Level NEPA

- But APD processing time is trending downward

Figure 4: Average Number of Days to Review Applications for Permit to Drill (APD) for Each Phase of the Process, Fiscal Years 2016 through 2019



Source: GAO analysis of Bureau of Land Management (BLM) data. | GAO-20-329

Graphic Source: [U.S. Government Accountability Office](#)

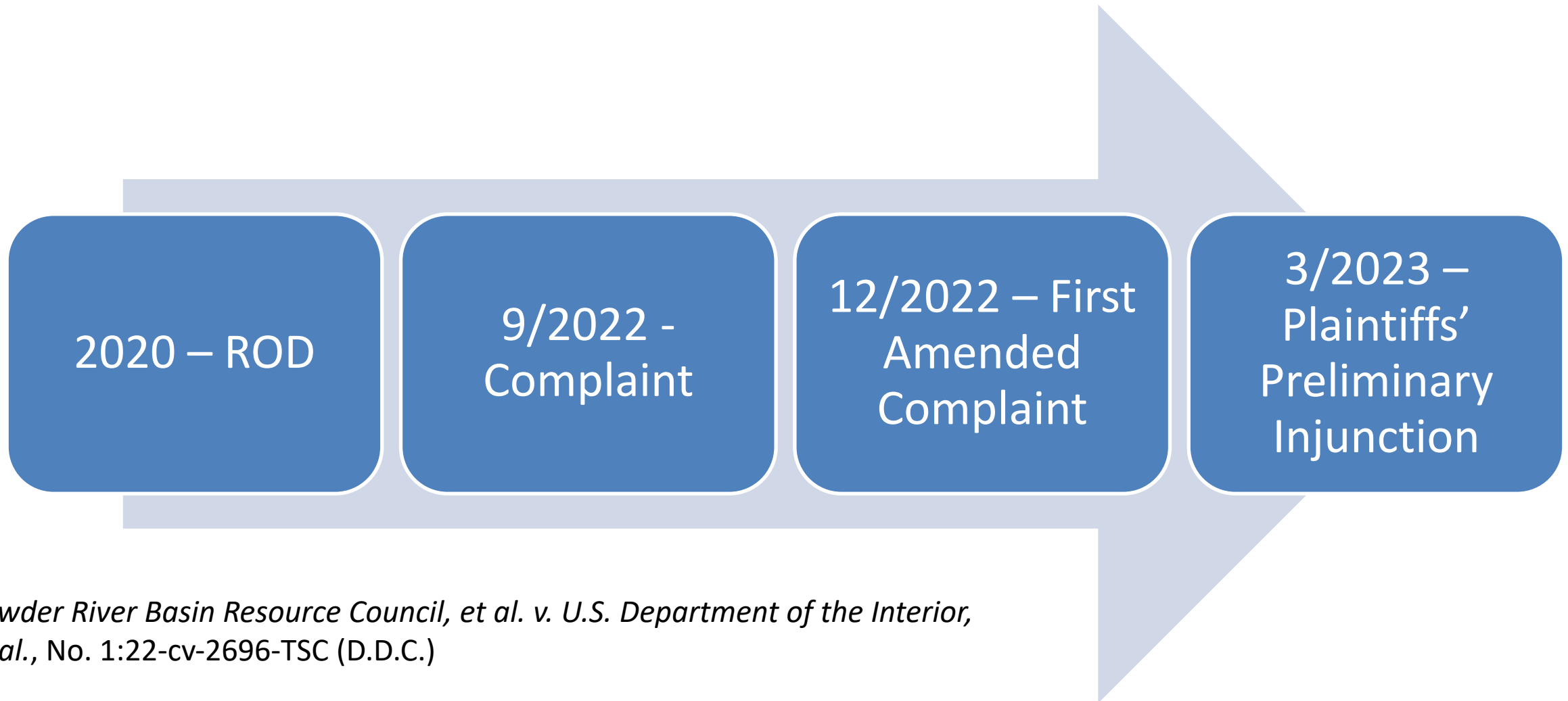
Litigation Risk

- Approximately 25% of energy and natural resources projects are challenged.
- Generally, when they involve a NEPA claim, subject to a 6-year statute of limitation.
 - Well, the project is often being developed (or even completed) after 6 years.
- Conflict with Mineral Leasing Act's 90-day statute of limitations for oil and gas development. See 30 U.S.C. § 226-2.

Litigation Risk

- 30 U.S.C. § 226-2:
 - “No action contesting a decision of the Secretary **involving any oil and gas lease** shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter.”

Challenge to the CCP



Greater APD Challenge

- Challenges nearly every APD approved under the Biden Administration in Wyoming and New Mexico.
 - **Over 4000 APDs**

Center for Biological Diversity, et al. v. U.S. Department of the Interior, et al.,
No. 1:22-cv-1716-TSC (D.D.C.)

What is on the table?

- [House Resolution No. 1](#)
- [Building American Energy Security Act of 2023](#)
- A small combination of both passed in the Fiscal Responsibility Act (June 3, 2023)

NEPA Deadlines

- A significant new addition. See 42 U.S.C. § 4336a(g).
- While it provides plenty of wiggle room for an agency to extend the deadline, court filings can help spur agency action.
- Analog to EPAAct2005's APD processing deadlines
 - *EnerVest, Ltd. v. Jewell*, No. 2:16-cv-01256-DN, 2016 WL 7496116 (D. Utah Dec. 30, 2016)
 - *Continental Resources, Inc. v. U.S. Dep't of the Interior*, No. 1:21-cv-00034-DMT-CRH (D.N.D.)
 - *Gunnison Energy LLC v. Haaland*, No. 1:23-cv-01696 (D. Colo.)

What did not get done?

- Statute of limitation for NEPA challenges
 - Clarification of the MLA's 90-day statute of limitation to oil and gas projects and permitting
- Limitation of available remedies for NEPA failures
 - No vacatur—only remand to address alleged deficiencies
 - Or a more stringent test for vacatur
- Attorney fee awards to the federal government and project proponents for unsuccessful court challenges to energy projects