

# Lawyer Insights

## Federal leasing update: What to Watch for in 2022

By Garrett Korbitz, Harve Truskett, Jason Hill  
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Within hours of the Biden Administration assuming office, the new Acting Secretary of the Department of the Interior (DOI) issued Secretary's Order (S.O.) 3395, which immediately removed the ability of all Offices and Bureaus in the Department to "issue any onshore or offshore fossil fuel authorization, including but not limited to a lease, amendment to a lease, affirmative extension of a lease, contract, or other agreement, or permit to drill."<sup>1</sup> A week

later, President Joe Biden signed Executive Order (E.O.) 14008, part of his plan to combat climate change.<sup>2</sup> Section 208 of E.O. 14008 established a moratorium on new oil and gas leasing of public lands and offshore waters pending the completion of a comprehensive review and reconsideration of federal oil and gas permitting and leasing practices.<sup>3</sup> Below, we discuss the cases contesting the validity of these actions and how the federal government and oil and gas industry have responded.

### OCS and onshore lease sales

The Bureau of Ocean Energy Management (BOEM) published the record of decision (ROD) for Lease Sale 257 on January 21, 2021.<sup>4</sup> However, without any analysis, it rescinded the ROD on February 18, 2021 under the stated rationale of complying with E.O. 14008.<sup>5</sup> In the wake of an August 9, 2021 motion for order to show cause and compel compliance with the preliminary injunction filed by the plaintiff states in *Louisiana v. Biden*<sup>6</sup>, BOEM finally posted an updated ROD for Lease Sale 257 on August 31, 2021, and held Lease Sale 257<sup>7</sup> on November 17, 2021, which elicited 317 bids from 33 companies and resulted in \$191.7 million in high bids.<sup>8</sup>

Prior to the issuance of the underlying leases, the United States District Court in the District of Columbia, vacated Lease Sale 257 in *Friends of the Earth, et al. vs Haaland, et al.*,<sup>9</sup> ruling that BOEM and the DOI acted arbitrarily and capriciously in excluding the impact on foreign greenhouse gas emissions in its "No Action Alternative"<sup>10</sup> analysis of the lease sale.

BOEM also cancelled Lease Sale 258 in February 2021. However, it appears to now be slowly moving forward in light of the injunction and motions to compel, and recently concluded the comment period as to the draft Environmental Impact Statement for Lease Sale 258.<sup>11</sup> The proposed sale includes 224 OCS blocks (approximately 1.09 million acres) in the Alaska OCS (Cook Inlet).

With respect to onshore leasing, the Bureau of Land Management (BLM) cancelled all lease sales scheduled for the first quarter of 2021 and halted environmental review on all planned lease sales within the first month of the Biden administration. Since the injunction in *Louisiana v. Biden*, however, the BLM does appear to be moving forward with lease sales tentatively scheduled in the first quarter of 2022.<sup>12</sup>

### *Louisiana v. Biden*

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Thirteen states<sup>13</sup> brought suit seeking a preliminary injunction against the federal leasing moratorium required by Section 208 of E.O. 14008. On June 15, 2021, the United States District Court for the Western District of Louisiana found the plaintiffs had established a likelihood of success on the merits, and enjoined the defendants from implementing the moratorium. The defendants filed an appeal on August 17, 2021, to the United States Court of Appeals for the Fifth Circuit, while neither seeking a stay of the injunction, nor immediately complying with it.<sup>14</sup> As of January 2022, the parties have nearly completed merits briefing on the appeal.

### ***Western Energy Alliance v. Biden***

On January 27, 2021, the Western Energy Alliance challenged S.O. 3395, claiming the DOI's suspension of federal oil and gas leasing violated federal law. On March 24, 2021, the State of Wyoming filed a suit making similar claims. On June, 20, 2021, finding these cases involved common questions of law and fact, the U.S. District Court for Wyoming consolidated these cases.<sup>15</sup>

On June 30, 2021, the court, in light of the nationwide preliminary injunction granted in *Louisiana v. Biden*, dismissed pending motions for preliminary injunction as moot. Noting the order does not provide all the relief requested, the court allowed the case to proceed on the merits as to the other claims. The parties completed merits briefing in October 2021, and await a ruling from the court.

### **Department of the Interior report**

In accordance with the portion of Section 208 of E.O. 14008 that was not subject to the preliminary injunction, the DOI, tasked with reviewing federal oil and gas leasing and permitting practices in E.O. 14008, published its report in November 2021.<sup>16</sup> The report received criticism from all sides, and broadly set forth "recommended reforms aimed at modernizing Federal land management".<sup>17</sup> These reforms would serve three main purposes:

(1) Increasing the costs of producing oil and gas from federal leases, which would be accomplished by:

- o Raising: royalty rates, bonus bids<sup>18</sup>, rental rates, and bonding requirements
- o Requiring greater financial assurances from offshore operators
- o Instituting "Fitness to Operate" standards for offshore operators

(2) Prioritizing areas that are most suitable for development and ensure lessees and operators have the financial and technical capacity to comply with all applicable laws and regulations.

(3) Imposing additional requirements for public engagement and Tribal consultation in leasing and permitting decisions.

### **Build Back Better bill**

Although the DOI's report made few substantive recommendations, several of these recommendations appeared in the Build Back Better Bill<sup>19</sup> which the Senate recently voted down.<sup>20</sup> Despite the bill's uncertain future, the Biden Administration may attempt to enact many of the recommendations in the bill through administrative action.<sup>21</sup>

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In addition to monitoring how the courts rule on the merits of the pending cases discussed above, interested stakeholders will want to be aware of, and continue to participate in, several other actions being taken by the DOI this year.

BOEM continues to operate under the 2017-2022 National Outer Continental Shelf Oil and Gas Leasing Program, which has three remaining lease sales scheduled through the end of 2022. While the last administration started the process with a request for information and draft proposed program, BOEM has been remarkably silent under the current administration on taking any further action with respect to putting out a new program that will govern the schedule for future OCS lease sales.

As BOEM endeavors to comply with its statutory obligations in light of the injunction, interested parties should continue to watch for developments and participate on this issue. As it becomes increasingly likely that BOEM will be unable to complete the process by the end of the year, it remains to be seen whether this will spark a new round of motions-to-compel under the injunction or new litigation.

The new administration has staked out an ambitious 2022 regulatory agenda, which includes rulemakings for high-pressure/high-temperature drilling offshore, and decommissioning standards for offshore infrastructure. In addition, given the emphasis on royalty rates in the November report on federal oil and gas leasing, parties should expect the administration to revisit the Office of Natural Resource Revenue's Valuation Rule, which will likely result in continued uncertainty for an issue that has been in constant flux in recent years. Many of these rulemakings will likely result in new legal challenges that should be watched and monitored.

Finally, interested parties should also continue to monitor changes to DOI policies that do not go through normal notice and comment rulemaking and that may slow down the process of approving oil and gas activities. For instance, the BLM has recently relied upon an Instruction Memorandum to impose additional, extra-legal public notice and comment procedures under the NEPA upon oil and gas activities.<sup>22</sup> In addition, the BLM recently announced changes in its approach to analyzing greenhouse gas emissions as part of the NEPA process, which has been standard practice for over a decade, by conducting analysis at a national level and also considering the social cost of greenhouse gases (GHGs) in the analysis, when it has long been the government's position—under both the Obama and Trump administrations—that social costs of GHGs are not required.<sup>23</sup>

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### Notes

1 <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3395-signed.pdf>

2 <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>

3 To be completed by the Secretary of the Interior in consultation with other governmental departments.

4 86 Fed. Reg. 6365 (Jan. 21, 2021).

5 86 Fed. Reg. 10,132 (Feb. 18, 2021).

6 *Louisiana v. Biden*, 2:21-CV-00778, 2021 WL 2446010 (W.D. La. June 15, 2021). In addition, North Dakota, in a separate lawsuit, filed a Motion for Immediate Mandamus Relief seeking an order compelling compliance with the preliminary injunction issued in *Louisiana v. Biden*, requiring the DOI to hold previously cancelled onshore quarterly lease sales on August 23, 2021. *North Dakota v. DOI*, 1:21-cv-00148-DMT-CRH, District of North Dakota.

7 OCS sale totaling 80.8 million acres in the Gulf of Mexico.

8 <https://www.ogj.com/general-interest/government/article/14214188/firms-submit-191-million-in-high-bids-in-lease-sale-257>

9 <https://int.nyt.com/data/documenttools/78-memorandum-opinion-1-27/b0903c94e57b0cb5/full.pdf>.

10 A part of the environmental impact analysis of the lease sale required under the National Environmental Policy Act (NEPA) in which BOEM considers what would happen if BOEM did not authorize leasing. See 43 C.F.R. § 46.30.

11 <https://www.boem.gov/oil-gas-energy/leasing/lease-sale-258>

12 <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing>. See also <https://www.blm.gov/policy/im-2021-027>

13 Alabama, Alaska, Arkansas, Georgia, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, Texas, Utah, and West Virginia.

14 Brief for Appellant, *Louisiana v. Biden*, No. 21-30505 (5th Cir. Nov. 16, 2021).

15 <https://www.lawweekcolorado.com/article/federal-court-fights-over-fossil-fuel-leasing-pause-near-crescendo/>.

16 <https://www.doi.gov/pressreleases/interior-department-report-finds-significant-shortcomings-oil-and-gas-leasing-programs>

17 Several of the recommendations echoed a report from the Government Accountability Office published on November 6, 2021, and publicly released on December 9, 2021. <https://www.gao.gov/assets/gao-22-103968.pdf>

18 The price paid at a lease sale for an oil and gas lease.

19 <https://www.congress.gov/bill/117th-congress/house-bill/5376/text>

20 Some of the proposals include: raising royalty rates, raising bonus bids, raising rental rates, reducing lease term lengths, etc.

21 <https://www.eenews.net/articles/with-bill-sidelined-whats-next-for-oil-and-gas-overhaul/>

22 E.g., <https://www.blm.gov/policy/im-2021-027>

23 <https://www.blm.gov/press-release/bureau-land-management-announces-next-steps-new-analyses-upcoming-oil-and-gas-lease>

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