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Federal Oil and Gas Leases: Where Are We Now and What's Next?

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In the short 100 days since inauguration day, the Biden Administration has put oil and gas leasing on public lands and federal waters at the forefront of its climate agenda—from issuance of Executive Order No. 14008, “Tackling the Climate Crisis at Home and Abroad” (EO 14008) to the appointment of Debra Haaland as the Secretary of the Department of Interior (DOI). This article covers the current status of federal oil and gas leasing, actions undertaken by the DOI, and what may lie ahead.

Executive and Secretarial Orders

Secretarial Order 3395 and March 19, 2021 Memo: Continued Suspension of Local Approval Authority

On inauguration day, the DOI Acting Secretary of Interior issued Secretarial Order No. 3395, “Temporary Suspension of Delegated Authority” (SO 3395), suspending the delegation of authority to the Department Bureaus and Offices to take certain outlined actions for 60 days, thereby requiring approval of those actions by the identified non-career officials. After protest by several Indian tribes, by a Memorandum dated January 25, 2021, DOI quickly clarified that SO 3395 did not apply to “actions taken with respect to Indian tribal and individual trust and restricted lands.” SO 3395 has now expired. However, by Memorandum dated March 19, 2021 (March Memo), Laura Daniel-Davis, Principal Deputy Assistant Secretary Lands and Minerals Management, to Bureau Directors (BLM, OSMRE, BSEE, BOEM), continued the Office of the Assistant Secretary of Land and Minerals Management (ASLM) review prior to taking final action on the following oil and gas activities:

- Draft or Final Resource Management Plans (RMPs)
- Records of Decision
- Lease sale notices
- National Environmental Policy Act analysis for final agency action, related to pending litigation, and/or high priority or high conflict areas where it may impact:
 - High priority sage grouse habitat
 - State, Tribal or Federally identified wildlife migration corridors
 - Lands with wilderness characteristics

- Lands with special designations
 - Reinstatement of terminated oil and gas leases
 - Extension of Applications of Permit to Drill (APDs)
 - Lease suspension
 - Applications for royalty relief

Notably, the March Memo specifically states that the above list is not exhaustive. And, to the extent approval is discretionary (i.e., extensions of APDs), we suspect an oil and gas lessee or operator will have difficulty receiving approval for those above-listed actions.

Although the March Memo is not addressed to the Bureau of Indian Affairs (BIA), the Bureau of Land Management (BLM) serves as a technical advisor to the BIA and is required to approve certain actions that impact Indian tribal and individual trust and restricted lands. The March Memo fails to make this distinction, thus raising the question whether the March Memo also excludes actions taken with respect to Indian tribal and individual trust and restricted lands.

Executive Order 14008: Pause on Federal Oil and Gas Leasing

As discussed in our January 27, 2021 article, President Biden signed EO 14008, ordering DOI to “pause” issuing new oil and gas leases on public lands or offshore waters pending completion of a “comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices.” Immediately, 2021 first quarter lease sales in several states were cancelled; the Gulf of Mexico Outer Continental Shelf lease sale set for March 2021 was cancelled; and work on environmental review for an Alaska Outer Continental Shelf sale scheduled for later this year was halted. On April 21, 2021, the BLM also cancelled all 2021 second quarter lease sales.

On March 25, 2021, the DOI hosted a virtual Public Forum on Federal Oil and Gas Program (Forum) as part of its mandated “comprehensive review.” Newly confirmed Secretary Haaland set the tone with opening remarks stating she recognized “there is no doubt that oil, gas, and coal energy from our public lands and ocean have helped build our economy and power our nation. Fossil fuels will continue to play a major role in America for years to come.” She then pivoted stating, “too often the extraction of resources have been rushed to meet the false urgency of political timetables rather than careful consideration for the impacts of current and future generations.”

Thereafter, DOI Principal Deputy Assistant Secretary for Land and Minerals Management, Laura Daniel-Davis, provided introductory remarks giving a glimpse at the priorities of the Administration when she stated, “We’re facing serious challenges onshore, in the form of contribution of fossil fuel development to climate change, including emissions from operations and addressing idled and orphaned wells. In addition, we have royalty rates that have not increased in more than a century and bonding rates that were set in the middle of the last century. In the offshore program, we also need to ensure we’re driving down emissions, protecting

marine life, and that the program serves the interests of taxpayers.... Through this review and how we do our work, we think that we can ensure greater equity, transparency, and public involvement, shore up our environmental review processes, provide a fair return to the American taxpayer, and be sure that we're protecting the special and sacred places that we hear about from so many." Each of the six invited stakeholder groups then gave a short presentation and responded to questions from the panelists, Principal Deputy Assistant Secretary Daniel-Davis, BLM Deputy Director of Policy and Programs, Nada Culver, and Bureau of Ocean Energy Management (BOEM) Director, Amanda Lefton. The stakeholder groups made the following general observations:

- Indigenous experts representatives from the National Congress of American Indians, Alaska Federation of Natives, and Diné C.A.R.E., differed in their support for federal oil and gas development and recognition of the economic benefits derived therefrom, but they universally urged the unique political and legal status of the tribal nations and their citizens be recognized and collaboration with their organizations and constituents be prioritized.
- Industry representatives from the American Petroleum Institute, American Exploration and Production Council, and the National Ocean Industries Association, unanimously supported continued leasing and development of federal lands, embracing a mixed energy strategy with oil and gas playing a role in reducing greenhouse gas emissions. Not surprisingly, they focused on the economic benefits to local communities, conservation efforts, and the nation and the benefits of the United States' energy independence.
- Environmental organizations representatives from the Natural Resources Defense Council, Earthworks, and the Ocean Conservancy, advocated for a halt to all new oil and gas leasing, an update to all regulations and legislation prioritizing the environment, and changes to rent and royalty provisions to account for pollution externalities.
- Labor experts representatives from the United Association of Plumbers and Pipefitters and the North America Building Trades Union, reiterated that the oil and gas industry provides high paying jobs to tens of thousands of American workers and similarly paying jobs are necessary to support the local communities. They expressed skepticism that renewable industry jobs or jobs plugging abandoned wells would be a sufficient substitute for the loss of middle-class family sustaining jobs from a permanent leasing ban.
- Equity experts representatives from the Hispanic Access Foundation, NAACP Environmental and Climate Justice Program, and the Deep South Center for Environmental Justice, stated that most oil and gas drilling, transportation, and processing and petrochemical manufacturing happen within Latinx, black, and indigenous communities, exposing the residents to toxic emissions and spills with serious health consequences to the residents and loss days of school for their children; and these communities are

further disproportionately impacted by climate change.

- Academics experts hailing from the University of Colorado Law School, Texas A&M, and the Resources for the Future institute, encouraged management of the decline of oil and gas in a responsible manner, evaluation of increasing rentals, royalty rates, minimum bids, and bonding to discourage speculation, and increased use of lease stipulations to protect the environment, with recognition given to the fact that such policies will increase cost of operations on public lands and cause a shift to foreign, private and state lands. They advocated for consideration to be given to carbon pricing or a fee on every ton of carbon and border taxes.

Secretarial Orders 3398 and 3399

On April 16, 2021, Secretary Haaland signed two separate secretarial orders. The first order, 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” (SO 3398), revokes 12 Secretarial Orders issued during the Trump Administration. Pertaining to oil and gas leasing, SO 3398 revoked orders promoting oil and gas leasing, exploration, and development on the Outer Continental Shelf (SO 3350), opening up the National Petroleum Reserve – Alaska and Arctic National Wildlife Refuge for development (SO 3352), and instructing BLM to streamline the permitting process and to conduct quarterly lease sales (SO 3354).

The second order, Secretarial Order No. 3399, “Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-Making Process” (SO 3399), establishes the Departmental Climate Task Force (Task Force) comprised of the Deputy Secretary, Counselor to the Secretary, and each Assistant Secretary. The Task Force will, among other directives, 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.”

Lawsuits

Currently, there are three separate lawsuits filed against the Biden Administration over EO 14008 and the “pause” in issuing new federal oil and gas leases on public lands and federal waters. The lawsuits are based on both the language of the executive order and administrative actions taken in the first quarter to implement the “pause.” These actions include:

- Cancelling a Gulf of Mexico Outer Continental Shelf lease sale which the Obama Administration’s Five Year plan for Outer Continental Shelf leasing had set by the Obama Administration for March of 2021.
- Stopping work on environmental review for an Alaska Outer Continental Shelf sale scheduled for later this year, making it unlikely the new administration will be prepared to hold the sale in accordance with the Obama schedule; and

- Issuing a variety of errata and notices to cancel onshore lease sales in several states that were scheduled to be held in the first quarter of 2021 to comply with the Mineral Leasing Act's (MLA's) quarterly leasing mandate.

Wyoming Lawsuits

The first lawsuit was filed by the Western Energy Alliance, an oil and gas trade association, and later joined in by the Petroleum Association of Wyoming, in the United States District Court for the District of Wyoming. The complaint argues the pause is actually a ban on leasing in violation of the Mineral Leasing Act (MLA) and Administrative Procedures Act (APA).

Separately, the State of Wyoming also filed suit in the same court, making the same claims but in more detail, and adding claims under the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA). Environmental groups have moved to intervene in both Wyoming actions, arguing that they have a legally protectable interest in the leasing “pause” because they have long advocated for such a policy to protect their interests in public lands. A group of recreational and grazing businesses have also intervened in one of the actions arguing that oil and gas leasing adversely affects their business operations.

Louisiana Lawsuit

On the same day Wyoming filed, 13 other states filed suit in the United States District Court for the Western District of Louisiana. The Louisiana complaint makes the same claims under the MLA and APA and also includes the arguments under the Outer Continental Shelf Lands Act (OCSLA). Days later, the plaintiff states moved for a preliminary injunction, arguing that the “paused” lease sales cause the states irreparable harm by depriving the states of their statutorily mandated share of the proceeds of those sales. Briefing on the motion for preliminary injunction is ongoing and is scheduled to conclude in May.

Future

The Forum did not conclude with any clear insights into the Biden Administration's path forward. Although it is difficult to predict, at a minimum, to the extent new oil and gas leases are issued, higher minimum bids, higher royalty rates, and shorter primary terms are to be expected. We expect climate and environmental justice considerations will be part of future leasing and permitting decisions, including through lease stipulations and APD conditions of approval. As noted by the academic experts at the Forum, these restrictions may reduce interest in federal leasing relative to state, private, and foreign opportunities.

In the checkerboard western public land states, any disruption in the federal oil and gas leasing and permitting programs reach beyond a discrete tract of federal lands. With the advent of horizontal drilling and one- to two-mile laterals, the spacing unit for a well will often include tracts of federal lands. Delays or denials of federal leases and federal permits impact every lease and owner within the spacing unit. Such delays can

result in losses of state, Indian, and fee (private) leases and deny the leasehold owners of their right to the oil and gas. New and novel litigation against the United States may be in the making.

The DOI has stated that as part of the directive it is conducting extensive outreach to members of Congress, governors, tribes, and other state and local elected leaders. Only time will tell how the Biden Administration will implement its climate policy and the ultimate impact on federal oil and gas leases and development. We now wait for the DOI report expected to be delivered “early summer” outlining DOI’s plans and recommendations to Congress and watch the on-going litigation. Stay with us.

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