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Legal Sidebar

Unpaused: District Court Enjoins Biden Administration from "Pausing" Oil and Gas Leasing on Federal Land

July 21, 2021

The President and the Secretary of the Interior have broad authority to administer oil and natural gas exploration and production on federal lands, but that authority has some limits. A federal judge in the Western District of Louisiana articulated one such limit last week, when the court enjoined the implementation of a so-called "pause" in federal oil and gas leasing. The Biden Administration had ordered that "pause" in Section 208 of Executive Order 14008, an expansive executive order to address climate change issued in late January 2021.

Section 208 directed the Secretary of the Interior to "pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices." The Order specified that the review should look at the "potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters." This "pause" was met with immediate criticism from industry and some on Capitol Hill, culminating in a legal challenge by several states. It is this legal challenge that resulted in the injunction against implementing the leasing pause.

The states alleged that the Department of the Interior (Interior) violated the Administrative Procedure Act (APA) by cancelling two previously scheduled lease sales and by failing to schedule any new lease sales after the Executive Order was issued. They alleged that, in these decisions, Interior was (i) acting contrary to laws that allegedly direct regular oil and gas leasing; (ii) acting arbitrarily and capriciously; (iii) failing to provide adequate notice and comment prior to the administrative moves, and (iv) unreasonably delaying or withholding administrative action. Resolving these claims required the court to consider a series of questions pertaining both to its own jurisdiction and to the merits of the plaintiffs' claims under the Outer Continental Shelf Lands Act (OCSLA) and the Mineral Leasing Act of 1920 (MLA).

After a lengthy review of standing concerns, the court turned to the issue of reviewability. As the court recognized, the President is not a federal agency subject to the APA, but the agencies tasked with administering Section 208 would be. The court therefore considered whether the APA authorizes the sort of challenge brought by the states here. The APA contains a requirement that the challenged act be a "final agency action," and the plaintiffs claimed that Interior had effectively taken a final action by forgoing

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LSB10627

lease sales. Interior argued that the agency decisions at issue were "merely interim postponements of lease sales, not decisions to forgo the sales entirely," and thus were not final agency actions. The court disagreed with Interior, finding that the pause itself constituted a "final agency action" even if the individual lease postponements did not. The court explained that agency action is final "[a]s long as an agency has completed its decision-making on a challenged rule – even one interim in nature."

The court turned next to the question of whether Interior had in fact instituted the pause called for by the President in Section 208. While the government acknowledged that it had not conducted *any* lease sales under either its MLA or OCSLA authority since the publication of Section 208, it claimed that only the cancellations of the scheduled *offshore* lease sales under OCSLA was a result of Section 208, and it had cancelled *onshore* lease sales under the MLA for different reasons. The court disagreed, reasoning that "[a]gency action need not be in writing to be final and judicially reviewable pursuant to the APA" and that "[i]t is the effect of the agency rule that is most relevant." The court reviewed various actions by Interior (including agencies within Interior) after the issuance of Section 208, concluding that "Plaintiff States have a substantial likelihood of success on the merits on proving the Agency Defendants have implemented the Executive Order Pause to both on land sales under MLA and offshore sales under OCSLA."

Finally, the court turned to the requested relief, a preliminary injunction to halt implementation of the "pause" called for in Section 208. As the court explained, a preliminary injunction is appropriate only if a movant shows: (1) the substantial likelihood of "success on the merits," that is, a favorable outcome at the conclusion of a full trial; (2) that it is likely to suffer irreparable harm in the absence of the injunction; (3) that the balance of equities tips in the movant's favor; and (4) that an injunction is in the public interest. The bulk of the court's analysis focused on the first factor, likelihood of success on the merits. The court concluded that the leasing pause violated both OCSLA and the MLA, finding that OCSLA mandates that the agency follow its own five-year plan, that any significant revisions thereto trigger a congressionally mandated administrative process, and that the MLA directs Interior to "hold lease sales, where eligible lands are available at lease quarterly." The court further held that Interior's actions in effectuating the pause were also arbitrary and capricious in violation of the APA, pointing to the lack of any published documents explaining Interior's decisionmaking prior to the lease cancellations. It also held that Interior had failed to satisfy the notice and comment requirements of the APA and that the agency had "unreasonably held or unreasonably delayed" agency action in violation of the APA.

After finding that the other preconditions for issuance of a preliminary injunction were also present, the court granted the plaintiff states' request and enjoined Interior from "implementing the Pause of new oil and natural gas leases on public lands or in offshore waters as set forth in Section 208 of Executive Order 14008." The court further specified that Interior was enjoined from implementing the pause with respect to two offshore lease sales scheduled in the five-year plan mandated by the OCSLA and "all eligible lands onshore." The court reasoned that it "does not favor nationwide injunctions unless absolutely necessary," but that "it is necessary here because of the need for uniformity. The agency defendants' lease sales are located on public lands and in offshore waters across the nation. Uniformity is needed despite this court's reluctance to issue a nationwide injunction."

Litigation related to Section 208 will likely continue in this and other fora. The Biden Administration may choose to appeal the district court's decision to issue a preliminary injunction. Even if it does so, the case on the merits will proceed in the district court while the preliminary injunction remains in place. In addition, separate litigation challenging Section 208 is underway in Wyoming federal district court, although a judge in that court recently ruled that the injunction issued by the Louisiana district court rendered the Wyoming litigation moot.

Legislators may also choose to address this issue. If Congress believes the executive branch should have the power to "pause" leasing as it sees fit, it could amend OCSLA and/or the MLA to clarify the scope of that power. Conversely, if Congress wishes to restrict the scope of executive branch discretion to schedule

or cancel leases, it may amend the relevant statutes accordingly. Congress also has the power to mandate or cancel future individual lease auctions.

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