

The Willow Project: History and Litigation

April 3, 2023

On March 13, 2023, the Bureau of Land Management (BLM), an agency within the Department of the Interior tasked with management of federal public lands and resources, issued a new [Record of Decision](#) approving a Master Development Plan (MDP) for the National Petroleum Reserve-Alaska (NPR-A), a [23-million-acre area](#) on the North Slope of Alaska under federal control. The land is leased by ConocoPhillips, which proposed the MDP for an oil and gas drilling and production [project](#) commonly referred to as the “Willow Project.” The Record of Decision [authorized](#) drilling at three sites within the leasehold interests held by ConocoPhillips.

BLM had previously approved an MDP for the Willow Project in 2020 during the Trump Administration; that approval was [vacated](#) by a federal court in Alaska. Likewise, the Biden Administration’s approval of the Willow Project is being challenged in court. This Legal Sidebar provides background about the history of the Willow Project and some of the legal issues the litigation could present.

Legal Background and 2020 Master Development Plan

The approval of the MDP is the latest step in ConocoPhillips’ longstanding attempts to produce oil from the NPR-A. Congress initially transferred authority over the NPR-A to BLM and largely prohibited oil and gas production in the area in [1976](#). Following further study, Congress [first authorized](#) leasing in the area in BLM appropriations for FY1981, and the agency held its [first lease auction](#) for acreage in the NPR-A the following year. [Between 1999 and 2019](#), BLM offered almost 60 million acres in the NPR-A for oil and gas leasing. ConocoPhillips obtained leases for the NPR-A, and under those leases, it has had broad authorization to conduct oil and gas exploration and development activities in the area of the Willow Project [since at least 2009](#).

BLM has [regulations that apply generally to oil and gas operations](#) on federal lands, as well as more specific [regulations that apply in the NPR-A](#). Among the many requirements, those regulations provide that oil and gas lessees must file, and BLM must approve, plans of operations prior to various activities pursuant to the lease, including drilling and site development activities.

ConocoPhillips elected to file an MDP to comply with these filing requirements. BLM’s approval of an MDP is a major federal action that is subject to the requirements of the National Environmental Policy Act (NEPA). To satisfy these requirements, BLM and ConocoPhillips first commenced preparation of an Environmental Impact Statement (EIS) [in 2018](#), shortly after ConocoPhillips filed its MDP. The contemplated project also required authorizations from the Army Corps of Engineers for dredging and

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filling activities pursuant to [Section 404](#) of the Clean Water Act (CWA), and consultation with the U.S. Fish and Wildlife Service (FWS) pursuant to [Section 7](#) of the Endangered Species Act (ESA). Environmental analysis for those agency decisions was conducted in conjunction with the NEPA process.

BLM [published](#) a Final EIS for the Willow Project MDP on August 14, 2020. [Two months later](#), the agency published a Record of Decision (ROD) approving ConocoPhillips' preferred MDP, but withholding approval for two of the five proposed drill sites at ConocoPhillips' request.

An Alaska Native interest group and multiple environmental advocacy organizations brought a challenge under the Administrative Procedure Act (APA) against this decision and related agency efforts to comply with the CWA and ESA. The groups [alleged](#) that BLM had not adequately considered various environmental consequences that might result from the Willow Project activities contemplated by the ROD. This failure, they alleged, violated NEPA and the APA, which [prohibits](#) agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Both the U.S. District Court for the District of Alaska and the U.S. Court of Appeals for the Ninth Circuit granted an [injunction](#) that blocked implementation of certain aspects of the MDP while litigation continued. Ultimately, the district court [held](#) that BLM's review and approval of the MDP had failed to satisfy the requirements of NEPA, and that the Biological Opinion prepared by FWS failed to satisfy the requirements of the ESA. Citing a recent Ninth Circuit [decision](#), the court [found](#) that BLM "'should have either given a quantitative estimate of the downstream greenhouse gas emissions' that will result from consuming oil abroad, or 'explained more specifically why it could not have done so.'" The court also found that BLM failed to give reasonable consideration to options that should have been considered in the EIS and ROD. In addition, the court held that FWS's consideration of the project's impacts on the polar bear had not satisfied that agency's obligations under the ESA. As a result, the court [vacated](#) the agencies' approval of the MDP and remanded the matter to those agencies for further consideration.

2023 Master Development Plan

On remand, the agencies were free to correct the errors identified in the district court's decision and, if their corrected analysis continued to support BLM's original decision, to reauthorize the MDP. While this matter was working its way through the litigation process, a presidential election resulted in a change in leadership at BLM and other federal agencies. Shortly after taking office, the Biden Administration issued [Executive Order 14008](#), a broad order directed at "tackling the climate crisis." Among other things, the Order 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."

This shift in policy provided opponents of the Willow Project with [renewed hope](#) that the project might not be approved. The pending Willow Project decision pertained to permitting, rather than new leasing, but Executive Order 14008 suggested that BLM might make broader policy changes that could impact existing leases, including changes to the permitting review stage. However, in June of 2021, the U.S. District Court for the Western District of Louisiana enjoined any pause on new leasing and permitting in response to Executive Order 14008. That nationwide injunction was eventually [lifted](#) by an appeals court, but the district court soon entered a more limited [injunction](#) that blocked the leasing pause in certain states, including Alaska. In granting the injunction, the district court relied on two statutes, the Outer Continental Shelf Lands Act and the Mineral Leasing Act, as well as DOI's five-year plan for offshore leasing. In the court's view, those statutes and plans created a legal obligation for DOI to sell leases.

The district court's injunction did not directly apply to the Willow Project because, as noted above, the legal framework that applies to onshore leases within the NPR-A is different in some respects from the offshore leasing at issue in the Louisiana litigation. The injunction, however, highlights the litigation risk to BLM if it had chosen to delay or postpone oil and gas exploration in the NPR-A. If BLM had rejected

ConocoPhillips' MDP based on Executive Order 14008, or any general policy against oil and gas leasing or operations, a court might find that decision violated a [statutory requirement](#) to administer the program.

The most recent version of the BLM form lease grants the lessee the “exclusive right to drill for, mine, extract, remove and dispose of all the oil and gas ... in the lands described.” In [Mobil Oil Exploration and Producing Southeast v. United States](#), the Supreme Court found that the government’s failure to grant lessees permission to conduct oil and gas exploration and production activities may be a breach of the lease requiring compensation. The specific decision at issue at this stage of the Willow Project was not whether to lease, but what operations to authorize pursuant to ConocoPhillips’ existing lease. If BLM had not authorized *any* operations, ConocoPhillips might have argued that BLM had breached the lease terms or its statutory obligations.

With these potential litigation risks and [competing political pressures](#) in the background, BLM developed a supplemental EIS for the Willow Project that addressed the issues identified by the Alaska district court and considered additional adjustments to the MDP. Based on that analysis, in March of 2023 BLM issued [an ROD for the revised MDP](#) for the Willow Project authorizing drilling at three sites within the NPR-A. The revised ROD [included](#) a number of measures intended to provide environmental protection for Alaska’s North Slope.

BLM’s decision to approve the MDP also carries litigation risk. Environmental groups immediately filed suit with the U.S. District Court for the District of Alaska. In their complaint, the plaintiffs claim that BLM again violated the APA and failed to satisfy the requirements of NEPA and the APA when it compiled the Supplemental EIS and the new ROD. The plaintiffs [seek](#) a declaratory judgment that various administrative decisions related to the Willow Project were “arbitrary, capricious and/or not in accordance with the law.”

Congress may also choose to have a say, as it can supersede any NEPA, APA or other regulatory compliance requirements for a project via legislation. Congress may also choose to block oil and gas activity on any federal land, although the latter may require compensation to lessees under the [Takings Clause of the Fifth Amendment](#) of the Constitution.

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