

# Pause on drilling leases seeks to avoid Obama's stumbles

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President Biden's executive order directing the Interior Department to pause new oil and gas leasing on federal lands and waters drew swift backlash from industry yesterday, but proponents say the administration's climate action is on firm legal ground.

The acting Interior secretary has broad discretion under federal law to determine what public lands and waters should be eligible for leasing, legal experts said.

The executive order puts a hold on new onshore and offshore leasing while Interior embarks on a full "review and reset" of its federal oil and gas program in an effort to reduce greenhouse gas emissions, Biden said before signing the order yesterday ([Greenwire](#), Jan. 27).

Biden's directive does not affect existing leases, including 13.9 million acres of public lands and 9.3 million acres of public waters that are held by companies but are not yet developed. The order also excludes tribal land or allotments held by tribal members, according to a press release from Interior.

"If they said they were going to end [leasing], that would be more vulnerable, but the administration clearly has the authority to not issue leases in particular to do this review," said Erik Schlenker-Goodrich, executive director of the Western Environmental Law Center.

The order marks a dramatic change from the Trump administration, which had aggressively pushed to open public lands to fossil fuel development.

In the near term, Biden's directive won't have much effect on greenhouse gas emissions but instead sets the stage for the administration to take long-term climate action to gradually wind down fossil fuel leasing on public lands as part of the federal government's broader investment in renewable energy, experts said.

"I think it's very clear from the cautious and narrow way that Section 208 of this executive order is structured that the Biden administration has done their homework," said Michael Saul, a senior attorney at the Center for Biological Diversity.

"They learned from where both the Obama and Trump administrations sometimes stumbled, and they have crafted the wording of this order very carefully to stay well within the bounds of the president's and secretary's discretion," he continued.

There is precedent dating back to the 1970s for the federal government to put both onshore and offshore leasing on hold, said Jayni Hein, natural resources director at New York University's Institute for Policy Integrity.

"Even under the Trump administration, it deferred numerous oil and gas lease sales from the crash in oil prices during the pandemic, even though they had been holding quarterly lease sales," she said. "It just goes to show the flexible authority Interior has."

As for offshore leasing, federal law requires Interior to examine the nation's energy needs and decide where to get its energy, said Linda Krop, chief counsel at the Environmental Defense Center.

"The administration definitely has the authority to say, 'We are going to get the energy somewhere else,'" she said. "We don't have to get it from offshore areas, for leasing."

While Interior generally does have discretion to pause leasing, it can do so only for a limited time, said Donald Kochan, a law professor at George Mason University.

"I do find it troubling that there is no identifiable end date," he said. "If you are honest about it and realistic, any temporary pause gets continued even beyond the anticipated end date."

There appeared to be a "high risk" of such extensions taking place under Biden because it will be time-consuming to make the statutory and regulatory changes the administration would need to institute a permanent ban on new leasing on federal lands, he added.

"This is a first shot in a long campaign," he said.

Kochan warned that existing authority to defer leases didn't contemplate fully banning all leasing. Doing so went against Congress' multiuse mandate for public lands that includes leasing along with conservation and recreational uses.

"For the executive to afford greater status than Congress has given these lands, it's a usurpation of authority," he said.

## **Lawsuits**

Biden's climate action is already being challenged in court.

The Western Energy Alliance, which had long vowed to sue the administration over its plans to pause leasing, filed suit yesterday in the U.S. District Court for the District of Wyoming ([E&E News PM](#), Jan. 27).

West Virginia Attorney General Patrick Morrisey (R), a high-profile opponent of the Obama administration's climate rules, also signaled that he was discussing possible litigation on Biden's leasing moratorium, as well as the president's order axing a key permit for the Keystone XL pipeline.

"We have to see the details of the regulations," Morrissey said yesterday afternoon. "We don't even have the language yet, but yes, we are going to defend America. That is what Republican attorneys general do. And we're going to make sure that we will be the last line of defense against some of these policies."

Challengers of the onshore leasing pause are also expected to focus on the question of what makes federal lands "eligible" for leasing, said Sarah Stellberg, a staff attorney at Advocates for the West.

"I think the leading theory is that lands are available for leasing when the secretary of Interior says they are, because the secretary of Interior has so much discretion under the [Mineral Leasing Act] to make lands available or not available for leasing," she said.

"But that hasn't been definitely answered in the courts," Stellberg continued. "It's not an open-and-shut case."

## **What's next**

Biden's new order will likely lead to some reevaluation of the federal government's position in pending litigation.

Yesterday, the 9th U.S. Circuit Court of Appeals prodded the administration to do just that in a lawsuit over President Trump's reversal of Obama-era withdrawals of parts of the Arctic Ocean and Bering Sea from oil and gas drilling — an action Biden is seeking to reinstate.

Biden's order doesn't define how Interior would go about pausing leases, leaving the department free to use authority from a number of different federal statutes to block development, including the Mineral Leasing Act, Federal Land Policy and Management Act (FLPMA), Outer Continental Shelf Lands Act (OCSLA), or National Environmental Policy Act, experts said.

The order "leaves the door open" to use more permanent authority under FLPMA to withdraw oil and gas leasing, said Hein of NYU.

Bureau of Land Management field offices could use their authority to defer leases from lease sales, or Interior could take the much longer approach of amending resource management plans to halt new leasing. Interior could also designate more lands as areas of "critical environmental concern," while the president could designate national monuments to conserve other areas, said Hein.

OCSLA gives Interior a lot of discretion to dictate where and whether to lease, and the president could move to withdraw areas altogether, she added.

"I'm looking at this pause on oil and gas leasing in the context of the Biden administration's whole-of-government approach," said Schlenker-Goodrich of the Western Environmental Law Center.

"That's not rhetoric," he continued. "They are very serious about transitioning to a clean energy economy."