



Decision

Matter of: U.S. Department of the Interior—Applicability of the Congressional Review Act to Cancellation of Oil Leases in the Artic National Wildlife Refuge

File: B-335781

Date: February 27, 2024

DIGEST

On September 6, 2023, the U.S. Department of the Interior (Interior) announced its decision to cancel seven oil leases issued to the Alaska Industrial Development and Export Authority in 2021. Interior cancelled these leases due to legal deficiencies it identified in the administrative record.

The Congressional Review Act (CRA) requires that agencies submit rules to Congress for review before they may take effect. Interior did not submit its decision memorandum cancelling the leases to Congress under CRA. CRA incorporates the Administrative Procedure Act's (APA) definition of a rule, which does not include agency orders, such as licensing. We conclude Interior's cancellation of the leases are licensing actions and thus orders that are not subject to CRA.

DECISION

On September 6, 2023, the U.S. Department of the Interior (Interior) announced its decision to cancel seven oil leases issued to the Alaska Industrial Development and Export Authority (AIDEA) in 2021. Interior, Biden-Harris Administration Takes Major Steps to Protect Arctic Lands and Wildlife in Alaska, *available at* <https://www.doi.gov/pressreleases/biden-harris-administration-takes-major-steps-protect-arctic-lands-and-wildlife-alaska> (last visited Feb. 14, 2024). Interior effectuated this decision by a decision memorandum sent to AIDEA. Decision Memorandum from Deputy Secretary, Interior to AIDEA (Sep. 6, 2023) (Decision Memorandum). We received a congressional request for a decision as to whether Interior's announcement is a rule for purposes of the Congressional Review Act (CRA). Letter from Congressional Requestors to Comptroller General (Nov. 16, 2023). Interior's announcement describes the Secretary of Interior's determination to cancel the leases at issue, which, was carried out through a decision memorandum issued that same day. Given the focus of the request letter is the cancellation, this decision evaluates the applicability of CRA to the Decision

Memorandum. For the reasons provided below, we conclude that the Decision Memorandum is not a rule under CRA, as it is an order under the Administrative Procedure Act (APA).

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/gao-06-1064sp>. Accordingly, we reached out to Interior to obtain the agency's legal views. Letter from Assistant General Counsel, GAO, to Solicitor, Interior (Dec. 5, 2023). We received a response on January 18, 2024. Letter from Solicitor, Interior, to Assistant General Counsel, GAO (Jan. 18, 2024) (Response Letter).

BACKGROUND

Decision Memorandum

As required by Public Law 115-97, commonly known as the Tax Cuts and Jobs Act, Interior conducted a gas and oil lease sale for the coastal plain of the Arctic National Wildlife Refuge. Response Letter, at 1; see Pub. L. No. 115-97, § 20001, 131 Stat. 2054, 2235 (Dec. 22, 2017). On January 13, 2021, Interior issued seven leases to AIDEA. Response Letter, at 1. On June 1, 2021, the Secretary of the Interior issued Secretary's Order 3041 (Order).¹ *Id.* The Order relied on what Interior described as multiple legal deficiencies in the administrative record supporting the leases. *Id.*; see also Secretary of the Interior, *Comprehensive Analysis and Temporary Halt on all Activities in the Arctic National Wildlife Refuge Relating to the Coast Plain Oil and Gas Leasing Program*, Order No. 3401. To address the deficiencies, the Order required Interior to conduct several reviews into the process used to issue these leases and to take any necessary steps to address the issues identified by these reviews. See *id.* After conducting the relevant reviews, Interior concluded the legal deficiencies were serious enough to require it to cancel the original leases held by AIDEA and to begin an entirely new process. Decision Memorandum, at 6. Interior sent the Decision Memorandum to AIDEA communicating its decision to cancel its leases, along with Interior's rationale, and stating AIDEA was entitled to a refund of lease bonus bids and first year rentals. See *id.*

¹ On January 15, 2021, Interior conducted another lease sale and issued two new separate leases, each to a different bidder. Response Letter, at 1. During the review ordered by the Secretary, each of the bidders from the January 15 sale released their leases and were given refunds. *Id.*, at 2. This leaves only the seven leases issued to AIDEA at issue here.

Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both houses of Congress and to the Comptroller General for review before a rule can take effect. 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, “a concise general statement relating to the rule,” and the rule’s proposed effective date. *Id.* CRA allows Congress to review and disapprove rules issued by federal agencies for a period of 60 days using special procedures. *See id.* § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. *Id.* § 801(b)(1).

CRA adopts the definition of rule under APA, *id.* § 551(4), which states that a rule is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” *Id.* § 804(3). CRA excludes three categories of rules from coverage: (1) rules of particular applicability, including a rule that approves or prescribes for the future rates or wages; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

Interior did not submit a CRA report on the Decision Memorandum to either house of Congress or the Comptroller General. In its response to us, Interior provided its views that the CRA’s Requirements do not apply to the Decision Memorandum. Response Letter, at 2–5. For the reasons discussed below, we conclude that the Decision Memorandum is not a rule but an order under APA, and, thus, is not a rule under CRA.

DISCUSSION

At issue here is whether the Decision Memorandum is a rule for purposes of CRA. First, we must decide whether the Decision Memorandum meets the APA definition of rule. If we conclude it does, we must then determine if any of CRA’s exceptions apply. Because we conclude the Decision Memorandum does not meet the APA definition of rule, we need not reach the second question.

As we have stated previously, APA provides for two mutually exclusive ways to implement agency action, either rules or orders. *See* B-334995, July 6, 2023, at 4. Any agency action meeting the definition of an order cannot be a rule under APA, and thus cannot be a rule for purposes of CRA. *Id.* APA specifically includes licensing actions in the definition of order. *See* 5 U.S.C. § 551(6). APA defines a licensing, in relevant part, as the “revocation, suspension, annulment, withdrawal, [or] limitation” of a license. *Id.* § 551(9). APA defines license as “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.” 5 U.S.C. § 551(8). Because the

leases are permission to explore for oil and gas in the Arctic National Wildlife Refuge, the leases are licenses for purposes of APA.²

Applying these definitions, our case law has found licensing actions to be outside the purview of CRA. In B-334400, we concluded that denials of petitions for exemption from certain Clean Air Act requirements were not rules under CRA as the denials were licensing actions and thus orders under APA. B-334400, Feb. 9, 2023, at 6–7. Additionally, we have concluded that modifications to existing licenses fell within the APA definition of order and thus could not be rules. See B-334995, July 6, 2023 (finding modifications to a Risk Evaluation and Mitigation Strategy issued by the Food and Drug Administration was an order and not a rule under APA); B-332233, Aug. 13, 2020 (finding changes to a license issued by the Federal Communications Commission was an order and not a rule under APA).

Consistent with our case law on this issue, here, as the Decision Memorandum revokes the previously issued leases to AIDEA, it constitutes a licensing. Decision Memorandum, at 7. Because the Decision Memorandum falls within the statutory definition of licensing, it is an order and cannot meet the APA definition of rule.

In its response to us, Interior alternatively argued that even if the Decision Memorandum met the APA definition of rule, it would still be exempt from CRA as it is a rule of particular applicability. Response Letter, at 4-5. We have previously stated that a rule of particular applicability is “addressed to an identified entity and also address[es] actions that entity may or may not take, taking into account facts and circumstances specific to that [] entity.” B-334995, July 6, 2023, at 5. For example, in B-334400, an agency’s denial of petitions for a statutory exemption addressed 69 petitions “based on the facts those petitions presented” and, therefore, would be a rule of particular applicability, had the action been considered a rule. B-334400, Feb. 9, 2023, at 7. Here, the Decision Memorandum addresses specific leases held by AIDEA and cancels them. Decision Memorandum, at 6. Interior based this decision on the legal defects it identified in the process used to make the initial leases. *Id.* Therefore, even if the Decision Memorandum did meet the APA definition of rule, it would still be exempt from CRA, as the Decision Memorandum would be a rule of particular applicability.

² The term an agency uses to describe its licenses is not dispositive for purposes of our analysis.

CONCLUSION

The Decision Memorandum revokes leases that Interior issued to AIDEA, which meet APA's definition of licensing. Because APA specifically defines licensing as an order, the Decision Memorandum is an order under APA and not a rule. Therefore, the Decision Memorandum is not subject to CRA's requirements of submission to Congress and the Comptroller General before it may take effect.



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