Protecting Offshore Areas from Oil and Gas Leasing: Presidential Authority under the Outer Continental Shelf Lands Act and the Antiquities Act

Robert T. Anderson

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
Protecting Offshore Areas from Oil and Gas Leasing: Presidential Authority under the Outer Continental Shelf Lands Act and the Antiquities Act

Robert T. Anderson*

For over one hundred years, presidents of both parties have used executive power to protect America’s lands and waters. Until the second half of the twentieth century, however, little attention was given to protecting the marine ecosystem. Federal authority reaches out to two hundred miles or more in the oceans off the United States, covering an area known as the Outer Continental Shelf. Federal interest in the area historically focused on developing oil and gas reserves and ensuring that the area was open to trade and commerce. The area is also very important for indigenous subsistence uses and commercial and sport fisheries. Yet it has received scant attention from Congress in terms of environmental protection. Climate change and ocean acidification have increased recognition of the marine ecosystem’s importance to the overall health of the planet. This Article reviews President Obama’s recent withdrawal of swaths of the outer continental shelf from oil and gas leasing under the Outer Continental Shelf Lands Act. It argues that while Congress has paramount authority over the outer continental shelf and retains the authority to undo conservation actions, it has delegated limited conservation authority to the president under section 12(a) of the Act. Thus, President Obama’s recent protective measures taken under the Act may only be altered by Congress—not by a subsequent president. This Article compares the president’s withdrawal authority under the Outer Continental Shelf Lands Act to the president’s authority to establish national monuments under the

DOI: https://dx.doi.org/10.15779/Z38XP6V365
Copyright © 2018 Regents of the University of California.

* Professor of Law, and Director, Native American Law Center, University of Washington School of Law; Oneida Indian Nation Visiting Professor of Law, Harvard Law School (2009–2020). Special thanks to Marilyn Heiman and John Leshy for their comments on this Article and work on the underlying issues. Thanks also to Mark Squillace, Sarah Krakoff, Erik Grafe, and Peter Van Tuyn for comments on earlier drafts of this Article, and to Makenzi Galvan and Aimee Miller for research assistance. As usual, the University of Washington School of Law reference librarians provided excellent assistance.
Antiquities Act. It argues that Congress did not delegate power to revoke national monument designations under the Antiquities Act, nor permanent withdrawals under section 12(a) of the Outer Continental Shelf Lands Act.

Introduction

I. Federal Power over Public Lands – a Brief Overview
II. United States Jurisdiction over Inland Waters and the OCS
III. Conservation Measures under the Antiquities Act
   A. National Monument Designations
   B. Congress Did Not Delegate Power to Revoke a Monument
IV. Conservation Authority under OCSLA
   A. OCSLA Delegated Leasing Authority to the Secretary of the Interior, and Included Presidential Power to Withdraw Areas for Conservation Purposes
   B. OCSLA Section 12(a) Has Consistently Been Used for Conservation Purposes
      1. Withdrawals up to the Obama Administration
      2. President Obama’s Withdrawals
      3. The Trump Administration Response

Conclusion

INTRODUCTION

The Constitution grants Congress plenary authority over federal public lands, and Congress has used that power in myriad ways that range from transfers to states and private parties to conservation and retention in federal ownership. Since the early twentieth century, Congress has protected some federal lands as wilderness areas and national parks, and authorized multiple uses on national forest and Bureau of Land Management lands. National

1. See U.S. Const. art. IV, § 3, cl. 2.
wildlife refuges occupy a middle ground in terms of protective management. In each instance, Congress provided statutory directives to guide federal management, but necessarily left to the executive branch the task of adopting and enforcing more detailed rules. In addition to administering lands set aside for various purposes by Congress, the president has also exercised unilateral management authority over public lands in the face of congressional inaction by withdrawing lands from oil and gas production, establishing bird refuges, and setting aside Indian reservations. This is because the president has a major role in managing public resources as head of the executive branch. Congress also provided presidents with delegated conservation authority in the Antiquities Act of 1906: “The President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.” The Antiquities Act has been used by 16 presidents since 1906 to proclaim 157 national monuments. As discussed below, the Act does not include a grant of power to eliminate or modify monuments—now a matter of intense controversy and litigation.

v. United States, 220 U.S. 523, 536 (1911) (“[The] United States can prohibit absolutely or fix the terms on which its property may be used.”).

3. Thus, the National Wildlife Refuge system’s primary purpose is conservation of fish and wildlife populations. Refuges may also be open to hunting and other recreational activities not inconsistent with their primary purposes. 16 U.S.C. § 668dd(a)(3)(D) (2012).


But what about the oceans? The United States asserts jurisdiction over coastal waters two hundred miles or more beyond the coastline under the Outer Continental Shelf Lands Act (OCSLA). The outer continental shelf (OCS) in important ways stands on similar footing to public domain lands, but only a few statutes speak to environmental protection of marine resources. Until recently, federal policy primarily pursued economic exploitation, in part because the OCS lacked the conservation advocacy that brought about wilderness designations, national parks, wildlife refuges and national forests in the continental United States. There are ten proclamations establishing

---


[t]he OCS refers to 1.7 billion acres of Federal submerged lands, subsoil, and seabed generally beginning 3 nautical miles off the coastline (for most states) and extending for at least 200 nautical miles to the edge of the Exclusive Economic Zone, or even farther if the continental shelf extends beyond 200 nautical miles.


10. See, e.g., Marine Mammal Protection Act of 1972 § 2, 16 U.S.C. § 1361. The Marine Mammal Protection Act is counted by some as a first step by Congress toward ecosystem-based management in the oceans. See Donald C. Baur et al., Legal Authorities of Ecosystem-Based Management in Coastal and Ocean Areas, in OCEAN AND COASTAL LAW AND POLICY, supra note 9, at 703.

11. See Davenport, supra note 7; CENTER FOR NATURAL AREAS, AN ASSESSMENT OF THE NEED FOR A NATIONAL MARINE SANCTUARIES PROGRAM 1 (Prepared for the Department of Commerce 1977) (“The confrontation over the preservation and wise utilization of land-based resources continues. But it is only recently that such a confrontation has begun over marine-related resources.”). Cf., Warren M. Christopher, The Outer Continental Shelf Lands Act: Key to a New Frontier, 6 STAN. L. REV. 23, 33–36 (1953) (explaining the genesis of the United States’ interest in the economic exploitation of the natural resources of the OCS); Robin Kundis Craig, Treating Offshore Submerged Lands As Public Lands: A
national monuments in marine areas, along with thirteen designated marine sanctuaries. While fishing opportunities are provided in all coastal areas, marine waters off the coast of Alaska are unique due to their importance for indigenous subsistence activities, and are subject to the aboriginal rights of Alaska Natives.

The president has a legal tool in addition to the Antiquities Act that he can use to protect the oceans. This Article examines President Obama’s use of OCSLA to protect certain marine areas from mineral exploration and production activity. It compares the durability of these actions with national monuments established under the Antiquities Act. While Congress enacted OCSLA partly to advance commercial development of oil and gas resources under federal supervision, it included a provision commonly known as section 12(a), which authorized the president to withdraw areas from oil and gas leasing “from time to time.” Presidents before Obama used section 12(a) to permanently protect important areas off the coasts of Florida and California, along with areas formally designated as marine sanctuaries. President Obama’s withdrawals stand out for their broad geographic scope and for their express recognition of Alaska Native dependence on marine resources for subsistence uses. President Obama protected approximately 160 million acres

Historical Perspective, 34 PUB. LAND & RESOURCES L. REV. 51, 53 (2013) (“[I]t is not an exaggeration to view the U.S. law of the continental shelf as the law of offshore oil and gas development . . . .”).


13. See Kim D. Connolly, Marine Protected Areas, in OCEAN AND COASTAL LAW AND POLICY, supra note 9, at 601 (discussing the thirteen national marine sanctuaries designated by the Secretary of Commerce as of 2015); see also 16 U.S.C. § 1431(c) (“There is established the National Marine Sanctuary System, which shall consist of national marine sanctuaries designated by the Secretary in accordance with this chapter.”).

14. See 16 U.S.C. § 1371(b). In recognition of the importance of marine mammals for subsistence uses, the Marine Mammal Protection Act’s moratorium on the taking of marine mammals does not apply to Alaska Natives who dwell on the coast of Alaska. Id.


from future oil and gas leasing, using his authority five times and explicitly providing that such withdrawals shall be “without specific expiration.”

The withdrawals were well publicized and struck a nerve with the proponents of unrestricted oil and gas development. Professor Charles Wilkinson aptly termed such outmoded ideas about resource exploitation the “lords of yesterday.” While these resource exploitation ideas had their genesis in the context of western public land and water policy, they linger in the field of mineral resource development in the OCS. Now, the pro-development interests have found an ally in the Trump Administration. Upon the urging of fossil fuel proponents, President Trump took executive action purporting to revoke several of Obama’s OCSLA withdrawal orders.


This Article situates President Obama’s OCSLA withdrawal orders in the larger field of federal public land management. In particular, it reviews the law surrounding the designation of national monuments under the Antiquities Act, and compares that authority to OCSLA’s section 12(a) withdrawal provision. Whether withdrawals under either statute may be undone is sharply contested.\(^{22}\) No national monument designation has ever been overturned by a subsequent president, and the only administrative authority on point reasoned that the president lacks such authority.\(^{23}\) This Article argues that the president’s withdrawal authority under section 12(a) is likewise a limited delegation of authority from Congress, and that only Congress may undo a section 12(a) withdrawal. While President Trump’s action purported to revoke the Obama withdrawals, that action will not result in any immediate lease sales in the affected areas because OCSLA requires additional processes before any area may be eligible for leasing. The Trump Administration is proceeding with such actions now, and would open the entire OCS to oil and gas leasing, except for Marine Sanctuaries, Bristol Bay in Alaska, and the Eastern Gulf of Mexico.\(^{24}\) The question will be litigated in a lawsuit alleging that President Trump’s action violates separation of powers principles and is beyond his statutory authority.\(^{25}\)

Part I of this Article outlines the principles of federal authority over federal public lands within state boundaries and the OCS. Part II reviews and compares the use of the Antiquities Act and OCSLA for conservation purposes. Part III provides an overview of the law regarding national monuments. Finally, Part IV discusses the durability of mineral leasing withdrawals under OCSLA.

Under the authority vested in me as President of the United States, including section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a), I hereby withdraw from disposition by leasing, for a time period without specific expiration, those areas of the Outer Continental Shelf designated as of July 14, 2008, as Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. 1431-1434, 33 U.S.C. 1401 et seq.


25. *See* Complaint for Declaratory and Injunctive Relief, League of Conservation Voters v. Trump, No. 3:17-cv-00101-SLG (D. Alaska May 3, 2017). Certain pre-lease activities, however, may be permitted if the withdrawal revocation stands. For the allegations related to pre-lease seismic testing, *see* id. at 33 (citing 43 U.S.C. § 1340(a), (b), (g) (2012) and 30 C.F.R. pts. 550–551 (2017)).
I. FEDERAL POWER OVER PUBLIC LANDS – A BRIEF OVERVIEW

Before European colonization of what is now the United States, indigenous peoples owned and occupied their territory, and governed relations among themselves according to their own laws. The rights of indigenous peoples in the United States have also received a measure of protection in the form of Indian reservations, and other reserved rights outside of actual reservations. In addition, other general statutes have been used to protect aspects of aboriginal use and occupancy. This Part reviews federal power to deal with the rights of indigenous peoples, and to deal with public lands after acquisition from Indian tribes.

The United States Constitution vests Congress with full jurisdiction over federal public lands: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .”26 “Congress exercises the powers both of a proprietor and of a legislature over the public domain.”27 This claim of proprietary control and regulatory jurisdiction, however, was limited at the outset by the fact that most of what became the United States was already claimed and occupied by indigenous peoples. Before full congressional authority could be exercised for the benefit of non-Indian settlers, the question of Indian property rights had to be resolved.

The rights of indigenous people to use and occupy their lands as property owners were variously described under international and U.S. law as aboriginal title, Indian title, or original Indian title.28 In \textit{Johnson v. M’Intosh}, Chief Justice Marshall considered competing claims to land by two non-Indians.29 One had acquired title directly from the Indians, and the other had acquired title from the United States, which had acquired the land from the Indians by treaty.30 Holding that only the national government had power to acquire Indian land, the Court declared that the tribes have a “legal as well as just claim to retain possession of [the lands]” they historically occupied.31 The right of the discovering nation, and the United States as successor, thus consisted of a technical legal title, plus the “right of pre-emption.”32 That is, the United States

30. \textit{Id.} at 561–62.
31. \textit{Id.} at 574. In \textit{Cherokee Nation v. Georgia}, 30 U.S. 1, 2 (1831), the Court declared that “[t]he Indians are acknowledged to have an unquestionable, and heretofore an unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government.”
asserted the exclusive right to acquire the full beneficial title to land used and occupied by the indigenous occupants.\textsuperscript{33}

Of course, the Indian nations had no such understanding—much less agreement—with the proposition that the United States, or any other country, could divest them of their rights to soil and their way of life without consent. Chief Justice Marshall was aware of the arrogance of the legal proposition: “However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained . . . it becomes the law of the land, and cannot be questioned.”\textsuperscript{34} Thus, Supreme Court precedent buttressed the United States’ legal claim to title, and the framework for eventual extinguishment of aboriginal title was in place.\textsuperscript{35} This assertion of authority over the continental United States was also extended to the territorial sea by various measures.\textsuperscript{36} This began with a three-mile belt off the coasts in 1793, and expanded to include the Exclusive Economic Zone.\textsuperscript{37}

By the late nineteenth century, most Indian claims to land had been resolved through treaties and acts of Congress, although some claims persisted to the 1970s.\textsuperscript{38} Tribes retained substantial amounts of land and, in many cases, off-reservation rights to hunt fish and gather.\textsuperscript{39} There are still unsettled questions regarding aboriginal title to marine areas in the OCS off the coast of Alaska.\textsuperscript{40} The importance of these areas to Alaska Natives is illustrated in part by litigation over oil and gas leasing in Arctic waters.\textsuperscript{41} The areas have tremendous importance as a source of food. President Obama took steps to protect Native subsistence uses in the OCS off of Alaska as discussed in subpart IV.B.

\textsuperscript{33} For an illuminating analysis of the case and its progeny, see generally LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLE OF THEIR LANDS (2005); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 999–1004 (2012).

\textsuperscript{34} See STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 178 (2005) (surveying federal-Indian land transactions and underlying policies).


\textsuperscript{36} 16 U.S.C. § 1801 (2012); Hickey, Jr., supra note 9, at 2, 11.

\textsuperscript{37} For an illuminating analysis of the case and its progeny, see generally LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLE OF THEIR LANDS (2005); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 999–1004 (2012).


\textsuperscript{40} See People of the Village of Gambell v. Hodel, 869 F.2d 1273, 1280 (9th Cir. 1989) (avoiding a determination of Alaska Native aboriginals’ subsistence rights in the OCS and merely holding that those rights were not extinguished by Congress in ANCSA); Native Village of Eyak v. Blank, 688 F.3d 619, 623 (9th Cir. 2012) (en banc) (finding that the Native tribes used and occupied the Outer Continental Shelf of Alaska but rejecting the existence of aboriginal title based on lack of exclusive use); see generally Jordan Diamond et al., Rights and Roles: Alaska Natives and Ocean and Coastal Subsistence Resources, 8 FLA. A&M U. L. REV. 219 (2013).

\textsuperscript{41} See People of the Village of Gambell, 869 F.2d at 1280.
As it purchased or otherwise extinguished tribal aboriginal title, the federal government obtained full title to what became known as the public domain. In keeping with notions of manifest destiny and in order to encourage settlement and economic exploitation of western lands, the federal government divested itself of title to much of the public domain through a variety of means. The divestment process included railroad grants, homesteading laws, and grants of land directly to states as they were admitted to the Union. But as the United States retained increasing amounts of land in federal ownership, questions abounded as to the scope of federal power over such land—or whether the federal government could even retain land. Thus, a lessee of land used for mining purposes challenged federal authority to lease land on the theory that the Constitution only provided the federal government with authority to sell lands it acquired within the boundaries of a state. The Supreme Court answered that federal power over its land was complete and that Congress had the authority to transfer ownership of federal land in fee simple, or to retain the fee and merely lease the land for mining purposes as prescribed by Congress. As time passed, the Court rebuffed other challenges to federal power, including authority to condemn private land for use as a national historical park, and to withdraw land within a state for a federal forest reserve. The power over the public lands includes the authority to delegate regulatory power to an agency to adopt preemptive regulations on such lands, to regulate activity off of such lands in order to ensure access, and to protect the purposes for which such lands are set aside or to preserve other federal interests. The next Part discusses how this power crept out to marine areas.

---

42. See United States v. Sioux Nation, 448 U.S. 371, 374-84 (1980) (recounting the events leading up to the unconstitutional taking of the Black Hills from the Great Sioux Nation).
43. See generally GEORGE CAMERON COGGIN & ROBERT L. GLICKSMAN, 1 PUB. NAT. RESOURCES L. § 1:9 (2d ed. 2016).
44. See Getches, supra note 5, at 281–82; John D. Leshy, A Property Clause for the Twenty-First Century, 75 COLO. L. REV. 1101, 1102 (2004).
45. See WILKINSON, supra note 20, at 18–27; see generally COGGIN & GLICKSMAN, supra note 43, at § 1:14 (“Traditional ‘public land laws’ were the statutes ‘governing the alienation of public land,’ according to the Supreme Court in 1965.”).
47. Id. at 538.
49. See Light v. United States, 220 U.S. 523, 537 (1911).
51. See Camfield v. United States, 167 U.S. 518, 528 (1897) (affirming the power to ensure access).
II. UNITED STATES JURISDICTION OVER INLAND WATERS AND THE OCS

In the mid-twentieth century, a sharp dispute developed between the states and the federal government over ownership and control of marine waters adjacent to state coastlines. The controversy centered primarily over resource development issues, with little notice of conservation needs. President Truman declared that the United States owned and controlled marine waters, while the states claimed to own submerged marine waters out to three miles from the coast. This Part explains the nature of federal and state interests in navigable waters, the OCS, and resolution of these claims by Congress.

The bounds of federal and state jurisdiction over waters are set by Congress, acting under the Commerce Clause and the Property Clause. States have long been recognized to possess important interests in submerged lands under inland navigable waterways: “In order to allow new States to enter the Union on an ‘equal footing’ with the original States . . . , ‘the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory . . . as held for the ultimate benefit of future States.” Moreover, in the Desert Land Act and other nineteenth century statutes, Congress made state law generally applicable to the use of waters on unreserved federal lands. While the federal government has deferred to state regulation of navigable waters for many purposes, that state authority is subject to preemptive federal power. The United States may

---

54. Id. at 23.
55. See infra notes 62–66 and accompanying text.
56. U.S. CONST. art. I, § 8, cl. 3.
57. U.S. CONST. art. IV, § 3, cl. 2.
58. See PPL Mont., LLC v. Montana, 565 U.S. 576, 591 (2012) (“Upon statehood, the State gains title within its borders to the beds of waters then navigable.”); Pollard’s Lessee v. Hagan, 44 U.S. 212, 230 (1845). Congress does have the authority to reserve the submerged lands in federal or Indian ownership. See Idaho v. United States, 533 U.S. 262, 273 (2001) (“We ask whether Congress intended to include land under navigable waters within the federal reservation and, if so, whether Congress intended to defeat the future State’s title to the submerged lands.”).
62. See id.
63. See United States v. Twin City Power Co., 350 U.S. 222, 226 (1956) (holding that federal navigational servitude can preempt any use rights granted by a State to a private party, so that compensation under the Fifth Amendment is not required for taking such interests); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913) (“Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable.”); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 706–07 (1899) (stating that a state may not grant private rights that destroy the navigability of that water course in derogation of the interests of all the people of the United States); John D. Leshy, Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation, 4 U. DENVER W. L. REV. 271, 288 (2001); see also Federal “Non-Reserved” Water Rights, 6 Op. O.L.C. 328, 363 (1982) (discussing federal power to reserve water unassociated with a
reserve the *submerged land* under navigable waters for federal or Indian purposes, and it also may reserve the water itself for the same purposes. 64 These authorities dealt with inland waters. Whether the submerged land principles applied in coastal marine waters remained a matter of dispute until the mid-twentieth century.

Federal jurisdiction and control over the OCS was premised on a proclamation and executive order issued by President Truman in 1945, which provided that the “natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States [are declared] as appertaining to the United States, subject to its jurisdiction and control.” 65 President Truman’s action fixed the federal claim to coastal waters and associated resources for the United States and vested administrative jurisdiction within the Department of the Interior. It also preserved a dispute with the coastal states over ownership of the “continental shelf within or outside of the three-mile limit.” 66 The coastal states claimed ownership of submerged lands under marine waters within three miles of the low water mark on the coastline. 67 The Supreme Court ruled that the federal government, not the states, owned submerged lands in the marginal sea in a series of cases in the mid-twentieth century. 68 The Court reasoned “that national interests [and] responsibilities, and therefore national rights are paramount in waters lying . . . seaward [of the low water mark] in the three-mile belt.” 69

---

64. See Arizona v. California, 373 U.S. 546, 594–601 (1963) (affirming Indian and federal reserved water rights for various reservations along the Colorado River); see also Idaho, 533 U.S. at 274 n.5 (holding that the submerged lands had been reserved for the Coeur d’Alene Indian tribe, but not reaching the issue of whether “the Tribe retained aboriginal title to the submerged lands, which cannot be extinguished without explicit action by Congress”).


67. See United States v. California, 332 U.S. 19, 23 (1947) (invoking California alleging “that the original thirteen states acquired from the Crown of England title to all lands within their boundaries under navigable waters, including a three-mile belt in adjacent seas”); see also Matthew H. Armsby et al., *Role of the States, in OCEAN AND COASTAL LAW AND POLICY*, supra note 9, at 75–76 (explaining the historical role of the states in ocean and coastal management).

68. See United States v. Louisiana, 339 U.S. 699, 705 (1950); United States v. Texas, 339 U.S. 707, 720 (1950); *California*, 332 U.S. at 40. The Court noted that “the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world, although as late as 1876 there was still considerable doubt in England about its scope and even its existence.” *California*, 332 U.S. at 33.

Congress reversed the outcome by enacting the Submerged Lands Act (SLA), which confirmed state ownership of submerged lands and resources in the marginal sea to the states. The SLA established seaward boundaries of most states at three nautical miles from the coastline, and relinquished to the states title and most regulatory jurisdiction over the submerged lands and associated natural resources. In territorial waters (out to three miles), the United States generally defers to state jurisdiction and control under the SLA. However, the SLA specifically provides that “nothing” in the statute “shall affect . . . the constitutional authority of the United States . . . to regulate . . . navigation.” As Justice Scalia explained in the context of marine waters in a national park in Alaska, state ownership of submerged lands under marine waters has little effect on federal authority to regulate activities in navigable waters—even within state boundaries. “If title to submerged lands passed to Alaska [under the equal footing doctrine], the Federal Government would still retain significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power.” All of these sources of power are also at play in the OCS—although without any general basis for competing state authority.

Working its way through Congress at the same time as the SLA was OCSLA, in which Congress “assert[ed] the exclusive jurisdiction and control of the Federal Government of the United States over the seabed and subsoil of the outer Continental Shelf, . . . [in order to] provide for the development of its vast mineral resources.” It became law a little more than two months after the SLA. In OCSLA, Congress defined the term “outer Continental Shelf” as “all

---


71. 43 U.S.C. § 1311(a), (b); see Armsby et al., supra note 67, at 76–93 (describing a variety of state statutes and programs affecting marine waters).

72. 43 U.S.C. § 1311(a) (“It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States . . . .”).

73. Id. § 1311(d); see id. § 1314(a); Robin Kundis Craig, Treating Offshore Submerged Lands as Public Lands: a Historical Perspective, 34 PUB. LAND & RESOURCES L. REV. 51, 69–70 (2013).


submerged lands lying seaward and outside of the area of [state] lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.”77 The OCS thus extends the seaward boundary of each coastal State, which is three miles beyond the state’s coastline.78 Forty-eight states have the three-mile boundary from the coastline, while Texas and Florida succeeded in establishing their seaward boundary at three leagues.79

The primary purposes of OCSLA were to broadly assert jurisdiction over the OCS and to promote the development of mineral interests.80 The Secretary of the Interior was also empowered “to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf.”81 Section 11 authorizes geological and geophysical exploration in the OCS provided that it is “not unduly harmful to aquatic life” in the area subject to exploration.82 Section 12 delegated to the president broad authority to withdraw areas from


77. 43 U.S.C. § 1331(a); see also H.R. REP. NO. 83-1031, at 12 (“[J]urisdiction and control of the United States is extended to the seabed and subsoil of the entire outer Continental Shelf adjacent to the shores of the United States instead of merely to the natural resources of the subsoil and seabed as in the original House version . . .”) (emphasis added).

78. 43 U.S.C. § 1301(a)(2). The coastline is defined as “the line of ordinary low water.” Id. § 1301(c).

79. See United States v. Louisiana, 363 U.S. 1, 83–84 (1960) (holding that Texas was entitled to a three-league boundary from the coastline); United States v. Florida, 363 U.S. 121, 129 (1960) (holding that Florida’s three-league boundary extends only along the Gulf coast—not the Atlantic). According to the Bureau of Ocean Energy Management:

Texas and the Gulf coast of Florida [extend] 3 marine leagues (9 nautical miles) seaward from the baseline from which the breadth of the territorial sea is measured. Louisiana extends 3 U.S. nautical miles (U.S. nautical mile = 6080.2 feet) seaward of the baseline from which the breadth of the territorial sea is measured. All other States’ seaward limits are extended 3 International Nautical Miles (International Nautical Miles = 6076.10333 feet) seaward of the baseline from which the breadth of the territorial sea is measured. 


80. See PUB. LAND LAW REVIEW COMM’N, supra note 65, at 187 (“Congress enacted [OCSLA] to provide a system to govern the issuance and maintenance of mineral leases on the Shelf.”); Christopher, supra note 53, at 23; Mason & Smyth, supra note 76, at 392. Congress did provide, however, that state law that does not conflict with federal law may be applied to the OCS. See 43 U.S.C. § 1333(a)(2)(A).

81. OCSLA § 5(a)(1). The “conservation of natural resources” mentioned in the statute includes actions to protect environmental values as well as matters related to efficient mineral production. See Gulf Oil Corp. v. Morton, 493 F.2d 141, 144 (9th Cir. 1973) (“[A] careful reading of the statutes leads us to the conclusion that Congress authorized the Secretary to suspend operations under existing leases whenever he determines that the risk to the marine environment outweighs the immediate national interest in exploring and drilling for oil and gas.”); see also Copper Valley Mach. Works, Inc. v. Andrus, 653 F.2d 595, 600–01 n.8 (D.C. Cir. 1981) (citing Gulf Oil Corp. for the proposition that the phrase “conservation of natural resources” as used in the Mineral Leasing Act includes environmental protection).

82. OCSLA § 11(a).
leasing, purchase all minerals, suspend leases in times of war, and restrict mineral development in leased areas when necessary for national defense. Major amendments in 1978 added more explicit and detailed environmental considerations to some aspects of mineral leasing in the OCS. Those amendments left intact the authority of the president to withdraw areas under OCSLA section 12(a)—authority exercised in the Eisenhower and Nixon Administrations.

The next Part examines the similar withdrawal provision in the Antiquities Act, before Part IV more closely examines OCSLA’s conservation and withdrawal authority.

III. CONSERVATION MEASURES UNDER THE ANTIQUITIES ACT

As discussed above, Congress has broad power to designate federal public lands for conservation, development, or multiple-use purposes. It can also transfer lands to the states or to private parties as in the cases of statehood acts, railroad grants, or the homestead laws. This Part examines the history and application of another course Congress has followed, delegating authority to the president to withdraw lands for conservation and other purposes in the Antiquities Act. The Antiquities Act provides that “[t]he President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.”

The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects described in the proclamation. Congress provided that one purpose of the statute is to "preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need . . . (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments . . . ." Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95–372, § 102, 92 Stat. 629, 631 (codified in scattered sections of 33 U.S.C. and 43 U.S.C.). In addition, Congress required that “[m]anagement of the outer Continental Shelf shall be conducted in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the outer Continental Shelf and the marine, coastal, and human environments.” Id. § 208, codified at 43 U.S.C. § 1344(a)(1).


of the objects to be protected.”

The Antiquities Act applies to federally owned uplands as well as to marine areas within the OCS because they are “owned or controlled” by the United States.

The statute delegates broad authority to the president to designate monuments. Moreover, courts have rejected every challenge to monument designations. However, the Act does not also delegate to the president authority to revoke monument designations. No monument has ever been abolished by presidential action; no president has even attempted to abolish a national monument.

As discussed below, while there is no case law dealing with presidential revocation or modification, the plain language of the statute supports the argument that only Congress may revoke a monument. Furthermore, a long-standing administrative interpretation by the attorney general holds that the president’s delegated authority does not include the power to revoke monument designations. As explained in Part IV, a similarly limited delegation of authority is provided in OCSLA section 12(a).

A. National Monument Designations

The legislative history of the Antiquities Act reveals that while the initial concern that brought the issue to the attention of Congress was the looting and exploitation of Native American archeological sites, the statute’s final text included much broader coverage. The American Association of the Advancement of Science and the Department of the Interior sponsored the first bill introduced by Congress.

Other bills, more narrowly drafted, would have simply prohibited and criminalized the act of harming an “aboriginal antiquity” on federal land, or authorized land reservations of up to 320 acres to protect

---

90. 54 U.S.C. § 320301(b). As originally enacted, the Act stated:

The President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.


92. ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS 3 (2016).

93. Squillace, supra note 89, at 478; see RONALD F. LEE, THE ANTIQUITIES ACT OF 1906, at 47 (1970) (describing the initial efforts of the Antiquities Act to promote aboriginal antiquities situated on federal lands).

94. H.R. 8066, 56th Cong. (1900); see sources cited supra note 93.

95. Squillace, supra note 89, at 479 (citing H.R. 8195, 56th Cong. (1900)); see generally LEE, supra note 93, at 51.
ancient ruins.96 Department of the Interior officials were heavily involved in the debate and advanced a proposal to expand the authority of the president to set aside lands for more expansive purposes than simply protecting artifacts and architectural sites.97 The bill that ultimately became the Antiquities Act dropped the 320-acre limitation, and included authority to protect not only archeological sites, but also “objects of historic or scientific interest.”98 Thus, the history and language of the Act support an interpretation that Congress delegated to the president broad power to designate monuments.

Such an interpretation is buttressed by the early, expansive, and undisturbed use of the Antiquities Act’s designation authority by presidents and the fact that courts—including the Supreme Court—have rejected every challenge to a monument designation. Some have argued that geographically broad designations are not permitted, or that a president has unbridled authority to revoke monuments.99 As shown below, these arguments are not supported by the text or history of the Act’s application. Instead, every court to consider a monument designation has upheld the action as within the authority delegated by Congress. Moreover, when Congress has disapproved of a particular monument, it has explicitly revoked the monument designation, but left untouched presidential authority to establish monuments.100

The first challenge to a monument designation under the Antiquities Act, the 1920 case Cameron v. United States, involved a miner/entrepreneur who claimed a right of possession to portions of the South Rim of the Grand Canyon, including the Bright Angel Trail,101 under the General Mining Law of 1872.102 The miner alleged that President Theodore Roosevelt’s Proclamation of the Grand Canyon National Monument was invalid. The Supreme Court upheld the Proclamation:

The defendants insist that the monument reserve should be disregarded on the ground that there was no authority for its creation. To this we cannot assent. The act under which the president proceeded empowered him to establish reserves embracing “objects of historic or scientific interest.” The Grand Canyon, as stated in his proclamation, “is an object of unusual scientific interest.” It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is

96. Squillace, supra note 89, at 479 (citing H.R. 9245, 56th Cong. (1900)).
97. Id. at 479–80 (citing H.R. 11021, 56th Cong. (1900)); see Lee, supra note 93, at 52–55.
99. See generally Yoo & Gaziano, supra note 22.
100. See NAME REDACTED, CONG. RESEARCH SERV., R41330, NATIONAL MONUMENTS and the ANTIQUITIES ACT 3 n.17 (2017) (citing abolishment of Fossil Cyad National Monument and Papago Saguaro National Monument in 1956 and 1930, respectively).
regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.\textsuperscript{103}

There was no specific discussion by the Court of whether the monument was “confined to the smallest area compatible with the proper care and management of the objects to be protected.”\textsuperscript{104} However, one can surmise from the quoted text that the Court believed the standard was quite easily met.

The Supreme Court also considered the scope of the Antiquities Act in \textit{Cappaert v. United States}, which involved a monument designated to protect a rare species of desert fish and the pool they inhabited.\textsuperscript{105} The challengers—nearby ranchers enjoined by the federal government from engaging in groundwater pumping that lowered the water level in the pool and threatened the fish\textsuperscript{106}—argued that the monument was invalid because the Act authorized the president to reserve federal lands as monuments only to protect archeological sites.\textsuperscript{107} The Court rejected the argument, ruling that the Act authorized the president to proclaim the pool as a national monument because the pool and its fish were “objects of historic or scientific interest.”\textsuperscript{108}

In another case, \textit{United States v. California},\textsuperscript{109} the Court considered whether a proclamation establishing the Channel Islands National Monument\textsuperscript{110} included submerged lands. The Court upheld the monument designation, but because Congress had transferred ownership of the submerged lands out to the three-mile limit to the states,\textsuperscript{111} the Court did not need to reach the question of presidential intent to include the submerged lands in the monument.\textsuperscript{112} The case illustrates the initial use of the Antiquities Act to protect marine waters and associated resources.\textsuperscript{113}

\begin{itemize}
  \item \textsuperscript{103} \textit{Cameron}, 252 U.S. at 455–56.
  \item \textsuperscript{104} \textit{See} 54 U.S.C. § 320301(b).
  \item \textsuperscript{105} \textit{Cappaert v. United States}, 426 U.S. 128 (1976).
  \item \textsuperscript{106} \textit{Id.} at 133.
  \item \textsuperscript{107} \textit{Id.} at 141–42.
  \item \textsuperscript{108} \textit{Id.}
  \item \textsuperscript{109} \textit{United States v. California}, 436 U.S. 32 (1978).
  \item \textsuperscript{110} \textit{Proclamation No. 2281}, 52 Stat. 1541 (Apr. 26, 1938).
  \item \textsuperscript{111} \textit{California}, 436 U.S. at 40–42. The transfer was accomplished in the Submerged Lands Act. \textit{See supra} notes 65–71 and accompanying text.
  \item \textsuperscript{112} \textit{California}, 436 U.S. at 40–42.
\end{itemize}
President Clinton exercised authority under the Antiquities Act with great vigor. He “proclaimed twenty-two new or expanded national monuments, thereby adding approximately six million acres to the national monument system.” 114 In 2002, the D.C. Court of Appeals rejected a sweeping challenge to six monuments proclaimed by President Clinton. 115 The court of appeals rejected the argument that the president did not have power to create monuments under the authority granted by the Antiquities Act. The court first noted that “[i]n reviewing challenges under the Antiquities Act, the Supreme Court has indicated generally that review is available to ensure that the Proclamations are consistent with constitutional principles and that the president has not exceeded his statutory authority.” 116 Moving on to discuss the president’s actions, the court observed that “[e]ach Proclamation identifies particular objects or sites of historic or scientific interest and recites grounds for the designation that comport with the Act’s policies and requirements.” 117 The court accepted the statements in the proclamation at face value because the challengers had not alleged any facts to the contrary in their complaint. 118

In Tulare County v. Bush, a case decided the same day as Mountain States Legal Foundation, the D.C. Court of Appeals rejected a challenge to the establishment of Grand Sequoia National Monument. 119 Tulare County owned land within and near the Monument and claimed that the Proclamation violated the Antiquities Act because it failed to adequately identify the objects to be protected and, among other things, was too large. 120 As in Mountain States Legal Foundation, the court rejected all the arguments. First, the court stated that “[b]y identifying historic sites and objects of scientific interest located within the designated lands, the Proclamation adverts to the statutory standard.” 121 Second, the court found that including “such items as ecosystems and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features.” 122 Third, the court found that the size of the monument was appropriate, noting that the “claim that the Proclamation covered too much land is dependent on the proposition that parts of the Monument lack scientific or historical value, an issue on which Tulare County made no factual allegations.” 123 Finally, the court rejected the claim that

114. Squillace, supra note 89, at 474.
116. Id.
117. Id. at 1137.
118. See id.
120. Id. at 1140–41.
121. Id. at 1141.
122. Id. at 1142.
123. Id.
Congress had unconstitutionally delegated authority to the president due to inadequate standards for making the withdrawals.\textsuperscript{124}

\textbf{B. Congress Did Not Delegate Power to Revoke a Monument}

Although the language of the Antiquities Act authorizes the president to designate monuments, it is silent regarding revocation or modification.\textsuperscript{125} While there is no judicial precedent respecting presidential authority to revoke a monument,\textsuperscript{126} the Supreme Court recently reminded us that “it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that . . . it never faced.”\textsuperscript{127} No court has considered whether Congress intended to grant presidential authority to revoke a monument absent an express declaration, because no president has ever attempted to revoke a monument.\textsuperscript{128}

It has been argued that the delegated power to establish national monuments also includes the implied power to revoke them.\textsuperscript{129} Reading a statute as including a delegation of power not provided by Congress requires adding something to the law, and should not be done without compelling reasons provided by legislative history or the circumstances of Congress’s action. Here, there is no legislative history supporting that argument, and the circumstances surrounding the passage indicate that when Congress wished to delegate such authority, it did so expressly. There were two contemporaneous statutes authorizing the use of executive authority to revoke prior executive withdrawals.\textsuperscript{130} First, with respect to forests, Congress provided that

\begin{quote}
[t]he President is hereby authorized . . . to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.
\end{quote}

Second, the Pickett Act of 1910 authorized the president to temporarily withdraw public lands for various purposes with “such withdrawals . . . [to] remain in force until revoked by him or by an Act of Congress.”\textsuperscript{132} In each case, the authorization of withdrawal authority was accompanied by an express

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{124} \textit{Id.} at 1143 (citing Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136–37 (D.C. Cir. 2002)).
\item \textsuperscript{125} See 54 U.S.C. § 320301(a) (Supp. 2017).
\item \textsuperscript{126} See \textit{Wyatt}, supra note 92, at 1.
\item \textsuperscript{127} Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1725 (2017).
\item \textsuperscript{128} See \textit{Wyatt}, supra note 92, at 3.
\item \textsuperscript{129} \textit{Yoo & Gaziano}, supra note 22, at 1–2.
\item \textsuperscript{130} Squillace, supra note 89, at 553.
\end{enumerate}
\end{footnotesize}
congressional grant of power to the Executive to revoke or modify the reserved or withdrawn area. The implication of the practice is that at least in the case of turn-of-the-century public lands statutes, presidential power to reserve an area is a one-way street unless accompanied by a corresponding grant of revocation power.\textsuperscript{133}

The question of presidential authority to revoke a monument was addressed in a 1938 attorney general’s opinion. Attorney General Homer Cummings was asked to comment on the recommendation from the acting secretary of the interior that the president revoke the 3.4-acre Castle Pinckney National Monument established by President Coolidge in 1924.\textsuperscript{134} Castle Pinckney was the site of the first takeover of Union property by the Confederacy in the Civil War, but it apparently lacked significant political support.\textsuperscript{135} Cummings noted, “My predecessors have held that if public lands are reserved by the president for a particular purpose under express authority of an act of Congress, the president is thereafter without authority to abolish such reservation.”\textsuperscript{136} The attorney general in 1862 considered an effort to revoke the Rock Island military reservation and reasoned that “the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can.”\textsuperscript{137} This reasoning supported Cummings’ conclusion that the president does not have “the power to abolish a monument entirely.”\textsuperscript{138}

The latter portion of the attorney general opinion alludes to the power to diminish monuments based on findings that an original designation was not the “smallest area compatible with the proper care and management of the objects to be protected” as required by the statute. Although subsequent presidents diminished at least sixteen monuments in size,\textsuperscript{139} persuasive scholarship\textsuperscript{140}...

---

\textsuperscript{133} See Jack M. Beermann, Presidential Power in Transitions, 83 B.U. L. REV. 947, 975 (2003). Because the President’s successor cannot unilaterally revoke such [national monument] designations, this action seems to be a good candidate for a President who wants to extend his influence beyond his term in office. A President’s policy in favor of designating national monuments is likely to bear fruit well beyond that President’s term. Subsequent administrations could neglect national monuments, the same as they can subvert the effectiveness of midnight regulations by failing to enforce them vigorously. However, the designation is there to stay and, in most instances, it is likely to be honored, even by administrations with less enthusiasm for the designation.


\textsuperscript{135} \textit{Id.} at 186.

\textsuperscript{136} \textit{Id.} at 186–87 (citing Rock Island Military Reservation, 10 Op. Att’y Gen. 359, 364 (1862)).

\textsuperscript{137} Rock Island Military Reservation, 10 U.S. Op. Att’y Gen. at 364.


\textsuperscript{139} See https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm. Two were diminished by granting rights of way and the other changes varied in size from 40 acres to 313,000 acres. See also Squillace, supra note 89, at 585 (Appendix). See also NAME REDACTED, CONG. RESEARCH SERV., R41330, NATIONAL MONUMENTS and the ANTIQUITIES ACT 15, tbl.B-2 (2017).
also supports the argument that Congress’s express grant of withdrawal authority does not include implied revocation authority. The same reasoning supports the argument that presidential boundary alterations to date are of dubious validity. Professor Mark Squillace argues that a monument may neither be revoked nor diminished after being proclaimed by a president. He argues that by definition, a monument proclamation contains the “smallest area compatible with the proper care and management of the objects to be protected.” Thus, to allow a new president to “reverse the considered judgment of a prior President is not simply correcting a mistake” but allows the new president to exercise a power not granted by the Antiquities Act. Instead, only Congress has the authority to revoke or diminish a monument pursuant to its plenary authority under the Property Clause of the Constitution.

The fact that no president has ever purported to revoke a national monument in over one hundred years indicates that such power is not necessary for the use and well-being of the nation’s public lands. Moreover, the fact that Congress retains and exercises plenary power to adjust designations and uses of public lands counsels in favor of interpreting the statute consistently with its literal terms—a limited Executive power to withdraw lands, but not to revoke or modify prior designations. Congress revised the general public lands laws in the Federal Land and Policy Management Act (FLPMA) in 1976, when it limited some executive authority to make withdrawals and revoke them. Although Congress repealed the Pickett Act and reversed the “implied withdrawal authority” recognized in the Midwest Oil case, it did not revise the withdrawal authority provided in the Antiquities Act. Instead, FLPMA provides that no modification or revocation of a withdrawal may be made except as provided by Congress.

No monument designation has been set aside by a court, and the arguments discussed above demonstrate that the president lacks authority to

(accepting that eighteen monuments were either diminished, or enlarged and diminished by various presidents).

140. See generally id.
141. Id. at 554–66
142. Id. at 566–68.
143. Squillace, supra note 89, at 554–68.
144. Id. at 555.
145. Id.
146. See U.S. CONST. art. IV, § 3, cl. 2.
147. See John F. Manning, Chevron and the Reasonable Legislator, 128 HARV. L. REV. 457, 458 (2014) (“In particular, the Court’s new textualism permits interpreters to read statutes reasonably and purposively—to engage in Legal Process–style reasoning—within the margins of discretion left by the statutory text.”).
149. Id. § 704(a).
150. Id. § 102(a)(4).
revoke a monument designation. As discussed below, the withdrawal authority delegated to the president under OCSLA section 12(a) is a similar grant of reservation authority that does not include the grant of power to future presidents to revoke the prior action. Instead, that authority is reserved to Congress. The marine monuments stand on the same legal footing as all others, and likewise may be altered or revoked only by Congress.

IV. CONSERVATION AUTHORITY UNDER OCSLA

OCSLA’s text and the history of its administration provide context for President Obama’s actions and demonstrate that his five withdrawals of areas from mineral leasing may not be revoked or modified by a subsequent president. As a matter of policy, withdrawal by the president preserves Congress’s “prerogative and flexibility” to authorize mineral leasing in the future, while preserving resources determined to be important enough to justify a presidential withdrawal.151 Such a result strikes an appropriate balance between Congress’s plenary power over public lands, and the historic role of the president in reserving land from certain uses. It also allows presidents to set particularly important areas aside from the possibility of any leasing, while allowing the secretary of the interior to carry out the offshore leasing program in the remainder of the OCS. In addition, in FLPMA, Congress indicated approval of prior OCSLA withdrawals, and precluded their revocation without explicit congressional authorization.

A. OCSLA Delegated Leasing Authority to the Secretary of the Interior, and Included Presidential Power to Withdraw Areas for Conservation Purposes

The substance of OCSLA was originally considered with the SLA, but passed as separate legislation in August of 1953, just two months after the SLA.152 As discussed in Part II, OCSLA asserted the federal government’s exclusive jurisdiction and control over the seabed, subsoil, and natural resources of the OCS, to provide for the development of its vast mineral resources.153 Mineral leases were authorized to provide access to “oil, gas, or

151. See Getches, supra note 5, at 287; see also United States ex rel. McLennon v. Wilbur, 283 U.S. 414, 419 (1931) (power to lease land under the 1920 Mineral Leasing Act does not require any leasing at all).

152. OCSLA, Pub L. No. 83-212, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331–1342 (2012); see also S. REP. NO. 83-411, at 1 (1953); H.R. REP. NO. 83-1031, at 1 (1953) (Conf. Rep.) (describing OCSLA as an amendment to the Submerged Lands Act); GATES, supra note 76, at 31–32 (describing the political circumstances leading to the passage of SLA and OCSLA about two months apart in 1953); Christopher, supra note 53, at 29–31 (describing the legislative history of OCSLA). Given the short period between the two, the legislative history and provisions of the SLA are relevant to the proper interpretation of OCSLA. See infra note 163 and accompanying text.

153. See 43 U.S. § 1333(a)(1); OCSLA § 4; S. REP. NO. 83-411, at 2; Mason & Smyth, supra note 76, at 392–93.
other minerals.” Federal jurisdiction extended to the OCS “as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.” State laws could apply so long as they did not interfere with the text or objectives of federal law. OCSLA did not specify the nature of all the rights to explore, develop, or produce that were transferred to the purchaser of a lease, instead leaving it to the Department of the Interior to define the scope of such rights at the time a lease sale was announced.

OCSLA provides for leasing “at the discretion of the Secretary [of the Interior]” for terms of up to five years, or so long as oil and gas are produced in paying quantities. When passed in 1953, OCSLA provided no detailed provisions dealing with environmental protection, but it did allow the secretary of the interior to provide by regulation for “the prevention of waste and conservation of the natural resources of the outer Continental Shelf.” Of course, whether to lease any particular area was within the discretion of the secretary, and that alone would provide some temporary protection from development-related harms. In addition, Congress’s grant of authority to promulgate regulations included the general power to protect environmental values. In the only decision considering the secretary’s power to take actions suspending leases in aid of environmental protection, the Ninth Circuit noted that “the Act speaks of ‘conservation of the natural resources of the outer Continental Shelf,’ not just of conservation of oil, gas, sulphur and other mineral resources.”

154. OCSLA § 2(c) (defining the term “mineral lease”).
155. Id. § 4(a)(1). As such, the OCS is an area “owned or controlled by the government within the meaning of the Antiquities Act.” 54 U.S.C. § 320301 (Supp. 2017).
156. OCSLA § 4(a)(2).
157. Id. § 5; see Sec’y of the Interior v. California, 464 U.S. 312, 336 (1984). Section 6 of the statute provided for the transition from state leases in the OCS that were issued prior to OCSLA. OCSLA § 6. This statutory scheme demonstrates sufficient federal government control over the OCS to bring the area within the text of the Antiquities Act. See supra note 9.
158. OCSLA § 8(a).
159. Id. § 8(b). This section also required that leases not exceed 5760 acres, and that the federal government receive a royalty of not less than 12.5 percent. Id.
160. Id. § 5(a)(1).
161. See Christopher, supra note 53, at 44–45, n.108. Section 11 of the statute authorized any federal agency, or private party authorized by the Secretary, to carry our geologic and geophysical explorations “which are not unduly harmful to aquatic life in such a area.” OCSLA § 11.
162. Union Oil Co. of Cal. v. Morton, 512 F.2d 743, 749 (9th Cir. 1975) (“The Secretary is responsible for conserving marine life, recreational potential, and aesthetic values, as well as the reserves of gas and oil.”). 163. Gulf Oil Corp. v. Morton, 493 F.2d 141, 145 (9th Cir. 1973). In so doing, the court carefully examined the legislative history of the phrase “natural resources.” Id. Because the term was drawn from and defined in the Submerged Lands Act, the court ascribed the same meaning to it in OCSLA. Id. at 145–46 (“The OCS Act was originally introduced in Congress as Title III of the Submerged Lands Act, 67 Stat. 29, May 22, 1953. See 1953 U.S. Code Cong. & Admin. News 2177 ff, quoting S. Rep. 411, H. Rep. 413, Conf. Rep. 1031, 83rd Cong., 1st Sess. (1953). It was stricken from that Act, but reintroduced in the same form and ultimately adopted on August 7, 1953. In the legislative history, it is still referred to as Title III of the Submerged Lands Act, although it was finally adopted as an amendment to the Submerged Lands Act. It is clear, however, that the two Acts are in pari materia. . . . We think it entirely

Major amendments to OCSLA in 1978 added explicit environmental protections to the leasing process. The revisions set out four distinct stages that could lead to the production of oil and gas in the OCS, and added environmental provisions in keeping with the modernization of environmental law. First, the Department of the Interior must formulate a five-year leasing plan for the entire OCS. Second, lease sales occur under a competitive bidding process. Third, successful lessees submit an exploration plan and are permitted to explore for oil and gas, but subject to secretarial discretion. Exploration may proceed only if the lessees’ exploration plan “will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance.” The fourth stage is also discretionary, and consists of development and production on the leases. Challenges to leasing decisions may occur at any stage of the proceedings, and often do. In addition, the 1978 amendments added detailed environmental protections to OCSLA. For

reasonable for the Secretary to conclude that the OCS Act, in § 5(a)(1), uses the phrase “natural resources” in the sense in which it is defined in Section 2(e) of the Submerged Lands Act.”). See also Copper Valley Mach. Works, Inc. v. Andrus, 653 F.2d 595, 600–01 n.8 (D.C. Cir. 1981) (citing Gulf Oil Corp. for the proposition that the phrase “conservation of natural resources” as used in the Mineral Leasing Act included environmental protection).

164. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 102, 92 Stat. 629, 631 (codified at 43 U.S.C. § 1802 (2012)) (stating the purpose is to develop oil and natural gas resources in the OCS “in a manner which is consistent with the need (A) to make such resources available to meet the Nation’s energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments”); see Krueger & Singer, supra note 87, at 921.


166. 43 U.S.C. § 1344. Except, of course, for those areas withdrawn from leasing by statute or presidential directive.

167. Id. § 1337(a). States and local governments have rights to notice and participation “regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan.” Id. § 1345.

168. Id. § 1340(c)(1).

169. Id. § 1340(g)(3).


171. See, e.g., Ctr. for Sustainable Economy v. Jewell, 779 F.3d 588, 599–600 (D.C. Cir. 2015) (dismissing NEPA challenge to national leasing program on ripeness grounds, but reaching other issues); Ctr. for Biological Diversity v. U.S. Dept. of Interior, 563 F.3d 466, 472 (D.C. Cir. 2009) (dismissing NEPA and ESA claims on ripeness grounds, but reaching OCSLA-based challenges).

172. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 102(2)–(3), 92 Stat. 629, 631 (codified at 43 U.S.C. § 1802) (stating that the purposes of the Act are to “preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation’s energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human,
example, exploration activity under an OCS lease may not occur if the
secretary of the interior finds that the activity “would probably cause serious
harm or damage to life (including fish and other aquatic life), to property, to
any mineral . . . , to the national security or defense, or to the marine, coastal, or
human environment.”173 Despite these protective changes, the program’s
implementation has been sharply criticized.174

Unchanged from the original 1953 enactment is section 12(a), which
provides simply: “The President of the United States may, from time to time,
withdraw from disposition any of the unleased lands of the outer Continental
Shelf.”175 Section 12(a) was added by the Congressional Conference
Committee176 to supplement withdrawal authority delegated to the president for
defense and other national security concerns.177 Before the amendment, the
section was captioned “National Emergency Reservations” and provided, “[t]he

marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of
the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition”). The federal
government’s environmental record in implementing the statute has been criticized. See Michael LeVine
et al., What About BOEM? The Need to Reform the Regulations Governing Offshore Oil and Gas
Planning and Leasing, 31 ALASKA L. REV. 231, 258 (2014) (“The 1978 amendments to OCSLA were
intended to ensure an appropriate balance between the pursuit of hydrocarbon resources in federal
waters and the protection of the marine environment. All too often, however, DOI has fallen short of this
objective.”); see also William M. Cohen & Jack Haugrud, Environmental Considerations in Outer
Continental Shelf Oil and Gas Leasing in the United States, 3 TUL. ENVTL. L.J. 1 (1990).

States, 530 U.S. 604, 609 (2000)).

174. See Andrew Hartsig et al., Next Steps to Reform the Regulations Governing Offshore Oil
and Gas Planning and Leasing, 33 ALASKA L. REV. 1, 2 (2016) (“suggesting potential improvements to the
regulations that govern three of BOEM’s substantive obligations: (1) development of five-year OCS oil
and gas leasing programs; (2) sale of OCS leases to oil and gas companies; and (3) review of OCS
exploration drilling plans”). Even after the Deepwater Horizon tragedy, such efforts fell on deaf ears in
Congress, and not likely to fare better in the Trump Administration. The current five-year plan is in
effect from 2017 until 2022. Notice of Availability of the 2017–2022 Outer Continental Shelf Oil and
Gas Leasing Proposed Final Program, 81 Fed. Reg. 84,612 (Nov. 23, 2016) (announcing the availability of
the 2017–2022 OCS Oil and Gas Leasing Proposed Final Program). But it may be revised to reflect
the current administration’s support of fossil fuel dominance. A proposed new five-year plan would
open the entire OCS to leasing except for Bristol Bay in Alaska, the Eastern Gulf of Mexico, and the

1341(a)). Section 12(b) provided a federal right of first refusal to purchase any minerals in time of war;
section 12(c) provided authority to suspend lease operations in time of war or natural emergency;
section 12(d) gave the Secretary of Defense authority (subject to presidential approval) to restrict areas
from “exploration and operation” in parts of the OCS needed for national defense; section 12(e) reserved
all uranium in the OCS for the use of the United States; and section 12(f) reserved federal ownership of
any helium produced as a result of production under a lease. 43 U.S.C. § 1341.

176. See H.R. REP. NO. 83-1031, at 9, 13 (1953) (Conf. Rep.). The Senate version of the bill
provided the working draft that eventually became law after extensive committee work and revision. See
Christopher, supra note 53, at 31 (“The bill reported out of Committee was passed by the Senate . . .
and [t]he Senate-House conference accepted the Senate version . . . . The conference bill was accepted
by the House by voice vote and in the Senate by the narrow margin of 45-43. The President signed the
Act on August 7, 1953.”).

President may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf and reserve them for the United States in the interest of national security.”\textsuperscript{178} In a letter to the Senate Committee, the Department of Justice’s Office of Legal Counsel pointed out that the italicized language was unnecessary because the bill did not require that any particular area be leased and that limiting the president’s withdrawal authority to national security “may imply that [national security] constitutes the only permissible reason for refusing to lease.”\textsuperscript{179} Accordingly, the language was dropped before the bill passed.\textsuperscript{180}

The Senate Report described section 12(a) as authorizing “the President to withdraw from disposition under the act any of the unleased areas of the outer shelf. Such a provision is similar to authority given to the President on the public domain.”\textsuperscript{181} This begs the question: What was the president’s power to withdraw or revoke withdrawals of public domain lands in 1953 when Congress passed OCSLA? First, it is worth emphasizing that executive authority over public lands is very broad. In \textit{United States v. Midwest Oil Co.}, the Supreme Court upheld an executive order issued by President Taft that withdrew millions of acres of land in Wyoming and California from oil and gas prospecting.\textsuperscript{182} The Court ruled that the president had broad authority to withdraw the lands from oil- and gas-related claims, notwithstanding the fact that Congress had explicitly made oil-bearing lands subject to private claims under the 1872 Mining Law.\textsuperscript{183} Although no law explicitly authorized such a withdrawal, the Court found that presidential power was implicitly granted by Congress’s long acquiescence in the exercise of such authority.\textsuperscript{184} Congress abrogated the \textit{Midwest Oil} rule with the passage of FLPMA.\textsuperscript{185} While the president’s power over the OCS is broad, it is subject to limitations imposed by Congress through its own powers over foreign affairs and federal property. After all, it was in OCSLA that Congress affirmed President Truman’s 1945
assertion of authority over the OCS.\textsuperscript{186} Thus, the delegated powers should be governed by the literal terms of the statute, and in light of its legislative history. Absent congressional action, Congress’s limited delegation to make withdrawals is just that—limited to \textit{making} withdrawals. As discussed below, when Congress wished to delegate a power to make withdrawals or other land reservations, it explicitly included a revocation or modification power.

In 1953, the primary laws regarding administrative withdrawals from unreserved federal lands consisted of the Pickett Act of 1910,\textsuperscript{187} the Antiquities Act,\textsuperscript{188} and the Forest Reserve Act.\textsuperscript{189} The Pickett Act authorized the president to temporarily withdraw public lands for various purposes with “such withdrawals . . . [to] remain in force until revoked by him or by an Act of Congress.”\textsuperscript{190} The Pickett Act apparently left in place the permanent general withdrawal authority approved in \textit{Midwest Oil}, but explicitly provided revocation authority.\textsuperscript{191} The Forest Service Organic Act of 1897, building on the president’s authority to set up forest reserves, provided that “[t]he President is hereby authorized . . . to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.”\textsuperscript{192} The sponsor of the quoted language explained that the express delegation of revocation/modification authority was necessary because Congress previously delegated only the power to create forest reservations.\textsuperscript{193} Thus, in both the Forest Reserve Act (accompanied by the Organic Act) and the Pickett Act, the authorization of withdrawal authority was accompanied by an express congressional grant of power to the president to revoke or modify the reserved or withdrawn area.\textsuperscript{194} Both statutes differ from the Antiquities Act and OCSLA section 12(a), which provide withdrawal authority, but do not have a corresponding revocation power. As discussed in the 1938 Attorney General’s

\begin{flushleft}
\textsuperscript{186} See S. REP. NO. 83-411, at 7 (1953).
\textsuperscript{188} 54 U.S.C. § 320301 (Supp. 2017).
\textsuperscript{189} Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103. While the Forest Reserve Act established the authority to create forest reserves, the statute was carried forward in the Forest Service Organic Act of 1897. \textit{See Act} of June 4, 1897, ch. 2, 30 Stat. 11, 34–36 (codified in 16 U.S.C. §§ 473–481 (2012)). For a detailed discussion of these and other authorities, see generally Getches, \textit{supra} note 5.
\textsuperscript{190} Pickett Act § 1, 36 Stat. at 847.
\textsuperscript{191} See Getches, \textit{supra} note 5, at 298–300 (explaining the continued vitality of executive withdrawal authority after the Pickett Act).
\textsuperscript{193} 29 Cong. Rec. 2677 (1897) (statement of Sen. Lacey) (“The act of 1890 gave him the power to create a reserve, but no power to restrict it or annul it, and there ought to be such authority vested in the President of the United States.”).
\textsuperscript{194} The Pickett Act and \textit{Midwest Oil} rule were both repealed by Congress in FLPMA’s comprehensive revision of the general public land laws. Federal Land Policy and Management Act of 1976 § 704(a), 90 Stat. at 2792.
\end{flushleft}
Opinion, “if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation.” The logical implication is that a congressional delegation of presidential power to reserve an area as a national monument does not include an implied revocation power. This is also the case with respect to marine areas withdrawn pursuant to section 12(a).

B. OCSLA Section 12(a) Has Consistently Been Used for Conservation Purposes

1. Withdrawals up to the Obama Administration

As noted earlier, section 12(a) does not identify specific purposes for which areas may be withdrawn from oil and gas drilling, although the context and legislative history indicates that Congress delegated broad discretion to the president. President Eisenhower, who signed OCSLA into law in 1953, was also the first to make use of section 12(a) withdrawal authority. President Eisenhower established the Key Largo Coral Reef Preserve to protect the “scenic and scientific values of [the] area unimpaired for the benefit of future generations.” The proclamation creating the preserve pointed to the “great scientific interest and value” of the coral reefs and associated habitat in the area, and the possible “commercial exploitation” and “danger of destruction” of the reef. The proclamation concluded that it was in the “public interest to preserve this formation of great scientific and esthetic importance for the benefit and enjoyment of the people.” The proclamation explicitly relied on section 12(a) for authority, and did not have an expiration date. Key Largo

---


196. See Beermann, supra note 133, at 974.

Because the President’s successor cannot unilaterally revoke such [monument] designations, this action seems to be a good candidate for a President who wants to extend his influence beyond his term in office. A President’s policy in favor of designating national monuments is likely to bear fruit well beyond that President’s term. Subsequent administrations could neglect national monuments, the same as they can subvert the effectiveness of midnight regulations by failing to enforce them vigorously. However, the designation is there to stay and, in most instances, it is likely to be honored, even by administrations with less enthusiasm for the designation.

Id.

197. See supra notes 175–186 and accompanying text.


199. Id.

200. Id.

201. Id. After citing to both the generic conservation authority in section 5 of OCSLA and section 12(a) in the whereas clauses, the Proclamation cites “particularly [to] section 12(a)” of OCSLA for designation of the Reef Preserve, and for the withdrawal of the lands from leasing under OCSLA. Id.
Coral Reef Preserve was designated as part of a marine sanctuary in 1975\textsuperscript{202} and was subsequently incorporated into the Florida Keys National Marine Sanctuary in 1990.\textsuperscript{203} The original Coral Reef Preserve and expanded area thus remain protected from mineral development.\textsuperscript{204}

The second use of the withdrawal authority occurred in the wake of the disastrous 1969 Santa Barbara oil spill.\textsuperscript{205} The Santa Barbara Channel Ecological Preserve, established by secretarial order in 1969, withdrew areas off of the coast of Santa Barbara and near the Channel Islands from “all forms of disposition, including mineral leasing, and reserved [the area] for use for scientific, recreational, and other similar uses as an ecological preserve.”\textsuperscript{206} This withdrawal was made by the secretary of the interior pursuant to a delegation of presidential authority.\textsuperscript{207} The area remains withdrawn under OCSLA.\textsuperscript{208} In 1998, President Clinton issued an order to “withdraw from disposition by leasing for a time period without specific expiration those areas of the Outer Continental Shelf currently designated Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972.”\textsuperscript{209} Until President Obama’s withdrawals, this was the last “permanent” withdrawal

\begin{itemize}
\item\textsuperscript{202} Key Largo Coral Reef Marine Sanctuary, 41 Fed. Reg. 2378, 2379 (Jan. 13, 1976); see CTR. FOR NAT. AREAS, AN ASSESSMENT OF THE NEED FOR A NATIONAL MARINE SANCTUARIES PROGRAM 61–65 (1977) (describing history of Key Largo Coral Reef protections).
\item\textsuperscript{204} Florida Keys National Marine Sanctuary and Protection Act § 6(b) (“No leasing, exploration, development, or production of minerals or hydrocarbons shall be permitted within the Sanctuary.”).
\item\textsuperscript{205} See Christine Mai-Duc, The 1969 Santa Barbara Oil Spill That Changed Oil and Gas Exploration Forever, LOS ANGELES TIMES (May 20, 2015), http://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-htmlstory.html; Union Oil Co. v. Morton, 512 F.2d 743, 746 (9th Cir. 1975) (“The [well] blowout caused the disastrous Santa Barbara oil spill which killed birds and marine organisms, damaged beaches and seafront properties, and restricted fishing and recreational activities in the area.”).
\item\textsuperscript{207} The announcement cites 43 U.S.C. § 1341 (OCSLA), and to Exec. Order No. 10,355, 17 Fed. Reg. 4831 (May 28, 1952), which explicitly delegates presidential authority under the Pickett Act, ch. 421, 36 Stat. 847 (1910), and [includes a delegation of] the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made.
\item\textsuperscript{209} Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 WEEKLY COMP. PRES. DOC. 1111 (June 12, 1998).
\end{itemize}
order issued. Before reaching the Obama withdrawals, however, the “time-limited” withdrawals should be noted.

Starting in 1990, section 12(a) was used to withdraw some areas from mineral leasing for a finite period of time. This is well within the scope of the congressional delegation of authority, which does not speak to the duration of withdrawals. Thus, in 1990, President George H.W. Bush issued a statement directing the secretary of the interior not to put up for lease several areas off the coasts of Washington and Oregon, and in the Georges Bank in the North Atlantic. In addition, the statement simply announced “support for a moratorium on oil and gas leasing and development” in certain areas off of Florida and California until after 2000, and directed the agencies to begin the process to buy back certain leases off of southwest Florida. President Bush’s action was based in part on a federal interagency task force report, which concluded that there was inadequate environmental information available to proceed with leasing in the areas named in the president’s statement. The statement also indicated agreement with a recommendation by the secretary of the interior not to lease or develop areas off of Washington and Oregon until after 2000 as part of an environmental protection agenda. The president’s statement may not have cited section 12(a), but it was undoubtedly meant to be binding. As one might expect, in its Proposed Final Program for federal oil and gas leasing and development for the period from 1992 to 1997, the Minerals Management Service described the areas included in the statement as having been “withdrawn by the President on June 26, 1990.” And, like preceding withdrawals without temporal limitation in 1960 and 1969, the president’s action was taken to protect the environment. Congress immediately

210. Statement on Outer Continental Shelf Oil and Gas Development, 26 WEEKLY COMP. PRES. DOC. 1006 (June 26, 1990). The president also ordered the secretary of the interior to commence a buyback of several existing leases off the coast of Florida. Id.

211. Id.

212. Id. The president also approved establishment of a National Marine Sanctuary in California’s Monterey Bay with a permanent ban on oil and gas development. Id. Proposed regulations, including the oil and gas leasing ban, were published in 1990 and finalized in 1992. Monterey Bay National Marine Sanctuary Regulations, 57 Fed. Reg. 43,310 (Sept. 18, 1992).

213. See Statement on Outer Continental Shelf Oil and Gas Development, 26 WEEKLY COMP. PRES. DOC. 1006 (“I have received the report of the interagency OCS Task Force on Leasing and Development off the coasts of Florida and California and have accepted its recommendation that further steps to protect the environment are needed.”) (citing COMM. TO REVIEW THE OUTER CONTINENTAL SHELF ENVIRONMENTAL STUDIES PROGRAM, THE ADEQUACY OF ENVIRONMENTAL INFORMATION FOR OUTER CONTINENTAL SHELF OIL AND GAS DECISIONS: FLORIDA AND CALIFORNIA 2 (1989)).

214. See id. (regarding Sale Area 132). The president also cancelled Lease Sale 96 in the Georges Bank area of the North Atlantic. See id.


confirmed the president’s action in the 1990 Appropriations Act and continued the moratorium by riders in appropriations bills in subsequent years.218

In 1998, President Clinton relied on section 12(a) to withdraw the areas covered by the previously mentioned congressional moratorium through 2012, and Congress continued the moratorium for several more years. This belt-and-suspenders approach was apparently taken to ensure that the enumerated areas would remain off limits to mineral leasing even if the congressional moratoria were to lapse. The Clinton withdrawals, in place through 2012, were modified by President George W. Bush in 2007 to comply with congressionally mandated changes. President Bush announced further changes in 2008, which purported to end the Clinton-initiated moratorium, except for the restrictions on leasing in marine sanctuaries. The areas covered by the congressional moratorium also lapsed after 2008. President Bush’s action to cut short the Clinton moratorium by four years was not challenged.

217. Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, § 110, 104 Stat. 1915, 1936 (1990) (“No funds provided in this title may be expended by the Department of the Interior for the conduct of offshore leasing and related activities placed under restriction in the President’s moratorium statement of June 26, 1990 . . .”). It is difficult to attach much significance to this congressional action, except that for a period of time Congress chose to solidify the temporary withdrawals made by the president by precluding the use of funds for any leasing related activity in areas subject to the moratorium. The permanent withdrawals in the Florida Keys (1960) and off of Santa Barbara (1969) remain in place.


219. See Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 WEEKLY COMP. PRES. DOC. 1111 (June 12, 1998).


222. Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition, 44 WEEKLY COMP. PRES. DOC. 986 (July 14, 2008).

223. Id. Some areas, however, remained restricted under a congressional moratorium. The area off limits is in the Eastern Gulf of Mexico and the withdrawal is set to expire on June 30, 2022. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 104(a), 120 Stat. 2922, 3003; see VANN, supra note 9, at 5.

224. The Eastern Gulf of Mexico withdrawal remains subject to a congressional moratorium. VANN, supra note 9, at 5; see BUREAU OF OCEAN ENERGY MGMT., 2017–2022 OUTER CONTINENTAL
2. President Obama’sWithdrawals

President Obama exercised his authority under section 12(a) 5 times to withdraw approximately 160 million acres in the Arctic and Atlantic Oceans from future mineral leasing for an unlimited time period. Four of President Obama’s withdrawals were accomplished by executive memoranda, while a fifth withdrawal was nested inside an executive order establishing the Northern Bering Sea Climate Resilience Area. The vast majority—125 million acres—were in Arctic waters. Each of President Obama’s withdrawal orders explicitly provided that such withdrawals shall be “without specific expiration.” In addition, the four Arctic withdrawals explicitly mentioned and relied upon the importance of the withdrawn areas for “subsistence uses” by Alaska Natives. As noted earlier, Alaska Native subsistence rights in the OCS are part of the aboriginal title that tribes may possess until such rights are extinguished under federal law.

The first withdrawal by the Obama Administration was for the Bristol Bay area, and was carefully negotiated with various Alaska Native tribes and nongovernmental interest groups over a period of years. The withdrawal was made with “due consideration of the importance of Bristol Bay and the North Aleutian Basin Planning Area to subsistence use by Alaska Natives, wildlife, wildlife habitat, and sustainable commercial and recreational fisheries, and to

---

225. See supra note 18.

226. See id.


229. See supra note 18. This contrasts with some earlier withdrawals that included specific end dates. See Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 2010 DAILY COMP. PRES. DOC. 1 (Mar. 31, 2010) (“Under the authority granted to me in section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a), I hereby withdraw from disposition by leasing through June 30, 2017, the Bristol Bay area of the North Aleutian Basin in Alaska.”); Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 WEEKLY COMP. PRES. DOC. 1111 (June 12, 1998) (citing Clinton withdrawal effective through June 30, 2012).

230. See supra notes 28–40 and accompanying text.

231. See Press Release, Pew Charitable Trs., Pew Applauds Protection of Alaska’s Bristol Bay (Dec. 16, 2014) (“‘The president’s announcement is a victory for the people of Bristol Bay, who for more than 30 years have worked to secure their fishing grounds and ensure that their cultural heritage will continue to thrive for generations,’ said Marilyn Heiman, director of Pew’s U.S. Arctic project.”); Timeline: Oil and Gas Leasing in Bristol Bay, PEW CHARITABLE TR. (Dec. 16, 2014), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2010/10/timeline-oil-and-gas-leasing-in-bristol-bay.
ensure that the unique resources of Bristol Bay remain available for future
generations.”232 One of the coalition leaders praised the withdrawal in the
following terms: “Last month, President Barack Obama removed the North
Aleutian Basin from the federal offshore oil and gas leasing program. . . . His
decision was supported by 20 seafood companies and trade associations who
operate in the region as well as 50 tribes and Native organizations from
Western Alaska and the Interior.”233 Alaska Republican Senator (and Chair of
the United States Senate Energy Committee) Lisa Murkowski did not object to
the decision, “given the lack of interest by industry and the public divide over
allowing oil and gas exploration in this area.”234

Just over a month later, President Obama withdrew from mineral leasing
activity several carefully delineated areas in the Beaufort and Chukchi Seas
(Hannah Shoal, Barrow Canyon, and a twenty-five-mile coastal buffer).235 The
Alaska Native community opposed oil and gas drilling previously proposed in
these areas.236 The areas withdrawn provide habitat for whales, walrus, and
other marine mammals important for Native subsistence uses.237 The
importance of these areas is underscored by prior litigation in which Alaska
Natives asserted aboriginal claims in order to limit offshore oil and gas
development, and in comments consistently made on prior five-year leasing
plans.238 Thus, President Obama made the withdrawal “with due consideration

232. Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf
233. Norm Van Vactor, In Support of a Permanent Withdrawal of Bristol Bay from Offshore
permanently-removing-bristol-bay-offshore-drilling-better-surprise-mega-sanctuary/2015/01/23/.
234. Marie L. La Ganga, Obama Protects Alaska’s Bristol Bay from Oil and Gas Drilling, LOS
story.html.
235. See Memorandum on Withdrawal of Certain Areas of the United States Outer Continental
Shelf Offshore Alaska from Leasing Disposition, 2015 DAILY COMP. PRES. DOC. 1 (Jan. 27, 2015)
(delineating those areas with a map of the withdrawn areas attached to the Memorandum); see also
BUREAU OF OCEAN ENERGY MGMT., supra note 224, at 4-4 figs.4-1 & 4-2 (showing maps as well). The
Proposed plan was approved in a Record of Decision published at the very close of the Obama
Administration. Record of Decision for the 2017–2022 Outer Continental Shelf Oil and Gas Leasing
236. The map of the areas withdrawn show their importance to Alaska Native whaling and
subsistence uses of marine mammals. Memorandum on Withdrawal of Certain Areas of the United
States Outer Continental Shelf Offshore Alaska from Leasing Disposition, 2015 DAILY COMP. PRES.
DOC. 1 (Jan. 27, 2015); see also BUREAU OF OCEAN ENERGY MGMT., supra note 224, at 4-4 fig.4-2.
237. PEW CHARITABLE TRUS., SAFEGUARDING IMPORTANT AREAS IN THE U.S. ARCTIC OCEAN
(2015), http://www.pewtrusts.org/-/media/assets/2015/08/safeguarding_important_areas_in_the_arctic_
_oean_v8.pdf.
238. See People of the Village of Gambell v. Hodel, 869 F.2d 1273, 1275 (9th Cir. 1989)
(concerning an action to enjoin the Secretary of the Interior’s sale of oil and gas exploration leases in the
Bering Sea on the Outer Continental Shelf of Alaska); Inupiat Cnty. of Arctic Slope v. United States,
548 F. Supp. 182, 185 (D. Alaska 1982) (“The Inupiat again challenge the lease-sale made in the
Beaufort Sea in 1979. They assert that they possess sovereign rights and unextinguished aboriginal title
to the area lying from three to sixty-five miles off-shore in the Beaufort and Chukchi Seas of the Arctic
Ocean.”); see also Comments of the Inupiat Community of the Arctic Slope on the Draft Environmental
of the critical importance of certain areas within the Beaufort and Chukchi Seas to subsistence use by Alaska Natives as well as for marine mammals, other wildlife, and wildlife habitat, and to ensure that the unique resources of these areas remain available for future generations . . . .239

The third withdrawal was part of an executive order creating the Northern Bering Sea Climate Resilience Area.240 The order contained the most explicit description of the need for the withdrawal, and established an intertribal body to advise federal agencies carrying out various activities in the area:

The Bering Intergovernmental Tribal Advisory Council shall be charged with providing input and recommendations on activities, regulations, guidance, or policy that may affect actions or conditions in the Northern Bering Sea Climate Resilience Area, with attention given to climate resilience; the rights, needs, and knowledge of Alaska Native tribes; the delicate and unique ecosystem; and the protection of marine mammals and other wildlife.241

The order included additional directives to various federal agencies intended to protect marine habitat, prepare for possible oil spills, exercise care in development of new shipping routes, develop plans regarding the discharge from vessels, and preclude future bottom trawling. Central to carrying out the mission of the executive order is the use of traditional knowledge from the indigenous people who live nearby and who have relied on the resources for centuries. To that end, agencies were ordered to include traditional knowledge in all planning for federal actions and activities in the Northern Bering Sea Climate Resilience Area.242 The withdrawal and executive order were a major

Impact Statement – Beaufort Sea and Chukchi Sea Planning Areas – Oil & Gas Sales 209, 212, 217, and 221, at 2 (March 30, 2009) ("We are generally opposed to offshore oil leasing, exploration, and development because of the threats they pose to the subsistence resources of the Arctic."); Letter from North Slope Borough Mayor, Charlotte E. Brower, to Mr. James F. Bennett re: 5-Year Program Draft Programmatic Environmental Impact Statement, at 2 (Jan. 9, 2012) ("Since the Borough’s Incorporation in 1972, our leaders have taken a consistent stand in opposition to offshore leasing, exploration, and development. . . . The adverse impacts from an oil spill, especially a large spill, would be devastating to our communities, our ability to feed ourselves, and the continued viability of the Inupiat culture.").


241. Id. at 90,671.

242. Id.
step forward in terms of Alaska Native tribal involvement and influence to protect a vast area of the Bering Sea.\textsuperscript{243}

The final area withdrawn from leasing off the Alaska coast encompassed almost the entire Arctic Ocean.\textsuperscript{244} Obama announced the withdrawal in conjunction with a larger United States-Canada Arctic agreement, where “both countries committed to defining new approaches and exchanging best practices to strengthen the resilience of Arctic communities and continuing to support the well-being of Arctic residents, in particular respecting the rights and territory of Indigenous peoples.”\textsuperscript{245} As with the other Arctic withdrawals, President Obama pointed explicitly to the importance of the marine habitat to subsistence uses as part of his justification. At the same time, the massive size of the withdrawal was plainly the trigger causing the Alaska congressional delegation and oil and gas industry to urge the Trump Administration to revoke the Obama withdrawal orders.\textsuperscript{246}

Each of these withdrawals is significant in the recognition of the importance of Alaska Native subsistence uses to the tribes in the area. As discussed earlier, Alaska Native tribes arguably retain aboriginal rights to hunt, fish, and gather in these areas as a matter of federal law.\textsuperscript{247} Indeed, much like Northwest Indian rights to fish, the uses of marine mammals by Alaska Natives “were not much less necessary to the existence of the [Alaska Natives] than the atmosphere they breathed.”\textsuperscript{248} The Obama OCSLA withdrawals were made in large part to protect the marine environment from the demonstrated and inherent dangers in oil and gas exploration and production in the Arctic, and to prevent a major oil spill in the Arctic. The environmental protection objectives of the Obama withdrawals are consistent with the past use of the withdrawal authority by Presidents Eisenhower, Nixon, G.H.W. Bush, Clinton, and G.W. Bush. The indigenous rights and protection elements, as well as the history of failed efforts to drill in Arctic waters make the Arctic withdrawals even more compelling, and the best interpretation of the statute is that the withdrawals for a “time period without expiration” cannot be undone by a subsequent president. This is addressed in the next subpart.

\textsuperscript{244} See Memorandum on Withdrawal of Certain Areas of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016) (designating a large Arctic withdrawal).
\textsuperscript{245} Joint Statement—United States-Canada Joint Arctic Leaders’ Statement, 2016 DAILY COMP. PRES. DOC. 1, 1 (Dec. 20, 2016).
\textsuperscript{246} As noted above, the December 2016 Arctic withdrawal consumed approximately 115 million acres of the approximately 160 million acres withdrawn. See Davenport, supra note 17.
\textsuperscript{247} See supra notes 28–40 and accompanying text.
\textsuperscript{248} United States v. Winans, 198 U.S. 371, 381 (1905).
3. The Trump Administration Response

President Donald Trump issued an executive order on April 28, 2017 that purported to revoke all of President Obama’s section 12(a) withdrawals, except for Bristol Bay.\(^{249}\) It left in place the prior withdrawals applicable to designated marine sanctuaries, but also mandated a review of all marine sanctuary and marine national monument designations or expansions affected within the ten years prior to the date of the order.\(^{250}\) The Trump Administration’s reaction was foreshadowed by cries of outrage from the Alaska congressional delegation.\(^{251}\) The Trump Order parallels another executive order calling for review of all terrestrial monument designations of one hundred thousand acres or more since January 1, 1996.\(^{252}\) The OCLSA revocation order directly raises the question of whether a subsequent president has the authority to revoke or modify a section 12(a) withdrawal.\(^{253}\) As discussed above, because the withdrawal was made pursuant to a limited congressional delegation of authority, a new president may not simply revoke it with the stroke of a pen, as some have asserted. Moreover, the withdrawal authority in section 12(a) is distinct from the five-year leasing program set forth in the OCSLA, which

---


The body text in each of the memoranda of withdrawal from disposition by leasing of the United States Outer Continental Shelf issued on December 20, 2016, January 27, 2015, and July 14, 2008, is modified to read, in its entirety, as follows:

Under the authority vested in me as President of the United States, including section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a), I hereby withdraw from disposition by leasing, for a time period without specific expiration, those areas of the Outer Continental Shelf designated as of July 14, 2008, as Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. 1431–1434, 33 U.S.C. 1401 et seq.


253. The first lawsuit challenging the attempt to revoke the withdrawals was filed on May 3, 2017, less than a week after the order was signed, and the same day it was published in the Federal Register. League of Conservation Voters v. Trump, No. 3:17-cv-00101 (D. Alaska May 3, 2017). See Margaret Kriz Hobson, Trump Lawyers, Enviros Square Off over Drilling Expansion ENERGYWIRE (Nov. 9, 2017), https://www.eenews.net/stories/1060066103.
provides discretion to the secretary of the interior to leave areas out of lease sale planning. Rather, the section 12(a) authority is a “one-way” delegation of Congress’s power over the OCS, and similar to the Antiquities Act, there is no grant of revocation power to the president.254

The 2017–2022 leasing program excluded most areas in the Arctic from lease sales, and as noted above, the entire area was placed off limits by President Obama’s withdrawals. The 2017–2012 leasing program could be amended or revised by following the statutory process to include excluded areas,255 but may not extend to areas withdrawn by the president under section 12(a). Because these areas were withdrawn under section 12(a) for a period “without expiration,” any leasing or related activity is precluded unless and until Congress provides otherwise. The express delegation of authority to withdraw areas leaves with Congress the decision of whether and when such withdrawals should be revoked. When a congressional grant of authority is clear, it is limited by the terms Congress used, and here Congress granted authority to withdraw areas from mineral leasing under section 12(a), but not to revoke or amend the withdrawals previously made. The Supreme Court recently reminded us that “it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that . . . it never faced.”256 The terms of OCSLA as written limit presidential authority to making withdrawals. That should be the end of the matter unless Congress acts.

CONCLUSION

For over one hundred years, presidents of both parties used executive power delegated by Congress in the Antiquities Act to protect important objects of historic, scientific, and natural interest. But until the second half of the twentieth century, little attention was given to marine life, resources, and habitat in need of protection. After initially viewing marine areas as primarily important for commerce and mineral exploitation, the federal government has taken a variety of approaches to protecting marine areas. While Congress has paramount authority over all public lands and the outer Continental Shelf, President Obama’s protective measures taken under the Antiquities Act and OCSLA may only be altered by Congress. As demonstrated above, President Trump lacks delegated authority to reverse the withdrawal orders made under section 12(a) of the OCSLA by President Obama. This leaves the ultimate

255. That process is underway on the Trump Administration’s assumption that the president has the authority to revoke a section 12(a) withdrawal. See supra notes 24–25.
authority with Congress and is consistent with that body’s plenary authority over public lands and the limited authority delegated to the president.

We welcome responses to this Article. If you are interested in submitting a response for our online journal, Ecology Law Currents, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, http://www.ecologylawquarterly.org.