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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

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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.

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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.¹ 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.² National

1. See U.S. CONST. art. IV, § 3, cl. 2.

2. Compare Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136 (2012) (designating certain lands as “wilderness areas” and protecting them from development), and National Park Service Organic Act of 1916, ch. 408, 39 Stat. 535 (codified as amended in scattered sections of 54 U.S.C.) (committing the federal government to the preservation of national parks through the National Park Service), with Multiple Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528–531 (2012) (authorizing the federal government to allow resource extraction from national forests while considering sustained yield and recreational, watershed, and wildlife and fish purposes), and Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1782 (2012) (authorizing the federal government to allow development and resource extraction on federal lands while considering “scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values”). “‘Multiple use management’ is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, ‘including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.’” Norton v. S. Utah Wilderness All., 542 U.S. 55, 58 (2004) (citing 43 U.S.C. § 1702(c)). The Supreme Court brushed aside challenges to Congress’s regulatory power in *Light*

wildlife refuges occupy a middle ground in terms of protective management.³ 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.⁴ 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.⁵ 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.”⁶ The Antiquities Act has been used by 16 presidents since 1906 to proclaim 157 national monuments.⁷ 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.⁸

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).

4. See *United States v. Grimaud*, 220 U.S. 506, 522 (1911).

5. See *United States v. Midwest Oil Co.*, 236 U.S. 459, 470, 483 (1915); David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 283, 285–86, 297 (1982).

6. Pub. L. No. 59-209, § 2, 34 Stat. 225, 225 (1906) (codified as amended in 54 U.S.C. § 320301(a) (Supp. 2017)).

7. The National Park Service published a list of 152 national monuments created from 1906 through September 15, 2016. *Antiquities Act 1906–2006*, NAT’L PARK SERV., <https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm> (last updated May 8, 2017). President Obama proclaimed five additional monuments after that date. *Monuments Protected Under the Antiquities Act*, NAT’L PARKS CONSERVATION ASS’N (Jan. 13, 2017), <https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act>. The total area protected under the Antiquities Act during the Obama Administration is estimated at over 550 million acres of land and water—far more than any other president, and a matter of current controversy. See Coral Davenport, *Obama Designates Monuments in Nevada and Utah*, N.Y. TIMES, Dec. 29, 2016, at A14. See generally Mark Squillace et al., Essay, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55 (2017), <http://www.virginialawreview.org/sites/virginialawreview.org/files/Hecht%20PDF.pdf>.

8. President Trump issued an executive order directing the secretary of the interior to solicit comments to assess public support for selected monuments. Review of Designations under the Antiquities Act, Exec. Order No. 13,792, 82 Fed. Reg. 20,429, 20,429 (Apr. 26, 2017). The secretary of the interior solicited comments due by June 10, 2017. Review of Certain National Monuments Established since 1996; Notice of Opportunity for Public Comment, 82 Fed. Reg. 22,016, 22,016 (May 11, 2017). Recommendations were reportedly sent to President Trump on August 24, 2017. Press Release, U.S. Dep’t of the Interior, Secretary Zinke Sends Monument Report to the White House (Aug. 24, 2017), available at <https://www.doi.gov/pressreleases/secretary-zinke-sends-monument-report-white-house>. President Trump issued proclamations “Modifying the Bears Ears National Monument”

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).⁹ 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.¹⁰ 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.¹¹ There are ten proclamations establishing

Procl. 9681, 82 Fed. Reg. 58081 (Dec. 4, 2017), and “Modifying the Grand Staircase Escalante National Monument.” Procl. 9682, 82 Fed. Reg. 58089 (Dec. 4, 2017). See Remarks by President Trump on Antiquities Act Designations (Dec. 4, 2017), available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-antiquities-act-designations>. President Trump was sued over both “modifications” on the ground that the Antiquities Act does not authorize such modifications or revocation of an established monument. See *Hopi Tribe, et al. v. Donald J. Trump, et al.*, No: 1:17-cv-02590 (D.D.C.) (complaint filed, December 5, 2017, on behalf of the Hopi Tribe, Navajo Nation, Ute Indian Tribe Ute Mountain Ute Tribe, and the Zuni Tribe).

9. Outer Continental Shelf Lands Act, Pub. L. No. 83-212, § 4, 67 Stat. 462, 462 (1953) (codified as amended at 43 U.S.C. § 1332 (2012)); see ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 1–4 (2014) (summarizing federal ocean resource jurisdiction). According to the Bureau of Ocean Energy Management, the agency principally charged with jurisdiction over ocean mineral resource development,

[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.

The Continental Shelf, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/The-Continental-Shelf/> (last visited Oct. 28, 2017). In the Magnuson-Stevens Fisheries Conservation and Management Act, the United States asserted “sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone” previously established by executive order. 16 U.S.C. § 1801(b)(1) (2012) (citing Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983)). The United Nations Convention on the Law of the Sea also recognizes the 200 mile Exclusive Economic Zone (EEZ), and is part of customary law recognized by the United States. See *Mayagüezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 305 n.14 (1st Cir. 1999) (“The United States has taken the position that the twelve-mile territorial sea and the two-hundred-mile EEZ are declarative of customary international law.”) (quoting Restatement (Third) of Foreign Relations Law, pt. III, introductory note, at 145); Proclamation No. 5928, 54 Fed. Reg. 777 (1988); Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983); Statement on United States Oceans Policy, 1983 Pub. Papers 378, 379 (Mar. 10, 1983).”; see also James E. Hickey, Jr., *The 1982 United Nations Convention on the Law of the Sea, in OCEAN AND COASTAL LAW AND POLICY* 373–75 (Donald C. Baur et al. eds., 2015).

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 I (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,¹² along with thirteen designated marine sanctuaries.¹³ 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.¹⁴

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."¹⁵ 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.¹⁶ 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 . . .").

12. See Northeast Canyons and Seamounts Marine National Monument, Proclamation No. 9496, 81 Fed. Reg. 65,161 (Sept. 15, 2016); Marianas Trench National Monument, Proclamation No. 8335, 74 Fed. Reg. 1557 (Jan. 6, 2009); Pacific Remote Islands National Monument, Proclamation No. 8336, 74 Fed. Reg. 1565 (Jan. 6, 2009); Rose Atoll National Monument, Proclamation No. 8337, 74 Fed. Reg. 1577 (Jan. 6, 2009); World War II Valor in the Pacific National Monument, Proclamation No. 8327, 73 Fed. Reg. 75,293 (Dec. 5, 2008); Northwestern Hawaiian Islands National Monument, Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006) (redesignated as Papahānaumokuākea Marine National Monument, Proclamation No. 8112, 72 Fed. Reg. 10,031 (Feb. 28, 2007)); Virgin Islands Coral Reef National Monument, Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 17, 2001); California Coastal National Monument, Proclamation No. 7264, 65 Fed. Reg. 2821 (Jan. 11, 2000); Buck Island National Monument, Proclamation No. 3443, 27 Fed. Reg. 31 (Dec. 28, 1961); Channel Islands National Monument, Proclamation No. 2281, 52 Stat. 1541 (Apr. 26, 1938). National monuments may be established "on land owned or controlled by the Federal Government." 54 U.S.C. § 320301(a) (Supp. 2017). The United States asserts ownership and control of the OCS. See *infra* Part II.

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.*

15. 43 U.S.C. § 1341(a) (2012).

16. 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) (describing the protection of marine sanctuaries); Statement on Outer Continental Shelf Oil and Gas Development, 26 WEEKLY COMP. PRES. DOC. 1006 (June 26, 1990); Establishment of Santa Barbara Channel Ecological Preserve, 34 Fed. Reg. 5655 (Mar. 26, 1969); Key Largo Coral Reef Preserve, Proclamation No. 3339, 25 Fed. Reg. 2352 (Mar. 15, 1960).

from future oil and gas leasing,¹⁷ using his authority 5 times and explicitly providing that such withdrawals shall be “without specific expiration.”¹⁸

The withdrawals were well publicized and struck a nerve with the proponents of unrestricted oil and gas development.¹⁹ Professor Charles Wilkinson aptly termed such outmoded ideas about resource exploitation the “lords of yesterday.”²⁰ 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.²¹

17. Coral Davenport, *Obama Bans Drilling in Parts of the Atlantic and Arctic*, N.Y. TIMES (Dec. 20, 2016), <https://www.nytimes.com/2016/12/20/us/obama-drilling-ban-arctic-atlantic.html> (reporting on the withdrawal of 3.8 million acres of the Atlantic and 115 million acres of the Arctic from future leasing); Mike Boots & Dan Utech, *President Obama Protects Untouched Marine Wilderness in Alaska*, THE WHITE HOUSE (Jan. 27, 2015, 12:00 PM), <https://obamawhitehouse.archives.gov/blog/2015/01/27/president-obama-protects-untouched-marine-wilderness-alaska> (discussing the withdrawal of 9.8 million acres of the Beaufort and Chukchi Seas from future leasing); Press Release, The White House, President Obama Protects Alaska’s Bristol Bay From Future Oil and Gas Drilling (Dec. 16, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/12/16/president-obama-protects-alaska-s-bristol-bay-future-oil-and-gas-drilling> (describing the withdrawal of 32.5 million acres of Bristol Bay from future leasing).

18. Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016) (expanding the withdrawals from future leasing in the Arctic “without specific expiration”); Memorandum on Withdrawal of Certain Areas off the Atlantic Coast on the Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016) (withdrawing Atlantic canyons from future leasing “without specific expiration”); Northern Bering Sea Climate Resilience, Exec. Order No. 13,754, 81 Fed. Reg. 90,669, 90,670 (Dec. 9, 2016) (establishing North Bering Sea Climate Resilience Area and withdrawing certain areas from leasing “without specific expiration”); 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) (withdrawing Beaufort and Chukchi Seas from future leasing “without specific expiration”); Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 2014 DAILY COMP. PRES. DOC. 1 (Dec. 16, 2014) (withdrawing Bristol Bay from future leasing “without specific expiration”). Only the four withdrawals off the coast of Alaska reference Native subsistence uses.

19. See Davenport, *supra* note 17; Sarah Emerson, *Obama Blocked Trump from Drilling the Arctic and Atlantic with This Obscure Law*, MOTHERBOARD (Dec. 21, 2016), https://motherboard.vice.com/en_us/article/obama-permanently-withdraw-drilling-arctic-atlantic-outer-continental-shelf-lands-act; Kevin Ewing & Michael Weller, *Obama Bans Drilling Offshore Atlantic, Arctic – But For How Long?*, BRACEWELL (Dec. 21, 2016), <http://www.energylegalblog.com/blog/2016/12/21/obama-bans-drilling-offshore-atlantic-arctic-how-long>; Daniel J. Graeber, *Oil Industry Asks Trump about Drilling Offshore*, UPI (Mar. 1, 2017), <http://www.upi.com/Oil-industry-asks-Trump-about-drilling-offshore/2461488369535/>.

20. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* xiii (1992) (using the phrase to describe the historical exploitation of public lands and resources in the United States).

21. Implementing an America-First Offshore Energy Strategy, Exec. Order No. 13,795, § 5, 82 Fed. Reg. 20,815, 20,816 (Apr. 28, 2017). Modification of the Withdrawal of Areas of the Outer Continental Shelf from Leasing Disposition: 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:

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.

22. See Julie Turkewitz, *Battle over Bears Ears Heats Up as Trump Rethinks Its Monument Status*, N.Y. TIMES (May 14, 2017), https://www.nytimes.com/2017/05/14/us/bears-ears-ryan-zinke.html?_r=0. Cf. Squillace et al., *supra* note 7, at 71, with JOHN YOO & TODD GAZIANO, AM. ENTERPRISE INST., PRESIDENTIAL AUTHORITY TO REVOKE OR REDUCE NATIONAL MONUMENT DESIGNATIONS 1 (2017), <https://www.nationalparkstraveler.org/sites/default/files/attachments/presidential-authority-to-revoke-or-reduce-national-monument-designations.pdf>.

23. See Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 189 (1938).

24. See Dep't. of the Interior, Bureau of Ocean Energy Management, 2019–2024 National Outer Continental Shelf Oil & Gas Leasing: Draft Proposed Program (January 2018).

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 *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

26. U.S. CONST. art. IV, § 3, cl. 2.

27. *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976).

28. See Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43–52 (1947) (explaining origins and meaning of Indian property rights under international and federal law).

29. *Johnson v. M’Intosh*, 21 U.S. 543, 571–72 (1823).

30. *Id.* at 561–62.

31. *Id.* at 574. In *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.”

32. *Johnson*, 21 U.S. at 585.

asserted the exclusive right to acquire the full beneficial title to land used and occupied by the indigenous occupants.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.”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.³⁵ This assertion of authority over the continental United States was also extended to the territorial sea by various measures.³⁶ This began with a three-mile belt off the coasts in 1793, and expanded to include the Exclusive Economic Zone.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.³⁸ Tribes retained substantial amounts of land and, in many cases, off-reservation rights to hunt fish and gather.³⁹ There are still unsettled questions regarding aboriginal title to marine areas in the OCS off the coast of Alaska.⁴⁰ The importance of these areas to Alaska Natives is illustrated in part by litigation over oil and gas leasing in Arctic waters.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.

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).

34. *Johnson*, 21 U.S. at 591.

35. 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).

36. See John E. Noyes, *The Territorial Sea and Contiguous Zone*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 91, 92–93 (Donald Rothwell et al. eds., 2015).

37. 16 U.S.C. § 1801 (2012); Hickey, Jr., *supra* note 9, at 2, 11.

38. See Robert T. Anderson, *Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather after ANCSA*, 33 *ALASKA L. REV.* 187, 189–211 (2016). Aboriginal claims in Alaska were not settled until 1971 in the Alaska Native Claims Settlement Act. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629h (2012)).

39. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207 (1999); *Washington v. Wash. State Pass. Fishing Vessel Ass’n*, 443 U.S. 658, 690–91 (1979).

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).

41. See *People of the Village of Gambell*, 869 F.2d at 1280.

As it purchased or otherwise extinguished tribal aboriginal title,⁴² the federal government obtained full title to what became known as the public domain.⁴³ 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.⁴⁴ The divestment process included railroad grants, homesteading laws, and grants of land directly to states as they were admitted to the Union.⁴⁵ 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.⁴⁶ 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.⁴⁷ As time passed, the Court rebuffed other challenges to federal power, including authority to condemn private land for use as a national historical park,⁴⁸ and to withdraw land within a state for a federal forest reserve.⁴⁹ The power over the public lands includes the authority to delegate regulatory power to an agency to adopt preemptive regulations on such lands,⁵⁰ to regulate activity off of such lands in order to ensure access,⁵¹ and to protect the purposes for which such lands are set aside or to preserve other federal interests.⁵² 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 COGGINS & 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 COGGINS & 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.”).

46. See *United States v. Gratiot*, 39 U.S. 526, 531 (1840).

47. *Id.* at 538.

48. See *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 681–83 (1896).

49. See *Light v. United States*, 220 U.S. 523, 537 (1911).

50. See *United States v. Grimaud*, 220 U.S. 506, 520–21 (1911).

51. See *Camfield v. United States*, 167 U.S. 518, 528 (1897) (affirming the power to ensure access).

52. See *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) (regarding the power to protect wild horses and burros); *United States v. Alford*, 274 U.S. 264, 267 (1927). For a current battle over the scope of federal authority over public lands see *Sturgeon v. Frost*, 136 U.S. 1061, 1072 (2016).

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.⁵³ The controversy centered primarily over resource development issues, with little notice of conservation needs.⁵⁴ 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.⁵⁵ 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 Clause⁵⁶ and the Property Clause.⁵⁷ States have long been recognized to possess important interests in submerged lands under inland navigable waterways:⁵⁸ “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.’”⁵⁹ Moreover, in the Desert Land Act⁶⁰ and other nineteenth century statutes, Congress made state law generally applicable to the use of waters on unreserved federal lands.⁶¹ While the federal government has deferred to state regulation of navigable waters for many purposes,⁶² that state authority is subject to preemptive federal power.⁶³ The United States may

53. See Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 40–41 (1953).

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.”).

59. *Idaho*, 533 U.S. at 272 (citing *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)).

60. Act for Sale of Desert Land, ch. 107, § 1, 19 Stat. 377, 377 (1877).

61. See *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162–63 (1935).

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. DENV. WATER 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

reservation of federal property); A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 9.6 (2017) (“Federal jurisdiction over waters now extends to all activities subject to the full Commerce Clause.”).

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”).

65. Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, Proclamation No. 2667, 10 Fed. Reg. 12,303, 12,303 (Sept. 28, 1945); see also Exec. Order No. 9633, 10 Fed. Reg. 12,305, 12,305 (Sept. 28, 1945); PUB. LAND LAW REVIEW COMM’N, *ONE THIRD OF THE NATION’S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS* 187–95 (1970) (discussing the OCS and its relation to federal public land law). The entire OCS is estimated at 1.7 billion acres. See BUREAU OF OCEAN ENERGY MGMT., *supra* note 9.

66. Exec. Order No. 9633, 10 Fed. Reg. at 12,305.

67. See *United States v. California*, 332 U.S. 19, 23 (1947) (involving 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.

69. *California*, 332 U.S. at 36.

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.⁷⁰ 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.⁷¹ In territorial waters (out to three miles), the United States generally defers to state jurisdiction and control under the SLA.⁷² However, the SLA specifically provides that “nothing” in the statute “shall affect . . . the constitutional authority of the United States . . . to regulate . . . navigation.”⁷³ 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.”⁷⁴ 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.”⁷⁵ It became law a little more than two months after the SLA.⁷⁶ In OCSLA, Congress defined the term “outer Continental Shelf” as “all

70. Pub. L. No. 83-31, § 3(a)–(b), 67 Stat. 29, 30 (1953) (codified as amended at 43 U.S.C. § 1311(a), (b) (2012)). The Submerged Lands Act of 1953 was made applicable to the State of Alaska in its Statehood Act. Pub. L. No. 85-508, § 6(m), 72 Stat. 339, 343 (1958); *see* Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 547 (1987).

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).

74. *Alaska v. United States*, 545 U.S. 75, 116–17 (2005) (Scalia, J., concurring in part and dissenting in part) (footnote omitted).

75. S. REP. NO. 83-411, at 2 (1953).

76. 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; H.R. REP. NO. 83-1031, at 1 (1953) (Conf. Rep.) (describing OCSLA as an amendment to the Submerged Lands Act); Christopher, *supra* note 53, at 29–31; PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 31–32 (1968) (describing the political circumstances leading to the passage of SLA and OCSLA about two months apart in 1953);

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

Milo B. Mason & Paul B. Smyth, *Offshore Mineral Development*, in OCEAN AND COASTAL LAW AND POLICY, *supra* note 9, at 392–93.

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 extend[s] 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.

Outer Continental Shelf, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Outer-Continental-Shelf/Index.aspx> (last visited Oct. 28, 2017).

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,⁸³ purchase all minerals,⁸⁴ suspend leases in times of war,⁸⁵ and restrict mineral development in leased areas when necessary for national defense.⁸⁶ Major amendments in 1978 added more explicit and detailed environmental considerations to some aspects of mineral leasing in the OCS.⁸⁷ 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.⁸⁸

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.”⁸⁹ “The limits of the parcels shall be confined to the smallest area compatible with the proper care and management

83. *Id.* § 12(a).

84. *Id.* § 12(b).

85. *Id.*

86. *Id.* § 12(d).

87. See Gordon L. James, *The Outer Continental Shelf Lands Act Amendments of 1978: Balancing Energy Needs with Environmental Concerns?*, 40 *LA. L. REV.* 177, 178 (1979); Robert B. Krueger & Louis H. Singer, *An Analysis of the Outer Continental Shelf Lands Act Amendments of 1978*, 19 *NAT. RESOURCES J.* 909, 921 (1979). 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, costal, and human environments.” *Id.* § 208, codified at 43 U.S.C. § 1344(a)(1).

88. See *Establishment of Santa Barbara Channel Ecological Preserve*, 34 *Fed. Reg.* 5655 (Mar. 26, 1969); *Key Largo Coral Reef Preserve*, Proclamation No. 3339, 25 *Fed. Reg.* 2352 (Mar. 15, 1960).

89. 54 U.S.C. § 320301(a) (Supp. 2017). For a comprehensive review of the Antiquities Act, see generally Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 *GA. L. REV.* 473 (2003).

of the objects to be protected.”⁹⁰ 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.⁹¹

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.⁹² 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.⁹³ The American Association of the Advancement of Science and the Department of the Interior sponsored the first bill introduced by Congress.⁹⁴ Other bills, more narrowly drafted, would have simply prohibited and criminalized the act of harming an “aboriginal antiquity” on federal land,⁹⁵ 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.

Act of June 8, 1906, ch. 3060, § 2, 34 Stat. 225, 225. The statute was recodified in 2014. Act of Dec. 19, 2014, Pub. L. No. 113-287, § 3, 128 Stat. 3094, 3259 (codified at 54 §§ 100101–320303).

91. See *supra* notes 75–79 and accompanying text; 54 U.S.C. § 320301(a) (Supp. 2017). Cf. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 548 n.15 (1987) (“The United States may not hold ‘title’ to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have ‘title’ to any ‘interests therein.’”).

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.

98. 54 U.S.C. § 320301(a) (Supp. 2017).

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).

101. *Cameron v. United States*, 252 U.S. 450, 454–55 (1920); see also JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION 57–60 (1987) (discussing Cameron’s claims against the federal government); Getches, *supra* note 5, at 303–05.

102. General Mining Act of 1872, ch. 152, 17. Stat. 91 (codified as amended at 30 U.S.C. §§ 22–42 (2012)).

regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.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.”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 *Cappaert v. United States*, which involved a monument designated to protect a rare species of desert fish and the pool they inhabited.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 fish¹⁰⁶—argued that the monument was invalid because the Act authorized the president to reserve federal lands as monuments only to protect archeological sites.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.”¹⁰⁸

In another case, *United States v. California*,¹⁰⁹ the Court considered whether a proclamation establishing the Channel Islands National Monument¹¹⁰ 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,¹¹¹ the Court did not need to reach the question of presidential intent to include the submerged lands in the monument.¹¹² The case illustrates the initial use of the Antiquities Act to protect marine waters and associated resources.¹¹³

103. *Cameron*, 252 U.S. at 455–56.

104. *See* 54 U.S.C. § 320301(b).

105. *Cappaert v. United States*, 426 U.S. 128 (1976).

106. *Id.* at 133.

107. *Id.* at 141–42.

108. *Id.*

109. *United States v. California*, 436 U.S. 32 (1978).

110. Proclamation No. 2281, 52 Stat. 1541 (Apr. 26, 1938).

111. *California*, 436 U.S. at 40–42. The transfer was accomplished in the Submerged Lands Act. *See supra* notes 65–71 and accompanying text.

112. *California*, 436 U.S. at 40–42.

113. Other marine monuments have been created within United States waters in the OCS. *See* Buck Island Reef National Monument, Proclamation No. 3443 (Dec. 28, 1961) (U.S. Virgin Islands); California Coastal National Monument, Proclamation No. 7264, 65 Fed. Reg. 2821 (Jan. 11, 2000); Virgin Islands Coral Reef National Monument, Proclamation No. 7399, 66 Fed. Reg. 7364 (Jan. 17, 2001); Papahānaumokuākea Marine National Monument, Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006) (originally named Northwestern Hawaiian Marine National Monument); WW II Valor in the Pacific National Monument, Proclamation No. 8327, 73 Fed. Reg. 75,293 (Dec. 5, 2008); Marianas Trench Marine National Monument, Proclamation No. 8335, 74 Fed. Reg. 1557 (Jan. 6, 2009); Pacific Remote Islands Marine National Monument, Proclamation No. 8336, 74 Fed. Reg. 1565 (Jan. 6, 2009); Rose Atoll Marine National Monument, Proclamation No. 8337, 74 Fed. Reg. 1577 (Jan. 6, 2009); Northeast Canyons and Seamounts Marine Monument, Proclamation No. 9496, 81 Fed. Reg. 65,161 (Sept. 15, 2016).

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.

115. *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002).

116. *Id.*

117. *Id.* at 1137.

118. *See id.*

119. *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002).

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.¹²⁴

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.¹²⁵ While there is no judicial precedent respecting presidential authority to revoke a monument,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.”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.¹²⁸

It has been argued that the delegated power to establish national monuments also includes the implied power to revoke them.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.¹³⁰ First, with respect to forests, Congress 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.*¹³¹

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.”¹³² In each case, the authorization of withdrawal authority was accompanied by an express

124. *Id.* at 1143 (citing *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136–37 (D.C. Cir. 2002)).

125. See 54 U.S.C. § 320301(a) (Supp. 2017).

126. See WYATT, *supra* note 92, at 1.

127. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

128. See WYATT, *supra* note 92, at 3.

129. YOO & GAZIANO, *supra* note 22, at 1–2.

130. Squillace, *supra* note 89, at 553.

131. Act of June 4, 1897, ch. 2, 30 Stat. 11, 36, *repealed in part* by National Forest Management Act of 1976, Pub. L. No. 94-588, § 9, 90 Stat. 2949, 2957 (codified in 16 U.S.C. § 1609(a) (2012) (emphasis added)).

132. Pickett Act, ch. 421, § 1, 36 Stat. 847, 847 (1910), *repealed* by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (emphasis added); see Getches, *supra* note 5, at 292–93 (discussing the Pickett Act).

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.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 1924.¹³⁴ 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.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."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."¹³⁷ This reasoning supported Cummings' conclusion that the president does not have "the power to abolish a monument entirely."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,¹³⁹ persuasive scholarship¹⁴⁰

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.

Id.

134. Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 Op. Att'y Gen. 185, 185-86 (1938).

135. *Id.* at 186.

136. *Id.* at 186-87 (citing Rock Island Military Reservation, 10 Op. Att'y Gen. 359, 364 (1862)).

137. Rock Island Military Reservation, 10 U.S. Op. Att'y Gen. at 364.

138. Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 Op. Att'y Gen. at 188. The Monument designation was eventually extinguished by Congress, and the property was transferred to the State of South Carolina. Act of Mar. 29, 1956, Pub. L. No. 84-447, 70 Stat. 61.

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.¹⁴¹ The same reasoning supports the argument that presidential boundary alterations to date are of dubious validity.¹⁴² Professor Mark Squillace argues that a monument may neither be revoked nor diminished after being proclaimed by a president.¹⁴³ 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."¹⁴⁴ 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.¹⁴⁵ Instead, only Congress has the authority to revoke or diminish a monument pursuant to its plenary authority under the Property Clause of the Constitution.¹⁴⁶

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.¹⁴⁷ 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.¹⁴⁸ Although Congress repealed the Pickett Act and reversed the "implied withdrawal authority" recognized in the *Midwest Oil* case,¹⁴⁹ 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.¹⁵⁰

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

(asserting 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.")

148. Pub. L. No. 94-579, § 102(a)(4), 90 Stat. 2743, 2743 (1976) (codified at 43 U.S.C. § 1701(a)(4) (2012)).

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.”¹⁵⁴ Federal jurisdiction extended to the OCS “as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.”¹⁵⁵ State laws could apply so long as they did not interfere with the text or objectives of federal law.¹⁵⁶ 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.¹⁵⁷

OCSLA provides for leasing “at the discretion of the Secretary [of the Interior]”¹⁵⁸ for terms of up to five years, or so long as oil and gas are produced in paying quantities.¹⁵⁹ 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.”¹⁶⁰ Of course, whether to lease any particular area was within the discretion of the secretary of the interior, and that alone would provide some temporary protection from development-related harms.¹⁶¹ In addition, Congress’s grant of authority to promulgate regulations included the general power to protect environmental values.¹⁶² 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.”¹⁶³

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 out geologic and geophysical explorations “which are not unduly harmful to aquatic life in such 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.¹⁶⁴ 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.¹⁶⁵ First, the Department of the Interior must formulate a five-year leasing plan for the entire OCS.¹⁶⁶ Second, lease sales occur under a competitive bidding process.¹⁶⁷ Third, successful lessees submit an exploration plan and are permitted to explore for oil and gas, but subject to secretarial discretion.¹⁶⁸ 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."¹⁶⁹ The fourth stage is also discretionary, and consists of development and production on the leases.¹⁷⁰ Challenges to leasing decisions may occur at any stage of the proceedings, and often do.¹⁷¹ In addition, the 1978 amendments added detailed environmental protections to OCSLA.¹⁷² 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.

165. Outer Continental Shelf Lands Act Amendments of 1978 § 208 (codified at 43 U.S.C. § 1344); Edward A. Fitzgerald, *Natural Resources Defense Council v. Hodel: The Evolution of Interior's Five Year Outer Continental Shelf Oil and Gas Leasing Program*, 12 TEMP. ENVTL. L. & TECH. J. 1, 5 (1994) (describing evolution of offshore leasing programs); Mason & Smyth, *supra* note 76, at 396 (describing how "OCSLA intends a careful and detailed analysis at least every five years" to weigh the benefits and risks of development in the nation's OCS areas).

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).

170. *See id.* § 1351(h); *Sec'y of the Interior v. California*, 464 U.S. 312, 337–42 (1984); *see also* *Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 610 (2000).

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).

173. 43 U.S.C. § 1334(a)(2)(A)(i) (quoted in *Mobil Oil Expl. & Producing Se., Inc. v. United 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 Marine Sanctuaries. 2019–2024 Draft Proposed Leasing Program, *supra* note 24; Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017).

175. OCSLA, Pub L. No. 83-212, § 12(a), 67 Stat. 462, 469 (1953) (codified at 43 U.S.C. § 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 conferees 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.”).

177. H.R. REP. NO. 83-1031, at 9–10.

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.*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."¹⁷⁹ Accordingly, the language was dropped before the bill passed.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."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 *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.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.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.¹⁸⁴ Congress abrogated the *Midwest Oil* rule with the passage of FLPMA.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

178. S. REP. NO. 83-411, at 22 (1953).

179. *Id.* at 39.

180. *Id.* at 22.

181. *Id.* at 14. Use of the term "similar" instead of "identical" supports an inference that Congress was aware of the Pickett Act's grant of authority to withdraw, and to revoke or modify withdrawals, while OCSLA section 12 lacks the grant of authority to revoke or modify section 12(a) withdrawals.

182. *United States v. Midwest Oil Co.*, 236 U.S. 459, 475 (1915).

183. *Id.* at 485.

184. *See id.* at 475 ("The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time, and affecting vast bodies of land, in many states and territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen."). The *Midwest Oil* Court relied in part on the long-standing practice of creating Indian reservations by executive order. Congress later revoked presidential power to make changes in Indian reservation boundaries. Act of Mar. 3, 1927, ch. 299, § 4, 44 Stat. 1347.

185. *See supra* notes 148–150 and accompanying text.

assertion of authority over the OCS.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 *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 1910,¹⁸⁷ the Antiquities Act,¹⁸⁸ and the Forest Reserve Act.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.”¹⁹⁰ The Pickett Act apparently left in place the permanent general withdrawal authority approved in *Midwest Oil*, but explicitly provided revocation authority.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.”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.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.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

186. See S. REP. NO. 83-411, at 7 (1953).

187. Pickett Act, ch. 421, 36 Stat. 847 (1910), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792.

188. 54 U.S.C. § 320301 (Supp. 2017).

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. See Act of June 4, 1897, ch. 2, 30 Stat. 11, 34–36 (codified as 16 U.S.C. §§ 473–481 (2012)). For a detailed discussion of these and other authorities, see generally Getches, *supra* note 5.

190. Pickett Act § 1, 36 Stat. at 847.

191. See Getches, *supra* note 5, at 298–300 (explaining the continued vitality of executive withdrawal authority after the Pickett Act).

192. Act of June 4, 1897, 30 Stat. at 36, *repealed in part by* National Forest Management Act of 1976, Pub. L. No. 94-588, § 9, 90 Stat. 2949, 2957 (codified in 16 U.S.C. § 1609(a)).

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.”).

194. The Pickett Act and *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.

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.”¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ 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.”¹⁹⁸ 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.¹⁹⁹ 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.”²⁰⁰ The proclamation explicitly relied on section 12(a) for authority, and did not have an expiration date.²⁰¹ Key Largo

195. Proposed Abolishment of Castle Pinckney Nat’l Monument, 39 Op. Att’y Gen. 185, 186–87 (1938); see *supra* text accompanying notes 119–142.

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.

198. Key Largo Coral Reef Preserve, Proclamation No. 3339, 25 Fed. Reg. 2352 (Mar. 15, 1960).

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 1975²⁰² and was subsequently incorporated into the Florida Keys National Marine Sanctuary in 1990.²⁰³ The original Coral Reef Preserve and expanded area thus remain protected from mineral development.²⁰⁴

The second use of the withdrawal authority occurred in the wake of the disastrous 1969 Santa Barbara oil spill.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.”²⁰⁶ This withdrawal was made by the secretary of the interior pursuant to a delegation of presidential authority.²⁰⁷ The area remains withdrawn under OCSLA.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.”²⁰⁹ Until President Obama’s withdrawals, this was the last “permanent” withdrawal

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).

203. Florida Keys National Marine Sanctuary and Protection Act, Pub. L. No. 101-605, 104 Stat. 3089 (1990); see *Historic Timeline: Florida Keys National Marine Sanctuary*, NAT’L OCEANIC & ATMOSPHERIC ASS’N, <http://floridakeys.noaa.gov/about/timeline.html> (last visited Apr. 3, 2017).

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.”).

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.”).

206. Establishment of Santa Barbara Channel Ecological Preserve, 34 Fed. Reg. 5655, 5655–56 (Mar. 26, 1969).

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.

Exec. Order No. 10,355, 17 Fed. Reg. at 4831. Of course, OCSLA did not become law until 1953, and unlike the Pickett Act, OCSLA section 12(a) does not contain a grant of authority to modify or revoke presidential withdrawals.

208. See *Santa Barbara Channel OCS Operations Map*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/santa-barbara-map/> (last updated May 10, 2014); *Pacific OCS Region Map*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/pacific-ocs-map/> (last updated Feb. 2017) (maps showing Ecological Preserve outside of lease areas).

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).

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.²¹⁰ 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 2000,²¹¹ and directed the agencies to begin the process to buy back certain leases off of southwest Florida.²¹² 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.²¹³ 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.²¹⁴ 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 offshore oil and gas leasing 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.”²¹⁵ And, like preceding withdrawals without temporal limitation in 1960 and 1969, the president’s action was taken to protect the environment.²¹⁶ 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.*

215. MINERAL MGMT. SERV., U.S. DEP’T OF THE INTERIOR, PROPOSED FINAL COMPREHENSIVE OUTER CONTINENTAL SHELF NATURAL GAS AND OIL RESOURCE MANAGEMENT PROGRAM 1992–1997, at 5 (1992).

216. See generally 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).

confirmed the president's action in the 1990 Appropriations Act²¹⁷ 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 2012,²¹⁹ and Congress continued the moratorium for several more years.²²⁰ 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.²²¹ President Bush announced further changes in 2008, which purported to end the Clinton-initiated moratorium, except for the restrictions on leasing in marine sanctuaries.²²² The areas covered by the congressional moratorium also lapsed after 2008.²²³ President Bush's action to cut short the Clinton moratorium by four years was not challenged.²²⁴

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.

218. Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, § 109, 105 Stat. 990, 1012 (1991); Department of the Interior and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-381, § 108, 106 Stat. 1374, 1396 (1992); Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, § 107, 107 Stat. 1379, 1398 (1993); Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, § 107, 108 Stat. 2499, 2519 (1994); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 111, 110 Stat. 1321, 1321-177; Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 109, 110 Stat. 3009, 3009-200 (1996); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, § 108, 111 Stat. 1, 19 (1997).

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).

220. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 107, 112 Stat. 2681, 2681-254 (1998); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 107, 113 Stat. 1501, 1501A-156 (1999); Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, § 107, 114 Stat. 922, 942 (2000).

221. Memorandum on Modification of the June 12, 1998, Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 43 WEEKLY COMP. PRES. DOC. 19 (Jan. 9, 2007).

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's Withdrawals

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.²²⁵ Four of President Obama's withdrawals were accomplished by executive memoranda,²²⁶ while a fifth withdrawal was nested inside an executive order establishing the Northern Bering Sea Climate Resilience Area.²²⁷ The vast majority—125 million acres—were in Arctic waters.²²⁸ Each of President Obama's withdrawal orders explicitly provided that such withdrawals shall be “without specific expiration.”²²⁹ 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.²³⁰

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.²³¹ 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

SHELF OIL AND GAS LEASING PROPOSED FINAL PROGRAM 1-2 figs.1-1 & 1-2, 4-9 fig.4-4 (2016) (maps of planning areas showing area under moratorium).

225. See *supra* note 18.

226. See *id.*

227. Northern Bering Sea Climate Resilience, Exec. Order No. 13,754, 81 Fed. Reg. 90,669, 90,670 (Dec. 9, 2016).

228. See, e.g., Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016). See Joint Statement—United States-Canada Joint Arctic Leaders' Statement, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016); *Fact Sheet: President Obama Protects 125 Million Acres of the Arctic Ocean*, DEP'T OF THE INTERIOR (Dec. 20, 2016), https://www.doi.gov/sites/doi.gov/files/uploads/2016_arctic_withdrawal_fact_sheet_for_release.pdf. The exterior boundaries of this final withdrawal of about 115 million acres surrounded the prior Beaufort and Chukchi Sea OCSLA section 12(a) withdrawals, which totaled about 9.8 million acres. See Davenport, *supra* note 17; Boots & Utech, *supra* note 17.

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 from Leasing Disposition, 2014 DAILY COMP. PRES. DOC. 1 (Dec. 16, 2017).

233. Norm Van Vactor, *In Support of a Permanent Withdrawal of Bristol Bay from Offshore Drilling*, ALASKA DISPATCH NEWS (Jan. 22, 2015), <https://www.adn.com/commentary/article/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 ANGELES TIMES (Dec. 16, 2014), <http://www.latimes.com/nation/la-na-bristol-bay-leases-20141216-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 Program, 82 Fed. Reg. 6643 (Jan. 19, 2017).

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 TRS., SAFEGUARDING IMPORTANT AREAS IN THE U.S. ARCTIC OCEAN (2015), http://www.pewtrusts.org/~media/assets/2015/08/safeguarding_important_areas_in_the_arctic_ocean_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 Cmty. 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 our communities, our ability to feed ourselves, and the continued viability of the Inupiat culture.”).

239. 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). President Obama had inherited several active leases in Arctic waters from his predecessor, which were fraught with problems associated with the difficulty of operating and exploring in harsh Arctic waters. See Michael LeVine et al., *Oil and Gas in America’s Arctic Ocean: Past Problems Counsel Precaution*, 37 SEATTLE U. L. REV. 1271, 1351–57 (2014). Industry relinquished the vast majority of its leases after these problems. See Dan Joling, Shell Relinquishes Offshore Leases in Alaska’s Chukchi Sea, ASSOCIATED PRESS (May 10, 2016), <https://apnews.com/b995f7949d4c4033846959d486acf7cb/shell-relinquishes-offshore-leases-alaskas-chukchi-sea>.

240. Northern Bering Sea Climate Resilience, Exec. Order No. 13,754, 81 Fed. Reg. 90,669, 90,670 (Dec. 9, 2016).

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.²⁴³

The final area withdrawn from leasing off the Alaska coast encompassed almost the entire Arctic Ocean.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.”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.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.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.”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.

243. See Press Release, *President Obama Signs Executive Order to Protect the Northern Bering Sea* (Dec. 9, 2016), available at <http://www.beringseaelders.org/wp-content/uploads/2014/09/The-White-House-Executive-Order-12-9-16.pdf>.

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).

245. Joint Statement—United States-Canada Joint Arctic Leaders’ Statement, 2016 DAILY COMP. PRES. DOC. 1, 1 (Dec. 20, 2016).

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.

247. See *supra* notes 28–40 and accompanying text.

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

249. Implementing an America-First Offshore Energy Strategy, Exec. Order No. 13,795, 82 Fed. Reg. 20,815, 20,816 (2017). The Order accomplishes this by replacing the text in the prior orders:

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.

Id. Section 4(c) of the Trump Executive Order revokes the Obama Executive Order establishing the Northern Bering Sea Climate Resilience, Exec. Order No. 13,754, 81 Fed. Reg. 90,669, (Dec. 9, 2016), which contains a large OCSLA withdrawal. Exec. Order No. 13,795, 82 Fed. Reg. at 20,816.

250. Exec. Order No. 13,795, 82 Fed. Reg. at 20,816.

251. See Press Release, Sen. Lisa Murkowski, Alaska Delegation Reacts to Stunning Arctic Withdrawal: Obama Locks up the Arctic, Denies Economic Opportunity for Alaskans (Dec. 20, 2016), <https://www.murkowski.senate.gov/press/release/alaska-delegation-reacts-to-stunning-arctic-withdrawal>. A more muted response followed an earlier decision to remove areas from possible leasing under the 2012–2022 Program. See Jack Fitzpatrick, *Obama Administration Pulls Arctic Leases from Offshore Drilling Plan*, MORNING CONSULT (Nov. 18, 2016), <https://morningconsult.com/2016/11/18/obama-administration-pulls-arctic-leases-offshore-drilling-plan/>.

252. Review of Designations under the Antiquities Act, Exec. Order No. 13,792, 82 Fed. Reg. 20,429, 20,429 (Apr. 26, 2017). The secretary of the interior established a monument review process, which includes a list of the monuments under review. Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment, 82 Fed. Reg. 22,016, 22,016 (May 11, 2017).

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, Enviro 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

254. Compare 43 U.S.C. § 1344 (2012) (describing the five-year leasing program), with 43 U.S.C. § 1341(a) (describing the withdrawal authority). See *supra* Part III.B.

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.

256. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

authority with Congress and is consistent with that body's plenary authority over public lands and the limited authority delegated to the president.

