

BRIEFER ON PRESIDENTIAL WITHDRAWAL UNDER OCSLA SEC. 12(a)

The President has broad authority to withdraw portions of the outer continental shelf from mineral leasing, including leasing to drill for oil and gas through the Department of the Interior’s periodic Five-Year Leasing Program. Section 12(a) of the Outer Continental Shelf Lands Act (OCSLA) provides that “The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.”¹

Though more narrowly focused than the Antiquities Act, which authorizes the President to “reserve parcels of land as a part of [a] national monument[],”² Section 12(a) affords the President even more discretion within its limited subject area. It allows Presidents to bar a particular federal agency action: the disposition—i.e. transfer—of title or rights to land or minerals³ under federal marine waters. But withdrawals from such disposition are not restricted to sites around “objects of historic or scientific interest,” and to “the smallest area compatible with the proper care and management of the objects to be protected,” as national monuments are.⁴ Any sized area of the outer continental shelf can be withdrawn under Section 12(a) and for any public purpose. This makes it well-suited where presidential concerns extend beyond preserving specific areas, for instance to limiting climate change. The provision has been used regularly, by six Presidents over 65 years, including to withdraw as much as several hundred million acres at a time.⁵

While the text of Section 12(a) delegates to Presidents the power to create protected areas, like the Antiquities Act it does not authorize them to undo those designations. A legal opinion from the U.S. Attorney General found that such congressional delegations operate

¹ 43 U.S.C. § 1341(a).

² 54 U.S.C. § 320301(b). Section 2 of the Antiquities Act, as amended, specifies that 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.” *Id.* § 320301(a).

³ “Disposition” refers to the transfer of title or rights (including through leasing). Harrison, S.L., *Disposition of the Mineral Estate on United States Public Lands: A Historical Perspective*, 10 Pub. Land L. Rev. 131 (1989). Mineral withdrawal under Section 12(a) has, however, been exercised as part of the creation of marine reserves. Eisenhower, D.D., Proclamation 3339—Establishing the Key Largo Coral Reef Preserve, F.R. Doc. 60–2544 (Mar. 15, 1960); Hickel, W.J., Establishment of Santa Barbara Channel Ecological Preserve, 34 Fed. Reg. 5655 (Mar. 26, 1969).

⁴ 54 U.S.C. § 320301(a)–(b).

⁵ See attached chronology of prior withdrawals under Section 12(a).

in one direction only: they do not imply a power to undo. “[I]f 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.”⁶ The opinion explained that “the reservation made by the President under the discretion vested in him by the statute was in effect a reservation by the Congress itself,” and that, except where Congress expressly provided, “the President thereafter was without power to revoke or rescind the reservation.” While the opinion referred to the Antiquities Act, the legal rationale applies equally to Section 12(a)’s withdrawal authority. As explained by a previous Attorney General’s opinion it quoted, “unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can.” *Id.*; *see also Gorbach v. Reno*, 219 F.3d 1087, 1095 (9th Cir. 2000) (en banc) (“There is no general principle that what one can do, one can undo”).

Consistent with this, Congress has included an explicit delegation of the power to undo withdrawals in other statutory schemes. Thus, where the Forest Service Organic Administration Act once authorized a President to create national forests, it also expressly provided that “he may reduce the area or change the boundary lines or may vacate altogether any order creating a national forest” issued under Section 471 of that law. 16 U.S.C. § 473. Similarly, the Federal Land Policy and Management Act specifies that “the Secretary [of the Interior] is authorized to make, modify, extend, *or revoke* withdrawals but only in accordance with the provisions and limitations of this section.” 43 U.S.C. § 1714(a) (emphasis added). And that same law repealed the long-standing Pickett Act, which specifically provided that the President “may, at any time in his discretion, temporarily withdraw . . . any of the public lands of the United States . . . and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.” Pub. L. No. 61-303, Ch. 421, 36 Stat. 847 (1910).

Consistent with this analysis, no President has ever attempted to undo a permanent withdrawal under Section 12(a). Not all withdrawals are permanent; some have been time-limited. President Bush did curtail a time-limited withdrawal of President Clinton’s, but left in place portions of the Clinton withdrawal that were not time-limited.⁷ Changes even to time-limited withdrawals, however, have never been tested in, or approved by, the courts. In litigation, a withdrawal with explicit presidential intent of permanence and an articulated purpose well served by it, would likely have an increased chance of prevailing over either a challenge to the president’s authority or an attempted presidential reversal.

⁶ United States Attorney General, Proposed Abolishment of Castle Pinckney National Monument (39 U.S. Op. Atty. Gen. 185) (Sept. 26, 1938).

⁷ Bush, G.W., Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition (44 Weekly Comp. Pres. Docs. 986) (July 14, 2008).

PAST PRESIDENTIAL WITHDRAWALS UNDER OCSLA SECTION 12(A)

March 15, 1960. President Eisenhower withdrew areas of the Key Largo Coral Reef Preserve from leasing under OCSLA.¹ The size of the withdrawal is unclear, but it was apparently permanent.

March 21, 1969. Citing OCSLA Section 12 and an executive order delegating withdrawal authority to the Secretary of the Interior, Secretary Walter J. Hickel withdrew the “Santa Barbara Channel Ecological Preserve” for scientific study, recreation, and other uses.² The area formally withdrawn by this action totaled 55,000 acres.³

June 26, 1990. Following the recommendations of a cabinet-level task force and the Secretary of the Interior, President George H. W. Bush withdrew areas of the OCS off the coasts of Florida, California, Washington, Oregon, and Massachusetts through 2000.⁴ He also permanently banned oil and gas development in the proposed Monterey Bay National Marine Sanctuary.⁵ The total area covered by these actions was approximately 33.7 million acres.⁶

June 12, 1998. President Clinton withdrew, through June 30, 2012, certain areas of the OCS already under congressional moratoria established in the annual appropriations process.⁷ He also withdrew “for a time period without specific expiration” areas of the OCS designated as marine sanctuaries.⁸ These actions collectively removed some 300 million acres of the OCS from future leasing.⁹

January 9, 2007. President George W. Bush modified the 1998 time-limited Clinton withdrawals—still effective through June 30, 2012—to match more-limited congressional moratoria in place in 2005 and 2006 and conform with the Gulf of Mexico Energy Security Act of 2006 requiring leasing in certain areas of the Gulf.¹⁰ Thus limited, the withdrawals accounted for about 250 million acres of the OCS.¹¹

July 14, 2008. President Bush further modified the 1998 Clinton withdrawals by revoking the remaining time-limited withdrawals but leaving in place the permanent withdrawals for then-designated marine sanctuaries.¹² At the time, the sanctuaries comprised about 10.8 million acres.¹³ In the next funding cycle for the Department of the Interior, Congress followed suit, declining to extend the 2005 and 2006 offshore moratoria.¹⁴

March 31, 2010. President Obama withdrew, through June 30, 2017, Bristol Bay, also known as the North Aleutian Basin planning area.¹⁵ The action blocked leasing on about 32.5 million acres of the OCS.¹⁶

December 16, 2014. President Obama replaced his 2010 time-limited withdrawal with a withdrawal covering the North Aleutian Basin planning area “for a time period without specific expiration.”¹⁷

January 27, 2015. President Obama withdrew leasing deferral areas in the Chukchi and Beaufort Sea planning areas and in the Hanna Shoal “for a time period without specific expiration.”¹⁸ The withdrawal encompassed approximately 9.8 million acres.¹⁹

¹ 25 Fed. Reg. 2352, 2352 (Mar. 19, 1960).

² 34 Fed. Reg. 5655, 5655–56 (Mar. 26, 1969).

³ See *New Oil Wells Off California Banned by U. S.: Hickel Issues Strong Drilling Rules*, Chi. Tribune, Mar. 22, 1969, at 19.

⁴ Statement on Outer Continental Shelf Oil and Gas Development, 26 Weekly Comp. Pres. Docs. 1006, 1006 (June 26, 1990).

⁵ *Id.*

⁶ The total area is calculated from the following sources: 54 Fed. Reg. 33,150, 33,153 (Aug. 11, 1989) (Lease Sale 116, Part II, off the coast of Florida, covers about 14 million acres); *id.* at 33,151 (Lease Sale 91, off the coast of northern California, covers about 1.1 million acres); Cal. Coastal Comm'n, Oil and Gas Activities Affecting California's Coastal Zone: A Summary Report at 6 (1988), available at <https://www.gpo.gov/fdsys/pkg/CZIC-tn872-c3-b63-1988/html/CZIC-tn872-c3-b63-1988.htm> (Lease Sale 119, off the coast of central California, covers about 1.7 million acres, and Lease Sale 95, off the coast of southern California, covers about 76,000 acres); Socioeconomics Panel, Comm. to Review the Outer Continental Shelf Envtl. Studies Program, Assessment of the U.S. Outer Continental Shelf Environmental Studies Program 133 (1992), available at http://www.nap.edu/download.php?record_id=2062# (Lease Sale 132, off the coasts of Washington and Oregon, covers 12.7 million acres); 44 Fed. Reg. 45,768, 45,768 (Aug. 3, 1979) (Lease Sale 42 in the Georges Bank area of the North Atlantic covers 294,912 hectares, or about 729,000 acres); 57 Fed. Reg. 43,310, 43,310 (Sept. 18, 1992) (Monterey Bay National Marine Sanctuary covers 4,024 square nautical miles, or about 3.4 million acres).

⁷ Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 Weekly Comp. Pres. Docs. 1111, 1111 (June 12, 1998); Pub. L. No. 105-83, §§ 108–111, 111 Stat. 1543, 1561–62 (1997) (prohibiting the Department of the Interior (DOI) from using funds for oil and gas leasing and related activities on certain lands covered by President Bush's 1990 moratorium, as well as lands in the North Aleutian Basin planning area, the Eastern Gulf of Mexico planning area outside Sale 181, and the Mid-Atlantic and South Atlantic planning areas).

⁸ Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 Weekly Comp. Pres. Docs. 1111, 1111 (June 12, 1998).

⁹ The total area is calculated from the following sources: *supra* note 4 (listing about 30.3 million acres withdrawn in 1990, excluding the Monterey Bay National Marine Sanctuary); Bureau of Ocean Energy Management, Planning Area Acreages for 2007–2012 5-Year Plan (2007-2012 Planning Area Acreages) (2008), available at <http://www.boem.gov/Oil-and-Gas-Energy-Program/Mapping-and-Data/PAstats-pdf.aspx> (the North Aleutian Basin planning area covers about 32.5 million acres, the Eastern Gulf of Mexico planning area about 64.6 million acres, the Mid-Atlantic planning area about 112.8 million acres, and the South Atlantic planning area about 54.3 million acres); 64 Fed. Reg. 3707, 3707 (Jan. 2, 1999) (Sale 181 covered approximately 5.9 million acres); 65 Fed. Reg. 77,665, 77,666 (Dec. 12, 2000) (specifying marine sanctuaries withdrawn in 1998); 65 Fed. Reg. 81,176, 81,178 (Dec. 22, 2000) (Flower Garden Banks National Marine Sanctuary covers approximately 42.34 square nautical miles, or 35,885 acres); 60 Fed. Reg. 16,399, 16,401 (Mar. 30, 1995) (Florida Keys National Marine Sanctuary covers approximately 2,800 square nautical miles, or 2.4 million acres); 59 Fed. Reg. 24,586, 24,586 (May 11, 1994) (Olympic Coast National Marine Sanctuary covers approximately 2,500 square nautical miles, or 2.1 million acres); 58 Fed. Reg. 53,865, 53,872 (Oct. 19, 1993) (Stellwagen Bank National Marine Sanctuary covers approximately 638 square nautical miles, or 540,735 acres); 57 Fed. Reg. 43,310, 43,310 (Sept. 18, 1992) (Monterey Bay National Marine Sanctuary covers 4,024 square nautical miles, or about 3.4 million acres); 54 Fed. Reg. 22,417, 22,417 (May 24, 1989) (Cordell Bank National Marine Sanctuary covered 397.05 square nautical miles, or 336,518 acres); 46 Fed. Reg. 7942, 7942 (Jan. 26, 1981) (Gray's Reef National Marine Sanctuary covers approximately 16.68 square nautical miles, or 14,137 acres); 46 Fed. Reg. 7936, 7938 (Jan. 26, 1981) (Point Reyes-Farallon Islands National Marine Sanctuary covered 948 square nautical miles, or 803,475 acres); 45 Fed. Reg.

65,198, 65,203 (Oct. 2, 1980) (Channel Islands National Marine Sanctuary covers approximately 1,252.5 square nautical miles, or about 1.1 million acres); 40 Fed. Reg. 21,706, 21,707 (May 19, 1975) (Monitor National Marine Sanctuary consists of a vertical water column one mile in diameter, which is about 2010.6 acres).

¹⁰ 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. Docs. 19, 19 (Jan. 9, 2007); *see also* Pub. L. No. 109-432, § 103(b), 120 Stat. 2922, 3002 (2006) (requiring the Secretary of the Interior to offer the “181 South Area” for oil and gas leasing); Pub. L. No. 109-54, §§ 104–06, 119 Stat. 499, 521-22 (2005) (prohibiting DOI from using funds for preleasing, leasing, and related activities on lands covered by President Bush’s 1990 moratorium, as extended by President Clinton’s 1998 withdrawal, as well as lands in the Eastern Gulf of Mexico planning area outside Sale 181, and in the Mid-Atlantic and South Atlantic planning areas).

¹¹ The total area is calculated from the following sources: *supra* note 4 (listing about 30.3 million acres withdrawn in 1990, excluding the Monterey Bay National Marine Sanctuary; indicating that the Eastern Gulf of Mexico planning area encompasses about 64.6 million acres, the Mid-Atlantic planning area encompasses about 112.8 million acres, the South Atlantic planning area encompasses about 54.3 million acres; and indicating that Sale 181 covered 5.9 million acres); 73 Fed. Reg. 19,872, 19,872 (Apr. 11, 2008) (the 181 South Area covers about 5.8 million acres).

¹² Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition, 44 Weekly Comp. Pres. Docs. 986, 986 (July 14, 2008).

¹³ *See supra* notes 4 (listing acreage of Monterey Bay National Marine Sanctuary) & 7 (listing acreages of other marine sanctuaries withdrawn in 1998); 66 Fed. Reg. 4268, 4268 (Jan. 17, 2001) (expanding the boundary of the Florida Keys National Marine Sanctuary by 96 square nautical miles, or 81,365 acres).

¹⁴ *See* Pub. L. No. 111-8, Div. E, 123 Stat. 524, 711-12 (2009).

¹⁵ Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 2010 Daily Comp. Pres. Docs. 1, 1 (Mar. 31, 2010); *see also* DOI, Outer Continental Shelf Oil and Gas Strategy Map, *available at* https://www.doi.gov/sites/doi.gov/files/migrated/whatwedo/energy/ocs/upload/OCS_Alaska_Strategy.jpg (showing Bristol Bay as coterminous with the North Aleutian Basin planning area).

¹⁶ *See* 73 Fed. Reg. 19,095, 19,097 (Apr. 8, 2008).

¹⁷ Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 2014 Daily Comp. Pres. Docs. 1, 1 (Dec. 16, 2014); *see also* *President Obama Protects Alaska’s Bristol Bay from Future Oil and Gas Drilling*, The White House (Dec. 16, 2014), <https://www.whitehouse.gov/the-press-office/2014/12/16/president-obama-protects-alaska-s-bristol-bay-future-oil-and-gas-drillin> (noting that the 2014 withdrawal extended the 2010 withdrawal).

¹⁸ Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf Offshore Alaska from Leasing Disposition, 2015 Daily Comp. Pres. Docs. 1, 1 (Jan. 27, 2015).

¹⁹ Mike Boots & Dan Utech, *President Obama Protects Untouched Marine Wilderness in Alaska*, The White House (Jan. 27, 2015, 12:00 PM), <https://www.whitehouse.gov/blog/2015/01/27/president-obama-protects-untouched-marine-wilderness-alaska>.