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# OPEN FOR BUSINESS IN UNCHARTED WATERS: LEASING THE OUTER CONTINENTAL SHELF

[Natural Resource \(/full-blog/category/Natural+Resource\)](#)

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The U.S. Department of the Interior dove into 2018 with a proposal to open roughly the entire U.S. Outer Continental Shelf (hereinafter “OCS”) for potential oil and gas lease sales.<sup>[i]</sup> The proposal is in furtherance of the National Outer Continental Shelf Oil and Gas Leasing Program (hereinafter “National OSC Program”).<sup>[ii]</sup> The National OCS Program currently preserves ninety-four percent of the total OCS acreage by prohibiting any oil and gas exploration, or development therein.<sup>[iii]</sup> However, the January proposal made by U.S. Secretary of Interior Ryan Zinke, would open ninety-percent of the total OCS acreage for potential offshore drilling—almost a complete conversion from closed to exposed<sup>[iv]</sup> The Department of the Interior’s January proposal elicited strong responses from the affected coastal states. Six of the twenty-two coastal state governors are in favor of the program, which boasts American energy independence and dominance.<sup>[v]</sup> Meanwhile, fifteen coastal state governors have publicly opposed the plan, fearing the negative environmental and asetic impacts on the American coastline.<sup>[vi]</sup>

The proposal derives its authority from President Trump’s April Executive Order 13795: “Implementing an American-First Offshore Energy Strategy.”<sup>[vii]</sup> In the final days of his administration, President Obama invoked his right under the 1953 Outer Continental Shelf Lands Act (hereinafter “OCSLA”) to “withdraw approximately 119 million acres of unleased submerged land on the outer continental shelf to ‘prevent consideration of this area for any future mineral leasing for the purpose of exploration, developments, or production.’”<sup>[viii]</sup> President Trump’s Executive Order directly seeks to reverse the Obama Administration’s efforts to protect the OCS.<sup>[ix]</sup> There has been a bipartisan cry to prohibit the reversal and to refuse offshore drilling, which—in today’s society—speaks volumes.<sup>[x]</sup> Republican Governor Larry Hogan of Maryland has vowed “to take any legal action necessary against the federal government to prevent this possible exploration.”<sup>[xi]</sup> But, what claim could the states have to resist President Trump’s Executive Order?

President Trump’s Executive Order cannot reverse the protections to the OSC instituted by the Obama Administration. When President Obama invoked his unilateral authority to withdraw lands under the OCSLA, he claimed that his ban on offshore oil and gas drilling was permanent.<sup>[xii]</sup> At the time of the pronouncement, scholars marveled at the revolutionary use of the provision to enact a permanent ban, for “there is no case law on this. [It is] uncharted waters.”<sup>[xiii]</sup> Provision 12(a) of

the OCSLA reads: “The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the Outer Continental Shelf.”[xiv] On its face, the statute does not grant subsequent presidents the power to “un-withdraw” lands, and the absence of such an expressed provision is convincing evidence that the president alone may not rescind a prior withdrawal.[xv] Moreover, “no president before Trump has ever reversed a predecessor’s withdrawal of outer continental shelf areas, other than one with an express end date.”[xvi] Arguably, one of the only feasible ways to reverse President Obama’s withdrawal would be for Congress to amend the OCSLA to include a reversal provision.[xvii]



<http://thehill.com/blogs/congress-blog/energy-environment/368092-trump-administrations-offshore-drilling-proposal-a> (<http://thehill.com/blogs/congress-blog/energy-environment/368092-trump-administrations-offshore-drilling-proposal-a>)

U.S. district courts have original jurisdiction over claims arising out of the OCSLA, and ten environmental groups have already challenged President Trump’s Executive Order in the U.S. District Court for the District of Alaska.[xviii] In *League of Conservation Voters et. al. v. Trump et al.*, these ten environmental groups allege that President Trump’s Executive Order, inter alia, violates the OCSLA.[xix] “The federal defendants moved to dismiss the case in June, arguing that the suit fails based on sovereign immunity, violation of separation of powers, lack of ripeness, and lack of standing to sue.”[xx] Alaska has aligned itself with the federal defendants, adopting their position and arguing that venue is only proper in the D.C. Circuit.[xxi]

While *League of Conservation Voters et. al. v. Trump et al.* appears to be at a standstill, with “the largest oil and gas offshore auction in U.S. history” set to take place on March 21st, 2018, it is foreseeable that many other opponents will take their fight to the U.S. district courts.[xxii] Consequently, with so many jurisdictions impacted by the proposal, this question has the potential to cause a split amongst the circuits and maybe even warrant the attention of the Supreme Court. As the impending historical sale draws nearer, the question remains: is the Outer Continental Shelf really open for business? Or is it still off-the-market under the OCSLA?

[i] *Secretary Zinke Announces Plan for Unleashing America’s Offshore Oil and Gas Potential*, U.S. Dep’t of Interior: Press Releases (Jan. 4, 2018), <https://www.doi.gov/pressreleases/secretary-zinke-announces-plan-unleashing-americas-offshore-oil-and-gas-potential> [hereinafter Press Release].

[ii] *Id.*

[iii] *Id.*

[iv] *Id.*

[v] Hiroko Tabuchi & Tim Wallace, *Trump Would Open Nearly All U.S. Waters to Drilling. But Will They Drill*, N.Y. Times (Jan. 23, 2018), <https://www.nytimes.com/interactive/2018/01/23/climate/trump-offshore-oil-drilling.html>. See also Press Release, *supra* note i.

[vi] *Id.*

[vii] Exec. Order No. 13795, 82 Fed. Reg. 20815 (Apr. 28, 2017). *See also* Darryl Fears, *Trump Administration Plan Would Widely Expand Drilling in U.S. Continental Waters*, Wash. Po. (Jan. 4, 2018), <https://www.washingtonpost.com/news/energy-environment/wp/2018/01/04/trump-administration-plans-to-allow-drilling-off-all-u-s-waters>.

[viii] Kevin O. Leske, “*Un-Shelving*” *Lands Under the Outer Continental Shelf Act (OCSLA)*, 26 N.Y.U. Envtl. L.J. 1 (2017).

[ix] Tabuchi, *supra* note v.

[x] Fears, *supra* note vii.

[xi] *Id.*

[xii] Coral Davenport, *Obama Bans Drilling in Parts of the Atlantic and the Arctic*, N.Y. Times (Dec. 20, 2016), <https://www.nytimes.com/2016/12/20/us/obama-drilling-ban-arctic-atlantic.html>.

[xiii] *Id.*

[xiv] Leske, *supra* note viii, at 24.

[xv] *Id.*

[xvi] Michael Nordskog, *Alaska Opposes Suit Over Trump’s Rollback of Arctic Drilling Protections League of Conservation Voters v. Trump*, 38 No. 5 Westlaw J. Envtl. (2017).

[xvii] Richard Gardner, *Uncharted Waters: Overturning President Obama’s Indefinite Moratorium on Offshore Drilling in the Atlantic and Arctic Oceans*, 20 No. 2 ABA Air Quality Comm. Newsl. 11 (Jun. 2017).

[xviii] Nordskog, *supra* note xvi.

[xix] *Id.*

[xx] *Id.*

[xxi] *Id.*

[xxii] *U.S. Set Largest Offshore Oil, Gas Lease Auction for March*, Reuters (Feb. 16, 2018, 3:47 PM), <https://www.reuters.com/article/us-usa-offshore-auction/us-s-sets-largest-offshore-oil-gas-lease-auction-for-march-idUSKCN1G02CX>.

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