CHOOSE YOUR LAWS CAREFULLY: EXECUTIVE AUTHORITY TO UNILATERALLY WITHDRAW THE UNITED STATES OUTER CONTINENTAL SHELF FROM LEASING DISPOSITION

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ABSTRACT

Congress enacted the Outer Continental Shelf Lands Act (OCSLA) to both exert federal jurisdiction over the submerged lands of the U.S. Outer Continental Shelf and establish the legal framework for America’s offshore energy production regime. Section 12(a) of OCSLA is a short yet potent provision that grants a president the authority to withdraw unleased offshore lands from leasing disposition, effectively banning any form of energy exploration or production. In recent decades, presidents have embraced section 12(a) not only to ban offshore energy production, but also to protect the marine environment itself. Presidents have also utilized a different federal law, the Antiquities Act of 1906 (Antiquities Act), to create marine national monuments, providing general protection for areas of rich biodiversity, scientific interest, and cultural heritage. Interestingly, both OCSLA and the Antiquities Act achieve the same end results: offshore energy production is prohibited and the marine environment is protected. The crucial distinction between the two laws, though, is the ability to provide permanent protection. A close study of these laws reveals that only one indeed provides the intended lasting protection that presidents have sought: the Antiquities Act.

This Note probes the theory of executive authority to unilaterally remove America’s submerged lands from leasing disposition.

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Specifically, it centers on President Barack Obama’s twin December 2017 offshore withdrawals in the Atlantic and Arctic Oceans. President Obama utilized OCSLA to ban offshore energy production, but he framed the withdrawals as a way to permanently protect each area’s unique marine biodiversity, scientific value, and cultural significance to indigenous inhabitants. This Note concludes that a president seeking such lasting protection must use the Antiquities Act in lieu of OCSLA. The Note examines the relevant statutory histories, judicial inquiries, and precedential usage of these laws and argues that OCSLA’s protection falls incredibly short. This Note is particularly relevant given the Trump administration’s effort to roll back the Obama administration’s bans on offshore energy production. President Donald Trump’s recent executive actions will surely test the conclusions of this Note.

INTRODUCTION

In the waning weeks of President Barack Obama’s presidency, pressure mounted to take bold action to protect his legacy and to bolster the nation before the arrival of the antagonistic Trump administration.1 Sitting as a lame duck, mere weeks after Donald Trump’s victory over Hillary Clinton and following years of contentious congressional stalemate, President Obama acted.2 He embraced permeating progressive worry and malcontent, issuing a flurry of last-minute executive directives.3 Two of the directives that President Obama released were aimed squarely at marine environmental protection.4


2. See Kevin Drum, Here’s How Obama Is Trump-Proofing His Legacy, MOTHER JONES (Dec. 29, 2016, 10:25 AM), http://www.motherjones.com/kevin-drum/2016/12/here-s-how-obama-trump-proofing-his-legacy [https://perma.cc/3PC2-HV7M] (noting the difficulty to overturn some executive actions by Congress or a subsequent president).

3. Id.

On December 20, 2016, President Obama withdrew millions of acres of the U.S. Outer Continental Shelf (OCS) from leasing disposition. The two withdrawal actions effectively banned broad swaths of both the Atlantic and Arctic Oceans from oil and gas development, adding to millions of ocean acres already removed from leasing disposition by multiple presidents over many years. President Obama utilized withdrawal authority pursuant to the Outer Continental Shelf Lands Act (OCSLA). Enacted in 1953, OCSLA governs offshore mineral exploration and development, empowering the Department of the Interior (DOI) to grant leases and promulgate guidelines for all stages of offshore energy production, most notably oil and gas.

President Obama relied on OCSLA’s section 12(a), an obscure provision providing that “[t]he President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.” With one relatively unknown sentence and two strokes of his pen, President Obama finished his presidency with a nod to environmental stewardship, both on land and in the sea. That same provision and a new president’s pen, however,
may prove sufficient to unravel President Obama’s new marine protections as quickly as they were created.12

OCSLA’s section 12(a) is not the only law that President Obama could have employed to withdraw offshore lands from leasing disposition. Four months earlier, the President significantly expanded the Papahānaumokuākea Marine National Monument (PMNM) in the northwestern Hawaiian Islands.13 President George W. Bush first created the PMNM in 2006 to shelter the vibrant marine ecosystem that exists throughout the islands.14 Unlike President Obama’s Atlantic and Arctic withdrawals, the PMNM withdrawal was created and expanded by Presidents Bush and Obama under a different federal law, the Antiquities Act of 1906 (Antiquities Act).15 The Antiquities Act allows the president to create national monuments;16 as the first federal law to “provide general protection of natural and cultural heritage,” it “reflects the earliest national policy on historic preservation.”17 Under the Antiquities Act, the PMNM withdrawal banned mineral exploration, leasing, and production in the PMNM national monument, achieving an identical outcome to the Atlantic and Arctic withdrawals.18

This Note grapples with the executive authority to unilaterally withdraw the submerged lands of the OCS from leasing disposition. President Obama justified each withdrawal not by solely opposing offshore energy, but by stressing each area’s unique ecosystem and biodiversity, submarine geology, current and future areas of scientific interest, and the waters’ historical and cultural importance to indigenous inhabitants. He framed each action as a permanent way to preserve the regions for future generations. Given this goal, this Note

12. During the final days of this Note’s composition, President Donald Trump issued an executive order rescinding President Obama’s OCSLA withdrawals. For further discussion, see infra Part IV.B.
13. Proclamation No. 9478, 81 Fed. Reg. 60,225 (Aug. 26, 2016) [hereinafter PMNM]. For a map of the PMNM expansion, see infra Appendix A.
17. Id. at 1.
argues that the Antiquities Act is superior for providing these enduring legal protections. Studying the Antiquities Act’s legislative history reveals that Congress intended it to be a permanent means of preservation, not susceptible to later modification or revocation by a subsequent president. Additionally, the Antiquities Act has been judicially scrutinized and consistently upheld as a legitimate and broad delegation of power to the Executive Branch, leaving little recourse for opponents of new national monuments.

This Note proceeds in four Parts. Part I.A surveys the intricate web of international and domestic jurisdictional laws implicating the OCS. Part I.B examines President Obama’s recent use of these federal laws—OCSLA and the Antiquities Act—to withdraw submerged lands from leasing disposition. Part II then considers current federal laws permitting a president to unilaterally withdraw the OCS from any form of disposition or activity.

Against this backdrop, Part III concludes that the Antiquities Act is markedly superior for permanent removal and lasting protection. Part III.A is a comparative analysis of the identified statutes; Part III.B assesses the environmental, economic, and political implications of potential large marine national monuments. Balancing the costs and benefits of marine national monuments created under the Antiquities Act against the two other conservation options, OCSLA withdrawals and National Marine Sanctuaries Act (NMSA) designations, the scale tips heavily in favor of marine national monuments. Marine national monuments are preferable most notably for their executive irrevocability: subsequent presidents cannot unilaterally eliminate national monuments. Part IV concludes with a brief assessment of the relevant recent executive actions by the Trump administration. President Trump issued executive orders to review—and potentially attempt to revoke—national monument designations, undoing President Obama’s Atlantic and Arctic withdrawals. This presidential action will spawn litigation that will surely test the conclusions of this Note.

I. THE CONTEXT OF OCS WITHDRAWALS: JURISDICTION AND RECENT HISTORY

The OCS’s jurisdictional history is crucial to comprehending how contemporary nations, particularly the United States, govern their offshore waters and submerged lands. Given that this Note examines and compares President Obama’s use of the Antiquities Act and
OCSLA to forbid energy production in various offshore areas, understanding the OCS’s jurisdictional history is integral to this Note’s argument. The Antiquities Act and OCSLA have identical goals of permanently protecting the marine environment; by utilizing both laws, President Obama invited disparate legal implications, including the modification and revocability of withdrawals.

A. Jurisdiction

The United States’ coastal waters and submerged lands are subject to a multilayered network of international and domestic laws, which collectively assert a semblance of authority in a system with multiple parties and myriad interests.19 To appreciate this complex regime, this Section will first detach international from domestic law. This will be followed by a sequential exploration of the executive actions, congressional lawmaking, and judicial decisionmaking that have formed the contemporary state of American ocean governance.

1. International. The seventeenth-century “Freedom of the Seas” doctrine limited a nation’s control “over the oceans to a narrow belt of sea surrounding a nation’s coastline.”20 This zone of unfettered sovereignty was recognized at three nautical miles and was identified as a nation’s “territorial sea.”21 The remaining ocean was considered the “high seas” and open to all nations.22 This regime lasted until the mid-twentieth century, when global concerns over fishing management, pollution, and conservation of ocean resources, which included claims to offshore minerals, reached a pinnacle.23

Under President Harry Truman, the United States began to affirmatively assert control over its offshore lands due to the growing urge to explore America’s seabed and prudently facilitate energy


22. Id.

production. Other nations shortly followed, each maintaining sovereign control over different areas and varying distances from their coastlines. Such widespread disparity and confusion prompted the United Nations to convene several conferences to delineate formal boundaries for coastal nations.

The United Nations’ third, nine-year-long Conference on the Law of the Sea (UNCLOS) began in 1973. The resulting treaty dramatically redefined maritime zones and modernized international law to account for emerging scientific and technological innovations. Most significantly, UNCLOS set the territorial sea’s outermost boundary to twelve nautical miles from the baseline measurement, which is ordinarily a nation’s coastline. UNCLOS also created a two-hundred-nautical-mile “exclusive economic zone” (EEZ) to provide nations sovereignty over a larger area to conserve or utilize any ocean resource as they determined. The rules created by UNCLOS endure today and are crucial to comprehending America’s domestic laws.

2. Domestic. American domestic law strives to balance the competing interests of many stakeholders, including federal and state governments and environmental and industry groups. Early Supreme Court jurisprudence acknowledged the international view that a nation’s authority within its territorial sea is absolute. In 1832, the Supreme Court recognized in *Martin v. Waddell* that the states held

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24. Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 1, 1945); Executive Order 9633, 10 Fed. Reg. 12,305 (Sept. 28, 1945). President Truman was also motivated to take this action by domestic interest in emerging offshore oil and gas production. A struggle brewed between the federal and state governments over the title to such lands, as is outlined infra Part II.A.2.

25. The United Nations Convention: A Historical Perspective, supra note 20 (“In October 1946, Argentina claimed its shelf . . . . Chile and Peru . . . and Ecuador . . . asserted sovereign rights over a 200-mile zone . . . Egypt, Ethiopia . . . and some Eastern European countries laid claim to a 12-mile territorial sea . . . Indonesia asserted the right to dominion over the water that separated its 13,000 islands.”).

26. Id.

27. *Background to UNCLOS, supra* note 21.


29. Id. art. 57.

30. Id. art. 56 (“[S]overeign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living . . . .”).


32. *See Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804) (“The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory . . . .”).

title to their submerged lands, not the federal government.\footnote{34}{See Pollard v. Hagan, 44 U.S. (3 How.) 212, 216 (1845) (recognizing that the “equal footing doctrine” required that states admitted after independence also retain title to their submerged lands); \textit{Martin}, 41 U.S. (16. Pet.) at 426–27 (holding that the original states acquired title to their respective submerged lands at independence).} Over the next century, relations strained as the federal and state governments sparred over true ownership of America’s OCS, ultimately forcing Congress to delineate formal boundaries.\footnote{35}{In 1897, Henry L. Williams located the first offshore oil rig on a pier built three hundred feet into the Pacific Ocean. \textit{Offshore Petroleum History}, AM. OIL & GAS HIST. SOC’Y, http://aoghss.org/offshore-history/offshore-oil-history [https://perma.cc/EG8K-3AFQ]. This discovery of offshore oil reserves and production capability alongside emerging capture technologies led the federal government to alter its position regarding the true ownership of offshore petroleum reserves. NOAA, \textit{supra} note 8, at 1–2.}

Between the eighteenth and nineteenth centuries, tensions began to flare. The federal government had initially viewed the states as titleholders to their respective offshore lands and minerals. Slowly, however, the federal government’s view shifted. By 1947, the federal government had commenced suit against California in the Supreme Court to decide the true titleholders to the OCS. In \textit{United States v. California},\footnote{36}{\textit{United States v. California}, 332 U.S. 804 (1947).} the Court held that the federal government “possessed . . . paramount rights in, and full dominion and power over, the lands, minerals and other things . . . extending seaward three nautical miles. . . .”\footnote{37}{\textit{Id.} at 805; \textit{see also} United States v. Louisiana, 340 U.S. 899, 899 (1950) (concluding that the federal government retained control over the submerged lands off the coast of Louisiana); United States v. Texas, 339 U.S. 707, 718 (1950) (holding that the Republic of Texas joined the Union on equal footing with the other states, thus submitting its submerged lands to the federal government).}

nautical mile territorial sea.\footnote{Texas and Florida (on its Gulf coast side) have title to three marine leagues (nine nautical miles) instead of three nautical miles. This is based on a statutory provision allowing for state title of greater distances should the state prove that such title existed at the time of its admittance to the United States. BUREAU OF OCEAN ENERGY MGMT., U.S. DEP’T OF INTERIOR, SUMMARY OF LAW – SUBMERGED LANDS ACT 11, \url{https://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Outer_Continental_Shelf/Lands_Act_History/submerged.pdf} [https://perma.cc/8PLL-MMZU].} Shortly thereafter, Congress enacted OCSLA to assert federal jurisdiction over the submerged lands beyond the states’ three-mile boundary.\footnote{Outer Continental Shelf Lands Act, Pub. L. No. 83-212, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331–1356b (2012)).} This SLA-OCSLA regime still exists today, alongside other legislation governing marine sanctuaries and fisheries.\footnote{See infra Parts II & III.}

A nation’s EEZ provides sovereignty to manage its submerged lands and the authority to regulate marine environmental protection.\footnote{United Nations Convention on the Law of the Sea, \textit{supra} note 28, art. 56.} In the EEZ—unlike in the territorial sea—all nations may engage in internationally lawful uses of the ocean without retribution from a host nation. A host nation may, however, retain exclusive control over certain activities within its EEZ, such as mineral extraction and marine protection.”\footnote{\textit{Id.} art. 58 (“\textit{[A]ll States . . . enjoy . . . the freedoms . . . of navigation and overflight and of the laying of submarine cables and pipelines}” and the right to engage in “\textit{other internationally lawful uses of the sea . . . such as those associated with the operation of ships, [or] aircraft}.” (emphasis added)); U.S. COMM’N ON OCEAN POL’Y, \textit{supra} note 19, at 72.} President Ronald Reagan established the U.S. EEZ at two hundred nautical miles after UNCLOS.\footnote{See Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983) (announcing the establishment of the United States’ EEZ).} He acknowledged that EEZs “will advance the development of ocean resources . . . [for] exploring, exploiting, conserving and managing natural resources . . . and the protection and preservation of the marine environment.”\footnote{\textit{Id.}}

\textbf{B. The Obama Presidency}

During the first months of the Obama administration, the new president demonstrated a desire to chart a different course on environmental policy than his predecessor, President George W. Bush. From a rededication to the Endangered Species Act to heightened alarm over climate change, President Obama immediately confirmed...
that the United States had new environmental priorities. Despite his heightened commitment to environmentalism, President Obama never exhibited the aversion to domestic oil and gas that many allies assumed he would. Even before the 2008 presidential election, he had toyed with a comprehensive energy plan that included expanded offshore oil and gas production. Once in office, he gradually expressed a willingness to expand development.

In spring 2010, the Obama administration proposed making large sections of the Chukchi and Beaufort Seas in the Arctic Ocean, the eastern Gulf of Mexico, and large portions of the mid-to-southern Atlantic Ocean available for federal leasing. By mid-2014, progressive American magazine *Mother Jones* published an article titled “How Obama Became the Oil President,” chiding President Obama for his praise of rising American oil output and efforts to boost


49. In a summer 2008 interview with Larry Kudlow, future vice-presidential nominee Sarah Palin responded to a question regarding the views of both then-Senator Obama and Senator John McCain concerning Alaskan oil drilling. She lamented that, “Obama is way off base on all that. I think those politicians who don’t understand that we need more domestic supply of energy flowing into our hungry markets [are] living in La-La Land.” Larry Kudlow, *Drill, Drill, Drill, My Interview with Alaska Governor Sarah Palin*, CNBC (June 26, 2008, 1:57 PM), http://www.cnbc.com/id/25394468 [https://perma.cc/E8YL-D6JH].


It is noteworthy that this announcement came twenty days before the explosion on the Deepwater Horizon oil well drilling platform and subsequent oil spill. In response to that spill, which became the worst in American history, President Obama stated ten days later: “[L]et me be clear: I continue to believe that domestic oil production is an important part of our overall strategy for energy security, but I’ve always said it must be done responsibly, for the safety of our workers and our environment.” Remarks on the National Economy, 2010 DAILY COMP. PRES. DOC. 1 (Apr. 30, 2010). The statement is telling in that, mid-crisis, he publicly admitted that domestic oil production is important to the overarching American energy strategy.
production. This moment marked the apex of Barack Obama as the “oil president” vis-à-vis offshore drilling; conceivably due to incessant congressional stalemate and a looming end to his presidency, President Obama began shortly thereafter to govern in furtherance of the environmental stewardship he enthusiastically championed during the 2008 campaign.

On December 16, 2014, President Obama utilized section 12(a) of OCSLA to withdraw Alaska’s Bristol Bay and the North Aleutian Basin Planning Area (Bristol Bay OCSLA withdrawal) from leasing disposition, prohibiting all offshore energy exploration, development, and production. In halting offshore production, the memorandum introduced two subtle, yet important, concepts. First, President Obama relied on the area’s scientific, cultural, and historical values, including its wildlife and fisheries, and its significance to its indigenous peoples, to justify the withdrawal. Second, he declared that the withdrawal was “for a time period without specific expiration.” In other words, in lieu of an exact expiration date, the President ordered the withdrawal to be permanent. Taken together, President Obama premised the withdrawal on both environmental protection and cultural preservation to permanently safeguard the unique marine environment.

Less than two years later, President Obama created the Northeast Canyons and Seamounts Marine National Monument (Northeast Canyons Monument) in the northern Atlantic Ocean, off the coast of New England. To do so, he utilized the Antiquities Act, creating a new marine national monument rather than utilizing OCSLA for a straightforward withdrawal. In accordance with using the Antiquities Act, President Obama premised the withdrawal on the preservation of objects of historical and scientific interest, including deep-sea canyons and underwater mountains that produce biodiverse hotspots where

54. Id. (stating the withdrawal was “consistent with principles of responsible public stewardship . . . with due consideration of the importance of [the area] to subsistence use by Alaska Natives, wildlife, wildlife habitat, and sustainable commercial and recreational fisheries, and [ensuring] that the unique resources . . . remain available for future generations”).
55. Id.
56. Proclamation No. 9496, 81 Fed. Reg. 65,159 (Sept. 21, 2016) [hereinafter Northeast Canyons Monument]. For a map of the Northeast Canyons Monument, see infra Appendix B.
abundant marine species live or migrate. President Obama also justified the withdrawal by reference to the destructive effects of extractive activities to the sensitive local habitats.

In December 2016, President Obama made three additional OCS withdrawals. The twin withdrawals in the Atlantic (Atlantic withdrawal) and Arctic Oceans (Arctic withdrawal) made national headlines, sparking both praise and outrage. With only one month before President Trump’s inauguration, President Obama had removed large portions of the Atlantic and Arctic seafloors from leasing disposition.

The language of the Atlantic and Arctic withdrawal memoranda mirrored that in both the Northeast Canyons Monument proclamation and the Bristol Bay OCSLA withdrawal memorandum. Both the Atlantic and Arctic withdrawals cited “the critical importance of canyons along the edge of the Atlantic continental shelf for marine mammals, deep water corals, other wildlife, and wildlife habitat, and to ensure that the unique resources associated with these canyons remain available for future generations . . . .” Likewise, the Arctic withdrawal memorandum noted the area’s “important, irreplaceable values” for wildlife and indigenous Alaskans, as well as its vulnerability to oil spills. President Obama also conveyed the fundamental purpose of the Atlantic and Arctic withdrawals in terms that echoed his Bristol Bay OCSLA withdrawal: the permanent prohibition of energy production in areas of the OCS that encompass significant scientific, cultural, and historical interests.

The curious distinction between the withdrawals, however, is the underlying federal law employed by President Obama for their effectuation. The Bristol Bay OCSLA withdrawal, the Atlantic

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57. Id. at 65,151–63.
58. Id. at 65,161.
60. See, e.g., NAT. RES. DEF. COUNCIL, supra note 6 (arguing that the president has broad authority under OCSLA § 12(a) to make permanent withdrawals); Hall, supra note 6 (“Obama’s executive action is taking economic opportunity away from American families and decisions away from states which have a strong incentive to ensure natural resource development happens . . . .”).
61. Arctic Withdrawal, supra note 4; Atlantic Withdrawal, supra note 4. For a map of the Arctic Ocean withdrawal, see infra Appendix C. For a map of the Atlantic Ocean withdrawal, see infra Appendix D. Such a bold move ultimately led President Trump to retaliate through executive action of his own. See infra Part IV.
62. Arctic Withdrawal, supra note 4.
63. Arctic Withdrawal, supra note 4.
withdrawal, and the Arctic withdrawal all derived their authority from OCSLA section 12(a); the Northeast Canyons Monument withdrawal utilized the Antiquities Act.64

II. STATUTES

Three principal federal laws authorize executive withdrawals of the OCS, albeit for different purposes. These acts allow a president to effectively ban offshore energy development. This Part explores the relevant histories and scopes of the National Marine Sanctuaries Act (NMSA), OCSLA, and the Antiquities Act.

A. The Marine Protection, Research, and Sanctuaries Act and the National Marine Sanctuaries Act

Congress designed the NMSA65 to safeguard the marine environment.66 The Act authorizes the creation of national marine sanctuaries and includes supplementing regulations to govern their management.67 Although each sanctuary in the National Marine Sanctuary System has tailored regulations for its unique needs, every marine system regulated under the NMSA is subject to a prohibition on oil, gas, and mineral development.68 Thus, a president can both preclude offshore energy development and protect a marine environment by creating a national marine sanctuary. But because marine sanctuaries can only be created by congressional action or by the NMSA’s administrative process, a president cannot unilaterally establish a national marine sanctuary through executive action.69

64. Compare id. (citing Section 12(a) of OCSLA for statutory authority), and Atlantic Withdrawal, supra note 4 (same), with Northeast Canyons Monument, supra note 56 (citing the Antiquities Act as authority).


66. The NMSA begins by stating: “[T]his Nation historically has recognized the importance of protecting special areas of its public domain, but these efforts have been directed almost exclusively to land areas above the high-water mark . . . .” 16 U.S.C. § 1431(a)(1).

67. Id. §§ 1431(b), (c).


69. For further discussion of how marine sanctuaries can be established, see infra Part III.A.1.
The NMSA was enacted in 1972 as the Marine Protection, Research, and Sanctuaries Act (MPRSA). The MPRSA authorized the secretary of commerce to “designate as marine sanctuaries those areas of the oceans . . . as far seaward as the outer edge of the Continental Shelf . . . which [the secretary] determines necessary for the purpose of preserving or restoring . . . [of] conservation, recreational, ecological, or esthetic values.”

The MPRSA has undergone multiple substantive amendments since its inception, one of which was renaming title III the National Marine Sanctuaries Act. When the MPRSA was enacted, it retained a veto power for state governors, enabling them to reject a withdrawal within their state’s territory as unacceptable. In 1980, Congress also empowered itself to reject a secretary’s proposed withdrawals or regulations and expanded the veto authority to governors of United States’ territories and possessions.

The final round of MPRSA revisions organized marine sanctuaries into the collective “National Marine Sanctuary System” and criminalized interference with any NMSA enforcement. Congress also obligated the secretary to publish findings that new sanctuaries would not stress the entire system, forcing studies to be produced to ensure that each sanctuary could be properly managed. In its current iteration, the NMSA is a feasible way to ban offshore energy production and protect marine environments, although it does not offer the president unilateral withdrawal authority.


72. See Legislative History of the National Marine Sanctuaries Act, supra note 70 (listing a summary of the major amendments to the NMSA over the years); National Marine Sanctuaries History Timeline, supra note 65 (same). Other original provisions included authorizing the secretary of commerce to promulgate regulations controlling activity in the sanctuary, enforcement of violations with steep monetary penalties, and allowing the governors of neighboring coastal states veto power. Legislative History of the National Marine Sanctuaries Act, supra note 70.


74. Legislative History of the National Marine Sanctuaries Act, supra note 70.

75. Id.

76. Id.
B. 

OCSLA

OCSLA is the law that exerts federal jurisdiction over the submerged lands beyond the three nautical miles belonging to the states and authorizes the DOI to manage the federal leasing program for offshore energy production. Congress enacted OCSLA on August 7, 1953, three months after it passed the SLA. OCSLA’s passage signified that offshore energy development would be a national priority. The Senate Committee on Interior and Insular Affairs’ Report (Senate Report) narrowly tailored federal jurisdiction to only the submerged lands themselves, not to the waters overlying the seafloor. OCSLA’s section 3(2) makes clear that these overlying waters are not affected by federal jurisdiction and that “the right to navigation and fishing therein [is not] affected.” The Senate Report referred to this as “horizontal jurisdiction,” covering the seabed and minerals therein, rather than “vertical jurisdiction” of the waters extending from the seabed to the ocean surface.

Section 12(a) of OCSLA authorizes an OCSLA withdrawal. An OCSLA withdrawal occurs when a president, by executive action, declares a designated, unleased portion of the OCS to be removed from leasing disposition. Section 12(a) is a short provision; crucially, it does not contain a durational element clarifying whether withdrawals are merely temporary or are permanent. Given how section 12(a) is...
used to permanently prohibit OCS energy development and protect the marine environment, this detail would be essential.

The Senate Report helps reveal Congress’s intent concerning the statute’s duration: it explains that section 12(a)’s withdrawal authority over the OCS “is similar to authority given to the President on the public domain.”85 Moreover, another section of the Senate Report notes that “[t]he authority vested in the President by the amended section is comparable to that which is vested in him with respect to federally owned lands on the uplands.”86

The analogies made between the president’s OCSLA section 12(a) withdrawal authority and that “on the public domain” and on “federally owned lands on the uplands” likened the withdrawal authority the president has over the seabed with that over public land.87 At the time of OCSLA’s passage, presidential modifications and revocations of prior withdrawals on public land were commonplace, so Congress would likely have been familiar with the durational extent of the presidential power “on the public domain” and on “federally owned lands on the uplands.” The Pickett Act, which allowed presidential withdrawals of public lands for public purposes, was in effect and controlled presidential authority over withdrawals on public lands.88 The Pickett Act stated: “The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry 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.”89

Moreover, in the year preceding OCSLA’s passage, President Truman issued an executive order delegating Pickett Act withdrawal authority from the president to the secretary of the interior.90 He wrote, “I hereby delegate to the Secretary of the Interior the authority vested in the President by [the Pickett Act] . . . including the authority to

86. Id. at 26 (emphasis added).
87. The Senate Report defines the Continental Shelf as “the extension of the land mass of the continents out under the waters of the ocean to the point where the continental slope leading to the true ocean bottom begins.” Id. at 4. Thus, when referencing the public domain and the uplands, the Senate Report is describing what is commonly called “on land” versus “in the ocean”; see also Upland, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/upland [https://perma.cc/K8PX-XSLX] (defining upland as “high land especially at some distance from the sea”).
89. Id. (emphasis added).
modify or revoke withdrawals and reservations of such lands heretofore or hereafter made.”91 As such, it is reasonable that Congress intended section 12(a) to vest the same modification and revocation authority over the submerged lands as existed over public land.92

In sum, OCSLA claimed jurisdiction for the United States over its submerged lands. The law allows a president to withdraw any offshore, unleased lands from leasing disposition. Studying its legislative history reveals that Congress seemingly intended for a president to have the ability to modify or revoke a predecessor’s prior withdrawals.

C. The Antiquities Act

1. History. The Antiquities Act permits the president to create national monuments, withdrawing historic or scientific areas of federal land for preservation for future generations.93 In the offshore context, the Antiquities Act is a potent means of both prohibiting energy development and preserving marine environments. Within each designating proclamation, the president lists the prohibited activities within a monument’s boundaries and directs the secretaries of commerce and the interior to promulgate effectuating regulations.94 Notably, national monuments also receive environmental protection pursuant to the Minerals Leasing Act,95 which prohibits the leasing of mineral rights on federal lands in national parks and monuments.96 This offers monuments double protection, preventing the president from simply issuing a directive to allow federal leasing and production in a national monument.

91. Id. at 4831 (emphasis added).
92. A counterargument could embrace the textual canon of expression unius est exclusion alterius (the express mention of one thing excludes all others). This argument posits that since governing law (that is, the Pickett Act) expressly provided for modification and revocation authority, Congress’ silence should be interpreted as its desire to exclude those authorities in OCSLA. This argument is tenuous at best given the Committee’s statement that the withdrawal authority is “comparable to that which is vested in him with respect to federally owned lands on the uplands.” S. REP. NO. 83-411, at 26.
94. See, e.g., Northeast Canyons Monument, supra note 56, at 65,164–65 (President Obama restricted “exploring for, developing, or producing oil and gas or minerals,” “[i]ntroducing or otherwise releasing an introduced species from within or into the monument,” “[f]ishing commercially or possessing commercial fishing gear except when stowed,” among others); PMNM, supra note 13, at 60,231 (restricting a variety of activities from energy exploration to anchoring vessels on corals).
96. Id.
The Antiquities Act became law on June 8, 1906, and it provides that a president may “declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments.” The lands must be owned or controlled by the federal government and must “be confined to the smallest area compatible with the proper care and management of the objects to be protected.”

The Antiquities Act was enacted out of a growing desire to defend America’s archeological sites from desecration and ruin. The Antiquities Act is the first federal law to recognize archaeological sites as important public resources that should be preserved for posterity. During the enactment process, Congress considered other proposals that created a more limited executive withdrawal authority over “only historic and prehistoric ruins, monuments, archaeological objects, and antiquities on the public lands.” Prominent commentators have agreed, though, that the Antiquities Act’s early proponents intended a much broader purpose than just the protection of small archaeological sites, and a district court interpreting the Antiquities Act concluded that its final language “was indeed intended to enlarge the authority of the President.”

President Theodore Roosevelt invoked the Act to create eighteen national monuments. He did not restrict national monuments to small archaeological sites or ruins; he famously created the Grand Canyon National Monument on January 11, 1908.

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97. 54 U.S.C. § 320301(a); NOAA, supra note 8, at 2.
98. 54 U.S.C. § 320301(b).
100. Id.
102. The impetus for the Antiquities Act may have been protection of archaeological sites, but DOI officials lobbied for much vaster authority. DOI’s “persistence helps to explain why the language included in the final legislation was not as limiting as some in Congress may have preferred.” Id. at 478.
103. Id. at 485 (citing Anaconda Copper Co. v. Andrus, 14 Envtl. Rep. Cas. (BNA) 1853 (D. Alaska 1980)).
after this designation, the Supreme Court held in *Cameron v. United States*\(^\text{107}\) that the Antiquities Act indeed conferred authority on President Roosevelt to create the monument, despite its large size.\(^\text{108}\) *Cameron* set the precedent that size would not be a disqualifying factor for national monuments.

After President Roosevelt, the succeeding seven presidents utilized the Antiquities Act to create sixty-six national monuments.\(^\text{109}\) These early withdrawals provided the foundation for modern presidents to establish national monuments that encompass millions of acres in order to promote long-term conservation and preservation.\(^\text{110}\) Recent presidential use has consistently been upheld by the courts, demonstrating the Antiquities Act’s adaptability.

In *Utah Ass’n of Counties v. Bush*,\(^\text{111}\) a federal district court upheld President Clinton’s 1.7-million-acre designation of the Grand Staircase-Escalante National Monument and observed that several challenges to Antiquities Act designations had all been unsuccessful.\(^\text{112}\) President Clinton’s Giant Sequoia National Monument was affirmed in *Tulare County v. Bush*.\(^\text{113}\) Plaintiffs did not challenge President Clinton’s authority to create national monuments; rather they argued that he failed to detail enough qualifying features to invoke the Antiquities Act.\(^\text{114}\) The court dismissed these arguments and concluded that a president is not obligated to conduct a demanding inquiry for a proposed monument: “Inclusion of such items as ecosystems and scenic vistas . . . did not contravene the terms of the statute by relying on non-qualifying features [and that] [b]y identifying historic sites and objects of scientific interest located within the designated lands, the Proclamation adverts to the statutory standard.”\(^\text{115}\)

\(^\text{107}\) Cameron v. United States, 252 U.S. 450 (1920).

\(^\text{108}\) *Id.* at 455–56. Justice Willis Van Devanter described the Grand Canyon as an “object[] of historic or scientific interest” and “the greatest eroded canyon in the United States, if not in the world, . . . afford[ing] an unexampled field for geologic study, [and] is regarded as one of the great natural wonders . . . .” *Id.*


\(^\text{112}\) *Id.* at 1179–80.

\(^\text{113}\) Tulare County v. Bush, 306 F.3d 1138 (D.C. Cir. 2002).

\(^\text{114}\) *Id.* at 1140–41.

\(^\text{115}\) *Id.* at 1141, 1142.
2. Duration. Central to a national monument’s preservation is the Antiquities Act’s durational element. The Antiquities Act, however, is silent regarding the president’s ability to modify or revoke a predecessor’s designation, which necessarily determines whether a national monument may be temporary or permanent. This was an active debate in the first several decades after the Antiquities Act’s adoption.

During President Franklin Roosevelt’s presidency, the DOI recommended abolishing the Castle-Pinckney National Monument in South Carolina. Attorney General Homer Cummings provided legal analysis and determined that President Roosevelt lacked authority to abolish national monuments. He cited a prior executive opinion on the legality of unilateral presidential revocation, and stated 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 the President thereafter was without power to revoke or rescind the reservation.” There have been no further proposed unilateral executive revocations since the Castle-Pinckney Controversy.

President Calvin Coolidge’s Solicitor General recommended that if a president is unaware of the proper boundaries for a national monument, the land reservation should be revoked pursuant to the Pickett Act because it “specifically authorize[s] the modification[s] of reservations.” He concluded that once a national monument is created only Congress may eliminate it. Indeed, to date, Congress has abolished ten national monuments.

Congress itself demonstrated the Antiquities Act’s universal irrevocability and staying power when it enacted the Federal Land Policy and Management Act (FLPMA) in 1976. The FLPMA represented a major overhaul of federal public land oversight, and during its planning the Public Land Law Review Commission proposed

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116. Squillace, supra note 101, at 552.
117. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att’y Gen. 185, 186–87 (1938) (“[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.” (emphasis added)).
118. Id. (citing Rock Island Military Reservation, 10 Op. Att’y Gen. 359 (1862)).
119. Squillace, supra note 101, at 553.
120. Id. at 559–60.
121. Id. at 560.
122. Squillace, supra note 101, at 553.
that Congress repeal all of the federal laws allowing presidential withdrawal authority over public lands.\textsuperscript{124} Congress agreed and adopted the Commission’s recommendation, including the repeal of the longstanding Pickett Act.\textsuperscript{125} The new legislation stipulated that “the Secretary [of the Interior] is authorized to make, modify, extend, or revoke withdrawals . . . \textsuperscript{126} Rather than consolidate the Antiquities Act into the FLPMA, though, Congress left the law untouched.\textsuperscript{127} This implies that Congress affirmatively sought to leave the president with at least one law authorizing irrevocable withdrawals.

3. \textit{The Antiquities Act Extends Offshore.} President George W. Bush invoked the Antiquities Act to create the first offshore marine national monument.\textsuperscript{128} He formed the Northwestern Hawaiian Islands Marine National Monument on June 15, 2006.\textsuperscript{129} In the designating proclamation, he noted a plethora of objects of scientific or historic interest, including several existing wildlife refuges and a diverse reef ecosystem.\textsuperscript{130} Ten years later, President Obama drastically expanded the renamed PMNM, citing the diverse ecosystem, the geologic features, the great cultural connection to early Polynesia, and the significance of the area to the Native Hawaiian community.\textsuperscript{131}

Presidents Bush and Obama both based their authority to create offshore national monuments on legal precedent and guidance.\textsuperscript{132} President Clinton’s assistant attorney general, Randolph D. Moss, had outlined marine national monuments’ constitutionality in an opinion composed for the DOI, the National Oceanic and Atmospheric Administration (NOAA), and the Council on Environmental Quality (CEQ).\textsuperscript{133} The primary legal question centered on the federal government’s jurisdiction over the various offshore areas, mainly the territorial sea and the EEZ. Moss concluded that a president may

\begin{itemize}
  \item \textsuperscript{124} Squillace, supra note 101, at 568–69.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} 43 U.S.C. § 1714(a) (2012).
  \item \textsuperscript{127} Id.; Squillace, supra note 101, at 568–69.
  \item \textsuperscript{128} Proclamation No. 8031, 71 Fed. Reg. 36,441 (June 15, 2006).
  \item \textsuperscript{129} Id.
  \item \textsuperscript{130} Id. at 36,443.
  \item \textsuperscript{131} PMNM, supra note 13, at 60,227.
  \item \textsuperscript{132} See United States v. California, 436 U.S. 32, 36–37 (1978) (acknowledging that President Truman’s designation of the Channel Islands National Monument, including its submerged lands, was proper).
  \item \textsuperscript{133} Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 O.L.C. 183 (Sept. 15, 2000) [hereinafter Administration of Coral Reef Resources].
\end{itemize}
withdraw offshore lands under the Act in both the territorial sea and the EEZ:

[W]e think that Congress intended for the reach of the Antiquities Act to extend to any area that at the particular time the monument is being established is in fact “owned or controlled” by the U.S. Government, even if it means that the area covered by the Act might change over time as new lands and areas become subject to the sovereignty of the nation.134

Because the Antiquities Act covers any lands “owned or controlled” by the United States, when laws changed to expand the federal government’s jurisdiction over its coastlines, the Antiquities Act’s reach changed with it.135

Moss also appreciated that the federal government’s “sovereignty over the territorial sea [is] almost [to] the same extent that it maintains sovereignty over its land territory.”136 Thus, when President Reagan extended the territorial sea to twelve nautical miles in 1988, the Antiquities Act’s jurisdiction enlarged with it.137 Likewise, after President Reagan established the United States’ EEZ at two hundred nautical miles, the Antiquities Act’s jurisdiction extended as well.138 Moss concluded: “The United States, in sum, exerts greater restraining and directing influence over the EEZ than any other sovereign entity . . .”139 Furthermore, international law governing marine environmental protection provides the United States great authority to act in its own interest.140 The combination of the United States’ sovereign rights within the EEZ and international authority to protect the marine environment affords adequate “control” to satisfy the Act’s “owned or controlled” requirement.141

The NMSA, OCSLA, and Antiquities Act all authorize the president to withdraw OCS lands from leasing disposition. While each law has its own advantages and downfalls, the Antiquities Act far exceeds the NMSA and OCSLA in its ability to provide the lasting

134. Id. at 191.
135. Id.
136. Id. at 186.
140. Id. at 197.
141. Id.
legal protections that a president seeking permanent marine protection desires.

III. THE ANTIQUITIES ACT’S SUPERIORITY

A. Comparative Analysis

1. Antiquities Act v. NMSA. The Antiquities Act offers noteworthy advantages over the NMSA for a president seeking to remove submerged lands from leasing disposition while preserving the marine environment. Foremost, the Antiquities Act delivers a speedier mechanism for formal designation.142 Next, the Antiquities Act’s legal protections and longevity are often superior to the NMSA. The Antiquities Act and the NMSA are not mutually exclusive, however—they can coexist in the same area.143

The president cannot unilaterally remove submerged lands from leasing disposition by creating a marine sanctuary pursuant to the NMSA, which is a substantial disadvantage when compared to both OCSLA and the Antiquities Act. The NMSA provides for dual designation processes that are substantially slower and more onerous, often taking several years.144 Sanctuaries are either formed through the NOAA’s administrative process or by Congress directly.145 To initiate the administrative process, the NOAA accepts nominations from local communities, which trigger a merit-based review of various criteria, including statutory requirements.146 Should the NOAA agree to advance with a proposal, the agency next consults with myriad agencies and stakeholders, including Congress, state and local entities, Fishery Management Councils, and the public.147 Pursuant to the Magnuson-Stevens Act, the NOAA must obtain a fishery management plan from the appropriate fishery management councils. The agency must also create an environmental impact statement, as required by the National

145. Id.
146. Id.
147. Id.
Environmental Policy Act.\textsuperscript{148} Multiparty input and community comments are encouraged at every phase, but the result is several years of bureaucratic maneuvering.\textsuperscript{149} Alternatively, Congress may bypass the NOAA by enacting legislation designating a new marine sanctuary itself.\textsuperscript{150} To date, the NOAA has created ten marine sanctuaries while Congress has dedicated only three.\textsuperscript{151}

A president seeking immediate action to defend and preserve the marine environment will foreseeably invoke the Antiquities Act over the NMSA. The Antiquities Act confronts none of the same regulatory obstacles as the NMSA. As modern presidents consistently encounter a polarized Congresses, in which legislation is difficult to enact, presidential directives have become a crucial executive weapon.\textsuperscript{152} President Clinton unilaterally established the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve in December 2000, the predecessor to the PMNM.\textsuperscript{153} Following the announcement, he directed the NOAA to create a national marine sanctuary in the same area.\textsuperscript{154} After four years, the process was still slowly progressing amid the NOAA’s prolonged work on the environmental impact statement.\textsuperscript{155} President Bush curtailed the protracted process and bypassed the NOAA by invoking the Antiquities Act to establish the Northwestern Hawaiian Islands Marine National Monument in 2006.\textsuperscript{156}

In addition to the Antiquities Act’s faster designation process, its legal protections appear more permanent because it has greater statutory protection. Pursuant to the Mineral Leasing Act, all federal lands in national parks and monuments are unavailable for federal

\begin{itemize}
\item \textsuperscript{148} Craig, supra note 142, at 31.
\item \textsuperscript{149} Monuments and Sanctuaries: What’s the Difference?, supra note 144.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Id.
\item \textsuperscript{154} Craig, supra note 142, at 29–30.
\item \textsuperscript{155} Id. at 30–31.
\item \textsuperscript{156} Id. at 31.
\end{itemize}
Should a president seek to amend a predecessor’s monument designation to allow for energy development in the national monument, the Minerals Leasing Act’s prohibition would remain in place. A national marine sanctuary, in contrast, lacks the Minerals Leasing Act’s added protection. Consequently, it appears that a marine national monument is more protected from energy production than a national marine sanctuary.

It is crucial to note that both regimes are not mutually exclusive, but may coexist. The NMSA “specifically envisions that other regulatory schemes could be applicable to the area sought to be designated as a sanctuary.” The NMSA lists the need “to provide authority for comprehensive and coordinated conservation . . . in a manner that complements existing regulatory authorities” as one of its purposes. This allows for the creation of a national marine sanctuary after another conservation mechanism is already in place. Assistant Attorney General Moss understood, nonetheless, that there were legal limitations to a dual marine national monument-national marine sanctuary. He concluded that the secretary of commerce may only designate a sanctuary if existing federal authorities are “inadequate or should be supplemented.” Therefore, the secretary of commerce must determine whether a marine national monument’s existing regulations are inadequate before the designation process may commence. In other words, the Antiquities Act may be used to create a marine national monument after an NMSA-designated national marine sanctuary has been created; however, if a marine national monument already exists, it might be harder to establish a national marine sanctuary. Despite this requirement, marine national monuments and national marine sanctuaries indeed coexist.

For example, President Bush created the Rose Atoll Marine National Monument in American Samoa in 2009. He directed the NOAA to launch the designation process for adding the monument to

159. Id.
160. Id. (emphasis omitted).
161. Id. at 211 (quoting 16 U.S.C. § 1433(a)(2)(B) (2012)).
162. This is an enigmatic position for the secretary of commerce as the NOAA (within the Commerce Department), together with the Fish and Wildlife Service (within the DOI), jointly manage national marine monuments. The secretary ostensibly would have already promulgated all necessary regulations.
the existing Fagatele Bay National Marine Sanctuary.164 In 2012, the Sanctuary expanded to incorporate the Rose Atoll Marine National Monument.165 After the 2016 PMNM expansion, President Obama urged the secretary of commerce and the NOAA to initiate the national marine sanctuary designation process to extend the current sanctuary to include the expanded PMNM.166 He sought to supplement and complement existing authorities.167

Congress undoubtedly crafted the NMSA for marine environmental protection. However, should the president need to move rapidly, the Antiquities Act will likely be chosen over the NMSA. The Antiquities Act may be implemented years faster and has a sturdier statutory foundation for permanent withdrawals. Plausibly, however, the most comprehensive legal defense against OCS development is an Antiquities Act-created marine national monument supplemented by a NMSA-established national marine sanctuary.

2. Antiquities Act v. OCSLA. The Antiquities Act is also superior to OCSLA for marine environmental protection. First, Congress arguably designed OCSLA for preservation, but for preservation of the minerals themselves. Second, OCSLA withdrawals have not been judicially scrutinized. Furthermore, recent presidents have utilized OCSLA to modify their predecessors’ withdrawals, setting precedent for revocability. This Note additionally asserts that many OCSLA withdrawals over the years have been statutorily misplaced.168

First, the disparity in protection between OCSLA and the Antiquities Act is traceable to each law’s fundamental purpose. Congress enacted the Antiquities Act to preserve historic or scientific areas on federal lands for future generations to enjoy.169 In contrast, Congress created OCSLA to “resolv[e] competing claims to ownership of the natural resources of the offshore seabed and subsoil.”170 OCSLA may compel the secretary of the interior to evaluate environmental

164. Id. at 1578.
166. PMNM, supra note 13, at 60,230.
167. Id.
168. For example, President Eisenhower established the Key Largo Coral Reef Preserve in 1960. He described the area as a “unique coral formation [with] associated marine life [that] are of great scientific interest and value to students of the sea.” Proclamation No. 3339, 25 Fed. Reg. 2352, 2352 (Mar. 17, 1960). This language triggers the Antiquities Act, not OCSLA.
concerns during lease planning, but the law was not devised for environmental protection.

During OCSLA’s markup, the Senate Report stressed that the United States was purposely exerting jurisdiction *horizontally*, covering only the submerged lands themselves while not affecting “the character as high seas of the waters above . . . nor their use with respect to navigation and fishing.” The Committee unequivocally clarified that *vertical jurisdiction* was not exerted. Thus, OCSLA is improper for protecting marine mammals, fish, and other life above the seafloor.

Moreover, examining OCSLA’s section 12 as a whole also helps to illuminate Congress’s purpose concerning section 12(a)’s withdrawal authority. Section 12(b) allows the federal government to have “the right of first refusal to purchase at the market price all or any portion of any mineral produced” during times of war or whenever a president chooses. Section 12(c) provides the secretary of the interior authority to suspend operations of any lease during a national emergency or state of war. Section 12(d) permits the president and the secretary of defense to ban energy exploration and production as “needed for national defense.” Taken together, section 12’s subdivisions (b), (c), and (d) imply two central ideas. First, the president and various executive-agency heads have immense authority to regulate offshore energy production. Second, the law champions natural resource preservation. Section 12’s subdivisions (c) and (d) allude to the conservation of oil and gas for long-term petroleum storage and reserve. Extrapolating from these subdivisions, Congress enacted OCSLA to conserve OCS mineral resources for future use by the United States. Thus it is probable that section 12(a) withdrawals are intended for preserving the natural resources themselves, not the surrounding marine environment.

This concept of natural resource preservation is bolstered by the Senate Report’s proposed amendments to section 12(a). The Senate Report explained that section 12(a)’s markup vis-à-vis withdrawal authority of submerged lands sought to parallel the president’s authority to withdraw or reserve public lands. There were many

173. *Id.* § 1341(c).
174. *Id.* § 1341(d).
fights over public lands in the decades before OCSLA’s enactment. Prominent natural-resource-law scholars agree that in the early twentieth century, these public lands were expected to be used and developed in a manner that would satisfy long-term national purposes, to conserve them for eventual use. Since this philosophy predated OCSLA’s passage in 1953, it is sensible to propose that section 12(a)’s withdrawal authority aimed to promote natural resource conservation for eventual use, not for preserving fragile marine environments.

Given that the two laws have different purposes, the commonalities between President Obama’s language in his Antiquities Act withdrawals and his OCSLA withdrawals are stunning. In the PMNM withdrawal, based on the Antiquities Act, President Obama recognized the northwestern Hawaiian Islands’ distinctive submarine geologic features and diverse ecosystem, “home to many species of coral, fish, birds, [and] marine mammals.” He affirmed that preserving this unique marine environment is in the public’s interest.

In the Northeast Canyons Monument withdrawal, also based on the Antiquities Act, he again paid homage to the vibrant marine animal life, the “three submarine canyons and . . . four undersea mountains . . . [and] geology, currents, and productivity [that] create diverse and vibrant ecosystems.” He again concluded that the public interest is served by preserving the area’s historic and scientific objects of interest.

President Obama’s OCSLA withdrawals reveal important similarities and parallel language. President Obama justified the Atlantic withdrawal by citing “the critical importance of canyons along the edge of the Atlantic continental shelf for marine mammals, deep water corals, other wildlife, and wildlife habitat, and to ensure that the

176. To illustrate, in response to the federal government’s fear of “an imminent loss of the government’s oil and gas resources,” President William Taft withdrew “millions of acres of oil lands from appropriation under the public land laws.” This executive action prompted Congress to enact the Pickett Act in 1910, explicitly delegating to the President authority to remove, modify, and revoke areas of federally-owned lands from leasing disposition. David H. Getches, Managing the Public Lands: The Authority of the Executive to Withdraw Lands, 22 NAT. RESOURCES J. 279, 290, 309 (1982).

177. Id. at 309.

178. PMNM, supra note 13, at 60,227.

179. Id. at 60,229.


181. Id. at 65,163.
unique resources associated with these canyons remain available for future generations.”

In an accompanying press release, Secretary of the Interior Sally Jewell further elaborated: “The withdrawal does not impact ocean uses beyond mineral exploration and development, . . . [and] [o]il and gas activities have the potential to impact the seafloor wherever these activities occur. This includes discharge of oil, drilling muds, cuttings, and other debris that could affect seafloor habitats.”

Secretary Jewell then admitted that the area “has a very limited oil and gas history, with no active leases since the mid-1990s and no production of oil and gas,” and that energy production would not be impacted as exploration and production are challenging due to the submerged geology. Therefore, Secretary Jewell conceded that energy production in the region is not only challenging but nonexistent. This acknowledgement raises questions as to why the Obama administration chose to use OCSLA, a statute wholly focused on offshore natural resource production.

President Obama used identical language in the Arctic withdrawal, citing the irreplaceable values of the Chukchi and Beaufort Seas for the marine environment, the scientific research performed there, the area’s biodiversity, and the Alaskan native communities. Again, Secretary Jewell released an accompanying “press release” acknowledging that the area has known oil and gas reserves, but that “if oil prices remain at current levels, production . . . would be cost-prohibitive” and never take place. Secretary Jewell recognized the area’s past leasing history but reported “very limited activity and industry has demonstrated its declining interest in the

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182. Atlantic Withdrawal, supra note 4.
185. Id. (emphasis added).
186. Arctic Withdrawal, supra note 4.
Arctic waters. 188 Once again, the Obama administration relied on OCSLA even though any potential oil and gas production is minimal or nonexistent.

Beyond the statutory history and parallel language, the Antiquities Act is also preferable to OCSLA for its history of judicial approval and relative lack of later modification. Almost every president has withdrawn federal lands under the Antiquities Act. 189 The courts have reliably upheld these withdrawals, with “courts remain[ing] ‘severely limited’ in reviewing the proclamation[s].” 190 A district court explained its enormous deference to President Clinton’s withdrawal of the Grand Staircase-Escalante National Monument:

With little additional discussion, these facts compel a finding in favor of the President’s actions. . . . That is essentially the end of the legal analysis. Clearly established Supreme Court precedent instructs that the Court’s judicial review in these circumstances is at best limited to ascertaining that the President in fact invoked his powers under the [Act]. 191

The court concluded that it can only conduct a facial review; when Congress grants as broad discretion as it did in the Antiquities Act, “the courts have no authority to determine whether the President abused his discretion.” 192

On the contrary, there has been no judicial interpretation of OCSLA’s section 12(a) withdrawal provision. Moreover, recent presidents have invoked section 12(a) to modify their predecessors’ withdrawals. Some withdrawals even presume—and explicitly state—that eventual modification will be necessary. In June 1998, President Clinton withdrew all portions of the OCS under congressional moratoria through June 30, 2012 and all marine sanctuaries “for a time period without specific expiration.” 193 He stated, “[e]ach of these withdrawals is subject to revocation by the President in the interest of national security.” 194 President Clinton anticipated a future need to

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188. Id. at 7 (emphasis added).
190. Id. at 163.
192. Id.
193. Memorandum on Withdrawal of Certain Areas off the Atlantic Coast on the Outer Continental Shelf from Leasing Disposition, 34 WEEKLY COMP. PRES. DOC. 1111, 1111 (June 12, 1998).
194. Id. (emphasis added).
revoke the withdrawal and open the land to federal leasing under certain conditions. This established precedent for presidents to incorporate similar qualifying language in future section 12(a) withdrawals. A prime example is President Trump’s reversal of President Obama’s OCSLA withdrawals, discussed in Part IV.

Admittedly, the Antiquities Act has also been used for modification purposes; several presidents have modified early national monuments. Unlike OCSLA withdrawal modifications, however, decades have elapsed since those modifications, in which precedent has been set against national monument modification or revocation. Most infamously, President Woodrow Wilson reduced the size of Mount Olympus National Monument almost by half.195 Congress later restored the adjustment and no further Antiquities Act modifications have been attempted since that time.

The Antiquities Act is superior to OCSLA when a president seeks permanent protection of the marine environment. Congress arguably designed OCSLA for natural resource preservation, whereas the Antiquities Act was designed for the preservation of historic and scientific resources. Additionally, OCSLA withdrawals have not been scrutinized by the courts, and recent presidents have utilized OCSLA to modify and revoke their predecessors’ withdrawals. Although the Antiquities Act provides greater protection than OCSLA, there would be noticeable effects if the Antiquities Act is employed to a large number marine national monuments, as will be discussed in the next Section.

B. Marine National Monument Implications

Should future presidents exclusively utilize the Antiquities Act to withdraw submerged lands for marine environmental protection, there would be noticeable implications. Ultimately, though, the benefit of their irrevocability outweighs any benefit that an OCSLA withdrawal or a NMSA national marine sanctuary may provide.

First, federal management and resources devoted to national monuments must increase. Both the PMNM and Northeast Canyons Monument showcase streamlined management plans, but extra resources would be necessary as federal, state, and local officials are all heavily involved in the national monument designation process.196

196. The Proclamation designating the Northeast Canyons Monument is illustrative, providing:
Second, various industries, principally the commercial fishing and energy industries, would be affected by an increased number of marine monuments. Depending on how the proclamations and their supplementing regulations were drafted, potential industry effects could run the gamut. Finally, increased presidential usage of the Act would surely face resistance from opponents.

1. **Management.** Management of marine national monuments involves multiple players at the federal, state, and local levels, as well as outside participants and the public. As such, the responsible parties must devote resources and share responsibilities to ensure that any given monument effectuates the desired protection. Such an inclusionary governance model is likely more cost prohibitive than a simple OCSLA withdrawal, which merely disallows the DOI from considering areas for future leasing disposition.

   The fact that there are multiple federal agencies involved in monument creation and oversight complicates the marine-national-monument governance model. Assistant Attorney General Moss detailed these issues in the legal opinion that guided both Presidents Bush and Obama in delegating oversight responsibility amid several federal agencies.\(^{197}\) By default, the DOI assumes management duty, but that may be shared with other agencies.\(^{198}\) Both Presidents Bush and Obama ordered apportionment between the DOI, through the Fish and Wildlife Service (FWS), and the Department of Commerce, through the NOAA.\(^{199}\) Presidents have then given the secretaries three

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The Secretary of Commerce, through [the NOAA] . . . shall have responsibility for management of activities and species . . . under the Magnuson-Stevens Fishery Conservation and Management Act, the Endangered Species Act (for species regulated by NOAA) [and] the Marine Mammal Protection Act . . . The Secretary of the Interior, through [FWS] . . . shall have responsibility for management of activities and species . . . including the National Wildlife Refuge System Administration Act, the Refuge Recreation Act, and the Endangered Species Act (for species regulated by FWS).

Northeast Canyons Monument, supra note 56, at 65,164; see also PMNM, supra note 13, at 60,230 (“The Secretaries shall prepare a joint management plan, within their respective authorities and after consultation with the State of Hawaii, for the Monument Expansion within 3 years of the date of this proclamation, and shall promulgate as appropriate implementing regulations . . . .”).

198. Id. at 203.
199. For further discussion of apportionment between the DOI and the Department of Commerce, see supra note 196 and accompanying text.
years to proffer a joint management plan and to promulgate needed implementing regulations.200

Governance often involves each monument’s respective state government, too. For example, in the weeks preceding President Obama’s PMNM expansion in the northwestern Hawaiian Islands, Senator Brian Schatz of Hawai’i composed a letter to President Obama urging him to move forward with the withdrawal.201 Senator Schatz requested that the Office of Hawaiian Affairs be added as the Monument’s fourth co-trustee, beside the State of Hawai’i, the Department of Commerce, and the DOI.202 He sought to “ensure that Native Hawaiian perspectives [would] have representation in deliberations by a co-trustee with the appropriate jurisdiction.”203 Governor David Ige of Hawai’i similarly wrote to President Obama, requesting that the Office of Hawaiian Affairs be added as a co-trustee and “that the federal-state monument collaborative co-management structure extend to the expansion area.”204 President Obama formalized their wishes on January 12, 2017, adding the Office of Hawaiian Affairs as a co-trustee.205

Imperative for success is the additional engagement of impacted groups and the general public. The Obama administration opened dialogue with local communities about the proposed expansion.206 Governor Ige praised the administration for conducting meetings and forums throughout Hawai’i and receiving “the input of fishers, Hawaiian cultural practitioners, scientists, conservationists and others.”207 The NOAA has also recognized that the public is heavily

200. See, e.g., Northeast Canyons Monument, supra note 56, at 65,164 (“The Secretaries shall prepare a joint management plan . . . for the monument within 3 years of the date of this proclamation, and shall promulgate as appropriate implementing regulations . . . that address any further specific actions necessary for the proper care and management of the objects and area identified in this proclamation.”); PMNM, supra note 13 and accompanying text.
202. Id. at 4.
203. Id.
206. Letter from David Y. Ige, supra note 204.
207. Id.
involved in the management of several national monuments through the use of “citizen advisory councils.”

Every entity involved in managing a marine national monument incurs costs for the monument’s success and survival. Increased use of the Antiquities Act to create marine national monuments would require committing the resources to effectively sustain and protect the monument.

2. Industry. Marine national monuments produce economic consequences, chiefly within the commercial fishing and energy industries. Besides the obvious statutory prohibition on offshore energy production required by OCSLA, restrictions on activities like commercial fishing do not exist for OCSLA withdrawals. As described in Part II.B, Congress and the Senate Report ensured that OCSLA only exerted horizontal jurisdiction, not vertical. On the contrary, a national marine sanctuary under the NMSA faces harsher restrictions, like that of marine national monuments under the Antiquities Act.

A president’s customary practice in a designating proclamation is to enumerate all regulated and prohibited activities, then further assign rulemaking to the secretaries of commerce and of the interior. For the Northeast Canyons Monument withdrawal, President Obama prohibited all energy exploration and production, commercial fishing, and “[d]rilling into, anchoring, dredging, or otherwise altering the submerged lands,” among other activities. Activities like scientific research and exploration, recreational fishing, and “[c]ommercial fishing for red crab and American lobster [for 7 years before prohibition],” on the other hand, were only regulated.

This language underscores not only the restrictions’ severity, but the president’s discretion in tailoring each monument to its particular needs. President Obama outlawed commercial fishing, excepting red crab and American lobster, though those exceptions sunset after seven years. Recreational fishing is only regulated. This proscription has obvious effects on commercial fishermen, and future presidents will

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208. Monuments and Sanctuaries: What’s the Difference?, supra note 144. For example, the National Marine Sanctuary of American Samoa’s Sanctuary Advisory Council delivers public input to respective authorities on behalf of the Rose Atoll Marine National Monument. Id.
209. For further discussion of the NMSA and its restrictions, see supra Part II.A.
211. Id.
212. Id.
213. Id.
likely face backlash and resistance if they create monuments with similar restrictions, as President Obama did after designating the Northeast Canyons Monument. Local industry groups, such as the Southern New England Fisherman & Lobstermen’s Association, balked at the new monument, even after President Obama reduced its original size to accommodate outrage.\textsuperscript{214} Despite this gesture, the final proclamation either directly banned the individuals in that association from fishing within the Northeast Canyons Monument or caused fear of new and greater competition in their current fishing grounds.\textsuperscript{215} Some fishermen expressed worry about future extensions of the Northeast Canyons Monument’s boundaries, just as President Obama expanded the PMNM.\textsuperscript{216}

In addition to vocal outrage, several industry groups filed a lawsuit in the United States District Court for the District of Columbia decrying and challenging the president’s authority to create the monument.\textsuperscript{217} Plaintiffs include the Massachusetts Lobstermen’s Association, the Long Island Commercial Fishing Association, and the Rhode Island Fishermen’s Alliance.\textsuperscript{218} The Natural Resources Defense Council and other environmental groups support the designation.\textsuperscript{219}

The energy industry is also directly impacted, as all exploratory or operational activities are banned. Environmentally friendly presidents would presumably applaud an offshore energy prohibition, but renewable energy sources would be impacted as well. Offshore wind energy is a budding industry; the nation’s first offshore windfarm


\textsuperscript{215} See Fishermen Upset over Creation of Atlantic’s First Monument, CBS NEWS (Sept. 16, 2016, 8:53 AM), http://www.cbsnews.com/news/fishermen-upset-over-creation-of-atlantics-first-monument [https://perma.cc/728D-UEFB] (“After Thursday’s announcement, fishermen pondered their next move: sue, lobby Congress to change the plan or relocate. It’s hard to move, they said, because other fishermen would likely already be fishing where they would want to go.”).\

\textsuperscript{216} Id.


\textsuperscript{218} Id.

launched operation in December 2016 off the coast of Rhode Island.220 Emergent wind technology positions environmentally conscious presidents in a precarious policy situation. Wind energy’s expansion, especially in the Atlantic Ocean where wind resources are “outstanding” and even “superb,” is crucial to alternative energy development.221 But wind farms produce their own negative externalities. The NOAA’s Habitat Conservation Division described wind turbines as “enormous” with “towers . . . taller than 300 feet . . . [and] [t]he entire wind turbine structure . . . extend[ing] more than 650 feet out of the water.”222 The structures’ foundations reach 250 feet below the seabed.223 This leads to “direct crushing of the [ocean floor] from structures and barge anchors,” and complex ocean floors are extremely slow to recover from the damage.224 Allowing alternative energy sources like wind or ocean thermal energy conversion would likely undermine a monument’s ability to protect marine biodiversity. The president must work with the Bureau of Ocean Management to tailor wind farm and other renewable energy leasing programs accordingly.

Future presidents have the latitude to permit, regulate, or outlaw activities in a monument’s borders, just as President Obama permitted certain types of commercial fishing for seven years after the withdrawal of the Northeast Canyons Monument. Should monument areas require tailoring to appease a certain industry or group, the president has the authority to accommodate that need. Eventually, though, there comes a point at which a monument’s ability to protect a marine environmental is undermined and threatened. Future presidents must

220. See Tatiana Schlossberg, America’s First Offshore Wind Farm Spins to Life, N.Y. TIMES (Dec. 14, 2016), https://www.nytimes.com/2016/12/14/science/wind-power-block-island.html?_r=0 [https://perma.cc/K8C3-EQL5] (“On Monday, the country’s first offshore wind farm, developed by a company called Deepwater Wind and helped along by the state’s political leadership, started spinning its turbines to bring electricity to Block Island . . . .”); Sue Tuxbury, Protecting Habitat: Going Where the Wind Blows, NOAA FISHERIES, https://www.greateratlantic.fisheries.noaa.gov/stories/2016/august/09_going_where_the_wind_blows.html [https://perma.cc/PFR6-U4ZM] (“The nation’s first offshore wind farm, located off Rhode Island, enters its final stage of construction this summer. Given the region’s reputation, this may be the first of many.”).

221. See Tuxbury, supra note 220 (“According to the U.S. Department of Energy, the shores off of New England and the Mid-Atlantic are ‘outstanding’ wind resources. Some areas even qualify for the ‘superb’ classification, the best there is. . . . While Pacific winds are stronger, the shallower waters off the Atlantic coast make our area more inviting to wind energy developers.”).

222. Id.

223. Id.

224. Id.
thus prudently balance all public and private interests before any designation.

3. Resistance. Increased use of the Antiquities Act would spawn heightened resistance, especially by members of Congress. Indeed, presidential use of the Antiquities Act has caused outrage since its enactment in 1906.

Louisiana Senator Mary Landrieu, for example, understood that a marine national monument’s durability could have crippling effects on offshore oil and gas production. In 2008, Senator Landrieu presented a bill prohibiting funds for new national marine monuments unless certain new requirements were met.\(^{225}\) The bill’s accompanying statement denounced President Bush’s “misuse of the Antiquities Act . . . to create very large monuments.”\(^{226}\) She preferred using the NMSA to protect marine environments because the law allowed all stakeholders, including energy companies, to comment and debate.\(^{227}\) Senator Landrieu’s censure was not the harshest rebuke of the Antiquities Act; that occurred when Congress countered President Franklin Roosevelt’s designation of Jackson Hole National Monument in 1943. Congress forbade the Antiquities Act from being used in Wyoming absent direct congressional action.\(^{228}\) To this day, no president may create a national monument in Wyoming.\(^{229}\)

It is noteworthy, though, that both OCSLA withdrawals and national marine sanctuaries also face resistance, especially from coastal states and representatives.\(^{230}\) The Alaska State Legislature reacted to President Obama’s January 2015 OCSLA withdrawal\(^{231}\) by approving House Concurrent Resolution No. 3.\(^{232}\) The Resolution pressed “the governor and the attorney general to pursue all legal and legislative options to open . . . areas of the Chukchi and Beaufort Seas to oil and

\(^{225}\) See S. 3438, 110th Cong. (2008) (“Notwithstanding any other provision of law, no funds made available under any Act making appropriations for fiscal year 2008 or 2009 may be used to establish a national monument or otherwise convey protected status to any area in the marine environment of the Exclusive Economic Zone . . . under the [Antiquities Act].”).


\(^{227}\) Id.

\(^{228}\) 54 U.S.C. § 320301 (2012) (“No extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.”).

\(^{229}\) Id.

\(^{230}\) For further discussion of coastal representatives’ actions regarding restricted offshore production, see supra notes 225–27 and infra notes 231–34.

\(^{231}\) This OCSLA withdrawal was subsequent to the 2014 Bristol Bay OCSLA withdrawal.

gas exploration, development, and production.”233 Also in 2015, Alaska’s Representative Don Young introduced legislation in Congress to “amend[] the [NMSA] to prohibit the Department of Commerce from designating as a national marine sanctuary an area of the marine environment off the coast of Alaska . . . unless an Act of Congress requires Congress to make the designation.”234

Still, new marine national monuments would test the Antiquities Act greater than ever before. Congress would need to appropriate resources for proper monument management, industries would face economic ramifications, and the opposition would fight new designations in the judiciary, in Congress, and possibly even at the ballot box.

IV. THE TRUMP ADMINISTRATION FIGHTS BACK

During the pendency of this Note, President Donald Trump issued two presidential directives rescinding all of President Obama’s OCSLA withdrawals and attempting to abolish land and marine national monuments created by his predecessors. On April 26, 2017, President Trump issued an executive order prescribing the “Review of Designations Under the Antiquities Act.”235 Two days later he issued an executive order “Implementing an America-First Offshore Energy Strategy.”236 These actions will surely spawn litigation that will test the conclusions of this Note.

A. “Review of Designations Under the Antiquities Act”

President Trump issued an executive order requiring the secretary of the interior to review all new or expanded Antiquities Act designations or expansions of designations since January 1, 1996.237 The order covered monuments greater than 100,000 acres or wherever the secretary finds that a national monument was established “without adequate public outreach and coordination with relevant stakeholders . . . .”238 The order continued by delegating broad discretion to the secretary to make such determinations “in recognition of the importance of the Nation’s wealth of natural resources to American

233. Id.
238. Id.
workers and the American economy . . .”239 This timeframe targets only national monuments created by Presidents Clinton, Bush, and Obama, even though large national monuments were enshrined by numerous presidents. Also, while the executive order does not unilaterally attempt to modify or revoke any designations, it represents the first step in such a process. Given that both Congress and the presidency are controlled by the Republican Party, it is likely that Congress may act on any recommendations by the secretary, leaving President Trump’s signature the only action necessary for the modification or revocation of these monuments.

B. “Implementing an America-First Offshore Energy Strategy”

President Trump’s OCSLA-based executive order is comprehensive, completely refocusing the federal government’s attention “to maintain global leadership in energy innovation, exploration, and production.”240 It announced that the United States’ new policy is to encourage offshore energy exploration and production.241 The order requires the secretary of the interior to consult with the secretary of defense to consider revising the oil and gas lease sale schedule; requires the secretary of the interior to consult with the secretary of commerce to streamline permitting for seismic research “aimed at expeditiously determining the offshore energy resource potential of the United States within the Planning Areas”242 and prohibits the creation of any additional NMSA-established national marine sanctuaries unless a very specific cost-benefit analysis is undertaken.243 Section 4(c) of the order also revoked President’s Obama’s Northern Bering Sea Climate Resilience order.244 Finally, section 5 modifies all previous memoranda of withdrawals, including President Obama’s twin December 20, 2016 Atlantic and Arctic withdrawals, only retaining as withdrawn from leasing those areas designated as national marine sanctuaries prior to July 14, 2008.245 Such an executive order will require the courts to directly probe whether

239. Id.
241. Id.
242. Id.
243. Id. at 20,815–16.
244. Id. at 20,816.
245. Id.
OCSLA inherently allows subsequent modification or revocation of presidential withdrawals.

**Conclusion**

President Obama’s environmental legacy will largely be shaped by the executive actions he undertook during his final months in office. Whether such withdrawals and designations endure for posterity is wholly dependent on the statutory basis for and the eventual judicial interpretation of the withdrawals. By invoking presidential authority pursuant to OCSLA section 12(a), a statute designed for natural resource development, President Obama left the withdrawals in a precarious position. Given President Obama’s goals of prohibiting offshore energy development and preserving unique ecosystems and areas of scientific, historical, and cultural interest, the Antiquities Act would have been better suited to achieve these goals. The Antiquities Act has been demonstrated to be a reliable statutory method for protecting large areas, including protecting those areas from energy leasing. The Trump administration has not only already acted to undo President Obama’s OCSLA withdrawals in the Arctic and Atlantic Oceans, but is also preparing attempted modification or revocation of national monuments created under the Antiquities Act. Only time will tell whether OCSLA withdrawals are immune from unilateral presidential revocation or if the Antiquities Act becomes the weapon of choice for presidents seeking lasting environmental protection and preservation, both on and offshore.
APPENDIX A: MAP OF PAPAHĀNAUMOKUĀKEA MARINE NATIONAL MONUMENT

APPENDIX B: MAP OF NORTHEAST CANYONS MONUMENT AND SEAMOUNTS MARINE NATIONAL MONUMENT

APPENDIX C: MAP OF DECEMBER 2016 ARCTIC OCEAN WITHDRAWAL

APPENDIX D: MAP OF DECEMBER 2016 ATLANTIC OCEAN WITHDRAWAL

Legend
- Atlantic Canyon Withdrawal
- Northeast Canyons and Seamounts Marine National Monument

Date: 12/2016

249. Id.