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Sent: Wed 28/09/2016 1:42:54 PM (UTC)
Subject: Fwd: For awareness: Obama could use obscure provision to permanently ban leasing

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Begin forwarded message:

From: "Chen, Matthew" [REDACTED]@bp.com>
Date: September 28, 2016 at 9:38:19 AM EDT
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Subject: For awareness: Obama could use obscure provision to permanently ban leasing

[President] Obama could use obscure provision to permanently ban leasing

Emily Yehle, E&E reporter

<http://www.eenews.net/greenwire/2016/09/27/stories/1060043495>

Published: Tuesday, September 27, 2016

More than 50 years ago, President Eisenhower permanently protected 75 square miles of coral reefs along the Florida Keys, declaring them a "natural wonder" that must be preserved for future generations. In many ways, his 1960 declaration mimicked presidential monument designations with its emphasis on being unimpaired and "scenic and scientific values." But Eisenhower did not use the Antiquities Act, the 1906 law favored by a long line of presidents looking to protect land and water.

Instead, the 34th president of the United States was the first to use an obscure provision in the Outer Continental Shelf Lands Act. Section 12(a) could be described as Antiquities Act lite; it only works in water and focuses solely on prohibiting oil and gas activity.

Now, major environmental groups want President Obama to use it to cement his climate change legacy. Last week, the heads of Earthjustice, Environment America, Defenders of Wildlife, the League of Conservation Voters, the Natural Resources Defense Council, NextGen Climate and the Sierra Club asked Obama to permanently withdraw Arctic and Atlantic waters from oil and gas leasing (*Greenwire*, Sept. 20).

The request is bold — and unusual.

Since Eisenhower preserved the Key Largo reefs, only two presidents have used Section 12 for permanent protection: Nixon and Obama. Nixon withdrew waters around the Santa Barbara Channel Islands off California. Obama's use came decades later, when he set aside Bristol Bay in 2014 "without specific expiration" (*EnergyWire*, Dec. 17, 2014).

The proposal from environmentalists would be the broadest permanent use of the provision to date.

"Usually if the president doesn't want to lease something, he just doesn't lease it," said John Leshy, who served as Interior's top attorney under the Clinton administration and now teaches at the University of California's Hastings College of the Law. "To go further and say 'I'm withdrawing the area' is somewhat unusual."

Leshy also called the provision "pretty sticky," meaning it would be hard to revoke. Much like the Antiquities Act, Section 12(a) does not include specific language allowing future presidents to reverse permanent withdrawals.

The issue has never been litigated. But Niel Lawrence, an attorney who is NRDC's Alaska director, expressed confidence that Obama's withdrawal of the Arctic and Atlantic would stick.

"It would be rash to say with certainty," Lawrence said, "but the better legal view is that a permanent 12(a) withdrawal cannot be undone by a later president, and that's the view that ought to prevail in court."

He cited a 1938 legal opinion from the U.S. attorney general, which dealt with the proposed abolishment of a national monument. It found that "if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation."

The opinion dealt with the Antiquities Act. But Lawrence asserts that the legal argument is the same: Congress must give the executive branch the express power to undo such protections. In Section 12(a), it doesn't.

Nicolette Nye, a spokeswoman for the National Ocean Industries Association, disagreed. While Obama has the authority to withdraw waters under Section 12(a), "a future president could rescind such a withdrawal via a new executive order," she said.

Nye pointed to a series of executive orders that withdrew lease areas off the coasts of California, Florida, New England, Washington and Oregon. President George H. W. Bush first used Section 12(a) to protect them in 1990, building on a long-standing congressional prohibition. His executive order withdrew the areas from oil and gas leasing for 10 years.

In 1998, President Clinton extended the withdrawal until 2012. But President George W. Bush cut it short, rescinding Clinton's executive order in 2008 and reopening the areas four years early.

The case is comparable because of the scope of the withdrawal. Lawrence, however, highlighted the difference between such time-limited withdrawals and a permanent one.

No president, he said, has attempted to undo a permanent withdrawal. Eisenhower's Key Largo preserve lives on as the John Pennekamp Coral Reef State Park. Even George W. Bush left in place portions of Clinton's withdrawal that had no specified end date. Those comprised marine sanctuaries off California, Florida, Georgia and Washington.

"No president has ever rescinded an open-ended reserve under this, and so there's no litigation history," Leshy said, later adding: "Nobody knows the answer because it's never been tried."

Would a President Trump or Hillary Clinton try to reverse such a withdrawal? Environmentalists contend that the oil industry, while powerful, doesn't have the incentive it once did. Drilling in the Arctic is expensive, and current interest in the Atlantic is low (*EnergyWire*, March 16).

Nye emphasized the need to keep options open to meet the energy demands of the future, citing government projections that fossil fuel could still supply much of the nation's energy in 2040.

Environmentalists have argued that the nation needs to more quickly transition to renewable energy. New drilling, they say, would thwart the Paris climate agreement to keep global temperatures from rising more than 2 degrees Celsius — and Section 12(a) gives the president broad authority to take offshore minerals off the table.

Obama is positioned to take a "bold" step on his way out, Lawrence said.

"I think this year is the moment in time for progress on climate change that we may not see for a while," he said. "I think that this is a great opportunity to permanently bar offshore drilling in the Arctic and Atlantic because of the president's commitment to ocean preservation and his unusually clear understanding that we must do everything we can on climate change."

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