No. 19-35460
(Consolidated with Nos. 19-35461 and 19-35462)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEAGUE OF CONSERVATION VOTERS, et al.,
Plaintiffs/Appellees,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States, et al.,
Defendants/Appellants.

Appeal from the United States District Court for the District of Alaska
No. 3:17-cv-00101 (Hon. Sharon L. Gleason)

FEDERAL APPELLANTS' REPLY BRIEF

Of Counsel:

DENNIS DAUGHERTY
SUSAN HOVEN CASON
STEPHEN R. VORKOPER
Attorneys
Division of Mineral Resources
Office of the Solicitor
U.S. Department of the Interior

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
ROBERT J. LUNDMAN
SARAH D. HIMMELHOCH
JUSTIN D. HEMINGER
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-5442
justin.heminger@usdoj.gov

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INTRODUCTION

The United States' opening brief showed why the Court should reject this suit either at the threshold or on the merits. The answering brief from Plaintiffs (collectively, the League) fails to rebut either point.

First, the League's effort to seek judicial review of presidential action fails at the outset. The League has not met any, let alone all, of three threshold requirements for maintaining a suit against the President: (1) Article III standing and ripeness; (2) a waiver of sovereign immunity; and (3) a cause of action.

Second, the challenged Executive Order is a proper exercise of delegated authority by the President. Congress enacted the Outer Continental Shelf Lands Act (OCSLA) to develop the immense oil and natural gas reserves on the Outer Continental Shelf. In Section 12(a) of OCSLA, Congress delegated to the President broad discretionary authority "from time to time" to withdraw from disposition any unleased areas of the Shelf. Consistent with the understanding of the last four Presidents, the President in 2017 issued an Executive Order modifying prior presidential withdrawals to reopen 128 million acres of the Shelf for potential energy development. The President's interpretation of Section 12(a) is supported by its plain text, by OCSLA's structure and purpose, and (if there is ambiguity) by ample extrinsic evidence.

This Court should reverse the district court's judgment.

ARGUMENT

I. The League has failed to satisfy any of three independent threshold requirements for maintaining this suit.

The League has failed to establish (1) an Article III case or controversy and a ripe claim; (2) a waiver of sovereign immunity; and (3) a cause of action. U.S. Brief 11-45. The League fails to rebut the United States' threshold arguments. And while it insists that its suit cannot wait, Answering Brief 12-44, the League offers no credible reason why it cannot raise its claims in a later suit within OCSLA's framework for judicial review.

A. There is no Article III case-or-controversy or ripe claim.

The League has not established constitutional standing and ripeness. Nor has it shown its suit is prudentially ripe for seeking non-statutory equitable relief against the President.

1. The League has no Article III injury-in-fact caused by the Executive Order.

The League's standing is tested from "when the suit was filed." *Davis v. Federal Election Commission*, 554 U.S. 724, 734 (2008). The League must show that when it filed suit in May 2017 — just five days after the President issued the Executive Order — its members faced an imminent, concrete, and particularized injury caused by the Order. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *id*. at 569 n.4 ("The existence of federal jurisdiction ordinarily depends on the facts

as they exist when the complaint is filed."). The League fails to meet this burden. It abandons the broad standing theory that it unsuccessfully asserted in district court: that the Executive Order "catalyzes" oil and gas activities that will harm its members' aesthetic interests. Answering Brief 12. And its narrower standing theory based on "seismic surveying" fares no better.

The League speculates that the Executive Order will cause private companies to apply for permits to conduct seismic surveying in some areas of the Arctic or Atlantic Oceans that were previously withdrawn; then the Department of the Interior will grant those permits; then the companies will conduct surveying that will harm wildlife living in one of the Oceans; and then the League's members will visit one of these areas where their aesthetic and subsistence interests in that wildlife will be harmed. *Id.* at 13-26. This jumble of dominos fails to establish an Article III injury.

Imminence is lacking. The Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013) (emphasis added). The Court has likewise declined to endorse standing theories "that require guesswork as to how independent decisionmakers will exercise their judgment." *Id*. at 413. The Executive Order does not grant any permits; nor could it. Although the Order

instructs Interior to expedite *consideration* of seismic survey permit *applications*, it does not require the agency to grant any permits. 2 E.R. 287. Thus, the League's alleged future injury boils down to guesswork about how third parties may respond to the Executive Order by seeking permits to conduct seismic surveying subject to independent legal requirements. Although the League invokes "common sense" and "basic economics," Answering Brief 19, without sufficient factual support, these principles amount to pure speculation about the potential impact that the Executive Order may have on future seismic surveying.

The "proof required to establish standing *increases* as the suit proceeds." *Davis*, 554 U.S. at 734 (emphasis added). At summary judgment, the League's burden is to " 'set forth' by affidavit or other evidence 'specific facts' " establishing standing. *Defenders of Wildlife*, 504 U.S. at 561. Yet when the League filed its summary judgment motion more than a year after filing suit, 2 E.R. 348, it identified no new applications for seismic surveying permits in previously withdrawn areas of the Shelf, no permits that had been granted, and no surveying that had occurred or was likely to occur purportedly as a result of the Order. The floodgates of surveying boldly predicted by the League never materialized.

Indeed, the primary evidence on which the League and the district court relied is two short press releases, 1 E.R. 9 n.34, neither of which establishes the Executive Order will cause a certainly impending injury to the League's members.

See Mendia v. Garcia, 768 F.3d 1009, 1013 (9th Cir. 2014) (holding that plaintiff "must offer facts showing that the government's unlawful conduct is at least a substantial factor motivating the third parties' actions" (internal quotation marks omitted)). The industry trade association's press release urged the Executive Branch to make "timely decisions on permit applications." League Supplemental Excerpts of Record 159. Although the press release calls for "offshore seismic surveys to be conducted without delay, in the Atlantic and other frontier areas," this is little more than general expression of optimism by third parties, not a certainly impending injury to any member of the League. *Id.* Likewise, Interior's May 2017 press release stated only that it would *reconsider* its denial of the six applications for surveying in the Atlantic Ocean, which were submitted *before* the Executive Order issued. https://perma.cc/9ZCW-YQRU. The district court's finding of imminence rested on pure conjecture about future independent agency decisions.

In any event, the League has failed to show how even the handful of pending applications for Atlantic surveying establish that the Executive Order threatens a certainly impending injury to one of its members. The League's primary concern is the Arctic, not the Atlantic: of the League's seventeen declarations, just three focus on the Atlantic Ocean. 2 E.R. 81-282. Of those three, none establishes that a

member faces a certainly impending injury from future seismic surveying allegedly linked to the Executive Order. 2 E.R. 89-120, 153-56, 196-203.

The League declines to defend the district court's heavy (and unjustified) reliance on *In re Zappos.com, Inc.*, 888 F.3d 1020 (9th Cir. 2018). *See* 1 E.R. 47-52. Instead, the League seeks refuge in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). Answering Brief 22-23. But that case (unlike this one) involved a highly deferential standard of review combined with credible evidence to support standing.

In *Department of Commerce*, the Supreme Court applied a clear-error standard of review to uphold the district court's factual findings, issued after a bench trial, that (1) noncitizen households "will likely react in predictable ways" by declining to respond if the national census included a citizenship question; and (2) even an undercount of as little as 2% would cause states to lose federal funding. 139 S. Ct. at 2565-66. As the Court noted, the Census Bureau predicted this behavior, *id*. at 2563, and the administrative record had Bureau memos "analyzing the predicted effects of reinstating the question," *id*. at 2564. The League provided no comparable evidence to support its predictions about the connection between the Executive Order and subsequent seismic surveying. Moreover, unlike in *Department of Commerce*, this Court reviews the question of standing de novo. *Levin v. Vilsack*, 587 F.3d 986, 991 (9th Cir. 2009).

Concreteness and particularity are lacking. The League's allegations of injury lack concreteness and particularity. Many of the member declarations focus on the League's abandoned theory that the Executive Order "catalyzes" oil and gas activities. 2 E.R. 81-282. But where the declarations could relate to seismic surveying, the members do not show that any future surveying will likely occur in the areas that they plan to visit. U.S. Brief 21-25.

That is, the League has not shown that any future seismic surveying is likely to affect a *particular* area of the 128 million previously withdrawn acres of the Outer Continental Shelf that its members plan to use. *See Wilderness Society, Inc. v. Rey*, 622 F.3d 1251, 1257 (9th Cir. 2010) (rejecting standing because there was "no indication" that the challenged project "would affect the particular area" of the forest that the individual "plans to use in the future"). Thus, there can be no injury that affects the League's members in a "personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (internal quotation marks omitted). The remote chance that a League member will visit a specific area affected by a seismic survey within an area larger than California is not a sound basis for an Article III injury. *See Summers v. Earth Island Institute*, 555 U.S. 488, 495 (2009). And there is certainly no *concrete* injury — one that is "real" and not "abstract." *Spokeo*, 136 S. Ct. at 1548 (internal quotation marks omitted).

Put differently, the League has failed to satisfy (or even address) this Court's precedent rejecting standing because "it is possible that none of the public lands affected by" the alleged harmful activities "will be the ones" that its members "use and enjoy." *Wilderness Society v. Griles*, 824 F.2d 4, 15 (9th Cir. 1987); *see also* U.S. Brief 21-22. The League cites what it believes is a more lenient standard under *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009). Answering Brief 17-18. But the district court and the League misread *Kempthorne*, which required the plaintiffs to establish a "geographically specific" injury to their members. 588 F.3d at 708-09; *see also* U.S. Brief 23-25. Unlike in *Kempthorne*, the League challenges the Executive Order "in the abstract" and complains about any seismic surveying wherever and whenever Interior might eventually authorize it. 588 F.3d at 708. As noted above, to the extent that the League addresses geography, it emphasizes the Arctic Ocean. But it fails to connect its interest in that region with any certainly impending and specific injury to its members.

In sum, the League has not established an Article III injury to its members caused by the Executive Order.

2. The League has no ripe challenge to the Executive Order.

Just as the League lacks Article III standing, its suit is not constitutionally ripe because the Executive Order threatens no imminent injury to the League's

members. U.S. Brief 25-30; *see Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (dismissing suit on constitutional ripeness grounds). The Order reopened areas of the Shelf for consideration in OCSLA's four-stage process for leasing. At the earliest, the League's claims may ripen once Interior issues a final decision on the five-year leasing program, which is reviewable in the D.C. Circuit. 43 U.S.C. § 1349(c)(1).

Nor is this case prudentially ripe. U.S. Brief 26-30. The League complains that prudential ripeness is a "disfavored" doctrine, Answering Brief 26-27, but (to borrow the League's phrasing) "the passage of time has not vitiated" the doctrine's "controlling effect," *id*. at 35. *See Thomas*, 220 F.3d at 1139; *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (declining to resolve "the continuing vitality of the prudential ripeness doctrine"). This Court recently reaffirmed that a "proper ripeness inquiry contains a constitutional and a prudential component." *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153 (9th Cir. 2017).

Even if the issues presented by the League were otherwise fit for immediate judicial consideration, the League has "not identified any hardship that would befall" its members if its "claims were not considered at this time." *Lee v. Oregon*, 107 F.3d 1382, 1391 (9th Cir. 1997). Unlike agency regulations subject to pre-enforcement review, the Executive Order does not regulate primary conduct or impose direct legal consequences on anyone, and certainly not on the League

and its members. U.S. Brief 26 (citing *Habeas Corpus Resource Center v. U.S. Department of Justice*, 816 F.3d 1241, 1252 (9th Cir. 2016)). The League disputes the relevance of ripeness cases in the pre-enforcement context, Answering Brief 28, but this Court recently applied these principles in an analogous context involving a challenge to an EPA rulemaking. *See Safer Chemicals, Healthy Families v. U.S. EPA*, 943 F.3d 397, 413-16 (9th Cir. 2019). The Executive Order does not "create adverse effects of a strictly legal kind," nor has it "given anyone a legal right" to conduct seismic surveying or other energy development activities. U.S. Brief 27 (relying on *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998)).

Congress amended OCSLA in 1978 to include judicial review provisions that align with a four-stage framework for energy development. U.S. Brief 27-29. Congress crafted this stair-step framework specifically to avoid premature litigation over alleged environmental effects. *Id*. at 27-28. In this sense, the League's challenge to the Executive Order is like the premature claims in *Center for Biological Diversity v. U.S. Department of Interior*, 563 F.3d 466, 480-81 (D.C. Cir. 2009) (*CBD*). The League notes that *CBD* allowed the plaintiffs' OCSLA-based claims to proceed, while rejecting as unripe their claims under the National Environmental Policy Act and the Endangered Species Act. Answering Brief 29. But the League has *disavowed* any OCSLA claim. *Id.* at 40-41. Indeed,

CBD arose in a challenge in the D.C. Circuit to a five-year leasing program, and the court rejected the very argument advanced by the League — that its claims are ripe because, although the action under review did not authorize seismic surveying, it would lead to more surveying. 563 F.3d at 481 n.1.

Finally, equitable remedies like injunctions and declaratory judgments "are discretionary, and courts traditionally have been reluctant to apply them . . . unless the effects of the administrative action challenged have been felt in a concrete way by the challenging parties." *Reno v. Catholic Social Services*, 509 U.S. 43, 57 (1993) (internal quotation marks omitted). The League has not shown that OCSLA's judicial review provisions are inadequate for review of the Executive Order if and when Interior ever takes final action with a concrete effect on the League's members. U.S. Brief 30.

Moreover, to exercise equitable discretion, the Court must have jurisdiction. Here, it has no jurisdiction because the League failed to satisfy the *constitutional* requirements for standing and ripeness.

B. There is no waiver of sovereign immunity.

The League's suit should also be dismissed for the independent reason that it is barred by sovereign immunity, and the League has failed to justify non-statutory review. U.S. Brief 30-37. The League does not dispute that Congress declined to waive immunity for Section 12(a) decisions in either OCSLA or the Administrative

Procedure Act (APA) — the two logical places to do so. *Id*. at 31-34. Congress' policy choice to maintain the United States' immunity from suit should end the judicial inquiry.

Lacking waiver, the League resorts to non-statutory review under *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Answering Brief 30-36. But *Larson* provides no basis for judicial review of Executive Branch actions after Congress amended Section 702 of the APA in 1976. U.S. Brief 32-33. The League seeks to reinvigorate *Larson*, which the Supreme Court has treated as a "narrow and questionable exception" to immunity. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 116 (1984). But the Supreme Court has never held that *Larson* authorizes review of presidential action; nor, since 1963, has the Court applied *Larson* in the context of federal sovereign immunity. U.S. Brief 34.[*]

Even if *Larson* survives and authorizes non-statutory review of the Executive Order, the League's suit fails to qualify for its exceptions. Under *Larson*'s first exception for *ultra vires* acts, the League's claim falls short of the high bar for establishing that the President's decision was "completely outside his

[*] Despite this Court's holding in *E.V. v. Robinson*, 906 F.3d 1082 (9th Cir. 2018), the United States' position is that Congress abrogated the *Larson* exceptions in the 1976 amendments to APA Section 702. In any event, *Robinson* applied *Larson* to authorize judicial review of the action of a federal judge, not of the President.

governmental authority." *United States v. Yakima Tribal Court*, 806 F.2d 853, 859-60 (9th Cir. 1986). As the United States has explained, U.S. Brief 45-77, OCSLA Section 12(a) confers discretion on the President to make, modify, and undo withdrawals — an interpretation embraced by the last four Presidents. At most, the Executive Order is an "incorrect decision as to law or fact." *Id.* at 36 (quoting *Larson*, 337 U.S. at 695).

Under *Larson*'s second exception for unconstitutional acts, courts may in proper cases review the President's actions for constitutionality. U.S. Brief 36 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992)). But the League's constitutional claim is wholly derivative of its *ultra vires* claim. *Id.* at 36-37. The Supreme Court has expressly rejected the argument that "whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Dalton v. Specter*, 511 U.S. 469, 471 (1994). Claims "simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review under the exception recognized in *Franklin*." *Id*. at 473-74. *Dalton* forecloses review of the League's purported constitutional claim.

C. There is no statutory or equitable cause of action.

The League's suit fails at the threshold for the independent reason that it has no viable legal or equitable cause of action. U.S. Brief 38-42. On this point, both

the League and the Amici Curiae Federal Court Scholars misunderstand the United States' argument to be that absent a *statutory* cause of action, federal courts lack *any* equitable authority to remedy violations of federal law. Answering Brief 36; Federal Court Scholars Brief 2. To the contrary, the United States agrees that "in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer." *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015). This is not "a proper case" because the League has no cause of action.

The League does not state a claim simply by alleging that the President exceeded his statutory authority or violated the Constitution. It needs a cause of action, "which authorizes a court to hear a case or controversy." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 73 (1992). "Federal courts cannot reach out to award remedies when the Constitution or laws of the United States do not support a cause of action." *Id*. at 74. *Larson* (which the League otherwise embraces) confirms this rule. *See* 337 U.S. at 693 (Unless plaintiff states a cause of action, "the suit must fail even if he alleges that the agent acted beyond statutory authority or unconstitutionally.").

The League conflates its members' alleged aesthetic interests for purposes of establishing Article III standing with the requirement to assert a cause of action. Answering Brief 42. But standing and a cause of action are distinct requirements for federal cases. *See Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) ("The

Court of Appeals appeared to confuse the question of whether petitioner had standing with the question of whether she had asserted a proper cause of action."). Thus, even if the League's members' inchoate aesthetic interests could be a basis for standing, they do not supply a cause of action.

As to the *ultra vires* claim, federal courts do not recognize a freestanding equitable cause of action for exceeding statutory authority. Although the League disavows reliance on Section 12(a) of OCSLA for any substantive rights, Answering Brief 41, its *ultra vires* claim seeks to enforce that provision against the President, 2 E.R. 332. This effort to enforce federal statutory law without a congressionally created cause of action is foreclosed by *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). *See San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093 (9th Cir. 2005) (applying *Sandoval*).

As to the League's constitutional claim, *Dalton* confirms that the League possesses no cause of action for violating the Constitution. The Property Clause — the only constitutional provision cited by the League — confers no legal rights or immunities on the League or its members that federal courts may enforce against the President. *Passman*, 442 U.S. at 239 n.18 ("Whether petitioner has asserted a cause of action . . . depends not on the quality or extent of her injury, but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue."). Nor does the League identify a liberty

interest that would justify an implied cause of action to enforce separation-of-powers principles against the President. *Cf. Bond v. United States*, 564 U.S. 211, 222 (2011) (discussing "cases in which individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations").

The League relies on *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 491 n.2 (2010), to argue that the Supreme Court has recognized an equitable cause of action for violating separation-of-powers principles. Answering Brief 38. But in that case, the petitioners asserted the constitutional claim against the agency that regulated one of them, and they lacked another meaningful avenue for relief short of contesting an enforcement sanction. 561 U.S. at 490-91. In contrast, the Executive Order does not expose the League or its members to any regulation or threat of enforcement.

Non-statutory review is the rare exception, not the rule. By specifying a path for judicial review in OCSLA, Congress displayed an "intent to foreclose" the availability of a "judge-made action at equity." *Armstrong*, 575 U.S. at 329.

D. No equitable relief should be granted against the President.

By vacating Section 5 of the Executive Order, the district court transgressed separation-of-powers principles under which courts decline to issue injunctive or declaratory relief directly against the President. U.S. Brief 43-45. The League downplays this intrusive remedy of vacatur, recasting it as affecting "only the

Order's implementation by inferior officials." Answering Brief 86. But the district court's vacatur remedy operated directly against the President and nullified an official, discretionary presidential action. 1 E.R. 30.

In many cases, "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin*, 505 U.S. at 815 (Scalia, J., concurring in part and concurring in the judgment). Although the League named as defendants the Secretaries of Interior and Commerce, it failed to establish standing and ripeness as to either one and never identified a reviewable final agency action. U.S. Brief 43 n.7. The League's failure to sue a defendant against whom relief could properly be granted underscores that its suit is non-justiciable and premature.

* * * * *

The League's suit should be dismissed at the threshold on any of three independent grounds. Judicial review of the Executive Order should follow the avenues for judicial review that Congress established in OCSLA.

II. The President acted within the authority delegated to him in OCSLA Section 12(a).

If the Court reaches the merits, it should reverse the district court because the President acted within his delegated authority.

Section 12(a) of OCSLA delegated to the President broad discretionary authority over withdrawals of areas of the Outer Continental Shelf. U.S. Brief 45-69. The text, structure, and purpose of OCSLA confirm that this authority includes the power to modify and undo prior presidential withdrawals — consistent with the understandings and actions of each of the last four Presidents. Even if the provision is ambiguous, the extra-statutory evidence supports the President's power. *Id*. at 69-77. Section 5 of the Executive Order is a proper exercise of Congress' delegated authority.

The League's reading of Section 12(a) is flawed for three primary reasons. *First*, the League's central argument — that the power to "withdraw" and the power to revoke a withdrawal are distinct and opposite powers — departs from the provision's text and rests on faulty interpretive principles. *Second*, the League's interpretation of Section 12(a) conflicts with OCSLA's structure and purpose. *Third*, the League's extra-statutory evidence is unconvincing.

A. The text of Section 12(a) supports the President's authority to modify and undo presidential withdrawals.

Section 12(a)'s text grants every President broad discretionary authority over withdrawal decisions on the Outer Continental Shelf: "The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf." 43 U.S.C. § 1341(a). As the United States has explained, this delegated authority must include the power to modify, undo, and otherwise reconsider presidential withdrawals so that each sitting President may exercise flexible authority over stewardship of the Shelf's resources. U.S. Brief 45-69. None of the League's statutory arguments compels its extreme reading of the provision to require every withdrawal to be permanent and unalterable absent an Act of Congress.

1. Section 12(a) confers on the President broad authority over the size, purpose, and duration of withdrawals.

The plain text of Section 12(a) gives the President expansive power over withdrawal decisions on the Outer Continental Shelf, including their size, purpose, and duration. That the President "may" withdraw "any" unleased area of the Shelf, for any reason, at any time, is noteworthy for both the substantial discretion conferred on the President and the absence of express limitations on its exercise. This discretion extends to the timing and duration of withdrawals. Congress' use of the phrase "from time to time" signals that it anticipated any President could

withdraw areas for limited periods of time, rather than permanently removing areas of the Shelf from OCSLA's reach. U.S. Brief 47-48.

The League maintains that the phrase means merely that the President may withdraw areas "at will," such that he may exercise the power "multiple times." Answering Brief 58. But the League's reading renders the phrase superfluous, because that meaning is contained in the rest of the text, which provides that the President "may . . . withdraw from disposition any of the unleased lands of the outer Continental Shelf." Indeed, the League's interpretation of "from time to time" is better expressed by the phrase "at any time," which Congress used in Section 5(a) of OCSLA: "The Secretary may at any time prescribe and amend such rules and regulations as he determines necessary and proper . . . ." 43 U.S.C. § 1334(a). By adding "from time to time" in Section 12(a) Congress confirmed that it intended the sitting President to withdraw areas for *limited* periods of time, with the discretionary power to return the area to use.

The district court determined that the phrase "from time to time" meant that Congress had delegated authority to the President to "withdraw lands at any time and *for discrete periods*." 1 E.R. 18 (emphasis added). The court recognized that the phrase could be interpreted, consistent with the Executive Order, to authorize "each President the authority to revoke or modify any prior withdrawal." *Id*. at 17-18. But the court failed to appreciate that Congress' delegation of power to make

time-limited withdrawals conflicts with the League's argument that all withdrawals must be permanent. Instead, the court found that the phrase merely rendered the authority ambiguous. *Id*. Even if the court correctly concluded that Section 12(a) is ambiguous, it still erred in its analysis of the structure and purpose of OCSLA and in its reliance on selected extra-statutory evidence. *See* U.S. Brief 61-77.

The League also argues that Congress' use of "from time to time" in three other OCSLA provisions undercuts the United States' position. Answering Brief 59-60. The League contends that these provisions reveal that Congress used the phrase to refer to an action taken "intermittently or at will." *Id*. at 60. Each of the provisions, however, authorizes the Executive Branch to take actions that are time-limited or that can be revised or modified. *See* 43 U.S.C. § 1335(a)(1) (authorizing Interior to establish a filing period or periods "as may be fixed from time to time"); *id*. § 1347(c) (authorizing the Coast Guard to promulgate regulations applying to unregulated hazardous working conditions and to "from time to time modify any regulations"); *id*. § 1351(h)(3) (requiring Interior "from time to time, [to] review" each development and production plan and whether "the plan should be revised" to "require such revision"). In other words, Congress paired the phrase "from time to time" with authority for the Executive Branch to revisit and modify prior actions — just the sort of flexible reconsideration authority that Congress contemplated for presidential withdrawals in Section 12(a).

Congress' inclusion of "from time to time" in Section 12(a) confirms that it expected each President to have flexibility to respond to the Nation's shifting energy needs and national security interests by reconsidering the scope and continuing utility of withdrawals. If Section 12(a) required withdrawals to be permanent, as the League posits, then any President could nullify OCSLA's central purpose of energy development by withdrawing the entire Outer Continental Shelf. In the League's view, each President wields unfettered power over future leasing of the Shelf under OCSLA — to the detriment of all future Presidents. This potent power stands in stark relief to Congress's assignment of power to the "President of the United States," who is elected to serve for two four-year terms at most.

The League justifies this extreme scenario by observing that Congress chose to assign this "consequential power" directly to the President rather than to an inferior officer. Answering Brief 59. But the same reasons for assigning the withdrawal power to the President himself — political accountability, a national perspective, and a motivation to consider the public interest — favor a reading that gives each President flexibility to exercise that power as he sees fit. The beliefs and political disposition of the electorate are, of course, subject to change, and different Presidents are no doubt elected in the wake of such political evolution. Indeed, the inability of one President to bind future Presidents is one aspect of our governmental system allowing the Chief Executive to be responsive to the people.

The League also tries to minimize the extreme implications of its reading by noting that in Section 13 of OCSLA, Congress revoked President Truman's January 1953 Executive Order, which withdrew the entire Continental Shelf and set it aside as a "Naval Petroleum Reserve." Answering Brief 58-59. But this underscores our point: would a Congress that revoked a presidential withdrawal of the entire Shelf (to allow development of its resources) in the same statute grant the next President (Eisenhower) the power to immediately nullify the entire statute by permanently withdrawing the entire Shelf from leasing, thereby wastefully requiring Congress to act a second time?

Finally, the League contends that the Court need not decide whether Section 12(a) authorizes time-limited withdrawals. But this stems from the League's erroneous view that President Obama intended his withdrawals to be permanent. If that had been his intent, President Obama would have withdrawn the areas for a time period "without expiration," not (as he did) for a time period "without *specific* expiration." 2 E.R. 289, 290, 292, 296. President Obama's language reflects his understanding, shared among all recent Presidents, that Section 12(a) does not grant authority to make permanent withdrawals.

The League places stock in President Obama's statements providing the reasons for his withdrawals, Answering Brief 7-9, 62-63, but those statements undercut its position. They discuss preserving the Shelf's resources for "future

generations," but they never claim that the withdrawals are permanent. Thus, it is equally likely that President Obama recited the reasons for his withdrawals to appeal to future Presidents that the withdrawals should continue.

2. The term "withdraw" does not mean "one-way protective authority" revocable only by Congress.

The League's principal textual argument is that the term "withdraw" means to remove areas of the Shelf from disposition by the Executive Branch unless Congress enacts new legislation. Answering Brief 45-48. The core of this argument is that Congress exercises two distinct powers under the Property Clause — a "withdrawal power" and an equal and opposite "revocation power" — and it must expressly delegate one or both before the Executive Branch has any authority to act. The League's argument is based on the false premise that all withdrawals are inherently permanent, absent a separate act of revocation by Congress.

First, the ordinary meaning of "withdrawal" does not convey permanence. Although the League nods to the plain meaning of "withdrawal," no dictionary offers the meaning it seeks. Answering Brief 46. As the United States explained, none of the contemporaneous dictionary definitions establishes that a "withdrawal" is permanent or that it may be modified or undone only by a separate, formal act of "revocation." U.S. Brief 52-53. The League's response — that the plain meaning of "withdrawal" also does not mean that it must be temporary, Answering Brief 64 — is beside the point. The ordinary meaning of "withdrawal" does not help the

League establish that a withdrawal is always inherently permanent so that it can be undone only through a separate revocation power.

The League also falters when it tries to distinguish examples of the ordinary usage of withdrawal in the United States' brief. Answering Brief 65. In ordinary usage, one does not refer to withdrawals and revocations of withdrawals as distinct powers. When people speak in everyday terms of "withdrawing" something and later "un-withdrawing" it, they do not talk about the need for a separate revocation authority to formally revoke the withdrawal. U.S. Brief 52-53. Thus, the plain meaning of "withdrawal" does not support the League's position.

Second, the heart of the League's argument is that when the President makes a withdrawal, Congress intended that act to restore to Congress its full Property Clause power over the withdrawn area. Answering Brief 56-57. But as discussed above, Section 12(a) authorizes the President to withdraw areas for limited durations, as confirmed by the way the last four Presidents have actually read the provision. *See also* U.S. Brief 6-7. The League's congressional-restoration theory is flawed because it fails to account for the interpretation, rooted in actual practice, where Presidents make withdrawals with expiration dates. The League has offered no reason why Congress would, under its theory, want the President's choices to dictate when Property Clause power would be restored to Congress versus retained by the President. The far simpler reading of Section 12(a) — gutting the League's

bolted-on and academic congressional-restoration approach — instead recognizes that Congress has delegated its Property Clause powers to the President to decide when to withdraw areas of the Shelf and when not to. Moreover, Congress may always exercise its Property Clause power to make a withdrawal permanent.

Third, the League invokes interpretive canons that simply do not apply. For instance, the League notes that "absent provisions cannot be supplied by the courts." Answering Brief 47 (quoting *Rothkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019)). Likewise, the League argues that "when interpreting the scope of a statutory delegation of Congress's authority, courts take Congress at its word, and generally do not assume that the express conferral of one power silently includes its opposite." *Id*. at 47-48 (citing cases). These canons do not apply because they depend on the League's erroneous (and circular) assumption that withdrawal power is inherently permanent and therefore may be undone only through a separately conferred power of revocation.

Finally, the League shifts from the plain meaning of "withdrawal" to a long detour into "statutory context and legislative history." Answering Brief 49-56. By "statutory context," the League means an exercise in comparing Section 12(a) to different withdrawal or reservation language that Congress used in other public land statutes with dissimilar legislative purposes, as well as Attorney General opinions about these statutes. *Id*. The League's leap from the plain meaning of

"withdrawal" directly to extra-statutory evidence, before considering the remaining text of Section 12(a) and the structure and purpose of OCSLA, wrongly departs from traditional principles of statutory interpretation. *See Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068, 1073 (9th Cir. 2016) (If congressional intent is clear from "the plain language of the statute, its structure, and purpose," then the "judicial inquiry is complete." (internal quotation marks omitted). Even if it were necessary to consider extrinsic evidence, however, the League's interpretation of that evidence is unpersuasive, as discussed below (pp. 33-39).

3. Congress delegated the withdrawal power directly to "The President of the United States."

Finally, a complete textual analysis of Section 12(a) requires consideration of Congress' decision to assign withdrawal power to "The President of the United States." U.S. Brief 57-61. The League downplays the significance of this choice, asserting that a direct delegation to the President is no different from any other routine delegation Congress makes to the Executive Branch, and that any "tangential" relationship between OCSLA and national security or foreign relations makes no difference in interpreting Section 12(a). Answering Brief 78-82.

The League is wrong. Following on the heels of President Truman's assertion of authority over the Outer Continental Shelf and his reservation of the Shelf as a Naval Petroleum Reserve, Congress enacted OCSLA to meet the Nation's critical energy needs in a responsible manner. Section 12(a) gave the

President another tool to fulfill this purpose. As Chief Executive, the President is uniquely positioned to respond to rapidly evolving challenges facing the Nation, including global supply and demand for energy, national security threats, and evolving environmental challenges.

Congress reaffirmed in the 1978 amendments that OCSLA established "policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade." 43 U.S.C. § 1802(1). If Congress intended Section 12(a) to imbue each President with a power so great that he could thwart the ability of all future Presidents to responsibly manage the Outer Continental Shelf's resources, it easily could have done so by authorizing the President to "*permanently* withdraw lands from disposition." It did not. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (appealing to "common sense" when deciding whether Congress "is likely to delegate a policy decision of such economic and political magnitude to an administrative agency").

The President also has inherent Article II power to undo or modify prior presidential decisions. Although the President may voluntarily restrain himself,

he cannot bind his successors by diminishing their powers. *See Free Enterprise Fund*, 561 U.S. at 497, 513. The clear statement rule in *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), is also relevant, despite the League's contrary assertion. *See* Answering Brief 80. There, the court determined that textual silence and the clear statement rule showed that Congress did not intend to subject the President to the APA: where Congress enacts laws that "significantly alter the balance between Congress and the President," it must do so by a clear statement. 924 F.2d at 289. Congress well knows that the President cannot bind successors in office and thus, if Congress had wanted to make OCSLA withdrawals permanent, it would have said so in pellucid terms; yet it did not do so.

The clear statement rule applies here, too. If Congress meant to delegate to the President a one-way withdrawal power, such that any withdrawal could be modified or undone only by Congress itself, it would have stated that clearly. To imply "permanent and irrevocable," as the League argues, undercuts OCSLA's framework — all the more so because Section 12(a) places no conditions or limits on presidential withdrawals save that the lands be unleased. Silence is not enough.

B. The structure and the purpose of Section 12(a) reinforce the President's authority to reconsider presidential withdrawals.

If Section 12(a)'s text "standing alone" does not "resolve the question" because of "indeterminacy in isolation," then "the terms should be read together and interpreted in light of the entire statute." *Parker Drilling Management*

Services, Ltd. v. Newton, 139 S. Ct. 1881, 1888 (2019). As the United States has explained, the structure and the purpose of OCSLA confirm that Section 12(a) withdrawals may be modified or undone by the President. U.S. Brief 61-69. The League's interpretation of Section 12(a) conflicts with OCSLA's structure and purpose.

As to structure, a "provision that may seem ambiguous in isolation" is "often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). Interpreting Section 12(a) to authorize the President to reconsider and undo presidential withdrawals aligns the provision with the rest of OCSLA. In contrast, reading Section 12(a) to authorize only one-way withdrawals "would make little sense" within "the overall statutory scheme" because it alters OCSLA's fundamental structure. *Parker Drilling*, 139 S. Ct. at 1888-89. If Congress had intended to delegate such a significant irreversible power with vast discretion, it would have said so in clear terms. U.S. Brief 64-67.

The League contends that Section 12(a) is a "protective complement" to Section 8, which authorizes Interior to lease areas of the Shelf to the highest bidder. Answering Brief 54-56, 70 (discussing Pub. L. No. 83-212, § 8, 67 Stat. 462, 468 (codified as amended at 43 U.S.C. § 1337). The League posits that

Section 12(a) must be a one-way, protective-and-permanent authority because the President could effect a temporary withdrawal under Section 8 by directing the Secretary not to lease particular lands. But Section 8 does not authorize this (at least in express terms), whereas Section 12(a) does. The League's failed effort to show such superfluity is even more pronounced after the 1978 amendments, which prescribe a detailed four-stage process for leasing decisions. *See Secretary of Interior v. California*, 464 U.S. 312, 337 (1984).

Even if the President could indirectly accomplish the same effect as a withdrawal through Section 8, the advantage of Section 12(a) is that the President has full discretion to withdraw *any* unleased lands at *any* time for *any* reason and similarly to modify or undo those withdrawals. Interior may not modify presidential withdrawals, and so Section 12(a) has the benefit of remaining under the exclusive control of the President and his successors.

Under the rule against superfluity, the League's interpretation of Section 12(a) poses a much greater risk of overtaking *other* law that Congress has enacted to protect natural resources on the Outer Continental Shelf, namely, the Antiquities Act. *See, e.g., Massachusetts Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019) (holding that the Antiquities Act authorizes the President to *reserve* areas of the Shelf as a national monument). The Antiquities Act prescribes specific conditions and procedures for the President to follow, including that the protected

area be "confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). If the President could permanently withdraw as much of the Shelf as he wanted under Section 12(a), for an arbitrary reason or for no reason at all, then the Antiquities Act has lost its force on the Shelf.

As to OCSLA's purpose, the League fails to reconcile its interpretation of Section 12(a) with Congress' primary goal of energy development. U.S. Brief 63-69. As this Court stressed in another OCSLA case, it "is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their *dominant legislative purpose*." *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126, 1133 (9th Cir. 2010) (emphasis added and internal quotation marks omitted). OCSLA's "primary purpose" is "expeditious, orderly development of the oil and gas resources of the [Shelf], with due consideration for the impact of that development and an equitable sharing of its risks and benefits." *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 302 (D.C. Cir. 1988); *see also* H.R Rep. No. 83-413, at 2 (1953) (OCSLA's "principal purpose" is "to authorize the leasing by the Federal Government of the shelf.").

The League and the district court embrace the same erroneous approach, interpreting Section 8 and Section 12(a) of OCSLA to fulfill diametrically opposed purposes. Answering Brief 68-71; 1 E.R. 20. They both treat Section 12(a) as

protecting marine life and the natural environment with no consideration of stewardship of the other natural resources of the Shelf, most critically, its oil and gas reserves. *See Union Oil Co. v. Morton*, 512 F.2d 743, 749 (9th Cir. 1975) ("The Secretary is responsible for conserving marine life, recreational potential, and aesthetic values, as well as the reserves of gas and oil.").

By contrast, the United States' interpretation of Section 12(a) is compatible with OCSLA's structure and primary purpose, including the district court's observation that Congress "did not seek unbridled leasing." 1 E.R. 26. The key difference between the parties' competing interpretations is that the League's reading of Section 12(a) gives each President unfettered power to bind all future Presidents to his withdrawal decision, while the United States' interpretation gives each President power to determine the size and duration of withdrawals. The League suggests that if Congress disagreed with a permanent withdrawal, it easily could step in and enact new legislation. But the same point holds in the opposite (and more logical) direction: if Congress truly desired to permanently withdraw one or more areas of the Shelf from leasing under OCSLA — as here, 128 million acres of the Arctic and Atlantic Oceans — it could easily amend OCSLA to say so.

C. If Section 12(a) were ambiguous, extra-statutory evidence confirms the President's authority.

Only if the meaning of Section 12(a) is unclear "after consulting internal indicia of congressional intent" (including OCSLA's text, structure, and purpose)

may the Court "then turn to extrinsic indicators, such as legislative history." *Hernandez*, 829 F.3d at 1073. That is not necessary here, but the extra-statutory materials confirm the President's authority. U.S. Brief 69-77.

First, presidential practice corroborates a consistent understanding of the President's authority. U.S. Brief 69-71. The League argues that this evidence is useful only in the *absence* of a statute, Answering Brief 72, but (in a case cited by the League) the Supreme Court recently considered similar evidence to affirm the President's interpretation of his statutory authority. *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018) ("Common sense and historical practice confirm as much. . . . Presidents have repeatedly exercised their authority" in this manner.).

The League also insists that there are only two examples of a President's undoing a withdrawal. Answering Brief 76. But the broader practice by the last four officeholders — President George H.W. Bush, President Clinton, President George W. Bush, and President Obama — reflects a consistent understanding that withdrawals are temporary and revocable. U.S. Brief 6-7, 70. If there is ambiguity in Section 12(a), the Court should defer to this consistent and reasonable presidential interpretation. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."). In OCSLA's sixty-seven-year history, moreover, *no* President

has claimed the authority that the League contends the Court should now discover in Section 12(a) to permanently withdraw areas of the Shelf.

Second, although the evidence of congressional acquiescence is limited, U.S. Brief 72-73, the question is whether Congress has made an informed and deliberate choice, Answering Brief 73. There are two crucial points here. First, Congress for decades annually imposed moratoria on leasing certain areas of the Outer Continental Shelf but discontinued doing so in 2009, aligning its policies with President George W. Bush's 2007 and 2008 modifications of withdrawals. Second, Congress declined to reverse President Bush's modifications, even though it later amended other OCSLA provisions in 2010 and 2013. These actions suggest Congress was aware of, and supported, President Bush's modifications of the Section 12(a) withdrawals.

Third, as the United States explained, the plain meaning of "withdrawal" in Section 12(a) is also supported by the common understanding of the term in public land laws and the recognized distinction between temporary and permanent withdrawals. U.S. Brief 53, 55-56. In response, the League surveys other public land laws to support its construction of withdrawal authority, claiming that Congress " 'knows how' to delegate revocation authority when it wants to do so." Answering Brief 49 (quoting *Rotkiske*, 140 S. Ct. at 361). But the League commits an interpretive mistake by presuming that Congress has used the same or similar

language consistently across the entire body of public land laws, despite the widely differing legislative purposes of those laws. *See Singh v. Ashcroft*, 386 F.3d 1228, 1233 n.8 (9th Cir. 2004) ("The same or similar words may have different meanings when used in different statutes motivated by different legislative purposes."). In this sense, the League has pointed to no statute with a purpose similar to OCSLA.

As the United States explained, the League and the district court erroneously equate OCSLA with the Antiquities Act. U.S. Brief 73-75. These two statutes employ markedly *different language*, and they have *different purposes*: OCSLA is a resource development and use statute, while the Antiquities Act is a conservation statute. It is error to import the meaning of the Antiquities Act into OCSLA. *Cf. United States v. Kimsey*, 668 F.3d 691, 702 (9th Cir. 2012) ("Generally, [w]hen Congress uses the *same language* in two statutes having *similar purposes* . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." (emphasis added and internal quotation marks omitted)). For similar reasons, the League misplaces its reliance on Attorney General opinions addressing the President's authority under the Antiquities Act. U.S. Brief 73-74. In any event, those opinions confirm that the President has delegated authority to diminish the area of a national monument, affirming that under the Antiquities Act, the President may reconsider and modify reservations. *Id*.

In total, the League reviews six statutes over the 19th and 20th Centuries addressing withdrawals or reservations. Answering Brief 49-51. Yet again, these statutes have distinct purposes and employ language differing from OCSLA Section 12(a). For instance, the League points to the Forest Reserve Act, noting that Congress did not grant the President authority to "modify or vacate" forest reserves until several years later. Answering Brief 50. But the Forest Reserve Act of 1891 was a conservation statute. And the League fails to quote the full language of Congress' 1897 amendment, which provides: "That, *to remove any doubt which may exist pertaining to the authority of the President thereunto*, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests . . . ." Ch. 2, 30 Stat. 11, 34 (1897) (emphasis added).

The League also cites the definition of "withdrawal" in the Federal Land Policy and Management Act (FLPMA). Answering Brief 46 (quoting 43 U.S.C. § 1702(j)). Enacted in 1976, this definition arrives decades too late to bear on Congress' intent in OCSLA. But its limited relevance supports the President's interpretation. FLPMA came on the heels of a longstanding practice by the Executive Branch of exercising implied authority to withdraw lands (and to undo or revoke withdrawals in its discretion). *See United States v. Midwest Oil Co.*, 236

U.S. 459, 471 (1915). In FLPMA, Congress imposed strict conditions on executive withdrawals, including that withdrawals of more than five thousand acres may be made only for twenty years or less. 43 U.S.C. § 1714(c)(1). Congress thereby signaled its view that Executive Branch withdrawals should be temporary and limited in size, retaining for itself the much more significant power to execute permanent withdrawals. The League offers no reason why Congress' perspective in FLPMA that the Executive Branch's withdrawal authority should be limited both in duration and size would not also apply to Section 12(a).

Finally, everyone agrees that OCSLA's legislative history is inconclusive. U.S. Brief 75-77; Answering Brief 53-54. What that history does show, however, is that Congress intended to give the President withdrawal authority "comparable to that which is vested in him with respect to federally owned lands on the uplands." S. Rep. No. 83-411, at 26 (1953). Most likely this is shorthand for the general withdrawal authority that Congress gave the President in the General Withdrawal Statute (Pickett Act) of 1910), which clarified that withdrawals "shall remain in force until revoked" by the President or Congress. U.S. Brief 76. The League dismisses this as speculation, Answering Brief 54, but even the Natural Resources Law Professors assert that in 1953, the Pickett Act was one of the three "primary laws regarding administrative withdrawals from unreserved federal lands." Natural Resources Law Professors Brief 17. The other two laws identified

by the Professors — the Antiquities Act and the Forest Reserve Act — have purposes that are quite distinct from OCSLA; and in any event, the Forest Reserve Act also confirms ("to remove doubt") that the President may revoke, modify, or suspend withdrawals.

* * * * *

In sum, the President acted within his delegated authority under Section 12(a) of OCSLA.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

Respectfully submitted,

s/ *Justin D. Heminger*
JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
ROBERT J. LUNDMAN
SARAH D. HIMMELHOCH
JUSTIN D. HEMINGER
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

Of Counsel:

DENNIS DAUGHERTY
SUSAN HOVEN CASON
STEPHEN R. VORKOPER
Attorneys
Division of Mineral Resources
Office of the Solicitor
U.S. Department of the Interior

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