United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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M-37062

Memorandum

To: Secretary

From: Solicitor

Subject: Secretarial Discretion in Promulgating a National Outer Continental Shelf Oil and Gas Leasing Program

I. Introduction

The Bureau of Ocean Energy Management (BOEM) has asked whether the Secretary of the Interior (Secretary) must promulgate a National Outer Continental Shelf Oil and Gas Leasing Program (Program or National Program) and whether the Secretary could adopt a Program that proposes no sales. I advise you that section 18 of the Outer Continental Shelf Lands Act (OCSLA) does not expressly prohibit the Secretary from not promulgating a Program, but, for the reasons discussed below, the better interpretation of section 18 is that the Secretary must promulgate a National Program and that such a Program may consist of a schedule with as few as two lease sales, but no fewer, as long as the Program meets the requirements of section 18.

II. Statutory Language

OCSLA is the primary federal law governing development of oil and gas on the Outer Continental Shelf (OCS). OCSLA's policy goals provide that the OCS "should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs." 43 U.S.C. § 1332(3). OCSLA provides that "[t]he Secretary shall administer the provisions of this [Act] relating to the leasing of the [OCS] . . . ." *Id.* § 1334(a).

Under general principles of statutory construction, the plain language of the statute is the first place we must look to try to answer the questions presented. *See, e.g.*, *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (observing that in questions of statutory construction "we begin by analyzing the statutory language"). Section 18(a) of OCSLA is controlling here but does not directly address the question of whether the Secretary may decide not to promulgate a schedule of lease sales. Nevertheless, its language implies that a decision not to promulgate a Program was not contemplated as a possibility by Congress. Section 18 states, in pertinent part:

> The Secretary, pursuant to procedures set forth in subsections (c) and (d) of this section, shall prepare and periodically revise, *and maintain* an oil and gas leasing program to implement the policies of this [Act]. The leasing program *shall consist of a schedule of proposed lease sales* indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year period following its approval or reapproval. *Such leasing program shall be prepared and maintained in a manner consistent with the following principles* . . . .

43 U.S.C. § 1344(a) (emphasis added). Section 18(a) uses the mandatory "shall" to set out the Secretary's duty to "prepare," and "periodically revise" a Program.[1] Those terms alone, however, are not enough to denote that Congress intended to forbid gaps between Programs if a Secretary does not promulgate a new Program to begin at the end of an existing Program. This language, in isolation, could be read to mean that the Secretary could promulgate a Program in a certain year, applicable to the following five years, yet then let that Program end and not promulgate a new Program for several years, or at all.

But the language of section 18 does not stop at "prepare" and "periodically revise." Section 18(a) also requires that the Secretary "shall . . . maintain" a Program. *Id.* "Maintain" has several meanings, but the ones relevant here are "to keep in an existing state" or "to continue."[2] By using the word "maintain," Congress inserted into section 18 a Secretarial duty to keep in existence or continue the National Program. This duty would be abrogated by a Secretarial decision not to promulgate a Program. Thus, such a decision would appear to be inconsistent with section 18.

Section 18(a) further states that the Program "shall consist of a schedule of proposed lease sales." *Id.* By stating directly that the Program shall consist of a schedule of lease sales, Congress left no room for the Secretary to propose anything other than a schedule of lease sales. He or she cannot promulgate or adopt a Program that proposes no such schedule, i.e., no lease sales. Because a Program "consist[s] of" a schedule of lease sales, a Program does not exist unless it proposes such a schedule.[3]

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[1] The meaning of "shall" can cause confusion. It can mean "must" or be read to indicate future action. *See, e.g.*, Off. of the Fed. Reg., Nat'l Archives and Recs. Admin., *Drafting Legal Documents, Principles of Clear Writing*, https://www.archives.gov/federal-register/write/legal-docs/clear-writing.html (last visited Jan. 12, 2021). However, in 1978, when section 18 was added to OCSLA, statutory language using "shall" was generally interpreted to be mandatory language. *See, e.g.*, *Hill v. U.S. Immigr. & Naturalization Serv.*, 714 F.2d 1470, 1475 (9th Cir. 1983). ("It is a well-established rule of statutory construction that use of the word 'shall' denotes a mandatory requirement.") (internal citations omitted).

[2] *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com (last visited Nov. 24, 2020). The full definition of "maintain" is: "1: to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline; 2: to sustain against opposition or danger: uphold and defend; 3: to continue or persevere in: [carry on], [keep up]; 4a: to support or provide for; b: [sustain]; 5: to affirm in or as if in argument: [assert]."

[3] *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com (last visited Nov. 24, 2020). The definition of "consist of" is: "to be formed or made up of (specified things or people)."

Language found throughout OCSLA supports the interpretation of section 18(a) that removes Secretarial discretion to choose not to promulgate a schedule of lease sales. Congress's declaration of policy in OCSLA states that the OCS should be made available for "expeditious and orderly development." 43 U.S.C. § 1332(3). Congress reiterated its goal of "expeditious" development in stating that one of the purposes of the management of OCS resources is "to make such resources available to meet the Nation's energy needs *as rapidly as possible*." *Id.* § 1802(2) (emphasis added). The policy of "expeditious" and "rapid" OCS development is tempered by policies requiring consideration of other factors, such as environmental impacts, when developing a lease sale schedule, but it is impossible to square a decision not to schedule any lease sales with these Congressional policy declarations.

Congress has instructed the Secretary to make OCS resources available expeditiously and as rapidly as possible and to maintain a schedule of proposed lease sales. Since no OCS oil and gas resources can be made available at all if they are not included in a Program, not promulgating a Program would thwart Congress's clear instruction. *See id.* § 1344(d)(3) ("[N]o lease shall be issued unless it is for an area included in the approved leasing program.").

III. Legislative History

OCSLA's voluminous legislative history in the 93rd, 94th, and 95th Congresses does not directly address whether the Secretary can decide not to promulgate a Program, but it tends to indicate Congress intended otherwise. In several places, the legislative history states: "[t]he committee believes that a 5-year leasing program should be adopted, in accordance with this act, as quickly as possible," and "[t]here is intended to be no delay or interruptions in lease sales." H.R. Rep. No 95-590, at 151 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 1450, 1557; S. Rep. No. 95-284, at 77 (1977). These two statements were made in the context of a discussion of section 18(d)(3) of OCSLA, which provides:

> After the leasing program has been approved by the Secretary, or after eighteen months following September 18, 1978, whichever first occurs, no lease shall be issued unless it is for an area included in the approved leasing program and unless it contains provisions consistent with the approved leasing program, except that leasing shall be permitted to continue until such program is approved and for so long thereafter as such program is under judicial or administrative review pursuant to the provisions of this subchapter.

43 U.S.C. § 1344(d)(3). The language of section 18(d)(3) and the legislative history discussing it indicate that the provision applies only to the first Program, promulgated in 1978. But the statements demonstrate Congress' emphasis on the continuity of lease sales. With section 18(d)(3), Congress was attempting to ensure that, even if the first Program were challenged, lease sales would continue. *See State of Cal. v. Watt*, 668 F.2d 1290, 1326 (D.C. Cir. 1981). And, the only way to ensure continuity of lease sales in later Programs is to consecutively promulgate OCS National Programs so as to avoid a period in which no Program is in effect.

When section 18 was enacted, the new statutory language mandated the promulgation and maintenance of the Program, and it may be that Congress did not envision a situation where the

Secretary would not enact a Program or schedule lease sales. No language has been found, either in the legislative history or in the resulting statute, i.e., OCSLA, evidencing that Congress intended to give the Secretary the discretion to not schedule lease sales.

IV. Case Law

Programs have been challenged five times in the United States Court of Appeals for the District of Columbia Circuit.[4] None of the resulting opinions have directly addressed the question here, but again, the cases strongly imply that the Secretary lacks discretion not to promulgate a Program. In the first decision on a Program, the court, harking back to OCSLA's policy declaration, states that "[c]ompliance with the mandates of section 18, therefore, is extremely important to the expeditious but orderly exploitation of OCS resources." *State of Cal.*, 668 F.2d at 1290. "Compliance with section 18" would include the maintenance of a Program, and therefore, following the court's logic, maintaining a leasing schedule is important to fulfilling the policy of OCSLA.

In a later Program challenge, the D.C. Circuit spoke of "Interior's continuing duty to promulgate five-year Leasing Programs under OCSLA." *Ctr. for Biological Diversity v. Dep't of Interior*, 563 F.3d 466, 485 (D.C. Cir. 2009). The court, in discussing a claim that the Department of the Interior (Interior) should consider the greenhouse gas effects of OCS oil and gas consumption (finding that Interior lacked the discretion to consider those effects), addressed the question posed here:

> Therefore, even if, as Petitioners assert, Interior were not to adopt the Program at issue here, *Interior's continuing duty to promulgate Leasing Programs would compel it to promulgate a different Leasing Program*, potentially approving oil and gas extraction from other areas of the OCS . . . .
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> Petitioners' consumption-related claims appear to stem from *the flawed premise that, before Interior approves an offshore oil and gas Leasing Program, it must first consider whether it should extract oil and gas from the OCS at all. But Congress has already decided that the OCS should be used to meet the nation's need for energy.* Indeed, OCSLA instructs Interior to ensure that oil and gas are extracted from the OCS in an expeditious manner that minimizes the local environmental damage to the OCS. *See* 43 U.S.C. § 1344.

Id. (emphasis added; emphasis in original omitted). The court notes that Interior has no choice but to "extract oil and gas from the OCS," and that if one Program were not promulgated, Interior would be "compelled" to promulgate a different Program by its "duty" to do so. The court's use of the word "compel" indicates a lack of choice on the part of the Secretary as to whether to promulgate a Program. This language signals that not promulgating a schedule of lease sales would breach the Secretary's "continuing duty to promulgate leasing programs."

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[4] Program challenges must be brought in the United States Court of Appeals for the District of Columbia Circuit. 43 U.S.C. § 1349(c)(1).

V. The Secretary's Discretion as to the Number of Sales

The Secretary meets his or her section 18 duty by promulgating a Program that "consist[s] of a schedule of proposed lease sales." 43 U.S.C. § 1344(a). Section 18 does not specify a minimum number of lease sales that must be scheduled, but uses the plural "sales," indicating that the Secretary may schedule as few as two sales, but no fewer, as long as the Program meets the requirements of section 18. To determine the number of sales in a Program, section 18 mandates that the Secretary determine what schedule "will best meet national energy needs" for the following five years. *Id.* The Secretary makes that determination after considering all the factors listed in section 18(a)(1) and (2) and incorporating them into the balancing required by section 18(a)(3). *Id.* Although the Secretary must consider all of the section 18(a)(1) and (2) factors, he or she has considerable discretion in making policy judgments required by section 18, such as obtaining a proper balance among the three criteria specified in section 18(a)(3). *State of Cal.*, 668 F.2d at 1302, 1305 & 1307 ("The Act does not mandate any particular balance, but vests the Secretary with discretion to weigh the elements so as to 'best meet national energy needs.'"). Accordingly, the Secretary has discretion in selecting the number and frequency of sales to fulfill the statutory requirement of best meeting national energy needs for the next five years, but with the limitation that the number of sales may not be fewer than two sales.

VI. Cancellation of Sales

While the promulgation of a schedule of lease sales to meet the next five years' national energy needs is a mandatory procedural step under OCSLA, the Secretary has considerable discretion to cancel lease sales. OCSLA does not expressly provide for lease sale cancellation, but section 18 does not mandate that all scheduled sales be held, and it allows Program revisions. However, section 18 states that a "significant" Program revision must be done "in the same manner as [a Program is] originally developed," without defining what "significant" means. 43 U.S.C. § 1344(e).[5] Therefore, if the Secretary were to find that cancelling one or more lease sales is a significant Program revision, that significance determination would trigger the need to engage in all the procedures required for the development of a new Program. On the other hand, if the Secretary were to find that cancelling one or more sales is not a significant Program revision, he or she would have the discretion to cancel the scheduled sales without following the procedures required to develop and promulgate a new Program. *See id.*

In 1981, the Solicitor opined that "the Secretary has considerable discretion to determine whether the deletion, delay or advancement of sales or milestones within an approved 5-year program is significant or not." *Annual Review, Revision & Reapproval of 5-Year OCS Oil & Gas Leasing Programs*, M-36932 at 23 (Jan. 5, 1981). In 1996, the Solicitor confirmed and refined this conclusion by providing three key factors for the Secretary to consider when deciding if a

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[5] This subsection provides:

> (e) Review, revision, and reapproval of program
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> The Secretary shall review the leasing program approved under this section at least once each year. He may revise and reapprove such program, at any time, and such revision and reapproval, except in the case of a revision which is not significant, shall be in the same manner as originally developed.

As indicated in section 18(e), an insignificant Program revision consisting of a cancellation can occur during an annual review or at any time.

Program revision is significant: (1) "whether it significantly changes the potential for discovery of oil and gas;" (2) "whether it significantly increases the potential for environmental or other impacts in coastal areas;" and (3) "whether it significantly changes the sharing of the developmental benefits and environmental risks of offshore development." *What are "Significant Revisions in the Five-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program*, M-36983 at 4 (Feb. 12, 1996). Without legal challenge, the Secretary has cancelled lease sales in the past without following section 18 procedures.[6]

Based on the plain language of section 18(e), the Secretary could cancel one or more sales scheduled in a Program without following the procedures required by section 18 if, after considering relevant factors, such as those set forth above, he or she found such cancellation(s) to be an insignificant Program revision. But the Secretary could not cancel all sales en masse if that were to cause a period of time in which the Secretary was not "maintaining" a Program. Moreover, for the reasons discussed in Section IV above, the Secretary may not cancel so many sales as to diminish the Program's schedule of lease sales to fewer than two lease sales.

VII. Conclusion

Neither OCSLA, its legislative history, nor judicial interpretations of OCSLA expressly state whether the Secretary has the discretion to choose not to promulgate a Program or to promulgate a Program without any sales. All three of these sources instead indicate that the Secretary lacks such discretion, and I believe that is the better conclusion. Accordingly, I advise you that the Secretary must promulgate a National Program and, for the reasons stated above, such a Program may consist of a schedule with as few as two lease sales, but no fewer, as long as the Program meets the requirements of section 18. In addition, the Secretary may cancel one or more scheduled lease sales. However, if the Secretary finds that the lease sale cancellation(s) would qualify as a significant program revision, the revision would require the agency to go through the procedures and analysis required for adopting a Program before cancelling the lease sale(s). If, on the other hand, he or she determines that the lease sale cancellation(s) would not qualify as a significant Program revision, the cancellation(s) could occur without going through the procedures and analysis required for adopting a Program. Moreover, a lease sale cancellation that qualifies as an insignificant Program revision may occur at any time. Finally, the Secretary may not cancel so many lease sales in a National Program as to diminish the Program's schedule of lease sales to fewer than two lease sales.

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[6] For example, in 2015, the Secretary cancelled both Beaufort Sea Sale 242 and Chukchi Sea Sale 237 due to existing market conditions and low industry interest. Central Gulf of Mexico Planning Area Sale 216 was delayed and combined with Sale 222 in light of the Deepwater Horizon event, effectively cancelling Sale 216. Western Gulf of Mexico Planning Area Sale 215 and Virginia Sale 220 were both cancelled in 2010 due to the Deepwater Horizon Event.