



United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 13, 2021

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

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).”