

*Tom Schumann drafted this blog post.*

Provisions tucked in a House oil and gas development bill would repeal one of the oldest conservation laws and scale back another. The provisions show House Republicans working to make rollbacks by the Trump Administration permanent, consistent with the administration's "America First" energy campaign. H.R. 4239, reported out of the Natural Resources Committee on November 8, would allow states to share in the regulation of, and revenues from, federal oil and gas leasing programs. It would entitle coastal states to a share of royalties from offshore oil and gas leases—a benefit that states already enjoy from onshore leases—and authorize the Interior Department to delegate permitting for onshore drilling plans to the states. The bill would also weaken environmental protections seen as an obstacle to oil and gas development. One provision would amend the Marine Mammal Protection Act to remove requirements that permitted activities limit incidental takings to small numbers and employ methods that have the "least practicable impact" on species. The bill would further prevent permits from including conditions that would significantly modify an approved activity.

But the biggest blows to environmental protections would come from provisions eliminating presidential authority to withdraw federal lands and waters for conservation, which dates to the 1906 Antiquities Act, and eliminating liability for unintentional killing of migratory birds under the Migratory Bird Treaty Act (MBTA) of 1918. The Antiquities Act grants the President unilateral authority to designate as national monuments tracts of federal land possessing exceptional archaeological or scientific value, and to prohibit their development. Over the years, Presidents have used the act to protect numerous sites, including several—the Grand Canyon, Grand Tetons, and Arches among them—that later became national parks. The act has generated controversy in the past several decades, as Presidents have used its authority to protect vast swaths of federal lands, often in Western states with large federal holdings and economic interests in oil, gas, and coal production. Much of the controversy has centered on Utah. In 1996, Bill Clinton used the act to designate the 1.7 million-acre Grand Staircase-Escalante Monument in southern Utah, killing plans for a coal mine in the area. In 2016 Barack Obama used the act to create several monuments shortly before leaving office, including the 1.4 million-acre Bears Ears National Monument, also in southern Utah. Although the monument did not contain areas of active fossil-fuel exploration and final [monument boundaries](#) left out a uranium mine and areas of past oil and gas exploration, the designation drew comparisons to Grand Staircase from Utah politicians. In his [speech](#) announcing reductions to both monuments, Donald Trump characterized them as attempts to prevent natural resource development.

Trump issued an executive order in April directing the Interior Secretary to review all

designations from Grand Staircase onwards and recommend reductions. The order provoked a [legal debate](#) on the scope of authority granted by the act's broad language. Does it allow Presidents to rescind or reduce the size of monuments designated by their predecessors? Does it allow them to designate areas that possess outstanding aesthetic and natural value, or only archaeological sites? Trump's decision to shrink Grand Staircase (by roughly 50%) and Bears Ears (by 85%) has shifted this debate to the courts, as environmental groups immediately [sued](#) to stop it.

H.R. 4239 would go a step further than ratifying presidential authority to rescind or reduce monuments. The bill would require an act of Congress to set aside any new national monuments, although it would leave existing monuments untouched. It would also eliminate the President's authority to withdraw areas of the Outer Continental Shelf (OCS) from oil and gas leasing. The 1953 Outer Continental Shelf Leasing Act (OCSLA), which governs oil and gas development of the OCS, contains a provision similar to the Antiquities Act, which grants the President discretion to withdraw areas of the OCS from leasing but does not state whether withdrawals may be permanent. Obama used the provision to permanently withdraw around 170 million acres of the OCS, the vast majority adjacent to Alaska. In an April executive order, Trump reversed all of those withdrawals, except the one covering Alaska's salmon-rich Bristol Bay, and directed the Interior Secretary to include the OCS off Alaska in a new five-year leasing plan under OCSLA. H.R. 4239 would ratify Trump's reversals and prohibit future withdrawals of the OCS by the President under OCSLA. It would also prevent protection of offshore areas under the Antiquities Act. (Seven marine national monuments have been designated under the Antiquities Act.) It would leave in place the National Marine Sanctuaries Act, but that statute is procedurally cumbersome and does not preclude oil and gas leasing.

An amendment inserted during committee markup would amend the MBTA to clarify that its misdemeanor provisions do not apply to incidental, or unintentional, taking or killing migratory birds. The MBTA criminalizes both taking and killing of migratory birds, but does not indicate what, if any, state of mind is required to establish misdemeanor culpability. Circuit courts are split on whether the terms implicitly require intent—that is, purpose or knowledge—or imply strict liability, requiring no state of mind for misdemeanor culpability. (Felony convictions require purpose or knowledge.) The Second Circuit has applied strict liability to the taking or killing of migratory birds. The Eighth and Ninth Circuits have interpreted the term “take” to apply only to intentional acts such as hunting. The Fifth Circuit recently adopted the latter interpretation, in holding that Citgo was not culpable for the deaths of several dozen birds that landed on uncovered oil wastewater tanks. Energy production causes a large number of [incidental takings](#): oil wastewater pits kill between half

a million and a million migratory birds annually; wind turbines kill between 140,000 and half a million. Shortly before Obama left office, the Interior Department issued a legal opinion concluding that the MBTA applied strict liability to misdemeanor takings. The department has since suspended that opinion, pending review.