



Litigation and Presidential Action on National Monuments

Lawson Fite

OSB ENR Year in Review, October 3, 2019

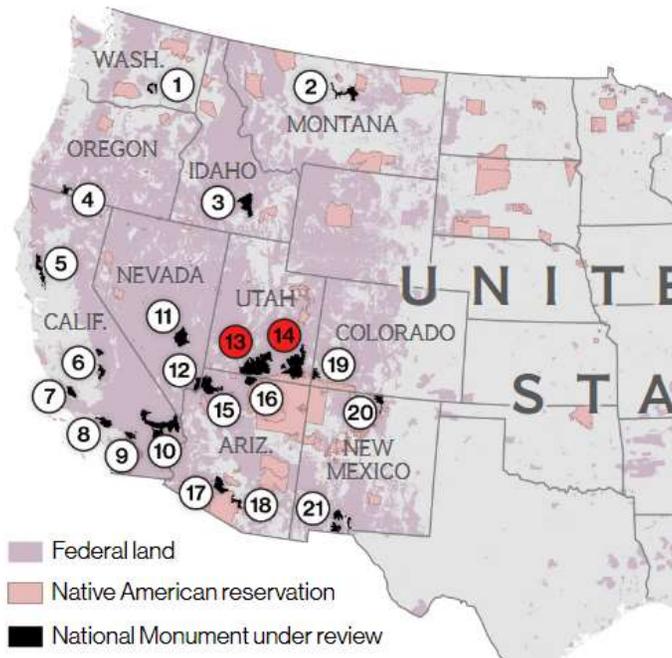
Antiquities Act of 1908

- The President may, **in the President's discretion**, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.
- 54 U.S.C. § 320301.

MONUMENTAL CHANGES

The Department of the Interior manages one-fifth of all land in the United States, including National Monuments. Under executive order, Interior Secretary Ryan Zinke reviewed 26 monuments to possibly alter. At the conclusion of the review process:

- 2 monuments were reduced in size.
- 25 monuments remained unchanged in size.



THE SECRETARY OF THE INTERIOR
WASHINGTON

MEMORANDUM FOR THE PRESIDENT

FROM: RYAN K. ZINKE

SUBJECT: Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act

Designation Reviews - 2017

patagonia

The President Stole Your Land

In an illegal move, the president just reduced the size of Bears Ears and Grand Staircase-Escalante National Monuments. This is the largest elimination of protected land in American history.



Utah Monuments- Revisions and Litigation



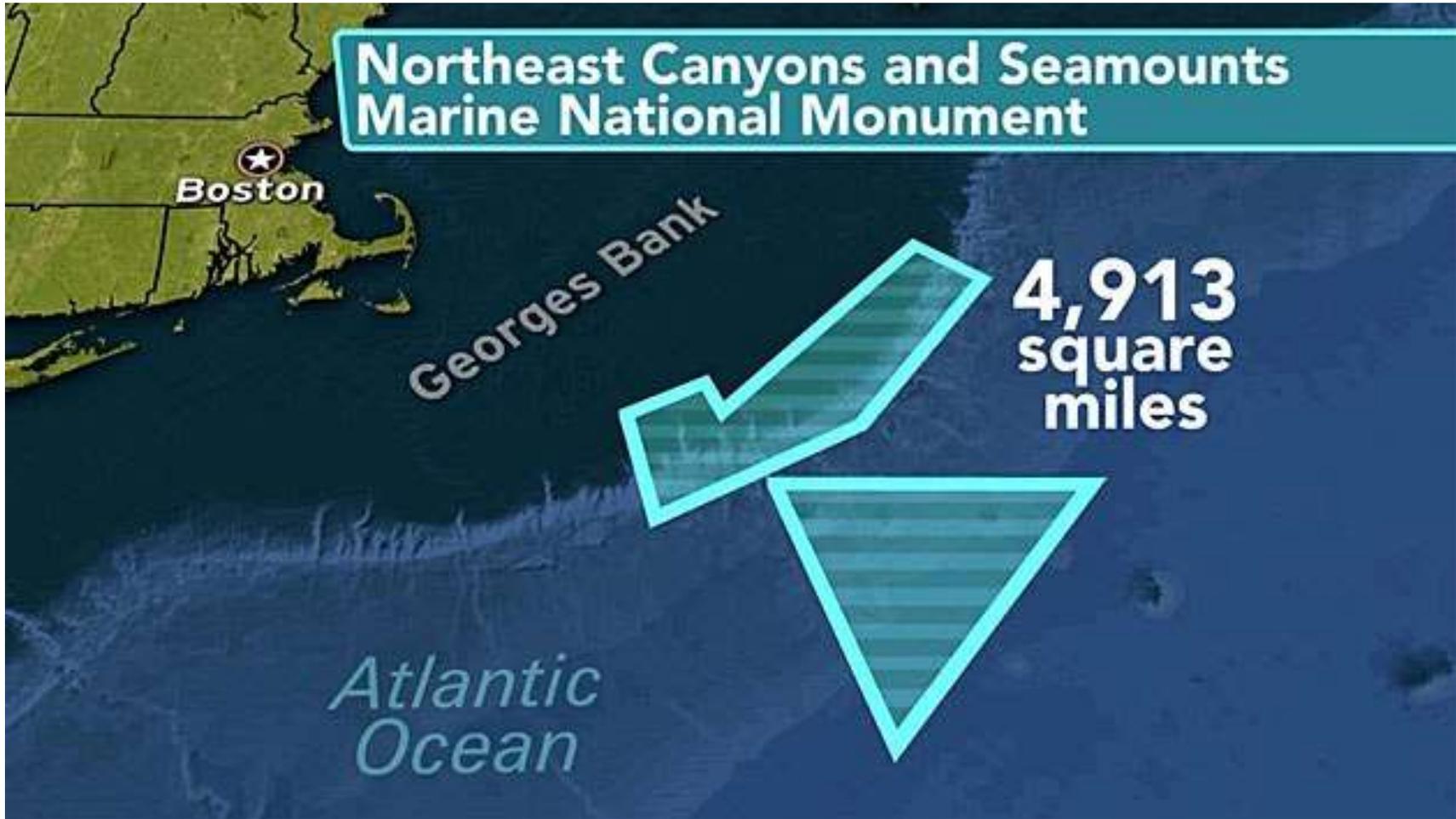
Northeast Canyons and Seamounts Marine National Monument

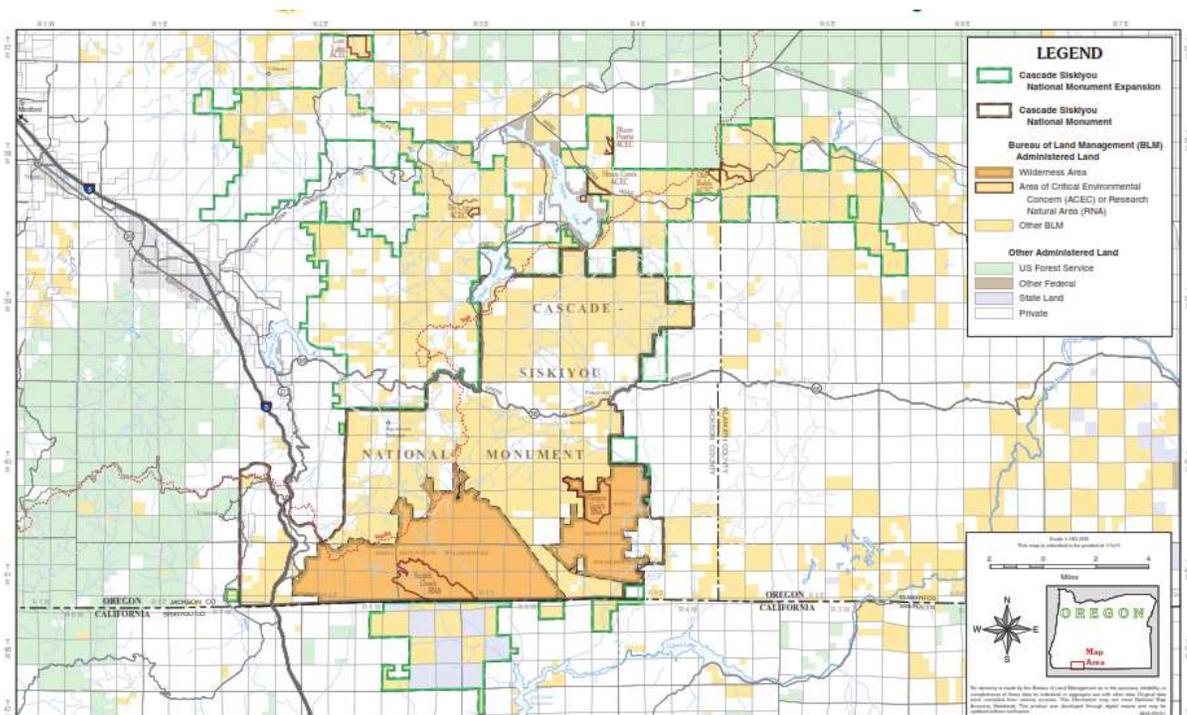
Boston

Georges Bank

4,913
square
miles

*Atlantic
Ocean*





Cascade-Siskiyou

- O&C Lands: *shall* be managed ... for permanent forest production, and the timber thereon *shall* be sold, cut, and removed in conformity with the princip[le] of sustained yield
- CSNM Expansion: No portion of the monument shall be considered to be suited for timber production, and no part of the monument shall be used in a calculation or provision of a sustained yield of timber.

Public Land and Resources Committee Newsletter

Vol. 15, No. 1

December 2017

CAN TRUMP REDEVELOP AMERICA'S MONUMENTAL LEGACY?

John C. Ruple

On April 26, 2017, President Trump ordered Interior Secretary Ryan Zinke to review a suite of national monuments for conformity with administration policy. This policy reflects two criteria contained in the Antiquities Act and five additional policy considerations identified by President Trump. After reviewing 27 monuments, Secretary Zinke recommended boundary and management reductions for six monuments, and management changes for four additional monuments.

Since passage of the Antiquities Act 111 years ago, 16 Presidents have established 157 national monuments. Presidents have also expanded existing monuments when surrounding lands contain protection-worthy resources. No president has undertaken such a sweeping review of prior national monuments. The Antiquities Act does not discuss monument reduction, and the courts have never addressed the issue. But based upon the plain language of the statute, the nature of the authority it conveys, and a century of legal interpretation and history, I conclude that monument revisions remain the exclusive province of Congress.

The Constitution's Property Clause states, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to

the United States." No comparable grant of power over our public lands was made to the President. He must therefore obtain congressional authorization before acting in this arena. In passing the Antiquities Act, Congress made such a grant, delegating to the President the discretionary authority to:

[D]eclare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments. . . . The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. 54 U.S.C. § 320301(a).

The Act and the legislative hearings leading up to its passage never mention monument reductions, suggesting that Congress intended to reserve that power for itself. Congress established programs allowing the President to set land aside and later revisit those decisions in a dozen or so other statutes, and had it intended to grant the President the power to revise national monuments, it could have adopted that model in the Antiquities Act.

Tellingly, in 1924 the Department of the Interior held that the President lacked the authority to

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Kristin Nichols, Editor

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AMERICAN BAR ASSOCIATION
**SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

CALENDAR OF SECTION EVENTS

December 13, 2017
**Flood Insurance in a Time of Flooding:
Addressing the National Flood Insurance
Program in an Era of Change**
Committee Program Call

January 9, 2018
**Clean Air Act Advocacy: Tips and Skills
for Addressing Regulatory, Permitting and
Enforcement Issues with Clients, Regulators
and the Public**
CLE Webinar

January 25-27, 2018
**2018 Environmental & Energy, Mass Torts
and Products Liability Committees' Joint CLE
Seminar**
Whistler, BC, Canada
Primary Sponsor: ABA Section of Litigation

March 8, 2018
**Shifting Policies for a Shifting Environment:
Environmental Policy Symposium**
The University of Mississippi School of Law
Oxford, MS

April 16-18, 2018
36th Water Law Conference
Hilton Bonnet Creek
Orlando, FL

April 18-20, 2018
47th Spring Conference
Hilton Bonnet Creek
Orlando, FL

**For full details, please visit
www.ambar.org/EnvironCalendar**

Continued from page 1.

authorize an irrigation canal through the Casa Grande National Monument. Congress had already funded the project, which would convey water to the Gila River Indian Reservation, and substantial work had been completed on the canal. The Assistant Secretary, however, concluded that “the Department has no power to authorize the construction [through the monument] under present law,” and recommended that the matter be brought before Congress. DOI Opinion, 50 Pub. Lands Dec. 569 (June 27, 1924).

The next year Senator Harreld introduced a bill to remove the canal route from the monument, stating that “hereafter the President of the United States is authorized in his discretion to eliminate lands from national monuments by proclamation.” S. 3826, 68th Cong. (1925). Harreld’s bill died in committee. One year later, he reintroduced an identical bill and it became law—but only after the provision regarding presidential authority to eliminate lands from national monuments was struck from the bill. That deletion was the only amendment to the bill. At least four additional bills to authorize presidential monument reductions have also died in committee.

The Assistant Secretary’s Opinion comports with the only Justice Department Opinion directly addressing national monument revisions. In 1938, President Roosevelt sought to eliminate the Castle Pinkney National Monument, which had fallen into disrepair. Attorney General Cummings opined that the Antiquities Act “does not in terms authorize the President to abolish national monuments, and no other statute containing such authority has been suggested.” 39 U.S. Op. Atty. Gen. 185, 186 (Sept. 26, 1938). The Attorney General then concluded that because Congress had not impliedly granted the President such powers, the President was without authority to eliminate the monument. The same conclusion applies to reductions in size or management protection, as they would eliminate protections for monument resources.

Prior to 1964, however, U.S. Presidents did reduce national monument boundaries on multiple occasions. These reductions were never challenged in court, and Congress never intervened to reign in the President. On its face, this appears to indicate that Congress accepted these actions as valid. After all, *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), holds that a congressional delegation of power to the President can be found by virtue of congressional acquiescence in prior executive actions.

But in 1976, Congress enacted the Federal Land Policy and Management Act, reasserting its authority over public lands and circumscribing “the extent to which the Executive may withdraw lands without legislative action.” 43 U.S.C. § 1701(a)(4). Indeed, FLPMA expressly repealed “the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress.” Pub. L. No. 94-579, § 704(a) (1976) (not codified in the U.S. Code). Congress similarly directed that the Interior Secretary cannot “modify or revoke any withdrawal creating national monuments,” 43 U.S.C. § 1714(j), a clear reassertion of congressional authority and limitation on executive power. No president has modified a monument since FLPMA’s enactment.

Even if an implied power to revise a national monument existed and it somehow survives post-FLPMA, that power must be limited by the scope of the prior acquiescence. While a review of all prior presidential monument reductions is not possible in the space available, several examples demonstrate that today’s review is without precedent.

President Roosevelt proclaimed the Petrified Forest National Monument in 1906, but the location of the principal deposit of silicified wood was not known at that time. He therefore established a larger monument than necessary, intending to reduce the area after determining the location of the most valuable deposits. The head curator of geology for the National Museum visited the monument

and submitted such a report, prompting President Taft, in 1911, to reduce the monument. None of the monuments under review today were created with an expectation of future reduction.

The most infamous reduction involved Mount Olympus National Monument, which was set aside by President Roosevelt in 1909, just two days before he left office. The proclamation was drafted in haste and lacked the careful vetting reflected in modern proclamations. Haste resulted in poorly drawn boundaries, and three years later, President Taft removed a 160-acre private homestead from the monument. In 1929 President Coolidge trimmed 640 acres from the monument, removing a hydroelectric dam.

The largest reduction occurred in 1915, when President Wilson cut 311,280 acres from the monument's original 639,040 acres, making much-needed lumber available to support the war effort in Europe. Douglas fir was essential for shipbuilding, and Sitka spruce was prized for airplane construction because it did not splinter when struck by bullets. Spruce, however, was available only in temperate rain forests like those along the Northwest coast, and the monument was home to the largest Sitka spruce stands in the Northwest. In fact, the United States went so far as to mobilize the U.S. Army's "Spruce Production Division" to ensure lumber for the war effort. A 1935 Department of the Interior Solicitor's Opinion also observed that the Department of Agriculture investigated the boundary change and concluded that the reduction would not impact elk summer range or glaciers, which were the resources that the monument was set aside to protect. Five subsequent expansions added almost all of the excised lands, and then some, back into what is now Olympic National Park. The monument reductions considered today are neither driven by national security concerns nor backed by analysis that they will not adversely impact monument resources.

The most recent presidential monument reduction involved Bandelier National Monument, which

was established in 1916. President Kennedy redrew the boundary in 1963, adding 2882 acres of land that had been released from Los Alamos National Laboratory, while eliminating 3925 "detached" acres that had been "fully researched" and were "not needed to complete the interpretive story of the Bandelier National Monument." Again, a far cry from today.

Each reduction was unique, and the reasons behind them differ. Hovenweep and Great Sand Dunes national monuments were both revised to correct survey errors, and several monuments were modified to exclude nonfederal inholdings. Other monuments have a more complicated history, but all prior reductions stand in stark contrast to today's wholesale and politically motivated suite of proposed revisions.

The Antiquities Act does not expressly grant the President authority to revise national monuments. Congress repeatedly rejected legislation granting the President such power, while also reasserting its authority over the public domain and revoking its implied consent to presidential public land withdrawals. The President's claim to implied authority is therefore questionable at best. The fact that five of President Trump's review criteria are unmoored from the only statutory basis for national monument designation further undermines his claim of authority.

While reasonable people can disagree about the wisdom of individual monuments, the breadth of President Trump's review at most demonstrates the need for a comprehensive policy balancing state, tribal, and local government concerns in monument designation and management. Unilateral and questionably supported presidential action is not the tool to resolve those disputes. Broad public land policy questions like these should be left to Congress.

Mr. Ruple is an associate professor of law (research) and a Wallace Stegner Center Fellow at the University of Utah S.J. Quinney College of Law.

NATIONAL MONUMENTS AND PUBLIC POLICY

Chris Mehl

Recently updated information (<https://headwaterseconomics.org/public-lands/protected-lands/national-monuments/>) of western national monuments indicates that their designation is consistent with economic growth in adjacent local communities.

Work by Headwaters Economics shows that trends in important economic indicators (<https://headwaterseconomics.org/dataviz/national-monuments/>)—population, employment, personal income, and per-capita income growth—in each of the regions surrounding the national monuments studied generally grew following a monument’s creation. Our analysis also found no evidence that designating these national monuments prevented economic growth.

These findings have significant policy implications for the role and management of national monuments and, more broadly, the economic role and benefits of public lands—especially for rural communities across the West.

National Monument Research Details

The 2017 study by Headwaters Economics—like earlier studies we conducted in 2011 and 2014—found that local economic trends continued or improved for the communities surrounding all 17 of the western national monuments studied. For example, per capita income, a widely accepted measure of prosperity, increased for the studied counties adjacent to every national monument in the years following establishment. This rise in personal wealth is significant, particularly in rural areas where average earnings per job are often declining.

The 2017 analysis also compared the economic performance of national monument counties since the turn of the century to similar benchmark counties—either to the urban or rural portion of

the state where the monument is located. In most instances, the growth in the four key economic indicators—population, employment, real personal income, and real per capita income—was the same or stronger in national monument counties than in comparable peer counties, though this varies by monument. Looking at these four indicators for all 17 national monument regions, 13 grew at similar or faster rates compared to the benchmark and 4 were slower.

The 2011, 2014, and 2017 studies analyzed the economies surrounding 17 national monuments in 11 western states, each monument larger than 10,000 acres and created between 1982 and 2001. This approach avoids smaller monuments with little potential to impact local economies, and allows an analysis of economic indicators before and after designation using reliable measures of performance.

While the results showing continued growth in nearby communities do not demonstrate a cause-and-effect relationship, the findings do show that national monuments are consistent with economic growth in adjacent local communities.

The Changing Economy of the West

The economy of the West has changed dramatically in recent decades and rural economies have been challenged to sustain prosperity. Some of the reasons for this include a broader transition (<https://headwaterseconomics.org/dataviz/west-wide-atlas/>) from a commodity-based to services-based economy and the lack of access to major markets (<https://headwaterseconomics.org/dataviz/three-west/>) for many rural places.

Employment in non-service industries like manufacturing, farming, and forestry are holding relatively steady, but have not created many net new jobs as the overall economy has expanded. As a result, some rural and isolated areas are struggling to sustain population (<https://headwaterseconomics.org/dataviz/migration/>), rely on employment concentrated in slow-growth

or volatile sectors such as agriculture and oil and natural gas industries, and increasingly depend on retirement income.

Some of the differences in economic performance are a function of topography and historical land use (<https://headwaterseconomics.org/dataviz/migration/>): communities dominated by flat, arable land tend to depend more on agriculture, which has employed fewer people as it becomes increasingly efficient and automated. These also are the places with more private and less public land. Communities with land unsuitable for agriculture are more likely to have a large share of federal land, which in some places has spurred more diverse economic activity.

By comparison, service industries that employ people in a wide range of occupations—from doctors and engineers to teachers and accountants—are driving economic growth (<https://headwaterseconomics.org/economic-development/trends-performance/west-is-best-value-of-public-lands/>) and now make up the large majority of jobs in both urban and rural areas.

At the same time, non-labor income (<https://headwaterseconomics.org/dataviz/non-labor-income/>), which consists largely of investment and retirement income, is the largest and fastest-growing source of personal income in the West.

Federal Lands and Prosperity in the West

The economic trends discussed above—the growth in services, relative decline of goods-producing sectors, urbanization of the West, importance of access to markets, and other factors—help to explain how the economic role of public lands (<https://headwaterseconomics.org/public-lands/public-lands-research/>) in the West has shifted and how protecting public lands can assist western communities working to promote a more robust economic future.

While every county has its own set of unique circumstances, a large body of peer-reviewed

literature examines the relationship between natural amenities, land conservation, and local and regional economic well-being. Numerous studies by Headwaters Economics and others—carefully scrutinized to pass scientific muster and credibility—have concluded that protected federal public lands in the West, including lands in rural counties, can be an important economic asset that extends beyond tourism and recreation to attract people and businesses.

Important considerations for policy makers include:

- Today, rural counties in the West with more federal lands or protected federal lands are performing better (<https://headwaterseconomics.org/public-lands/federal-lands-performance/>) on average than their peers with less federal lands or protected federal lands.
- Protected lands increase per capita income (<https://headwaterseconomics.org/public-lands/protected-lands/protected-public-lands-increase-per-capita-income/>). In 2010, per capita income in western rural counties with 100,000 acres of protected public lands was on average \$4360 higher than per capita income in similar counties with no protected public lands.
- Research in the *American Journal of Agricultural Economics* shows that natural amenities—such as pristine scenery and wildlife—help sustain property values and attract new investment.
- Outdoor recreation is important to western economies. In New Mexico, for example, the Outdoor Industry Association (OIA) reported this year that active outdoor recreation contributes \$9.9 billion annually (<https://outdoorindustry.org/state/new-mexico/>) in consumer spending to the state's economy and supports 99,000 jobs. Across the nation, OIA reported that outdoor recreation contributes \$887 billion to the economy (https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_

RecEconomy_FINAL_Single.pdf).

- Many entrepreneurs locate their businesses in areas with a high quality of life. Conserving lands, while also creating a new visibility for them through protective designations, helps safeguard and highlight the amenities that attract people and business.
- Studies by the Brookings Institution and others show that for many seniors and soon-to-be retirees, protected public lands and recreation provide important aspects of a high quality of life (https://headwaterseconomics.org/wp-content/uploads/Todays_Economy_Federal_Public_Lands.pdf). Non-labor sources of income already represent more than one-third of all personal income in the West and almost half of all personal income in the rural West. Non-labor's share of personal income will grow as the Baby Boomer generation retires.

Natural amenities are not the only element needed for economic success. Other factors such as access to markets and education levels also are important. How local leaders combine public land assets along with investments, marketing, and policy decisions will play a significant role in determining future economic prosperity.

Chris Mehl is the policy director at *Headwaters Economics* (<https://headwaterseconomics.org/>), an independent, nonprofit research group, which assists the public and elected officials in making informed choices about land management and community development decisions in the West.

WITH CASCADE-SISKIYOU NATIONAL MONUMENT, THE PRESIDENT'S ANTIQUITIES ACT AUTHORITY REACHES A LIMIT

Lawson Fite

On January 12, 2017, President Obama issued Proclamation 9564 expanding the Cascade-Siskiyou National Monument in Oregon and California. Building on a 2000 proclamation, the expanded monument severely restricts commercial timber activity. The President did not have the authority to issue this restriction. Unlike the other monuments that are the subject of current debate, the Cascade-Siskiyou's expansion presents a clear conflict with preexisting congressional action. The expansion presents the question whether the President's delegated power can be used to unilaterally override a specific Act of Congress that requires the same lands be managed for a different purpose (timber production).

Eighty percent of the expansion, or 40,000 acres, is grant land covered by the Oregon and California Railroad & Coos Bay Wagon Road Grant Lands Act of 1937, 43 U.S.C. § 2601. Known as the "O&C Act," this statute provides that the two million-plus subject acres in Oregon "shall be managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princip[le] of sustained yield. . . ." *Id.*

The O&C Act is a legacy of one of the many railroad land grants enacted in the late 1800s to spur settlement of the West. The O&C lands departed the public domain in 1866 pursuant to statute. Act of July 25, 1866, 14 Stat. 239. Western Oregon still displays a "checkerboard" land ownership pattern common to such grants. The grant was conditioned on requirements that the land be resold by the railroad to "actual settlers" in parcels not to exceed 160 acres and for no more than \$2.50 per acre. The railroad completed construction of the rail line and initially complied with the terms of the grant, but eventually ceased reselling lands to actual settlers. Following

a lengthy court battle, Congress passed the Chamberlain-Ferris Revestment Act in 1916, 39 Stat. 218 (June 9, 1916), returning the O&C lands to federal ownership. Under the Chamberlain-Ferris Act, revenues flowed from timber sales to the local counties to repay back taxes owed by the railroad and to substitute for the lack of property taxes available from the land.

The Chamberlain-Ferris Act envisioned that the lands would be harvested and then sold as rapidly as possible to restore lands to the property tax rolls. But the lands were not suitable for agricultural purposes and a “cut and dispose” practice did not contribute sustained support to the rural economy. In 1937, Congress enacted the O&C Act, establishing a new policy calling for permanent timber production from the O&C lands based on the scientific forestry principle of “sustained yield” to produce a permanent timber supply and to provide revenues to the O&C Counties that had been promised but not delivered by prior legislation.

Under the O&C Act, “O & C lands must be managed for the primary purpose of sustained yield timber production *unless* such lands are unsuitable for timber production.” *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 893 F.2d 1012, 1013 (9th Cir. 1989) (emphasis in original). The Ninth Circuit has characterized these lands as having the “dominant” use of timber production. *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1183–84 (9th Cir. 1990). The O&C Act was designed to establish “a vast, self-sustaining timber reservoir for the future.” *Id.* at 1184 (quoting H.R. Rep. No. 1119, 75th Cong., 1st Sess. 4 (1937)).

As early as 1940, the government recognized that the reservation of O&C Lands for timber production precluded withdrawing them under the Antiquities Act. Harold Ickes, Interior Secretary to President Franklin D. Roosevelt, sought legal counsel from the Department’s Solicitor, asking whether O&C lands could be added to the Oregon Caves National Monument. The answer was a resounding “no.” The Solicitor’s opinion stated:

“There can be no doubt that the administration of the lands for national monument purposes would be inconsistent with the utilization of the O. & C. lands as directed by Congress. It is well settled that where Congress has set aside lands for a specific purpose the President is without authority to reserve the lands for another purpose inconsistent with that specified by Congress.” DOI Solicitor’s Opinion M. 30506, Mar. 9, 1940. President Roosevelt did not expand the Oregon Caves National Monument; instead, Congress did so in 2014, in the Oregon Caves National Monument and Preserve Act. *See* 16 U.S.C. § 410vvv. Subsequent opinions from Interior Solicitors dating from the 1940s to 1970s concluded the O&C Lands were not subject to the 1872 Mining Law, could not be withdrawn for a state park and could not be included within wilderness study areas otherwise required as part of the Federal Land Policy and Management Act (FLPMA).

Unlike virtually every other monument dispute in the history of the Antiquities Act, the Cascade-Siskiyou Monument expansion sets up a direct conflict between the President’s delegated authority on one hand, and Congress’s retained authority on the other hand. While many current controversies address whether the President has the power to amend or withdraw a monument proclamation, no other monument raises the issue of a proclamation void ab initio as beyond the President’s delegated authority. Further, while many monument advocates have relied on FLPMA to argue the President may not shrink monuments, Congress included a “savings” provision in FLPMA that insures the O&C Act will control. FLPMA § 701(b), 90 Stat. 2743 (1976), 43 U.S.C. § 1701 note.

This question tests the separation of powers and Congress’s plenary authority under the Property Clause of the Constitution. U.S. Const. art. IV, § 3. As the Supreme Court has repeatedly observed, congressional power over public lands “is without limitations.” *See Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). Abiding by the O&C Act respects Congress’s authority to limit the scope of its own

delegation, particularly in an area where its power is so broad.

Because of the conflict between the O&C Act and the monument expansion, the American Forest Resource Council (AFRC), a trade association representing the forest products industry, filed suit in March 2017 seeking to vacate the monument expansion. Suits have also been filed by the Association of O&C Counties and by Murphy Company, an owner of timberlands whose access will be curtailed by the monument expansion. These cases were stayed pending the review of monument designations by Secretary Zinke. Now that the review has been completed, the litigation is likely to resume absent presidential action.

The groups challenging the expansion have raised ecological concerns with the designation of these lands as a monument. In the face of a warmer, drier climate and denser forests resulting from decades of fire suppression and a lack of forest management, there is widespread recognition about the need for active forest restoration across this part of Southwest Oregon. A 2014 paper, published in *Forest Ecology and Management* by the Nature Conservancy and others, identified most of the lands included in the national monument as having “moderate to high active restoration needs.” The authors of that paper determined that “forest restoration needs were dominated by the need for thinning” and that “disturbance alone cannot restore forest structure.” By precluding such management, the monument designation hinders rather than promotes restoration of the forest.

Whether by administrative action or court decision, the controversy over the Cascade-Siskiyou National Monument will clarify the limits of presidential power and may lead to restoration of congressional primacy in this policy area.

Lawson Fite is the general counsel of the American Forest Resource Council (AFRC). He directs AFRC’s legal program in supporting the goal of sustainable timber harvest from public lands throughout the five Western states where AFRC’s members operate.

NATIONAL WILDLIFE REFUGES AND NATIONAL MONUMENTS AS CERCLA INSTITUTIONAL CONTROLS

Raymond Takashi Swenson

The task assigned to the President under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or “Superfund,” 42 U.S.C. § 9601 et seq.) is to remediate the release of hazardous substances into the environment. In addition to physical cleanup measures, the range of remedial action options has always included “institutional controls” (ICs), which prevent use of contaminated sites in ways that could expose humans and the natural environment to hazardous residues. In the National Contingency Plan (40 C.F.R. pt. 300), the implementing regulation for CERCLA, the Environmental Protection Agency (EPA) states that:

EPA expects to use institutional controls such as water use and deed restrictions to supplement engineering controls . . . to prevent or limit exposure to hazardous substances, pollutants, or contaminants. Institutional controls may be used . . . as a component of the completed remedy. The use of institutional controls shall not substitute for active response measures . . . as the sole remedy. . . [40 C.F.R. § 300.430(a)(1)(iii)(D)].

When ICs are protective and reliable, they are generally much less expensive than alternative physical remedial actions for low concentration contaminants, in which the marginal cost of remediation can rise steeply as the marginal reduction in risk shrinks.

One category of ICs is land use and zoning regulations enacted by state or local government that prohibit extraction of contaminated groundwater, bar excavation and construction that could damage containment barriers built around and over hazardous waste landfills, and prevent land uses such as schools, day-care centers,

hospitals, and residences that could expose people, outside an industrial workplace, to hazardous wastes that lie beneath clean fill.

A second category of ICs is restrictive covenants attached to land that is being remediated. Recognizing the need to make environmental restrictive covenants more robust, many states have adopted the Uniform Environmental Covenants Act (UECA, e.g., ch. 64.70 Wash. Rev. Code).

However, ICs can be made reliable in a third way at Superfund sites on federal lands. Because of federal supremacy under Article VI of the U.S. Constitution, state and local land use and zoning laws cannot control the use of federal lands. CERCLA remedial actions can invoke the UECA for the state where a federal Superfund site is located, when part of the remedial action involves the transfer of land out of federal ownership, such as at closing military bases. However, if no such land transfer is on the horizon, another approach is available that can reassure EPA and the public that the land use restrictions will be permanent and sustainable. That involves transforming the federal Superfund site into a national wildlife refuge or national monument.

While the particular land uses allowed within a wildlife refuge or national monument can vary, depending on the authorities under which it is created, when that creation is done specifically as an IC, it can prevent release of contaminated soils and groundwater into the environment, and convert a contaminated industrial “brownfield” into a literal “greenfield.”

Three good examples of using national wildlife refuges or national monuments as CERCLA site ICs involve three federal facilities that were contaminated during decades of the production of chemical and nuclear weapons. These are the Rocky Mountain Arsenal near Denver, the Rocky Flats plutonium fabrication facility near Boulder, and the Hanford Nuclear Site in eastern Washington.

Rocky Mountain Arsenal National Wildlife Refuge

The Arsenal is 15,000 acres just north of what used to be Stapleton International Airport in Denver, that was set aside by the Army during World War II to manufacture chemical weapons, to be held in reserve to enable a response if chemical weapons were used by the Axis nations against the Allies. Because of the chemical similarity of military nerve agents to insecticides, the facility was transitioned to a pesticide factory by Shell Chemical Company. Because most hazardous waste regulations did not take effect until 1980, the Arsenal had become extensively contaminated from standard industrial waste management practices. The majority of the chemical weapons stored at the Arsenal were transported to the Deseret Chemical Depot in Utah, where they were eventually treated in the Depot’s decommissioning facility.

Ironically, because the Arsenal had been closed to human entry for military and industrial security, it had an established wildlife population of some 330 species when the CERCLA cleanup began, including raptors, pelicans, raccoons, black-footed ferrets, deer, and bison. On September 25, 1992, Congress enacted a law setting aside the Arsenal land as a national wildlife refuge under the administration of the U.S. Fish & Wildlife Service (USFWS). After spending over \$2 billion on site cleanup, in 2004 the Arsenal was opened to the public, and has had hundreds of thousands of visitors annually.

Rocky Flats National Wildlife Refuge

The Arsenal is managed as part of a complex with the National Wildlife Refuge at the Rocky Flats site near Boulder. Rocky Flats was established during the Cold War as a facility where plutonium “hockey pucks,” prepared at the Hanford Nuclear Site in eastern Washington, were fabricated into hollow spheres which, when precisely imploded by shaped explosives, would cause an explosive nuclear fission chain reaction, then triggering the

fusion of elements in a hydrogen bomb. Because of the need to maintain security around the facility, most of the 5000 acres of Rocky Flats were undeveloped, retaining a tallgrass prairie, wetlands, and habitat for numerous species, including deer, elk, falcons, songbirds, and the threatened Preble's meadow jumping mouse.

EPA listed Rocky Flats on the Superfund National Priorities List in 1989, and the Department of Energy (DOE) undertook an extensive demolition of facilities and cleanup of radioactively contaminated soils. The remediation was made easier because most of the plutonium-contaminated waste generated in the manufacture of the plutonium spheres was sent for disposal to the Idaho National Laboratory Site, an 890-square-mile nuclear reactor research facility in eastern Idaho, where that waste has been undergoing excavation and treatment since 2006.

In 2001, Congress set aside most of the Rocky Flats facility as a national wildlife refuge. Some 1300 acres are still managed by DOE because of higher levels of hazardous contaminants in the soil. In 2018, the refuge will be opened to the public, and include hiking, cycling, and horseback riding.

Hanford Reach National Monument

In 1943, the Manhattan Project created the Hanford Nuclear Site by setting aside public domain land and acquiring a cattle ranch, a railroad line, orchards, the two small towns of Hanford and White Bluffs, and the submerged lands under 35 miles of the Columbia River, totaling over 580 square miles. Eventually, nine nuclear reactors were constructed along the river, where uranium fuel rods assembled in giant graphite blocks maintained low level chain reactions, transmuting uranium 238 into isotopes of a new element, plutonium, which was used in the first nuclear explosion at Alamogordo and in the bomb dropped on Nagasaki, Japan. Through the end of the Cold War, large enclosed chemical processing facilities in the center of the Hanford Site used millions of gallons of acid to separate plutonium from uranium

and its cobalt 137, strontium 90, technetium 99, and iodine 131 fission products. The plutonium was sent on to Rocky Flats and other facilities, but the 55 million gallons of highly radioactive, caustic chemicals are still held in massive underground tanks, awaiting construction of a treatment plant that will turn the waste into glass logs that can be safely stored deep underground until the radioactive elements decay away.

In 1989, DOE signed an agreement with EPA and the Washington Department of Ecology governing DOE's investment of \$2 billion per year to clean up the nuclear and chemical waste in the uranium fuel fabrication plant, the nine nuclear reactors, the plutonium separation structures, and the many underground tanks holding waste. Hanford is also excavating soils contaminated by years of nuclear waste disposal, and conducting groundwater extraction and purification plants that have cleaned over 2 billion gallons from uranium, technetium 99, strontium 90, carbon tetrachloride, hexavalent chromium, and other chemicals. Ten thousand containers of waste contaminated with plutonium have been excavated from the ground and are being stored pending shipment to a deep repository in southern New Mexico.

Like other weapon factories, the Hanford Site has had large undeveloped safety buffers across the Columbia River to the north, and by Rattlesnake Mountain to the west, which used to house a Nike anti-bomber missile site. Over 1000 species of migratory birds come to Hanford each summer to lay their eggs, and the site has elk, deer, coyotes, raccoons, bats, and rattlesnakes.

In 1996, Congress enacted 50 U.S.C. § 2582, directing DOE to prepare a comprehensive land use plan (CLUP) for the Hanford Site. The Hanford CLUP was completed in 1999. It reserved a central industrial area of about 20 square miles for long-term management of nuclear waste, while most of the land was set aside as undeveloped open space. This is the authoritative land use for Hanford, which cannot be easily modified.

In 2000, under authority of the Antiquities Act of 1906, President Clinton proclaimed the creation of the Hanford Reach National Monument, which includes the Hanford Reach of the Columbia River (including spawning grounds for endangered salmon), the buffer lands to the north and west, and a strip of riparian land about ¼ mile wide running through the nuclear reactor complexes. The Monument is administered by USFWS, though the land continues to be owned by DOE. The Monument prevents the development of riparian lands for industrial, agricultural, residential, or commercial recreational use. It prevents use of groundwater near the river, making it easier to achieve appropriate groundwater cleanup levels.

The monument proclamation was accompanied by a memo that favors the inclusion of additional portions of the Hanford Site into the monument as active remediation is completed at each facility. The B Reactor, the first operating nuclear reactor on earth, has been preserved and has been set aside by Congress as part of the Manhattan Project National Historical Park. Another large segment of previously undeveloped land is occupied by the Laser Interferometer Gravitational-Wave Observatory, whose founders at MIT and CalTech were awarded the 2017 Nobel Prize for physics. The ongoing missions of historical and habitat preservation at Hanford will ensure the continuation of ICs that will contribute to the CERCLA remediation of the most contaminated Superfund site in the nation.

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MARINE MONUMENTS LEGALLY ESTABLISHED BY PRESIDENTS MUST BE PRESERVED

Lois Schiffer

With an eye to the future and our national values, presidents of both parties, from Teddy Roosevelt to Barack Obama, have used the Antiquities Act to protect some of America's most beloved places, including the Grand Canyon, the Chesapeake & Ohio Canal, and the Statue of Liberty. For over 100 years, presidents have used this authority granted by Congress to protect areas of historic, cultural, or scientific interest more than 150 times.

This bipartisan protection of our nation's treasures is under attack. President Trump seems prepared to undo conservation of some of our country's most scientifically or historically important places. He has ordered a "review" of 20 years of national monument designations, including seven marine designations in the Pacific and off Cape Cod. As of early November, President Trump's review is ongoing: Secretary of the Interior Zinke in an August 24 report recommended, inter alia, reducing the size and changing the management to be less protective of two of the marine monuments; further, Secretary of Commerce Ross is required by Executive Order 13795 to make a report and recommendations on marine monuments and sanctuaries that is so far not available.

These include the extraordinary marine national monument in the waters off Hawaii, Papahānaumokuākea Marine National Monument, designated by President George W. Bush in 2006 and expanded by President Obama; and the Northeast Canyons and Seamounts. The review is unprecedented, and could lead to unlawful decisions to rescind, substantially reduce in size, or change the management. Such decisions would also undermine one of our nation's most important conservation tools. The United States has long taken the position that only Congress can revoke or substantially reduce the size of a monument. A long-standing opinion of the Attorney General,

issued in 1938, provides that only Congress has authority to rescind a monument.

Challengers have raised two legal arguments against these important marine monuments: Presidents cannot designate them in the ocean, and some of these monuments are too big. These challengers are legally wrong on both counts.

Does the Antiquities Act allow the president to proclaim monuments in the ocean? Yes it does. Past presidents, including Presidents George W. Bush and Barack Obama, thought so, and recognized the scientific and conservation values they serve by protecting our cherished national marine resources.

The Act provides that the President may declare, as a monument, “objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States.” The marine monuments not only protect marine species like corals, whales, and fish, they also protect ecosystems and other objects of historic or scientific interest. The monuments lie within the United States’ Exclusive Economic Zone—that area, out to 200 miles in the ocean, is under the control of the United States for certain purposes, including environmental protection.

In a legal Opinion in 2000, the U.S. Department of Justice concluded that this control was sufficient to allow the President to use the Antiquities Act to establish a national monument to protect the marine environment in the Exclusive Economic Zone. The United Nations Convention on the Law of the Sea recognizes a nation’s “sovereign rights” there for specified purposes. Sovereign rights provide sufficient “control” to the United States to meet the Antiquities Act requirement. The lands and waters within the seven marine monument designations proclaimed from 2006 through 2016 may be designated for protection and research. These seven Proclamations lawfully do so.

As to the second question: Are these monuments just “too big?” Certainly not. The Antiquities Act provides that a monument must be confined to

“the smallest area compatible with proper care and management of the objects to be protected.” In each of these proclamations, the President has made that finding. Federal courts, including the Supreme Court, have consistently found that ecosystems may be objects under the Act and have honored the Presidents’ proclamations. For marine ecosystems and other objects such as fish, coral, seamounts, and marine mammals, a large area including the submerged lands and the water column is essential for proper care and management. So are the other conditions for protection set forth in these proclamations.

These seven presidential proclamations to protect important marine national treasures are fully lawful. We owe them our respect and appreciation. If President Trump wants to reverse the conservation of these areas for future generations, he should follow the law and ask Congress to act to rescind them.

He would be better advised to remember Jacques Cousteau’s wisdom: “The sea, once it casts its spell, holds one in its net of wonder forever.”

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UNCHARTED WATERS: THE SCOPE AND REVOCATION OF PRESIDENTIAL WITHDRAWALS UNDER THE OUTER CONTINENTAL SHELF LANDS ACT SECTION 12(A)

Brian Broussard

I. Introduction

On December 20, 2016, one month before his last day in office, President Barack Obama withdrew nearly 120 million acres of the federal outer continental shelf (OCS) from consideration for future oil and gas development.¹ The two withdrawals, effected by separate presidential memoranda, encompass large portions of the Atlantic and Arctic OCS.² Supporters cheered the news as a step forward for not only the unique environments protected, but also the fight against climate change and indigenous peoples' rights.³ Opponents derided the decision as a short-sighted waste of valuable resources and an abuse of the President's authority.⁴ Though larger withdrawals of the OCS have taken place under past presidents, these two withdrawals represent the largest permanent withdrawals enacted under the authority vested in the President under Section 12(a) of the Outer Continental Shelf Lands Act (OCSLA).⁵ Although some critics believe these withdrawals were excessive and beyond the executive authority granted under OCSLA Section 12(a), in the context of the broader universe of public land withdrawal powers generally, President Obama's withdrawals align with past presidents' use of their withdrawal authority.⁶

No court yet has reviewed the scope of the power granted by OCSLA Section 12(a); therefore, it remains unclear whether these withdrawals will stand the test of time. Namely, can President Trump amend or revoke Obama's memoranda to reduce or eliminate the areas of withdrawal using the same law by which they were withdrawn?⁷ This article will discuss the extent to which Obama's recent withdrawals complied with OCSLA Section 12(a) and whether the withdrawals can be undone under the same provision.

II. The Outer Continental Shelf Lands Act (OCSLA) and Public Lands Withdrawals

The OCSLA grants comprehensive control over the OCS to the Department of the Interior.⁸ The OCS is a term of art referring to the portion of the seabed that lies beyond the jurisdiction of the individual states, thus belonging to the federal government.⁹ The Department of the Interior is charged with deciding which areas of the OCS will be offered for lease through the federal offshore leasing program, which it must review every year and revise as necessary.¹⁰ As part of the maintenance of the leasing program, the Secretary of the Interior (Secretary) must create a Five-Year Plan, scheduling which areas of the OCS will be put up for lease over the next five years.¹¹ After an oil company purchases an OCS lease, the Secretary reserves the right to cancel the lease at any time if the company does not continue to comply with the prescribed regulations for oil and gas exploration and production.¹²

The President may exert influence over the executive officers of the Department of the Interior at any point during this process, but OCSLA also provides the President some roles apart from the responsibilities directed to the Secretary and the Department of the Interior. OCSLA Section 12(a) states: "The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf."¹³ This withdrawal power within OCSLA is one of a plethora of similar withdrawal powers in other statutes that grant special authority over the public domain to the President or another officer of the executive branch.¹⁴

The public domain refers to all public lands under the control of the federal government, including the OCS.¹⁵ Historically, the public lands have been administered through a complex array of overlapping and potentially conflicting management schemes, and the executive withdrawal power oftentimes functioned as a way to cut through the confusion and declare that a certain regime thenceforth applied.¹⁶ To

“withdraw” public land means either to set it aside for a particular use; restrict it from certain uses; or remove it from public use altogether.¹⁷ The essential characteristic of a withdrawal is that certain use restrictions are imposed on the withdrawn land, which are distinct from the other (non-withdrawn) lands to which the public land regime applies.¹⁸

For purposes of the OCSLA leasing regime and its Section 12(a) withdrawal power, to withdraw portions of the OCS means to remove them from consideration for sale through the federal offshore leasing program.¹⁹ OCSLA was enacted in 1953, and the first presidential withdrawal effected under Section 12(a) authority was by President Eisenhower in 1960.²⁰ Since that first withdrawal, five other presidents have made nine additional withdrawals, ranging in size from about 55,000 acres to about 300 million acres.²¹ For comparison, Obama’s two recent Section 12(a) withdrawals covered approximately 115 million acres in the Arctic and 3.8 million acres in the Atlantic.²²

III. Analysis of OCSLA Section 12(a): Language and Historical Meaning

A. Language Analysis of the Scope of Withdrawals Under OCSLA

Statutory interpretation begins with a review of the plain language of the statute itself.²³ The President’s power to withdraw lands from the federal offshore leasing program under OCSLA is plainly stated in Section 12(a): “The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.”²⁴

From this language, several aspects of the provision stand out. First, there are very few restrictions placed on the withdrawals themselves. There are no express limitations on the size or duration of withdrawals made under Section 12(a).²⁵ The major restriction expressed in the provision is that the withdrawals may not affect current OCS leases: the President may withdraw only “unleased lands.”²⁶ However, beyond that

limitation, Section 12(a) withdrawals may apply to any area; indeed, the President may withdraw “any of the unleased lands.”²⁷

Second, besides the instruction that the President may only make withdrawals “from time to time,” there are no express limitations on the discretion of the President, such as specific factors to consider in making the decision.²⁸ Moreover, the power is vested in the President, not in the Secretary of the Interior, who is charged with administering the leasing program.²⁹ Importantly, the President is not an agency for purposes of the Administrative Procedure Act (APA), thereby precluding any procedure the APA might otherwise require.³⁰ To exercise the withdrawal power under OCSLA, the President need only issue a presidential memorandum, proclamation, or executive order describing the extent of the withdrawal.³¹

Third, Section 12(a) notably makes no mention either explicit or implicit as to whether a future president may modify or revoke a previous withdrawal.³² In short, the plain language is silent on this point. When a provision is silent or ambiguous in its meaning, the next statutory canon directs us to consider the statute as a whole.³³ In reviewing the whole statute, the rule against surplusage instructs that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]”³⁴

OCSLA affords the Secretary the authority to “exclude[.]” vast stretches of the OCS from the offshore leasing program.³⁵ In creating the Five-Year Plans used to conduct the offshore leasing process, the Secretary has the power to exclude portions of the OCS much greater in size than Obama’s recent withdrawals.³⁶ In the context of this broad authority, the importance of the President’s withdrawal power is not as apparent as it might otherwise seem. The rule against surplusage encourages an interpretation of the Section 12(a) power as one that is materially different from the Secretary’s³⁷ overarching power to include and exclude lands from the leasing program.³⁸

There are two plausible interpretations of OCLSA Section 12(a) that follow from the rule against surplusage. First, the focus of this difference could rest on the disparity between the simplicity of the presidential memorandum by which a President may withdraw lands and the detailed procedure the Secretary must follow in drafting the Five-Year Plans, through which lands are ultimately excluded from the leasing program. In this interpretation, the presidential withdrawal power is simply a way to enhance the nimbleness of the executive's authority over the leasing program, enabling the branch to respond more rapidly or with less political input when needed. This interpretation is less satisfying, however, in light of the Secretary's ability to quickly cancel lease sales, even after they have been included in the Five-Year Plan and are scheduled for disposition.³⁹ Indeed, to cancel a lease sale of a portion of the OCS is literally to "withdraw from disposition."⁴⁰

However, because any such cancellations deemed "significant" will have to follow the procedures required of the Secretary for the original leasing proposal, the ability of the Section 12(a) withdrawal to override this statutory requirement can still be viewed as materially distinct from the Secretary's exclusion power.⁴¹ In fact, the significance of this difference can be demonstrated by the promulgation of President Obama's recent withdrawals. Though not included in the Proposed Final Program, the 2017–2022 Proposed Program Lease Sale Schedule originally included portions of the Beaufort and Chukchi Seas.⁴² If these lease sales would have been included in the Proposed Final Program, then there would have been no time for the Secretary to remove them from inclusion in the leasing program at the time of President Obama's December 2016 memorandum withdrawing most of the Arctic. Therefore, the Section 12(a) presidential withdrawal power would have been the only way to effect such a withdrawal, and it can thereby be viewed as representing a separate power from the Secretary's exclusion authority.

An alternative interpretation offers another material difference between the exclusion power

of the Secretary and the withdrawal power of the President. If the President lacks the ability to revoke or significantly modify the withdrawals of past administrations, then Section 12(a) would represent a power a step beyond that of the Secretary, who is not entirely locked into the final leasing program for the full five years and "may revise and reapprove such program, at any time."⁴³ If Section 12(a) withdrawals can be undone by later administrations at the stroke of a pen, they have the same effect as the President directing the Secretary to exclude areas of the OCS through the normal workings of the leasing program. In order to avoid construing the Section 12(a) power as mere surplusage then, Section 12(a) could be interpreted to be binding on future administrations.⁴⁴

As an example, under the Obama administration, the Secretary excluded all of the Atlantic and Pacific OCS from oil and gas development by not including any Atlantic or Pacific region planning areas in the lease sale schedule authorized in the 2017–2022 Proposed Final Program (PFP).⁴⁵ Though this action received less press than President Obama's Section 12(a) withdrawals, this exclusion affected a much larger area of the OCS and has the same effect on the OCS and the public's right to utilize it for the duration of the PFP.⁴⁶ Crucially, however, the Secretary under any subsequent administrations could undo this vast exclusion before the expiration of the current leasing program in 2022.⁴⁷ If Trump or any subsequent president has the ability to revoke a Section 12(a) withdrawal, and the ability to do so with much greater ease (procedurally speaking) than a reversal of the exclusions embodied in the 2017 PFP, then it is unclear what advantage, if any, the Section 12(a) withdrawal power provides.

Of course, one key distinction remains at play, which is the fact that a Section 12(a) withdrawal is indefinite, whereas a secretarial exclusion under the leasing schedule of a PFP would be effective for no more than five years before it must be reevaluated by the next administration.⁴⁸ Yet, this same indefinite effect may also be accomplished through the implicit powers of the President without

resorting to Section 12(a).⁴⁹ There is nothing to prevent a president from issuing a presidential memorandum (or executive order)—separate and apart from Section 12(a) authority—which directs the Secretary to exclude specific regions or planning areas from future five-year OCS plans based on certain findings, such as potential environmental degradation.⁵⁰ A presidential directive like this would be similar to the executive directive under Section 12(a), and would likewise not automatically terminate at the end of the President’s term. Indeed, it would remain effective until repealed by a subsequent president’s order or memorandum.⁵¹ Thus, a generic, non-Section 12(a) presidential memorandum could have the same effect as a presidential memorandum invoking the Section 12(a) authority. One important difference, however, is that the non-Section 12(a) presidential memorandum could not shortcut the procedural requirements placed on the Secretary.

Therefore, from the text of the statute alone, there remain two possible interpretations of OCSLA Section 12(a). Interpreting Section 12(a) to provide *both* a procedural advantage as well as the ability to effect withdrawals that endure until their stated expiration or legislative override would provide the greatest distinction between the President’s withdrawal power and the Secretary’s exclusion power. But, in the end, though this meaning is supported by the rules of the Supreme Court to read a provision in the context of the statute as a whole and to avoid reading provisions as mere surplusage, it is not the ineluctable interpretation of Section 12(a).⁵²

After analyzing the language of OCSLA, the scope of the President’s Section 12(a) withdrawal power comes into greater focus. First, the only restrictions placed on the Section 12(a) authority are that a withdrawal (1) will have no effect on leased lands, and (2) will only remove the applicable area of the OCS from the leasing program. Second, there is no prescribed procedure for a president to make a withdrawal and no stated requirement that withdrawals must be based on any specific objective (e.g., an environmental benefit). Finally,

there is no explicit grant of power to modify or revoke the withdrawals of past presidents, and it is ambiguous as to whether the plain language of Section 12(a) impliedly grants that power. In order to more decisively construe the congressional intent given this ambiguity, it may be helpful to compare the executive withdrawal powers granted in other public lands statutes that were in effect at the time of the enactment of OCSLA.

B. Presidential Withdrawal Powers Contemporaneous with the Enactment of OCSLA

While there has been some debate regarding whether the OCS should properly be considered public lands—which could pull into question the legitimacy of across-statute analogies—Congress has historically construed the OCS as such, including within OCSLA itself.⁵³ Tellingly, Congress codified OCSLA in Title 43 of the U.S. Code (“Public Lands”) and gave authority over offshore leasing to the Secretary of the Interior.⁵⁴

The major statutory withdrawal powers delegated to the President by Congress prior to OCSLA include the Forest Reserve Act of 1891 (later amended by the Organic Administration Act of 1897) and the Antiquities Act of 1906. This section will further analyze the scope of the Section 12(a) withdrawal power—its restrictions on withdrawals, its degree of discretion afforded the decision maker, and its ability to be modified or revoked—by way of comparison to the meaning and congressional intent regarding the withdrawal powers of these similar, contemporaneous public lands statutes.

1. Restrictions on Withdrawal Powers in Other Public Lands Statutes

In considering the scope of authority entrusted to the President in these other public lands statutes, it is evident that Congress understood and was capable of articulating various types and degrees of restrictions on the President’s withdrawal authority. It also demonstrates that the nearly unrestricted withdrawal language in Section 12(a) was not an unintended grant of excessive authority, but rather an intentional delegation to the executive.

a. The Forest Reserve Act's Restrictions

The Forest Reserve Act of 1891, the first statutory withdrawal power, instructs that the President “may, from time to time, set apart and reserve . . . forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations[.]”⁵⁵ Thus the only restriction placed on the withdrawals was that they be “wholly or in part covered with timber or undergrowth,” which would of course be expected of a forest reserve.⁵⁶ There were no express size or time limitations placed on the withdrawals, and a withdrawal effected under the Act removed the land “from every form of use by the people.”⁵⁷ An early test of the President’s authority under the provision came in 1911. After the establishment of a forest reserve in Colorado, a local rancher continued to allow his herd of 500 head of cattle to graze in the reserve.⁵⁸ The United States sought an injunction to stop the grazing, and the rancher contended that the withdrawal of otherwise public land for a forest reserve did not prohibit access to the unenclosed lands for grazing purposes.⁵⁹ The Supreme Court disagreed; Congress has all the “rights incident to proprietorship” over the federal lands, and this power can be granted to the executive branch, including the ability to “withhold or reserve the land . . . indefinitely” from any use.⁶⁰

While creating the management regime for the forest reserves in the Organic Act of 1897, Congress imposed some additional restrictions on the withdrawal power.⁶¹ For example, withdrawals issued after the passage of the 1897 Act would have no effect on certain uses of the land, such as the ability of settlers to prospect and develop mining claims under the mining laws.⁶² Nonetheless, these new restrictions did not include any time limitations on the withdrawals.⁶³ The President’s power to create forest reserves was again curtailed by Congress in 1907, this time geographically. The Forest Reserve Act led to immense withdrawals of federal land shortly after its passage,⁶⁴ and President Roosevelt contributed significantly to the expansion, increasing the aggregate size of the forest reserves to around 75 million acres.⁶⁵

In response, Congress repealed the President’s authority to withdraw lands under the Act in six western states.⁶⁶ As a result of this back-and-forth between the legislature and the executive (along with input from the judiciary), Congress was well aware that broad authority could be exercised as such, broad language would be construed as such, and express restrictions were conceivable.

b. The Antiquities Act's Restrictions

The history of the executive withdrawal power granted by the Antiquities Act of 1906 makes these facts all the more apparent. The Antiquities Act states in pertinent part that “the President may . . . declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.”⁶⁷ Additionally, Congress provided an express size limitation in that the withdrawal cannot exceed “the smallest area” necessary to protect the withdrawn objects or sites.⁶⁸

Since the first exercises of authority under the Antiquities Act and continuing to the present day, many commentators and litigants have argued that the vast national monuments created under the President’s withdrawal power violate the congressional intent of protecting only small archaeological sites.⁶⁹ While some members of Congress apparently thought this to be the case, the legislative history reveals that the Act was a compromise between western legislators who favored small, constrained withdrawals and the Department of the Interior who favored large withdrawals for anything of sufficient historical interest or even “scenic beauty.”⁷⁰ Notably, earlier, competing bills in the legislature did provide for explicit and quantified size limitations, calling for maximum withdrawals of either 320 or 640 acres.⁷¹ But the final statute allows for broader interpretation, and the courts have since confirmed increasingly broad exercises of the withdrawal power.⁷²

Even though Congress attempted to make explicit restrictions in the Antiquities Act, in practice they had little effect on the exercise of the President’s authority. President Roosevelt declared 18 national

monuments in the first three years of the Act's existence, and at least four of these withdrawals were 10,000 acres or more, including the Grand Canyon National Monument, which was more than 800,000 acres.⁷³ The legality of this vast withdrawal was put to the test in 1920, when the federal government brought suit to enjoin an Arizona politician from running a private business charging entrance fees to a popular trail on the Grand Canyon.⁷⁴ The Supreme Court, focusing on the validity of the defendant's mining claims, dismissed the contention that the monument was beyond the scope of the withdrawal power in a single paragraph, emphasizing the meaning of the plain language of the Act.⁷⁵ The Court agreed with the President that the Grand Canyon was unquestionably "an object of unusual scientific interest" and thereby implied that the smallest area language of the Act was highly flexible, able to expand to fit the needs of immense withdrawals.⁷⁶

The early public land withdrawal powers granted to the President by Congress reveal that Congress was aware that broad language with few explicit restrictions would lead to vast withdrawals by the President. Likewise, this early history demonstrates that the judiciary would be willing to uphold such vast withdrawals. Finally, these statutes also reveal that Congress had considered including explicit acreage limitations on the withdrawal powers but ultimately decided against this limitation in favor of offering the executive branch the flexibility and nimbleness necessary to fulfill the purpose of the withdrawals. In applying the lessons from these withdrawal powers to OCSLA Section 12(a), it is apparent that Congress intended for there to be no size or time limitations placed on presidential withdrawals of the OCS and that withdrawals of increasing size would likely flow from that power.

2. Level of Discretion Authorized in Other Public Land Statutes

Historically, executive withdrawal powers have afforded a president a great deal of discretion in making a withdrawal decision.⁷⁷ In the case of presidential withdrawal powers, Congress has ordinarily provided little to no guidance and

rarely prescribes any procedure, and this broad grant of discretion has been upheld in the courts.⁷⁸ Nevertheless, in comparison, OCSLA arguably provides for the broadest grant of discretion of all of the withdrawal powers.

a. Discretion Under the Forest Reserve Act

Like OCSLA, the Forest Reserve Act of 1891 provided for no express limitations on the President's discretion in exercising the withdrawal power, and President Cleveland irritated many members of Congress with his liberal use of the Act.⁷⁹ In effecting his final flurry of withdrawals, President Cleveland relied on the report of a commission tasked with exploring the West and recommending suitable forest reserves; some senators contended that the recommendations were so inconsiderate of western needs that the commission could not have visited, much less surveyed, all the reserves they recommended.⁸⁰ Though members of Congress questioned President Cleveland's judgment in making the reserves, they nonetheless recognized that it was within his granted discretion to do so.⁸¹ However, even in the face of this broad and potentially problematic power, when amending the Act's withdrawal authority via the Organic Act of 1897, Congress only slightly cabined the discretion of the President by imposing a public interest standard and mandating specific purposes.⁸²

When arguing that comprehensive control over the reserves should be turned over to the executive due to the scientific nature of modern forest management and the wide variation of regions of the country, one senator insisted that the executive, not the legislature, is best suited for these kinds of decisions.⁸³ The degree of discretion the Act maintained in the President stands in stark contrast to the more complicated procedure required for revocations initiated by the Secretary of the Interior.⁸⁴ Whereas the President need only issue an "Executive order [or] proclamation" in order to revoke a withdrawal, the Secretary must provide 60 days' notice in at least two newspapers, appoint an inspector to investigate the reserves proposed for revocation, and make findings that the land is better

suiting for mining or agriculture than for forest purposes.⁸⁵ In keeping broad discretion in the hands of the President, Congress recognized the ability of the President to place the needs of the nation as a whole above those of more narrow, local interests.

b. Discretion Under the Antiquities Act

Furthermore, the history of the Antiquities Act provides evidence that the courts are willing to affirm that broad discretion. The Antiquities Act states that “[t]he President may, in the President’s discretion, declare . . . national monuments.”⁸⁶ An early competing bill of the Act would have required additional procedures to be carried out: a preliminary survey of public lands would be conducted before any withdrawals could take place on them.⁸⁷ While such a requirement would not have been unreasonable, the legislature again chose to vest decision-making authority solely in the hands of the President. Though the Antiquities Act does require that withdrawals must be (1) “objects of historic or scientific interest” and (2) “confined to the smallest area compatible with the proper care and management of the objects to be protected,” the Supreme Court has upheld creative uses of the Act, thereby affirming the broad discretion of the President.⁸⁸

The history of the Forest Reserve Act and the Antiquities Act reveals that the broad discretion vested in the President in OCSLA Section 12(a) is not a new innovation. The limitations imposed on the President’s discretion by past withdrawal powers have been interpreted so broadly as to amount to almost no limitation at all, and Section 12(a) is arguably broader still. The statutory language that the President “may, from time to time, withdraw from disposition any of the unleased lands” places no restrictions or procedure on the decision of the President to effect a withdrawal.⁸⁹ Moreover, if a court decides that Section 12(a) incorporates all of the policies defined by Congress in OCSLA Section 2 as guidance for the President’s discretion, these limitations would likely be broadly construed, like the Court’s interpretation of “historic or scientific interest” in the Antiquities Act.⁹⁰ That is, policy

limitations such as 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[,]” are broad enough to permit virtually any exercise of the withdrawal authority of the President.⁹¹

3. The Power to Modify or Revoke Withdrawals in Other Public Land Statutes

Some presidential withdrawal language explicitly includes the attendant power to modify or revoke past withdrawals, while other withdrawal powers make no express mention of the authority to do so and are limited to the “withdrawal” language only. Historically, the absence of a reference to the authority to “modify or revoke” in a withdrawal statute has resulted in an interpretation that the statute only grants the power to make withdrawals, thereby prohibiting the executive from significantly modifying or revoking past withdrawals.⁹² Under this interpretation, a presidential withdrawal that did not include the power to modify or revoke past withdrawals could only be altered or undone by an act of Congress, which has the constitutional authority to regulate all “Property belonging to the United States.”⁹³

a. The Forest Reserve Act’s Power to Modify or Revoke

The Forest Reserve Act of 1891 instructs that the President “may, from time to time, set apart and reserve . . . forests[.]”⁹⁴ Similar to Section 12(a) of OCSLA, there is no express mention of the power to modify or revoke withdrawals,⁹⁵ and this lack of an explicit power heightened tensions toward forest reserves at the end of the Cleveland administration.⁹⁶ During the final weeks of his presidency, President Cleveland withdrew 13 forest reserves in seven states and then vetoed Congress’s bill overriding his withdrawals.⁹⁷ These acts ignited a firestorm of resentment and protest in the West, where the withdrawals took place, because they made it illegal for many settlers to access the local timber on which they relied.⁹⁸ After President McKinley came into office, he suggested that he would be willing to revoke or decrease the size

of the withdrawals, but it was unclear whether he actually possessed the power to do so.⁹⁹ Even in the context of this “urgent request” from the affected states, without an explicit power grant in the statute, members of Congress were wary of the President using the withdrawal power of the Forest Reserve Act to revoke the withdrawal of the preceding administration.¹⁰⁰

Some members of Congress did not believe that the Forest Reserve Act granted the President the power to modify or revoke past withdrawals at all.¹⁰¹ One senator remarked that even if the power was implied from the authority to make withdrawals, that such an “extreme measure” by the President “might be considered violent or disrespectful to a predecessor in office,” and urged for the passage of the proposed amendment explicitly granting such a power.¹⁰² Thus, the withdrawal power of the Forest Reserve Act was amended in the Organic Act of 1897 to state: “The President of the United States is authorized and empowered to *revoke, modify, or suspend* any and all Executive orders and proclamations or any part thereof issued under section 471 of this title, from time to time as he shall deem best for the public interests.”¹⁰³ To make sure the boundaries of this modification power were clear, the provision continued: “By such modification he may reduce the area or change the boundary lines or may vacate altogether any order creating a national forest.”¹⁰⁴

From the history and amendments of the Forest Reserve Act, it is apparent that Congress believed the President’s authority to withdraw public lands and the authority to modify or revoke past withdrawals to be two separate powers. The legislative history makes clear that Congress did not believe that the power to modify or revoke was necessarily implied by the power to effect withdrawals, and at the very least, such a claim would result in “insulting the Office of the Presidency.”¹⁰⁵ As the first statutorily granted withdrawal power, the lessons from the Forest Reserve Act informed the withdrawal provisions in subsequent public land statutes.

b. The Antiquities Act’s Power to Modify or Revoke

Though a President has never attempted to revoke a national monument established under the

Antiquities Act, such a revocation was seriously considered by President Franklin Roosevelt in 1938, and the legal opinion requested of Attorney General Cummings has become the influential source on the issue.¹⁰⁶ Because the text of the Act makes no express mention of revoking past withdrawals, Cummings reasoned that if the President possessed revocation authority, it must be by implication.¹⁰⁷ However, he decided that statutory grants of withdrawal powers alone do not also grant the power to revoke such withdrawals.¹⁰⁸ “The grant of power to execute a trust, even discretionally, by no means implies the further power to undo it when it has been completed. . . . [T]he Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can.”¹⁰⁹

The express grant of revocation authority granted by Congress in the Organic Act of 1897 is easily distinguished from the withdrawal power in the Antiquities Act and likewise in OCSLA Section 12(a).¹¹⁰ The opinion of Attorney General Cummings regarding Antiquities Act reservations is directly applicable to presidential withdrawals under OCSLA and indicative that OCSLA Section 12(a) does not grant the President the power to modify or revoke past withdrawals.

In sum, the public land withdrawal powers in effect at the time OCSLA was enacted support a broad interpretation of the authority and discretion granted to the President under Section 12(a). But this withdrawal grant does not necessarily include authority to modify or revoke past withdrawals. This conclusion is based on the fact that Congress has considered varying types and degrees of restrictions on the withdrawal power and yet chose to place almost no restrictions on Section 12(a) authority under OCSLA. In addition, Congress has required varying types and degrees of limitations on the discretion afforded to the President, but chose to grant full discretion to the President in OCSLA Section 12(a). Taken together, the scope of the potential withdrawals under OCSLA Section 12(a) should extend to whatever portion of the OCS that the President sees fit. Finally, Congress

has recognized the importance of express language for proper modification and revocation of past withdrawals.¹¹¹ Accordingly, OCSLA Section 12(a), which lacks express revocation or modification language, should not be construed to impliedly grant the President the power to modify or revoke past withdrawals.

IV. Evolution of the Executive Power Under OCSLA Section 12(a)

A. *Midwest Oil Co.* and Congressional Acquiescence

While the legislative history and judicial decisions on statutorily granted public lands withdrawal powers do not appear to support the conclusion that OCSLA Section 12(a) affords the President the authority to modify or revoke past withdrawals, case law provides another view that must be considered. In the landmark case of *United States v. Midwest Oil Co.*, the Court affirmed the executive’s ability to acquire withdrawal powers by its own insistence via congressional acquiescence in the practice.¹¹²

In the early 20th century, government officials were concerned that the operation of the mining laws—which allowed anyone who found minerals on the public lands in sufficient quantities to claim ownership over the minerals and the land in which they lie—would result in the federal government giving away ownership to all of the oil fields in California within a matter of months.¹¹³ In response, President Taft issued a “temporary petroleum withdrawal,” premised on no particular statutory power, and withdrew over three million acres of land in California and Utah.¹¹⁴ In spite of the proclamation, prospectors entered onto withdrawn land and produced oil, and the government filed suit to enjoin the production and any further development.¹¹⁵

The Supreme Court had previously traced the President’s authority to withdraw lands back to the “early period in the history of the government.”¹¹⁶ In *Midwest Oil*, most of the Court’s references to examples of this implied withdrawal power were instances when the President acted out of necessity and in the public interest, and the Court reasoned that when it must determine the existence

of a power, it will give weight to actual usage.¹¹⁷ “[G]overnment is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice.”¹¹⁸ Thus, in upholding Taft’s petroleum withdrawals, the Court held that congressional silence matures into consent if the Congress is aware of a regular practice of the executive and acquiesces to that practice by not acting to repudiate it.¹¹⁹

Later statutes gave express mention to the notion of implied authority to make withdrawals via congressional acquiescence, further bolstering its existence under the Court’s reasoning.¹²⁰ The case of *Midwest Oil* has become something of a historical relic, however, because the Federal Land Policy and Management Act of 1976 (FLPMA) explicitly repealed this authority, replacing it with a more constrained withdrawal power.¹²¹ Nevertheless, scholars have suggested that this legislative repeal of the holding in *Midwest Oil* might apply only to the lands over which FLPMA exerts authority.¹²² Notably, the definition of “public lands” for the purposes of FLPMA does not include the OCS, and thus the willingness of Congress and the Court to acquiesce to what might otherwise be deemed executive overreach still holds sway over the President’s authority to withdraw lands under OCSLA.¹²³ While there is no room to apply this concept to withdrawals of the OCS explicitly granted under Section 12(a), it is possible to apply it a fortiori to the power of the President to modify or revoke OCS withdrawals, especially if these actions have turned into a regular practice.

B. Bush’s “Modification” Under Section 12(a) as an Effective Revocation of Past Withdrawals

In 1990, President George H.W. Bush withdrew the majority of the OCS from the federal offshore leasing program through his Section 12(a) authority.¹²⁴ This withdrawal was set to expire in 2000, but in 1998, President Clinton subsequently extended the withdrawal until 2012.¹²⁵ However,

in 2008, with gas prices at record highs and a presidential election looming, then President George W. Bush modified Clinton's withdrawal, opening up previously withdrawn portions of the OCS to oil and gas development.¹²⁶ Though it was entitled "Memorandum on Modification of the Withdrawal," upon closer inspection the so-called modification amounted to a complete revocation of almost all of the withdrawals of the earlier memoranda, leaving in place only those parts of the OCS that were also designated as "Marine Sanctuaries."¹²⁷ The "modification" resulted in a reduction of the previous withdrawal's total area from 250 million to 10.8 million acres.¹²⁸

Though modifications of OCSLA Section 12(a) withdrawals had been made in the past, in contrast to Bush's 2008 revocation, these prior modifications likely conformed to the authority provided by the Act. First, President Clinton used his Section 12(a) authority to modify a previous administration's withdrawal in 1998.¹²⁹ Though termed a modification, effectively it only added to the previous withdrawal by extending the duration of the initial withdrawal. It did nothing to alter or revoke the original withdrawal, leaving its effects intact, and thus may be viewed as a supplement to rather than a supplanting of the prior withdrawal.¹³⁰

Second, in 2007, another modification of a Section 12(a) withdrawal actually reduced the scope of the withdrawal by about 50 million acres.¹³¹ Nevertheless, this reduction could be characterized less as an example of a president acting in his sole discretion under Section 12(a) as it was an action taken via Section 12(a) but pursuant to a recently passed requirement of Congress.¹³² The Gulf of Mexico Energy Security Act (GOMESA) instructed the Secretary of the Interior to specifically include certain withdrawn tracts of the OCS in the next leasing round of the offshore leasing program; thus, the President had to modify the withdrawal in order to fulfill his duty to carry out the law.¹³³ Therefore, because the President was executing an act of Congress, this particular revocation was likewise not beyond the President's authority.

As a result, only Bush's 2008 modification can be viewed as a violation of the President's Section 12(a) authority.¹³⁴ The Supreme Court's holding in *Midwest Oil* applied to congressional silence regarding a "regular practice" of the executive.¹³⁵ Accordingly, it would be difficult to argue that a single action—Bush's 2008 modification—resulted in a "regular practice," thereby granting the President implied authority to modify or revoke Section 12(a) withdrawals.¹³⁶ However, acquiescence may be indicated by other means.

C. *Grisar v. McDowell* and Congressional Recognition

The reasoning in *Midwest Oil* relied on the congressional silence that the Court found regarding the practice of President Taft and his predecessors to withdraw lands without explicit statutory authority.¹³⁷ In its opinion, the Court explained that a similar pattern dates back to the Court's decision in *Grisar v. McDowell*, where the Court made no mention of the need for an executive action to occur with sufficient frequency to "crystallize into a regular practice."¹³⁸ Instead, in *Grisar* the Court acknowledged that the President may also acquire implied withdrawal authority when this power is "recognized in . . . acts of Congress."¹³⁹

In *Grisar*, the defendant asserted that the President did not have the power to withdraw the lands in question because of the lack of an explicit power grant from Congress.¹⁴⁰ Even though Congress had never granted this authority to the President directly, the Court pointed to acts of Congress that nonetheless recognized the existence of this authority, such as by referencing lands previously withdrawn by "proclamation of the President."¹⁴¹ For the particular withdrawal at issue in *Grisar*, the Court declared that "[t]he action of the President in making the reservations in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other works upon . . ." the withdrawn land.¹⁴²

In the same way, the Court could consider that Congress “indirectly approved” the revocation power of the President by passing laws recognizing the President’s Section 12(a) revocation. Two months after President Bush revoked the withdrawal of over 200 million acres of the OCS in his 2008 “modification,” Congress ended its own moratorium on the same portions of the OCS, thereby allowing the President’s revocation to have full effect.¹⁴³ The 1998 withdrawal by President Clinton that President Bush revoked defined its boundaries according to the areas of the OCS over which a congressional moratorium was in effect.¹⁴⁴ Congress had instituted a moratorium by denying funding to the Department of the Interior for any leasing or pre-leasing activities on certain areas of the OCS.¹⁴⁵ When Congress acted in October 2008 to allow its 26-year-old moratorium to expire, the consolidated appropriations bill providing funding for offshore leasing on any part of the OCS could be viewed as an act of Congress that “recognized” the revocation power of the President under OCSLA Section 12(a).¹⁴⁶

Perhaps acknowledging that OCSLA Section 12(a) does not grant the power to revoke past withdrawals, President Bush had tried for some time to get Congress to act first, saying publicly: “When Congress lifts the legislative ban, I will lift the executive prohibition.”¹⁴⁷ And, like the early exercises of the implied withdrawal power, President Bush was also acting “as the exigencies of the public service required.”¹⁴⁸ Gas prices in the week that President Bush issued his revocation, July 14, 2008, were the highest ever in U.S. history, and the situation was described as a “gas price emergency” by one senator who nonetheless opposed lifting the moratorium.¹⁴⁹

It should be noted that the presidential withdrawal and the congressional funding moratorium—though each applied to the same area of the OCS—were two separate and overlapping bans. By letting the moratorium expire, Congress did not in any real sense affirm the revocation action of the President; rather, the act of Congress removed the second, independent barrier to allowing offshore leasing

to proceed.¹⁵⁰ In the broader context of the public debate regarding the moratorium, the political campaigns’ coverage of gas prices and support for offshore drilling, and the ongoing negotiation between Congress and the White House regarding the particulars of the appropriations bill, it seems clear that Congress recognized the total effect of its action to allow the moratorium to expire.¹⁵¹ In fact, the Minerals Management Service (MMS)¹⁵² began including areas of the OCS in its leasing schedule planning before the congressional moratorium had been lifted, further underscoring Congress’s awareness of its role in effectively affirming the President’s revocation.¹⁵³ Nonetheless, the consolidated appropriations bill here differed materially from the appropriations in *Grisar*; instead of explicitly granting funding to the lands affected by the President’s action as in *Grisar*, Congress only removed the language explicitly denying funding to the affected lands.¹⁵⁴

As a result, though there is a plausible path to the presidential authority to modify or revoke past withdrawals under OCSLA Section 12(a)—via indirect recognition by Congress consistent with the holding in *Grisar*—this route seems tenuous at best. Case law has suggested that the congressional acquiescence in *Midwest Oil* and the congressional recognition in *Grisar* are actually one and the same.¹⁵⁵ Thus, a court could reasonably hold that FLPMA’s repeal of “the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress” equally applies to any implied recognition of a presidential revocation power under OCSLA Section 12(a).¹⁵⁶

Nevertheless, the Bush and the Obama administrations both acted on Bush’s 2008 revocation by conducting pre-leasing activities for portions of the OCS that would have been otherwise withdrawn; however, no lease sales were actually conducted for any of the otherwise-withdrawn areas before the withdrawal’s stated expiration of June 30, 1998.¹⁵⁷ Although OCSLA does specifically provide for citizen suits and pre-implementation judicial review, no entity would

have likely had standing to sue for President Bush's potential violation of OCSLA Section 12(a).¹⁵⁸ The only lease sale set to be approved in the Revised 2007–2012 Leasing Program that would have been otherwise withdrawn was preemptively cancelled by the Secretary of the Interior in response to the BP Deepwater Horizon oil spill in the Gulf of Mexico.¹⁵⁹ Accordingly, even under the citizen suit provisions of OCSLA, an interested party would likely lack a cognizable injury to support a judicial finding of standing.¹⁶⁰ Thus, any future dispute should not take this lack of legal action into account.

Because of the early history of the executive's use of implied, nonstatutory withdrawal powers and the Court's willingness to affirm the existence of these powers, it is possible that the President may possess the power to modify or revoke Section 12(a) withdrawals even if this authority was not explicitly granted by Congress in the statute. Though FLPMA repealed any withdrawal powers granted by congressional acquiescence, this repeal may not apply to the OCS, and thus the Supreme Court's decisions in *Midwest Oil* and *Grisar* could still hold sway. President Bush's effective revocation of President Clinton's 1998 withdrawal under OCSLA Section 12(a) was arguably "recognized" by Congress when it lifted the congressional moratorium on most of the OCS. As a result, by granting funding to the offshore leasing program for the lands subject to the recent revocation, it could be said that Congress has approved of the President's use of Section 12(a) authority to revoke the withdrawals of past administrations and thereby acquiesced to that interpretation of OCSLA Section 12(a).

V. Conclusion

President Obama's withdrawals of large areas of the Arctic and Atlantic OCS brought newfound attention to OCSLA Section 12(a). While some applauded the action, others claimed the withdrawals were an abuse of authority and called on the new president to quickly undo them under the same provision. While the present analysis

concludes that President Obama acted within the authority and discretion granted him by OCSLA Section 12(a), it remains uncertain whether the same provision similarly grants the authority to modify or revoke withdrawals of the OCS. Though the plain text and analogies to contemporaneous statutorily granted presidential withdrawal powers seem to discourage an interpretation that Section 12(a) grants such authority, the early history of nonstatutory executive withdrawals suggests that this power may have been acquired through congressional recognition and acquiescence, as in the Supreme Court's decisions in *Midwest Oil* and *Grisar*. President Bush's 2008 memorandum serves as an example of the President using Section 12(a) authority to revoke an OCS withdrawal, and Congress's subsequent funding of offshore leasing activities in the area of the OCS previously withdrawn could be understood as congressional recognition of that authority.

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Endnotes

1 Nick Snow, *Obama Puts US Arctic, Atlantic OCS Off-Limits to Oil, Gas Activity*, OIL & GAS J. (Dec. 20, 2016), <http://www.ogj.com/articles/2016/12/obama-puts-us-arctic-atlantic-ocs-off-limits-to-oil-gas-activity.html>.

2 Presidential Memorandum—Withdrawal of Certain Areas off the Atlantic Coast on the Outer Continental Shelf from Mineral Leasing, 2016 WL 7367725 (Dec. 20, 2016); Presidential Memorandum—Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 WL 7367726 (Dec. 20, 2016).

3 Press Release, U.S. Dep't of the Interior, Secretary Jewell Applauds President's Withdrawal of Atlantic and Arctic Ocean Areas from Future Oil and Gas Leasing (Dec. 20, 2016), <https://www.doi.gov/pressreleases/secretary-jewell-applauds-presidents-withdrawal-atlantic-and-arctic-ocean-areas-future>.

4 Snow, *supra* note 1.

5 See *id.*; *Clinton Extends Wide Offshore Drilling Ban*, OIL & GAS J. (June 22, 1998), <http://www.ogj.com/articles/print/volume-96/issue-25/in-this-issue/drilling/>

clinton-extends-wide-offshore-drilling-ban.html.

6 See, e.g., *Bush Creates World's Biggest Ocean Preserve*, NBC NEWS (June 16, 2006, 8:58 AM), http://www.nbcnews.com/id/13300363/ns/us_news-environment/t/bush-creates-worlds-biggest-ocean-preserve; Philip Shabecoff, *Bush Cuts Back Areas off Coasts Open for Drilling*, N.Y. TIMES, June 27, 1990, <http://www.nytimes.com/1990/06/27/us/bush-cuts-back-areas-off-coasts-open-for-drilling.html>.

7 On April 28, 2017, President Trump signed an executive order revoking Obama's Arctic and Atlantic withdrawals enacted under OCSLA, and the legality of the executive order was quickly challenged in federal court by several conservation groups. Executive Order Implementing an America-First Offshore Energy Strategy, 82 Fed. Reg. 20,815 (Apr. 28, 2017); Complaint, League of Conservation Voters v. Trump, No. 3:17-cv-00101-SLG (D. Alaska May 3, 2017), 2017 WL 1736693.

8 Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356b (2012).

9 43 U.S.C. § 1302 (2012); BUREAU OF OCEAN ENERGY MGMT. (BOEM), *Outer Continental Shelf*, <https://www.boem.gov/Outer-Continental-Shelf/> (last visited Mar. 29, 2017).

10 43 U.S.C. §§ 1334, 1344 (2012).

11 *Id.*

12 43 U.S.C. § 1334 (2012).

13 43 U.S.C. §1341(a) (2012).

14 See, e.g., Defense Withdrawal Act, 43 U.S.C. §§ 155-158 (2012); Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1714 (2012); Antiquities Act, 54 U.S.C. § 320301 (2012).

15 Robin Kudis Craig, *Treating Offshore Submerged Lands as Public Lands: A Historical Perspective*, 34 PUB. LAND & RESOURCES L. REV. 51, 52–55, 80 (2013).

16 Peter C. Fleming, *Vested Pre-FLPMA Rights of Way for Water Conveyance Facilities*, COLO. LAW., Feb. 1996, at 83.

17 63C AM. JUR. 2d *Public Lands* § 31.

18 See *id.*

19 See 43 U.S.C. § 1341(a) (2012).

20 OCSLA, ch. 345, § 2, 67 Stat. 46 (1953); Proclamation No. 3339, 74 Stat. C48 (Mar. 15, 1960).

21 Natural Resources Defense Council (NRDC), Briefer on Presidential Withdrawal Under OCSLA Sec. 12(A), at i (2016) [hereinafter NRDC Briefer], https://www.nrdc.org/sites/default/files/briefer-on-ocsla-withdrawal-authority_20161121_0.pdf. President Clinton withdrew areas of the OCS totaling approximately 300 million acres in 1998. *Id.*

22 Snow, *supra* note 1.

23 LARRY M. EIG, CONGRESSIONAL RESEARCH SERVICE (CRS), STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 3 (2011); see *Ex parte Collett*, 337 U.S. 55, 61 (1949).

24 43 U.S.C. § 1341(a) (2012).

25 See *id.*

26 *Id.*

27 *Id.* (emphasis added).

28 See *id.*

29 43 U.S.C. § 1331(b) (2012); 43 U.S.C. § 1334(a) (2012); 43 U.S.C. § 1341(a) (2012).

30 *Franklin v. Mass.*, 505 U.S. 788, 788–801 (1992).

31 See Presidential Memorandum—Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 WL 7367726 (Dec. 20, 2016).

32 See 43 U.S.C. § 1341(a) (2012).

33 *United States v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850).

34 *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); EIG, CRS, *supra* note 23, at 13–14.

35 43 U.S.C. § 1344 (2012).

36 See DEP'T OF INTERIOR, PROPOSED FINAL PROGRAM: 5-YEAR OCS PROGRAM (1980), https://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Five_Year_Program/PFP%2080-82.pdf; BOEM, DEP'T OF INTERIOR, 2017–2022 OUTER CONTINENTAL SHELF OIL AND GAS LEASING PROPOSED FINAL PROGRAM (2016) [hereinafter 2017 PFP], <https://www.boem.gov/2017-2022-OCS-Oil-and-Gas-Leasing-PFP/>.

37 As the head of an executive agency, the Secretary is directed by the President and can be fired without cause. *Myers v. United States*, 272 U.S. 52, 163–64 (1926); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631–32 (1935). Thus, in the sense that the President would have final say over the development of Five-Year Plans, this power of exclusion can be indirectly attributed to the President as well as the Secretary.

38 See *Hibbs*, 542 U.S. at 101.

39 See Press Release, Dep't of Interior, Interior Department Cancels Arctic Offshore Lease Sales (Oct. 16, 2015), <https://www.doi.gov/pressreleases/interior-department-cancels-arctic-offshore-lease-sales>.

40 43 U.S.C. § 1341(a) (2012).

41 See *id.*; 43 U.S.C. § 1344(e) (2012).

42 2017 PFP, *supra* note 36, at 4-11 to 4-12.

43 43 U.S.C. § 1344(e) (2012).

44 43 U.S.C. § 1341(a) (2012); *United States v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850); see 43 U.S.C. § 1332 (2012).

- 45 See 2017 PFP, *supra* note 36, at 4-11.
- 46 See *Atlantic OCS Facts and Figures*, BOEM, <https://www.boem.gov/Atlantic-OCS-Facts-and-Figures/> (last visited Mar. 17, 2017); Snow, *supra* note 1.
- 47 See 43 U.S.C. § 1344 (2012).
- 48 *Id.*
- 49 See U.S. CONST. art. II, § 3, cl. 5 (granting the President the power to “take care that the laws be faithfully executed.”)
- 50 See OCSLA, 43 U.S.C. § 1331-1356b (2012); PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* 19, 115 (2d ed. 2014).
- 51 COOPER, *supra* note 50, at 115.
- 52 See *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *United States v. Boisdore’s Heirs*, 49 U.S. 113, 122 (1850).
- 53 Robin Kudis Craig, *Treating Offshore Submerged Lands as Public Lands: A Historical Perspective*, 34 PUB. LAND & RESOURCES L. REV. 51, 52-55, 80 (2013).
- 54 *Id.* at 77, 79.
- 55 Law of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (repealed Oct. 21, 1976). The act, entitled “An act to repeal timber-culture laws, and for other purposes,” is often referred to as the General Revision Act; Section 24 of the Act is commonly referenced as the Forest Reserve Act. *Id.* at 1095; David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RES. J. 279, 284, 284 n.25 (1982).
- 56 Law of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (repealed Oct. 21, 1976).
- 57 Olson, 45 IBLA 232, 239 (1980).
- 58 *Light v. United States*, 220 U.S. 523, 523 (1911).
- 59 *Id.* at 535-36.
- 60 *Id.* at 534, 536-37.
- 61 16 U.S.C. §§ 478-481 (2012).
- 62 16 U.S.C. § 478 (2012).
- 63 See 16 U.S.C. §§ 473-483 (2012).
- 64 Getches, *supra* note 55, at 286.
- 65 SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT: 1890-1920*, at 47 (1st ed. 1999).
- 66 *Id.* Interestingly, President Roosevelt nevertheless “spoke the last word. Between the time that Congress passed the measure and he signed it, Roosevelt set aside 75,000,000 additional acres in reserves.” *Id.*
- 67 54 U.S.C. § 320301(a) (2012).
- 68 54 U.S.C. § 320301(b) (2012).
- 69 See Brian Maffly & Thomas Burr, *Obama Declares Bears Ears National Monument in Southern Utah*, SALT LAKE TRIB., Dec. 28, 2016, 1:57 PM, <http://www.sltrib.com/home/4675012-155/mike-lee-staffer-says-bears-ears>. These arguments often revolve around the assurance of the bill’s sponsor that the law would “[c]ertainly not” result in the huge withdrawals occurring under the Forest Reserve Act: “The objective is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos of the Southwest.” Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 484 n.59 (2003).
- 70 Squillace, *supra* note 69, at 485.
- 71 *Id.* at 479, 484.
- 72 See *Cameron v. United States*, 252 U.S. 450, 455 (1920).
- 73 *Id.* at 490, 490 n.92.
- 74 *Cameron*, 252 U.S. at 454. Curiously, later that same year, Ralph Cameron won election to the U.S. Senate, campaigning on issues such as flooding the Grand Canyon for hydroelectricity. Douglas H. Strong, *Ralph H. Cameron and the Grand Canyon (Part II)*, 20 ARIZ. & WEST 155, 155 (1978).
- 75 *Cameron*, 252 U.S. at 455-56.
- 76 *Id.* at 455.
- 77 There is inevitably some overlap here with the restrictions placed on withdrawals—looser restrictions allow for broader discretion. It is nevertheless helpful to approach the concept of the scope of the withdrawal power from both angles because opponents’ critiques of presidential withdrawals often utilize parallel characterizations: the withdrawal was an abuse of authority (the President does not have the power to make this withdrawal) and an abuse of discretion (the President did not properly exercise his power to make this withdrawal).
- 78 See, e.g., 16 U.S.C. § 473 (2012); 54 U.S.C. § 320301(a)-(b) (2012).
- 79 HAYS, *supra* note 65, at 47.
- 80 30 CONG. REC. 913 (daily ed. May 6, 1897) (statement of Sen. Pettigrew); Robert Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 NAT. RES. LAWYER 503, 509 (1974).
- 81 30 CONG. REC. 913 (daily ed. May 6, 1897) (statement of Sen. Pettigrew).
- 82 16 U.S.C. §§ 473, 475 (2012).
- 83 Bassman, *supra* note 80, at 508 (emphasizing that “we must repose confidence in some authority” besides Congress).
- 84 See 43 U.S.C. §§ 471, 473, 482 (2012).
- 85 43 U.S.C. § 482 (2012).
- 86 54 U.S.C. § 320301(a) (2012).
- 87 Squillace, *supra* note 69, at 479.
- 88 54 U.S.C. § 320301(a)-(b) (2012); *Cappaert v.*

United States, 426 U.S. 128, 131 (1976). In *Cappaert v. United States*, the Supreme Court upheld the President’s authority to withdraw not only land but a subsurface pool known as “Devil’s Hole.” Referencing the President’s proclamation, the Court also reasoned that the rare species of fish residing in the pool was “one of the features of scientific interest” and thus protected by the withdrawal. *Cappaert*, 426 U.S. at 132–34, 141.

89 43 U.S.C. § 1341(a) (2012).

90 See 43 U.S.C. § 1332.

91 See *id.*

92 See Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att’y Gen. 185 (1938).

93 U.S. CONST. art. IV, § 3, cl. 2.

94 Law of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (repealed Oct. 21, 1976).

95 See 43 U.S.C. § 1341(a) (2012); law of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (repealed Oct. 21, 1976).

96 Bassman, *supra* note 80, at 509–10.

97 *Id.*

98 *Id.* Apparently, entire towns were included in some of the forest reserves, which President Cleveland was led to believe were uninhabited wilderness. 30 CONG. REC. 913 (daily ed. May 6, 1897) (statement of Sen. Pettigrew).

99 Bassman, *supra* note 80, at 510.

100 30 CONG. REC. 900–901 (daily ed. May 5, 1897) (statement of Sen. Gorman).

101 *Id.*

102 30 CONG. REC. 902 (daily ed. May 5, 1897) (statement of Sen. Carter).

103 16 U.S.C. § 473 (2012) (emphasis added).

104 *Id.*

105 Bassman, *supra* note 80, at 510.

106 Squillace, *supra* note 69, at 552.

107 Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att’y Gen. 185 (1938).

108 *Id.*

109 *Id.*

110 The Pickett Act of 1910 provides another example of Congress explicitly delegating the President the authority to revoke a past withdrawal: “the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands . . . and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.” General Withdrawal Act of 1910 (Pickett Act), ch. 421, § 1, 36 Stat. 847, 847 (1910).

111 See 30 CONG. REC. 900–902 (daily ed. May 5, 1897).

112 *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

113 *Id.* at 466–67.

114 *Id.*

115 *Id.* at 468.

116 *Id.* at 473 (quoting *Grisar v. McDowell*, 73 U.S. 363, 381 (1868)).

117 *Id.* at 473; CHARLES F. WHEATLEY JR., STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS, PUB. LAND L. REV. COMM’N 74–75 (1969).

118 *Midwest Oil*, 236 U.S. at 472–73.

119 *Id.* at 475.

120 Getches, *supra* note 55, at 299–300.

121 *Id.*

122 *Id.*

123 See FLPMA, 43 U.S.C. § 1714(e) (2012).

124 Sheryl Gay Stolberg, *Bush Calls for End to Ban on Offshore Drilling*, N.Y. TIMES, June 19, 2008, <http://www.nytimes.com/2008/06/19/washington/19drill.html>.

125 *Id.*

126 *Id.*

127 Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition, 44 WEEKLY COMP. PRES. DOC. 986, 986 (July 14, 2008).

128 NRDC Briefer, *supra* note 21, at i.

129 Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 WEEKLY COMP. PRES. DOC. 1111, 1111 (June 12, 1998).

130 See *id.*

131 Memorandum on Modification of the June 12, 1998, Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 43 WEEKLY COMP. PRES. DOC. 19, 19 (Jan. 9, 2007); NRDC Briefer, *supra* note 21, at iii n.11.

132 Gulf of Mexico Energy Security Act (GOMESA), Pub. L. No. 109-432, § 103(b), 120 Stat. 2922, 3002 (2006).

133 *Id.*

134 However, President Trump’s revocation of Obama’s Section 12(a) withdrawals copied Bush’s 2008 modification almost verbatim and thus may also be a violation of Section 12(a) authority. See Executive Order Implementing an America-First Offshore Energy Strategy, 82 Fed. Reg. 20,815 (Apr. 28, 2017).

135 *United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915).

136 See *id.*

137 *Id.* at 466–68.

138 *Id.* at 473; see *Grisar v. McDowell*, 73 U.S. 363 (1868).

139 *Grisar*, 73 U.S. at 381.

140 *Id.* at 380.

141 *Id.* at 381.

- 142 *Id.*
- 143 Jacob Dweck et al., *Congress Allows Moratorium on Offshore Drilling to Expire*, LEXOLOGY (Oct. 1, 2008), <http://www.lexology.com/library/detail.aspx?g=4cb13ed2-aed3-4d0f-8b85-59e23a8ed659>.
- 144 Snow, *supra* note 1.
- 145 See Dweck et al., *supra* note 143.
- 146 See *Grisar*, 73 U.S. at 381; Environment News Service (ENS), *Congress Allows Offshore Oil Drilling Ban to Expire*, NBC N.Y. (Sept. 30, 2008), http://www.nbcnewyork.com/news/green/Congress_Allows_Offshore_Oil_Drilling_Ban_to_Expire.html.
- 147 *Bush Calls on Congress to Lift Oil Drilling Ban*, NBC NEWS (July 14, 2008, 4:02:47 PM), http://www.nbcnews.com/id/25674571/ns/business-oil_and_energy/t/bush-calls-congress-lift-oil-drilling-ban/#.WNvklzvyteU. Curiously, despite many Democrats in Congress and environmental groups speaking out against the potential action by President Bush, there appears to have been no debate at the time regarding whether the President could lawfully revoke past withdrawals under Section 12(a) in the first place.
- 148 *Grisar*, 73 U.S. at 381.
- 149 U.S. Energy Information Administration (EIA), U.S. Regular Gasoline Prices: Full History, http://www.eia.gov/oil_gas/petroleum/data_publications/wrgp/mogas_history.html (last updated Mar. 20, 2017); Steven Lee Myers & Carl Hulse, *Bush Lifts Drilling Moratorium, Prodding Congress*, N.Y. TIMES, July 14, 2008, <http://www.nytimes.com/2008/07/14/washington/14drillcnd.html>.
- 150 BOEM, DEP'T OF INTERIOR, 2012–2017 OUTER CONTINENTAL SHELF OIL AND GAS LEASING PROPOSED FINAL PROGRAM ENVIRONMENTAL IMPACT STATEMENT 1-1 (2016), https://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Five_Year_Program/2012-2017_Five_Year_Program/01_Introduction_Purpose_Need.pdf.
- 151 Dweck et al., *supra* note 143; Deirdre Walsh, *House Democrats Will Allow Offshore Drilling Ban to Expire*, CNN POLITICS (Sept. 24, 2008, 11:16 AM), <http://www.cnn.com/2008/POLITICS/09/24/congress.drilling.ban/>; *President Urges Congress to Lift Offshore Oil Drilling Ban*, PBS NEWSHOUR (June 18, 2008, 6:00 PM), http://www.pbs.org/newshour/updates/politics-jan-june08-bushoil_06-18/.
- 152 The Minerals Management Service (MMS) is the administrative predecessor to BOEM, which was created in 2011.
- 153 Dweck et al., *supra* note 143.
- 154 *Grisar*, 73 U.S. at 381; Dweck et al., *supra* note 143.
- 155 *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 324–25 (1942); *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 686 (9th Cir. 1976).
- 156 See FLPMA, Pub. L. No. 94-579, § 704(a), 90 Stat. 2744, 2792 (1976).
- 157 See BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION, AND ENFORCEMENT (BOEMRE), DEP'T OF INTERIOR, 2007–2012 REVISED OCS OIL AND GAS LEASING PROGRAM i–ii, 85–93 (2010) [hereinafter 2010 RP], <https://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Five-Year-Program/RP2007-2012wSecSig-pdf.aspx>.
- 158 See OCSLA, 43 U.S.C. § 1349 (2012).
- 159 2010 RP, *supra* note 157, at 93; Noelle Straub, *Interior Suspends Planned Va. Offshore Oil and Gas Lease Sale*, N.Y. TIMES, May 6, 2010, <http://www.nytimes.com/gwire/2010/05/06/06greenwire-interior-suspends-planned-va-offshore-oil-and-73308.html>.
- 160 See *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 479 (D.C. Cir. 2009).

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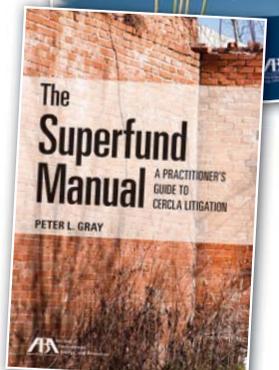
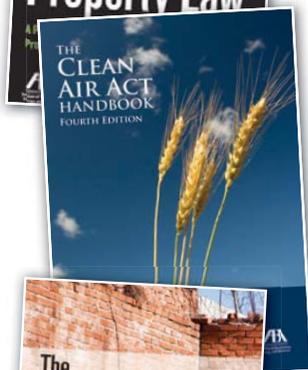
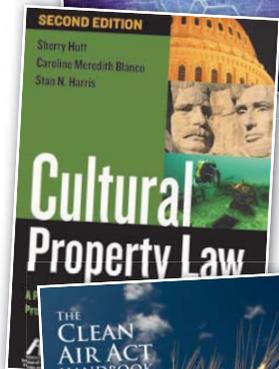
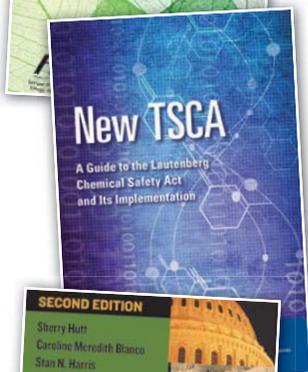
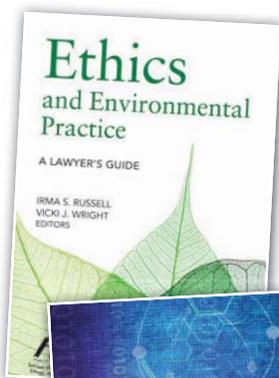
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**MASSACHUSETTS LOBSTERMEN'S
ASSOCIATION, *et al.*,**

Plaintiffs,

v.

WILBUR J. ROSS, Jr., *et al.*,

Defendants.

Civil Action No. 17-406 (JEB)

MEMORANDUM OPINION

In 1905, Teddy Roosevelt wrote that “there can be nothing in the world more beautiful” than the natural wonders of the United States, and “our people should see to it that they are preserved for their children and their children’s children forever.” Outdoor Pastimes of An American Hunter at 317 (1905). Roosevelt was talking, of course, about those legendary sites that most Americans know: Yosemite Valley, the Canyon of Yellowstone, and the Grand Canyon.

But he might have been talking about a less well-known — and only more recently appreciated — natural wonder: the Canyons and Seamounts of the Northwestern Atlantic Ocean. Like the landmarks the twenty-sixth President had in mind, the Canyons and Seamounts are a “region of great abundance and diversity as well as stark geographic relief.” ECF No. 1 (Compl.), Exh. 4 (Proclamation of Northeast Canyons and Seamounts Marine National Monument) at 1. Dating back 100 million years — much older than Yosemite and Yellowstone — they are home to “vulnerable ecological communities” and “vibrant ecosystems.” Id. at 1–2.

And, as was true of the hallowed grounds on which Roosevelt waxed poetic, “[m]uch remains to be discovered about these unique, isolated environments.” Id. at 4.

More than a century after Roosevelt had left office, but in reliance on a conservation statute passed during that time, President Barack Obama proclaimed the Canyons and Seamounts a National Monument. Motivated by the area’s “unique ecological resources that have long been the subject of scientific interest,” the President sought to protect it for future use and study. Id. at 1.

The question before the Court in this case is whether he had the power do so. More specifically, does the Antiquities Act give the President the authority to designate this monument? Plaintiffs are various commercial-fishing associations who argue that it does not for three reasons: first, because the submerged lands of the Canyons and Seamounts are not “lands” under the Antiquities Act; second, because the federal government does not “control” the lands on which the Canyons and Seamounts lie; and third, because the amount of land reserved as part of the Monument is not the smallest compatible with its management. The Government, backed by intervening conservation organizations and two groups of law professor *amici*, disagrees entirely.

The Court concludes that, just as President Roosevelt had the authority to establish the Grand Canyon National Monument in 1908, see Cameron v. United States, 252 U.S. 450 (1920), so President Obama could establish the Canyons and Seamounts Monument in 2016. It therefore grants Defendants’ Motion to Dismiss.

I. Background

The Court begins with a brief discussion of the Antiquities Act and the establishment of the Monument before explaining the procedural history of the case.

A. The Antiquities Act

During the nascency of America's efforts to protect her cultural and scientific heritage, Congress passed the Antiquities Act of 1906. See Pub. L. No. 59–209, 34 Stat. 225 (codified at 54 U.S.C. § 320301 *et seq.*). Proposed initially to address the loss of archaeological artifacts in the West, the Act has played a central role in presidents' modern conservation efforts. See Bruce Babbitt, *Introduction*, in The Antiquities Act of 1906 (Ronald F. Lee, 2001 Electronic Edition). Presidents have declared, in all, 157 national monuments, protecting everything from the natural marvels of the Grand Canyon and Death Valley to Native American artifacts in El Morro and Chaco Canyon. See Carol Hardy Vincent & Laura A. Hanson, Cong. Research Serv., Executive Order for Review of National Monuments: Background and Data at 1 (2017); see also National Park Service, List of National Monuments, <https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm> (last updated Sept. 21, 2018).

The Act works in three parts. First, it authorizes the President, in his discretion, to declare “objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.” 54 U.S.C. § 320301(a). Second, it empowers her to “reserve parcels of land as a part of the national monuments.” Id. § 320301(b). Any parcel of land she reserves must be “confined to the smallest area compatible with the proper care and management of the objects to be protected.” Id. Third, it allows privately held land to be voluntarily given to the federal government if the land is “necessary for the proper care and management” of the national monument. Id. § 320301(c). Together, those provisions give the Executive substantial, though not unlimited, discretion to designate American lands as national monuments.

B. The Northeast Canyons and Seamounts Marine National Monument

This case concerns the Northeast Canyons and Seamounts Marine National Monument, proclaimed by President Obama in 2016. The Monument seeks to protect several underwater canyons and mountains, and the ecosystems around them, situated about 130 miles off the New England coast. See Compl., ¶¶ 2, 54–55. Covering in total about 4,913 square miles, the Monument consists of two non-contiguous units that lie within an area of the ocean known as the U.S. Exclusive Economic Zone. See Proclamation at 2–3. The first covers three underwater canyons that “start at the edge of the continental shelf and drop thousands of meters to the ocean floor.” Compl., ¶ 54. According to the Proclamation, whose scientific conclusions are (as yet) unchallenged, the canyons are home to a diverse range of marine life, including corals, squid, octopus, and several species of endangered whales. Id.; see also Proclamation at 2–3. Because of the oceanographic features of the canyons, they are also home to highly migratory species like tuna, billfish, and sharks. See Proclamation at 2–3.

The second unit covers four undersea mountains known as seamounts. See Compl., ¶ 55. Formed up to 100 million years ago by magma erupting from the seafloor, the seamounts are now extinct volcanoes that are thousands of meters tall. See Proclamation at 3. According to the Proclamation, the geology of the seamounts — namely, their steep and complex topography — results in a “a constant supply of plankton and nutrients to animals that inhabit their sides” and causes an “upwelling of nutrient-rich waters toward the ocean surface.” Id. The seamounts thus support “highly diverse ecological communities,” serving as homes to “many rare and endemic species, several of which are new to science and not known to live anywhere else on Earth.” Id. at 3–4.

Together, the geological formations of the canyons and seamounts allow a wide range of unique and rare species to flourish. As such, the formations and the ecosystems surrounding them “have long been of intense scientific interest.” Id. at 4. Although a range of scientists has studied the area using research vessels, submarines, and remotely piloted vehicles, “[m]uch remains to be discovered about these unique, isolated environments and their geological, ecological, and biological resources.” Id.

In proclaiming the area to be a national monument, President Obama directed the Executive Branch to take several practical steps to conserve the area’s resources. First, he directed the Secretaries of Commerce and Interior to develop plans within three years for “proper care and management” of the canyons and seamounts. Id. at 6. Second, he required the Secretaries to prohibit oil and gas exploration and most commercial fishing within the Monument. Id. at 7–8. Third, he directed the Secretaries to encourage scientific and research activities as consistent with the Proclamation. Id. at 8–9.

C. This Lawsuit

On March 7, 2017, several commercial-fishing associations, including the Massachusetts Lobstermen’s Association, filed this lawsuit. Claiming injury from the restrictions on commercial fishing, Plaintiffs seek declaratory and injunctive relief against the President, the Secretaries of Commerce and Interior, and the Chairman of the Council on Environmental Quality. See Compl., ¶ 4. Invoking the Court’s jurisdiction to conduct non-statutory review of *ultra vires* executive action, see Chamber of Commerce v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996), they argue that the President lacked authority under the Antiquities Act to declare this Monument. See Compl., ¶¶ 3–4. The Government has now filed a Motion to Dismiss, backed

by several intervening conservation organizations and two groups of law professor *amici*. The matter is now ripe for the Court’s consideration.

II. Legal Standard

In evaluating Defendants’ Motion to Dismiss, the Court must “treat the complaint’s factual allegations as true . . . and must grant plaintiff ‘the benefit of all inferences that can be derived from the facts alleged.’” Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1113 (D.C. Cir. 2000) (quoting Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979)); see also Jerome Stevens Pharms., Inc. v. FDA, 402 F.3d 1249, 1253–54 (D.C. Cir. 2005). The Court need not accept as true, however, “a legal conclusion couched as a factual allegation,” nor an inference unsupported by the facts set forth in the Complaint. See Trudeau v. FTC, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of an action where a complaint fails “to state a claim upon which relief can be granted.” Although “detailed factual allegations” are not necessary to withstand a Rule 12(b)(6) motion, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citation omitted). For a plaintiff to survive a 12(b)(6) motion, the facts alleged in the complaint “must be enough to raise a right to relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007).

The standard to survive a motion to dismiss under Rule 12(b)(1) is less forgiving. Under this Rule, Plaintiffs bear the burden of proving that the Court has subject-matter jurisdiction to hear their claims. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). A court also has an “affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority.” Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C.

2001). For this reason, “‘the [p]laintiff’s factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion’ than in resolving a 12(b)(6) motion for failure to state a claim.” Id. at 13–14 (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1987)).

III. Analysis

The Government seeks dismissal under Rules 12(b)(1) and 12(b)(6) on the grounds that the case is not judicially reviewable and that the President did not exceed his statutory authority. The Court agrees with the latter but not the former.

A. Reviewability

Before diving into the merits of the case, the Court must determine if Plaintiffs’ claims are judicially reviewable. In other words, does the Court have any role to play here? Despite a raft of precedent holding otherwise, the Government initially suggests that it does not. Defendants say that the Antiquities Act commits national-monument determinations to the President’s sole discretion, and, as such, those determinations cannot be reviewed. See ECF No. 32 (Def. MTD) at 7–8. The Court disagrees. Three times the Supreme Court has reviewed the legality of a President’s proclamation of a national monument. See United States v. California, 436 U.S. 32–33 (1978) (Channel Islands National Monument); Cappaert v. United States, 426 U.S. 128, 141–42 (1976) (Death Valley National Monument); Cameron, 252 U.S. at 455–56 (Grand Canyon National Monument). Citing those precedents, the D.C. Circuit has thus explained that “review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority.” Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002); accord Tulare County v. Bush, 306 F.3d 1138, 1141 (D.C. Cir. 2002); see also Chamber of Commerce, 74 F.3d

at 1331–32 (explaining basis for review of statutory-authority questions). Because Plaintiffs’ claims assert that the President exceeded his statutory authority under the Antiquities Act — *i.e.*, that the Proclamation was *ultra vires* — they are generally reviewable.

Still, hard questions remain about the scope of review of Plaintiffs’ claims. In that regard, two categories of *ultra vires* claims should be distinguished. First, there are those that can be judged on the face of the proclamation. The plaintiffs in Cappaert made such a claim when they argued that the Devil’s Pool in Death Valley was not an “object[] of historic or scientific interest” because it was not archaeological in nature. See 426 U.S. at 141–42. So did the plaintiff in California when it contended that the federal government did not “control[]” the submerged lands off the coast of the Channel Islands. See 436 U.S. at 36. Judicial review of such claims resembles the sort of statutory interpretation with which courts are familiar. See Aid Ass’n for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1174–75 (D.C. Cir. 2003).

The second category requires some factual development. The plaintiffs in Mountain States and Tulare County brought such claims when they asserted that the national monuments, as a factual matter, “lack[ed] scientific or historical value.” Tulare County, 306 F.3d at 1142. The same is true of those plaintiffs’ claims that the monuments’ size was not “the smallest area compatible with the proper care and management of the objects to be protected.” Id. Courts cannot adjudicate such claims without considering the facts underlying the President’s determination. See Mountain States, 306 F.3d at 1134. The availability of judicial review of this category of claims thus stands on shakier ground. Id. at 1133 (declining to decide “the availability or scope of judicial review” of such claims because doing so was unnecessary to resolve the case); see also Dalton v. Specter, 511 U.S. 462, 474 (1994). What is clear about this category, however, is that review would be available only if the plaintiff were to offer plausible

and detailed factual allegations that the President acted beyond the boundaries of authority that Congress set. See Mountain States, 306 F.3d at 1137 (emphasizing that courts should be “necessarily sensitive to pleading requirements where, as here, [they are] asked to review the President’s actions under a statute that confers very broad discretion on the President and separation of powers concerns are presented”).

The Lobstermen assert both types of claims here. Their allegations that the submerged lands of the Exclusive Economic Zone are not “land” under the Antiquities Acts and are not “controlled” by the federal government fall into the first category. The Court can undoubtedly review these claims and decide whether the President acted within the bounds of his authority. Plaintiffs’ allegations that the land reserved as part of the monument is not the “smallest area compatible” with monument management, however, lie in the second category. While the availability and scope of review of such claims are unsettled, the Court need not venture into those uncharted waters because it concludes that Plaintiffs have not offered sufficient factual allegations to succeed.

As a quick aside, under either circumstance, the Court’s rejection of Plaintiffs’ argument results in dismissal under Rule 12(b)(1), rather than Rule 12(b)(6). In concluding that Plaintiffs failed to demonstrate that the President acted outside his statutory authority, the Court holds, at least as a formal matter, that Plaintiffs’ claims are not subject to further judicial review. Such a determination, as best the Court can tell, is jurisdictional. See Griffith v. Fed. Labor Relations Auth., 842 F.2d 487, 494 (D.C. Cir. 1988) (concluding that district court “was without jurisdiction to review” plaintiff’s claims because government acted within its statutory authority). Regardless, whether properly deemed a dismissal under Rule 12(b)(1) or Rule 12(b)(6), the Court’s analysis would be the same.

With that preface, the Court moves on to the claims themselves.

B. Lands

The Lobstermen first contend that the Northeast Canyons and Seamounts Marine National Monument is *per se* invalid because it lies entirely in the ocean. The Antiquities Act authorizes monuments on “lands” controlled by the federal government, they say, and the Atlantic Ocean is obviously not “land.” See ECF No. 41 (Pl. Opp.) at 11–14. While the argument admittedly has some surface appeal, it is buffeted by the strong winds of Supreme Court precedent, executive practice, and ordinary meaning. The Court examines these and one last issue sequentially.

1. *Precedent*

Take precedent first. The Supreme Court has thrice concluded that the Antiquities Act does reach submerged lands and the water associated with them. In Cappaert, the Court addressed a dispute about a pool of water in the Devil’s Hole, a cavern near Death Valley. See 426 U.S. at 131. After some discussion, it concluded that the pool and groundwater beneath it were properly reserved under the Antiquities Act as part of the Death Valley National Monument. Id. at 141–42.

The Court next addressed the matter in California, 436 U.S. 32. There, it considered whether California or the federal government had dominion “over the submerged lands and waters within the Channels Islands National Monument.” Id. at 33. It began by emphasizing that “[t]here can be no serious question . . . that the President in 1949 had power under the Antiquities Act to reserve the submerged lands and waters . . . as a national monument.” Id. at 36. It explained that “[a]lthough the Antiquities Act refers to ‘lands,’ this Court has recognized that it also authorizes the reservation of waters located on or over federal lands.” Id. n.9 (citing

Cappaert, 426 U.S. at 138–42). The Court went on to conclude for other reasons that title to the lands had subsequently passed to California. Id. at 37.

Finally, just over a dozen years ago, the Court considered how the Antiquities Act applies to submerged lands in Alaska v. United States, 545 U.S. 75 (2005). The relevant issue in that case, like in California, was whether Alaska or the federal government had title to the submerged lands in Glacier Bay off the coast of Alaska. Id. at 78. The Court concluded that the federal government had title, in necessary part because those submerged lands were lawfully part of the Glacier Bay National Monument. Id. at 101–02. The Court separately emphasized that “[i]t is clear . . . that the Antiquities Act empowers the President to reserve submerged lands.” Id. at 103 (citing California, 436 U.S. at 36). In all three opinions, then, the Court affirmed that the Antiquities Act authorizes presidents to declare submerged lands like the canyons and seamounts as national monuments.

Not so fast, Plaintiffs say: those opinions’ discussions of the Antiquities Act, they believe, are *dicta*. See Pl. Opp. at 13 n.4. The Court disagrees, at least as to Alaska. In that case, the Supreme Court applied a two-part test to determine whether the federal government had title to the submerged lands: first, it asked whether the federal government had properly reserved the land; second, it inquired whether the federal government had demonstrated an intent to defeat the state’s title to the land. While the Supreme Court did not rely on the monument designation to demonstrate the federal government’s intent to defeat Alaska’s title (step two), it affirmatively relied on the designation to demonstrate that the federal government had reserved the lands originally (step one). See 545 U.S. at 100–02. Indeed, the Court went out of its way to emphasize that its conclusion to that effect was “a necessary part of the reasoning.” Id. at 101. Its decision that the submerged lands in Glacier Bay were indeed lands under the Antiquities Act

was thus a holding, not *dictum*. In any event, “[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” NRDC v. NRC, 216 F.3d 1180, 1189 (D.C. Cir. 2000) (quoting United States v. Oakar, 111 F.3d 146, 153 (D.C. Cir. 1997)). This Court is loath to hold otherwise and thus sticks with the Supreme Court’s admonition that “the Antiquities Act empowers the President to reserve submerged lands.” Alaska, 545 U.S. at 103.

2. *Practice*

In light of those decisions, it should come as no surprise that past presidents have frequently reserved submerged lands as national monuments. In addition to the Devil’s Hole, Channel Islands, and Glacier Bay monuments, presidents have declared, among others, the Fort Jefferson National Monument off the coast of Florida, see 49 Stat. 3430 (1935), the Buck Island Reef National Monument off the Virgin Islands, see 76 Stat. 1441 (1961), and the Papahānaumokuākea Marine National Monument off the coast of Hawaii. See 72 Fed. Reg. 10,031 (Feb. 28, 2007); see also Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 186–200 (2000) (Office of Legal Counsel opinion explaining Executive understanding that Antiquities Act extends to submerged lands in ocean). That history supports interpreting the Act to reach submerged lands. See Zemel v. Rusk, 381 U.S. 1, 11 & n.8 (1965). Accentuating the persuasiveness of the Executive’s longstanding interpretation, Congress recodified the Antiquities Act with minor changes in 2014 but without modifying the Act’s reach. See N. Haven Bd. of Ed. v. Bell, 456 U.S. 512, 535 (1982) (explaining that Congress’s acquiescence to agency’s construction in amending statute suggests agency has “correctly discerned” the “legislative intent”) (quoting United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979)).

Plaintiffs contend that this executive practice and the precedents sustaining it do not control the circumstances of this case. They argue, in short, that those past monuments should be distinguished because they are not confined to submerged lands, but also include some non-submerged lands. See Pl. Opp. at 25–26. Why this would make a difference for the purpose of construing the word “land” in the Antiquities Act escapes the Court; it apparently escapes Plaintiffs as well, for their Opposition fails to explain the salience of the distinction. What seems inescapable is that if the submerged lands in Glacier Bay are “lands” under the Antiquities Act, so are the submerged canyons and seamounts in the Atlantic Ocean.

3. *Ordinary Meaning*

What this Court has already said should be enough to settle the matter of defining lands under the Antiquities Act. A few brief words are nonetheless warranted in response to Plaintiffs’ argument that “[t]he ordinary meaning of ‘land’ excludes the ocean.” Pl. Opp. at 11. In support of that assertion, they cite several definitions of “land” from dictionaries published in the Rooseveltian era that define it in opposition to “ocean.” Id. at 12 (citing, *e.g.*, Webster’s New International Dictionary (1st ed. 1909)). Of course, it is true that the world is roughly divided up into dry land, on the one hand, and ocean on the other. But what about that part of the earth that lies beneath the seas? It is not dry land, to be sure; yet ordinary parlance would seem to deem places like the ocean floor and the beds of lakes and streams land. As it turns out, the dictionaries Plaintiffs cite would agree. Webster’s First includes “land under water” as a proper use of the word “land.” Webster’s New International Dictionary at 1209. Black’s Law Dictionary likewise defines land as “any ground soil, or earth whatsoever,” including “everything attached to it . . . [such] as trees, herbage, and water.” Black’s Law Dictionary at

684 (1st ed. 1891). If that were not enough, the Supreme Court has offered the following commentary directly on point:

[T]he word “lands” includes everything which the land carries or which stands upon it, whether it be natural timber, artificial structures, or water, and that an ordinary grant of land by metes and bounds carries all pools and ponds, non-navigable rivers, and waters of every description by which such lands, or any portion of them, may be submerged, since, as was said by the court in Queen v. Leeds & L. Canal Co. 7 Ad. & El. 671, 685: “Lands are not the less land for being covered with water.”

Ill. Cent. R.R. Co. v. Chicago, 176 U.S. 646, 660 (1900) (emphases added). That should settle it:

The Antiquities Act reaches lands both dry and wet.

4. *National Marine Sanctuaries Act*

But wait. Plaintiffs offer one last argument why the Antiquities Act does not reach submerged lands in the oceans. They say that such a reading would conflict with the National Marine Sanctuaries Act, which gives the Executive Branch the authority to designate certain areas of the marine environment as “national marine sanctuaries” and to issue regulations protecting those areas. See Pl. Opp. at 26–33 (citing 16 U.S.C. § 1431 *et seq.*). The Court understands them to be making two separate arguments in that regard. First, they say that the Sanctuaries Act impliedly repealed the Antiquities Act, at least as it applied to the oceans. Id. at 26. Second, they posit that Congress’s decision to pass the Sanctuaries Act sheds light on its understanding that oceans are excluded from the reach of the Antiquities Act. Id. at 26–33. Neither argument, so to speak, holds water.

Take the implied-repeal contention first. It is axiomatic that “repeals by implication are not favored.” Watt v. Alaska, 451 U.S. 259, 267 (1981). Courts do not “infer a statutory repeal ‘unless the later statute expressly contradicts the original act’ or unless such a construction ‘is absolutely necessary in order that the words of the later statute shall have any meaning at all.’”

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007) (formatting modified) (quoting Traynor v. Turnage, 485 U.S. 535, 548 (1988)). Plaintiffs, moreover, do not attempt to make the kind of showing required for an implied-repeal argument. And for good reason. Not only does the Sanctuaries Act fail to mention the Antiquities Act, but it also expressly provides that it is intended to “complement[] existing regulatory authorities.” 16 U.S.C. § 1431(b)(2).

The post-enactment-intent argument similarly provides the Lobstermen’s boat little headway. It is true, as they note, that “the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.” Pl. Opp. at 29 (quoting FDA v. Brown & Williamson, 529 U.S. 120, 133 (2000)). But subsequent acts may also “provid[e] overlapping sources of protection,” intended to complement earlier enactments. See Mountain States, 306 F.3d at 1138; see also United States v. Borden Co., 308 U.S. 188, 198 (1939) (statutes “may be merely affirmative, or cumulative, or auxiliary”). Such was the case in Mountain States. There, the plaintiffs argued that “the specific provisions of the numerous environmental statutes adopted in the years following enactment of the Antiquities Act,” including the Endangered Species Act and the Wilderness Act, demonstrated that Congress did not intend for the Antiquities Act to address similar environmental values. See Brief for Appellant, Mountain States, 306 F.3d 1132 (No. 01-5421). They believed that those more specific enactments provided “the sole mechanisms by which certain environmental values were to be protected.” Id. The Court disagreed, explaining that the argument “misconceives federal laws as not providing overlapping sources of protection.” 306 F.3d at 1138. In other words, the subsequent environmental statutes provided the Executive Branch with a targeted way of addressing similar environmental concerns — the fact that Congress subsequently expanded

the Executive's tools to protect the environment, however, did not invalidate Congress's prior authorization to the Executive to designate national monuments. Id.

The Court concludes that, as in Mountain States, the Antiquities Act's reach is unaffected by subsequent statutory enactments such as the Sanctuaries Act. As the Court interprets them, both Acts address environmental conservation in the oceans. Yet they do so in different ways and to different ends. Begin with the purposes of the Acts. The Antiquities Act is entirely focused on preservation. The Sanctuaries Act, on the other hand, addresses a broader set of values, including "recreation[]" and the "public and private uses of the [ocean] resources." 16 U.S.C. §§ 1431(a)(2), 1431(b)(6). In line with their different purposes, the Acts' regulatory tools also vary. The Antiquities Act provides presidents with a blunt tool aimed at preserving objects of scientific or historic value. The Sanctuaries Act, on the other hand, offers a targeted approach, incorporating feedback from a host of stakeholders and reflecting more tailored conservation measures. See 16 U.S.C. § 1434(a)(5) (outlining procedures and explaining that commercial fishing, among other private uses, generally permitted). Contrary to Plaintiffs' argument, then, the Court's interpretation of the Antiquities Act does not render the Sanctuaries Act redundant. Far from it. Like the Endangered Species Act in Mountain States, the Sanctuaries Act gives the President an important, but more targeted, implement to achieve an overlapping, but not identical, set of goals.

Considered in the broader context of Congressional involvement in marine conservation, Plaintiffs' post-enactment-intent argument faces another problem. When Congress passed the Sanctuaries Act in 1972, it acted on a backdrop of presidential practice establishing national monuments on submerged lands, aimed at conserving natural resources. See e.g., 53 Stat. 2534 (1939) (Glacier Bay Expansion); 76 Stat. 1441 (1961) (Buck Island Reef). If the later Congress

had a narrower understanding of the Antiquities Act's reach, as Plaintiffs contend, it might be expected to have expressly amended or repealed the Act when it passed the Sanctuaries Act. It did not do so. *See supra* at 12–13. The natural inference from Congress's silence is not that it intended to change the Antiquities Act's reach, but that it intended to keep it the same.

These circumstances, among others, also show why Plaintiffs' reliance on FDA v. Brown & Williamson Tobacco, 529 U.S. at 133, is misplaced. Much simplified, the question in that case was whether the FDA could regulate tobacco. *Id.* In concluding that it could not, the Supreme Court emphasized that the FDA had made “consistent and repeated statements that it lacked authority” to regulate tobacco, *id.* at 144, and Congress had subsequently passed several more specific statutes regulating tobacco, thereby “ratify[ing] the FDA's prior position that it lacks jurisdiction.” *Id.* at 158. This case is different. Here, as mentioned, Congress enacted the Sanctuaries Act against the backdrop of the Executive's position that the Antiquities Act reaches submerged lands. So, if the Sanctuaries Act ratified anything, it was the Executive's understanding that the Act reaches certain submerged lands.

Finally, while on the subject of later Congresses' intents, it is worth emphasizing again that the legislature recodified the Antiquities Act with several small amendments in 2014 without altering its scope. By that point, more presidents had declared marine national monuments, and several of those monuments had been sustained by the Supreme Court. *See supra* at 10–13. The response from Congress? Silence. Had later Congresses understood the Antiquities Act not to reach submerged lands in the oceans or the Sanctuaries Act to alter the Antiquities Act, as Plaintiffs contend, one might expect them to have effectuated that understanding somewhere in the U.S. Code.

* * *

The Court, accordingly, rejects Plaintiffs' argument that this Monument exceeds the President's authority under the Antiquities Act because it lies entirely beneath the waves.

C. Control

With plenty of bait left, the Lobstermen next argue that the Monument is invalid because the Government does not adequately "control" the Exclusive Economic Zone, the sector of the ocean where the Monument lies. Recall that presidents may only declare national monuments on land "owned or controlled by the Federal Government." 54 U.S.C. § 320301(a). Plaintiffs contend that the Antiquities Act requires the federal government to maintain "complete" control over the area, and that the Government lacks such control over the EEZ. See Pl. Opp. at 14. This argument hauls in no more catch than Plaintiffs' prior one about submerged lands. The Court starts by explaining why it disagrees with Plaintiffs' interpretation of "control" before articulating why it concludes that the federal government adequately controls the EEZ for purposes of the Act.

1. *"Complete" Control*

Plaintiffs contend that the phrase "lands owned or controlled by the federal government" should be interpreted to mean "lands owned or completely controlled by the federal government." See Pl. Opp. at 14–15. The Court cannot concur. The ordinary meaning of the word, backed by statutory context and Supreme Court precedent, demonstrates that Congress meant something less than complete control.

The Court starts with the plain meaning of the word "control." Relying on definitions from Webster's First Dictionary, Plaintiffs argue that "control" means "to exercise complete dominion." Id. at 14. Webster's First defines control as follows: "To exercise restraining or directing influence over; to dominate; regulate; hence, to hold from action; to curb; subject;

overpower.” Webster’s New International Dictionary at 490. None of the definitions they cite supports Plaintiffs’ understanding. Most of the definitions, including “to exercise directing influence, regulate, hold from action, curb,” clearly indicate something less than absolute control. But even the most favorable definitions for Plaintiffs — *e.g.*, “to dominate and overpower” — arguably suggest something less than complete control. Consider a simple example: If a technology investor said that IBM “dominated” the market for laptop computers, one would not understand her to mean that it “exercised complete dominion” over the market. Rather, she would be understood to say that IBM is the unrivaled leader in the market, though other companies continue to compete with it. Replace dominate with control and the meaning remains largely the same. Far from supporting Plaintiffs’ understanding of control, the dictionary definitions thus suggest a broader interpretation of the term.

In response, the Lobstermen invoke several canons of interpretation. They first raise *noscitur a sociis* — the rule that “a word is known by the company it keeps.” Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995). Because “controlled” is grouped with the word “owned,” Plaintiffs argue it should refer to the same degree of control as ownership. See Pl. Opp. at 15. The Court is unpersuaded. Rejecting a nearly identical contention, the Supreme Court has explained that “[t]he argument seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one, but there is no such general usage.” S.D. Warren Co. v. Maine Bd. of Environmental Protection, 547 U.S. 370, 379 (2006); see also Graham County Soil & Water Conserv. Dist. v. United States ex rel. Wilson, 559 U.S. 280, 288–89 (2010) (“[T]hree items . . . [are] too few and too disparate to qualify as string of statutory terms.”) (internal quotation marks and citation omitted). Just as the Supreme Court refused to apply *noscitur a sociis* to narrow the broader term in a two-term list, S.D. Warren, 547 U.S. at 379–81, this Court rejects application

of the canon here. Indeed, the Lobstermen’s *noscitur a sociis* argument is weaker even than the one rejected in S.D. Warren. There at least, the two-term list was conjunctive — *i.e.*, separated by an “and.” Id. at 379. Here, Congress separated ownership and control with the word “or,” whose use “is almost always disjunctive, that is, the words it connects are to be given separate meanings.” Loughrin v. United States, 134 S. Ct. 2384, 2390 (2014) (quoting United States v. Woods, 571 U.S. 31, 45 (2013)). Just so here, for control and ownership “are distinct concepts.” Dole Food Co. v. Patrickson, 538 U.S. 468, 477 (2003). A statutory canon focused on “identifying a common trait that links all the words” is thus particularly inapplicable. See Yates v. United States, 135 S. Ct. 1074, 1097 (2015) (Kagan, J., dissenting).

Not dissuaded, Plaintiffs next invoke the rule against surplusage. See Pl. Op. at 15. They say that a broader interpretation of the term “control” — to mean something less than absolute dominion — would render irrelevant the term “owned.” Id. But Plaintiffs’ interpretation does not resolve any surplusage problem. Assuming “control” requires “the same degree of control” as ownership, see Pl. Opp at 15, the term “ownership” is equally irrelevant as it would be under a broader understanding of “control.” The Court thus rejects the surplusage argument. See Bruesewitz v. Wyeth LLC, 562 U.S. 223, 236 (2011) (rejecting surplusage argument that did not resolve surplusage problem).

Somewhat more interesting, though ultimately just as unpersuasive, are Plaintiffs’ legislative-history arguments. See Pl. Opp. at 15–17. In that regard, they note that earlier versions of the Antiquities Act used the phrase “public lands,” rather than “lands owned or controlled by the United States.” Compare 54 U.S.C. § 320301(a) with S. 5603, 58th Cong. (1904). Plaintiffs contend that the change was precipitated by one senator’s remark in a subcommittee hearing on an earlier version of the Bill. See Preservation of Historic and

Prehistoric Ruins, Hearing before the Subcomm. of the Senate Committee on Public Lands, 58th Cong. Doc. No. 314, at 24 (1904). There, Senator Fulton had the following exchange with the Commissioner of Indian Affairs:

Senator FULTON: I suppose the public lands would include these Indian reservations?

Commissioner Jones: No; I think not.

Senator FULTON: They are public lands, although the Indians have possession.

Commission JONES: Take the Southern Ute Reservation in the case cited—

Senator FULTON: Still the Government has control absolutely.

Id.

Plaintiffs maintain that this exchange, taken with the change in the final Bill's language, demonstrates that by "control," Congress meant "absolute control." Pl. Opp at 16. This argument encounters any number of problems. For one, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979), particularly where the record lacks "evidence of an agreement among legislators on the subject." Rivers v. Roadway Exp., Inc. 511 U.S. 298, 308–09 n.8 (1994). Here, Plaintiffs present no persuasive evidence that Senator Fulton's statement, insofar as it in fact reflected his view and correctly described the law, embodied Congress's view of the matter. The Bill was ultimately passed by a different Congress several years after the hearing in question, with no substantiated connection between Senator Fulton's statement and the language of the final Bill.

A second problem is that Senator Fulton's remark is highly equivocal. Based on the hearing transcript, Fulton appeared to interrupt Commissioner Jones to answer his own question, stating that Indian reservations "are public lands." 58th Cong. Doc. No. 314, at 24 (emphasis added). Indeed, when Jones was subsequently asked whether the proposed bill would allow the

Interior Department to protect artifacts on Indian lands, he replied, “I think this bill will cover it[.]” Id. One reading of the exchange is that Fulton and Jones agreed that the proposed Bill’s coverage of public lands would include Indian lands. If that were so, it would mean the addition of the phrase “lands controlled by the federal government” did not arise from this exchange. The takeaway is that the isolated comments Plaintiffs pick out are, to put the matter generously, equivocal and therefore unreliable evidence of legislative intent.

Even if Plaintiffs were correct that the proposed Bill was amended to ensure the Act covered Indian lands, that would not mean that “control” means “absolute control.” Contrary to Senator Fulton’s statement, the federal government did not (and does not) maintain absolute control over Indian lands. The Supreme Court said as much in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980): “[A] reviewing court must recognize that tribal lands are subject to Congress’ power to control and manage the tribe’s affairs. But the court must also be cognizant that ‘this power to control and manage [is] not absolute.’” Id. at 415 (emphasis added) (quoting United States v. Creek Nation, 295 U.S. 103, 109 (1935)); see also American Indian Law Deskbook § 3.8 (May 2018) (“Tribes and individual Indians have acquired significant control over their land and its resources.”). So, even if Congress had in mind the level of control the federal government had over Indian lands when it added the word “control” to the Antiquities Act, it would not support Plaintiffs’ “absolute control” interpretation.

The more persuasive interpretation of “control” does not require inserting an adjective in front of the word to achieve a desired meaning. See EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033 (2015) (“The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result.”). Instead, it tracks the ordinary understanding of the term, as discussed

above and as reflected in the way the Supreme Court has used the term. The Court’s decision in California is a good example. Recall that the Court in that case affirmed that the federal government “controlled” the waters in the territorial sea, supporting the President’s authority to establish the Channel Islands National Monument. See 436 U.S. at 36 (discussing United States v. California, 332 U.S. 804, 805 (1947)). Even Plaintiffs appear not to contest that the federal government controls the territorial sea. Yet that control is neither “complete” nor “absolute.” States may exercise their police powers there. See United States v. Louisiana, 394 U.S. 11, 22 (1969). Other nations have “the right of innocent passage” through that territory — *viz.*, passage that “is not prejudicial to the peace, good order, or security of the coastal state.” Restatement (Third) of Foreign Relations Law § 513 (last updated June 2018). When it stated that the federal government “controlled” the territorial sea, California, 436 U.S. at 36, the Court thus had in mind something short of absolute control; it instead understood the term to mean something closer to, in dictionary parlance, “to exercise directing or restraining influence over.” Webster’s First at 490.

Additional instances abound of the courts’ and Congress’ defining areas of the ocean like the territorial sea and beyond as under federal-government control. See, e.g., Outer Continental Shelf Lands Act, 43 U.S.C. § 1331(a) (defining outer continental shelf in part as submerged lands subject to federal “jurisdiction and control”); see also Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1091 (9th Cir. 1998) (acknowledging “sovereign control and jurisdiction of the United States to waters lying between 3 and 200 miles off the coast”). The bottom line: Plaintiffs are wrong when they assert that the Antiquities Act only extends to lands the federal government completely controls. The voyage is not over, however. This determination still leaves open the question of whether the government has enough influence

over the Exclusive Economic Zone under the Antiquities Act to constitute “control,” which issue the Court turns to next.

2. *Control of the EEZ*

Three considerations convince the Court that the federal government sufficiently controls the Exclusive Economic Zone — where the Northeast Canyons and Seamounts National Marine Monument is located — to empower the President under the Antiquities Act. First, the federal government exercises substantial general authority over the EEZ, managing natural-resource extraction and fisheries’ health and broadly regulating economic output there. Second, it possesses specific authority to regulate the EEZ for purposes of environmental conservation. Third, no private person or sovereign entity rivals the federal government’s dominion over the EEZ.

Some background to start. Customary international law, which is ordinarily deemed binding federal law in the United States, sets forth the rights and responsibilities of nations in different parts of the oceans and their corresponding seabeds. See Restatement (Third) of Foreign Relations Law § 511, Cmt. D; see also The Paquete Habana, 175 U.S. 677, 700 (1900). Abutting the coastline of the United States lies the territorial sea, a body of water extending up to twelve nautical miles from the coast. See Restatement (Third) of Foreign Relations Law § 511(a). Beyond the territorial sea is the EEZ, which “may not exceed 200 nautical miles” from the point at which the territorial sea is measured. Id. § 511(d). To refresh the reader, the Monument at issue lies about 130 miles off the coast of New England, and Plaintiffs do not dispute that it plainly sits within the EEZ. See Compl., ¶ 2.

Consistent with international law, President Reagan established the EEZ out to 200 nautical miles in 1983. See Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983). In

that Proclamation, he claimed for the United States the authority recognized under international law, including: (1) the sovereign right to “explor[e], exploit[], conserv[e] and manag[e] natural resources, both living and non-living, of the seabed and subsoil and superadjacent waters”; (2) the rights to pursue “other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds”; (3) “jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes”; and (4) the responsibility for “protection and preservation of the marine environment.” *Id.* The Government therefore possesses broad sovereign authority to manage and regulate the EEZ. That wide-ranging authority obviously tips the scale towards finding that it controls the EEZ under the Antiquities Act.

Second, the federal government has the specific authority to regulate the EEZ for purposes of marine conservation. As President Reagan explained in his proclamation, the federal government maintains in the EEZ “jurisdiction with regard to . . . the protection and preservation of the marine environment.” *Id.* International law likewise acknowledges the federal government’s ability to issue and enforce laws and regulations related to marine conservation in the EEZ. See Restatement (Third) of Foreign Relations Law § 514, Cmt. i; see also U.N. Convention on the Law of the Sea, *e.g.*, Art. 65 (affirming coastal nation’s rights to regulate marine mammals in EEZ for purposes of marine conservation), Arts. 61–62 (providing for coastal nation’s responsibilities for fishery management and conservation).

This specific authority exists not just on paper. Rather, the federal government exercises close management and regulation of marine environments in the EEZ. One way it does so is through the National Marine Sanctuaries Act, mentioned above. See 16 U.S.C. § 1431 *et seq.* Under that Act, the federal government declares marine sanctuaries in the EEZ, over which it

exercises “authority for comprehensive and coordinated conservation and management.” *Id.* § 1431(b)(2) (emphases added). Another is through fisheries management under laws like the Magnuson-Stevens Act. *Id.* § 1801 *et seq.* One purpose of that Act is “to take immediate action to conserve and manage the fishery resources found off the coasts of the United States . . . by exercising (A) sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone.” *Id.* § 1801(b)(1) (emphases added). Of course, such enactments do not on their own give the federal government the power to establish national monuments in the EEZ — only the Antiquities Act can do that. But they shed light on what kind of control the federal government exercises over the EEZ. As the Court sees it, the fact that the federal government maintains and exercises specific authority under domestic and international law to “protect the marine environment in the EEZ” strongly suggests that Congress would have understood the Government to maintain the requisite level of control under the Antiquities Act. *See* 24 Op. O.L.C. at 197 (suggesting that federal government’s ability to regulate marine environments essential to question of control of EEZ under Antiquities Act).

Third, the federal government’s control over the EEZ is unrivaled. As explained, the United States exercises sovereign rights there for a host of purposes, including natural-resource extraction, fisheries management, marine conservation, and the establishment of artificial islands. No other person or entity, public or private, comes close to matching the Government’s dominion over that area — whether for the purposes discussed already or for any others. That matters a great deal for understanding the sufficiency of the Government’s control over the EEZ. For just as control can be defined by the presence of dominion or authority over something, so the absence of control can be underscored by the presence of someone else’s dominion or

authority over that same thing. That no one else challenges the federal government's control over the EEZ thus suggests that it possesses, rather than lacks, control of the area.

Yet, as discussed earlier, the Government does not claim to exercise complete control over the EEZ. Other nations may exercise “the freedoms of navigation and overflight” there, as well as the “freedom to lay submarine cables and pipelines.” Restatement (Third) of Foreign Relations Law § 514(2). But those limitations on U.S. control in the EEZ are not all that different from those in the territorial sea, which the Supreme Court has affirmed is controlled by the federal government. See California, 436 U.S. at 36 (discussing California, 332 U.S. at 805). In the territorial sea, as mentioned, foreign ships maintain “the right of innocent passage” — defined as passage that is “not prejudicial to the peace, good order, or security of the coastal state.” Restatement (Third) of Foreign Relations Law § 513(1)(a)–(b). Foreign ships thus pass through the territorial sea, just as they pass through the EEZ. More broadly, the presence of foreign ships and undersea cables does not vitiate the other forms of Government control of the EEZ, discussed in detail above.

These three considerations demonstrate that, under any of the range of definitions referenced above — to regulate, to dominate, to overpower, to curb, to exercise restraining or directing influence over — the federal government's control here is adequate. It bears mentioning that this conclusion is not novel. In 2000, the Office of Legal Counsel in the Department of Justice — in an opinion drafted by Randolph Moss, now a highly regarded judge in this district — concluded, based on very similar considerations, that the federal government controlled the EEZ for purpose of the Antiquities Act. See 24 Op. O.L.C. at 195–97. The Government thus appears to have maintained for over fifteen years the same understanding prior to the creation of the Monument at issue here. Likewise, several courts, while not deciding the

issue raised in this case, have described the EEZ as subject to control of the federal government. See Native Vill. of Eyak, 154 F.3d at 1091 (United States has “sovereign control and jurisdiction . . . to waters lying between 3 and 200 miles off the coast”); R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 965 n.3 (4th Cir. 1999) (United States has “exclusive control over economic matters involving fishing, the seabed, and the subsoil”). Even Congress has described the area as “subject to [federal] jurisdiction and control.” 43 U.S.C. § 1331(a). This Court can be added to that list. For all the reasons outlined, the federal government controls the EEZ for purposes of the Antiquities Act.

3. *Plaintiffs’ Counterarguments*

Not ready to head back to shore, the Lobstermen offer three arguments to the contrary that the Court has yet to address. First, they claim that interpreting the Antiquities Act to reach the EEZ conflicts with the Fifth Circuit’s decision in Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978). See Pl. Opp. at 33–34. The Court disagrees for two reasons. For one, that decision predated President Reagan’s Proclamation establishing U.S. control over the EEZ. While the federal government had previously claimed dominion over the area’s minerals, see Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945), it had not yet claimed the broader authority discussed in detail above. The non-binding case might well have come out differently had it occurred after Reagan’s proclamation.

For another, that decision addressed the Antiquities Act’s reach with respect to a historic — rather than a scientific — object. As the Office of Legal Counsel has explained, the Government might well have the authority to declare a scientific object in the EEZ to be a national monument to advance conservation goals, yet lack the authority to declare a historic

object one to advance historic-preservation goals. See 24 Op. O.L.C. at 196. That is because the Government possesses the sovereign right to regulate the EEZ for purposes of marine conservation, which the Court found persuasive above, yet lacks any sovereign right to regulate or salvage historic objects there. While the Court need not decide the matter, the upshot is that the Fifth Circuit’s decision could be correct if decided today and still have no bearing on this Court’s conclusion that the President may establish this national monument in the EEZ.

Second, Plaintiffs maintain that the Antiquities Act cannot reach certain territory that was not controlled by the United States when the Act was passed in 1906. See Pl. Opp. at 17–18. But Congress did not freeze the Act’s coverage in place in 1906. Rather, by referring to “lands controlled by the U.S. Government,” the legislature intended for the Act’s “reach [to] change[] as the U.S. Government’s control changes.” 24 Op. O.L.C. at 191. In line with that understanding, Presidents have declared national monuments in areas that were not under U.S. control in 1906. See, e.g., Proclamation No. 3443, 76 Stat. 1441 (1961) (Buck Island in the Virgin Islands). Plaintiffs concede that “Congress anticipated the federal government obtaining additional lands within categories covered by the Act,” but insist that Congress did not want the Act to extend to “areas that were categorically ineligible for federal ownership or control in 1906.” Pl. Opp. at 17–18. Any distinction between the two is illusory. The federal government did not control lands in the Virgin Islands in 1906, but once it gained such control, it could declare national monuments there. Likewise, the federal government did not control the waters from 3 to 200 miles off the coast in 1906, but once it gained such control under international and domestic law, it could declare national monuments there. Plaintiffs offer no evidence that Congress would have intended to treat the EEZ and the Virgin Islands any differently — if

expansion in U.S. control and ownership can expand the Act's scope as to one, logically it can expand the Act's scope as to the other.

The Lobstermen finally resort to a classic slippery-slope argument: If the Act reaches the EEZ, it could reach anywhere, up to and including private property. *Id.* at 20–21. Plaintiffs can rest easy: The slope, assuming there is one, has plenty of traction. To start, the Court does not understand the Antiquities Act to reach anywhere the Government can regulate. Such a reading would indeed expand the Act's scope to a host of private lands outside the Government's control. Rather, in concluding that the Antiquities Act reaches the EEZ, the Court has emphasized that the Government possesses broad dominion over the area, that it possesses specific regulatory authority over the subjects of the Monument, and that its authority there is unrivaled. The last point particularly addresses Plaintiffs' concern about private property. Had a private person or entity exercised some control or ownership over the EEZ, that would indicate the federal government lacked the requisite control over the area. *See supra* at 27. In all, the Court's narrow reading of "land controlled by the federal government" poses few of the hurricane-is-coming concerns Plaintiffs raise.

D. Smallest Area

Finally nearing harbor, the Court addresses Plaintiffs' fact-specific arguments about the boundaries of the Monument. Recall that the Antiquities Act requires monuments to be "confined to the smallest area [of land] compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). But to obtain judicial review of claims about a monument's size, plaintiffs must offer specific, nonconclusory factual allegations establishing a problem with its boundaries. *See Mountain States*, 306 F.3d at 1137. Plaintiffs allegations here do not rise to that level.

The Lobstermen offer the following factual allegations about the Monument's size:

(1) "The monuments['] boundaries bear little relation to the canyons and seamounts, thereby prohibiting much fishing outside of these areas that would have no impact on the canyons, seamounts, or the coral that grows on them. Between Retriever and Mytilus Seamounts, for instance, the monument encompasses areas that are dozens of miles from the nearest seamount. Yet in other areas, the monument's boundary lies right next to a seamount excluding areas that are at most only several miles away"; and (2) "the monument's canyon unit broadly sweeps in the entire area between the canyons, as well as significant area closer to the shore than the canyons." Compl., ¶¶ 73–74. The crux of the Lobstermen's argument seems to be that the Monument reserves large areas of ocean beyond the objects the Proclamation designated for protection. *Id.* The problem is that this position is based on the incorrect factual assumption that the only objects designated for protection are the canyons and seamounts themselves. The Proclamation makes clear that the "objects of historic and scientific interest" include not just the "canyons and seamounts" but also "the natural resources and ecosystems in and around them." Proclamation at 2. Insofar as Plaintiffs allege otherwise, the Court need not accept such allegations as true because they "contradict exhibits to the complaint or matters subject to judicial notice." Kaempe v. Myers, 367 F.3d 958, 963 (D.C. Cir. 2004).

With that cleared up, it becomes obvious that Plaintiffs' allegations are insufficient. Even if it were true that the Monument's boundaries do not perfectly align with the canyons and seamounts, that would not call into question the Monument's size. As Intervenor explain, the Monument's boundaries presumably align with the resources and ecosystems around them. See ECF No. 44 (Intervenor Reply) at 24. Plaintiffs allege no facts to the contrary.

The Lobstermen insist that the boundaries cannot be based on the ecosystems and natural resources because they are not “objects” under the Antiquities Act. See Compl., ¶ 75. Not according to the D.C. Circuit and the Supreme Court, which have concluded that ecosystems are objects of scientific interest under the Act. See Alaska, 545 U.S. at 103; Cappaert, 426 U.S. at 141–42; Cameron, 252 U.S. at 455–56; see also Tulare County v. Bush, 306 F.3d 1138, 1142 (D.C. Cir. 2002) (“Inclusion of such items as ecosystems and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features.”). Plaintiffs also suggest that highly migratory species cannot be designated as monuments under the Act because they are not “‘situated’ upon federal lands.” Pl. Opp. at 39–40. Their concerns are misplaced: the Proclamation did not designate highly migratory species as objects — it instead so designated the ecosystems surrounding the canyons and seamounts. See Proclamation at 2. Insofar as they might relatedly suggest that the ecosystems are not situated on federal lands, they would be mistaken. As the Proclamation explains, the protected ecosystems are formed by “corals” and “other structure-forming fauna such as sponges and anemones” that physically rest on, and are otherwise dependent on, the canyons and seamounts themselves. Id.

In all, Plaintiffs offer no factual allegations explaining why the entire Monument, including not just the seamounts and canyons but also their ecosystems, is too large. The Court therefore need not undertake further review of the matter.

IV. Conclusion

For these reasons, the Court will grant Defendants’ Motion to Dismiss under Rule 12(b)(1). A separate Order so stating will issue this day.

/s/ James E. Boasberg
 JAMES E. BOASBERG
 United States District Judge

Date: October 5, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

MURPHY COMPANY, et al.,

Case No. 1:17-cv-00285-CL

Plaintiffs,

v.

**REPORT AND
RECOMMENDATION**

DONALD J. TRUMP, et al.,

Defendants,

and

**SODA MOUNTAIN WILDERNESS
COUNCIL, et al.,**

Defendant-Intervenors.

CLARKE, Magistrate Judge.

Plaintiffs Murphy Company and Murphy Timber Investments, LLC (collectively “Plaintiff”) bring this case challenging the authority of the President of the United States to include lands covered under the Oregon & California Revested Lands Act (“O&C Act”) in the expansion of the Cascade-Siskiyou National Monument. This case comes before the Court on Plaintiff’s Motion for Summary Judgment (#39), Federal Defendant’s Cross-Motion for Summary Judgment (#42), and Defendant-Intervenor’s Cross-Motion for Summary Judgment

(#44). For the reasons discussed below, Plaintiff's motion should be DENIED, and Defendants' motions should be GRANTED.

BACKGROUND

Congress passed the Antiquities Act in 1906, authorizing the President of the United States, in his discretion, to declare by public proclamation landmarks, structures, and objects of historic and scientific interest that are situated upon lands owned or controlled by the federal government to be national monuments. 54 U.S.C. § 320301. The only limitation that Congress placed on the President's authority to reserve federal land for the creation of national monuments by the Antiquities Act is that the "parcels of land" reserved must "be confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.*; see generally *Mt. States Legal Found. v. Bush*, 306 F.3d 1132, 1135-37 (D.C. Cir. 2002).

On June 9, 2000, President Clinton exercised authority under the Antiquities Act to designate the Cascade-Siskiyou National Monument ("Monument") in Southern Oregon. Proclamation No. 7318, 65 Fed. Reg. 37249 (June 9, 2000). The Monument was created to protect the unique ecosystem and biodiversity of the area. In designating the Monument, President Clinton prohibited commercial timber harvest within the Monument boundaries. Included in the Monument were lands subject to the O&C Act, which states that such lands shall be managed ... for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the [principle] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.

43 U.S.C. § 2601.

The O&C Act covers roughly 2.1 million acres and requires the Bureau of Land Management (“BLM”) to determine and declare the “annual productive capacity” of these lands. *Id.* Several courts have held that the O&C Act is a “dominant” or “primary” use statute for sustained yield timber production. *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1183-84 (9th Cir. 1990); *Soda Mt. Wilderness Council v. Bureau of Land Mgmt.*, 2013 WL 12120098, *1 (D. Or. May 29, 2013), *adopted in part*, 2013 WL 4786242 (D. Or. Sept. 6, 2013). The BLM is tasked with managing these lands and retains considerable discretion in implementing the Act’s principles of sustained yield, which has included establishing and maintaining reserves within O&C lands, *i.e.*, areas which no or very little timber production occurs. 43 U.S.C. § 2601; *Portland Audubon Society v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993) (finding that the O&C Act did not deprive the “BLM of all discretion with regard to either the volume requirements of the Act or the management of the lands entrusted to its care”). For example, out of the approximately 950,827 acres of O&C lands covered by the BLM’s Southwest Oregon Resource Management Plan, 191,300 acres have been withdrawn from timber harvest for various reasons. Federal Def.’s Br. at 24-25 (#42). Although President Clinton’s designation of the Monument and prohibition of commercial timber harvest within the Monument’s boundaries affected O&C Act lands, no challenge was brought to dispute President Clinton’s exercise of authority.

In 2011, fifteen independent scientists issued a report calling for the Monument to be expanded. Seventy other scientists and two local town governments close to the Monument joined in support of the expansion. *See* Declaration of Dave Willis, Ex. B and Ex. C (##5-3 to 5-7). A series of four public meetings on the proposed expansion were held in 2016, with more

than 500 people attending the public meeting held in Ashland, Oregon, the closest town to the Monument. Oregon Senator Merkley's office reported an almost 4:1 ratio of public support for the Monument's expansion. Declaration of Susan Brown, Ex. I at 1-2 (#44-10).

On January 12, 2017, seemingly in response to this public support, President Obama exercised his authority under the Antiquities Act to modify and enlarge the boundary of the Monument to include approximately 48,000 additional acres, of which approximately 39,841 acres are also subject to the O&C Act. Proclamation No. 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017). Proclamation No. 9564 identified objects of biological, scientific, and historical interest within the Monument expansion area. *Id.* Because the provisions set by the initial Monument proclamation prohibited commercial timber harvest, those same restrictions applied to the expanded Monument area.

Plaintiff now challenges President Obama's authority to expand the Monument, claiming that Proclamation 9564 is void and must be set aside because the lands covered in the expansion were subject to the O&C Act and therefore were not available for inclusion as national monument lands. Plaintiff's Br. at 11 (#39). Both the Federal Defendants and the Defendant-Intervenors move this Court to find that the President lawfully exercised his discretion in accordance with his congressionally delegated authority.

DISCUSSION

I. The President did not exceed his congressionally delegated statutory authority.

Plaintiff has asked this Court to review both the O&C Act and the Antiquities Act to determine whether Proclamation 9564 exceeded the President's statutory authority. Plaintiff's Br. at 17 (#39). Plaintiff devotes the majority of their brief comparing Proclamation 9564 to the O&C Act to support their argument that the President exceeded his statutory authority.

However, this is an irrelevant comparison when discussing the President's statutory authority because the President was acting under the statutory authority of the Antiquities Act when declaring Proclamation 9564, not the O&C Act. The O&C Act designates authority to the BLM, not the President. Therefore, the appropriate legal question here is whether the President had the statutory authority under the Antiquities Act to add these federal lands to the existing Monument. This Court concludes that he did.

Courts are very limited in their review of congressionally authorized presidential actions. It has long been held that where Congress has authorized a public officer to take some specified legislative action, when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of facts calling for that action is not subject to review. *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940) (internal citations omitted). Thus, where the President acts in accordance with a delegation of authority from Congress, such as with the Antiquities Act, judicial review of the presidential decision making is limited to (1) ensuring that the actions by the President are consistent with constitutional principles, and (2) ensuring that the President has not exceeded his statutory authority. *United States v. California*, 436 U.S. 32, 35-36 (1978) (holding that whether federal lands are included within a national monument raises "a question only of Presidential intent, not of Presidential power"); *see also Mt. States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) ("In reviewing challenges under the Antiquities Act, the Supreme Court has indicated generally that review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority.").

The Supreme Court has confirmed that the Antiquities Act delegates "broad power" to the President to designate national monuments and reserve lands for those monuments. *Mt.*

States Legal Found., 306 F.3d at 1135. The statute grants the President substantial flexibility, expressly leaving the definition of a monument and its boundaries to the President’s discretion, and only requiring that the reserved parcels “be confined to the smallest area compatible with the proper care and management of the objects to be protected.” 54 U.S.C. § 320301. When declaring Proclamation 9564, the President invoked the correct statutory standards under the Antiquities Act and made explicit findings consistent with those standards. *See* 82 Fed. Reg. at 6145-48 (describing the unique, scientific biodiversity of the parcel); *id.* at 6148 (“This enlargement of the [Monument] will maintain its diverse array of natural and scientific resources and preserve its cultural and historic legacy, ensuring that the scientific resources and historic values of this area remain for the benefit of all Americans.”); *id.* (“The boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected.”). Plaintiff never contends that the President abused his statutory authority in making these findings. Therefore, there is no dispute that the President acted within his congressionally delegated authority under the Antiquities Act when declaring Proclamation 9564.

II. There is no irreconcilable conflict between the O&C Act and the Antiquities Act.

Plaintiff further argues that the Antiquities Act simply cannot be invoked to override the O&C Act’s mandate for the use of public lands. Plaintiff points to the *non obstinate* clause included in the O&C Act as evidence that Congress intended for the O&C Act to repeal the Antiquities Act to the extent the latter was in conflict with the former. Plaintiff’s Br. at 20 (#39). The *non obstante* clause in the O&C Act provides that “[a]ll Acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and effect to this Act.” 50 Stat. 874, 876. This *non obstante* clause is a general repealing clause and does not explicitly

repeal the Antiquities Act. See *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Engr's*, 619 F.3d 1289, 1299 (11th Cir. 2010) (“A general repealing clause is explicit only in the sense that it is announcing a repeal of ‘all law’ or ‘any law’ or ‘federal laws’—its actual reach depends on an analysis of the statutory language relevant to it.”). Courts do not infer a statutory repeal “unless the later statute ‘expressly contradicts the original act’” or unless such a construction “is absolutely necessary ... in order that [the] words [of the later statute] shall have any meaning at all. *Traynor v. Turnage* 485 U.S. at 548 (1988). To warrant a finding that the Antiquities Act has been impliedly repealed by the O&C Act there must be an irreconcilable conflict—not simply tension—between the two acts. See *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (“It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than state the problem.”); *Morton*, 417 U.S. at 545-46 (statute prohibiting discrimination in employment on the basis of “race, color, sex, or national origin” did not repeal employment preference for qualified Indians at Bureau of Indian Affairs).

Although there may be tension between the dominant purpose of the O&C Act and the conservationist purpose of the Antiquities Act, there is no irreconcilable conflict between the two Acts. Several courts have found sustained yield timber production to be the dominant purpose of the O&C Act, but no court has held that the Act sets aside federal public land exclusively for timber production or that the Act invalidates other federal environmental laws such as NEPA or the ESA. See *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1183-84 (9th Cir. 1990); *Soda Mt. Wilderness Council v. Bureau of Land Mgmt.*, 2013 WL 12120098, *1 (D. Or. May 29, 2013), *adopted in part*, 2013 WL 4786242 (D. Or. Sept. 6, 2013). Federal public lands can, and do, have overlapping statutory mandates without presenting an irreconcilable statutory

conflict. The O&C Act is not in irreconcilable conflict with the Antiquities Act because the principle of sustained yield under the O&C Act does not mean maximum sustained yield—the principle merely ensures that the timber resource is managed in perpetuity while providing the BLM with discretion in how to achieve that objective. *See sustained yield*, Merriam-Webster (defining “sustained yield” as “production of a biological resource (such as timber or fish) under management procedures which ensure replacement of the part harvested by regrowth or reproduction before another harvest occurs.”). The plain text of the O&C Act does not mandate that the BLM’s land use plans devote all classified timberlands exclusively to maximum sustained yield timber production, thus allowing the BLM to designate land as reserved from harvest.

Even before the Monument was designated by President Clinton, the BLM removed portions of O&C lands from commercial timber harvest and courts have found reserves on O&C lands legally permissible. *See Portland Audubon Society v. Babbitt*, 998 F.2d 705 (9th Cir. 1993); *Swanson Grp. V. Salazar*, 951 F. Supp. 2d 75, 79 (D.D.C. 2013), *overruled on other grounds*, 790 F.3d 235 (D.C. Cir. 2015); *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1314 (W.D. Wash 1994), *aff’d*, 80 F.3d 1401 (9th Cir. 1996) (per curiam). Out of roughly 950,827 acres of O&C lands covered by the BLM’s 2016 Southwest Oregon Resource Management Plan, 191,300 acres were reserved from commercial timber harvest. *See e.g.*, Def’s Br. at 24-25 (#42) (providing reserve numbers from the 2016 RMP). Specifically, within the Monument boundary expansion, of the 39,841 acres classified as O&C lands, only 16,448 acres were previously subject to harvest in the BLM’s 2016 RMP. If the BLM has the authority under the O&C Act to reserve lands from harvest, then the President reserving lands within the confines of the smallest area permitted under the Antiquities Act presents no irreconcilable

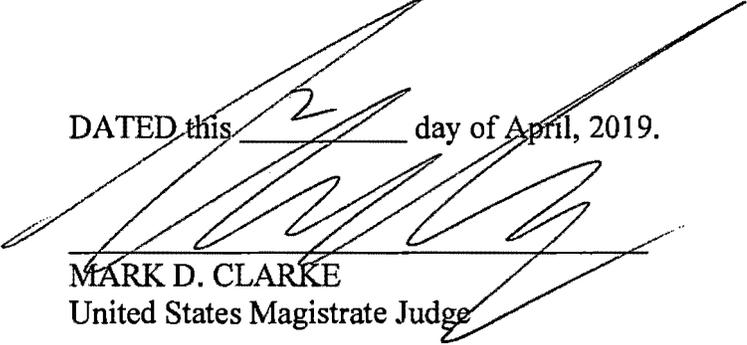
conflict with the O&C Act. Land can be reserved from timber harvest under both Acts; the O&C Act just gives discretion to the BLM to reserve land and the Antiquities Act gives discretion to the President to reserve land. Therefore, Plaintiff has not shown that Congress intended for the O&C Act to substitute or repeal the Antiquities Act¹ or that an irreconcilable conflict exists between the two Acts.

RECOMMENDATION

For the reasons stated above, Plaintiff's Motion for Summary Judgment (#39) should be DENIED and Defendants' Cross-Motions for Summary Judgment (##42, 44) should be GRANTED.

This Report and Recommendation will be referred to a district judge. Objections, if any, are due no later than fourteen (14) days after the date this recommendation is filed. If objections are filed, any response is due within fourteen (14) days after the date the objections are filed. See Fed. R. Civ. P. 72, 6. Parties are advised that the failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED this 2 day of April, 2019.


 MARK D. CLARKE
 United States Magistrate Judge

¹ When considering the intent of Congress in regard to O&C lands, it may be worth noting that Congress has not failed to appropriate funds for conservation on O&C lands. Most recently, on March 12, 2019, President Trump signed into law S. 47, the *John D. Dingell, Jr. Conservation, Management, and Recreation Act*. S. 47 designated 171 miles of rivers that flow through O&C lands and created a protective corridor of ¼ mile on either side of the waterway, where management actions, including timber harvest, are limited or prohibited. At the very least, S. 47 demonstrates that Congress is aware of and has approved the designation of O&C lands for protective purposes beyond those identified in the O&C Act itself.