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End of the Line for O&C Act Cases?

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Dubbed by some as the Nation's first "multiple use" statute, and others as a dominant timber production statute, the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937—better known as the "O&C Act"—has been the source of significant controversy for over three decades. The foundational question fueling this controversy is largely whether the O&C Act obligates the U.S. Bureau of Land Management ("BLM") to manage its O&C lands for timber production, or whether the BLM can employ multiple-use management within those lands—or even have those lands taken out of timber production completely—pursuant to the O&C Act. Recent decisions by the United States Court of Appeals for the D.C. Circuit and the Ninth Circuit Court of Appeals have found the latter to be true, allowing BLM and the President to take O&C lands out of permanent timber production. Time will tell whether these recent decisions will stand, or whether the U.S. Supreme Court will take certiorari and reverse.

The O&C Act was borne out of a necessity to create a railroad spanning the state of Oregon, from its border with California to its border with Washington. The railroad was developed by the Oregon and California Railroad Company. To subsidize this development, Congress granted to the Railroad Company alternating sections of land in a checkerboard pattern 20—30 miles on each side of the railroad right-of-way. As a condition to this subsidization, Congress required the Railroad Company to sell the checkerboard lands to settlers in 160-acre parcels. While some of these lands were sold, often in violation of the conditions placed on the subsidy, much of the lands remained under the Railroad Company's ownership. In the 1916 Chamberlain-Ferris Act, Congress revested those lands

still owned by the Railroad Company to the federal government, providing initial compensation to the counties where the lands were located for the loss of taxable lands. *Skoko v. Andrus*, 638 F.2d 1154, 1155–56 (9th Cir. 1979). The funds received by counties under the Chamberlain-Ferris Act did little to compensate for the indefinite loss of millions-of-acres of taxable land. The 1937 O&C Act was intended to be a legislative fix for the counties. It required:

> [S]uch portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberland[ ] ... shall be managed ... for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] 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 facilties [sic] ....
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> The annual productive capacity for such lands shall be determined and declared as promptly as possible after August 28, 1937, but until such determination and declaration are made the average annual cut therefrom shall not exceed one-half billion feet board measure: *Provided*, That timber from said lands in an amount not less than one-half billion feet board measure, or not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market.

43 U.S.C. § 2601. Fifty percent of the timber receipts generated by this sustained yield sale of timber is earmarked to the counties where the lands are located to offset the lost tax base resulting from the federal government's ownership of these lands. 43 U.S.C. § 2605.

For much of the 1960s through the 1980s, sustained yield timber harvest on O&C lands averaged around one billion board feet annually. *Annual Timber Harvest in Oregon 1962-2019*, Oregon.gov Open Data Portal (Nov. 3, 2022) https://data.oregon.gov/Natural-Resources/Annual-Timber-Harvest-in-Oregon-1962-2019/c3f3-8idr. Western Oregon's rural counties, and their timber-centric economies, flourished from this federal timber harvest.

During this period of high timber yield environmental groups sought a judicial determination of the meaning of the O&C Act's sustained yield mandate. In *Headwaters, Inc.*

v. Bureau of Land Mgmt., Medford Dist., the environmental plaintiffs argued that BLM's management of the O&C lands for the dominant use of timber production violated what they asserted was the multiple use mandate of the O&C Act. 914 F.2d 1174, 1183 (9th Cir. 1990). The Ninth Circuit disagreed, holding that the O&C Act was a "dominant use" act with two purposes—providing counties with reliable revenue in lieu of taxes, and halting the historic practice of logging without reforestation. *Id*. at 1183–84.

It was immediately after *Headwaters* was decided that timber production on O&C lands experienced a sharp decline, continuing through to today, as the listing of the Northern Spotted Owl as a threatened species under the Endangered Species Act and ensuing Northwest Forest Plan created restrictions on timber harvest across the O&C lands. Despite the holding of *Headwaters*, since the inception of the Northwest Forest Plan BLM has managed the O&C lands under a multiple-use concept. The Northwest Forest Plan and BLM's governing Resource Management Plan ("RMP") create habitat and riparian reserves where timber harvest is largely precluded for the goal of benefiting sensitive species. Timber production has been supplanted by these ecological uses, as the RMP and Northwest Forest Plan designate a minority of the O&C lands for timber production. In addition to these regulatory designations, President Obama's expansion of the Cascade-Siskiyou National Monument under the Antiquities Act removed additional O&C lands from timber production.

This background all leads to the cases which were recently decided by the D.C. and Ninth circuits. Between 2015 and 2017, timber companies, timber industry organizations, and a coalition of the counties with O&C lands filed lawsuits in the United States District Court for the District of Columbia. These lawsuits challenged BLM's RMP, BLM's annual "allowable sale quantity" of timber offered for sale each year, and President Obama's expansion of the Cascade-Siskiyou National Monument pursuant to Proclamation 9564. *Am. Forest Res. Council v. United States*, No. 20-5008, 2023 WL 4567578, at *1 (D.C. Cir. July 18, 2023). Before Judge Leon of the D.C. District Court, it was argued that the O&C Act created an obligation on BLM to manage the O&C lands for sustained yield timber production, and that the creation of habitat reserves and annual sale of less-than a sustained-yield quantity of timber violated the O&C Act. Judge Leon agreed with the plaintiffs, holding that BLM violated the O&C Act by "excluding portions of O&C timberland from sustained yield timber harvest" and "repeatedly fail[ing] to comply with the O&C Act's timber sale mandate." *Am. Forest Res. Council v. Nedd*, No. CV 15-01419 (RJL), 2021 WL 6692032, at *1 (D.D.C. Nov. 19, 2021); *Swanson Grp. Mfg. LLC v. Bernhardt*, 417 F. Supp. 3d 22, 30 (D.D.C. 2019); *Am. Forest Res. Council v. Hammond*, 422 F. Supp. 3d 184, 190 (D.D.C. 2019). Judge Leon further held that Proclamation 9564 expanding the Cascade-Siskiyou National Monument

unlawfully conflicted with the directives of the O&C Act. *Am. Forest Res. Council*, 422 F. Supp. 3d at 190.

In the Ninth Circuit, Murphy Company and Murphy Timber Investments, LLC separately challenged Proclamation 9564. *Murphy Co. v. Trump*, No. 1:17-CV-00285-CL, 2019 WL 2070419, at *1 (D. Or. Apr. 2, 2019), *report and recommendation adopted*, No. 1:17-CV-00285-CL, 2019 WL 4231217 (D. Or. Sept. 5, 2019). There, Oregon District Court Magistrate Judge Clarke found that the Antiquities Act did not create an irreconcilable conflict with the O&C Act, though recognizing that "there may be tension between the dominant purpose of the O&C Act and the conservationist purpose of the Antiquities Act[.]" *Id*. at 3. In what seemed a departure from *Headwaters*, Judge Clarke explained that "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." *Id*.

In the D.C. Circuit, the federal Government appealed Judge Leon's holdings, while in the Ninth Circuit Murphy Co. appealed the opinion of Magistrate Judge Clarke, adopted by United States District Judge McShane. In the D.C. Circuit a panel consisting of Judges Henderson, Pan, and Edwards fixated on 43 U.S.C. § 2601's text stating that "lands … which have heretofore or may hereafter be *classified* as timberland[ ] ... shall be managed ... for permanent forest production[.]" The panel found that the O&C Act lacked directives indicating who may "classify" lands, or standards for how lands must be "classified"—rejecting the notion that the classification definitions in the Chamberlain-Ferris Act were still valid. *Am. Forest Res. Council v. United States*, 2023 WL 4567578, at *9. Finding then that the O&C Act's sustained yield mandate applied only to lands "classified" as timberlands, and having been presented little-to-no evidence indicating how the lands were currently "classified," the D.C. Circuit declared that President Obama's Proclamation 9564 was a "reclassification" of 40,000 acres of O&C lands, removing those lands from the O&C Act's sustained yield mandate. *Id*. at 10. The D.C. Circuit further found that the creation of reserves in BLM's governing RMP was little more than BLM's discretionary act of "classifying" the O&C lands for a use other than timer production—a use the court found was compatible with the O&C Act's "multiple objectives." *Id*. at 11.

The Ninth Circuit's opinion in *Murphy Co. v. Biden*, 65 F.4th 1122 (9th Cir. 2023) took a similar approach. The opinion of Judges McKeown and Rakoff held that the O&C Act authorizes BLM to "classify" the lands for several purposes, not exclusively for timber production. *Id*. at 1133. The court found that, while timber production was the primary purpose, the O&C Act has other purposes, such as protecting watersheds, regulating stream

flow, and providing recreational facilities. *Id*. at 1134. Judge McKeown urged that this holding was not inconsistent with *Headwaters*, which, she wrote, never required that timber production be the "exclusive" use of the O&C lands. Dissenting from the judgment, Judge Tallman explained that the O&C Act created a requirement that the O&C lands be managed for timber production where consistent with past practice, finding that the definition of timberlands in the Chamberlain-Ferris Act informed what lands are to be classified as timberlands. *Id*. at 1143—1144. Therefore, by removing any opportunity for sustained yield timber production within the lands affected by Proclamation 9564, Judge Tallman wrote that the monument designation created an irreconcilable conflict with the O&C Act—a conflict which rendered the proclamation unlawful as the President may not suspend the operation of another act of Congress. *Id*. at 1140–44.

The opinions of the D.C. and Ninth circuits, if they stand, will undoubtedly have a significant impact on the management of O&C lands, as they seem to reject the notion that the O&C Act requires sustained yield timber production across the entire O&C landbase. However, given the enormous impact on Oregon's O&C counties and the forestry-based economy, there can be little doubt that this battle is not quite over yet. Petitions for rehearing en banc are currently pending in the Ninth Circuit and likely forthcoming in the D.C. Circuit. Depending on the outcome of those petitions, a petition for review before the U.S. Supreme Court seems likely as well, and Chief Justice Roberts has recently expressed skepticism about the breadth of Presidential Powers under the Antiquities Act. *See Massachusetts Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 981 (2021) (opinion denying petition for a writ of certiorari) (indicating that the Antiquities Act "has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea.") While one can speculate on the likelihood of certiorari being granted, either way, these cases appear to be approaching a final answer on the bounds of the federal government's discretion in managing O&C lands.