UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, *et al.*, Plaintiffs, v. WILBUR J. ROSS, JR., *et al.*, Defendants, and NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, Defendant-Intervenors.	Civil Action No. 1:17-cv-406-JEB

REPLY BRIEF IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' Opposition to Federal Defendants' Motion to Dismiss fails to establish that their Complaint states any claim upon which relief can be granted. Pls.' Opp. To Mot. To Dismiss ("Pls.' Opp."), ECF No. 41. The President lawfully exercised the broad Congressionally-delegated discretion he holds under the Antiquities Act to designate the Northeast Canyons and Seamounts Marine National Monument ("Monument").

Plaintiffs try to increase the stringency of the scope of judicial review while decreasing the broad authority possessed by the President. The review of the President's designation of this Monument should be limited to the proclamation on its face. The proclamation for this Monument explicitly acknowledged the standards in the Act and stated that the designation complied with those standards. *See* Proclamation No. 9496, 81 Fed. Reg. 65,161 (Sept. 15, 2016) (the "Proclamation" or "Proc. 9496"). Plaintiffs do not allege otherwise.

Plaintiffs' arguments that the Monument is not designated on land owned or controlled by the federal government and that the Monument's presidentially-designated boundaries are too expansive are contrary to Supreme Court and D.C. Circuit precedent. Nor does the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431–1445c-1, somehow deprive the President of authority under the Antiquities Act to designate marine monuments. Thus, the Court should grant Federal Defendants' motion to dismiss.

Plaintiffs also fail to state any claim against the Council on Environmental Quality ("CEQ") Chairman as a defendant, so their claims against the CEQ Chairman should be dismissed. Additionally, Plaintiffs have failed to show that claims against the Secretary of Commerce, Deputy Undersecretary of National Oceanic and Atmospheric Administration, and Secretary of the Interior (the "Agency Defendants") are ripe as these Defendants have yet to act

to manage the Monument or to enforce any of the prohibited or restricted activities. Accordingly, the Court should dismiss Plaintiffs' claims against all of the Agency Defendants.

ARGUMENT

I. Circuit Precedent Establishes That Judicial Review Of A Presidential Monument Designation Is Extremely Limited.

"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." *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (citation omitted). No constitutional challenges exist here, so the only question is whether the President exceeded his statutory authority. Like the plaintiffs in *Mountain States Legal Foundation*, Plaintiffs have not made the specific factual allegations sufficient to support their ultra vires claim. *Id*. at 1136-37. No infirmities are obvious from the face of this Monument's Proclamation, so further review is not warranted.

Plaintiffs here raise two primary arguments: (1) the President purportedly lacks authority under the Antiquities Act to designate a monument on federally-controlled maritime lands; and (2) the Monument designated by the President is purportedly not the smallest area compatible with the purpose of the designation. The first issue is a pure question of law that should be decided against Plaintiffs. The second issue is one that is left to the discretion of the President, and judicial review of this issue should not include this Court delving into the President's determinations and factual findings. *W. Watersheds Project v. Bureau of Land Mgmt.*, 629 F. Supp. 2d 951, 959 (D. Ariz. 2009). Such review should be limited to the face of the Proclamation. *See Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004).

This makes sense. Congress did not provide a standard by which to judge how scientifically significant or historically important an object needs to be before it can be protected under the Antiquities Act. Instead, Congress delegated authority to the President to protect objects of value with the smallest possible area, but beyond that, Congress left it to the President's discretion. If a court were to look further and delve into the details of how scientifically or historically important a certain seamount or marine environment should be, the court would be making its own determination of significance, impermissibly intruding into areas committed to the legislative and executive branches of government. And Congress provided no standard by which to evaluate that discretionary finding. The Proclamation on its face acknowledges the standards in the Antiquities Act and sets out its compliance with those standards. So, the Court should find that no further review is needed.

II. This Monument Designation Did Not Exceed The President's Authority Under The Antiquities Act.

Considering the arguments raised by Plaintiffs, it is clear that the President did not exceed the broad discretion conferred by Congress in the Antiquities Act in designating this Monument.

A. Plaintiffs' urging of a more limited meaning of statutory terms is not supported by the context of the Act.

As set forth in Federal Defendants' opening brief, there is a long history of Presidential proclamations designating submerged lands under the Antiquities Act. *See* Mem. of Points and Auths. in Supp. of Fed. Defs.' Mot. to Dismiss at 10–12, ECF No. 32-1. And as Plaintiffs note, if Congress disagreed with a designation, it has the ability to amend the Antiquities Act to further limit the President's power. Pls.' Opp. 22. But Congress has not restricted the President's power under the Act as it relates to submerged lands or marine monuments.

"It is well established that once an agency's statutory construction has been fully brought to the attention of the public and Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *Bolden v. Blue Cross & Blue Shield Ass'n*, 848 F.2d 201, 209 (D.C. Cir.1988) (internal quotations and citations omitted). Similarly, Congress has had several opportunities to correct the President's interpretation and application of the Antiquities Act and has not acted.[1] Congress has amended the Antiquities Act only once in 1950 to limit further extension or establishment of national monuments in Wyoming. *See* Pub. L. No. 81-787, 64 Stat. 849 (1950). This Court should reject Plaintiffs' arguments that the President's construction of the Act as applied in this Proclamation was impermissible.

i. The Antiquities Act's use of the term "land" includes submerged lands

"At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). In this case, subsequent acts, like the Outer Continental Shelf Lands Act, National Marine Sanctuaries Act, and the Magnuson-Stevens Fishery Conservation and Management Act, have helped to inform the understanding that the

[1] Congress has recently considered various amendments to the Antiquities Act but, to date, has not enacted any of them. *See* S. 33, 115th Cong. (2017) (proposing to amend the Antiquities Act to restrict the President's ability to designate a monument in the EEZ and limiting the restrictions on the public's use of monument areas); H.R. 1489, 115th Cong. (2017) (proposing to establish additional requirements for declaring marine national monuments); H.R. 2157, 115th Cong. (2017) (proposing to terminate the authority to establish marine national monuments under the Antiquities Act); H.R. 3990, 115th Cong. (2017) (proposing to amend the definition of "land" under the Antiquities Act to exclude submerged land or water).

Antiquities Act allows for protection of lands, including submerged lands that are within the exclusive economic zone ("EEZ").

The term "land" is not defined under the Act as narrowly as Plaintiffs purport. Plaintiffs focus entirely on the fact that this Monument is located in the ocean, but the focus of the designation is the actual historic and scientific objects—that is, the canyons and seamounts. It is not logical to say that such a monument "consists entirely of ocean . . . and includes no land" merely because the land is submerged. Pls.' Opp. 14. While Plaintiffs rely on definitions from Webster's and Oxford Dictionaries that land is the solid part of the earth's surface, a reasonable reading of a contemporaneous edition of Black's Law Dictionary supports the view that land can include areas covered by water. The Second Edition of Black's published during the time period that the Antiquities Act was enacted, defined land as follows:

> in the most general sense, comprehends *any* ground, soil, or earth *whatsoever*; as meadows, pastures, woods, moors, *waters*, marshes, furzes, and heath. . . .
>
> The word "land" includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and *water*, or by the hand of man, as buildings and fences.

Black's Law Dictionary 694 (2d ed. 1910) (emphasis added).

Plaintiffs attempt to distinguish various Supreme Court decisions that recognize the Antiquities Act is not limited to dry land or otherwise discount the relevance of those statements as mere dicta. Pls.' Opp. 35. For example, Plaintiffs assert *Cappaert v. United States* simply considered the applicability of the federal reserved water rights doctrine to a unique cavern pool and not the scope of the Antiquities Act; yet, Plaintiffs cannot escape the fact that the Supreme Court expressly stated that "[t]he pool in Devil's Hole and its rare inhabitants are 'objects of historic or scientific interest'" under the Antiquities Act. 426 U.S. 128, 142 (1976). Regardless

of whether this statement is an express holding of that case, it is an express statement by the Court about its understanding of the Antiquities Act's application to submerged lands.

Even more convincingly, in *United States v. California*, the Supreme Court expressly stated 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." 436 U.S. 32, 36 n.9 (1978). While the United States does not dispute whether this statement by the Court is part of its express holding, it is yet another example of the Supreme Court interpreting the Antiquities Act in a manner consistent with the Presidential Proclamation at issue here.

Lastly, Plaintiffs discount the relevance of the Glacier Bay National Monument, which was first designated in 1925 and later extended to include up to three miles of sea, as discussed in the Supreme Court's opinion in *Alaska v. United States,* 545 U.S. 75 (2005). Pls.' Opp. 37. Plaintiffs admit that the Supreme Court, in explaining that its conclusion that the Alaska Statehood Act's exception applies, "remarked that [i]t is clear, after all, that the Antiquities Act empowers the President to reserve submerged lands." *Id*.; *Alaska*, 545 U.S. at 103. Even if it were dicta, this statement by the Supreme Court is clear and leaves little doubt as to this question.

ii. The United States controls the Monument area as that term is used in the Act

Plaintiffs argue that the definition of "control" should be limited in a way that excludes the EEZ, but the ordinary meaning of this word is not so limiting. Pls.' Opp. 14-15. The EEZ includes public land controlled by the federal government. Plaintiffs misstate the meaning for control as to "exercise complete dominion." *Id*. at 14. Yet, the definition they cite from Webster's First Dictionary does not use the word "complete." *Id*. Nor does the plain language in the Antiquities Act require complete or absolute control.

Plaintiffs' argument here is internally inconsistent. On one hand, Plaintiffs argue that the interpretation of the Antiquities Act is limited to what existed in 1906, but on the other hand, they acknowledge that Congress did not limit the Act to the existing land owned or controlled by the United States. Pls.' Opp. 17-18. Just like additional land such as the Virgin Islands has been acquired since the passage of the Antiquities Act, the contours of what land is and what is owned or controlled by the United States has changed over the years. The law of the sea has evolved over the years to extend the territorial sea from one mile to three. Similarly, the United States' exercise of control in the EEZ has grown over the years.

Plaintiffs admit that the federal government has authority over the EEZ, but their attempt to argue that the United States' authority is too limited to support a monument designation under the Antiquities Act rings hollow. This point is especially true given Plaintiffs' recognition of the National Marine Sanctuaries Act's operation in the EEZ. There is no question that the federal government controls the EEZ in a variety of ways, including the authority to designate a national monument under the Antiquities Act. No other sovereign or private individual or entity asserts ownership of the EEZ or possesses the level of control of the United States. Plaintiffs also assert that "controlled" should be read to mean the same degree of control as to land it owns in order to avoid the word being redundant. Pls.' Opp. 15. This argument is also illogical. If "controlled" meant the same as "owned," there would be no need to use the word "controlled." The Act could just be limited to lands owned by the federal government if "controlled" has no other meaning.

Federal Defendants have already acknowledged that certain limitations exist to the authority that the United States has in the EEZ. However, these restrictions have no impact on this Monument. Instead, the Proclamation is consistent with the few limits on the federal government's control of this area. For example, the Proclamation states it "shall be applied in

accordance with international law" and any management "shall not unlawfully restrict navigation and overflight and other internationally recognized lawful uses of the sea in the monument." Proc. 9496, 81 Fed. Reg. at 65,164. Plaintiffs rely on the legislative history of the Antiquities Act to argue that it was only intended to apply to lands in "the public domain or in Indian reservations." Pls.' Opp. 16. No other sovereign or entity owns or controls the EEZ, so it is in the public domain. Thus, this Court should find that the federal government controls the EEZ within the meaning of the Antiquities Act.

B. The Antiquities Act permits marine monuments.

Presidential declarations under the Antiquities Act have protected marine environments for nearly 100 years. As early as 1925, the Antiquities Act was invoked to protect the maritime component of Glacier Bay National Monument. Proc. 1733, 43 Stat. 1988 (Feb. 26, 1925). Numerous other presidents have established national monuments that protect, in whole or in part, submerged land. *See, e.g.,* Proc. 8031, 71 Fed. Reg. 36,443 (June 15, 2006) (designating the Northwestern Hawaiian Islands Marine National Monument). Plaintiffs' cramped reading of the term "land" in the Antiquities Act would call into question all such designations.

Plaintiffs are plainly wrong that this is a case where the President claims to have "discover[ed] a great and previously unheralded power in an old statute." Pls.' Opp. 24-25 (citing *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)). Unlike *Utility Air Regulatory Group*, where the EPA's interpretation of a Prevention of Significant Deterioration program resulted in "an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization," 134 S. Ct. at 2444, here, the President simply made a designation consistent with prior designations by other Presidents and in line with his

congressionally-delegated discretion under the Antiquities Act. The President has not acted against clear congressional authorization.

Plaintiffs assert that the National Marine Sanctuaries Act conflicts with the designation of marine monuments under the Antiquities Act. Pls.' Opp. 26. The plain language of the National Marine Sanctuaries Act does not reference the Antiquities Act, much less expressly repeal the authority granted by that statute. 16 U.S.C. § 1431. So, Plaintiffs are left to argue that the National Marine Sanctuaries Act repealed by implication the President's power to designate marine monuments under the Antiquities Act. "It is a cardinal principle of construction that repeals by implication are not favored." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). "Mere overlap between or among federal statutes is not enough to show that one of them is meant to be exclusive over a given subject matter; one of the statutes 'may be merely affirmative, or cumulative, or auxiliary.'" *United States v. Phillip Morris Inc.*, 263 F. Supp. 2d 72, 76 (D.D.C. 2003) (quoting *Borden Co.*, 308 U.S. at 198). Instead, where possible, the court should read the statutes as coexisting. *Id*. (quoting *FCC v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 304 (2003)). Here, both statutes operate to preserve portions of the marine environment, but they have different goals and methods to achieve those goals. Thus, there is no impermissible conflict. Nor has Congress identified such a conflict, let alone an irreconcilable conflict. *See Nat'l Coal. to Save Our Mall v. Norton*, 161 F. Supp. 2d 14, 21 (D.D.C. 2001), *aff'd*, 269 F.3d 1092 (D.C. Cir. 2001) (finding an irreconcilable conflict in the statutes before applying a "notwithstanding" clause).

Similarly, in *Mountain States Legal Foundation v. Bush*, the parties argued as to whether newly reserved monuments "facially defy congressional intent" because there are other more specific statutes involved with management of these lands that are designed to "protect various

archeological and environmental values." 306 F.3d at 1138. The plaintiffs argued that because the Endangered Species Act was the "sole means" for protecting species on these lands and that the Wilderness Act was the '"sole means' by which the federal government may withdraw land from public use to protect scenic beauty," those newly-created monuments impermissibly conflicted with the other more specific statues. *Id.* at 1134 (as the plaintiffs argued, "Presidential actions violate other statutes governing the withdrawal of land from public use and the protection of environmental values on federal land"). While it was true that the reservation of those monuments protected species and wilderness characteristics, and admittedly overlapped with the objectives of other statutes, the court found no conflict with the Antiquities Act. *Id*. at 1138. The court succinctly rejected this false conflict, stating: "[t]his contention, however, misconceives federal laws as not providing overlapping sources of protection." *Id.* The court found that monument lands could have dual purposes with overlapping statutory directives without creating an impermissible conflict. *Id.* Accordingly, the court dismissed the plaintiffs' challenge. *Id.* Here, the Court should disregard Plaintiffs' argument that the National Marine Sanctuaries Act has implicitly repealed the President's authority under the Antiquities Act or that it forecloses the designation of this Monument.

While both statutes apply to the EEZ, the Antiquities Act and the National Marine Sanctuaries Act serve different purposes. The former allows the President to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest," while the latter authorizes the Secretary of Commerce to protect areas of the marine environment with special significance due to their "conservation, recreational, ecological, historical, scientific, cultural, archeological, educational or esthetic qualities." 54 U.S.C. § 320301; 16 U.S.C. § 1431. In short, a marine monument is not the same as a marine sanctuary. Plaintiffs argue that since

the two statutes intersect, the more specific statute, the National Marine Sanctuaries Act, should trump the more general statute, the Antiquities Act, citing *Loving v. I.R.S.*, 917 F. Supp. 2d 67, 77 (D.D.C. 2013). Pls.' Opp. 29. Not so. The National Marine Sanctuaries Act does not assume exclusive control over this area of the law. In fact, Congress expressly intended the National Marine Sanctuaries Act to work "in a manner which complements existing regulatory authorities." 16 U.S.C. § 1431(b)(2). Plus, this Monument's designation does not preclude the creation of a marine sanctuary in this area.

Lastly, *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel* did not hold that the Antiquities Act does not apply to monument designations beyond the territorial sea. 569 F.2d 30 (5th Cir. 1978). Instead, the Fifth Circuit there determined that the Antiquities Act could not be used to claim ownership of "objects such as wrecked ships and their cargoes . . . lying on the seabed . . ." on the continental shelf. *Id*. at 340. The determination in that case was fact-specific. The United States asserted its interest to a Spanish sunken vessel in part based on the Antiquities Act and the Abandoned Property Act. *Id*. at 335. The court rejected the argument that the Outer Continental Shelf Lands Act provided the necessary "extension of sovereignty" or "national control over non-resource-related material in the shelf area." *Id*. at 339-40. On that basis, the court found there was a limited scope of control over the wreck site and the Antiquities Act did not apply. *Id*. at 340.

Significantly, as Defendant-Intervenors rightly note, President Reagan proclaimed the United States' control over the EEZ after the *Treasure Salvors* decision was issued.[2]

[2] Plaintiffs argue that another proclamation was considered by the *Treasure Salvors* court, but they avoid examining the difference in the prior proclamation issued by President Truman. Pls.' Opp. 34-35. "The [Truman] proclamation asserted the jurisdiction and control of the United States over the mineral resources of the continental shelf." *Treasure Salvors*, 569 F.2d at 338. In issuing Proclamation 5030, President Reagan recognized the United States' sovereign rights

Intervenors' Resp. in Supp. of Fed. Defs.' Mot. to Dismiss at 23 n.13, ECF No. 33. As a result, there is no longer any question as to whether the United States has sufficient control over the EEZ. It does.

C. Plaintiffs' challenge to the Monument's boundaries should be rejected.

Plaintiffs rely on conclusory allegations to assert that, assuming that a marine monument is allowed under the Antiquities Act, the Monument is not the smallest area compatible with its purpose. Pls.' Opp. 38. They state that the boundaries bear no relationship to the canyons and seamounts and that dozens of miles exist between canyons and seamounts. Compl. ¶¶ 73-74, ECF No. 1. As previously discussed, the Proclamation states that the President acknowledged the smallest area compatible requirement. Proc. 9496, 81 Fed. Reg. at 65,163. Further, the Proclamation details reasons that support the boundaries and size of this Monument. *Id*. The decision as to where and how to establish a monument's boundaries is committed to the discretion of the President. 54 U.S.C. § 320301 (stating the "President may, in the President's discretion . . ."). Even taken with all reasonable inferences drawn against Federal Defendants, Plaintiffs' allegations do not show a failure to comply with the Antiquities Act. No additional review is needed.

III. Plaintiffs' Claims Against Agency Defendants Should Be Dismissed.

Plaintiffs agree that their challenge to Agency Defendants' future management regime is premature. Pls.' Opp. 42. They also agree that Federal Defendant CEQ Chairman should be dismissed for a failure to state a claim. *Id*. at 41 n.22. The only remaining issue is whether the

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and jurisdiction in the EEZ on a broader scale. *See* 48 Fed. Reg. 10,605 (Mar. 10, 1983). President Reagan did not expand the reach of the Antiquities Act as Plaintiffs argue; he simply recognized the changes in international law and the effect on federal authority over the EEZ.

Agency Defendants should remain in the case because of unknown and unpled enforcement actions they may have taken.

While the Proclamation states that the Secretaries of Commerce and the Interior will share management responsibility for this Monument, Plaintiffs have not identified any actions taken by these Agency Defendants to enforce the Proclamation. The Proclamation does not specify any actions for the Secretaries to complete prior to the preparation of a joint management plan, which has not been completed. In fact, it is Plaintiffs' position that "the proclamation is self-executing and immediately forbids many types of fishing within the monument and requires the Secretaries to phase out remaining fishing from the area over the next seven years." Compl. ¶ 68.

Plaintiffs assert that the Agency Defendants should be left in the case in order to facilitate injunctive relief. Yet, no relief can be granted without a finding that the President has exceeded his power in designating this Monument. If such a finding is made, the Monument and related regulations would be rendered void, and no injunction would be necessary. Thus, these Agency Defendants are not necessary parties to this case, and the claims against them should be dismissed.

CONCLUSION

Plaintiffs fail to set forth any reason for this Court to invade the discretion of the President in establishing this Monument. For all these reasons, as well as those contained in Federal Defendants' opening memorandum supporting their motion, Plaintiffs' Complaint should be dismissed with prejudice.

Respectfully submitted, this 12th day of June, 2018,

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2018, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

/s/ Davené D. Walker
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