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## Are Marine National Monuments "Situated on Lands Owned or Controlled by the Government of the United States?"

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ARE MARINE NATIONAL MONUMENTS  
“SITUATED ON LANDS OWNED OR CONTROLLED  
BY THE GOVERNMENT OF THE UNITED  
STATES?”

*Tyler C. Costello*

- I. INTRODUCTION
- II. CREATION OF THE NORTHEAST CANYONS AND SEAMOUNTS MARINE NATIONAL MONUMENT AND SUBSEQUENT LITIGATION
  - a. *The Northeast Canyons and Seamounts Marine National Monument*
  - b. *Litigation Following President Obama’s Proclamation of the Northeast Canyons and Seamounts Marine National Monument*
- III. HISTORY AND USE OF THE ANTIQUITIES ACT
  - a. *Scope of Authority Under the Antiquities Act*
  - b. *How Do Courts Review a Challenge Under the Antiquities Act?*
  - c. *Use of the Antiquities Act to Protect Submerged Lands*
- IV. FEDERAL OWNERSHIP OF SUBMERGED LANDS AND THE MEANING OF “LANDS” WITHIN THE ANTIQUITIES ACT
  - a. *The Meaning of “Lands” Within the Antiquities Act*
  - b. *What Level of Control Does the Federal Government Have Over the Exclusive Economic Zone Within the Meaning of the Antiquities Act?*
- V. WHO HAS THE AUTHORITY TO CREATE, MODIFY, OR REVOKE A MARINE NATIONAL MONUMENT?
  - a. *Congress’s Authority Over National Monuments*
  - b. *President’s Authority to Modify or Revoke National Monuments*
- VI. CONCLUSION

ARE MARINE NATIONAL MONUMENTS  
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STATES?”

*Tyler C. Costello*<sup>1</sup>

I. INTRODUCTION

The Antiquities Act of 1906 has emerged as a powerful and effective source of presidential authority to protect and conserve large areas of land and objects of historic or scientific interest.<sup>2</sup> Since its inception, the Antiquities Act has been used by sixteen presidents to convert public land into 170 national monuments including monuments both on land and in the sea.<sup>3</sup> The language of the Antiquities Act is simple, yet its broad language and few limiting factors effectively delegate to the president a substantial source of discretionary authority. The Antiquities Act provides:

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 . . . . [t]he President may reserve parcels of land as a part of the 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.<sup>4</sup>

The Antiquities Act first originated out of a concern that the nation’s archeological sites and artifacts would be lost due to professional and amateur looters, who threatened to rob the public of their cultural

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1. J.D. Candidate, 2019, University of Maine School of Law.

2. See JAMES RASBAND ET AL., *NATURAL RESOURCES LAW AND POLICY*, 687-89 (2d ed. 2009).

3. See Tatiana Schlossberg, *What Is the Antiquities Act and Why Does President Trump Want to Change It?* N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/climate/antiquities-act-federal-lands-donald-trump.html> [https://perma.cc/W9FD-WT8E].

4. The Antiquities Act, 54 U.S.C.A. § 320301(a)(b) (2014).

heritage.<sup>5</sup> However, it has since been established that “objects of historic or scientific interest” are not limited to ruins, artifacts, or man-made objects.<sup>6</sup> The courts have interpreted this power broadly. In fact, nearly every president has used this power specifically for preservation and conservation purposes despite its more limited origin.<sup>7</sup>

Considering this authority is discretionary, and the language is largely unrestrictive, presidents have consistently tested the boundaries of the Antiquities Act by designating expansive areas of land, and successfully broadening what qualifies as “objects of historic or scientific interest.”<sup>8</sup> For instance, President Bill Clinton expanded the traditional scope of the Antiquities Act by declaring nineteen monuments and expanding three.<sup>9</sup> Covering over five million acres, his focus was on protecting large ecosystems of historic or scientific interest.<sup>10</sup> Most notably was the Grand Staircase-Escalante National Monument, encompassing 1.7 million acres of federal land in south central Utah.<sup>11</sup>

Accordingly, it was not a novel idea when President Barack Obama created the Northeast Canyons and Seamounts Marine National Monument for the purposes of conserving and managing a scientifically unique ecosystem. Although the Monument only covers 4,913 square miles of entirely submerged land in federal waters<sup>12</sup> the President’s authority to designate *ocean* monuments is considered by some commentators beyond the scope of a president’s authority under the Antiquities Act.<sup>13</sup> National Monument designations have been used to protect federal lands and waters in marine environments going back as

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5. JAMES RASBAND ET AL., *supra* note 2, at 620.

6. *See* Mountain States Legal Foundation v. Bush, 306 F.3d 1132, 1135, 1137 (D.C. Cir. 2002).

7. Brent J. Hartman, *Extending the Scope of the Antiquities Act*, 32 PUBL. LAND & RESOURCES L. REV. 153, 153 (2011); *see also* United States v. Midwest Oil Co., 236 U.S. 459 (1915) (As early as 1915, the Supreme Court recognized the Executive Branch has an implied authority to withdraw public lands); Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 488-89 (2003).

8. *See generally* Hartman, *supra* note 7.

9. *See* Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVT’L L. REV. 535, 555 (2001).

10. *Id.* at 535.

11. Proclamation No. 9682, 82 Fed. Reg. 235, 58089, 58093 (Dec. 8, 2017) (later reduced by 861,974 acres by President Donald Trump’s December 4, 2017 Proclamation).

12. Proclamation No. 9496, 81 Fed. Reg. 65159, 65161 (Sept. 15, 2016).

13. Cliff White, *Calls grow louder for Trump to reverse marine monument designations*, SEAFOODSOURCE (Mar. 10, 2017), <https://www.seafoodsource.com/news/supply-trade/calls-grow-louder-for-trump-to-reverse-marine-monument-designations> [<https://perma.cc/KG3W-ZMCM>]; *see* Mass. Lobstermen’s Ass’n. v. Ross, 349 F.Supp.3d 48 (D.D.C. 2018).

early as 1938 with the creation of the Channel Islands National Monument.<sup>14</sup> However, after President Obama created the Northeast Canyons and Seamounts National Monument, his authority to do so was challenged by the Massachusetts Lobstermen's Association ("Association"), who, among others, filed a lawsuit in March 2017 in the United States District Court for the District of Columbia.<sup>15</sup> Although there have been challenges to monuments that include submerged lands within their boundaries, the Association specifically alleged that ocean monuments and the objects of historic or scientific interest are not situated on "lands owned or controlled by the Federal government."<sup>16</sup>

The question presented before the District Court, and an apparent threat to any marine national monument, is not whether the Antiquities Act can be used to protect large ecosystems, as both Congress and the Supreme Court acquiesce, but whether it can be used to designate marine national monuments entirely.<sup>17</sup> Therefore, for any president to be empowered to create a marine monument using the Antiquities Act, the submerged lands on the continental shelf must qualify as "lands" and be "owned or controlled by the federal government" within the meaning of the Act.<sup>18</sup> Considering Congress has the authority to limit the scope of the Antiquities Act, and the courts have consistently upheld the broad discretionary authority delegated to the president; until Congress acts, a president can rely on the Antiquities Act to create ocean national monuments.

This Comment addresses whether the president has the authority to use the Antiquities Act to protect submerged lands and waters. Specifically, whether submerged lands in the marine environment qualify as objects of historic or scientific interest "situated upon lands owned or controlled by the Government of the United States."<sup>19</sup> Part II of this Comment discusses the creation and challenges to the Northeast Canyons and Seamounts Marine National Monument. Part III discusses the history and use of the Antiquities Act, as well as judicial review courts of a presidential proclamation under the Act. Part IV discusses federal ownership of submerged lands on the continental shelf and how courts

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14. Proclamation No. 2281, 52 Stat. 1541 (Apr. 26, 1938) (later designated as the Channel Islands National Park in 1980).

15. Complaint, *Mass. Lobstermen's Ass'n v. Ross*, 349 F.Supp.3d 48 (D.D.C. 2018) (No. 17-cv-406).

16. *Id.* at 2.

17. *Id.* at 17.

18. 54 U.S.C.A. § 320301(a) (2014).

19. *Id.*

have interpreted “lands” within the meaning of the Act. Part V discusses who has authority to modify or revoke National Monuments.

Although presidents have subsequently reduced the size of monuments by relying on the Acts limitation that the lands be limited to the “smallest area compatible with the proper care and management of the objects to be protected,” no president has ever revoked a national monument entirely, and arguably lacks the authority to do so.<sup>20</sup> As such, the greatest threats to any marine monument is whether submerged land qualifies as “land” within the meaning of the Act, and whether the federal government exercises sufficient control over the submerged lands and waters within the oceans.<sup>21</sup>

This Comment demonstrates that President Obama had the authority under the Antiquities Act to designate the Northeast Canyons and Seamounts Marine National Monument. As this Comment will explain, this finding rests on a president’s broad authority under the Antiquities Act, congressional acquiescence, and the scope of federal jurisdiction and control over the submerged lands on the continental shelf. This Comment is further supported by the District Court’s recent dismissal of the Association’s Complaint. Finally, this Comment concludes by arguing that, until Congress amends the Antiquities Act, presidents have the authority to designate marine monuments because marine national monuments are situated on “lands owned or controlled by the Government of the United States.”

## II. CREATION OF THE NORTHEAST CANYONS AND SEAMOUNTS MARINE NATIONAL MONUMENT AND SUBSEQUENT LITIGATION

### *a. The Northeast Canyons and Seamounts Marine National Monument*

President Obama designated the Northeast Canyons and Seamounts Marine National Monument on September 15, 2016, citing the vibrant history that communities and families have with the waters of the Atlantic Ocean and the current threats and related impacts from climate change.<sup>22</sup>

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20. Alexandra M. Wyatt, *Antiquities Act: Scope of Authority for Modification of National Monuments*, CONG. RES. SERV., 3, 5 (Nov. 14, 2016), [http://www.law.indiana.edu/publicland/files/national\\_monuments\\_modifications\\_CRS.pdf](http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf) [<https://perma.cc/A8WV-PMNJ>].

21. See Andy Kerr, *Precedent for Secretary Zinke’s Gut-Job on the National Monuments*, THE LARCH COMPANY (2017), [https://www.eenews.net/assets/2017/09/21/document\\_gw\\_04.pdf](https://www.eenews.net/assets/2017/09/21/document_gw_04.pdf) [<https://perma.cc/HMT6-6CZ3>].

22. Proclamation No. 9496, 81 Fed. Reg. 65153 (Sept. 15, 2016).

While this is not the first marine national monument, it is the first monument in the Atlantic Ocean, covering about 1.5 percent of U.S. federal waters on the East Coast.<sup>23</sup> The Monument is located 130 nautical miles off the New England coast and is situated within the United States Exclusive Economic Zone (“EEZ”).<sup>24</sup> The Monument encompasses two distinct geological features, canyons and seamounts (underwater volcanoes), and seeks to protect the natural resources and ecosystems surrounding them.<sup>25</sup> The canyons include three underwater canyons, covering approximately 941 square miles and dropping thousands of meters starting at the edge of the continental shelf, while the seamounts include four underwater volcanoes covering 3,972 square miles that rise thousands of meters from the ocean floor.<sup>26</sup>

Scientists have discovered species of coral found nowhere else on earth.<sup>27</sup> President Obama described how the canyons and seamounts create a “foundation for vibrant deep-sea ecosystems” that provide food, spawning habitat, and shelter for a variety of marine life including the endangered sperm, fin, and sei whales.<sup>28</sup> Furthermore, this ecosystem provides feeding grounds for other seabirds, whales, sharks, dolphins, turtles, and migratory fish.<sup>29</sup> These two distinct geological formations support a diverse range of marine life, and “have long been of intense scientific interest.”<sup>30</sup> This Proclamation, along with the expansion of the Papahānaumokuākea Marine National Monument off the coast of Hawaii, reflect President Obama’s policy towards addressing climate change and protecting the nation’s ocean resources for the long run.<sup>31</sup>

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23. *First marine national monument created in Atlantic*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Sept. 19, 2016), <http://www.noaa.gov/news/first-marine-national-monument-created-in-atlantic> [<https://perma.cc/HH4E-ZYUR>] (last updated Sep. 19, 2016).

24. *Mass. Lobstermen’s Ass’n v. Ross*, 349 F.Supp.3d 48, 52 (D.D.C. 2018).

25. Proclamation No. 9496, 81 Fed. Reg. 65162-63 (Sept. 15, 2016).

26. *Id.*; Office of the Press Secretary, *FACT SHEET: President Obama to Continue Global Leadership in Combating Climate Change and Protecting Our Ocean by Creating the First Marine National Monument in the Atlantic Ocean*, THE WHITE HOUSE (Sept. 15, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/15/fact-sheet-president-obama-continue-global-leadership-combatting-climate> [<https://perma.cc/SKS9-PJSC>]. For a map depicting this area, see *First marine national monument created in Atlantic*, *supra* note 23, at 3.

27. Proclamation No. 9496, 81 Fed. Reg. 65161 (Sept. 15, 2016).

28. *Id.*

29. *Id.* at 65161-62.

30. *Id.* at 65161.

31. *FACT SHEET*, *supra* note 26, at 2.

The Proclamation states that “[a]ll Federal lands and interests in lands within the boundaries of the [National] [M]onument are . . . withdrawn from [any] . . . sale [or] leasing” of land relating to mining, oil, and renewable energy.<sup>32</sup> President Obama directed the Secretary of Commerce (through the National Oceanic and Atmospheric Administration) and the Department of the Interior to share joint management responsibility.<sup>33</sup> To effectuate its purpose, the Proclamation prohibits commercial fishing, the exploration and production of oil and gas or minerals, and the removing, taking, or injuring any living or nonliving marine resources.<sup>34</sup>

The importance of this Monument cannot be understated. The effects of overfishing and climate change have historically plagued New England.<sup>35</sup> This Monument helps rebuild commercial stocks by increasing the population of commercial species within the Monument and producing a spillover effect felt beyond the Monuments boundaries.<sup>36</sup> Furthermore, this Monument shelters an ecosystem that is home to species found nowhere else on earth and were only recently discovered inside the monument.<sup>37</sup> Despite the direct impacts on the fishery, threats from fishing were not the only concern President Obama considered when designating the Monument.<sup>38</sup> The deep ocean is becoming more available to oil and gas exploration, which threatens to destroy these unique habitats.<sup>39</sup> This Monument offers immediate protection by prohibiting all natural resource extraction activities that threaten to destroy the unique coral ecosystems, whether from commercial fishing or oil and natural gas activities.<sup>40</sup> Unlike the Pacific Ocean, where many areas have been protected, the Atlantic Ocean is waiting for the same level of protection, and this Monument is a step in the right direction towards protecting these ecosystems before they are damaged beyond repair.<sup>41</sup> Overall, this Monument protects a

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32. Proclamation No. 9496, 81 Fed. Reg. 65163 (Sept. 15, 2016).

33. *Id.* at 65164.

34. *Id.* at 65164-65 (the commercial fishing for red crab and American lobster are permitted until September 15, 2023).

35. Robert Buchobaum, et. al., *The Decline of Fisheries Resources in New England*, MASS. INST. OF TECHNOLOGY, vii (MIT Sea Grant College Program, 2005).

36. *Northeast Canyons and Seamounts Marine National Monument*, NAT'L WILDLIFE REFUGE ASS'N (Jun. 15, 2017), <https://www.refugeassociation.org/2017/06/northeast-canyons-and-seamounts-marine-national-monument/> [<https://perma.cc/45KB-48Q7>].

37. *Id.*

38. *Id.*

39. *See id.*; *The Northeast Canyons and Seamounts Marine National Monument*, EARTHJUSTICE.ORG, <https://earthjustice.org/features/explainer-marine-national-monument> [<https://perma.cc/2U9N-NMCU>].

40. *See id.*

41. *Id.*



susceptible ecosystem from the damaging of effects climate change, overfishing, and oil and gas exploration.

This Monument illustrates the primary purpose behind the Antiquities Act, as an immediate and effective tool for preserving an area for its “objects of historic or scientific interest.”<sup>42</sup> Despite the large amount of discretion the President Obama has under the Antiquities Act, the Association still relied on the argument that the canyons and seamounts are not objects of scientific interest.<sup>43</sup> However, scientists from the government and oceanographic institutions have studied these canyons and seamounts yielding new information about the living marine resources and, as President Obama writes, “much remains to be discovered about these unique, isolated environments and their geological, ecological, and biological resources.”<sup>44</sup> With this in mind, the Association’s claim that the objects to be protected are not of historic or scientific interest falls short.

*b. Litigation Following President Obama’s Proclamation of the Northeast Canyons and Seamounts Marine National Monument*

On March 7, 2017 the Pacific Legal Foundation filed a complaint in the United States District Court for the District of Columbia on behalf of several fishermen’s associations.<sup>45</sup> The Complaint alleges (1) that President Obama exceeded his power under the Antiquities Act because the ocean is not “land” within the meaning of the Act and, further, that the federal government does not exercise complete “control” over the area containing the Monument; and (2) even if it is within the President’s authority to declare ocean monuments, the roughly 5,000 square mile monument is not the smallest area compatible to protect the canyons and seamounts.<sup>46</sup> Regarding the size of the Monument, as one Circuit Court has stated, the Antiquities Act does “not impose upon the President an

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42. See The Antiquities Act, 54 U.S.C.A. § 320301(a) (2014).

43. See Complaint at 3, 16, *Mass. Lobstermen’s Ass’n v. Ross*, 349 F.Supp.3d 48 (D.D.C. 2018) (No. 17-cv-406) (claiming (1) that the monument is not limited to the size necessary to protect the objects stated, (2) that the monument is not situated on lands owned or controlled by the federal government, and (3) that the monument does not protect objects of historic or scientific interest).

44. Proclamation No. 9496, 81 Fed. Reg. 65163 (Sept. 15, 2016).

45. Complaint at 3-6, *Mass. Lobsterman’s Ass’n*, 349 F.Supp.3d (No. 17-cv-406) (the plaintiffs include Massachusetts Lobstermen’s Association based out of Scituate, Massachusetts; Atlantic Offshore Lobstermen’s Association based out of Newport, Rhode Island; Long Island Commercial Fishing Association based out of Montauk, New York; Garden State Seafood Association based out of Trenton, New Jersey; and Rhode Island Fishermen’s Alliance based out of East Greenwich, Rhode Island).

46. *Id.* at 3.

obligation to make any particular investigation” as to the scope and size of the monument.<sup>47</sup>

Therefore, the most significant argument is that the Monument is not located on “land owned or controlled by the Federal government.”<sup>48</sup> This is essentially broken down into two questions for the District court to resolve. First, what are “lands” within the meaning of the Antiquities Act. Second, what level of control is necessary to empower the president to act pursuant to his authority under the Act. The Complaint emphasizes how the Proclamation offers no explanation for why that section of the ocean is “land owned or controlled” by the federal government, but instead merely asserts that protecting the marine environment is in the public interest.<sup>49</sup> The Association argues that the Monument is superfluous because the New England Fishery Management Council manages the area near or in the Monument (the Georges Bank fishery) under the Magnuson-Stevens Act, and works together with state and federal governments, and non-governmental organizations that already strive toward sustainability.<sup>50</sup> Also important in the Complaint, on June 27, 2016, eight Regional Fishery Management Councils jointly filed a letter stating that the Monument designation would frustrate the Councils’ efforts to regulate the fisheries and could be counterproductive if managed in a way that utilizes less sustainable practices.<sup>51</sup> Specifically, they claim that unless a permanent injunction is issued to forbid the Proclamation’s fishing prohibitions, Plaintiffs will be irreparably harmed due to diminution of income, reduced fishing opportunities, and depletion of their investment in their boats and permits.<sup>52</sup>

The Complaint further focuses on how Congress only has limited authority to regulate the waters to protect the environment.<sup>53</sup>—Specifically, that the U.S. only enjoys limited regulatory authority over these federal waters and lacks the level of sovereignty they enjoy with other territories.<sup>54</sup> Furthermore, pursuant to that limited authority in 1976, Congress enacted the Magnuson Stevens Fishery Conservation and

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47. Roberto Iraola, *Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 159, 178 (quoting *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002)).

48. Complaint at 8, *Mass. Lobstermen's Ass’n v. Ross*, 349 F.Supp.3d 48 (D.D.C. 2018) (No. 17-cv-406).

49. *Id.* at 14, 16.

50. *Id.* at 9-11.

51. *Id.* at 12.

52. *Id.* at 15.

53. *Id.* at 9.

54. *Id.*

Management Act (“Magnuson-Stevens Act”) the primary law governing fisheries management in the Exclusive Economic Zone (EEZ).<sup>55</sup> The Magnuson-Stevens Act is administered by eight regional fishery management councils, and the Association claims it should be the councils who manage the area, arguing that 90% of the fisheries managed under the statute maintain healthy, sustainable harvest levels below their annual catch limits.<sup>56</sup> Regarding the level of sovereignty over the area in question the Complaint focuses on how these statutes refer to the EEZ, rather than “lands owned or controlled” by the federal government, and that the amount of protection should be tailored to the amount of authority the federal government has over the EEZ.<sup>57</sup> However, as discussed below this argument loses its merit considering that within the EEZ, the U.S. has the rights to explore, exploit, and conserve and manage these submerged lands and waters.

Along with this suggestive history and claim, the Complaint alleges that even if the Antiquities Act does authorize the president to create an ocean monument in the EEZ, the monument is not the “smallest area compatible with proper care and management” of the canyons and seamounts.<sup>58</sup> The Association alleges that the Monument’s boundaries “bear little relation to the canyons and seamounts” and prohibits fishing outside of these areas that have no impact on the canyons, seamounts, or the coral.<sup>59</sup> While this limitation has been effectively used to reduce the size of monuments in the past, the District Court declined to review this allegation upon finding that the Complaint failed to offer sufficient factual allegations that the President acted beyond his authority in defining the Monument’s boundaries.<sup>60</sup> Regardless, upon close examination of the Monument’s boundaries, it is clear that at least some discernable limits were used to create the boundaries; in fact the boundaries directly correspond to the locations of the canyons and seamounts.

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55. U.N. Convention on the Law of the Sea, art. 55, 57 1833 U.N.T.S. 397, (Dec. 10, 1982) [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/part5.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/part5.htm) [<https://perma.cc/642Y-4NYV>] (defining the U.S. Exclusive Economic Zone as “the area beyond and adjacent to the territorial sea” that is “[no more than] 200 nautical miles from the baseline from which the breadth of the territorial sea is measured”).

56. See Complaint at 9-10, *Mass. Lobstermen's Ass'n v. Ross*, 349 F.Supp.3d 48 (D.D.C. 2018) (No. 17-cv-406); *What is the EEZ*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://oceanservice.noaa.gov/facts/eez.html> [<https://perma.cc/5US6-Q5NG>].

57. Complaint at 10, *Mass. Lobstermen's Ass'n*, 349 F.Supp.3d (No. 17-cv-406).

58. *Id.* at 16.

59. *Id.*

60. *Mass. Lobstermen's Ass'n v. Ross*, 349 F.Supp.3d 48, 55 (D.D.C. 2018).

In addition, the Association alleges that an ecosystem is not an “object” under the Antiquities Act, citing the *Yates v. United States* interpretation of “tangible object,” which held that “fish” are not objects, and therefore the individual fish and shellfish within that ecosystem are not “objects” within the meaning of the statute.<sup>61</sup> However, early on, the Supreme Court in *Cappaert v. United States* previously resolved this argument in the affirmative, holding that fish are “objects” under the Antiquities Act.<sup>62</sup> Furthermore, as discussed below, President Clinton and President George W. Bush already used the Antiquities Act to protect marine ecosystems by claiming the biological communities and its inhabitants that make up a marine ecosystem qualify as scientific objects.<sup>63</sup> As such, considering the amount of discretion the courts and Congress have afforded the president to decide what qualifies as an “object of historic or scientific interest,” it’s clear why this argument was not a source of discussion in the District Court’s dismissal of the Complaint.

The remaining allegations in the Complaint argue that the Atlantic Ocean is not “land” within the meaning of the Antiquities Act, and that the land in question is not sufficiently “owned or controlled” by the federal government. As discussed in Part V, Supreme Court precedent firmly establish that the meaning of “land” can include submerged lands and water and similarly, the federal government arguably maintains sufficient ownership and control over the area in question.<sup>64</sup>

### III. HISTORY AND USE OF THE ANTIQUITIES ACT

#### *a. Scope of Authority Under the Antiquities Act*

The Supreme Court’s review of Presidential Proclamations under the Antiquities Act is scarce, yet in all three cases the courts confirmed the broad power delegated to the President under the Act, and upheld the proclamations.<sup>65</sup> The Antiquities Act was passed to protect objects of

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61. Complaint at 16-17, *Mass. Lobstermen's Ass'n*, 349 F.Supp.3d (No. 17-cv-406); see *Yates v. United States*, 135 S.Ct. 1074, 1099 (2015) (applying the statutory canon of interpretations to hold that a fish is not a “tangible object” within the meaning of 18 U.S.C. § 1519 destruction, alteration, or falsification of records in federal investigations and bankruptcy).

62. *Cappaert v. United States*, 426 U.S. 128, 132, 141-42 (1976).

63. Proclamation No. 7399, 66 Fed. Reg. 7364, 7364 (Jan. 17, 2001) (establishment of the Virgin Islands Coral Reef National Monument).

64. See *Cappaert*, 426 U.S. at 138.

65. *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1135 (D.C. Cir. 2002) (citing *United States v. California*, *Cappaert v. United States*, and *Cameron v. United States*).

antiquity on federal lands, such as ruins and artifacts, in response to Native American archeological and historical sites being lost, destroyed, or exploited in the new western states.<sup>66</sup>

Some observers claim the Act was only intended to protect small tracts of land around archeological sites, yet legislative history, congressional acquiescence, and courts' interpretations suggests otherwise.<sup>67</sup> In 1900, Congressman Lacey of Iowa introduced the predecessor to the Antiquities act, authored within the Department of the Interior, a draft bill entitled, "[a] Bill to establish and administer national parks, and for other purposes."<sup>68</sup> This Bill proposed to give the president the authority to set aside lands by proclamation, including "public land, which for their scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest . . . or other properties it is desirable to protect and utilize in the interest of the public."<sup>69</sup> With this broad language, came resistance, so, a few years later a revised bill passed, known today as the Antiquities Act.

This Act embodies the notion that the president should have the authority to designate "objects of scientific or historic interest" as the basis for national monuments, but limited the reservation of land to the "smallest area compatible with the proper care and management of the objects to be protected."<sup>70</sup> In passing the Antiquities Act, Congress did not give the president the authority to set apart tracts of public land "for their scenic beauty, natural wonders or curiosities" as the original Bill suggested, but still included the broad language in Lacey's Bill that gave the president the authority to protect "objects of historic or scientific interest."<sup>71</sup> As for the limitation on acreage, Congressman Lacey wrote a letter expressing the view that the president should only set apart small reservations, not exceeding 320 acres each.<sup>72</sup> However, the final bill only limited the reserves "to 'the smallest area compatible with the proper care and management of the objects to be protected'" and did not propose any

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as the only Supreme Court cases have considered the Antiquities Act, all confirming the broad power delegated to the President).

66. Ranchod, *supra* note 9, at 540.

67. RASBAND, *supra* note 2, at 688. *But see* Ranchod, *supra* note 9, at 540-41.

68. Squillace, *supra* note 7, at 480.

69. H.R. 11021, 58th Cong. § 1 (1900).

70. Squillace, *supra* note 7, at 480, 484; *see* 54 U.S.C. § 320301 (2014); H.R. 11021, 58th Cong. § 1 (1900).

71. *See generally* RASBAND, *supra* note 2, at 688.

72. Squillace, *supra* note 7, at 481.

concrete limitation.<sup>73</sup> Furthermore, all subsequent bills proposing a limitation on acreage have failed.

The plain language of the Act that Congress ultimately approved, with the inclusion of “objects of historic and scientific interest” and an absence of any limitation on acreage, represents Congress’s intent to ensure judicial support that the president can proclaim large landscapes that relate to science and history.<sup>74</sup> Similar to the legislative history rebutting the idea that the Act was designated to protect only very small tracts of land around archeological sites, courts have also expressed the idea that the president’s authority is not so limited. Soon after the Antiquities Act was passed, President Theodore Roosevelt designated Devil’s Tower in Wyoming as the nation’s first national monument, and proceeded to proclaim seventeen more monuments, including the 800,000-acre Grand Canyon National Monument.<sup>75</sup> This proclamation spawned a lawsuit that set the groundwork for the authority of future presidents to give the Antiquities Act an expansive interpretation.<sup>76</sup>

The Supreme Court, in *Cameron v. United States*, first rejected the contention that the Antiquities Act was limited to protecting only archeological sites.<sup>77</sup> Petitioner, a local prospector, who was using his strategically located mining claims in Arizona to charge tourists access fees to the Canyon, claimed the President exceeded his authority under the Antiquities Act because the Grand Canyon is not an “object of historic or scientific interest.”<sup>78</sup> The Court ultimately ruled that the president is empowered to reserve “objects of historic or scientific interest” and as President Roosevelt stated in his proclamation, the Grand Canyon is an object of unusual scientific interest under the Antiquities Act.<sup>79</sup> The *Cameron* court found it important that the canyon has attracted a wide variety of scientists, is over a mile deep, and one of the greatest eroded canyons in the United States.<sup>80</sup> As a result of this decision, it’s clear that

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73. *Id.* at 483.

74. *Id.* at 484-85. (Stating how the only judicial analysis of the legislative history of the Antiquities Act came from an unpublished opinion from a United States District Court in Alaska that stated the inclusion of “objects of historic or scientific interest” was intended to enlarge the president’s authority).

75. Proclamation No. 658, 34 Stat. 3236 (Sept. 24, 1906); Proclamation No. 794, 35 Stat. 2175 (Jan. 11, 1908); *see* Ranchod, *supra* note 9, at 544.

76. Squillace, *supra* note 7, at 489.

77. *See* *Cameron v. United States*, 252 U.S. 450, 455-56 (1920).

78. *Id.* at 455.

79. *Id.* at 456.

80. *Id.*

the size of the monument does not disqualify it as long as the objects to be protected are still of historic or scientific interest.<sup>81</sup>

In 1976, the Supreme Court further expanded the concept by holding that a pool of water in Devil's Hole and the rare fish inhabiting the pool are "objects of historic or scientific interest."<sup>82</sup> The Court held that the president had the authority under the Antiquities Act to reserve Devil's Hole as a National Monument, thereby expanding the Death Valley National Monument.<sup>83</sup> The purpose of reserving Devil's Hole was to protect a pool of water claimed to be of "outstanding scientific importance" consisting of a "peculiar race of desert fish . . . found nowhere else in the world . . . [that is] of such outstanding scientific importance that it should be given special protection."<sup>84</sup> After the Monument was designated, petitioners in 1968 began pumping groundwater from an underground aquifer that was also the source of water for Devil's Hole.<sup>85</sup> Petitioners claimed that (1) the 1952 reservation of Devil's Hole did not reserve any water rights for the United States, and (2) even if the intent of the 1952 Proclamation was to protect the pool, the Antiquities Act did not give the president the authority to reserve a pool considering the president can only reserve federal lands to protect archeological sites.<sup>86</sup> The Court held that when the President reserved Devil's Hole, it also acquired the right to maintain the level of the pool to preserve its scientific value.<sup>87</sup> Additionally, consistent with the *Cameron* court, the Court held that a president's authority is not limited to artifacts.<sup>88</sup> Accordingly, the Court found that the President acted properly in reserving the pool in Devil's Hole because its rare inhabitants are "objects of historic or scientific interest."<sup>89</sup> The Court further noted that as long as the president states why the place has scientific value the court will be satisfied.

In addition to the broad authority, the Antiquities Act includes the president's right to dispense with any requirement that the public participate in the designation process and the establishment of conservation areas. This is because the president's actions do not fall within the purview of the notice and comment requirements under the

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81. RASBAND, *supra* note 2, at 690.

82. *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (citing *Cameron* as they reject the claim that the president may reserve federal lands only to protect archeological sites).

83. *Id.*

84. Proclamation No. 2961, 66 Stat. C18 (Jan. 17, 1952).

85. *Cappaert*, 426 U.S. at 133.

86. *Id.* at 141-42.

87. *Id.* at 146-47.

88. *See id.*

89. *Id.* at 142.

National Environmental Policy Act (NEPA).<sup>90</sup> This is one of the major concerns that some commentators have regarding the president's authority to designate ocean monuments. The president is not subject to the NEPA requirements that require notice and comment procedures and is also not subject to an environmental impact statement as with all other "major federal actions [that] significantly affect the quality of the human environment."<sup>91</sup> Despite these concerns, courts have held that NEPA's mandate only applies to agencies, and the president is not an agency.<sup>92</sup> Given this narrow reading of NEPA's requirements, there is no requirement to negotiate with those who will be most impacted, meaning the president can act much more rapidly than if Congress were to use another avenue, such as the Marine Sanctuaries Act.<sup>93</sup> While some argue that the Antiquities Act denies people the right to participate in how the United States' public lands are used, others applaud the Act's lack of process because it is specifically the lack of procedural requirements that has served the American people so well.<sup>94</sup> Furthermore, as a brief aside, the courts have also held that the Antiquities Act does not violate the non-delegation principle, which requires Congress to provide an "intelligible principle" to guide such authority whenever Congress delegates authority to another branch.<sup>95</sup>

In conclusion, the absence of any procedural requirements and the few discernable limitations within the Act effectively bar most claims against a president's use of the Antiquities Act. Although Congress originally rejected the president's ability to protect lands for their "scenic beauty, natural wonders or curiosities," the courts have played a pivotal role by implicitly including those terms within their interpretation of "objects of historic or scientific interest" and further granting water rights within the monuments' jurisdiction. This precedent along with congressional

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90. See Wayatt, *supra* note 20, at 2 (stating that a president's use of the Antiquities Act falls outside the procedures usually required for agency actions under the National Environmental Policy Act.); see 40 C.F.R. § 1508.12 (1977) (stating that "federal agency" does not include Congress, the Judiciary, or the President).

91. Joseph Brigggett, *An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power to Designate Monuments in the Outer Continental Shelf*, 22 TUL. ENVTL. L.J. 403, 411 (2009) (quoting National Environmental Policy Act of 1969 (NEPA) § 102, 42 U.S.C.A. § 4332 (2006)).

92. 40 C.F.R. § 1508.12 (excluding the president from the procedural requirements of NEPA).

93. See *Alaska v. Carter*, 462 F.Supp. 1155, 1160 (D. Alaska 1978).

94. Iraola, *supra* note 47, at 187.

95. Brigggett, *supra* note, 91 at 413; *Whitman v. Am. Trucking Ass'n.*, 531 U.S. 457, 472 (2001).



acquiescence has solidified the broad authority and force of the Antiquities Act.

*b. How Do Courts Review a Challenge Under the Antiquities Act?*

The D.C. Circuit in *Mountain States Legal Foundation v. Bush* discussed judicial review while also rejecting a claim that Congress only intended the president to designate rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts.<sup>96</sup> It appears that the petitioners failed to review the precedent regarding what qualifies as an “object of historic or scientific interest.” What is important is that prior to this case, the courts had never expressly discussed the scope of judicial review under the Antiquities Act. Yet courts had addressed review of discretionary powers under other statutes, specifically noting that review is not available when the statute “commits the decision to the discretion of the president,” saying “how the President chooses to exercise the discretion Congress has granted him is not a matter for our review.”<sup>97</sup> However, the Court went on to say that judicial review is “available to ensure that the proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority.”<sup>98</sup> In its holding, the Court stated that judicial review is available if the alleged facts support a claim that the President has acted beyond his authority under the Antiquities Act’s “discernable limits.”<sup>99</sup>

Overall, these cases demonstrate several points. Courts afford broad discretionary power to the presidents when determining what constitutes an “object of historic or scientific interest” and only when a president acts beyond the limits of his statutory mandate will courts review a proclamation. Considering the Antiquities Act is silent as to procedures to create a national monument, only that the president shall “declare” one by “public proclamation,” a challenge must allege facts demonstrating that the monument or president has failed to comply with the Antiquities Act’s discernable limitations. Those limitations are (1) only “historic landmarks,” “historic and prehistoric structures,” and similar “objects of historic or scientific interest” can form the basis of a monument designation; (2) the monument can only be designated for objects on “land owned or controlled by the federal government;” and (3) the monument

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96. *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002).

97. *Id.* at 1136 (quoting *Dalton v. Spector*, 511 U.S. 462, 474, 476 (1994)).

98. *Id.* at 1136; *see United States v. California*, 436 U.S. 32, 35-36 (1978); *Cappaert v. United States*, 426 U.S. 128, 141-42 (1976).

99. *Mountain States Legal Found.*, 306 F.3d at 1136.

must be “confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>100</sup> Most of the litigation arising from a monument designation alleges a failure to be an object of historic or scientific interest. There has yet to be a challenge where the court has to specifically decide whether ocean monuments are “situated on lands owned or controlled by the Federal government.”

In conclusion, given the plain language of the Act, lack of congressional review, and any procedural requirements, the courts are very deferential to the language of the proclamation.<sup>101</sup> Importantly, as discussed in more detail below, subsequent presidents are limited in their authority to modify and revoke a national monument.<sup>102</sup>

*c. Use of the Antiquities Act to Protect Submerged Lands*

Since it became law, the Antiquities Act has mostly been used to protect terrestrial land. However, National Monument designations have been used as far back as 1938 when President Franklin Roosevelt created the Channel Islands National Monument to protect the California coastline.<sup>103</sup> This Monument was extended by President Truman to specifically include submerged land.<sup>104</sup> Truman’s proclamation added 17,635 acres to the Channel Islands National Monument, as well as the area within one nautical mile of the shoreline of Anacapa and Santa Barbara Islands.<sup>105</sup> More recently, President Clinton used the Antiquities Act to protect submerged lands and waters by designating the Virgin Islands Coral Reef National Monument and expanding the Buck Island Reef National Monument in the U.S. Virgin Islands.<sup>106</sup> Together, these two monuments protect 30,843 marine acres.<sup>107</sup> Similar to the Northeast Canyons and Seamounts Marine National Monument, the Virgin Islands Coral Reef National Monument located off of the island of St. John was designated to protect the fishery habitats, deep coral reefs, octocoral

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100. 54 U.S.C.A. § 320301(a)-(b) (2014).

101. Iraola, *supra* note 47, at 162-63.

102. *Id.* at 163-64.

103. Proclamation No. 2281, 52 Stat. 1541, 152 (Apr. 26, 1938). (Redesignated Channel Islands National Park in 1980).

104. Proclamation No. 2825, 63 Stat. 1258 (Feb. 9, 1949),

105. *Id.*

106. Ranchod, *supra* note 9, at 537.

107. Mary G. Davidson, *Protecting Coral Reefs: The Principal National and International Legal Instruments*, 26 HARV. ENVTL. L. REV. 499, 515 (2002).

hardbottom, and algal plains, all objects of scientific interest.<sup>108</sup> The Monument covers approximately 12,708 marine acres of entirely submerged land and within it, the objects of scientific interest consist of several threatened and endangered species that forage, breed, nest, rest, or calve in the waters.<sup>109</sup>

Clinton's use of the Antiquities Act to protect these marine ecosystems, rather than individual species, objects, or curiosities is considered by some to be a departure from how monuments were previously justified.<sup>110</sup> Not just for the protection of a marine ecosystem, but for the fact that the Virgin Islands Coral Reef National Monument explicitly includes submerged lands, and does not restrict its protection to land above the mean tide line.<sup>111</sup> President Clinton, in an effort to combat the threat against coral reefs, recognized the interdependence between the coral reefs, the mangroves, and marine species.<sup>112</sup>

Following President Clinton's use of the Antiquities Act to protect marine environments, President Bush established four national monuments with an emphasis on protecting marine resources in submerged federal lands. His first and most important designation came on June 15, 2006, by creating the first oceanic National Monument.<sup>113</sup> It was called the Northwestern Hawaiian Islands Marine National Monument, later changed to Papahānaumokuākea Marine National Monument to give the monument a Native Hawaiian name.<sup>114</sup> The Monument reserved approximately 139,793 square miles of terrestrial and submerged land off of the waters of the Northwestern Hawaiian Islands.<sup>115</sup> The specific "objects" to be protected were the diverse ecosystem, home to coral, fish, birds, marine mammals, and threatened and endangered sea turtles.<sup>116</sup> The Monument also protects significant cultural sites found on the surrounding islands.<sup>117</sup> Continuing on this path, just before President

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108. Proclamation 7399, 66 Fed. Reg. 7364 (Jan. 17, 2001) (Virgin Islands Coral Reef National Monument).

109. *Id.* at 7365.

110. Davidson, *supra* note 107, at 515.

111. Ranchod, *supra* note 9, at 567.

112. Proclamation No. 7399, 66 Fed. Reg. 7364, 7364 (Jan. 17, 2001).

113. Proclamation No. 8031, 71 Fed. Reg. 36443, 36443 (June 15, 2006) (Establishment of the Northwestern Hawaiian Islands Marine National Monument).

114. Proclamation No. 8112, 72 Fed. Reg. 10031, 10031 (Feb. 28, 2007) (Amending Proclamation 8031 to change the name of the monument).

115. Proclamation No. 8031, 71 Fed. Reg. 36443, 36443 (June 15, 2006).

116. *Id.* (Establishment of the Northwestern Hawaiian Islands Marine National Monument).

117. See *Papahānaumokuākea Expands, Now Largest Conservation Area on Earth*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Aug. 2016), <https://sanctuaries.noaa.gov/news>

Bush left office on January 6, 2009, he designated three more marine national monuments: the Marianas Trench Marine National Monument, the Pacific Remote Islands Marine National Monument, and the Rose Atoll Marine National Monument.<sup>118</sup> Later, on August 26, 2016, President Obama, by proclamation, expanded the Papahānaumokuākea Marine National Monument to include the waters and submerged lands to the “extent of the seaward limit of the United States Exclusive Economic Zone,” making it the largest conservation area on earth that extended to the outer limits of the EEZ and U.S. jurisdiction.<sup>119</sup>

As such, President Obama was not the first to use the Antiquities Act to protect the marine environment and the Act continues to serve as a valuable marine conservation mechanism. Most importantly, monuments established under the Antiquities Act are effective immediately, whereas a sanctuary under the National Marine Sanctuary Act may take years. For example, NOAA took seven years to issue final regulations for the Florida Keys Marine Sanctuary, whereas NOAA only took two and a half months to issue final regulations on the Northwestern Hawaiian Islands Marine National Monument.<sup>120</sup>

Despite using the Antiquities Act to conserve marine ecosystems, Congress has consistently failed to take action addressing the scope of the Antiquities Act. Most notably, under the Federal Land Policy Management Act, Congress repealed almost all avenues providing the president with the authority to withdraw land, but left the Antiquities Act in place.<sup>121</sup> In fact, Congress has only restricted the president’s authority under the Antiquities Act twice, and only in ways that restrict monument designations in Alaska and Wyoming.<sup>122</sup> The first, an actual amendment to the Antiquities Act requiring congressional approval for any monument

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/aug16/president-announced-expansion-of-papahanaumokuakea-marine-national-monument.html [https://perma.cc/7US8-83UT].

118. *President Bush Creates Three New Pacific Marine Monuments in U.S. Pacific Insular Areas*, U.S. DEP’T OF THE INTERIOR, (Jan. 6, 2009) <https://www.doi.gov/oia/press/2009/President-Bush-Creates-Three-New-Pacific-Marine-Monuments> [https://perma.cc/36PN-QU75].

119. Proclamation No. 9478, 81 Fed. Reg. 60227, 60227 (Aug. 26, 2016) (Expanding the Papahānaumokuākea Marine National Monument); *Papahānaumokuākea Expands, Now Largest Conservation Area on Earth*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Aug. 2016), <https://sanctuaries.noaa.gov/news/aug16/president-announced-expansion-of-papahanaumokuakea-marine-national-monument.html> [https://perma.cc/7US8-83UT].

120. Briggett, *supra* note 91, at 409.

121. See David Negri, *Grand Staircase-Escalante National Monument: Presidential Discretion Plus Congressional Acquiescence Equals a New National Monument*, 10 UTAH. B. J. 20, 22 (1997).

122. See Hartman, *supra* note 7, at 175.

in Wyoming, and similarly, the Alaska National Interest Lands Conservation Act requiring congressional approval for any monument larger than five thousand acres.<sup>123</sup>

#### IV. FEDERAL OWNERSHIP OF SUBMERGED LANDS AND THE MEANING OF “LANDS” WITHIN THE ANTIQUITIES ACT

A monument designation under the Antiquities Act means no more than shifting land from one federal use to another, and it does not frustrate the underlying ownership of the land being designated as a monument.<sup>124</sup> Therefore, a reservation under the Antiquities Act cannot “escalate” the federal government’s underlying claim to the land.<sup>125</sup> Put another way, for a president to designate a National Monument, the land in question must already fall within the jurisdiction of the federal government. As such, to empower a president to create a National Monument, the objects to be protected must already be on “lands owned or controlled by the Federal government.”<sup>126</sup> Seemingly dispositive is whether or not the submerged land and waters within the Northeast Canyons and Seamounts Marine National Monument qualify as “lands” and whether the federal government (and the president) has sovereignty within the EEZ for preservation purposes where the Monument is located. Considering that prior proclamations have established National Monuments including submerged land in marine environments, until Congress acts, courts will likely uphold national monument designations including submerged lands and waters within the EEZ.

##### *a. The Meaning of “Lands” Within the Antiquities Act*

In 1945, President Harry Truman declared that the United States has jurisdiction over the natural resources of the subsoil and seabed located below the waters from the coastline out to the outer continental shelf.<sup>127</sup> Shortly after this Proclamation, in *United States v. California* (1947), the question before the Supreme Court was whether the United States or California had jurisdiction over the waters and submerged lands within the

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123. *Id.*

124. *United States v. California*, 436 U.S. 32, 40 (1978).

125. *Id.* at 41.

126. *See* 54 U.S.C.A. § 320301(a) (2014).

127. Proclamation No. 2667, 10 Fed. Reg. 12305 (Sept. 28, 1945) (Policy of the United States with respect to the natural resources of the subsoil and sea bed of the Continental Shelf).

marginal sea, the area within three nautical miles of the state's coastline.<sup>128</sup> The Court held that the United States "possessed of paramount rights in, and full dominion and power over, the lands, minerals, and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark . . . extending seaward three nautical miles . . ."<sup>129</sup> As a result of this decision, the original idea was that the federal government had "paramount rights" to the first three miles of states' coastal submerged lands. Accordingly, two years later when President Truman added the submerged lands within one nautical mile of the shoreline surrounding the Channel Islands National Monument, the federal government owned and controlled the land in question.<sup>130</sup> However, this jurisdictional decision was shortly overturned six years later when Congress passed the Submerged Lands Act ("SLA") in 1953.<sup>131</sup> In passing the SLA, Congress gave states title to submerged land within their boundaries extending three nautical miles from the coastline for coastal states.<sup>132</sup> Therefore, California and every other coastal state now has title to the natural resources located within three nautical miles seaward of the state's border.<sup>133</sup> Still, the Supreme Court later stated in *United States v. California* (1978) that, at the time of Truman's expansion of the Monument, "[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 within the one-mile belts as a national monument, since they were then 'controlled by the Government of the United States.'"<sup>134</sup>

What's most important about these cases is that even though the Antiquities Act only refers to "lands," the Supreme Court in *United States v. California* (1978) specifically stated that President Truman had the authority at the time of his 1947 Proclamation to reserve the submerged lands and waters surrounding the Channel Islands because they were then "controlled by the Government of the United States."<sup>135</sup> To further lend support and resolve any ambiguity as to the meaning of "land," the Court mentioned in a footnote that "[a]lthough the Antiquities Act refers to

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128. See *United States v. California*, 332 U.S. 19, 22 (1947).

129. *United States v. California*, 436 U.S. 32, 36 (1978) (quoting *United States v. California*, 332 U.S. 804, 805 (1947) (Per Curiam)).

130. See *United States v. California*, 332 U.S. 19, 38-39 (1947); Submerged Lands Act, 43 U.S.C. §§ 1301-15 (2002).

131. James R. Keller, *State Ownership in the Marginal Sea around the Channel Islands National Monument*, 18 URB. L. ANN. J. OF URB. & CONTEMP. L. 313, 321 (Jan. 1980).

132. 43 U.S.C. § 1312 (2012).

133. See *id.*

134. *California*, 436 U.S. at 36.

135. See *id.*

'lands,' this Court has recognized that it also authorizes the reservation of waters located on or over federal lands."<sup>136</sup>

Consistent with this precedent the District Court Judge dismissing the Association's Complaint placed important emphasis on the Supreme Court's decision in *Alaska v. United States*.<sup>137</sup> The question before the Court was whether the State of Alaska or the federal government held title to the submerged lands in Glacier Bay.<sup>138</sup> As a brief introduction, in 1939 President Franklin Roosevelt extended the boundaries of Glacier Bay National Monument to include all of the waters out to three nautical miles.<sup>139</sup> Later, in 1980, Congress incorporated the Monument into Glacier Bay National Park, years after Alaska had achieved statehood. While the issue of title turned on whether the United States "clearly intended" to defeat Alaska's title to the submerged lands, the important takeaway from this decision, as the Court stated, "[i]t is clear, after all, that the Antiquities Act empowers the President to reserve submerged lands."<sup>140</sup> What this means is that "land" for purposes of the Antiquities Act has been noticeably interpreted by the Supreme Court to include submerged lands and waters.

*b. What Level of Control Does the Federal Government Have Over the Exclusive Economic Zone Within the Meaning of the Antiquities Act?*

Considering that the Northeast Canyons and Seamounts Marine National Monument is not located within the lands subject to the SLA, but is instead within the EEZ, the question now becomes how much control does the federal government have over the submerged lands and waters within boundaries of the Monument. Immediately following the SLA, Congress passed the Outer Continental Shelf Lands Act (OCSLA) in 1953, giving the United States jurisdiction over all submerged lands lying seaward of the states' three nautical mile territory out to the seabed and subsoil subject to the United States jurisdiction (out to the 200 nautical mile limit, known today as the EEZ).<sup>141</sup> This is important because the outer limit of the Northeast Canyons and Seamounts Marine National Monument end precisely at the outer limits of the EEZ. The OCSLA

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136. *Id.* at n.9 (*citing* Cappaert, 426 U.S. at 138-142).

137. *Mass. Lobstermen's Ass'n v. Ross*, 349 F.Supp.3d 48, 57 (D.D.C. 2018).

138. *Id.* at 56 (D.D.C. 2018).

139. *Alaska v. United States*, 545 U.S. 75, 101 (2005).

140. *Id.* at 103.

141. Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1331(a) (1953).

defines the continental shelf as “all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.”<sup>142</sup>

In *United States v. Maine*, the Supreme Court held that the federal government controls all submerged land beyond the state territorial waters established by the SLA out to the outer edge of the Continental Shelf.<sup>143</sup> The Court rested its decision on the language of the SLA, which expressly declared that nothing in the Act would affect the rights of the United States to the natural resources lying beyond the territorial seas.<sup>144</sup> In its ruling, the Court held that “Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit when a few months later it enacted the Outer Continental Shelf Lands Act of 1953.”<sup>145</sup>

While this may seem conclusive, the OCSLA did not establish complete federal ownership and control over the EEZ for all purposes, as demonstrated in the Fifth Circuit’s decision holding that the OCSLA did not establish federal jurisdiction under the Antiquities Act to certain submerged land on the continental shelf. In *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, the United States Court of Appeals for the Fifth Circuit held that an abandoned Spanish vessel that sank in 1622 on the continental shelf outside the territorial waters of the United States was not situated on lands owned or controlled by the federal government and therefore the Antiquities Act could not be used.<sup>146</sup> The government argued that the OCSLA represented congressional intent to extend jurisdiction and control of the United States to the outer continental shelf, but the court looked at the history of the continental shelf and said that the Truman Proclamation of 1945 was only concerned with giving the United States jurisdiction and control over the mineral resources.<sup>147</sup> The Court stated that congress passed the OCSLA only to resolve competing claims over mineral rights. Citing their earlier decision in *United States v. Maine*, holding that “Congress emphatically

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142. *Id.*

143. Keller, *supra* note 131, at 314, n.8; *see* *United States v. Maine*, 420 U.S. 515, 528 (1975).

144. *Maine*, 420 U.S. at 528.

145. *Id.* at 526.

146. Barbara J. Van Arsdale, *Validity, Construction, and Application of Antiquities Act of 1906*, 16 U.S.C.A. §§ 431 *et seq.*, 11 A.L.R. Fed. 2d. 623, § 19 (2006); *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337-38 (5th Cir. 1978).

147. *Treasure Salvors, Inc.*, 569 F.2d at 338.



implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit,” the Court’s limited reading of the OCSLA only extended jurisdiction for purposes of controlling the exploitation of the natural resources, not necessarily extending jurisdiction for all purposes.<sup>148</sup>

Therefore, the Fifth Circuit takes the view that the OCSLA extends only limited jurisdiction to the outer continental shelf, the area where President Obama’s ocean monument is located. Thus, while the OCSLA may be a more restrictive jurisdictional avenue to empower a president to establish a marine monument, this case may have had a different outcome had the federal government not tried to assert ownership under the OCSLA, but rather focused generally on the federal government’s control of the outer continental shelf.<sup>149</sup> Under the OCSLA, the president has less withdrawal authority compared to the Antiquities Act, meaning the OCSLA was not the ideal show of federal ownership of the submerged lands to validate the President’s attempt to protect the submerged vessel in *Treasure Salvors*.<sup>150</sup> Instead, general control of the outer continental shelf would have likely sufficed and persuaded the Fifth Circuit to rule in favor of using the Antiquities Act to exercise control of the ship at issue.

A close examination of federal control over the EEZ and the presence of other acts of Congress offer another view; namely that the United States has jurisdiction over the submerged lands and waters within EEZ for conservation purposes, irrespective of the Fifth Circuit’s view that the OCSLA only extended jurisdiction for the purposes of exploiting natural resources of the continental shelf, not sovereignty for all purposes.<sup>151</sup> Specifically, President Reagan’s 1983 Proclamation establishing the EEZ provides the United States with “the sovereign right to explore, exploit, conserve, and manage natural resources, both living and non-living, of the seabed and subsoil and super[adjacent waters” and further with “the

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148. *Id.* at 338-39.

149. *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Vessel*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., [https://coast.noaa.gov/data/Documents/OceanLawSearch/TreasureSalvorsInc\\_CaseSummary\\_PDF.pdf](https://coast.noaa.gov/data/Documents/OceanLawSearch/TreasureSalvorsInc_CaseSummary_PDF.pdf) [<https://perma.cc/66Y7-YW2C>].

150. Christian Termyn, No Take Backs: Presidential Authority and Public Land Withdrawals, 9 (unpublished essay)(on file with Columbia Law School, [https://www.law.columbia.edu/sites/default/files/news/files/chris\\_termyn\\_no\\_take\\_backs.pdf](https://www.law.columbia.edu/sites/default/files/news/files/chris_termyn_no_take_backs.pdf) [<https://perma.cc/WP6H-44A8>]); Memorandum from Nat. Res. Council and Earthjustice, Briefer on Residential Withdrawal Under OCSLA Sec. 12(a) (Dec. 20, 2016) (on file with author) (stating that “Section 12(a) of the Outer Continental Shelf Lands Act [] provides that [t]he President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf”).

151. *Treasure Salvors, Inc.*, 569 F.2d at 340, n.23.

responsibility of protect[ing] and preserv[ing] . . . the marine environment.”<sup>152</sup> In addition, the presence of other federal laws exercising control over the EEZ is evidence of the federal government’s control over the EEZ for conservation purposes. Federal laws such as the Magnuson-Stevens Act, the Endangered Species Act of 1973, and the National Marine Sanctuaries Act of 1972, are all federal laws focused on preservation and conservation that reach the EEZ.<sup>153</sup>

Therefore, it is not surprising that the District Court in *Massachusetts Lobstermen’s Association v. Ross* emphasized these Acts to illuminate the extent of federal control over the EEZ.<sup>154</sup> These federal laws demonstrate federal control over the submerged lands and waters within the EEZ and rebut the argument that their control is limited to uses surrounding oil and natural gas leasing, as the Fifth Circuit noted in its discussion of federal control under the OCSLA. Furthermore, the OCSLA language authorizing the secretary to suspend or limit production of minerals in offshore lands in the presence of environmental concerns cuts against the argument that federal jurisdiction over submerged lands is solely to manage offshore drilling. Instead the OCSLA could be an avenue to conserve land by restricting leasing in certain areas of environmental concern.

Another argument that ocean monuments and the submerged lands and waters within the EEZ are not “owned or controlled by the federal government” within the meaning of the Antiquities Act is because extending federal jurisdiction over the continental shelf did not occur until 1945, nearly forty years later.<sup>155</sup> These commentators argue that, when it enacted the Antiquities Act in 1906, Congress “would not have regarded submerged lands beyond the territorial seas” as within the federal government’s control.<sup>156</sup> This reasoning complements the Fifth Circuit’s holding in *Treasure Salvors*, however, it’s clear that Congress now interprets the Antiquities Act and “land” to include submerged land.

In 1974, Congress passed what’s commonly known as the Territorial Submerged Lands Act, giving Guam, the Commonwealth of the Northern Mariana Islands, Virgin Islands, and American Samoa, all title to the submerged lands three geographical miles from the coastlines. It reserved all submerged lands that the president or Congress determines to be of

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152. *Mass. Lobstermen’s Ass’n v. Ross*, 349 F.Supp.3d 48, 64 (D.D.C. 2018) (citing Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983)).

153. Marine Sanctuaries Act, 16 U.S.C.A. §§ 1431 *et seq.* (2000); Endangered Species Act, 16 U.S.C.A. §§ 1531 *et seq.* (1973); Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C.A. § 1801 *et seq.* (2018).

154. *Mass. Lobstermen’s Ass’n*, 349 F.Supp.3d at 64-65.

155. Briggett, *supra* note 91, at 414.

156. *Id.*

“scientific, scenic, or historic character” that warrant preservation, as such they are reserved for the federal government.<sup>157</sup> Therefore, the federal government can still use the U.S. Virgin Islands submerged lands for environmental protection, but every other purpose was reserved to the islands.<sup>158</sup> What can be taken away from this Act is that Congress interprets “land” to include the submerged land within a national monument, because it explicitly reserved, for the United States, the submerged land within the Buck Island Marine National Monument, indicating that Congress has no problem with a president including submerged land as part of their monument.<sup>159</sup>

Overall, the plain language of the Act offers a broad interpretation of “lands owned or controlled by the federal government” and the legislative history provides little about the congressional intent. Although it can be argued that, at the time the Antiquities Act was enacted in 1906, Congress would not have considered submerged lands beyond the territorial seas to be under the control of the federal government because jurisdiction over submerged lands was not officially considered until 1945—Congress is certainly aware of it now. The fact that Congress is drafting legislation seeking to limit the President’s authority to designate ocean monuments implies that the submerged land located in the EEZ is in fact under the jurisdiction and control of the federal government within the meaning of the Antiquities Act. Therefore, congressional acquiescence favors jurisdiction over submerged land, and, given the lack of congressional action, President Obama had the authority to designate the Northeast Canyons and Seamounts Marine National Monument.<sup>160</sup>

## V. WHO HAS THE AUTHORITY TO CREATE, MODIFY, OR REVOKE A MARINE NATIONAL MONUMENT?

### *a. Congress’s Authority Over National Monuments*

In light of the history of challenges to presidential proclamations and the president’s broad authority under the Antiquities Act, there seems to be a simpler solution than using the courts to challenge this authority, namely Congress. Congress has the authority to modify, revoke, or create national monuments and the ability to amend the Antiquities Act to limit the president’s authority. Congress, however, has very rarely chosen to

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157. 48 U.S.C. § 1705(b)(vi) (2013).

158. See 48 U.S.C. § 1705(a), (b)(vi) (2013).

159. See 48 U.S.C. § 1705 (b)(vi), (xi) (2013).

160. *Contra* Briggett, *supra* note 91, at 414.

exercise its authority to do so, but some presidential monument designations have prompted changes in law to restrict the president's authority.<sup>161</sup> After all, in 1906, Congress gave presidents such broad authority, and it can again be Congress that limits such authority.

One historical example of Congress's displeasure with a monument is President Franklin Roosevelt's proclamation of the Jackson Hole National Monument in Wyoming in 1943.<sup>162</sup> This led to a 1950 law that prohibited a president from designating any new national monuments in Wyoming unless created by Congress.<sup>163</sup> Later, after President Carter established a National Monument in Alaska, Congress enacted a law requiring congressional approval of land withdrawals greater than 5,000 acres in Alaska.<sup>164</sup> Along with laws requiring congressional approval, Congress has also used its authority to abolish national monuments, but has rarely done so. For example, in 1930, Congress abolished the Papago Saguaro National Monument in Arizona and conveyed the land to the state for a park or other public purpose.<sup>165</sup> Again, in 1956 Congress abolished the Fossil Cycad National Monument in South Dakota, and transferred the land to the Bureau of Land Management.<sup>166</sup>

Despite these examples of Congress's displeasure with presidential proclamations, Congress rarely gets in the way of national monuments. Congress has considered bills to restrict the president's authority to create national monuments, but none have succeeded, and no court challenges have actually succeeded in Congress undoing a presidential designation.<sup>167</sup> In fact, some controversial monuments were later re-designated as national parks, such as the Grand Canyon National Monument.<sup>168</sup> One failed attempt, H.R. 330, introduced in 2015 would have required Congressional approval and input from nearby states prior to designating a monument in the EEZ, but failed to become law.<sup>169</sup>

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161. Carol H. Vincent, *National Monuments and the Antiquities Act*, CONGRESSIONAL RESEARCH SERVICE, 3 (Nov. 30, 2018), <https://fas.org/sgp/crs/misc/R41330.pdf> [<https://perma.cc/9SXY-F5TX>].

162. *Id.* at 2.

163. *Id.*

164. *Id.* at 1.

165. *Id.* at 4, n.21.

166. *Id.*

167. *Id.* at 11-12.

168. *Id.* at 2.

169. MAST Act, H.R. 330 114th Congress (2015) (An act to bar the president from designating a monument in the EEZ unless its authorized by Congress, a proposal is submitted to the governor of each state or territory within 100 nautical miles of the area, each governor submits notice that the legislator of that state has approved the proposal, and the declaration is substantially the same as the proposal); *see* S.437 114th Congress

Overall, Congress has considered, and failed to pass amendments aimed at limiting the president's authority. Congressional acquiescence and a trend of upholding monument designations confirm Congress is unlikely to amend the Act. As mentioned above, the Federal Land Policy and Management Act of 1976 (FLPMA), which changed how public lands administered by the Bureau of Land Management are managed, is proof that Congress had the authority to limit a president's ability to reserve federal land for conservation purposes but chose to leave the Antiquities Act undisturbed. Instead, Congress expressly prohibited the Secretary of the Interior's ability to modify or revoke any withdrawal from national monuments, and further left only Congress the authority to modify or revoke monuments created under the Antiquities Act.<sup>170</sup>

*b. President's Authority to Modify or Revoke National Monuments*

When President Trump issued a proclamation on December 4, 2017 reducing Grand Staircase by 861,974 acres,<sup>171</sup> it was not the first time a president has used the Antiquities Act to reduce the size of a national monument, rather than create or expand one. The terms "smallest area compatible" create a justification for both enlarging a national monument, and for diminishing one.<sup>172</sup> Presidents have deleted acres from national monuments, claiming that the acres do not meet the Acts requirement that the area be the "smallest area compatible with the proper care and management of the objects to be protected."<sup>173</sup> For example, President Kennedy issued a proclamation to add 2,882 acres to Bandelier National Monument in New Mexico while at the same time removed 3,925 acres from the monument.<sup>174</sup> He removed a section of the monument because the land contained limited archeological values and were not necessary to protect the cultural value of the monument.<sup>175</sup> At the same time added

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Improved National Monument Designation Process Act (this act would have required the President before designating a monument in the EEZ to comply with NEPA and get authorization from Congress and each state legislature within 100 nautical miles of the proposed monument).

170. Federal Land Policy and Management Act, H.R. 13777, 94th Cong. (1967).

171. Proclamation No. 9682, 82 Fed. Reg. 58089 (Dec. 4, 2017).

172. Alexandra M. Wayatt, *Antiquities Act: Scope of Authority for Modification of National Monuments*, CONGRESSIONAL RESEARCH SERVICE, 5 (Nov. 14, 2016); 54 U.S.C.A. § 320301 (2014).

173. Wayatt, *supra* note 172, at 5.

174. *Id.* at 4.

175. *Id.*

acres that he believed possessed an “unusual scenic character” that better reflected the purpose of the monument.<sup>176</sup>

Although a president has modified national monuments, the President’s authority to revoke an entire monument contradicts the Act’s plain language and there does not appear to be any other source of implied authority.<sup>177</sup> Supporting this contention is a 1938 Attorney General opinion stating:

While the president from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom, under that part of the act which provides that the limits of the monuments ‘in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected,’ it does not follow from his power so to confine that area that he has the power to abolish a monument entirely.<sup>178</sup>

Similarly, during the overhaul of federal public land, Congress repealed the Pickett Act, thereby removing much of the president’s authority to withdraw federal lands, leaving the Secretary of the Interior with the authority make, modify, extend, or revoke withdrawals.<sup>179</sup> However, as mentioned above, during the creation of the FLPMA, Congress left the Antiquities Act in place, leaving the president with the authority to make withdrawals under the Antiquities Act that cannot be undone by subsequent presidents.<sup>180</sup> Overall, no president has ever revoked a national monument, and arguably lacks the authority to do so.

## VI. CONCLUSION

The Antiquities Act empowers the president to act swiftly and decisively without any delay from state, local, or federal procedural requirements.<sup>181</sup> The inclusion of lands “owned or controlled” by the federal government means that when laws change extending the

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176. *Id.*

177. *Id.* at 3.

178. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att’y Gen. 185, 188 (1938).

179. Payton A. Wells, *Choose your Laws Carefully*, 67 DUKE L.J. 863, 882-83 (2018).

180. *Id.* at 883; *see also* Natural Resources Defense Council, *Briefer on Presidential Withdrawal Under OCSLA Sec. 12(a)*, 2 (2017).

181. Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America*, 29 ECOLOGY L. Q. 71, 125 (2002).

jurisdiction of the United States, so too does the reach of the Antiquities Act.<sup>182</sup> If the president were restricted by further limitations on the Antiquities Act, the force and threat to marine and terrestrial environments would be without an effective immediate solution. Currently, the fate of the Northeast Canyons Marine National Monument and any marine national monument is largely protected by Supreme Court precedent and Congress. As for the Association's Complaint in *Massachusetts Lobstermen's Association v. Ross*, the Court held that, "just as President Roosevelt had the authority to establish the Grand Canyon National Monument in 1908 . . . President Obama could establish the Canyons and Seamounts Monument in 2016."<sup>183</sup>

This Comment does not argue that the Antiquities Act is without flaws. Like any area undergoing a transition from commercial use to conservation, many stakeholders are affected. However, the Antiquities Act and all presidential proclamations under the Act are forward thinking and the long-term benefits likely outweigh any short-term hardship.

Although there is no obligation to follow the notice and comment procedures of NEPA or to provide an assessment of the environmental impacts of the President's action, one solution is to amend the Antiquities Act to require the president to follow a procedural requirement similar to that of the NEPA. Communities and local governments would receive notice and comments to serve as an information tool for both the president and local stakeholders. However, unlike NEPA, there would be no need for an environmental impact statement, because the purpose of such statement is to ensure the environmental impacts are considered and abated, and a president's designation of the Antiquities Act will undoubtedly have no environmental impact as they are all for preservation purposes. As such, just as NEPA is mostly a procedural statute, the president would not be bound by the findings. Instead, it would force the president to consider alternatives, and find the most suitable solution, taking into account local stakeholder interests.

In conclusion, the Antiquities Act has continued to survive legislative and judicial challenges.<sup>184</sup> This Comment, consistent with the District Court's dismissal of the Association's Complaint, demonstrates that marine national monuments are "situated on lands owned or controlled by

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182. Wells, *supra* note 179, at 884 (stating that "when President Reagan extended the territorial sea to twelve nautical miles in 1988, the Antiquities Act's jurisdiction enlarged with it"); see Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

183. *Mass. Lobstermen's Ass'n v. Ross*, 349 F.Supp.3d 48, 51 (D.D.C. 2018).

184. Hartman, *supra* note 7, at 177.

the Federal government.”<sup>185</sup> Simply put: Who owns or controls the submerged lands and waters within the EEZ if they are not owned or controlled by the federal government?<sup>186</sup> The Antiquities Act was intended to serve as an immediate solution to protect objects of historic or scientific interest, irrespective of congressional approval, agency goals, and resources. Until Congress acts, the courts only review a presidential proclamation when the president has acted beyond the discernable limits. This challenge falls short.

The fact that Congress has considered legislation attempting to limit the president’s authority to designate monuments on the EEZ is further evidence that submerged land and waters within the Monument’s boundaries qualify as lands owned or controlled by the federal government. Accordingly, the Northeast Canyons and Seamounts Marine National Monument, and all other marine monuments located within the EEZ, will survive challenges alleging that they are not “situated on lands owned or controlled by the Federal government.”<sup>187</sup>

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185. *See generally* Mass. Lobstermen's Ass'n, 349 F.Supp.3d 48.

186. *See id.* at 65 (stating that the “federal government’s control over the EEZ is unrivaled” and that “[n]o other person or entity, public or private, comes close to matching the Government’s dominion over that area . . .”).

187. 54 U.S.C.A. § 320301(a) (2014).