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Submitted via regulations.gov

July 10, 2017

Honorable Ryan Zinke
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Monument Review, MS-1530
Washington, DC 20240

Re: Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment, 82 Fed. Reg. 22,016 (May 11, 2017)

Dear Secretary Zinke:

Defenders of Wildlife submits the following comments on the original designation and subsequent expansion of Papahānaumokuākea Marine National Monument to inform the Department of the Interior's review of this and twenty-six other national monuments designated or expanded since 1996 under the Antiquities Act of 1906, as required by Executive Order 13792.[1]

Founded in 1947, Defenders of Wildlife is a national non-profit conservation organization dedicated to conserving and restoring native species and the habitats on which they depend. Based in Washington, DC, the organization maintains six regional field offices around the country. Defenders is deeply involved in the conservation of marine species and ocean habitats, including the protection and recovery of species that occur in U.S. waters in the Atlantic Ocean. We submit these comments on behalf of our almost 1.2 million members and supporters nationwide.

Executive Order 13792 directs you to review national monuments designated or expanded pursuant to the Antiquities Act of 1906 since January 1, 1996.[2] Section 1 of the order, "Policy," states in pertinent part: "Designations should be made in accordance with the requirements and original objectives of the Act and appropriately balance the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities."

Section 2 of Executive Order 13792 establishes seven criteria for reviewing national monument designations or expansions since January 1, 1996, either 1) where the designation or the designation after expansion exceeded 100,000 acres or 2) "where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant

[1] Executive Order 13792 of April 26, 2017, "Review of Designations Under the Antiquities Act," 82 Fed. Reg. 20,429 (May 1, 2017).
[2] Act of June 8, 1906, ch. 3060, 34 Stat. 225, codified at 54 U.S.C. ch. 3203.

stakeholders." The review is to determine whether each designation or expansion "conforms to the policy set forth in section 1 of the order." At the conclusion of this review, you are to "formulate recommendations for Presidential actions, legislative proposals, or other appropriate actions to carry out that policy."[3]

Twenty-seven national monuments are listed in the notice, including Papahānaumokuākea and four other marine national monuments that are also subject to separate review under Executive Order 13795.[4] Defenders firmly believes that none of the national monuments under review, including Papahānaumokuākea Marine National Monument, should be revoked, reduced in size, or opened to nonconforming uses through presidential, legislative, or other action.

Papahānaumokuākea Marine National Monument is largest of the five marine national monuments in U.S. waters and protects invaluable scientific, historic, and cultural resources. It is the largest contiguous and fully protected conservation area in the entire United States, encompassing 583,000 square miles of ocean waters, including ten islands and atolls in the Northwestern Hawaiian Islands. The unique blend of naturally and culturally significant areas led the UNESCO's inscribing this area in 2010 as our nation's first mixed World Heritage Site.[5] Both the original designation by President George W. Bush in 2006 and the subsequent expansion by President Barack Obama in 2016 were fully consistent with the Antiquities Act of 1906 and the policy articulated in Executive Order 13792.

The president lacks the legal authority to revoke or reduce the size of a national monument, or diminish legal protections for it in any way. Further, legislative proposals or other actions to carry out the policy of Executive Order 13792 are unnecessary and inappropriate. Defenders of Wildlife therefore urges that your report not include any recommendations to alter the size or status of the Papahānaumokuākea Marine National Monument.

Thank you for your attention to these comments.

Sincerely,

Robert G. Dreher
Senior Vice President, Conservation Programs

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[3] 82 Fed. Reg. 22,016 (May 11, 2017).
[4] Executive Order 13795, "Implementing an America-First Offshore Energy Strategy," 82 Fed. Reg. 20815 (May 3, 2017); *see also* 82 Fed. Reg. 28827 (June 26, 2017) (Review of National Marine Sanctuaries and Marine National Monuments Designated or Expanded Since April 28, 2007; Notice of Opportunity for Public Comment).
[5] See http://whc.unesco.org/en/list/1326

THE DESIGNATION AND EXPANSION OF PAPAHĀNAUMOKUĀKEA MARINE NATIONAL MONUMENT WERE LAWFUL AND APPROPRIATE UNDER THE ANTIQUITIES ACT

The Antiquities Act Imposes Few Requirements Restricting the President's Authority to Designate National Monuments

In the Antiquities Act of 1906, Congress chose to implement the general policy of protecting "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" on federal lands by affording the president broad power to designate national monuments by proclamation.[6]

In designating national monuments under Antiquities Act, the only limits on the president's authority are that: (1) the area must contain "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest"; (2) the area must be "situated on land owned or controlled by the Federal Government"; and (3) "[t]he limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[7]

Beyond these requirements, the president is afforded extensive discretion to protect federal lands and waters under the Antiquities Act. If Congress had sought to limit the type or size of objects that could be reserved under the Antiquities Act, the text of the statute would have reflected that limitation. Instead, as federal courts have repeatedly held, the plain language of the Antiquities Act bestows vast discretionary authority upon the president to select both the type and size of an object to be protected. For example, in rejecting a challenge to President Clinton's designation of Grand Staircase-Escalante National Monument premised on the argument that the legislative history of the Act demonstrated Congress' intent to protect only man-made objects, the reviewing court stated:

> This discussion, while no doubt of interest to the historian, is irrelevant to the legal questions before the Court, since the plain language of the Antiquities Act empowers the President to set aside "objects of historic or scientific interest." 16 U.S.C. § 431. The Act does not require that the objects so designated be made by man, and its strictures concerning the size of the area set aside are satisfied when the President declares that he has designated the smallest area compatible with the designated objects' protection. There is no occasion for this Court to determine whether the plaintiffs' interpretation of the congressional debates they quote is correct, since a court generally has recourse to congressional intent in the interpretation of a statute *only when the language of a statute is ambiguous*.[8]

Before passing the Antiquities Act of 1906, Congress had considered other antiquities bills that set forth a clearly defined list of qualifying "antiquities."[9] An earlier version of the Antiquities Act—

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[6] 54 U.S.C. § 320301(a) (2012).
[7] *Id.* § 320301(a), (b).
[8] *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1186 n.8 (D. Utah 2004) (emphasis added) (citation omitted); *see also Mt. States Leg. Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002) (affirming the president's broad discretionary authority to designate natural, landscape-scale objects of historic or scientific interest).
[9] H.R. 12447, 58th Cong. § 3 (1904), *reprinted in* National Park Service, History of Legislation Relating to The National Park System Through the 82d Congress: Antiquities Act App. A (Edmund B. Rogers, comp., 1958). [hereinafter History of Legis.]

considered immediately before the final Act—also would have made reservations larger than 640 acres only temporary.[10] Rather than place limitations on the president's authority, however, the final version of the Act expanded executive discretion by adding the phrase "other objects of historic or scientific interest" to the list of interests that may be protected as national monuments.[11]

The addition of this language to the Act has significant implications for how it is administered. Former National Park Service Chief Historian Ronald Lee recognized that "the single word 'scientific' in the Antiquities Act proved sufficient basis to establish the entire system of … national monuments preserving many kinds of natural areas."[12] By the time the Federal Lands Policy and Management Act of 1976 ("FLPMA") was enacted, 51 of the 88 national monuments that had been established "were set aside by successive Presidents … primarily though not exclusively for their scientific value."[13]

"Scientific Interests" Have Included Biological Features Since the Earliest National Monument Designations

The designation of national monuments for scientific interests is not a recent phenomenon. For more than 100 years, national monuments have been established for the "scientific interests" they preserve. These values have included plants, animals, and other ecological concerns. In 1908, for instance, President Theodore Roosevelt designated Muir Woods National Monument because the "extensive growth of redwood trees (*Sequoia sempervirens*) … is of extraordinary scientific interest and importance because of the primeval character of the forest in which it is located, and of the character, age and size of the trees."[14] President Roosevelt also established Mount Olympus National Monument because it "embrace[d] certain objects of unusual scientific interest, including numerous glaciers, and the region which from time immemorial has formed summer range and breeding grounds of the Olympic Elk (*Cervus roosevelti*), a species peculiar to these mountains and rapidly decreasing in numbers."[15]

President Roosevelt was not alone in utilizing the Antiquities Act's broad authority to protect ecological marvels. For example, Presidents Harding, Roosevelt, Truman, and Eisenhower all subsequently expanded Muir Woods National Monument for the same reasons it was originally designated.[16] Likewise, in designating Papago Saguaro National Monument in 1914, President Wilson's proclamation highlighted that the "splendid examples of the giant and many other species of cacti and the yucca palm, with many additional forms of characteristic desert flora [that] grow to great size and perfection . . . are of great scientific interest, and should, therefore, be preserved."[17]

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[10] *See* S. 5603, 58th Cong. § 2 (1905), *reprinted in* History of Legis.
[11] S. 4698, 59th Cong. § 2 (1906), *reprinted in* History of Legis.
[12] Ronald F. Lee, The Antiquities Act of 1906 (1970), *reprinted in* Raymond H. Thompson, *An Old and Reliable Authority*, 42 J. OF THE S.W. 197, 240 (2000).
[13] *Id.*
[14] Proclamation No. 793, 35 Stat. 2174 (1908).
[15] Proclamation No. 896, 35 Stat. 2247 (1909).
[16] Proclamation No. 1608, 42 Stat. 2249 (1921); Proclamation No. 2122, 49 Stat. 3443 (1935); Proclamation No. 2932, 65 Stat. c20 (1951); Proclamation No. 3311, 73 Stat. c76 (1959).
[17] Proclamation No. 1262, 38 Stat. 1991 (1914).

Further, in 1925, President Coolidge designated nearly 1.4 million acres as Glacier Bay National Monument because

> the region [was] said by the Ecological Society of America to contain a great variety of forest covering consisting of mature areas, bodies of youthful trees which have become established since the retreat of the ice which should be preserved in absolutely natural condition, and great stretches now bare that will become forested in the course of the next century.[18]

Similarly, President Hoover enlarged Katmai National Monument "for the purpose of including within said monument additional lands on which there are located features of historical and scientific interest and for the protection of the brown bear, moose, and other wild animals."[19] President Franklin D. Roosevelt designated Channel Islands National Monument, in part, for the "ancient trees" it contained.[20] President Kennedy expanded Craters of the Moon National Monument to include "an island of vegetation completely surrounded by lava, that is scientifically valuable for ecological studies because it contains a mature, native sagebrush-grassland association which has been undisturbed by man or domestic livestock."[21]

Federal Courts Have Confirmed the President's Authority to Determine the Meaning of "Scientific Interests"

The broad objectives of the Antiquities Act, coupled with the vast deference afforded to the president in specifying a monument's purpose, compel courts to uphold presidential determinations of what constitute "objects" and "scientific interests" when those findings are challenged.[22] Beginning with a challenge to the designation of the Grand Canyon National Monument in 1920, the Supreme Court has promoted an expansive reading of the president's discretion to determine which "scientific interests" may be protected. In its analysis, the Supreme Court simply quoted from President Roosevelt's proclamation to uphold the presidential finding that the Canyon "is an object of unusual scientific interest."[23]

In *Cappaert v. United States*, the Supreme Court upheld President Truman's exercise of authority to add Devil's Hole to the Death Valley National Monument by relying upon the designation's objective of preserving a "remarkable underground pool," which contained "unusual features of scenic, scientific, and educational interest."[24] In his proclamation, President Truman's noted "that the pool contains 'a peculiar race of desert fish … which is found nowhere else in the world' and that the 'pool is of … outstanding scientific importance …'"[25] In its analysis, the Supreme Court acknowledged that "the language of the Act . . . is not so limited" as to preclude the president from

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[18] Proclamation No. 1733, 43 Stat. 1988 (1925).
[19] Proclamation No. 1950, 47 Stat. 2453 (1931).
[20] Proclamation No. 2281, 52 Stat. 1541 (1938).
[21] Proclamation No. 3506, 77 Stat. 960 (1962).
[22] *See Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1179 (D. Utah 2004) ("[T]here have been several legal challenges to presidential monument designations … Every challenge to date has been unsuccessful.").
[23] *Cameron v. United States*, 252 U.S. 450, 455–56 (1920) (quoting Proclamation No. 794, 34 Stat. 225 (1908)).
[24] *Cappaert v. United States*, 426 U.S. 128, 141 (1976) (internal quotations omitted) (quoting Proclamation No. 2961, 3 C.F.R. § 147 (1949-1953 Comp.)).
[25] *Id.*

exercising his broad discretion to protect such unique "features of scientific interest."[26] As a result, the Supreme Court ultimately held that "[t]he pool in Devil's Hole and its rare inhabitants are 'objects of historic or scientific interest.'"[27]

Similarly, in upholding the designation of Jackson Hole National Monument, the district court of Wyoming found that

> plant life indigenous to the particular area, a biological field for research of wild life in its particular habitat within the area, involving a study of the origin, life, habits and perpetuation of the different species of wild animals …[all] constitute matters of scientific interest within the scope and contemplation of the Antiquities Act.[28]

Likewise, when ruling on a challenge to the millions of acres that President Carter set aside as national monuments in Alaska, the district court of Alaska concluded that "[o]bviously, matters of scientific interest which involve geological formations or which may involve plant, animal or fish life are within this reach of the presidential authority under the Antiquities Act."[29] The court also found that the Act protected a broad range of natural features, including the ecosystems of plant and animal communities relied upon by the Western Arctic Caribou herd.[30]

Recently, Giant Sequoia National Monument was challenged on grounds that it protects objects that do not qualify under the Act.[31] In rejecting that argument, the circuit court noted that "other objects of historic or scientific interest may qualify, at the President's discretion, for protection as monuments. Inclusion of *such items as ecosystems and scenic vistas* in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features."[32]

In addition, one court found that the designation of the Cascade-Siskiyou National Monument legitimately protects "scientific interests" within the meaning of the Act, because the Monument is

> a "biological crossroads" in southwestern Oregon where the Cascade Range intersects with adjacent ecoregions … the Hanford Reach National Monument, a habitat in southern Washington that is the largest remnant of the shrub-steppe ecosystem that once dominated the Columbia River basin … and … the Sonoran Desert National Monument, a desert ecosystem containing an array of biological, scientific, and historic resources.[33]

There are No Acreage Restrictions on the Size of the Objects That May Be Designated as National Monuments

As the court in *Wyoming v. Franke* recognized: "What has been said with reference to the objects of historic and scientific interest applies equally to the discretion of the Executive in defining the area

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[26] *Id.*
[27] *Id.* at 142 (emphasis added) (citing *Cameron v. U.S.*, 252 U.S. 450, 455–56 (1920)).
[28] *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945).
[29] *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853, 1855 (D. Alaska 1980).
[30] *Id.*
[31] *Tulare County v. Bush*, 306 F.3d 1138, 1140–41 (D.C. Cir. 2002).
[32] *Id.* at 1142 (emphasis added) (internal quotations omitted).
[33] *Mt. States Leg. Found. v. Bush*, 306 F.3d 1132, 1133–34 (D.C. Cir. 2002) (citations omitted).

compatible with the proper care and management of the objects to be protected."[34] In other words, the determination of "the smallest area compatible with the proper care and management of the objects to be protected" is almost entirely within the president's authority.

The Supreme Court honored this principle in *Cameron v. United States* by finding that President Theodore Roosevelt was authorized to establish the 800,000-acre Grand Canyon National Monument.[35] Since then, courts have been exceedingly hesitant to infringe upon the president's broad discretion in determining the "smallest area" possible encompassed by a monument—including the 1.7 million-acre Grand Staircase-Escalante National Monument.[36]

Courts, moreover, are even less likely to disturb the president's factual determinations when a proclamation contains the statement that the monument "is the smallest area compatible with the proper care and management of the objects to be protected."[37] Beginning in 1978, presidents have included this declaration in all proclamations establishing or enlarging national monuments.[38]

Designating National Monuments in U.S. Waters is Well Within the President's Discretionary Authority Under the Antiquities Act

The Antiquities Act does not limit the president's authority to designate only those lands owned by the United States in its capacity as sovereign; rather, the Act allows the president to reserve as national monuments "objects of historic or scientific interest that are situated on land owned *or controlled* by the Federal Government . . . ."[39] "Although the Antiquities Act refers to 'lands,'" the Supreme Court has consistently "recognized that it also authorizes the reservation of waters located on or over federal lands."[40] Further, as discussed above, the Supreme Court has specifically rejected the argument that the Antiquities Act cannot be utilized to protect wildlife or its habitat on federally controlled lands.[41]

Thus, the question of whether the president may designate as national monuments those lands and waters within either the territorial seas (from three to 12 miles offshore) or the exclusive economic zone (EEZ) (from 12 to 200 miles offshore) turns only upon whether the United States exercises a

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[34] 58 F. Supp. 890, 896 (D. Wyo. 1945).
[35] 252 U.S. 450, 455–56 (1920).
[36] *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004) ("When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion.").
[37] *See*, *e.g.*, *Mt. States Leg. Found.*, 306 F.3d at 1137; *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002).
[38] Including the determination that each national monument is confined to "the smallest area compatible with the proper care and management of the objects to be protected" began with President Carter (Proc. Nos. 4611–4627), and was continued by Presidents Clinton (Proc. Nos. 6920, 7263–66, 7317–20, 7329, 7373–74, 7392–7401), G.W. Bush (Proc. Nos. 7647, 7984, 8031), and Obama (Proc. Nos. 8750, 8803, 8868, 8884, 8943–47, 8089, 9131, 9173, 9194, 9232–34, 9297–99, 9394–96, 9423, 9465, 9476, 9478, 9496, 9558–59, 9563–67).
[39] 54 U.S.C. § 320301(a) (2012) (emphasis added).
[40] *United States v. California*, 436 U.S. 32, 36 n.9 (1978); *see also Cappaert v. United States*, 426 U.S. 128, 138–42 (1976) (holding that a monument designation implicitly includes a reservation of those waters necessary to effectuate the monument's purposes).
[41] *Cappaert*, 426 U.S. at 141 (stating that protection "of a peculiar race of desert fish," and the habitat upon which it depends, is a valid exercise of the President's authority under the Antiquities Act).

quantum of "control" sufficient to satisfy the Antiquities Act's plain language. Although no court has addressed the question of the requisite measure of "control" necessary under the Antiquities Act's plain language, Black's Law Dictionary defines "control" as "to exercise restraining or directing influence over; regulate; restrain; dominate; curb; to hold from action; overpower; counteract; govern."[42] Under this plain meaning of "control," it becomes clear that the jurisdiction exercised by the United States over its waters is more than sufficient to support the designation of marine national monuments under the Antiquities Act.

A. The President Has Ample Authority to Establish National Monuments in the United States' Territorial Seas

1. *Jurisdictional Framework in the Territorial Seas*

In its plainest terms, the territorial sea is a narrow band of ocean that parallels the length of a nation's coastline (or, "baseline").[43] According to the United Nation's Convention on the Law of the Sea ("UNCLOS"), "[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea."[44] Subject only to exceptions touching upon 'innocent passage,' "the coastal state has the same sovereignty over its territorial sea, and over the air space, sea-bed, and subsoil thereof, as it has in respect of its land territory."[45] As a concomitant to that sovereignty, "the coastal State may extend the reach of its domestic legislation to the limits of its territorial sea and enforce provisions of that legislation against its own citizens and foreigners."[46]

Domestically, "[t]he President has the authority to extend or contract the territorial sea pursuant to his constitutionally delegated power over foreign relations."[47] Under customary international law, every coastal nation "has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from [its] baselines."[48] Up until recent history, however, the

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[42] *Control*, Black's Law Dictionary (4th ed. 1951).

[43] Baselines may be defined in several ways depending upon *in situ* coastal features, however, "the normal baseline for measuring the breadth of the territorial sea [and exclusive economic zone] is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." United Nations Convention on the Law of the Sea Art. 5, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], https://treaties.un.org/doc/publication/unts/volume%201833/volume-1833-a-31363-english.pdf/.

[44] *Id.* at Art. 2(1).

[45] Restatement (Third) of The Foreign Relations Laws of the United States § 512.

[46] Michael Reed, *National and International Jurisdiction and Boundaries*, *in* Ocean and Coastal Law and Policy 10 (Donald C. Baur *et al.* eds., 2d ed., 2015).

[47] *Helman v. Alcoa Global Fasteners, Inc.*, 637 F.3d 986, 993 (9th Cir. 2011).

[48] UNCLOS, *supra* note 42, at Art. 2. Although the United States is not a signatory to UNCLOS, "[a] treaty can constitute evidence of customary international law 'if an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its principles.'" *United States v. Salad*, 908 F. Supp. 2d 730, 734 (E.D. Va. 2012) (alteration in original) (quoting *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003)). Further, "with the exception of its deep seabed mining provisions, the United States has consistently accepted UNCLOS as customary international law for more than 25 years." *Id.* (quoting *United States v. Hasan*, 747 F. Supp. 2d 599, 635 (E.D. Va. 2010)). *See also The Paquete Habana*, 175 U.S. 677, 700 (1900) ("where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .").

United States claimed only a three-mile territorial sea.[49] In 1988, President Ronald Reagan proclaimed that "[t]he territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law."[50] In extending the nation's territorial sea "to the limits permitted by international law," President Reagan sought to "advance the national security and other significant interests of the United States."[51]

In 1954, Congress passed the Submerged Lands Act ("SLA").[52] The relevant portion of the SLA conveyed to the various states all federal title in lands beneath navigable waters up to three miles seaward of the baseline.[53] In addition, the SLA also "confirmed" that all "natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward" of the three miles granted to the various states fell squarely under the control of "the jurisdiction and control" of the United States.[54] Thus, as a general matter, the United States remains sovereign in the portion of its territorial sea between three and twelve miles as measured from the baseline.

2. *The 'Control' Exercised by the United States in its Territorial Seas is More Than Sufficient to Support the Designation of Marine Monuments*

As highlighted above, the U.S. retains the same sovereignty "over its territorial seas, and the air space, sea-bed, and subsoil thereof, as it has in respect of its land territory."[55] Indeed, the Supreme Court has consistently recognized that "the United States has paramount sovereign authority over submerged lands beneath the territorial sea."[56] With respect to national monument designations specifically, the Supreme Court has also held that "[i]t is clear, after all, that the Antiquities Act empowers the President to reserve submerged lands."[57]

In addition to these express holdings by the Supreme Court, federal legislation also demonstrates the expansive control exercised by the U.S. over its territorial seas. For instance, in 1998, Congress passed the Coast Guard Authorization Act, which explicitly adopted President Reagan's 1988 Proclamation and extended federal shipping and safety regulations into the U.S.'s territorial seas.[58] These regulations, amplified by the U.S.'s attendant sovereign authority over its territorial seas, serves to demonstrate that Congress exercises sufficient—if not exclusive—"restraining or directing influence" under the Antiquities Act's plain meaning. Consequently, there cannot be any serious

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[49] *See, e.g.*, Carol Elizabeth Remy, *U.S. Territorial Sea Extension: Jurisdiction and International Environmental Protection*, 16 Fordham Int'l L.J. 1208, 1219–20 (1992) (discussing the state of U.S. jurisdiction in the territorial seas prior to Proclamation No. 5928).
[50] Proclamation No. 5928, 3 C.F.R. § 547 (1989).
[51] *Id.*
[52] 43 U.S.C. §§ 1301–1315 (2012).
[53] *Id.* § 1311.
[54] *Id.* § 1302.
[55] Restatement (Third) of The Foreign Relations Laws of the United States § 512.
[56] *United States v. Alaska*, 521 U.S. 1, 35 (1997) (citing *United States v. California*, 332 U.S. 19, 35–36 (1947); *United States v. Louisiana*, 339 U.S. 699, 704 (1950); *United States v. Texas*, 339 U.S. 707, 719 (1950)).
[57] *State of Alaska v. United States*, 545 U.S. 75, 103 (2005) (citing *United States v. California*, 436 U.S. 32, 36 (1978)).
[58] *See* Coast Guard Authorization Act of 1998, Pub. L. No. 105-383, § 301, 112 Stat. 3411 (1998) (amending multiple U.S. Code provisions to provide that: "'Navigable waters of the United States' includes all waters of the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988").

doubt as to the president's authority to "establish a national monument under the Antiquities Act within the territorial sea from 3–12 miles seaward from the baseline."[59]

3. *The 1988 Proclamation Savings Clause Does Not Limit the U.S.'s Sovereign Authority to Protect Marine Resources in its Territorial Seas*

Some commentators have argued that a savings clause in the 1988 Proclamation, stating that it did not "extend[] or otherwise alter[] existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom,"[60] limits the Antiquities Act's applicability within the territorial seas.[61] However, this argument is legally flawed because, as set forth in an Opinion by the Department of Justice's Office of Legal Counsel ("OLC"), the broad and unqualified terms of the Antiquities Act are precisely the kind that remain unaffected by the Proclamation's savings clause.[62]

As counseled by the OLC, the relevant consideration in determining whether the Proclamation's savings clause applies to a given statute turns on "whether Congress intended for the jurisdiction of any existing statute to include an expanded territorial sea."[63] Of course, any analysis of congressional intent in this context must begin with an examination of the plain language of the statute in question.[64] Yet where the geographical reach of "territorial sea" is left undefined, "further inquiry into the purpose and structure of a particular statute" is required to determine whether Congress "intended the term to refer to the three miles that history and existing practice had defined" or whether it "intended the statute's jurisdiction to always track the extent of the United States' assertion of territorial sea under international law."[65] Notably, this analytical framework has been endorsed and adopted by two separate U.S. Circuit Courts of Appeal.[66]

Although no court has addressed the issue with respect to the Antiquities Act specifically, its expansive terms support the proposition that Congress did not intend to leave the statute frozen in time. Rather than utilizing cabined terms such as "territorial sea," the Antiquities Act paints with a broad brush by granting the president the authority to designate any "lands owned or controlled" by the United States.[67] Accordingly, the OLC found that, based on the principal conservation purposes, straightforward structure, and unqualified language of the Statute,

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[59] Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 192 (2000).
[60] Proclamation No. 5928, 3 C.F.R. § 547 (1989).
[61] John Yoo & Todd Gaziano, Am. Enter. Inst., Presidential Authority to Revoke or Reduce National Monument Designations 12-14 (2017).
[62] 24 Op. O.L.C. at 191.
[63] *Id.* at 188 (internal quotations omitted) (quoting Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea, 12 Op. O.L.C. 238, 253 (1988)).
[64] *Id.*
[65] *Id.* at 188, 189 (internal quotations omitted) (quoting Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea, 12 Op. O.L.C. 238, 253–54 (1988)).
[66] *See In re Air Crash off Long Island*, 209 F.3d 200 (2d Cir. 2000) (utilizing OLC's analysis to determine that the Death on the High Seas Act, 46 U.S.C. §§ 30301–30308, remained unaffected by the 1988 Proclamation's savings clause); *Helman v. Alcoa Global Fasteners, Inc.*, 637 F.3d 986, 992 (9th Cir. 2011) ("According to the OLC, in determining whether a Presidential Proclamation affects a particular statute, one must determine whether Congress 'intended' the statute to be so affected.").
[67] 54 U.S.C. § 320301(a) (2012).

> Congress intended for the reach of the Antiquities Act to extend to any area that at the particular time the monument is being established is in fact "owned or controlled" by the U.S. Government, even if it means that the area covered by the Act might change over time as new lands and areas become subject to the sovereignty of the nation.[68]

In sum, Congress' broad intent to allow the president to designate as national monuments *any* lands controlled by the federal government necessarily extends to those lands beneath the territorial sea.[69]

Empirically, the OLC's conclusion finds historical precedent in President Kennedy's designation of Buck Island Reef National Monument in 1961.[70] Although the monument was established within three miles of the U.S. Virgin Islands' baseline, it nonetheless reserved lands that were not owned by the U.S. in 1906 when the Antiquities Act was enacted.[71] Consequently, the Buck Island Reef National Monument stands "for the underlying principle that when the United States gains control over lands and areas that it did not control in 1906, that land is nonetheless covered by the Antiquities Act."[72]

B. Under the Antiquities Act's Plain Language, the President May Establish National Monuments in the United States' Exclusive Economic Zone

The question of whether the president may lawfully designate national monuments within its EEZ again turns on whether the U.S. exercises a sufficient quantum of control necessary to satisfy the Antiquities Act's broad language. Here, the inescapable conclusion is that certain sovereign rights, coupled with exclusive jurisdiction and the concomitant authority to protect against environmental degradation, affords the U.S. the requisite measure of "directing influence" necessary to support the designation of a marine monument in its EEZ.

1. *Jurisdictional Framework in the Exclusive Economic Zone*

The EEZ represents a compromise between traditionally maritime nations, which sought extensive freedom of navigation on the oceans, and those nations interested in protecting their coastal resources from intrusive exploration.[73] As defined by UNCLOS, "[t]he exclusive economic zone is an area beyond and adjacent to the territorial sea," which "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." [74] Within the EEZ, "the coastal State has [exclusive] *sovereign rights* for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoils . . . ."[75] Subject to de minimis

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68 Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 191 (2000).
69 *Id.* at 191–92.
70 Proclamation No. 3443, 3 C.F.R. § 152 (1959–1963).
71 24 Op. O.L.C. at 191.
72 *Id.*
73 *See* Reed, *supra* note 45, at 11.
74 UNCLOS, *supra* note 42, at Arts. 55., 57.
75 *Id.* at Art. 56 (emphasis added).

limitations, UNCLOS also confers exclusive jurisdiction in the EEZ on coastal nations to regulate "marine scientific research . . . [and] the protection and preservation of the marine environment."[76]

Acting "in accordance with the rules of international law," President Reagan established the United States' current 200-mile EEZ in 1983.[77] In claiming that EEZ, the U.S. endeavored to "advance the development of ocean resources and *promote the protection of the marine environment*, while not affecting other [States'] lawful uses of the zone . . . ."[78] The "lawful uses" specifically identified by UNCLOS and President Reagan's proclamation were limited to "freedom[] of navigation, overflight" and "the laying of submarine cables and pipelines . . . ."[79] Thus, absent interference with these identified uses, "[w]ithin the Exclusive Economic Zone, the United States has . . . sovereign rights for the purpose of . . . conserving and managing natural resources, both living and non-living," as well as exclusive "jurisdiction with regard to . . . protection and preservation of the marine environment."[80]

2. *The United States Exercises a Quantum of Control Over its Exclusive Economic Zone Sufficient to Support Reservations Under the Antiquities Act*

In its EEZ, the United States exerts the requisite quantum of control necessary to support the designation of national monuments under the Antiquities Act for several reasons. First, by the plain terms of UNCLOS, the United States retains sovereign and exclusive rights over the exploration, exploitation, conservation, and management of all natural resources found within its declared EEZ.[81] Indeed, Congress exercises those rights with respect to fisheries through the Magnuson-Stevens Fishery Conservation and Management Act, which explicitly provides that "the United States claims, and will exercise . . . sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone."[82]

Likewise, certain sovereign rights afforded by customary international law also entitle the U.S. to "take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with" international law.[83] Here too, Congress exerts these jurisdictional controls over the U.S. EEZ through domestic legislation such as the Jones Act, which places certain ownership and operating restrictions on vessels engaged in coastwise trade.[84]

Second, the United States controls its EEZ through the exercise of a species of the right-to-exclude under customary international law. UNCLOS provides that coastal nations may contract with others to grant excess fishing rights in the coastal State's EEZ *only after* "the coastal State does not have the

[76] *Id.*
[77] Proclamation No. 5030, 3 C.F.R. § 22 (1984).
[78] *Id.* (emphasis added).
[79] *Id.*
[80] *Id.*
[81] UNCLOS, *supra* note 42, at Art. 56.
[82] 16 U.S.C. § 1811(a) (2012).
[83] UNCLOS, *supra* note 42, at Art. 73.
[84] 46 U.S.C. § 55102 (2012); *see also id.* § 55110 (providing that § 55102 "applies to the transportation of valueless material or dredged material, regardless of whether it has commercial value, from a point in the United States or on the high seas within the exclusive economic zone, to another point in the United States or on the high seas within the exclusive economic zone").

capacity to harvest the entire allowable catch . . . ."[85] The coastal State's contractual fishing rights, combined with its sovereign right to conserve living marine resources, imply a unique measure of exclusionary control over economic endeavors within a given EEZ.

Third, as a practical matter, a coastal State's expansive control over its own EEZ is generally defined by exclusion. In this context, the freedom of navigation and overflight and the freedom to lay submarine cables are the only definitive freedoms beyond a coastal State's "control."[86] While these exclusions leave a coastal State with something less than total sovereignty in its EEZ, the residual authority is nevertheless extensive. Importantly, absolute sovereignty over a given tract of land is not a necessary predicate to the designation of a national monument. As evidenced by the relevant presidential proclamations, marine national monuments may accomplish the purposes for which they were created without abrogating the control exercised by the United States.[87]

Fourth, under UNCLOS and customary international law, the United States possesses broad—and in certain cases, obligatory—authority to protect the marine environment within its EEZ. For instance, one identified purpose of UNCLOS is provide for the conservation of "natural resources of the sea-bed and subsoil of the super-adjacent waters."[88] To that end, "coastal state[s are] obligated to ensure, through proper conservation and management measures, that living resources in the exclusive economic zone are not endangered by over-exploitation."[89] As a result, the United States is afforded the requisite power and control necessary to protect the natural marine resources within its EEZ against exploitation and extraction. Consistent with that authority, the Antiquities Act—and its focus on curbing over-exploitation—is a valid exercise of the U.S.'s jurisdiction under international law.

Beyond concerns regarding over-exploitation, UNCLOS also grants additional authority to coastal States "to prevent, reduce and control pollution of the marine environment by dumping."[90] Accordingly, UNCLOS provides that "[d]umping within the territorial sea and the exclusive economic zone or onto the continental shelf shall not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate and control such dumping . . . ."[91] As a result, Congress exercises this authority through the Act to Prevent Pollution from Ships, which subjects all vessels to certain environmental controls "while in the navigable waters or the exclusive economic zone of the United States."[92]

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[85] UNCLOS, *supra* note 42, at Art. 62.
[86] UNCLOS, *supra* note 42, at Art. 58 ("In the exclusive economic zone, all States . . . enjoy . . . the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms . . . .").
[87] Each presidential proclamation designating national monuments in U.S. waters includes a provision explicitly integrating applicable international law. *See* Proc. No. 8335, 74 Fed. Reg. 1,557, 1,560 (Jan. 6, 2009) (Marianas Trench Marine National Monument); Proc. No. 8336, 74 Fed. Reg. 1,565, 1,569 (Jan. 6, 2009) (Pacific Remote Islands Marine National Monument); Proc. No. 8337, 74 Fed. Reg. 1,577, 1,579 (Jan. 6, 2009) (Rose Atoll Marine National Monument); Proc. No. 9496, 81 Fed. Reg. 65,159, 65,164 (Sept. 21, 2016) (Northeast Canyons and Seamounts Marine National Monument); Proc. No. 9478, 81 Fed. Reg. 60,227, 60,231 (Aug. 26, 2016) (Papahānaumokuākea Marine National Monument).
[88] UNCLOS, *supra* note 42, at Art. 61.
[89] Restatement (Third) § 514 cmt. f.
[90] UNCLOS, *supra* note 42, at Art. 210.
[91] *Id.*
[92] 33 U.S.C. § 1902 (2012).

Finally, Congress has tacitly approved the establishment of national monuments in the U.S. EEZ through recurring appropriations and legislative silence. As the Supreme Court counseled in *Alaska S.S. Co. v. United States*, courts should be "slow to disturb the settled administrative construction of a statute," particularly where "it has received congressional approval, implicit in the annual appropriations over a period of [several] years."[93]

Likewise, in the context of the executive's power over the public domain, congressional silence has long been understood to equate to tacit approval of executive action. For instance, in analyzing the propriety of federal land withdrawals made by President Taft in response to dwindling oil reserves, the Supreme Court—without citing explicit statutory authority—found that:

> The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time, and affecting vast bodies of land, in many States and Territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in lieu of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen.[94]

In contradistinction to the withdrawals made by President Taft, however, the designation at issue here is made under the color of an explicit congressional grant of authority. Consequently, where Congress has not acted to limit the president's authority to designate national monuments in the U.S. EEZ, such designations must be considered to bear a congressional seal of approval.

Only Congress Has the Authority to Revoke or Reduce the Size of a National Monument Designation

Executive Order 13792 instructs the Interior Secretary to "review" national monuments designated or expanded under the Antiquities Act and "include recommendations for Presidential actions."[95] In a press briefing on this order, Secretary Zinke stated that the it "directs the Department of Interior to make recommendations to the President on whether a monument should be rescinded, resized, [or][96] modified." However, any such actions taken by the president would be unlawful: only Congress has the authority to rescind, reduce, or substantially modify a national monument.

The president's powers regarding management of public lands are limited to those delegated to him by Congress. While the Antiquities Act of 1906 provides the president the power to "declare" and "reserve" national monuments, it does not grant him authority to rescind, resize, modify, or otherwise diminish designated national monuments.[97]

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[93] 290 U.S. 256, 262 (1933).
[94] *United States vs. Midwest Oil Co.*, 236 U.S. 459, 475 (1915).
[95] Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (May 1, 2017).
[96] Press Briefing on the Executive Order to Review Designations Under the Antiquities Act, Ryan Zinke, Sec'y of the Interior (Apr. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/04/25/press-briefing-secretary-interior-ryan-zinke-executive-order-review.
[97] 54 U.S.C. § 320301(a), (b).

The Property Clause of the U.S. Constitution[98] gives Congress "exclusive" authority over federal property,[99] in effect making "Congress[] trustee of public lands for all the people."[100] "The Clause must be given an expansive reading, for '(t)he power over the public lands thus entrusted to Congress is without limitations.' "[101] Congress may, of course, delegate its authority to manage these lands to executive agencies or the president,[102] as it did in the Antiquities Act.

In the Antiquities Act, Congress only delegated to the president the broad authority to *designate* as national monuments "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest"—an authority limited only by the requirement that such reservations be "confined to the smallest area compatible with the proper care and management of the objects to be protected."[103] Conspicuously absent from the Act, however, is language authorizing *any* substantive changes to national monuments once they have been established.

The omission of language granting the president the authority to rescind, reduce, or modify national monuments is intentional. Without it, an implicit congressional grant of these authorities cannot be read into the Antiquities Act.[104] If Congress intended to allow future presidents to rescind or reduce existing national monument designations, it would have included express language to that effect in the Act. Congress had done just that in many of the other public land reservation bills of the era.[105]

Furthermore, Congress considered a bill that would have authorized the president to restore future national monuments to the public domain, which passed the House in 1925, but was never enacted.[106] Logically, that effort would have been redundant if such authority already existed under the Act. The Antiquities Act thus demonstrates that Congress chose to constrain the president's authority not by limiting his ability to designate or expand national monuments, but by withholding the power to rescind, reduce, or modify monuments once designated or expanded.

For nearly eighty years, the federal government's position has been that the president lacks the authority to rescind, repeal, or revoke national monuments. Of course, if the president lacks such authority, it follows that the secretary lacks the authority to rescind, repeal, or revoke national

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[98] U.S. Const. art. IV, § 3, cl. 2.

[99] *See, e.g.*, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917).

[100] *United States v. City & Cty. of San Francisco*, 310 U.S. 16, 28 (1940).

[101] *Kleppe v. New Mexico*, 426 U.S. 529, 539–40 (1976) (quoting *San Francisco*, 310 U.S. at 29).

[102] *United States v. Grimaud*, 220 U.S. 506, 517 (1911); *Cameron v. United States*, 252 U.S. 450, 459–60 (1920); *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1191 (D. Utah 2004) (upholding Grand Staircase–Escalante National Monument) (citing *Yakus v. United States*, 321 U.S. 414 (1944)).

[103] 54 U.S.C. § 320301(a)–(b) (2012).

[104] *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (refusing "once again, to presume a delegation of power merely because Congress has not expressly withheld such power.").

[105] *See* National Forest Organic Act of 1897, Act of June 4, 1897, 30 Stat. 1, 34, 36 (authorizing President "to *modify* any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may *reduce* the area or *change the boundary lines* of such reserve, *or may vacate altogether* any order creating such reserve.") (emphasis added) (repealed in part by Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. 94-579, Title VII, § 704(a), Oct. 21, 1976; National Forest Management Act of 1976, 16 U.S.C. § 1609(a)); Pickett Act, Act of June 25, 1910, c. 421, § 1, 36 Stat. 847 (executive withdrawals were "temporary," only to "remain in effect until revoked by him or by an Act of Congress.") (repealed by FLPMA § 704(a)).

[106] H.R. 11357, 68th Cong. (1925).

monuments as well.[107] In 1938, U.S. Attorney General Homer Cummings concluded that "[t]he Antiquities Act … authorizing the President to establish national monuments, does not authorize him to abolish them after they have been established."[108] The Attorney General Opinion went on to state:

> The grant of power to execute a trust, even discretionally, *by no means* implies the further power to undo it when it has been completed. A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.[109]

Despite the apparent contradiction to this passage, and without addressing its legality or providing much discussion, this Attorney General's Opinion also recognized that "the President from time to time has diminished the area of national monuments established under the Antiquities Act."[110] However, none of these Presidential actions that reduced the size of national monuments has ever been challenged in court. Perhaps more importantly, there have been no attempts by the president or the secretary to rescind, resize, modify, or otherwise diminish designated national monuments since the enactment of FLPMA.[111]

In FLPMA, Congress not only repealed nearly all sources of executive authority to make withdrawals except for the Antiquities Act,[112] but also overturned the implied executive authority to withdraw public lands that the Supreme Court had recognized in 1915 as well.[113] FLPMA's treatment of the Antiquities Act was designed, moreover, to "specifically *reserve to the Congress the authority to modify and revoke withdrawals* for national monuments created under the Antiquities Act."[114]

Consequently, the authority Congress delegated to the president in the Antiquities Act is limited to the designation or expansion of national monuments. Where a President acts in accordance with that power, the designation is "in effect a reservation by Congress itself, and . . . the President thereafter [i]s without power to revoke or rescind the reservation . . . ."[115] Thus, as the district court in *Wyoming v. Franke* summarized, where "Congress presumes to delegate its inherent authority to [the president], . . . the burden is on the Congress to pass such remedial legislation as may obviate

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107 *Cf. Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1197 (D. Utah 2004) ("Because Congress only authorized the withdrawal of land for national monuments to be done in the president's discretion, it follows that the President is the only individual who can exercise this authority because only the President can exercise his own discretion.").

108 Proposed Abolishment of Castle Pickney National Monument, 39 Op. Atty. Gen. 185, 185.

109 *Id.* at 187 (emphasis added) (quoting 10 Op. Atty. Gen. at 364).

110 *Id.* at 188. *See also* National Monuments, 60 Interior Dec. 9 (1947) (concluding that the president is authorized to reduce the area of national monuments by virtue of the same provision of Act).

111 Pub. L. 94-579 (Oct. 21, 1976), codified at 43 U.S.C. § 1701 *et seq.*

112 *Id.* at Title II, § 204, Title VII, §704(a).

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

114 H.R. REP. 94-1163, 9, 1976 U.S.C.C.A.N. 6175, 6183 (emphasis added).

115 Proposed Abolishment of Castle Pickney National Monument, 39 Op. Atty. Gen. 185, 187 (1938) (citing 10 Op. Atty. Gen. 359, 364 (1862)).

any injustice brought about [because] the power and control over and disposition of government lands inherently rests in its Legislative branch."[116]

PAPAHĀNAUMOKUĀKEA MARINE NATIONAL MONUMENT

The Original Designation and Subsequent Expansion of Papahānaumokuākea Marine National Monument Protect and Provide for the Proper Care and Management of Significant and Rare Marine Ecosystem Objects and Values

The area now protected by the Papahānaumokuākea Marine National Monument is the result of a unique bipartisan conservation legacy stretching back more than 100 years in U.S. history. Six U.S. presidents have acted to protect the Northwest Hawaiian Islands, beginning in 1903 with President Theodore Roosevelt reserving islands and atolls for seabird conservation. In 1940, President Franklin D. Roosevelt established the Hawaiian Islands National Wildlife Refuge, for which President Lyndon B. Johnson provided additional protections in 1967. President Ronald Reagan created the Midway Atoll National Wildlife Refuge in 1988. In 2000, President Bill Clinton established the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, thereby creating the largest single nature preserve in the U.S. at that point in time.

On June 15, 2006, President George W. Bush established the Northwestern Hawaiian Islands Marine National Monument under the Antiquities Act by Proclamation 8031.[117] On February 28, 2007, President Bush amended the Proclamation to rename the monument Papahānaumokuākea to reflect native Hawaiian language and culture.[118] As originally designated, the Monument included approximately 139,793 square miles of emergent and submerged lands and waters of the United States. The original Monument was approximately 100 nautical miles wide, extending approximately 50 miles seaward from the Northwestern Hawaiian Islands for a total extent of around 1,200 miles around coral islands, seamounts, banks, and shoals.[119] The Monument designation encompassed areas already identified for conservation and protection under federal law, including the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve,[120] the Midway Atoll National Wildlife Refuge and the Battle of Midway National Memorial,[121] and the Hawaiian Islands National Wildlife Refuge.[122]

President Bush's Proclamation 8031 describes the objects of historic or scientific interest which the Monument was established to protect:

> The area . . . supports a dynamic reef ecosystem with more than 7,000 marine species, of which approximately half are unique to the Hawaiian Island chain. This diverse ecosystem is home to many species of coral, fish, birds, marine mammals, and other flora and fauna including the endangered Hawaiian monk seal, the threatened green sea turtle, and the endangered leatherback and hawksbill sea turtles.

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[116] 58 F. Supp. 890, 896 (D. Wyo. 1945).
[117] 71 Fed. Reg. 36,443 (June 26, 2006).
[118] 72 Fed. Reg. 10,031 (Mar. 6, 2007).
[119] 74 Fed. Reg. 33,209 (July 10, 2009).
[120] Executive Order 13178, Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, Dec. 4, 2000.
[121] https://www.fws.gov/refuge/Midway_Atoll/.
[122] https://www.fws.gov/refuge/hawaiian_islands/.

> In addition, this area has great cultural significance to Native Hawaiians and a connection to early Polynesian culture worthy of protection and understanding.[123]

President Bush explicitly found that the designated Monument constituted "the smallest area compatible with the proper care and management of the objects to be protected."[124]

Subsequently, President Barack Obama expanded the Papahānaumokuākea National Monument to adjacent waters and submerged lands on September 15, 2016, under Proclamation 9496.[125] This proclamation stated:

> As required by the Antiquities Act, the adjacent area contains objects of historic and scientific interest . . . . [these objects] are geological and biological resouces that are part of a highly pristine deep sea and open ocean ecosystem with unique biodiversity and that constitute a sacred cultural, physical, and spiritual place for the Native Hawaiian community.[126]

The expansion added another 442,781 square miles of waters under the control of the United States to the Monument.[127] As described in this proclamation, the expansion was necessary to protect the objects of scientific and historic interest protected under the original Monument designation, based on scientific research demonstrating that many wildlife species inhabit or utilize previously unknown geographic ranges in those adjacent areas.[128] President Obama also explicitly found that the reserved lands constitute "the smallest area compatible with the proper care and management of the objects to be protected."[129]

The 2006 proclamation delegated primary responsibility for the marine areas of the Monument to the National Oceanic and Atmospheric Administration (NOAA), in consultation with the U.S. Fish and Wildlife Service (FWS). It delegated sole responsibility for management of the areas of the Monument overlaying the two National Wildlife Refuges and the Battle of Midway National Memorial to the FWS in consultation with NOAA.[130] Following the original designation, NOAA, in consultation with FWS and the State of Hawaii, worked to develop a coordinated management plan for the original Monument area with significant input from the public, a plan that was finalized in 2008.[131] The 2016 proclamation directed NOAA and FWS to prepare a joint management plan for the expanded Monument area.[132]

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[123] 76 Fed. Reg. at 36,433.
[124] 71 Fed. Reg. at 36,443–44.
[125] The text of Proclamation 9496 of September 15, 2016 is reprinted at 81 Fed. Reg. 65,161 (Sept. 21, 2016).
[126] 81 Fed. Reg. at 60,227.
[127] 81 Fed. Reg. at 60,230.
[128] 81 Fed. Reg. at 60,228.
[129] 81 Fed. Reg. at 60,230.
[130] 71 Fed. Reg. at 36,444.
[131] See http://www.papahanaumokuakea.gov/new-about/management/. There are currently four co-trustees with management responsibilities for administering the Monument: NOAA, FWS, the State of Hawaii (through the Department of Land and Natural Resources (DLNR), and the Office of Hawaiian Affairs, a separate state entity responsible for representing the interests of the Native Hawaiian community.
[132] 81 Fed. Reg. at 60,230.

A. The Unique Terrestrial, Reef, and Marine Ecosystems of the Monument Constitute Objects of Scientific Interest

1. *The Monument's Ecosystems Are Objects of Great Scientific Interest*

The Monument consists of one of the largest, if not the largest, marine protected areas in the world. Dotted with small islands, islets, and atolls surrounded by coral reefs, the Monument contains a complex array of marine and terrestrial ecosystems. These range from 4600 meters below sea level to 275 meters above sea level, from abyssal seas and plains, deep pelagic basins, submarine escarpments, seamounts, and submerged banks, to deep and shallow coral reefs and shallow lagoons, and to littoral shores, dunes, dry coastal grasslands and shrublands, and even a hypersaline lake. The Monument represents a complete cross section of a Pacific archipelagic ecosystem.

Terrestrial Habitats

The Hawaiian Archipelago is the longest and most remote island chain on Earth, 2,600 miles away from the closest continental land mass. It formed from a volcanic hot spot in the center of the North Pacific Ocean, which has been creating islands in Hawaii for at least 80 million years. As a result, there is no geological connection to any continent, and the geographic isolation from continents has made colonization by plants and animals very difficult. The natural rate of successful colonization is estimated to be about one species every 35,000 years. The isolation and low colonization rate has allowed the Archipelago to develop many unique ecosystems, with many species evolving over thousands of years into unique species found nowhere else on the planet.

Land areas are very limited in the Monument; the ten islands and atolls of the chain compose less than six square miles of the entire Monument area. Nevertheless, these relatively tiny areas are of tremendous ecological importance, especially to seabirds and imperiled plant species. The land areas consist of both "high" islands, where the basalt rock from volcanic formation is still above the ocean's surface, and low-lying islands and atolls, islands composed of sedimented material, coral rubble, or uplifted coral reefs.

The only coral atolls in the United States are found in the Northwest Hawaiian Islands. Coral atolls develop in a ring around a high volcanic island; as the volcano erodes and subsides back into the sea, the corals continue to grow, staying near the surface. After millions of years, the volcanic rock sinks beneath the surface, with only coral skeletons and living coral remaining. Coral-rubble islets form in atoll environments by currents and wave energy; these small, ephemeral land areas provide important breeding and nesting areas for green turtles and seabirds as well as haul out areas for monk seals. Both atolls and islets provide a virtually predator-free haven for seabirds and haul-out habitat for turtles and seals to rest and reproduce.

Fresh water is a limiting factor for terrestrial animals and plants on these land areas. It is available to these species on atolls and other low-lying islands due to the hydrological feature known as a freshwater lens, a convex area of fresh water that floats on the denser seawater below.

Seamounts, Guyots, and Banks

The Monument contains extensive areas of relatively shallow underwater habitats (from 0 to 600 feet below the water's surface). These consist of seamounts (undersea volcanoes that never reached

the ocean's surface), guyots (undersea volcanoes that were once above the ocean's surface but have since submerged to form flat-topped undersea mountains) and banks (shallow areas that can be a submerged part of a land mass). More than 30 submerged ancillary banks and seamounts surround the islands and atolls of the Monument. These biological hotspots support abundant plant and animal communities, with fish and corals especially concentrated near the tops of seamounts and guyots.

Shallow Coral Reefs and Deep-water Corals

The Monument contains the largest coral reef system in the United States. Shallow-water, reef-forming corals provide a framework for the ecological community of the reef ecosystem. Fifty-seven species of stony corals are known to occur in the shallow subtropical waters of the Monument, with 17 species found only in the Hawaiian Archipelago.

The Monument's coral reefs are undisturbed by fishing or tourism, and support a nearly-pristine ecosystem with high levels of reef fish endemism and density. In turn, these abundantly healthy reef fish communities support a predator-dominated ecosystem, with extraordinarily abundant large, predatory fish, such as sharks, giant trevally, and Hawaiian groupers, that are rarely seen and heavily overfished in populated areas of the world.

The Monument's shallow coral reefs are invaluable objects of scientific interest. Although the Monument's reefs are relatively isolated from human impacts due to the protections bestowed by the Monument designation, they remain threatened by global disturbances such as coral diseases, global-warming-induced bleaching events, and global-warming-induced ocean acidification. The shallow-water coral reefs of the Monument are critically important for scientific research, not only as reference points to provide a comparison for less-protected or unprotected coral reefs elsewhere in the world, but also to understand the potential adaptability and resilience of these reefs to environmental change.

The Monument also has deepwater coral beds at depths of 1,200 to 1,330 feet. The Monument's deepwater corals are even more diverse than those in shallow waters, comprising more than 200 species. Unlike shallow-water corals, deepwater coral species do not rely on symbiotic algae for food and do not require sunlight; rather, their polyps collect tiny organisms from the surrounding nutrient-rich waters. These corals grow only millimeters per year over hundreds, or thousands, of years.

The centuries-old cold-water coral complexes and associated structure-forming fauna such as sponges and anemones are the foundation of their deep-sea ecosystem. They provide food, spawning and nursery habitat, and shelter for innumerable invertebrate and vertebrate species.

The Monument's deep-sea corals are also invaluable objects of scientific interest. Because they are so long-lived, scientists can analyze trace elements and isotopes incorporated into their calcium-based skeletons to learn about historic changes in global climate and ocean current systems. Research into coral and sponge communities has yielded advances in cancer treatments, human bone synthesis, and optic cables. Scientists are currently investigating compounds discovered in deep-sea coral ecosystems for their potential use in new medicines.

2. *The Monument's Terrestrial and Marine Species Are Objects of Great Scientific Interest For Their Diversity, Their Abundance, Their Endemism, and/or Their Status as Protected Species*

The geomorphological history and isolation of the Monument archipelago have led to an extremely high level of biodiversity and endemism. Of the nearly 7,000 presently known marine species in the Monument, twenty-five percent are endemic. More than twenty percent of the fish species present are found only in the archipelago, while the rate of endemism in coral species is more than forty percent. The Monument also protects species currently unknown to science, which are of great scientific interest. More than 90 percent of all ocean species are estimated to be unknown to science; new species are discovered nearly every time scientists conduct surveys in the Monument.

Some of the major groups of marine wildlife protected by the Monument include:

Seabirds and Shorebirds

A number of the islands and atolls now protected under the Monument designation were originally reserved to conserve breeding populations of seabirds and shorebirds as far back as 1903 and 1909 by President Theodore Roosevelt.[133] "[N]ative birds were the first wildlife species for which the Monument area was managed for conservation purposes by the U.S. Government."[134] Today, the Monument protects one of the largest and most important assemblages of seabirds and shorebirds in the world; 22 species of seabirds, numbering approximately 14 million birds, are represented, while 47 species of shorebirds have been recorded. The islands and atolls provide not only breeding and nesting habitat but also stopover or wintering habitat for boreally breeding shorebirds. Many of these species also forage in the waters of the Monument.

The Monument provides especially important habitat protections for bird species such as the bristle-thighed curlew, a migratory shorebird that becomes flightless during its autumnal molt and has suffered significant population losses on other Pacific islands populated by domestic dogs, cats, and pigs. Five species of endangered or threatened birds make their home in the Monument. One such species is the endangered Laysan duck, the rarest native waterfowl in the U.S.. Once widespread across the Hawaiian Islands, the species now survives only on Laysan Islands and Midway Atoll National Wildlife Refuges (within the Monument area). All three of the Pacific albatrosses (Laysan, black-footed, and the endangered short-tailed) breeding in the North Pacific are found on Midway Atoll NWR within the Monument.

Fish

The Monument protects a diversity and abundance of reef fish species characterized by a high degree of endemism, particularly at the northern end of the archipelago, which boasts endemism rates well over 50%. Biodiversity hot spots such as that protected by the Monument are vital to global marine conservation. In turn, the healthy reef fish populations, remarkable for their abundance as well as the size of the fish, support large populations of apex predators such as sharks, giant trevally, and Hawaiian groupers that are not found outside the Monument where fishing

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[133] Papahānaumokuākea Marine National Monument Management Plan (December 2008), at 173. http://www.papahanaumokuakea.gov/new-about/management/pdfs/vol1_mmp08.pdf.
[134] *Id.*

pressures have converted apex-predator-dominated ecosystems into herbivorous-fish-dominated ecosystems. In the Monument, 54% of the total fish biomass consists of apex predators, compared to only 3 percent in the main Hawaiian Islands.

The Monument boasts a number of shark species, many of which are in decline globally. These include oceanic whitetip, silky, Galapagos, tiger, grey reef, and other species. The Monument also provides important habitat for pelagic migratory species, including billfish, tuna, and wahoo, that are commercially and recreationally important. Because so many of these species have been overfished worldwide, resulting in a biomass of only about ten percent of pre-industrial levels worldwide, the Monument's protections for healthy and robust large predatory fish populations are more important than ever.

Sea Turtles

Of the seven species of marine turtles, five (loggerhead, green, olive ridley, leatherback, and hawksbill) occur in the Monument, all of which are protected under the Endangered Species Act. Of these species, only the green turtle comes ashore to bask and breed. French Frigate Shoals within the Monument is the site of the principal rookery for the entire Central North Pacific Distinct Population Segment, with more than 90 percent of the population nesting there, with smaller numbers nesting at Lisianski and Pearl and Hermes Atoll). The Monument provides important foraging habitat for this and other distinct population segments of green turtles.

Marine Mammals

All marine mammals found in the Monument are protected by the Marine Mammal Protection Act, and a number of these are also protected by the Endangered Species Act. The Monument's marine and littoral ecosystems provide essential habitat for the vast majority of the remaining Hawaiian monk seals, the most endangered pinniped in the U.S. and one of the most endangered in the world. The Monument is also home to more than 20 species of whales and dolphins, five of which are also listed under the Endangered Species Act. The most abundant large whales are sperm whales and Bryde's whales, while the most abundant small toothed whales are pilot whales, rough-toothed dolphins, Fraser's dolphins, spotted dolphins, and striped dolphins. Both spinner and bottlenose dolphin populations are resident year-round in the Monument. Dwarf and pygmy sperm whales as well as Cuvier's beaked whales are also estimated to be quite abundant. Some whale species, such as fin, sei, and minke whales migrate through the Monument, while others use it seasonally for breeding and birthing. Researchers have demonstrated that the Monument contains two-thirds of the humpback whale wintering habitat in the Hawaiian Archipelago.

Endangered and Threatened Species

The terrestrial and marine habitats of the Monument are critical to the survival of many imperiled species, the distributions of which may be highly or entirely restricted to the area. Many species of plants and animals known to occur in the Monument are protected by the federal Endangered Species Act (ESA). There are undoubtedly many more that might be eligible for listing.

The 23 ESA-listed species, some of which depend entirely on the Monument for their existence, include:

Common Name	Scientific Name	ESA Status
Marine turtles		
Green	*Chelonia mydas*	Threatened (Central North Pacific DPS)
Leatherback	*Dermochelys coriacea*	Endangered
Loggerhead	*Caretta caretta*	Threatened
Olive ridley	*Lepidochelys olivacea*	Threatened/Endangered
Hawksbill	*Eretmochelys imbricate*	Endangered
Marine mammals		
Sperm whale	*Physeter microcephalus*	Endangered
Sei whale	*Balaenoptera borealis*	Endangered
Fin whale	*Balaenoptera physalus*	Endangered
Blue whale	*Balaenoptera musculus*	Endangered
North Pacific right whale	*Eubalaena japonica*	Endangered
Hawaiian monk seal	*Monachus schaunislandi*	Endangered
Terrestrial birds		
Laysan duck	*Anas laysanensis*	Endangered
Laysan finch	*Telepyza cantans*	Endangered
Nihoa millerbird	*Acrocephalus familiarus kingi*	Endangered
Nihoa finch	*Telespyza ultima*	Endangered
Seabirds		
Short-tailed albatross	*Phoebastria albatrus*	Endangered
Plants		
No common name	*Cyperus (=Mariscus) pennatiformis* spp *bryanii*	Endangered
No common name	*Amaranthus brownie*	Endangered
No common name	*Schieda verticillata*	Endangered
Kamanomano	*Cenchrus agrimoniodes* var *laysanensis*	Endangered
Lou`lu	*Pritchardia remota*	Endangered
`Ohai	*Sesbania tomentosa*	Endangered

B. The Designation Is Situated Only on Emergent and Submerged Lands and Waters Owned or Controlled by the United States

The Monument consists solely of emergent and submerged lands and waters of the United States, which are owned or controlled by the federal government.[135] As demonstrated above, it is entirely within the president's discretionary authority under the Antiquities Act to designate national monuments consisting of lands owned or controlled by the U.S., together with submerged lands and the overlying waters within the U.S. EEZ.

135 The Northwest Hawaiian Islands also include State of Hawaii lands and waters, which are managed by the State DLNR as the Northwestern Hawaiian Islands Marine Refuge and the State Seabird Sanctuary at Kure Atoll. These state lands continue to be governed by state law and regulations.

C. The Monument Designation Was Narrowly Tailored to the Smallest Area Compatible with its Proper Care and Management

As stated above, the Monument's designation and subsequent expansion were narrowly tailored not to exceed the smallest area compatible with the proper care and management of the objects to be protected, as required by the Antiquities Act. Thus, there is no justification under criterion (i) of Executive Order 13792 to recommend any changes to the Monument.

The biological requirements and function of species and habitats within the Monument require the size and protections designated by Presidents Bush and Obama. The Monument proclamations provide for the proper care and management of these exceptionally important and unique resources. Altering its configuration or management would remove lawful protections for the wildlife species and fragile ecosystems—objects of historic and scientific interest—that the Monument was established to conserve.

Given the unique nature of the marine objects and values protected therein, the Monument's size is a necessary concomitant of their proper care and management. The unique marine ecosystem values protected by the Monument are entirely reliant upon its present size. While the open-ocean portions of the Monument are home to their own ecosystems, they also provide a necessary buffer to safeguard other pristine conditions within the Monument. Wide-ranging, highly mobile species, such as sharks, marine mammals, and sea turtles, require large-scale conservation areas.

Scientists recommend protecting at least 30 percent of the world's oceans to fulfill an intergenerational legacy of ocean resource sustainability; at present, less than three percent of the world's oceans are protected.[136] Protecting the Monument as designated will not only provide essential research for understanding comparatively little known marine ecosystems, but also ensure that the area serves as a marine reserve for conserving and restoring fish stocks for the benefit of current and future generations.

Numerous scientific studies demonstrate that well-designed and strictly enforced marine reserves increase the density, diversity and size of fish, invertebrates and other organisms vital to wildlife conservation, as well as to recreational and commercial fishing.[137] Growth of fish biomass in fully protected areas on average increases to four times than in fished areas. Reserves also safeguard more apex predators, many of which are rare or absent from unprotected areas.[138] The Monument's ability

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[136] O'Leary B.C., M. Winther-Janson, J.M. Bainbridge, J. Aitken, J.P. Hawkins, C. M. Roberts. 2016. Effective coverage targets for ocean protection. *Conservation Letters* 9(6):1–6.
[137] Edgar G.J., R.D. Stuart-Smith, T.J. Willis, *et al.* 2014. Global conservation outcomes depend on marine protected areas with five key features. *Nature* 506(7487): 216–220; B.S. Halpern and R.R. Warner. 2002. Marine reserves have rapid and lasting effects. *Ecological Letters* 5(3): 361–366; S. Lester and B. Halpern. 2008. Biological responses in marine no-take reserves versus partially protected areas. *Marine Ecology Progress Series* 367: 49–56; S.E. Lester, B.S. Halpern, K. Grorud-colvert, et al. 2009. Biological effects within no-take marine reserves : a global synthesis. *Marine Ecology Progress Series* 384: 33–46.
[138] Halpern, B.S. 2003. The impact of marine reserves: do reserves work and does reserve size matter? *Ecological Applications* 13(1 SUPPL.).

to conserve and restore fish stocks restores key ecological functions and species interactions that can have strong cascading effects on lower trophic levels.[139]

Research has demonstrated that marine protected areas such as the Monument yield the greatest conservation benefits when they are large, remote, strongly protected, protected for a long time, and enforced; MPA conservation benefits increase exponentially with these features. Effective marine reserves have more large fish, a much greater fish biomass, and a much greater apex predator biomass than fished areas. The Monument, as designated and expanded, is the nation's, if not the world's, pre-eminent marine protected area.

D. The Monument Was Designated Only After an Extensive Public Process and Stakeholder Engagement

Both the Monument designation and expansion processes underwent significant public comment and involvement and enjoyed overwhelming support from the Native Hawaiian community as well as the general public. Representatives from Commerce, Interior, and the Council on Environmental Quality met with key stakeholders, including state and county government leaders, Native Hawaiians, fishermen, scientists, and environmental groups. Both U.S. senators and the governor of Hawaii supported the expansion, as did state and local political representatives, who sent dozens of letters in support. Thus, the Monument designation was made with adequate public outreach and coordination with relevant stakeholders, as per EO 13792. Accordingly, no justification exists pursuant to criterion (v) of Executive Order 13792 to recommend any changes to the Monument.

CONCLUSION

The Papahānaumokuākea National Monument protects unique and invaluable objects of scientific and historic interest for the benefit of citizens across the United States. Its designation by President George W. Bush and its subsequent expansion by President Barack Obama were fully consistent with the Antiquities Act as well as the policy set forth in Executive Order 13792. Accordingly, we urge that your report refrain from making any recommendations to implement, via presidential action, legislative action, or otherwise, any changes to reduce the size of or revoke designation of the Monument, or to diminish protections in any respect.

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[139] Myers R., J.K. Baum, T.D. Shepherd, S.P. Powers and C.H. Peterson. 2007. Cascading effects of the loss of apex predatory sharks from a coastal ocean. *Science* 315(5820): 1846– 1850; P.J. Mumby, A.R. Harborne, J. Williams, et al. 2007. Trophic cascade facilitates coral recruitment in a marine reserve. *Proc. Nat'l Acad. Sci.* 104(20): 8362-8367; G.J. Edgar, N.S. Barrett, R.D. Stuart-Smith. 2009. Exploited reefs protected from fishing transform over decades into conservation features otherwise absent from seascapes. *Ecological Applications* 19(8): 1967-1974.