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*Submitted electronically via regulations.gov*

July 10, 2017

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

Re: Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment (May 11, 2017)

Dear Secretary Zinke:

Defenders of Wildlife (Defenders) respectfully submits the following comments on Rose Atoll Marine National Monument for consideration in the Department of the Interior's "Review of Certain National Monuments Established Since 1996."[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 also 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 Pacific Ocean. We submit these comments on behalf of almost 1.2 million members and supporters nationwide.

President Trump's Executive Order 13792[2] directed you to "review" national monuments designated or expanded since January 1, 1996, pursuant to the Antiquities Act of 1906.[3] Section 1 of the order, "Policy," states in pertinent part: "[d]esignations 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."

[1] 82 Fed. Reg. 22016 (May 11, 2017).
[2] 82 Fed. Reg. 20429 (May 1, 2017).
[3] Act of June 8, 1906, ch. 3060, 34 Stat. 225, codified at 54 U.S.C. ch. 3203.

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 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."[4]

Twenty-seven national monuments are listed in the Notice of Opportunity for Public Comment, including Rose Atoll and four other marine national monuments that are also subject to review by the National Oceanic and Atmospheric Administration pursuant to Executive Order 13795, "Implementing an America-First Offshore Energy Strategy."[5] Defenders firmly believes that none of America's national monuments should be revoked, reduced in size or opened to nonconforming uses, including Rose Atoll and the 26 other (marine) national monuments identified for administrative review.

Rose Atoll Marine National Monument protects unique and invaluable scientific, biological and ecological resources that can provide immeasurable social and economic benefits to Polynesians and people across the United States. Home to a diversity of fish, wildlife and plants, including numerous imperiled species, these public waters, islands and coral reefs merit the protection provided as a marine national monument, a designation that was made fully consistent with the Antiquities Act and the policy articulated in Executive Order 13792.

The president lacks the legal authority to revoke or diminish a national monument and should additionally refrain from seeking legislative action or taking any other action to undermine the designation. Defenders of Wildlife therefore urges that your report should not include any recommendations to alter the size or status of Rose Atoll Marine National Monument.

Thank you for your attention to these comments.

Sincerely,

Robert G. Dreher
Senior Vice President, Conservation Programs

[4] 82 Fed. Reg. 22016 (May 11, 2017).
[5] 82 Fed. Reg. 20815 (May 3, 2017).

## PROCLAMATION OF MARIANAS TRENCH MARINE NATIONAL MONUMENT WAS LEGAL 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

[6] 54 U.S.C. § 320301(a) (2012).
[7] *Id.* § 320301(a), (b).

> 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—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

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[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.].
[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).

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]

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]

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[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).
[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).

**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 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]

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[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.*
[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).

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 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 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

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[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).
[34] 58 F. Supp. 890, 896 (D. Wyo. 1945).

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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[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 43, 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*,

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

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 . . . .").

[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)).

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 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

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[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").

[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)).

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,

> 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

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[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).

[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.

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 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,

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[72] *Id.*

[73] *See* Reed, *supra* note 46, at 11.

[74] UNCLOS, *supra* note 43, at Arts. 55., 57.

[75] *Id.* at Art. 56 (emphasis added).

[76] *Id.*

[77] Proclamation No. 5030, 3 C.F.R. § 22 (1984).

[78] *Id.* (emphasis added).

[79] *Id.*

"[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 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

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[80] *Id.*
[81] UNCLOS, *supra* note 43, at Art. 56.
[82] 16 U.S.C. § 1811(a) (2012).
[83] UNCLOS, *supra* note 43, 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").
[85] UNCLOS, *supra* note 43, at Art. 62.

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

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[86] UNCLOS, *supra* note 43, 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. 1557, 1560 (Jan. 6, 2009) (Marianas Trench Marine National Monument); Proc. No. 8336, 74 Fed. Reg. 1565, 1569 (Jan. 6, 2009) (Pacific Remote Islands Marine National Monument); Proc. No. 8337, 74 Fed. Reg. 1577, 1,579 (Jan. 6, 2009) (Rose Atoll Marine National Monument); Proc. No. 9496, 81 Fed. Reg. 65159, 65164 (Sept. 21, 2016) (Northeast Canyons and Seamounts Marine National Monument); Proc. No. 9478, 81 Fed. Reg. 60227, 60231 (Aug. 26, 2016) (Papahānaumokuākea Marine National Monument).

[88] UNCLOS, *supra* note 43, at Art. 61.

[89] Restatement (Third) § 514 cmt. f.

[90] UNCLOS, *supra* note 43, at Art. 210.

[91] *Id.*

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]

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,

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[92] 33 U.S.C. § 1902 (2012).
[93] 290 U.S. 256, 262 (1933).
[94] *United States vs. Midwest Oil Co.*, 236 U.S. 459, 475 (1915).
[95] Exec. Order No. 13792, 82 Fed. Reg. 20429 (May 1, 2017).

[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]

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

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[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).
[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.").

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 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]

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[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).

[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).

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

**ROSE ATOLL MARINE NATIONAL MONUMENT**

President George W. Bush established Rose Atoll Marine National Monument (Rose Atoll Monument or "Monument") in 2009 through Presidential Proclamation 8337.[117] The Monument spans more than 8,600,000 acres of emergent and submerged lands and waters of and around Rose Atoll in American Samoa. One of the smallest atolls in the world, Rose Atoll includes two low elevation sandy islets atop a coralline algal reef that encloses a lagoon. It is the easternmost Samoan

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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)).
116 58 F. Supp. 890, 896 (D. Wyo. 1945).
117 Proclamation 8337, 74 Fed. Reg. 1577 (Jan. 12, 2009).

island and the southernmost point of the United States.[118] The Monument is principally managed by the U.S. Fish and Wildlife Service in consultation with the National Oceanic and Atmospheric Administration, with the Government of American Samoa as a cooperating agency in management planning.

Rose Atoll Marine National Monument includes Rose Atoll National Wildlife Refuge, which comprises approximately 20 acres of emergent land and 1,600 acres of lagoon habitat. The Refuge was established in 1973 by cooperative agreement with the Government of American Samoa.[119] It is the southernmost unit of the National Wildlife Refuge System, our only network of federal lands and waters dedicated to wildlife conservation. Encompassing 566 refuges with at least one in every U.S. state and territory, the Refuge System is essential to protecting our nation's astounding diversity of wildlife, supports innumerable recreational and educational opportunities and generates billions of dollars in local, sustainable economic revenue. As one of only two national wildlife refuges located south of the equator, Rose Atoll Refuge is a unique and exceptional unit of the Refuge System.[120]

As directed in the monument proclamation, the marine areas of Rose Atoll Marine National Monument outside of the Refuge were added to the Fagatele Bay National Marine Sanctuary in 2012, when it was also renamed the National Marine Sanctuary of American Samoa.[121]

The lands, submerged lands, waters and marine environment of Rose Atoll Monument contain objects of significant historic and scientific interest. The marine and terrestrial communities on and around Rose Atoll provide an unparalleled opportunity for scientific research and afford a rare baseline for biological and geological research of low elevation Pacific islands. Marine biologists are conducting research projects related to species monitoring and underwater mapping of the Monument's coral reefs, providing an invaluable record of change in this ecosystem over time.[122] Over the last century, approximately 300 papers and reports have been written describing the geology, geography, biology, meteorology and history of the area.[123] The facts concerning the

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[118] U.S. Fish and Wildlife Service. Undated. "Rose Atoll Marine National Monument" (factsheet), available at https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Rose_Atoll_Marine_National_Monument/Documents/RAMNM%20brief.pdf. [FWS factsheet]

[119] U.S. Fish and Wildlife Service, 2013. Rose Atoll National Wildlife Refuge Comprehensive Conservation Plan at 1-8 [CCP].

[120] CCP at 1-1.

[121] Expansion of Fagatele Bay National Marine Sanctuary, Regulatory Changes and Sanctuary Name Change, 77 Fed Reg. 43942 (July 26, 2012).

[122] NOAA Fisheries, Pacific Islands Regional Office. "Rose Atoll Marine National Monument" (webpage), available at http://www.fpir.noaa.gov/MNM/mnm_roseatoll.html.

[123] FWS factsheet.

important marine resources within Rose Atoll Monument clearly demonstrate that President Bush was well within his discretion under the Antiquities Act in designating the monument.

**Rose Atoll Marine National Monument Protects Sensitive Ecosystems and Habitats of Significant Historic and Scientific Interest**

The Rose Atoll Proclamation describes in great detail the dynamic ecosystem preserved in the Monument that support a diverse assemblage of terrestrial and marine species of high ecological value.[124] The atoll has all the major habitats and associated biological groups found on Pacific atolls, and provides for island and marine species groups that are adapted to each habitat type. The Monument also conserves deep ocean habitats. Courts have upheld that the Antiquities Act provides the President with the discretion to protect ecosystems, ecosystem features and large habitats. For example, in *Tulare vs. Bush* the court found that inclusion of ecosystems within the Proclamation "did not contravene the terms of the statute by relying on nonqualifying features."[125]

*Reef*

The most striking feature of Rose Atoll is the pink hue of fringing reef created by the dominance of a crustose coralline algae, which is also the primary reef-building species in the shallow depths of the atoll. It is vital to maintain these living coralline algae as all shallow water and terrestrial organisms in the Monument depend on the growing platform these corals create, which is resistant to physical and bio-erosion from wave action.[126] The outer reef of the atoll slopes down to a depth of more than 650 feet, dominated by mixed corals and coralline algae to depths of 150 feet. The Monument preserves approximately 113 species of corals, and the coral communities are quite distinctive and different from those found at other islands in Samoa. Dominant corrals at Rose Atoll include *Favia, Acropora, Porites, Montipora, Asteopora, Montastrea* and *Pocillopora.*[127]

*Lagoon*

Rose Atoll Monument shelters a lagoon about 1.2 miles wide and up to approximately 65 feet deep. The shallow lagoon and its substrates, from benthic bottom cover of sand and patch reefs to limestone blocks and coral pinnacles, offer habitat for a unique assemblage of fish and the largest population of faisua (giant clams) in American Samoa.[128]

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[124] Proclamation 8337.
[125] *Tulare Cnty. v. Bush*, 306 F.3d at 1142.
[126] CCP at 2-12.
[127] FWS factsheet, Proclamation 8337.
[128] CCP at 2-10.

*Beach Strand*

The Monument's two islands, dubbed Rose and Sand, are about 14 and 7 acres respectively. As the only terrestrial rat-free areas in American Samoa, their sandy beach strand habitat is a vital nesting site for federally protected seabirds and sea turtles.[129]

*Littoral Forest*

The tropical wet littoral forest ecosystem is very rare in the Pacific Islands due to human development in most locations. The littoral forest on the islands of Rose Atoll Monument provide nesting sites for arboreal and ground nesting seabirds as well as native land hermit crabs and migratory shorebirds. Rose Island contains the only *Pisonia* forest community remaining in Samoa.[130]

*Intertidal*

The north end of Rose Island is characterized by an expanse of sand and rubble that is exposed at low tide. Seabirds congregate and rest at this intertidal zone, which also provides foraging habitat for reef fish and shorebirds.

*Ava*

The ava connects the Monument's lagoon with the open ocean, controlling water flow in and out of the lagoon, as well as the transportation of sediment that has created and maintained the islands in roughly the same location since 1873. It is essential to protect and maintain the size and location of the ava as it is key to the current function of the many habitats at Rose Atoll. It is also a major passageway for fish, and shelters species that require calmer waters to breed. Sharks and other predators congregate at the mouth of the ava waiting for prey.[131]

*Deep Water Habitat*

The Monument additionally protects deeper water ecosystems surrounding the atoll that are rich with marine life. Much of this area has yet to be fully documented. However, in spring 2017, the National Oceanic and Atmospheric Administration ship, *Okeanos Explorer* collected important

[129] CCP at. 1-2
[130] CCP at 1-2; FWS factsheet; Proclamation 8337.
[131] CCP at 2-14.

baseline data on the deep water habitats of the Monument, with preliminary results indicating that new species have been discovered.[132]

**Rose Atoll Marine National Monument Protects Rare and Imperiled Terrestrial and Marine Species of Significant Historic and Scientific Interest**

Fish and wildlife qualify for protection as objects of historic and scientific interest under the Antiquities Act. Rose Atoll Monument provides vital habitat for a variety of rare and endemic fish, reptiles, birds, invertebrates and marine mammals, including imperiled species listed under the Endangered Species Act (ESA). Species that face depletion elsewhere, some of which have declined worldwide by as much as 98 percent, are found in abundance at Rose Atoll Monument.[133]

*Fish*

The fish communities at Rose Atoll Monument are distinct from others in the Samoan Archipelago, with high species density and diversity. The species assemblages also differ from similar areas with a higher density of planktivorous and carnivorous fish than found elsewhere in the archipelago. The Monument contains approximately 272 species of reef fish, with scientists first discovering at least seven species there.[134] Pelagic fish species found outside the lagoon include various tuna, mahi mahi, billfish, barracuda and sharks. Rare Maori wrasse, large parrotfishes and blacktip, whitetip and gray reef sharks are abundant at Rose Atoll Monument. A new species of cardinal fish was found in the lagoon in 2006.[135] Snappers, jacks, groupers, unicornfishes and many others also frequent the waters in the Monument.

*Reptiles*

The threatened green and endangered hawksbill turtles use the Monument's protected island beaches and lagoon, which support both migratory breeding populations of turtles as well as a small resident population of juveniles.[136] In fact, the Monument contains the largest number of nesting turtles in American Samoa, and is one of the last remaining refuges for these imperiled species in the

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[132] NOAA, National Marine Sanctuaries, "Exploring the Deep Waters of National Marine Sanctuary of American Samoa" (webpage), http://sanctuaries.noaa.gov/news/feb17/exploring-the-deep-waters-american-samoa.html.
[133] Proclamation 8337.
[134] Proclamation 8337.
[135] FWS factsheet.
[136] FWS factsheet.

Central Pacific.[137] Satellite tagging has demonstrated that the green turtles at Rose Atoll migrate between American Samoa and other Pacific island nations.

*Birds*

Approximately 97 percent of the seabird population of American Samoa resides at Rose Atoll Monument, making it the most important seabird colony in the region.[138] The two islands provide important nesting and roosting habitat for 12 species of seabirds protected under the Migratory Bird Treaty Act, including terns, noddies, boobies, frigatebirds and tropicbirds.[139] Fives species of federally protected migratory shorebirds and one species of migrant forest bird, the long-tailed cuckoo, use the islands for feeding, resting and roosting.[140]

*Invertebrates and Mollusks*

There are at least two species of federally protected corals found at Rose Atoll Monument. Tunicates, stalked crinoids and unusual sea stars have been observed during deep diving submersible surveys. In addition, and unlike the rest of the Samoan Archipelago where they are harvested by humans, the Monument's lagoon supports high densities of the spectacularly colored giant clams (*Tridacna maxima*). These mollusks are listed under the Convention on International Trade in Endangered Species (CITES) and have suffered serious depletion throughout their range due to over-harvesting.[141]

*Marine Mammals*

Endangered hump back whales, pilot whales and dolphins of the genus *Stenella* have all been observed within Rose Atoll Monument.[142] All of the marine mammals found in the Monument are protected under the Marine Mammal Protection Act.

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[137] Proclamation 8337.
[138] FWS factsheet.
[139] U.S. Fish and Wildlife Service. "Rose Atoll National Wildlife Refuge" (website), available at https://www.fws.gov/refuge/rose_atoll/wildlife_and_habitat/birds.html.
[140] FWS factsheet; Proclamation 8337.
[141] CCP at 1-1, 2-10.
[142] Proclamation 8337, FWS factsheet.

*Imperiled Species*

The International Union for Conservation of Nature has listed many fish, birds, corals and other species that use the Monument "vulnerable" and "near threatened."[143] At least five species known to use Rose Atoll Monument are also listed under the ESA.

| **ESA-listed Species That Use Rose Atoll Marine National Monument** | | |
|---|---|---|
| **Common Name** | **Scientific Name** | **Federal ESA Status** |
| Green Turtle | *Chelonia mydas* | Threatened |
| Hawksbill Turtle | *Eretmochelys imbricata* | Endangered |
| Stony Coral | *Acropora globiceps* | Threatened |
| Stony Coral | *Acropora retusa* | Threatened |
| Humpback Whale | *Megaptera novaeangliae* | Endangered |

**The Size and Protections Afforded Rose Atoll Marine National Monument are Necessary for the Proper Care and Management of Marine Species and Ecosystems of Historic and Scientific Interest**

The biological requirements and function of species and habitats within Rose Atoll Monument require the size and protections President Bush provided the area almost a decade ago. The area within Rose Atoll's boundaries supports a diverse and increasingly rare assemblage of fish and wildlife as compared to other areas within the Samoan Archipelago. The monument proclamation provides for the proper care and management of these exceptionally important and unique resources. Altering its configuration or management would remove lawful protections for the terrestrial and marine species and fragile ecosystem—objects of historic and scientific interest—that the monument was established to conserve.

Scientists recommend protecting 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.[144] Existing uses of Rose Atoll Monument are appropriately limited to study and monitoring carried out by the Fish and Wildlife Service, National Marine Fisheries Service and the American Samoa government.[145] Current management will not only provide essential research for understanding comparatively little known marine ecosystems, but also ensure the area serves as a

[143] CCP.
[144] 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.
[145] FWS factsheet.

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.[146] 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.[147] The Monument's ability to conserve and restore highly fished predatory species (e.g., sharks, grouper, lobster, etc.) restores key ecological functions and species interactions that can have strong cascading effects on lower trophic levels.[148]

**CONCLUSION**

Rose Atoll Marine National Monument protects invaluable natural resources that hold immeasurable social, scientific and ecological value for Polynesians and citizens across the United States. There is no question that these public waters warrant the protections provided under the Antiquities Act and that the designation is both consistent with the law as well as the policy set forth in section 1 of Executive Order 13792. The President lacks the legal authority to revoke or diminish a national monument and should additionally refrain from seeking legislative action or take any other action to undermine this designation.

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[146] 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.

[147] Halpern, B.S. 2003. The impact of marine reserves: do reserves work and does reserve size matter? *Ecological Applications* 13(1 SUPPL.).

[148] 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.