No. 23-____

IN THE

Supreme Court of the United States

AMERICAN FOREST RESOURCE COUNCIL, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

PER A. RAMFJORD
JASON T. MORGAN
ARIEL STAVITSKY
STOEL RIVES LLP
760 SW Ninth Avenue
Suite 3000
Portland, OR 97205
(503) 224 3380
Counsel for Association of O & C Counties

TIMOTHY S. BISHOP
Counsel of Record
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 701 7829
tbishop@mayerbrown.com
Counsel for Petitioners

[*Additional Counsel Listed on Signature Page*]

QUESTIONS PRESENTED

In 1937, Congress passed the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O&C Act), which set aside nearly 2.6 million acres of Oregon forestland as a permanent trust for local governments to fund public services. Congress mandated that these timberlands "shall" be managed for "permanent forest production" and that timber thereon be cut and sold under "the princip[le] of sustained yield" to generate revenue for the affected counties. 43 U.S.C. §§ 2601, 2605. Despite this clear congressional mandate, the President used the Antiquities Act of 1906 to add tens of thousands of O&C timberland acres into a national monument where sustained-yield timber harvest is prohibited. Similarly, the Bureau of Land Management (BLM) issued management plans for the entirety of the O&C forestlands that dedicated 80% of the O&C lands to no-harvest "reserves" for conservation purposes.

The questions presented are:

Whether the President can use an Antiquities Act Proclamation to override Congress's plain text in the O&C Act to repurpose vast swaths of O&C timberlands as a national monument where sustained-yield timber production is prohibited.

Whether the Secretary of the Interior can override the O&C Act by designating 80% of the O&C timberlands as conservation "reserves" where sustained-yield timber harvest is prohibited.

PARTIES TO THE PROCEEDING

Petitioners here, petitioner-appellees in the court of appeals,[1] are American Forest Resource Council; Association of O&C Counties; Carpenters Industrial Council, now known as Pacific Northwest Regional Council of Carpenters; Douglas Timber Operators, Inc.; C & D Lumber Co., now known as C & D Partners, Inc.; Freres Lumber Co. Inc., now known as Freres Engineered Wood; Seneca Sawmill Company, now known as Sierra Pacific Industries; Starfire Lumber Co.; Swanson Group Mfg.; Josephine County, Oregon; Gahlsdorf Logging, Inc.; Young's Trucking, Inc; Oregon Forest and Industries Council; D & H Logging Co.; Oregon Small Woodlands Association; and Mountain Western Log Scaling and Grading Bureau.

Respondents here, respondent-appellants in the court of appeals, are the United States of America; the Bureau of Land Management; Joseph R. Biden, Jr. in his official capacity as President of the United States of America; Tracy Stone-Manning, Director, Bureau of Land Management; and Debra A. Haaland, Secretary of the Interior.

Respondent-Intervenors here, respondent-intervenor-appellants in the court of appeals, are Soda Mountain Wilderness Council, Klamath Siskiyou Wildlands Center, and Oregon Wild.

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[1] The case caption in the District of Columbia Circuit listed only American Forest Resource Council as appellee, and listed the United States, et al. as appellees rather than appellants. Petitioners understand that caption resulted from the court's policy in consolidated cases to utilize only the caption in the lead underlying case. To avoid confusion here, petitioners have produced a caption that accurately reflects all parties involved and their respective roles.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioners state:

Association of O & C Counties (AOCC) is an unincorporated Oregon association and trade association formed in 1925 to advocate for the long-term sustained-yield management of O&C lands for the benefit of the AOCC member counties. Advocacy by AOCC led to the development and enactment of the 1937 O&C Act. Today, AOCC's members include Klamath, Douglas, Jackson, Curry, Coos, Lane, Lincoln, Linn, Polk, Yamhill, Marion, Clackamas, Columbia, Washington, and Tillamook Counties. AOCC advocates for the social and economic well-being of its member communities, and the health and productivity of federal O&C timberlands, including through sustained yield management to protect and support jobs and local economies, essential public services, and healthy resilient forests.

The American Forest Resource Council (AFRC) is an Oregon-based nonprofit and a regional trade association whose purpose is to advocate for sustained-yield timber harvests on public timberlands and to enhance forest health and resistance to fire, insects and disease throughout the West. AFRC represents more than 50 forest product businesses and forest landowners throughout Oregon, Washington, California, Nevada, Idaho and Montana. AFRC promotes active management to attain productive public forests, protect the value and integrity of adjoining private forests, and support the economic and social foundations of local communities. AFRC works to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands;

Carpenters Industrial Council, now known as Pacific Northwest Regional Council of Carpenters, is an Oregon-based nonprofit corporation;

Douglas Timber Operators, Inc. is an Oregon-based nonprofit corporation and a trade association;

C & D Lumber Co., now known as C & D Partners, Inc., is an Oregon-based, family-owned corporation;

Freres Lumber Co. Inc., now known as Freres Engineered Wood, is an Oregon-based, family-owned corporation;

Seneca Sawmill Company, now known as Sierra Pacific Industries, is a California corporation;

Starfire Lumber Co. is an Oregon-based, family-owned corporation;

Swanson Group Mfg. LLC is an Oregon family-owned limited liability company that is a wholly-owned subsidiary of Swanson Group, Inc., an Oregon corporation;

Josephine County, Oregon is a municipal subdivision of the State of Oregon;

Gahlsdorf Logging, Inc., is an Oregon-based corporation;

Young's Trucking, Inc. is an Oregon-based corporation;

Oregon Forest and Industries Council is an Oregon-based nonprofit corporation and a trade association;

D & H Logging Co. is an Oregon-based, family-owned logging corporation;

Oregon Small Woodlands Association is an Oregon-based nonprofit corporation;

Mountain Western Log Scaling and Grading Bureau is an Oregon-based nonprofit corporation; and

Rough and Ready Lumber LLC, a plaintiff in the underlying district court case but not an appellee or petitioner, was an Oregon-based, family-owned limited liability company that ceased being a going concern during the course of the district court litigation.

To the best of undersigned counsels' knowledge and belief, except for Swanson Group Mfg. LLC, which has a parent corporation as indicated above, none of the foregoing petitioners have parent corporations; no publicly held companies own 10% or more of petitioners' stock.

RELATED PROCEEDINGS

Pursuant to Rule 14.1(b)(iii), the proceedings directly related to this case in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit are:

AFRC v. *United States et al*., 77 F.4th 787 (D.C. Cir. July 18, 2023), No. 20-5008, reproduced in the Appendix (App.) at 1a-35a.

AFRC v. *Hammond*, 422 F. Supp. 3d 184 (D.D.C. 2019), reproduced at App. 36a-53a. The opinion adjudicated four separate cases:

AFRC v. *United States, et al*., 1:17-cv-00441;

AOCC v. *Biden, et al*., 1:17-cv-00280;[2]

AFRC v. *Stone-Manning, et al*., 1:16-cv-01599; and

AOCC v. *Stone-Manning, et al*., 1:16-cv-01602.

The final merits order was entered on November 22, 2019.[3]

A final order on the remedy in cases 1:16-cv-01599 and 1:16-cv-01602 was entered on November 19, 2021 but is not at issue in this petition.

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[2] Although not a directly related proceeding, *Murphy Co.* v. *Biden*, 65 F.4th 1122 (9th Cir. 2023), decided the same issue as that adjudicated in *AFRC* v. *United States, et al.*, 1:17-cv-00441, and *AOCC* v. *Biden, et al.*, 1:17-cv-00280. The *Murphy Company* plaintiffs also are filing a petition for certiorari.

[3] A fifth related case, *Swanson Group Mfg. LLC, et al.* v. *Haaland, et al.,* 1:15-cv-01419, was decided by separate opinion in the district court and as part of *AFRC* v. *United States, et al.,* 77 F.4th 787 (D.C. Cir. 2023). It is not at issue here.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The District of Columbia Circuit's decision (App., *infra*, 1a-35a) is reported at 77 F.4th 787 (D.C. Cir. 2023).

The district court's merits decision (App., *infra*, 36a-53a) is reported at 422 F. Supp. 3d 184 (D.D.C. 2019).

JURISDICTION

The judgment of the district court granting summary judgment to petitioners was entered on November 22, 2019. App., *infra*, 36a, 37a. The judgment of the court of appeals was entered on July 18, 2023. App., *infra*, 1a. On September 29, 2023, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including November 15, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution's Property Clause provides that "[t]he Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

Relevant provisions of the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O&C Act), 43 U.S.C. § 2601 et seq.; the Antiquities Act of 1906, 54 U.S.C. § 320301 et seq.; Chamberlain-Ferris Act of June 9, 1916, 39 Stat. 218; Endangered Species Act, 16 U.S.C. § 1531 et seq.; and Clean Water Act, 33 U.S.C. § 1251 et seq. are

reproduced in the appendix to the petition. App., *infra*, 54a-89a.

STATEMENT OF THE CASE

This petition arises from parallel, consolidated challenges to two actions—a presidential national monument proclamation and a Bureau of Land Management (BLM) resource management plan. Those actions share a common defect that urgently calls out for this Court's intervention: they override plain statutory language and in doing so strike at the heart of the separation of powers principle that is key to our Constitution.

The Constitution vests Congress with plenary power over federal lands. In 1937, Congress exercised that power in the O&C Act to make sustained-yield timber harvest the "dominant use" of 2.6 million acres of land in Oregon. *Headwaters, Inc.* v. *Bureau of Land Mgmt.*, 914 F.2d 1174, 1184 (9th Cir. 1990) (*Headwaters*). As the Solicitor of Interior explained three years after passage of the O&C Act, "Congress has specifically provided a plan of utilization" for these lands, and "[i]t is well settled that where Congress has set aside lands for a specific purpose the President is without authority to reserve the lands for another purpose inconsistent with that specified by Congress." U.S. Dep't of the Interior, Office of the Solicitor, Opinion M. 30506, 3-4 (Mar. 9, 1940) (1940 Solicitor's Opinion), App., *infra*, 111a-112a.

Yet that is precisely what occurred in these consolidated cases. Claiming authority under the Antiquities Act—part of "a trend of ever-expanding antiquities," *Mass. Lobstermen's Ass'n* v. *Raimondo*, 141 S. Ct. 979, 980 (2021) (statement of Roberts, C.J., respecting denial of certiorari) (*Mass. Lobstermen's*)—President Obama in 2017 repurposed tens of thousands of O&C

timberland acres to "bolster protection of the resources within the original boundaries of the [Cascade-Siskiyou] monument" (the Monument). App., *infra*, 98a. That action is a striking example of presidential overreach. Indeed, in a statement accompanying denial of certiorari in another Antiquities Act case that suffered pleading deficiencies, Chief Justice Roberts referenced this very case as one posing a "better opportunit[y] to consider this issue." *Mass. Lobstermen's*, 141 S. Ct. at 981 (referencing "five other cases pending in federal courts concerning the boundaries of other national monuments," including this case, No. 20-5008).

This Monument expansion is especially egregious because the designation eviscerates the dominant purpose for which the land was designated by Congress. The O&C Act mandates in terms that could not be plainer that O&C timberlands "*shall* be managed * * * for permanent forest production," that "the timber thereon *shall* be sold, cut, and removed in conformity with the princip[le] of sustained yield," that the "annual productive capacity for such lands *shall* be determined and declared," and that "the annual sustained yield capacity when the same has been determined and declared, *shall* be sold annually * * *." 43 U.S.C. § 2601 (emphases added; footnote omitted). By contrast, Proclamation 9564 added O&C timberlands to the original Monument where "commercial harvest of timber * * * is prohibited," "[n]o portion of the monument shall be considered to be suited for timber production," and "no part of the monument shall be used in a calculation or provision of a sustained yield of timber." 65 Fed. Reg. 37,249, 37,250 (June 9, 2000), App., *infra*, 93a; see also 82 Fed. Reg. at 6,149 (Monument expansion subject to "same laws and regulations that apply to the rest of the monu-

ment"), App., *infra*, 106a. A clearer override of congressional intent by executive fiat is hard to imagine.

The district court below understood this obvious conflict: "[t]he congressional mandates to manage O&C timberland 'for permanent forest production' * * * cannot be rescinded by Presidential Proclamation." App., *infra*, 49a. But the D.C. Circuit reversed, holding that the President can use a proclamation under the Antiquities Act to "remov[e] the land from the O & C Act's 'permanent forest production' mandate." App., *infra*, 24a. That leaves no limits on the reach of the President's power under the Antiquities Act.

Separately, the Bureau of Land Management (BLM) engaged in a similar re-writing of the O&C Act. In 2016, BLM issued resource management plans that place 80% of all O&C timberlands into conservation "reserves" where harvest is prohibited in favor of BLM's current environmental objectives. BLM's action overrides Congress's mandates in the O&C Act and compromises public services for local communities and hundreds of thousands of residents in those communities due to loss of revenue from timber sales. 43 U.S.C. § 2605(a) (mandating that 50% of the revenue from timber sales from O&C timberlands be paid to the counties in which the timberlands are located).

Here, too, the district court saw the clear conflict: "The O&C Act plainly requires that timber grown on O&C land 'be sold, cut, and removed in conformity with the princip[le] of sustained yield,'" and therefore BLM's plans "which prohibit the selling, cutting, and removing of timber in conformity with the principle of sustained yield on portions of O&C timberland, contravene the law." App., *infra*, 44a. As with the Monument case, however, the court of appeals brushed those concerns aside, concluding instead that "[t]he

creation of the reserves can reasonably be viewed as an exercise of the Secretary's discretion to reclassify O & C land as non-timberland, thus removing the land from the O & C Act's 'permanent forest production' mandate." App., *infra*, 29a. But the Secretary never claimed to have reclassified these lands. This Orwellian analysis (timberlands are non-timberlands) not only tramples on congressional authority to set aside lands for a particular purpose but also conflicts with settled precedent that agency action can only be sustained for the reason set forth by the agency. See, e.g., *Bowman Transp., Inc.* v. *Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974) ("[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given * * *.").

The decision below effectively gives the executive carte blanche to override congressional authority over federal lands, despite the Property Clause of the Constitution, which confers on Congress the "power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art IV, § 3, cl. 2. Consistent with Chief Justice Roberts's concern that the Antiquities Act "has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain," the court of appeals' decision affirms untethered presidential authority to override congressional policy, "transmut[ing] the Antiquities Act into a coiled timber rattler poised to strike at any land management law that the President dislikes." *Murphy Co.* v. *Biden*, 65 F.4th 1122, 1142 (9th Cir. 2023) (Tallman, J., dissenting in part).[1] In the

[1] Murphy Company and Murphy Timber Investments, LLC brought a separate challenge to Proclamation 9564 in the District of Oregon, which upheld the Monument expansion. A divided

case of BLM, the court's ruling gives the agency unfettered discretion to thwart congressional directive simply by relabeling timberlands as non-timberlands and putting those lands into no-harvest "reserves" that serve other BLM objectives.

This Court should grant certiorari to restore the effectiveness of the O&C Act (and the critical local funding it provides) and to rein in the President's unwarranted use of national monument designations to override plainly expressed congressional commands, in violation of the separation of powers.

A. The O&C Act Mandates that Timberlands be Managed for Sustained-Yield Timber Production to Fund Public Services for Oregon Counties.

In 1937, Congress reserved nearly 2.6 million acres of federal forestlands in Oregon for "permanent forest production," mandating that the timber located on lands "classified as timberlands" "*shall* be sold, cut, and removed in conformity with the princip[le] of sustained yield" harvest. 43 U.S.C. § 2601 (emphasis added; footnote omitted). These O&C lands span 18 counties in western Oregon that comprise the members of Petitioner the Association of O&C Counties.

The O&C Act arose from the saga of western settlement and embodied a sweeping congressional declaration intended to right past wrongs and ensure a permanent, stable source of funding for struggling Oregon communities. In 1866, Congress authorized a land grant to the Oregon and California Railroad to

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panel of the Ninth Circuit affirmed, with Judge Tallman dissenting. *Murphy Co.*, 65 F.4th 1122. Plaintiffs in that case are filing a petition for certiorari.

encourage construction of a rail line connecting Portland, Oregon to California. Act of July 25, 1866, ch. 242, § 1, 14 Stat. 239; *Or. & Cal. R.R. Co.* v. *United States*, 238 U.S. 393, 400-11 (1915) (recounting history). Congress soon amended that grant to require the land be sold to settlers to further development in the region. Act of April 10, 1869, ch. 27, 16 Stat. 47. But the railroad company shirked that law, marketing or retaining the land for timber speculation, claiming it was unfit for settlement. *Clackamas Cnty., Or.* v. *McKay*, 219 F.2d 479, 482 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955).

Congress responded by passing the Chamberlain-Ferris Act, which revested title of the O&C lands to the United States. Chamberlain-Ferris Revestment Act of 1916, ch. 137, 39 Stat. 218 (Chamberlain-Ferris Act), App., *infra*, 59a-70a. But because revesting title would take the O&C lands out of the local tax base, Congress directed the Secretary of the Interior to sell the lands' timber and create a fund from which the affected counties (the O&C Counties) would receive a share of the timber receipts. 39 Stat. at 220-23; *Clackamas Cnty.*, 219 F.2d at 482. The Chamberlain-Ferris Act defined "timberlands" to which the timber sale mandate applied as those "lands bearing a growth of timber not less than three hundred thousand feet board measure on each forty-acre subdivision." Chamberlain-Ferris Act, § 2, 39 Stat. at 219. Thus, the Act required that land be "classified according to its capacity to produce timber." App., *infra*, 24a.

Revenues from the Chamberlain-Ferris Act proved lower than anticipated, O&C Counties received no additional payments, and a further attempted congressional fix to protect local revenues failed. Stanfield Act, ch. 897, 44 Stat. 915 (1926). To address the O&C

Counties' continuing financial crisis, the Department of the Interior introduced House Resolution 5858, the precursor to the O&C Act. H.R. Res. 5858, 75th Cong., 1st Sess. (1937).

During that bill's congressional hearings, Oregon Representative James Mott, whose district spanned the revested O&C lands, sought assurances that Congress's intended financial goal would at last be met by ensuring that O&C timberlands would be harvested under a sustained-yield model. See, e.g., *Relating to the Revested Oregon & California Railroad Reconveyed Coos Bay Wagon Road Grant Lands Situated in the State of Oregon: Hearing on H.R. 5858 Before the Comm. on the Public Lands*, 75th Cong. (*1937 Hearings*), 1st Sess. 27 (Apr. 13, 1937). To limit discretion in administering that mandate and make certain the O&C Counties would receive an adequate funding stream, legislators agreed to incorporate a mandatory *minimum* harvest level until the annual productive capacity of the O&C timberlands was established. See *1937 Hearings,* 1st Sess. 116 (May 25, 1937) (statement of Rep. Mott "that assurance of a minimum annual revenue is absolutely necessary to the financial stability and welfare of the counties in which the Oregon and California grant lands are situated"). With that minimum harvest amendment included, the O&C Act was signed into law. Pub. L. No. 75-405, § 1, 50 Stat. 874 (1937).[2]

[2] To ensure the primacy of timber production and its contribution of funds to O&C Counties, Congress specified that "[a]ll Acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and effect to this Act." 50 Stat. at 876 (uncodified provision at end of Title II).

The O&C Act, in relevant part, provides:

> Notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218) [the Chamberlain-Ferris Act], and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber, shall be managed, * * * for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princip[le] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facil[i]ties * * *.
>
> The annual productive capacity for such lands shall be determined and declared as promptly as possible after August 28, 1937, but until such determination and declaration are made the average annual cut therefrom shall not exceed one-half billion feet board measure: *Provided,* That timber from said lands in an amount not less than one-half billion feet board measure, or not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market.

43 U.S.C. § 2601 (footnotes omitted).

As the text reflects, Congress recognized that ancillary benefits would flow from managing the O&C timberlands for sustained-yield timber production. See, e.g., 3 Fed. Reg. 1,795, 1,796 (July 21, 1938) ("The Act refers to certain secondary benefits of the forest which are to be conserved by the new plan of management."). Those ancillary benefits—a "permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facil[i]ties"—were not goals in themselves of the Act but were understood to flow from the dominant use of O&C timberlands for sustained-yield timber production. 43 U.S.C. § 2601; see *Headwaters*, 914 F.2d at 1183-84.

The legislation worked. Two years later, Interior's Chief Forester, overseeing O&C Act administration, confirmed in a press release that the O&C forests were being managed "in accordance with the principles of sustained yield forestry * * * as a vast estate held in trust" to benefit the O&C counties. *Press Release, Sale of O. and C. Timber*, W. Horning, U.S. Department of Interior General Land Office (Mar. 1, 1939). Starting in 1940, Interior sold 593 million board feet of timber (beyond the 500 million board feet minimum harvest requirement). Walter Horning, U.S. Dep't of Interior General Land Office, *The O&C Lands and their Management, an Important Advance in Forest Conservation* 7 (1940). And by 1942, Interior had determined that 2,446,000 acres of O&C Lands were properly classified as "timberlands." Walter Horning, U.S. Dep't of Interior General Land Office, *Forever Timber: Perpetual Sustained Yield Forestry on the Revested Oregon and California Railroad Grant Lands and the Reconveyed Coos Bay Wagon Road Grant Lands in Western Oregon* 17 (1945).

Through the 1980s, the Department of the Interior repeatedly upheld the O&C Act's mandate in managing the O&C timberlands, rejecting attempts to dedicate those lands for other purposes. In the first 30 years of responsible forest management guided by Congress's sustained-yield mandate, the O&C Act returned more than "1.4 billion dollars * * * to Oregon counties" and "enriched the lives of Oregonians, contributed to economic stability, and played an important part in the nation's commerce." U.S. Dep't of the Interior, Bureau of Land Mgmt., O&C Sustained Yield Act: the Land, the Law, the Legacy, 1937-1987, at 14-15 (1987).[3] The O&C Counties used the funds for public works and to support basic public services like law enforcement, corrections, public and mental health care, libraries, and a broad array of other services. *Id*. at 15, 17. The forest products sector became the bedrock of many of these communities and remains one of the few reliable providers of family wage employment in western Oregon.

B. The Antiquities Act Grants the President Power to Designate National Monuments.

The Antiquities Act provides that "[t]he President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301(a). The Antiquities Act further requires that monuments must be "confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.* § 320301(b). To date, courts have provided no meaningful

[3] https://www.blm.gov/or/files/OC_History.pdf.

standard by which the legality of such proclamations can be analyzed, and before the reversed district court decision in this case no monument designation had been invalidated by a court. See, e.g., *Cameron* v. *United States*, 252 U.S. 450 (1920); *State of Wyoming* v. *Franke*, 58 F. Supp. 890 (D. Wyo. 1945); *Tulare Cnty.* v. *Bush*, 306 F.3d 1138 (D.C. Cir. 2002); *Utah Ass'n of Cntys.* v. *Bush*, 455 F.3d 1094, 1096 (10th Cir. 2006); *Garfield Cnty., Utah* v. *Biden*, No. 4:22-cv-00059-DN-PK, 2023 WL 5180375 (D. Utah Aug. 11, 2023). In consequence, the Antiquities Act has been "transformed into a power without any discernible limit," *Mass. Lobstermen's*, 141 S. Ct. at 981 (Roberts, C.J.) (statement respecting the denial of certiorari), and presidents have abused it with the designation of ever more expansive monuments to the detriment of local communities.

The Antiquities Act has its origins in the exploration of the desert Southwest, and the alarms raised by archaeologists regarding the loss of irreplaceable Native American relics. Ronald Lee, Dep't of Interior, Nat'l Park Serv., The Antiquities Act of 1906, 1-39, 47-78 (1970).[4] While largely lobbied for by the archaeological community, the Antiquities Act's authority was extended to cover "other objects of historic or scientific interest," and the inclusion of the word "scientific" became the basis for the protection of natural areas by presidents. *Id.* at 74; see, e.g., *Cameron*, 252 U.S. at 455-56 (upholding Grand Canyon National Monument as protecting an object of scientific interest).

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[4] Ronald Lee's 1970 Report on the history of the Antiquities Act is widely recognized as a leading authority on the history of the Act and has been cited favorably by Chief Justice Roberts. See *Mass. Lobstermen's*, 141 S. Ct. at 980.

While the Antiquities Act permits the President to reserve federal lands that contain historic or scientific landmarks, its legislative history reveals that it was never intended to become one of the Nation's principal land management statutes, or to permit the President to override acts of Congress that mandate specific land management practices in specific areas. Indeed, concern over the President wresting land management decisions away from Congress was a matter of significant debate in Congress. Early versions of the Antiquities Act restricted the size of monuments to no more than 320 or 640 acres. Lee, *supra*, at 75. The Act only gained support in Congress after the inclusion of the "smallest area compatible" clause to assure western representatives that the grant of authority would be cabined. *Ibid*. The "smallest area compatible" clause was thus intended to ensure that the Antiquities Act did not become a blank slate for a president to dictate broad land management schemes in a manner that would displace Congress from its constitutional role of making land management law.

C. President Obama Expands the Cascade-Siskiyou National Monument, Over-riding the O&C Act Mandate for Timber Production.

President Clinton designated the original 52,000-acre Cascade-Siskiyou National Monument (Monument) in Presidential Proclamation 7318. 65 Fed. Reg. at 37,250. That Proclamation expressly prohibited sustained-yield timber harvest within the Monument, stating that "[t]he commercial harvest of timber or other vegetative material is prohibited" and that "[n]o portion of the monument shall be considered to be suited for timber production, and no part of the monument shall

be used in a calculation or provision of a sustained yield of timber." *Ibid*.

In 2017, President Obama issued Proclamation 9564, which expanded the Monument by an additional 48,000 acres, most of which were O&C lands. 82 Fed. Reg. at 6,148; see Memorandum from Ryan K. Zinke, Sec'y of the Interior, to the President, Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act 11 (2017) (acknowledging that the Monument expansion included a "substantial number of [O&C Act] acres * * * statutorily set aside for permanent forest production" under the O&C Act).[5] Under Proclamation 9564, all lands in the Monument expansion area, including O&C lands, were subject to management "under the same laws and regulations that apply to the rest of the monument." 82 Fed. Reg. at 6,149. As a result, sustained-yield timber production is expressly prohibited within the new portions of the Monument, just as it is in the original portions of the Monument. Accordingly, O&C timberlands included in the Monument expansion, which were dedicated by Congress more than 80 years ago to the dominant purpose of sustained-yield timber harvest for the economic benefit of the O&C Counties, are off-limits to sustained-yield timber harvest and no longer generate revenues for the affected counties.

[5] https://www.doi.gov/sites/doi.gov/files/uploads/revised_final_report.pdf.

D. BLM's 2016 Resource Management Plans Convert 80% of O&C Timberlands to No-harvest Reserves to Meet Purported Environmental Objectives.

Following listing of the northern spotted owl as a threatened species under the Endangered Species Act (ESA), 55 Fed. Reg. 26,114 (June 26, 1990), the Secretary of the Interior adopted a series of plans governing land management on federal forests within the owl's range, including on O&C lands. Beginning with the 1995 plans, BLM stopped managing the O&C timberlands for sustained-yield timber production and instead created untouchable reserves to provide owl habitat (see J.A. 3160, 3181, 3200, 3223, 3242, 3265), which gutted the annual timber yield by over 80%. J.A. 3473.[6]

Many of the petitioners here sued, alleging the no-harvest reservations violated the O&C Act. *Ass'n of O&C Cntys.* v. *Babbitt*, No. 1:94-cv-01044 (D.D.C. filed May 12, 1994); *Am. Forest Res. Council* v. *Dombeck*, No. 1:94-cv-01031 (D.D.C. filed May 11, 1994). Those cases settled, with BLM committing to revise the plans, which it did in 2008, appropriately authorizing sustained-yield harvest on the O&C timberlands. See BLM Records of Decision for Western Oregon Plan Revisions (Dec. 30, 2008). The 2008 plans were later vacated—and the 1995 plans reinstated—after environmental groups sued on grounds the 2008 plans were approved without ESA consultation. *Pac. Rivers Council* v. *Shepard*, No. 03:11-cv-00442-HU, 2011 WL 7562961 (D. Or. Sept. 29, 2011), *report and recommendation adopted as modified*, 2012 WL 950032 (D. Or. Mar. 20, 2012) (reinstating the 1995 plans).

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[6] "J.A." refers to the Joint Appendix filed on September 29, 2022 in the court of appeals.

BLM finally issued revised resource management plans in 2016 (the Plans).[7] Those Plans strengthened BLM's effort to repurpose O&C timberlands to a preservation purpose. They dedicated the vast majority of O&C timberlands to non-timber harvest uses, including committing nearly a million acres to species preservation purposes. J.A. 1862, 2182. Timber harvest is permitted on only 20 percent of land covered by the Plans. The remaining two million acres are allocated to conservation reserves "which do not have objectives for sustained-yield timber production." J.A. 1825. Because the Plans excluded most O&C timberlands from sustained-yield management, they project meager annual timber harvests of about only 205 million board feet. J.A. 1825. By comparison, the current sustained-yield capacity of *all* O&C timberlands is estimated to be over 1 billion board feet per year. J.A. 3734.

BLM in its records of decision adopting the Plans did not attempt to reconcile the O&C Act's sustained-yield mandate with the land reserves barring timber harvest. BLM simply stated that its actions were "consistent" with the Act, without further explanation. J.A. 1841; 2144-45.

E. The District Court Held That Actions of the President and BLM Conflict with the Plain Language and Intent of the O&C Act.

Petitioners challenged the Monument expansion and Plans on grounds they violated the O&C Act by designating tens of thousands of O&C timberland acres as off-limits to sustained-yield timber harvest.

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[7] One plan was issued for Northwestern & Coastal Oregon, another for Southwestern Oregon.

In a decision that robustly analyzes the O&C Act's text, history, and application over the last century, the district court held that both the Monument expansion and Plans violated the plain language of the O&C Act. App., *infra*, 36a-53a. As to the Monument, the court held that the O&C Act limits presidential authority and that the President exceeded that limit by purporting to "rescind[]" Congress's mandate that O&C timberlands be managed "for permanent forest production" under sustained-yield timber production. App., *infra*, 49a. "Put simply," the court concluded, "there is no way to manage land for sustained yield timber production, while simultaneously deeming the land unsuited for timber production and exempt from any calculation of the land's sustained yield of timber." App., *infra*, 51a-52a. Thus, whatever the scope of executive authority under the Antiquities Act, the President cannot "nullify" the O&C Act's "timber harvest mandates" for O&C timberlands. App., *infra*, 51a.

The district court had "no doubt" too that the Plans violated the plain language of the O&C Act. App., *infra*, 43a. In stark contrast to the O&C Act's mandate, the Plans "set[] aside [O&C] timberland in reserves where the land is not managed for permanent forest production and the timber is not sold, cut, and removed in conformity with the principle of sustained yield." App., *infra*, 48a. And the O&C Act's clear statutory text is confirmed, the court observed, by the drafters' original intent. See App., *infra*, 45a (quoting *Headwaters*, 914 F.2d at 1183, which found "no indication that Congress intended 'forest' to mean anything beyond an aggregation of timber resources").

Nor, the court held, did the ESA override the O&C Act's sustained-yield mandate. App., *infra*, 47a-48a. This Court definitively held in *National Association of*

Home Builders v. *Defenders of Wildlife,* 551 U.S. 644, 664 (2007), that the ESA did not implicitly repeal the non-discretionary mandates of pre-existing statutes, like the O&C Act. Under *Home Builders*, the district court concluded, "BLM cannot justify a refusal to abide by th[e O&C Act's] statutory commands by pointing to section 7 of the ESA" because "the '"no jeopardy duty"' simply 'does not attach' to such non-discretionary mandates." App., *infra*, 48a (quoting *Home Builders*, 551 U.S. at 669).

F. The Court of Appeals Reversed.

The D.C. Circuit reversed.

As to the Monument, the court first rejected the government's defenses that courts lack jurisdiction to review presidential proclamations, and that the O&C Act does not apply to the President. App., *infra*, 16a-19a, 20a-21a. The court then sought to harmonize the O&C Act with the Antiquities Act. It concluded the O&C Act's sustained-yield mandate only applies to O&C lands classified as timberlands, and therefore a no-harvest monument could exist on any O&C lands not so classified. App., *infra*, 23a-24a. It then found that the government had "considerable discretion regarding the classification and reclassification of O&C land," a ruling premised on rejecting the definition of "timberlands" in the Chamberlain-Ferris Act, a precursor statute to the O&C Act, App., *infra*, 23a-24a, that is, "lands bearing a growth of timber not less than three hundred thousand feet board measure on each forty-acre subdivision." Chamberlain-Ferris Act, § 2, 39 Stat. at 219.

The court then found that Proclamation 9564 "reclassified, albeit by implication, the 40,000 acres of O & C lands the president added to the Monument as

non-timberlands" (App., *infra*, 24a), though it pointed to no evidence that the President had considered the O&C Act in issuing the Proclamation. In the court's view, the President's implicit reclassification of O&C timberlands took those lands out of the scope of the O&C Act and thereby harmonized the Act and Proclamation.

The court also held that the O&C Act's ancillary benefits—protecting watersheds and regulating stream flow (see App., *infra*, 25a-28a)—could be balanced on equal footing with the dominant use, sustained-yield timber production mandate of the Act. It held that, in light of this equal footing, the O&C Act necessarily imbues the government with discretion to designate O&C timberlands as non-timberlands to achieve those ancillary objectives, even to the detriment or exclusion of the O&C Act's dominant use. App., *infra*, 25a-28a; see App., *infra*, 28a ("the O & C Act provides the Secretary * * * [with] discretion to decide how to balance the Act's multiple objectives").

Based on this same construction of the O&C Act, the court also held that the Plans were a "permissible exercise of the Secretary's discretion under the" statute. App., *infra*, 28a. The court held that BLM had appropriately "balance[ed]" the "multiple objectives" of the O&C Act; that BLM may "reclassify" O&C timberlands to non-timberlands; and that "both the ESA and the CWA support the establishment of reserves on O & C land." App., *infra*, 28a-31a.

REASONS FOR GRANTING THE WRIT

I. THE MONUMENT DECISION PRESENTS THE EXCEPTIONALLY IMPORTANT SEPARATION OF POWERS QUESTION OF WHETHER THE PRESIDENT MAY USE AN ANTIQUITIES ACT PROCLAMATION TO OVERRIDE A STATUTORILY MANDATED USE OF PUBLIC LANDS.

The President's use of the Antiquities Act to override a clear statutory directive in violation of the separation of powers urgently calls for this Court's review.

In the O&C Act in 1937, Congress exercised its plenary authority under the Property Clause to set aside specific federal lands for timber production and expressly *required* that those lands "shall be managed" for sustained-yield timber production. 43 U.S.C. § 2601. In 2017, the President desired to put those same lands to a different use, and used a general statute authorizing the designation of national monuments, passed 30 years before the O&C Act, to *prohibit* sustained-yield timber on those same lands. That is something the President cannot constitutionally do.

The President's claim of Antiquities Act authority here raises important questions that strike at the core of the separation of powers. The Property Clause vests Congress alone with the plenary power to "make all needful Rules and Regulations" regarding public lands. U.S. Const. art. IV, § 3, cl. 2; see *Cal. Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 581 (1987) ("[T]he Property Clause gives Congress plenary power to legislate the use of * * * federal land * * *."). Here, Congress "legislate[d] the use" of O&C timberlands in the clearest possible terms: those timberlands

- "*shall* be managed * * * for permanent forest production";
- "the timber thereon *shall* be sold, cut, and removed in conformity with the princip[le] of sustained yield";
- the "annual productive capacity for such lands *shall* be determined and declared"; and
- "the annual sustained yield capacity when the same has been determined and declared, *shall* be sold annually."

43 U.S.C. § 2601 (emphases added; footnote omitted). The repeated use of the word "shall" leaves no ambiguity as to Congress's intent. *Kingdomware Techs., Inc.* v. *United States*, 579 U.S. 162, 172 (2016) (Congress's use of the word "shall" generally "imposes a mandatory duty"). Thus for decades, courts have recognized that the O&C Act is a "dominant use" statute that mandates timber production as its primary purpose. *Headwaters*, 914 F.2d at 1184.

The President may not prohibit sustained-yield production on these same timberlands through a proclamation under the Antiquities Act. The Antiquities Act provides the President with authority to create national monuments, but "nowhere does it remotely purport to grant him authority to suspend the operation of another act of Congress." *Murphy Co.*, 65F.4th at 1139 (Tallman, J., dissenting in part). If it did, "every federal land management law that does not expressly shield itself from the Antiquities Act [would be] subject to executive nullification by proclamation." *Id.* at 1141.

Still less do the general powers granted the President in the Antiquities Act in 1906 allow the

President to override the very specific directives of the 1937 O&C Act. See, *e.g.*, *United States* v. *Estate of Romani*, 523 U.S. 517, 530, 532 (1998) ("the more recent and specific provisions of [an] Act would apply were they to conflict with the older * * * statute"; "a specific policy embodied in a later federal statute should control"). Indeed, nullification of the O&C Act by proclamation runs afoul of the President's constitutional obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

Simply put, "[t]he conflict between the O & C Act and Proclamation 9564 could not be more self-evident." *Murphy Co.*, 65 F.4th at 1139 (Tallman, J., dissenting in part). And given the Property Clause, that conflict can give rise to only one winner under separation of powers principles: the O&C Act's mandate for sustained-yield use of the O&C timberlands.

Not only does this case present these important constitutional issues, but it also provides an excellent vehicle to curtail the "ever-expanding" Antiquities Act, which over time has been "transformed into a power without any discernible limit." *Mass. Lobstermen's*, 141 S. Ct. at 980-81 (Roberts, C.J.) (statement respecting the denial of certiorari).

That is because the abuse of the Antiquities Act to thwart congressional mandates is particularly evident in this case, where the O&C Act is so clearly intended to be a dominant use statute. Indeed, three years after the O&C Act was passed, the Solicitor was asked by the Secretary of the Interior "whether the president is authorized" to put O&C lands into a national monument. 1940 Solicitor's Opinion, App., *infra*, 110a. The answer at the time was a resounding "no":

> There can be no doubt that the administration of the lands for national monument purposes would be inconsistent with the utilization of the O & C lands as directed by Congress. It is well settled that where Congress has set aside lands for a specific purpose the President is without authority to reserve the lands for another purpose inconsistent with that specified by Congress.

App., *infra*, 112a. The conflict in 1940 is the same as now—"the disposal of timber in a national monument is restricted" in a manner inconsistent with the O&C Act. App., *infra*, 112a. As Judge Tallman explained, "[e]ven a perfunctory review of the plain text of the Proclamation and the O & C Act reveals an obvious conflict." *Murphy Co.*, 65 F.4th at 1139 (Tallman, J., dissenting in part).

In the intervening 80 years, the textual mandate of the O&C Act has not changed, and neither has the text of the Antiquities Act. The only thing that has changed is the expanding modern view of the Antiquities Act as a tool to support presidential conservation objectives, and the court of appeals' decision in this case watering down the mandates of the O&C Act to meet current conservation goals. As discussed below, such reinterpretations are inconsistent with this Court's instructions. See, *e.g.*, *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2208 (2023) (Gorsuch, J., concurring) ("[O]ur task is to apply the law's terms as a reasonable reader would have understood them at the time Congress enacted them.").

The problems created by the evolving use of the Antiquities Act are well documented. As Chief Justice Roberts has explained, the Antiquities Act has over time been "transformed into a power without any

discernible limit." *Mass. Lobstermen's*, 141 S. Ct. at 981 (Roberts, C.J.) (statement respecting the denial of certiorari). Left unchecked, this power, and its potential for abuse, will only grow.

While numerous questions exist regarding the extent of the President's authority under the Antiquities Act, none is more fundamental than the one presented here: can the President use the Antiquities Act to override the will of Congress as expressed in a more specific and later enacted land management statute? That simple question about constitutional boundaries between the President and Congress is one of exceptional importance, going to the very foundation of our system of government.

Review is also urgently needed because the D.C. Circuit's decision opens the door to drastically expanding the use of the Antiquities Act. The court of appeals sidestepped the separation of powers issue by suggesting that the President could through Antiquities Act Proclamation "impliedly" reclassify O&C "timberlands" as "non-timberlands." App., *infra*, 24a ("We believe Proclamation 9564 reclassified, albeit by implication, the 40,000 acres of O & C land the president added to the Monument as non-timberlands, thereby removing the land from the O & C Act's 'permanent forest production' mandate."). But the power to reclassify federal lands that were classified by Congress for a particular use is a plenary one vested in Congress by the Property Clause. U.S. Const. art. IV, § 3, cl. 2.; *Cal. Coastal Comm'n*, 480 U.S. at 580. The court of appeals' unexplained ruling that the President may simply—and not even expressly, but "impliedly"—reclassify land use by proclamation leaves the Antiquities Act without any principled limit: "a coiled timber rattler poised to strike at any land management law that the

President dislikes." *Murphy Co.*, 65 F.4th at 1142 (Tallman, J., dissenting in part).

Equally problematic, the court of appeals' decision thwarts Congress's policy objectives in the O&C Act. "[T]he O & C Act was intended to provide the counties in which O & C Act land was located with the stream of revenue which had been promised but not delivered by the Chamberlain-Ferris Revestment Act, 39 Stat. 218 (1916)." *Headwaters*, 914 F.2d at 1183. Congress promised "permanent forest production" from the O&C timberlands to achieve that important goal. 43 U.S.C. § 2601. The court of appeals' decision allows the President by fiat to destroy Congress's careful plan to fund local O&C communities, writing "permanent" out of the statute. Courts, however, should not allow executive officials to rewrite unambiguous statutory mandates. See, *e.g.*, *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2371 (2023) (declining to uphold executive action that rewrote a statute to include "radically new text"). Review is urgently needed to give renewed meaning to the O&C Act and restore the promises made by Congress to the affected counties and their residents.

This case presents an excellent vehicle for review of these important separation of power issues. The conflict between the Monument Proclamation and the O&C Act is exceptionally clear, as Judge Talman explained in the *Murphy* case. In addition, the controversy is fully ripe, with the adverse effects of the ruling below already being felt. The Proclamation immediately resulted in cancelled timber sales on O&C timberlands, and it continues to result in foregone sales every year the Monument designation stands. The consequences are immediate, and direct, and felt most keenly by the communities that are now deprived of the funds

promised by Congress, including the members of petitioner O&C Counties.

The court of appeals' erroneous decision represents the do or die moment for the O&C Act. If left to stand, it gives the President unfettered discretion to impliedly reclassify timberlands as non-timberlands and (as addressed below), allows BLM unfettered discretion to do the same. Unless the Court steps in "to say what the law is," (*Marbury* v. *Madison*, 5 U.S. 137, 177 (1803)), the O&C Act is a meaningless empty promise, subject to implied reclassification at will by the President (and the BLM). Review of this decision is essential to avoid that unjust result.

II. THE PLAN DECISION SETS DANGEROUS PRECEDENT ON THE LIMITS OF EXECUTIVE POLICY-MAKING AUTHORITY OVER FEDERAL LANDS AND THREATENS THE FINANCIAL VIABILITY OF OREGON COUNTIES.

The court of appeals approved BLM's Plans that place 80% of the O&C timberlands into no-harvest reserves. It reasoned that the creation of those reserves "can reasonably be viewed as an exercise of the Secretary's discretion to reclassify O & C land as non-timberland, thus removing the land from the O & C Act's 'permanent forest production' mandate." App., *infra*, 29a. That ruling misinterprets the language of the O&C Act, subverts Congress's goal to provide funds for O&C communities, conflicts with decisions of this and other courts, and in doing so violates the separation of powers. It warrants this Court's immediate review alongside the Monument Proclamation ruling, which shares many of the same legal defects.

Allowing BLM to reclassify the timberlands specified as such in the O&C Act infringes basic principles of separation of powers and thwarts the will of Congress. Congress "specifically provided a plan of utilization" for the O&C timberlands. 1940 Solicitor's Opinion, App., *infra*, 111a. Specifically, sustained-use management for timber production on the 2.6 million acres of O&C timberlands "was intended to provide the counties in which O & C Act land was located with [a] stream of revenue." *Headwaters*, 914 F.2d at 1183.

The decision below allows BLM to override the mandate and purpose of the O&C Act. The vast majority of O&C timberlands are now in conservation reserves that do not, and cannot, provide the counties "with the stream of revenue which had been promised" by Congress. In fact, those lands provide no revenues at all. This is causing significant financial hardship to the counties and impairing their ability to provide basic services to hundreds of thousands of citizens. If certiorari is not granted, the congressional purpose will be permanently defeated.

Worse still, the court of appeals decision leaves no protection for the remaining 20% of O&C timberlands, as there is nothing to stop BLM from taking the rest. Without intervention by this Court, there is nothing to prevent BLM reclassifying the rest of the O&C timberlands as "non-timberlands" to serve other BLM objectives.

The court of appeals' decision misinterprets the O&C Act in ways that conflict with settled precedent of this Court.

The term "timberlands" was defined in the Chamberlain-Ferris Act in terms of timber producing capacity of the land. 39 Stat. 219, Sec. 2 ("timberlands"

are any lands growing "not less than three hundred thousand feet board measure on each forty-acre subdivision"), App., *infra*, 62a. When the term "timberlands" was later used in the O&C Act without further definition, petitioners argued, the same definition carried forward. The court of appeals disagreed. It held that the O&C Act impliedly repealed the definition of timberlands in the Chamberlain-Ferris Act simply because "[t]hat definition * * * was omitted from the O & C Act." App., *infra*, 24a. And that ruling was the foundation of the court's conclusion that BLM's no-harvest reserves "can reasonably be viewed" as a BLM decision to (impliedly) reclassify O&C timberlands simply by calling them non-timberlands, exempt from the O&C Act. App., *infra*, 29A.

That ruling was error. As Justice Barrett recently explained, it is "well established that '[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it.'" *Biden*, 143 S. Ct. at 2378-79 (Barrett, J., concurring) (quoting *George* v. *McDonough*, 142 S. Ct. 1953, 1959 (2022)). That is what happened here. The O&C Act was intended to provide the "stream of revenue which had been promised but not delivered by the Chamberlain-Ferris Revestment Act." *Headwaters*, 914 F.2d at 1183. The use of "timberlands" in the O&C Act was directly transplanted from the Chamberlain-Ferris Act—with no new definition supplied—and brings the same meaning with it. That use is consistent with the ordinary dictionary definition of "timberland" at the time as "[w]ooded or forested land, esp. when consisting of marketable timber." *Webster's New Int'l Dictionary* 2159 (1930).

The court of appeals' implied repeal analysis also runs head-first into other decisions of this Court.

Statutes *in pari materia* must be read together. *Wachovia Bank* v. *Schmidt,* 546 U.S. 303, 316 (2006); see also *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given context."). That is particularly true where, as here, "a later statute refers to an earlier statute." 2B Norman Singer & Shambie Singer, Sutherland Statutory Construction § 51:3, Westlaw (7th ed., database updated Nov. 2022); *Burnet* v. *Harmel*, 287 U.S. 103, 108 (1932). A statute should not be understood to repeal another unless Congress's intent to do so was "clear and manifest." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939)). The panel's threadbare implied repeal reasoning directly conflicts with this Court's admonition that "repeals by implication are not favored" and should not be found "without seeking to ascertain the actual intent of Congress." *Watt* v. *Alaska*, 451 U.S. 259, 266-67 (1981) (quoting *Morton*, 417 U.S. at 549).

Equally problematic, the court of appeals violated settled precedent when it provided an explanation that did not come from BLM itself. BLM did not state in the agency record that it was reclassifying lands as non-timberlands, or that the O&C Act repealed the Chamberlain-Ferris Act definition of timberlands. Rather, BLM stated that it used the longstanding "Timber Capability Classification System," a system that (like the Chamberlain-Ferris Act's "timberlands" definition) looks at the ability of the land to produce marketable timber. Proposed Resource Management Plan/Final Environmental Impact Statement for Western Oregon, Director's Protest Resolution Report 197 (Aug. 5, 2016). BLM then placed lands that were fully capable of timber production under its own classification system into no-harvest reserves. *Ibid*.

There was no reclassification of timberlands to non-timberlands. BLM simply decided that most of the O&C timberlands (as classified by its own timber capability system) should be used to provide habitat for the threatened spotted owl, and to protect water systems and their attendant species.

This Court has given clear instruction that an agency action reviewed under the Administrative Procedure Act may only be upheld on a basis articulated by the agency. *Bowman Transp.*, 419 U.S. at 285-86 ("[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given * * *."); *Motor Vehicle Mfrs. Ass'n of U.S.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The reviewing court should not attempt itself to make up for * * * deficiencies" in the agency's reasoning). Yet here, the rationale offered by the court of appeals is contradicted by that provided by the agency.

The court of appeals barely mentions the actual reason for no-harvest reserves stated by BLM to protect species habitat under the ESA and the CWA, and with good reason. This court in *Home Builders* held that the ESA cannot be interpreted as having implicitly repealed the non-discretionary mandates of pre-existing statutes. 551 U.S. at 664. Under *Home Builders*, BLM cannot use its obligation under the ESA (or the CWA) to thwart clear and express statutory mandates for the use of O&C timberlands.

The court of appeals compounded these errors in statutory construction by applying a modern view to "sustained yield" timber production that bears no connection to how those terms were employed in 1937. *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070 (2018) (the court's "job is to interpret the words consistent with their 'ordinary meaning ... at the time

Congress enacted the statute'") (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)).

Here, the court of appeals reasoned that the no-harvest reserves containing O&C timberlands "advance the Act's principal objective—providing a permanent source of timber supply—because a failure to protect endangered species (and their critical habitat) and water quality * * * would eventually limit the lands' timber production capacity." App., *infra*, 29a-30a.

But there is nothing to suggest that the term "sustained yield" as used in 1937 contemplated species habitat and ecosystem concepts. And a member of Congress in 1937 could not plausibly have believed that timber production capacity was limited or impacted by "a failure to protect endangered species." App., *infra*, 29a.

Rather, the term "sustained yield" in 1937 was more pragmatic:

> All land classified as timber in character will continue in Federal ownership and be managed for permanent forest production on what is commonly known as a sustained-yield basis. Under such a plan the amount of timber which may be cut is limited to a volume not exceeding new growth, thereby avoiding depletion of the forest capital. This type of management will make for a more permanent type of community, contribute to the economic stability of local dependent industries, protect watersheds, and aid in regulating streamflow.

H.R. Rep. No. 1119, 75th Cong., 1st Sess. 2 (1937). This same report concludes that the O&C Act "establishes a vast, self-sustaining timber reservoir for the future." *Id*. at 4.

Unsurprisingly, the court of appeals' 21st century conservation-centric view of "sustained yield" also creates a circuit conflict. The Ninth Circuit rejected this exact reasoning over 30 years ago in *Headwaters*, stating:

> Headwaters argues that the phrase 'forest production' in section 1181a encompasses not merely timber production, but also conservation values such as preserving the habitat of the northern spotted owl. However, Headwaters's proposed use—exempting certain timber resources from harvesting to serve as wildlife habitat—is inconsistent with the principle of sustained yield. As the statute clearly envisions sustained yield harvesting of O & C Act lands, we conclude that Headwaters's construction is untenable.

914 F.2d at 1183.

This conflict amongst the courts only underscores the need for this Court to provide guidance as to the meaning of the O&C Act. In *Headwaters*, BLM argued that the O&C Act mandated timber production as the "dominant use" of O&C timberlands, and the court agreed, explaining that the O&C Act's text "make[s] it clear that the *primary* use of the [O&C Act] lands is for timber production to be managed in conformity with the provision of sustained yield." *Id.* at 1184 (second brackets in original) (quoting *O'Neal* v. *United States*, 814 F.2d 1285, 1287 (9th Cir. 1987) (holding same); *Skoko* v. *Andrus*, 638 F.2d 1154, 1156 (9th Cir.) (same), *cert. denied*, 444 U.S. 927 (1979)). *Headwaters* further held that "[n]owhere does the legislative history suggest that wildlife habitat conservation or conservation of old growth forest is a goal on a par with timber production, or indeed that it is a goal of the

O&C Act at all." 914 F.2d at 1184. To construe the O&C Act's dominant use framework as akin to a multiple use, balancing framework disregards the clear text and context of the statute.

This confusion is further evidenced by the court of appeals' discussion regarding the ancillary benefits of sustained-yield timber production: "protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facil[i]ties." 43 U.S.C. § 2601 (footnote omitted). The court of appeals elevated these ancillary benefits as being on par with the O&C Act's dominant use, sustained-yield timber production purpose, concluding that these benefits were "objectives" of the statute and that BLM has "discretion to decide how to balance the Act's multiple objectives." App., *infra*, 30a.

This unwarranted endorsement of limitless agency discretion confuses the *benefits* of "sustained yield production" with the *objectives* of the Act to: (1) "provide the counties in which O & C Act land was located with the stream of revenue which had been promised but not delivered by the Chamberlain-Ferris Revestment Act" and (2) "halt previous practices of clear-cutting without reforestation, which was leading to a depletion of forest resources." *Headwaters*, 914 F.2d at 1183; see also U.S. Dep't of the Interior, Memorandum from Deputy Solicitor to Director, Bureau of Land Mgmt. at 9 (June 1, 1977), J.A. 528 (the "legislative history" and text of the O &C Act "force the conclusion" that "[r]ather than allowing equal consideration of all land uses, the O & C Act requires that lands be managed for commercial forestry if suitable"; "[o]ther uses" are "only allowed when subordinated to commercial forest management").

The court of appeals' decision eviscerates Congress's statutory directive for O&C timberlands. Instead of being a "dominant use" designed to ensure revenue for O&C communities, BLM has relegated sustained-yield timber production to an ever-shrinking percentage of the O&C timberlands with the panel's blessing. And there is nothing in the ruling below to prevent BLM from shrinking that diminishing slice even more. Certiorari is urgently needed to restore Congress's promise to the counties under the O&C Act that they would receive a stream of timber revenue, and to enforce core principles of separation of powers and statutory interpretation.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

JULIE A. WEIS
HAGLUND KELLEY LLP
2177 SW Broadway
Portland, OR 97201
(503) 225-0777
Counsel for American Forest Resource Council, et al.

DAVID O. BECHTOLD
NORTHWEST RESOURCE LAW PLLC
1500 SW First Ave., Suite 985
Portland, OR 97201
(503) 664-3582

SARA GHAFOURI
AMERICAN FOREST RESOURCE COUNCIL
700 NE Multnomah St.
Suite 320
Portland, OR 97232
(503) 222-9505
Counsel for American Forest Resource Council

TIMOTHY S. BISHOP
Counsel of Record
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 701 7829
tbishop@mayerbrown.com
Counsel for Petitioners

PER A. RAMFJORD
JASON T. MORGAN
ARIEL STAVITSKY
STOEL RIVES LLP
760 SW Ninth Avenue
Suite 3000
Portland, OR 97205
(503) 224 3380
Counsel for Association of O & C Counties

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5008

AMERICAN FOREST RESOURCE COUNCIL,

Appellee

v.

UNITED STATES OF AMERICA, *et al.*,

Appellees

SODA MOUNTAIN WILDERNESS COUNCIL, *et al.*,

Appellants

Argued November 16, 2022 Decided July 18, 2023

Consolidated with 20-5009, 20-5010, 20-5011,
22-5019, 22-5020, 22-5021

Appeals from the United States District Court
for the District of Columbia
(No. 1:17-cv-00441)
(No. 1:17-cv-00280)
(No. 1:15-cv-01419)
(No. 1:16-cv-01599)
(No. 1:16-cv-01602)

Brian C. Toth, Attorney, U. S. Department of Justice, argued the cause for federal appellants. With him on the briefs were *Todd Kim*, Assistant Attorney General, and *Robert J. Lundman*, Attorney. *Mark R. Haag*, Attorney, entered an appearance.

Kristen L. Boyles argued the cause for appellants Soda Mountain Wilderness Council, et al. With her on the briefs was *Susan Jane M. Brown*. *Patti A. Goldman* entered an appearance.

Julia K. Forgie and *Katherine Desormeau* were on the brief for *amicus curiae* Natural Resources Defense Council in support of appellants.

David O. Bechtold, Per A. Ramfjord, and *Julie A. Weis* argued the causes for appellees. With them on the brief were *Sarah Ghafouri*, *Jason T. Morgan*, *Ariel Stavitsky*, and *Caroline Lobdell*.

Frank D. Garrison, *Clerk M. Neily III*, and *Damien M. Schiff* were on the brief for *amici curiae* Pacific Legal Foundation and Cato Institute in support of appellees.

Before: HENDERSON and PAN, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: In these consolidated appeals we face the question whether overlapping statutes that affect more than two million acres of federally owned forest land in southwestern Oregon are reconcilable and therefore operative. The appeals arise from three sets of cases filed by an association of fifteen Oregon counties and various trade associations and timber companies. Two of the cases challenge Proclamation 9564, through which the

President expanded the boundaries of the Cascade-Siskiyou National Monument. Two others challenge resource management plans that the United States Bureau of Land Management (BLM), a bureau within the United States Department of the Interior (Interior), developed to govern the use of the forest land. The final case seeks an order compelling the Interior Secretary to offer a certain amount of the forest's timber for sale each year. The district court entered summary judgment for the plaintiffs in all five cases. As detailed *infra*, we reverse.

I. BACKGROUND

A. THE O & C ACT

We begin in 1866, when the Congress authorized a grant of public land to two railroad companies to facilitate the construction of a rail and telegraph line between Portland, Oregon and San Francisco, California. Act of July 25, 1866, ch. 242, 14 Stat. 239; s*ee also Clackamas Cnty. v. McKay*, 219 F.2d 479, 481-82 (D.C. Cir. 1954) (recounting grant's history), *vacated as moot*, 349 U.S. 909 (1955). For each mile of railroad the companies completed, they received every odd numbered, alternate section of public land "to the amount of twenty alternate sections per mile (ten on each side) of [the] railroad line." Act of July 25, 1866, § 2, 14 Stat. 239-40; *see also* David Maldwyn Ellis, *The Oregon and California Railroad Land Grant*, 1866-1945, 39 Pac. N.W. Q. 253, 277 (1948) (reciting conditions of grant). There were no restrictions on the railroads' authority to sell or otherwise dispose of the land.

Three years later, the Congress amended the grant to require the railroads to sell granted land to "actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not

exceeding two dollars and fifty cents per acre." Act of Apr. 10, 1869, ch. 27, 16 Stat. 47; *see also Clackamas Cnty.*, 219 F.2d at 483 ("The railroads through sale of the land were supplied with funds, and the condition that the land be sold to setters in small parcels and at a cheap price was to serve the cause of extensive settlement."). The railroads did not abide by these terms[1] and, in 1916, the Congress responded by revesting title in all of the land the railroads had not sold—about 2.9 million acres—in the United States. *See* Chamberlain-Ferris Act, ch. 137, 39 Stat. 218 (1916). It directed the Interior Secretary to classify the revested land (O & C land), "by the smallest legal subdivisions thereof," into three categories: timberland, power-site land and agricultural land. *Id.* § 2, 39 Stat. at 219. It also directed the Secretary to sell the timber on the portions classified as timberland "as rapidly as reasonable prices can be secured therefor in a normal market." *Id.* § 4, 39 Stat. at 219-20.

Handing 2.9 million acres of land back to the United States removed "huge tracts of land" from state and local property tax rolls. *Clackamas Cnty.*, 219 F.2d at 483. To make up for the consequent loss of tax revenue, the Congress directed the Secretary to compensate the affected counties (O & C counties) for the railroad

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[1] *See* Michael C. Blumm & Tim Wigington, *The Oregon & California Railroad Grant Lands' Sordid Past, Contentious Present, and Uncertain Future: A Century of Conflict*, 40 B.C. ENV'T AFF. L. REV. 1, 12 (2013) ("By 1903, the [railroad] had sold 5306 tracts, totaling approximately 820,000 acres. These sales ranged from $5 to $40 per acre, and the railroad sold some 524,000 acres of the patented land in parcels greater than 160 acres."); *Clackamas Cnty.*, 219 F.2d at 482 ("The railroad . . . ma[de] sales of from 1,000 to 20,000 acres to one purchaser at prices ranging from $5 to $40 an acre and, in one instance, a sale of 45,000 acres at $7 an acre to a single purchaser.").

companies' unpaid taxes and to create a "special fund" using the proceeds from O & C land and timber sales, which fund was to be distributed among several parties in a rather complex order. *See* Chamberlain-Ferris Act, §§ 9-10, 39 Stat. at 221-23.

The funding scheme, however, did not work as intended. Few timber sales occurred and, consequently, many O & C counties received no funds between 1916 and 1926. See Blumm & Wigington, *supra*, at 20. The Congress attempted to rehabilitate the scheme by enacting the Stanfield Act, ch. 897, 44 Stat. 915 (1926), but that attempt also failed, as it "merely shift[ed] the debts from the counties onto the U.S. Treasury," *Murphy Co. v. Biden*, 65 F.4th 1122, 1127 (9th Cir. 2023).

Undeterred by its earlier failures, the Congress again sought to remedy "the region's perilous economic and environmental situation," *id.*, *via* the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act (O & C Act), ch. 876, 50 Stat. 874 (1937) (codified as amended at 43 U.S.C. §§ 2601-2634). The third time was the charm; the O & C Act remains in effect today and is one of the subjects of these appeals. It provides, in pertinent part:

> [S]uch portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberland[] . . . shall be managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a

> permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilties [sic] . . . .
>
> The annual productive capacity for such lands shall be determined and declared as promptly as possible after August 28, 1937, but until such determination and declaration are made the average annual cut therefrom shall not exceed one-half billion feet board measure: *Provided*, That timber from said lands in an amount not less than one-half billion feet board measure, or not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market.

43 U.S.C. § 2601. The O & C Act, as amended, further provides that one-half of the proceeds of O & C timber sales are to be distributed to the O & C counties. *Id.* § 2605(a); *see also* Blumm & Wigington, *supra*, at 21 ("[B]y 1981, the O & C counties and the U.S. Treasury were each entitled to 50% of timber receipts.").

Since 1937, the BLM[2] has carried out the O & C Act's directive to declare an "annual productive capacity," 43 U.S.C. § 2601, by establishing the "allowable sale

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[2] The BLM was created in 1946 when the President combined the General Land Office and the Grazing Service. Before 1946, the O & C land was administered by the General Land Office. STEPHEN DOW BECKHAM, BUREAU OF LAND MGMT., O & C SUSTAINED YIELD ACT: THE LAND, THE LAW, THE LEGACY 13 (1987), https://www.blm.gov/sites/blm.gov/files/OC_History.pdf [https://perma.cc/9BSX-RR3L].

quantity" (ASQ).[3] The ASQ is an estimate of the volume of O & C timber that can be cut and sold in a given year without depleting the timberland. In other words, it is "the capacity of the lands, allocated to sustained yield objectives, to produce timber at a level that will remain constant over time." A. 4843 (Salem district supporting data, resource management plan (RMP) evaluation report, 2012). The ASQ is thus "neither a minimum level that must be met nor a maximum level that cannot be exceeded," but "an approximation." A. 4892 (1995 RMP, Roseburg district). The actual volume of timber sold often deviates from the ASQ.

The ASQ has fluctuated over time, starting at 500 million board feet in 1937 and peaking at 1.2 billion board feet in 1972. *See Murphy*, 65 F.4th at 1127. Because the BLM administered the O & C timberland from 1937 until the 1980s with the principal goal of maximizing timber production,[4] the ASQ for those years was consistently high. From 1959 to 1976, for instance, the ASQ did not fall below 874 million board feet, and actual timber sales regularly exceeded one billion board feet per year. *See* KATIE HOOVER, CONG. RSCH. SERV., R42951, THE OREGON AND CALIFORNIA RAILROAD LANDS: IN BRIEF 3–4 (2023).

But timber production on the O & C land plummeted in the late 1980s and early 1990s as the BLM attempted to reconcile the O & C Act's directive to manage O & C land for "permanent forest production,"

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[3] "Allowable sale quantity" is synonymous with "annual productive capacity," "annual sustained yield capacity" and "sustained yield capacity." A. 2144 n.5.

[4] We use the terms "timber production" and "logging" interchangeably.

43 U.S.C. § 2601, with other, later-enacted statues, especially the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., and the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq. The ESA requires all federal agencies to ensure that their actions are "not likely to jeopardize the continued existence" of any threatened or endangered species "or result in the destruction or adverse modification" of the species' designated critical habitat. 16 U.S.C. § 1536(a)(2). To comply with this obligation, federal agencies must "consult" with the expert wildlife agencies—the Fish and Wildlife Service (Interior Department) and the National Marine Fisheries Service (Commerce Department)—before taking action that could adversely affect listed species. *Id.* § 1536(a)(3); *see Shafer & Freeman Lakes Env't Conservation Corp. v. FERC*, 992 F.3d 1071, 1079 (D.C. Cir. 2021).

In 1990, the Fish and Wildlife Service listed the northern spotted owl[5] as "threatened" based in part on "the loss and adverse modification of suitable habitat as the result of timber harvesting." 55 Fed. Reg. 26114 (June 26, 1990). The owl's listing spawned a slew of litigation, which eventually culminated in the Northwest Forest Plan (NWFP). *See Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1300-02 (W.D. Wash. 1994) (discussing history of northern spotted owl litigation), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80

[5] "The northern spotted owl is the largest of three subspecies of spotted owls, and inhabits . . . forests from southwestern British Columbia, through Washington and Oregon, and into northern California. . . . Northern spotted owls are medium-sized, chocolate brown owls with dark eyes, and they have round or irregular white spots on their head, neck, back, and underparts." *Northern Spotted Owl*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/species/northern-spotted-owl-strix-occidentalis-caurina (last visited June 28, 2023) [https://perma.cc/2B4A-U4QD].

F.3d 1401 (9th Cir. 1996). The NWFP governs all of the federal land administered by either the United States Forest Service (Agriculture Department) or the BLM that is within the northern spotted owl's range, including the O & C land.[6] *Id.* Among other actions, the NWFP (1) created "late-successional reserves" and "riparian reserves"[7] in which logging is generally prohibited in order to protect habitat for endangered species, including the northern spotted owl; (2) designated unreserved areas as "matrix" or "adaptive management areas" where timber harvesting can go forward subject to environmental restrictions; and (3) implemented an "aquatic conservation strategy"[8] that overlay reserve and matrix land with a system of watersheds where

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[6] The NWFP covers 25 million acres of federal land, including 19 national forests and 7 BLM districts in California, Oregon and Washington. The O & C land makes up 11 per cent of the total NWFP management area. *See* HOOVER, *supra*, at 4 n.14.

[7] "Late-successional reserves [a]re intended to serve predominantly as habitat and riparian reserves [a]re intended to protect the water systems and their attendant species." *Pac. Rivers v. BLM*, No. 6:16-cv-01598-JR, 2018 WL 6735090, at *2 (D. Or. Oct. 12, 2018), *report and recommendation adopted*, 2019 WL 1232835 (D. Or. Mar. 15, 2019), *aff'd*, 815 F. App'x 107 (9th Cir. 2020); *see also* A. 3423 ("The objective of [l]ate-[s]uccessional [r]eserves . . . is to protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late-successional and old-growth related species."); A. 3294 ("Riparian [r]eserves . . . maintain and restore riparian structures and functions of intermittent streams, confer benefits to riparian-dependent and associated species other than fish, enhance habitat conservation for organisms that are dependent on the transition zone between upslope and riparian areas, improve travel and dispersal corridors for many terrestrial animals and plants, and provide for greater connectivity of the watershed.").

[8] The "aquatic conservation strategy" is "a comprehensive plan designed to maintain and restore the ecological health of the waterways in federal forests." *Pac. Rivers*, 2018 WL 6735090, at *2.

activities are restricted to protect water quality and aquatic species. *See Lyons*, 871 F. Supp. at 1304–05.

The BLM incorporated the NWFP's core principles into its 1995 RMPs for the O & C land.[9] Most notably, the 1995 RMPs, like the NWFP, divided the O & C land into reserves and matrix: 19 per cent of the O & C land was designated as late-successional reserves, 38 per cent as riparian reserves, and 28 per cent as matrix. *See Pac. Rivers* 2018 WL 6735090, at *2 (describing 1995 RMPs). Because the 1995 RMPs permitted logging only on land designated matrix, the reserve-heavy allocation dramatically reduced the O & C land's timber output. The 1995 RMPs declared an ASQ of 203 million board feet, far less than historic harvest levels. *See id.*

In 1994, various timber companies, including some of the plaintiffs here, filed several lawsuits against the Secretary. *See Am. Forest Res. Council v. Shea*, 172 F. Supp. 2d 24, 28 (D.D.C. 2001) (reciting procedural history). They argued that the proposed 1995 RMPs violated the O & C Act by holding back large tracts of O & C land from logging. The cases settled in 2003 and, as part of the settlement agreement, the Secretary agreed to revise the 1995 RMPs.

It was not until 2008 that the RMPs were revised. They established an ASQ of 502 million board feet, more than double the ASQ set by the 1995 RMPs. The 2008 RMPs were subsequently vacated because they

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[9] Under the Federal Land Policy and Management Act, the Secretary must "develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands." 43 U.S.C. § 1712(a). A "resource management plan" is "a land use plan as described by the Federal Land Policy and Management Act." 43 C.F.R. § 1601.0-5(n).

were approved without the consultation required by section 7 of the ESA. *See Pac. Rivers Council v. Shepard*, No. 03:11-cv-00442-HU, 2011 WL 7562961 (D. Or. Sept. 29, 2011), *report and recommendation adopted*, 2012 WL 950032 (D. Or. Mar. 20, 2012). As a result, the 1995 RMPs were reinstated in 2012. *See Pac. Rivers Council*, 2012 WL 950032, at *4.

Revised RMPs were issued again in 2016. The 2016 RMPs are the subject of one portion of this appeal. Like the 1995 and 2008 RMPs, the 2016 RMPs divide O & C land into multiple management categories: 499,000 acres (20%) are designated as "harvest land-base,"[10] 958,000 acres (38%) as late-successional reserves and 520,000 acres (21%) as riparian reserves. The remaining land is allocated to congressional reserves, national conservation land and district-designated reserves. The 2016 RMPs establish a total ASQ of 205 million board feet—slightly more than the ASQ set by the 1995 RMPs—and allow for the timber volume in fact sold to vary up to 40 per cent from the ASQ. *See Swanson Grp. Mfg. LLC v. Bernhardt*, 417 F. Supp. 3d 22, 27-28 & n.4 (D.D.C. 2019). The minimum timber volume the BLM must sell annually, then, is 123 million board feet and the maximum is 287 million board feet. As far as the record discloses, the timber volume in fact sold has met or exceeded the ASQ every year since the 2016 RMPs were adopted.

B. THE ANTIQUITIES ACT

As abstruse as the O & C Act's operation is, these lawsuits require us to interpret that legislation in

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[10] Like "matrix" land, the "harvest land base" is managed to "achieve continual timber production that can be sustained through a balance of growth and harvest." *Pac. Rivers*, 2018 WL 6735090, at *2 n.4.

light of earlier and potentially conflicting—legislation; to wit, the Antiquities Act of 1906. The 1906 statute provides that "[t]he President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301(a). It further authorizes the "President [to] reserve parcels of land as a part of the national monuments" but requires that the parcels be "confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.* § 320301(b).

Since the Act's enactment, the Presidents have established 161 national monuments. *See National Monument Facts and Figures*, NATIONAL PARK SERVICE, https://www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm (last visited June 28, 2023) [https://perma.cc/87EY-6T47]. Indeed, all but three Presidents holding office since 1906 have invoked its authority. *See* CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 1 n.5 (2023).

Two of these appeals involve one such designation. In 2000, the President used the Antiquities Act to reserve approximately 53,000 acres of land in southwestern Oregon including roughly 40,000 acres of O & C land—as the Cascade-Siskiyou National Monument (the Monument). *See* Proclamation No. 7318, 65 Fed. Reg. 37249 (June 13, 2000).[11] The Monument was

[11] Shortly after its issuance, several advocacy groups challenged Proclamation 7318, along with five other national monument designations, as unconstitutional under the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, and as *ultra vires* vis-à-vis the Antiquities Act. We upheld the Monument's designation in

created to protect the region's "unique geology, biology, climate, and topography," including its "biological diversity," which, according to the Proclamation, is "unmatched in the Cascade Range." 65 Fed. Reg. at 37249. The Proclamation, in effect, outlaws logging within the Monument:

> The commercial harvest of timber or other vegetative material is prohibited, except when part of an authorized science-based ecological restoration project aimed at meeting protection and old growth enhancement objectives. . . . No portion of the monument shall be considered to be suited for timber production, and no part of the monument shall be used in a calculation or provision of a sustained yield of timber. Removal of trees from within the monument area may take place only if clearly needed for ecological restoration and maintenance or public safety.

65 Fed. Reg. at 37250.

In 2017, the President issued Proclamation 9564, which added roughly 48,000 acres to the Monument, including 40,000 acres of O & C land. *See* 82 Fed. Reg. 6145 (Jan. 18, 2017). Proclamation 9564 provided that the expansion land is subject to the "same laws and regulations that apply to the rest of the monument," including the logging prohibition. *Id.* at 6149. As a result, roughly 10 million board feet of timber the BLM planned to sell during fiscal year 2017 could not be sold and the O & C counties missed out on an estimated $1.75 million in revenue. Going forward, the

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Mountain States Legal Foundation v. Bush, 306 F.3d 1132 (D.C. Cir. 2002). Notably, however, the *Mountain States* plaintiffs did not argue that Proclamation 7318 conflicted with the O & C Act.

counties anticipate that the expansion will cause them collectively to lose between $1 million and $2 million of revenue annually.

II. PROCEDURAL HISTORY

As noted, these appeals spring from five lawsuits. In two of the suits, which we call the "Monument cases," plaintiffs the American Forest Resource Council—a trade association that advocates for sustained yield logging on public timberland—and the Association of O & C Counties sued the United States, the President, the Secretary and the BLM (collectively, the Government). They challenged Proclamation 9564, the 2017 Proclamation that expanded the Monument. By outlawing logging on the O & C land included in the Monument, they asserted, the President violated the O & C Act's directive that O & C timberland "shall be managed . . . for permanent forest production." 43 U.S.C. § 2601. Notwithstanding their concession that he was authorized by the Antiquities Act to expand the Monument, they argued that he could not exercise that authority without violating the O & C Act. The Government responded that the claim is not subject to judicial review because neither the O & C Act nor Antiquities Act creates a private right of action and presidential action is not reviewable under the Administrative Procedure Act (APA). And even if the plaintiffs' claims are reviewable, the Government argued, the Monument's expansion was consistent with the O & C Act.

In two different lawsuits, which we refer to as the "Plan cases," the plaintiffs—the American Forest Resource Council, the Association of O & C Counties and other trade associations and companies in the timber industry—sued the BLM Director and the Secretary, contending that the 2016 RMPs violated the O & C Act by placing large swaths of O & C land in

reserves where logging is not permitted. The Government responded that the 2016 RMPs were consistent with the discretion the O & C Act grants the Secretary and that they reasonably harmonized the Secretary's competing statutory obligations.

In the final lawsuit, the "Swanson case,"[12] the plaintiffs—companies in the timber industry—sought an order compelling the Secretary to sell a certain amount of timber each year. They argued that the O & C Act imposes upon the Secretary a non-discretionary duty to sell annually a volume of timber that is not less than the declared ASQ. The Government denied that the O & C Act created any such non-discretionary duty and also argued that, even assuming it did, the Secretary's compliance *vel non* was unreviewable under the APA because the volume of timber the Secretary offers for sale each year is not a "discrete" agency action. *See Norton v. S. Utah Wilderness All. (SUWA)*, 542 U.S. 55, 64 (2004).

The district court entered summary judgment for the plaintiffs in all five cases. In the Monument cases, the court held that the O & C Act mandated timber production on all O & C timberland and precluded the expansion of the Monument, notwithstanding the President's Antiquities Act authority. *See Am. Forest Res. Council v. Hammond*, 422 F. Supp. 3d 184, 192-93 (D.D.C. 2019). In the Plan cases, the court found that the O & C Act precluded the Secretary from reserving O & C land from timber production and that the ESA did not give the Secretary authority to disregard the

[12] Swanson Group Manufacturing LLC was a plaintiff in district court. Although the company was dismissed from the case in 2016, *see Swanson Grp. Mfg. LLC v. Jewell*, 195 F. Supp. 3d 66, 73 (D.D.C. 2016), the parties continue to refer to the case as the "Swanson case."

timber-production mandate the O & C Act imposed. *Id.* at 191. Finally, in the Swanson case, the district court directed the Secretary to offer the ASQ for sale every year in perpetuity. *Swanson Grp. Mfg. LLC v. Bernhardt*, 417 F. Supp. 3d 22, 30 (D.D.C. 2019); *Am. Forest Res. Council v. Nedd*, 2021 WL 6692032, at *6 (D.D.C. Nov. 19, 2021). The Government timely appealed.

III. DISCUSSION

A. REVIEWABILITY

Before we turn to the merits, we must decide whether the plaintiffs' claims are reviewable. The Government contends that the Monument cases are not judicially reviewable because there is no applicable statutory cause of action and because non-statutory review is unavailable where, as here, a plaintiff challenges a discretionary exercise of presidential authority based on an "at-most ambiguous limitation" from a separate statute. Appellant Br. at 33. We disagree.

Although the Government correctly notes that the O & C Act and the Antiquities Act are silent regarding judicial review and the APA's general review provision does not permit review of presidential action because the President is not an agency within the meaning of that statute, *see Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992), the absence of a statutory review provision does not necessarily preclude judicial review of presidential action altogether. We have previously said that a claim alleging that the President acted in excess of his statutory authority is judicially reviewable even absent an applicable statutory review

provision. *See, e.g.*, *Chamber of Com. v. Reich*, 74 F.3d 1322, 1326-28 (D.C. Cir. 1996).[13]

The Government contends that even if non-statutory review of an *ultra vires* challenge to presidential action is available in some cases, review should be denied here because the Antiquities Act vests the President with broad discretion and the O & C Act puts no discernible limit on that discretion. For support, the Government cites the Supreme Court's statement in *Dalton v. Specter* that non-statutory review is unavailable "when the statute in question commits the decision to the discretion of the President." 511 U.S. at 474. As we explained in *Chamber of Commerce*, however, "*Dalton*'s holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains *no limitations* on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." 74 F.3d at 1331 (emphasis added). *Dalton* has no force where, as here, "the claim instead is that the presidential action . . . independently violates [another statute]." *Id.* at 1332; *see also Mountain States*, 306 F.3d at 1136 ("Judicial review in such instances does not implicate separation of powers concerns to the same degree as where the statute did

[13] The United States Supreme Court has not yet decided if a claim that the President acted in excess of his statutory authority is subject to non-statutory review. When facing such a claim, the Court generally assumes review is available and rejects the claim on the merits. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) (assuming without deciding *ultra vires* claim against President based on Immigration and Nationality Act is reviewable); *Dalton v. Specter*, 511 U.S. 462, 474 (1994) ("We may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA.").

'not at all limit' the discretion of the President." (quoting *Dalton*, 511 U.S. at 476)). We thus concluded in *Chamber of Commerce* that we could review a claim alleging that a Presidential order issued under the Federal Property and Administrative Services Act conflicted with the National Labor Relations Act (NLRA) even though the former vested "broad discretion" in the President. 74 F.3d at 1330-32.

That makes good sense. Even when the Congress gives substantial discretion to the President by statute, we presume it intends that the President heed the directives contained in other enactments. *See id.* at 1328 ("[C]ourts will 'ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.'" (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 (1986))). The Congress can and often does cabin the discretion it grants the President and it remains the responsibility of the judiciary to ensure that the President act within those limits. *See id.* at 1327; *Mountain States*, 306 F.3d at 1136.

Perhaps more to the point, we have consistently reviewed claims challenging national monument designations like the one challenged here. *See Mountain States*, 306 F.3d 1132; *Tulare Cnty. v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002); *Mass. Lobstermen's Assn v. Ross*, 945 F.3d 535 (D.C. Cir. 2019). In those cases, we have reviewed claims that the President exceeded his authority under the Antiquities Act and claims that he violated a separate statute through an otherwise appropriate exercise of his Antiquities Act authority. In *Mountain States*, for example, the plaintiffs challenged a number of monument designations as

statutorily *ultra vires*. *See* 306 F.3d at 1133. They argued the designations "reach[ed] far beyond the purpose, scope, and size of any national monuments contemplated by Congress under the [Antiquities] Act" and were also "contrary to various statutes relating to the protection of environmental values on federal land." *Id.* We found both types of claims reviewable notwithstanding the broad discretion the Antiquities Act vests in the President. *See id.* at 1136-38.

Massachusetts Lobstermen's Ass'n is similarly instructive. There, commercial fishing associations challenged the presidential proclamation that created the Northeast Canyons and Seamounts Marine National Monument. 945 F.3d at 537. The fishermen argued, among other things, that the monument was incompatible with the National Marine Sanctuaries Act, a statute that authorizes the government to designate and manage marine sanctuaries in the "exclusive economic zone"—the span of ocean between 12 and 200 nautical miles off the Nation's coasts. *Id.* at 538-39 (quoting 16 U.S.C. § 1437(k)). We concluded that the claim was reviewable, again despite the President's Antiquities Act discretion. *See id.* at 540.

Like the plaintiffs in *Massachusetts Lobstermen's Ass'n* and *Mountain States*, the plaintiffs here argue that the President's exercise of authority under the Antiquities Act was *ultra vires* because it was inconsistent with an independent statute—the O & C Act. Consistent with our precedent, we easily conclude that the plaintiffs' claims are reviewable.

B. MONUMENT CASES

We turn to the merits and begin with the Monument cases. The Government challenges the district court's decision that the President's expansion of the Monument

constitutes an invalid use of his Antiquities Act authority because the expansion conflicts with the O & C Act. The Government makes two arguments. First, because the O & C Act is directed at the Secretary, it does not limit the *President's* authority to reserve land under the Antiquities Act. Second, the Monument's expansion is consistent with the O & C Act because that Act does not mandate that every acre of O & C land be classified as timberland and, even for land that is so classified, the Act does not mandate that every acre be used solely for logging. Instead, the O & C Act contemplates a flexible concept of sustained yield management that permits the BLM to consider conservation values in making timber harvest decisions.

The Government's first contention need not long detain us. Although the O & C Act is addressed to the Secretary rather than to the President, that merely reflects the fact that the O & C land is administered by the Interior Department. The Congress usually directs its enactments to the executive official responsible for a program's administration rather than to the President himself. But that does not necessarily mean that the legislation does not also affect the President. For example, although the substantive provisions of the NLRA address the National Labor Relations Board, not the President, we concluded in *Chamber of Commerce* that the NLRA limited the President's discretion under the Procurement Act. *See Chamber of Com.*, 74 F.3d at 1332-33.

The O & C Act restricts the President's power to designate monuments under the Antiquities Act for the same reason the NLRA restricts the President's discretion under the Procurement Act: discretion conferred upon the President by the Congress is constrained by the limitations the Congress prescribes. Because

the President relied solely on the Antiquities Act to expand the Monument, he was constrained by the Congress's other enactments in exercising that delegated power. *See Mountain States*, 306 F.3d at 1137 ("the President exercise[s] his *delegated* powers under the Antiquities Act" in creating monuments (emphasis added)); *see also United States v. California*, 332 U.S. 19, 27, *supplemented*, 332 U.S. 804 (1947) ("[N]either the courts nor the executive agencies[] could proceed contrary to an Act of Congress in [a] congressional area of national power.").

The provision of the O & C Act that the plaintiffs argue constrains the President's discretion, moreover, is written in the passive voice, *see* 43 U.S.C. § 2601 (O & C land "shall be managed . . . for permanent forest production . . . in conformity with the princip[le] of sustained yield"), suggesting that the directive applies without respect to a particular actor. *See Bartenwerfer v. Buckley*, 143 S. Ct. 665, 672 (2023) ("[T]he passive voice signifies that 'the actor is unimportant.'" (quoting B. GARNER, MODERN ENGLISH USAGE 676 (4th ed. 2016))); *see also Dean v. United States*, 556 U.S. 568, 572 (2009) ("The passive voice focuses on an event that occurs without respect to a specific actor."). The provision thus declares that *whoever* manages O & C land must do so "for permanent forest production." 43 U.S.C. § 2601.

The Government next contends the Monument's expansion is permissible because it is compatible with the O & C Act. Its argument, in effect, is that the Antiquities Act and the O & C Act can be harmonized. The Supreme Court has counseled that, "[w]hen confronted with two Acts of Congress allegedly touching on the same topic, [we are] not at 'liberty to pick and choose among congressional enactments' and

must instead strive 'to give effect to both.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). A party suggesting two statutes cannot be reconciled "bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Id.* (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)). Accordingly, in reviewing an alleged statutory conflict, we must bear in mind the "'strong presumption' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." *Id.* (alterations accepted) (quoting *United States v. Fausto*, 484 U.S. 439, 452-53 (1988)).

We believe that the Antiquities Act and O & C Act are indeed compatible. We first observe that the 1937 O & C Act did not repeal the 1906 Antiquities Act, either explicitly or by implication. The O & C Act does not allude to the Antiquities Act, *see Murphy*, 65 F.4th at 1132, and the only evidence of implied repeal the plaintiffs point to—the O & C Act's generic *non-obstante* clause[14]—applies by its terms only to "Acts or parts of Acts in conflict with this Act." Act of Aug. 28, 1937, ch. 876, 50 Stat. 874, 876. The Antiquities Act, however, is not in conflict with the O & C Act. The O & C Act can reasonably be read in a manner that renders the statutes harmonious. Because it can be so read, it must be. *See Epic Sys. Corp.*, 138 S. Ct. at 1624.

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[14] The clause provides that "[a]ll Acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and effect to this Act." Act of Aug. 28, 1937, ch. 876, 50 Stat. 874, 876.

First, the text of the O & C Act provides that only the "portions of the" O & C land "which have heretofore or may hereafter be classified as timberland[]" must be managed "for permanent forest production . . . in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601. In anticipating that only "portions" of the O & C land were to be classified as timberland, the Act necessarily implies that land may be classified as timberland or not. The land classified as timberland is subject to the statute's "permanent forest production" instruction but land not so classified is not. *See Murphy*, 65 F.4th at 1134 ("The Department's duty to oversee the lands is obligatory ('shall be managed'), but treating *every* parcel as timberland is not."). The Act's "or may hereafter" language indicates, moreover, that a parcel's timberland classification is not fixed; it may be reclassified in the future.

The O & C Act's text does not specify what officer or entity classifies O & C land, how land should be classified or what classifications exist aside from "timberland[]" and "power-site land[] valuable for timber." 43 U.S.C. § 2601. Nor does the Act require a fixed proportion of O & C land to be classified as timberland. In fact, the Act does not define "timberland." Given the Act's classification ambiguities and our obligation to reconcile the O & C Act and Proclamation 9564 if possible, *see Epic Sys. Corp.*, 138 S. Ct. at 1624, we believe the Act provides the Secretary with considerable discretion regarding the classification and reclassification of O & C land. Our conclusion accords with the decision we issued long ago in *Clackamas County*, where we observed that the O & C Act "conferred upon the Secretary of the Interior many duties requiring the exercise of his discretion and judgment," one such duty being the "classification of land." 219 F.2d at 487.

We are unpersuaded by the plaintiffs' contention that O & C lands were once, and thus must continue to be, classified "based on their productive capacity." Appellee Br. at 32. Granted, before the O & C Act was enacted, land was classified according to its capacity to produce timber. The Chamberlain-Ferris Act defined "timberland[ ]" as "land[] bearing a growth of timber not less than three hundred thousand feet board measure on each forty-acre subdivision." Chamberlain-Ferris Act, § 2, 39 Stat. at 219. That definition, however, was omitted from the O & C Act. We presume the omission was intentional. *See Banks v. Booth*, 3 F.4th 445, 449 (D.C. Cir. 2021) ("Congress says what it means and means what it says."); *cf. Fed. Express Corp. v. Dep't of Com.*, 39 F.4th 756, 768 (D.C. Cir. 2022) ("When Congress includes particular language in one section of a statute but omits it in another section of the same Act, courts presume that Congress knew what it was doing and meant for the omission to have significance." (cleaned up)). The O & C Act simply does not define "timberland" or establish a procedure for classifying O & C land. And we decline to fill in those gaps with provisions from the outdated Chamberlain-Ferris Act, legislation that was, after all, replaced by the O & C Act because of its defects. *See Clackamas Cnty.*, 219 F.3d at 486-87; *see also Bates v. United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.").

We believe Proclamation 9564 reclassified, albeit by implication, the 40,000 acres of O & C land the President added to the Monument as non-timberland, thereby removing the land from the O & C Act's "permanent forest production" mandate. Moreover, "[t]his is not a case where the executive's action eviscerate[d] Congress's land-management scheme,

nor is it a case that concerns 'vast and amorphous expanses of terrain.'" *Murphy*, 65 F.4th at 1137-38 (quoting *Mass. Lobstermen's Assn v. Raimondo*, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., statement respecting certiorari denial)). Rather, the Proclamation's Monument expansion was modest, affecting only 40,000—less than two per cent—of the more than two million acres of O & C land, and neither unduly interfering with the principal objective of the O & C Act nor abridging the Secretary's authority to regulate the vast bulk of the O & C land.[15] Moreover, although the principal management objective of the O & C Act is "permanent forest production . . . in conformity with the princip[le] of sustained yield," 43 U.S.C. § 2601; *see also Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1184 (9th Cir. 1990) ("[T]he O & C Act envisions timber production as a dominant use."), the Act also authorizes the Secretary to manage the O & C land for uses other than the production of timber, including "protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facil[i]ties," 43 U.S.C. § 2601. The Act grants the Secretary discretion to decide how best to implement and balance these objectives. *See Murphy*, 65 F.4th at 1134.[16]

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[15] The plaintiffs do not seriously dispute that land may be reclassified or that only land classified as timberland is subject to the O & C Act's timber-production mandate. Instead, they contend that "all the lands at issue here are classified as timberland[]." Appellee Br. at 32. But they provide no evidence—and we find none in the record—manifesting that the land added to the Monument was in fact classified as timberland before the Proclamation was issued.

[16] The Congress's re-enactment of the Antiquities Act in 2014 without mention of the Monument further indicates that it did not intend the O & C Act to limit the Antiquities Act. "When

The O & C Act's history confirms that the Congress intended to give the Secretary flexibility to decide how best to carry out the program of "sustained yield" management. As we have explained, it was enacted to address two failures of the Chamberlain-Ferris Act and the Stanfield Act: "One was that they required the timber to be sold as rapidly as possible and the cut-over lands disposed of. The other was that they . . . creat[ed] a deficit due from the federal Treasury" to the O & C counties. *Clackamas Cnty.*, 219 F.2d at 487. To remedy these defects, the O & C Act "provided for the management of the timber on a conservation basis and for the payment to the counties of the net proceeds from the sales each year." *Id.*; *see also* H.R. Rep. No. 75-1119, at 2 (1937) (explaining that, under the earlier statutes, "[n]o provision was made for the administration of the land on a conservation basis looking toward the orderly use and preservation of its natural resources."). In lieu of the former clear-cutting regime, the O & C Act provided that timberland should be

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Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (cleaned up). The Congress first enacted the Antiquities Act in 1906 and the O & C Act in 1937. The President established the Monument in 2000. In 2009, the Congress enacted legislation that dealt with grazing rights, land swaps and wilderness preserves on the Monument. *See* Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, §§ 1401-05, 123 Stat. 991, 1026-32. Then, in 2014, the Congress recodified the Antiquities Act with no mention of the Monument. *See* Pub. L. No. 113-287, § 3, 128 Stat. 3094, 3259-60 (2014). This sequence of events suggests that the Congress has acquiesced in the Executive's interpretation of the Antiquities Act. *See Jackson v. Modly*, 949 F.3d 763, 773 & n.11 (D.C. Cir. 2020).

managed in accordance with the "innovative" principle of "sustained yield" so that the land's "natural assets could be 'conserved and perpetuated.'" *Murphy*, 65 F.4th at 1136 (quoting H.R. Rep. No. 75-1119, at 4). The goal of the O & C Act, then, was to "provide conservation and scientific management for this vast Federal property which now receives no planned management beyond liquidation of timber assets and protection from fire." H.R. Rep. No. 75-1119, at 2; *see also* S. Rep. No. 75-1231, at 1, 4 (1937) (statement of Acting Interior Secretary that "[p]roper protection of the interest of the communities, the States, and the Government requires a long-range program of planning, having for its object a well-regulated system of cutting, based upon the kind, character, and suitability of the timber, *rather than upon the actual presence on a given subdivision of a fixed amount of merchantable timber*." (emphasis added)).

In addition, the Monument's expansion is itself consistent with sustained yield forestry. The expansion "provides vital habitat connectivity, watershed protection, and landscape-scale resilience for the area's critically important natural resources." 82 Fed. Reg. at 6145. It effectuates the Act's aims of "protecting watersheds" and "regulating stream flow," *see* 43 U.S.C. § 2601, by protecting "hydrologic features" which are "vital to the ecological integrity of the watershed as a whole," 82 Fed. Reg. at 6147. It also helps to "provid[e] a permanent source of timber supply" in the long term, *see* 43 U.S.C. § 2601, by protecting the region's water and endangered species—both essential to maintaining a forest's vitality. Finally, the expansion provides recreational opportunities for residents and visitors, *see, e.g.*, 82 Fed. Reg. at 6147 ("Ornithologists and birdwatchers alike come to the Cascade-Siskiyou landscape for the variety of birds found here."); *id.* ("The

landscape also contains many hydrologic features that capture the interest of visitors."), consistent with the O & C Act's aim of "providing recreational facil[i]ties," 43 U.S.C. § 2601.

In sum, the O & C Act provides the Secretary three layers of discretion: first, discretion to decide how land should be classified, which includes discretion to classify land as timberland or not, second, discretion to decide how to balance the Act's multiple objectives, and third, discretion to decide how to carry out the mandate that the land classified as timberland be managed "for permanent forest production." 43 U.S.C. § 2601.

C. PLAN CASES

In the Plan cases, the plaintiffs contend that the 2016 RMPs violate the O & C Act because they place portions of O & C land in reserves where timber production is generally prohibited. Their challenge, however, fails for the same reason the Monument plaintiffs' challenge to Proclamation 9564 fails: the 2016 RMPs do not violate the O & C Act. Rather, the 2016 RMPs are a permissible exercise of the Secretary's discretion under the O & C Act. The 2016 RMPs also reasonably harmonize the Secretary's O & C Act duties with her obligations under two other statutes—the ESA and the CWA.

First, the balance the 2016 RMPs strike between conservation and logging is a valid exercise of the Secretary's discretion under the O & C Act. The Act, as we have explained, gives the Secretary discretion in classifying the land, balancing the Act's multiple objectives and meeting the requirement that timberland be managed for permanent forest production in

accordance with sustained yield principles. The 2016 RMPs fall well within that discretion.

The 2016 RMPs established two main types of reserves: late-successional reserves and riparian reserves. As we noted earlier, late-successional reserves were created to preserve critical habitat for the northern spotted owl and other endangered and threatened species. *See* A. 3423 ("The objective of [l]ate-[s]uccessional [r]eserves . . . is to protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late-successional and old-growth related species."). Riparian reserves were created to "protect the water systems and their attendant species." *Pac. Rivers*, 2018 WL 6735090, at *2. Both categories of reserves are consistent with the O & C Act.

The creation of the reserves can reasonably be viewed as an exercise of the Secretary's discretion to reclassify O & C land as non-timberland, thus removing the land from the O & C Act's "permanent forest production" mandate. *See* 43 U.S.C. § 2601. The reserves also reasonably balance the O & C Act's several objectives. Riparian reserves advance the aims of "protecting watersheds" and "regulating stream flow." *Id.* Those reserves, the 2016 RMPs explain, "provide substantial watershed protection benefits" and "help attain and maintain water quality standards, a fundamental aspect of watershed protection." A. 3126. They also "help regulate streamflows by moderating peak streamflows and attendant adverse impacts to watersheds." A. 3170. Both late-successional and riparian reserves also advance the Act's principal objective—providing a permanent source of timber supply—because a failure to protect endangered species (and their critical habitat) and water quality,

both necessary for the continuing vitality of the forest ecosystem, would eventually limit the lands' timber production capacity. *See* A. 3678 ("Contributing to the conservation and recovery of listed species is essential to delivering a predictable supply of timber."). In addition, if the Secretary were to threaten further the endangered species on O & C land, litigation would likely result and injunctions against timber sales sought, potentially disrupting timber production. *See* A. 3677 ("Declining populations of species now listed under the Endangered Species Act have caused the greatest reductions and instability in the BLM's supply of timber in the past."); A. 4691 (between 1999 and 2007, "legal challenges" and other factors "greatly reduced" BLM's ability to sell timber); A. 4716, 4721 (timber production during the first decade after the NWFP's promulgation was about one-half of what was expected due to litigation and ESA requirements, among other factors); *see also Portland Audubon Soc'y v. Babbit*, 998 F.2d 705, 709-10 (9th Cir. 1993) (affirming injunction barring Secretary from selling timber across entire spotted owl range); *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1037-38 (9th Cir. 2007) (invalidating incidental take statement for 75 timber sales); *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562-63 (9th Cir. 2006) (setting aside timber-regeneration sales).

Second, both the ESA and the CWA support the establishment of reserves on O & C land. Late-successional reserves, as noted, were created primarily to preserve habitat for ESA-listed species. As the 2016 RMPs explain, northern spotted owls in particular require large, contiguous blocks of forest for habitat and late-successional reserves allow for the continuing existence of such blocks. Thus, the reserves are consistent with the ESA's requirement that the Secretary

ensure her actions are "not likely to jeopardize the continued existence" of any listed species or "result in the destruction or adverse modification" of the species' designated critical habitat as well as its directive that the Secretary "review other programs administered by [her] and utilize such programs in furtherance of the purposes of this chapter." 16 U.S.C. § 1536(a)(1), (2).

The ESA supports the creation of riparian reserves because "[p]roviding clean water is essential to the conservation and recovery of listed fish, and a failure to protect water quality would lead to restrictions that would further limit the BLM's ability to provide a predictable supply of timber." A. 3678. And, as the 2016 RMPs recognize, "[t]he system of late-successional reserves and riparian reserves, watershed restoration, and the other components of the [RMPs'] aquatic conservation strategy provide a sound framework for meeting Clean Water Act requirements." A. 3128.

In short, the 2016 RMPs are well within the Secretary's discretion under the O & C Act and are consistent with the Secretary's other statutory obligations.

D. SWANSON CASE

The O & C Act provides that "timber ... in an amount not less than one-half billion feet board measure, or not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market." 43 U.S.C. § 2601. The Swanson plaintiffs contend that this language requires the Secretary to sell or offer for sale the declared annual sustained yield capacity—that is, the declared ASQ—every year. The Government contends

that the O & C Act's timber-volume provision is not enforceable *via* the APA.

The Swanson plaintiffs' claim is brought under section 706(1) of the APA, which provides that a reviewing court shall "compel agency action unlawfully withheld." 5 U.S.C. § 706(1). As the Supreme Court has explained, a claim under section 706(1) "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is required to take." *SUWA*, 542 U.S. at 64; see also HARRY T. EDWARDS & LINDA A. ELLIOT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 144 (3d ed. 2018). The "discreteness" requirement is rooted in the APR's insistence upon "agency action" as a necessary predicate to judicial review. *See SUWA*, 542 U.S. at 62-63. An "agency action" is an agency's determination of rights and obligations, *see Bennett v. Spear*, 520 U. S. 154, 177-78 (1997), by way of a "rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. § 551(13). All five categories of action listed in the APA's definition—rule, order, license, sanction and relief—are "circumscribed" and "discrete." *SUWA*, 542 U.S. at 62. And only an act or "failure to act" with "the same characteristic of discreteness" is reviewable under the APA. *Id.* at 63. Thus, a failure to act is challengeable under section 706(1) only if it is both an "agency action"—that is, an action involving the determination of rights and obligations—and is discrete.

To understand the reason that the plaintiffs' requested relief does not constitute discrete agency action, some background on the Secretary's timber sale process is necessary. The sale process comprises three pre-sale phases: preplanning, planning and preparation. In the preplanning phase, the BLM collects information

about forest and watershed conditions and access to each of the potential project areas, ascertains property lines through official land surveys, initiates pre-project clearance surveys for endangered species (some of which require two consecutive years of surveys), requests easements where its access is limited, develops preliminary timber harvest plans and initiates the public scoping process pursuant to the National Environmental Policy Act (NEPA). In the planning phase, the BLM completes its field evaluations, develops refined harvest plans and alternative project designs and prepares an environmental impact statement pursuant to NEPA, along with a biological assessment of the probable effect the sale will have upon ESA-listed species and their critical habitat. Finally, in the preparation phase, the BLM develops the final project design, issues a record of decision and prepares the timber sale contract and appraisal. The timber is then sold at auction pursuant to BLM regulations. *See* 43 C.F.R. pt. 5440. This complex process of planning, preparing and selling a timber contract generally takes between three and five years.

For a given fiscal year, the timber volume the BLM offers corresponds to the sum of all of the timber volumes offered for sale at all of the individual timber auctions conducted that year across the O & C land. Thus, the total timber volume sold comprises timber sales that can take years to finalize. The total timber volume the BLM offers for sale in a given year is thus not a discrete agency action. Instead, it is a measurement—a synthesis of multiple sales made over several years. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734-35 (1998) (rejecting argument that plaintiffs could "mount one legal challenge" to forest plan rather than "pursue many challenges to each site-specific logging decision to

which the Plan might eventually lead"). The total timber volume offered does not involve the determination of rights and obligations and is not a decision "from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). It is neither a litigable "determination" nor "decision."[17]

In this sense, the Swanson plaintiffs' request is analogous to the sort of "broad programmatic attack," *SUWA*, 542 U.S. at 64, the Supreme Court rejected in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 890-91 (1990). There, the plaintiff challenged the BLM's "land withdrawal review program," which involved the status of millions of acres of federal land. *See id.* at 875-76. The Court held that the plaintiff could not "challenge the entirety of [the] so-called 'land withdrawal program'" because the program was "not an 'agency action' within the meaning of § 702." *Id.* at 890. The "land withdrawal program," it reasoned, "does not refer to a single BLM order or regulation" but rather "is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands." *Id.* As such, it was not "an identifiable 'agency action'" and the plaintiff could not "seek *wholesale* improvement of [the] program by court decree." *Id.* at 890-91. Rather, "[u]nder the terms of the APA," the plaintiff had to "direct its attack against some particular 'agency action' that causes it harm." *Id.* at 891.

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[17] We do not mean to suggest that the total volume of timber sold in a given year is not ascertainable and measurable. It is. But its ascertainability does not make it a discrete agency action.

So too here. The Swanson plaintiffs' requested relief is targeted at the "continuing . . . operations of the BLM"—years' worth of policy choices and site-specific decisions—rather than "some particular 'agency action.'" *Id.* at 890-91. They complain not that the Secretary failed to take a *specific* action but rather that she failed to carry out the O & C Act's general directives. Their blunderbuss challenge to the BLM's program is better aimed at "the offices of the Department or the halls of Congress," not at the court. *Id.* at 891.

For the foregoing reasons, we reverse the district court's judgments in the Monument cases, the Plan cases and the Swanson case and remand for proceedings consistent with this opinion.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 16-1599 (RJL)

AMERICAN FOREST RESOURCE COUNCIL, *et al.*,
***Plaintiffs*,**
v.
CASEY HAMMOND, *et al.*,
***Defendants*.**

Civil Case No. 16-1602 (RJL)

ASSOCIATION OF O & C COUNTIES,
***Plaintiff*,**
v.
WILLIAM PERRY PENDLEY, *et al.*,
***Defendants*.**

Civil Case No. 17-280 (RJL)

ASSOCIATION OF O&C COUNTIES,
***Plaintiff*,**
v.
DONALD J. TRUMP, *et al.*,
***Defendants*,**
SODA MOUNTAIN WILDERNESS COUNCIL, *et al.*,
***Defendant-Intervenors*.**

Civil Case No. 17-441 (RJL)

AMERICAN FOREST RESOURCE COUNCIL,
***Plaintiff*,**

v.

UNITED STATES OF AMERICA, *et al.*,
***Defendants*,**

SODA MOUNTAIN WILDERNESS COUNCIL, *et al.*,
***Defendant-Intervenors*.**

MEMORANDUM OPINION
(November 22, 2019)

[Dkt. ## 49, 50 (in Case No. 16-1599); 37, 38 (in Case No. 16-1602); 59, 60, 66 (in Case No. 17-280); 60, 61, 66 (in Case No. 17-441)]

The Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 ("O&C Act"), 43 U.S.C. § 2601 *et seq.,* regulates timber harvest on approximately two million acres of federal land in western Oregon ("O&C land"). In these four cases, plaintiffs challenge decisions made by the President of the United States and by the Bureau of Land Management ("BLM")—the agency that administers the O&C Act—that effectively reduce the amount of O&C land that is available for commercial timber harvest.[1] In two of the cases, plaintiffs challenge

[1] In Case Number 16-1599, the American Forest Resource Council (a forest products trade association representing lumber and plywood manufacturing companies) as well as the Carpenters Industrial Council, Douglas Timber Operators, Inc., C & D Lumber Co., Freres Lumber Co. Inc., Seneca Sawmill Company, Starfire

Resource Management Plans, issued by BLM in 2016 ("the 2016 RMPs"), that set aside portions of O&C land as reserves on which commercial timber harvest is limited. In the other two cases, plaintiffs challenge a Presidential Proclamation ("Proclamation 9564"), by President Obama, that enlarged the Cascade-Siskiyou National Monument in southern Oregon, thereby limiting commercial timber harvest on the O&C land that was added to the monument. *See* 82 Fed. Reg. 6145 (Jan. 18, 2017).

In all four cases, plaintiffs contend that the Government's actions violate the plain text of the O&C Act.

Lumber Co., Inc., and Swanson Group Mfg. LLC (all entities engaged in business related to the timber industry) sued BLM's director and the Secretary of the Interior, alleging that the 2016 RMPs are arbitrary, capricious, and unlawful. In Case Number 16-1602, the Association of O&C Counties, which represents seventeen counties in western Oregon that contain O&C land, sued the same defendants on the same allegations.

In Case Number 17-280, the Association of O&C Counties sued President Donald J. Trump, the United States of America, the Secretary of the Interior, and BLM, alleging that Proclamation 9564 is *ultra vires.* In Case Number 17-441, the American Forest Resource Council sued the same defendants on the same allegations about Proclamation 9564. The Soda Mountain Wilderness Council, the Klamath-Siskiyou Wildlands Center, and Oregon Wild (public interest groups focused on protecting the environment in and around the Cascade-Siskiyou National Monument) intervened in Case Numbers 17-280 and 17-441 to defend Proclamation 9564.

Throughout this consolidated Memorandum Opinion, "plaintiffs" will refer to the collective plaintiffs in all four cases. "Defendants," "the Government," or the "United States" will refer to the collective named defendants in all four cases. And "intervenors" or "defendant-intervenors" will refer to the Soda Mountain Wilderness Council, the Klamath-Siskiyou Wildlands Center, and Oregon Wild, collectively

They moved for summary judgment, and the Government cross-moved, defending the legality of the 2016 RMPs and Proclamation 9564. In the cases about Proclamation 9564, intervenors filed additional cross-motions for summary judgment in defense of the Proclamation.

In all four cases, plaintiffs are correct. Both the 2016 RMPs and Proclamation 9564 conflict with mandates imposed by the O&C Act. For that reason, and for all those that follow, plaintiffs' motions for summary judgment must be GRANTED, and the Government's and intervenors' cross-motions for summary judgment must be DENIED.

BACKGROUND[2]

The O&C Act requires that timberland subject to the Act be "managed . . . for permanent forest production" and that timber grown on the land "be sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601. To implement these provisions, the Secretary of the Interior must declare the "annual productive capacity" of O&C timberland, and then offer timber commensurate with that productive capacity for sale each year.[3] *Id.* A portion of the proceeds from the timber sales is then paid to the

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[2] Additional background about these cases can be found in *American Forest Resource Council v. Steed,* No. 16-1599, 2019 WL 1440887 (D.D.C. Mar. 31, 2019). This Memorandum Opinion discusses only the background relevant to the issues decided.

[3] BLM, an agency with the Department of the Interior, has administered the O&C Act since 1947. *See Swanson Grp. Mfg. LLC v. Bernhardt,* No. 15-1419, 2019 WL 4750486, at *1 (D.D.C. Sept. 30, 2019); U.S. Dep't of the Interior, BLM, O&C Sustained Yield Act: the Land, the Law, the Legacy (1937-1987) at 5, available at https://www.blm.gov/or/files/OC_History.pdf.

Oregon counties that contain O&C land. *See id.* § 2605(a).

The O&C land's productive capacity—also referred to as the allowable sale quantity ("ASQ") of timber[4] has reached as high as 1.1 billion board feet per year. *See* Administrative Record (Case No. 16-1599) ("AR") .at JA-14, IND_0527316-17 [Dkt. ## 37, 40]. For much of the latter half of twentieth century, it remained relatively close to that figure. *See id.* (showing an ASQ of 874 million board feet or higher every year from 1959 until 1976). But in the 1990s, the ASQ dropped precipitously.

In 1990, the U.S. Fish and Wildlife Service classified the northern spotted owl as a threatened species under the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531 *et seq*. *See* Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990). Two years later, a federal district court in Oregon enjoined timber sales on land, including land subject to the O&C Act, that is suitable habitat for the threatened owls. *See Portland Audubon Soc'y v. Lujan,* 795 F. Supp. 1489, 1510-11 (D. Or. 1992). The injunction was not resolved until 1994, when BLM, in conjunction with the United States Forest Service, adopted a new "forest plan" to govern the management of northern spotted owl habitat. *See Seattle Audubon Soc. v. Lyons,* 871 F. Supp. 1291, 1300, 1302, 1304 (W.D. Wash. 1994).

Land subject to the 1994 forest plan was divided into "reserve areas in which logging and other ground-

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[4] BLM uses "annual productive capacity," "allowable sale quantity," and "annual sustained yield capacity" synonymously. *See* Fed. Defs.' Cross-Mot. Summ. J. (Case No. 16-1599) at 7 & n.3 [Dkt. # 50].

disturbing activities [we]re generally prohibited" and "unreserved areas" where "timber harvest [could] go forward." *Lyons,* 871 F. Supp. at 1304-05. In 1995, with the forest plan in place, BLM issued RMPs that adopted similar measures for O&C land. *See, e.g.,* AR at JA-27, IND_0523007; JA-28, IND_0523235. After allocating certain timberland to reserves, where sustained yield timber harvest was not permitted, the 1995 RMPs set an ASQ of 203 million board feet per year, about 20% of the one billion board feet ASQs that had been declared in the past. *See* AR at JA-41, IND_0340678; JA-46, IND_0514462; JA46, IND_0514701.

BLM revised the O&C land RMPs in 2016. Like their predecessors, the 2016 RMPs divide O&C land into separate management categories. *See* AR at JA-46, IND 0514399-402. Only one of the six categories—"harvest land base"—is managed to "achieve continual timber production that can be sustained through a balance of growth and harvest." *Id.* at JA-46, IND_0514402. The other five categories, which include multiple types of ecological reserves, limit timber production. *See id.* at JA-2, IND 0513044. When BLM calculated the ASQ for O&C timberland in the 2016 RMPs, the agency looked only to timber grown in the 498,597-acre harvest land base. *See id.* at JA-1, IND_0512707-10; JA-1, IND_0512745; JA-2, IND_0513027-29; JA-2, IND_0513065. Timberland in every other land category, including the 957,872 acres of late-successional reserves and the 520,092 acres of riparian reserves, was left aside. *See id.* This calculation yielded an ASQ of 205 million board feet per year—a slight increase from the 1995 RMPs, but still only about 20% of the historic maximum. *See id.* at JA-1, IND_0512708 (ASQ for Coos Bay, Eugene, and Salem of 130 million board feet); JA-2, IND_0513027 (ASQ for Klamath

Falls, Medford, and Roseburg of 75 million board feet); JA-14, IND_0527316-17 (historic ASQs).

A decade after the northern spotted owl was classified as a threatened species, President Clinton introduced one more variable to O&C land management by creating the Cascade-Siskiyou National Monument. *See* Proclamation 7318, 65 Fed. Reg. 37,249, 37,250 (June 13, 2000). At its inception, the monument included approximately 40,156 acres of O&C Act land within its boundaries. *See* Fed. Defs.' Cross-Mot. Summ. J. (Case No. 17-280), Ex. 15 at 11 [Dkt. # 60-2]. And since its inception, "[t]he commercial harvest of timber . . . [has been] prohibited," within the monument, "except when part of an authorized science-based ecological restoration project." *See* Proclamation 7318, 65 Fed. Reg. at 37,250.

On January 12, 2017, shortly before he left office, President Obama issued Proclamation 9564, which added approximately 47,660 more acres of O&C land to the Cascade-Siskiyou National Monument. *See* Proclamation 9564, 82 Fed. Reg. 6145 (Jan. 18, 2017); Declaration of Theresa M. Hanley ("Hanley Decl.") ¶ 8 (Case No. 17-280) [Dkt. # 57-1]. The addition effectively doubled the O&C land that can no longer be used for timber harvest because it falls within the monument's boundaries.

Plaintiffs in these suits contend that both the 2016 RMPs and Proclamation 9564 violate the O&C Act. In their view, setting aside O&C land to limit timber harvest—whether the set aside is called a reserve or a monument—contravenes Congress's mandate that O&C land "shall be managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601.

The Government disagrees, of course. It argues that the O&C Act gives BLM discretion to set land aside in reserves and that the 2016 RMPs reflect a reasonable balancing of the agency's obligations under the O&C Act and the ESA. The Government further argues that Proclamation 9564 is a valid exercise of power that Congress delegated to the President through the Antiquities Act, 54 U.S.C. § 320301. Intervenors in Case Numbers 17-280 and 17-441 support the Government on the latter point.

Plaintiffs, the Government, and intervenors have all moved or cross-moved for summary judgment. On March 31, 2019, I remanded these cases to BLM to provide additional explanation of how BLM has reconciled and, going forward, intends to reconcile the varied land management obligations imposed by the O&C Act, the 2016 RMPs, and Proclamation 9564. BLM has now filed its explanation, and accordingly, the questions whether the 2016 RMPs and Proclamation 9564 violate the O&C Act are ripe for resolution.

ANALYSIS

I. The 2016 Resource Management Plans

Of this there can be no doubt: the 2016 RMPs violate the O&C Act. When a "statute's language is plain," courts must "enforce it according to its terms."[5] *Lamie*

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[5] The Government does not appear to dispute that plaintiffs have standing to challenge the 2016 RMPs, and I conclude that plaintiffs have indeed established standing. When companies allege standing to challenge an agency action based on economic harm,

> [t]he . . . inquiry boils down to whether the plaintiff has adequately demonstrated: (1) a substantial probability that the challenged government action will cause a decrease in the supply of raw material from a particu-

v. U.S. Trustee, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.,* 530 U.S. 1, 6 (2000)). The O&C Act plainly requires that timber grown on O&C land "be sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601. So the 2016 RMPs, which prohibit the selling, cutting, and removing of timber in conformity with the principle of sustained yield on portions of O&C timberland, contravene the law.

This conclusion follows directly from the language in the O&C Act and the 2016 RMPs. The Act imposes two relevant, mandatory directives on BLM's management of all O&C land that has "heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber." 43 U.S.C. § 2601. That land "*shall* be managed . . . for permanent forest production,

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> lar source; (2) a substantial probability that the plaintiff manufacturer obtains raw material from that source; and (3) a substantial probability that the plaintiff will suffer some economic harm as a result of the decrease in the supply of raw material from that source.

Carpenters Indus. Council v. Zinke, 854 F.3d 1, 6 (D.C. Cir. 2017). Plaintiffs here have submitted declarations establishing that they obtain timber from BLM, that the 2016 RMPs affect the volume of timber they are able to obtain, and that decreases in the volume of timber they are able to obtain harm their businesses. *See* Declaration of Commissioner Simon Hare (Case No. 16-1599) [Dkt. # 29-2]; Declaration of Todd A. Payne (Case No. 16-1599) [Dkt. # 29-3]; Declaration of Sean M. Smith (Case No. 16-1599) [Dkt. # 29-4]; Declaration of Steven D. Swanson (Case No. 16-1599) [Dkt. # 29-5]; Declaration of Robert T. Freres, Jr. (Case No. 16-1599) [Dkt. # 29-6]; Declaration of Travis Joseph (Case No. 16-1599) [Dkt. # 29-7]; Declaration of Timothy Freeman (Case No. 16-1602) [Dkt. # 37-3]; Declaration of Sid Leiken (Case No. 16-1602) [Dkt. # 37-4]; Declaration of Craig Pope (Case No. 16-1602) [Dkt. # 37-5].

and the timber thereon *shall* be sold, cut, and removed in conformity with the princip[le] of sustained yield." *Id.* (emphasis added). Use of the word "shall" in a statutory directive to an agency "signals mandatory action." *Nat. Res. Def. Council v. Reilly,* 983 F.2d 259, 266 (D.C. Cir. 1993) (citing *Her Majesty the Queen v. USEPA,* 912 F.2d 1525, 1533 (D.C.Cir.1990)). When managing O&C timberland, then, BLM must ensure that the land continues to produce timber. *See Headwaters, Inc. v. Bureau of Land Mgmt.,* 914 F.2d 1174, 1183 (9th Cir. 1990) ("There is no indication that Congress intended 'forest' to mean anything beyond an aggregation of timber resources."). And BLM must ensure that the timber produced on O&C land is sold, cut, and removed in conformity with the principle of sustained yield. These are mandatory directives from Congress.

The 2016 RMPs violate these mandatory directives by excluding portions of O&C timberland from sustained yield timber harvest. In the RMPs, BLM looked only to the 498,597-acre harvest land base to calculate the ASQ. *See* AR at JA-1, IND_0512707-10; JA-1, IND_0512745; JA-2, IND_0513027-29; JA-2, IND_0513065. These 498,597 acres amount to about 20% of the land governed by the 2016 RMPs. *See id.* Much of remaining land is set aside in various reserves. *See id.* And some of the land placed into reserves can indisputably be characterized as timberland. *See id.* at JA-46, IND_0514442 (listing "Block Forest Reserve[s]" among the areas where sustained-yield timber harvest is prohibited); JA-46, IND_0514702 (explaining that "[t]he size of the Harvest Land Base is dependent on . . . the size of the Late-Successional Reserve"). But within the reserves, timber harvest is permitted for only limited purposes and is not performed on a sustained yield basis. *See id.* at JA-46,

IND_0514339. In the 2016 RMPs, BLM explains, "the term 'reserve' indicates that the BLM or Congress have reserved lands within the allocation from sustained-yield timber production. These reserve land use allocations . . . are in contrast to the Harvest Land Base, which includes management objectives for sustained-yield timber production." *Id.* This decision to reserve timberland from sustained yield timber production cannot be squared, however, with the O&C Act's mandates: all land "classified as timberlands" must "be managed . . . for permanent forest production," and that the timber produced on that land must "be sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601.

The Government raises two arguments in response. It argues first that the O&C Act grants BLM discretion in managing O&C land and second that the 2016 RMPs reasonably harmonize the agency's competing obligations under the O&C Act and section 7(a)(2) of the ESA. *See* 16 U.S.C. § 1531(b).

The Government's first point is true so far as it goes. BLM does have *some* discretion when managing O&C land. Indeed, this Court has recognized that "BLM has discretion as to establishing the ASQ, selecting the timberlands, pricing the sale (at 'reasonable prices on a normal market'), scheduling the sale, and even rejecting bids." *Swanson Grp. Mfg. LLC v. Salazar,* 951 F. Supp. 2d 75, 82 (D.D.C. 2013), *vacated on other grounds sub nom. Swanson Grp. Mfg. LLC v. Jewell,* 790 F.3d 235 (D.C. Cir. 2015). The Ninth Circuit drew a similar conclusion, holding, "the [O&C] Act has not deprived . . . BLM of all discretion with regard to either the volume requirements of the Act or the management of the lands entrusted to its care." *Portland Audubon Soc. v. Babbitt,* 998 F.2d 705, 709 (9th Cir. 1993).

But even where an agency has discretion, courts must "ensure that the [agency] . . . does not violate the statutory limitations on [that] discretion." *Cont'l Air Lines, Inc. v. C.A. B.,* 522 F.2d 107, 116 (D.C. Cir. 1974). The mandatory directives in the O&C Act constitute clear congressionally imposed bounds on the discretion the statute otherwise imparts. *See Gillan v. Winter,* 474 F.3d 813, 818 (D.C. Cir. 2007) ("[T]he word 'shall' limits the Secretary's discretion . . . ."). Accordingly, when exercising its discretion, BLM must do so in a way that ensures that O&C timberland is managed "for permanent forest production," and that the timber on that land is "sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601. The 2016 RMPs violate these mandates. As such, they are unlawful—notwithstanding BLM's discretion to make management decisions about O&C land within the statutorily imposed limits.

The Government's argument about section 7(a)(2) of the ESA fails for a similar reason. The Government may be correct that BLM "must fulfill conservation duties imposed by other statutes," *Seattle Audubon Soc. v. Lyons,* 871 F. Supp. 1291, 1314 (W.D. Wash. 1994), when *exercising its discretion* under the O&C Act. But the Supreme Court itself has made clear that section 7(a)(2) of the ESA does not alter *mandatory* duties imposed on agencies by statute. In *National Association of Home Builders v. Defenders of Wildlife,* the Court rejected a "reading of § 7(a)(2) [that] would . . . abrogate [a] statutory mandate" in the Clean Water Act. 551 U.S. 644, 664 (2007). After applying *Chevron* deference to an implementing regulation,[6] the Court held that "§ 7(a)(2)'s no-jeopardy duty covers only

[6] The regulation to which the Supreme Court deferred remains in effect. *See Home Builders,* 551 U.S. at 669; 50 C.F.R. § 402.03.

discretionary agency actions and does not attach to actions . . . that an agency is *required* by statute to undertake once certain specified triggering events have occurred."[7] *Id.* at 669. The O&C Act's timber harvest mandates fall into the latter category: once O&C land is classified as timberland, BLM is required to harvest the timberland pursuant to sustained yield principles. *See* 43 U.S.C. § 2601. According to *Home Builders,* then, BLM cannot justify a refusal to abide by those statutory commands by pointing to section 7 of the ESA. "[Section] 7(a)(2)'s no-jeopardy duty" simply "does not attach" to such non-discretionary mandates. *Home Builders, 551 U .S.* at 669.

This Court must, therefore, conclude that the 2016 RMPs violate the O&C Act by setting aside timberland in reserves where the land is not managed for permanent forest production and the timber is not sold, cut, and removed in conformity with the principle of sustained yield.

II. Remedy

All parties to Case Numbers 16-1599 and 16-1602 agreed in their motions for summary judgment that, if this Court were to determine that the 2016 RMPs violate the O&C Act, the parties should have an opportunity to separately brief the appropriate remedy for the violation. In light of the parties' agreement, the additional briefing will be permitted. *See Am. Hosp. Ass'n v. Azar,* 348 F. Supp. 3d 62, 85-87 (D.D.C. 2018) ("Plaintiffs are entitled to equitable relief. Fashioning that relief, however, requires supplemental briefing

[7] Our Circuit Court has read section 7(a)(2) similarly, holding that the provision "does not *expand* the powers conferred on an agency." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC,* 962 F.2d 27, 34 (D.C. Cir. 1992).

from the parties addressing the reliefs proper scope and implementation.").

III. Proclamation 9564

Proclamation 9564, not surprisingly, also violates the O&C Act. The congressional mandates to manage O&C timberland "for permanent forest production" and to "s[ell], cut, and remove[] [timber] in conformity with the principle] of sustained yield," 43 U.S.C. § 2601, cannot be rescinded by Presidential Proclamation.

To be sure, judicial review of Presidential Proclamations is more limited than review of actions taken by federal agencies. Courts may not, for example, second-guess "[h]ow the President chooses to exercise . . . discretion [that] Congress has granted him." *Mountain States Legal Found. v. Bush,* 306 F.3d 1132, 1136 (D.C. Cir. 2002) (quoting *Dalton v. Specter,* 511 U.S. 462, 476 (1994) (alteration added)). Nonetheless, when presented with a legal challenge to a Presidential Proclamation, courts must still "ensure that the Proclamation[] [is] consistent with constitutional principles and that the President has not exceeded his statutory authority." *Id.*

In some cases, the question whether a President's designation of a national monument exceeded his statutory authority requires review only of "the limits on Presidential authority . . . [that] derive from the Antiquities Act itself." *Mountain States,* 306 F.3d at 1136. And there is no question that the Antiquities Act—the statutory basis for Proclamation 9564, *see* 82 Fed. Reg. at 6148—"confers very broad discretion on the President." *Mountain States,* 306 F.3d at 1137; *see* 54 U.S.C. § 320301(b) ("The President may reserve parcels of land as a part of the national monuments.").

But our Circuit Court has also held that "limits on Presidential authority" to issue a Proclamation can "derive from . . . an independent statute." *Mountain States,* 306 F.3d at 1136. In *Chamber of Commerce of the United States v. Reich,* our Circuit Court held that an Executive Order was preempted by the National Labor Relations Act ("NLRA"), notwithstanding President Clinton's claim, on the face of the Order, that he was exercising authority granted to him through a different statute, the Procurement Act. *See* 74 F.3d 1322, 1324 (D.C. Cir. 1996). The Court recognized that, much like the Antiquities Act, "the Procurement Act . . . vest[s] broad discretion in the President." *Id.* at 1330. But because the Order "conflict[ed] with the NLRA," the Court found it "unnecessary to decide whether, in the absence of the NLRA, the President would be authorized (with or without appropriate findings) under the Procurement Act and the Constitution to issue the Executive Order." *Id.* at 1332. No matter the scope of the President's Procurement Act authority, "the Executive Order [wa]s . . . pre-empted by the NLRA."[8] *Id.* at 1339.

Proclamation 9564 runs into similar trouble. Citing the Antiquities Act, with its broad delegation of discretion, does not give the President license to contravene the O&C Act. *See Reich,* 74 F.3d at 1332-39. "Where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Crawford Fitting Co. v. J. T. Gibbons, Inc.,* 482 U.S. 437,

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[8] The *Reich* Court also "conclude[d] that judicial review [wa]s available" to the parties challenging the executive order. *See* 74 F.3d at 1324. Its reasoning forecloses the Government's contention that sovereign immunity bars plaintiffs' challenge to Proclamation 9564 here. *See id.* at 1328-32.

445 (1987) (quoting *Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 153 (1976)). The Antiquities Act says nothing specific about managing O&C timberland. *See* 54 U.S.C. §§ 320301-320303. As such, it cannot be understood to nullify the timber harvest mandates imposed by Congress in the O&C Act.

Just like in *Reich,* moreover, Proclamation 9564 "unacceptabl[y] conflict[s]" with the O&C Act. 74 F.3d at 1332-33. As discussed, the O&C Act *requires* that timberland subject to the Act be managed "for permanent forest production" and the timber grown on the land be "sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601. The Proclamation that established the Cascade-Siskiyou National Monument, by contrast, provides that "[n]o portion of the monument shall be considered to be suited for timber production, and no part of the monument shall be used in a calculation or provision of a sustained yield of timber." Proclamation 7318, 65 Fed. Reg. at 37,250. Proclamation 9564 then directs the Secretary of the Interior to "manage the area being added to the monument . . . under the same laws and regulations that apply to the rest of the monument." 82 Fed. Reg. at 6149. And BLM's Acting State Director for Oregon and Washington has confirmed that the agency "currently manages the lands in the [monument] expansion area . . . in accordance with the timber harvest constraints" set forth in the two Presidential Proclamations. Hanley Decl. ¶ 11. Put simply, there is no way to manage land for sustained yield timber production, while simultaneously deeming the land

unsuited for timber production and exempt from any calculation of the land's sustained yield of timber.[9]

Accordingly, the directives to the Secretary of the Interior set forth in Proclamation 9564 conflict with the directives from Congress in the O&C Act. Land subject to the O&C Act, regardless of whether it is included in the Cascade-Siskiyou National Monument expansion, *must* be managed "for permanent forest production," and timber grown on that land *must* be "sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601. Proclamation 9564's direction otherwise is *ultra vires* and invalid.

CONCLUSION

For the foregoing reasons, the 2016 RMPs and Proclamation 9564 both violate the O&C Act. Plaintiffs motions for summary judgment in each of these four cases are GRANTED. The Government's cross-motions for summary judgment in each case are DENIED, and intervenors' cross-motions in Case Numbers 17-280 and 17-441 are also DENIED.

In Case Numbers 16-1599 and 16-1602, the parties are ORDERED to submit supplemental briefs detailing their respective positions on the proper remedy in

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[9] Because of these conflicting directives, the cases from our Circuit Court holding that land can be subject to "overlapping sources of protection" are inapposite. *Mountain States,* 306 F.3d at 1138; *see also Tulare Cty. v. Bush,* 306 F.3d 1138, 1143 (D.C. Cir. 2002) ("The Proclamation thus conceives of the designated land as having a dual status as part of both the Monument and the Sequoia National Forest. The Proclamation is therefore wholly consistent with NFMA." (citations omitted)). A mandate that timberland be harvested in conformity with the principle of sustained yield and a declaration that the same land is exempt from sustained yield timber harvest cannot be characterized as two overlapping protections; each dictate is at odds with the other.

light of the Court's conclusion that the 2016 RMPs violate the O&C Act. All parties shall submit their opening briefs on remedy, which shall be limited to no more than fifteen pages each, within thirty days of this Memorandum Opinion's issuance. The parties may then file responsive briefs on remedy, limited to no more than ten pages each, within fourteen days of the filing of their opponent's opening brief.

In each of these four cases, an Order consistent with this decision accompanies this Memorandum Opinion.

/s/ Richard J. Leon
RICHARD J. LEON
United States District Judge

APPENDIX C

43 U.S.C. § 2601

§ 2601. Conservation management by Department of the Interior; permanent forest production; sale of timber; subdivision

Notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber, shall be managed, except as provided in section 3 hereof, for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal[1] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilties[2]: *Provided,* That nothing in this section shall be construed to interfere with the use and development of power sites as may be authorized by law.

The annual productive capacity for such lands shall be determined and declared as promptly as possible after August 28, 1937, but until such determination and declaration are made the average annual cut therefrom shall not exceed one-half billion feet board measure: *Provided,* That timber from said lands in an amount not less than one-half billion feet board measure, or

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[1] So in original. Probably should be "principle".

[2] So in original. Probably should be "facilities".

not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market.

If the Secretary of the Interior determines that such action will facilitate sustained-yield management, he may subdivide such revested lands into sustained-yield forest units, the boundary lines of which shall be so established that a forest unit will provide, insofar as practicable, a permanent source of raw materials for the support of dependent communities and local industries of the region; but until such subdivision is made the land shall be treated as a single unit in applying the principle of sustained yield: *Provided,* That before the boundary lines of such forest units are established, the Department, after published notice thereof, shall hold a hearing thereon in the vicinity of such lands open to the attendance of State and local officers, representatives of dependent industries, residents, and other persons interested in the use of such lands. Due consideration shall be given to established lumbering operations in subdividing such lands when necessary to protect the economic stability of dependent communities. Timber sales from a forest unit shall be limited to the productive capacity of such unit and the Secretary is authorized, in his discretion, to reject any bids which may interfere with the sustained-yield management plan of any unit.

43 U.S.C. § 2605

§ 2605. Oregon and California land-grant fund; annual distribution of moneys

On and after March 1, 1938, all moneys deposited in the Treasury of the United States in the special fund designated the "Oregon and California land-grant fund" shall be distributed annually as follows:

(a) Fifty per centum to the counties in which the lands revested under the Act of June 9, 1916 (39 Stat. 218), are situated, to be payable on or after June 30, 1938, and each year thereafter to each of said counties in the proportion that the total assessed value of the Oregon and California grant lands in each of said counties for the year 1915 bears to the total assessed value of all of said lands in the State of Oregon for said year, such moneys to be used as other county funds: *Provided, however*, That for the purposes of this subsection the portion of the said revested Oregon and California railroad grant lands in each of said counties which was not assessed for the year 1915 shall be deemed to have been assessed at the average assessed value of the grant lands in said county.

(b) Twenty-five per centum to said counties as money in lieu of taxes accrued or which shall accrue to them prior to March 1, 1938, under the provisions of the Act of July 13, 1926 (44 Stat. 915), and which taxes are unpaid on said date, such moneys to be paid to said counties severally by the Secretary of the Treasury of the United States, upon certification by the Secretary of the Interior, until such tax indebtedness as shall have accrued prior to March 1, 1938, is extinguished.

From and after payment of the above accrued taxes said 25 per centum shall be accredited annually to the general fund in the Treasury of the United States until

all reimbursable charges against the Oregon and California land-grant fund owing to the general fund in the Treasury have been paid: *Provided*, That if for any year after the extinguishment of the tax indebtedness accruing to the counties prior to March 1, 1938, under the provisions of Forty-fourth Statutes, page 915, the total amount payable under subsection (a) of this section is less than 78 per centum of the aggregate amount of tax claims which accrued to said counties under said Act for the year 1934, there shall be additionally payable for such year such portion of said 25 per centum (but not in excess of three-fifths of said 25 per centum), as may be necessary to make up the deficiency. When the general fund in the Treasury has been fully reimbursed for the expenditures which were made charges against the Oregon and California land-grant fund said 25 per centum shall be paid annually, on or after September 30, to the several counties in the manner provided in subsection (a) hereof.

(c) Twenty-five per centum to be available for the administration of this subchapter, in such annual amounts as the Congress shall from time to time determine. Any part of such per centum not used for administrative purposes shall be covered into the general fund of the Treasury of the United States: *Provided*, That moneys covered into the Treasury in such manner shall be used to satisfy the reimbursable charges against the Oregon and California land-grant fund mentioned in subsection (b) so long as any such charges shall exist.

54 U.S.C. § 320301

(a) Presidential declaration.--The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.

(b) Reservation of land.--The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

(c) Relinquishment to Federal Government.--When an object is situated on a parcel covered by a bona fide unperfected claim or held in private ownership, the parcel, or so much of the parcel as may be necessary for the proper care and management of the object, may be relinquished to the Federal Government and the Secretary may accept the relinquishment of the parcel on behalf of the Federal Government.

(d) Limitation on extension or establishment of national monuments in Wyoming.--No extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.

SIXTY-FOURTH CONGRESS.

Sess. I. Ch. 137. 1916.

CHAP. 137 – An Act To alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," approved July twenty-fifth, eighteen hundred and sixty-six, as amended by the Acts of eighteen hundred and sixty-eight and eighteen hundred and sixty-nine, and to alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," approved May fourth, eighteen hundred and seventy, and for other purposes.

Whereas by the Acts of Congress approved April tenth, eighteen hundred and sixty-nine (Fourteenth Statutes at Large, page two hundred and thirty-nine), and May fourth, eighteen hundred and seventy (Sixteenth Statutes at Large, page ninety-four), it was provided that the lands granted to aid in the construction of certain railroads from Portland, in the State of Oregon, to the northern boundary of the State of California, and from Portland to Astoria and McMinnville, in the State of Oregon, should be sold to actual settlers only, in quantities not exceeding one hundred and sixty acres to each person and at prices not greater than $2.50 per acre; and

Whereas the Oregon and California Railroad Company, beneficiary of said acts, has violated the terms under which the said lands were granted by selling certain of said lands to persons other than actual settlers, by selling in quantities of more than one-quarter section to each person, by selling at prices in excess of $2.50 per acre, and by refusing to sell any further portions of

such lands to actual settlers at any price, and in so doing has willfully violated the terms of the statutes by which the said lands were granted; and

Whereas in the suit instituted by the Attorney General of the United States, pursuant to the authority and direction contained in the joint resolution of April thirtieth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page five hundred and seventy-one), the Supreme Court of the United States, in its decision rendered June twenty-first, nineteen hundred and fifteen (Two hundred and thirty-eighth United States, page three hundred and ninety-three), ordered that the Oregon and California Railroad Company be enjoined from making further sales of lands in violation of the law, and that the said railroad company be further enjoined from making any sales whatever of either the land or the timber thereon until Congress should have a reasonable opportunity to provide for the disposition of said lands in accordance with such policy as Congress might deem fitting under the circumstances and at the same time secure to the railroad company all the value conferred by the granting Acts; and

Whereas it was expressly provided by section twelve of the Act of July twenty-fifth, eighteen hundred and sixty-six (Fourteenth Statutes at Large, page two hundred and thirty-nine), that Congress might at any time, having due regard for the rights of the grantee railroad company, add to, alter, amend, or repeal the Act making the grant; and

Whereas the Oregon and California Railroad Company and its predecessors in interest received a large sum of money from sales of said land for prices in excess of $2.50 per acre, and from leases, interest on contracts, and so forth; and

Whereas the aforesaid granting Acts conferred upon the said railroad company the right to receive not more than $2.50 per acre for each acre of land so granted: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the title to so much of the lands granted by the Act of July twenty-fifth, eighteen hundred and sixty-six, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon," as amended by the Acts of eighteen hundred and sixty-eight and eighteen hundred and sixty-nine, for which patents have been issued by the United States, or for which the grantee is entitled to receive patents under said grant, and to so much of the lands granted by the Act of May fourth, eighteen hundred and seventy, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," for which patents have been issued by the United States, or for which the grantee is entitled to receive patents under said grant, as had not been sold by the Oregon and California Railroad Company prior to July first, nineteen hundred and thirteen, be, and the same is hereby, revested in the United States: *Provided*, That the provisions of this Act shall not apply to the right of way to the extent of one hundred feet in width on each side of the railroad and all lands in actual use by said railroad company on December ninth, nineteen hundred and fifteen, for depots, sidetracks, wood yards, and standing grounds.

SEC. 2. That the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, is hereby authorized and directed, after due examination

in the field, to classify said lands by the smallest legal subdivisions thereof into three classes, as follows:

Class one. Power-site lands, which shall include only such lands as are chiefly valuable for water-power sites, which lands shall be subject to withdrawal and such use and disposition as has been or may be provided by law for other public lands of like character.

Class two. Timberlands, which shall include lands bearing a growth of timber not less than three hundred thousand feet board measure on each forty-acre subdivision.

Class three. Agricultural lands, which shall include all lands not falling within either of the two other classes:

Provided, That any of said lands, however classified, may be reclassified, if, because of a change in conditions or other reasons, such action is required to denote properly the true character and class of such lands: *Provided further*, That all the general laws of the United States now existing or hereafter enacted relating to the granting of rights of way over or permits for the use of public lands shall be applicable to all lands title to which is revested in the United States under the provisions of this Act. All lands disposed of under the provisions of this Act shall be subject to all rights of way which the Secretary of the Interior shall at any time deem necessary for the removal of the timber from any lands of class two.

SEC. 3. That the classification provided for by the preceding section shall not operate to exclude from exploration, entry, and disposition, under the mineral-land laws of the United States, any of said lands, except power sites, which are chiefly valuable for the mineral deposits contained therein, and the general

mineral laws are hereby extended to all of said lands, except power sites: *Provided*, That any person entering mineral lands of class two shall not acquire title to the timber thereon, which shall be sold as hereinafter provided in section four, but he shall have the right to use so much of the timber thereon as may be necessary in the development and operation of his mine until such time as such timber is sold by the United States.

SEC. 4. That nonmineral lands of class two shall not be disposed of until the Secretary of the Interior has determined and announced that the merchantable timber thereon has been removed, and thereupon said lands shall fall into class three and be disposed of in the manner hereinafter provided for the disposal of lands of that class.

The timber on lands of class two shall be sold for cash by the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, to citizens of the United States, associations of such citizens, and corporations organized under the laws of the United States, or any State, Territory, or District thereof, at such times, in such quantities, and under such plan of public competitive bidding as in the judgment of the Secretary of the Interior may produce the best results: *Provided*, That said Secretary shall have the right to reject any bid where he has reason to believe that the price offered is inadequate, and may reoffer the timber until a satisfactory bid is received: *Provided further*, That upon application of a qualified purchaser that any legal subdivision shall be separately offered for sale such subdivision shall be separately offered before being included in any offer of a larger unit, if such application be filed within ninety days prior to such offer: *And provided further*, That said timber shall be sold as rapidly as reasonable prices can be secured therefor in a normal market.

The Secretary of the Interior shall as soon as the purchase price is fully paid by any person purchasing under the provisions of this section issue to such purchaser a patent conveying the timber and expressly reserving the land to the United States. The timber thus purchased may be cut and removed by the purchaser, his heirs or assigns, within such period as may be fixed by the Secretary of the Interior, which period shall be designated in the patent; all rights under said patent shall cease and terminate at the expiration of said period: *Provided*, That in the event the timber is removed prior to the expiration of said period the Secretary of the Interior shall make due announcement thereof, whereupon all rights under the patent shall cease.

No timber shall be removed until the issuance of patent therefor. All timber sold under this Act shall be subject to the taxing power of the States apart from the land as soon as patents are issued as provided for herein.

SEC. 5. That nonmineral lands of class three shall be subject to entry under the general provisions of the homestead laws of the United States, except as modified herein, and opened to entry in accordance with the provisions of the Act of September thirtieth, nineteen hundred and thirteen (Thirty-eighth Statutes at Large, page one hundred and thirteen). Fifty cents per acre shall be paid at the time the original entry is allowed and $2 per acre when final proof is made. The provisions of section twenty-three hundred and one, Revised Statutes, shall not apply to any entry hereunder and no patent shall issue until the entryman has resided upon and cultivated the land for a period of three years, proof of which shall be made at any time within five years from date of entry. The area cultivated shall

be such as to satisfy the Secretary of the Interior that the entry is made in good faith for the purpose of settlement and not for speculation: *Provided*, That the payment of $2.50 per acre shall not be required from homestead entrymen upon lands of class two when the same shall become subject to entry as agricultural lands in class three: *Provided further*, That during the period fixed for the submission of applications to make entry under this section any person duly qualified to enter such lands who has resided thereon, to the same extent and in the same manner as is required under the homestead laws, since the first day of December, nineteen hundred and thirteen, and who has improved the land and devoted some portion thereof to agricultural use, and who shall have maintained his residence to the date of such application, shall have the preferred right to enter the quarter section upon which he was residing whether such lands shall be of class two or class three and where such quarter section does not contain more than one million two hundred thousand feet board measure of timber, and where the quarter section contains more than said quantity of timber such person may entre the forty-acre tract, or lot or lots containing approximately forty acres, upon which his improvements, or the greater part thereof, are situated: *Provided further*, That a prior exercise of the homestead right by any such person shall not be a bar to the exercise of such preference rights: *And provided further*, That all of the following described lands which may become revested in the United States by operation of this Act to-wit: Township one south, range five east, sections twenty-three and thirty five; township one south, range six east, sections three, five, seven, nine, seventeen, nineteen, twenty-nine, thirty-one, and thirty-three; township two south, range five east, sections one and three; township two south, range six

east, sections one, three, five, seven, nine, and eleven; township two south, range seven east, section seven; township three south, range three east, section fifteen; township four south, range four east, sections eleven and thirteen; township four south, range five east, sections nineteen and twenty-nine; and township twelve south, range seven west, sections fifteen, twenty-one, twenty-three, twenty-seven, thirty-three, and thirty-five, Willamette meridian and base, State of Oregon, shall be withheld from entry or other disposition for a period of two years after the approval hereof.

SEC. 6. That persons who purchase timber on lands of class two shall be required to pay a commission of one-fifth of one per centum of the purchase price paid, to be divided equally between the register and receiver, within the maximum compensation allowed them by law; and the register and receiver shall receive no other compensation whatever for services rendered in connection with the sales of timber under the provisions of section four of this Act.

SEC. 7. That the Attorney General of the United States be, and he is hereby, authorized and directed to institute and prosecute any and all suits in equity and actions at law against the Oregon and California Railroad Company, and any other proper party which he may deem appropriate, to have determined the amount of moneys which have been received by the said railroad company or its predecessors from or on account of any of said granted lands, whether sold or unsold, patented or unpatented, and which should be charged against it as part of the "full value" secured to the grantees under said granting Acts as heretofore interpreted by the Supreme Court. In making this determination the court shall take into consideration and give due and proper legal effect to all receipts of

money from sales of land or timber, forfeited contracts, rent, timber depredations, and interest on contracts, or from any other source relating to said lands; also to the value of timber taken from said lands and used by said grantees or their successor or successors. In making this determination in the aforementioned suit or suits the court shall also determine, on the application of the Attorney General, the amount of the taxes on said lands paid by the United States, as provided in this Act, and which should in law have been paid by the said Oregon and California Railroad Company, and the amount thus determined shall be treated as money received by said railroad company.

SEC. 8. That the title to all money arising out of said grant lands and now on deposit to await the final outcome of said suit commenced by the United States in pursuance of said joint resolution of nineteen hundred and eight is hereby vested in the United States, and the United States is subrogated to all the rights and remedies of the obligee or obligees, and especially of Louis L. Sharp as commissioner, under any contract for the purchase of timber on the grant lands.

SEC. 9. That the taxes secured and now unpaid on the lands revested in the United States, whether situate in the State of Oregon or State of Washington, shall be paid by the Treasurer of the United States, upon the order of the Secretary of the Interior, as soon as may be after the approval of this Act, and a sum sufficient to make such payment is hereby appropriated, out of any money in the Treasury not otherwise appropriated.

SEC. 10. That all moneys received from or on account of said lands and timber under the provisions of this Act shall be deposited in the Treasury of the United States in a special fund, to be designated "The Oregon

and California land-grant fund," which fund shall be disposed of in the following manner: The Secretary of the Interior shall ascertain as soon as may be the exact number of acres of said lands, sold or unsold, patented to the Oregon and California Railroad Company, or its predecessors, and the number of acres of unpatented lands which said railroad company is entitled to receive under the terms of said grants and the value of said lands at $2.50 per acre. From the sum thus ascertained he shall deduct that amount already received by the said railroad company and its predecessors in interest on account of said lands and which should be charged against it as determined under section seven of this Act; and a sum equal to the balance thus resulting shall be paid, as herein provided, to the said railroad company, its successors or assigns, and to those having liens on the land, as their respective interests may appear. The amount due lien holders shall be evidenced either by the consent, in writing, of the railroad company or by a judgment of a court of competent jurisdiction in a suit to which the railroad company and the lien holders are parties. Payments shall be made from time to time, as the fund accumulates, by the Treasurer of the United States upon the order of the Secretary of the Interior: *Provided, however*, That if, upon the expiration of ten years from the approval of this Act, the proceeds derived from the sale of lands and timber are not sufficient to pay the full amount which the said railroad company, its successors or assigns, are entitled to receive, the balance due shall be paid from the general funds in the Treasury of the United States, and an appropriation shall be made therefor. After the said railroad company, its successors or assigns, and the lien holders shall have been paid the amount to which they are entitled, as provided herein, an amount equal to that paid for

accumulated taxes, as provided in section nine hereof, shall be deposited in the Treasury to the credit of the United States, thereafter all other moneys received from the sales of land and timber shall be distributed as follows:

A separate account shall be kept in the General Land office of the sales of land and timber within each county in which any of said lands are situated, and, after deducting from the amount of the proceeds arising from such sales in each county a sum equal to that applied to pay the accrued taxes in that county and a sum equal to $2.50 per acre for each acre of such land therein title to which is revested in the United States under this Act, twenty-five per centum of the remainder shall be paid to the State treasurer of the State in which the land is located, to be and become a part of the irreducible school fund of the State; twenty-five per centum shall be paid to the treasurer of the county for common schools, roads, highways, bridges, and port districts, to be apportioned by the county courts for the several purposes above named; forty per centum shall be paid into, reserved, and appropriated as a part of the fund created by the Act of Congress approved June seventeenth, nineteen hundred and two, known as the reclamation Act; ten per centum shall become a part of the general fund in the Treasury of the United States; and of the balance remaining in said Oregon and California land grant fund from whatsoever source derived twenty-five per centum shall be paid to the State treasurer of the State in which the land is located, to be and become a part of the irreducible school fund of the State; twenty-five per centum shall be paid to the treasurer of the county for common schools, roads, highways, bridges, and port districts, to be apportioned by the county courts for the several purposes above named; and the remainder

shall become a part of the general fund in the Treasury of the United States. The payments herein authorized shall be made to the treasurers of the States and counties, respectively, by the Treasurer of the United States, upon the order of the Secretary of the Interior as soon as may be after the close of each fiscal year during which the moneys were received: *Provided*, That none of the payments to the States and counties and to the reclamation fund in this section provided for shall be made until the amount due the Oregon and California Railroad Company, its successors or assigns, has been fully paid, and the Treasury reimbursed for all taxes paid pursuant to the provisions of section nine of this Act.

SEC. 11. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect; and any person, applicant, purchaser, entryman, or witness who shall swear falsely in any affidavit or proceeding required hereunder or under the regulations issued by the Secretary of the Interior shall be guilty of perjury and liable to the penalties prescribed therefor.

SEC. 12. That the sum of $100,000 be, and the same is hereby, appropriated, out of any moneys in the Treasury not otherwise appropriated, to enable the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, to complete the classification of the lands as herein provided, which amount shall be immediately available and shall remain available until such classification shall have been completed.

Approved, June 9, 1916.

16 U.S.C. § 1531(a)(2)

§ 1531. Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that-

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to-

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

33 U.S.C. § 1251(a)

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of

pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

33 U.S.C. § 1313

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and

twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the

applicable requirements of this Act as in effect immediately prior to October 18, 1972, if--

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon

such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved--

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter. The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced,

indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(4) Limitations on revision of certain effluent limitations

(A) Standard not attained.

For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained

For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation

based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316,

and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term "water quality standards" includes thermal water quality standards.

(i) Coastal recreation water quality criteria

(1) Adoption by States

(A) Initial criteria and standards

Not later than 42 months after October 10, 2000, each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 1314(a) of this title.

(B) New or revised criteria and standards

Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 1314(a)(9) of this title, each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt

(A) In general

If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception

If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B), the Administrator shall publish any revised or new standard under this subsection not later than 42 months after October 10, 2000.

(3) Applicability

Except as expressly provided by this subsection, the requirements and procedures of subsection (c) apply to this subsection, including the requirement in subsection (c)(2)(A) that the criteria protect public health and welfare.

33 U.S.C. § 1323(a)

§ 1323. Federal facilities pollution control

(a) Compliance with pollution control requirements by Federal entities

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this

section, and any such proceeding may be removed in accordance with section 1441 et seq. of title 28. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including

the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

65 FR 37249, Pres. Proc. No. 7318
Proclamation 7318

Establishment of the Cascade-Siskiyou National Monument

June 9, 2000

By the President of the United States of America

A Proclamation

With towering fir forests, sunlit oak groves, wildflower-strewn meadows, and steep canyons, the Cascade-Siskiyou National Monument is an ecological wonder, with biological diversity unmatched in the Cascade Range. This rich enclave of natural resources is a biological crossroads—the interface of the Cascade, Klamath, and Siskiyou ecoregions, in an area of unique geology, biology, climate, and topography.

The monument is home to a spectacular variety of rare and beautiful species of plants and animals, whose survival in this region depends upon its continued ecological integrity. Plant communities present a rich mosaic of grass and shrublands, Garry and California black oak woodlands, juniper scablands, mixed conifer and white fir forests, and wet meadows. Stream bottoms support broad-leaf deciduous riparian trees and shrubs. Special plant communities include rosaceous chaparral and oak-juniper woodlands. The monument also contains many rare and endemic plants, such as Greene's Mariposa lily, Gentner's fritillary, and Bellinger's meadowfoam.

The monument supports an exceptional range of fauna, including one of the highest diversities of butterfly species in the United States. The Jenny Creek portion of the monument is a significant center of fresh water snail diversity, and is home to three endemic fish

species, including a long-isolated stock of redband trout. The monument contains important populations of small mammals, reptile and amphibian species, and ungulates, including important winter habitat for deer. It also contains old growth habitat crucial to the threatened Northern spotted owl and numerous other bird species such as the western bluebird, the western meadowlark, the pileated woodpecker, the flammulated owl, and the pygmy nuthatch.

The monument's geology contributes substantially to its spectacular biological diversity. The majority of the monument is within the Cascade Mountain Range. The western edge of the monument lies within the older Klamath Mountain geologic province. The dynamic plate tectonics of the area, and the mixing of igneous, metamorphic, and sedimentary geological formations, have resulted in diverse lithologies and soils. Along with periods of geological isolation and a range of environmental conditions, the complex geologic history of the area has been instrumental in producing the diverse vegetative and biological richness seen today.

One of the most striking features of the Western Cascades in this area is Pilot Rock, located near the southern boundary of the monument. The rock is a volcanic plug, a remnant of a feeder vent left after a volcano eroded away, leaving an outstanding example of the inside of a volcano. Pilot Rock has sheer, vertical basalt faces up to 400 feet above the talus slope at its base, with classic columnar jointing created by the cooling of its andesite composition.

The Siskiyou Pass in the southwest corner of the monument contains portions of the Oregon/California Trail, the region's main north/south travel route first established by Native Americans in prehistoric times,

and used by Peter Skene Ogden in his 1827 exploration for the Hudson's Bay Company.

Section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

WHEREAS it appears that it would be in the public interest to reserve such lands as a national monument to be known as the Cascade-Siskiyou National Monument:

NOW, THEREFORE, I, WILLIAM J. CLINTON, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the Cascade-Siskiyou National Monument, for the purpose of protecting the objects identified above, all lands and interests in lands owned or controlled by the United States within the boundaries of the area described on the map entitled "Cascade-Siskiyou National Monument" attached to and forming a part of this proclamation. The Federal land and interests in land reserved consist of approximately 52,000 acres, which is the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated

and withdrawn from all forms of entry, location, selection, sale, or leasing or other disposition under the public land laws, including but not limited to withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument.

There is hereby reserved, as of the date of this proclamation and subject to valid existing rights, a quantity of water sufficient to fulfill the purposes for which this monument is established. Nothing in this reservation shall be construed as a relinquishment or reduction of any water use or rights reserved or appropriated by the United States on or before the date of this proclamation.

The commercial harvest of timber or other vegetative material is prohibited, except when part of an authorized science-based ecological restoration project aimed at meeting protection and old growth enhancement objectives. Any such project must be consistent with the purposes of this proclamation. No portion of the monument shall be considered to be suited for timber production, and no part of the monument shall be used in a calculation or provision of a sustained yield of timber. Removal of trees from within the monument area may take place only if clearly needed for ecological restoration and maintenance or public safety.

For the purpose of protecting the objects identified above, the Secretary of the Interior shall prohibit all motorized and mechanized vehicle use off road and shall close the Schoheim Road, except for emergency or authorized administrative purposes.

Lands and interests in lands within the proposed monument not owned by the United States shall be reserved as a part of the monument upon acquisition of title thereto by the United States.

The Secretary of the Interior shall manage the monument through the Bureau of Land Management, pursuant to applicable legal authorities (including, where applicable, the Act of August 28, 1937, as amended (43 U.S.C. 1181a-1181j)), to implement the purposes of this proclamation.

The Secretary of the Interior shall prepare, within 3 years of this date, a management plan for this monument, and shall promulgate such regulations for its management as he deems appropriate. The monument plan shall include appropriate transportation planning that addresses the actions, including road closures or travel restrictions, necessary to protect the objects identified in this proclamation.

The Secretary of the Interior shall study the impacts of livestock grazing on the objects of biological interest in the monument with specific attention to sustaining the natural ecosystem dynamics. Existing authorized permits or leases may continue with appropriate terms and conditions under existing laws and regulations. Should grazing be found incompatible with protecting the objects of biological interests, the Secretary shall retire the grazing allotments pursuant to the processes of applicable law. Should grazing permits or leases be relinquished by existing holders, the Secretary shall not reallocate the forage available under such permits or for livestock grazing purposes unless the Secretary specifically finds, pending the outcome of the study, that such reallocation will advance the purposes of the proclamation.

The establishment of this momument is subject to valid existing rights.

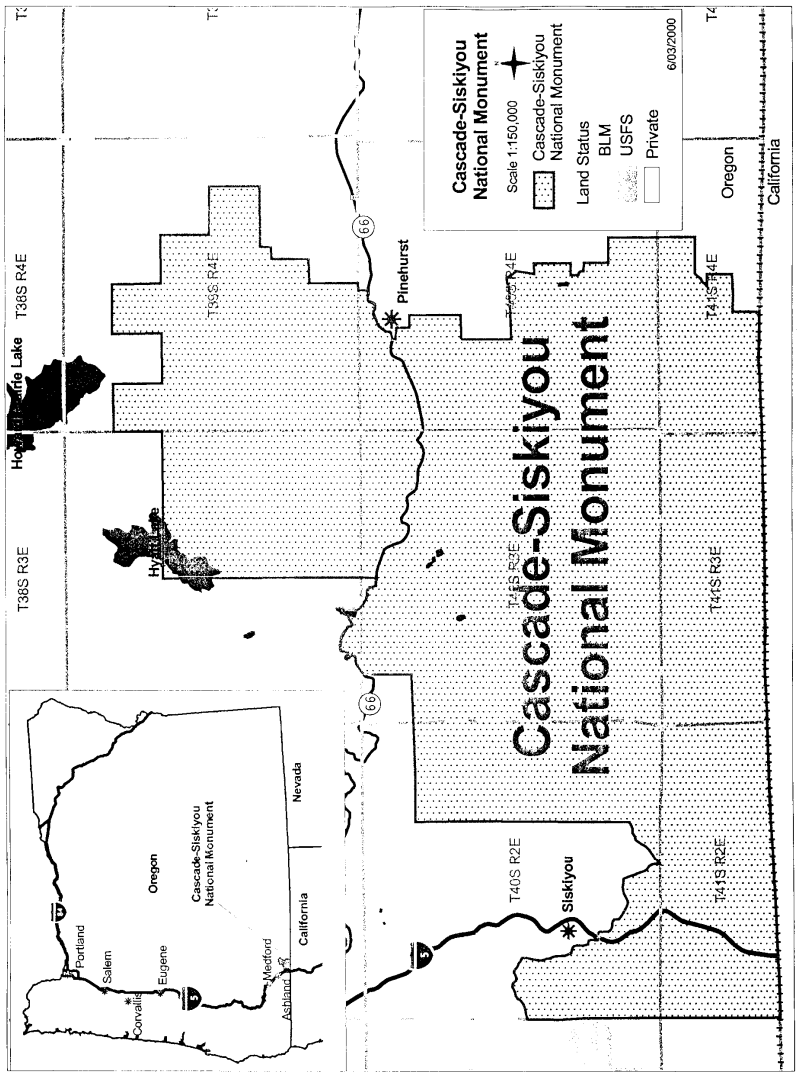
Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State or Oregon with respect to fish and wildlife management.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands therof.

IN WITNESS WHEREOF, I have hereunto set my hand this ninth day of June, in the year of our Lord two thousand, and the Independence of the United States of America the two hundred and twenty-fourth.

WILLIAM J. CLINTON


Cascade-Siskiyou
National Monument
Scale 1:150,000
Cascade-Siskiyou
National Monument
Land Status
BLM
USFS
Private
6/03/2000
Cascade-Siskiyou
National Monument
Pinehurst
Siskiyou
Oregon
California
Nevada
Portland
Salem
Eugene
Corvallis
Medford
Ashland
T36S R3E
T36S R4E
T40S R2E
T41S R2E
T46S R3E
T46S R4E
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5

Pres. Proc. No. 9564, 82 FR 6145
Proclamation 9564

Boundary Enlargement of the Cascade-Siskiyou National Monument

January 12, 2017

By the President of the United States of America

A Proclamation

Through Proclamation 7318 of June 9, 2000, President Bill Clinton established the Cascade-Siskiyou National Monument (monument) to protect the ecological wonders and biological diversity at the interface of the Cascade, Klamath, and Siskiyou ecoregions. The area, home to an incredible variety of species and habitats, represents a rich mosaic of forests, grasslands, shrublands, and wet meadows. The many rare and endemic plant and animal species found here are a testament to Cascade-Siskiyou's unique ecosystems and biotic communities.

As President Clinton noted in Proclamation 7318, the ecological integrity of the ecosystems that harbor this diverse array of species is vital to their continued existence. Since 2000, scientific studies of the area have reinforced that the environmental processes supporting the biodiversity of the monument require habitat connectivity corridors for species migration and dispersal. Additionally, they require a range of habitats that can be resistant and resilient to large-scale disturbance such as fire, insects and disease, invasive species, drought, or floods, events likely to be exacerbated by climate change. Expanding the monument to include Horseshoe Ranch, the Jenny Creek watershed, the Grizzly Peak area, Lost Lake, the Rogue Valley foothills, the Southern Cascades area,

and the area surrounding Surveyor Mountain will create a Cascade-Siskiyou landscape that provides vital habitat connectivity, watershed protection, and landscape-scale resilience for the area's critically important natural resources. Such an expansion will bolster protection of the resources within the original boundaries of the monument and will also protect the important biological and historic resources within the expansion area.

The ancient Siskiyou and Klamath Mountains meet the volcanic Cascade Mountains near the border of California and Oregon, creating an intersection of three ecoregions in Jackson and Klamath Counties in Oregon and Siskiyou County in California. Towering rock peaks covered in alpine forests rise above mixed woodlands, open glades, dense chaparral, meadows filled with stunning wildflowers, and swiftly-flowing streams.

Native American occupancy of this remarkably diverse landscape dates back thousands of years, and Euro-American settlers also passed through the expansion area. The Applegate Trail, a branch of the California National Historic Trail, passes through both the existing monument and the expansion area following old routes used by trappers and miners, who themselves made use of trails developed by Native Americans. Today, visitors to the Applegate Trail can walk paths worn by wagon trains of settlers seeking a new life in the west. The trail, a less hazardous alternative to the Oregon Trail, began to see regular wagon traffic in 1846 and helped thousands of settlers traverse the area more safely on their way north to the Willamette Valley or south to California in search of gold—one of the largest mass migrations in American history. Soon thereafter, early ranchers, loggers, and homesteaders

began to occupy the area, leaving traces of their presence, which provide potential for future research into the era of westward expansion in southwestern Oregon. A historic ranch can be seen in the Horseshoe Ranch Wildlife Area, in the northernmost reaches of California.

The Cascade-Siskiyou landscape is formed by the convergence of the Klamath, the Siskiyou, and the Cascade mountain ranges. The Siskiyou Mountains, which contain Oregon's oldest rocks dating to 425 million years, have an east-west orientation that connects the newer Cascade Mountains with the ancient Klamath Mountains. The tectonic action that formed the Klamath and Siskiyou Mountains occurred over 130 million years ago, while the Cascades were formed by more recent volcanism. The Rogue Valley foothills contain Eocene and Miocene formations of black andesite lava along with younger High Cascade olivine basalt. In the Grizzly Peak area, the 25 million-year geologic history includes basaltic lava flows known as the Roxy Formation, along with the formation of a large strato-volcano, Mount Grizzly. Old Baldy, another extinct volcanic cone, rises above the surrounding forest in the far northeast of the expansion area.

Cascade-Siskiyou's biodiversity, which provides habitat for a dazzling array of species, is internationally recognized and has been studied extensively by ecologists, evolutionary biologists, botanists, entomologists, and wildlife biologists. Ranging from high slopes of Shasta red fir to lower elevations with Douglas fir, ponderosa pine, incense cedar, and oak savannas, the topography and elevation gradient of the area has helped create stunningly diverse ecosystems. From ancient and mixed-aged conifer and hardwood forests to chaparral, oak woodlands, wet meadows, shrublands, fens, and

open native perennial grasslands, the landscape harbors extraordinarily varied and diverse plant communities. Among these are threatened and endangered plant species and habitat for numerous other rare and endemic species.

Grizzly Peak and the surrounding Rogue Valley foothills in the northwest part of the expansion area are home to rare populations of plant species such as rock buckwheat, Baker's globemallow, and tall bugbane. More than 275 species of flowering plants, including Siberian spring beauty, bluehead gilia, Detling's silverpuffs, bushy blazingstar, southern Oregon buttercup, Oregon geranium, mountain lady slipper, Egg Lake monkeyflower, green-flowered ginger, and Coronis fritillary can be found here. Ferns such as the fragile fern, lace fern, and western sword fern contribute to the lush green landscape.

Ancient sugar pine and ponderosa pine thrive in the Lost Lake Research Natural Area in the north, along with white fir and Douglas fir, with patches of Oregon white oak and California black oak. Occasional giant chinquapin, Pacific yew, and bigleaf maple contribute to the diversity of tree species here. Shrubs such as western serviceberry, oceanspray, Cascade barberry, and birchleaf mountain mahogany grow throughout the area, along with herbaceous species including pale bellflower, broadleaf starflower, pipsissewa, and Alaska oniongrass. Creamy stonecrop, a flowering succulent, thrives on rocky hillsides. Patches of abundant ferns include coffee cliffbrake and arrowleaf sword fern. Moon Prairie contains a late successional stand of Douglas fir and white fir with Pacific yew, ponderosa pine, and sugar pine.

Old Baldy's high-elevation forests in the northeast include Shasta red fir, mountain hemlock, Pacific silver

fir, and western white pine along with Southern Oregon Cascades chaparral. Nearby, Tunnel Creek is a high-altitude lodgepole pine swamp with bog blueberry and numerous sensitive sedge species such as capitate sedge, lesser bladderwort, slender sedge, tomentypnum moss, and Newberry's gentian.

The eastern portion of the expansion, in the area surrounding Surveyor Mountain, is home to high desert species such as bitterbrush and sagebrush, along with late successional dry coniferous forests containing lodgepole pine, dry currant, and western white pine.

The Horseshoe Ranch Wildlife Area in Siskiyou County, California, offers particularly significant ecological connectivity and integrity. The area contains a broad meadow ecosystem punctuated by Oregon white oak and western juniper woodlands alongside high desert species such as gray rabbitbrush and antelope bitterbrush. The area is also home to the scarlet fritillary, Greene's mariposa lily, Bellinger's meadowfoam, and California's only population of the endangered Gentner's fritillary.

The incredible biodiversity of plant communities in the expansion is mirrored by equally stunning animal diversity, supported by the wide variety of intact habitats and undisturbed corridors allowing animal migration and movement. Perhaps most notably, the Cascade-Siskiyou landscape, including the Upper Jenny Creek Watershed and the Southern Cascades, provides vitally important habitat connectivity for the threatened northern spotted owl. Other raptors, including the bald eagle, golden eagle, white-tailed kite, peregrine falcon, merlin, great gray owl, sharp-shinned hawk, Cooper's hawk, osprey, American kestrel, northern goshawk, flammulated owl, and

prairie falcon, soar above the meadows, mountains, and forests as they seek their prey.

Ornithologists and birdwatchers alike come to the Cascade-Siskiyou landscape for the variety of birds found here. Tricolored blackbird, grasshopper sparrow, bufflehead, black swift, Lewis's woodpecker, purple martin, blue grouse, common nighthawk, dusky flycatcher, lazuli bunting, mountain quail, olive-sided flycatcher, Pacific-slope flycatcher, pileated woodpecker, ruffed grouse, rufous hummingbird, varied thrush, Vaux's swift, western meadowlark, western tanager, white-headed woodpecker, and Wilson's warbler are among the many species of terrestrial birds that make their homes in the expansion area. The Oregon vesper sparrow, among the most imperiled bird species in the region, has been documented in the meadows of the upper Jenny Creek Watershed.

Shore and marsh birds, including the Tule goose, yellow rail, snowy egret, harlequin duck, Franklin's gull, red-necked grebe, sandhill crane, pintail, common goldeneye, bufflehead, greater yellowlegs, and least sandpiper, also inhabit the expansion area's lakes, ponds, and streams.

Diverse species of mammals, including the black-tailed deer, elk, pygmy rabbit, American pika, and northern flying squirrel, depend upon the extraordinary ecosystems found in the area. Beavers and river otters inhabit the landscape's streams and rivers, while Horseshoe Ranch Wildlife Area has been identified as a critical big game winter range. Bat species including the pallid bat, Townsend's big-eared bat, and fringed myotis hunt insects beginning at dusk. The expansion area encompasses known habitat for endangered gray wolves, including a portion of the area of known activity for the Keno wolves. Other

carnivores such as the Pacific fisher, cougar, American badger, black bear, coyote, and American marten can be seen and studied in the expansion area.

The landscape also contains many hydrologic features that capture the interest of visitors. Rivers and streams cascade through the mountains, and waterfalls such as Jenny Creek Falls provide aquatic habitat along with scenic beauty. The upper headwaters of the Jenny Creek watershed are vital to the ecological integrity of the watershed as a whole, creating clear cold water that provides essential habitat for fish living at the margin of their environmental tolerances. Fens and wetlands, along with riparian wetlands and wet montane meadows, can be found in the eastern portion of the expansion area. Lost Lake, in the northernmost portion of the expansion area, contains a large lake that serves as Western pond turtle habitat, along with another upstream waterfall.

The expansion area includes habitat for populations of the endemic Jenny Creek sucker and Jenny Creek redband trout, as well as habitat for the Klamath largescale sucker, the endangered shortnose sucker, and the endangered Lost River sucker. The watershed also contains potential habitat for the threatened coho salmon. Numerous species of aquatic plants grow in the area's streams, lakes, and ponds.

Amphibians such as black salamander, Pacific giant salamander, foothill yellow-legged frog, Cascade frog, the threatened Oregon spotted frog, and the endemic Siskiyou Mountains salamander thrive here thanks to the connectivity between terrestrial and aquatic habitats. Reptiles found in the expansion area include the western pond turtle, northern alligator lizard, desert striped whipsnake, and northern Pacific rattlesnake.

The Cascade-Siskiyou landscape's remarkable biodiversity includes the astounding diversity of invertebrates found in the expansion, including freshwater mollusks like the Oregon shoulderband, travelling sideband, modoc rim sideband, Klamath taildropper, chase sideband, Fall Creek pebblesnail, Keene Creek pebblesnail, and Siskiyou hesperian. The area has been identified by evolutionary biologists as a center of endemism and diversity for springsnails, and researchers have discovered four new species of mygalomorph spiders in the expansion. Pollinators such as Franklin's bumblebee, western bumblebee, and butterflies including Johnson's hairstreak, gray blue butterfly, mardon skipper, and Oregon branded skipper are critical to the ecosystems' success. Other insects found here include the Siskiyou short-horned grasshopper and numerous species of caddisfly.

The Cascade-Siskiyou landscape has long been a focus for scientific studies of ecology, evolutionary biology, wildlife biology, entomology, and botany. The expansion area provides an invaluable resource to scientists and conservationists wishing to research and sustain the functioning of the landscape's ecosystems into the future.

The expansion area includes numerous objects of scientific or historic interest. This enlargement of the Cascade-Siskiyou National Monument will maintain its diverse array of natural and scientific resources and preserve its cultural and historic legacy, ensuring that the scientific and historic values of this area remain for the benefit of all Americans.

WHEREAS, section 320301 of title 54, United States Code (known as the "Antiquities Act"), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric

structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Federal Government to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected;

WHEREAS, it is in the public interest to preserve the objects of scientific and historic interest on these public lands as an enlargement of the boundary of the Cascade-Siskiyou National Monument;

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by the authority vested in me by section 320301 of title 54, United States Code, hereby proclaim the objects identified above that are situated upon lands and interests in lands owned or controlled by the Federal Government to be part of the Cascade Siskiyou National Monument and, for the purpose of protecting those objects, reserve as part thereof all lands and interests in lands owned or controlled by the Federal Government within the boundaries described on the accompanying map, which is attached hereto and forms a part of this proclamation. These reserved Federal lands and interests in lands encompass approximately 48,000 acres. The boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected.

Nothing in this proclamation shall change the management of the areas protected under Proclamation 7318. Terms used in this proclamation shall have the same meaning as those defined in Proclamation 7318.

All Federal lands and interests in lands within the boundaries described on the accompanying map are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws, from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument.

The enlargement of the boundary is subject to valid existing rights. If the Federal Government subsequently acquires any lands or interests in lands not owned or controlled by the Federal Government within the boundaries described on the accompanying map, such lands and interests in lands shall be reserved as a part of the monument, and objects identified above that are situated upon those lands and interests in lands shall be part of the monument, upon acquisition of ownership or control by the Federal Government.

The Secretary of the Interior (Secretary) shall manage the area being added to the monument through the Bureau of Land Management as a unit of the National Landscape Conservation System, under the same laws and regulations that apply to the rest of the monument, except that the Secretary may issue a travel management plan that authorizes snowmobile and non-motorized mechanized use off of roads in the area being added by this proclamation, so long as such use is consistent with the care and management of the objects identified above.

Nothing in this proclamation shall preclude low-level overflights of military aircraft, the designation of new units of special use airspace, or the use or establishment of military flight training routes over the lands

reserved by this proclamation consistent with the care and management of the objects identified above.

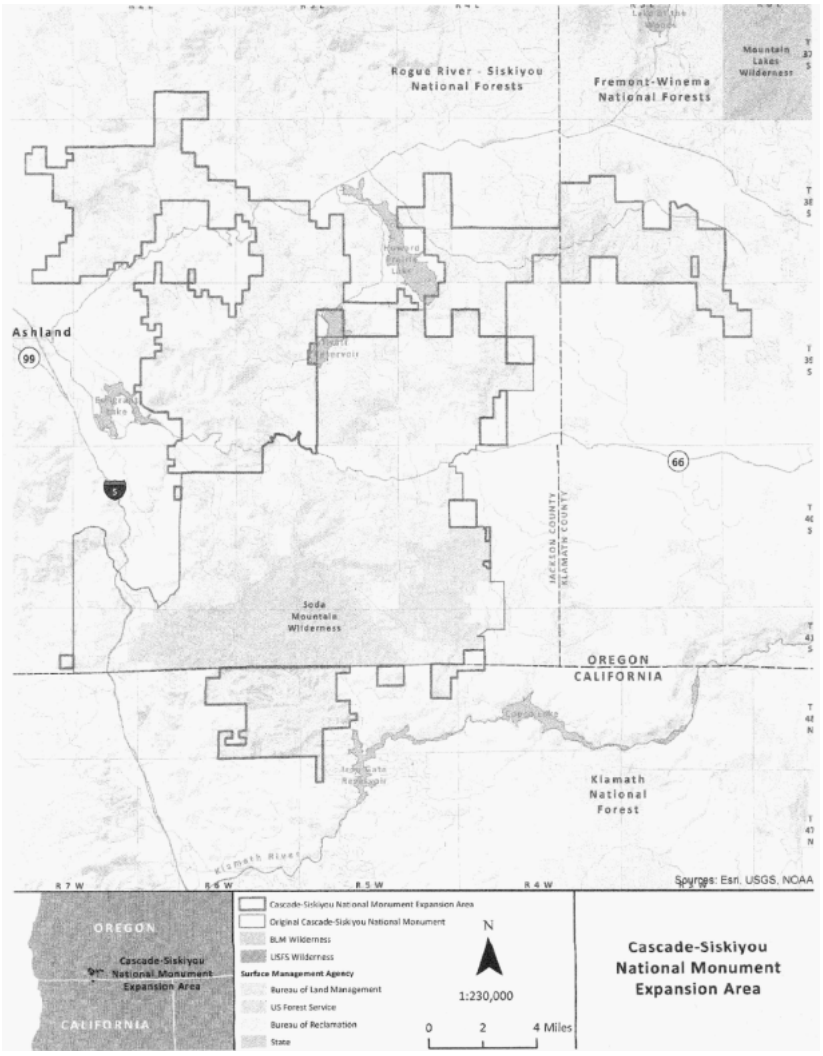
Nothing in this proclamation shall be deemed to enlarge or diminish the jurisdiction of the State of Oregon or the State of California with respect to fish and wildlife management.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of January, in the year of our Lord two thousand seventeen, and of the Independence of the United States of America the two hundred and forty-first.

BARACK OBAMA


Rogue River - Siskiyou National Forests
Fremont-Winema National Forests
Mountain Lakes Wilderness
Ashland
99
5
66
JACKSON COUNTY
KLAMATH COUNTY
Soda Mountain Wilderness
OREGON
CALIFORNIA
Klamath National Forest
Klamath River
R 7 W
R 6 W
R 5 W
R 4 W
Sources: Esri, USGS, NOAA
OREGON
Cascade-Siskiyou National Monument Expansion Area
CALIFORNIA
Cascade-Siskiyou National Monument Expansion Area
Original Cascade-Siskiyou National Monument
BLM Wilderness
USFS Wilderness
Surface Management Agency
Bureau of Land Management
US Forest Service
Bureau of Reclamation
State
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Cascade-Siskiyou National Monument Expansion Area

APPENDIX D

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

M. 30506.

Synopsis of
Solicitor's Opinion

Re: authority of the President to include certain revested Oregon and California Railroad Company lands in the Rogue River and Siskiyou National Forests.

Held: Since Congress has set aside the lands for a specific purpose which is inconsistent with an administration of the lands for national monument purpose, the President is without such authority.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

M. 30506. March 9, 1940

The Honorable

The Secretary of the Interior

My dear Mr. Secretary:

My opinion has been requested as to whether the President is authorized to set apart certain lands as an addition to the Oregon Caves National Monument.

It is my opinion that the President does not have such authority.

The lands in question were located within indemnity limits of the grant to the Oregon and California Railroad Company pursuant to the act of July 25, 1866 (14 Stat. 239), as amended. Subsequently, they were included within the limits of national forest reserves by proclamation of the President, but in the case of *United States v. Oregon and California Railroad Company*, 8 F. (2d) 645, 660, this action was held unauthorized and the lands were held to be covered by the grant to the railroad company. Accordingly, the title to these lands was revested in the United States by the act of June 9, 1916 (39 Stat. 218), as amended. This act, after revesting title in the United States to the unsold lands granted to the Oregon and California Railroad Company, directs the Secretary of the Interior to classify the lands as (1) power-site lands, (2) timberlands or (3) agricultural lands. The Secretary upon certain conditions is directed to sell the timber on the class 2 lands and such lands upon removal of the timber shall fall into class 3. The nonmineral lands

of class 3 are to be disposed of by the Secretary under the homestead laws with certain additional requirements, among them being the payment by the entryman of $2.50 per acre. All moneys received from or on account of said lands and timber are to be deposited in the Treasury in a special fund designated "The Oregon and California land-grant fund." These moneys are to be used to pay the balance, computed on the basis of $2.50 per acre, due the Oregon and California Railroad Company for the lands granted to it, and for specified payments into the reclamation fund and to the States and counties in which the lands are situated.

By the act of August 28, 1937 (50 Stat. 874), Congress directed that certain of the lands (those heretofore or hereafter classified as timberlands and power-site lands valuable for timber) be managed "for permanent forest production and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield." The Secretary of the Interior is authorized to lease for grazing any of the lands which may be so used without interfering with the production of timber or other purposes of the act, the proceeds to be covered into the special fund. The act also provided for a new method of distributing the moneys in the special fund, principally to the counties in which the lands are situated.

While the lands proposed to be added to the Oregon Caves National Monument have yet been classified formally, I am advised by the Chief Forester, O. and C. Administration, that they are in fact timberlands.

It is clear from the foregoing that Congress has specifically provided a plan of utilization of the Oregon and California Railroad Company revested lands. This plan among other things involves the disposal of lands and timber and the distribution of the moneys received

from such disposition. It must be concluded that Congress has set aside the lands for the specified purposes.

Pursuant to the act of August 25, 1916 (39 Stat. 535), Congress has directed that national monuments under the jurisdiction of the National Park Service shall be administered in such a manner as "to conserve the scenery and the national and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." The power of the Secretary with regard to the disposal of timber in national monuments is restricted to "cases where in his judgment the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects * * *."

There can be no doubt that the administration of the lands for national monument purposes would be inconsistent with the utilization of the O. and C. lands as directed by Congress. It is well settled that where Congress has set aside lands for a specific purpose the President is without authority to reserve the lands for another purpose inconsistent with that specified by Congress. See opinion of the Attorney General to the Secretary of the Interior dated June 12, 1935.

In my opinion, therefore, the President is not authorized to include the Oregon and California Railroad Company revested lands in the Oregon Caves National Monument.

Respectfully,
(Sgd) Nathan R. Margold, Solicitor.

Approved: March 9, 1940.
(Sgd) E. K. Burlew.
First Assistant Secretary.