UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 22, 2019 Decided December 27, 2019

No. 18-5353

Massachusetts Lobstermen's Association, et al.,
Appellants

v.

Wilbur Ross, in his official capacity as Secretary of Department of Commerce, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-00406)

Jonathan Wood argued the cause for appellants. With him on the briefs were *Damien M. Schiff* and *Joshua P. Thompson.*

Avi Kupfer, Attorney, U.S. Department of Justice, argued the cause for federal appellees. With him on the brief were *Jeffrey Bossert Clark*, Assistant Attorney General, *Eric Grant*, Deputy Assistant Attorney General, and *Andrew* C. *Mergen* and *Robert J Lundman*, Attorneys.

Katherine Desormeau argued the cause for defendants-intervenors-appellees. With her on the brief were *Ian Fein*, *Peter Shelley*, and *Roger Fleming*.

David J. Berger and *Justin A. Cohen* were on the brief for *amici curiae* Academic Scientists in support of appellees.

Paul M. Thompson was on the brief for *amici curiae* Alison Rieser, et al. supporting defendant's brief affirming the District Court.

Nicholas A. DiMascio, *Samantha R. Caravello*, and *Lori Potter* were on the brief for *amicus curiae* National Audubon Society in support of appellees and supporting affirmance.

Andrew J Pincus was on the brief for *amici curiae* Senator Richard Blumenthal and Senator Brian Schatz in support of appellees and for affirmance of the District Court's judgment.

Douglas W Baruch was on the brief for *amici curiae* Ocean and Coastal Law Professors in support of defendants-appellees and defendants-intervenors-appellees and affirmation.

Before: TATEL and MILLETT, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

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

TATEL, *Circuit Judge:* Acting pursuant to the Antiquities Act, 54 U.S.C. §§ 320301 et seq., President Obama established the Northeast Canyons and Seamounts Marine National Monument to protect "distinct geological features" and "unique ecological resources" in the northern Atlantic Ocean. Proclamation No. 9496, 3 C.F.R. 262, 262 (2017) ("Monument Proclamation"). Several commercial-fishing associations challenged the creation of the Monument, arguing that the President exceeded his statutory authority. The district court disagreed and dismissed the complaint. With a minor alteration, we affirm.

I.

"[A] statute of historical importance for natural resource conservation and for archeological and historic preservation in the United States," the Antiquities Act grew out of a movement to protect the nation's unique historical, archeological, and scientific heritage. Bruce Babbitt, *Introduction*, in *The Story of the Antiquities Act* (Ronald F. Lee, 2001). "[B]eg[inning] in 1879," "[a] whole generation of dedicated . . . scholars, citizens, and members of Congress . . . through [their] explorations, publications, exhibits, and other activities," *id.* (internal quotation marks omitted), pushed for the enactment of "national preservation legislation," culminating in 1906 with the passage of the Antiquities Act, Ronald F. Lee, *The Antiquities Act, 1900-06,* in *The Story of the Antiquities Act*

(Ronald F. Lee, 2001). To this day, the Act remains "a major part of the legal foundation for archeological, historic, and natural conservation and preservation in the United States." Babbitt, *supra.*

The 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 Act also authorizes the "President [to] reserve parcels of land as a part of the national monuments," so long as reservations are "confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.* § 320301(b).

Over the last century, Presidents have created a total of 158 national monuments, protecting a wide range of the nation's historic and scientific resources. National Park Service, *List of National Monuments,* https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm. For example, President Theodore Roosevelt established the Grand Canyon National Monument, reserving some 800,000 acres of land in the Arizona desert to protect "the greatest eroded canyon within the United States." Proclamation No. 794, 35 Stat. 2175, 2175 (Jan. 11, 1908). More recently, President Clinton established the Hanford Reach National Monument in Washington to protect "the largest remnant of the shrub-steppe ecosystem that once

blanketed the Columbia River Basin." Proclamation No. 7319, 3 C.F.R. 102, 102 (2001). And President George W. Bush created the Northwestern Hawaiian Islands Marine National Monument—later renamed the Papahānaumokuākea Marine National Monument, Proclamation No. 8112, 3 C.F.R. 16, 16 (2008)—reserving nearly 140,000 square miles of ocean off the Hawaiian coast to protect the area's "dynamic reef ecosystem, . . . home to many species of coral, fish, birds, marine mammals, and other flora and fauna." Proclamation No. 8031, 3 C.F.R. 67, 67 (2007).

Continuing in that tradition, President Obama reserved roughly 5,000 square miles of ocean to create the Northeast Canyons and Seamounts Marine National Monument ("the Monument"). Monument Proclamation, 3 C.F.R. at 262. Lying some 130 miles southeast of Cape Cod, the Monument consists of two non-contiguous units. *Id.*; *see infra* Figure 1. The first covers three underwater canyons that "start at the edge of the geological continental shelf and drop from 200 meters to thousands of meters deep." Monument Proclamation, 3 C.F.R. at 262. The second covers four extinct undersea volcanoes—called seamounts—that rise "thousands of meters from the ocean floor." *Id.* "Because of the steep slopes of the canyons and seamounts, oceanographic currents that encounter them create . . . upwelling" that "lift[s] nutrients . . . from the deep to sunlit surface waters," fueling "an eruption of [plankton] that form[s] the base of the food chain." *Id.* at 262-63. "Together the geology, currents, and productivity create diverse and vibrant ecosystems"

home to assorted marine flora and fauna, including rare species of deep-sea corals. *Id.* at 263. Accordingly, the Monument protects both "the canyons and seamounts themselves" as well as "the natural resources and ecosystems in and around them." *Id.* at 262.

Significantly for the issue before us, the Monument lies entirely in the U.S. Exclusive Economic Zone ("EEZ"), the belt of ocean between 12 and 200 nautical miles off the nation's coasts over which the United States exercises dominion under international law. *See* Restatement (Third) of Foreign Relations Law § 511(d), cmt. b ("Restatement") (explaining that costal states exercise sovereign rights over their exclusive economic zones). President Reagan created the U.S. EEZ in 1983 by issuing a proclamation that claimed for the United States

> sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and [ ] jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection and preservation of the marine environment.

Proclamation No. 5030, 3 C.F.R. 22, 23 (1984) ("Reagan Proclamation"). "The United States . . . exercise[s] these sovereign rights and jurisdiction in accordance with the rules of international law." *Id.*

Consistent with that authority and pursuant to several statutes, the federal government regulates a range of activity in the U.S. EEZ. The National Marine Sanctuaries Act, 16 U.S.C. §§ 1431 et seq. ("Sanctuaries Act"), authorizes the federal government to designate and manage marine sanctuaries in the "United States exclusive economic zone." *Id.* § 1437(k). The Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801 et seq., empowers the federal government to "exercise[ ] sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone." *Id.* § 1801(b)(1). And the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 et seq., provides a framework for the federal government to exploit the seabed's natural resources within the "outer Continental Shelf," defined to include the U.S. EEZ. *Id.* § 133 l(a); *see id.* (defining the "outer Continental Shelf" as "all submerged lands" beyond the lands reserved to the States up to the edge of the United States' "jurisdiction and control"); *see also* Dep't of the Interior, Office of the Solicitor, *Authority to Issue Outer Continental Shelf Mineral Leases in the Gorda Ridge Area*, 92 Interior Dec. 459, 487 (May 30, 1985) (explaining that the statutory definition of "outer Continental Shelf" includes the submerged lands within the EEZ).

In this case, several commercial-fishing associations ("the Fishermen") challenged the Monument's designation, arguing that the President "exceeded his statutory authority" under the Act because (1) the ocean is not "land" under the Antiquities Act; (2) the Monument is not compatible with the Sanctuaries Act; (3) the U.S. EEZ is not "controlled" by the federal government; and (4) the area reserved is not the "smallest area compatible" with management. *Massachusetts Lobstermen's Association v. Ross*, 349 F. Supp. 3d 48, 51, 58 (D.D.C. 2018). Several conservation groups intervened to defend the Monument. *Id.* at 51.

The district court concluded that the President acted within his statutory authority in creating the Monument and dismissed the Fishermen's claims. *Id.* It first rejected the Fishermen's argument that the Monument "is *per se* invalid because it lies entirely in the ocean," explaining that "Supreme Court precedent, executive practice, and ordinary meaning" establish that the Act reaches submerged land. *Id.* at 55-56. Second, the district court found that the President's interpretation of "the Antiquities Act does not render the Sanctuaries Act redundant" because the two statutes "address environmental conservation . . . in different ways and to different ends." *Id.* at 59. Third, the court found that the federal government "adequately controls the EEZ for purposes of the Act," *id.* at 60, not only because it "exercises substantial general authority over the EEZ" and "possesses specific authority to regulate the EEZ for purposes of environmental conservation," but also because "no private person or sovereign entity rivals the federal

government's dominion over the EEZ," *id.* at 64. And finally, the district court addressed the Fishermen's "fact-specific arguments about the boundaries of the Monument," observing that "to obtain judicial review of claims about a monument's size, plaintiffs must offer specific, nonconclusory factual allegations establishing a problem with its boundaries" and that the Fishermen's "allegations here d[id] not rise to that level." *Id.* at 67.

On appeal, the Fishermen press the same claims as they did in the district court: that the Monument is not "land," not compatible with the Sanctuaries Act, not "controlled" by the federal government, and not the "smallest area compatible" with management.

II.

Our court set out a framework for reviewing challenges to national monument designations in two companion cases, *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002), and *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002). There, we drew a distinction between two types of claims: those justiciable on the face of the proclamation and those requiring factual development. The former are resolved "as a matter of law" because they turn on questions of statutory interpretation. *Tulare*, 306 F.3d at 1140. As for the latter, although the precise "scope of judicial review" remains an open question, at a minimum, plaintiffs' pleadings must contain plausible factual allegations identifying an aspect of the designation that exceeds the President's statutory authority.

Mountain States, 306 F.3d at 1133. The Fishermen's first three claims—that the Monument is not "land," not compatible with the Sanctuaries Act, and not "controlled" by the federal government—can be judged on the face of the proclamation and resolved as a matter of law. Their last claim requires plausible factual allegations that the Monument is not the "smallest area compatible" with management to survive dismissal. We consider each in tum.

A.

The Fishermen first contend that the Monument is invalid because it "is not land, as that term is ordinarily understood." Appellants' Br. 22. This argument need not detain us long because, as the district court explained, the Supreme Court has consistently held that the Antiquities Act reaches submerged lands and the waters associated with them. In *Cappaert v. United States*, 426 U.S. 128 (1976), the Court determined that the Antiquities Act "g[a]ve the President authority to reserve" Devil's Hole—an underground pool of water near Death Valley that housed a rare species of fish—as part of Death Valley National Monument, rejecting the contention that the Act protected "archeologic sites" only. *Id.* at 141-42. The Court emphatically extended the point in *United States v. California*, 436 U.S. 32 (1978): "[t]here can be no serious question that the President . . . had power under the Antiquities Act to reserve the submerged lands and waters" of Channel Islands National Monument. *Id.* at 36. "Although the Antiquities

Act refers to 'lands,'" the Court explained, "it also authorizes the reservation of waters located on or over federal lands." *Id.* at 36 n.9. And in *Alaska v. United States*, 545 U.S. 75 (2005), which concerned Glacier Bay National Monument, the Court again made clear that "the Antiquities Act empowers the President to reserve submerged lands." *Id.* at 103.

The Fishermen insist that the Supreme Court's pronouncements in *Cappaert*, *California*, and *Alaska* are non-binding dicta because, they say, the cases concerned only whether Presidents intended to include submerged lands in their proclamations, not whether they had the authority to do so. The Fishermen are mistaken. At least in *Alaska*, the Supreme Court's holding expressly included its determination that the Antiquities Act reaches submerged lands. "[A] necessary part of [its] reasoning," the Court explained, was that "in creating Glacier Bay National Monument the United States had reserved the submerged lands underlying Glacier Bay and the remaining waters within the monument's boundaries." 545 U.S. at 100-01. Had the President lacked authority to reserve the submerged lands in the first place, the Court would have had no reason to inquire into whether he had, in fact, intended to do so. *Cf United States v. Windsor*, 570 U.S. 744, 759 (2013) (explaining that legal conclusions that are "necessary predicate[s]" to a court's holding are "not dictum"). In any event, "even if technically dictum," "carefully considered language of the Supreme Court . . . generally must be treated as authoritative." *Sierra Club v. EPA*, 322 F.3d 718,

724 (D.C. Cir. 2003) (internal quotation marks omitted).

Although the parties advanced, and the district court considered, other arguments about whether the Act reaches submerged lands—including arguments about historic practice and ordinary meaning—we need not wade into those waters, so to speak. On-point Supreme Court precedent resolves this claim.

B.

The Fishermen next argue that interpreting the Antiquities Act to permit ocean-based monuments would render the Sanctuaries Act "a practical nullity." Appellants' Br. 27. Congress enacted the Sanctuaries Act "to identify and designate as national marine sanctuaries areas of the marine environment which are of special national significance and to manage these areas as the National Marine Sanctuary System." 16 U.S.C. § 1431(b)(1). Because past conservation efforts "ha[d] been directed almost exclusively to land areas above the high-water mark," Congress crafted the Sanctuaries Act to "complement[ ] existing regulatory authorities" by protecting "certain areas of the marine environment possess[ing] conservation, recreational, ecological, historical, scientific, educational, cultural, archeological, or esthetic qualities." *Id.* § 1431(a)(1), (a)(2), (b)(2). To that end, the Sanctuaries Act empowers the Secretary of Commerce to "designate any discrete area of the marine environment as a national marine sanctuary and promulgate regulations

implementing the designation," *id.* § 1433, but only after complying with certain procedural requirements, *id.* §§ 1433-1434.

According to the Fishermen, by setting out a specific process to protect marine environments, the Sanctuaries Act precludes Presidents from using the Antiquities Act to do the same. As the Fishermen see it, a President's use of the Antiquities Act to create marine monuments renders the Sanctuaries Act "entirely redundant" because "[a]ny area that could be designated as a marine sanctuary could be more easily designated as an ocean monument . . . with the latter approach evading all of the substantive and procedural requirements of the former." Appellants' Br. 25, 29.

The Fishermen are again mistaken. Applying the Antiquities Act to oceans does not nullify the Sanctuaries Act for a simple reason: the two statutory schemes differ in several critical respects. Whereas the Antiquities Act limits national monuments to the "smallest area compatible" with monument management, 54 U.S.C. § 320301(b), the Sanctuaries Act permits marine sanctuaries to occupy an area of any size "that will permit comprehensive and coordinated conservation and management," 16 U.S.C. § 1433(a)(5). Whereas the Antiquities Act protects "objects of historic or scientific interest," 54 U.S.C. § 320301(a), the Sanctuaries Act protects areas' "recreational," "cultural," or "human-use values," 16 U.S.C. § 1433(a)(2). And whereas the Antiquities Act focuses on protecting

specific "objects" of historic or scientific interest, 54 U.S.C. § 320301(a), the Sanctuaries Act focuses on designating and managing "areas as the National Marine Sanctuary System," 16 U.S.C. § 431(b)(1). Thus, a marine sanctuary may be larger, protect more diverse values, and serve different overall goals than an ocean-based monument.

Indeed, we rejected a nearly identical argument in *Mountain States*, where the challengers asserted that the President's designation of six national monuments in the western United States "def[ied] congressional intent regarding the scope and purpose of 'a host' of other statutes enacted to protect various archeological and environmental values." 306 F.3d at 1138. We disagreed, explaining that the "contention that the Antiquities Act must be narrowly construed in accord with [the challengers'] view of Congress's original intent [regarding those statutes] misse[d] the mark" because it "misconceive[d] federal laws as not providing overlapping sources of protection" for environmental values. *Id.* The same is true here: that the Antiquities and Sanctuaries Acts "provid[e] overlapping sources of protection" for marine environments neither requires the Antiquities Act to "be narrowly construed" nor "def[ies] congressional intent regarding the scope and purpose of [the Sanctuaries Act]." *Id.*

Contrary to the Fishermen's contentions, then, ocean-based monuments are perfectly compatible with the Sanctuaries Act.

C.

Next, the Fishermen argue that the Monument is invalid because the federal government does not control the area of ocean where it is located. Recall that the statute gives the President monument-creating authority over "land owned or controlled by the Federal Government." 54 U.S.C. § 320301(a). According to the Fishermen, by pairing "owned" with "controlled," Congress intended the two words to have similar meanings, such that to "control[ ]" an area the federal government's authority there must be akin to its authority over federally "owned" land. And, the Fishermen continue, the federal government lacks control, so understood, over the U.S. EEZ.

Once more, the Fishermen misread the statute. Generally, "[c]ontrol and ownership . . . are distinct concepts." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003). Congress made that distinction plain here by separating "controlled" and "owned" with the conjunction "or," signaling that "the words . . . are to be given separate meanings." *United States v. Woods*, 571 U.S. 31, 45 (2013) (internal quotation marks and citations omitted). Nothing about the proximity of "owned" to "controlled" changes that: "[t]hat a word may be known by the company it keeps is . . . not an invariable rule, for the word may have a character of its own not to be submerged by its association." *Graham County Soil & Water Conservation District v. U.S. ex rel. Wilson*, 559 U.S. 280, 288 (2010) (quoting *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923)). Accordingly, the federal government may

"control[ ]" land even if it lacks authority akin to ownership there. And, here, three factors convince us that the federal government exercises sufficient authority to "control[ ]" the U.S. EEZ for purposes of the Act.

First, "under international law," the federal government exerts "significant" "authority to exercise restraining and directing influence over the EEZ." *Administration of Coral Reef Resources in the Northwest Hawaiian Islands*, 24 Op. O.L.C. 183, 196-97 (2000) ("OLC Op."). That power includes "substantial authority" to achieve the specific goal advanced here: "protecting the marine environment." *Id.* at 197.

Second, the federal government possesses substantial authority over the EEZ under domestic law. As noted, *supra* at 6, the Reagan Proclamation established U.S. sovereign dominion over the EEZ "for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters," as well as "jurisdiction with regard to . . . the protection and preservation of the marine environment." Reagan Proclamation, 3 C.F.R. at 23. Consistent with that authority, Congress has enacted several statutes regulating extraction and conservation activities in the EEZ, including the Sanctuaries Act, the Magnuson-Stevens Act, and the Outer Continental Shelf Lands Act.

And finally, the federal government exercises unrivaled authority over the EEZ. Although other nations may exercise "the freedoms of navigation and overflight" as well as the "freedom to lay submarine cables and pipelines" in the EEZ, Restatement § 514(2), no other entity matches the "extensive" "restraining and directing influence" exerted by the federal government, OLC Op. at 196-97. No private entity owns any portion of the EEZ, and no public entity possesses equivalent sovereign rights there. Indeed, the Supreme Court recently explained that "the Federal Government exercise[s] exclusive" authority over this portion of the ocean. *Parker Drilling Management Services, Ltd. v. Newton*, 139 S. Ct. 1881, 1887 (2019).

The federal government's unrivaled authority under both international and domestic law establishes that it "control[s]" the EEZ for purposes of the Act. The Fishermen's remaining arguments to the contrary are unavailing.

The Fishermen first invoke *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), where the Fifth Circuit held that the remains of a newly-discovered shipwreck "on the continental shelf, outside the territorial waters of the United States" was "not situated on lands owned or controlled by the United States under the provisions of the Antiquities Act." *Id.* at 333 n.1, 340. The Fishermen argue that *Treasure Salvors*' "logic requires the same conclusion in this case: that the [M]onument is not located on land owned or controlled by the federal government."

Appellants' Br. 51. But *Treasure Salvors* predated the Reagan Proclamation and thus never addressed whether the federal government exercises control over the U.S. EEZ. Accordingly, the decision carries no significance here.

Lastly, warning of a slippery slope, the Fishermen insist that if the Act reaches the EEZ, then it also reaches "areas clearly meant to be excluded, such as state and private lands." Appellants' Reply Br. 32. But no such danger lurks in the shadows of this opinion. The federal government controls the EEZ, in part, because no other entity—public or private—exerts competing influence there; the federal government's authority is "exclusive." *Parker*, 139 S. Ct. at 1887. That, however, is not true of state and private lands, where other entities—namely, states and private parties—possess competing authority, weakening any federal government claim to exercise control over such lands.

D.

This brings us to the Fishermen's final argument: that the Monument is not, as required by the Act, the "smallest area compatible" with management. 54 U.S.C. § 320301(b). In *Tulare County,* we set forth the type of allegations required to make out such a claim. That case concerned Giant Sequoia National Monument, which protects "groves of giant sequoias, the world's largest trees, and their surrounding ecosystem." *Tulare County*, 306 F.3d at 1140.

Challengers questioned the monument's boundaries, arguing that they were larger than necessary because "[s]equoia groves comprise[d] only six percent of the [m]onument['s]" area. *Tulare County v. Bush*, 317 F.3d 227, 227 (D.C. Cir. 2003) (*per curiam*). We concluded that the challengers failed to state a claim because the proclamation protected "natural resources present throughout the [m]onument area," meaning "[i]t was . . . incumbent upon [the challengers] to allege that some part of the [m]onument did not, in fact, contain natural resources that the President sought to protect." *Id.* The six-percent allegation, we speculated, "might well have been sufficient if the President had identified only [s]equoia groves for protection, but he did not," *id.*; he also protected "their surrounding ecosystem," *Tulare County*, 306 F.3d at 1140.

The Fishermen's pleadings are similarly insufficient. They allege only that the Monument reserves large areas of submerged land beyond the canyons and seamounts. Although those allegations "might well have been sufficient if the President had identified only [the canyons and seamounts] for protection, . . . he did not." *Tulare County*, 306 F.3d at 227. Instead, the Monument protects not only "the canyons and seamounts themselves," but also "the natural resources and ecosystems in and *around them*." Monument Proclamation, 3 C.F.R. at 262 (emphasis added). "It was therefore incumbent upon [the Fishermen] to allege that some part of the Monument did not, in fact, contain natural resources that the President sought to protect." *Tulare County*, 306 F.3d at 227. The Fishermen

failed to do so: the complaint contains no factual allegations identifying a portion of the Monument that lacks the natural resources and ecosystems the President sought to protect.

Grasping at straws, the Fishermen assert that "[a]n ecosystem is not an 'object' under the Antiquities Act." Compl. ¶ 75, Joint Appendix 24-25. In *Tulare County*, however, we expressly held that ecosystems are protectable "objects" under the Act: "[i]nclusion of such items as ecosystems . . . in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features." 306 F.3d at 1142; *cf. Alaska*, 545 U.S. at 99 (explaining that the President "create[d] Glacier Bay National Monument," in part, to protect "the complex ecosystem of Glacier Bay"). Accordingly, the Fishermen's smallest-area claim fails.

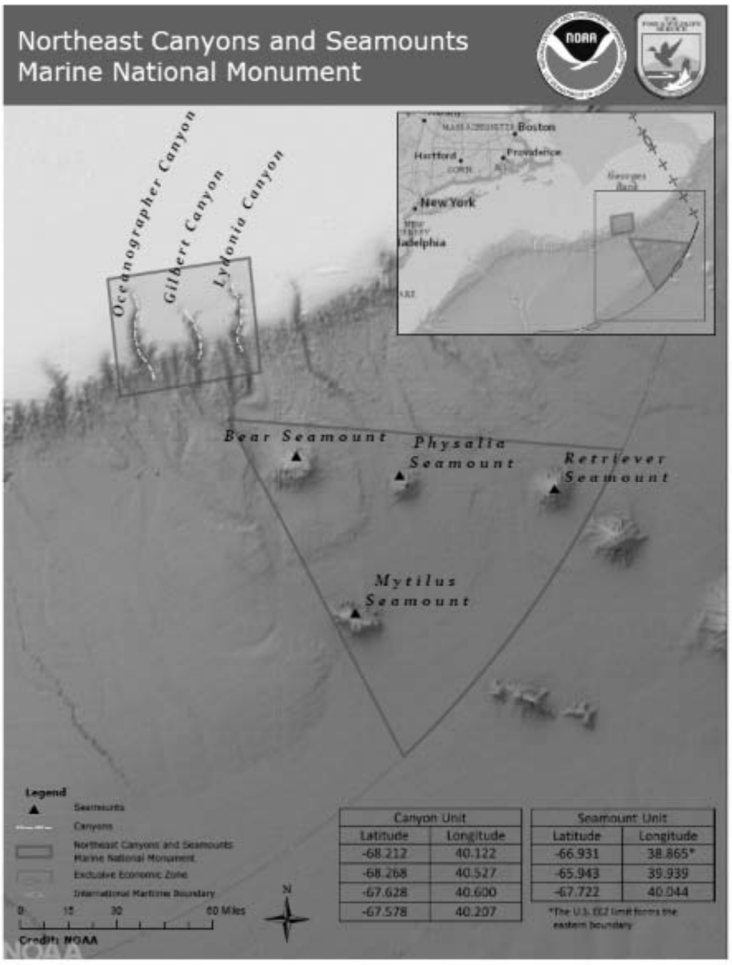
III.

We end with a housekeeping matter. Although the district court properly found that the Fishermen "failed to demonstrate that the President acted outside his statutory authority" in creating the Monument, it deemed such failure "jurisdictional" and dismissed the complaint "under Rule 12(b)(1), rather than Rule 12(b)(6)." *Lobstermen's Association*, 349 F. Supp. 3d at 55. To be fair, we have been less than precise about the basis for dismissing Antiquities Act cases. *See, e.g.*, *Tulare County*, 306 F.3d at 1140 (dismissing "for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Federal

Rules of Civil Procedure 12(b)(1) and 12(b)(6)"). We now clarify that where, as here, plaintiffs fail to make out legally sufficient claims challenging national monument designations, those claims should be dismissed pursuant to Rule 12(b)(6). Because district courts possess subject-matter jurisdiction over challenges to Antiquities Act designations under 28 U.S.C. § 1331, dismissal of such challenges pursuant to Rule 12(b)(1) is inappropriate. *See Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006) (explaining that where litigants challenge the executive's exercise of statutory authority, "[s]ection 1331 is an appropriate source of jurisdiction"). Accordingly, "[a]lthough the district court erroneously dismissed the action pursuant to Rule 12(b)(1), we c[an]"—and do—nonetheless affirm" the district court's dismissal of the Fishermen's complaint "based on failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997).

So ordered.

Figure 1


Northeast Canyons and Seamounts
Marine National Monument
Oceanographer Canyon
Gilbert Canyon
Lydonia Canyon
Boston
Hartford
Providence
New York
Bear Seamount
Physalia Seamount
Retriever Seamount
Mytilus Seamount
Legend
Seamounts
Canyons
Northeast Canyons and Seamounts Marine National Monument
Exclusive Economic Zone
International Maritime Boundary
0 15 30 60 Miles
N
Credit: NOAA
Canyon Unit
Latitude Longitude
-68.212 40.122
-68.268 40.527
-67.628 40.600
-67.578 40.207
Seamount Unit
Latitude Longitude
-66.931 38.865*
-65.943 39.939
-67.722 40.044
*The U.S. EEZ limit forms the eastern boundary

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION, *et al.*, **Plaintiffs,** **v.** **WILBUR J. ROSS, JR., *et al.*,** **Defendants.**	Filed Oct. 5, 2018 **Civil Action No. 17-406 (JEB)**

MEMORANDUM OPINION

In 1905, Teddy Roosevelt wrote that "there can be nothing in the world more beautiful" than the natural wonders of the United States, and "our people should see to it that they are preserved for their children and their children's children forever." *Outdoor Pastimes of An American Hunter* at 317 (1905). Roosevelt was talking, of course, about those legendary sites that most Americans know: Yosemite Valley, the Canyon of Yellowstone, and the Grand Canyon.

But he might have been talking about a less well-known — and only more recently appreciated — natural wonder: the Canyons and Seamounts of the Northwestern Atlantic Ocean. Like the landmarks the twenty-sixth President had in mind, the Canyons and Seamounts are a "region of great abundance and diversity as well as stark geographic relief." ECF

No. 1 (Compl.), Exh. 4 (Proclamation of Northeast Canyons and Seamounts Marine National Monument) at 1. Dating back 100 million years — much older than Yosemite and Yellowstone they are home to "vulnerable ecological communities" and "vibrant ecosystems." *Id.* at 1-2. And, as was true of the hallowed grounds on which Roosevelt waxed poetic, "[m]uch remains to be discovered about these unique, isolated environments." *Id.* at 4.

More than a century after Roosevelt had left office, but in reliance on a conservation statute passed during that time, President Barack Obama proclaimed the Canyons and Seamounts a National Monument. Motivated by the area's "unique ecological resources that have long been the subject of scientific interest," the President sought to protect it for future use and study. *Id.* at 1.

The question before the Court in this case is whether he had the power do so. More specifically, does the Antiquities Act give the President the authority to designate this monument? Plaintiffs are various commercial-fishing associations who argue that it does not for three reasons: first, because the submerged lands of the Canyons and Seamounts are not "lands" under the Antiquities Act; second, because the federal government does not "control" the lands on which the Canyons and Seamounts lie; and third, because the amount of land reserved as part of the Monument is not the smallest compatible with its management. The Government, backed by intervening conservation organizations and two groups of law professor *amici*, disagrees entirely.

The Court concludes that, just as President Roosevelt had the authority to establish the Grand Canyon National Monument in 1908, *see Cameron v. United States*, 252 U.S. 450 (1920), so President Obama could establish the Canyons and Seamounts Monument in 2016. It therefore grants Defendants' Motion to Dismiss.

I. Background

The Court begins with a brief discussion of the Antiquities Act and the establishment of the Monument before explaining the procedural history of the case.

A. The Antiquities Act

During the nascency of America's efforts to protect her cultural and scientific heritage, Congress passed the Antiquities Act of 1906. *See* Pub. L. No. 59-209, 34 Stat. 225 (codified at 54 U.S.C. § 320301 *et seq*.). Proposed initially to address the loss of archaeological artifacts in the West, the Act has played a central role in presidents' modem conservation efforts. *See* Bruce Babbitt, *Introduction*, in *The Antiquities Act of 1906* (Ronald F. Lee, 2001 Electronic Edition). Presidents have declared, in all, 157 national monuments, protecting everything from the natural marvels of the Grand Canyon and Death Valley to Native American artifacts in El Morro and Chaco Canyon. *See* Carol Hardy Vincent & Laura A. Hanson, Cong. Research Serv., *Executive Order for Review of National Monuments: Background and Data* at 1 (2017); *see also* National Park Service, List of National Monuments, https://www.nps.gov/

archeology/sites/antiquities/monumentslist.htm (last updated Sept. 21, 2018).

The Act works in three parts. First, it authorizes the President, in his discretion, to declare "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). Second, it empowers her to "reserve parcels of land as a part of the national monuments." *Id.* § 32030l(b). Any parcel of land she reserves must be "confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.* Third, it allows privately held land to be voluntarily given to the federal government if the land is "necessary for the proper care and management" of the national monument. *Id.* § 320301(c). Together, those provisions give the Executive substantial, though not unlimited, discretion to designate American lands as national monuments.

B. The Northeast Canyons and Seamounts Marine National Monument

This case concerns the Northeast Canyons and Seamounts Marine National Monument, proclaimed by President Obama in 2016. The Monument seeks to protect several underwater canyons and mountains, and the ecosystems around them, situated about 130 miles off the New England coast. *See* Compl., ¶¶ 2, 54-55. Covering in total about 4,913 square miles, the Monument consists of two non-contiguous units that lie within an area of the ocean known as the U.S. Exclusive Economic Zone. *See* Proclamation at 2-3. The first covers three underwater canyons that "start at the edge of the continental shelf and drop

thousands of meters to the ocean floor." Compl., ¶ 54. According to the Proclamation, whose scientific conclusions are (as yet) unchallenged, the canyons are home to a diverse range of marine life, including corals, squid, octopus, and several species of endangered whales. *Id.*; *see also* Proclamation at 2-3. Because of the oceanographic features of the canyons, they are also home to highly migratory species like tuna, billfish, and sharks. *See* Proclamation at 2-3.

The second unit covers four undersea mountains known as seamounts. *See* Compl., ¶ 55. Formed up to 100 million years ago by magma erupting from the seafloor, the seamounts are now extinct volcanoes that are thousands of meters tall. *See* Proclamation at 3. According to the Proclamation, the geology of the seamounts — namely, their steep and complex topography — results in a "a constant supply of plankton and nutrients to animals that inhabit their sides" and causes an "upwelling of nutrient-rich waters toward the ocean surface." *Id.* The seamounts thus support "highly diverse ecological communities," serving as homes to "many rare and endemic species, several of which are new to science and not known to live anywhere else on Earth." *Id.* at 3-4.

Together, the geological formations of the canyons and seamounts allow a wide range of unique and rare species to flourish. As such, the formations and the ecosystems surrounding them "have long been of intense scientific interest." *Id.* at 4. Although a range of scientists has studied the area using research vessels, submarines, and remotely piloted vehicles, "[m]uch remains to be discovered about these unique,

isolated environments and their geological, ecological, and biological resources." *Id.*

In proclaiming the area to be a national monument, President Obama directed the Executive Branch to take several practical steps to conserve the area's resources. First, he directed the Secretaries of Commerce and Interior to develop plans within three years for "proper care and management" of the canyons and seamounts. *Id.* at 6. Second, he required the Secretaries to prohibit oil and gas exploration and most commercial fishing within the Monument. *Id.* at 7-8. Third, he directed the Secretaries to encourage scientific and research activities as consistent with the Proclamation. *Id.* at 8-9.

C. This Lawsuit

On March 7, 2017, several commercial-fishing associations, including the Massachusetts Lobstermen's Association, filed this lawsuit. Claiming injury from the restrictions on commercial fishing, Plaintiffs seek declaratory and injunctive relief against the President, the Secretaries of Commerce and Interior, and the Chairman of the Council on Environmental Quality. *See* Compl., ¶ 4. Invoking the Court's jurisdiction to conduct non-statutory review of *ultra vires* executive action, *see Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996), they argue that the President lacked authority under the Antiquities Act to declare this Monument. *See* Compl., ¶¶ 3-4. The Government has now filed a Motion to Dismiss, backed by several intervening conservation organizations and two groups of law professor *amici*. The matter is now ripe for the Court's consideration.

II. Legal Standard

In evaluating Defendants' Motion to Dismiss, the Court must "treat the complaint's factual allegations as true . . . and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979)); *see also Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005). The Court need not accept as true, however, "a legal conclusion couched as a factual allegation," nor an inference unsupported by the facts set forth in the Complaint. *See Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of an action where a complaint fails "to state a claim upon which relief can be granted." Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). For a plaintiff to survive a 12(b)(6) motion, the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

The standard to survive a motion to dismiss under Rule 12(b)(1) is less forgiving. Under this Rule, Plaintiffs bear the burden of *proving* that the Court has subject-matter jurisdiction to hear their claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561

(1992). A court also has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). For this reason, "'the [p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Id.* at 13-14 (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (2d ed. 1987)).

III. Analysis

The Government seeks dismissal under Rules 12(b)(1) and 12(b)(6) on the grounds that the case is not judicially reviewable and that the President did not exceed his statutory authority. The Court agrees with the latter but not the former.

A. Reviewability

Before diving into the merits of the case, the Court must determine if Plaintiffs' claims are judicially reviewable. In other words, does the Court have any role to play here? Despite a raft of precedent holding otherwise, the Government initially suggests that it does not. Defendants say that the Antiquities Act commits national-monument determinations to the President's sole discretion, and, as such, those determinations cannot be reviewed. *See* ECF No. 32 (Def. MTD) at 7-8. The Court disagrees. Three times the Supreme Court has reviewed the legality of a President's proclamation of a national monument. *See United States v. California*, 436 U.S. 32-33 (1978) (Channel Islands National Monument); *Cappaert v.*

United States, 426 U.S. 128, 141-42 (1976) (Death Valley National Monument); *Cameron*, 252 U.S. at 455-56 (Grand Canyon National Monument). Citing those precedents, the D.C. Circuit has thus explained that "review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority." *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002); *accord Tulare County v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002); *see also Chamber of Commerce*, 74 F.3d at 1331-32 (explaining basis for review of statutory-authority questions). Because Plaintiffs' claims assert that the President exceeded his statutory authority under the Antiquities Act — *i.e.*, that the Proclamation was *ultra vires* — they are generally reviewable.

Still, hard questions remain about the *scope* of review of Plaintiffs' claims. In that regard, two categories of *ultra vires* claims should be distinguished. First, there are those that can be judged on the face of the proclamation. The plaintiffs in *Cappaert* made such a claim when they argued that the Devil's Pool in Death Valley was not an "object[ ] of historic or scientific interest" because it was not archaeological in nature. *See* 426 U.S. at 141-42. So did the plaintiff in *California* when it contended that the federal government did not "control[ ]" the submerged lands off the coast of the Channel Islands. *See* 436 U.S. at 36. Judicial review of such claims resembles the sort of statutory interpretation with which courts are familiar. *See Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003).

The second category requires some factual development. The plaintiffs in *Mountain States* and *Tulare County* brought such claims when they asserted that the national monuments, as a factual matter, "lack[ed] scientific or historical value." *Tulare County*, 306 F.3d at 1142. The same is true of those plaintiffs' claims that the monuments' size was not "the smallest area compatible with the proper care and management of the objects to be protected." *Id.* Courts cannot adjudicate such claims without considering the facts underlying the President's determination. *See Mountain States*, 306 F.3d at 1134. The availability of judicial review of this category of claims thus stands on shakier ground. *Id.* at 1133 (declining to decide "the availability or scope of judicial review" of such claims because doing so was unnecessary to resolve the case); *see also Dalton v. Specter*, 511 U.S. 462, 474 (1994). What is clear about this category, however, is that review would be available only if the plaintiff were to offer plausible and detailed factual allegations that the President acted beyond the boundaries of authority that Congress set. *See Mountain States*, 306 F.3d at 1137 (emphasizing that courts should be "necessarily sensitive to pleading requirements where, as here, [they are] asked to review the President's actions under a statute that confers very broad discretion on the President and separation of powers concerns are presented").

The Lobstermen assert both types of claims here. Their allegations that the submerged lands of the Exclusive Economic Zone are not "land" under the Antiquities Acts and are not "controlled" by the federal government fall into the first category. The

Court can undoubtedly review these claims and decide whether the President acted within the bounds of his authority. Plaintiffs' allegations that the land reserved as part of the monument is not the "smallest area compatible" with monument management, however, lie in the second category. While the availability and scope of review of such claims are unsettled, the Court need not venture into those uncharted waters because it concludes that Plaintiffs have not offered sufficient factual allegations to succeed.

As a quick aside, under either circumstance, the Court's rejection of Plaintiffs' argument results in dismissal under Rule 12(b)(1), rather than Rule 12(b)(6). In concluding that Plaintiffs failed to demonstrate that the President acted outside his statutory authority, the Court holds, at least as a formal matter, that Plaintiffs' claims are not subject to further judicial review. Such a determination, as best the Court can tell, is jurisdictional. *See Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 494 (D.C. Cir. 1988) (concluding that district court "was without jurisdiction to review" plaintiff's claims because government acted within its statutory authority). Regardless, whether properly deemed a dismissal under Rule 12(b)(1) or Rule 12(b)(6), the Court's analysis would be the same.

With that preface, the Court moves on to the claims themselves.

B. Lands

The Lobstermen first contend that the Northeast Canyons and Seamounts Marine National Monument

is *per se* invalid because it lies entirely in the ocean. The Antiquities Act authorizes monuments on "lands" controlled by the federal government, they say, and the Atlantic Ocean is obviously not "land." *See* ECF No. 41 (Pl. Opp.) at 11-14. While the argument admittedly has some surface appeal, it is buffeted by the strong winds of Supreme Court precedent, executive practice, and ordinary meaning. The Court examines these and one last issue sequentially.

1. *Precedent*

Take precedent first. The Supreme Court has thrice concluded that the Antiquities Act does reach submerged lands and the water associated with them. In *Cappaert*, the Court addressed a dispute about a pool of water in the Devil's Hole, a cavern near Death Valley. *See* 426 U.S. at 131. After some discussion, it concluded that the pool and groundwater beneath it were properly reserved under the Antiquities Act as part of the Death Valley National Monument. *Id.* at 141-42.

The Court next addressed the matter in *California*, 436 U.S. 32. There, it considered whether California or the federal government had dominion "over the submerged lands and waters within the Channels Islands National Monument." *Id.* at 33. It began by emphasizing that "[t]here can be no serious question . . . that the President in 1949 had power under the Antiquities Act to reserve the submerged lands and waters . . . as a national monument." *Id.* at 36. It explained that "[a]lthough the Antiquities Act refers to 'lands,' this Court has recognized that it also authorizes the reservation of waters located on or over federal lands." *Id.* n.9 (citing *Cappaert*, 426 U.S. at

138-42). The Court went on to conclude for other reasons that title to the lands had subsequently passed to California. *Id.* at 37.

Finally, just over a dozen years ago, the Court considered how the Antiquities Act applies to submerged lands in *Alaska v. United States*, 545 U.S. 75 (2005). The relevant issue in that case, like in *California*, was whether Alaska or the federal government had title to the submerged lands in Glacier Bay off the coast of Alaska. *Id.* at 78. The Court concluded that the federal government had title, in necessary part because those submerged lands were lawfully part of the Glacier Bay National Monument. *Id.* at 101-02. The Court separately emphasized that "[i]t is clear . . . that the Antiquities Act empowers the President to reserve submerged lands." *Id.* at 103 (citing *California*, 436 U.S. at 36). In all three opinions, then, the Court affirmed that the Antiquities Act authorizes presidents to declare submerged lands like the canyons and seamounts as national monuments.

Not so fast, Plaintiffs say: those opinions' discussions of the Antiquities Act, they believe, are *dicta*. *See* Pl. Opp. at 13 n.4. The Court disagrees, at least as to *Alaska*. In that case, the Supreme Court applied a two-part test to determine whether the federal government had title to the submerged lands: first, it asked whether the federal government had properly reserved the land; second, it inquired whether the federal government had demonstrated an intent to defeat the state's title to the land. While the Supreme Court did not rely on the monument designation to demonstrate the federal government's

intent to defeat Alaska's title (step two), it affirmatively relied on the designation to demonstrate that the federal government had reserved the lands originally (step one). *See* 545 U.S. at 100-02. Indeed, the Court went out of its way to emphasize that its conclusion to that effect was "a necessary part of the reasoning." *Id.* at 101. Its decision that the submerged lands in Glacier Bay were indeed lands under the Antiquities Act was thus a holding, not *dictum*. In any event, "[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *NRDC v. NRC*, 216 F.3d 1180, 1189 (D.C. Cir. 2000) (quoting *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997)). This Court is loath to hold otherwise and thus sticks with the Supreme Court's admonition that "the Antiquities Act empowers the President to reserve submerged lands." *Alaska*, 545 U.S. at 103.

2. *Practice*

In light of those decisions, it should come as no surprise that past presidents have frequently reserved submerged lands as national monuments. In addition to the Devil's Hole, Channel Islands, and Glacier Bay monuments, presidents have declared, among others, the Fort Jefferson National Monument off the coast of Florida, *see* 49 Stat. 3430 (1935), the Buck Island Reef National Monument off the Virgin Islands, *see* 76 Stat. 1441 (1961), and the Papahānaumokuākea Marine National Monument off the coast of Hawaii. *See* 72 Fed. Reg. 10,031 (Feb. 28, 2007); *see also* Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 186-200 (2000) (Office of Legal Counsel opinion

explaining Executive understanding that Antiquities Act extends to submerged lands in ocean). That history supports interpreting the Act to reach submerged lands. *See Zemel v. Rusk*, 381 U.S. 1, 11 & n.8 (1965). Accentuating the persuasiveness of the Executive's longstanding interpretation, Congress recodified the Antiquities Act with minor changes in 2014 but without modifying the Act's reach. *See N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982) (explaining that Congress's acquiescence to agency's construction in amending statute suggests agency has "correctly discerned" the "legislative intent") (quoting *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979)).

Plaintiffs contend that this executive practice and the precedents sustaining it do not control the circumstances of this case. They argue, in short, that those past monuments should be distinguished because they are not confined to submerged lands, but also include some non-submerged lands. *See* Pl. Opp. at 25-26. Why this would make a difference for the purpose of construing the word "land" in the Antiquities Act escapes the Court; it apparently escapes Plaintiffs as well, for their Opposition fails to explain the salience of the distinction. What seems inescapable is that if the submerged lands in Glacier Bay are "lands" under the Antiquities Act, so are the submerged canyons and seamounts in the Atlantic Ocean.

3. *Ordinary Meaning*

What this Court has already said should be enough to settle the matter of defining lands under the Antiquities Act. A few brief words are nonetheless

warranted in response to Plaintiffs' argument that "[t]he ordinary meaning of 'land' excludes the ocean." Pl. Opp. at 11. In support of that assertion, they cite several definitions of "land" from dictionaries published in the Rooseveltian era that define it in opposition to "ocean." *Id.* at 12 (citing, *e.g.*, *Webster's New International Dictionary* (1st ed. 1909)). Of course, it is true that the world is roughly divided up into dry land, on the one hand, and ocean on the other. But what about that part of the earth that lies beneath the seas? It is not *dry* land, to be sure; yet ordinary parlance would seem to deem places like the ocean floor and the beds of lakes and streams *land*. As it turns out, the dictionaries Plaintiffs cite would agree. Webster's First includes "land under water" as a proper use of the word "land." *Webster's New International Dictionary* at 1209. Black's Law Dictionary likewise defines land as "any ground soil, or earth whatsoever," including "everything attached to it . . . [such] as trees, herbage, and water." *Black's Law Dictionary* at 684 (1st ed. 1891). If that were not enough, the Supreme Court has offered the following commentary directly on point:

> [T]he word "lands" includes everything which the land carries or which stands upon it, whether it be natural timber, artificial structures, or *water*, and that an ordinary grant of land by metes and bounds carries all pools and ponds, non-navigable rivers, and waters of every description by which such lands, or any portion of them, may be submerged, since, as was said by the court in *Queen v. Leeds & L. Canal Co.* 7 Ad. & El. 671,

> 685: "Lands are not the less land for being *covered with water*."

Ill. Cent. R.R. Co. v. Chicago, 176 U.S. 646, 660 (1900) (emphases added). That should settle it: The Antiquities Act reaches lands both dry and wet.

4. *National Marine Sanctuaries Act*

But wait. Plaintiffs offer one last argument why the Antiquities Act does not reach submerged lands in the oceans. They say that such a reading would conflict with the National Marine Sanctuaries Act, which gives the Executive Branch the authority to designate certain areas of the marine environment as "national marine sanctuaries" and to issue regulations protecting those areas. *See* Pl. Opp. at 26-33 (citing 16 U.S.C. § 1431 *et seq.*). The Court understands them to be making two separate arguments in that regard. First, they say that the Sanctuaries Act impliedly repealed the Antiquities Act, at least as it applied to the oceans. *Id.* at 26. Second, they posit that Congress's decision to pass the Sanctuaries Act sheds light on its understanding that oceans are excluded from the reach of the Antiquities Act. *Id.* at 26-33. Neither argument, so to speak, holds water.

Take the implied-repeal contention first. It is axiomatic that "repeals by implication are not favored." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Courts do not "infer a statutory repeal 'unless the later statute expressly contradicts the original act' or unless such a construction 'is absolutely necessary in order that the words of the later statute shall have any meaning at all.'" *Nat'l Ass'n of Home Builders v.*

Defenders of Wildlife, 551 U.S. 644, 662 (2007) (formatting modified) (quoting *Traynor v. Turnage*, 485 U.S. 535, 548 (1988)). Plaintiffs, moreover, do not attempt to make the kind of showing required for an implied-repeal argument. And for good reason. Not only does the Sanctuaries Act fail to mention the Antiquities Act, but it also expressly provides that it is intended to "complement[ ] existing regulatory authorities." 16 U.S.C. § 1431(b)(2).

The post-enactment-intent argument similarly provides the Lobstermen's boat little headway. It is true, as they note, that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." Pl. Opp. at 29 (quoting *FDA v. Brown & Williamson*, 529 U.S. 120, 133 (2000)). But subsequent acts may also "provid[e] overlapping sources of protection," intended to complement earlier enactments. *See Mountain States*, 306 F.3d at 1138; *see also United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (statutes "may be merely affirmative, or cumulative, or auxiliary"). Such was the case in *Mountain States*. There, the plaintiffs argued that "the specific provisions of the numerous environmental statutes adopted in the years following enactment of the Antiquities Act," including the Endangered Species Act and the Wilderness Act, demonstrated that Congress did not intend for the Antiquities Act to address similar environmental values. *See* Brief for Appellant, *Mountain States*, 306 F.3d 1132 (No. 01-5421). They believed that those more specific enactments provided "the sole mechanisms by which certain environmental values were to be protected." *Id.* The Court disagreed,

explaining that the argument "misconceives federal laws as not providing overlapping sources of protection." 306 F.3d at 1138. In other words, the subsequent environmental statutes provided the Executive Branch with a targeted way of addressing similar environmental concerns — the fact that Congress subsequently expanded the Executive's tools to protect the environment, however, did not invalidate Congress's prior authorization to the Executive to designate national monuments. *Id.*

The Court concludes that, as in *Mountain States*, the Antiquities Act's reach is unaffected by subsequent statutory enactments such as the Sanctuaries Act. As the Court interprets them, both Acts address environmental conservation in the oceans. Yet they do so in different ways and to different ends. Begin with the purposes of the Acts. The Antiquities Act is entirely focused on preservation. The Sanctuaries Act, on the other hand, addresses a broader set of values, including "recreation[ ]" and the "public and private uses of the [ocean] resources." 16 U.S.C. §§ 1431(a)(2), 1431(b)(6). In line with their different purposes, the Acts' regulatory tools also vary. The Antiquities Act provides presidents with a blunt tool aimed at preserving objects of scientific or historic value. The Sanctuaries Act, on the other hand, offers a targeted approach, incorporating feedback from a host of stakeholders and reflecting more tailored conservation measures. *See* 16 U.S.C. § 1434(a)(5) (outlining procedures and explaining that commercial fishing, among other private uses, generally permitted). Contrary to Plaintiffs' argument, then, the Court's interpretation of the Antiquities Act does not

render the Sanctuaries Act redundant. Far from it. Like the Endangered Species Act in *Mountain States*, the Sanctuaries Act gives the President an important, but more targeted, implement to achieve an overlapping, but not identical, set of goals.

Considered in the broader context of Congressional involvement in marine conservation, Plaintiffs' post-enactment-intent argument faces another problem. When Congress passed the Sanctuaries Act in 1972, it acted on a backdrop of presidential practice establishing national monuments on submerged lands, aimed at conserving natural resources. *See e.g.*, 53 Stat. 2534 (1939) (Glacier Bay Expansion); 76 Stat. 1441 (1961) (Buck Island Reef). If the later Congress had a narrower understanding of the Antiquities Act's reach, as Plaintiffs contend, it might be expected to have expressly amended or repealed the Act when it passed the Sanctuaries Act. It did not do so. *See supra* at 12-13. The natural inference from Congress's silence is not that it intended to *change* the Antiquities Act's reach, but that it intended to keep it the same.

These circumstances, among others, also show why Plaintiffs' reliance on *FDA v. Brown & Williamson Tobacco*, 529 U.S. at 133, is misplaced. Much simplified, the question in that case was whether the FDA could regulate tobacco. *Id.* In concluding that it could not, the Supreme Court emphasized that the FDA had made "consistent and repeated statements that it lacked authority" to regulate tobacco, *id.* at 144, and Congress had subsequently passed several more specific statutes regulating tobacco, thereby "ratify[ing] the FDA's

prior position that it lacks jurisdiction." *Id.* at 158. This case is different. Here, as mentioned, Congress enacted the Sanctuaries Act against the backdrop of the Executive's position that the Antiquities Act reaches submerged lands. So, if the Sanctuaries Act ratified anything, it was the Executive's understanding that the Act reaches certain submerged lands.

Finally, while on the subject of later Congresses' intents, it is worth emphasizing again that the legislature recodified the Antiquities Act with several small amendments in 2014 without altering its scope. By that point, more presidents had declared marine national monuments, and several of those monuments had been sustained by the Supreme Court. *See supra* at 10-13. The response from Congress? Silence. Had later Congresses understood the Antiquities Act not to reach submerged lands in the oceans or the Sanctuaries Act to alter the Antiquities Act, as Plaintiffs contend, one might expect them to have effectuated that understanding somewhere in the U.S. Code.

* * *

The Court, accordingly, rejects Plaintiffs' argument that this Monument exceeds the President's authority under the Antiquities Act because it lies entirely beneath the waves.

C. Control

With plenty of bait left, the Lobstermen next argue that the Monument is invalid because the Government does not adequately "control" the

Exclusive Economic Zone, the sector of the ocean where the Monument lies. Recall that presidents may only declare national monuments on land "owned or controlled by the Federal Government." 54 U.S.C. § 320301(a). Plaintiffs contend that the Antiquities Act requires the federal government to maintain "complete" control over the area, and that the Government lacks such control over the EEZ. *See* Pl. Opp. at 14. This argument hauls in no more catch than Plaintiffs' prior one about submerged lands. The Court starts by explaining why it disagrees with Plaintiffs' interpretation of "control" before articulating why it concludes that the federal government adequately controls the EEZ for purposes of the Act.

1. *"Complete" Control*

Plaintiffs contend that the phrase "lands owned or controlled by the federal government" should be interpreted to mean "lands owned or *completely* controlled by the federal government." *See* Pl. Opp. at 14-15. The Court cannot concur. The ordinary meaning of the word, backed by statutory context and Supreme Court precedent, demonstrates that Congress meant something less than complete control.

The Court starts with the plain meaning of the word "control." Relying on definitions from Webster's First Dictionary, Plaintiffs argue that "control" means "to exercise complete dominion." *Id.* at 14. Webster's First defines control as follows: "To exercise restraining or directing influence over; to dominate; regulate; hence, to hold from action; to curb; subject; overpower." *Webster's New International Dictionary* at 490. None of the definitions they cite supports

Plaintiffs' understanding. Most of the definitions, including "to exercise directing influence, regulate, hold from action, curb," clearly indicate something less than absolute control. But even the most favorable definitions for Plaintiffs — *e.g.*, "to dominate and overpower" — arguably suggest something less than complete control. Consider a simple example: If a technology investor said that IBM "dominated" the market for laptop computers, one would not understand her to mean that it "exercised complete dominion" over the market. Rather, she would be understood to say that IBM is the unrivaled leader in the market, though other companies continue to compete with it. Replace dominate with control and the meaning remains largely the same. Far from supporting Plaintiffs' understanding of control, the dictionary definitions thus suggest a broader interpretation of the term.

In response, the Lobstermen invoke several canons of interpretation. They first raise *noscitur a sociis* — the rule that "a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Because "controlled" is grouped with the word "owned," Plaintiffs argue it should refer to the same degree of control as ownership. *See* Pl. Opp. at 15. The Court is unpersuaded. Rejecting a nearly identical contention, the Supreme Court has explained that "[t]he argument seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one, but there is no such general usage." *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 379 (2006); *see also Graham County Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 288-89

(2010) ("[T]hree items . . . [are] too few and too disparate to qualify as string of statutory terms.") (internal quotation marks and citation omitted). Just as the Supreme Court refused to apply *noscitur a sociis* to narrow the broader term in a two-term list, *S.D. Warren*, 547 U.S. at 379-81, this Court rejects application of the canon here. Indeed, the Lobstermen's *noscitur a sociis* argument is weaker even than the one rejected in *S.D. Warren*. There at least, the two-term list was conjunctive — *i.e.*, separated by an "and." *Id.* at 379. Here, Congress separated ownership and control with the word "or," whose use "is almost always disjunctive, that is, the words it connects are to be given separate meanings." *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)). Just so here, for control and ownership "are distinct concepts." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003). A statutory canon focused on "identifying a common trait that links all the words" is thus particularly inapplicable. *See Yates v. United States*, 135 S. Ct. 1074, 1097 (2015) (Kagan, J., dissenting).

Not dissuaded, Plaintiffs next invoke the rule against surplusage. *See* Pl. Op. at 15. They say that a broader interpretation of the term "control" — to mean something less than absolute dominion — would render irrelevant the term "owned." *Id.* But Plaintiffs' interpretation does not resolve any surplusage problem. Assuming "control" requires "the same degree of control" as ownership, *see* Pl. Opp at 15, the term "ownership" is equally irrelevant as it would be under a broader understanding of "control." The Court thus rejects the surplusage argument. *See Bruesewitz*

v. Wyeth LLC, 562 U.S. 223, 236 (2011) (rejecting surplusage argument that did not resolve surplusage problem).

Somewhat more interesting, though ultimately just as unpersuasive, are Plaintiffs' legislative-history arguments. *See* Pl. Opp. at 15-17. In that regard, they note that earlier versions of the Antiquities Act used the phrase "public lands," rather than "lands owned or controlled by the United States." *Compare* 54 U.S.C. § 320301(a) *with* S. 5603, 58th Cong. (1904). Plaintiffs contend that the change was precipitated by one senator's remark in a subcommittee hearing on an earlier version of the Bill. *See Preservation of Historic and Prehistoric Ruins*, Hearing before the Subcomm. of the Senate Committee on Public Lands, 58th Cong. Doc. No. 314, at 24 (1904). There, Senator Fulton had the following exchange with the Commissioner of Indian Affairs:

> Senator FULTON: I suppose the public lands would include these Indian reservations?
> Commissioner Jones: No; I think not.
> Senator FULTON: They are public lands, although the Indians have possession .
> Commission JONES: Take the Southern Ute Reservation in the case cited—
> Senator FULTON: Still the Government has control absolutely.

Id.

Plaintiffs maintain that this exchange, taken with the change in the final Bill's language, demonstrates that by "control," Congress meant "absolute control." Pl. Opp at 16. This argument encounters any number

of problems. For one, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), particularly where the record lacks "evidence of an agreement among legislators on the subject." *Rivers v. Roadway Exp., Inc.* 511 U.S. 298, 308-09 n.8 (1994). Here, Plaintiffs present no persuasive evidence that Senator Fulton's statement, insofar as it in fact reflected his view and correctly described the law, embodied *Congress's* view of the matter. The Bill was ultimately passed by a different Congress several years after the hearing in question, with no substantiated connection between Senator Fulton's statement and the language of the final Bill.

A second problem is that Senator Fulton's remark is highly equivocal. Based on the hearing transcript, Fulton appeared to interrupt Commissioner Jones to answer his own question, stating that Indian reservations "*are* public lands." 58th Cong. Doc. No. 314, at 24 (emphasis added). Indeed, when Jones was subsequently asked whether the proposed bill would allow the Interior Department to protect artifacts on Indian lands, he replied, "I think this bill will cover it[.]" *Id.* One reading of the exchange is that Fulton and Jones agreed that the proposed Bill's coverage of public lands would include Indian lands. If that were so, it would mean the addition of the phrase "lands controlled by the federal government" did not arise from this exchange. The takeaway is that the isolated comments Plaintiffs pick out are, to put the matter generously, equivocal and therefore unreliable evidence of legislative intent.

Even if Plaintiffs were correct that the proposed Bill was amended to ensure the Act covered Indian lands, that would not mean that "control" means "absolute control." Contrary to Senator Fulton's statement, the federal government did not (and does not) maintain absolute control over Indian lands. The Supreme Court said as much in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980): "[A] reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that 'this power to control and manage [is] *not absolute*.'" *Id.* at 415 (emphasis added) (quoting *United States v. Creek Nation*, 295 U.S. 103, 109 (1935)); *see also American Indian Law Deskbook* § 3.8 (May 2018) ("Tribes and individual Indians have acquired significant control over their land and its resources."). So, even if Congress had in mind the level of control the federal government had over Indian lands when it added the word "control" to the Antiquities Act, it would not support Plaintiffs' "absolute control" interpretation.

The more persuasive interpretation of "control" does not require inserting an adjective in front of the word to achieve a desired meaning. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) ("The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result."). Instead, it tracks the ordinary understanding of the term, as discussed above and as reflected in the way the Supreme Court has used the term. The Court's decision in *California* is a good example. Recall that the Court in that case affirmed that the federal

government "controlled" the waters in the territorial sea, supporting the President's authority to establish the Channel Islands National Monument. *See* 436 U.S. at 36 (discussing *United States v. California*, 332 U.S. 804, 805 (1947)). Even Plaintiffs appear not to contest that the federal government controls the territorial sea. Yet that control is neither "complete" nor "absolute." States may exercise their police powers there. *See United States v. Louisiana*, 394 U.S. 11, 22 (1969). Other nations have "the right of innocent passage" through that territory — *viz.*, passage that "is not prejudicial to the peace, good order, or security of the coastal state." Restatement (Third) of Foreign Relations Law § 513 (last updated June 2018). When it stated that the federal government "controlled" the territorial sea, *California*, 436 U.S. at 36, the Court thus had in mind something short of absolute control; it instead understood the term to mean something closer to, in dictionary parlance, "to exercise directing or restraining influence over." Webster's First at 490.

Additional instances abound of the courts' and Congress' defining areas of the ocean like the territorial sea and beyond as under federal-government control. *See, e.g.*, Outer Continental Shelf Lands Act, 43 U.S.C. § 1331(a) (defining outer continental shelf in part as submerged lands subject to federal "jurisdiction and control"); *see also Native Vill. of Eyak v. Trawler Diane Marie, Inc.*, 154 F.3d 1090, 1091 (9th Cir. 1998) (acknowledging "sovereign control and jurisdiction of the United States to waters lying between 3 and 200 miles off the coast"). The bottom line: Plaintiffs are wrong when they assert that the Antiquities Act only extends to lands the federal government completely controls. The voyage is

not over, however. This determination still leaves open the question of whether the government has *enough* influence over the Exclusive Economic Zone under the Antiquities Act to constitute "control," which issue the Court turns to next.

2. *Control of the EEZ*

Three considerations convince the Court that the federal government sufficiently controls the Exclusive Economic Zone — where the Northeast Canyons and Seamounts National Marine Monument is located — to empower the President under the Antiquities Act. First, the federal government exercises substantial general authority over the EEZ, managing natural-resource extraction and fisheries' health and broadly regulating economic output there. Second, it possesses specific authority to regulate the EEZ for purposes of environmental conservation. Third, no private person or sovereign entity rivals the federal government's dominion over the EEZ.

Some background to start. Customary international law, which is ordinarily deemed binding federal law in the United States, sets forth the rights and responsibilities of nations in different parts of the oceans and their corresponding seabeds. *See* Restatement (Third) of Foreign Relations Law § 511, Cmt. D; *see also The Paquete Habana*, 175 U.S. 677, 700 (1900). Abutting the coastline of the United States lies the territorial sea, a body of water extending up to twelve nautical miles from the coast. *See* Restatement (Third) of Foreign Relations Law § 511(a). Beyond the territorial sea is the EEZ, which "may not exceed 200 nautical miles" from the point at which the territorial sea is measured. *Id.* § 511(d). To refresh the reader,

the Monument at issue lies about 130 miles off the coast of New England, and Plaintiffs do not dispute that it plainly sits within the EEZ. *See* Compl., ¶ 2.

Consistent with international law, President Reagan established the EEZ out to 200 nautical miles in 1983. *See* Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983). In that Proclamation, he claimed for the United States the authority recognized under international law, including: (1) the sovereign right to "explor[e], exploit[ ], conserv[e] and manag[e] natural resources, both living and non-living, of the seabed and subsoil and superadjacent waters"; (2) the rights to pursue "other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds"; (3) "jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes"; and (4) the responsibility for "protection and preservation of the marine environment." *Id.* The Government therefore possesses broad sovereign authority to manage and regulate the EEZ. That wide-ranging authority obviously tips the scale towards finding that it controls the EEZ under the Antiquities Act.

Second, the federal government has the specific authority to regulate the EEZ for purposes of marine conservation. As President Reagan explained in his proclamation, the federal government maintains in the EEZ "jurisdiction with regard to . . . the protection and preservation of the marine environment." *Id.* International law likewise acknowledges the federal government's ability to issue and enforce laws and

regulations related to marine conservation in the EEZ. *See* Restatement (Third) of Foreign Relations Law § 514, Cmt. i; *see also* U.N. Convention on the Law of the Sea, *e.g.*, Art. 65 (affirming coastal nation's rights to regulate marine mammals in EEZ for purposes of marine conservation), Arts. 61-62 (providing for coastal nation's responsibilities for fishery management and conservation).

This specific authority exists not just on paper. Rather, the federal government exercises close management and regulation of marine environments in the EEZ. One way it does so is through the National Marine Sanctuaries Act, mentioned above. *See* 16 U.S.C. § 1431 *et seq*. Under that Act, the federal government declares marine sanctuaries in the EEZ, over which it exercises "authority for *comprehensive* and coordinated *conservation* and *management*." *Id.* 1431(b)(2) (emphases added). Another is through fisheries management under laws like the Magnuson-Stevens Act. *Id.* § 1801 *et seq*. One purpose of that Act is "to take immediate action to *conserve* and *manage* the fishery resources found off the coasts of the United States . . . by exercising (A) *sovereign rights* for the purposes of exploring, exploiting, conserving, and managing *all fish, within the exclusive economic zone*." *Id.* § 1801(b)(1) (emphases added). Of course, such enactments do not on their own give the federal government the power to establish national monuments in the EEZ — only the Antiquities Act can do that. But they shed light on what *kind* of control the federal government exercises over the EEZ. As the Court sees it, the fact that the federal government maintains and exercises specific authority under domestic and international law to "protect the marine

environment in the EEZ" strongly suggests that Congress would have understood the Government to maintain the requisite level of control under the Antiquities Act. *See* 24 Op. O.L.C. at 197 (suggesting that federal government's ability to regulate marine environments essential to question of control of EEZ under Antiquities Act).

Third, the federal government's control over the EEZ is unrivaled. As explained, the United States exercises sovereign rights there for a host of purposes, including natural-resource extraction, fisheries management, marine conservation, and the establishment of artificial islands. No other person or entity, public or private, comes close to matching the Government's dominion over that area — whether for the purposes discussed already or for any others. That matters a great deal for understanding the sufficiency of the Government's control over the EEZ. For just as control can be defined by the *presence* of dominion or authority over something, so the *absence* of control can be underscored by the presence of someone else's dominion or authority over that same thing. That no one else challenges the federal government's control over the EEZ thus suggests that it possesses, rather than lacks, control of the area.

Yet, as discussed earlier, the Government does not claim to exercise complete control over the EEZ. Other nations may exercise "the freedoms of navigation and overflight" there, as well as the "freedom to lay submarine cables and pipelines." Restatement (Third) of Foreign Relations Law § 514(2). But those limitations on U.S. control in the EEZ are not all that different from those in the

territorial sea, which the Supreme Court has affirmed *is* controlled by the federal government. *See California*, 436 U.S. at 36 (discussing *California*, 332 U.S. at 805). In the territorial sea, as mentioned, foreign ships maintain "the right of innocent passage" — defined as passage that is "not prejudicial to the peace, good order, or security of the coastal state." Restatement (Third) of Foreign Relations Law § 513(1)(a)-(b). Foreign ships thus pass through the territorial sea, just as they pass through the EEZ. More broadly, the presence of foreign ships and undersea cables does not vitiate the other forms of Government control of the EEZ, discussed in detail above.

These three considerations demonstrate that, under any of the range of definitions referenced above — to regulate, to dominate, to overpower, to curb, to exercise restraining or directing influence over — the federal government's control here is adequate. It bears mentioning that this conclusion is not novel. In 2000, the Office of Legal Counsel in the Department of Justice — in an opinion drafted by Randolph Moss, now a highly regarded judge in this district — concluded, based on very similar considerations, that the federal government controlled the EEZ for purpose of the Antiquities Act. *See* 24 Op. O.L.C. at 195-97. The Government thus appears to have maintained for over fifteen years the same understanding prior to the creation of the Monument at issue here. Likewise, several courts, while not deciding the issue raised in this case, have described the EEZ as subject to control of the federal government. *See Native Vill. of Eyak*, 154 F.3d at 1091 (United States has "sovereign control and jurisdiction

. . . to waters lying between 3 and 200 miles off the coast"); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 965 n.3 (4th Cir. 1999) (United States has "exclusive control over economic matters involving fishing, the seabed, and the subsoil"). Even Congress has described the area as "subject to [federal] jurisdiction and control." 43 U.S.C. § 1331(a). This Court can be added to that list. For all the reasons outlined, the federal government controls the EEZ for purposes of the Antiquities Act.

3. *Plaintiffs' Counterarguments*

Not ready to head back to shore, the Lobstermen offer three arguments to the contrary that the Court has yet to address. First, they claim that interpreting the Antiquities Act to reach the EEZ conflicts with the Fifth Circuit's decision in *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978). *See* Pl. Opp. at 33-34. The Court disagrees for two reasons. For one, that decision predated President Reagan's Proclamation establishing U.S. control over the EEZ. While the federal government had previously claimed dominion over the area's minerals, *see* Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945), it had not yet claimed the broader authority discussed in detail above. The non-binding case might well have come out differently had it occurred after Reagan's proclamation.

For another, that decision addressed the Antiquities Act's reach with respect to a historic — rather than a scientific — object. As the Office of Legal Counsel has explained, the Government might well have the authority to declare a scientific object in the

EEZ to be a national monument to advance conservation goals, yet lack the authority to declare a historic object one to advance historic-preservation goals. *See* 24 Op. O.L.C. at 196. That is because the Government possesses the sovereign right to regulate the EEZ for purposes of marine conservation, which the Court found persuasive above, yet lacks any sovereign right to regulate or salvage historic objects there. While the Court need not decide the matter, the upshot is that the Fifth Circuit's decision could be correct if decided today and still have no bearing on this Court's conclusion that the President may establish this national monument in the EEZ.

Second, Plaintiffs maintain that the Antiquities Act cannot reach certain territory that was not controlled by the United States when the Act was passed in 1906. *See* Pl. Opp. at 17-18. But Congress did not freeze the Act's coverage in place in 1906. Rather, by referring to "lands controlled by the U.S. Government," the legislature intended for the Act's "reach [to] change[ ] as the U.S. Government's control changes." 24 Op. O.L.C. at 191. In line with that understanding, Presidents have declared national monuments in areas that were not under U.S. control in 1906. *See, e.g.*, Proclamation No. 3443, 76 Stat. 1441 (1961) (Buck Island in the Virgin Islands). Plaintiffs concede that "Congress anticipated the federal government obtaining additional lands within categories covered by the Act," but insist that Congress did not want the Act to extend to "areas that were categorically ineligible for federal ownership or control in 1906." Pl. Opp. at 17-18. Any distinction between the two is illusory. The federal government did not control lands in the Virgin Islands in 1906, but

once it gained such control, it could declare national monuments there. Likewise, the federal government did not control the waters from 3 to 200 miles off the coast in 1906, but once it gained such control under international and domestic law, it could declare national monuments there. Plaintiffs offer no evidence that Congress would have intended to treat the EEZ and the Virgin Islands any differently — if expansion in U.S. control and ownership can expand the Act's scope as to one, logically it can expand the Act's scope as to the other.

The Lobstermen finally resort to a classic slippery-slope argument: If the Act reaches the EEZ, it could reach anywhere, up to and including private property. *Id.* at 20-21. Plaintiffs can rest easy: The slope, assuming there is one, has plenty of traction. To start, the Court does not understand the Antiquities Act to reach anywhere the Government can regulate. Such a reading would indeed expand the Act's scope to a host of private lands outside the Government's control. Rather, in concluding that the Antiquities Act reaches the EEZ, the Court has emphasized that the Government possesses broad dominion over the area, that it possesses specific regulatory authority over the subjects of the Monument, and that its authority there is unrivaled. The last point particularly addresses Plaintiffs' concern about private property. Had a private person or entity exercised some control or ownership over the EEZ, that would indicate the federal government lacked the requisite control over the area. *See supra* at 27. In all, the Court's narrow reading of "land controlled by the federal government" poses few of the hurricane-is-coming concerns Plaintiffs raise.

D. Smallest Area

Finally nearing harbor, the Court addresses Plaintiffs' fact-specific arguments about the boundaries of the Monument. Recall that the Antiquities Act requires monuments to be "confined to the smallest area [of land] compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). But to obtain judicial review of claims about a monument's size, plaintiffs must offer specific, nonconclusory factual allegations establishing a problem with its boundaries. *See Mountain States*, 306 F.3d at 1137. Plaintiffs allegations here do not rise to that level.

The Lobstermen offer the following factual allegations about the Monument's size: (1) "The monuments['] boundaries bear little relation to the canyons and seamounts, thereby prohibiting much fishing outside of these areas that would have no impact on the canyons, seamounts, or the coral that grows on them. Between Retriever and Mytilus Seamounts, for instance, the monument encompasses areas that are dozens of miles from the nearest seamount. Yet in other areas, the monument's boundary lies right next to a seamount excluding areas that are at most only several miles away"; and (2) "the monument's canyon unit broadly sweeps in the entire area between the canyons, as well as significant area closer to the shore than the canyons." Compl., ¶¶ 73-74. The crux of the Lobstermen's argument seems to be that the Monument reserves large areas of ocean beyond the objects the Proclamation designated for protection. *Id.* The problem is that this position is based on the incorrect

factual assumption that the only objects designated for protection are the canyons and seamounts themselves. The Proclamation makes clear that the "objects of historic and scientific interest" include not just the "canyons and seamounts" but also "the natural resources and ecosystems in and around them." Proclamation at 2. Insofar as Plaintiffs allege otherwise, the Court need not accept such allegations as true because they "contradict exhibits to the complaint or matters subject to judicial notice." *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004).

With that cleared up, it becomes obvious that Plaintiffs' allegations are insufficient. Even if it were true that the Monument's boundaries do not perfectly align with the canyons and seamounts, that would not call into question the Monument's size. As Intervenors explain, the Monument's boundaries presumably align with the resources and ecosystems around them. *See* ECF No. 44 (Intervenors Reply) at 24. Plaintiffs allege no facts to the contrary.

The Lobstermen insist that the boundaries cannot be based on the ecosystems and natural resources because they are not "objects" under the Antiquities Act. *See* Compl., ¶ 75. Not according to the D.C. Circuit and the Supreme Court, which have concluded that ecosystems are objects of scientific interest under the Act. *See Alaska*, 545 U.S. at 103; *Cappaert*, 426 U.S. at 141-42; *Cameron*, 252 U.S. at 455-56; *see also Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002) ("Inclusion of such items as ecosystems and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features."). Plaintiffs also suggest that highly

migratory species cannot be designated as monuments under the Act because they are not "'situated' upon federal lands." Pl. Opp. at 39-40. Their concerns are misplaced: the Proclamation did not designate highly migratory species as objects — it instead so designated the *ecosystems* surrounding the canyons and seamounts. *See* Proclamation at 2. Insofar as they might relatedly suggest that the ecosystems are not situated on federal lands, they would be mistaken. As the Proclamation explains, the protected ecosystems are formed by "corals" and "other structure-forming fauna such as sponges and anemones" that physically rest on, and are otherwise dependent on, the canyons and seamounts themselves. *Id.*

In all, Plaintiffs offer no factual allegations explaining why the entire Monument, including not just the seamounts and canyons but also their ecosystems, is too large. The Court therefore need not undertake further review of the matter.

IV. Conclusion

For these reasons, the Court will grant Defendants' Motion to Dismiss under Rule 12(b)(1). A separate Order so stating will issue this day.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: October 5, 2018

United States Court of Appeals
For The District of Columbia Circuit

No. 18-5353 **September Term, 2019**

1:17-cv-00406-JEB

Filed On: February 28, 2020

Massachusetts Lobstermen's Association, et al.,

Appellants

v.

Wilbur Ross, in his official capacity as Secretary of Department of Commerce, et al.,

Appellees

BEFORE: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Garland, Griffith, Millett, Pillard, Wilkins, Katsas*, and Rao*, Circuit Judges; and Ginsburg, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

* Circuit Judges Katsas and Rao did not participate in this matter.

Filed 3/7/2017

JONATHAN WOOD,* D.C. Bar No. 1045015
E-mail: jw@pacificlegal.org
TODD F. GAZIANO,* Tex. Bar No. 07742200
E-mail: tfg@pacificlegal.org
Pacific Legal Foundation
3033 Wilson Blvd., Suite 700
Arlington, Virginia 22201
Telephone: (202) 888-6881

DAMIEN M. SCHIFF,* Cal. Bar No. 235101
E-mail: dms@pacificlegal.org
JOHANNA B. TALCOTT,* Cal. Bar No. 311491
E-mail: jbt@pacificlegal.org
JOSHUA P. THOMPSON, Cal. Bar No. 250955
E-mail: jpt@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111

**Pro Hac Vice* pending

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MASSACHUSETTS LOBSTERMEN'S ASSOCIATION 8 Otis Place Scituate, Massachusetts 02066	No. 1:17-cv-00406

ATLANTIC OFFSHORE LOBSTERMEN'S ASSOCIATION
221 Third Street
Newport, Rhode Island 02840

LONG ISLAND COMMERCIAL FISHING ASSOCIATION
P.O. Box 191
Montauk, New York 11954

GARDEN STATE SEAFOOD ASSOCIATION
212 West State Street
Trenton, New Jersey 08608

RHODE ISLAND FISHERMEN'S ALLIANCE
P.O. Box 337
East Greenwich, Rhode Island 02818

Plaintiffs,

v.

WILBUR J. ROSS, JR., in his official capacity as Secretary of Department of Commerce
1401 Constitution Ave. NW
Washington, DC 20230

BENJAMIN FRIEDMAN, in his official capacity as Deputy Undersecretary for Operations for the National Oceanic and Atmospheric Association
1401 Constitution Ave. NW,
Room 5128
Washington, DC 20230

RYAN ZINKE, in his official capacity as Secretary of the Department of Interior
1849 C Street, NW
Washington, DC 20240

DONALD J. TRUMP, in his official capacity as President of the United States
1600 Pennsylvania Ave. NW
Washington, DC 20006

JANE DOE, in her official capacity as Chairman for the Council on Environmental Quality
722 Jackson Place NW
Washington, DC 20506

Defendants.

COMPLAINT

Introduction

1. The Antiquities Act of 1906 authorizes the President to declare historic artifacts, historic landmarks, and other objects of historic or scientific interest "situated upon the lands owned or controlled by the Government of the United States" as national monuments. The President may also reserve "parcels of land" for a monument's protection. These lands must be limited to "the smallest area compatible with proper care and management of the objects to be protected."

2. On September 15, 2016, the President declared an approximately 5,000 square mile—roughly the size of Connecticut—area of the Atlantic Ocean to be the Northeast Canyons and Seamounts National Marine Monument. This area lies 130 miles from the New England coast and has been an important commercial fishery for decades. Under the President's unilateral declaration, the entire area is off-limits to many commercial fishermen, with the rest ejected after seven years.

3. In declaring the monument, the President exceeded his power under the Antiquities Act. The ocean is not "land owned or controlled by the Federal government" and, thus, is not within the President's monument proclaiming authority. Even if the President could lawfully declare monuments beyond the United States' territorial sea, this 5,000 square mile monument would nonetheless violate the Antiquities Act because it is not the smallest area

compatible with protecting the canyons and seamounts on which it is purportedly based.

4. Therefore, the Massachusetts Lobstermen's Association, Atlantic Offshore Lobstermen's Association, Long Island Commercial Fishing Association, Garden State Seafood Association, and Rhode Island Fishermen's Alliance ask this Court to declare the designation unlawful and enjoin enforcement of its regulations and prohibitions against fishing.

Jurisdiction and Venue

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); § 2201 (authorizing declaratory relief); and § 2202 (authorizing injunctive relief).

6. Venue is proper under 28 U.S.C. § 1391(b), because at least one defendant resides in this district and a substantial part of the events giving rise to this complaint occurred here.

Parties

Plaintiffs

7. The Massachusetts Lobstermen's Association was established in 1963 to represent the interests of its 1,800 members and the fishery on which their livelihoods depend. Its mission reflects the interdependence of species conservation and a thriving lobster fishery. The association actively engages with state and regional government agencies

to sustainably manage the ecosystem. For instance, it has helped the industry shift equipment to reduce incidental impacts on whales. It also worked with fishery management agencies to reduce the number of traps in the region by 30% and, prior to the monument designation, was working to reduce traps by another 25%. The association also educates its members on best practices and regulatory issues through a monthly newspaper and social media. And the association serves as the voice of the Massachusetts lobster industry in the state legislature and regulatory agencies. As the representative of the Massachusetts' lobstermen, the association, through this lawsuit, seeks to protect its members' interests germane to its purposes. *Cf. Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977) (standard for organizations to bring lawsuits on behalf of their members in a representative capacity).

8. The Massachusetts Lobstermen's Association members would have standing to challenge the monument in their own right but their participation is not required for this lawsuit. *Cf. id*. The association has approximately 250 members who will be adversely affected, directly or indirectly, by the monument. It will deplete the value of some of the lobstermen's permits—a key part of these small businesses' value—put more pressure on the fisheries left open to fishermen, and impact coastal businesses that depend on a productive lobster industry, including marinas, bait dealers, mechanics, processors, and restaurants. Based on the significant impacts this monument will have on the industry, the association spoke out against it in the only public town hall held on the proposal. It also signed onto letters

opposing the monument as bad for the economy, the environment, and exceeding the President's power under the Antiquities Act.

9. The Atlantic Offshore Lobstermen's Association was founded in 1973 to sustain and enhance the offshore lobster fishery. Its membership includes the owners of 45% of the permits for offshore lobster and Jonah crab and 57% of the total traps for these species. It also represents dozens of shoreside businesses related to this industry. The association educates its members and the public about issues affecting the offshore lobster fishery. It also supports efforts to improve the resource, protect habitat, and other conservation efforts that benefit the lobster industry. As the representative of the East Coast's lobstermen, the association, through this lawsuit, seeks to protect its members' interests germane to its purposes. *Cf. Hunt*, 432 U.S. 333.

10. The Atlantic Offshore Lobstermen's Association's members would have standing to challenge the monument but their individual participation is not required for this lawsuit. *Cf. id*. The monument designation will displace over 11,000 lobster traps used by members of the Atlantic Offshore Lobstermen's Association. These traps are hauled in weekly, year-round and are thus an important source of employment and income for the industry. The association estimates the impact on the industry will be $3 million. The displacement of these traps will cause severe disruption to the industry and the environment. It will increase conflicts with other gear as lobstermen invade other fisheries. Although the lobster fishery in the Gulf of Maine/Georges Bank

is healthier than the Southern New England lobster fishery, this displacement will put further pressure on that fishery.

11. The Long Island Commercial Fishing Association has represented Long Island's commercial fishermen since 2001. Its members include more than 150 businesses, boats, or individual fishermen who fish for a variety of species. The Long Island Commercial Fishing Association's trawl and longline fishermen have been injured by the monument declaration, which forbids them from fishing in the area. Previously, this was an important area for New York's fluke, whiting, squid, swordfish, and tuna fishermen. Prior to the monument's declaration, the Association's leaders and members met with members of the Council on Environmental Quality to discuss the adverse impacts the monument would have on their industry and individual members. The association estimates that the loss to New York fishermen alone will be $1.6 million per year. But these impacts are further multiplied when you consider impacts to shoreside businesses related to the fishermen, like marinas and restaurants. As the representative of Long Island's commercial fishermen, the association, through this lawsuit, seeks to protect its members interests germane to its purposes. *Cf. Hunt*, 432 U.S. 333. The association's member would have standing to challenge the monument, but their individual participation is not required for this lawsuit. *Cf. id.*

12. The Garden State Seafood Association represents the interests of New Jersey fishermen and fishery dependent businesses. It is active on

regulatory issues at both the state and federal level and helps to coordinate fishing industry representatives throughout the country. Founded in 1999, Garden State Seafood Association is a trade association for New Jersey's commercial fishing industry. Its 200 members include fishing vessel owners and operators throughout the state, from Belford to Cape May. The Association works with local, state, and federal governments, researches, and others to promote the continued sustainability of New Jersey's $100 million commercial fishing industry. It has also played a key role in working with regulators to ensure that commercial fishing not have adverse environmental consequences. In particular, it has worked with the Mid-Atlantic Fishery Management Council to develop a rule to protect deep-sea coral in that region, while maintaining a productive fishery.

13. Founded in 2007, the Rhode Island Fishermen's Alliance is the state's largest commercial fishing industry advocacy organization, representing 150 members from the state's two major ports. It has been extensively involved in every major issue that has confronted Rhode Island's fishing community since its inception, including fisheries management, collaborative research on sustainable fishing, state and federal lobbying, and the establishment of festivals to promote awareness of the importance of this industry to the community. Many of its members are trawl fishermen who have worked in the area included within the monument designation. Based on the impacts of the first few months that this fishing has been prohibited, the alliance estimates that its fishermen will lose more than $3 million in annual income. The impact on the many businesses that

depend on a thriving commercial fishing industry are likely to be three times that. Representing its members, the alliance participated in the limited public process during the President's consideration of the monument, including attending a town hall and meetings with representatives from the Council on Environmental Quality.

Defendants

14. Donald J. Trump is the President of the United States and is sued in his official capacity. His predecessor, President Barack Obama, issued the proclamation establishing the monument.

15. Wilbur J. Ross, Jr. is the Secretary of Commerce and, under the proclamation, is charged with enforcing the proclamation's fishing prohibitions. He is also required to issue a joint management plan for the monument.

16. Benjamin Friedman is the National Oceanic and Atmospheric Association's Deputy Under-secretary for Operations and is sued in his official capacity. The proclamation establishing the monument charges the Secretary of Commerce, through the National Oceanic and Atmospheric Administration, with responsibility for managing the monument. Upon information and belief, Mr. Friedman exercises the authority over the monument given to the National Oceanic and Atmospheric Administration.

17. Ryan Zinke is the Secretary of Interior and is sued in his official capacity. The proclamation establishing the monument directs the Secretary of

Commerce to consult with the Secretary of Interior on decisions about how to manage the monument. Together, the Secretaries are required to issue a joint management plan for the monument and implement the proclamation's fishing prohibitions.

18. Jane Doe is the Chairman for the Council on Environmental Quality which, on information and belief, consulted with the President and purportedly collected evidence to support the proclamation. Nancy Sutley, the chairman when the monument proclamation was issued, has since stepped down and no successor has been announced.

Legal Background

The Antiquities Act of 1906

19. Responding to reports of pueblo ruins looted in the southwest, Congress enacted the Antiquities Act of 1906 to empower the President to quickly and unilaterally protect these precious antiquities.

20. Under the Antiquities Act, the President may declare historic landmarks, historic structures, and other objects of historic or scientific interest "situated on land owned or controlled" by the federal government to be national monuments. 54 U.S.C. § 320301(a). To protect these objects, the President may reserve "parcels of land," if "confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.* § 320301(b). The statute also directs the agencies who manage the monument to issue uniform rules and regulations to carry out the purposes of the act. *Id.* § 320303.

21. The Antiquities Act "places discernible limits" on the President's power to declare monuments. *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002). Therefore, courts are "obligated to determine whether statutory restrictions have been violated." *Id.*

22. The first of those limits is that only "historic landmarks," "historic and prehistoric structures," and similar "objects of historic or scientific interest" may form the basis of a monument designation. 54 U.S.C. § 320301(a); *cf. Yates v. United States*, 135 S. Ct. 1074 (2015) (applying *noscitur a sociis* and statutory context to hold that a fish is not a "tangible object" in the context of the Sarbanes-Oxley Act).

23. The second limit is that a monument may only be designated for objects on "land owned or controlled by the Federal government[.]" 54 U.S.C. § 320301(a). Consistent with Congress' purpose of protecting historic Indian artifacts, this phrase includes Indian lands and federal territories that are controlled but not owned by the federal government. In 1906, most of the Southwest, where these objects were located, was Indian land or federal territory. The Antiquities Act does not authorize the President to designate monuments on anything other than lands "owned or controlled" by the federal government. A monument may not be designated on privately owned land. Nor may one be designated beyond the nation's territory, including the high seas. *Cf. Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337-40 (5th Cir. 1978) (holding that the Antiquities Act does not apply to a 1622 shipwreck beyond the nation's territorial sea).

24. A third limit is that the area set aside for the monument must be "confined to the smallest area compatible with proper care and management of the objects to be protected[.]" 54 U.S.C. § 320301(b). Congress has twice amended the Antiquities Act in response to Presidents abusing this power by making huge monument designations. *See* 54 U.S.C. § 320301(d) (no monuments can be designated in Wyoming); 16 U.S.C. § 3213 (no monuments larger than 5,000 acres in Alaska).

Federal authority over the high seas, including the Exclusive Economic Zone

25. In 1906, the United States' territorial reach extended only three miles off the coast—the limits of the territorial sea. Beyond that was the high seas, which were international waters. By proclamation, President Reagan asserted that the territorial sea extends up to 12 miles off the coast. *See United States v. Alaska*, 521 U.S. 1, 8-9 (1997).

26. Under the Convention on the Law of the Sea—which has never been ratified by Congress—the next 188 miles from the coast are the Exclusive Economic Zone.

27. Nations enjoy limited regulatory authority over the Exclusive Economic Zone but do not have the level of sovereignty they enjoy within their territories. *See* Restatement (Third) of Foreign Relations Law § 514 cmt. c. For instance, nations may regulate oil drilling and fishing in this area but may not interfere with navigation or the laying of cables.

Federal regulation of ocean fisheries

28. Congress has exercised its limited authority to regulate the Exclusive Economic Zone to protect the environment by adopting statutes specifically directed to this area of the ocean and establishing procedures to protect against excess restrictions on its sustainable use.

29. In 1972, Congress adopted the National Marine Sanctuaries Act, which is aimed at protecting sensitive areas of the Exclusive Economic Zone to the extent the United States can. *See* 16 U.S.C. §§ 1431-1445(b). This statute permits the Secretary of Commerce to designate marine sanctuaries within the Exclusive Economic Zone based on twelve factors explicitly set out in the statute and only after providing notice to the public and consultation with state regulators. 16 U.S.C. §§ 1433-1434. If a marine sanctuary is established, the Regional Fishery Management Council, not the Secretary, has primary authority to regulate fishing to the extent required to protect it. 16 U.S.C. § 1434(a)(5). The statute encourages all public and private uses of the resources in a marine sanctuary, to the extent compatible with the sanctuary's protection.

30. In 1976, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act, which is more commonly known as the Magnuson-Stevens Act. 16 U.S.C. § 1801, *et seq*. This is the primary law governing fisheries management in the Exclusive Economic Zone. It is administered by eight regional fishery management councils, which must include representatives of federal and state agencies as well the fishing industry.

31. Pursuant to the Magnuson-Stevens Act, the regional councils prepare an annual stock assessment for each species commercially harvested in a fishery. If that assessment indicates that a species is being overfished, the regional council sets an annual catch limit. As a result of this regulatory program, nearly 90% of fisheries managed under the statute maintain healthy, sustainable harvest levels below their annual catch limits.

32. In addition to regulating the levels of harvest, the regional councils regulate the gear used to fish, to reduce impacts to the ecosystem and incidental bycatch.

33. Unlike the Antiquities Act, these statutes refer to the ocean or Exclusive Economic Zone specifically, rather than "lands owned or controlled" by the federal government, and tailor the degree of environmental protection to the limited authority the federal government enjoys in this area.

Factual Allegations

Georges Bank fishery

34. The Georges Bank is an elevated area of sea floor off the Massachusetts coast that separates the Gulf of Maine from the Atlantic Ocean.

35. Like much of the continental shelf off the United States' east coast, canyons pockmark the Georges Bank's edge.

36. Although a few companies have explored for oil under the Georges Bank, none of those efforts have

been successful. Consequently, the federal government has enforced a moratorium on further drilling and exploration for decades.

37. For centuries, the Georges Bank has supported lucrative fisheries. The iconic fishing communities of New England and throughout the East Coast sprang up because of the value of this fishery.

38. Today, this area supports significant fisheries for a wide variety of species of fish and shellfish. Those fisheries provide an important source of income and employment for fishermen throughout the northeast, including Plaintiffs' members.

39. The commercial fisheries are part of a rich ecosystem that also features whales, sharks, sea turtles, and other ocean species.

40. Beyond Georges Bank lie several seamounts rising from the ocean floor. These too support fish and other species. However, they are not the subject of significant commercial fishing.

41. Deep-sea coral grows on both the canyons and seamounts.

42. Fishermen are careful to avoid areas where coral is present because it severely damages their gear, costing the fishermen more than any benefit that could be obtained from fishing in this area.

Existing management

43. The New England Fishery Management Council manages the Georges Bank fishery under the Magnuson-Stevens Act. Since that statute was enacted, it has worked with industry, state and federal government, and nongovernment organizations to improve sustainability of the fishery. These efforts have included regulation of the equipment and methods fishermen use, the areas they use them, as well as enforcing catch limits.

44. The Atlantic States Marine Fisheries Commission manages lobster fishing on the Georges Bank under an interstate compact. It too has worked with industry, state and federal government, and nongovernmental organizations to improve sustainability. In particular, the Commission, working with several of the Plaintiffs, has retired traps in order to reduce pressures on the lobster stock. Those efforts have been very successful and the Commission's latest stock report shows record abundance of lobster in Georges Bank and the Gulf of Maine.

Proposal to designate a monument in the North Atlantic

45. In 2015, the penultimate year of former-President Obama's second term, several environmental groups petitioned the President to designate a monument in the Atlantic Ocean before his presidency ended.

46. The proposal met with substantial opposition from both government and industry.

47. On September 18, 2015, the Massachusetts Lobstermen's Association, joined by the Atlantic Offshore Lobstermen's Association and several other fishermen organizations, sent a letter to the Council on Environmental Quality opposing the potential monument. That letter explained the many steps taken by the industry groups, working with state and federal fisheries managers, to improve sustainability of this fishery. This has included developing a prohibition against harmful gear and improving fishing methods during the region. The fishery in this area is thriving precisely because of the success of these efforts. Exhibit 1 is an accurate copy of the Massachusetts Lobstermen's Association letter.

48. In November 2015, Governor Baker of Massachusetts sent a letter to the President criticizing the proposed monument designation, arguing that it would undermine ongoing efforts to sustainably manage the fishery.

49. On May 9, 2016, the Atlantic States Marine Fisheries Commission also submitted a letter on the potential designation of a monument designation. The letter noted that the New England Fishery Management Council is already working on an Omnibus Deep-Sea Coral Amendment to protect corals in all the canyons in its region, which could be frustrated by a monument designation. The letter specifically requested that any monument designation not prohibit mid-water or surface fishing methods, as these could not impact deep-sea coral.

50. On June 27, 2016, the eight Regional Fishery Management Councils jointly filed a letter on the possibility of a monument designation in the North

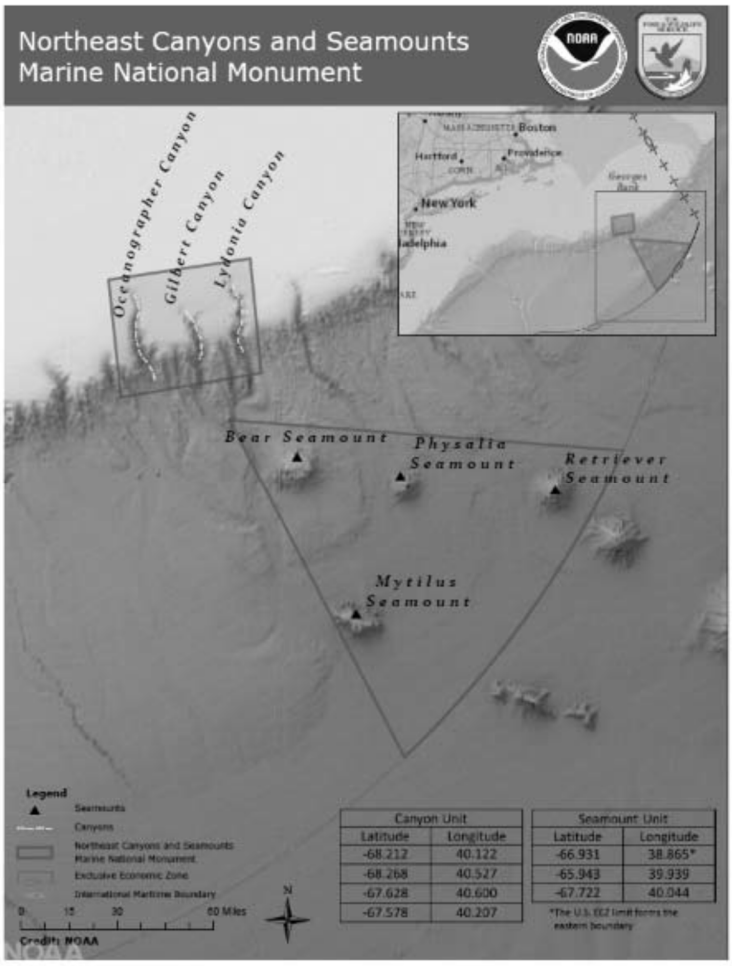
Atlantic. That letter specifically noted that a monument designation would frustrate the Councils' efforts to responsibly regulate fisheries and ultimately harm the environment. Specifically, the Councils explained "[m]arine monument designations can be counterproductive as they may shift fishing effort to less sustainable practices . . ." Exhibit 2.

51. On September 14, 2016, the Southern Georges Bank Coalition, a group made up of many of the Plaintiffs and their members, sent the Council on Environmental Quality a letter opposing the potential monument designation. The Coalition argued that the Antiquities Act does not authorize the President to designate monuments beyond the nation's territorial sea and, even if it did, the proposed monument was too big to comply with the statute. The Coalition further argued that management of the fishery should remain under the public, collaborative, and science-based process established by the Magnuson-Stevens Act. Exhibit 3 is an accurate copy of the Southern Georges Bank Coalition letter.

Northeast Canyons and Seamounts Marine National Monument

52. Despite these objections, on September 15, 2016, President Obama issued a proclamation declaring the Northeast Canyons and Seamounts Marine National Monument. The proclamation describes the monument as consisting of two units. The Canyons unit includes three large underwater canyons and two smaller ones, and covers nearly 1,000 square miles (approximately 640,000 acres). The Seamounts Unit includes four seamounts (underwater mountains) and covers nearly 4,000

square miles (approximately 2.56 million acres). Exhibit 4 is an accurate copy of the President's Proclamation.



53. The proclamation asserts that the canyons and seamounts, and the natural resources and ecosystems in and around them, are "objects of

historic and scientific interest" and form the basis for the monument designation.

54. The three underwater canyons start at the edge of the continental shelf and drop thousands of meters to the ocean floor. The proclamation notes that deep-sea corals live in the canyon and form the foundation of a deep-sea ecosystem. The steep sides of the canyons concentrate phytoplankton, which draw fish, whales, and other ocean species.

55. The four seamounts are part of a larger seamount chain formed by extinct volcanoes. The seamounts also support deep-sea coral and several ecosystems.

56. The proclamation also asserts that the ecosystems in the huge area around the canyons and seamounts have drawn scientific interest. The ecosystem includes sharks, whales, turtles, and many highly migratory fish.

57. The proclamation offers no explanation for why this huge section of the ocean is "lands owned or controlled" by the federal government. Instead, it simply asserts that protecting the marine environment is in the public interest.

58. The proclamation offers no justification for why this roughly 5,000 square mile (3.2 million acre) area is the smallest area compatible with protecting the monument.

59. The proclamation divides the authority to manage the monument between the Secretaries of Commerce and Interior. The Secretary of Commerce,

through the National Oceanic and Atmospheric Administration, is responsible for managing activities and species within the monument. The Secretary of Interior is responsible for managing the area pursuant to its statutory authorities. Together, the Secretaries are directed to prepare a joint management plan within 3 years and promulgate regulations to protect the monument.

60. Recognizing that the federal government's authority to regulate this area is limited by international law, the proclamation forbids the Secretaries from adopting and implementing any regulations which would exceed the federal government's authority even if necessary to protect the monument. In particular, the proclamation forbids the Secretaries from restricting the ships that can pass through the area or the planes that can fly over it or regulating any lawful uses of the high seas.

61. The proclamation directs the Secretaries to specifically prohibit: energy exploration and development within the monument; the taking or harvesting of any living or nonliving resources within the monument; drilling, anchoring, or dredging in the area, unless for scientific reasons or constructing or maintaining cables; and commercial fishing or the possession of commercial fishing gear, if available for immediate use.

62. The proclamation allows the Secretaries, according to their unconstrained discretion, to permit: research and scientific exploration; recreational fishing; commercial fishing with some gear types but not others for red crab, Jonah crab, and lobster, but only for the next 7 years; other activities that do not

impact any resource within the monument; and the construction and maintenance of underwater cables.

63. On November 14, 2016, the proclamation's prohibition against all fishing in the area except for lobster and red crab went into effect. Since that time, none of the Plaintiffs' members who previously fished for other species in the area have been able to do so.

Allegations Supporting
Declaratory and Injunctive Relief

64. Unless a permanent injunction is issued to forbid the implementation of the proclamation's fishing prohibitions, Plaintiffs are and will continue to be irreparably harmed. They are currently and continuously injured by the proclamation's restrictions. The fishermen are suffering and will continue to suffer a diminution of income, reduced fishing opportunities, and depletion of their investment in their boats and permits.

65. Plaintiffs have no plain, speedy, and adequate remedy at law.

66. If not enjoined by this Court, Defendants will continue to enforce the proclamation's fishing prohibitions and adopt regulations further restricting fishing within the monument.

67. An actual and substantial controversy exists between Plaintiffs and Defendants over the President's power to proclaim monuments in the ocean beyond the nation's territorial sea.

68. This case is currently justiciable because the proclamation is self-executing and immediately forbids many types of fishing within the monument and requires the Secretaries to phase out remaining fishing from the area over the next seven years. Plaintiffs are currently and continuously injured by the proclamation's fishing restrictions.

69. Injunctive and declaratory relief are therefore appropriate to resolve this controversy.

Claim for Relief

(Violation of the Antiquities Act,
54 U.S.C. §§ 320301-320303)

70. The Antiquities Act limits the President's authority to designate monuments to historic artifacts, historic landmarks, and similar objects of historic or scientific interest "situated on land owned or controlled by the Federal government." 54 U.S.C. § 320301(a). Any designation must be "the smallest area compatible with proper care and management" of the objects protected by the monument. *Id.* § 320301(b).

A. The President exceeded his power by designating a monument on the ocean rather than "lands owned or controlled" by the federal government

71. The Northeast Canyons and Seamount National Marine Monument purports to designate a monument in the ocean 130 miles from the nation's coast. This area of the ocean is not "lands owned or controlled" by the federal government. Therefore, the

Antiquities Act does not authorize the President to establish the Northeast Canyon and Seamounts Marine National Monument.

B. The President exceeded his power by designating a monument that is not the smallest area compatible with the care and management of antiquities and similar objects of historic or scientific interest

72. Even if the Antiquities Act authorized the President to declare a monument in the ocean beyond the territorial sea, the Northeast Canyons and Seamounts Marine National Monument would violate the statute because it is not "the smallest area compatible with proper care and management" of the canyons and seamounts on which it is purportedly based.

73. The monuments boundaries bear little relation to the canyons and seamounts, thereby prohibiting much fishing outside of these areas that would have no impact on the canyons, seamounts, or the coral that grows on them. Between Retriever and Mytilus Seamounts, for instance, the monument encompasses areas that are dozens of miles from the nearest seamount. Yet in other areas, the monument's boundary lies right next to a seamount excluding areas that are at most only several miles away.

74. Similarly, the monument's canyon unit broadly sweeps in the entire area between the canyons, as well as a significant area closer to shore than the canyons. Many of these areas are miles from the nearest canyon's edge and fishing would not adversely affect the canyons.

75. To the extent the monument's overly large size is not defended based on the canyons or seamounts but instead the area's marine ecosystem, that too would exceed the President's power under the Antiquities Act. An ecosystem is not an "object" under the Antiquities Act. *Cf. Yates*, 135 S. Ct. 1074. The individual fish and shellfish that make up that ecosystem are also not "objects" for the purposes of the statute.

Request for Relief

Plaintiffs respectfully request the following relief:

1. A declaration that the Antiquities Act does not authorize the President to establish ocean monuments and that the establishment of the Northeast Canyons and Seamounts National Marine Monument is consequently unlawful;

2. An injunction forbidding the President, Secretary of Commerce, and Secretary of Interior from enforcing any of the proclamation's fishing prohibitions;

3. An injunction forbidding the Secretary of Commerce and Secretary of Interior from issuing any further regulations restricting fishing pursuant to the proclamation;

4. An award of attorney's fees, expenses, and costs; and

5. Any other relief the Court deems just and proper.

DATED: March 7, 2017.

Respectfully submitted,

/s/ Joshua P. Thompson

JONATHAN WOOD,*
D.C. Bar No. 1045015
E-mail: jw@pacificlegal.org
TODD F. GAZIANO,*
Tex. Bar No. 07742200
E-mail: tfg@pacificlegal.org
Pacific Legal Foundation
3033 Wilson Blvd.,
Suite 700
Arlington, Virginia 22201
Telephone: (202) 888-6881

*_Pro Hac Vice_ pending

JOSHUA P. THOMPSON,
Cal. Bar No. 250955
E-mail: jpt@pacificlegal.org
Damien M. Schiff,*
Cal. Bar No. 235101
E-mail: dms@pacificlegal.org
JOHANNA B. TALCOTT,*
Cal. Bar No. 311491
E-mail: jbt@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111

Attorneys for Plaintiffs

EXHIBIT 1

Massachusetts Lobstermen's Association, Inc.
8 Otis Place — Scituate, MA 02066
Bus. (781) 545-6984 Fax. (781) 545-7837

September 18, 2015

President Barack Obama
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

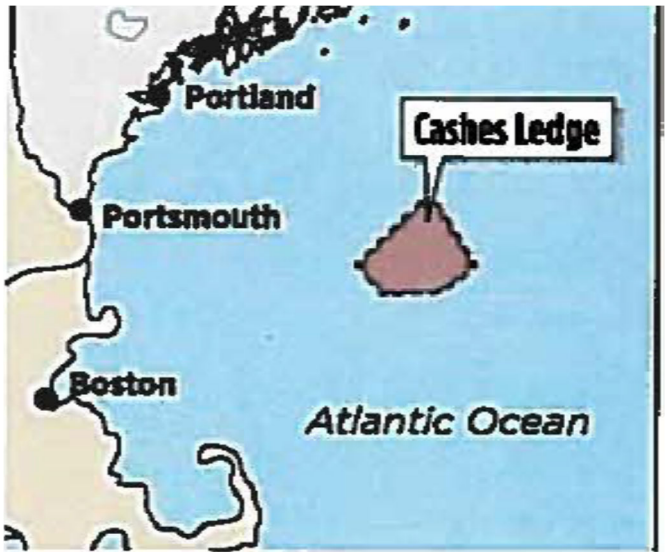
RE: Opposition to Cashes Ledge and the
New England Canyons designation a National
Monument with in the region of the Gulf of Maine

Dear Mr. President;

The Massachusetts Lobstermen's Association along with the following organizations: Atlantic Offshore Lobstermen's Association, Maine Lobstermen's Association, Downeast Lobstermen's Association, Maine Lobstermen's Union, Stellwagen Bank Charter Boat Association, Rhode Island Lobstermen's Association, Gloucester Fisheries Commission and the American Bluefin Tuna Association (Organizations); collectively represent an estimated 10,500 commercial and charter fishermen from New Jersey to the Canadian Maritimes. Collectively, our Organizations are greatly concerned and strongly oppose the proposal put forth by environmental organizations to have Cashes Ledge and New England Canyons designated National Monuments. To unilaterally allow such a

designation would usurp the established habitat and fisheries management public process and could be economically catastrophic not only to the commercial and charter fishermen, but also to hundreds of small coastal communities in New England.

The iconic New England commercial lobster industry has historically, fished within the Cashes Ledge and canyon areas without harm to the habitat/bottom. Over the years, the commercial fishermen, state and federal fisheries managers, and environmental groups have continually agreed that the Cashes Ledge region of the Gulf of Maine is home to a number of unique and important marine environments. State and federal fisheries managers have recognized the significance of this area and taken steps to ensure the long term protection of this unique habitat area. This includes prohibitions of mobile bottom tending gear from the area. The only fixed gear commercial fishery currently allowed is the lobster fishery, which is managed under the Atlantic Coastal Fisheries Cooperative Act, via the Atlantic States Marine Fisheries Commission and NOAA Fisheries. These organizations have determined that the placement of lobster pots on the bottom has negligible impact on the habitat/bottom as Cashes Ledge continues to thrive even with lobster fishing taking place.



The management measures adopted to date have been the result of countless discussions, public hearings, rulings and collaborative efforts of scientists, commercial fishermen, state & federal fisheries managers, and other important stakeholders in the New England region. The key point is that these efforts have all been taken in an open, democratic, deliberative, public process that allows individuals to offer public comments on proposed restrictions, and offer suggestion on how to mitigate negative impacts. Furthermore, the New England Fishery Management Council (NEFMC) and NOAA Fisheries have agreed to prioritize the development of a coral amendment for the New England area, so consideration of the New England Canyons is premature at this time. The proposed Council management plan will be developed in an open public process that involves all parties, including the environmental organizations, and

allow for extensive opportunities for comment from all concerned parties.

We strongly oppose the designation of Cashes Ledge and the New England Canyons as a National Monument under the Antiquities Act. Any designation for a National Monument would require a unilateral action by your office, so we are requesting that you reject any such effort and allow the current process by NEFMC, ASMFC, and NOAA Fisheries to take place.

Thank you for taking the time to read out letter of concern. Should you have any further questions or concerns please feel free to call me at 781-545-6984 or on mobile 508-738-1245.

Kind regards,
Beth Casoni, Executive Director
Massachusetts Lobstermen's Assoc.

David Borden, Executive Director
Atlantic Offshore Lobstermen's Assoc.

Patrice McCarron, Executive Director
Maine Lobstermen's Assoc.

Sheila Dassatt, Executive Director
Downeast Lobstermen's Assoc.

Charlie Wade, President
Stellwagen Bank Charter Boat Assoc.

Gregory Mataronas, President
Rhode Island Lobstermen's Assoc.

Rock Alley, President
Maine Lobstermen's Union

Ralph Pratt, President
American Bluefin Tuna Association

Mark Ring, Chairman
Gloucester Fisheries Commission

CC: Senate Committee on Energy and Natural Resources
House Committee on Natural Resources
Senator Elizabeth Warren
Senator Edward Markey
Congressman William Keating
Congressman Stephen Lynch, Congressman Seth Moulton, Governor Charles Baker, MA FWE Commissioner George Peterson

EXHIBIT 2

U.S. Regional Fishery Management Councils

June 27, 2016

The Honorable Barack H. Obama
President of the United States
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

The nation's eight Regional Fishery Management Councils are charged under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) with managing, conserving, and utilizing fishery resources. The Council Coordination Committee—which consists of the senior leaders of the Councils—respectfully requests your consideration of the attached resolution. We recommend that, if any designations impacting fishing activities are made within the U.S. exclusive economic zone (EEZ) waters under authorities such as the Antiquities Act of 1906, management of fisheries, including designation of essential fish habitat, continues to be developed, analyzed and implemented through the public, transparent, and science-based management process required by the MSA.

The Councils protect essential fish habitat, minimize bycatch, and comply with protections for species listed under the Endangered Species Act,

marine mammals and seabirds within the U.S. EEZ. Through implementation of the MSA, the United States is the global leader in the successful conservation and management of fishery resources and associated ecosystems in a proactive sustainable manner. Spatial management, such as marine protected areas, is one of the tools utilized by the Councils. Through the Council process, more than 1,000 individual spatial habitat and fisheries conservation measures have been implemented protecting more than 72 percent of the nation's ocean waters. The Councils use a public process, in a transparent and inclusive manner, and rely on the best scientific information available as required by the MSA. As a result, we not only meet conservation objectives but also ensure sustainable seafood for U.S. consumers, promote the economies of coastal communities and maintain the social-cultural fabric of our nation's recreational, commercial and subsistence fishing communities.

We are concerned that decisions to close areas of the U.S. EEZ through statutory authorities such as the Antiquities Act of 1906 may not take into account MSA requirements to achieve optimum yield from the nation's fishery resources and may negatively impact jobs and recreational opportunities. We are concerned that authorities such as the Antiquities Act of 1906 do not explicitly require a robust public process or science-based environmental analyses. Designations, such as marine national monuments, may disrupt our ability to continue to manage fisheries throughout their range and in an ecosystem-based manner. Marine monument designations can be counter-productive as they may shift fishing effort to less

sustainable practices that are not regulated by the United States. For all of these reasons, we believe fisheries management decisions should be made using the robust process established by the MSA and successfully used for over forty years.

Your ocean legacy includes significant progress in curbing illegal, unregulated and unreported (IUU) fishing and minimizing our nation's dependence upon seafood imports. We hope you will continue to support our nation's sustainable fisheries and fishing communities by ensuring that fishing in the U.S. EEZ continues to be managed through the MSA.

Respectfully,

s/ Carlos Farchette
Carlos Farchette, Chair
Caribbean Fishery
Management Council

s/ Dan Hull
Dan Hull, Chair
North Pacific Fishery
Management Council

s/ Kevin Anson
Kevin Anson, Chair
Gulf of Mexico Fishery
Management Council

s/ Dorothy Lowman
Dorothy Lowman, Chair
Pacific Fishery
Management Council

s/ Richard Robins
Richard Robins, Chair
Mid-Atlantic Fishery
Management Council

s/ Michelle Duval
Michelle Duval, Chair
South Atlantic Fishery
Management Council

s/ Edwin Ebisui Jr.
Edwin Ebisui Jr., Chair
Western Pacific Fishery
Management Council

s/ E.F. "Terry" Stockwell III
E.F. "Terry" Stockwell III, Chair
New England Fishery Management Council

Enclosure: CCC May 24-26, 2016, Marine National Monuments Resolution
Marine Protected Areas Established by Regional Fishery Management Councils
Antiquities Act of 1906
Celebrating 40 Years of Regional Fisheries Management booklet

CC: Christy Goldfuss, Managing Director, White House Council on Environmental Quality
Penny Pritzker, U.S. Secretary of Commerce
Sally Jewel, U.S. Secretary of the Interior
Senator Lisa Murkowski, Chair, U.S. Senate Committee on Energy and Natural Resource
Congressman Rob Bishop, Chair, US House Committee on Natural Resources

Carlos Farchette, Chair
Caribbean Fishery Management Council
268 Muñoz Rivera Ave., Suite 1108
San Juan, Puerto Rico 00918-1920
http://www.caribbeanfmc.com

E.F. "Terry" Stockwell, III, Chair
New England Fishery Management Council
50 Water Street, Mill 2
Newburyport, MA 01950
http://nefmc.org/

Kevin Anson, Chair
Gulf of Mexico Fishery Management Council
2203 N. Lois Avenue, Suite 1100
Tampa, FL 33607
http://www.gulfcouncil.org

Michelle Duval, Chair
South Atlantic Fishery Management Council
4055 Faber Place Drive, Suite 201
North Charleston, SC 29405
http://www.safmc.net/

Richard Robins, Chair
Mid-Atlantic Fishery Management Council
800 N. State St., Suite 201
Dover, DE 19901
http://www.mafmc.org/

Dan Hull, Chair
North Pacific Fishery Management Council
605 West 4th, Suite 306
Anchorage, Alaska 99501
http://www.npfmc.org/

Edwin Ebisui Jr., Chair
Western Pacific Fishery Management Council
1164 Bishop Street, Suite 1400
Honolulu, Hawaii 96813
http://www.wpcouncil.org/

Dorothy Lowman, Chair
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, Oregon 97220
http://www.pcouncil.org/

Outcomes Statement and Recommendations

Council Coordination Committee

MARRIOTT BEACH RESORT
ST. THOMAS, U.S.V.I.
MAY 24-26, 2016

Marine National Monuments

The Council Coordination Committee (CCC) notes the successes of the Magnuson-Stevens Fishery Conservation and Management Act in managing fishery resources of the United States as well as the marine ecosystems of the United States Exclusive Economic Zone (EEZ) and the CCC recognizes that there have been a number of proposals regarding the designation of new, or the expansion of existing, Marine National Monuments within the U.S. EEZ.

Whereas, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) was originally passed by Congress in 1976 for the specific purpose of sustainably managing the nation's fishery resources to provide a food source, recreational opportunities and livelihoods for the people of the United States;

Whereas Congress, in passing the Magnuson-Stevens Act, found that "Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation."

Whereas, the Magnuson-Stevens Act created eight Regional Fishery Management Councils that are

charged with managing, conserving, and utilizing fishery resources as well as protecting essential fisheries habitat, minimizing bycatch, and protecting listed species within the United States Exclusive Economic Zone;

Whereas, through the implementation of the Magnuson-Stevens Act and through the actions of the Regional Fishery Management Councils, the United States has become a global leader in the successful management of its fishery resources and associated ecosystems in a proactive sustainable manner;

Whereas, the Regional Fishery Management Councils and the National Marine Fisheries Service have made great strides in managing fisheries in an ecosystem-based manner;

Whereas, the Magnuson-Stevens Act requires that fisheries management actions be developed through a public process, in a transparent manner, and based on the best scientific information available;

Whereas, the Regional Fisheries Management Councils and the National Marine Fisheries Service manage fisheries stocks throughout their range and concerns have been raised that designations such as marine monuments may disrupt the ability of the Councils to continue to manage fisheries throughout their range and in an ecosystem-based manner;

Whereas, the designation process of marine national monuments under the Antiquities Act of 1906 does not explicitly require a robust public process or that decisions be based on a science-based

environmental analyses, and does not require fishery management or conservation as an objective;

Whereas, the Regional Fishery Management Councils have a strong history of implementing spatial habitat and fisheries conservation measures (over 1000 individual spatial management measures) in a public, transparent, science-based manner through the Magnuson-Stevens Act.

Whereas, concern has been rained that decisions to close areas of the U.S. EEZ, through statutory authorities such as through the Antiquities Act of 1906, may not take into account requirements to achieve optimum yield (OY) from the Nation's fishery resources, may negatively affect domestic fishing jobs, recreational opportunities and undermine efforts by the Regional Fishery Management Councils to develop and implement ecosystem-based management;

Therefore be it resolved, the CCC reiterates its support for the public, transparent, science-based process and management required by the Magnuson-Stevens Fishery Conservation and Management Act.

Therefore be it further resolved, the CCC recommends that if any designations are made in the marine environment under authorities such as the Antiquities Act of 1906 that fisheries management in the U.S. EEZ waters continue to be developed, analyzed and implemented through the public process of the Magnuson-Stevens Fishery and Conservation and Management Act.

s/ Carlos Farchette
Carlos Farchette, Chair
Caribbean Fishery
Management Council

s/ Dan Hull
Dan Hull, Chair
North Pacific Fishery
Management Council

s/ Kevin Anson
Kevin Anson, Chair
Gulf of Mexico Fishery
Management Council

s/ Dorothy Lowman
Dorothy Lowman, Chair
Pacific Fishery
Management Council

s/ Richard Robins
Richard Robins, Chair
Mid-Atlantic Fishery
Management Council

s/ Michelle Duval
Michelle Duval, Chair
South Atlantic Fishery
Management Council

s/ E.F. "Terry" Stockwell III
E.F. "Terry" Stockwell III, Chair
New England Fishery
Management Council

s/ Edwin Ebisui Jr.
Edwin Ebisui Jr., Chair
Western Pacific Fishery
Management Council

EXHIBIT 3

KELLEY DRYE & WARREN LLP
WASHINGTON HARBOUR, SUITE 400
3050 K STREET, NW
WASHINGTON, DC 20007

September 14, 2016

Christina W. Goldfuss, Managing Director
Council on Environmental Quality
722 Jackson Place NW
Washington, D.C. 20503

Dear Ms. Goldfuss:

On behalf of participants in the Southern Georges Bank Coalition ("SGBC"), we are writing to oppose the White House's decision to designate a marine national monument in the Northwest Atlantic Ocean, which we understand to encompass Oceanographer, Lydonia, and Gilbert Canyons and adjacent sea mounts, starting at a depth of one hundred meters. The SGBC, moreover, opposes the designation of such marine protected areas pursuant to the Antiquities Act more generally. The SGBC's founding participants include: Dennis Colbert, Colbert Seafood Inc. & Trebloc Seafood Inc., Sandwich, MA; Charles Raymond, Fair Wind, Inc., Gloucester, MA; J. Grant Moore, Broadbill Fishing Inc., Westport, MA; Jon Williams, Atlantic Red Crab Co., New Bedford, MA; William Palombo,

Palombo Fishing Corp., Newport, RI; Glenn Goodwin, Seafreeze Ltd., Davisville, RI; David Spencer, Spencer Fish & Lobster Inc., Newport, RI; Edward McCaffrey, Silver Fox Fisheries Inc., Point Judith, RI; John Peabody, Lady Clare Inc., Point Judith, RI; Jonathan Shafmaster, Little Bay Lobster Co. & Shafmaster Fishing, Newington, NH; Daniel Farnham, Silver Dollar Seafood Inc., Montauk, NY; and Beth Casoni, Massachusetts Lobstermen's Association. The above-described fishermen and fishing organizations are directly affected by the monument description, as it includes their fishing grounds. Millions of dollars of lost revenue are at stake.

We explained in our letter dated May 4, 2016, on behalf of another client, that the President lacks the unilateral authority to sue the Antiquities Act to designate marine monuments offshore. The SGBC concurs, and submits the following additional information. Extending the Antiquities Act's application into the Exclusive Economic Zone ("EEZ") represents an illegal and illegitimate use of presidential authority. Moreover, by enacting what was then called the Magnuson Fishery Conservation and Management Act, Congress explicitly granted regional fishery management councils authority over fishery management activities in what has since become the EEZ. Furthermore, this law governs executive authority, rather than the prior-enacted and more general Antiquities Act, and controls over the subsequently-implemented presidential proclamation regarding the United States EEZ more generally. Finally, the Antiquities Act does not allow for designation of any part of the water column as a monument.

To be clear, the SGBC and its participants support sound, science-based fisheries conservation and management. They have participated—actively and constructively—in regional fishery management council and Atlantic interstate fishery compact processes for decades. What they request is that the Administration observe the limits of its authority and honor well-developed statutory and regulatory processes.

I. THE ANITIQUITIES ACT DOES NOT ALLOW FOR MARINE MONUMENT DESIGNATION IN THE EXCLUSIVE ECONOMIC ZONE

In 1906, Congress enacted the Antiquities Act,[1] specifically with reference to terrestrial areas of unique value. Far later, in what is now called the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"),[2] Congress in 1976 staked a brand new claim to an exclusive fisheries zone seaward of the United States territorial sea, and established a unique, quasi-legislative governance structure, administered under the auspices of the Department of Commerce.[3] The conflict between these two laws is evident from the circumstances of each law's enactment.

In 1906, no such exclusive fisheries zone or EEZ yet existed. Rather, it was not until 1976 when Congress declared an exclusive U.S. fishing zone—

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[1] 16 U.S.C. §§ 431-433.

[2] 16 U.S.C. §§ 1801 *et seq.*

[3] *See generally J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138, 1143 (E.D. Va. 1995).

consistent with emerging trends in international law of the sea—which it ultimately in 1986 MSA amendments redefined as "the zone established by Proclamation Numbered 5030, dated March 10, 1983."[4] Tellingly, Congress extended U.S. fisheries jurisdiction via legislation, in a manner entirely distinct from the manner in which the U.S. Constitution provides for the addition of the terrestrial states of the union.[5] Notably, the MSA did not incorporate pre-existing terrestrial management processes but created an entirely new, fully unique, process of regional representative government for this newly claimed fishery zone. This newly enacted, purpose-designed MSA thus governs the management of U.S. fisheries in the EEZ.

The Antiquities Act did not apply to areas to which Congress staked its MSA-based claims, moreover, because the United States had never claimed any right or authority to manage the area for fisheries, natural resource protection, or anything else, prior to 1976. As explained above, the MSA literally invented and applied a novel system of governance—the regional fishery management council system—to this newly-claimed fisheries zone. Indeed, the MSA provides that it is "to maintain without change the existing territorial or other ocean

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[4] 16 U.S.C. § 1802(11). Under the United Nations Convention on the Law of the Sea, the EEZ is merely a zone and not a territory. It is specifically defined as "an area *beyond and adjacent to* the territorial sea." United Nations Convention on the Law of the Sea, art. 55, 1833 UNTS 3 (1982) (entered into force Nov. 16, 1994) (emphasis added). The Reagan Proclamation, *infra* note 7, later incorporated the United Nations definition.

[5] *See* U.S. Const. art. IV, § 3.

jurisdiction of the United States *for all purposes other than the conservation and management of fishery resources*."[6]

Seven years after the MSA's adoption, the President proclaimed, as a matter of international relations, an EEZ substantively more broad than an exclusive fisheries zone.[7] By its terms, however, the EEZ remains "an area beyond and adjacent to the territorial sea" of the United States. Indeed, Proclamation 5030 further stated it "does not change existing United States policies concerning the continental shelf, marine mammals and fisheries…" This condition makes sense; a presidential proclamation, simply put, lacks the authority to amend an Act of Congress.[8] In relation to the issue of domestic fisheries management, the MSA created a specific governance structure that cannot be simply overruled by presidential decree.

In 2000, in the Clinton Administration's waning days, the Department of Justice's Office of Legal Counsel ("OLC") issued a memorandum in response to a request from the National Oceanic and Atmospheric Administration ("NOAA"). NOAA demonstrated, among other claims, that the President could not

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[6] 16 U.S.C. § 1801(c)(1) (emphasis added).

[7] Presidential Proclamation No. 5030 (March 10, 1983).

[8] *See, e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (invalidating an Executive Order that conflicted with provisions of the National Labor Relations Act).

establish a national monument in the EEZ.[9] OLC did concede the question was "closer" than one of whether the President could establish a monument within the territorial sea.[10] It also stated that, because regulations implemented under the MSA must comply with all other applicable law,[11] there was no conflict between the MSA and the Antiquities Act.[12]

In summary, while the Justice Department's OLC not surprisingly rationalized an expansive envisioning of presidential authority, the experts at NOAA who understood the MSA's nature and intent have the better of the argument. The Antiquities Act explicitly states that the President may declare as national monuments "objects of historic or scientific interest that are *situated upon the lands owned or controlled by the Government of the United States*."[13] In *Alaska v. United States*,[14] the Supreme Court delimited the Act's scope to include submerged lands, and other judicial precedent has established that the Antiquities Act can be applied in the United States territorial sea.[15] This conclusion is satisfactory, as the

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[9] Randolph Moss, Assistant Attorney General, *Administration of Coral Reef Resources in the Northwest Hawaiian Islands*, Memorandum Opinion (Sept. 15, 2000), at 197 ("Mem. Op.").

[10] *Id.* at 196.

[11] 16 U.S.C. § 1853(a)(1)(c).

[12] Mem. Op. at 208.

[13] 16 U.S.C. § 431 (emphasis added).

[14] 545 U.S. 75, 103 (2005).

[15] *See United States v. California*, 436 U.S. 32 (1978); *see also* Restatement (Third) of the Foreign Relations Law of the United States § 512 (1987) ("…the coastal state has the same sovereignty

territorial sea is clearly "controlled by" the government in a comprehensive sense. However, in this instance, the question presented is not whether the Secretary of Commerce can implement a fishery management plan with provisions that conflict with a pre-existing, legally-authorized monument designation. The question is, rather, whether the MSA and its unique role in the EEZ represents an exercise of federal management authority beyond the scope of the Antiquities Act. We contend that it does.

Nor, moreover, does the OLC memorandum address the issue of a monument designation within the water column. A plain reading of the statutory language referenced above—authorizing monument designation for objects of scientific interest "situated *upon the lands* owned or controlled by" the United States government—excludes the water column from eligibility for monument designation, and does not allow presidential authority to manage activities therein. The Antiquities Act does not confer unilaterally authority on the President to create what amounts to a marine protected area extending up through the water column.

II. FISHERIES ARE BEST MANAGED UNDER THE MSA

As stated above, the MSA established a specific statutory process for managing our nation's fisheries in the U.S. EEZ. This regional fishery management council system has existed and evolved over forty

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over its territorial sea, and over the air space, sea-bed, and subsoil thereof, as it has in respect of its land territory").

years. The Mid-Atlantic Fishery Management Council has taken, and the New England Fishery Management Council is in the process of taking, actions to protect the types of deep sea areas subject to the monument designation, using public transparent processes prescribed in detail by law.[16]

The council process provides a series of major important benefits totally absent from the monument designation process. First, as noted directly above, for instance, the council process is, by law, open and transparent. The Mid-Atlantic deep sea coral protection areas represent just how cooperative such public management processes can be. In fact, some of the same organizations advocating for these monuments praised the Mid-Atlantic Council's collaborative action. Second, the MSA requires decisions to be made based on the best scientific information available. In complete and total contrast, the monument ultimately designated in the Atlantic was largely the result of a series of political compromises layered with a thin veneer of public outreach. Significantly, courts invalidate management actions made under the MSA that are the result of such political compromise rather than the product of the best scientific information available.[17]

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[16] *See generally* 16 U.S.C. §§ 1852-1853.

[17] *See Parravano v. Babbitt*, 837 F. Supp. 1034, 1047 (N.D. Cal. 1993) ("…the purpose of the Magnuson Act is to ensure that such compromise decisions are adequately explained and based on the best scientific evidence available—and not simply a matter of political compromise"); *see also Midwater Trawlers Co-op. v. Dept. of Commerce*, 282 F.3d 710, 720-21 (9th Cir. 2002) (stating that while the National Marine Fisheries Service's allocation of

III. THE PROPOSAL IS NOT NARROWLY TAILORED AS REQUIRED UNDER THE ANTIQUITIES ACT

The Antiquities Act requires the limits of national monuments to be "confined to the smallest area compatible with proper care and management of the objects to be protected."[18] As we understand it,[19] however, the proposal for a monument designation in the Northwest Atlantic canyons if not narrowly tailored to achieve its objectives. Unlike the deliberative, scientifically-based fishery management council activities to protect habitat based on the presence of or suitability for corals, a restricted fishing area based solely on geographic location and depth contour is neither narrowly tailored, nor practically defensible.

* * * * *

In conclusion, we urge you to reconsider the White House's position on designating a marine monument in the Northwest Atlantic. Such a designation by an

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Pacific whiting between tribes and industry groups "may well be eminently fair, the Act requires that it is founded on science and law, not pure diplomacy").

[18] 16 U.S.C. § 431.

[19] Significantly, there has been no proposed monument designation that in any way would resemble a notice of proposed rulemaking under the Administrative Procedure Act, 5 U.S.C. §§ 553(b). Rather, the monument designation process has more resembled a shadow-boxing exercise, largely best characterized as an *ad hoc* combination of media events, hastily-arranged "stakeholder" sessions, and often secretive bargaining. This is no way to administer a public resource in a democracy.

imperial stroke of the pen would be contrary to controlling law and principles of sound fisheries management.

Respectfully submitted,

s/David E. Frulla
David E. Frulla
Andrew E. Minkiewicz
Anne E. Hawkins

EXHIBIT 4

Presidential Proclamation — Northeast Canyons and Seamounts Marine National Monument

NORTHEAST CANYONS AND SEAMOUNTS MARINE NATIONAL MONUMENT

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BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

For generations, communities and families have relied on the waters of the northwest Atlantic Ocean and have told of their wonders. Throughout New England, the maritime trades, and especially fishing, have supported a vibrant way of life, with deep cultural roots and a strong connection to the health of the ocean and the bounty it provides. Over the past several decades, the Nation has made great strides in its stewardship of the ocean, but the ocean faces new threats from varied uses, climate change, and related impacts. Through exploration, we continue to make new discoveries and improve our understanding of ocean ecosystems. In these waters, the Atlantic Ocean meets the continental shelf in a region of great abundance and diversity as well as stark geological relief. The waters are home to many species of deep-sea corals, fish, whales and other marine mammals. Three submarine canyons and, beyond them, four undersea mountains lie in the waters approximately 130 miles southeast of Cape Cod. This area (the canyon and seamount area)

includes unique ecological resources that have long been the subject of scientific interest.

The canyon and seamount area, which will constitute the monument as set forth in this proclamation, is composed of two units, which showcase two distinct geological features that support vulnerable ecological communities. The Canyons Unit includes three underwater canyons — Oceanographer, Gilbert, and Lydonia — and covers approximately 941 square miles. The Seamounts Unit includes four seamounts — Bear, Mytilus, Physalia, and Retriever — and encompasses 3,972 square miles. The canyon and seamount area includes the waters and submerged lands within the coordinates included in the accompanying map. The canyon and seamount area contains objects of historic and scientific interest that are situated upon lands owned or controlled by the Federal Government. These objects are the canyons and seamounts themselves, and the natural resources and ecosystems in and around them.

The canyons start at the edge of the geological continental shelf and drop from 200 meters to thousands of meters deep. The seamounts are farther off shore, at the start of the New England Seamount chain, rising thousands of meters from the ocean floor. These canyons and seamounts are home to at least 54 species of deep-sea corals, which live at depths of at least 3,900 meters below the sea surface. The corals, together with other structure-forming fauna such as sponges and anemones, create a foundation for vibrant deep-sea ecosystems, providing food, spawning habitat, and shelter for an

array of fish and invertebrate species. These habitats are extremely sensitive to disturbance from extractive activities.

Because of the steep slopes of the canyons and seamounts, oceanographic currents that encounter them create localized eddies and result in upwelling. Currents lift nutrients, like nitrates and phosphates, critical to the growth of phytoplankton from the deep to sunlit surface waters. These nutrients fuel an eruption of phytoplankton and zooplankton that form the base of the food chain. Aggregations of plankton draw large schools of small fish and then larger animals that prey on these fish, such as whales, sharks, tunas, and seabirds. Together the geology, currents, and productivity create diverse and vibrant ecosystems.

The Canyons

Canyons cut deep into the geological continental shelf and slope throughout the mid-Atlantic and New England regions. They are susceptible to active erosion and powerful ocean currents that transport sediments and organic carbon from the shelf through the canyons to the deep ocean floor. In Oceanographer, Gilbert, and Lydonia canyons, the hard canyon walls provide habitats for sponges, corals, and other invertebrates that filter food from the water to flourish, and for larger species including squid, octopus, skates, flounders, and crabs. Major oceanographic features, such as currents, temperature gradients, eddies, and fronts, occur on a large scale and influence the distribution patterns of such highly migratory oceanic species as tuna,

billfish, and sharks. They provide feeding grounds for these and many other marine species.

Toothed whales, such as the endangered sperm whale, and many species of beaked whales are strongly attracted to the environments created by submarine canyons. Surveys of the area show significantly higher numbers of beaked whales present in canyon regions than in non-canyon shelf-edge regions. Endangered sperm whales, iconic in the region due to the historic importance of the species to New England's whaling communities, preferentially inhabit the U.S. Atlantic continental margin. Two additional species of endangered whales (fin whales and sei whales) have also been observed in the canyon and seamount area.

The Seamounts

The New England Seamount Chain was formed as the Earth's crust passed over a stationary hot spot that pushed magma up through the seafloor, and is now composed of more than 30 extinct undersea volcanoes, running like a curved spine from the southern side of Georges Bank to midway across the western Atlantic Ocean. Many of them have characteristic flat tops that were created by erosion by ocean waves and subsidence as the magma cooled. Four of these seamounts — Bear, Physalia, Retriever, and Mytilus — are in the United States Exclusive Economic Zone. Bear Seamount is approximately 100 million years old and the largest of the four; it rises approximately 2,500 meters from the seafloor to within 1,000 meters of the sea surface. Its summit is over 12 miles in diameter. The three smaller seamounts reach to within 2,000 meters of

the surface. All four of these seamounts have steep and complex topography that interrupts existing currents, providing a constant supply of plankton and nutrients to the animals that inhabit their sides. They also cause upwelling of nutrient-rich waters toward the ocean surface.

Geographically isolated from the continental platform, these seamounts support highly diverse ecological communities with deep-sea corals that are hundreds or thousands of years old and a wide array of other benthic marine organisms not found on the surrounding deep-sea floor. They provide shelter from predators, increased food, nurseries, and spawning areas. The New England seamounts have many rare and endemic species, several of which are new to science and are not known to live anywhere else on Earth.

The Ecosystem

The submarine canyons and seamounts create dynamic currents and eddies that enhance biological productivity and provide feeding grounds for seabirds; pelagic species, including whales, dolphins, and turtles; and highly migratory fish, such as tunas, billfish, and sharks. More than ten species of shark, including great white sharks, are known to utilize the feeding grounds of the canyon and seamount area. Additionally, surveys of leatherback and loggerhead turtles in the area have revealed increased numbers above and immediately adjacent to the canyons and Bear Seamount.

Marine birds concentrate in upwelling areas near the canyons and seamounts. Several species of gulls,

shearwaters, storm petrels, gannets, skuas, and terns, among others, are regularly observed in the region, sometimes in large aggregations. Recent analysis of geolocation data found that Maine's vulnerable Atlantic puffin frequents the canyon and seamount area between September and March, indicating a previously unknown wintering habitat for those birds.

These canyons and seamounts, and the ecosystem they compose, have long been of intense scientific interest. Scientists from government and academic oceanographic institutions have studied the canyons and seamounts using research vessels, submarines, and remotely operated underwater vehicles for important deep-sea expeditions that have yielded new information about living marine resources. Much remains to be discovered about these unique, isolated environments and their geological, ecological, and biological resources.

WHEREAS, the waters and submerged lands in and around the deep-sea canyons Oceanographer, Lydonia, and Gilbert, and the seamounts Bear, Physalia, Retriever, and Mytilus, contain objects of scientific and historic interest that are situated upon lands owned or controlled by the Federal Government;

WHEREAS, section 320301 of title 54, United States Code (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 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 marine environment, including the waters and submerged lands, in the area to be known as the Northeast Canyons and Seamounts Marine National Monument, for the care and management of the objects of historic and scientific interest therein;

WHEREAS, the well-being of the United States, the prosperity of its citizens and the protection of the ocean environment are complementary and reinforcing priorities; and the United States continues to act with due regard for the rights, freedoms, and lawful uses of the sea enjoyed by other nations under the law of the sea in managing the canyon and seamount area and does not compromise the readiness, training, and global mobility of the U.S. Armed Forces when establishing marine protected areas;

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 the Northeast Canyons and Seamounts Marine National Monument (monument) and, for the purpose of protecting those objects, reserve as a part thereof all lands and interests in lands owned or controlled by the Federal Government within the boundaries described on the

accompanying map entitled "Northeast Canyons and Seamounts Marine National Monument," which is attached hereto, and forms a part of this proclamation. The Federal lands and interests in lands reserved consist of approximately 4,913 square miles, which is the smallest area compatible with the proper care and management of the objects to be protected.

The establishment of the monument is subject to valid existing rights. All Federal lands and interests in lands within the boundaries of the monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, leasing, or other disposition under the public land laws to the extent that those laws apply, including but not limited to, withdrawal from location, entry and patent under mining laws, and from disposition under all laws relating to development of oil and gas, minerals, geothermal, or renewable energy. Lands and interest in lands within the monument not owned or controlled by the United States shall be reserved as part of the monument upon acquisition of title or control by the United States.

Management of the Marine National Monument

The Secretaries of Commerce and the Interior (Secretaries) shall share management responsibility for the monument. The Secretary of Commerce, through the National Oceanic and Atmospheric Administration (NOAA), and in consultation with the Secretary of the Interior, shall have responsibility for management of activities and species within the monument under the Magnuson-Stevens Fishery Conservation and Management Act, the Endangered

Species Act (for species regulated by NOAA), the Marine Mammal Protection Act, and any other applicable Department of Commerce legal authorities. The Secretary of the Interior, through the United States Fish and Wildlife Service (FWS), and in consultation with the Secretary of Commerce, shall have responsibility for management of activities and species within the monument under its applicable legal authorities, including the National Wildlife Refuge System Administration Act, the Refuge Recreation Act, and the Endangered Species Act (for species regulated by FWS), and Public Law 98-532 and Executive Order 6166 of June 10, 1933.

The Secretaries shall prepare a joint management plan, within their respective authorities, for the monument within 3 years of the date of this proclamation, and shall promulgate as appropriate implementing regulations, within their respective authorities, that address any further specific actions necessary for the proper care and management of the objects and area identified in this proclamation. The Secretaries shall revise and update the management plan as necessary. In developing and implementing any management plans and any management rules and regulations, the Secretaries shall consult, designate, and involve as cooperating agencies the agencies with jurisdiction or special expertise, including the Department of Defense and Department of State, in accordance with the National Environmental Policy Act (42 U.S.C. 4321 et seq.) and its implementing regulations. In addition, the Secretaries shall work to continue advances in resource protection in the Monument area that have resulted from a strong

culture of collaboration and enhanced stewardship of marine resources.

This proclamation shall be applied in accordance with international law, and the Secretaries shall coordinate with the Department of State to that end. The management plans and their implementing regulations shall not unlawfully restrict navigation and overflight and other internationally recognized lawful uses of the sea in the monument and shall incorporate the provisions of this proclamation regarding U.S. Armed Forces actions and compliance with international law. No restrictions shall apply to or be enforced against a person who is not a citizen, national, or resident alien of the United States (including foreign flag vessels) unless in accordance with international law. Also, in accordance with international law, no restrictions shall apply to foreign warships, naval auxiliaries, and other vessels owned or operated by a state and used, for the time being, only on government non-commercial service, in order to fully respect the sovereign immunity of such vessels under international law.

Restrictions

Prohibited Activities

The Secretaries shall prohibit, to the extent consistent with international law, any person from conducting or causing to be conducted the following activities:

1. Exploring for, developing, or producing oil and gas or minerals, or undertaking any other energy

exploration or development activities within the monument.

2. Using or attempting to use poisons, electrical charges, or explosives in the collection or harvest of a monument resource.

3. Introducing or otherwise releasing an introduced species from within or into the monument.

4. Removing, moving, taking, harvesting, possessing, injuring, disturbing, or damaging, or attempting to remove, move, take, harvest, possess, injure, disturb, or damage, any living or nonliving monument resource, except as provided under regulated activities below.

5. Drilling into, anchoring, dredging, or otherwise altering the submerged lands; or constructing, placing, or abandoning any structure, material, or other matter on the submerged lands, except for scientific instruments and constructing or maintaining submarine cables.

6. Fishing commercially or possessing commercial fishing gear except when stowed and not available for immediate use during passage without interruption through the monument, except for the red crab fishery and the American lobster fishery as regulated below.

Regulated Activities

Subject to such terms and conditions as the Secretaries deem appropriate, the Secretaries,

pursuant to their respective authorities, to the extent consistent with international law, may permit any of the following activities regulated by this proclamation if such activity is consistent with the care and management of the objects within the monument and is not prohibited as specified above:

1. Research and scientific exploration designed to further understanding of monument resources and qualities or knowledge of the North Atlantic Ocean ecosystem and resources.

2. Activities that will further the educational value of the monument or will assist in the conservation and management of the monument.

3. Anchoring scientific instruments.

4. Recreational fishing in accordance with applicable fishery management plans and other applicable laws and other requirements.

5. Commercial fishing for red crab and American lobster for a period of not more than 7 years from the date of this proclamation, in accordance with applicable fishery management plans and other regulations, and under permits in effect on the date of this proclamation. After 7 years, red crab and American lobster commercial fishing is prohibited in the monument.

6. Other activities that do not impact monument resources, such as sailing or bird and marine mammal watching so long as those activities are conducted in accordance with applicable laws and regulations, including the Marine Mammal

Protection Act. Nothing in this proclamation is intended to require that the Secretaries issue individual permits in order to allow such activities.

7. Construction and maintenance of submarine cables.

Regulation of Scientific Exploration and Research

The prohibitions required by this proclamation shall not restrict scientific exploration or research activities by or for the Secretaries, and nothing in this proclamation shall be construed to require a permit or other authorization from the other Secretary for their respective scientific activities.

Emergencies and Law Enforcement Activities

The prohibitions required by this proclamation shall not apply to activities necessary to respond to emergencies threatening life, property, or the environment, or to activities necessary for law enforcement purposes.

U.S. Armed Forces

1. The prohibitions required by this proclamation shall not apply to activities and exercises of the U.S. Armed Forces, including those carried out by the United States Coast Guard.

2. The U.S. Armed Forces shall ensure, by the adoption of appropriate measures not impairing operations or operation capabilities, that its vessels and aircraft act in a manner consistent so far as is practicable, with this proclamation.

3. In the event of threatened or actual destruction of, loss of, or injury to a monument resource or quality resulting from an incident, including but not limited to spills and groundings, caused by a component of the Department of Defense or the United States Coast Guard, the cognizant component shall promptly coordinate with the Secretaries for the purpose of taking appropriate action to respond to and mitigate any harm and, if possible, restore or replace the monument resource or quality.

4. Nothing in this proclamation or any regulation implementing it shall limit or otherwise affect the U.S. Armed Forces' discretion to use, maintain, improve, manage or control any property under the administrative control of a Military Department or otherwise limit the availability of such property for military mission purposes, including, but not limited to, defensive areas and airspace reservations.

Other Provisions

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, excavate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of September, in the year of our Lord two thousand sixteen, and of the

Independence of the United States of America the two hundred and forty-first.

BARACK OBAMA