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THE ANTIQUITIES ACT OF 1906 MAY BE USED TO PROTECT MARINE AREAS

Opponents of National Monuments have made many arguments against the broad scope of the Antiquities Act of 1906 (the "Antiquities Act" or the "Act"), which has been used by presidents for more than 100 years to protect areas of historic or scientific interest beyond small scale archeological sites.[1] In our May 3, 2017 memorandum entitled "The President Has No Power to Unilaterally Abolish or Materially Change a National Monument Designation Under the Antiquities Act," we demonstrate the error of those arguments. The same Opponents also argue that, in any event, the Act may not be used to protect areas located at sea. Our client, the National Parks Conservation Association ("NPCA"), has asked us to expand upon our May 3, 2017 memorandum to address this question, which arises in the context Executive Order 13792, "Review of Designations Under the Antiquities Act", and Executive Order 13795, "Implementing an America-First Offshore Energy Strategy."

These Executive Orders direct the Department of Commerce and the Department of Interior to review the designations and expansions of a number of marine national monuments created under the Act and make recommendations to the President as to whether he should make any changes in those designations, including even their rescission. The Opponents argue that presidential use of the Act to establish such marine national monuments violated the Antiquities Act and that those monuments should therefore be revoked. Contrary to the Opponents' arguments, however, the use of the Act to protect marine objects of historic or scientific interest, including unique marine habitats, species, and geological or ecological features, through the creation of marine national monuments is authorized under the Act. Submarine lands and seabeds and associated water columns within the United States' territorial sea or its Exclusive Economic Zone ("EEZ") are "lands owned or controlled by the Government of the United States" for purposes of the Act, as President Reagan and Congress have recognized. While it is beyond the scope of this memorandum to discuss the particulars of each monument under review, the unique geological features, species, and ecosystems identified for protection in the proclamations establishing those marine national monuments are the very types of "objects of historic or scientific interest" that may be protected under the Act. Consequently, the maritime nature of the monuments at issue does not lessen a president's ability to ensure their continued protection through an Antiquities Act designation.

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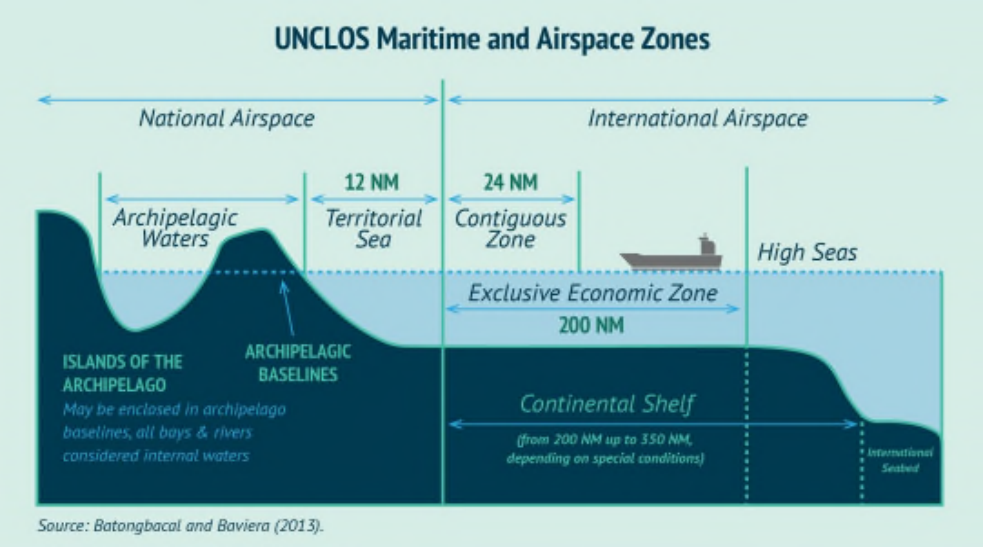
[1] *See* John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, AM. ENTER. INST., at 12-14 (Mar. 2017), http://www.aei.org/wp-content/uploads/2017/03/Presidential-Authority-to-Revoke-or-Reduce-National-Monument-Designations.pdf. We will refer here to those authors as the "Opponents."

I. SUBMERGED LANDS ARE "LANDS" AND THOSE LANDS AND ASSOCIATED WATER COLUMNS ARE CONTROLLED BY THE UNITED STATES FOR PURPOSES OF THE ANTIQUITIES ACT

The marine national monuments presently under review include emergent and submerged lands and their associated water columns in the territorial sea and in the EEZ. The Third U.N. Conference on the Law of the Sea, which took place from 1973 to 1982, resulted in the United Nations Convention on the Law of the Sea ("UNCLOS"). UNCLOS establishes four maritime zones for coastal States, two of which are relevant here: the territorial sea and the EEZ. Under domestic and international law, the United States' territorial sea extends twelve nautical miles from the coastal baseline. Pursuant to Articles 55 and 57 of UNCLOS, the EEZ is "an area beyond and adjacent to the territorial sea," which "shall not extend beyond 200 nautical miles from" the coastal baselines, and which is "subject to the specific legal regime established in this Part."[2] As discussed below, this area includes the seabed, subsoil, and the water column (namely all water above the seabed). The following image depicts the four maritime zones and the area beyond these zones, known as the "high seas".[3]



In 1983, President Reagan claimed for the United States the rights and authority over its EEZ as permitted by UNCLOS.[4] In 1988, President Reagan confirmed the United States'

[2] UNCLOS, arts. 55, 57.

[3] Asia Marine Transparency Initiative (January 21, 2015). The Opponents incorrectly use the term "high seas" to refer to the EEZ.

[4] Exclusive Economic Zone of the United States of America, Proclamation 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983).

claim to, and authority over, its territorial seas consistent with customary international law.[5]

While the United States has signed but not ratified UNCLOS, the provisions of UNCLOS setting forth these areas and the scope of coastal States' authority over territorial seas and EEZs have become accepted internationally as "customary international law." As such, coastal States such as the United States have certain rights concerning these areas. *See Mayagüezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 304-05 (1st Cir. 1999) (recognizing the EEZ regime under UNCLOS as a part of customary international law); *United States v. Carvajal*, 924 F. Supp. 2d 219, 234 (D.D.C. 2013) (same); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 514 (1987). Moreover, Congress has adopted President Reagan's claim over these area, expressly authorizing administrative creation of marine sanctuaries in the EEZ. *See* 16 U.S.C. § 1432(3) (defining "marine environment" for purposes of the Marine Sanctuaries Act's authorization for the designation of such areas as sanctuaries as areas "over which the United States exercises jurisdiction, including the exclusive economic zone, consistent with international law"); *see also id.* § 1802(11) (adopting the EEZ as set forth in Proclamation 5030).[6]

As set forth below, submerged lands and water columns within both the United States' territorial sea and EEZ are "lands owned or controlled by the Government of the United States" for purposes of the Antiquities Act. The conclusion that a president may designate under that Act submerged lands and associated water columns within the United States' territorial sea and EEZ is shared by the Office of Legal Counsel.[7] Marine national monuments have been designated by Republican and Democratic Presidents alike, with Franklin Roosevelt designating the Channel Islands National Monument as the first marine national monument in 1938.[8]

Notwithstanding this clear and long-standing precedent, the Opponents suggest that (a) the submerged lands and associated water columns are not "lands" for purposes of the Antiquities Act and (b) the submerged lands and associated water columns are not

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[5] Territorial Sea of the United States of America, Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

[6] UNCLOS, art. 56 (setting forth the customary international law regarding the authority of a coastal nation within its EEZ).

[7] *See* Administration of Coral Reef Resources in the Northwest Hawaiian Islands, Op. O.L.C., 2000 WL 34475732, at *1-13 (Sept. 15, 2000) (confirming the longstanding position that the President could establish a national monument in territorial seas and further concluding that "the President could establish a national monument in the EEZ to protect marine resources").

[8] Proclamation No. 2281, 52 Stat. 1541 (Apr. 26, 1938); *see also* Proclamation No. 2337, 3 C.F.R. 88 (May 17, 1939) (designating the Santa Rosa Island National Monument); Proclamation No. 3443, 3 C.F.R. 152 (Dec. 28, 1961) (designating the Buck Island Reef National Monument).

"owned or controlled" by the federal government. As set forth below, their arguments are without merit.

a. Submerged Lands are "Lands"

The Supreme Court recognized that a President may designate submerged lands and associated water columns for purpose of the Antiquities Act in 1978 and reaffirmed that conclusion in 2005. In *United States v. California*, the Supreme Court resolved a dispute regarding whether the United States or California had dominion over areas within the Channel Islands National Monument.[9] In so doing, the Supreme Court made clear that there was "no serious question" that the President "had power under the Antiquities Act to reserve submerged lands and waters" so long as they are "controlled by the Government of the United States."[10] In *Alaska v. United States*, the Supreme Court reaffirmed this position, finding it "clear, after all, that the Antiquities Act empowers the President to reserve submerged lands."[11] Accordingly, there is no plausible argument that submerged lands are not "lands" for purposes of the Act.

The same conclusion is mandated as to the water column above the seabed. No credible argument could be made that the air and winged wildlife above protected terrestrial areas is not protected along with the land itself. The same analysis that applies to terrestrial areas applies to the seabed and the water column above it. *See Cappaert v. United States*, 426 U.S. 128, 142-43 (1976) (upholding Presidential monument designation of Devil's Hole—a subterranean pool of water that was home to a unique species of fish—as proper under the Antiquities Act and further concluding that designation properly included both its surface water and groundwater).

b. The United States' Territorial Sea is "Owned and Controlled" by the United States

Some of the monuments under review are located in the United States' territorial sea. The Supreme Court has long held that the United States' authority over its territory, including its territorial seas, "is absolute and exclusive."[12] Accordingly, the federal government "owns or controls" the submerged lands and associated water columns

[9] 436 U.S. 32, 32 (1978).

[10] *Id.* at 36.

[11] *Alaska v. United States*, 545 U.S. 75, 103 (2005).

[12] *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 234 (1804); *see also The Ann*, 1 F. Cas. 926, 927 (C.C.D. Mass. 1812) (No. 397) (Story, J.) (recognizing that the territorial waters "are considered as a part of the territory of the sovereign). Under President Reagan, the Office of Legal Counsel explained that the United States "is sovereign in its territorial sea" and, consistent with customary international law, the "only qualification . . . is that ships enjoy a right of innocent passage." Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, 12 O.L.C. 238, 240 & n.4 (1988); *see also* UNCLOS, art. 3 ("The sovereignty of a coastal State extends, beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea.").

within the territorial sea for purposes of the Antiquities Act. In *United States v. California*, the Supreme Court acknowledged that there is "no serious question" that the President has the "power under the Antiquities Act to reserve the submerged lands and waters" within the territorial sea as a national monument because, absent a relinquishment of authority, there is no doubt that those submerged lands and waters are "'controlled by the Government of the United States.'"[13]

c. The United States' EEZ is "Owned and Controlled" by the United States

Some of the monuments under review are located in the United States' EEZ. The United States' established and accepted sovereign rights and jurisdiction in the EEZ provide it with sufficient "control" for a president to be able to designate areas within it for protection as national monuments under the Antiquities Act.

The federal government does not need to have absolute and exclusive control for the designated areas to be considered "owned or controlled by the United States" for purposes of the Act.[14] While neither the Antiquities Act nor its legislative history define the term "control," "control" was defined by dictionaries at the time of the Antiquities Act to mean the authority "to exercise restraining or directing influence."[15] Contemporary Supreme Court decisions similarly linked the concept of "control" with the authority to direct influence or regulate.[16] Thus, to assess whether the United States has sufficient "control" for purposes of the Antiquities Act, one must assess the level of restraint, regulation, and directing influence it has over an area consistent with the aims of the Act and vis-à-vis the states and other sovereigns.

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[13] 436 U.S. at 32. While the United States has conveyed to the states and territories certain title, jurisdiction, or rights to submerged lands within the first three miles of its territorial sea, that does not undermine the authority of the President to designate areas within the territorial sea over the submerged lands within the first three miles. *See, e.g.*, Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 518 & n. 287 (2003) (explaining that the Attorney General concluded that "the President may proclaim a national monument over submerged lands under the primary jurisdiction of the states in accordance with the Submerged Lands Act").

[14] Mark Squillace, *The Monumental Legacy*, 37 GA. L. REV. at 518 n.287 ("Under the Antiquities Act, the retention of some 'control' over the lands is all that is required to allow designation of a national monument.")

[15] *See Control*, Webster's Collegiate Dictionary (1919 ed.); *Control*, New Webstarian Dictionary (1912 ed.) (defining control as "to restrain," to "govern," or to "regulate").

[16] *See People of State of New York ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U.S. 549, 559 (1915) (stating that the federal government's authority "to regulate commerce" gives it "control over interstate commerce"); *Standard Oil Co. v. Anderson*, 212 U.S. 215, 222 (1909) (linking, in the context of agency, the concept of control with the authority to direct).

Under domestic and customary international law, the United States has extensive sovereign rights and jurisdiction within its EEZ. According to Article 56 of UNCLOS, the coastal State, here the United States, has the following rights in the EEZ:

> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, 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;
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> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; and (iii) the protection and preservation of the marine environment.

"Superjacent waters" means the water column above the seabed. *See* National Oceanic and Atmospheric Administration, "Maritime Zones and Boundaries," *available at* http://www.gc.noaa.gov/gcil_maritime.html (defining "superjacent waters" as the entire "water column" above the seabed).[17]

When President Reagan claimed authority over the United States' EEZ in Proclamation 8030, President Reagan confirmed that the United States has "(a) 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 "(b) 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 monument."[18]

The United States' established and accepted sovereign rights and jurisdiction in the EEZ plainly provide it with sufficient "control" to designate areas within it as a national monument for purposes of the Antiquities Act. First, the United States exercises greater authority and control over the EEZ than any other sovereign, as well as any state or territory.[19] Indeed, when President Reagan issued Proclamation 5030 asserting the United States' claims to its EEZ, the White House explained that the proclamation confirmed the United States' "sovereign rights *and control* over the living and non-living

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[17] *See also* U.N. Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, at app. I (Glossary of Technical Terms), at 64, U.N. Pub. Sales No. E.88.V.5 (1989) (defining "superjacent waters" as "[t]he waters lying immediately above the sea-bed or deep ocean floor up to the surface.").

[18] *Id.*

[19] *See* Administration of Coral Reef Resources in the Northwest Hawaiian Islands, Op. O.L.C., 2000 WL 34475732, at *9.

natural resources of the seabed, subsoil and superjacent waters beyond the territorial sea but within 200 nautical miles of the United States coasts."[20] Thus, the United States has paramount authority and—as President Reagan's administration acknowledged—control over areas within its EEZ.

Second, the United States exercises the precise type of control over the EEZ for which designations under the Antiquities Act are intended as a matter of international and domestic law. As set forth both in Proclamation 5030 and in UNCLOS, the United States has sovereign rights within the EEZ "for the purpose of exploring, exploiting, conserving and managing natural resources" and further has jurisdiction for "the protection and preservation of the marine environment."[21] The United States also may "promote the objective of the optimum utilization of the living resources" in the EEZ, "determine the allowable catch of the living resources" in the EEZ, and engage in "conservation and management" to prevent over-exploitation.[22] These broad powers afford the United States significant control within the EEZ for the exact purpose for which designations are to be made under the Antiquities Act, which as President Trump explained, "are a means of stewarding America's natural resources, protecting America's natural beauty, and preserving America's historical places."[23]

Ignoring UNCLOS, President Reagan's proclamation and Congress' adoption of the EEZ, as discussed above, the Opponents argue that any area outside the territorial waters of the United States is beyond the scope of the Antiquities Act. They cite *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F. 2d 330 (5th Cir. 1978). But it was decided before UNCLOS and did not involve what was later recognized as the EEZ in any respect.

Accordingly, the United States has "control" over both the EEZ and the territorial sea for purposes of the Antiquities Act.

[20] Fact Sheet, United States Oceans Policy, Off. Press Sec'y, (Mar. 10, 1983) (emphasis added).

[21] Proclamation 5030 (exercising rights under international law).

[22] UNCLOS, arts. 61-62.

[23] Exec. Order No. 13792, 82 Fed. Reg. 20,429 (Apr. 26, 2017); *see also Alaska*, 545 U.S. at 103 (explaining that the purpose of designations under the Antiquities Act is "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations").

II. THE OBJECTS PROTECTED ARE "OBJECTS OF HISTORIC OR SCIENTIFIC INTEREST"

It is well-accepted that aquatic life and habitat can be among the "objects of historic or scientific interest" that may be protected under the Antiquities Act. The phrase "other objects of historic and scientific interest" in the Antiquities Act has long been understood to encompass wildlife and habitat and, from the outset, presidents have used the Act to protect wildlife and the habitat supporting that wildlife.[24] Over 40 years ago in *Cappaert*, the Supreme Court expressly recognized that aquatic life and habitat are among "objects" that may be protected by the Act.[25]

Cappaert involved a "peculiar race of fish," whose habitat is Devil's Hole, a deep limestone canyon in Nevada. The specific question posed in *Cappaert* was whether the creation of the Devil's Hole National Monument reserved federal water rights in unappropriated water such that the Cappaerts, who owned a ranch appurtenant to Devil's Hole, could be enjoined from pumping groundwater when pumping jeopardized the fish's spawning habitat. In a unanimous decision, the Supreme Court held that because "[t]he fish are one of the features of scientific interest" protected by the proclamation establishing the monument, the district court correctly determined that the level of the pool may only be permitted to drop "to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved."[26] In so deciding, the Supreme Court expressly acknowledged that aquatic life may be protected under the Act.

The Opponents make the specious argument that "sea life" should not be considered "objects" under the Antiquities Act despite the Supreme Court's clear and unequivocal holding in *Cappaert* and an 80-year tradition of establishing marine monuments.[27] For support, they point to *Yates v. United States*, 135 S. Ct. 1074 (2015), which dealt not with the Antiquities Act, but with whether a commercial fisherman's destroying an illegal fish catch violated the record destruction provisions of the Sarbanes Oxley Act (18 U.S.C. § 1519). The Court rejected the Government's claim, explaining that such an interpretation would "cut [that provision] loose from its financial-fraud mooring." *Id.* at 1079.

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[24] *See, e.g.*, Proclamation No. 869, 35 Stat. 2247 (Mar. 2, 1909) (protecting the summer range and breeding grounds of the Olympic elk (Cervus Roosevelti)).

[25] 426 U.S. at 142.

[26] *Id*. at 141.

[27] *See* Yoo & Gaziano, *Presidential Authority*, at 14.

CONCLUSION

It is too late in the day to argue now that the Antiquities Act may not be used to protect marine areas and their ecosystems. The language and purpose of that Act, long-standing presidential actions under that Act, Supreme Court decisions applying it, and accepted international and domestic law of the seas all make clear that this Act may be used for that purpose.

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