IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

MURPHY COMPANY, *et al.*,

Case No. 1:17-cv-00285-CL

Plaintiffs,

v.

REPORT AND RECOMMENDATION

DONALD J. TRUMP, *et al.*,

Defendants,

and

SODA MOUNTAIN WILDERNESS COUNCIL, *et al.*,

Defendant-Intervenors.

CLARKE, Magistrate Judge.

Plaintiffs Murphy Company and Murphy Timber Investments, LLC (collectively "Plaintiff") bring this case challenging the authority of the President of the United States to include lands covered under the Oregon & California Revested Lands Act ("O&C Act") in the expansion of the Cascade-Siskiyou National Monument. This case comes before the Court on Plaintiff's Motion for Summary Judgment (#39), Federal Defendant's Cross-Motion for Summary Judgment (#42), and Defendant-Intervenor's Cross-Motion for Summary Judgment

(#44). For the reasons discussed below, Plaintiff's motion should be DENIED, and Defendants' motions should be GRANTED.

BACKGROUND

Congress passed the Antiquities Act in 1906, authorizing the President of the United States, in his discretion, to declare by public proclamation landmarks, structures, and objects of historic and scientific interest that are situated upon lands owned or controlled by the federal government to be national monuments. 54 U.S.C. § 320301. The only limitation that Congress placed on the President's authority to reserve federal land for the creation of national monuments by the Antiquities Act is that the "parcels of land" reserved must "be confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.*; *see generally Mt. States Legal Found. v. Bush*, 306 F.3d 1132, 1135-37 (D.C. Cir. 2002).

On June 9, 2000, President Clinton exercised authority under the Antiquities Act to designate the Cascade-Siskiyou National Monument ("Monument") in Southern Oregon. Proclamation No. 7318, 65 Fed. Reg. 37249 (June 9, 2000). The Monument was created to protect the unique ecosystem and biodiversity of the area. In designating the Monument, President Clinton prohibited commercial timber harvest within the Monument boundaries. Included in the Monument were lands subject to the O&C Act, which states that such lands

> shall be managed ... for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the [principle] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.

43 U.S.C. § 2601.

The O&C Act covers roughly 2.1 million acres and requires the Bureau of Land Management ("BLM") to determine and declare the "annual productive capacity" of these lands. *Id.* Several courts have held that the O&C Act is a "dominant" or "primary" use statute for sustained yield timber production. *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1183-84 (9th Cir. 1990); *Soda Mt. Wilderness Council v. Bureau of Land Mgmt.*, 2013 WL 12120098, *1 (D. Or. May 29, 2013), *adopted in part*, 2013 WL 4786242 (D. Or. Sept. 6, 2013). The BLM is tasked with managing these lands and retains considerable discretion in implementing the Act's principles of sustained yield, which has included establishing and maintaining reserves within O&C lands, *i.e.*, areas which no or very little timber production occurs. 43 U.S.C. § 2601; *Portland Audubon Society v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993) (finding that the O&C Act did not deprive the "BLM of all discretion with regard to either the volume requirements of the Act or the management of the lands entrusted to its care"). For example, out of the approximately 950,827 acres of O&C lands covered by the BLM's Southwest Oregon Resource Management Plan, 191,300 acres have been withdrawn from timber harvest for various reasons. Federal Def.'s Br. at 24-25 (#42). Although President Clinton's designation of the Monument and prohibition of commercial timber harvest within the Monument's boundaries affected O&C Act lands, no challenge was brought to dispute President Clinton's exercise of authority.

In 2011, fifteen independent scientists issued a report calling for the Monument to be expanded. Seventy other scientists and two local town governments close to the Monument joined in support of the expansion. *See* Declaration of Dave Willis, Ex. B and Ex. C (##5-3 to 5-7). A series of four public meetings on the proposed expansion were held in 2016, with more

than 500 people attending the public meeting held in Ashland, Oregon, the closest town to the Monument. Oregon Senator Merkley's office reported an almost 4:1 ratio of public support for the Monument's expansion. Declaration of Susan Brown, Ex. I at 1-2 (#44-10).

On January 12, 2017, seemingly in response to this public support, President Obama exercised his authority under the Antiquities Act to modify and enlarge the boundary of the Monument to include approximately 48,000 additional acres, of which approximately 39,841 acres are also subject to the O&C Act. Proclamation No. 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017). Proclamation No. 9564 identified objects of biological, scientific, and historical interest within the Monument expansion area. *Id.* Because the provisions set by the initial Monument proclamation prohibited commercial timber harvest, those same restrictions applied to the expanded Monument area.

Plaintiff now challenges President Obama's authority to expand the Monument, claiming that Proclamation 9564 is void and must be set aside because the lands covered in the expansion were subject to the O&C Act and therefore were not available for inclusion as national monument lands. Plaintiff's Br. at 11 (#39). Both the Federal Defendants and the Defendant-Intervenors move this Court to find that the President lawfully exercised his discretion in accordance with his congressionally delegated authority.

DISCUSSION

I. The President did not exceed his congressionally delegated statutory authority.

Plaintiff has asked this Court to review both the O&C Act and the Antiquities Act to determine whether Proclamation 9564 exceeded the President's statutory authority. Plaintiff's Br. at 17 (#39). Plaintiff devotes the majority of their brief comparing Proclamation 9564 to the O&C Act to support their argument that the President exceeded his statutory authority.

However, this is an irrelevant comparison when discussing the President's statutory authority because the President was acting under the statutory authority of the Antiquities Act when declaring Proclamation 9564, not the O&C Act. The O&C Act designates authority to the BLM, not the President. Therefore, the appropriate legal question here is whether the President had the statutory authority under the Antiquities Act to add these federal lands to the existing Monument. This Court concludes that he did.

Courts are very limited in their review of congressionally authorized presidential actions. It has long been held that where Congress has authorized a public officer to take some specified legislative action, when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of facts calling for that action is not subject to review. *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940) (internal citations omitted). Thus, where the President acts in accordance with a delegation of authority from Congress, such as with the Antiquities Act, judicial review of the presidential decision making is limited to (1) ensuring that the actions by the President are consistent with constitutional principles, and (2) ensuring that the President has not exceeded his statutory authority. *United States v. California*, 436 U.S. 32, 35-36 (1978) (holding that whether federal lands are included within a national monument raises "a question only of Presidential intent, not of Presidential power"); *see also Mt. States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) ("In reviewing challenges under the Antiquities Act, the Supreme Court has indicated generally that review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority.").

The Supreme Court has confirmed that the Antiquities Act delegates "broad power" to the President to designate national monuments and reserve lands for those monuments. *Mt.*

States Legal Found., 306 F.3d at 1135. The statute grants the President substantial flexibility, expressly leaving the definition of a monument and its boundaries to the President's discretion, and only requiring that the reserved parcels "be confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301. When declaring Proclamation 9564, the President invoked the correct statutory standards under the Antiquities Act and made explicit findings consistent with those standards. *See* 82 Fed. Reg. at 6145-48 (describing the unique, scientific biodiversity of the parcel); *id.* at 6148 ("This enlargement of the [Monument] will maintain its diverse array of natural and scientific resources and preserve its cultural and historic legacy, ensuring that the scientific resources and historic values of this area remain for the benefit of all Americans."); *id.* ("The boundaries described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected."). Plaintiff never contends that the President abused his statutory authority in making these findings. Therefore, there is no dispute that the President acted within his congressionally delegated authority under the Antiquities Act when declaring Proclamation 9564.

II. There is no irreconcilable conflict between the O&C Act and the Antiquities Act.

Plaintiff further argues that the Antiquities Act simply cannot be invoked to override the O&C Act's mandate for the use of public lands. Plaintiff points to the *non obstinate* clause included in the O&C Act as evidence that Congress intended for the O&C Act to repeal the Antiquities Act to the extent the latter was in conflict with the former. Plaintiff's Br. at 20 (#39). The *non obstante* clause in the O&C Act provides that "[a]ll Acts or parts of Acts in conflict with this Act are hereby repealed to the extent necessary to give full force and effect to this Act." 50 Stat. 874, 876. This *non obstante* clause is a general repealing clause and does not explicitly

repeal the Antiquities Act. *See Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Engr's*, 619 F.3d 1289, 1299 (11th Cir. 2010) ("A general repealing clause is explicit only in the sense that it is announcing a real of 'all law' or 'any law' or 'federal laws'—its actual reach depends on an analysis of the statutory language relevant to it."). 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. *Traynor v. Turnage* 485 U.S. at 548 (1988). To warrant a finding that the Antiquities Act has been impliedly repealed by the O&C Act there must be an irreconcilable conflict—not simply tension—between the two acts. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) ("It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than state the problem."); *Morton*, 417 U.S. at 545-46 (statute prohibiting discrimination in employment on the basis of "race, color, sex, or national origin" did not repeal employment preference for qualified Indians at Bureau of Indian Affairs).

Although there may be tension between the dominant purpose of the O&C Act and the conservationist purpose of the Antiquities Act, there is no irreconcilable conflict between the two Acts. Several courts have found sustained yield timber production to be the dominant purpose of the O&C Act, but no court has held that the Act sets aside federal public land exclusively for timber production or that the Act invalidates other federal environmental laws such as NEPA or the ESA. *See Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1183-84 (9th Cir. 1990); *Soda Mt. Wilderness Council v. Bureau of Land Mgmt.*, 2013 WL 12120098, *1 (D. Or. May 29, 2013), *adopted in part*, 2013 WL 4786242 (D. Or. Sept. 6, 2013). Federal public lands can, and do, have overlapping statutory mandates without presenting an irreconcilable statutory

conflict. The O&C Act is not in irreconcilable conflict with the Antiquities Act because the principle of sustained yield under the O&C Act does not mean maximum sustained yield—the principle merely ensures that the timber resource is managed in perpetuity while providing the BLM with discretion in how to achieve that objective. *See sustained yield*, Merriam-Webster (defining "sustained yield" as "production of a biological resource (such as timber or fish) under management procedures which ensure replacement of the part harvested by regrowth or reproduction before another harvest occurs."). The plain text of the O&C Act does not mandate that the BLM's land use plans devote all classified timberlands exclusively to maximum sustained yield timber production, thus allowing the BLM to designate land as reserved from harvest.

Even before the Monument was designated by President Clinton, the BLM removed portions of O&C lands from commercial timber harvest and courts have found reserves on O&C lands legally permissible. *See Portland Audubon Society v. Babbitt*, 998 F.2d 705 (9th Cir. 1993); *Swanson Grp. V. Salazar*, 951 F. Supp. 2d 75, 79 (D.D.C. 2013), *overruled on other grounds*, 790 F.3d 235 (D.C. Cir. 2015); *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1314 (W.D. Wash 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996) (per curiam). Out of roughly 950,827 acres of O&C lands covered by the BLM's 2016 Southwest Oregon Resource Management Plan, 191,300 acres were reserved from commercial timber harvest. *See e.g.*, Def's. Br. at 24-25 (#42) (providing reserve numbers from the 2016 RMP). Specifically, within the Monument boundary expansion, of the 39,841 acres classified as O&C lands, only 16,448 acres were previously subject to harvest in the BLM's 2016 RMP. If the BLM has the authority under the O&C Act to reserve lands from harvest, then the President reserving lands within the confines of the smallest area permitted under the Antiquities Act presents no irreconcilable

conflict with the O&C Act. Land can be reserved from timber harvest under both Acts; the O&C Act just gives discretion to the BLM to reserve land and the Antiquities Act gives discretion to the President to reserve land. Therefore, Plaintiff has not shown that Congress intended for the O&C Act to substitute or repeal the Antiquities Act[1] or that an irreconcilable conflict exists between the two Acts.

RECOMMENDATION

For the reasons stated above, Plaintiff's Motion for Summary Judgment (#39) should be DENIED and Defendants' Cross-Motions for Summary Judgment (##42, 44) should be GRANTED.

This Report and Recommendation will be referred to a district judge. Objections, if any, are due no later than fourteen (14) days after the date this recommendation is filed. If objections are filed, any response is due within fourteen (14) days after the date the objections are filed. *See* Fed. R. Civ. P. 72, 6. Parties are advised that the failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED this 2 day of April, 2019.

MARK D. CLARKE
United States Magistrate Judge

[1] When considering the intent of Congress in regard to O&C lands, it may be worth noting that Congress has not failed to appropriate funds for conservation on O&C lands. Most recently, on March 12, 2019, President Trump signed into law S. 47, the *John D. Dingell, Jr. Conservation, Management, and Recreation Act*. S. 47 designated 171 miles of rivers that flow through O&C lands and created a protective corridor of ¼ mile on either side of the waterway, where management actions, including timber harvest, are limited or prohibited. At the very least, S. 47 demonstrates that Congress is aware of and has approved the designation of O&C lands for protective purposes beyond those identified in the O&C Act itself.