

**To:** Brown, Laura[laura.brown@sol.doi.gov]  
**From:** Damm, Laura  
**Sent:** 2017-12-20T14:33:59-05:00  
**Importance:** Normal  
**Subject:** Re: O&C Act Memo  
**Received:** 2017-12-20T14:34:05-05:00  
Draft - Confidential - Antiquities Act & the O&C Act (v2)+Id.docx

Hi Laura, A few thoughts for you about the insertions. I'm happy to discuss.

Thanks.  
Laura

On Wed, Dec 20, 2017 at 2:23 PM, Brown, Laura <laura.brown@sol.doi.gov> wrote:

any feedback?

On Wed, Dec 20, 2017 at 12:39 PM, Brown, Laura <laura.brown@sol.doi.gov> wrote:

I am about to go into a meeting, but can you give this a quick look and let me know what you think? I've not had a chance to review. I should be back at 2

----- Forwarded message -----

**From:** Lawkowski, Gary <gary.lawkowski@sol.doi.gov>  
**Date:** Wed, Dec 20, 2017 at 11:12 AM  
**Subject:** O&C Act Memo  
**To:** "Brown, Laura" <laura.brown@sol.doi.gov>

Would it be possible to get your thoughts on the newly added language (changes tracked) before I send this around to the broader group this afternoon?  
Thank you very much for your time and help!

Sincerely,

*Gary Lawkowski*  
*Counselor to the Solicitor*  
*Department of the Interior*  
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202-208-7340

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TO: Deputy Secretary

FROM: Counselor to the Solicitor

DATE: December 19, 2017

SUBJECT: The Interaction between the Antiquities Act and the O&C Act

## I. Summary

The President lacks authority under the Antiquities Act of 1906, 54 U.S.C. § 320301, (“Antiquities Act”) to permanently prohibit commercial timber production on “timberlands” or “power site lands valuable for timber” (collectively “timberlands”) described in the Oregon and California Revested Land Sustained Yield Management Act of 1937 (O&C Act), 43 U.S.C. §§ 2601 *et seq.* The O&C Act requires that such lands be managed for “permanent forest production.” Management for permanent forest production is irreconcilable with a national monument designation under the Antiquities Act that, with limited exceptions, permanently prohibits commercial timber harvest on O&C Act timberlands and prohibits BLM from using such lands in a calculation or provision of a sustained yield of timber.

The June 9, 2000 proclamation creating the Cascade Siskiyou National Monument (CSNM), Proclamation No. 7318, 65 Fed. Reg. 37, 247 (June 9, 2000) (“Proclamation 7318” or “2000 Proclamation”), and the January 12, 2017 monument expansion, Proclamation No. 9565 (Jan. 12, 2017) (“Proclamation 9565” or “2017 Expansion”), both designate relevant O&C Act lands as part of CSNM and prohibit commercial timber production thereon. Given the conflict between the provisions of the O&C Act and the CSNM national monument designation and expansion, the text of the O&C Act and basic principles of statutory interpretation mandate that the provisions of the O&C Act control.

## II. Background

### a. Antiquities Act

The Antiquities Act states “[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.” In doing so, “[t]he President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”

With the exception of a permitting process for certain archeological activities, 54 U.S.C. § 320302, the Antiquities Act itself does not specify what activities are allowed in areas designated national monuments, leaving it to the Secretaries of the Interior, Agriculture, and the Army, respectively, to adopt appropriate regulations. *See* 54 U.S.C. § 320303; *see generally United States v. California*, 436 U.S. 32, 40 (1978) (In reviewing the effect of the Antiquities Act on lands claimed by the United States, the Supreme Court noted “[a] reservation under the

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Antiquities Act thus means no more than the land is shifted from one federal use, and perhaps from one federal managing agency, to another.”). Subsequent statutes have further defined what activities are permissible based upon which agency is responsible for administering a given monument. *See, e.g.* 54 U.S.C. § 100753 (providing the Secretary authority to sell or dispose of timber in any “system unit,” including national monuments, managed by the National Park Service, where “the cutting of timber is required to control attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects.”). As a result, what is permitted in a national monument can vary greatly based on terms in the specific proclamation, including, but not limited to, what objects are being protected, what agency is given management authority, and what specific protection measures are mandated by the proclamation.

*b. The O&C Act*

The O&C Act provides, in relevant part:

[S]uch portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and power site lands valuable for timber, shall be managed, except as provided in section 3 hereof [classification of lands for agricultural purposes], for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal *[sic]* of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities, and providing recreational facilities....

43 U.S.C. 2601. The O&C Act further provides “[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.” 39 Stat 218, Title II (hereinafter, the “general repeal clause”).

The Bureau of Land Management (BLM) has long held, and courts have sustained, that timber production is established as the “dominant use” of the O&C Act. *See Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1184, rehearing denied 940 F.2d 435 (9th. Cir. 1990) (“The BLM did not err in construing the O&C Act as establishing timber production as the dominant use.”); *Swanson Superior Forest Products, Inc.*, 127 IBLA 379, 384 (1993) (“The primary purpose declared by section 1 of the O&C Act is to promote permanent forest production to permit timber harvesting and insure a sustained yield of timber”); *Elaine Mikels et al.*, 44 IBLA 51, 56 (1979) (“The O&C Act has been construed as ‘mandat[ing] dominant use management of the O&C lands for commercial forestry’ such that “[a]ny use conflicting with the dominant use is not allowed.” (quoting Memorandum from Acting Solicitor, U.S. Department of the Interior to Director, Bureau of Land Management (June 1, 1977))); *see also* Solicitor’s Opinion M 36910, Sept. 5, 1978 (O&C Act prevails where section 603 of FLPMA would prevent permanent forest production); Memorandum from the Director, BLM to the Solicitor (Sept. 8, 1981) (“[T]he primary thrust of the management program on the O&C lands is to provide a high level and undiminishing output of wood under the principle of sustained yield and recognize and provide for these other needs so as to maintain the economic stability of the local communities and

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industries.”); Memorandum from Gale Norton, Associate Solicitor, Division of Conservation and Wildlife, and Constance B. Harriman, Associate Solicitor, Division of Energy and Resources to James Cason, Deputy Assistant Secretary, Land and Minerals Management (Oct. 20, 1986) (concluding with respect to conservation efforts to protect the as of that time, not listed northern spotted owl, that “[i]f a program for managing northern spotted owls conflicts with producing timber on a sustained basis in O&C timberlands, the O&C Act will preclude the program’s application to that realty.”). Consistent with this dominant use paradigm, the BLM has discretion in determining the amount of timber to be harvested and sold from the O&C lands under its jurisdiction in order to ensure permanent sustainable timber yields, and in managing the land in a way that also furthers the O&C Act’s secondary purposes, *i.e.*, protecting watersheds, regulating streamflow, providing for recreational facilities, and contributing to the economic stability of local communities and industries. *See Elaine Mikels et al.*, 44 IBLA at 56 57 (noting that dominant use management for timber production “is not to say . . . that consideration will not be given in appropriate cases to protection of watersheds or development of the recreational potential of a timber area.”).

*c. Solicitor’s Opinion M 30506*

Solicitor’s Opinion M 30506 (Mar. 9, 1940) (1940 Opinion) analyzed whether the President had authority to include lands covered by the O&C Act in the Oregon Caves National Monument. It concluded that he did not. The 1940 Opinion looked to the text and structure of the O&C Act and concluded that Congress had set aside land covered by the O&C Act for “specified purposes,” including timber production, 1940 Opinion at 3. It further looked to the Antiquities Act and noted that subsequent statutes governing the management of national monuments, such as Oregon Caves, by the National Park Service prohibited the disposal of timber except in cases where such disposal is necessary to control attacks of insects or diseases or “otherwise conserve the scenery or the natural or historic objects.” *Id.* (quoting Act of August 25, 1916, 39 Stat. 535). Since timber production is one of the specified purposes of the O&C Act, and since timber production would have been effectively prohibited by inclusion in the Oregon Caves National Monument, the 1940 Opinion concluded “[t]here can be no doubt that the administration of the lands for national monument purposes would be inconsistent with the utilization of the O. and C. lands as directed by Congress.” *Id.* Since “[i]t is well settled that where Congress has set aside lands for a specific purpose the President is without authority to reserve the lands for another purpose,” the 1940 Opinion reasoned that “the President is not authorized to include the Oregon and California Railroad Company revested lands in the Oregon Caves National Monument.” *Id.* at 3 4.

The 1940 Opinion has never been withdrawn and remains the Department’s official legal position.

*d. Proclamation 7318*

On June 9, 2000, President Clinton issued Proclamation 7318 establishing the Cascade Siskiyou National Monument. Proclamation 7318 set aside “approximately 52,000 acres,” including approximately 40,143 acres of O&C Act timberlands, as a national monument. 65 Fed. Reg. at 37, 250. With respect to timber production in the CSNM:

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

*Id.* Proclamation 7318 went on to declare “[n]othing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation.” *Id.* at 37, 251. Consistent with this declaration, the Bureau of Land Management (BLM) Environmental Impact Statement prepared for the CSNM Resource Management Plan (CSNM EIS) stated:

[I]n accordance with the Proclamation, the Monument is the dominant reservation. The CSNM Proclamation does not change the O&C status of the land, it simply withdraws it from all forms of entry or disposal under mining, land and mineral leasing laws and removes the timber volume within the CSNM from the BLM Medford District’s sustainable harvest levels calculations.

CSNM DEIS at 11.

*e. Proclamation 9565*

Proclamation 9565 expanded the CSNM by adding approximately 48,000 acres, including approximately 39,760 acres of O&C Act timberlands. The prohibitions and restrictions on commercial timber production that were included in the 2000 Proclamation (described above) also apply to the 2017 Expansion.

### III. Analysis

Based upon the text and purpose of the O&C Act, as well as basic tools of statutory interpretation, the President lacks authority under the Antiquities Act to designate a national monument on O&C Act timberlands that permanently prohibits commercial timber harvest thereon. The text of the O&C Act reflects Congressional intent to set aside relevant O&C Act lands to be managed permanently for timber production, and for this purpose to take precedence over prior statutory authorities. Since the O&C Act is a more specific, later in time statute with a general repeal clause, to the extent that any national monument designation under the Antiquities Act conflicts with the purpose designated by the O&C Act, the provisions of the O&C Act control.

“When there are two acts upon the same subject, the rule is to give effect to both if possible . . .,” *United States v. Borden Co.*, 308 U.S. 188, 198 (1939), unless there is “a clearly expressed congressional intention to the contrary.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Where two statutes are unable to be harmonized, a later enacted statute will generally

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control the earlier enacted one, *see Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (where there is a conflict between two statutes the later statute controls to the extent necessary to resolve the conflict), provided that “a specific statute will not be controlled by a general statute, irrespective of priority of enactment.” *Morton*, 417 U.S. at 550 51(citing *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961)).

By virtue of the 2000 Proclamation and 2017 expansion, the Antiquities Act and the O&C Act purport to act upon the same subject: just under 80,000 acres of O&C Act timberland designated part of CSNM. Thus, whether the President has authority to prohibit commercial timber harvest on O&C Act timberlands through a national monument designation requires an examination of the interplay between the two statutes.<sup>1</sup>

The 2000 Proclamation establishing the CSNM is broad. It identifies specified examples of biodiversity as the objects of protection, and establishes a number of restrictions, including, with limited exceptions, prohibiting commercial timber production on the monument. It further designates BLM as the management agency for CSNM and establishes “monument purposes” as the dominant reservation. These restrictions and designations were carried forward and extended by the 2017 Expansion.

By prohibiting commercial timber production, the 2000 Proclamation and 2017 Expansion conflict with the O&C Act. The text of the O&C Act suggests that lands described in the O&C Act *must* be managed for permanent timber production. To wit, the O&C Act uses the word *shall* in describing the executive branch’s management responsibilities:

- O&C lands which are classified as timberlands and power site lands valuable for timber and are not classified for agricultural purposes “*shall* be managed . . . for permanent timber production” (emphasis added); and
- “[T]he timber thereupon *shall* be cut, sold, and removed in conformity with the principal [*sic*] of sustained yield . . .” (emphasis added).

The word “shall” traditionally signifies a mandatory obligation, while “may” is traditionally permissive. *See generally* Antonin Scalia & Bryan A. Gardner, *Reading the Law: The Interpretation of Legal Texts* 112 115 (2012) (noting that “[t]he traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive,” observing that legislative drafters have nonetheless used the word “shall” as permissive, and advising “when the word *shall* can reasonably read as mandatory, it ought to be so read.”). There is no indication that Congress intended to depart from the general rule with respect to management of the lands. *See Swanson Group Mfg. LLC v. Salazar*, 951 F. Supp. 2d 75, 81 (D.D.C. 2013) *vacated on other grounds sub nom. Swanson Group Mfg. LLC v. Jewell*, 790 F.3d 235 (D.C. Cir. 2015) (“The use of the

<sup>1</sup> This analysis is limited to the relationship between the O&C Act and the Antiquities Act. It does not seek to address the relationship between the O&C Act and other later-in-time statutes such as the Endangered Species Act. *See generally Seattle Audubon Society, et al. v. Lyons et al.*, 871 F.Supp. 1291 (W.D. Wash. 1994).



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word 'shall' [in the O&C Act] creates a mandatory obligation on the action in this case, BLM to perform the specified action.”]

The use of the word “shall” sets the O&C Act apart from other land management statutes that use more discretionary language. For example, the National Forest Management Act of 1976 (NFMA), 90 Stat. 2949, states that the Secretary of Agriculture “may” sell timber. Consistent with this distinction between discretionary authority and Congressional mandate, national forests are managed under an explicit multiple use mandate, *see* Multiple Use Sustained Yield Act of 1960, 74 Stat. 215 (1960); *United States v. New Mexico*, 438 U.S. 696, 714 (1978) (“The [Multiple Use Sustained Yield] Act directs the Secretary of Agriculture to administer all forests, including those previously established, on a multiple use and sustained yield basis.”), while the O&C Act is a dominant use statute, with timber production as the dominant use.<sup>2</sup> *See Headwaters*, 914 F.2d at 1183.

Further, the text of the O&C Act suggests that these Congressional mandated management principles are not subject to change absent subsequent Congressional action:

- The land “shall be managed . . . for *permanent* timber production” (emphasis added);
- Timber shall be managed consistent with principles of sustained yield “for the purpose of providing a *permanent* source of timber supply” (emphasis added).

The permanent nature of the O&C Act’s Congressional mandate is reinforced by the O&C Act’s general repeal clause, which provides: “All 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.”<sup>3</sup> Thus, whereas under other statutes, the executive branch had authority to shift land from one purpose to another, the language of permanency in the O&C Act indicates that Congress intended for its mandate to the executive to manage O&C Act lands for timber production to last until further notice, notwithstanding any authority granted under previous laws such as the Antiquities Act.<sup>4</sup>

<sup>2</sup> This also serves to distinguish the court’s holding in *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002). The court in *Tulare County* heard a challenge on multiple grounds to the President’s authority to establish the Giant Sequoia National Monument, including a claim that the monument designation violated the NFMA by improperly withdrawing lands from the national forest system. The court held that it did not, reasoning that because the proclamation itself conceived of the designated lands having dual status as part of the Monument and part of the national forest and merely established the monument purpose as the “dominant purpose,” it was “wholly consistent” with the National Forest Management Act. *Id.* at 1143. As noted above, timber production is the dominant purpose for the O&C Act.

<sup>3</sup> Unlike the O&C Act, neither the 1897 Organic Act, the Multiple-Use Sustained-Yield Act of 1960, the Forest Renewable Resources and Planning Act of 1974, nor the National Forest Management Act of 1976 have a general repeal clause that explicitly provides that the purposes of the act supersede any contrary prior enactments.

<sup>4</sup> The centrality of continued timber production on O&C Act land was reaffirmed by Congress in the Federal Land Policy and Management Act, which explicitly provides that “[n]otwithstanding any provision of this Act, in the event of conflict with or inconsistency between this Act and [the O&C Act], insofar as [it relates] to management of timber resources, and disposition of revenues from lands and resources, the latter Act[] shall prevail.”

**Commented [LWD1]:** This citation acknowledges the court’s ruling in *Swanson* that was the basis for the court finding this provision of the O&C Act was enforceable under 706(1).

There are multiple “shalls” in the O&C Act and we have argued you must look beyond the word shall to determine if this is mandatory or directory. This could undermine our position in the *Swanson III* litigation.

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The permanent, mandatory direction in the O&C Act does not strip the executive branch of all discretion in how it manages the land. Rather, it compels the executive branch to exercise the discretion it does have within congressionally set boundaries and consistent with congressionally mandated principles. For example, the O&C Act provides that “timber shall be cut, sold, and removed in conformity with the princip[le] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities, and providing recreational facilities.” Ensuring that timber production on O&C Act land is sustainable necessarily requires BLM to exercise prudent judgement, including potentially limiting or temporarily prohibiting timber cutting and removal on some O&C Act lands. However, these restrictions are not divorced from the dominant purpose of the O&C Act. Rather, they must further the long term sustainability of timber production on the affected lands. Thus, the discretion provided in the O&C Act is not discretion to balance competing purposes and uses, as in the NFMA, but rather discretion to balance the value of timber production today against the ability to ensure continued timber production tomorrow, and to consider the secondary purposes of the O&C Act in deciding where and how to harvest timber, not whether or not to do so. See BLM, Director’s Protest Resolution Report: Western Oregon Resource Management Plan Revisions 100 (Dec. 29, 2008) (“[T]he legislative history of the O&C Act and the Ninth Circuit Court ruling in *Headwaters v. BLM*, 914 F.2d 1174 (9th Cir. 1990) make it clear that management of these lands for sustained yield timber forest management is expected to result in ‘... 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.’ It would be inconsistent with the O&C Act to treat these expected benefits as additional objectives that must be balanced against sustained yield forest management, and thereby might reduce the annual productive capacity that would be offered for sale.” (quoting BLM, Proposed Final Resource Management Plan/Final Environmental Impact Statement: Western Oregon 1 6)); *see also Swanson*, 951 F. Supp. 2d at 82 (“[D]espite its discretion with respect to many aspects of the timber sales, BLM is nevertheless required to sell or offer for sale at reasonable prices the annual sustained yield capacity.” (emphasis in the original)); *Swanson Superior Forest Products, Inc.*, 127 IBLA 379 (1993) (noting that BLM could consider other factors in the context of a land exchange that would result in a net increase in available timberlands); *Elaine Mikels et al.*, 44 IBLA 51 (1979) (noting that BLM may consider other factors provided they do not conflict with the dominant use).

This sets the O&C Act apart from other statutes which courts have sought to harmonize with a monument designation under the Antiquities Act by identifying similar purposes. For example, the Wilderness Act, which was at issue in *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) and *Utah Association of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004), serves a purpose similar to that of the Antiquities Act by protecting the scenic beauty and natural wonders of the area in question. By contrast, the O&C Act serves a purpose, preserving continued commercial timber production, that is different from and irreconcilable with the stated monument purpose, preserving biodiversity in part by prohibiting continued commercial timber production.<sup>5</sup> See *Headwaters*, 914 F.2d at 1183 (“Nowhere does the

<sup>5</sup> Some have suggested that the O&C Act can be harmonized with the commercial timber ban by focusing on the amount of land at issue and concluding that, since CSNM only includes a relatively small percentage of total

**Commented [LWD2]:** I think this is different than the way the statute was discussed in the 2016 RMPs. It is also from the BLM protest report, which is not a final decision. There may be something in the 2008 ROD that would help, though I’m not sure it is necessary.

**Commented [LWD3]:** This decision was vacated and could undermine our position in the swanson III case.

**Deleted:** See generally

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legislative history suggest that wildlife habitat conservation or conservation of old growth forest is a goal on a par with timber production, or indeed that it is a goal of the O&C Act at all.”).

Both the 2000 Proclamation and the 2017 Expansion purport to mandate that the dominant use on CSNM land, including O&C Act timberlands land therein, is monument purposes and permanently prohibit commercial timber harvest thereon. Monument purposes are not sustained yield timber production, and a permanent ban on timber harvest is directly counter to the Congressional mandate that the lands be used for the dominant purpose of sustained yield timber production. See *Headwaters*, 914 F.2d at 1183 (The O&C Act “clearly envisions sustained yield harvesting of O&C Act lands” and “exempting certain timber resources from harvesting to serve as wildlife habitat is inconsistent with the principle of sustained yield.”).

Given the conflict between the O&C Act and the use of the Antiquities Act to permanently prohibit commercial timber production on O&C Act timberlands, the text of the O&C Act and basic principles of statutory interpretation indicate that the terms of the O&C Act control. First, as described above, the O&C Act itself has a general repeal clause that purports to supersede all acts and parts of acts “to the extent necessary to give full force and effect to this Act.”<sup>6</sup> This likely serves a “clearly expressed congressional intent[.]” for the terms of the O&C Act to control. Second, the O&C Act is a later in time statute than the Antiquities Act.<sup>7</sup> Finally,

relevant O&C Act land (approximately 3.3%), permanently banning commercial timber on some O&C Act land does not frustrate the Congressional purpose because timber can still be produced on other O&C Act land. This argument misses the mark. By passing the O&C Act, Congress exercised its judgement that all the relevant land described therein was necessary to ensure sustainable timber production for the beneficial purposes described in the Act. If Congress believed that only some of the land was necessary, or that other purposes were sufficiently important to predominate over timber production, it could have said so, and indeed, did with respect to land that is more suitable for agricultural uses. *See* O&C Act at § 3. It did not with respect to monument purposes. Instead, it explicitly included a general repeal clause. Thus, while BLM may, as discussed above, have discretion in how to comply with the direction to manage lands for permanent timber production, permanently removing those lands from such production conflicts with the requirements of the O&C Act by permanently preventing the BLM from even considering whether the lands should be harvested for timber. The 2000 Proclamation seems to recognize this problem and arguably attempts to reclassify all of the lands as non-timberlands. *See* Proclamation 7318 (“No portion of the monument shall be considered to be suited for timber production”). That determination was arguably carried forward in Proclamation 9565 with its incorporation of the management prescriptions in Proclamation 7318. However, neither proclamation cites the O&C Act as authority nor does either state a factual basis for the President to reclassify O&C Act lands.

<sup>6</sup> To the extent the question is analyzed as one of implied repeal, this clause overcomes any general disfavor of such repeals.

<sup>7</sup> Even if it was unlawful upon designation, it could be argued that Congress ratified the 2000 Monument establishment on O&C timberlands by passing legislation in 2009 facilitating a grazing buyout program on the Monument and by establishing Wilderness on 24,100 acres within the Monument. *See* Omnibus Public Land Management Act of 2009, 111 P.L. 11; 123 Stat. 991, section 1402 (grazing lease donation program); 1405 (Soda Mountain Wilderness). It is unlikely that these acts evince sufficiently clear Congressional intent to ratify the President’s creation of the CSNM. *See Utah Ass’n of Counties v. Clinton*, 1999 U.S. Dist. LEXIS 15852, 48-61 (D.Utah, 1999) (boundary adjustment legislation, the Utah School and Lands Exchange Act, appropriations acts, and rejection of a bill that would have limited the President’s authority under the Antiquities Act did not individually or collectively amount to Congressional ratification of the creation of Grand Staircase-Escalante National Monument). As the Supreme Court has noted, “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am.*

**Commented [LWD4]:** Yes, however the act does not define how BLM carries out sustained yield management. The 2016 RMPs present that BLM has the authority under the O&C Act to conserve species to enable the BLM to continue sustained yield management on the lands.

Headwaters was also decided prior to listing of the owl and did not include an ESA issue.

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given that the O&C Act governs only certain federal lands while the Antiquities Act governs all of them, the O&C Act is a more specific statute than Antiquities Act. As both a later in time and more specific statute, traditional tools of statutory interpretation counsel that the terms of the O&C Act control.

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*Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

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#### IV. Conclusion

Based upon the text and purpose of the O&C Act, as well as basic tools of statutory interpretation, the President lacks authority under the Antiquities Act to ban commercial harvest on O&C Act timberlands and prevent BLM from using such lands in a calculation or provision of a sustained yield of timber. This does not mean that the President lacks authority under the Antiquities Act to designate a national monument that includes O&C Act timberlands under any circumstances. For example, the President could conceivably issue a proclamation establishing a national monument on O&C Act timberlands that has management for timber production as the dominant use and management for monument purposes as a secondary purpose, consistent with the O&C Act.<sup>8</sup> However, in the event of a conflict between a national monument designation under the Antiquities Act and the O&C Act, the terms of the O&C Act control.

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<sup>8</sup> Some have noted that the 2000 Proclamation and 2017 Expansion also prohibit BLM from including O&C Act timberlands in a calculation or provision of sustained yield of timber, implicitly suggesting that the O&C Act and Antiquities Act proclamations could be harmonized by simply including such lands in sustained yield calculations. Given the mandatory nature of the O&C Act, this approach is likely to be insufficient because the potential production that serves as the basis for the sustainable yield calculation could never actually be realized.