

Seeing the Forest Through the Trees: A Look at *Murphy Company v. Biden* and the Reclassification of Federal Timberlands

INTRODUCTION

The Antiquities Act of 1906 grants presidents the authority to create and modify national monuments.¹ In his last month in office, President Obama used this power to enact Proclamation 9564, which added 48,000 acres to the Cascade-Siskiyou National Monument (“the Monument”).² Scientific studies since 2000 had shown the Monument’s ecosystems required “habitat connectivity corridors for species migration and dispersal,” especially due to the increased frequency of “large-scale disturbance[s] . . . exacerbated by climate change.” This reservation included 39,852 acres from a 2.4-million-acre area in Western Oregon (“O&C Lands”).³ The Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (“O&C Act”) directs the governance of O&C timberlands in Western Oregon, including federal lands.⁴ A controversy arose as the expansion of the Monument effectively prohibited logging on these previously available lands.⁵ Murphy Timber Company and Murphy Timber Investments, LLC (collectively, “Murphy”) claimed injury to their business resulting from the President’s purported usurpation of Murphy’s “wood basket,” timberlands from which the BLM logs and then auctions wood to companies like Murphy.⁶ Soda Mountain Wilderness Council, Klamath-Siskiyou Wildlands Center, Oregon Wild, and Wilderness Society (collectively, “Soda Mountain”) intervened on the side of the government to argue in favor of upholding Proclamation 9564.

In *Murphy Company v. Biden*, the Ninth Circuit ruled that the O&C Act and the Antiquities Act did not conflict and that Proclamation 9564 was a proper use

DOI: <https://doi.org/10.15779/Z38W950Q2N>

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1. 54 U.S.C. § 320301(a)-(b).
2. Proclamation No. 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017).
3. BUREAU OF LAND MGMT., ANALYSIS OF THE MANAGEMENT SITUATION RESOURCE MANAGEMENT PLAN FOR CASCADE-SISKIYOU NATIONAL MONUMENT 7 (2023), https://eplanning.blm.gov/public_projects/2023675/200549213/20081282/250087464/20230602_CSNM_RMP_AMS-PC_Final_508c.pdf.
4. 43 U.S.C. § 2601.
5. Brief for Plaintiff-Appellant at 19, *Murphy Co. v. Biden*, 64 F.4th 1122 (2023), cert. denied, 144 S. Ct. 1111 (2024) (No. 19-35921).
6. *Id.*

of presidential authority.⁷ The Ninth Circuit held that Proclamation 9564 was consistent with the O&C Act because the O&C Act grants “considerable discretion” to the Department of the Interior (“DOI”).⁸ The court should have found a lack of conflict due to the O&C Act’s allowance for Proclamation 9564 to reclassify the land in controversy as timberlands. Nonetheless, the court’s decision upheld a properly enacted presidential proclamation and will benefit the vital biodiversity of the area.

I. BACKGROUND

A. *The O&C Act*

In the 1860s, Congress granted the Oregon and California Railroad Company (“Railroad Company”) six million acres of forested land in exchange for building a rail line.⁹ Upon completion of the rail line, the Railroad Company was to sell the lands “only to actual settlers, in quantities not exceeding one hundred and sixty acres . . . and at prices not exceeding two dollars and fifty cents per acre.”¹⁰ Because the lands were poorly suited for farming and excellent for logging, the Railroad Company breached Congress’s directive and sold the lands in large parcels to the highest bidder.¹¹ Following public outcry and numerous court proceedings, Congress revested the remaining lands (“O&C Lands”) via the 1916 Chamberlain-Ferris Act.¹² Revesting removed O&C Lands from the local tax base, causing economic injury to local governments.¹³ Despite multiple attempts to remedy this harm, Congress was unable to stabilize the area¹⁴ due to the 20th Century logging practice of clear-cutting without consideration for regrowth and O&C Lands being considered worthless once the trees were gone.¹⁵

In 1937, Congress passed the O&C Act, limiting logging on O&C Lands and commencing a period of stability in the area.¹⁶ The O&C Act requires that “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

7. *Murphy Co. v. Biden*, 65 F.4th at 1126.

8. *Id.* at 1131-32.

9. Taylor et al., *Follow the Money: A Spatial History of In-Lieu Programs for Western Federal Lands*, STANFORD CTR. FOR SPATIAL AND TEXTUAL ANALYSIS, https://web.stanford.edu/group/spatial-history/FollowTheMoney/pages/O_C.html (last visited Dec. 3, 2024).

10. *Or. & Cal. R.R. Co. v. United States*, 238 U.S. 393, 396 (1915).

11. *Id.* at 408.

12. Chamberlain-Ferris Act, Pub. L. No. 86, ch. 137, § 2, 39 Stat. 218, 218-19 (1916).

13. HISTORY OF THE O & C LANDS: 1866 TO 1937, <http://www.oandc.org/o-c-lands/history-of-o-c-lands/history-of-the-oc-lands-1866-to-1937/> (last visited Dec. 3, 2024) [hereinafter O & C HISTORY 1866-1937].

14. Initially, Congress set up a revenue distribution scheme, but no payments were made to local O&C Counties. Next, Congress passed the Stanfield Act of 1926, which also failed to help the struggling area. *Id.*

15. *See id.*

16. HISTORY OF THE O & C LANDS: 1937 TO 1990, <http://www.oandc.org/o-c-lands/history-of-o-c-lands/history-of-the-oc-lands-1937-to-1990/> (last visited Dec. 3, 2024).

. . . shall be” harvested pursuant to the “sustained yield” principle.¹⁷ That is, only what lumber that can be regrown in a year can be harvested.¹⁸ Harvested lumber is auctioned and the revenue is split between local and federal governments as a proxy for the tax base.¹⁹ The O&C Act’s purpose is “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 [sic].”²⁰ The O&C Act contains a non-obstinate clause stating, “[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.”²¹

Today, O&C jurisdictions continue to receive subsidies from the sale of O&C Land timber.²² At times, those subsidies have made up 80 percent of local counties’ discretionary funds.²³ When Federal logging policy changed in the early 1990s in the direction of conservation, the amount of timber harvested from O&C Lands declined, and the subsidies followed suit. Congress responded by providing the counties with “safety net” payments.²⁴ These payments too, continue to support the region today.²⁵

Murphy argued that Proclamation 9564 is incompatible with the O&C Act, reading that the O&C Act requires that O&C timberlands be sustainably harvested. Murphy also asserted that Congress intended to repeal the Antiquities Act by including the non-obstinate clause in the O&C Act.

B. *The Antiquities Act*

The Antiquities Act of 1906 “provide[s] an expeditious means to protect federal lands and resources” that are “owned or controlled by the Federal Government.”²⁶ It delegates a “discretion[ary]” power to the President limited by the text of the Antiquities Act and by two subsequent Acts of Congress.²⁷ The text limits the size of a monument being created to “the smallest area compatible with the proper care and management of the objects to be protected.”²⁸ The subsequent acts of Congress limit the President’s Antiquities Act power specifically in Wyoming and Alaska.²⁹

17. Act Aug. 28, 1937, ch. 876, title II, 50 Stat. 876.

18. HISTORY OF THE O&C ACT, https://www.blm.gov/sites/blm.gov/files/Oregon_Flyer.pdf (last visited Dec. 3, 2024).

19. *Id.*

20. § 2601.

21. *Id.*

22. SUSTAINABLE COMMUNITIES, <http://www.oandc.org/o-c-lands/sustainable-communities/> (last visited Dec. 3, 2024).

23. *Id.*

24. *Id.*

25. S. Rep. No. 118–163 (2024).

26. CAROL H. VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 6 (2024) [hereinafter CRS Report] (emphasis omitted).

27. *Id.*; 54 U.S.C. § 320301.

28. 54 U.S.C. § 320301.

29. CRS Report, *supra* note 26.

C. *The Creation of the Cascade-Siskiyou National Monument*

Proclamation 7318 established the Monument in 2000, reserving nearly 53,000 acres in Jackson County, Oregon.³⁰ In doing so, it acknowledged that the area was a “biological crossroads” at the intersection of three distinct ecoregions “with unmatched biodiversity” and historical and scientific importance. The reservation was made in recognition that the land constituted an irreplaceable natural heritage worthy of preservation.³¹ The Bureau of Land Management (“BLM”), the DOI agency managing most multiple-use public lands,³² retained jurisdiction over the land, though the proclamation modified BLM’s management directive for those acres.³³ With the 2009 Omnibus Public Lands Management Act, Congress redesignated nearly 23,000 of those acres (“Soda Mountain Wilderness”) to “wilderness” status,³⁴ giving them the “highest form of land protection.”³⁵ In 2017, President Obama expanded the Monument via Proclamation 9564,³⁶ adding approximately 48,000 acres collectively from the Jackson and Klamath Counties in Oregon and Siskiyou County, California.³⁷ Of those 48,000 acres, 39,839 were O&C Lands; before Proclamation 9564, 16,448 of those 39,839 acres were classified as timberlands.³⁸ Proclamation 7318 directed, and Proclamation 9564 reaffirmed, that “no part of the monument shall be used in a calculation or provision of a sustained yield of timber.”³⁹

II. *MURPHY CO. V. BIDEN*

A. *Murphy Co. v. Trump – District Court of Oregon*

After Proclamation 9564 redesignated 16,448 acres from “timberlands” to “Monument,” Murphy brought a challenge in Oregon District Court⁴⁰ claiming injury to their harvest.⁴¹ Murphy moved for summary judgment on the grounds that the President lacked authority to reserve O&C Lands because the O&C Act

30. Proclamation No. 7318, 65 Fed. Reg. 37249 (June 13, 2000) [hereinafter Proc. 7318].

31. *Id.*

32. ABOUT THE U.S. AND ITS GOVERNMENT, <https://www.usa.gov/agencies/u-s-department-of-the-interior> (last visited Dec. 3, 2024).

33. BLM NATIONAL HISTORY AND TIMELINE, <https://www.blm.gov/about/history/timeline> (last visited Dec 3, 2024).

34. Rachel A. Werling, *Cascade-Siskiyou National Monument*, OR. ENCYC., <https://www.oregonencyclopedia.org/articles/cascade-siskiyou-national-monument/> (last visited Dec. 3, 2024); Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991.

35. *What is Wilderness*, THE WILDERNESS SOC’Y, <https://www.wilderness.org/articles/article/what-wilderness> (last visited Dec. 3, 2024).

36. Proclamation No. 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017).

37. Werling, *supra* note 33.

38. Defendants’ Cross Motion for Summary Judgment at 9-10, *Murphy Co. v. Trump*, No. 1:17-CV-00285-CL, 2019 WL 4231217 (D. Or. Sept. 5, 2019).

39. *Murphy Co. v. Biden*, 65 F.4th at 1126; Proclamation 7318 was enacted by President Bill Clinton. 65 Fed. Reg. 37249, 37249-50 (June 9, 2000).

40. *Murphy Co. v. Trump*, No. 1:17-CV-00285-CL, 2017 WL 979097, at *1 (D. Or. Mar. 14, 2017).

41. Complaint at 19 (Feb. 16., 2022) (No. 1:17-cv-00285-CL).

had repealed the Antiquities Act,⁴² and that the DOI could not follow Proclamation 9564 because it directed the DOI to manage O&C Lands contrary to the O&C Act’s “permanent forest production” mandate.⁴³

Soda Mountain intervened on the government’s side to argue in favor of upholding Proclamation 9564.⁴⁴ The Defendants and Soda Mountain cross-moved for summary judgment on the grounds that the O&C Act did not repeal the Antiquities Act, that the two acts did not irreconcilably conflict, and that the O&C Act did not remove federal lands from the President’s Antiquities Act authority.⁴⁵ A magistrate judge recommended that the district judge grant the Defendants’ cross-motion for summary judgment because “[t]he President did not exceed his congressionally delegated statutory authority” under the Antiquities Act and because “no irreconcilable conflict” exists between the acts.⁴⁶ In 2019 the United States District Court for the District of Oregon affirmed the magistrate judge’s recommendation.⁴⁷

B. *Murphy Co. v. Biden – 9th Circuit*

Murphy appealed to the Ninth Circuit, which affirmed in a 2-1 decision.⁴⁸ Murphy then petitioned the court for rehearing en banc and received no votes.⁴⁹ The Supreme Court later denied certiorari.⁵⁰

The Ninth Circuit majority ruled that the Antiquities Act and the O&C Act do not conflict.⁵¹ First, the majority held that the O&C Act did not repeal the Antiquities Act because they are directed at different officials.⁵² It quoted the Supreme Court: “[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.”⁵³ The majority explained that the legislative intent behind the O&C Act’s non-obstante clause was to overrule the “tangle” of prior O&C area legislation, not to overrule the Antiquities Act.⁵⁴ Second, the majority held that Proclamation 9564 was consistent with the O&C Act’s “text, history, and purpose.”⁵⁵ The O&C Act’s text gave the DOI

42. Plaintiff’s Motion for Summary Judgment at 20, *Murphy Co. v. Trump*, 2017 WL 4231217 (No. 1:17-cv-00285-CL).

43. *Murphy Co. v. Biden*, 65 F.4th at 1131-32.

44. Intervenor’s Cross Motion for Summary Judgment at 2, *Murphy Co. v. Trump*, 2017 WL 4231217 (No. 1:17-cv-00285-CL).

45. *Id.*

46. *Murphy Co. v. Trump*, No. 1:17-cv-00285-CL, 2019 U.S. Dist. LEXIS 81597, at *6, *9 (D. Or. Apr. 2, 2019), *aff’d sub nom. Murphy Co. v. Biden*, 65 F.4th.

47. *Murphy Co. v. Trump*, No. 1:17-cv-00285-CL, 2019 U.S. Dist. LEXIS 151055, at *4 (D. Or. Sep. 5, 2019).

48. *Murphy Co. v. Biden*, 65 F.4th at 1138.

49. *See generally* *Murphy Co. v. Biden*, No. 19-35921, 2023 U.S. App. LEXIS 23033 (9th Cir. Aug. 30, 2023).

50. *Murphy Co. v. Biden*, 144 S. Ct. 1111, 218 L. Ed. 2d 348 (2024).

51. *Murphy Co. v. Biden*, 65 F.4th at 1131-32.

52. *Id.* at 1132.

53. *Id.*

54. *Id.*

55. *Id.* at 1133.

“significant discretion” in the stewardship of the lands for logging and for “economic, recreational, and environmental uses.”⁵⁶ The history of the DOI’s stewardship of the O&C Lands over the past decades combined with the O&C Act’s conception both supported environmental protection purposes.⁵⁷ Thus, the Ninth Circuit held Proclamation 9564 to be a valid use of presidential authority under the Antiquities Act.⁵⁸

III. ANALYSIS

The Ninth Circuit correctly upheld Proclamation 9564 and correctly found the Antiquities and O&C Acts to be consistent. However, the court overlooked perhaps the strongest argument for why Proclamation 9564 is valid. The Ninth Circuit should have found that Proclamation 9564 was consistent with the O&C Act due to the O&C Act’s acknowledgment that timberlands may be reclassified.

A. *The Ninth Circuit correctly held that the O&C Act did not statutorily repeal the Antiquities Act either expressly or by implication.*

In general, later enacted statutes supersede former ones, though statutory repeal is nuanced.⁵⁹ Explicit repeal requires the later statute to name the former statute.⁶⁰ Implicit repeal covers all non-explicit repeals.⁶¹ The Supreme Court has held that implicit repeals require either an “affirmative showing of an intention to repeal” or a showing that the statutes are “irreconcilable.”⁶²

The Antiquities Act was not explicitly repealed by the O&C Act as the Antiquities Act does not name the O&C Act. Additionally, the Supreme Court held in *PLIVA, Inc. v. Mensing* that non-obstante clauses suggest implied repeal, if any.⁶³ Thus, the court correctly rejected Murphy’s claim that non-obstante clauses are an “express repeal of any and all prior inconsistent statutes.”⁶⁴

56. *Id.* at 1135.

57. *Id.* at 1135-36.

58. *Id.* at 1132.

59. See generally Deborah A. Widiss, *Communication Breakdown: How Courts Do—and Don’t—Respond to Statutory Overrides*, 104 JUDICATURE 51 (2020) (exploring the ineffectiveness of Congress’s communicated intent in response to courts’ interpretations of statutes).

60. Cf. *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 (2007) (“While the language of § 7(a)(2) does not *explicitly* repeal any provision of the CWA (or any other statute), reading it for all that it *might* be worth runs foursquare into our presumption against implied repeals.”) (emphasis added).

61. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982) (holding that for an exception to a statute to exist, “a later statute” would need to contain either “an express or implied partial repeal”).

62. The Supreme Court has been exceedingly clear that statutes are repealed only where legislatures are explicit or where no other option exists. See *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (“In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”); see also *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018); *United States v. Fausto*, 484 U.S. 439, 452-53 (1988); *United States v. Borden Co.*, 308 U.S. 188, 198-199 (1939); *Wood v. United States*, 41 U.S. 342, 363 (1842).

63. 564 U.S. 604, 622 (2011).

64. *Murphy Co. v. Biden*, 65 F.4th at 1132. Plaintiff’s Motion for Summary Judgment at 16, *Murphy Co. v. Trump*, 2017 WL 4231217 (Sept. 5, 2019) (No. 1:17-cv-00285-CL).

Nor was the Antiquities Act impliedly repealed by the O&C Act. The Supreme Court has consistently held that courts have a duty to reconcile statutes if possible.⁶⁵ However, as Murphy argued, the Supreme Court has also said that non-obstante clauses indicate “the general presumption against implied repeals” should *not* be applied.⁶⁶ Thus, while the Ninth Circuit correctly found the O&C Act did not impliedly repeal the Antiquities Act, it misstated the standard for non-obstante, implied repeals.

The Ninth Circuit should not have said “Murphy ‘faces a stout uphill climb’ against the ‘strong presumption that repeals by implication are disfavored.’”⁶⁷ That language insinuated the Ninth Circuit would employ the “general presumption against implied repeals,” which would run afoul of the *PLIVA* court’s holding.⁶⁸ However, despite naming the presumption, the Ninth Circuit in actuality embarked on a careful analysis of the O&C Act’s lack of an implied repeal of the Antiquities Act.⁶⁹

1. The Antiquities Act is not impliedly repealed because the O&C Act contains no “affirmative showing of an intention to repeal.”

The Supreme Court has said that only statutes that are a “clearly intended [] substitute” of the prior statute can be an “affirmative showing of an intention to repeal.”⁷⁰ The Antiquities Act “provide[s] an *expeditious* means to protect federal lands and resources” across the United States.⁷¹ Thus, for the O&C Act to be a substitute it would have to expressly re-delegate that same national monument-creation power.⁷² Additionally, the Congress that enacted the O&C Act actively engaged with Antiquities Act proclamations and conservation efforts. The Ninth Circuit could have explained that “it [would be] improbable, to say the least, that the same Congress [that funded habitat conservation would] condem[n]” the President’s continued Antiquities Act power over O&C Lands.⁷³

65. *Morton*, 417 U.S. at 551 (“[W]hen two statutes are *capable* of co-existence, it is the *duty* of the courts . . . to regard each as effective.”) (emphasis added); *see also Borden*, 308 U.S. at 198-99 (citing *United States v. Tynen*, 78 U.S. 88, 92 (1870), *In re Henderson’s Tobacco*, 78 U.S. 652, 657 (1870), and *Gen. Motors Acceptance Corp. v. United States*, 286 U.S. 49, 61-62 (1932)) (noting that “[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible;” holding that even when two acts “cover” all the same scenarios, they do not necessarily conflict because the new act could be “merely affirmative, or cumulative, or auxiliary” of the previous act; and holding that to characterize two acts as conflicting requires “positive repugnancy,” and if that exists, the prior act is “repealed by implication only . . . to the extent of the repugnancy”).

66. Plaintiff’s Motion for Summary Judgment at 16, *Murphy Co. v. Trump*, 2017 WL 4231217 (No. 1:17-cv-00285-CL) (citing *PLIVA, Inc. v. Mensing*, 564 U.S. at 622).

67. *Murphy Co. v. Biden*, 65 F.4th at 1132 (citing *Epic Sys. Corp.*, 584 U.S. at 510).

68. *See id.*; *PLIVA, Inc. v. Mensing*, 564 U.S. at 622.

69. *Murphy Co. v. Biden*, 65 F.4th at 1132-33.

70. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982).

71. *See id.*; CRS Report, *supra* note 26; 54 U.S.C. § 320301.

72. *See Kremer*, 456 U.S. at 468; CRS Report, *supra* note 26.

73. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974). The same 1937 Congress sat silent while President Franklin D. Roosevelt exercised his Antiquities Act power fourteen times before the O&C Act was passed in August of 1937. *See National Monument Facts and Figures*, NAT’L PARK SERV., <https://www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm> (last visited Nov. 26,

Thus, even with the O&C Act's non-obstante clause making implied repeal more attainable, an "affirmative showing of an intention to repeal" remains nonexistent.

The Ninth Circuit rightly found that Congress included the non-obstante clause in the O&C Act to clear the legislative slate of the "tangle" of prior O&C-area legislation.⁷⁴ That need, combined with the explicitness with which all other repeals of Antiquities Act power have been carried out,⁷⁵ evidenced that the O&C Act drafters would have specifically named the Antiquities Act had they intended to overturn it.⁷⁶

2. The Antiquities Act was not impliedly repealed because the O&C Act and the Antiquities Act are not "irreconcilable."

The question of irreconcilability between the statutes necessarily implicates Proclamation 9564. Because the O&C Act did not repeal the President's Antiquities Act power over the O&C Lands, conflict cannot be discerned until a proclamation directed at O&C Lands is made.

B. The Ninth Circuit correctly held that the O&C Act does not conflict with Proclamation 9564.

Murphy contended the DOI could not simultaneously comply with both the O&C Act and Proclamation 9564.⁷⁷ The Ninth Circuit correctly held that the DOI could reconcile these directives. However, the Ninth Circuit needlessly discussed whether the two acts could be carried out simultaneously on the same land.⁷⁸ These discussions were unnecessary because Proclamation 9564 reclassified the 16,448 acres from a classification of "timberlands" to a classification of "national monument."⁷⁹

1. The Antiquities Act and the O&C Act being nominally directed at different individuals is irrelevant to whether they conflict.

The majority held that the statute and the proclamation did not conflict because they were "directed at different officials: the Antiquities Act vests

2024). Additionally, just four days before it passed the O&C Act, Congress abolished Presidential Proclamation 807 under the Antiquities Act and transferred nearly 1,500 acres in Montana to state control. See Proclamation No. 807, 35 Stat. 2187 (May 11, 1908). Finally, just five days after the O&C Act was passed, an Act was passed that worked to fund habitat conservation—the Pittman-Robertson Wildlife Restoration Act, now called the Federal Aid in Wildlife Restoration Act. See *The Federal Aid in Wildlife Restoration Act*, S.C DEP'T OF NAT. RES., <https://www.dnr.sc.gov/wsfr/index.html> (last visited Nov. 26, 2024).

74. *Murphy Co. v. Biden*, 65 F.4th at 1132.

75. See, e.g., 16 U.S.C. § 3213 (prohibiting future reservations of over 5,000 acres of Alaska public lands by the Executive Branch).

76. *Murphy Co. v. Biden*, 65 F.4th at 1132-33; see *Morton*, 417 U.S. at 551.

77. Complaint at 27, *Murphy Co. v. Trump*, No. 1:17-CV-00285-CL, 2017 WL 4231217 (D. Or. Sept. 5, 2019) (No. 1:17-cv-00285-CL).

78. *Murphy Co. v. Biden*, 65 F.4th at 1133-36.

79. Proc. 9564, 82 Fed. Reg. 6145.

authority in the President, while the [O&C] Act concerns the [DOI].”⁸⁰ Thus, the majority reasoned the O&C Act could not limit presidential power.⁸¹ However, while the O&C Act names the DOI, in reality, the act guides the management of an area of land more than it vests power in an organization.⁸²

Both the text and the history of the O&C Act support the contention that the O&C Lands and not the DOI were the focus of the O&C Act.⁸³ For years Congress struggled with the stewardship of the O&C Lands.⁸⁴ The O&C Act’s purpose was to give stabilizing direction to the area, not to expand the DOI’s power.⁸⁵ The DOI is the governmental entity that manages most multiple-use public lands, and so was put in charge when the lands were revested in 1937.⁸⁶ Conversely, the Antiquities Act’s purpose was to expand presidential power, not to regulate a defined area of land.⁸⁷ Textually, the O&C Act uses the phrase “shall be,” which is in passive voice.⁸⁸ The Supreme Court has consistently held that where passive voice is used, Congress was attempting to “fram[e] it to ‘focu[s] on an event that occurs without respect to a specific actor.’”⁸⁹ Thus, the O&C Act does not solely apply to the DOI.⁹⁰

2. Proclamation 9564 reclassified timberlands as National Monument lands.

Unlike the Antiquities Act, Proclamation 9564 was directed at a specific area of land.⁹¹ Proclamation 9564 was a redesignation of federally held lands, but it did not prevent the DOI from continuing to follow the O&C Act’s guidance because it did not change the rules for the management of O&C timberlands.⁹²

The Ninth Circuit likened this case to *Portland Audubon Society v. Babbitt*, a Ninth Circuit case where the National Environmental Policy Act (“NEPA”)

80. *Murphy Co. v. Biden*, 65 F.4th at 1132.

81. *Id.*

82. *See generally* 43 U.S.C. § 2601.

83. O & C HISTORY 1866-1937, *supra* note 13.

84. *Id.*

85. *See Murphy Co v. Biden*, 65 F.4th at 1133-34.

86. U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., O&C SUSTAINED YIELD ACT: THE LAND, THE LAW, THE LEGACY 11 (1987).

87. Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, NAT’L PARK SERV. HIST. E-LIBR., <https://www.nps.gov/parkhistory/hisnps/npshistory/righter.htm> (last visited Nov. 26, 2024) (“Disappointed by Congress, he was anxious to invest power in the presidency.”).

88. 43 U.S.C. § 2601; *Changing a sentence into the passive voice when the active verb is in the simple future tense*, ENGLISHGRAMMAR, <https://www.englishgrammar.org/changing-sentence-passive-voice-active-verb-simple-future-tense/> (last visited Nov. 26, 2024).

89. *See, e.g., Bartenwerfer v. Buckley*, 598 U.S. 69, 75-76 (2023) (citing *Dean v. United States*, 556 U.S. 568, 572 (2009)).

90. *See id.*; 43 U.S.C. § 2601.

91. *The proclamation of National Monuments under the Antiquities Act, 1906-1970*, NAT’L PARK SERV., <https://www.nps.gov/articles/lee-story-proclamation.htm> (last visited June 24, 2024); Proclamation No. 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017).

92. *See Murphy Co. v. Biden*, 65 F.4th at 1131-32; Proclamation No. 9564, 82 Fed. Reg.

seemed to clash with the O&C Act.⁹³ In *Babbitt*, the Ninth Circuit held that BLM “could not use ‘an excessively narrow construction of its existing statutory authorizations’ under the O&C Act to avoid compliance with NEPA.”⁹⁴ Based on the precedent set in *Babbitt*, the Ninth Circuit reasoned in *Murphy* that “BLM has latitude to reserve [O&C] Act land from logging in light of competing directives.”⁹⁵ However, the O&C Act and Proclamation 9564 did not provide the DOI with competing directives, and little was left to the DOI’s discretion.⁹⁶ Congress empowered the President to designate national monuments under the Antiquities Act and the O&C Act did not overturn the Antiquities Act or forestall presidential proclamations on O&C Land.⁹⁷ Proclamation 9564 was simply a reclassification of timberlands to monument lands.

3. *Proclamation 9564 is Auxiliary to the O&C Act.*

In defining which of the O&C Lands “shall be managed . . . for permanent forest production,” the O&C Act laid out a three-part test.⁹⁸ Lands must be managed “for permanent forest production” if they are 1) O&C Lands, 2) under the DOI’s jurisdiction, and 3) classified as timberlands.⁹⁹ Notably, the statute uses the word “may,” both when talking about lands coming under the jurisdiction of the DOI and when talking about lands being classified as timberlands.¹⁰⁰ “The word ‘may,’ when used in a statute, usually implies some degree of discretion.”¹⁰¹ Thus, it can be inferred that Congress foresaw the need for executive branch discretion regarding which lands were under DOI’s jurisdiction and which were classified or unclassified as timberlands.¹⁰² This implication is rebuttable “by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose” of the statute.¹⁰³

As explained above, legislative intent and statutory inferences indicate that Congress wanted this land to be managed in ways that brought health and prosperity to O&C counties. In holding that “no portion of the monument shall be considered to be suited for timber production,” Proclamation 9564 reclassified the 16,000 acres from timberlands to monument lands.¹⁰⁴ Because the language of the O&C Act does not limit who may classify/declassify timberlands, and the

93. *Murphy Co. v. Biden*, 65 F.4th at 1135; *Portland Audubon Society v. Babbitt*, 998 F.2d 705 (9th Cir. 1993).

94. *Murphy Co. v. Biden*, 65 F.4th at 1135.

95. *Id.*

96. *Id.* at 1131-35; see generally Proclamation No. 9564, 82 Fed. Reg. at 6145.

97. *Murphy Co. v. Biden*, 65 F.4th at 1131-32; see 54 U.S.C. § 320301(a).

98. 43 U.S.C. § 2601 (referring to “such portions of the [O&C 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”).

99. *Id.*

100. *Id.*

101. *United States v. Rodgers*, 461 U.S. 677, 706 (1983).

102. See *id.*; 43 U.S.C. § 2601.

103. See *Rodgers*, 461 U.S. at 706.

104. 65 Fed. Reg. 37247, 37250 (June 9, 2000).

O&C Act is directed at an area of land and not a specific actor, a presidential proclamation can modify the classification of timberlands.¹⁰⁵

CONCLUSION

The Ninth Circuit correctly upheld Proclamation 9564 and correctly found that the Antiquities Act is consistent with the O&C Act. However, it did not consider several stronger arguments, and it should have found Proclamation 9564 to be consistent with the O&C Act due to the O&C Act's acknowledgment that timberlands may be reclassified.

The O&C counties' timber industry is struggling to modernize. This is a familiar struggle; old industries frequently fight change.¹⁰⁶ However, the O&C Lands were revested nearly a century ago and many other rural communities adjacent to national monuments sustain economies without relying on federal funds. Many small towns have lost relied-upon industries and yet have managed to reinvent themselves. The O&C counties, too, could move away from their traditional reliance on logging and timber production. Finally, environmental developments over the last century have shifted what constitutes a sustainable yield of timber. The O&C Lands' ecological needs have changed over the past century and ensuring a future yield of O&C Land timber requires different limits on logging than existed in 1937. Proclamation 9564, consistent with the purpose of the O&C Act, thus supports the local economy and future generations' ability to harvest timber.

Meg O'Neill

105. See generally 43 U.S.C. § 2601.

106. See, e.g., Kate Roberts, *Taxi drivers fight back against Uber and Lyft*, CNBC (May 26, 2015), <https://www.cnbc.com/2015/05/26/taxi-drivers-fight-back-against-uber-and-lyft.html>; Nathaniel Popper et al, *The Silicon Valley Start-Up That Caused Wall Street Chaos*, N.Y. TIMES (Jan. 30, 2021), <https://www.nytimes.com/2021/01/30/business/robinhood-wall-street-gamestop.html>.

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