2019 WL 6314826
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NOTICE: FINAL PUBLICATION
DECISION PENDING. SEE W.S.A. 809.23.

Court of Appeals of Wisconsin.

MICHAEL G. DESOMBRE AND JIYOUNG C. DESOMBRE, PLAINTIFFS-RESPONDENTS,
V.
JAMES I. BOLDEBUCK AND CHARITY A. BOLDEBUCK, DEFENDANTS-APPELLANTS.

Appeal No. 2018AP2227
|
November 26, 2019

Cir. Ct. No. 2018CV2

APPEAL from a judgment of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. *Reversed and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Seidl, JJ.

Opinion

PER CURIAM.

¶1 This case concerns a dispute regarding the ownership of a pier and a "wet boathouse"—that is, a boathouse constructed beyond the ordinary high water mark (OHWM) of a navigable waterway. [1] Michael and Jiyoung DeSombre sued their neighbors, James and Charity Boldebuck, seeking a declaration that the DeSombres own a permanent pier and wet boathouse extending into Otter Lake in Vilas County, as well as a declaration that the pier and wet boathouse do not interfere with the Boldebucks' **riparian** rights. The circuit court granted summary judgment in favor of the DeSombres on both of their claims.

¶2 We conclude the circuit court erred by granting the DeSombres summary judgment because they failed to make a prima facie showing that the pier and wet boathouse are not located at least partially within the Boldebucks' **riparian** zone. At the very least, there are disputed issues of material fact regarding the location of the pier and wet boathouse in relation to the parties' respective **riparian** zones. We therefore reverse the court's grant of summary judgment in favor of the DeSombres and remand for further proceedings on their claims. [2]

BACKGROUND

¶3 The DeSombres and the Boldebucks own neighboring properties on Otter Lake in Vilas County. The western boundary line of the DeSombres' property is the eastern boundary line of the Boldebucks' property. Both properties are part of Fred Morey's Subdivision, the plat for which was recorded in 1910.

¶4 Prior to 2004, both the Boldebucks' property—Lot 29—and the DeSombres' property—Lot 30—were owned by Jocelyn Blair. On October 11, 2004, Blair executed a warranty deed conveying Lot 30 to Jerome and Patricia Connery. Although identified in the deed as Lot 30, the property was described using a metes and bounds legal description. Below the legal description, the deed contained the notation: "Including the right to continue to use and maintain the existing boat house and pier located near the Northwest corner of this parcel."

¶5 Just over two weeks later, on October 29, 2004, Blair executed a warranty deed conveying Lot 29 to Jay Brentlinger. Again, although the deed identified the property as Lot 29, it was described using a metes and bounds legal description. Below the legal description, the deed stated: "Subject to the right of the grantor, their heirs and assigns to continue to use and maintain the existing boat house and pier located near the Northeast corner of this parcel, said grantor owning adjoining lands to the East of this parcel." [3]

¶6 On November 14, 2007, the Connerys sold Lot 30 to the DeSombres. Again, the deed contained a metes and bounds legal description and included the notation: "Including the right to continue to use and maintain the existing boat house and pier located near the Northwest corner of this parcel." The Boldebucks purchased Lot 29 on June 12, 2012. Their deed included a metes and bounds legal description and did not contain any reference to the pier or wet boathouse. It is undisputed that according to the metes and bounds legal

descriptions contained in the parties' deeds, which were taken from a survey completed in 2003, the pier and wet boathouse extend into Otter Lake from the DeSombres' property.

¶7 At some point after the Boldebucks purchased their property, they began using the pier and wet boathouse when the DeSombres were absent, without the DeSombres' consent. On June 25, 2016, the Boldebucks wrote to the DeSombres asserting that they had a right to use the pier and wet boathouse because those structures were located "substantially within [the Boldebucks'] **riparian** zone." The letter conceded that the DeSombres' deed granted them a "permissive right" to use and maintain the pier and boathouse, but it stated that right was "concurrent with [the Boldebucks'] rights of ownership and use."

¶8 The DeSombres subsequently commenced this lawsuit, which asserted two claims against the Boldebucks. First, the DeSombres asked the circuit court to declare that they were the sole owners of the pier and wet boathouse, and that the Boldebucks did not have any ownership interest in those structures. Second, they sought a declaration that the pier and boathouse did not interfere with the Boldebucks' **riparian** rights.

¶9 The DeSombres ultimately moved for summary judgment, which the circuit court granted. The court summarized its reasoning as follows:

> The boathouse and pier are attached to the DeSombre Parcel according to the legal descriptions and surveys under which both parties took title. The DeSombres were marketed a property containing a boathouse, specifically contracted for it, and took title based on verification by survey and legal description that the boathouse was theirs. They have insured the boathouse for casualty and liability as part of their homeowner's policy since purchase, they have been assessed and have paid taxes on the structure as part of the improvements to their parcel since purchase. They have spent money and been responsible for maintenance of the pier and boathouse since purchase. Real or personal, and however situated, the boathouse and pier are the exclusive property of the DeSombres. The Boldebucks have no basis to claim ownership of the boathouse and pier, and no right to use based on any theory they have advanced. Any encroachment of the structure into the Boldebuck **riparian** zone under the facts of this case does not constitute an actionable violation of **riparian** rights. The situation was open and obvious to the Boldebucks at the time of their purchase, a purchase they elected to make despite the existence of the boathouse and the pier, and without any basis to believe at the date of purchase that they had any legal or equitable claim to its ownership or use.

The Boldebucks now appeal the court's summary judgment ruling.

DISCUSSION

I. Standard of review

¶10 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. "Under that methodology, the court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented." ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If so, we then examine the moving party's submissions to determine whether they establish a prima facie case for summary judgment. ***Id.*** If the moving party has made a prima facie showing, we examine the opposing party's affidavits to determine whether a genuine issue exists as to any material fact. ***Id.***

¶11 Ultimately, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). "Summary judgment is a drastic remedy; therefore, the moving party must clearly be entitled to judgment as a matter of law." ***CED Props., LLC v. City of Oshkosh***, 2018 WI 24, ¶19, 380 Wis. 2d 399, 909 N.W.2d 136 (citation omitted). Accordingly, when reviewing a grant of summary judgment, we view the facts in the light most favorable to the nonmoving party, and we resolve any doubts as to the existence of a genuine issue of material fact against the moving party. ***Id.***

II. Riparian rights

¶12 The DeSombres moved for summary judgment on their claims for a declaration that: (1) they own the pier and wet boathouse; and (2) the pier and wet boathouse do not interfere with the Boldebucks' **riparian** rights. It is undisputed that both the DeSombres and the Boldebucks are **riparian** owners of property on Otter Lake. "**Riparian** owners are those who have title to the ownership of land on the bank of a body of water." ***ABKA Ltd. P'ship v. DNR***, 2002 WI 106, ¶57, 255 Wis. 2d 486, 648 N.W.2d 854. A **riparian** owner is accorded certain rights based upon his or her ownership of shoreline property. ***Id.*** As relevant to this case, those rights include the right to "construct a pier or similar structure in aid of navigation." ***Id.*** In addition, a **riparian** owner has the exclusive right to use any such pier and may therefore "eject others" who attempt to use it. *See* ***Anchor Point Condo. Owner's Ass'n v. Fish Tale Props., LLC***, 2008 WI App 133, ¶¶13-14, 313 Wis. 2d 592, 758 N.W.2d 144.

¶13 A property owner's **riparian** zone is comprised of "the area that extends from **riparian** land waterward to the line of navigation as determined by a method that establishes **riparian** zone lines between adjacent **riparian** owners in a manner that equitably apportions access to the line of navigation." WIS. STAT. § 30.01(5r). The line of navigation, in turn, means "the depth of a navigable water that is the greater of ... [t]hree feet, as measured at summer low levels" or "[t]he depth required to operate a boat on the navigable water." Sec. 30.01(3c).

¶14 Wisconsin case law sets forth three general methods for determining the boundaries between neighboring property owners' **riparian** zones. ***Nosek v. Stryker***, 103 Wis. 2d 633, 635, 309 N.W.2d 868 (Ct. App. 1981). First, "where the course of the shore approximates a straight line and the onshore property division lines are at right angles with the shore, the boundaries are determined by simply extending the onshore property division lines into the lake." ***Id.*** This method is typically referred to as the "extended lot line method." *See* ***Borsellino v. Kole***, 168 Wis. 2d 611, 614, 484 N.W.2d 564 (Ct. App. 1992). Second, if "the boundary lines on land are not at right angles with the shore but approach the shore at obtuse or acute angles ... the division lines should be drawn in a straight line at a right angle to the shoreline without respect to the onshore boundaries." ***Nosek***, 103 Wis. 2d at 636. Our case law refers to this method as both the "right angle method" and the "coterminous method." *See* ***Borsellino***, 168 Wis. 2d at 614; ***Manlick v. Loppnow***, 2011 WI App 132, ¶15, 337 Wis. 2d 92, 804 N.W.2d 712. Third, "where the shoreline is irregular ... the boundary line should be run in such a way as to divide the total navigable waterfront in proportion to the length of the actual shorelines of each owner taken according to the general trend of the shore." ***Nosek***, 103 Wis. 2d at 637.

III. Application of the summary judgment methodology

¶15 The Boldebucks do not develop any argument that the DeSombres' complaint failed to state a claim upon which relief could be granted. We therefore proceed to the second and third steps of the summary judgment analysis and consider: (1) whether the DeSombres made a prima facie case for summary judgment on each of their claims; and (2) whether genuine issues of material fact precluded the circuit court from granting the DeSombres summary judgment.

A. Prima facie case for summary judgment

¶16 The Boldebucks first argue that the DeSombres failed to make a prima facie case for summary judgment on their claim for ownership of the pier and wet boathouse. That claim sought a declaration of interest in real property, pursuant to WIS. STAT. § 841.01(1). The Boldebucks contend that the DeSombres "failed to present a prima facie case that the boathouse and pier are real property," and that, as a result, they are not entitled to relief under that statute.

¶17 The term "real property" means "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." *Property*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶58, 311 Wis. 2d 492, 753 N.W.2d 448. Here, it is undisputed that the pier and wet boathouse are "attached to" the bed of Otter Lake. It is further undisputed that the pier and boathouse are permanent, rather than temporary or removable, structures. Nonetheless, the Boldebucks argue that even permanent structures that are "attached to" the bed of a navigable waterway cannot be owned as real property by private individuals because title to the underlying land is held by the State, pursuant to the public trust doctrine.

¶18 We reject this argument because the Boldebucks cite no legal authority supporting their assertion that the public ownership of a lakebed means that any structures affixed to it cannot qualify as real property. "Arguments unsupported by references to legal authority will not be considered." ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶19 Furthermore, in support of their summary judgment motion, the DeSombres offered the affidavit of Michael Muelver, the tax assessor for the town where the parties' properties are located. Muelver averred that the DeSombres had paid real estate taxes on the wet boathouse since at least 2006, and he submitted documentation supporting that averment. For purposes of Wisconsin's tax statutes, the term "real property" is defined to include "not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto." WIS. STAT. § 70.03(1). "A benefit is appurtenant if the right to enjoy that benefit is tied to the ownership of a particular parcel of land." ***Nature Conservancy of Wis., Inc. v. Altnau***, 2008 WI App 115, ¶7, 313 Wis. 2d 382, 756 N.W.2d 641. The rights to place and use structures in aid of navigation on the bed of a navigable lake are appurtenant to the ownership of **riparian** property. *See* ***ABKA Ltd. P'ship***, 255 Wis. 2d 486, ¶57; ***Anchor Point***, 313 Wis. 2d 592, ¶¶13-14. We therefore conclude that such structures may be owned by a private individual as real property, even though the underlying lakebed is owned by the State.

¶20 Nevertheless, we conclude for another reason that the DeSombres failed to make a prima facie case for summary judgment on both of their claims. Specifically, the DeSombres failed to introduce any evidence on summary judgment showing the location of the pier and wet boathouse in relation to the parties' respective **riparian** zones. That determination appears to be material both to whether the DeSombres own the pier and wet boathouse and to whether those structures interfere with the Boldebucks' **riparian** rights. [4]

¶21 As noted above, a party's **riparian** zone extends from the shoreline waterward to the line of navigation, and the boundaries between neighboring owners' **riparian** zones are typically determined using one of the three methods set forth in our case law. *See* WIS. STAT. § 30.01(5r); ***Nosek***, 103 Wis. 2d at 635. The DeSombres submitted several survey maps in support of their summary judgment motion. Each of those maps shows the pier (to which the wet boathouse is attached) extending into Otter Lake from the corner of the DeSombres' property closest to the Boldebucks' property line. However, none of the maps that the DeSombres submitted on summary judgment purport to show the location of either the line of navigation or the boundary between the parties' **riparian** zones. Thus, those maps do not provide any evidence as to whether the pier and wet boathouse lie completely within the DeSombres' **riparian** zone, whether they extend partially into the Boldebucks' **riparian** zone, or to what extent the structures extend beyond the line of navigation and therefore lie outside both the DeSombres' and the Boldebucks' **riparian** zones.

¶22 The DeSombres also submitted an affidavit of surveyor Thomas Boettcher in support of their summary judgment motion. However, neither Boettcher's affidavit nor its attachments provide any evidence as to the location of the pier and wet boathouse in relation to the parties' respective **riparian** zones.

¶23 The DeSombres also submitted an affidavit of Brian Hug, who was employed as a caretaker for their property. Hug averred that Otter Lake is approximately three feet deep at the two corners of the wet boathouse closest to the shore and that "[i]n the area of the common boundary between the DeSombre and Boldebuck properties the depth of the water reaches 3 feet at 30 feet from the ordinary high water mark." Hug's affidavit therefore provides some evidence regarding the location of the line of navigation. Notably, however, the line of navigation is located at "*the greater of* ... [t]hree feet, as measured at summer low levels" or "[t]he

depth required to operate a boat on the navigable water." WIS. STAT. § 30.01(3c) (emphasis added). The DeSombres did not introduce any evidence as to whether Hug's depth measurements were taken at summer low levels, nor did they introduce evidence regarding the depth of water required to operate a boat on Otter Lake.

¶24 In its summary judgment decision, the circuit court relied on an "Eagle Landmark Survey submitted by [the DeSombres]" as showing the boundary between the parties' respective **riparian** zones. However, the Eagle Landmark survey was not submitted by affidavit in support of the DeSombres' summary judgment motion. Instead, it was submitted as an attachment to the DeSombres' complaint. "On summary judgment, the allegations in the complaint are not evidence." ***Oddsen v. Henry***, 2016 WI App 30, ¶26, 368 Wis. 2d 318, 878 N.W.2d 720. We therefore agree with the Boldebucks that the court could not rely on the Eagle Landmark survey when determining whether the DeSombres had established a prima facie case for summary judgment. [5]

¶25 As the foregoing summary shows, the DeSombres failed to submit sufficient evidence on summary judgment showing the location of the pier and wet boathouse in relation to the parties' respective **riparian** zones, including to the line of navigation. Accordingly, the DeSombres failed to establish a prima facie case for summary judgment on either of their claims, and the circuit court erred by granting their summary judgment motion.

B. Existence of genuine issues of material fact

¶26 Moving on to the third step of the summary judgment analysis, we conclude that even if the DeSombres did establish a prima facie case for summary judgment, the evidentiary materials submitted by the Boldebucks were sufficient to raise a genuine issue of material fact as to the location of the pier and wet boathouse in relation to the parties' respective **riparian** zones. In opposition to the DeSombres' summary judgment motion, the Boldebucks submitted an affidavit of surveyor Gregory Maines, attached to which was a survey map that Maines had prepared in June 2018. On that survey map, Maines depicted the location of the boundary line between the parties' **riparian** zones using both the extended lot line method and the coterminous method. [6]

¶27 Using the boundary line created by extending the lot line established by the parties' legal descriptions, the Maines survey shows that nearly the entire pier and boathouse are on the Boldebucks' side of the line. Using the boundary line established by the coterminous method, a small portion of the boathouse and a substantial portion of the pier are on the Boldebucks' side of the line.

¶28 The Maines survey does not purport to show the location of the line of navigation. However, it does include a line labeled "30' Offset From OHWM." Assuming that line is consistent with the line of navigation, [7] the Maines survey shows that portions of the pier and boathouse are located within the Boldebucks' **riparian** zone, regardless of whether the extended lot line method or the coterminous method is used to determine the boundary between the parties' **riparian** zones. Furthermore, Maines expressly averred in his affidavit that using either method, portions of the pier and wet boathouse are within the Boldebucks' **riparian** zone.

¶29 Maines' affidavit and survey therefore show that there is a factual dispute as to whether the pier and wet boathouse are located partially within the Boldebucks' **riparian** zone. This dispute appears to be material to determining both the ownership of the pier and wet boathouse and whether those structures interfere with the Boldebucks' **riparian** rights. *See supra* n.4. As a result, the circuit court erred by granting the DeSombres summary judgment on both of the claims alleged in their complaint. We therefore reverse the court's grant of summary judgment in favor of the DeSombres and remand for further proceedings on their claims. [8]

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

All Citations

Slip Copy, 2019 WL 6314826

Footnotes

1 *See* ***Oneida Cty. v. Converse***, 180 Wis. 2d 120, 122 n.3, 508 N.W.2d 416 (1993).

2 Given our determination that the circuit court erred by granting the DeSombres summary judgment, we reject the DeSombres' assertion that the Boldebucks' appeal is frivolous. We therefore deny the DeSombres' motion for an award of attorney fees and costs under WIS. STAT. RULE 809.25(3) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

3 The inclusion of this language in Brentlinger's deed is perplexing, as Blair no longer owned Lot 30—the adjoining property to the east of Lot 29—when she conveyed Lot 29 to Brentlinger. Rather, as noted above, she had conveyed Lot 30 to the Connerys just over two weeks earlier.

4 The DeSombres do not develop any argument explaining why they should be deemed to own any portions of the pier and wet boathouse that are located within the Boldebucks' **riparian** zone. Moreover, they do not explain why the presence of the pier and wet boathouse within the Boldebucks' **riparian** zone would not interfere with the Boldebucks' **riparian** rights as a matter of law, given that the Boldebucks have the exclusive rights to place and use piers and other structures in aid of navigation in their own **riparian** zone. *See* ***ABKA Ltd. P'ship v. DNR***, 2002 WI 106, ¶57, 255 Wis. 2d 486, 648 N.W.2d 854; ***Anchor Point Condo. Owner's Ass'n v. Fish Tale Props., LLC***, 2008 WI App 133, ¶¶13-14, 313 Wis. 2d 592, 758 N.W.2d 144. This opinion should not be read, however, to foreclose the DeSombres from raising arguments regarding these legal issues on remand.

5 The situation would be different if the DeSombres' complaint had contained an allegation regarding the validity of the Eagle Landmark survey and if the Boldebucks had admitted that allegation in their answer. However, that is not the case here, as the Boldebucks' answer expressly denied the only allegation in the DeSombres' complaint that pertained to the Eagle Landmark survey.

In addition, as the circuit court acknowledged in its summary judgment decision, even the Eagle Landmark survey shows a significant portion of the pier extending over the purported boundary between the parties' **riparian** zones onto the lakebed on the Boldebucks' side of the line. However, it is unclear from the Eagle Landmark survey whether that portion of the pier is past the line of navigation and therefore outside the Boldebucks' **riparian** zone.

6 The Maines survey actually depicts two sets of boundary lines between the parties' **riparian** zones. One set assumes that the boundary between the parties' lots is that established by the legal descriptions in their deeds, which were based on a 2003 survey. Another set of boundary lines assumes that the boundary between the parties' lots is in a different location that was established by the 1910 subdivision plat.

Maines averred that the 2003 survey was inconsistent with the 1910 subdivision plat and was therefore "incorrect." According to Maines, if the measurements from the 1910 subdivision plat were used to determine the boundary line between the parties' lots, the pier and boathouse would extend into Otter Lake from the Boldebucks' property, rather than from the DeSombres' property.

The Boldebucks contend that Maines' affidavit creates a genuine issue of material fact because if the boundary line between the parties' lots is actually located at the site established by the 1910 subdivision plat, the pier and wet boathouse are attached to the Boldebucks' property and are located entirely within the Boldebucks' **riparian** zone. We do not find this argument persuasive. Regardless of where the boundary line may have been located in 1910, Blair—the common grantor to both the DeSombres' and the Boldebucks' predecessors in title—was free to subdivide her property in a manner that was inconsistent with the 1910 plat. Accordingly, the legal descriptions in the DeSombres' and the Boldebucks' deeds—which are consistent with the 2003 survey—control the location of the common boundary between their lots. Any discrepancy between the 1910 plat and the 2003 survey is therefore immaterial for purposes of this appeal.

7 As noted above, Hug averred that in the vicinity of the boundary between the parties' properties, Otter Lake reaches a depth of three feet "at 30 feet from the ordinary high water mark."

8 The Boldebucks raise several additional arguments in their appellate briefs. Given our conclusion that the circuit court erred by granting the DeSombres summary judgment for the reasons explained above, we need not address these additional issues. *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (court of appeals decides cases on the narrowest possible grounds).

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United States District Court, District of Columbia.

AMERICAN FOREST RESOURCE COUNCIL, et al., Plaintiffs,
v.
CASEY HAMMOND, et al., Defendants.
ASSOCIATION OF O & C COUNTIES, Plaintiff,
v.
WILLIAM PERRY PENDLEY, et al., Defendants.
ASSOCIATION OF O&C COUNTIES, Plaintiff,
v.
DONALD J. TRUMP, et al., Defendants.
SODA MOUNTAIN WILDERNESS COUNCIL, et al., Defendant-Intervenors.
AMERICAN FOREST RESOURCE COUNCIL, Plaintiff,
v.
UNITED STATES OF AMERICA, et al., Defendants,
SODA MOUNTAIN WILDERNESS COUNCIL, et al., Defendant-Intervenors.

Civil Case No. 16-1599 (RJL), Civil Case No. 16-1602 (RJL), Civil Case No. 17-280 (RJL), Civil Case No. 17-441 (RJL)
|
Filed 11/22/2019

MEMORANDUM OPINION

RICHARD J. LEON United States District Judge

[Dkt. ## 49, 50 (in Case No. 16-1599); 37, 38 (in Case No. 16-1602); 59, 60, 66 (in Case No. 17-280); 60, 61, 66 (in Case No. 17-441)]

***1** The Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 ("O&C Act"), 43 U.S.C. § 2601 *et seq.*, regulates timber harvest on approximately two million acres of federal land in western Oregon ("O&C land"). In these four cases, plaintiffs challenge decisions made by the President of the United States and by the Bureau of Land Management ("BLM")—the agency that administers the O&C Act—that effectively reduce the amount of O&C land that is available for commercial timber harvest. [1] In two of the cases, plaintiffs challenge Resource Management Plans, issued by BLM in 2016 ("the 2016 RMPs"), that set aside portions of O&C land as reserves on which commercial timber harvest is limited. In the other two cases, plaintiffs challenge a Presidential Proclamation ("Proclamation 9564"), by President Obama, that enlarged the Cascade-Siskiyou National Monument in southern Oregon, thereby limiting commercial timber harvest on the O&C land that was added to the monument. *See* 82 Fed. Reg. 6145 (Jan. 18,2017).

In all four cases, plaintiffs contend that the Government's actions violate the plain text of the O&C Act. They moved for summary judgment, and the Government cross-moved, defending the legality of the 2016 RMPs and Proclamation 9564. In the cases about Proclamation 9564, intervenors filed additional cross-motions for summary judgment in defense of the Proclamation.

***2** In all four cases, plaintiffs are correct. Both the 2016 RMPs and Proclamation 9564 conflict with mandates imposed by the O&C Act. For that reason, and for all those that follow, plaintiffs' motions for summary judgment must be GRANTED, and the Government's and intervenors' cross-motions for summary judgment must be DENIED.

BACKGROUND [2]

The O&C Act requires that timberland subject to the Act be "managed ... for permanent forest production" and that timber grown on the land "be sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601. To implement these provisions, the Secretary of the Interior must declare the "annual productive capacity" of O&C timberland, and then offer timber commensurate with that productive capacity for sale each year. [3] *Id.* A portion of the proceeds from the timber sales is then paid to the Oregon counties that contain O&C land. *See id.* § 2605(a).

The O&C land's productive capacity—also referred to as the allowable sale quantity ("ASQ") of timber [4] —has reached as

high as 1.1 billion board feet per year. *See* Administrative Record (Case No. 16-1599) ("AR") at JA-14, IND_0527316–17 [Dkt. ## 37, 40]. For much of the latter half of twentieth century, it remained relatively close to that figure. *See id.* (showing an ASQ of 874 million board feet or higher every year from 1959 until 1976). But in the 1990s, the ASQ dropped precipitously.

In 1990, the U.S. Fish and Wildlife Service classified the northern spotted owl as a threatened species under the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531 *et seq.* *See* Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990). Two years later, a federal district court in Oregon enjoined timber sales on land, including land subject to the O&C Act, that is suitable habitat for the threatened owls. *See Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489, 1510–11 (D. Or. 1992). The injunction was not resolved until 1994, when BLM, in conjunction with the United States Forest Service, adopted a new "forest plan" to govern the management of northern spotted owl habitat. *See Seattle Audubon Soc. v. Lyons*, 871 F. Supp. 1291, 1300, 1302, 1304 (W.D. Wash. 1994).

Land subject to the 1994 forest plan was divided into "reserve areas in which logging and other ground-disturbing activities [we]re generally prohibited" and "unreserved areas" where "timber harvest [could] go forward." *Lyons*, 871 F. Supp. at 1304–05. In 1995, with the forest plan in place, BLM issued RMPs that adopted similar measures for O&C land. *See, e.g.*, AR at JA-27, IND_0523007; JA-28, IND_0523235. After allocating certain timberland to reserves, where sustained yield timber harvest was not permitted, the 1995 RMPs set an ASQ of 203 million board feet per year, about 20% of the one billion board feet ASQs that had been declared in the past. *See* AR at JA–41, IND_0340678; JA-46, IND_0514462; JA46, IND_0514701.

***3** BLM revised the O&C land RMPs in 2016. Like their predecessors, the 2016 RMPs divide O&C land into separate management categories. *See* AR at JA-46, IND_0514399-402. Only one of the six categories—"harvest land base"—is managed to "achieve continual timber production that can be sustained through a balance of growth and harvest." *Id.* at JA-46, IND_0514402. The other five categories, which include multiple types of ecological reserves, limit timber production. *See id.* at JA-2, IND_0513044. When BLM calculated the ASQ for O&C timberland in the 2016 RMPs, the agency looked only to timber grown in the 498,597-acre harvest land base. *See id.* at JA-1, IND_0512707-10; JA-1, IND_0512745; JA-2, IND_0513027-29; JA-2, IND_0513065. Timberland in every other land category, including the 957,872 acres of late-successional reserves and the 520,092 acres of **riparian** reserves, was left aside. *See id.* This calculation yielded an ASQ of 205 million board feet per year—a slight increase from the 1995 RMPs, but still only about 20% of the historic maximum. *See id.* at JA-1, IND_0512708 (ASQ for Coos Bay, Eugene, and Salem of 130 million board feet); JA-2, IND_0513027 (ASQ for Klamath Falls, Medford, and Roseburg of 75 million board feet); JA-14, IND_0527316–17 (historic ASQs).

A decade after the northern spotted owl was classified as a threatened species, President Clinton introduced one more variable to O&C land management by creating the Cascade-Siskiyou National Monument. *See* Proclamation 7318, 65 Fed. Reg. 37,249, 37,250 (June 13, 2000). At its inception, the monument included approximately 40,156 acres of O&C Act land within its boundaries. *See* Fed. Defs.' Cross-Mot. Summ. J. (Case No. 17-280), Ex. 15 at 11 [Dkt. # 60-2]. And since its inception, "[t]he commercial harvest of timber ... [has been] prohibited," within the monument, "except when part of an authorized science-based ecological restoration project." *See* Proclamation 7318, 65 Fed. Reg. at 37,250.

On January 12, 2017, shortly before he left office, President Obama issued Proclamation 9564, which added approximately 47,660 more acres of O&C land to the Cascade-Siskiyou National Monument. *See* Proclamation 9564, 82 Fed. Reg. 6145 (Jan. 18, 2017); Declaration of Theresa M. Hanley ("Hanley Decl.") ¶ 8 (Case No. 17-280) [Dkt. #57-1]. The addition effectively doubled the O&C land that can no longer be used for timber harvest because it falls within the monument's boundaries.

Plaintiffs in these suits contend that both the 2016 RMPs and Proclamation 9564 violate the O&C Act. In their view, setting aside O&C land to limit timber harvest—whether the set aside is called a reserve or a monument—contravenes Congress's mandate that O&C land "shall be managed ... for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601.

The Government disagrees, of course. It argues that the O&C Act gives BLM discretion to set land aside in reserves and that the 2016 RMPs reflect a reasonable balancing of the agency's obligations under the O&C Act and the ESA. The Government further argues that Proclamation 9564 is a valid exercise of power that Congress delegated to the President through the Antiquities Act, 54 U.S.C. § 320301. Intervenors in Case Numbers 17-280 and 17-441 support the Government on the latter point.

Plaintiffs, the Government, and intervenors have all moved or cross-moved for summary judgment. On March 31, 2019, I remanded these cases to BLM to provide additional explanation of how BLM has reconciled and, going forward, intends to reconcile the varied land management obligations imposed by the O&C Act, the 2016 RMPs, and Proclamation 9564. BLM has now filed its explanation, and accordingly, the questions whether the 2016 RMPs and Proclamation 9564 violate the O&C Act are ripe for resolution.

ANALYSIS

I. The 2016 Resource Management Plans

Of this there can be no doubt: the 2016 RMPs violate the O&C Act. When a "statute's language is plain," courts must "enforce it according to its terms."[5] *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)). The O&C Act plainly requires that timber grown on O&C land "be sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601. So the 2016 RMPs, which prohibit the selling, cutting, and removing of timber in conformity with the principle of sustained yield on portions of O&C timberland, contravene the law.

***4** This conclusion follows directly from the language in the O&C Act and the 2016 RMPs. The Act imposes two relevant, mandatory directives on BLM's management of all O&C land that has "heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber." 43 U.S.C. § 2601. That land "*shall* be managed ... for permanent forest production, and the timber thereon *shall* be sold, cut, and removed in conformity with the princip[le] of sustained yield." *Id.* (emphasis added). Use of the word "shall" in a statutory directive to an agency "signals mandatory action." *Nat. Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) (citing *Her Majesty the Queen v. USEPA*, 912 F.2d 1525, 1533 (D.C.Cir.1990)). When managing O&C timberland, then, BLM must ensure that the land continues to produce timber. *See Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1183 (9th Cir. 1990) ("There is no indication that Congress intended 'forest' to mean anything beyond an aggregation of timber resources."). And BLM must ensure that the timber produced on O&C land is sold, cut, and removed in conformity with the principle of sustained yield. These are mandatory directives from Congress.

The 2016 RMPs violate these mandatory directives by excluding portions of O&C timberland from sustained yield timber harvest. In the RMPs, BLM looked only to the 498,597-acre harvest land base to calculate the ASQ. *See* AR at JA-1, IND_0512707-10; JA-1, IND_0512745; JA-2, IND_0513027-29; JA-2, IND_0513065. These 498,597 acres amount to about 20% of the land governed by the 2016 RMPs. *See id.* Much of remaining land is set aside in various reserves. *See id.* And some of the land placed into reserves can indisputably be characterized as timberland. *See id.* at JA-46, IND_0514442 (listing "Block Forest Reserve[s]" among the areas where sustained-yield timber harvest is prohibited); JA-46, IND_0514702 (explaining that "[t]he size of the Harvest Land Base is dependent on ... the size of the Late-Successional Reserve"). But within the reserves, timber harvest is permitted for only limited purposes and is not performed on a sustained yield basis. *See id.* at JA-46, IND_0514339. In the 2016 RMPs, BLM explains, "the term 'reserve' indicates that the BLM or Congress have reserved lands within the allocation from sustained-yield timber production. These reserve land use allocations ... are in contrast to the Harvest Land Base, which includes management objectives for sustained-yield timber production." *Id.* This decision to reserve timberland from sustained yield timber production cannot be squared, however, with the O&C Act's mandates: all land "classified as timberlands" must "be managed ... for permanent forest production," and that the timber produced on that land must "be sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601.

The Government raises two arguments in response. It argues first that the O&C Act grants BLM discretion in managing O&C land and second that the 2016 RMPs reasonably

harmonize the agency's competing obligations under the O&C Act and section 7(a)(2) of the ESA. *See* 16 U.S.C. § 1531(b).

The Government's first point is true so far as it goes. BLM does have *some* discretion when managing O&C land. Indeed, this Court has recognized that "BLM has discretion as to establishing the ASQ, selecting the timberlands, pricing the sale (at 'reasonable prices on a normal market'), scheduling the sale, and even rejecting bids." *Swanson Grp. Mfg. LLC v. Salazar*, 951 F. Supp. 2d 75, 82 (D.D.C. 2013), *vacated on other grounds sub nom. Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235 (D.C. Cir. 2015). The Ninth Circuit drew a similar conclusion, holding, "the [O&C] Act has not deprived ... BLM of all discretion with regard to either the volume requirements of the Act or the management of the lands entrusted to its care." *Portland Audubon Soc. v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993).

But even where an agency has discretion, courts must "ensure that the [agency] ... does not violate the statutory limitations on [that] discretion." *Cont'l Air Lines, Inc. v. C A. B.*, 522 F.2d 107, 116 (D.C. Cir. 1974). The mandatory directives in the O&C Act constitute clear congressionally imposed bounds on the discretion the statute otherwise imparts. *See Gillan v. Winter*, 474 F.3d 813, 818 (D.C. Cir. 2007) ("[T]he word 'shall' limits the Secretary's discretion ...."). Accordingly, when exercising its discretion, BLM must do so in a way that ensures that O&C timberland is managed "for permanent forest production," and that the timber on that land is "sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601. The 2016 RMPs violate these mandates. As such, they are unlawful—notwithstanding BLM's discretion to make management decisions about O&C land within the statutorily imposed limits.

***5** The Government's argument about section 7(a)(2) of the ESA fails for a similar reason. The Government may be correct that BLM "must fulfill conservation duties imposed by other statutes," *Seattle Audubon Soc. v. Lyons*, 871 F. Supp. 1291, 1314 (W.D. Wash. 1994), when *exercising its discretion* under the O&C Act. But the Supreme Court itself has made clear that section 7(a)(2) of the ESA does not alter *mandatory* duties imposed on agencies by statute. In *National Association of Home Builders v. Defenders of Wildlife*, the Court rejected a "reading of § 7(a)(2) [that] would ... abrogate [a] statutory mandate" in the Clean Water Act. 551 U.S. 644, 664 (2007). After applying *Chevron* deference to an implementing regulation,[6] the Court held that "§ 7(a)(2)'s no-jeopardy duty covers only discretionary agency actions and does not attach to actions ... that an agency is *required* by statute to undertake once certain specified triggering events have occurred."[7] *Id.* at 669. The O&C Act's timber harvest mandates fall into the latter category: once O&C land is classified as timberland, BLM is required to harvest the timberland pursuant to sustained yield principles. *See* 43 U.S.C. § 2601. According to *Home Builders*, then, BLM cannot justify a refusal to abide by those statutory commands by pointing to section 7 of the ESA. "[Section] 7(a)(2)'s no-jeopardy duty" simply "does not attach" to such non-discretionary mandates. *Home Builders*, 551 U.S. at 669.

This Court must, therefore, conclude that the 2016 RMPs violate the O&C Act by setting aside timberland in reserves where the land is not managed for permanent forest production and the timber is not sold, cut, and removed in conformity with the principle of sustained yield.

II. Remedy

All parties to Case Numbers 16-1599 and 16-1602 agreed in their motions for summary judgment that, if this Court were to determine that the 2016 RMPs violate the O&C Act, the parties should have an opportunity to separately brief the appropriate remedy for the violation. In light of the parties' agreement, the additional briefing will be permitted. *See Am. Hosp. Ass'n v. Azar*, 348 F. Supp. 3d 62, 85–87 (D.D.C. 2018) ("Plaintiffs are entitled to equitable relief. Fashioning that relief, however, requires supplemental briefing from the parties addressing the reliefs proper scope and implementation.").

III. Proclamation 9564

Proclamation 9564, not surprisingly, also violates the O&C Act. The congressional mandates to manage O&C timberland "for permanent forest production" and to "s[ell], cut, and remove[ ] [timber] in conformity with the princip[le] of sustained yield," 43 U.S.C. § 2601, cannot be rescinded by Presidential Proclamation.

To be sure, judicial review of Presidential Proclamations is more limited than review of actions taken by federal agencies. Courts may not, for example, second-guess "[h]ow

the President chooses to exercise ... discretion [that] Congress has granted him." *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (quoting *Dalton v. Specter*, 511 U.S. 462, 476 (1994) (alteration added)). Nonetheless, when presented with a legal challenge to a Presidential Proclamation, courts must still "ensure that the Proclamation[ ] [is] consistent with constitutional principles and that the President has not exceeded his statutory authority." *Id.*

In some cases, the question whether a President's designation of a national monument exceeded his statutory authority requires review only of "the limits on Presidential authority ... [that] derive from the Antiquities Act itself." *Mountain States*, 306 F.3d at 1136. And there is no question that the Antiquities Act—the statutory basis for Proclamation 9564, *see* 82 Fed. Reg. at 6148—"confers very broad discretion on the President." *Mountain States*, 306 F.3d at 1137; *see* 54 U.S.C. § 320301(b) ("The President may reserve parcels of land as a part of the national monuments.").

***6** But our Circuit Court has also held that "limits on Presidential authority" to issue a Proclamation can "derive from ... an independent statute." *Mountain States*, 306 F.3d at 1136. In *Chamber of Commerce of the United States v. Reich*, our Circuit Court held that an Executive Order was preempted by the National Labor Relations Act ("NLRA"), notwithstanding President Clinton's claim, on the face of the Order, that he was exercising authority granted to him through a different statute, the Procurement Act. *See 14* F.3d 1322, 1324 (D.C. Cir. 1996). The Court recognized that, much like the Antiquities Act, "the Procurement Act ... vest[s] broad discretion in the President." *Id.* at 1330. But because the Order "conflict[ed] with the NLRA," the Court found it "unnecessary to decide whether, in the absence of the NLRA, the President would be authorized (with or without appropriate findings) under the Procurement Act and the Constitution to issue the Executive Order." *Id.* at 1332. No matter the scope of the President's Procurement Act authority, "the Executive Order [wa]s ... pre-empted by the NLRA." [8] *Id.* at 1339.

Proclamation 9564 runs into similar trouble. Citing the Antiquities Act, with its broad delegation of discretion, does not give the President license to contravene the O&C Act. *See Reich*, 74 F.3d at 1332–39. "Where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)). The Antiquities Act says nothing specific about managing O&C timberland. *See* 54 U.S.C. §§ 320301–320303. As such, it cannot be understood to nullify the timber harvest mandates imposed by Congress in the O&C Act.

Just like in *Reich*, moreover, Proclamation 9564 "unacceptabl[y] conflict[s]" with the O&C Act. 74 F.3d at 1332–33. As discussed, the O&C Act *requires* that timberland subject to the Act be managed "for permanent forest production" and the timber grown on the land be "sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601. The Proclamation that established the Cascade-Siskiyou National Monument, by contrast, provides that "[n]o 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." Proclamation 7318, 65 Fed. Reg. at 37,250. Proclamation 9564 then directs the Secretary of the Interior to "manage the area being added to the monument ... under the same laws and regulations that apply to the rest of the monument." 82 Fed. Reg. at 6149. And BLM's Acting State Director for Oregon and Washington has confirmed that the agency "currently manages the lands in the [monument] expansion area ... in accordance with the timber harvest constraints" set forth in the two Presidential Proclamations. Hanley Decl. ¶ 11. Put simply, there is no way to manage land for sustained yield timber production, while simultaneously deeming the land unsuited for timber production and exempt from any calculation of the land's sustained yield of timber. [9]

***7** Accordingly, the directives to the Secretary of the Interior set forth in Proclamation 9564 conflict with the directives from Congress in the O&C Act. Land subject to the O&C Act, regardless of whether it is included in the Cascade-Siskiyou National Monument expansion, *must* be managed "for permanent forest production," and timber grown on that land *must* be "sold, cut, and removed in conformity with the princip[le] of sustained yield." 43 U.S.C. § 2601. Proclamation 9564's direction otherwise is *ultra vires* and invalid.

CONCLUSION

For the foregoing reasons, the 2016 RMPs and Proclamation 9564 both violate the O&C Act. Plaintiffs motions for summary judgment in each of these four cases are GRANTED. The Government's cross-motions for summary judgment in each case are DENIED, and intervenors' cross-motions in Case Numbers 17-280 and 17-441 are also DENIED.

In Case Numbers 16-1599 and 16-1602, the parties are ORDERED to submit supplemental briefs detailing their respective positions on the proper remedy in light of the Court's conclusion that the 2016 RMPs violate the O&C Act. All parties shall submit their opening briefs on remedy, which shall be limited to no more than fifteen pages each, within thirty days of this Memorandum Opinion's issuance. The parties may then file responsive briefs on remedy, limited to no more than ten pages each, within fourteen days of the filing of their opponent's opening brief.

In each of these four cases, an Order consistent with this decision accompanies this Memorandum Opinion.

All Citations

Slip Copy, 2019 WL 6311896

Footnotes

1 In Case Number 16-1599, the American Forest Resource Council (a forest products trade association representing lumber and plywood manufacturing companies) as well as the Carpenters Industrial Council, Douglas Timber Operators, Inc., C & D Lumber Co., Freres Lumber Co. Inc., Seneca Sawmill Company, Starfire Lumber Co., Inc., and Swanson Group Mfg. LLC (all entities engaged in business related to the timber industry) sued BLM's director and the Secretary of the Interior, alleging that the 2016 RMPs are arbitrary, capricious, and unlawful. In Case Number 16-1602, the Association of O&C Counties, which represents seventeen counties in western Oregon that contain O&C land, sued the same defendants on the same allegations.
In Case Number 17-280, the Association of O&C Counties sued President Donald J. Trump, the United States of America, the Secretary of the Interior, and BLM, alleging that Proclamation 9564 is *ultra vires.* In Case Number 17-441, the American Forest Resource Council sued the same defendants on the same allegations about Proclamation 9564. The Soda Mountain Wilderness Council, the Klamath-Siskiyou Wildlands Center, and Oregon Wild (public interest groups focused on protecting the environment in and around the Cascade-Siskiyou National Monument) intervened in Case Numbers 17-280 and 17-441 to defend Proclamation 9564.
Throughout this consolidated Memorandum Opinion, "plaintiffs" will refer to the collective plaintiffs in all four cases. "Defendants," "the Government," or the "United States" will refer to the collective named defendants in all four cases. And "intervenors" or "defendant-intervenors" will refer to the Soda Mountain Wilderness Council, the Klamath-Siskiyou Wildlands Center, and Oregon Wild, collectively.

2 Additional background about these cases can be found in *American Forest Resource Council v. Steed*, No. 16-1599, 2019 WL 1440887 (D.D.C. Mar. 31, 2019). This Memorandum Opinion discusses only the background relevant to the issues decided.

3 BLM, an agency with the Department of the Interior, has administered the O&C Act since 1947. *See Swanson Grp. Mfg. LLC v. Bernhardt*, No. 15-1419, 2019 WL 4750486, at *1 (D.D.C. Sept. 30, 2019); U.S. Dep't of the Interior, BLM, O&C Sustained Yield Act: the Land, the Law, the Legacy (1937-1987) at 5, available at https://www.blm.gov/or/files/OC_History.pdf.

4 BLM uses "annual productive capacity," "allowable sale quantity," and "annual sustained yield capacity" synonymously. *See* Fed. Defs.' Cross-Mot. Summ. J. (Case No. 16-1599) at 7 & n.3 [Dkt. #50].

5 The Government does not appear to dispute that plaintiffs have standing to challenge the 2016 RMPs, and I conclude that plaintiffs have indeed established standing. When companies allege standing to challenge an agency action based on economic harm,

> [t]he ... inquiry boils down to whether the plaintiff has adequately demonstrated: (1) a substantial probability that the challenged government action will cause a decrease in the supply of raw material from a particular source; (2)

a substantial probability that the plaintiff manufacturer obtains raw material from that source; and (3) a substantial probability that the plaintiff will suffer some economic harm as a result of the decrease in the supply of raw material from that source.

Carpenters Indus. Council v. Zinke, 854 F.3d 1, 6 (D.C. Cir. 2017). Plaintiffs here have submitted declarations establishing that they obtain timber from BLM, that the 2016 RMPs affect the volume of timber they are able to obtain, and that decreases in the volume of timber they are able to obtain harm their businesses. *See* Declaration of Commissioner Simon Hare (Case No. 16-1599) [Dkt. #29-2]; Declaration of Todd A. Payne (Case No. 16-1599) [Dkt. # 29-3]; Declaration of Sean M. Smith (Case No. 16-1599) [Dkt. # 29-4]; Declaration of Steven D. Swanson (Case No. 16-1599) [Dkt. # 29-5]; Declaration of Robert T. Freres, Jr. (Case No. 16-1599) [Dkt. # 29-6]; Declaration of Travis Joseph (Case No. 16-1599) [Dkt. # 29-7]; Declaration of Timothy Freeman (Case No. 16-1602) [Dkt. # 37-3]; Declaration of Sid Leiken (Case No. 16-1602) [Dkt. #37-4]; Declaration of Craig Pope (Case No. 16-1602) [Dkt. # 37-5].

6 The regulation to which the Supreme Court deferred remains in effect. *See Home Builders*, 551 U.S. at 669; 50 C.F.R. § 402.03.

7 Our Circuit Court has read section 7(a)(2) similarly, holding that the provision "does not *expand* the powers conferred on an agency." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992).

8 The *Reich* Court also "conclude[d] that judicial review [wa]s available" to the parties challenging the executive order. *See* 74 F.3d at 1324. Its reasoning forecloses the Government's contention that sovereign immunity bars plaintiffs' challenge to Proclamation 9564 here. *See id.* at 1328—32.

9 Because of these conflicting directives, the cases from our Circuit Court holding that land can be subject to "overlapping sources of protection" are inapposite. *Mountain States*, 306 F.3d at 1138; *see also Tulare Cty. v. Bush*, 306 F.3d 1138, 1143 (D.C. Cir. 2002) ("The Proclamation thus conceives of the designated land as having a dual status as part of both the Monument and the Sequoia National Forest. The Proclamation is therefore wholly consistent with NFMA." (citations omitted)). A mandate that timberland be harvested in conformity with the principle of sustained yield and a declaration that the same land is exempt from sustained yield timber harvest cannot be characterized as two overlapping protections; each dictate is at odds with the other.

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