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The Antiquities Act: History, Current Litigation, and Considerations for the 116th Congress

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SUMMARY

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The Antiquities Act: History, Current Litigation, and Considerations for the 116th Congress

The Antiquities Act authorizes the President to declare, by public proclamation, historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest situated on federal lands as national monuments. The act also authorizes the President to reserve parcels of land surrounding the objects of historic or scientific interest, but requires that the amount of land reserved be confined to the smallest area compatible with the proper care and management of the objects to be protected. Since its enactment in 1906, Presidents have used the Antiquities Act to establish 158 monuments, reserving millions of acres of land in the process. Presidents have also modified existing monuments, whether by increasing or decreasing their size (or both), on more than 90 occasions.

Though most monument proclamations have been uncontroversial, some have spurred corrective legislative action and litigation. Congress has twice imposed geographic limitations on the President's authority under the Antiquities Act in response to proclamations reserving millions of acres of land in Wyoming and Alaska. Litigants have also challenged the President's authority to establish certain monuments, disputing whether the historic or scientific objects selected for preservation were encompassed by the act, as well as whether the amount of land reserved exceeded the smallest area necessary for the objects' preservation. Courts, however, have uniformly rejected these challenges and adopted a broad interpretation of the President's authority under the Antiquities Act.

No President has purported to revoke a national monument, but past Presidents have reduced the size of existing monuments on 18 occasions. In 2017, President Trump issued proclamations reducing the size of the Grand Staircase-Escalante National Monument and the Bears Ears National Monument. Various groups have sued to block these proclamations, arguing that the President exceeded his authority under the Antiquities Act. Because none of the prior proclamations diminishing monuments was challenged in court, these lawsuits offer the first opportunity for a court to decide whether the act empowers the President to diminish a national monument.

Those challenging President Trump's proclamations argue that the Antiquities Act's authorization for the President to "declare" national monuments and "reserve" surrounding lands does not include the distinct power to revoke or diminish an existing monument. They underscore this point by noting that, unlike the Antiquities Act, several contemporaneous public land laws expressly authorized the President to undo a prior reservation of land. The plaintiffs also highlight a number of 19th and early 20th century legal opinions from the executive branch concluding that the President lacks authority to undo a reservation of land absent express statutory authorization. Finally, the plaintiffs argue that the Federal Land Policy and Management Act of 1976 (FLPMA)—which prohibited the Secretary of the Interior from modifying or revoking a national monument established under the Antiquities Act—demonstrates Congress's intent to consolidate modification power in the legislature.

By contrast, the United States argues that the requirement that reserved land be "the smallest area compatible" with the preservation of the designated objects empowers the President to reduce the size of a monument when he determines that more land was reserved than necessary. The United States also contends that the Executive has implied authority to revisit prior discretionary decisions. Further, the United States argues that the President's authority to diminish monuments is confirmed by the 18 times past Presidents have done so and by several executive branch legal opinions that support this conclusion. Finally, the United States argues that FLPMA is irrelevant because that law prohibits the Secretary of the Interior, not the President, from diminishing monuments.

While the President's authority to diminish a national monument has been questioned, there appears to be no dispute that Congress has authority to do so, a power it has exercised before. Several Members of Congress have introduced legislation either codifying or reversing President Trump's proclamations or placing limits on the President's authority under the Antiquities Act going forward.

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The Antiquities Act was enacted in 1906 in response to the destruction of prehistoric ruins and other archaeological sites in the western United States, often by amateur archaeologists and treasure hunters.[1] The act authorizes the President to declare, by public proclamation, historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest located on federal land as national monuments.[2] It also authorizes the President to reserve parcels of land surrounding these objects, but limits the size of such reservations to "the smallest area compatible with the proper care and management of the objects to be protected."[3] Though the Antiquities Act was enacted with the primary goal of preserving archaeological sites, it has also been frequently used to protect naturally occurring objects, such as the geological features within the Grand Canyon National Monument.[4] Once a national monument is established, use of the lands and resources within the monument's boundaries are subject to the limitations specified in the proclamation itself and other sources of law, without need of congressional authorization.[5] Since its enactment, Presidents have used the Antiquities Act to establish 158 national monuments, reserving millions of acres of land in the process, and to modify existing monuments more than 90 times.[6]

Like many laws concerning federal lands, the Antiquities Act operates in the midst of an ongoing, and sometimes contentious, public policy debate regarding how to best reconcile the need to preserve natural resources and other objects located on public lands with the needs of the local communities affected by the limitations on land use that follow from the creation of a national monument.[7] Though most monument proclamations have been uncontroversial, some have precipitated corrective legislation and litigation.[8] In two instances, Congress passed legislation placing geographic limits on the President's authority to establish national monuments.[9] Attempts to undo proclamations through litigation have been less successful, as courts have uniformly upheld challenged proclamations through a broad interpretation of the Antiquities Act.[10]

The Antiquities Act has received renewed attention in recent years as a result of President Trump's December 2017 proclamations reducing the size of the Grand Staircase-Escalante National Monument and the Bears Ears National Monument.[11] Various groups have challenged those proclamations in federal district court, arguing (among other things) that the Antiquities Act does not empower the President to diminish the size of national monuments.[12] These cases will be the first time a court has had an opportunity to address whether the President has such authority.[13]

This report begins by discussing the Antiquities Act's legislative history.[14] It then provides an overview of the act's provisions before reviewing past presidential proclamations as well as

[1] *See infra* notes 17–54 and accompanying text.

[2] Pub. L. No. 59-209 § 2, 34 Stat. 225, 225 (June 8, 1906) (codified at 54 U.S.C. § 320301(a)).

[3] *Id*. (codified at 54 U.S.C. § 320301(b)).

[4] *See infra* notes 73–80 and accompanying text.

[5] *See infra* notes 61–66 and accompanying text.

[6] *See infra* notes 89–90 and accompanying text.

[7] See CRS Report R41330, *National Monuments and the Antiquities Act*, by Carol Hardy Vincent.

[8] *See infra* notes 100–176 and accompanying text.

[9] *See infra* notes 115–123, 137–141, and accompanying text.

[10] *See infra* notes 100–176 and accompanying text.

[11] *See infra* notes 182–188 and accompanying text.

[12] *See infra* notes 191–196 and accompanying text.

[13] *See infra* notes 180–181 and accompanying text.

[14] *See infra* notes 17–54 and accompanying text.

judicial decisions and legislation related to certain monument proclamations.[15] Finally, the report discusses the current litigation involving President Trump's proclamations diminishing the Grand Staircase-Escalante and Bears Ears monuments, with a focus on the parties' arguments addressing whether the Antiquities Act authorizes the President to diminish a national monument.[16]

Legislative History of the Antiquities Act

Congress passed the Antiquities Act in 1906, and President Theodore Roosevelt signed it into law that same year.[17] As this section discusses, this law's enactment marked the culmination of a multiyear effort to empower the federal government to take swift action to protect archaeological sites and other objects of historical and scientific value from destruction.

In the 1880s, a growing interest emerged in the prehistoric ruins and other archaeological sites located in the western United States.[18] Prehistoric ruins were initially discovered by ranchers and other prospectors in Colorado, New Mexico, and Arizona.[19] Word of these discoveries spread rapidly, leading to extensive and unregulated excavation of these sites by antiquity hunters from around the world.[20] Amateur excavators removed large quantities of artifacts from prehistoric sites and sold them to exhibitors, museum curators, and private collectors, often causing extensive damage to the ruins during the excavation process.[21] These excavations continued throughout the 1880s and 1890s, leading one observer to bemoan that "[a] commercial spirit is leading to careless excavations for objects to sell, and walls are ruthlessly overthrown, buildings torn down in hope of a few dollars' gain."[22]

During this period, federal law did not provide general protection against the excavation or destruction of historic sites located on public lands or require a permit before excavation could commence.[23] Nonetheless, some limited protections did apply. First, the General Land Office was authorized to "withdraw specific tracts of land from sale or entry for a temporary period,"[24] a

[15] *See infra* notes 55–179 and accompanying text.

[16] *See infra* notes 180–275 and accompanying text.

[17] Pub. L. No. 59-209, 34 Stat. 225 (June 8, 1906).

[18] RONALD F. LEE, THE ANTIQUITIES ACT OF 1906 21–30 (1970).

[19] *Id*. at 29–30.

[20] *Id*. at 31–32.

[21] *Id*. at 31–32, 35–38; *see also* Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553, 562–63 (2018) ("Both amateur and professional antiquity hunters—'pot hunters'—were removing antiquities from the public lands and vandalizing the sites on which they were located."); H.R. REP. NO. 58-3704, at 2 (1905) ("These ruins have been frequently mutilated by people seeking the relics for the purpose of selling them. Such excavations destroy the valuable evidence contained in the ruins themselves, and prevent a careful and scientific investigation by representatives of public institutions interested in archaeology."); S. REP. NO. 59-8797, at 1 (1906) ("[T]he historic and prehistoric ruins and monuments on the public lands of the United States are rapidly being destroyed by parties who are gathering them as relics.").

[22] LEE, THE ANTIQUITIES ACT, *supra* note 18, at 32 (quoting J. Walter Fewkes, *Two Ruins Recently Discovered in the Red Rock Country, Arizona*, IX AMERICAN ANTHROPOLOGIST 269–70 (1896)).

[23] Ronald F. Lee, *The Origins of the Antiquities Act, in* THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 23 (David Harmon, et al. eds., 2006) ("There was no system of protection and no permit was needed to dig.").

[24] *Id*. at 27 ("Until the Antiquities Act was passed in 1906, the chief weapon available to the federal government for protecting antiquities on public land was the power to withdraw specific tracts from sale or entry for a temporary period.").

power it exercised with increasing frequency as the threat to historic sites grew.[25] Second, through the Forest Reserve Act of 1891,[26] the President had authority to "create permanent forest reserves by executive proclamation."[27] However, though lands within forest reserves were "withdrawn from disposition and entry under the homestead and other laws, they were not protected from other forms of development, especially mining."[28] Thus, none of these laws authorized the President to make permanent and comprehensive reservations for the purpose of preservation.[29]

With the need for federal intervention apparent,[30] Congress set out to empower the President to expeditiously protect historic sites from further destruction. Legislation to protect the nation's antiquities was first introduced in Congress in 1900, though the various proposals differed in how they defined the objects to be protected and how the objects were to be designated. The first bill, introduced by Representative Jonathan P. Dolliver of Iowa, would have authorized the President to designate as a park or reservation "any prehistoric or primitive works, monuments, cliff dwellings, cave dwellings, cemeteries, graves, mounds, forts, or any other work of prehistoric or primitive man" in addition to "any natural formation of scientific or scenic value or interest, or natural wonder or curiosity on the public domain."[31] Under this bill, the President would have had authority to designate surrounding land needed for such preservation "as [the President] may deem necessary for the proper preservation or suitable enjoyment of said reservation," and the Secretary of the Interior would have been empowered to acquire private lands or interests within reservation areas.[32] A proposal supported by the Department of the Interior that same year would have similarly vested protective powers in the President, but it defined the objects to be preserved more generally than Representative Dolliver's proposal, protecting "tracts of public land" based on their "scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest, or springs of medicinal or other properties."[33] Neither of these proposals limited the amount of land the President could reserve.

In contrast to these proposals, a bill introduced that same Congress by Representative John Shafroth of Colorado and reported out of the House Committee on the Public Lands provided much narrower authority to the executive branch. That legislation would have authorized the

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[25] *Id*. (noting that the General Land Office withdrew "a large area around Frijoles Canyon in northern New Mexico," "an extensive part of the Mesa Verde area," and "portions of the lands in Chaco Canyon").

[26] ch. 561 § 24, 26 Stat. 1095, 1103 (1891) (providing that "the President of the United States may, from time to time, set apart and reserve . . . any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations").

[27] Lee, *The Origins of the Antiquities Act*, *supra* note 23, at 27.

[28] Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 487 (2003).

[29] *Id*. at 487–88 ("But at the time of the Antiquities Act, no legislative authority was available that provided for the preservation of public lands.").

[30] *See Preservation of Prehistoric Ruins on the Pub. Lands: Hearing on S. 5603, H.R. 7269, and H.R. 15986 Before the H. Comm. on the Pub. Lands*, 58th Cong. 8 (1905) [hereinafter, *Hearing on S. 5603*] ("They consider it the most important thing to have legislation which will prevent the vandalism that is now prevalent in the southwestern territory in the region of the ruins of Indian antiquities, and the results being used for commercial purposes. Vast numbers—we hear of one case of two carloads—of Indian antiquities have been shipped away by private individuals." (Statement of Charles P. Bowditch, Chairman of the Comm. of the Archaeological Institute of America on American Archaeology)); *id*. at 9 ("These ruins and these old sites, mounds, and burial places are rapidly disappearing, or they are being destroyed by what can literally be termed 'pot hunting.' These ruins, then, are going so fast that if legislation to protect them is not enacted at once it will be impossible in a few years to read the past history of North America." (Statement of Prof. F.W. Putman)).

[31] H.R. 8066, 56th Cong. § 7 (as introduced, Feb. 5, 1900).

[32] *Id*. §§ 7–8.

[33] H.R. 11021, 56th Cong. § 1 (as introduced, Apr. 26, 1900).

Secretary of the Interior—rather than the President—to "reserve from sale, entry, and settlement" any public lands containing "monuments, cliff dwellings, cemeteries, graves, mounds, forts, or any other work of prehistoric, primitive, or aboriginal man," but it would have limited the Secretary to creating monuments in Colorado, Wyoming, and the then territories of Arizona and New Mexico, with no monument to exceed 320 acres.[34]

None of these proposals passed either chamber of Congress. In the following Congress, the Senate did pass legislation aimed at protecting antiquities.[35] That legislation would have authorized the Secretary of the Interior to make "temporary withdrawals" of land to protect "historic and prehistoric ruins, monuments, archaeological objects, and other antiquities," but only to the extent "necessary for the preservation" of those objects.[36] Permanent withdrawals would have been authorized for "ruins and antiquities of special importance," but the amount of land reserved could not "exceed[] six hundred and forty acres in any one place."[37]

As these proposals were being considered, some Members of Congress sought to limit the total amount of land the Executive could withdraw. During a hearing before the House Committee on the Public Lands on the Senate-passed legislation, Delegate Bernard Rodey of New Mexico expressed his desire that the bill contain "some limit upon the amount of withdrawals that [the Executive] could make,"[38] noting that much of the land in New Mexico was already withdrawn from public use and that many archaeological sites in need of preservation were located within this territory.[39] Delegate Rodey worried that the Executive could evade an acreage limitation—such as the 640-acre limitation in the Senate-passed bill—by creating multiple 640-acre tracts.[40] Other committee members and witnesses, however, concluded that the Executive was "not . . . likely to" evade an acreage limitation in this way and that a 640-acre limitation "would prevent very extensive reservations in any one State."[41] In response to Delegate Rodey's concerns, Edgar Lee Hewett—a prominent archaeologist who was closely involved in developing the Antiquities Act[42]—suggested that the President's discretion could be sufficiently checked by language stating "that positively no more land shall be withdrawn than is necessary for the purpose."[43] The House Committee on the Public Lands reported the Senate bill to the full House, but the legislation was opposed by the Smithsonian Institution and ultimately did not win passage.[44]

After more than half a decade of debate, the 59th Congress passed the Antiquities Act in 1906. Legislation drafted by Edgar Lee Hewett was introduced in both chambers of Congress in 1906.[45]

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[34] H.R. 10451, 56th Cong. § 1 (as reported by the H. Comm. on the Pub. Lands, Apr. 21, 1900); *see also* H.R. REP. NO. 56-1104, at 1–2 (1900).

[35] S. 5603, 58th Cong. (as introduced, Apr. 20, 1904).

[36] S. 5603, 58th Cong. § 2 (as reported by the H. Comm. on the Pub. Lands, Jan. 19, 1905); *see also* H.R. REP. NO. 58-3704, at 1 (1905) (reproducing legislation).

[37] S. 5603, 58th Cong. § 2 (as reported by the H. Comm. on the Pub. Lands, Jan. 19, 1905).

[38] *Hearing on S. 5603*, *supra* note 30, at 13.

[39] *Id*.

[40] *Id*. at 14.

[41] *Id*. at 14–15 (Statement of Rep. Eben Martin); *see also id*. at 16 (Edgar Lee Hewett stating that "[m]any of the sites would necessitate a reservation of not to exceed 10 acres for their protection").

[42] For a discussion of Edgar Lee Hewett's role in the passage of the Antiquities Act, see LEE, THE ANTIQUITIES ACT, *supra* note 18, at 68–77.

[43] *Hearing on S. 5603*, *supra* note 30, at 17 (Statement of Edgar Lee Hewett).

[44] LEE, THE ANTIQUITIES ACT, *supra* note 18, at 64; *see also* Seamon, *Dismantling Monuments*, *supra* note 21, at 564.

[45] *See* S. 4698, 59th Cong. (1906); H.R. 11016, 59th Cong. (1906); *see also* Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1178 (D. Utah 2004) ("Edgar Lee Hewett . . . drafted the bill that was finally enacted in 1906."); LEE, THE

This proposal authorized the President (rather than the Secretary of the Interior) to issue "public proclamation[s]" to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" on federal land as "national monuments."[46] This proposal also limited the amount of land reserved for each monument "to the smallest area compatible with the proper care and management of the objects to be protected[.]"[47]

The Senate bill was passed by voice vote in that chamber on May 24, 1906.[48] During the House debate, Representative John Lacey—chairman of the House Committee on the Public Lands—responded to an inquiry from Representative John Stephens of Texas as to "[h]ow much land will be taken off the market in the Western States by the passage of the bill?"[49] Representative Stephens was particularly concerned that the bill provided authority similar to the Forest Reserve Act of 1891, under which Presidents had set aside tens of millions of acres of land.[50] "Not very much," was Representative Lacey's reply, pointing to the language in the proposed legislation requiring that the amount of land reserved be "the smallest area necessary" to preserve designated objects.[51] This assurance mirrored that found in the House report on the bill, which explained that "[t]he bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times."[52]

The House passed the Senate bill on June 5, unanimously and without amendment.[53] President Theodore Roosevelt signed the bill into law on June 8, 1906.[54]

The Antiquities Act

Overview

The Antiquities Act consists of four sections. In its first section, the act imposes a fine or imprisonment for not more than 90 days (or both) on "any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States."[55] As

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ANTIQUITIES ACT, *supra* note 18, at 70–71 (explaining that Representative John Lacey introduced the draft legislation that had been prepared by Edgar Lee Hewett and approved by the American Archaeological Association).

[46] S. 4698, 59th Cong. § 2 (1906); H.R. 11016, 59th Cong. § 2 (1906).

[47] S. 4698, 59th Cong. § 2 (1906).

[48] 40 Cong. Rec. 7331 (1906).

[49] *Id*. at 7888 (Statement of Rep. John Stephens).

[50] *Id*. ("Would [the amount of land reserved] be anything like the forest-reserve bill by which seventy or eighty million acres of land in the United States have been tied up?"); *see also* Seamon, *Dismantling Monuments*, *supra* note 21, at 566–67 & n.68 ("President Theodore Roosevelt and his predecessors had used [the Forest Reserve Act] to reserve millions of acres of public lands as national forests.").

[51] 40 Cong. Rec. 7888 (1906) (Statement of Rep. John Lacey).

[52] H.R. REP. NO. 59-2224, at 1 (1906).

[53] 40 Cong. Rec. 7888 (1906).

[54] Pub. L. No. 59-209, 34 Stat. 225 (June 8, 1906).

[55] *Id*. § 1, 34 Stat. at 225 (codified at 18 U.S.C. § 1866(b)). The Antiquities Act originally set a maximum fine of $500. *Id*. However, under the current sentencing provisions in Title 18 of the United States Code, a violation of Section 1 of the Antiquities Act would carry a maximum fine of $5,000. *See* 18 U.S.C. § 1866(b) (providing for the imposition of a fine "under this title"); *id*. § 3559(a)(7) (providing that an offense warranting a maximum term of imprisonment of six months or less, but more than 30 days, is a Class B misdemeanor); *id*. § 3571 (providing for a maximum fine of $5,000 for Class B or C misdemeanors that do not result in death).

written, this section prohibits damaging objects of antiquity, regardless of whether the President had established a monument under the authority conferred by Section 2 of the act.[56] The penalties of this section apply in addition to general federal prohibitions on the misappropriation of federal property.[57]

The second section—the core of the act—authorizes the President "in his discretion" "to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments."[58] In addition to protecting the "objects" themselves, the act also authorizes the President to "reserve . . . parcels of land" to be part of the monuments, but requires that those parcels be "confined to the smallest area compatible with the proper care and management of the objects to be protected."[59]

The Antiquities Act does not require the President to produce an evidentiary record or to follow specific procedures in establishing a national monument. Moreover, because proclamations under the Antiquities Act are issued directly by the President, rather than by an executive agency, they are not subject to the procedural and judicial review provisions of the Administrative Procedure Act (APA) or the procedural and administrative record requirements of the National Environmental Policy Act (NEPA).[60] As a result, presidential proclamations under the Antiquities Act offer a more expeditious means of preserving federal lands than other environmental statutes.

The act also does not specify what effect the establishment of a national monument has on the use of the objects and lands encompassed within the monument, other than by prohibiting the appropriation, excavation, injury, or destruction of "historic or prehistoric ruin[s]," "monument[s]," or other "object[s] of antiquity."[61] Instead, limitations on the use of lands and resources within a monument follow from a variety of other sources.[62] The Mineral Leasing Act prohibits new mineral leasing within national monuments,[63] and a presidential proclamation may impose additional restrictions on mining and mineral claims, as well as oil and gas leases, timber

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[56] *See* United States v. Diaz, 499 F.2d 113, 114–15 (9th Cir. 1974) (vacating on constitutional grounds a conviction under the Antiquities Act for appropriating alleged antiquities from the San Carlos Indian Reservation); United States v. Quarrell, 310 F.3d 664, 672 (10th Cir. 2002) ("Since the Antiquities Act of 1906, it has been a crime to excavate for historic ruins on government land without express permission from the government.").

[57] *See, e.g.*, United States v. Jones, 607 F.2d 269, 270–71, 273 (9th Cir. 1979) ("[W]e find no indication that Congress, in passing the Antiquities Act, meant to limit the applicability of the general theft statutes; nor do we find that Congress in passing the general statutes, intended that they would not apply to conduct covered by the Antiquities Act."). This penalty provision was held to be unconstitutionally vague in the context of a conviction for removing face masks from an Indian Reservation that were only three or four years old. *See Diaz*, 499 F.2d at 114–15. In a later case, the U.S. Court of Appeals for the Tenth Circuit rejected a vagueness challenge to this penalty provision in the context of a conviction for removing "objects 800-900 years old . . . from ancient sites for commercial motives." United States v. Smyer, 596 F.2d 939, 941 (10th Cir. 1979).

[58] Pub. L. No. 59-209 § 2, 34 Stat. at 225 (codified at 54 U.S.C. § 320301(a)).

[59] *Id*. (codified at 54 U.S.C. § 320301(b)). The act also authorizes the Secretary of the Interior to accept lands from a private party who wishes to relinquish them to the United States. *Id*. (codified at 54 U.S.C. § 320301(c)).

[60] *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (holding that the President is not subject to the APA); 40 C.F.R. § 1508.12 (NEPA regulations defining "federal agency" to exclude the President).

[61] 18 U.S.C. § 1866(b).

[62] *See* Squillace, *The Monumental Legacy*, *supra* note 28, at 514–18 (discussing various sources of restrictions on monument land use).

[63] 30 U.S.C. § 181 (providing for the disposition of "[d]eposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite . . . or gas, and lands containing such deposits owned by the United States" but "excluding lands . . . in national parks and monuments"); *see also* Squillace, *The Monumental Legacy*, *supra* note 28, at 516 & n.278.

harvesting, and hunting, fishing, and grazing.[64] Use restrictions may also be found in the management plans developed by the agency responsible for overseeing a given monument.[65] Monuments established in the last 50 years have also made accommodations for the continued exercise of valid rights existing at the time of the monument's creation.[66]

The act is also silent on which federal agency is responsible for managing a national monument once established.[67] For much of the act's history, the National Park Service was most often selected for this task.[68] Indeed, every monument from 1933 to 1978 was assigned to the National Park Service's care.[69] However, some Presidents have departed from this practice and tasked other agencies (such as the Bureau of Land Management) with this responsibility.[70]

In its last sections, the act authorizes the executive branch to issue permits for "the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity" for the benefit of scientific or educational institutions in order to "increas[e] the knowledge of such objects" and for their "permanent preservation in public museums."[71] The act also authorizes the responsible executive departments to issue "uniform rules and regulations" to effectuate the act's provisions.[72]

Past Presidential Proclamations

President Theodore Roosevelt did not tarry long before using his new authority. On September 24, 1906, President Roosevelt issued his first proclamation under the Antiquities Act to protect Devil's Tower—a "lofty isolated rock" and "natural wonder" located in Wyoming[73]—with a reservation of land totaling 1,152 acres.[74] Most of President Roosevelt's initial designations similarly adhered to Representative Lacey's predication that "[n]ot very much" land would be

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[64] Squillace, The Monumental Legacy, supra note 28, at 516–18; see also CRS Report R41330, *National Monuments and the Antiquities Act*, supra note 7.

[65] Squillace, *The Monumental Legacy*, *supra* note 28, at 517–18 & n.283.

[66] *See, e.g.*, Establishing the Buck Island Reef Nat'l Monument in the Virgin Islands of the United States, Pres. Proc. No. 3443, 76 Stat. 1441, 1442 (Dec. 28, 1961); Denali Nat'l Monument, Pres. Proc. No. 4616, 93 Stat. 1455, 1456 (Dec. 1, 1978); Yukon Flats Nat'l Monument, Pres. Proc. No. 4627, 93 Stat. 1473, 1475 (Dec. 1, 1978); Establishment of the Grand Canyon-Parashant Nat'l Monument, Pres. Proc. No. 7265, 114 Stat. 3236, 3239 (Jan. 11, 2000).

[67] Kelly Y. Fanizzo, *Separation of Powers and Fed. Land Mgmt.: Enforcing the Direction of the President under the Antiquities Act*, 40 ENVTL. L. 765, 781 (2010). For a more detailed discussion of the history of agency management of national monuments and related issues, see *id*. at 781–84 and Squillace, *The Monumental Legacy*, *supra* note 28, at 519–33.

[68] Fanizzo, *Separation of Powers*, *supra* note 67, at 783–84.

[69] *Id*. at 783.

[70] *Id*. at 784 ("President Clinton caused a stir of controversy when he selected [the Bureau of Land Management] as a managing agency in a series of monument designations."); *see also* Robert Iraola, *Proclamations, Nat'l Monuments, and the Scope of Judicial Review under the Antiquities Act of 1906*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 159, 167–68 (2004) ("Typically, while management of national monuments has been given to the National Park Service, such authority has also been delegated to agencies such as the Forest Service and Bureau of Land Management.").

[71] Pub. L. No. 59-209 § 3, 34 Stat. 225, 225 (codified at 54 U.S.C. § 320302).

[72] *Id*. § 4, 34 Stat. at 225 (codified at 54 U.S.C. § 320303); *see, e.g.*, 43 C.F.R. §§ 3.1–3.17 (Department of the Interior regulations).

[73] Pres. Proc. No. 658 (Sept. 24, 1906) (reproduced in U.S. DEP'T OF THE INTERIOR, PROCLAMATIONS AND ORDERS RELATING TO THE NATIONAL PARK SERVICE 171 (GPO 1947), https://archive.org/details/proclamationsord00sull/page/n3).

[74] Nat'l Park Serv., *Antiquities Act 1906-2006: Maps, Facts, & Figures – Monuments List*, https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm [hereinafter, *Monuments List*].

reserved through presidential proclamations under the act.[75] President Roosevelt's second designation in December 1906 (El Morro in New Mexico) consisted of 160 acres and his third (Montezuma Castle in Arizona, also in December 1906) was 161 acres.[76] But it did not take long for the size of monuments to increase.[77] As part of his establishment of the Chaco Canyon National Monument in March 1907, President Roosevelt reserved 20,629 acres, while his creation of the Petrified Forest National Monument in Arizona set aside 60,776 acres.[78] Yet these designations were dwarfed by his establishment of the 808,120-acre Grand Canyon National Monument, by far the largest of President Roosevelt's monuments.[79] All told, President Roosevelt designated 18 monuments in his final years in office.[80]

Over the last century, Presidents have utilized the Antiquities Act to varying degrees. Presidents from Taft through Eisenhower established or enlarged 10 or more monuments each, with President Franklin Roosevelt leading the pack with 30.[81] Presidents after Eisenhower used the act to a lesser extent. Presidents Kennedy and Johnson each created or enlarged less than ten monuments, President Ford enlarged two, and Presidents Nixon, Reagan, and George H. W. Bush created or enlarged none.[82] President Carter, however, created or enlarged 17 monuments.[83]

The Antiquities Act's three-term dormancy ended with the election of President Clinton. During his two terms in office, President Clinton established 19 new monuments and enlarged three more.[84] These new monuments included the 1.7 million-acre Grand Staircase-Escalante National Monument in Utah.[85] Following a decline in use under President George W. Bush, who created six national monuments, President Obama exceeded all his predecessors by establishing 29 new monuments and enlarging another five.[86] Among these was the 1.35 million-acre Bears Ears monument in Utah, designated in the last week of President Obama's presidency.[87] To date, President Trump has established one national monument, the Camp Nelson National Monument in Kentucky.[88]

All told, Presidents Theodore Roosevelt through Trump have used the Antiquities Act to establish a total of 158 national monuments.[89] These presidents also issued proclamations modifying

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[75] Seamon, *Dismantling Monuments*, *supra* note 21, at 568 n.74 (noting that "most monuments created by President Roosevelt were small"); 40 Cong. Rec. 7888 (1906) (Statement of Rep. John Lacey).

[76] Nat'l Park Serv., *Monuments List*, *supra* note 74.

[77] Seamon, *Dismantling Monuments*, *supra* note 21, at 568 ("Although most monuments created by President Roosevelt were small, some covered '[a]reas far larger than ever conceived' by the Congress that passed the Antiquities Act." (quoting HAL ROTHMAN, PRESERVING DIFFERENT PASTS: THE AMERICAN NATIONAL MONUMENTS 48 (1989)).

[78] Nat'l Park Serv., *Monuments List*, *supra* note 74.

[79] *Id*.

[80] *Id*.

[81] *Id*.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*. For additional discussion of the monument proclamations from President Theodore Roosevelt to President Clinton, see Squillace, *The Monumental Legacy*, *supra* note 28, at 489–514.

[86] Nat'l Park Serv., *Monuments List*, *supra* note 74.

[87] *Id*.

[88] *Id*.

[89] *Id*.

existing monuments over 90 times.[90] Though many of these monuments have retained their status as national monuments, Congress has exercised its authority under the Property Clause[91] to alter certain monument designations, whether by incorporating the monument (or portions thereof) into the National Park System,[92] transferring the monuments to state control,[93] or abolishing the monument outright.[94]

No President has purported to abolish a national monument, but past Presidents have reduced the size of monuments on 18 separate occasions.[95] President Franklin Roosevelt took such action four times during his presidency, while President Eisenhower did so on six occasions. [96] Presidents Taft, Wilson, Coolidge, Truman, and Kennedy each reduced three or fewer monuments.[97] In some instances, Presidents have simultaneously removed lands from a monument reservation while adding others.[98] No President after Kennedy diminished an existing monument until President Trump's issuance of proclamations in December 2017 diminishing the Grand Staircase-Escalante National Monument by 700,000 acres and the Bears Ears National Monument by 1.15 million acres.[99]

Legislation and Litigation in Response to Proclamations

Most monument declarations have not generated significant debate. Over the years, however, a few monuments have proved controversial, resulting in corrective legislation, litigation, or both.[100] In two instances, Congress imposed restrictions on the President's authority to establish national monuments in Wyoming and Alaska, and in some cases it has abolished monuments altogether.[101] But through all this, Congress has not fundamentally altered the authority of the President under the Antiquities Act. Courts also have broadly interpreted the President's authority to designate prehistoric ruins and other man-made structures (in addition to naturally occurring objections of scientific interest) and to determine the amount of lands needed for their preservation.[102] Finally, though the Supreme Court has not directly addressed the scope of judicial

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[90] *Id*.

[91] U.S. CONST. art. IV § 3, cl. 2.

[92] Nat'l Park Serv., *Monuments List*, *supra* note 74; Seamon, *Dismantling Monuments*, *supra* note 21, at 580 ("Of course, Congress has also effectively ratified some presidentially established monuments by adding to them or converting them into national parks.").

[93] Nat'l Park Serv., *Monuments List*, *supra* note 74 (noting six national monuments that were transferred to state control).

[94] Nat'l Park Serv., *Antiquities Act 1906–2006: Frequently Asked Questions*, http://www.nps.gov/archeology/sites/antiquities/FAQs.doc (listing national monuments abolished by Congress); Seamon, *Dismantling Monuments*, *supra* note 21, at 579 & n.138 ("Congress has abolished ten presidentially established monuments.").

[95] Nat'l Park Serv., *Monuments List*, *supra* note 74; Seamon, *Dismantling Monuments*, *supra* note 21, at 575 & n.114 ("Presidents have excluded land originally included in a monument eighteen times over fifty years." (collecting proclamations)). The justifications for these reductions have varied. *Id*. at 576–77 (discussing justifications).

[96] Nat'l Park Serv., *Monuments List*, *supra* note 74.

[97] *Id*.

[98] *Id*.; Seamon, *Dismantling Monuments*, *supra* note 21, at 577–78.

[99] Nat'l Park Serv., *Monuments List*, *supra* note 74; *see* Modifying the Grand Staircase-Escalante Nat'l Monument, Pres. Proc. No. 9682, 82 Fed. Reg. 58,089, 58,093 (Dec. 4, 2017); Modifying the Bears Ears Nat'l Monument, Pres. Proc. No. 9681, 82 Fed. Reg. 58,081, 58,084–85 (Dec. 4, 2017).

[100] *See infra* notes 104–176 and accompanying text.

[101] *See infra* notes 120–123, 137–141, and accompanying text.

[102] *See infra* notes 104–176 and accompanying text. For additional discussion of the cases discussed below, see John

review of a presidential proclamation, courts that have addressed the issue have concluded that such review is deferential.[103]

The Roosevelt Proclamations

The first lawsuit implicating an Antiquities Act proclamation involved President Theodore Roosevelt's 1908 creation of the Grand Canyon National Monument, which reserved the land designated as part of that monument "subject to all prior valid adverse claims."[104] A businessman and his associates continued to conduct mining operations within the bounds of the monument, arguing first that the President had "no authority" to establish the monument because it was not the type of object encompassed by the act, and second that they had a valid and preexisting "lode mining claim."[105] In its 1920 decision in *Cameron v. United States*, the Supreme Court rejected this challenge. Recognizing the Grand Canyon as "the greatest eroded canyon in the United States" and "one of the great natural wonders," the Court noted that it "has attracted wide attention among explorers and scientists" and "affords an unexampled field for geological study."[106] Thus, the Court concluded that the Grand Canyon was an "object[] of unusual scientific interest" for purposes of the Antiquities Act.[107]

President Franklin Roosevelt's 1943 establishment of the Jackson Hole National Monument—a 221,610-acre monument in Wyoming[108]— generated both litigation and legislation. Litigants sued in federal district court in Wyoming to invalidate the proclamation, claiming (among other things) that the reserved land "contain[ed] no objects of an historic or scientific interest" and was "not confined to the smallest area compatible" with the preservation of the monument.[109] The court concluded first that it had "limited jurisdiction to investigate and determine whether or not the Proclamation" was lawful.[110] Though acknowledging that a court could void a proclamation lacking any evidentiary support, the court concluded that it lacked authority to determine the legality of the monument based on its own assessment of the preponderance of the evidence.[111] The court thus held that its review was limited only to assessing whether the government had put forward "substantial evidence" to sustain the proclamation.[112] Relying on that standard, the court upheld the Jackson Hole National Monument. It found that the United States' evidence of "trails and historic spots in connection with the early trappings and hunting of animals" and "structures

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Murdock, *Monumental Power: Can Past Proclamations under the Antiquities Act be Trumped?*, 22 TEX. REV. L. & POL. 349, 357–60 (2018) (providing overview of cases addressing the Antiquities Act).

[103] *See infra* notes 104–176 and accompanying text.

[104] Pres. Proc. No. 794, 35 Stat. 2175, 2176 (Jan. 11, 1908). The Grand Canyon had already been designated as a forest reserve in 1891. *See* Cameron v. United States, 252 U.S. 450, 455 (1920). President Roosevelt's 1908 proclamation expressly preserved the Grand Canyon's designation as a forest reserve, but provided that "the National Monument hereby established shall be the dominant reservation." 35 Stat. at 2176.

[105] *Cameron*, 252 U.S. at 454–56. For additional information on the factual background of this case, see Squillace, *The Monumental Legacy*, *supra* note 28, at 490–92.

[106] *Cameron*, 252 U.S. at 456.

[107] *Id*. at 455. The Court also concluded that the plaintiffs did not have a prior valid adverse claim that would entitle them to continue their operations on the monument land. *Id*. at 456–65.

[108] Squillace, *The Monumental Legacy*, *supra* note 28, at 495–96; Nat'l Park Serv., *Monuments List*, *supra* note 74.

[109] Wyoming v. Franke, 58 F. Supp. 890, 892 (D. Wyo. 1945).

[110] *Id*. at 894.

[111] *Id*. at 895–96 ("In the proofs of this case we have evidence of experts and others as to what the area contains in regard to objects of historic and scientific interest and by that testimony this Court is bound although it may not agree that the testimony of the witnesses by the preponderance rule sufficiently supports the claim of the defendant.").

[112] *Id*.

of glacial formation and peculiar mineral deposits and [indigenous] plant life" was sufficient to sustain the proclamation with respect to both the nature of the objects designated and the amount of lands reserved.[113] In so doing, the court placed the "burden . . . on the Congress to pass such remedial legislation as may obviate any injustice brought about" by the proclamation.[114]

Congress's response to the Jackson Hole monument has been described as "perhaps the most successful congressional opposition to a monument proclamation."[115] Extensive hearings were held by committees in both chambers.[116] The House Committee on the Public Lands emphasized the economic injury that the reservation of land would inflict on the local communities, including by reducing the tax base for local governments and "destroying the cattle business."[117] The Senate Committee on Public Lands and Surveys went further, and concluded that the Jackson Hole proclamation "disregarded" the Antiquities Act's requirement that reserved lands be "confined to the smallest area" necessary for preservation.[118] In this committee's judgment, the authority given the President in the Antiquities Act "was not broad enough to cover the establishment of the Jackson Hole Monument," and so it sought to "disestablish[]" that monument in order to eliminate "a dangerous precedent."[119]

Congress ultimately approved legislation abolishing the Jackson Hole monument, but President Roosevelt pocket-vetoed that bill.[120] Responding in kind, Congress refused to fund the Jackson Hole monument for the next seven years.[121] The fate of Jackson Hole was finally resolved when President Truman signed legislation to consolidate it with the existing Grand Teton National Park.[122] But Congress further restricted the President's authority under the Antiquities Act by including a provision in this legislation that amended the Antiquities Act to prohibit the President from establishing monuments within Wyoming.[123]

Judicial Decisions in the 1970s

Though the Antiquities Act authorizes the President to set aside "lands," the Supreme Court in the 1970s concluded that the act authorizes the preservation of waters and submerged lands as well.

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[113] *Id*. at 895–86 ("What has been said with reference to the objects of historic and scientific interest applies equally to the discretion of the Executive in defining the area compatible with the proper care and management of the objects to be protected.").

[114] *Id*. at 896.

[115] Squillace, *The Monumental Legacy*, *supra* note 28, at 498.

[116] *See generally A Bill to Abolish the Jackson Hole Nat'l Monument: Hearing Before the H. Comm. on the Pub. Lands on H.R. 2241*, 78th Cong. (1943); *Jackson Hole Nat'l Monument, Wyoming: Hearing Before the S. Comm. on Pub. Lands and Surveys*, 78th Cong. (1943).

[117] H.R. REP. NO. 78-1303, at 5–6 (1944).

[118] S. REP. NO. 78-1388, at 2 (1944).

[119] *Id*.

[120] Squillace, *The Monumental Legacy*, *supra* note 28, at 498; *see* H.R. 2241, 78th Cong. (1943); 90 Cong. Rec. 9196 (1944) (passing House); *id*. at 9769 (passing Senate). Article 1 of the Constitution provides that a bill will become law in the absence of a presidential veto or signature within 10 days of being passed by, except when Congress has adjourned during that 10-day window. U.S. CONST. art. 1 § 7, cl. 2. A bill's failure to become law by presidential inaction is known as the "pocket veto." *Pocket veto*, BLACK'S LAW DICTIONARY (5th ed. 1979).

[121] Seamon, *Dismantling Monuments*, *supra* note 21, at 580 ("[A]fter Congress was unsuccessful in abolishing the Jackson Hole National Monument . . . Congress refused to appropriate funds for administering the monument").

[122] Pub. L. No. 81-787, 64 Stat. 849 (Sept. 14, 1950) (codified at 16 U.S.C. § 406d-1).

[123] *Id*. § 1, 64 Stat. at 849 (codified at 54 U.S.C. § 320301(d)).

In *Cappaert v. United States*,[124] the United States sought to prevent ranchers, the Cappaerts, from pumping groundwater on their ranch that was two and one-half miles from an underground pool known as "Devil's Hole," located within a 40-acre plot of land within the Death Valley National Monument.[125] The Cappaerts' use of groundwater, the United States argued, reduced the water level of Devil's Hole and threatened the survival of a rare desert fish—the Devil's Hole pupfish—living within.[126] The United States argued that this pumping was prohibited because the proclamation adding Devil's Hole to the Death Valley National Monument also reserved the groundwater feeding the pool.[127] Relying on the Antiquities Act's legislative history, the Cappaerts argued that the inclusion of Devil's Hole in the Death Valley monument was unlawful because the act allows only the protection of land, not water or animals.[128] In any event, the Cappaerts argued, the inclusion of thousands of square miles of groundwater for the preservation of the 40-acre Devil's Hole violated the requirement that land reservations "be confined to the smallest area compatible" with the preservation of the designated objects.[129]

The Supreme Court rejected the Cappaerts' arguments in a few brief sentences. Relying on *Cameron*, the Court concluded that the underground pool, and the endangered pupfish living within, were objects of scientific interest and thus appropriate subjects of protection under the Antiquities Act.[130] Two years later, the Supreme Court in *United States v. California* reaffirmed that the Antiquities Act allows the President to withdraw bodies of water, as well as plots of land, when it upheld President Truman's expansion of the Channel Island National Monument.[131]

President Carter's Alaska Monuments

In 1980, Congress also imposed an additional territorial restriction on the President's authority under the Antiquities Act, this time in response to President Carter's creation of numerous monuments in Alaska.[132] In 1971, Congress passed and President Nixon signed the Alaska Native Claims Settlement Act,[133] which authorized the Secretary of the Interior to propose up to 80 million acres for preservation and gave Congress five years to approve or disapprove the

[124] 426 U.S. 128 (1976).

[125] *Id*. at 131–35; *see also* Nat'l Park Serv., *Monuments List*, *supra* note 74. The Death Valley National Monument was established by President Hoover in 1933 and enlarged in 1952 by President Truman to include the 40 acres containing Devil's Hole. *See* Nat'l Park Serv., *Monuments List*, *supra* note 74.

[126] *Cappaert*, 426 U.S. at 135.

[127] *Id*.

[128] Brief for Petitioners, Cappaert v. United States, 426 U.S. 128 (1976) (No. 74-1107), 1975 WL 173691, at *64, *66–67.

[129] *Id*. at *66–67.

[130] *Cappaert*, 426 U.S. at 141–42. The Court did not, however, address the Cappaerts' argument that the amount of land reserved in conjunction with Devil's Hole was the smallest area necessary.

[131] 436 U.S. 32, 36 & n.9 (1978) ("There can be no serious question, therefore, that the President in 1949 had power under the Antiquities Act to reserve the submerged lands and waters within the one-mile belt as a national monument[.]"). The Supreme Court reaffirmed its holding in *California* in *Alaska v. United States*, 545 U.S. 75 (2005). In the course of addressing whether the United States retained title to the submerged lands in the Glacier Bay National Monument, the Court in *Alaska* stated that "[i]t is clear, after all, that the Antiquities Act empowers the President to reserve submerged lands." *Id*. at 103 (citing *California*, 436 U.S. at 36).

[132] *See generally* Squillace, *The Monumental Legacy*, *supra* note 28, at 502–05. For further discussion of the development of federal land policy in Alaska, see *Sturgeon v. Frost*, 139 S. Ct. 1066, 1073–76 (2019).

[133] Pub. L. No. 92-203, 85 Stat. 688 (Dec. 18, 1971) (codified at 43 U.S.C. §§ 1601–1629h).

recommendation.[134] During that five-year window, the lands would be temporarily withdrawn.[135] But when it became clear that Congress would not act before this deadline, President Carter invoked his authority under the Antiquities Act to establish 17 new or expanded monuments within Alaska, totaling 56 million acres.[136]

These monument proclamations "sparked bitter opposition in Alaska,"[137] leading to protests throughout the state.[138] Responding to these protests, and with the twin goals of securing environmental protection and providing for the economic needs of Alaskans, Congress passed and the President signed the Alaska National Interest Lands Conservation Act (ANILCA).[139] This law rescinded President Carter's monument designations, but simultaneously set aside over 100 million acres of land for conservation, much of which consisted of the same lands that had been included in President Carter's monuments.[140] But to avoid a repeat of the controversy that surrounded President Carter's proclamations, Congress again limited the President's authority under the Antiquities Act, providing that "future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska" will not be "effective until notice is provided in the Federal Register and to both Houses of Congress" and that each "withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress."[141]

Like the Jackson Hole monument, several of President Carter's Alaska monuments were challenged in federal district court.[142] The district court, while recognizing that the Antiquities Act limits the President's discretion as to which objects may be protected and how much land may be

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[134] Squillace, *The Monumental Legacy*, *supra* note 28, at 503; *see also Sturgeon*, 139 S. Ct. at 1074.

[135] Squillace, *The Monumental Legacy*, *supra* note 28, at 503; *see also Sturgeon*, 139 S. Ct. at 1074. This statutory framework is also summarized in *Alaska v. Carter*, 462 F. Supp. 1155, 1156–57 (D. Alaska 1978). The plaintiffs in *Carter* argued that proclamations under the Antiquities Act are subject to the National Environmental Policy Act, a position the district court rejected. *Id.* at 1158–60. The district court's decision did not address whether the challenged proclamations complied with the Antiquities Act.

[136] Squillace, *The Monumental Legacy*, *supra* note 28, at 504 ("[O]n December 1, 1978, the President proclaimed seventeen new or expanded national monuments in Alaska covering nearly fifty-six million acres of land to be administered by the National Park Service."); *see* Admiralty Island Nat'l Monument, Pres. Proc. No. 4611, 93 Stat. 1446 (Dec. 1, 1978); Aniakchak Nat'l Monument, Pres. Proc. No. 4612, 93 Stat. 1448 (Dec. 1, 1978); Becharof Nat'l Monument, Pres. Proc. No. 4613, 93 Stat. 1450 (Dec. 1, 1978); Bering Land Bridge Nat'l Monument, Pres. Proc. No. 4614, 93 Stat. 1451 (Dec. 1, 1978); Cape Krusenstern Nat'l Monument, Pres. Proc. No. 4615, 93 Stat. 1453 (Dec. 1, 1978); Denali Nat'l Monument, Pres. Proc. No. 4616, 93 Stat. 1455 (Dec. 1, 1978); Gates of the Artic Nat'l Monument, Pres. Proc. No. 4617, 93 Stat. 1457 (Dec. 1, 1978); Enlarging the Glacier Bay Nat'l Monument, Pres. Proc. No. 4618, 93 Stat. 1458 (Dec. 1, 1978); Enlarging the Katmai Nat'l Monument, Pres. Proc. No. 4619, 93 Stat. 1460 (Dec. 1, 1978); Kenai Fjords Nat'l Monument, Pres. Proc. No. 4620, 93 Stat. 1462 (Dec. 1, 1978); Kobuk Valley Nat'l Monument, Pres. Proc. No. 4621, 93 Stat. 1463 (Dec. 1, 1978); Lake Clark Nat'l Monument, Pres. Proc. No. 4622, 93 Stat. 1465 (Dec. 1, 1978); Misty Fjords Nat'l Monument, Pres. Proc. No. 4623, 93 Stat. 1466 (Dec. 1, 1978); Noatak Nat'l Monument, Pres. Proc. No. 4624, 93 Stat. 1468 (Dec. 1, 1978); Wrangell-St. Elias Nat'l Monument, Pres. Proc. No. 4625, 93 Stat. 1470 (Dec. 1, 1978); Yukon-Charley Nat'l Monument, Pres. Proc. No. 4626, 93 Stat. 1472 (Dec. 1, 1978); Yukon Flats Nat'l Monument, Pres. Proc. No. 4627, 93 Stat. 1473 (Dec. 1, 1978).

[137] Squillace, *The Monumental Legacy*, *supra* note 28, at 504.

[138] *Sturgeon*, 139 S. Ct. at 1074.

[139] Pub. L. No. 96-487, 94 Stat. 2371 (Dec. 2, 1980) (codified at 16 U.S.C. §§ 3101–3233).

[140] Squillace, *The Monumental Legacy*, *supra* note 28, at 504; *see also Sturgeon*, 139 S. Ct. at 1074.

[141] 16 U.S.C. § 3213(a). A "joint resolution" is a legislative vehicle similar to a "bill," requiring presidential approval before it may become law. *Learn About the Legislative Process: How Our Laws Are Made*, CONGRESS.GOV, https://www.congress.gov/resources/display/content/How+Our+Laws+Are+Made+-+Learn+About+the+Legislative+Process (last visited May 6, 2019).

[142] *See* Anaconda Copper Co. v. Andrus, No. 79-161, 1980 U.S. Dist. LEXIS 17861 (D. Alaska July 1, 1980).

included in a monument, rejected the plaintiffs' argument that the Antiquities Act does not apply to naturally occurring objects of scientific interest.[143] The court observed that prior Presidents had repeatedly used the Antiquities Act for this purpose and Congress had not amended the Antiquities Act in response, thus indicating Congress's tacit approval of the practice.[144] No appeal was taken from the district court's decision in this case.

Recent Lower Court Decisions

Litigation over the Antiquities Act abated during the 1980s and early 1990s, as President Reagan and President H. W. Bush did not use the Antiquities Act to establish national monuments.[145] That hiatus came to an end with challenges to several of President Clinton's monument designations, including the Grand Staircase-Escalante monument in Utah and the Giant Sequoia monument in California. The plaintiffs in two cases—*Mountain States Legal Foundation v. Bush*[146] and *Tulare County v. Bush*[147]—argued (among other things) that President Clinton exceeded his authority under the Antiquities Act because that law authorizes only designations of "man-made objects, such as prehistoric ruins and ancient artifacts," not natural phenomena, and because the monuments were not limited to the smallest area necessary for protecting the designated objects.[148]

The U.S. Court of Appeals for the D.C. Circuit[149] rejected these arguments. The court of appeals disposed of the first objection based on the Supreme Court's holdings in *Cameron* and *Cappaert*.[150] "[T]he President's Antiquities Act authority," the court explained, "is not limited to protecting only archaeological sites."[151] The court of appeals then decided that it had no occasion to resolve the second argument—that the reserved land was not the smallest area compatible with the preservation of the objects—because it determined that the plaintiffs failed to meet their burden of "identify[ing] the improperly designated lands with sufficient particularity to state a claim."[152]

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[143] *Id*. at *2, *5 ("I conclude that presidential authority is not limited only to historic landmarks, historic and prehistoric structures, but is much enlarged by the extent of authority to declare by point of Proclamation public monuments for other objects of historic or scientific interest.").

[144] *Id*. at *6 ("I find the executive practice is consistent and long established and must be looked to, as well as the words of the statute itself. . . . I believe it is significant that . . . Congress did not curtail or restrict the exercise of presidential authority."). *See also* Squillace, *The Monumental Legacy*, *supra* note 28, at 506–07 (discussing *Anaconda Copper*).

[145] Nat'l Park Serv., *Monuments List*, *supra* note 74.

[146] 306 F.3d 1132 (D.C. Cir. 2002) (challenging six monument designations).

[147] 306 F.3d 1138 (D.C. Cir. 2002) (challenging Giant Sequoia National Monument).

[148] *Mountain States Legal Found.*, 306 F.3d at 1137; *Tulare Cty.*, 306 F.3d at 1141–42. The plaintiffs also unsuccessfully argued that President Clinton's proclamations (1) violated the Property Clause of the U.S. Constitution, (2) constituted unlawful delegations of legislative power, and (3) conflicted with other federal statutes. *See Mountain States Legal Found.*, 306 F.3d at 1136–38; *Tulare Cty.*, 306 F.3d at 1143–44.

[149] This report references a significant number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (*e.g.*, the D.C. Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[150] *Mountain States Legal Found.*, 306 F.3d at 1137; *Tulare Cty*., 306 F.3d at 1142.

[151] *Tulare Cty*., 306 F.3d at 1142.

[152] *Id*.; *Mountain States Legal Found.*, 306 F.3d at 1137 ("Mountain States' arguments contain only the bald assertion that the President acted outside the bounds of his constitutional and statutory authority."); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

Notably, the district court in each of these cases dismissed the suits by concluding that judicial review of proclamations under the Antiquities Act is limited "to the face of the Proclamation," thus prohibiting courts from reviewing "the President's determinations and factual findings."[153] The D.C. Circuit, however, declined to "decide the availability or scope of judicial review of a Presidential Proclamation . . . under the Antiquities Act," based on its conclusion that the plaintiffs had failed to allege facts which could plausibly show noncompliance with the Antiquities Act.[154] At the same time, the court of appeals suggested that judicial review of an Antiquities Act proclamation would be appropriate to the extent of ensuring that the President acted within his statutory authority.[155] Relying on *Cappaert* and *Cameron*, the D.C. Circuit explained "that [judicial] review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority."[156]

Though the D.C. Circuit in *Mountain States* and *Tulare* did not purport to definitively resolve the scope of judicial review of a monument proclamation, a federal district court in *Utah Association of Counties v. Bush* did.[157] This case involved a challenge to President Clinton's designation of the Grand Staircase-Escalante monument, with the plaintiffs taking the view that the President exceeded his authority under the Antiquities Act by "fail[ing] to designate the requisite objects of historic or scientific value" and "not limit[ing] the size of the monument to the 'smallest area' necessary to preserve the objects."[158] The district court, however, declined to engage in an in-depth review of these claims, concluding instead that because the Antiquities Act commits the creation of monuments to the President's discretion, judicial review of those proclamations is limited to "ascertaining that the President in fact invoked his powers under the Antiquities Act"—that is, that he "considered the principles that Congress required him to consider."[159] Under this deferential standard, the court rejected the plaintiffs' claims because it was "evident from the language of the Proclamation" that President Clinton had "considered the principles that Congress required him to consider."[160]

The most recent case to address the scope of presidential power under the Antiquities Act involved a challenge to President Obama's establishment of the 4,913-square mile Northeast

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alleged." (internal quotation marks omitted)).

[153] Tulare Cty. v. Bush, 185 F. Supp. 2d 18, 25 (D.D.C. 2001) (holding that "the Proclamation on its face describes with specificity the objects of historic and scientific interest to be included in the Monument" and that "[a]s required by the Antiquities Act, the Proclamation specifically states that the land reserved for the Monument consists of 'approximately 327,769 acres, which is the smallest area compatible'"); *Mountain States Legal Found.*, 306 F.3d at 1134 ("The district court . . . rul[ed] that . . . under the Antiquities Act only facial review of Mountain States' arguments was appropriate.").

[154] *Mountain States Legal Found.*, 306 F.3d at 1133, 1136–37; *Tulare Cty.*, 306 F.3d at 1140, 1142, 1144.

[155] *Mountain States Legal Found.*, 306 F.3d at 1136.

[156] *Id*.

[157] 316 F. Supp. 2d 1172 (D. Utah 2004) (addressing challenge to the Grand Staircase-Escalante National Monument), *appeal dismissed* 455 F.3d 1094 (10th Cir. 2006).

[158] *Id*. at 1176–77.

[159] *Id*. at 1183, 1186 (concluding that courts may not review the President's factual findings for accuracy or review how he exercised his discretion, but may only "ensure that [the] [P]resident was in fact exercising the authority conferred by the [Antiquities Act]").

[160] *Id*. at 1186. The district court also rejected the plaintiffs' various arguments that the Grand Staircase-Escalante monument violated (1) the nondelegation doctrine, (2) the Property Clause and the Spending Clause, and (3) various federal statutes. *Id*. at 1176–77, 1190–1201. The district court's decision was appealed, but the Tenth Circuit never reached the merits because it concluded that the appellant lacked standing. *See* Utah Ass'n of Ctys. v. Bush, 455 F.3d 1094, 1101 (10th Cir. 2006).

Canyons and Seamounts Marine National Monument.[161] As its name suggests, this monument is composed of "underwater canyons and mountains, and the ecosystems around them," sitting approximately 130 miles off of the coast of Massachusetts in an area of water known as the Exclusive Economic Zone.[162] Those challenging the designation argued that the term "lands" in the Antiquities Act does not encompass submerged lands and, even if it does, that the amount of "land" reserved was not the smallest necessary for preserving the designated objects.[163] In addition, the plaintiffs contended that the monument proclamation was invalid because the reserved waters were not *completely* controlled by the United States, thus violating the requirement in the Antiquities Act that reserved lands be "owned or controlled by the Federal Government."[164]

The district court began with the scope of its review. Relying on the Supreme Court and D.C. Circuit cases discussed above, the court distinguished between two types of challenges to a presidential proclamation.[165] The first category involves those "that can be judged on the face of the proclamation," such as the argument in *Cappaert* that only archaeological sites qualify as objects of historic or scientific interest under the act.[166] When a challenge is premised on a disputed question of law, judicial review is conducted without deference.[167] The district court distinguished this category of challenge from those "requir[ing] some factual development,"[168] such as the argument raised in *Mountain States* and *Tulare* that the amount of land reserved was not "the smallest area compatible with the proper care and management of the objects to be protected."[169] Though recognizing that "[t]he availability of judicial review of this category of claims . . . stands on shakier ground," the court relied on *Mountain States* and *Tulare* to conclude that a plaintiff asserting such a challenge must at least "offer plausible and detailed factual allegations that the President acted beyond the boundaries of authority that Congress set."[170]

With this framework, the district court rejected the plaintiffs' challenges. As to their first argument, the court relied on *Cappaert* and *California* to conclude that the Antiquities Act authorizes the President to reserve submerged lands and the water associated with them.[171] As to the second argument, the district court recognized that it fell within the second category of challenges, thus potentially limiting the scope of the court's review.[172] But, as in *Mountain States* and *Tulare*, the district court concluded that it did not need to resolve the scope of judicial review because it found that the plaintiffs failed to offer specific, nonconclusory factual allegations "establishing a problem with [the monument's] boundaries."[173]

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[161] Mass. Lobstermen's Ass'n v. Ross, 349 F. Supp. 3d 48 (D.D.C. 2018).

[162] *Id*. at 52. The "Exclusive Economic Zone" consists of the waters between 12 and 200 miles off the coast of the United States. *Id*. at 64.

[163] *Id*. at 51.

[164] 54 U.S.C. § 320301(a); *Mass. Lobstermen's Ass'n*, 349 F. Supp. 3d at 60.

[165] *Mass. Lobstermen's Ass'n*, 349 F. Supp. 3d at 54–55.

[166] *Id*. at 54.

[167] *Id*. at 54–55.

[168] *Id*. at 55.

[169] *Id.*; 54 U.S.C. § 320301(b).

[170] *Mass. Lobstermen's Ass'n*, 349 F. Supp. 3d at 55.

[171] *Id*. at 56. The district court also asserted that its conclusion was supported by the presidential practice of "frequently reserv[ing] submerged lands" as well as the ordinary meaning of the term "lands." *Id*. at 57–58.

[172] *Id*. at 67.

[173] *Id*.

The court also rejected the plaintiffs' argument that President Obama lacked authority under the Antiquities Act to establish the monument because the United States did not have "complete control" over the Exclusive Economic Zone.[174] The court first concluded that the Antiquities Act does not require that the United States have *complete* control over the relevant area, only that the United States "'exercise directing or restraining influence.'"[175] Applying this definition, the court concluded that the United States' "broad sovereign authority" to regulate and manage the Exclusive Economic Zone for conservation and other purposes—a level of influence unrivaled by any other sovereign—established the federal control necessary under the Antiquities Act.[176]

Conclusion

In summary, Courts have consistently interpreted the Antiquities Act as giving the President broad authority to protect objects of historic and scientific interest and to determine the amount of lands needed for their preservation. Despite repeated arguments to the contrary, courts have uniformly concluded that the Antiquities Act is not limited to the protection of prehistoric ruins and other man-made structures, but encompasses naturally occurring objects of scientific interest, including bodies of water and submerged lands.[177] And, though it has received less judicial attention, at least one court has held that the United States need not have absolute control over the lands (or waters) at issue in order for them to fall within the ambit of the Antiquities Act.[178] However, the scope of judicial review of a monument proclamation has not been settled. Though courts appear to acknowledge that review of a presidential proclamation is deferential, particularly with respect to factual and discretionary determinations, they have not definitively decided what amount of review is appropriate.[179]

Presidential Authority to Diminish Monuments

The President has clear authority under the Antiquities Act to establish national monuments. Less clear, however, is the President's authority to diminish a previously established monument or to abolish a monument altogether. As already discussed, several Presidents in the early and mid-20th

[174] *Id*. at 60–67.

[175] *Id*. at 63 (quoting *Control*, WEBSTER'S NEW INT'L DICTIONARY (1st ed. 1909)).

[176] *Id*. at 63–65. In concluding that the United States exercised the requisite control over the ocean area surrounding the Northeast Canyons and Seamounts Marine National Monument, the court distinguished *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978). In that case, the U.S. Court of Appeals for the Fifth Circuit held that the Antiquities Act does not apply to the outer continental shelf—an area overlapping with the Exclusive Economic Zone—because the outer continental shelf is not owned or controlled by the United States. 569 F.2d at 337–40. The district court in *Massachusetts Lobstermen's Association* concluded that *Treasure Salvors, Inc.* was inapposite because (1) that decision predated a proclamation by President Reagan that "establish[ed] U.S. control" over the Exclusive Economic Zone, and (2) that decision addressed the scope of the Antiquities Act only with respect to objects of historic, rather than scientific, interest. 349 F. Supp. 3d at 66. Relying on an opinion by the Office of Legal Counsel in the Department of Justice, the district court reasoned that "the Government might well have the authority to declare a scientific object in [this area of ocean] to be a national monument to advance conservation goals, yet lack the authority to declare a historic object . . . to advance historic-preservation goals." *Id*.

[177] *See supra* notes 106–107, 130–131, 148–151, and accompanying text.

[178] *See supra* notes 174–176 and accompanying text.

[179] *See supra* notes 152–160, 165–173, and accompanying text.

century reduced the size of existing monuments,[180] but none of those modifications was challenged in court, thus leaving the lawfulness of that practice unresolved.[181]

That may soon change. On December 4, 2017, President Trump issued two proclamations modifying the Grand Staircase-Escalante National Monument (established by President Clinton) and the Bears Ears National Monument (established by President Obama).[182] This was the first time since President Kennedy that a President has diminished a national monument.[183] President Trump's proclamations explained that each of the monuments contained objects that were "not . . . of any unique or distinctive scientific or historic significance"[184] and were not in danger of being damaged or destroyed.[185] The proclamations explained that other federal laws enacted after the Antiquities Act's passage protected many of these objects, such as the Archaeological Resources Protection Act and the Endangered Species Act.[186] On these grounds, the proclamations concluded that the lands reserved for these monuments were "greater than the smallest area compatible with the protection of the objects for which the lands were reserved."[187] All said, President Trump's proclamations reduced the Grand Staircase-Escalante monument from 1.7 million acres to 1 million acres and the Bears Ears monument from 1.35 million acres to 228,784 million acres.[188]

President Trump's proclamations attracted significant attention,[189] leading many scholars to take a renewed look at presidential authority under the Antiquities Act.[190] These proclamations have also

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[180] *See supra* notes 95–99 and accompanying text.

[181] *See* Seamon, *Dismantling Monuments*, *supra* note 21, at 575 ("It does not appear that any of these modifications has ever been judicially challenged."); Murdock, *Monumental Power*, *supra* note 102, at 372 ("None of the boundary modifications from Presidents Taft to Kennedy were ever challenged in court.").

[182] Modifying the Grand Staircase-Escalante Nat'l Monument, Pres. Proc. No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017); Modifying the Bears Ears Nat'l Monument, Pres. Proc. No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017).

[183] Nat'l Park Serv., *Monuments List*, *supra* note 74.

[184] 82 Fed. Reg. at 58,090; 82 Fed. Reg. at 58,081 ("Some of the objects [in the Bears Ears National Monument] are not unique to the monument, and . . . are not of significant scientific or historic interest.").

[185] 82 Fed. Reg. at 58,090 ("[M]any of the objects identified . . . are not under threat of damage or destruction such that they require a reservation of land to protect them[.]"); 82 Fed. Reg. at 58,082 (noting "the lack of a threat of damage or destruction to many of those objects").

[186] 82 Fed. Reg. at 58,090–91; 82 Fed. Reg. at 58,082.

[187] 82 Fed. Reg. at 58,091; 82 Fed. Reg. at 58,082 ("I find that the area of Federal land reserved in the Bears Ears National Monument . . . is not confined to the smallest area compatible with the proper care and management of those objects.").

[188] 82 Fed. Reg. at 58,093 (Grand Staircase-Escalante); 82 Fed. Reg. at 58,084–85 (Bears Ears); *see also* Nat'l Park Serv., *Monuments List*, *supra* note 74. For additional information regarding the process leading to these proclamations, see Murdock, *Monumental Power*, *supra* note 102, at 365–68.

[189] *See, e.g.*, Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html; Josh Dawsey and Juliet Eilperin, *Trump Shrinks Two Huge National Monuments in Utah, Drawing Praise and Protests*, WASH. POST (Dec. 4, 2017), https://www.washingtonpost.com/politics/trump-scales-back-two-huge-national-monuments-in-utah-drawing-praise-and-protests/2017/12/04/758c85c6-d908-11e7-b1a8-62589434a581_story.html?utm_term=.53d23de50505; Richard Gonzales, et al., *Trump Orders Largest National Monument Reduction in U.S. History*, NPR (Dec. 4, 2017), https://www.npr.org/sections/thetwo-way/2017/12/04/567803476/trump-dramatically-shrinks-2-utah-national-monuments.

[190] *Compare, e.g.*, Squillace, *The Monumental Legacy*, *supra* note 28, at 566, 582–83 (arguing that Presidents lacks authority under the Antiquities Act to abolish or diminish existing monuments) *and* Mark Squillace, et al., *Presidents Lack the Auth. to Abolish or Diminish Nat'l Monuments*, 103 VA. L. REV. ONLINE 55, 71 (2017) (same), *with* John Yoo & Todd Gaziano, *Presidential Auth. to Revoke or Reduce Nat'l Monument Designations*, 35 YALE J. ON REG. 617, 665 (2018) (arguing that Presidents have authority under the Antiquities Act to modify or abolish existing monuments) *and* Seamon, *Dismantling Monuments*, *supra* note 21, at 575–600 (same). *See also* Murdock, *Monumental Power*, *supra*

been challenged in court, and those cases are now pending in the U.S. District Court for the District of Columbia.[191]

As discussed below, the plaintiffs in these cases have raised multiple arguments to oppose the proclamations. First, the plaintiffs argue that the Antiquities Act does not authorize the President to abolish or diminish monuments once established.[192] Second, the plaintiffs contend that, absent statutory authorization, President Trump's proclamations exceed his authority under the Constitution and conflict with Congress's constitutional power to regulate public lands.[193] Third, and finally, some of the plaintiffs have brought a claim under the APA[194] against the Secretary of the Interior and other federal officials, arguing that because President Trump's proclamations are unauthorized, these officials will be acting unlawfully in failing to abide by the original proclamations issued by President Clinton and President Obama.[195] The United States contests the plaintiffs' standing to sue, contends that judicial review of Presidential proclamations is limited in scope, and argues that the plaintiffs' arguments are meritless in any event.[196] The remainder of this report discusses the central arguments made by the plaintiffs and the United States in this litigation.[197]

Text and Implied Authority

The parties advance competing interpretations of the Antiquities Act. The plaintiffs contend that the President's authority under the act is limited to the express grants of authority in the text itself, namely, the power to "declare" monuments and to "reserve" surrounding lands—neither of

note 102, at 354 (concluding that "both [sides] have overestimated their chances of success").

[191] *See* The Wilderness Soc'y, et al. v. Trump, No. 1:17-cv-2587-TSC (D.D.C. Dec. 4, 2017) (consolidating two cases challenging President Trump's modification of the Grand Staircase-Escalante National Monument); Hopi Tribe, et al. v. Trump, No. 1:17-cv-2590-TSC (D.D.C. Dec. 4, 2017) (consolidating three cases challenging President Trump's modification of the Bears Ears National Monument).

[192] No. 1:17-cv-2587, Doc. 1 ¶¶ 143–47 (D.D.C., filed Dec. 4, 2017); No. 1:17-cv-2590, Doc. 1 ¶¶ 197–201 (D.D.C., filed Dec. 4, 2017).

[193] No. 1:17-cv-2587, Doc. 1 ¶¶ 148–59; No. 1:17-cv-2590, Doc. 1 ¶¶ 202–13; *see also* U.S. CONST. art. IV § 3, cl. 2.

[194] 5 U.S.C. §§ 701–706.

[195] No. 1:17-cv-2587, Doc. 1 ¶¶ 166–71; No. 1:17-cv-2590, Doc. 1 ¶¶ 214–21.

[196] *See generally* Memo. in Support of Fed. Defendants' Mot. to Dismiss, No. 1:17-cv-2587, Doc. 43-1 (D.D.C. Oct. 1, 2018) [hereinafter, Gov't Br. (2587)]; Memo. in Support of Fed. Defendants' Mot. to Dismiss, No. 1:17-cv-2590, Doc. 49-1 (D.D.C. Oct. 1, 2018) [hereinafter, Gov't Br. (2590)].

[197] Some of the plaintiffs argue that President Trump's proclamations constitute revocations, rather than only modifications, of the monuments because those proclamations exclude certain objects from the monuments that were protected under the original proclamations. *See* Modifying the Grand Staircase-Escalante Nat'l Monument, Pres. Proc. No. 9682, 82 Fed. Reg. 58,089, 58,090 (Dec. 4, 2017) (noting that certain "artifacts that are known to generally occur" in that area "may be excluded from the monument's boundaries"); Modifying the Bears Ears Nat'l Monument, Pres. Proc. No. 9681, 82 Fed. Reg. 58,081, 58,084 (Dec. 4, 2017) ("Some of the existing monument's objects, or certain examples of those objects, are not within the monument's revised boundaries"). Though scholars have staked out different positions on this issue, *compare* Yoo & Gaziano, *Presidential Auth.*, *supra* note 190, at 647 (arguing for revocation authority), *with* Squillace, et al., *Presidents Lack the Auth.*, *supra* note 190, at 64 (arguing against revocation authority), the United States concedes that the Antiquities Act does not give the President revocation authority—though it disputes that this was the effect of President Trump's proclamations. *See* Fed. Defendants' Reply in Support of Mot. to Dismiss, No. 1:17-cv-2587, Doc. 81, at 27 n.23, 34–35 (Dec. 13, 2018) [hereinafter, Gov't Reply Br. (2587)]; Fed. Defendants' Reply in Support of Mot. to Dismiss, No. 1:17-cv-2590, Doc. 101, at 25–26, 39–41 (Dec. 13, 2018) [hereinafter, Gov't Reply Br. (2590)]. Because the United States does not contest this issue and because many of the arguments regarding monument "diminishment" and "revocation" overlap, this report does not separately discuss monument revocation.

which includes or implies the distinct power to diminish or revoke a monument.[198] "In ordinary parlance," the plaintiffs argue, "the phrases to 'declare national monuments' and to 'revoke' or 'shrink' national monuments are polar opposites[.]"[199] Under this reading, the Antiquities Act authorizes the President to create national monuments in order to provide for the expeditious protection of objects of historical and scientific interest, but leaves with Congress the authority to modify monuments once established.

The plaintiffs point to a number of contemporaneous statutes to support this reading, principally the Forest Service Organic Act of 1897,[200] the Reclamation Act of 1902,[201] and the Pickett Act.[202] Because these statutes contain express grants of authority to the President to modify or otherwise alter an initial reservation of public lands, the plaintiffs argue that the absence of similar language in the Antiquities Act implies the absence of similar authority.[203] In particular, the plaintiffs note that the Forest Reserve Act of 1891 authorized the President to "set apart and reserve . . . public land bearing forests" and to "declare the establishment of such reservations and the limits thereof," but did not also include authorization to revoke or modify a reservation once made.[204] After President Cleveland and several Members of Congress expressed the view that the Forest Reserve Act did not authorize the President to alter an existing reservation, Congress passed the Forest Service Organic Act to fill that gap.[205] That law expressly authorized the President to "revoke, modify, or suspend" existing forest reservations in order to "remove any doubt" regarding the President's authority to do so.[206] Having just gone to the trouble of expressly authorizing the President to modify a prior land reservation, the plaintiffs argue that it "belies logic" that Congress would have intended the Antiquities Act to confer this authority *sub silentio*.[207] And the plaintiffs highlight the fact that Representative Lacey—one of the primary supporters of the Antiquities Act—stated that the Forest Reserve Act did not authorize the President to alter existing reservations.[208] The plaintiffs also point to the Reclamation Act of 1902—authorizing the Secretary of the Interior to "withdraw . . . lands" and "restore to public entry any of the lands so withdrawn"[209]—and the Pickett Act of 1910—providing that lands withdrawn by the President will remain reserved "until revoked by him or by an Act of Congress"[210]—to show that when Congress intends to authorize the President to alter a

[198] No. 1:17-cv-2587, Doc. 61 at 20–21 [hereinafter, TWS Br.]; *id*. Doc. 63 at 30–31 [hereinafter, GSEP Br.]; No. 1:17-cv-2590, Doc. 71 at 25–27 [hereinafter, UDB Br.]; *id*. Doc. 74 at 24–25 [hereinafter, Tribal Br.].

[199] UDB Br. at 26 ("It would be nonsensical to say that *removing* land *from* a national monument is no different from '*reserv[ing]*' land 'as a *part* of' a monument; words simply cannot be interpreted to mean their opposites.").

[200] ch. 2, 30 Stat. 11 (1897).

[201] Pub. L. No. 57-161, 32 Stat. 388 (1902).

[202] Pub. L. No. 61-303, 36 Stat. 847 (1910).

[203] *See* TWS Br. at 21; UDB Br. at 32–34; Tribal Br. at 29–34; *see also* Murdock, *Monumental Power*, *supra* note 102, at 381–82 ("[Some] argue that because Congress demonstrated the ability to expressly specify revocation and modification powers both before and after passing the Antiquities Act, then one can read the exclusion of such powers in the Antiquities Act as intentional. That is a reasonable argument and could prove persuasive to a court.").

[204] ch. 561 § 24, 26 Stat. 1095, 1103 (1891).

[205] ch. 2, 30 Stat. 11 (1897).

[206] 30 Stat. at 34.

[207] Tribal Br. at 32.

[208] *See, e.g.*, UDB Br. at 33 ("Representative John Lacey explained why that amendment was necessary: The [Forest Reserve] Act 'gave [the President] the power to create a reserve, but *no power to restrict it or annul it*.'" (quoting 29 Cong. Rec. 2677 (1897))).

[209] Pub. L. No. 57-161 § 3, 32 Stat. 388, 388 (1902).

[210] Pub. L. No. 61-303 § 1, 36 Stat. 847, 847 (1910).

reservation of federal land, it confers that authority expressly.[211] Finally, in addition to these laws, the plaintiffs identify other "near-contemporaneous statutes that expressly include language regarding modification or revocation of withdrawn land."[212]

By contrast, the United States argues that the Antiquities Act does authorize the President to modify a previously established monument. The United States places significant weight on the act's requirement that the area of land reserved "shall be confined to the smallest area compatible" for preserving the monument.[213] That language, the United States argues, imposes a continuing obligation that cannot be met without the accompanying authority to reduce a monument when it is later determined that excess lands were included in the reservation.[214] Moreover, the United States asserts that the President possesses authority to diminish existing monuments—even absent express statutory authorization—based on "the general principle that reconsideration 'is inherent in the power to decide.'"[215] According to the United States, "[n]umerous statutes authorize various Executive Branch officers to regulate, administer, and make decisions, without expressly saying that those decisions can be repealed or modified."[216] The Antiquities Act is, in the United States' view, no exception.[217]

Finally, the United States contests the plaintiffs' argument that contemporaneous public land laws imply the absence of modification authority in the Antiquities Act. With respect to the Pickett Act, the United States notes that this law provided that "withdrawals or reservations shall remain in force until revoked by [the President] *or by an act of Congress*."[218] Given that Congress has authority under the Property Clause of the Constitution to dispose of federal law as it sees fit,[219]

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[211] *See* UDB Br. at 32 (arguing that the absence of authority to diminish monuments "is reinforced by a bevy of other statutes, passed around the same time as the Antiquities Act, that *do* grant the Executive power to modify a previous reservation or withdrawal of land in explicit terms"); Tribal Br. at 34 ("Before, during, and after enactment of the Antiquities Act, Congress explicitly delegated the power to revoke or modify reservations of public lands in other public lands statutes, but it did not do so in the Antiquities Act.").

[212] UDB Br. at 34 n.5 (collecting statutes).

[213] 54 U.S.C. § 320301(b).

[214] Gov't Br. (2587) at 26 ("Congress could not have been more plain that Presidents are to ensure that monument reservations are and remain 'confined' to the smallest area the President deems to be consistent with protection of the monument objects."); *id*. at 27 ("The President cannot fully comply with Congress' instruction to ensure that monument reservations remain 'confined' to the smallest area without the power to revisit prior reservations."); *see also* Yoo & Gaziano, *Presidential Auth.*, *supra* note 190, at 660–61 (concluding that this language from the Antiquities Act is "[o]ne textual signal in support of boundary adjustments" by Presidents and that "[t]here is nothing in the Act that privileges the original designation . . . over a later presidential proclamation").

The plaintiffs disagree with this interpretation, arguing that the requirement that the lands reserved be the "smallest area compatible" "conditions and limits the *initial* exercise of the establishment power, and is not a separate grant of power that gives rise to an ongoing test of a monument's proper size." GSEP Br. at 32 (emphasis added). Indeed, the plaintiffs contend that if the "smallest area" requirement did impose an ongoing obligation, then it would "force the President to evaluate, on an ongoing basis, whether the reserved parcels of land in each of the . . . monuments complies with the statutory criteria." UDB Br. at 31.

[215] Gov't Br. (2587) at 28–29 (quoting Albertson v. FCC, 182 F.2d 397, 399 (D.C. Cir. 1950) and citing Sierra Club v. Van Antwerp, 560 F. Supp. 2d 21, 23 (D.D.C. 2008)). The plaintiffs dispute the existence of such a principle. *See* UDB Br. at 32 ("The Government next adverts to 'the general principle that reconsideration is inherent in the power to decide.' There is no such principle." (citation omitted)).

[216] Gov't Reply Br. (2587) at 20.

[217] *Id*. at 22; *see also* Yoo & Gaziano, *Presidential Auth.*, *supra* note 190, at 639–647 ("A background principle of American law . . . is that the authority to execute a discretionary government power usually includes the power to revoke it—unless the original grant expressly limits the power of revocation.").

[218] Gov't Reply Br. (2587) at 22 (quoting Pub. L. No. 61-303, 36 Stat. 847, 847 (1910)).

[219] U.S. CONST. art. IV § 3, cl. 2.

the United States argues that this language must be read as simply acknowledging *existing* authority vested in both Congress and the President.[220] As for the Forest Service Organic Act, the United States contends that the legislative record shows mixed opinions among Members of Congress on whether the President had authority under that law to modify existing reservations.[221] Thus, the United States contends that this law's inclusion of language authorizing the President to alter reservations does not reflect a congressional consensus that the President did not have this power already, but merely shows that Congress took a belt-and-suspenders approach in order to (in the words of the statute) "remove any doubt" on this question.[222]

Past Executive and Legislative Action

Noting that historical practice may inform a court's understanding of executive power,[223] the United States argues that the long-standing practice of executive monument modification and congressional acquiescence in this practice shows that the President has authority under the Antiquities Act to modify existing monuments.[224]

The United States first points to the fact that past Presidents have reduced the size of national monuments a total of 18 times, including President Taft's reduction of the Petrified Forest National Monument "[o]nly five years after passage of the Antiquities Act."[225] Though Congress was no doubt aware of these modifications, the United States observes that Congress never passed legislation disapproving this practice, even as Congress did amend the Antiquities Act

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[220] Gov't Reply Br. (2587) at 22 ("The clause referencing revocation authority was not necessary to reserve such authority to Congress, but the Act mentioned it regardless, indicating that the President's revocation authority, mentioned in the same clause, was likewise undisputed.").

[221] *Id*. *Compare* 29 Cong. Rec. 2677 (1897) (Rep. John Pickler stating that "[t]he President has had that power always") *and* 30 Cong. Rec. 917 (1897) (Sen. Clarence Clark noting that "it was expressly decided in the Department of [the] Interior . . . that the Executive always had the exact right . . . to modify an Executive proclamation"), *with* 29 Cong. Rec. 2677 (1897) (Rep. John Lacey stating that "[t]he Act of 1890 gave [the President] the power to create a reserve, but no power to restrict it or annul it").

[222] *See also* Yoo & Gaziano, *Presidential Auth.*, *supra* note 190, at 640 (discussing the Pickett Act and Forest Service Organic Act and concluding that "[o]n balance, these two examples suggest a congressional awareness that the President is generally able to reverse executive directives"); Murdock, *Monumental Power*, *supra* note 102, at 383 ("In normal speech, when one seeks to 'remove any doubt' and states *x*, the implication is that *x* was always intended.").

The United States and the plaintiffs also dispute which of their competing interpretations is most consistent with the purpose of the Antiquities Act. The plaintiffs contend that reading the Antiquities Act as they urge is most consistent with that act's goal of ensuring an expeditious means of protecting endangered antiquities. The United States argues that the legislative record evinces a desire to prevent the Executive from withdrawing or reserving vast swaths of land. *Compare* TWS Br. at 25 ("[The United States'] argument . . . is wholly incompatible with the Act's 'essential purpose' of providing stable, long-term protection for irreplaceable scientific and historic objects." (citation omitted)), *with* Gov't Reply Br. (2587) at 24 ("In the years leading up to the passage of the Antiquities Act, Congress was equally concerned with the Executive Branch making unnecessarily large reservations of public land. . . . Thus, while Congress intended to preserve objects of historic significance, it firmly intended to ensure unnecessarily large amounts of land for monuments were not reserved.").

[223] *See*, *e.g.*, Gov't Br. (2587) at 29–30 (citing NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014); Dames & Moore v. Regan, 453 U.S. 654, 686 (1981); and United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)).

[224] *See* Gov't Br. (2587) at 29–33 ("Here, the longstanding and extensive history of presidential modifications of monument boundaries, acquiesced in by Congress, corroborates the authority to make such modifications."); Gov't Br. (2590) at 32–36 (same); *see also* Seamon, *Dismantling Monuments*, *supra* note 21, at 579–82 (making congressional acquiescence argument).

[225] Gov't Br. (2587) at 30–31; *see also supra* notes 95–99 and accompanying text (discussing past presidential modifications).

after President Franklin Roosevelt's creation of the Jackson Hole National Monument to prohibit the establishment of future monuments in Wyoming.[226]

The United States also relies on various legal opinions from the executive branch to bolster its argument that Congress has acquiesced in an executive assertion of authority to diminish monuments.[227] In a series of opinions issued in 1915,[228] 1935,[229] and 1947,[230] the Department of the Interior concluded that the President has authority under the Antiquities Act to reduce the size of existing monuments. These opinions identified two sources for that power. First, the Department of the Interior concluded that the President had an implied power to undo reservations or withdrawals of public land.[231] For this, the Department of the Interior relied on the Supreme Court's 1915 decision in *United States v. Midwest Oil*, which held that Congress had implicitly delegated authority to the President to withdraw or reserve lands from public use by acquiescing in the Executive's "long-continued practice" of making such withdrawals and reservations.[232] From this principle, the Department of the Interior concluded that the President had acquired an implied power to diminish the size of national monuments through congressional acquiescence in this practice, as well as the Executive's practice of reducing Indian reservations established by executive order pursuant to statutes that, like the Antiquities Act, did not expressly authorize modification.[233] Second, in opinions from 1935 and 1947, the Department of the Interior argued for presidential modification authority based on the language in the Antiquities Act requiring that lands reserved be "the smallest area compatible" for the preservation of the designated objects.[234]

The plaintiffs contest the United States' reliance on congressional and executive practice. While noting that "past practice does not, by itself, create power,"[235] the plaintiffs further argue that

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[226] Gov't Br. (2587) at 32–33; Murdock, *Monumental Power*, *supra* note 102, at 384 ("Within a decade of the enactment of the Antiquities Act, there would be reductions both small and large, but Congress made no changes to the law to prohibit post-proclamation reductions, nor does it appear to have even considered such a bill."); 54 U.S.C. § 320301(d) (prohibiting the establishment of monuments in Wyoming).

[227] *See* Gov't Br. (2587) at 31 ("The Executive Branch's interpretation of the Antiquities Act as authorizing the President to modify a monument[] to reduce the size of the associated reservation is also reflected in long-standing legal opinions.").

[228] U.S. Dep't of the Interior, Solicitor's Op. (Apr. 20, 1915) [hereinafter, 1915 Solicitor's Op.].

[229] U.S. Dep't of the Interior, Solicitor's Op., M-27657 (Jan. 30, 1935) [hereinafter, 1935 Solicitor's Op.].

[230] U.S. Dep't of the Interior, 60 Interior Dec. 9 (D.O.I.), 1947 WL 5112 (July 21, 1947) [hereinafter, 1947 Solicitor's Op.].

[231] 1915 Solicitor's Op., *supra* note 228, at 4; 1935 Solicitor's Op., *supra* note 229, at 3–5 ("These facts [regarding executive practice] are sufficient to show the existence of the implied power of the President to reduce the area of Executive order reservations").

[232] 236 U.S. 459, 469–75, 478–81 (1915); *id*. at 474 ("[T]he long-continued practice, known to and acquiesced in by Congress, . . . raise[s] a presumption that the withdrawals had been made in pursuance of [Congress's] consent or of a recognized administrative power of the Executive in the management of the public lands."). *Midwest Oil* was subsequently abrogated by the enactment of the Federal Land Policy and Management Act of 1976. *See infra* note 257 and accompanying text.

[233] 1935 Solicitor's Op., *supra* note 229, at 3–5 ("These facts are sufficient to show the existence of the implied power of the President to reduce the area of Executive order reservations under the doctrine of the *Midwest Oil* case").

[234] *Id*. at 5–6 ("The action of the President . . . was therefore only made in accordance with the requirement of the act that the area set apart should be confined to the smallest area compatible with the proper care of the objects sought to be protected."); 1947 Solicitor's Op., *supra* note 230, at *10 (relying on same portion of the Antiquities Act to conclude that the President had authority to modify the Jackson Hole National Monument).

[235] Medellin v. Texas, 552 U.S. 491, 532 (2008) (internal quotation marks omitted) (alterations omitted) (quoting Dames & Moore v. Regan, 453 U.S. 654, 686 (1981)).

history does not show the "systematic, unbroken, executive practice" "long pursued to the knowledge of Congress and never before questioned" that is necessary to support the United States' acquiescence argument.[236] The plaintiffs note that even during the time when several Presidents were reducing monuments, various departments within the executive branch issued opinions concluding that the President does *not* have implied authority to undo a reservation of land.[237] Thus, in a 1924 opinion, the Department of the Interior concluded that the President did not have authority to modify a monument because a monument once established "becomes a fixed reservation subject to restoration to the public domain only by legislative act."[238] This view was reiterated in a 1932 opinion from the Department of the Interior.[239]

The U.S. Attorney General also issued opinions on this question, though the one opinion to address the scope of presidential authority under the Antiquities Act left the issue of monument modification unresolved. In a 1938 opinion, Attorney General Homer Cummings considered whether the President has authority under the Antiquities Act to abolish the Castle Pinckney National Monument.[240] Noting that Presidents had "from time to time . . . diminished the area of national monuments . . . by removing or excluding lands therefrom,"[241] the Attorney General concluded that "[the President's] power so to confine that area" does not include "the power to abolish a monument entirely."[242] In support of this conclusion, the 1938 opinion relied on a previous Attorney General opinion from 1862, which concluded that the President lacked implied authority to undo a military reservation made by executive order where the statute authorizing the initial reservation did not also authorize its reversal.[243] "The grant of power to execute a trust, even discretionally," the Attorney General argued, "by no means implies the further power to undo it when it has been completed."[244]

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[236] *Dames & Moore*, 453 U.S. at 686.

[237] TWS Br. at 31 ("Defendants are thus mistaken in suggesting that there existed some 'enduring understanding' of a purported presidential power to diminish national monuments.").

[238] U.S. Dep't of the Interior, Solicitor's Op., M-12501 & M-12529, at 1–2 (June 3, 1924) ("I fail to find statutory authority for the President to restore such reservation lands to entry").

[239] U.S. Dep't of the Interior, Solicitor's Op., M-27025, at 4 (May 16, 1932); *see also* Squillace, et al., *Presidents Lack the Auth.*, *supra* note 190, at 65–67 (discussing conflicting executive branch opinions); Squillace, *The Monumental Legacy*, *supra* note 28, at 557–61 (same); Murdock, *Monumental Power*, *supra* note 102, at 376–80 (same).

[240] 39 Op. Att'y Gen. 185, 185–86 (1938).

[241] *Id*. at 188.

[242] *Id*. at 188–89.

[243] *Id*. at 187; 10 Op. Att'y Gen. 359, 363 (1862) ("But, in my opinion, [the President] had no power to take them out of the class of reserved lands, and restore them to the general body of public lands. It is certain that no such power is conferred on the President in the act under which the selection of a site for Fort Armstrong was made.").

[244] 10 Op. Att'y Gen. at 364 ("When the President, in the exercise of the discretion vested in him by the act of 1809, selected Rock Island as the site of a fort, and expended the money appropriated therefor in erecting the fort, and occupied it as a military station, thus setting it aside as a reservation for military purposes, the power conferred by the act was exhausted, and he had no more authority to recall that reservation, and restore the land to the condition of other portions of the public lands not so appropriated, than he would have had to expend the public money in erecting the fort without an appropriation by Congress for that purpose."); *see also* 28 Op. Att'y Gen. 143, 146 (1910) (concluding that the President did not have authority to transfer lands reserved for military use to the Department of Agriculture without congressional authorization); 21 Op. Att'y Gen. 120, 120–21 (1895) (concluding that the President did not have authority to return lands reserved for use by the Navy back to the public domain); 17 Op. Att'y Gen. 168, 169 (1881) ("I am accordingly of the opinion . . . that the lands cannot be restored to the public domain by the Executive without authority from Congress."); 16 Op. Att'y Gen. 121, 123–24 (1878) (concluding that the President did not have authority to remove lands from an existing military reservation to be used as part of an Indian Reservation).

Both the United States and the plaintiffs maintain that the 1938 Attorney General opinion supports their position.[245] Though stating that it agrees with the 1938 Attorney General opinion with respect to monument *abolition*, the United States asserts that this opinion supports the existence of authority to *modify* monuments through its acknowledgment that prior Presidents had done so and through its reliance on the Antiquities Act's requirement that reservations be limited to the smallest area necessary.[246] The plaintiffs, by contrast, argue that the same logic that led the Attorney General to conclude that the Antiquities Act does not confer authority to abolish monuments shows that the President also lacks authority to modify monuments.[247]

The plaintiffs also argue that the United States' claim of an unbroken assertion of, and congressional acquiescence in, executive authority to diminish national monuments is undermined by the numerous instances in which the executive branch itself sought statutory authorization to reduce existing monuments—requests that Congress uniformly denied.[248] For example, the Secretary of the Interior in 1925—the year after that department issued an opinion disclaiming presidential modification authority[249]—sent a letter to Congress requesting that it pass legislation to provide this authorization.[250] Though legislation was introduced in both chambers to accomplish this end, neither became law.[251] In fact, only a few months earlier the Department of the Interior had asked Congress to reduce the Casa Grande Ruins National Monument and at the same time grant the President authority "in his discretion to eliminate lands from national monuments by proclamation."[252] But while Congress did pass legislation reducing the Casa Grande Ruins National Monument, it did so only after removing the language that would have given general modification authority to the President.[253]

[245] Some scholars have also argued that the 1938 Attorney General opinion was incorrect. *See* Yoo & Gaziano, *Presidential Auth.*, *supra* note 190, at 633–39.

[246] Gov't Reply Br. (No. 2590) at 25–26 ("[I]t remains the United States' position that, consistent with a 1938 Attorney General opinion, the President cannot completely *abolish* a national monument, [but] this same opinion *supports* the [United States'] position here . . . ."); *see also* Murdock, *Monumental Power*, *supra* note 102, at 375 (noting that the 1938 Attorney General opinion "did not forbid [all] changes" but "found the basis for monument modifications" in the language of the Antiquities Act requiring that reservations be of the "smallest area compatible" with monument preservation).

[247] *See, e.g.*, TWS Br. at 31 ("[A]lthough the 1938 opinion was concerned specifically with abolishment, its reasoning prohibits diminishment as well."); UDB Br. at 38 (similar); *see also* Squillace, *The Monumental Legacy*, *supra* note 28, at 554 (discussing 1938 Attorney General opinion and concluding that "just as Congress denied the President revocation authority in the Antiquities Act, it also might be argued that it denied the President the power to modify monuments").

[248] *See* TWS Br. at 30 & n.15; Tribal Br. at 35–37; GSEP Br. at 38; UDB Br. at 39–40.

[249] *See supra* note 238 and accompanying text.

[250] S. REP. NO. 68-849, at 1–2 (1925) (reprinting Jan. 3, 1925 letter from the Secretary of the Interior); H.R. REP. NO. 68-1119, at 1–2 (1925) (same).

[251] S. 3840, 68th Cong. (1925); H.R. 11357, 68th Cong. (1925).

[252] S. 3826, 68th Cong. (1925); *see also* H.R. 11363, 68th Cong. (1925) (same); S. REP. NO. 68-1127, at 1–2 (1925) (reprinting Dec. 20, 1924 letter from the Secretary of the Interior).

[253] S. 2703, 69th Cong. (1926) (as reported to the Senate with amendment, Mar. 20, 1926); Pub. L. No. 69-342, 44 Stat. 698, 698–99 (June 7, 1926).

Finally, the plaintiffs rely on the enactment of the Federal Land Policy and Management Act of 1976 (FLPMA)[254] to show that the President lacks authority to modify national monuments.[255] Congress passed FLPMA to modernize and streamline the management of federal lands.[256] In so doing, FLPMA repealed 29 separate statutes authorizing the President to make withdrawals of federal land and simultaneously "repealed" the Supreme Court's decision in *United States v. Midwest Oil Co.*—one of the bases relied on by the Department of the Interior to find an implied presidential authority to diminish national monuments.[257] At the same time, a provision in FLPMA prohibits "[t]he Secretary" from "modify[ing] or revok[ing] any withdrawal creating national monuments under [the Antiquities Act]," while leaving the act otherwise unchanged.[258] While acknowledging that FLPMA's prohibition is directed to the "Secretary"—not the President—the plaintiffs point to the House report accompanying the legislation, which stated that FLPMA "reserve[s] to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act"[259]—suggesting an intent to consolidate all withdrawal authority in Congress.[260] The United States responds that FLPMA's use of the term "Secretary," rather than "President," is controlling, and that the legislative history on which the plaintiffs rely cannot overcome the plain statutory language.[261]

Scope of Judicial Review

Assuming that the President has authority to diminish an existing monument, the parties dispute the scope of judicial review of a presidential proclamation that purports to exercise that authority. As previously discussed, the D.C. Circuit in *Mountain States* and *Tulare*, and the district court in *Massachusetts Lobstermen's Association*, did not definitively resolve the scope of judicial review of a monument designation, while the district court in *Utah Association of Counties* concluded that judicial review was limited to assessing whether the President considered the principles specified in the Antiquities Act.[262] Both parties rely on these cases to support their positions.

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[254] Pub. L. No. 94-579, 90 Stat. 2743 (Oct. 21, 1976) (codified at 43 U.S.C. §§ 1701–1772).

[255] UDB Br. at 28–30 ("Any doubt as to whether the President has the power to unilaterally reduce or revoke national monuments is laid to rest by [FLPMA]."); TWS Br. at 32–35 (similar); GSEP Br. at 38–39 (similar).

[256] H.R. REP. NO. 94-1163, at 1 (1976) ("[Current laws] do not add up to a coherent expression of Congressional policies adequate for today's national goals.").

[257] Pub. L. No. 94-579 § 704(a), 90 Stat. 2743 (Oct. 21, 1976) ("Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459) and the following statutes and parts of statutes are repealed").

[258] *Id.* § 204(j) (codified at 43 U.S.C. § 1714(j)); *see also* H.R. REP. NO. 94-1163, at 29 (1976) (noting that FLPMA did not repeal the Antiquities Act).

[259] H.R. REP. NO. 94-1163, at 9 (1976).

[260] Squillace, et al., *Presidents Lack the Auth.*, *supra* note 190, at 61–64 ("Nonetheless, this language reinforces the most plausible reading of the text of the Antiquities Act: that it deliberately provides for one-way designation authority."). Some scholars also argue based on FLPMA's legislative history that the reference to "the Secretary" rather than "the President" was a drafting error and that Congress clearly intended to "constrain all executive branch power to modify or revoke national monuments, not just Secretarial authority." *Id.* at 64. The plaintiffs make this argument as well. *See, e.g.*, TWS Br. at 34 n.17.

[261] Gov't Reply Br. (2587) at 27–28 (citing Shannon v. United States, 512 U.S. 573, 584 (1994) ("[C]ourts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point." (alterations omitted))); *see also* Seamon, *Dismantling Monuments*, *supra* note 21, at 597–99 (concluding that FLPMA did not withdraw modification power from the President); Yoo & Gaziano, *Presidential Auth.*, *supra* note 190, at 652–53 ("FLPMA is clear that the limitation only applies to the Secretary, not the President.").

[262] *See supra* notes 152–160, 165–173, and accompanying text.

The United States contends that judicial review of Presidential proclamations is "extremely limited" to "addressing . . . whether the President's decision to modify the Monument is authorized by the Antiquities Act"—that is, "whether the President, on the face of the Proclamation, exercised his authority in accordance with [the] act's standard."[263] On this view, if a proclamation invokes the standards specified in the Antiquities Act in the course of diminishing a monument, a court has no authority to evaluate the factual determinations underlying the proclamation or to review the manner in which the President chose to exercise his discretion in reducing the monument.[264] The United States supports its position by noting that a President's discretionary decisions—unlike agency action—are not subject to "arbitrary and capricious" or "abuse of discretion" review under the APA.[265] Thus, the United States asserts that President Trump's proclamations must be upheld because, on their face, they "'advert[] to the statutory standard' for designating monument objects and reserving monument lands."[266]

The plaintiffs, by contrast, contend that courts are not limited to assessing whether a proclamation purports to apply the Antiquities Act, but are authorized to conduct a more searching inquiry to ensure that the President "'has not exceeded his statutory authority.'"[267] On this view, courts have authority to review the factual determinations and rationale underlying a proclamation that diminishes a national monument to ensure that the President did not abuse his discretion in modifying the monument's boundaries.[268] Applying this more searching inquiry, the plaintiffs contend that President Trump's proclamations—though purporting to only "modify" the Grand Staircase-Escalante and Bears Ears monuments—effected "the wholesale dismantling" of these monuments, thus constituting an abuse of any presidential authority that might exist to diminish a national monument.[269] Further, as required by *Mountain States* and *Tulare*, the plaintiffs identify particular objects that, in their view, should not have been removed from the boundaries of these monuments.[270] At least one plaintiff has also argued that President Trump's proclamations were an abuse of discretion because they were "improperly motivated by potential energy production and resource extraction," rather than "the protection and preservation of sensitive resources."[271]

Some plaintiffs also note that President Trump's proclamations not only reduced the amount of *land* reserved for these monuments, but also removed certain *objects* from these monuments. They argue that because the "objects" selected for preservation under the Antiquities Act *are* the "monuments" under the act,[272] the exclusion of any previously designated object is, in effect, a

[263] Gov't Br. (2587) at 25, 37.

[264] *Id*. at 25, 37–39.

[265] *Id*. at 37–38 (citing Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) ("Although the President's actions may still be reviewed for constitutionality, . . . we hold that they are not reviewable for abuse of discretion under the APA." (citation omitted))). The plaintiffs have also pleaded claims under the APA, but those claims are directed at certain executive branch officials, not the President. *See, e.g.*, TWS Br. at 43–45 (discussing "claim for relief against Agency Defendants under the [APA]").

[266] Gov't Br. (2587) at 37–39 (quoting Tulare Cty. v. Bush, 306 F.3d 1138, 1141 (D.C. Cir. 2002)).

[267] TWS Br. at 41 (quoting Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002)).

[268] *Id*. at 41–43.

[269] *Id*.

[270] GSEP Br. at 41–42 ("Plaintiffs Complaint identifies specific objects with significant scientific, historical and cultural value that are now unprotected . . . ."); TWS Br. at 41–43.

[271] GSEP Br. at 41–42 (referring to "non-statutory extractive considerations and political factors that primarily and impermissibly governed the Administration's selection of the new boundaries").

[272] 54 U.S.C. § 320301(a) (authorizing the President to declare "objects of historic or scientific interest . . . to be national monuments").

revocation of a monument[273]—a power the Executive has disclaimed.[274] Thus, these plaintiffs contend that President Trump's proclamations surpassed any authority that might exist under the Antiquities Act to "diminish" or "modify" the amount of land included in a monument designation.[275]

Considerations for Congress

There are viable arguments on both sides of the debate over the President's authority to diminish monuments. Both parties purport to rely on the text of the Antiquities Act, and both have marshalled historical sources and practice to support their respective interpretations. As one scholar has concluded, "[r]isk is present all around," as "the legal authorities are mixed and none are clearly controlling."[276]

However, though the President's authority to diminish monuments may reasonably be questioned, it appears clear that Congress has authority to codify or repeal a presidential proclamation. The Property Clause of the Constitution gives Congress the "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[277] The Supreme Court has long held that "the power over the public land thus entrusted to Congress is without limitations."[278] And Congress has exercised this authority on several occasions in response to presidential proclamations issued under the Antiquities Act, whether by incorporating monuments (or portions thereof) into the National Park System,[279] transferring certain monuments to state control,[280] or by abolishing monuments outright.[281]

Legislation was introduced in the 115th and 116th Congresses in response to President Trump's proclamations diminishing the Grand Staircase-Escalante and Bears Ears monuments. Some proposals would have overridden President Trump's proclamations and expanded the monuments to their original (or greater) size.[282] Other Members of Congress have proposed amending the Antiquities Act to limit the President's authority to declare national monuments and to bar the President from diminishing existing monuments, except in specified circumstances.[283] At present,

[273] *See, e.g.*, UDB Br. at 44–45 ("President Trump has therefore revoked the monument status of those objects and landmarks.")

[274] *See supra* note 197.

[275] UDB Br. at 44–45.

[276] Murdock, *Monumental Power*, *supra* note 102, at 409, 412.

[277] U.S. CONST. art. IV § 3, cl. 2.

[278] Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (alteration omitted) (internal quotation marks omitted); *see also* Minnesota v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981) ("Congress clearly has the power to dedicate federal land for particular purposes.").

[279] Seamon, *Dismantling Monuments*, *supra* note 21, at 580 ("Of course, Congress has also effectively ratified some presidentially established monuments by adding to them or converting them into national parks."); Nat'l Park Serv., *Monuments List*, *supra* note 74.

[280] Nat'l Park Serv., *Monuments List*, *supra* note 74 (noting six national monuments that were transferred to states).

[281] Nat'l Park Serv., *Antiquities Act 1906–2006: Frequently Asked Questions*, http://www.nps.gov/archeology/sites/antiquities/FAQs.doc (listing national monuments abolished by Congress); Seamon, *Dismantling Monuments*, *supra* note 21, at 579–80 & n.138 ("Congress has abolished ten presidentially established monuments.").

[282] H.R. 871, 116th Cong. (2019) (expanding the Bears Ears National Monument); S. 367, 116th Cong. §§ 102, 103(41)–(42) (2019) (expanding the Grand Staircase-Escalante and Bears Ears monuments); H.R. 1050, 116th Cong., §§ 102, 103(41)–(42) (2019) (same); S. 2354, 115th Cong. §§ 102, 103(40)–(41) (2018) (same); H.R. 6410, 115th Cong. §§ 102, 103(40)–(41) (2018) (same).

[283] *See* H.R. 1664, 116th Cong. (2019); H.R. 3990, 115th Cong. (2017); H.R. 1489, 115th Cong. (2017).

none of these proposals has passed either chamber of Congress.[284] In the absence of congressional action, the President's authority to diminish national monuments will ultimately be decided by the courts.

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[284] In the 115th Congress, the House Committee on Natural Resources reported H.R. 3990 to the full House, but it did not receive a vote. *See generally* H.R. REP. NO. 115-1081 (2018). This legislation would have limited the objects capable of protection to "objects of antiquity," generally confined the amount of land eligible for reservation to 640 acres and prohibited monuments from being created within 50 miles of each other. *See* H.R. 3990, 115th Cong. § 2 (2017). This bill also would have given the President discretion to reduce a monument by 85,000 acres or less, and allowed further reductions if additional requirements were satisfied. *Id.* Earlier in 2017, the House Subcommittee on Federal Lands of the Committee on Natural Resources held a hearing on presidential use of the Antiquities Act. *See generally Examining the Consequences of Exec. Branch Overreach of the Antiquities Act: Hearing Before the Subcomm. on Fed. Lands of the Comm. on Nat. Res.*, 115th Cong. (2017). That same subcommittee also held hearings on a bill to codify President Trump's reduction of the Grand Staircase-Escalante monument. *See H.R. 4558, Grand Staircase-Escalante Enhancement Act: Hearing before the Subcomm. on Fed. Lands of the Comm. on Nat. Res.*, 115th Cong. (2017).