



MONUMENTAL OR NOT: PRESIDENTIAL AUTHORITY UNDER THE ANTIQUITIES ACT OF 1906

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Since the enactment of the one-page Antiquities Act of 1906, 16 presidents have designated 157 national monuments under its authority. These monuments range from a few acres to millions of acres in size preserving federal lands and cultural and historical sites for the benefit of the American public. These sites include well-known landmarks such as the Statue of Liberty and the Grand Canyon to lesser-known monuments such as the Lewis and Clark Caverns and the Crow Flies High Overlook.

As one commentator expressed, “never has so much been preserved for so many with so little statutory text.”¹ The act has drawn controversy in recent years because of its vigorous use by presidents in the waning days of office. President Bill Clinton, for instance, made 18 of his 19 national monument designations in his final year of office.²

The debate about presidential authority has now taken a sharp U-turn, with critics of President Donald Trump questioning his ability to unilaterally “de-designate” or “de-preserve” lands designated for protection by his predecessors. President Trump recently issued proclamations modifying two national monuments in Utah, reducing the lands included in the Bears Ears National Monument by about 85 percent (1.35 million acres to 201,786 acres) and the lands included in the Grand Staircase-Escalante National Monument by approximately 46 percent (1.87 million acres to approximately 1 million acres). The monument reductions are the first since 1963, and U.S. Secretary of the Interior Ryan Zinke has promised more in response to an executive order by President Trump calling for a comprehensive review of all monuments over 100,000 acres designated since 1996. Pending litigation may well turn on the same “little statutory text.”

US Constitution—Property Clause

Although national monument designations focus on presidential authority under the Antiquities Act, administration of federally owned lands ultimately rests with Congress. Under the separation of powers established by the U.S. Constitution, the Property Clause of the United States expressly grants Congress the exclusive “power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”³ In limited circumstances, Congress may delegate its authority,⁴ and as discussed below, Congress has expressly delegated the power to create national monuments to the president under the Antiquities Act. However, the Antiquities Act is silent regarding the president’s power to abolish or reduce the size of a monument, raising a constitutional question concerning the president’s authority and whether the power delegated by Congress carries any implied powers, or if only Congress can modify a designated national monument.

Antiquities Act of 1906

The Antiquities Act was born out of Progressive Era policy and 19th century struggles to preserve archaeological sites in the American

Southwest beyond site-by-site legislation.⁵ These concerns were driven by increasing commercial demand for authentic prehistoric antiquities resulting from the unregulated excavation and looting of artifacts from archeological sites and by parallel ongoing natural and scenic resources conservation and preservation efforts under President Theodore Roosevelt. While legislation was proposed as early as 1900, disagreements regarding presidential authority to create “national parks,” including monument acreage and size; management concerns; and tensions between conservation and preservation and private development and economic activity gridlocked congressional action until nearly six years later when a compromise was reached and the Antiquities Act was signed into law by President Roosevelt on June 8, 1906.⁶

When enacted in 1906, the Antiquities Act was one-page in length and consisted of three sections; it has remained largely unchanged since. Generally, § 1 criminalized excavation and destruction of historic or prehistoric ruins or monuments or objects of antiquity on federal lands without government permission, and § 3 established a permitting process for the examination and excavation of archaeological sites for the benefit of museums, universities, colleges, or other recognized scientific or educational institutions with the intent to increase knowledge about the objects and permanently preserve such objects in public museums.⁷

Under § 2 of the Antiquities Act, Congress expressly delegated authority to the president to establish national monuments by public proclamation, stating in pertinent part that:

The president of the United States is hereby authorized, 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, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with proper care and management of the objects to be protected.⁸

Under this provision, presidential Antiquities Act designations have been contentious and subject to litigation and legislation.⁹ Shortly after adoption of the Antiquities Act, President Roosevelt established 18 national monuments including the Grand Canyon National Monument by designating 818,000 acres, which immediately triggered litigation.¹⁰ However, in *Cameron v. United States*, involving a challenge by a mining claimant to land in the south rim of the canyon, the U.S. Supreme Court upheld the president’s authority under the Antiquities Act.¹¹ Since then, the U.S. Supreme Court has considered the Antiquities Act in at least three other cases, each time confirming the broad power delegated to the president,¹² and upholding presidential authority under the Antiquities Act to create a national monument to protect fish habitat¹³ and to preserve unique geologic features and tourist attractions.¹⁴ Lower courts have similarly deferred to executive created monuments¹⁵ and upheld presidential authority under the Antiquities Act to create a national monument of geologic features and natural resources.¹⁶

Congressional Limitations on Presidential Authority

In at least two instances, Congress has expressly limited the president’s authority through congressional action. Congress passed a law

in 1950 amending the Antiquities Act to prohibit the future establishment of national monuments in Wyoming except by Congress.¹⁷ This amendment arose out of President Franklin Roosevelt’s establishment of the Jackson Hole National Monument in 1943 and litigation, where the court determined review of presidential action was a matter of public interest more suited for congressional determination than judicial action.¹⁸ While Congress amended the Antiquities Act to prevent future monuments in Wyoming without congressional action, the wrath of Congress did not result in further reversal of the Jackson Hole monument, and instead, the monument was incorporated into the congressionally created Grand Teton National Park.

Congress similarly passed the Alaska National Interest Lands Conservation Act in 1980¹⁹ in response to large land withdrawals and monument designations in Alaska by President Jimmy Carter and litigation challenging such authority.²⁰ Under the Act, executive action that withdraws more than 5,000 acres in Alaska is not effective until notice is provided in the Federal Register and to both houses of Congress, and Congress passes a joint resolution of approval within one year after the notice has been provided to Congress.²¹ If not approved by Congress, such withdrawal terminates.²² Congress has also abolished a number of national monuments by legislation when it determined the president exceeded the authority granted by Congress, and has otherwise responded by withholding funds for monument administration.²³

Presidential Modification of Monuments

While the designation of national monuments is more common under the Antiquities Act, the president has exercised executive authority to modify and diminish previously established monuments (as shown in Table 1).²⁴ This authority was acknowledged by a 1938 U.S. Attorney General Opinion, which held that from time to time a president may diminish the area of national monuments established under the Antiquities Act by removing or excluding lands to ensure the limits of the monuments “in all cases shall be confined to the smallest area [compatible] with the proper care and management of the objects to be protected.”²⁵ In contrast, to date, it appears no cases have decided the issue of the authority of a president to withdraw, revoke, or abolish a national monument, which may be the result of the same 1938 opinion that found that “if public lands are reserved by the president for a particular purpose under express authority of an act of Congress, the president is thereafter without authority to abolish such reservation.”²⁶

Land Management Under the Antiquities Act

The Antiquities Act does not expressly designate the agency responsible for managing new monuments. Instead, historically, the president has selected agencies other than the National Park Service to manage monuments, particularly where the subject lands are already under the agency’s management responsibility. Accordingly, the Bureau of Land Management and U.S. Forest Service manage various national monuments.²⁸ These agencies have procedures to develop and revise land use management plans under the Federal Land Policy and Management Act of 1976 (FLPMA) and National Forest Management Act of 1976 to implement land use restrictions and regulations that may apply generally to federal land under the agency’s control, in addition to any restrictions or requirements specific to the monument under the president’s proclamation.²⁹ A presidential proclamation may also specifically require an agency to develop a monument management plan.³⁰

Table 1. Presidential Monument Modifications²⁷

National Monument	State	Acres/Action	President (Date)	Reason(s)
Petrified Forest National Monument	Arizona	25,625 acres diminished	Taft (7/31/1911)	Outside of the new boundaries there is practically nothing "worth preserving"
Navajo National Monument	Arizona	320 acres diminished	Taft (3/14/1912)	Reserved area larger than necessary for the protection of the ruins
Olympic National Park	Washington	160 acres diminished	Taft (4/17/1912)	Homesteader issues
		313,280 acres diminished	Wilson (5/11/1915)	Need for timber supplies for the war
		640 acres diminished	Coolidge (1/7/1929)	Homesteader issues
White Sands National Monument	New Mexico	R.O.W. diminished	F.D. Roosevelt (8/29/1938)	Removed highway rights-of-way
Grand Canyon	Arizona	71,854 acres diminished	F.D. Roosevelt (4/4/1940)	Not necessary
Craters of the Moon	Idaho	R.O.W. diminished	F.D. Roosevelt (7/18/1941)	Permit building a highway
Wupatki National Monument	Arizona	52.27 acres diminished	F.D. Roosevelt (1/22/1941)	Create a diversion dam for irrigation
Santa Rosa Island	Florida	4,700 acres diminished	Truman (8/13/1945)	Needed for military purposes
Glacier Bay National Park and Preserve	Alaska	4,193 acres (water) and 24,925 acres (land) diminished	Eisenhower (3/31/1955)	No longer necessary to conserve objects of scientific interest
Hovenweep National Monument	Utah, Colorado	40 acres diminished (canyon lands enlarged by the same amount)	Eisenhower (4/6/1956)	Initially included in error
Great Sand Dunes National Park and Preserve	Colorado	9,880 acres diminished	Eisenhower (6/7/1956)	No longer necessary for conservation
Colorado National Monument	Colorado	211 acres diminished (also enlarged)	Eisenhower (8/7/1959)	Not necessary to conserve objects of interest
Arches National Park	Utah	720 acres diminished	Eisenhower (7/22/1960)	Grazing lands with no scenic or scientific interest
Black Canyon of the Gunnison National Park	Colorado	470 acres diminished	Eisenhower (4/8/1960)	Congressional land exchanges provided for the management of the objects of scientific interest
Natural Bridges National Monument	Utah	320 acres modified (diminished and also enlarged)	Kennedy (8/14/1962)	No longer contained features of archeological value
Bandelier National Monument	New Mexico	3,925 acres diminished (also enlarged)	Kennedy (5/27/1963)	Limited archeological value and boundary adjustments

Monument Issues and Controversies

Over the years, presidentially created monuments have generated heated controversy and, in some cases, litigation. While these issues vary by monument, they generally include some of the following concerns:³¹

- **Delegation and Separation of Powers.** Critics have asserted that the Antiquities Act is an unconstitutionally broad delegation of congressional power because all federal lands have some historic or scientific value. Similar questions have been raised in context of the effect of a presidential proclamation under a congressional delegation of power as opposed to general executive authority.³²
- **Size of the Area.** Based on the text of the Antiquities Act that states the president may designate "the smallest area compatible with the proper care and management of the objects to be protected," critics and defenders disagree on the president's

authority to designate monuments covering significant acreage.³³

- **Type of Resources.** Critics similarly contend that the Antiquities Act has been used for impermissibly broad purposes to generically cover conservation and scenic protection, while supporters indicate that the president has broad discretion to identify objects with "historic or scientific interest."
- **Inclusion of Non-Federal Lands.** While some supporters indicate that land exchanges could be pursued to offset impacts to private land, designation of federal lands surrounding private land raises concerns regarding access, development, and eminent domain. To date, no presidential declaration has converted private property to federal property, but the text of the Antiquities Act provides that property "may be relinquished to the federal government" and private landowners and other nonfederal owners have donated land under this provision.³⁴

- **Land Use and Management.** Monument designations also raise concerns regarding negative impacts to resource extraction and development on federal lands, including the loss of jobs and tax revenues in local communities and restrictions on recreation, such as hunting and off-road vehicle use. Additionally, designations raise concerns regarding agency management of new monuments, along with budgetary concerns.
- **Consistency With FLPMA.** While the FLPMA reasserted control over certain withdrawals and reservations of public lands, it left the Antiquities Act in place. Consequently, critics and supporters have raised opposing arguments regarding the effect of FLPMA on the president's withdrawal authority under the Antiquities Act, as well as other statutory changes that have been enacted since 1906, including the National Park System Organic Act of 1916 and its 1970 and 1978 amendments.³⁵
- **Consistency With NEPA.** Critics also assert that the Antiquities Act provides insufficient public input and environmental studies, while supporters assert that subjecting monument designations to National Environmental Policy Act (NEPA) review would impair the president's ability to act quickly. Presidents may also consult in practice with stakeholders prior to designating a monument, but this is not assured. Likewise, the NEPA generally only requires a detailed review and process such as an environmental impact statement for proposed federal agency actions that have likely significant adverse environmental effects, rather than those that would protect the environment.³⁶

In addition to substantive issues and concerns, monument challenges also separately raise procedural, jurisdictional, and standard of review issues.³⁷

President Trump's Executive Order

On April 26, 2017, President Trump issued Executive Order 13792³⁸ directing the Secretary of the Interior to review all presidential designations or expansions of designations under the Antiquities Act made since Jan. 1, 1996, where:

- The original designation or its expansion covers more than 100,000 acres; or
- The Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders.

The secretary is ordered to determine whether the designations were "made in accordance with the requirements and original objectives of the [Antiquities] Act and appropriately balance the protection of landmarks, structures, and objects against the appropriate use of federal lands and the effects on surrounding lands and communities."³⁹ The executive order acknowledges that the Antiquities Act provides a means to protect America's natural resources, natural beauty, and historic places, but contends that such designations have had a substantial impact on the management of federal lands and the use and enjoyment of neighboring lands. The order further asserts that the lack of public outreach and coordination with state, tribal, local officials, and other relevant stakeholders can create barriers to energy independence, restrict public use and access to federal lands, and prevent economic growth.

To assist with this review, the executive order directed the

secretary to coordinate with other agency and executive department heads and consider the following seven items:

1. The requirements and original objectives of the Antiquities Act, including the requirement that reservations of land not exceed "the smallest area compatible with the proper care and management of the objects to be protected";
2. Whether the designated lands are appropriately classified as "historic landmarks, historic and prehistoric structures, or other objects of historic or scientific interest";
3. The effect of the designation on the available uses of designated federal lands, including the multiple-use policy under FLPMA⁴⁰ and effects on the available uses of federal lands beyond the monument boundaries;
4. The effects of a designation on the use and enjoyment of non-federal lands within or beyond monument boundaries;
5. Concerns of state, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected states, tribes, and localities;
6. The availability of federal resources to properly manage designated areas; and
7. Such other factors as the secretary deems appropriate.⁴¹

Under the executive order, the secretary is required to provide two reports with the secretary's recommendations for presidential actions, legislative proposals, or other action to carry out the policy set forth in the executive order:

1. An interim report within 45 days regarding review of Proclamation 9558 of Dec. 28, 2016, establishing Bears Ears National Monument and other designations the secretary determines are appropriate for inclusion.
2. A final report within 120 days summarizing the findings of the secretary's review pursuant to the direction in the executive order.

Secretary Zinke's Bears Ears National Monument Reports

In response to President Trump's executive order, the Department of Interior announced the first-ever formal public comment period on monument designations under the Antiquities Act, including a comment period for Bears Ears National Monument and a separate comment period for other monument designations review, which collectively received over 2.8 million comments.⁴²

Interim Monument Report

On June 10, 2017, Secretary Zinke submitted an interim report to President Trump addressing the Bears Ears National Monument, which encompasses approximately 1.5 million acres in Utah and was established by President Barack Obama in the final weeks of his second term.⁴³

Based on the Department of Interior's interim review, the report found that (1) rather than an all-encompassing 1.5-million-acre area designation, area designations could have been identified and separated to protect the areas with significant objects; (2) many of the lands reserved in the monument are already congressionally or administratively protected as wilderness or wilderness study areas subject to higher protections, and further designation would be unnecessary; and (3) the lands would be more appropriately categorized under another type of special designation, such as a national recreation area. The report further found that to the extent areas should remain protected, certain land management prescriptions appeared too restrictive, and tribal interests had not been granted an

adequate management role. Consequently, the interim report recommends that:

- The Bears Ears National Monument boundary be revised;
- The president request congressional authority to enable tribal co-management of designated cultural areas within the revised boundaries of the monument;
- Congress make more appropriate conservation designations within the current monument, such as national recreation areas or national conservation areas; and
- Congress clarify the intent of the management practices of wilderness or wilderness study areas within the monument.

The report further noted that during the public comment period over 76,500 comments were received expressing various positions, and among these, Utah federal and state elected officials voiced strong opposition to the monument's boundary.

Final Monument Report

While a draft of Secretary Zinke's final monument report was leaked to the media in September 2017, the final report was formally released on Dec. 5, 2017,⁴⁴ including specific modification recommendations for the following 10 monuments: Bears Ears, Cascade-Siskiyou, Gold Butte, Grand Staircase-Escalante, Katahdin Woods and Waters, Northeast Canyons and Seamounts, Organ Mountains-Desert Peaks, Pacific Remote Islands, Rio Grande del Norte, and Rose Atoll.

The secretary's review identified 22 monuments (Table 2) and five marine monuments (Table 3) that were jointly reviewed with the U.S. Department of Commerce. This review included a formal comment period resulting in receipt of over 2.8 million comments, visits to eight national monuments in six states, and numerous meetings with individuals and organizations, including tribal, local, and state government officials, local stakeholders, and advocacy organizations.

In recommending modification to 10 monuments, the secretary's review found that: (1) monuments designated under the Antiquities Act were broadly and arbitrarily defined and in some instances mirrored broader land management legislation that had stalled, thereby circumventing the legislative process; (2) designating geographic landscape areas as objects of historic or scientific interest raises management questions

Table 2. Monuments Under Review

Monument	Location	Year Established/Modified	Federal Acreage (Est.)
Basin and Range	Nevada	2015	703,585
Bears Ears*	Utah	2016	1,353,000
Berryessa Snow Mountain	California	2015	330,780
Canyons of the Ancients	Colorado	2000	176,370
Carrizo Plain	California	2001	211,045
Cascade Siskiyou*	Oregon	2000/2017	113,431
Craters of the Moon	Idaho	1924/2000	738,420
Giant Sequoia	California	2000	328,315
Gold Butte*	Nevada	2016	296,937
Grand Canyon-Parashant	Arizona	2000	1,021,030
Grand Staircase-Escalante*	Utah	1996	1,866,331
Hanford Reach	Washington	2000	194,450
Ironwood Forest	Arizona	2000	129,055
Katahdin Woods and Waters*	Maine	2016	87,564
Mojave Trails	California	2016	1,600,000
Organ Mountains-Desert Peaks*	New Mexico	2014	496,529
Rio Grande del Norte*	New Mexico	2013	242,710
Sand to Snow	California	2016	154,000
San Gabriel Mountains	California	2014	346,177
Sonoran Desert	Arizona	2001	486,400
Upper Missouri River Breaks	Montana	2001	377,346
Vermilion Cliffs	Arizona	2000	279,566

*Monuments identified for modification by Secretary Zinke's report.

Table 3. Marine Monuments Under Review

Monument	Location	Year Established/Modified	Federal Acreage (Est.)
Marianas Trench	CNMI/Pacific Ocean	2009	61,077,668
Northeast Canyons and Seamounts*	Atlantic Ocean	2016	3,144,320
Pacific Remote Islands*	Pacific Ocean	2009	313,941,851
Papahānaumokuākea	Hawaii	2006/2016	372,848,597
Rose Atoll*	American Samoa	2009	8,609,045

*Monuments identified for modification by Secretary Zinke's report.

Figure 1. Changes to Declared National Monuments



that may be more appropriately regulated under FLPMA; (3) there is perception that monument designation was intended to prevent access and economic activity, including grazing, mining, and timber production as opposed to protect specific objects, and such designations may limit use of private land; (4) concerns have been raised by state, tribal, and local governments regarding lost jobs, access, and inadequate public involvement; and (5) large designations under the act may provide less protection than applicable land-management authorities already in place and therefore undermine the intent of the Act.⁴⁵

Additionally, Secretary Zinke stated his review uncovered inadequate coordination with the sportsmen community and overly restrictive land management plans. As a result, he recommended ongoing review to prioritize public access, infrastructure upgrades, repair, and maintenance, traditional use, tribal culture use, and hunting and fishing rights, including commercial fishing, while continuing to protect monuments. He further recommended that the president request Congress to legislate tribal co-management authority, examination of more appropriate public land-use designations, and that Congress consider establishing a standard process for public input and monument designations in the future.⁴⁶

Secretary Zinke also identified three sites for consideration as monument designations.⁴⁷ These sites included Camp Nelson, an 1863 Union Army supply depot, training center, and hospital in Kentucky; the Medgar Evers Home, the house of the field secretary of the first National Association for the Advancement of Colored People in Mississippi; and the Badger-Two Medicine Area in Montana, which is considered a sacred area by the Blackfeet Nation.

Dec. 4 Presidential Proclamations Modifying Monuments

On Dec. 4, 2017, President Trump issued two separate proclamations under the Antiquities Act modifying the Bears Ears National Monument and the Grand Staircase-Escalante National Monument in Utah as shown in Figure 1.⁴⁹

Bears Ears National Monument Proclamation and Litigation

President Trump's Proclamation 9681⁵¹ modifies the Bears Ears National Monument to exclude approximately 1,150,860 acres of land from the approximately 1.35 million acres originally designated by President Obama under Proclamation 9558 of Dec. 28, 2016. The reduction focuses on protection of two specific areas encompassing approximately 301,876 acres known as the Shash Jaa unit⁵² and Indian Creek unit.⁵³ The proclamation indicates that the modified boundaries do not include the San Juan River, Valley of the Gods, or Hideout Canyon, but these areas remain designated as Areas of Critical Environmental Concern or partially within a Wilderness Study Area.

In support of this determination, the proclamation states that some of the objects are (1) not unique or those within the monument do not have historic or scientific interest and (2) are not under threat of damage or destruction that require a reservation of land to protect them. Instead, these lands are protected under other laws and existing agency management designations, including more than 500,000 managed acres to maintain, enhance, or protect their roadless character and 89,396 acres included in eight inventoried roadless areas managed under the U.S. Forest Service's 2001 Roadless Area Conservation Rule.

The proclamation further provides that 60 days after the date of the proclamation, the public lands to be excluded from the monument reservation shall be open to mineral entry, leasing, sale and other disposition under the mining laws and other public land laws. The proclamation does not affect or remove any lands from the Manti-La Sal National Forest. Except as to the following four items, the proclamation does not change management of the areas designated and reserved as part of the monument: (1) modifying the Bears Ears Commission to the Shash Jaa Commission for the Shash Jaa unit only and to include the elected officer of the San Juan County Commission representing District 3; (2) providing the secretary the discretion to maintain roads and allow motorized or non-mechanized vehicle use on roads and trails existing immediately before the issuance of Proclamation 6920; (3) generally authorizing livestock grazing beyond existing permits or lease rights; and (4) authorizing the secretary to conduct ecological restoration and active vegetation management activities in the monument.

In response, five Native American Indian tribes (the Hopi, Navajo, Ute Indian, Ute Mountain, and Zuni) and environmental and other groups filed suit in the District of Columbia federal district court asking that the court order the president to rescind the order or otherwise prohibit its implementation,⁵⁴ restore the original monuments,⁵⁵ and prohibit mining and oil and gas drilling on the lands.⁵⁶ The federal defendants have sought to consolidate the cases and filed a motion to transfer the cases to the Utah federal district court.

The plaintiffs contend that the Antiquities Act only empowers the president to declare national monuments and does not delegate or authorize the power to revoke, replace, or diminish such monuments once designated. Plaintiffs specifically raise constitutional challenges that the president's actions violate the separation of powers doctrine by purporting to executive legislate modifications to designated monuments and by encroaching on Congress' power under the Property Clause. Additionally, plaintiffs assert that presidential action contrary to the direction of prior executive proclamations made under an act of Congress violate the president's duties under the

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⁴⁸*Batterton*, *supra* note 3, at *3.

⁴⁹*Evich*, *supra* note 23, at 258.

⁵⁰*Batterton*, *supra* note 3, at *11.

⁵¹*McBride*, 768 F.3d at 393 (Clement, concurring).

⁵²*Id.*

⁵³*Id.* at 394.

⁵⁴*Mitchell*, 362 U.S. 539.

⁵⁵*Id.* at 542.

⁵⁶*Carlisle Packing Co. v. Sandanger*, 259 U.S. 255 (1922); *Mahnich v. Souther S.S. Co.*, 321 U.S. 96 (1944); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

⁵⁷*Mitchell*, 362 U.S. at 549.

⁵⁸*Id.* at 550.

⁵⁹*McBride*, 768 F.3d 382, *cert. denied* by *McBride v. Estis Well Serv. LLC*, 135 S.Ct. 2310 (2015).

⁶⁰*Tabingo v. Am. Triumph LLC*, 188 Wn.2d 41, 391 P.3d 434 (Was. 2017), *cert. denied* by *Am. Triumph LLC v. Tabingo*, 2018 U.S. LEXIS 381 (2018).

⁶¹391 P.3d 434 (Wash. 2017).

⁶²*See Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 100 (2010) (citing *Norfolk S. R. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 28 (2004)).

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Table 4. Bills Introduced in the 115th Congress

Bill	Proposed By	Summary
H.R. 243	Rep. Mark Amodei (R-Nev.)	Legislation that would prohibit monument designations in Nevada without congressional approval
H.R. 1489	Rep. Don Young (R-Alaska)	Similar to S. 33
H.R. 2074	Rep. Greg Walden (R-Ore.)	Legislation that the president shall certify compliance with NEPA as a condition of designating a monument
H.R. 2157	Rep. Dave Brat (R-Va.)	Companion bill to S. 956
H.R. 2284	Rep. Raul Labrador (R-Idaho)	Requiring congressional approval and the state in which the monument is located enacting legislation approving the creation of the monument. Also, the secretary shall not implement any restrictions on public use until appropriate review.
H.R. 3249	Rep. Steve Scalise (R-La.)	Legislation includes provision that terminates president's authority to designate marine national monuments, but is not retroactive.
H.R. 3668	Rep. Jeff Duncan (R-S.C.)	Legislation that requires land management agencies to provide facilities for recreational fishing, hunting, and shooting on federal land, including national monuments.
H.R. 3905	Rep. Tom Emmer (R-Minn.)	Legislation that would prohibit president from extending or establishing national monuments on National Forest System lands in Minnesota without congressional approval.
H.R. 3990	Rep. Rob Bishop (R-Utah)	Legislation to make national monuments harder to designate.
H.R. 4558	Rep. Chris Stewart (R-Utah)	Legislation to approve President Trump's modification to the Grand Staircase-Escalante National Monument.
H.R. 4532	Rep. John Curtis (R-Utah)	Legislation to approve President Trump's modification to the Bears Ears National Monument.
H.R. 4518	Rep. Ruben Gallego (D-Ariz.)	Legislation to expand the boundaries of Bears Ears National Monument.
S. 22	Sen. Dean Heller (R-Nev.)	Legislation to amend § 32030 to prohibit monument designation in Nevada without congressional approval.
S. 33	Sen. Lisa Murkowski (R-Alaska)	Legislation preventing president from establishing a national monument without congressional and state legislature approval and without certifying NEPA compliance <i>inter alia</i> .
S. 132	Sen. Mike Crapo (R-Idaho)	Similar to S. 33
S. 956	Sen. Bill Cassidy (R-La.)	Legislation includes provision that terminates president's authority to designate marine national monuments, but is not retroactive.
S. 2354	Sen. Tom Udall (D-N.M.)	Legislation to set forth management of certain covered national monuments, including Bears Ears National Monument and Grand Staircase-Escalante National Monument, including funding.

Take Care Clause of the Constitution. Plaintiffs also raise statutory construction claims that (1) President Trump's proclamation is *ultra vires* and beyond the statutory authority delegated by Congress, and (2) the president's proclamation violates the Antiquities Act because *inter alia* the proclamation is based on considerations outside of the Antiquities Act and lacked any adequate legal or factual justification.

Grand Staircase-Escalante National Monument Proclamation and Litigation

President Trump's Proclamation 9682⁵⁷ modifies the boundary of the Grand Staircase-Escalante National Monument to exclude 861,974 acres of land from the original 1.7 million designation by President

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Clinton under Proclamation 6920 of Sept. 18, 1996,⁵⁸ so that the boundaries of the reservation are “reduced to the smallest area compatible with the protection of the objects of scientific or historic interest.” In doing so, President Trump’s proclamation effectively designates three smaller monuments—the Grand Staircase area, the White Cliffs area, and the Kaiparowits area—on similar findings as the Bears Ears National Monument proclamation.

The proclamation contains a similar provision regarding the opening of public lands within 60 days after the date of the proclamation as the Bears Ears National Monument proclamation. As to general land management issues, the proclamation changes the following items:

- requires the secretary of the interior to prepare and maintain a management plan for the three units of the monument with maximum public involvement and tribal consultation;
- requires the secretary to maintain one or more advisory committees under the Federal Advisory Committee Act; and
- includes similar provisions as the Bears Ears National Monument proclamation concerning:
 - ▶ motorized or non-mechanized vehicle use on roads and trails, livestock grazing, and
 - ▶ ecological and active vegetation management activities in the monument.

Environmental groups immediately responded with litigation in the D.C. federal district court in two separate cases, which the federal defendants have also sought to consolidate and transfer to the Utah federal district court.⁵⁹ Similar to the litigation involving the Bears Ears National Monument, in *Wilderness Society v. Trump*, the Wilderness Society and nine other environmental organizations⁶⁰ seek declaratory and injunctive relief against President Trump, Secretary Zinke, and Bureau of Land Management Deputy Director Brian Steed in their official capacities alleging Proclamation 9682 exceeds presidential authority under the U.S. Constitution and Antiquities Act and that only Congress may abolish national monuments, in whole or in part. Although motions to consolidate and transfer are pending, in *Grand Staircase-Escalante Partners v. Trump*, the plaintiffs filed a motion for partial summary judgment on Jan. 20, 2018, on three counts: (1) that the president lacks constitutional authority to eliminate national monument protections under the U.S. Constitution, (2) the president’s action is ultra vires and not authorized by the Antiquities Act, and (3) the president’s action is unconstitutional and ultra vires as a result of legislative enactments adjusting the boundaries of the monument.⁶¹

Congressional Oversight and Resolution

The pending litigation would not preclude Congress from designating monument boundaries by statute, which could thereby moot the litigation. Indeed, the current Congress has proposed several bills concerning specific monuments or the Antiquities Act (see Table 4). Absent congressional action, the courts will be left to sort out the president’s authority under the Antiquities Act—without much statutory text to consult. ☺



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Endnotes

- ¹Francis McManamon, *Theodore Roosevelt and the Antiquities Act of 1906: Timely Action and an Enduring Legacy*, THEODORE ROOSEVELT ASS’N J. XXXII (3): 24-38, 34 (2011).
- ²See, e.g., CAROL HARDY VINCENT, CONG. RESEARCH SERV., RL20902, NATIONAL MONUMENT ISSUES (2002) (18 out of the 19 monuments designated by President Clinton occurred in his last year in office).
- ³U.S. Const. art. IV, § 3, cl. 2.
- ⁴See *Tulare Cty. v. Bush*, 185 F. Supp. 2d 18, 26 (D.D.C. 2001) (stating “Congress must provide standards to guide the authorized action such that one reviewing the action could recognize whether the will of Congress has been obeyed” citing *Yakus v. U.S.*, 321 U.S. 414 (1944)).
- ⁵McManamon, *supra*, at 28.
- ⁶Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. §§ 431-33.
- ⁷*Id.*
- ⁸54 U.S.C. §§ 320301-320303.
- ⁹See generally Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473 (2003).
- ¹⁰*Establishment of Grand Canyon National Monument*, Proclamation No. 794, 35 Stat. 2175 (1908).
- ¹¹*Cameron v. U.S.*, 252 U.S. 450 (1920).
- ¹²See *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1135 (D.C. Cir. 2002) (pointing out that the Supreme Court has confirmed broad powers delegated to the president under the Antiquities Act citing *U.S. v. California*, 436 U.S. 32 (1978); *Cappaert v. U.S.*, 426 U.S. 128 (1976); *Cameron v. U.S.*, 252 U.S. 450 (1920)); *Alaska v. U.S.*, 545 U.S. 74, 102-03 (2005) (holding the Antiquities Act delegated sufficient power to the president to reserve submerged lands).
- ¹³*Cappaert*, 426 U.S. at 141-42 (upheld President Truman’s creation of a national monument at Devil’s Hole in Nevada as habitat for a species of fish, finding the fish were “objects of historic or scientific interest”).
- ¹⁴*Cameron v. U.S.*, 252 U.S. 450 (1920).
- ¹⁵Christine Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1344 nn. 63, 64 (2001) (citing *Anaconda Copper Co. v. Andrus*, 14 Env’t Rep. Cas. (BNA) 1853, 1854 (D. Alaska 1980)); *Alaska v. Carter*, 462 F. Supp. 1155, 1159-60 (D. Alaska 1978); *Wyoming v. Franke*, 58 F. Supp. 890, 896 (D. Wyo. 1945); see also *Mountain States Legal Found.*, 306 F.3d at 1135 n. 1; *Tulare Cty.*, 185 F. Supp. 2d at 24.
- ¹⁶*Anaconda Copper Co.*, 14 Env’t Rep. Cas. (BNA) at 1854.
- ¹⁷54 U.S.C. § 320301(d).
- ¹⁸*Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945).
- ¹⁹Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (16 U.S.C. § 3213).