

LEGISLATIVE STUDY AND INVESTIGATIVE STAFF REPORT ON ABUSE
OF DISCRETION IN THE CREATION OF THE GRAND STAIRCASE-ESCALANTE
NATIONAL MONUMENT UNDER THE ANTIQUITIES ACT

November 7, 1997

Majority staff of the Committee on Resources, Subcommittee on National Parks and Public Lands submits the following

STAFF REPORT

to the Members of the Committee

Behind Closed Doors:
The Abuse of Trust And Discretion
In The Establishment Of The
Grand Staircase-Escalante National Monument

This report has not been officially adopted by the Committee on
Resources and may not therefore necessarily reflect the views of its Members

**Introduction: Committee Review Of The
Designation of the Grand Staircase-Escalante National Monument**

On September 18, 1996, President Clinton established, by Presidential Proclamation No. 6920, the 1.7-million-acre Grand Staircase-Escalante National Monument ("Utah Monument") in Utah pursuant to Section 2 of the Act of June 8, 1906 ("Antiquities Act"). The Committee on Resources has jurisdiction over the Antiquities Act and the creation of the Monument, jurisdiction that is delegated under Rule 6(a) of the Rules For the Committee on Resources ("Committee Rules") to the Subcommittee on National Parks and Public Lands.

The Subcommittee has a continuing responsibility under Rule 6(d) of the Committee Rules to monitor and evaluate administration of laws within its jurisdiction. In relevant part, that rule states:

. . . Each Subcommittee shall review and study, on a continuing basis, the application, administration, execution, and effectiveness of those statutes or parts of statutes, the subject matter of which is within that Subcommittee's jurisdiction; and the organization, operation, and regulations of any Federal agency or entity having responsibilities in or for the administration of such statutes, to determine whether these statutes are being implemented and carried out in accordance with the intent of Congress. . . .

The Subcommittee, in concert with the Full Committee, undertook its Rule 6(d) responsibility when, on March 18, 1997, Chairman Young and Subcommittee Chairman Hansen initiated a review of the creation of the Monument. Some records were produced by the Council on Environmental Quality (CEQ) and the Department of the Interior (DOI) pursuant to a March 18, 1997, request to the Chair of CEQ and the Secretary of DOI related to the review. The documents that were produced were utilized by unanimous consent at a Subcommittee oversight hearing on April 29, 1997.

However, CEQ Chair Kathleen McGinty refused to produce copies of embarrassing documents that revealed why--beyond the reasons stated in the proclamation and publicly--the monument was created. Staff was given access to some of the documents and Members to others in an attempt to accommodate stated Administration desires to keep the documents secret because the Administration claimed they might be "privileged." However, constitutional executive privilege was never officially asserted by the President over the documents.

Chairman Young was delegated the authority to subpoena Monument records by the Committee on September 25, 1997. After a protracted legal exchange between the White House and Committee staff on the applicability of privileges to the documents withheld, Chairman Young, on October 9, 1997, issued the subpoena for the records withheld by CEQ Chair Kathleen McGinty.

The subpoena was unreturned on the due date and the committee staff began preparing a contempt resolution. However, on Wednesday, October 22, 1997, the Counsel to the President, Charles F.C. Ruff, produced the subpoenaed documents to the Committee.¹

The delay--from March through October 1997--in producing the ultimately subpoenaed documents thwarted efforts of the Subcommittee and Committee to properly undertake its duties under Article I and Article IV of the Constitution and Rule 6(d) of the Committee Rules. The Subcommittee hearing on the matter had already been held and the remaining days in the first session of the 105th Congress were limited. The Committee is actively considering legislation that modifies the Antiquities Act.

As a result of the delay, the Chairman and Subcommittee Chairman requested this legislative study and investigative majority staff report. The request was to analyze and append relevant documents produced under the subpoena that show if there were abuses of discretion by the President and his advisors in the execution of the Antiquities Act to create the Utah Monument and whether that Act was being implemented and carried out in accordance with the intent of Congress. This legislative study and report responds to that request. This report was developed for and provided to Members of the Committee on Resources for their information so that Members can undertake their legislative and oversight responsibilities under the Constitution, the Rules of the House of Representatives, and the Rules for the Committee on Resources.

The Law: Antiquities Act Monument Designations

The Antiquities Act can be summarized simply. By proclamation, the President may reserve federal land as a National Monument. The land must be a historic landmark, a historic or prehistoric structure, or an object of historic or scientific interest. In addition, the reserved area must "in all cases" be "confined to the smallest area compatible with the proper care and management of the objects to be protected." The Act contemplates that objects to be protected must be threatened or endangered in some way.²

¹Based upon representations of CEQ staff, all documents in the possession of CEQ regarding the Grand Staircase-Escalante National Monument have now been produced.

²See Report to accompany S. 4698, Rpt. No 3797, 59th Cong., 1st Sess. (May 24, 1906).

Executive Summary of Findings
Monumental Decisions Behind Closed Doors

*I'm increasingly of the view that we should just drop these Utah ideas,
... these lands are not really endangered.*

-- CEQ Chair Kathleen McGinty

The state of Utah was settled by hearty Mormon pioneers seeking to avoid persecution for their beliefs. They moved west in an effort to find wide, open spaces and freedom from intrusion into their affairs by their neighbors and the government. Now, more than a century later, the citizens of Utah have been forced to endure the ultimate government intrusion: a federal land grab of 1.7 million acres, taken in the dead of night--with no public notice, no opportunity to comment, and no involvement of the Utah Congressional Delegation. Indeed, the Utah delegation was deceived about the imminent decision to designate the Grand Staircase-Escalante National Monument up until hours before the President's high-profile, public, campaign-style announcement.

Once again, at the hands of the Clinton Administration, the people of Utah were being persecuted for their beliefs. Had Utah been a pro-Clinton state, a state with prominent Democratic Members of Congress, or one that factored importantly into Clinton's re-election effort, then the land-grab would almost certainly not have occurred.

In sum, the documents received by the Committee show several points quite clearly: (1) the designation of the Monument was almost entirely politically motivated; (2) the plan to designate the monument was purposefully kept secret from Americans and Utah Members of Congress; (3) the Monument designation was put forward even though the Administration officials did not believe that the lands proposed for protection were in danger; (4) use of the Antiquities Act was intended to overcome Congressional involvement in land designation decisions; (5) use of the Antiquities Act for monument designation was planned to evade the National Environmental Policy Act (NEPA). Indeed, its use was specifically intended to evade the provisions of NEPA and other federal administrative requirements, and to assist the Clinton-Gore reelection effort.

It's Politics. Stupid--Not The Environment

The records and documents provided by the CEQ and DOI clearly demonstrate that the Administration's goal was political, not environmental, a fact that contradicts the Congressional intent of the Antiquities Act.

The Clinton White House took pains to ensure that all prominent Democrats from neighboring states were not only warned in advance, but had an opportunity to give their views on the designation. In an August 14, 1996, memorandum for the President, CEQ Chair Kathleen McGinty opines that the monument designation would be politically popular in several key Western states. In Ms. McGinty's words:

"This assessment squares with the positive reactions by Senator [sic] Harry Reid (D-NV), Governor Roy Romer (D-CO), and Representative Bill Richardson (D-NM) when asked their views on the proposal. . . . Governor Bob Miller's (D-NV) concern that Nevada's sagebrush rebels would not approve of the new monument is almost certainly correct, and echoes the concerns of other friends, but can be offset by the positive response in other constituencies."

In fact, even non-incumbent Democratic candidates for office from states other than Utah were warned about the impending land grab. CEQ Chair Kathleen McGinty explained this in a moment of partisan candor in her September 6, 1996, White House weekly report:

"I have called several members of congress to give them notice of this story and am working with political affairs to **determine if there are Democratic candidates we should alert**. We are neither confirming nor denying the story; just making sure that Democrats are not surprised." (Emphasis supplied)

It was only Republicans, the lone Utah Democratic Member, and Utahns who were to be kept in the dark. Even media outlets like the Washington Post were advised by insiders to the Utah Monument decision as evidenced by electronic mail (e-mail) traffic:

"Brian: So when pressed by Mark Udall and Maggie Fox on the Utah monument at yesterday's private ceremony for Mo [Udall] Clinton said: '**You don't know when to take yes for an answer.**' Sounds to me like it's going forward. I also hear Romer is pushing the president to announce it when he's in Colorado on Wednesday. . . . --Tom Kenworthy" (Emphasis supplied) (September 10, 1996 From Brian Johnson (CEQ press) to others at CEQ transmitting e-mail from Washington Post reporter Tom Kenworthy)

Another CEQ staffer commenting on the above e-mail:

"Wow. He's got good sources and a lot of nerve." (September 10, 1996, response

from Tom Jensen to Brian Johnson's e-mail previously forwarded)

The exchange continues:

"south rim of the grand canyon, sept 18th -- be there or be square."
(Emphasis supplied) (September 11, 1996, e-mail from Tom Kenworthy to Brian Johnson)

The exchange continues again:

"Nice touch doing the Escalante Canyons announcement on the birthday of Utah's junior senator! Give me a call if you get a chance." (September 16, 1996, e-mail from Tom Kenworthy to Brian Johnson)

This e-mail traffic demonstrates that by September 10 and 11, 1996, the Washington Post clearly had been notified not only that the decision had been made, but when and where the announcement would be. By contrast, the Utah Congressional delegation was being told by Ms. McGinty and top CEQ staff on September 9 that no decision had been made and the delegation would be consulted prior to any announcement.

Moreover, CEQ, White House Staff, and DOI officials met with Utah's delegation staff again on September 16, 1996--two days before the Utah Monument designation--and continued to deny that a decision had been made to go forward with the designation. Meeting notes taken by Tom Jensen of CEQ at the September 16, 1996, meeting indicate the following exchange between Senator Hatch and Kathleen McGinty:

Senator Hatch: "Can you give us an idea of what the POTUS [President] will do before he does it? Don't want to rely on press."

Kathleen McGinty: "Yes. We need to caucus and will reengage."

This deception, a full week after the Washington Post knew all of the details of the Utah Monument designation and "Utah event," allowed the White House to move forward without Congressional intervention.

In an August 14, 1996, memo to the President, CEQ Chair Kathleen McGinty candidly discusses the goal of the project--to positively impact the President's re-election campaign:

"The political purpose of the Utah event is to show distinctly your willingness to use the office of the President to protect the environment. . . . It is our considered assessment that an action of this type and scale would help to overcome the negative views toward the Administration created by the timber rider. Designation of the new monument would create a compelling reason for persons who are

now disaffected to come around and enthusiastically support the Administration. . . Opposition to the designation will come from some of the same parties who have generally opposed the Administration's natural resource and environmental policies and who, in candor, are unlikely to support the Administration under any circumstances."(Emphasis supplied)

Many of the documents attempt to gauge the political impact of the action, yet the environmental impact of the decision is rarely explored. Regardless of the environmental impact, the Clinton-Gore campaign needed the Utah Monument to shore up its political base in the environmental movement. When environmental impact is explored in some documents, they note that the lands to be set aside under the designation are not environmentally threatened--a sentiment echoed by CEQ Chair Kathleen McGinty herself in a March 25, 1996, e-mail:

"i'm increasingly of the view that we should just drop these utah ideas. we do not really know how the enviros will react and i do think there is a danger of 'abuse' of the withdraw/antiquities authorities especially because these lands are not really endangered." (Emphasis supplied)

In a March 22, 1996, e-mail, CEQ Associate Director for Public Lands Linda Lance agreed, warning against the Utah Monument designation because of the political impact of using the Act to set aside unthreatened lands:

". . . [T]he real remaining question is not so much what this letter says, but the political consequences of designating these lands as monuments when they're not threatened with losing wilderness status, and they're probably not the areas of the country most in need of this designation. presidents have not used their monument designation authority in this way in the past--only for large dramatic parcels that are threatened. do we risk a backlash from the bad guys if we do these--do they have the chance to suggest that this administration could use this authority all the time all over the country, and start to argue that the discretion is too broad?" (Emphasis supplied)

However, sentiment changed a few days later. The March 27, 1996, e-mail from Linda Lance at CEQ to Kathleen McGinty who forwarded it to others at CEQ shows that DOI was keeping the Monument idea alive:

"since i and i think others were persuaded at yesterday's meeting w/ Interior that we shouldn't write off the canyonlands and arches monuments just yet, here's another try at a draft letter to Babbitt to get this process started." (Emphasis supplied)

Despite the fact that CEQ Chair advocated dropping the idea, and despite the fact that there is no indication that the President had given either CEQ or Interior any formal notice that he

even knew about the idea, DOI was apparently pushing hard (behind the scenes) for this monument. Still there was no letter in March, April, May, June, or July 1996 from the President to the Secretary directing work on designating a possible Utah Monument. At a minimum, this is a violation of the spirit of NEPA, a statute that CEQ is responsible for implementing. Both DOI and CEQ knew it was a violation. Hence, the urgency in seeking the letter from the President to the Secretary directing him to undertake work to designate the Utah Monument.

The Ends Justify The Means:
NEPA, A Law of Convenience For The Clinton-Gore Campaign

No Presidential written direction to the Secretary of DOI emerged until August 7, 1996, and by then, the first planned announcement was only ten days away. Still, no one from state or local government, or the Utah Congressional delegation had been consulted. These actions, in the absence of written direction from the President, make a mockery of what CEQ Chair Kathleen McGinty testified was the overriding purpose behind NEPA:

“It provides the federal government an opportunity for collaborative decision-making with state and local governments and the public.”
(September 26 , 1996, Testimony of Kathleen McGinty before the Senate Energy Committee) (Emphasis supplied)

The National Environmental Policy Act created CEQ, and the Council is charged with reviewing and appraising federal activities and determining whether they comply with the requirements and policies of the Act. (See, National Environmental Policy Act, Section 204.) Those requirements include development of environmental impact statements (EIS) or NEPA documents by federal agencies for major federal actions. Nearly all major federal actions--like designating land--require some level of NEPA documentation and process. NEPA environmental impact statements receive public notice, public comment, and public hearings. There was a conscious effort to use the Antiquities Act to avoid these NEPA requirements altogether in the designation of the Utah Monument.

Under the Antiquities Act, at the direction of the President, a monument may be established unilaterally by the President under limited circumstances. Using the Antiquities Act had several benefits to the Clinton-Gore Administration: (1) it is not necessary to work with Congress; (2) it is not necessary to comply with the Administrative Procedures Act's requirements to provide public notice or opportunity to be heard; and (3) it is not necessary to comply with NEPA requirements to involve the public or establish an administrative record on environmental impacts.

In short, the Antiquities Act was used to override the chance that the views of the people of Utah--and most importantly, elected Members of the Utah delegation--would influence the Utah Monument decision. In fact, the documents demonstrate that evading NEPA was a major internal rationale for using the Antiquities Act. This is a striking example of

how the Clinton-Gore Administration manipulated the law to the advantage of the Clinton-Gore campaign for purposes of a “Utah event”—an event that might make the insatiable desires of the environmentalist constituency happy for a moment. Alarming, the chief architects of the endeavor to evade NEPA were in the leadership of CEQ—the entity charged with overseeing NEPA. A draft memo dated July 25, 1996, from CEQ Chair Kathleen McGinty to the President revealed that use of the Act was a means to avoid NEPA:

“Ordinarily, if the (Interior) Secretary were on his own initiative to send you a recommendation for establishment of a monument, **he would most likely be required to comply with NEPA and certain federal land management laws in advance of submitting his recommendation.** But, because he is responding to your request for information, he is not required to analyze the information or recommendations under NEPA or other laws. And, because Presidential actions are not subject to NEPA, you are empowered to establish monuments under the Antiquities Act without NEPA review.” (Emphasis supplied)

Although this revealing paragraph was edited out of the final memo, it is alarmingly hypocritical that CEQ, the agency created by NEPA and charged with seeing that it is complied with, was clearly advising the President how to evade NEPA. The same July 25, 1996, draft, written by CEQ staffer Thomas Jensen, makes it clear, however, that this was the secret goal. Contrast this with the lofty public pronouncements from high-ranking CEQ officials about the importance that other government entities comply with NEPA:

“The lack of attention to NEPA’s policies speaks to the tendency of our society to devalue those provisions of law that are not enforceable through the judicial system. One answer to the common complaint that we live in an overly litigious society is for individuals and agencies to **take seriously such provisions as the national environmental policy set forth in section 101 of NEPA.** Absent such a trend, interested individuals will naturally be skeptical of approaches that are not amendable to a legal remedy.” Dinah Bear, General Counsel, CEQ, “The National Environmental Policy Act: its Origins and Evolutions,” Natural Resources and Environment, Vol. 10, No. 2 (Fall, 1995). (Emphasis supplied)

Contrast this with the testimony of CEQ Chair Kathleen McGinty to the Senate Energy and Natural Resources Committee within days of the designation (September 26, 1996):

“In many ways, NEPA anticipated today’s call for **enhanced local involvement and responsibility, sustainable development and government accountability.** By **bringing the public into the agency decision-making process,** NEPA is like no other statute and is an extraordinary tribute to the ability of the American people to build upon shared values . . .”

“[NEPA] gives greater voice to communities. It provides the federal government an

opportunity for collaborative decision-making with state and local governments and the public. . . . It should and in many cases does improve federal decision-making. . . .

“As directed by NEPA, CEQ is responsible for overseeing implementation of the environmental impact assessment process. . . .” (Emphasis supplied)

Either NEPA is an important statute worthy of implementation, as CEQ Chair McGinty states, or it is not. Either public, state, and local involvement is important, as CEQ Chair McGinty states, or it is not. Apparently, in the case of the Utah Monument designation, it was not important enough to implement NEPA because the end apparently justified the means.

What was important was selective application of NEPA for the convenience of the Clinton-Gore re-election effort. **One of two conclusions exist as to why NEPA was not applied to the Utah Monument designation as it would “ordinarily” be applied (the words used by Ms. McGinty). The first possible conclusion is that the Utah Monument designation would not pass muster under NEPA. The second possible conclusion is that NEPA would not allow a decision before the 1996 Presidential election, and the designation was needed for the campaign. Otherwise, why not allow NEPA to “bless” the Utah Monument?**

Further, it is obvious from the documents that the Administration, in its zeal to use the Antiquities Act in an attempt to shield the Utah land grab from APA and NEPA, did not fully comply with the statutory requirements to justify using the Antiquities Act--namely that the President initiate the designation process. Ms. McGinty clarifies this point in a July 29, 1996, e-mail to Todd Stern of CEQ:

“the president will do the utah event on aug 17. however, we still need to get the letter (from the President to Interior Secretary Bruce Babbitt) signed asap. the reason: under the antiquities act, we need to build a credible record that will withstand legal challenge that: (1) the president asked the secretary to look into these lands to see if they are of important scientific, cultural, or historic value; (2) the secy undertook that review and presented the results to the president; (3) the president found the review compelling and therefore exercised his authority under the antiquities act. presidential actions under this act have always been challenged. they have never been struck down, however. so, letter needs to be signed asap so that secy has what looks like a credible amount of time to do his investigation of the matter. we have opened the letter with a sentence that gives us some more room by making it clear that the president and babbitt had discussed this some time ago.” (Emphasis supplied)

This e-mail clarifies the following points: (1) by July 29, 1996, not only had the decision to make the designation been made by the White House, the staff had already agreed to an announcement event (the date was eventually postponed) and (2) although this decision had already been made, a fake paper trail had to be carefully crafted to make it appear as if the President had asked the

Secretary to look into the matter and initiate the staff work. By that time, however, the staff work was already apparently underway. This is an alarming breach of responsibility at the top levels of DOI and CEQ.

In fact, CEQ's Tom Jensen, in a frantic July 23, 1996, e-mail, asks fellow CEQ staffer Peter Umhofer to help create the fake paper trail:

"Peter, I need your help. The following text needs to be transformed into a signed POTUS (President of the United States) letter ASAP. The letter does not need to be sent, it could be held in an appropriate office (Katie's? [McGinty's] Todd Sterns?) but it must be prepared and signed ASAP. You should discuss the processing of the letter with Katie, given its sensitivity." (Emphasis supplied)

The e-mail spells out the CEQ plan to create the letter to the Secretary and store it in its own White House files--never even really sending it to the Secretary--creating the false appearance that the President's letter had predated and prompted the staff work on Escalante. All the while, work on the monument designation was already underway within DOI to draw the necessary Antiquities Act papers to make the secretly planned designation. Without such a letter, the White House would have had to comply with NEPA just like the rest of America.

Campaign Style "Event" For A Campaign-Motivated Decision That Violates The Intent of the Antiquities Act

The documents show that the White House abused its discretion in nearly every stage of the process of designating the Grand Staircase-Escalante National Monument. It was a staff-driven effort, first to short-circuit a Congressional wilderness proposal, and then to help the Clinton-Gore re-election campaign. The lands to be set aside, by the staff's own descriptions, were not threatened--and hence did not qualify for protection as a National Monument.

The decision was withheld from any public scrutiny or Congressional oversight--and Members of the Utah Congressional delegation were deceived as to its impending status until well after the decision had been made, and the campaign-style announcement event was only days away. The administrative and environmental hurdles that would normally accompany such an action were evaded by contorting a turn-of-the-century statute designed to protect Indian artifacts into a 1.7-million-acre land grab. And finally, to justify use of this Act, and evasion of the requirements of NEPA--the CEQ's own enabling statute--the administrative record was toyed with to create the false impression that the President had requested the staff work before it had been conducted.

Indeed, a careful review of the Act and historic Presidential use of the Antiquities Act clarifies that the President's use of the Act was an abuse of discretion. The Antiquities Act of 1906 is an obscure Act that pre-dated the regulatory reforms that require public notice, analysis of

environmental and economic impacts, and an opportunity for interested parties to be heard. Until Clinton used it in the 1996 Utah land grab, the Act had languished unused for nearly two decades.

The Act is designed to help protect architecturally and anthropologically unique artifacts from acquisition or destruction. It has primarily been used to protect antique artifacts, historic buildings, and relatively small parcels of rare geologic formations. It was emphatically not designed to be used to set aside massive chunks of western states. When the Act was created by Congress, the West was still being settled. Congress wanted to prevent valuable historic and geologic artifacts from being destroyed or carried off. The Act was necessary, according to the 1906 bill report, "in view of the fact that the 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 and for the use of museums and colleges, etc." Nowhere was a 1.7-million-acre land grab mentioned or contemplated. Nowhere in the subpoenaed documents obtained were there serious allegations of the 1.7 million acres being "threatened" in any way.

Indeed, the House debate over the bill records that, even nearly a century ago, western Members were concerned that the powers of this Act not be used to grab up huge quantities of land. One such Member, Mr. Stephens of Texas, only agreed not to object to consideration of the bill after being assured by the bill's proponent, Mr. Lacey, that such an outcome was not possible under the act, whose major focus was Indian artifacts:

Mr. LACEY. There has been an effort made to have national parks in some of these regions, but this will merely make small reservations where the objects are of sufficient interest to preserve them.

Mr. STEPHENS of Texas. Will that take this land off the market, or can they still be settled on as part of the public domain?

Mr. LACEY. It will take that portion of the reservation out of the market. It is meant to cover the cave dwellers and cliff dwellers.

Mr. STEPHENS of Texas. How much land will be taken off the market in the Western States by the passage of this bill?

Mr. LACEY. Not very much. The bill provides that it shall be the smallest area necessary [sic] for the care and maintenance of the objects to be preserved.

Mr. STEPHENS of Texas. Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?

Mr. LACEY. Certainly not. The object is entirely different. It is to preserve these old objects of special interest in the Southwest, whilst the other reserves the forests and the water courses.

Mr. STEPHENS of Texas. I will say that that bill was abused. I know of one place where in 5 miles square you could not get a cord of wood, and they call it a forest, and by such means they have locked up a very large area in this country.

Mr. LACEY. The next bill I desire to call up is a bill . . . which permits the opening up of specified tracts of agricultural lands where they can be used, by

which the very evil that my friend is protesting against can be remedied. . . .
Mr. STEPHENS of Texas. I hope the gentleman will succeed in passing that bill, and this bill will not result in locking up other lands. I have no objection to its consideration.

(40 Cong. Rec. H7888, June 5, 1906)

So why take an old, obscure law designed to protect cliff dwellings or historic relics and manipulate it into a 1.7-million-acre land grab? The answer is clear from the attached documents: the ends (the political gain amongst environmental groups) justified the means (violating the purpose and intent of the Antiquities Act and NEPA to lock up the land).

The Clinton-Gore Administration's abuse of the Antiquities Act meant (1) it was not necessary to work with Congress and elected leaders from Utah; (2) it was not necessary to comply with the Administrative Procedures Act's requirements to provide public notice or opportunity to be heard; and (3) it was not necessary to comply NEPA's requirements of establishing an administrative record on environmental impacts.

The early e-mail traffic indicated a concern with establishing a paper trail from the President to the Secretary. As early as March 21, 1996, e-mail traffic between Linda Lance (Office of the Vice President) and Kathleen McGinty and others comment on several drafts of a letter that was to come from the President to Secretary Babbitt requesting information on lands in Utah eligible for monument designation. Solicitor Leshy was informed of the importance of past practice on this important legal point.

"As I recall, the advice we have given over the last couple of decades is that, in order to minimize NEPA problems on Antiquities Act work, it is preferable to have a letter from the President to the Secretary asking him for his recommendations. Here are my questions: . . .

5. If the President signs a proclamation, and a lawsuit is then brought challenging lack of Secretarial NEPA compliance, could a court set aside the proclamation; i.e.' what is the appropriate relief?

Please give me your . . . reactions by return e-mail, and keep this close."

(April 24, 1996, e-mail from Sam Kalen to John Leshy and others)

Even earlier, on March 20, 1996, Kathleen McGinty evinced concern that the paper trail needed to be created as quickly as possible to justify Interior's actions under the Antiquities Act:

"attached is a letter to babbitt as we discussed yesterday that makes clear that the utah monument action is one generated by the executive office of the president, not the agency.

... ideally it should go tomorrow."

(March 20, 1996, e-mail from Kathleen McGinty to Tom Jensen)

The lack of a Presidential letter making the request is critical. The NEPA requirements for notice, comment, and public process safeguards would ordinarily apply to a major federal action designating lands that were initiated outside of the Antiquities Act process. CEQ staff apparently knew this approximately six months before the actual decision that a record needed to be established with a request from the President to Secretary Babbitt. Time was of the essence, at least in the early part of 1996, before legislative activity on the Utah wilderness bill ended.

The record is clear that from start to finish, this was an abuse of Presidential discretion, designed to gain political advantage at the expense of the people of Utah--all the while keeping the decision behind closed doors for as long as possible.

Highlights of Select Utah Monument Records:
A Glimpse Of The Abuse Of Trust And Discretion

As early as August 3, 1995, the Department of the Interior discussed the use of the Antiquities Act to withdraw land for the Utah Monument. In a memo to "Raynor" and "Baum," from "Dave" (all within the DOI Solicitor's Office) discussed the legal risks involved with DOI studying lands for national monument status. He noted that:

"To the extent the Secretary [of the Interior] proposes a national monument, NEPA applies. However, monuments proposed by the president do not require NEPA compliance because NEPA does not cover presidential actions. To the extent that the president directs that a proclamation be drafted and an area withdrawn as a monument, he may direct the Secretary of the Interior to be part of the president's staff and to undertake and complete all the administrative support. This Interior work falls under the presidential umbrella." (Emphasis supplied)

This realization--that the administrative record must make it look like the idea came from the President, and not from an agency, in order to avoid NEPA compliance--is a dominant theme manifested throughout the documents. The idea was to create the false impression that this was an idea that came from the President, instead of from the Department of the Interior.

In a March 19, 1996, e-mail from Linda Lance (CEQ director for Land Management) to Tom Jensen (CEQ) and other CEQ staff, Ms. Lance states:

"attached is a letter to babbitt as we discussed yesterday that makes clear that the utah monument action is one generated by the executive office of the president, not the agency."

This letter was never signed until August 7, 1996, and indeed may never have been sent.³ *This is significant because it demonstrates an effort--beginning with DOI in 1995--to construct an Antiquities Act rationale to circumvent NEPA. All the while, meetings and work on the monument designation are proceeding within and between DOI, CEQ, and Department of Justice.*

A draft letter from Kathleen McGinty on behalf of the President to Babbitt also makes it very clear that one early motivation behind the monument idea was to circumvent Congress's authority over wilderness designations, and specifically to control the Utah wilderness debate. The draft says:

"As you know, the Congress currently is considering legislation that would remove significant portions of public lands in Utah from their current protection as wilderness study areas. . . . Therefore, on behalf of the President I/we are requesting your opinion on what, if any, actions the Administration can and should take to protect Utah lands that are currently managed to protect wilderness eligibility, but that **could be made unsuitable for future wilderness designation if opened for development by Congress.** . . . The President particularly seeks your advice on the suitability of such lands for designation as national monuments under the Antiquities Act of 1906." (Emphasis supplied) (March 19, 1996 e-mail from Linda Lance (CEQ director for Land Management) to Tom Jensen (CEQ) and other CEQ staff.)

This blatant disregard for Congressional authority over public lands is further evidence that staff was attempting to construct a path around NEPA and Congress.

On March 21, 1996, Linda Lance wrote another e-mail message to Kathleen McGinty responding to comments Ms. McGinty had made about the draft letter. She commented:

"I completely agree that this can't be pitched as our answer to their Utah bill. But I'm having trouble deciding where we go from here. If we de-link from Utah but limit our request for info to Utah, why? If we instead request info on all sites that might be covered by the antiquities act, we probably get much more than we're probably ready to act on, **including some that might be more compelling than the Utah parks?** Am I missing something or lacking in creativity? Is there another Utah hook? Whatdya think?" (Emphasis supplied.)

³Whether DOI ever actually received the Clinton letter is at issue because: (1) DOI was asked to provide all Utah Monument documents to the Committee, but never supplied the August 7, 1996, copy signed by President Clinton--that version was supplied to the Committee by the White House after the Chairman was authorized on September 25, 1997 to subpoena Utah Monument documents; and (2) this strategy--to create the letter as a paper trail but never send it--was discussed in White House e-mail traffic.

This communication makes two things clear. First, in addition to helping the Clinton-Gore campaign, the purpose of the monument was to circumvent Congressional control over Utah lands. This was a direct response to proposed Utah wilderness legislation. Second, CEQ staff concluded that they had to come up with a facade, "another Utah hook", so their real motivations weren't exposed.

This e-mail message evinces CEQ knowledge that other lands were much better suited to monument designation. In fact, the next day--March 22, 1996--Linda Lance sent another e-mail to TJ Glauthier at OMB and Kathleen McGinty at CEQ that expounded on this problem. She stated that the real problem with drafting a request letter that singled out Utah lands was:

"the political consequences of designating these lands as monuments when they're not threatened with losing wilderness status, and they're probably not the areas of the country most in need of this designation." (Emphasis supplied)

She concluded the e-mail message by prophetically questioning whether:

"the bad guys [will]. . . have the chance to suggest that this administration could use this authority all the time all over the country, and start to argue that the discretion is too broad?" (Emphasis supplied)

It is interesting to note that the Administration staff foresaw the kind of uproar the Utah Monument would cause. Ms. Lance recognized first, that people would see this as a blatant abuse of Presidential authority, and second that there may be cause to narrow the President's discretion under the Act. This process is currently underway with the successful passage in the House of the National Monument Fairness Act of 1997. Other amendments to the Antiquities Act and NEPA are currently under consideration by Members of the House Committee on Resources.

On March 25, 1996, Kathleen McGinty stated that she agreed with these doubts about the Utah Monument. In fact she was so convinced that the lands in question weren't in any real danger that she was ready to drop the whole project. She noted in an e-mail message to TJ Glauthier at OMB and Linda Lance at CEQ that:

"i'm increasingly of the view that we should just drop these utah ideas. we do not really know how the enviros will react and I do think there is a danger of "abuse" of the withdraw/antiquities authorities especially because these lands are not really endangered." (Emphasis supplied)

A March 27, 1996, e-mail from Linda Lance at CEQ to Robert Vandermark at CEQ shows that DOI was trying to push the monument designation despite the lack of endangered lands. Lance stated:

"since i and i think others were persuaded at yesterday's meeting w/ interior that we shouldn't write off the canyonlands and arches monuments just yet, here's another try at a draft letter to Babbitt to get this process started." (Emphasis supplied)

It is clear that DOI was still advocating the monument despite the fact that CEQ was ready to drop the project. Even the DOI Solicitor's Office concluded that case law requires full compliance with NEPA's requirements when national monument proposals come out of DOI.

At this point the monument idea had been tailored to respond to the Utah wilderness bills in Congress. The areas in question were centered around Arches National Park and Canyonlands National Park--areas that were in no danger of losing protection. At this point no mention had been made about the Kaiparowits Plateau or saving the West from Andalex Coal mining.

The Kaiparowits Plateau was first mentioned by Tom Jensen at CEQ in an e-mail to Linda Lance, T. Glauthier (OMB) and Kathleen McGinty on March 27, 1996. He stated that in the latest version of the proposed Clinton letter to Babbitt, he had added a reference to Glen Canyon National Recreation Area

"because KM [probably Kathleen McGinty] and others may want to rope in the Kaiparowits and Escalante Canyons regions if this package ultimately doesn't seem adequate to the President's overall purpose."

By "rop[ing] in the Kaiparowits," the Administration would effectively quash the Andalex Coal Mine--in spite of the fact that the NEPA process (already under way) was incomplete for the mine. Until that process was completed, it would be impossible to know whether the mine would have any negative impact on the environment. Unconcerned with the ultimate conclusion of these environmental impact studies, the Administration wanted Kaiparowits included so they could claim that there were some "endangered" lands to be "protected" by the monument.

It is worth noting that the Chairman and Subcommittee Chairman have requested the draft Andalex Coal mine EIS five times since March 1997 for purposes of committee oversight and legislative needs, but the Secretary has failed to provide the record as requested.

By April 1996, DOI was starting to get frantic about the idea that they were in violation of NEPA by continuing to go forward on the national monument idea without prior Presidential direction. In an April 25, 1996, e-mail, Sam Kalen of the DOI Solicitor's office noted this concern to Solicitor John Leshy and colleagues Dave Watts and Robert Baum:

"As I recall, the advice we have given over the last couple of decades is that, in order to minimize NEPA problems on Antiquities Act work, it is preferable to have a letter from the President to the Secretary asking him for his

recommendations." (Emphasis supplied)

As late as July 23, 1996, CEQ was still trying to get Bill Clinton to sign a letter to send to Babbitt. In an e-mail from Tom Jensen (CEQ) to Peter Umhofer at the White House, Mr Jensen begged:

"I need your help. The following needs to be transformed into a signed POTUS letter ASAP. The letter does not need to be sent, it could be held in an appropriate office . . . but it must be prepared and signed ASAP." (Emphasis supplied)

On July 25, 1996, Kathleen McGinty sent a memo to the President with an attached, suggested letter to Babbitt. This is also the first time, as far as we can tell from the documents, that CEQ mentions the Andalex coal mine as an excuse for the national monument.

By this time it is obvious that Interior had been working on the Utah Monument for quite some time. In fact, three days later, on July 26, 1996, John Leshy sent a letter to University of Colorado law professor Charles Wilkinson asking him to draw up the actual proclamation. Included with the letter was a package of materials that Interior had put together on their monument proposal. Note that at this same time CEQ was still frantically trying to get the President to agree to send Babbitt a request to start looking at the lands in question. However, the DOI work was already underway. In this case, things were being done in exactly the reverse order.

On July 29, 1996, Kathleen McGinty sent an e-mail to Todd Stern at the White House pleading for the President to sign something. She noted that the

"letter needs to be signed asap so that [the] secy has what looks like a credible amount of time to do his investigation of the matter." (Emphasis supplied)

The President finally signed the letter authorizing DOI to **begin** its work on August 7, 1996, but it seems that the final decision to create a Grand Staircase-Escalante National Monument had already been made--by someone--on or before July 29, 1996, as evidenced by the July 29 e-mail from Kathleen McGinty to Todd Stern:

"The President will do the Utah event on Aug 17."

The documents show, however, that for some reason, the White House decided not to go ahead with the August 17 announcement date. On August 5, 1996, Kathleen McGinty sent a memo to Marcia Hale at the White House telling her that Leon Panetta wanted them to call several western Democrats to get their reactions to a possible monument proclamation. She noted that "[t]he reactions to these calls, and other factors, will help determine whether the proposed action occur." She also emphasized that the whole thing should be kept secret, noting that "any public release of the information would probably foreclose the President's option to

proceed." It seems that at this point, the focus had shifted from pre-empting Congressional authority over Utah wilderness to creating a Presidential campaign event. The announcement had to be postponed until Democratic politicians could be consulted.

On August 14, 1996, Kathleen McGinty sent the President a memo outlining the possible places to have the photo-op announcement event. The three options discussed were (1) an oval office setting; (2) on the Utah lands themselves; or (3) at Jackson Hole, Wyoming. Ms. McGinty noted that Secretary Babbitt thought that the Utah option would be the most "confrontational" or "in-your-face" event. Ms. McGinty commented that she thought that all three options sounded good to her. Since the event was designed to be an election year photo-op, the Arizona setting became the choice.

In this memo Ms. McGinty reveals the real purpose of the monument:

"The political purpose of the Utah event is to show distinctly your willingness to use the office of the President to protect the environment. In contrast to the Yellowstone ceremony, this would not be a "feel-good" event. You would not merely be rebuffing someone else's bad idea, you would be placing your own stamp, sending your own message. It is our considered assessment that an action of this type and scale would help to overcome the negative views toward the Administration created by the timber rider. Designation of the new monument would create a compelling reason for persons who are now disaffected to come around and enthusiastically support the Administration."
(Emphasis supplied)

She also underscored the potential political benefits in key western states, as confirmed by the non-Utah Democratic politicians who had been consulted:

"In addition, the new monument will have particular appeal in those areas that contribute the most visitation to the parks and public lands of southern Utah, namely, coastal California, Oregon and Washington, southern Nevada, the Front Range communities of Colorado, the Taos-Albuquerque corridor, and the Phoenix-Tucson area. This assessment squares with the positive reactions by Sen. Reid, Gov. Romer, and Rep. Richardson when asked their views on the proposal."

Finally, she added that the Administration really didn't have anything to lose, as far as votes are concerned:

"Opposition to the designation will come from some of the same parties who have generally opposed the Administration's natural resource and environmental policies and who, in candor, are unlikely to support the Administration under any circumstances." (Emphasis supplied)

The situation was painted as a no-lose political situation. Translation: The monument designation will help solidify Clinton's electoral base--while those who will object to the monument, as in Utah, will oppose Clinton's re-election anyway. They did not matter.

The event was postponed further. On August 23, 1996, Kathleen McGinty wrote another memo to the President begging him to act on the monument soon. She stated, **"in any event, we need to decide this soon, or I fear, press leaks will decide it for us."**

The leak finally occurred. In a September 6, 1996, memo from Kathleen McGinty to the President, she informed him that **"the Washington Post is going to run a story this weekend reporting that the Administration is considering a national monument designation."** She also told him that "we are working with Don Baer and others to scope out sites and dates that might work for an announcement on this issue."

After the September 7, 1996, Washington Post article, Senator Bennett wrote to Secretary Babbitt requesting the Administration not to take such a drastic step without time for significant public input. Secretary Babbitt responded on September 13--**just five days before the event announcing the Utah Monument**--telling him that nothing was imminent and that no decisions had yet been made.

It is important to note that two days earlier, on September 11, 1996, Tom Kenworthy, a Washington Post reporter, had confirmed the whole story--including the date, time, and exact location of the announcement event at the Grand Canyon. In a September 11 e-mail to Brian Johnson, CEQ's press spokesman, Kenworthy confirmed he had all the information he needed: "south rim of the grand canyon, sept 18--be there or be square." **While the Utah Monument designation was being concealed from the entire Utah Congressional delegation, it had already been revealed to the Washington press.** This strategy worked to the Administration's advantage by encouraging press interest in the event, while effectively eliminating the possibility of Congress stepping in to stop the proposed action.

On September 18, 1996, President Clinton, standing on the South Rim of the Grand Canyon, with nature's splendor as his backdrop, finally got his photo-op. He told the nation that he was following in Teddy Roosevelt's footsteps, and that he was saving the environment from Dutch coal companies. It worked just like the Administration predicted. Bill Clinton locked up the environmental votes in the West and carried key western states like California, Arizona, and Nevada. Of course they lost Utah, but as Kathleen McGinty had predicted, Utahns are voters **"who, in candor, are unlikely to support the Administration under any circumstances."**

In the final analysis, the Utah Monument designation was all about politics. To achieve their political ends, the Clinton-Gore Administration contorted a century-old statute and evaded the environmental requirements they foist on others. The Administration took pains to see that no one knew about this decision until the last minute, even to the point of deceiving the entire Utah Congressional delegation--all so they could get a political photo-op out of the monument

proclamation, and preclude any Congressional action that might stop the event. It comes as no surprise the announcement event was finally held not in Utah, but across the Grand Canyon in more hospitable Arizona. This was an abuse of discretion under the Antiquities Act and a violation of NEPA by the Clinton-Gore Administration.