

To: Santucci, Vincent[vincent_santucci@nps.gov]
Cc: Fracasso, Mike -FS[mfracasso@fs.fed.us]; Beasley, Barbara A -FS[babeasley@fs.fed.us]; Schumacher, Bruce A -FS[baschumacher@fs.fed.us]
From: Foss, Scott
Sent: 2017-10-31T11:12:35-04:00
Importance: Normal
Subject: Re: HR 3990 - Specific Reference to Fossils
Received: 2017-10-31T11:13:13-04:00
[FR 43069, pp1495-14975-14976, Monday, April 10, 1978 - Definition of Object of Antiquity.pdf](#)

Hello,

I still haven't heard anything on this bill, but I'll let you know if I do. There are other bills of peripheral interest, but none relate directly to paleo.

I did discover this nugget. In response to the

United States vs. Diaz, 1974, case (that found that the phrase "objects of antiquity" was constitutionally vague), the DOI proposed adding a subpart to its departmental rule on the preservation of antiquities (at 43 C.F.R. 3) that would define "objects of antiquity". The proposed amendment was never adopted, but it would have included vertebrate fossils. (attached)

Interesting.

S

Scott E. Foss, PhD
BLM Senior Paleontologist
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On Mon, Oct 16, 2017 at 9:12 AM, Foss, Scott <sfoss@blm.gov> wrote:

We should coordinate if/when we are asked to comment (especially if any of us don't all get asked by our own bureau). I would hate to miss an opportunity to comment on this.

S

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On Fri, Oct 13, 2017 at 7:21 PM, Santucci, Vincent <vincent_santucci@nps.gov> wrote:

Very good suggestion Scott -

When agencies are provided the opportunity to comment on the more complete version of the bill - we can have both BLM and NPS ask for the technical correction to change "fossil" to "paleontological resources."

On Fri, Oct 13, 2017 at 2:44 PM, Foss, Scott <sfoss@blm.gov> wrote:

Mike brings up a good point about the definition of an object of antiquity. The 9th Circuit Court (

United States vs. Diaz, 1974) found that under the Antiquities Act the phrase "objects of antiquity" was constitutionally vague (REFERENCED ON P.17 OF VINCE'S 2006 PAPER). After that decision the BLM shifted to FLPMA as the authority to preserve and manage fossils. Now we have PRPA to serve as that authority.

So I am glad that H.R. 3990 would correct the oversight of defining an object of antiquity. However, the proposed definition of object or objects of antiquity uses the language "*fossils (other than fossil fuels)*". It would be nice to accomplish this by changing the line to "*paleontological resources*". This would put the proposed law in line with PRPA, which already excludes fossil fuels and other economic minerals from the definition of a paleontological resource through the savings provisions at Section 6311.

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On Fri, Oct 13, 2017 at 12:22 PM, Fracasso, Mike -FS <mfracasso@fs.fed.us> wrote:

Thanks for forwarding this Vince. It is somewhat nice to see that the H.B. specifically calls out fossils as objects meriting protections under the Antiquities Act (as long as they don't occur spread out over areas greater than 85,000 acres—apparently no area greater than that is worth designating/protecting, whatever the reason). However, the suggested area restrictions and other conditions related to monument designation are pretty unpalatable imo, and it's difficult to reconcile teasing out for attention only one facet of a proposed act which is otherwise pretty onerous re. the process of designating national monuments. If the bill gains traction we may be able to obtain at least some comfort from the specification of fossils as objects of antiquity by listing. Otherwise...the bill presents pretty meager fare. The presence of fossils certainly doesn't seem to have impacted much discussion on proposals to reduce areas of designated Monuments such as GSENM...

Certainly bears watching, though.

--Mike



Michael Fracasso, PhD
Assistant Director, Geological Resources, Hazards, and Services

Forest Service

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Caring for the land and serving people

From: P. David Polly, SVP [mailto:svp_president@vertpaleo.org]
Sent: Friday, October 13, 2017 10:04 AM
To: Vince Santucci <vincent_santucci@nps.gov>
Cc: Ted Vlamis <tedjv@pioneerballoon.com>; Shimada, Kenshu <KSHIMADA@depaul.edu>; Scott Foss <sfoss@blm.gov>; Greg Liggett <gliggett@blm.gov>; Fracasso, Mike -FS <mfracasso@fs.fed.us>; Breithaupt, Brent <bbreitha@blm.gov>; Philip Gensler <pgensler@blm.gov>; Greg McDonald <greg_mcdonald@nps.gov>; Glenn Storrs <gstorrs@cincymuseum.org>
Subject: Re: HR 3990 - Specific Reference to Fossils

Thank you, Vince. We have already started to watch this bill carefully. I presume paleontological work falls under categories of both science and geology in addition to objects of antiquity?

On 13 Oct 2017, at 11:59 AM, Santucci, Vincent
<vincent_santucci@nps.gov<mailto:vincent_santucci@nps.gov>> wrote:

FYI -

HR 3990 draft bill and media attached here. Please note that "fossils" are specifically included in "Objects of Antiquity". This is an important discussion. Attached is an article I published on this topic in 2006 (during the centennial of the Antiquities Act).

NATIONAL MONUMENTS
Antiquities Act revision advances

Jennifer Yachnin<https://www.eenews.net/staff/Jennifer_Yachnin>, E&E News reporter
Published: Thursday, October 12, 2017

The House Natural Resources Committee last night voted in favor of legislation that would overhaul the Antiquities Act for the first time since its enactment more than a century ago, approving reforms that would sharply reduce the size of future monuments and create a formal process for reductions.

Lawmakers passed the measure sponsored by Chairman Rob Bishop (R-Utah) on a party-line vote, 23 to 17.

"The only path to transparency and to accountability that we all claim to be seeking, no matter which party controls the White House, is to amend the act itself," Bishop said in his opening remarks.

The Utah lawmaker's legislation, H.R. 3990<https://www.eenews.net/assets/2017/10/10/document_daily_04.pdf>, the "National Monument Creation and Protection Act," would limit the size of new monuments to a maximum of 85,000 acres and require approval from local and state lawmakers and governors, as well as review under the National Environmental Policy Act.

The measure, also known as the "CAP Act," would also limit designations to protect areas with relics, cultural artifacts and fossils, while eliminating the inclusion of "vast landscape domains."

As the law stands now, a president may designate existing public lands as a monument to protect areas of cultural, scientific or historical value, without any restrictions on acreage.

During the committee's markup, Bishop noted the legislation would refocus the law on its original intent of protecting man-made relics, and that requirements for NEPA review and state or local input would provide a formal decisionmaking process for new monuments.

"It establishes a process to get information before the designation, not afterward," Bishop said. He criticized unspecified monuments created in recent years as designations made "not on scientific or archaeological" basis "but for political purposes."

Bishop has been a longtime critic of the Antiquities Act, specifically with sites in his home state including the Bears Ears National Monument created by President Obama in late 2016 and the Grand Staircase-Escalante National Monument created by President Clinton in 1996.

Arizona Rep. Raúl Grijalva, the committee's top Democrat, slammed Bishop's proposal, which he said "essentially destroys the Antiquities Act."

"We need additional national monuments, not fewer. Our national monuments should be larger, not smaller," he later added.

Democratic lawmakers and conservation groups also criticized Bishop's bill ahead of the hearing, arguing its passage would lead to fewer national parks in the future.

About one-third of national monuments created under the Antiquities Act have been converted to national parks, historic parks or sites, national preserves, or other properties controlled by the National Park Service, according to data provided by the Wilderness Society.

But Bishop rebutted those claims as "misinformation" intended to create opposition to his legislation. "With all due respect, Trump Tower could not be made a national monument because that's private property," Bishop noted wryly.

He later added: "The idea that Grand Canyon or Zion National Park would never have been created without this is misinformation. Those are national parks that can only be made by Congress. The idea that this stops the process is simply one of those things you throw out there that is a nice argument, but it's not a real argument."

Democrats did praise provisions in Bishop's bill that would prohibit presidents from reducing a monument by more than 85,000 without agreement of local and state officials.

Opponents have argued presidents do not have authority to reduce monuments under the Antiquities Act and have vowed to challenge the Trump administration in court if it attempts to do so.

Although presidents have previously reduced the size of some monuments, none of those cases has ever been tested in federal court. President Kennedy was the last to do so when he modified the Bandelier National Monument in New Mexico.

"There is something good about this bill," said Virginia Rep. Don McEachin (D). "And that is that it points out that the president has no authority to unilaterally shrink or redesignate a national monument under current law. This admission is useful because the president may soon try to invoke that nonexistent power to the lasting detriment of our country."

Earlier in the day Bishop said that such interpretations are incorrect, stating the bill does not create a "new power" but defines one that already exists (E&E News PM<<https://www.eenews.net/eenewspm/stories/1060063371>>, Oct. 11).

Democratic resolution

During the meeting, lawmakers also voted on a resolution of inquiry sponsored by Grijalva that aimed to force the Trump administration to disclose the details of its recent review of more than two dozen national monuments.

In a private report to President Trump in late August, which leaked to the media last month, Interior Secretary Ryan Zinke recommended reducing the boundaries of six monuments and altering the management plans of a handful more (Greenwire<<https://www.eenews.net/stories/1060060979>>, Sept. 18).

Neither the White House nor the Interior Department has commented on that report, which has

not been finalized. Noting the Trump administration conducted an "extensive review," Grijalva said Democrats were attempting to force a formal disclosure of the recommendations.

"We would like to read that report," he said. "We would like to see the information that was gathered during the review process so we can make informed decisions regarding the value of the report."

The committee voted along party lines, 23-17, to report the resolution unfavorably to the House, effectively killing the measure.

Reporter Kellie Lunney contributed.

<https://www.eenews.net/eedaily/2017/10/12/stories/1060063399>

Here is the specific language which identifies "fossils" as "Objects of Antiquity":

“(3) OBJECT OR OBJECTS OF ANTIQUITY.—
“(A) The term ‘object or objects of antiquity’ means—
“(i) relics;
“(ii) artifacts;
“(iii) human or animal skeletal remains;
“(iv) fossils (other than fossil fuels); and
“(v) certain buildings constructed before the date of the enactment of this subsection.
“(B) The term ‘object or objects of antiquity’ does not include—
“(i) natural geographic features; and
“(ii) objects not made by humans, except fossils (other than fossil fuels) or human or animal skeletal remains.’”.

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Celebrate National Fossil Day - October 11, 2017

<http://nature.nps.gov/geology/nationalfossilday/>

<H.R. 3990 NM Creation and Protection Act.pdf><SANTUCCI 2006 - RANGER - FOSSILS, OBJECTS OF ANTIQUITY.pdf>

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PROPOSED RULES

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devices the Company intends to use to obtain the information required by subparagraph B. of this paragraph.

4. Within thirty (30) days of approval by EPA of the monitoring and information gathering system proposed under subparagraph A.3 of this paragraph, the Company shall implement such system as may be modified by the Director, Air and Hazardous Materials Division, EPA Region III in his approval.

5. Within sixty (60) days of commencing the use of coal in the Company's boiler number eight (8), the Company shall perform source testing for particulate emissions using EPA method five (5) as specified in appendix A of part 60, title 40 of the Code of Federal Regulations, as amended. The Company shall perform such tests in a manner approved in writing by EPA Region III and shall provide to the EPA Region III Regional Energy Coordinator a minimum of fifteen (15) days written notice prior to conducting such tests. The Company shall provide to said Regional Energy Coordinator a complete report containing all information pertinent to the performance and results of said stack tests within thirty (30) days of completing such tests.

6. Within sixty (60) days of installation of the continuous capacity monitor required under subparagraph B.1. of this paragraph, the Company shall conduct a Performance Specification Test (PST) in accordance with Performance Specification 1, appendix B of part 60, title 40 of the Code of Federal Regulations. The Company shall notify the Regional Energy Coordinator, EPA Region III, of the date on which the PST will be conducted at least thirty (30) days prior to such date.

7. Within forty-five (45) days of the PST required under subparagraph A.6. of this paragraph, the Company shall submit a complete report containing all information pertinent to the PST to the Regional Energy Coordinator, EPA Region III.

B. Recordkeeping and reporting. 1. The Company shall keep monthly records both of air quality monitoring data and of air pollutant emissions, of which records the Company shall submit copies to the EPA Region III Regional Energy Coordinator within fifteen (15) days of the end of each calendar month. Said air pollutant emission records shall detail daily emission for all combustion units of the company and shall at a minimum, include:

(a) For each steam generating unit, a breakdown of the fuel consumed each day of the preceding month;

(b) For each steam generating unit, an analysis of the fuel consumed each week to include sulfur content, ash content, and high heating value; and

(c) For the stacks serving boiler numbers eight (8) only, a record of the hourly measurement of opacity, acquired by means of a continuous opacity monitoring device. Such device shall be installed, calibrated, and maintained in accordance with Performance Specification 1. of appendix B, part 60, title 40 of the Code of Federal Regulations.

2. If, for any reason, the Company does not comply or will be unable to comply with the requirements of this order, the Company shall provide in writing to the Director, Air and Hazardous Materials Division, EPA Region III, within five (5) days of becoming aware of such situation:

(a) A description of the violation and its cause; and

(b) The period during which noncompliance has occurred and/or is expected to

occur, and the steps taken to reduce, eliminate and prevent recurrence of the violation.

3. If the air quality monitoring data collected by the Company pursuant to section A of this paragraph indicates that the National Primary Ambient Air Quality Standards for particulates are being exceeded in the area, the Company shall notify the Director, Air and Hazardous Materials Division, EPA Region III of such occurrence by telephone or letter or other means, within seventy-two (72) hours of the collection of such data.

4. The requirement of subparagraph three (3) hereinabove shall apply with respect to monitoring data and the National Ambient Air Quality Standards for Sulfur Dioxide, if such monitoring requirements are imposed pursuant to section A. of this paragraph.

VII. Nothing herein shall affect the responsibility of Chesapeake Corp. to comply with State, local, or other Federal regulations.

VIII. Chesapeake Corp. is hereby notified that its failure to achieve final compliance at its boiler number eight (8) with the applicable particulate emission regulations of the Virginia SIP by June 30, 1980, or such other date as may be specified in a second order pursuant to subsection 113(d) of the Act, if issued, may result in a requirement to pay a noncompliance penalty under section 120 of the Act. Such requirement may be imposed at an earlier date, which is subsequent to July 1, 1979, as provided by subsection 113(d) and section 120 of the Act, either in the event that this order is terminated as provided in paragraph IX, below, or in the event that any requirement of this order is violated as provided in paragraph X, below. In any event, the Company will be formally notified, pursuant to subsection 120(b)(3) and any regulations promulgated thereunder, of its noncompliance.

IX. This order shall be terminated in accordance with subsection 113(d)(8) of the Act if the Administrator or his delegatee determines, on the record, after notice and hearing, that an inability of the Company to comply with Rules EX-2 and EX-3, Part IV of the Virginia Regulations for the Control and Abatement of Air Pollution, as approved by EPA, no longer exists with respect to its boiler number eight (8).

X. Violation of any requirement of this order shall result in one or more of the following actions:

A. Enforcement of such requirement pursuant to subsection 113 (a), (b), or (c) of the Act, including possible judicial action for an injunction and/or penalties and in appropriate cases, criminal prosecution.

B. Revocation of this order, after notice and opportunity for a public hearing, and subsequent enforcement of the Virginia SIP in accordance with the preceding paragraph.

C. If such violation occurs on or after July 1, 1979, notice of noncompliance and subsequent action pursuant to section 120 of Act.

XI. This order is effective upon promulgation in the FEDERAL REGISTER and after having received concurrence from the Governor of the Commonwealth of Virginia.

Date: _____

*Administrator or Delegatee,
U.S. Environmental Protection
Agency.*

Waiver of Rights to Challenge Order

The Chesapeake Corp., by the duly authorized undersigned, hereby consents to the terms of this order and waives any and all rights under any provision of law to challenge this order.

Date: _____

(Authority: 42 U.S.C. 7413(d).)

Dated: March 13, 1978.

**JACK J. SCHRAMM,
Regional Administrator.**

[FR Doc. 78-9234 Filed 4-7-78; 8:45 am]

[1505-01]

**GENERAL SERVICES
ADMINISTRATION**

National Archives and Records Service

[41 CFR Part 101-11]

RECORDS MANAGEMENT

Micrographs Management

Correction

In FR Doc. 78-7953 appearing at page 12731 in the issue for Monday, March 27, 1978, in §101-11.506-3 (e)(2), in the table which appears on page 12734, the "Background Density" for the classification "Group 5" was omitted and should have read as follows: "1.50-1.80".

[4310-70]

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[43 CFR Part 3]

PRESERVATION OF AMERICAN ANTIQUITIES

Definition of "Object of Antiquity"

AGENCY: Heritage Conservation and Recreation Service.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document is in furtherance of the Department of the Interior's responsibilities in the administration of the American Antiquities Act of 1906, for the preservation and protection of archeological, historic and paleontological resources located on federally owned or controlled lands administered by this Department. Specifically, the Department proposes a definition of the phrase "object of antiquity" as used in the act for the purpose of providing notice to the public of those objects subject to the prohibitions of the Act.

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DATE: Comments must be received on or before May 25, 1978. It is the policy of the Department of the Interior to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comment, suggestions or objections regarding the proposed regulations to the Heritage Conservation and Recreation Service.

ADDRESS: Comments should be submitted to the Director, Heritage Conservation and Recreation Service, Department of the Interior, 1951 Constitution Avenue, Washington, D.C. 20240, Attention: Code 780.

FOR FURTHER INFORMATION CONTACT:

Departmental Consulting Archeologist, Attention: Charles M. McKinney Office of Archeology & Historic Preservation, Heritage Conservation and Recreation Service, Department of the Interior, Telephone Number: 202-523-5454.

SUPPLEMENTAL INFORMATION: The proposed definition of "object of antiquity" is designed to provide understanding as to the objects covered by the American Antiquities Act of 1906, (34 Stat. 225), which provides criminal penalties for the violation of its provisions. To this end, "object of antiquity" is defined by four subsections that attempt to describe, in lay terms, objects that are of archeological, anthropological, paleontological, or historic interest.

This definition is intended to eliminate the infirmities in the act found by the Ninth Circuit Court of Appeals in *United States v. Diaz*, 499 F. 2d 113 (9th Cir. 1974). In that case, the court held that because the act used undefined terms of uncommon usage, it was unconstitutionally vague. Of specific concern to the court was that the Government used not only age, but also the use to which an object was put in determining which objects were protected by the act. This proposed definition addresses both of those problems by providing notice, in lay terms, of what it is to be protected and by making age, and not use, the most significant factor.

Artifacts (or objects made or modified by man for his use) are protected by paragraph (a). The involvement of man in making or modifying the object with a view toward subsequent use is the attribute that makes the object valuable to the fields of archeology and anthropology. While the list in paragraph (a) of types of objects covered is intended to be exemplary, not inclusive, it should give the average person adequate notice of what is meant by the word "artifact."

Skeletal remains are covered by paragraph (b). Bones are generally not artifacts, but are of great importance to archeology and anthropology when

they occur in a cultural context. This point is obvious for human skeletal remains. Faunal (animal) skeletal materials are also important because they often yield human behavioral data of great value to the study of man.

The third paragraph (c) gives land managers the option of protecting any object, natural or man-made, located in or associated with a site of archeological, prehistoric, or historic significance by taking an official action to notify the public that the site is protected. Such notification could occur either by the inclusion of the site on the National Register of Historic Places (constructive notice), or through fencing, discretionary posting, or some other onsite designation (actual notice).

The fourth paragraph (d) provides protection for vertebrate paleontological specimens under the authority of this act other than those specimens located in a cultural context referenced in paragraph (b). This subsection pertains specifically to fossil materials important to the study of vertebrate paleontology.

It should be noted that this definition will apply only to lands administered by the Department of the Interior. Those other Departments to which this act grants regulatory authority, Defense and Agriculture, are considering similar action.

It is hereby determined that the publication of this proposed regulation would not constitute a major Federal action significantly affecting the quality of the human environment and that no environmental impact statement pursuant to section 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. 433(c) is required. For specific proposals requiring the Department of the Interior to carry out its cultural resource management responsibilities under the Antiquities Act, or other historic preservation legislation, compliance with the National Environmental Policy Act will be accomplished on an individual basis.

The following persons participated in the writing of this regulation: Charles M. McKinney, Manager, Federal Antiquities Program, Office of Archeology and Historic Preservation, Department of the Interior, Washington, D.C. and John G. DeKoster, Attorney, Office of the Solicitor, Department of the Interior, Washington, D.C.

NOTE.—The Department of the Interior has determined that this document does not contain a major proposal requiring preparation of an Inflation Impact Statement under Executive Order 11821 and Office of Management and Budget (OMB) Circular A-107.

Dated: March 31, 1978.

ROBERT L. HERBST,
Assistant Secretary for Fish
and
Wildlife and Parks.

Pursuant to the authority of the Secretary of the Interior contained in Section 4 of the American Antiquities Act of 1906, 34 Stat. 225 (16 U.S.C. 432), it is hereby proposed to add § 3.18 to Part 3 of Title 43 of the Code of Federal Regulations, to read as follows:

§ 3.18 Definition.

Object of antiquity as used in the American Antiquities Act of 1906, 34 Stat. 225 (16 U.S.C. 431, 432 and 433) and in this Part, means—

(a) Any artifact that is at least 100 years of age, including but not limited to petroglyphs, pictographs (prehistoric and historic rock art), intaglios, rock alignments, paintings, pottery (ceramics), tools, implements, ornaments, jewelry, coins, fabrics, clothing, containers, ceremonial objects (items of socio-religious or political significance), vessels, ships armaments, vehicles, structures (or remains thereof), and buildings;

(b) When found within a cultural context, any skeletal remains of humans or other vertebrate animals (including fossils), that are at least 100 years of age;

(c) Any object that is at least 100 years of age and is located in or associated with an archeological, historic, or paleontological site, if the site has been physically posted or marked by the land manager as protected, or has been listed in the National Register of Historic Places; or

(d) Any remains of extinct fossil vertebrate species.

NOTE.—The Department is presently considering various alternatives for paleontological specimens as "objects of scientific interest" aside from "objects of antiquity" and for future consideration under the authority of the American Antiquities Act of 1906. Until further notice of either separate protective legislation or administrative actions under the existing statute, vertebrate specimens will continue to receive full protection under the act.

By Departmental administrative decision, invertebrate and paleobotanical specimens have not received protection under the permit authority of this statute in the past. However, should a land managing bureau through documented consultation with the paleontological professional community determine certain species to be rare and endangered, specific localities may be designated and subject to the permit provisions of the Act at the discretion of the Secretary. Such localities would receive protection referenced in subsection (c) above and be subject to conservation measures as directed by the Secretary of the Interior.

[FR Doc. 78-9477 Filed 4-7-78; 8:45 am]