

ARTICLE: Grand Staircase-Escalante National Monument: Preservation or Politics?

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Text

[*57]

I. Introduction

On September 18, 1996, in what Utah Senator Orrin Hatch called the "mother of all land-grabs," ¹ President William Clinton, by proclamation, ² designated 1.7 million acres of federal land ³ in southern Utah as the Grand Staircase-Escalante National Monument. ⁴ The source of authority for this presidential fiat was the Antiquities Act of 1906 ⁵ (Antiquities Act), which empowers a president to designate a national monument without congressional approval.

Although President Clinton's monumental action designated lands located entirely in Utah, the proclamation signing and announcement occurred from the south rim of the Grand Canyon in Arizona. With just forty-eight days until the presidential election, and using the grandeur of the Grand Canyon as a backdrop for this announcement, President Clinton left little doubt as to the political nature of his action in attempting to secure the environmental vote for the upcoming election.

By including the Kaiparowits Plateau within the Grand Staircase-Escalante National Monument, President Clinton effectively precluded development of the nation's largest undeveloped resource of high quality coal (i.e., high BTU and low sulfur)--the Kaiparowits Coal Field. In the 1960s, exploration of the Kaiparowits coal field indicated a vast high quality coal resource. In the 1970s, based upon this exploration, a consortium of electric utilities proposed the Kaiparowits Power Project. ⁶ The threat

¹ Clinton's 'Mother Of All Land Grabs', U.S. News & World Report, Jan. 20, 1997, at 44.

² See Proclamation No. 6920, *61 Fed. Reg. 50,223 (1996)*.

³ See *id.* At the time of its designation the Grand Staircase Escalante National Monument included approximately 176,699 acres of state trust lands in holdings. See Utah Geological Survey, A Preliminary Assessment of Energy and Mineral Resources Within the Grand StaircaseEscalante National Monument iii (1997).

⁴ See Proclamation No. 6920, *61 Fed. Reg. 50, 223 (1996)*.

⁵ See *16 U.S.C. § 431* et seq. (1994).

⁶ The consortium consisted of Arizona Public Service Company, San Diego Gas & Electric Company, and Southern California Edison Company. The Kaiparowits Power Project consisted of four underground coal mines producing approximately nine million tons per year, a 3,000 megawatt power plant, and a new community of 14,000 to 15,000 people. See Kaiser Engineers, Kaiparowits Coal Project (Aug. 1976); Governor's Office of Planning and Budget, Andalex Resources and the Proposed Smoky Hollow Mine: a Fiscal Impact Analysis and Economic Overview 18 (1993).

of developing the Kaiparowits Coal Field has fueled a heated debate as environmentalists view such development as threatening the designation of wilderness areas in Southern Utah.

This essay analyzes the process for wilderness designation and the wilderness debate of southern Utah, the Antiquities Act, and the effects of the designation of the Grand Staircase-Escalante National Monument. [*58]

II. Wilderness

A. Background

The government's wilderness preservation movement was created through policies established early in this century by various officials within the Department of Agriculture. Gifford Pinchot, Chief Forester during President Theodore Roosevelt's administration, is often credited as a founding father of the conservation movement.⁷ Under the General Revision Act of 1891⁸ and the Organic Act of 1897,⁹ Pinchot withdrew over 150 million acres from the public domain. This massive withdrawal created the foundation for the present day National Forest System.

In 1924, the District Forester (today called Regional Forester) for Arizona and New Mexico administratively preserved a portion of the Gila National Forest with exceptional wilderness qualities, thus creating the nation's first wilderness area.¹⁰ This was followed in 1926 by the preservation of lands in the Superior National Forest in Minnesota,¹¹ which Congress subsequently permanently withdrew and named the Boundary Waters Canoe Area.¹² These practices resulted in the Secretary of Agriculture promulgating regulations to effectuate the designation of primitive areas in national forests. In 1939, these regulations were replaced by regulations known as the Secretary of Agriculture's U-1 and U-2 regulations, which governed the designation of wilderness and wild areas.¹³ Prior to their repeal by the Wilderness Act of 1964 (Wilderness Act),¹⁴ the U-1 and U-2 regulations empowered the Secretary of Agriculture to designate national forest lands of 100,000 acres or more as wilderness areas.¹⁵ Additionally, the Chief of the Forest Service was authorized to designate national forest lands between 5,000 and 100,000 acres as wild areas.¹⁶

While the designation of wilderness and wild areas ensured the protection and preservation of such areas by prohibiting incompatible activities, the fact that the areas were administratively created left them under administrative control, and [*59] ultimately under the constant threat of being administratively abolished.¹⁷ The seriousness of the threat of abolishment became apparent as persons with different land use philosophies were appointed to administrative positions where they could effectuate changes in administrative policies. This situation left many advocates of wilderness preservation dissatisfied with administratively created wilderness areas, resulting in a strong demand for congressional action to resolve this precarious situation. Prior to World War II, Congress gave little regard to the preservation of public lands.¹⁸ However, as urban growth

⁷ See George C. Coggins et al., *Federal Public Land and Resources Law* 107 20 (3d ed. 1993).

⁸ See 16 U.S.C. § 471 (1994) (repealed by Federal Land Management and Policy Act of 1976 § 704(a) Oct. 21, 1976).

⁹ See id. § 473.

¹⁰ See generally D. Roth, *The Wilderness Movement and the National Forests* (1988).

¹¹ See Charles F. Wheatley, *Public Land Law Review Comm'n, Study of Withdrawals and Reservations of Public Domain Lands* 365 (1969).

¹² See 16 U.S.C. § 577 577(a) (1985).

¹³ See Wheatley, *supra* note 11.

¹⁴ See 16 U.S.C. §§ 1131 36 (1994).

¹⁵ See Wheatley, *supra* note 11.

¹⁶ See id.

¹⁷ See id. at 366.

¹⁸ See Coggins et al., *supra* note 7, at 1013.

resulted in rapid development of lands and the luxury of a strong economy facilitated increased vacation opportunities, public demand for preservation of pristine lands became more evident.

B. The Wilderness Act

In response to this demand, and to resolve the precarious protection provided to administratively created wilderness areas,¹⁹ Congress enacted the Wilderness Act of 1964.²⁰ By enacting the Wilderness Act, Congress ensured a:

statutory framework for the preservation of this country's wilderness that would permit long-range planning and stability and also assure that no future administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or make uncalled for additions to the wilderness system where another use would be more in accord with the true nature of the area.²¹

Accordingly, the Wilderness Act provides:

it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas", and these shall be administered for the use and enjoyment of the American [*60] people in such manner as will leave them unimpaired for future use and enjoyment as wilderness²²

1. Designation of Wilderness

To effectuate this policy, the Wilderness Act required an inventory of all lands contained within the National Forest System (NFS),²³ the National Park System (NPS),²⁴ and the National Wildlife Refuge System (NWRS),²⁵ for potential inclusion in the National Wilderness Preservation System (NWPS).²⁶ To provide guidance in assessing such lands for wilderness qualities, Congress stated:

a wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and

¹⁹ See Wheatley, *supra* note 11, at 367. At the time of the enactment of the Wilderness Act, 9,087,043 acres of administratively created wilderness existed within National Forest System. These areas were automatically designated wilderness areas under the Wilderness Act. See *id.*

²⁰ 16 U.S.C. §§ 1131 36 (1994). Ironically, some cite the Echo Park Dam controversy in Utah as a major catalyst for the enactment of the Wilderness Act. This controversy involved building of the proposed Echo Park Dam within the Dinosaur National Monument in Utah. See Coggins et al., *supra* note 7, at 1013.

²¹ Wheatley, *supra* note 11, at 366.

²² 16 U.S.C. § 1131(c) (1994).

²³ See *id.* § 1609. Lands within the NFS are national forests administered by the United States Forest Service (USFS).

²⁴ Lands within the NPS include national parks, national monuments, historic sites, national recreational areas, international historic sites, national military parks, national parkways, scenic trails, national lakeshores, national rivers, and other sites that are administered by the National Park Service (Park Service). See *id.* §§ 1 18.

²⁵ Lands within the NWRS include wildlife refuges and waterfowl production areas that are administered by the United State Fish and Wildlife Service (FWS). See *id.* § 668dd(a)(1).

²⁶ See *id.* § 1132(b) (c).

use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value. ²⁷

Once such lands were inventoried for suitability the respective secretary ²⁸ was to "report his findings to the President." ²⁹ Based upon this report, the President was to provide recommendations to Congress for which lands to designate as wilderness. The Wilderness Act provides only Congress with the authority to [*61] designate an area as wilderness. ³⁰ Since the Wilderness Act only applies to lands within the NFS, the NPS, and the NWRS, the vast public lands under the authority of the Bureau of Land Management (BLM), by far the federal government's largest land holder, ³¹ were not subject to the Wilderness Act. With the enactment of the Federal Land Management and Policy Act of 1976 (FLPMA), however, lands under BLM jurisdiction, public lands, ³² became subjected to the provisions of the Wilderness Act. Specifically, section 603(a) of FLPMA states:

The Secretary [of Interior] shall review those roadless areas of five thousand acres or more and roadless islands of the public lands . . . inventoried as having wilderness characteristics described in the Wilderness Act . . . And shall from time to time report to the President his recommendation as to the suitability or non-suitability of each such area or island for preservation as wilderness. ³³

In following FLPMA's wilderness review mandate BLM established a wilderness review process that included three phases: inventorying, studying, and reporting. BLM's wilderness review process generally occurs on a state-by state basis for logistical purposes and, consequently, congressional designation of wilderness frequently occurs on a state-by-state basis. ³⁴ The inventory phase primarily utilizes existing information regarding BLM lands within a particular state and eliminates such units that obviously fail to satisfy the mandated wilderness characteristics. Units that are not initially eliminated become subject to a more extensive inventory where field work is performed to determine the existence of wilderness characteristics. ³⁵ Units not eliminated after the extensive inventory become subject to the study phase. ³⁶

During the study phase BLM must, in addition to considering a unit for its wilderness characteristics, assess the multiple use characteristics of the units. ³⁷ Section 603(a) of FLPMA contains a proviso that, "prior to any recommendations for the designation of an area as wilderness the Secretary [of Interior] shall cause mineral surveys to be conducted by the United States Geological Survey and the [*62] United States Bureau of Mines ³⁸ to determine the mineral value, if any, that may be present in such areas." ³⁹ This proviso indicates Congress' intent that, notwithstanding a unit's satisfaction of the wilderness criteria, a

²⁷ Id. § 1131(c).

²⁸ The Secretary of Agriculture for the NFS, and the Secretary of Interior for the NPS and NWRS.

²⁹ 16 U.S.C. § 1132(b) (c) (1994).

³⁰ See id.

³¹ See Wheatley, *supra* note 11, at 7.

³² See 43 U.S.C. § 103(e) (1994) ("The term 'public lands' means any land and interest in land owned by the United States within the several States and administered by the Secretary of Interior through the Bureau of Land Management . . .").

³³ Id. § 1782(a).

³⁴ See Government Institutes, Inc., *Natural Resources Law Handbook* 237 (1991).

³⁵ See E. Baynard, *Public Land Law and Procedure* 139 (1986).

³⁶ See id.

³⁷ See id.

³⁸ The United States Bureau of Mines was eliminated in 1996. See 61 Fed. Reg. 8,641 (1996).

³⁹ 43 U.S.C. § 1782 (1994).

unit may lack suitability for inclusion in the NWPS due to potential mineral development, which may be considered a higher value use of such a unit. ⁴⁰

Upon the completion of the study phase, the Secretary of the Interior enters the reporting phase by making a recommendation to the President as to the suitability of each unit for inclusion in the NWPS. ⁴¹ Like the Wilderness Act, under FLPMA "the President shall advise . . . Congress of his recommendations with respect to designation as wilderness of each such area A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress." ⁴² Furthermore, the President's recommendation must be given within two years of receipt of the Secretary of the Interior's recommendation. ⁴³

An intermediate designation for certain inventoried lands is "wilderness study areas" (WSAs). WSAs are comprised of lands that have not been eliminated for consideration of wilderness designation, but for which there has not yet been a determination by Congress to include such units in the NWPS. According to BLM regulations:

Wilderness Study Area means a roadless area of 5,000 acres or more or roadless islands which have been found through the BLM wilderness inventory process to have wilderness characteristics (thus have the potential of being included in the NWPS), and which will be subjected to intensive analysis . . . to determine wilderness suitability, and is not yet the subject of a Congressional decision regarding its designation as wilderness. ⁴⁴

2. Interim Management of WSAs

Section 603(c) of FLPMA provides complex and confusing interim management policies regarding WSAs. Specifically, section 603(c) provides:

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands [*63] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976; Provided, That, in managing the public lands BLM shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. ⁴⁵

Section 603(c) appears to provide for two different and distinct management standards: a non-impairment standard, and a standard preventing unnecessary or undue degradation. It is important to identify which standard applies, because the former is more strict in its application.

BLM regulations provide guidance in the interpretation of these standards by defining "impairment of suitability for inclusion in the Wilderness System" as:

taking actions that cause impacts, that cannot be reclaimed to the point of being substantially unnoticeable in the area as a whole by the time the Secretary [of Interior] is scheduled to make a recommendation to the President on the suitability of a WSA for inclusion in the NWPS or have degraded wilderness values so far, compared with the area's values for other purposes,

⁴⁰ See Baynard, *supra* note 35.

⁴¹ See *id.*

⁴² 43 U.S.C. § 1782(b) (1994).

⁴³ See *id.*

⁴⁴ 43 C.F.R. § 3802.0 5(c) (1997).

⁴⁵ 43 U.S.C. § 1782(c) (1994) (emphasis added).

as to significantly constrain the Secretary [of Interior's] recommendation with respect to the area's suitability for preservation as wilderness.⁴⁶

Whereas "substantially unnoticeable" is defined as "something that either is so insignificant as to be only a very minor feature of the overall area or is not distinctly recognizable by the average visitor as being manmade or man-caused because of age, weathering or biological change."⁴⁷ BLM regulations define "undue and unnecessary" as "impacts greater than those that would normally be expected from an activity being accomplished in compliance with current standards and regulations and based on sound practices, including use of the best reasonably available technology."⁴⁸

The United States District Court in *State v. Andrus*⁴⁹ addressed the issue of which management standard to apply. The court agreed with the United States that two distinct standards are provided in section 603(c), with the unnecessary or undue [*64] degradation standard applying only to uses in existence on October 21, 1976, and the non-impairment standard applying to uses existing after October 21, 1976.⁵⁰ The court concluded that in providing two distinct standards, Congress:

was concerned about devising a way to protect both existing uses and wilderness values present on tracts not subject to existing uses . . . [therefore, BLM's] authority to preserve wilderness is subject to existing uses which may not be arbitrarily terminated, nor regulated solely with a view to preserving wilderness characteristics. But BLM may continue to regulate such uses in order to prevent unnecessary or undue degradation. On the other hand, activity on lands with potential wilderness value which are not subject to existing uses may be regulated more stringently so as to preserve wilderness characteristics.⁵¹

Existing uses subject to the unnecessary and undue degradation standard are only permissible to the same "manner and degree in which . . . [they were] being conducted on October 21, 1976."⁵² Furthermore, the *Andrus* court determined that "presumably, when [FLPMA section 603(c)] refers to existing uses being carried out in the same manner and degree it is referring to actual uses, not merely a statutory right to use."⁵³ This distinction is important when valid existing rights (VERs)⁵⁴ exist within a WSA. Arguably, this interpretation of "same manner and degree" provision subjects the development of VERs to the stricter nonimpairment standard.

Interpretation of section 603(c) becomes more difficult when read with section 201(a). Section 603(c) appears to conflict with Congress' express language in section 201(a) which provides: "BLM shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands."⁵⁵ While section 603(c) expressly provides, at a minimum, that WSAs shall be managed so as not to unnecessarily degrade their wilderness qualities, section 201(a) provides that even though an area has been designated a WSA, such a designation shall not prevent a change in management or use. Therefore, it appears that under section 201(a), management of a WSA is subject to

⁴⁶ *43 C.F.R. § 3802.0 5(d) (1997)* (emphasis added).

⁴⁷ *Id.* § 3802.0 5(m).

⁴⁸ *Id.* § 3802.0 5(k)(1).

⁴⁹ *486 F. Supp. 995 (D. Utah 1979).*

⁵⁰ See *id.* at 1003 04.

⁵¹ *Id.* at 1004.

⁵² *43 U.S.C. § 1782(c) (1994).*

⁵³ *Andrus, 486 F. Supp. at 1006.*

⁵⁴ Basically, a VER is a right short of a vested right but immune from denial or extinguishment by the exercise of secretarial discretion. Typical examples of VERs include undeveloped mineral leases and unpatented valid mining claims.

⁵⁵ *43 U.S.C. § 1711(a) (1994)* (emphasis added).

possible management changes, such as opening a WSA for mineral exploration or timber sales even though [*65] such actions may degrade an area so as to impair its potential for inclusion into the NWPS. This position is affirmed by the fact that under section 603(c) Congress provided that, "unless previously withdrawn from appropriation under the mining law, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary [of Interior] . . . for reasons other than preservation of their wilderness character." ⁵⁶ Explaining section 201, the Senate Report version of FLPMA provided:

The purpose of [section 201] is to insure that, under no circumstances will the pattern of uses on the national resource land be frozen, or will uses be automatically terminated during the preparation of the inventory and identification of areas possessing wilderness characteristics. Equity demands that BLM not be barred from considering and permitting new uses during the lengthy inventory and identification processes. On the other hand, the "of itself" language is not meant to be license to continue to allow or disallow uses as if no inventory and identification process were being conducted. The Committee fully expects BLM, wherever possible, will make management decisions which will insure that no future use or combination of uses which might be discovered as appropriate in the inventory or identification process . . . will be foreclosed by any use or combination of uses conducted after the enactment of FLPMA, but prior to the completion of those processes. ⁵⁷

In drafting section 201(c) and section 603(c), Congress was apparently attempting to provide a balanced approach to the management of BLM lands by providing discretionary latitude to BLM which arguably, as the land management agency, is best equipped to determine which activities are compatible and should be allowed to proceed during the wilderness study process. The Andrus court relied on the Senate Report in recognizing BLM's discretionary latitude, concluding "section 201 does not mandate that BLM allow all potential uses to take place on a particular portion of land regardless of wilderness characteristics." ⁵⁸

As FLPMA's purpose is to provide an extensive statutory scheme for public lands, it is not surprising that it contains many apparently conflicting provisions. In fact, browsing the congressional declaration of policy illustrates FLPMA's conflicting managerial policies. Under section 102(a)(8) it is the policy of the United States that: [*66]

the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use. ⁵⁹

However, this managerial approach appears to conflict with section 102(a)(12), which declares Congress' policy that:

The public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1879, 30 U.S.C. 21a) as it pertains to public lands ⁶⁰

These conflicting declarations of policy are somewhat reconciled once it is understood that FLPMA advocates that public lands should be managed under the concept of "multiple use." ⁶¹ FLPMA did not create the multiple use concept, ⁶² but

⁵⁶ Id. § 1782(c) (emphasis added).

⁵⁷ S. Rep. No. 94 583, at 44 (1975).

⁵⁸ Andrus, 486 F. Supp. at 1007.

⁵⁹ 43 U.S.C. § 1701(a)(8) (1994) (emphasis added).

⁶⁰ Id. § 1701(a)(12) (emphasis added).

⁶¹ See Baynard, *supra* note 35, at 44.

⁶² See *id.* at 44 45.

carries out the concept as provided under the Multiple-Use Sustained-Yield Act of 1960 (MUSYA).⁶³ FLPMA adopted MUSYA's definition of multiple use almost verbatim, defining it as:

the management of public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land . . . and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources⁶⁴

3. Effect of Wilderness Designation

In general terms, the Wilderness Act provides that the administering agency "shall be responsible for preserving the wilderness character of the area," and [*67] "wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."⁶⁵ The Wilderness Act expressly provides:

there shall be no commercial enterprise and no permanent road within any wilderness area . . . and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation with any such area.⁶⁶

Furthermore, BLM has established regulations⁶⁷ and the Wilderness Management Policy,⁶⁸ both of which regulate specific activities in wilderness areas.

C. Wilderness Designation in Utah⁶⁹

In August 1979, in response to section 603 of FLPMA, BLM commenced a comprehensive statewide wilderness study program to identify BLM lands that were appropriate for inclusion in the NWPS.⁷⁰ This inventory involved reviewing over 22 million acres of Utah BLM lands and identifying such lands that "'clearly and obviously' did not contain wilderness characteristics and those areas that might have those characteristics, as specified by the Wilderness Act."⁷¹ Of these 22 million acres BLM determined that 5,228,800 possibly contained wilderness characteristics.⁷² Approximately 2.5 million

⁶³ See *16 U.S.C. §§ 528* 31 (1994).

⁶⁴ *43 U.S.C. § 1702(c)* (1994) (emphasis added). See also *16 U.S.C. § 531(a)* (1994).

⁶⁵ *16 U.S.C. § 1133(b)* (1994).

⁶⁶ *Id.* § 1133(c).

⁶⁷ See 43 C.F.R. § 8560 et seq. (1997).

⁶⁸ *46 Fed. Reg. 47180 205* (1981).

⁶⁹ Pursuant to the Wilderness Act, the Forest Service evaluated the lands under its control in Utah for inclusion in the NWPS. This evaluation resulted in Congress designating thirteen separate wilderness areas covering a total 779,638 acres of Utah Forest Service land. The thirteen Forest Service wilderness areas in Utah are: Ashdown Gorge, Box Death Hollow, Dark Woodenshow Canyon, Twin Peaks, Mt. Naomi, Mt. Nebo, Mt. Timpanogos, Mt. Olympus, Pine Valley Mountain, Wellsville Mountain, High Uintas, Lone Peak, and Deseret Peak. 1 Bureau of Land Management, Utah BLM Statewide Wilderness Final Impact Statement 77 (1990). Furthermore, pursuant to wilderness inventories for Arizona BLM lands, two separate wilderness areas were designated in Utah covering a total of 22,600 acres of BLM land. These wilderness areas are Paria Canyon and Beaver Dam Mountains. Although these wilderness designations resulted from the Arizona wilderness inventory, the wilderness designation occurred in Utah because portions of these wilderness areas are located in both Arizona and Utah. See *id.*

⁷⁰ See Bureau of Land Management, *supra* note 69, at 12.

⁷¹ *Id.*

⁷² See *45 Fed. Reg. 75,602* (1980).

acres were subsequently designated and delineated into WSAs for extensive study for possible inclusion in the NWPS. A number of environmental groups were dissatisfied with BLM's decision not to [*68] designate all or a portion of twenty-seven areas as WSAs. Consequently, these groups appealed BLM's decision,⁷³ which resulted in BLM adding additional acreage, for a total of 3,235,834 acres within eighty-three separate WSAs.⁷⁴

1. Utah BLM Environmental Impact Statement

The National Environmental Policy Act of 1969 (NEPA)⁷⁵ requires that "all federal administrators consider the consequences of their actions before acting."⁷⁶ In a nutshell, section 102(c), the action forcing section of NEPA, requires a "detailed statement," such as an environmental impact statement (EIS), to be written for all "major federal actions" that have a "significant impact" on the environment. One purpose of the EIS is to identify potential effects and impacts of the proposed major federal action.

The Department of the Interior (DOI) has determined that wilderness designation pursuant to the Wilderness Act constitutes a "major federal action." As such, wilderness designation is subject to NEPA's EIS requirements.⁷⁷ In 1990, in conformance with this determination, BLM issued a final EIS (Utah BLM EIS) regarding the designation of wilderness of Utah BLM lands.⁷⁸ The Utah BLM EIS provided a comprehensive analysis of the potential effects of designating any of the eighty-three WSAs within Utah as wilderness. Specifically, the EIS analyzed the potential impacts wilderness designation would have on, inter alia, mineral exploration and production, local employment, and federal revenues.⁷⁹

The Utah BLM EIS concluded as its preferred alternative that 1,975,219 acres within sixty-six WSAs should be designated as wilderness.⁸⁰ In addition to the preferred alternative the Utah BLM EIS analyzed five other alternatives: (1) No Action/No Wilderness Alternative--no wilderness designated; (2) Regional Representative Areas Alternative--956,616 acres in fourteen WSAs designated as wilderness; (3) Paramount Wilderness Quality Alternative--1,533,030 acres in thirty-two WSAs designated as wilderness; (4) Cluster and Interagency Areas Concept Alternative--2,486,732 acres in fifty-three WSAs designated as wilderness; and (5) All Wilderness Alternative--3,235,834 acres in eighty-three WSAs designated as wilderness. Relying on the Utah BLM EIS, on October 18, 1991, former Secretary of the Interior Manuel Lujan, under authority of the President, [*69] recommended to Congress that 1,958,339 acres of Utah BLM lands be designated as wilderness and included within the NWPS. This recommendation occurred just two days prior to the expiration of the fifteen year limit of section 603(a) which authorized BLM to conduct comprehensive studies of its lands for wilderness qualities.⁸¹ Since designation of wilderness on Utah BLM lands is such a contentious issue Congress has yet to act on Secretary Lujan's recommendation.

2. Congressional Bills Proposing Wilderness Designation in Utah

Since 1989, at least seven congressional bills have been introduced to designate Utah BLM lands as wilderness areas, but none have passed.

a. House Bill 1500

⁷³ See *Utah Wilderness Ass'n*, 72 I.B.L.A. 125 (1983).

⁷⁴ See Bureau of Land Management, *supra* note 69, at 3.

⁷⁵ 42 U.S.C. §§ 4321 47 (1994).

⁷⁶ Coggins et al., *supra* note 7, at 335.

⁷⁷ See Department of the Interior, Manual 516 DM 6, Appendix 5.3A(2) (1992).

⁷⁸ See generally Bureau of Land Management, *supra* note 69.

⁷⁹ See *id.* at 3 4.

⁸⁰ See *id.*

⁸¹ See 43 U.S.C. § 1782(a) (1994).

On March 20, 1989, before the Utah BLM EIS was even completed, former Representative Wayne Owens of Utah⁸² introduced House Bill 1500 which proposed the designation of over 5.1 million acres of Utah BLM lands as wilderness.⁸³ The environmental community strongly supported the bill because of the amount of land it proposed to designate as wilderness. However, House Bill 1500 disregarded the intent of the Wilderness Act and FLPMA that wilderness areas be at least 5,000 acres in size.⁸⁴ The bill proposed designation of twenty-seven units that contain less than 5,000 acres.⁸⁵ In fact, House Bill 1500 boldly proposed four units of less than 100 acres in size: (1) Beartrap Canyon--forty acres;⁸⁶ (2) Goose Creek--eighty-nine acres;⁸⁷ (3) Shunesburg--eighty acres;⁸⁸ and (4) Taylor Creek Canyon--thirty-five acres.⁸⁹ For perspective, Liberty Park in Salt Lake City, Utah, is just over 100 acres in size, and the famous Liberty Island and Ellis Island combined are approximately forty acres in total size.

In 1991, Representative Owens reintroduced House Bill 1500 in a form that was identical to his 1989 version except for an increase in acreage to approximately 5.7 million acres.⁹⁰ In the 1992 elections, Representative Owens declined to defend [*70] his seat in the House of Representatives, instead campaigning for a seat in the Senate, which he lost to Senator Robert F. Bennett.⁹¹ In 1993,⁹² 1995,⁹³ and 1997,⁹⁴ Representative Maurice Hinchey of New York reintroduced House Bill 1500, continuing the proposal of designating 5.7 million acres of Utah BLM lands as wilderness.

b. House Bill 1501

On March 20, 1989, Utah Representative James Hansen introduced House Bill 1501, which proposed the designation of over 1.4 million acres of Utah BLM lands as wilderness.⁹⁵ Besides the obvious acreage difference with House Bill 1500, House Bill 1501 did not contain any units of less than 5,000 acres in size.⁹⁶ Furthermore, for the WSAs not designated as wilderness, House Bill 1501 contained "release" language that stated: "areas in the State of Utah administered by BLM . . . which, upon enactment of this Act, are not designated as wilderness shall be managed for multiple use in accordance with FLPMA."⁹⁷

c. House Bill 1508

⁸² Mr. Owens represented the Second District from 1972-1976 and 1986-1992, which encompasses the Salt Lake City Wasatch Front region. The Second District demonstrates a strong environmental preservation attitude; hence, Mr. Owens' introduction of House Bill 1500 pleased his constituents.

⁸³ See H.R. 1500, 101st Cong. (1989).

⁸⁴ See *16 U.S.C. § 1131(c)* (1994). See also *43 U.S.C. § 1782(a)* (1994).

⁸⁵ See H.R. 1500, 101st Cong. §§ 102-10 (1989).

⁸⁶ See *id.* § 102.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See H.R. 1500, 102d Cong. (1991). Located within the additional areas is Andalex Resources, Inc.'s proposed Smoky Hollow Mine, which previously was not within any of House Bill 1500's proposed wilderness areas. Arguably, the additional areas were added to prevent development of the Smoky Hollow Mine.

⁹¹ See U.S. Senate, Wash. Post, Nov. 5, 1992, at A32.

⁹² See H.R. 1500, 103d Cong. (1993).

⁹³ See H.R. 1500, 104th Cong. (1995).

⁹⁴ See H.R. 1500, 105th Cong. (1997).

⁹⁵ See H.R. 1501, 101st Cong. (1989).

⁹⁶ See *id.* § 102.

⁹⁷ *Id.* § 2(e).

On March 20, 1991, Representative Hansen introduced House Bill 1508, which proposed to designate over 1.3 million acres of Utah BLM lands as wilderness.⁹⁸ House Bill 1508 proposed to designate similar areas proposed in House Bill 1501 and, accordingly, did not contain any units of less than 5,000 acres in size.⁹⁹ Furthermore, House Bill 1508 contained the same release language for WSAs not designated as wilderness.¹⁰⁰ [*71]

d. House Bill 1745

In 1995, Representative Hansen proposed the designation of approximately 1.8 million acres of Utah BLM lands as wilderness through the introduction of House Bill 1745.¹⁰¹ This bill insured that no federal water reservations, either express or implied, would result from these wilderness designations.¹⁰² Furthermore, House Bill 1745 contained release language for Utah BLM lands not designated as wilderness, therefore subjecting them to multiple use management as provided under FLPMA.¹⁰³

e. House Bill 3625

In 1998, Congressman Chris Cannon of Utah introduced House Bill 3625, a unique bill to designate approximately 407,468 acres of Utah BLM lands as wilderness pursuant to the establishment of the San Rafael Swell National Heritage Area and the San Rafael National Conservation Area.¹⁰⁴ These areas cover parts of Carbon, Emery, Sanpete and Sevier counties.¹⁰⁵ In addition to wilderness designation, House Bill 3625 proposed the creation of a bighorn sheep management area, semi-primitive nonmotorized use areas, and scenic visual areas of critical concern.¹⁰⁶ House Bill 3625 also provided that no federal water reservations, either express or implied, would result from wilderness, conservation area, or semi-primitive area designations.¹⁰⁷

f. Senate Bill 884

In 1995, Senators Hatch and Bennett of Utah introduced Senate Bill 884 to designate approximately 2.2 million acres of Utah BLM lands as wilderness.¹⁰⁸ Senate Bill 884 contained similar provisions to House Bill 1745 in that there were no reservations of federal water rights, either express or implied,¹⁰⁹ and it included release language for Utah BLM lands not designated as wilderness to be subject to multiple use management.¹¹⁰ [*72]

g. Senate Bill 773

On May 21, 1997, Senator Richard Durbin of Illinois introduced Senate Bill 773, the first Senate companion bill to House Bill 1500, proposing the designation of 5.7 million acres of Utah BLM land as wilderness.¹¹¹ Senate Bill 773 and House Bill

⁹⁸ See H.R. 1508, 102d Cong. (1991).

⁹⁹ See id. § 2(a).

¹⁰⁰ See id. § 2(e).

¹⁰¹ See H.R. 1745, 104th Cong. (1995).

¹⁰² See id. § 4(a).

¹⁰³ See id. § 10(b).

¹⁰⁴ See H.R. 3625, 105th Cong. §§ 221, 301 (1998).

¹⁰⁵ See id. §§ 102 03, 202, 221, 231 33, 301.

¹⁰⁶ See id. §§ 231 33.

¹⁰⁷ See id. § 407.

¹⁰⁸ See S. 884, 104th Cong. (1995).

¹⁰⁹ See id. § 4(a).

¹¹⁰ See id. § 10(b).

¹¹¹ See S. 773, 105th Cong. (1997).

1500 appear to be political attempts to manipulate the recommendations of BLM and ignore the process for wilderness designation as set forth under the Wilderness Act ¹¹² and FLPMA. ¹¹³ Furthermore, these bills ignore NEPA studies ¹¹⁴ by proposing to designate Utah BLM lands that were not studied in the Utah BLM EIS. ¹¹⁵ In comparison, House Bill 1501, House Bill 1508, House Bill 1745, and Senate Bill 884 proposed to designate Utah BLM lands that were contained in WSAs and that were subjected to intensive studies and public participation under the NEPA process. Deference, as courts often give agencies, ¹¹⁶ should be provided to BLM, who as the land managing agency is best equipped to determine the most appropriate use of Utah's BLM lands based upon their characteristics and potential.

3. Babbitt's 1996 Reinventory of Utah BLM Lands

During a congressional committee hearing conducted on April 24, 1996, ¹¹⁷ Secretary of the Interior Bruce Babbitt and Representative James Hansen exchanged heated words over the proper number of acres of Utah BLM land to designate as wilderness. ¹¹⁸ The exchange intensified when Secretary Babbitt stated that he advocated at least five million acres be designated as wilderness. ¹¹⁹ In response, Representative Hansen asked Secretary Babbitt to explain the five million acre designation, since the BLM inventory determined only 3.2 million acres contained the wilderness characteristics required by the Wilderness Act. ¹²⁰ Secretary Babbitt [*73] stated "that my own experience and knowledge of this area led me to believe that five million is the right number." ¹²¹ Secretary Babbitt ended this exchange by threatening to rescind BLM's prior inventory and commence a new inventory. ¹²² True to his threat, on July 24, 1996, Secretary Babbitt told Representative Hansen that a reinventory of Utah BLM lands would occur by a small hand-picked team (the Babbitt Team) "of career professionals, who have substantial expertise in addressing wilderness issues in Utah and elsewhere." ¹²³ Secretary Babbitt also stated that the Babbitt Team was "to take a careful look at the lands identified in the 5.7 million acre bill that have not been identified by the BLM as WSAs," and report their findings to him. ¹²⁴

Acknowledging that section 603 of FLPMA had expired and "no longer provided authority to inventory BLM land in Utah for wilderness values," ¹²⁵ Secretary Babbitt claimed "FLPMA's section 202 (land use planning), along with section 201's mandate to 'prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values

¹¹² See 16 U.S.C. § 1132(b) (1994).

¹¹³ See 43 U.S.C. § 1782(c) (1994).

¹¹⁴ See 42 U.S.C. § 4332 (1994); 40 C.F.R. § 1503.1 (1997).

¹¹⁵ The Utah BLM EIS concluded that of the 3.2 million acres that met the wilderness criteria, only 1.9 million acres of Utah BLM lands qualified for wilderness designation. See Bureau of Land Management, *supra* note 69, at 3. This fulfilled NEPA's purpose to force agencies to make educated decisions based on issue identification facilitated through public participation. See *id.*

¹¹⁶ See *Jerry D. Reynolds*, 54 *I.B.L.A.* 300, 301 02 (1981); *Richard J. Leaumont*, 54 *I.B.L.A.* 242, 245 (1981) ("Considerable deference must be accorded the conclusions reached by [BLM in its wilderness inventory] . . . notwithstanding that such conclusions might reach a result over which reasonable men would differ.").

¹¹⁷ Since a transcript of this hearing is not available, various other documents are cited verifying this event.

¹¹⁸ See Letter from Bruce Babbitt, Secretary, Department of the Interior, to James V. Hansen, Representative, United States House of Representatives 1 (July 24, 1996) (on file with author).

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ *Id.*

¹²² See Judge Halts BLM Wilderness Reinventory in Utah: Doubts DOI, Pub. Lands News, Feb. 6, 1996, at 6.

¹²³ Letter from Babbitt to Hansen, *supra* note 118, at 2.

¹²⁴ *Id.*

¹²⁵ *Id.*

(including, but not limited to, outdoor recreation and scenic values),' [authorized his] taking another look at these lands." ¹²⁶ Furthermore, Secretary Babbitt claimed the Babbitt Team was "explicitly instructed to apply the same legal criteria that were used in the original inventory, and to consider each area on its own merits, solely to determine whether it had wilderness characteristics. [The Babbitt Team would] have no particular acreage target to meet; the chips would fall where they may." ¹²⁷ Secretary Babbitt expected the reinventory to be completed within six months and, based upon the findings, determined that the following options were available:

(1) taking the findings as a starting point, going through a public process under FLPMA, including compliance with NEPA, to consider amendments to applicable resource management plans and/or withdrawals under FLPMA to protect any newly identified areas under the same standards as WSAs; (2) taking the findings as a starting point, formulating, through a legislative NEPA process, new recommendations to Congress on what areas are suitable for designation as wilderness by Congress; or (3) combining options (1) and (2). ¹²⁸

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The Utah delegation's response was quite critical. First, it cautioned that "the creation of a special reinventory team designed to conduct an inventory outside the scope of the public input process would set a bad precedent for all future planning activities by every federal agency." ¹²⁹ Next, in refuting Secretary Babbitt's claim that the Babbitt Team would have no target acreage, the Utah delegation argued that "this statement presupposes the team will conclude with some kind of recommendation to increase the current WSA acreage. The three options you list assume that additional acreage should be added to the existing wilderness study area inventory regardless of the findings of [the Babbitt Team]." ¹³⁰ Finally, the Utah delegation characterized the reinventory as:

insulting to your own employees whose hard and laborious efforts, utilized objective and professional expertise and arrived at the conclusion that 3.2 million acres of Utah should be classified as WSAs. We understand that you disagree with the end product of their work that cost over \$ 10 million and required over 2700 employee workmonths to complete. However, implying that this Administration is now in a position to conduct a "credible professional study of the ground involved" and can "move forward toward resolution of this contentious issue" with a small, handpicked team of professionals, in six months, and without public involvement is simply foolhardy. ¹³¹

Undaunted by the Utah delegation's response, the Babbitt Team proceeded with the reinventory. In response, the State of Utah, the Utah School and Institutional Trust Lands Administration, and the Utah Association of Counties filed suit in the United States District Court seeking to enjoin the Babbitt Team from performing the reinventory. ¹³² In its complaint, the plaintiffs alleged, inter alia, that the Babbitt Team reinventory was unlawful because it failed to provide for public participation as required under FLPMA, the Administrative Procedures Act, and NEPA. ¹³³ On November 18, 1996, the Honorable Dee Benson issued a preliminary injunction enjoining the Babbitt Team from continuing its reinventory process. ¹³⁴ Judge Benson found that Secretary Babbitt's argument that public participation is not required at this stage of the process "failed to recognize

¹²⁶ Id. (quoting 43 U.S.C. § 1711(a) (1994)).

¹²⁷ Id.

¹²⁸ Id. at 2 3.

¹²⁹ Letter from James V. Hansen, Representative, United States House of Representatives, Orrin G. Hatch, Senator, United States Senate, and Robert F. Bennett, Senator, United States Senate, to Bruce Babbitt, Secretary, United States Department of the Interior 1 (Aug. 1, 1996) (on file with author).

¹³⁰ Id.

¹³¹ Id. at 2.

¹³² See Complaint, *State v. Babbitt*, No. 2: 96 CV 870B (D. Utah 1996).

¹³³ See id. at 3.

¹³⁴ See *State v. Babbitt*, No. 2: 96 CV 870B, slip op. (D. Utah Nov. 18, 1996).

the basic legislative scheme of [*75] FLPMA." ¹³⁵ He ruled that the Defendants were attempting to use general statutory provisions . . . [i.e., sections 201 and 202] to privately reinventory lands for wilderness characteristics when the authority for such a venture was explicitly granted in [section 603] . . . which mandated public involvement, and which had since expired." ¹³⁶

On January 14, 1997, Babbitt filed an appeal with the United States Court of Appeals for the Tenth Circuit. ¹³⁷ In his appeal, Babbitt argued, *inter alia*, that the plaintiffs lacked standing, ¹³⁸ as the reinventory was:

intended only to determine the presence or absence of wilderness characteristics on certain lands in Utah and "will not make any decisions, recommendations, new land use designations, or changes in land management." [Consequently,] . . . the plaintiffs simply cannot demonstrate that BLM's fact-gathering actions in the reinventory of the lands in Utah actually affect the lands or injure them in any way." ¹³⁹

The Tenth Circuit accepted this standing argument, and on March 3, 1998, vacated the preliminary injunction. ¹⁴⁰ In making its ruling, the Tenth Circuit determined that public participation is not required under section 201 of FLPMA, and concluded that "plaintiffs' claim that they are injured by the denial of public participation with respect to the reinventory is consequently without merit. Plaintiffs therefore have no standing to challenge the reinventory based on this alleged injury." ¹⁴¹ In making this determination, the Tenth Circuit held that the reinventory "cannot be characterized as a 'land use plan,' 'land use program,' 'land use regulation,' or 'land use decision' requiring public participation under § 202 [of FLPMA]." ¹⁴² In addition to vacating the preliminary injunction, the Tenth Circuit remanded the case to district court with instructions to dismiss seven of the eight causes of action related to the reinventory based upon its standing analysis, and to consider the final cause of action [*76] which alleged that the defendants were imposing a *de facto* wilderness management standard on non-WSA public lands in violation of FLPMA. ¹⁴³

On February 4, 1999, the Babbitt Team issued the Utah Wilderness Inventory Report (Babbitt Team Report), which documents its findings of over 2.6 million acres of federal lands that qualify for wilderness designation. ¹⁴⁴ This is in addition to the 3.2 million acres currently contained within WSAs, bringing the total to 5.8 million acres, ironically close to the acreage contained in House Bill 1500. It is interesting to note that the Babbitt Team Report boldly recommends that approximately 442,910 acres of state lands ¹⁴⁵ --presumably all state school trust lands--contain wilderness characteristics, even though under the

¹³⁵ *Id.* at 5 (footnote omitted).

¹³⁶ *Id.*

¹³⁷ See Notice of Appeal, *State v. Babbitt*, No. 2: 96 CV 870B (D. Utah 1996).

¹³⁸ Jurisdiction of the federal courts is restricted by art. III of the United States Constitution to resolve "cases" and "controversies." *U.S. Const. art. III, § 2, cl. 1*. The Supreme Court has determined that a plaintiff seeking to invoke federal court jurisdiction must show: (1) injury in fact; (2) that their injury is fairly traceable to the challenged action of the defendant; and (3) that their injury will be redressed by a favorable decision. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 61 (1992).

¹³⁹ Opening brief for the *Federal Appellants at 26, Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998) (citations omitted).

¹⁴⁰ See *Utah v. Babbitt*, 137 F.3d 1193, 1197 (10th Cir. 1998).

¹⁴¹ *Id. at 1210* (footnote omitted).

¹⁴² *Id. at 1209*.

¹⁴³ See *id. at 1216*.

¹⁴⁴ See Bureau of Land Management, Wilds Inventory Results Released (visited Feb., 1999) <<http://www.blm.gov/utah/utah/winvinintro>>.

¹⁴⁵ See Bureau of Land Management, Acreage Summary Table (visited Feb., 1999) <<http://www.access.gpo.gov/blm/utah/pdf/ast.pdf>>.

Wilderness Act and FLPMA only federal lands can be designated as wilderness.¹⁴⁶ This disregard of land ownership evidences the Babbitt Team's reliance upon House Bill 1500, which also disregards land ownership¹⁴⁷ in its wilderness reinventory, and calls into question the credibility of the Babbitt Team Report.

As if the issue of wilderness designation of Utah BLM lands was not polarized enough, in response to BLM's reinventory, but prior to the release of the Babbitt Team Report, the Utah Wilderness Coalition (UWC), the orchestrating group behind House Bill 1500, conducted its own reinventory utilizing volunteers from the general public and determined that 9.1 million acres¹⁴⁸ of Utah BLM lands should be designated as wilderness.¹⁴⁹ UWC stated there will definitely be a new congressional wilderness bill in the future to reflect the results of its reinventory.¹⁵⁰ Ironically, in pushing for the enactment of House Bill 1500, UWC alleged that the lands subject to House Bill 1500 were under threat of being developed and, consequently, forever lost to the possibility of being designated as wilderness. With its reinventory, however, UWC has dispelled the very threat that UWC so heavily relied upon in attempting to gain support for House Bill 1500. Through the "discovery" of additional lands that qualify for wilderness designation, UWC has proven that the threat of development of Utah wild lands is for the most part illusory. [*77]

III. Antiquities Act of 1906

A. Background and Legislative History

The concept for enacting a law to provide for the permanent protection of aboriginal antiquities situated on federal lands is credited to the American Association for the Advancement of Science that, in 1899, established the Committee on the Protection and Preservation of Objects of Archaeological Interest for purposes of promoting such a bill in Congress.¹⁵¹ While the concept of providing protection for prehistoric ruins was met with approval in Congress, competing viewpoints quickly surfaced as numerous bills were introduced differing in how, what, and to what extent such protection should be afforded.¹⁵²

In 1905, the American Anthropological Association appointed archeologist Edgar Lee Hewett secretary of the committee responsible for drafting antiquities legislation.¹⁵³ He proved to be exceptionally skilled in identifying and resolving the conflicts that prevented the passage of earlier antiquities legislation.¹⁵⁴ In fact, Hewett's draft bill resolved a number of important issues. First, a jurisdictional issue arose when control over the forest reserves was transferred from DOI to the Department of Agriculture under the Forest Transfer Act.¹⁵⁵ Earlier bills only provided protection to lands under DOI's control.¹⁵⁶ Hewett resolved this jurisdictional issue by providing that the proposed law would apply to "lands owned or controlled by the Government of the United States."¹⁵⁷ Second, the bill expanded the authority of the President to create

¹⁴⁶ See *16 U.S.C. § 1132(b) (c)* (1994); *43 U.S.C. § 1782(a)* (1994).

¹⁴⁷ See H.R. 1500, 105th Cong. (1997).

¹⁴⁸ UWC's new recommendation of 9.1 million acres represents more than a sixty percent increase over UWC's previous recommendation, reflected in House Bill 1500, that 5.7 million acres of Utah BLM lands should be designated as wilderness.

¹⁴⁹ See Southern Utah Wilderness Alliance, *Fruition of the New Citizens' Inventory of Utah Wilderness* (visited Apr. 1999) <<http://www.suwa.org/newinventory>>.

¹⁵⁰ See Brent Israelsen, *Activists Take Utah Wilderness to Boston*, Salt Lake Trib., Sept. 17, 1998, at A1.

¹⁵¹ See Ronald F. Lee, U.S. Dep't of Interior, *The Antiquities Act of 1906* 47 (1970).

¹⁵² See *id.* at 48 67.

¹⁵³ See *id.* at 68 70.

¹⁵⁴ See *id.* at 70 77.

¹⁵⁵ See *id.* at 67.

¹⁵⁶ See *id.* at 48 67.

¹⁵⁷ *Id.* at 74.

monuments beyond prehistoric sites to include "other objects of historic or scientific interest."¹⁵⁸ This expansion pleased DOI, which had emphasized the need for legislation providing for the preservation of "scenic beauties and natural wonders and curiosities, by Executive Proclamation," because the necessity to procure a separate law for each national park often resulted in serious scientific losses.¹⁵⁹ Finally, in providing that national monuments "should be confined to the smallest area compatible with the proper care and management of the objects to be protected[.]" the bill gained approval of the western members of [*78] Congress who were wary of providing the President unfettered discretion in establishing the size of national monuments.¹⁶⁰

On January 9, 1906, Hewett's draft bill was introduced in the House of Representatives by Representative John Lacey of Iowa as House Bill 11016,¹⁶¹ and on February 26, 1906, in the Senate by Senator Thomas Patterson of Colorado as Senate Bill 4698.¹⁶² The Committee on the Public Lands reported that the purpose of House Bill 11016 was to protect Indian ruins of the Southwest by "proposing to create small reservations reserving only so much lands as may be absolutely necessary for the preservation of these interesting relics of prehistoric times."¹⁶³ This intent of House Bill 11016 is further affirmed by the fact that the bulk of the committee's report is comprised of a memorandum, authored by Hewett, which inventories, groups, and describes the Indian ruins of the Southwest.¹⁶⁴

On June 5, 1906, Representative Lacey and Representative Stephens of Texas discussed the antiquities bill's nature and effect on the public domain.¹⁶⁵ In response to Representative Stephens questions, Representative Lacey, in describing the purpose of the bill, stated: "this will merely make small reservations where the objects are of sufficient interest to preserve them It is meant to cover the cave dwellers and the cliff dwellers It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest."¹⁶⁶ At the end of the discussion Representative Stephens made a final statement which unfortunately has rung true of the Antiquities Act: "I hope . . . this bill will not result in locking up other lands."¹⁶⁷ While it is unclear which lands Representative Stephens meant, it is presumably a reference to lands other than those in the Southwest that contained cliff dwellings and Indian remains as described by Representative Lacey.

In the end, the final version is a testament to Hewett's skillful drafting as both House Bill 11016 and Senate Bill 4698 passed committees without an alteration of a single significant word.¹⁶⁸ On June 6, 1906, President Theodore Roosevelt signed Senate Bill 4698 into law.¹⁶⁹ [*79]

B. Presidential Power

Congress delegated to the President broad authority to create national monuments under the Antiquities Act, which provides:

The President of the United States is 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

¹⁵⁸ Id.

¹⁵⁹ Id. at 52.

¹⁶⁰ Id. at 75.

¹⁶¹ See id. at 71. However, it appears that Lee erroneously labeled the bill H.R. 13349 on page 71, but correctly labeled it H.R. 11016 on page 76 of the report. See id. at 76.

¹⁶² See id. at 72.

¹⁶³ H.R. Rep No. 59 2224, at 1 (1906) (emphasis added).

¹⁶⁴ See id. at 2 8.

¹⁶⁵ See 40 Cong. Rec. 7,888 (1906).

¹⁶⁶ Id. (emphasis added).

¹⁶⁷ Id. (emphasis added).

¹⁶⁸ See Lee, *supra* note 151, at 72, 77.

¹⁶⁹ See id. at 76 77.

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 the proper care and management of the objects to be protected.¹⁷⁰

In *State Legislation Relating to Disposition of Antiquities on Public Lands*,¹⁷¹ DOI determined that the Antiquities Act's grant of authority to the President to proclaim national monuments was within the powers of Congress.¹⁷² The source of authority is found in section 3, Article IV of the Constitution, which provides 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."¹⁷³

In addition to reserving lands as national monuments, the President is authorized to reduce the size of national monuments so that their boundaries "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."¹⁷⁴ However, once the President establishes a national monument, "thereafter [he is] without power to revoke or rescind the reservation."¹⁷⁵

C. Use and Litigation

Ironically, the first national monument established under the Antiquities Act did not involve any aboriginal objects, but involved a "scientific" object. On September 24, 1906, President Theodore Roosevelt created a 1152 acre reservation [*80] encompassing Devils Tower.¹⁷⁶ Subsequently, President Roosevelt, in accordance with his conservation philosophy, established eighteen national monuments under the authority of the Antiquities Act,¹⁷⁷ including the reservation of 818,560 acres for the Grand Canyon National Monument.¹⁷⁸

Such large reservations for "scientific" objects undoubtedly surprised the congressional members who must have envisioned that "the smallest area compatible" would be relatively small and only for the protection of aboriginal sites. The legislative history specifically indicates that the Antiquities Act's purpose was to protect Indian ruins of the Southwest.¹⁷⁹ Moreover, earlier proposed antiquities legislation limited reservations to 320 acres or 640 acres.¹⁸⁰ Therefore, the very first exercise of the Antiquities Act by President Roosevelt apparently conflicts with its intent and subsequently established a bad precedent for its future use.

1. *Cameron v. United States*

Presidential exercise of the authority granted under the Antiquities Act met little resistance from 1906 to 1943, when eighty-two national monuments were established.¹⁸¹ The Grand Canyon's creation, however, was challenged in the case of *Cameron*

¹⁷⁰ *16 U.S.C. § 431* (1994).

¹⁷¹ See 52 I.D. 150 (1927).

¹⁷² See Wheatley, *supra* note 11, at 260.

¹⁷³ *U.S. Const. art. IV, § 3, cl. 2*.

¹⁷⁴ Wheatley, *supra* note 11, at 261 (citing Proposed Abolishment of Castle Pinckney Nat'l. Monument, *39 Op. Att'y Gen. 185, 188 (1938)*).

¹⁷⁵ Proposed Abolishment of Castle Pinckney Nat'l Monument, *39 Op. Att'y Gen. 185, 187 (1938)*.

¹⁷⁶ See Lee, *supra* note 151, at 87 (describing President Roosevelt's proclamation under the Antiquities Act).

¹⁷⁷ See *id.* at 88.

¹⁷⁸ See *id.* at 90.

¹⁷⁹ See H.R. Rep. No. 59 2224 (1906); 40 Cong. Rec. 7,888 (1906).

¹⁸⁰ See Lee, *supra* note 151, at 56, 66 67, 75.

¹⁸¹ See Richard M. Johannsen, Public Land Withdrawal Policy and the Antiquities Act, 56 Wash. L. Rev. 439, 451 n.86 (1981).

v. United States. ¹⁸² Cameron, in resistance to federal attempts to evict him from mining claims he had located along popular tourist sites around the south rim of the Grand Canyon, attacked President Roosevelt's creation of the Grand Canyon National Monument as being beyond the scope of authority granted under the Antiquities Act. ¹⁸³ In response, the United States Supreme Court stated:

[Cameron insists] that the monument reserve should be disregarded on the ground that there was no authority for its creation. To this we cannot assent. The act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon . . . is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention [*81] among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders ¹⁸⁴

2. State v. Franke

In 1943, the Antiquities Act was again shrouded in controversy when President Franklin D. Roosevelt established the Jackson Hole National Monument. ¹⁸⁵ Philanthropist John D. Rockefeller had offered to donate lands adjoining the Grand Teton National Park (GTNP) if the lands would be included within the park. Congress, however, refused to expand the GTNP to encompass these lands. ¹⁸⁶ Rockefeller became impatient with the failed attempts to include the lands in the GTNP, and subsequently threatened to otherwise dispose of the lands if the government did not immediately take possession of them. Consequently, President Franklin Roosevelt utilized his authority under the Antiquities Act by designating the lands as the Jackson Hole National Monument. ¹⁸⁷

Both the State of Wyoming and Congress opposed this reservation. The State of Wyoming brought suit in the United States Federal District Court charging that the Jackson Hole National Monument was beyond the scope of the Antiquities Act, as the monument was barren of any "historic landmarks, historic or prehistoric structures or objects of historic or scientific interest" ¹⁸⁸ The Wyoming Federal District Court, in upholding President Roosevelt's establishment of the monument, stated:

If there be evidence in the case of a substantial character upon which the President may have acted in declaring that there were objects of historic or scientific interest included within the area, it is sufficient upon which he may have based a discretion Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. ¹⁸⁹

The court concluded: [*82]

this seems to be a controversy between the Legislative and Executive Branches of the Government in which . . . the Court cannot interfere. . . . If the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and the disposition of government lands inherently rests in its Legislative branch. ¹⁹⁰

¹⁸² 252 U.S. 450 (1920).

¹⁸³ See Coggins et al., *supra* note 7, at 306.

¹⁸⁴ Cameron, 252 U.S. at 455 56.

¹⁸⁵ See Proclamation No. 2578, 57 Stat. 731 34 (1943).

¹⁸⁶ See Wheatley, *supra* note 11, at 261 62, 465.

¹⁸⁷ See *id.*

¹⁸⁸ State v. Franke, 58 F. Supp. 890, 895 (D. Wyo. 1945).

¹⁸⁹ Id. at 895 96 (citations omitted) (emphasis added).

¹⁹⁰ Id. at 896.

In response to creation of the Jackson Hole National Monument, Congress passed legislation to abolish it, which the President vetoed.¹⁹¹ In 1947, legislation was again introduced to abolish the monument; however, public sentiment favored preserving the area despite the arguable abuse of presidential authority used in its creation.¹⁹² In fact, on September 14, 1950, Congress passed an act including the monument in the Grand Teton National Park.¹⁹³ This act, however, contained a provision prohibiting further extension or establishment of national monuments in Wyoming except through congressional action.¹⁹⁴ As a result of the controversy surrounding the establishment of the Jackson Hole National Monument, only seven national monuments were established by presidential proclamation between 1943 and 1977 under authority of the Antiquities Act.¹⁹⁵

3. State v. Carter

In 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA) to, inter alia, settle the fate of the public domain lands in Alaska.¹⁹⁶ Section 17(d)(2) of ANCSA authorizes the Secretary of Interior to withdraw up to eighty million acres (d-2 lands), "which the Secretary deems are suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems" ¹⁹⁷ However, the d-2 lands withdrawn by the Secretary would expire on December 16, 1978, absent congressional legislation.¹⁹⁸ By November of 1978 Congress had yet to pass legislation finalizing the d-2 land [*83] withdrawals.¹⁹⁹ With the expiration of the withdrawals of d-2 lands looming, President Jimmy Carter, on December 1, 1978, utilized the Antiquities Act to establish seventeen different national monuments reserving a total of fifty-six million acres.²⁰⁰ With these reservations, President Carter reserved an unprecedented amount of land under the Antiquities Act. In fact, President Carter's reservations constituted a withdrawal of over four and a half times the twelve million acres of land that had previously been reserved in all the national monuments established under the Antiquities Act.²⁰¹

In November 1978 the State of Alaska, apparently informed of the possibility that President Carter might utilize his authority under the Antiquities Act, sought a preliminary injunction in the United State District Court citing violations of NEPA.²⁰² The lawsuit basically sought to use NEPA as a delay mechanism until after December 16, 1978, when the withdrawal authority for d-2 lands would expire.²⁰³ The court denied the state's motion for a preliminary injunction by finding that the President was not subject to the requirements of NEPA, so it was unlikely the state would succeed on the merits.²⁰⁴

¹⁹¹ See Wheatley, *supra* note 11, at 465.

¹⁹² See *id.*

¹⁹³ See 64 Stat. 849 (1950).

¹⁹⁴ See 16 U.S.C. § 431(a) (1994).

¹⁹⁵ See Johannsen, *supra* note 181, at 451-52.

¹⁹⁶ See 43 U.S.C. §§ 1601-09 (1994).

¹⁹⁷ *Id.* § 1616(d)(2)(A).

¹⁹⁸ See *id.* § 1616(d)(2)(C) (D) (providing the Secretary two years to make withdrawals and Congress five years to approve through legislation).

¹⁹⁹ See Baynard, *supra* note 35, at 184-85.

²⁰⁰ See 43 Fed. Reg. 57,009-131 (1978).

²⁰¹ See Johannsen, *supra* note 181, at 455.

²⁰² See State v. Carter, 462 F. Supp. 1155 (D. Alaska 1978).

²⁰³ See Congressional Stall Prompts Administrative Actions to Protect the Alaska National Interest Lands, 8 Envtl. L. Rep. 10245-49 (Dec. 1978).

²⁰⁴ See Carter, 462 F. Supp. at 1164.

The facts surrounding President Carter's use of the Antiquities Act presented an excellent opportunity to judicially limit the President's authority under the Antiquities Act. However, in December 1980 the Alaska National Interest Lands Conservation Act (ANILCA) ²⁰⁵ was enacted. ANILCA contained a provision rescinding all the national monuments that President Carter had established, ²⁰⁶ thereby rendering any litigation regarding the national monuments moot. Furthermore, ANILCA provides that future reservations in Alaska of over 5,000 acres by the President under authority of the Antiquities Act are subject to congressional approval. ²⁰⁷

D. The Antiquities Act and NEPA

The President is not subject to NEPA when exercising the power provided to him under the Antiquities Act. The action forcing requirements under section 102 [*84] of NEPA only apply to "agencies of the Federal Government." ²⁰⁸ Under the regulations established by the Council on Environmental Quality (CEQ) to effectuate the provisions of NEPA, federal agencies are defined as "all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office." ²⁰⁹ The Carter court affirmed this position. ²¹⁰ Therefore, national monuments established by presidential proclamation pursuant to the Antiquities Act are not subject to NEPA.

E. Attempts to Amend or Repeal the Antiquities Act Prior to 1996

1. 78th Congress

As mentioned, in 1943 various legislative bills were introduced in Congress to either amend or repeal section 2 of the Antiquities Act in response to the establishment of the Jackson Hole National Monument. Wyoming Representative Frank A. Barrett introduced House Bill 2591 ²¹¹ and Senator Edward V. Robertson, also from Wyoming, introduced Senate Bill 1056, ²¹² which proposed to amend the Antiquities Act by rescinding the President's power to establish national monuments and vest such power in Congress. Furthermore, to repeal section 2 of the Antiquities Act, Colorado Representative J. Edgar Chenoweth introduced House Bill 3884 ²¹³ and Wyoming Senator Joseph C. O'Mahoney introduced Senate Bill 1046. ²¹⁴ Congress failed to pass any of this legislation.

2. 96th Congress

In 1979, after President Carter's creation of seventeen national monuments encompassing 56 million acres in Alaska, Senator Mike Gravel of Alaska introduced Senate Bill 1176 to amend the Antiquities Act. ²¹⁵ In response to what Senator Gravel perceived as abuses resulting from the broad discretion the President had been granted under the Antiquities Act, Senate Bill 1176 attempted to limit it to: "historic or prehistoric specimens or structures such as pottery, bottles, weapons, dwellings, [*85]

²⁰⁵ See 16 U.S.C. §§ 3100-3233 (1994).

²⁰⁶ See *id.* § 3209(a). While the national monuments were rescinded, most all of the lands contained therein were reserved under various other preservation systems under ANILCA. See Coggins et al., *supra* note 7, at 308.

²⁰⁷ See 16 U.S.C. § 3213(a) (1994).

²⁰⁸ 42 U.S.C. § 4332 (1994) (emphasis added).

²⁰⁹ 40 C.F.R. § 1508.12 (1997) (emphasis added).

²¹⁰ See *Carter*, 462 F. Supp. at 1164.

²¹¹ H.R. 2591, 78th Cong. (1943).

²¹² S. 1056, 78th Cong. (1943).

²¹³ H.R. 3884, 78th Cong. (1943).

²¹⁴ S. 1046, 78th Cong. (1943).

²¹⁵ See S. 1176, 96th Cong. (1979).

rock paintings, carvings, graves, human skeletal materials, and nonfossilized and fossilized paleontological specimens when found in an archaeological context. Such objects that shall be directly associated with human behavior and activities." ²¹⁶ Furthermore, Senate Bill 1176 provided that future national monuments reserved under proclamation by the President in excess of 5,000 acres would not become effective unless Congress approved the proclamation within sixty calendar days. ²¹⁷ Congress failed to pass Senate Bill 1176.

The next push for legislation to undermine presidential authority under the Antiquities Act recently came about in response to its use in designating the Grand Staircase-Escalante National Monument, as discussed later in this essay.

IV. The Grand Staircase-Escalante National Monument

On September 7, 1996, Tom Kenworthy reported in the Washington Post that President Clinton was considering a proposal to designate "a huge swath of federal land in southern Utah as a national monument." ²¹⁸ This article gave notice to the Utah delegation which had no knowledge of the impending designation. ²¹⁹ On September 18, 1996, President Clinton, under the authority of the Antiquities Act, designated the Grand Staircase-Escalante National Monument (GSENM) in southern Utah. ²²⁰ The GSENM embraces 1.7 million acres, or roughly 2,700 square miles. ²²¹ While the designation of the GSENM only applied to federal lands, at the time of designation approximately 176,600 acres of school trust lands were contained within the monument. ²²²

President Clinton stated that the purpose of the GSENM was to provide for the preservation of objects of geological, paleontological, archeological, biological, and modern human history. ²²³ The lands within the GSENM will remain open for multiple uses including hunting, fishing, hiking camping and grazing. ²²⁴ These lands, [*86] however, are withdrawn, and consequently cannot be disposed of under various land laws such as the General Mining Law. ²²⁵

A. Assessment of the Proclaimed Resources Within the GSENM

The Presidential Proclamation sets forth a description of some of the resources sought to be protected by the designation of the GSENM.

1. Geological Resources

While President Clinton's description is specific as to some geological objects, upon reading the proclamation it appears scenery, not geological objects, was the main commodity sought to be preserved. This is illustrated in the proclamation's declaration that the upper Escalante Canyons be preserved for their "exposed sandstone and shale deposits in shades of red,

²¹⁶ Id. § 2(a).

²¹⁷ See id. § 2(b)(1).

²¹⁸ Tom Kenworthy, President Considers Carving National Monument out of Utah Land, Wash. Post, Sept. 7, 1996, at A3.

²¹⁹ See 143 Cong. Rec. S1571 (daily ed. Feb. 25, 1997) (statement of Sen. Bennett).

²²⁰ See Proclamation No. 6920, *61 Fed. Reg. 50,223 (1996)*.

²²¹ See President William J. Clinton, Announcement of the Designation of the Grand Staircase Escalante National Monument (Sept. 18, 1996). The GSENM is approximately the size of Delaware and Rhode Island combined.

²²² See Utah Geological Survey, A Preliminary Assessment of Energy and Mineral Resources Within the Grand Staircase Escalante National Monument iii (1997) [hereinafter Utah Geological Survey Energy].

²²³ See Proclamation No. 6920, *61 Fed. Reg. 50,223 (1996)*.

²²⁴ See *id.* at 50,225.

²²⁵ See *id.*

maroon, chocolate, tan, gray, and white." ²²⁶ Utilizing the Antiquities Act to protect lands containing geological features that also have scenic significance has been done before, most notably with the Grand Canyon ²²⁷ and Devil's Tower. ²²⁸ A strong argument can be made for the protection of the scenic Escalante Canyons region; however, it is harder to support the inclusion of the Kaiparowits Plateau, which contains the Kaiparowits Coal Field, within the GSENM.

2. Paleontological Resources

The reservation of areas for paleontological purposes is not a novel use of the Antiquities Act. In 1915, the Dinosaur National Monument was established on the Utah-Colorado border. ²²⁹ The monument's purpose was to preserve an area containing a high concentration of dinosaur bones. However, an inventory conducted of the paleontological resources within the GSENM concluded that, the "knowledge of the paleontology of all the formations in the monument is still rudimentary" ²³⁰ Since the knowledge of the paleontological resources is rudimentary, the logical approach dictates further study to identify areas containing high concentrations of [*87] important paleontological specimens. Once such areas are identified a management strategy can be developed to protect such areas.

3. Archeological Resources

President Clinton's proclamation concerning archeological resources is misleading, stating:

Archeological inventories carried out to date show extensive use of the places within the monument by ancient Native American cultures. . . . Hundreds of recorded sites include rock art panels, occupation sites, campsites and granaries. Many more undocumented sites that exist within the monument are of significant scientific and historic value worthy of preservation for future study. ²³¹

An assessment of the archeological resources within the GSENM found this statement to be "generally true, [but the] archaeological resources within the monument are not as well known as this statement implies." ²³² The report concluded that "the nature of archaeological resources in . . . [the GSENM are] poorly known" ²³³ This indicates that the President's use of the term "undocumented" to describe the archeological resources is misleading, as the proper term is "undiscovered or unknown." Similar to the paleontological resources, further studies should identify areas of significant archeological value, and once identified a management strategy should be developed to ensure the protection of such sites.

4. Biological Resources

President Clinton declared: "the monument is an outstanding biological resource." ²³⁴ This statement found in the proclamation is questionable considering that lands within the GSENM have been frequently described as "sterile . . . and

²²⁶ *Id.* at 50,223.

²²⁷ See 35 Stat. 2175 (1908).

²²⁸ See Proclamation No. 658, 34 Stat. 3236 (1906).

²²⁹ See Proclamation No. 1313, 39 Stat. 1752 (1915); Proclamation No. 2290, 53 Stat. 2454 (1938).

²³⁰ Utah Geological Survey, A Preliminary Inventory of Paleontological Resources Within the Grand Staircase Escalante National Monument 16 (1997).

²³¹ Proclamation No. 6920, 61 Fed. Reg. 50,224 (1996) (emphasis added).

²³² Utah Geological Survey, A Preliminary Assessment of Archaeological Resources Within the Grand Staircase Escalante National Monument 3 (1997).

²³³ *Id.*

²³⁴ Proclamation No. 6920, 61 Fed. Reg. 50,224 (1996).

sparse,"²³⁵ and a "parched, desolate landscape."²³⁶ The proclamation also asserts the GSENM is necessary for the protection of wildlife,²³⁷ but not just any wildlife- [*88] threatened and endangered species.²³⁸ The Antiquities Act, however, was not intended to protect wildlife, which is the purpose of various other laws--specifically the Endangered Species Act.²³⁹ If threatened or endangered species exist in southern Utah they are best protected by the Endangered Species Act, not the Antiquities Act.

5. Modern Human History

While technically qualifying under the Antiquities Act's broad language of "historic landmarks,"²⁴⁰ events and relics of modern human history are not what Congress intended the Antiquities Act to protect. Yet modern human history was heavily relied upon in justifying the designation of the GSENM. The proclamation stated "the monument is rich in human history," such as: (1) use by modern tribal groups; (2) John Wesley Powell's expedition, which initially mapped the portions of the area; and (3) early Mormon pioneer relics.²⁴¹ Congress intended the Antiquities Act to provide protection to objects of antiquity, not to areas involved in, or objects of, modern human history. The National Historic Preservation Act is the proper law to protect landmarks of recent history.²⁴²

B. Spirit of the Antiquities Act

In designating the GSENM President Clinton violated the spirit of the Antiquities Act. The Antiquities Act's original purpose was to provide protection to the large Indian ruins of the southwest.²⁴³ Over the years many presidents have strayed from this original intent,²⁴⁴ including President Clinton by designating the GSENM for the stated purpose of protecting a variety of resources, the existence of which are unknown. Such a designation is arguably in violation of the Antiquities Act because by its terms it extends protection only to "objects."²⁴⁵ While the Antiquities Act does not define object, it is commonly understood to mean "anything [*89] that is visible or tangible."²⁴⁶ Therefore, the intent of the Antiquities Act is only to protect specific ascertained objects, not unknown resources.

²³⁵ Mike Gorrell, *Coal v. Cool! Does Beauty Outweigh Economic Value?; Escalante Area is Largely Untouched*, Salt Lake Trib., Sept. 18, 1996, at A1.

²³⁶ Shaun Stanley, *The Last Place*, Denver Post, Nov. 17, 1996, at A1.

²³⁷ See Proclamation No. 6920, *61 Fed. Reg. 50,224 (1996)*.

²³⁸ In a memorandum entitled "Project Liberty" released to the Committee on National Parks and Public Lands, threatened and endangered species are listed as a possibility to be included in the presidential proclamation. See Project Liberty Memorandum, July 16, 1995 (on file with author).

²³⁹ See *16 U.S.C. § 1531(b)* (1994) (declaring the purpose of the Endangered Species Act is, inter alia, to provide conservation of ecosystems upon which endangered species and threatened species depend).

²⁴⁰ Id. § 431. A landmark is defined as "a building or other place of outstanding historical, aesthetic, or cultural importance." Webster College Dictionary 760 (1991).

²⁴¹ Proclamation No. 6920, *61 Fed. Reg. 50,224 (1996)*.

²⁴² See *16 U.S.C. § 470a* (1994).

²⁴³ See H.R. Rep. No. 2224, 59th Cong. 1 (1906); 40 Cong. Rec. 7,888 (1906).

²⁴⁴ See Johannsen, *supra* note 181, at 450 51.

²⁴⁵ See *16 U.S.C. § 431* (1994).

²⁴⁶ Webster College Dictionary 208 (1991).

In providing protection to objects of historic or scientific interest the Antiquities Act contemplates that such objects must be threatened or endangered in some way. ²⁴⁷ Early on, officials in the Council on Environmental Quality (CEQ), the agency that advises the President on environmental and natural resources matters, recognized this was not the case for the GSENM. In an e-mail, Linda Lance, CEQ Associate Director for Public Lands, stated:

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 sic have not used their monument designation authority in this way in the past--only for large dramatic parcels that are threatened. ²⁴⁸

Following Lance's e-mail, Kathleen McGinty, Chair of CEQ, voiced similar concerns in writing "i'm sic

increasingly of the view that we should just drop these utah sic ideas. we sic 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." ²⁴⁹

If, as Lance indicates, other lands in the country were in more need of protection through the designation of a national monument under the Antiquities Act, why were such lands not designated in place of the Utah lands? The answer is that the designation of the GSENM was solely for political purposes--to gain support of the environmental community for the 1996 Clinton/Gore campaign. The political nature of the designation of the GSENM is starkly illustrated in a memorandum sent by McGinty to the President, which states:

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 view 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 In addition, the new monument will have particular appeal in those areas that [*90] contribute the most visitation to the parks and public lands of southern Utah, namely, coastal California, Oregon and Washington, southern Nevada, and the Front Range communities of Colorado, the TaosAlbuquerque corridor, and the Phoenix-Tucson area Opposition to the designation will come from some of the same parties who have generally opposed the Administration's natural resources and environmental policies and who, in candor, are unlikely to support the Administration under any circumstances. ²⁵⁰

It is ironic that as a result of the Clinton Administration's focus on securing the environmental vote in the 1996 presidential election other lands in more need of protection under the Antiquities Act were bypassed in favor of designating the GSENM. Due to its historically conservative voting record, Clinton/Gore had little or no chance of carrying Utah in the 1996 presidential election. Thus, politically, Utah presented the perfect place to designate a national monument. While the designation would alienate Utah, as McGinty's memorandum indicates, Clinton/Gore would gain the support of environmental voters from the West. ²⁵¹ Accordingly, the lands in Utah were selected for national monument designation not because of their need for protection, but because they were politically advantageous to the Clinton/Gore campaign. In a background briefing the day before the designation of the GSENM, a senior administration official reaffirmed the political nature of President Clinton's action by stating, "we're in a period now that he is the official nominee of the Democratic Party where all events are campaign

²⁴⁷ See H. R. Rep. No. 105 D, 105th Cong. (Comm. Print 1997); S. Rep. No 3797, 59th Cong. (1906).

²⁴⁸ Email from L. Lance to J. Glauthier, K. McGinty, T. Jensen, D. Bear, J. Crutchfield, and B. Beard (Mar. 22, 1996) (emphasis added) (on file with author).

²⁴⁹ Email from K. McGinty to J. Glauthier (Mar. 25, 1996) (emphasis added) (on file with author).

²⁵⁰ Memorandum from Kathleen A. McGinty, Chair of Counsel of Environmental Quality, to William J. Clinton, President of the United States 2 3 (Aug. 14, 1996) (on file with author).

²⁵¹ See *id.* It is interesting to note that in this memorandum, McGinty utilized language, almost verbatim, found in House Bill 1500, the Utah wilderness bill supported by the environmental community. See H.R. 1500, 105th Cong. (1997).

events in one fashion or another So this will be a case for him to argue about the steps we've taken to protect the nation's environment over the recent years." ²⁵²

C. State School Trust Lands

The Antiquities Act only authorizes designation of national monuments on federal lands. ²⁵³ At the time of designation, however, approximately 176,600 acres of State of Utah school trust lands (trust lands) were included within the GSENM. ²⁵⁴ Upon statehood, Congress, under the Utah Enabling Act, granted the State of Utah four [*91] sections (sections 2, 16, 32, and 36) in each township for the support of public schools. ²⁵⁵ A Utah court described this land grant as:

not unilateral gifts made by the United States Congress. Rather, they were in the nature of a bilateral compact entered into between two sovereigns. In return for receiving the federal lands Utah disclaimed all interest in the remainder of the public domain, agreed to forever hold federal lands immune from taxation, and agreed to hold the granted lands, or the proceeds therefrom, in trust as a common school fund. Thus, the land grants . . . were in the nature of a contract, with a bargained-for consideration exchanged between the two governments. ²⁵⁶

President Clinton directed the Secretary of the Interior, in consultation with the Utah delegation and Governor, to exchange the trust lands within the GSENM for other federal lands of equivalent value. ²⁵⁷ Reasonable differences as to the valuation of the trust lands were to be resolved in favor of the school trust. ²⁵⁸

On May 8, 1998, Secretary Babbitt and Utah Governor Michael O. Leavitt signed an agreement to exchange trust lands between the State of Utah and the United States (the Exchange Agreement). ²⁵⁹ In addition to the exchange of trust lands within the GSENM the Exchange Agreement also provides for the exchange of other trust lands in-holdings described in Public Law 103-93, ²⁶⁰ which deals with trust lands contained within units of the National Park System, National Forests, and the Navajo and Goshute Indian Reservations. ²⁶¹ As a result of the exchange the federal government receives title to 376,739 acres, plus title to the mineral interests of an additional 65,852 acres. ²⁶² In consideration for the trust lands the State of Utah receives: 1) a \$ 50 million cash payment to the State of Utah, which will be placed in the Utah Permanent School Fund; 2) approximately \$ 13 million generated from the sale of the unleased Cottonwood Coal Tract in Emery County, Utah; 3) approximately 160.3 million tons of coal resources; 4) 58,000 acres located in Carbon and Emery Counties, which are estimated to contain approximately 185 billion cubic feet of coal bed methane; and 5) 60,045.5 acres identified as mineral,

²⁵² Background Briefing by Senior Administration Official (visited Nov., 1997) <http://www.pub.whitehouse.gov/white_house/publications/1996/09/1996_09_17_background_briefing_onnational_monument_in_utah.text>.

²⁵³ See *16 U.S.C. § 431* (1994).

²⁵⁴ See *Utah Geological Survey Energy*, *supra* note 222, at iii.

²⁵⁵ See *28 Stat. 107, 109 (1894)*.

²⁵⁶ *State v. Andrus*, 486 F. Supp. 995, 1001 (D. Utah 1979).

²⁵⁷ See Proclamation No. 6920, *61 Fed. Reg. 50,225 (1996)*.

²⁵⁸ See *id.*

²⁵⁹ See Utah State and Institutional Trust Lands Administration, Agreement to Exchange Utah School Trust Lands Between the State of Utah and the United States of America (visited Feb., 1999) <<ftp://www.tl.state.ut.us/ftptl/monuagr.pdf>>.

²⁶⁰ See *id.* See also Utah Schools and Lands Improvement Act of 1993, Pub. L. No. 103 93, *107 Stat. 995*, amended by Pub. L. No. 104 211, *110 Stat. 3013*.

²⁶¹ See *Utah State and Institutional Trust Lands Administration*, *supra* note 259.

²⁶² See *id.* § 2.

[*92] commercial, or potential development properties. ²⁶³ To protect the interests of existing lessees, the conveyance of these lands are subject to valid existing rights and interests. ²⁶⁴ Furthermore, pursuant to the Exchange Agreement, the State of Utah agrees to dismiss itself with prejudice as a party to litigation concerning the designation of the GSENM, and to dismiss with prejudice litigation commenced under authority of Public Law 103-93. ²⁶⁵ In October 1998, President Clinton signed into law the Utah Schools and Lands Exchange Act of 1998, which ratified the Exchange Agreement, provided for the \$ 50 million cash payment, and repealed Public Laws 103-93 and 104-211. ²⁶⁶

Although development of trust lands would have been permissible within the GSENM, it was economically impractical. Courts have ruled that the State of Utah (or its lessees) "must be allowed access to the state school trust lands so that those lands can be developed in a manner that will provide funds for the common schools . . . [and such access must not be] so narrowly restrictive as to render the lands incapable of their full economic value." ²⁶⁷ However, there are a number of obstacles to development. Even if the GSENM were to be set aside, major problems in extracting full value from trust lands within the GSENM still existed. For instance, "almost all the GSENM is in House Bill 1500." ²⁶⁸ Consequently, any resource development within the GSENM would be highly controversial and would result in an enormous investment of the agency's time and resources. Accordingly, the Utah School and Institutional Trust Lands Administration, the state agency vested with management authority over trust lands, ²⁶⁹ concluded that "pursuing an exchange out of [the GSENM was] the wisest course of action." ²⁷⁰

D. Western States Coalition v. President William Clinton

On October 31, 1996, Western States Coalition and Mountain States Legal Foundation filed a lawsuit in the United States District Court challenging the legitimacy of the GSENM. ²⁷¹ The lawsuit seeks to enjoin BLM from implementing changes in the management of the lands within the GSENM. ²⁷² In addition, the [*93] lawsuit requests that the court declare President Clinton's actions in violation of the Antiquities Act, alleging that: (1) he "failed to 'confine the area to the smallest area compatible with the area to be protected,'" and that in fact the GSENM boundaries were arbitrarily determined; (2) he failed to "confine his proclamation to 'objects' of historic or scientific interest but included general scenery and living organisms;" and (3) "the . . . designation was arbitrary and capricious." ²⁷³ Further, the lawsuit contends that the Antiquities Act itself violates the delegation doctrine by providing the President unrestrained authority over federal lands, and therefore should be declared unconstitutional. ²⁷⁴ The district court has yet to rule in this litigation.

E. Proposed Legislation in Response to the GSENM

1. 104th Congress

²⁶³ See id. § 3.

²⁶⁴ See id. § 4(A).

²⁶⁵ See id. § 12.

²⁶⁶ See Utah Schools and Lands Exchange Act of 1998, Pub. L. No. 105 335, 112 Stat. 3139.

²⁶⁷ *Andrus*, 486 F. Supp. at 1009.

²⁶⁸ Minutes of the Meeting of the School and Institutional Trust Lands Administration Board of Trustees 4 (May 14, 1998) [hereinafter Board Minutes] (on file with author).

²⁶⁹ See *Utah Code Ann. § 53C 1 201* (1953).

²⁷⁰ Board Minutes, supra note 268.

²⁷¹ See Complaint, Western States Coalition v. President William Clinton, Civil No. 2:96 CV 0924G (D. Utah 1996).

²⁷² See id. at 1.

²⁷³ Id. at 2.

²⁷⁴ See id. at 11.

On September 19, 1996, the day after President Clinton designated the GSENM, Representative Hansen introduced House Bill 4118 to amend section 2 of the Antiquities Act by requiring that any national monument in excess of 5,000 acres be designated only through an act of Congress with the concurrence of the governor and state legislature of the affected state.²⁷⁵

On September 26, 1996, Representative William Orton of Utah introduced House Bill 4214 to amend section 2 of the Antiquities Act to require that any national monument designated by proclamation be approved by Congress within 180 days.²⁷⁶ Representative Orton, in whose district the GSENM is located, expressed his opposition to the monument along with the rest of the Utah congressional delegation.²⁷⁷ House Bill 4214 was Representative Orton's only attempt to amend the Antiquities Act.²⁷⁸ Soon thereafter he lost his congressional seat to Republican candidate Chris Cannon in the November 1996 elections.²⁷⁹ On September 27, 1996, Senator Frank Murkowski of Alaska introduced Senate Bill 2150, which would require congressional approval of extensions or establishments of national monuments and further require that they be executed in full compliance with NEPA and the Endangered Species Act.²⁸⁰ [*94]

2. 105th Congress

In an apparent attempt to protect California from suffering a similar fate as Utah, on January 7, 1997, Representative Wally Herger of California introduced House Bill 193 to prohibit designation of the Mt. Shasta area in California as a national monument under the Antiquities Act.²⁸¹

On February 25, 1997, Senator Bennett introduced Senate Bill 357, the "Grand Staircase-Escalante Resource Protection Act."²⁸² The sole purpose of the bill, according to Senator Bennett, was "to codify the promises the President made when he created the monument."²⁸³ Specifically the bill would: (1) Provide that the GSENM be managed under the principles of multiple use;²⁸⁴ (2) allow the exercise of valid existing rights;²⁸⁵ (3) continue to permit the grazing of livestock;²⁸⁶ (4) not include any federal water rights, either express or implied;²⁸⁷ (5) not affect the State of Utah's jurisdiction regarding fish and wildlife management;²⁸⁸ (6) expedite all exchanges of school trust lands;²⁸⁹ (7) establish an advisory committee and planning team for management purposes;²⁹⁰ and (8) authorize appropriation necessary for the GSENM's management.²⁹¹

²⁷⁵ See H.R. 4118, 104th Cong. (1996).

²⁷⁶ See H.R. 4214, 104th Cong. (1996).

²⁷⁷ See Laurie Sullivan Maddox, Taking Swipes at Clinton, Utahns Vow to Fight Back, Salt Lake Trib., Sept. 19, 1996, at A5.

²⁷⁸ See H.R. 4214, 104th Cong. (1996).

²⁷⁹ See Greene, Orton Consider Staying on in Washington, Salt Lake Trib., Dec. 15, 1996, at C5.

²⁸⁰ See S. 2150, 104th Cong. (1996).

²⁸¹ See H.R. 193, 105th Cong. (1997).

²⁸² S. 357, 105th Cong. (1997).

²⁸³ 143 Cong. Rec. S1571 (daily ed. Feb. 25, 1997) (Statement of Sen. Bennett).

²⁸⁴ See S. 357, 105th Cong. § 4 (1997).

²⁸⁵ See id. § 5.

²⁸⁶ See id. § 6.

²⁸⁷ See id. § 8.

²⁸⁸ See id. § 10.

²⁸⁹ See id. § 11.

²⁹⁰ See id. §§ 12-13.

²⁹¹ See id. § 14.

March 19, 1997, saw the introduction of two more bills--House Bill 1127 ²⁹² by Representative Hansen and Senate Bill 477 ²⁹³ by Senator Orrin Hatch. House Bill 1127 was Representative Hansen's second attempt to amend section 2 of the Antiquities Act by requiring any national monument in excess of 50,000 acres to be designated only through an act of Congress, with the concurrence of the Governor and state legislature of the affected state. ²⁹⁴ In Senate Bill 477, the National Monument Fairness Act of 1997, Senator Hatch proposed to amend section 2 of the Antiquities Act to require congressional approval of national monuments in excess of 5,000 acres, and to require consultation with the governor of the affected state prior to Congress' approval. ²⁹⁵ [*95]

On May 5, 1997, Senator Murkowski introduced Senate Bill 691, the Public Land Management Participation Act of 1997. ²⁹⁶ The stated purpose of Senate Bill 691 is to "ensure that the public and the Congress have both the right and a reasonable opportunity to participate in decisions that affect the use and management of all public lands owned or controlled by the Government of the United States." ²⁹⁷ As drafted, Senate Bill 691 would create notice requirements and provide opportunities to the public and the federal, state, and local governments to comment on and participate in the declaration of national monuments pursuant to the authority of the Antiquities Act. ²⁹⁸ Furthermore, Senate Bill 691 provided that, based upon reviews and mineral surveys provided by the Secretary of Interior or Secretary of Agriculture, the President would be required to make his recommendation with respect to designation of a particular area as national monument, and that the national monument would only be effective if provided by an act of Congress. ²⁹⁹ This proposed study and recommendation process appears to be modeled on the wilderness designation process set forth in the Wilderness Act ³⁰⁰ and FLPMA. ³⁰¹

On May 20, 1998, Representative Cannon introduced House Bill 3909, the Grand Staircase-Escalante National Monument Minor Boundary Adjustments Act. ³⁰² House Bill 3909 proposed various boundary modifications to the GSENM resulting in the removal of four towns (Henrieville, Cannonville, Tropic, and Boulder), an actively producing oil field (the Upper Valley Oil Field), and a highway (U.S. Route 89) from within its boundaries. ³⁰³ While proposing boundary changes to the GSENM, House Bill 3909 contains a disclaimer that it shall not be "construed as constituting congressional approval, explicit or implicit, of the establishment of . . . [the GSENM]." ³⁰⁴ Although House Bill 3909 failed to pass Congress, the boundary changes proposed by House Bill 3909 were included in House Bill 3910, ³⁰⁵ which was signed into law by President Clinton on November 6, 1998. ³⁰⁶

²⁹² H.R. 1127, 105th Cong. (1997).

²⁹³ S. 477, 105th Cong. (1997).

²⁹⁴ See H.R. 1127, 105th Cong. (1996).

²⁹⁵ See S. 477, 105th Cong. (1997).

²⁹⁶ See S. 691, 105th Cong. (1997).

²⁹⁷ Id. § 2.

²⁹⁸ See id. § 3.

²⁹⁹ See id.

³⁰⁰ See 16 U.S.C. § 1132(b) (c) (1994).

³⁰¹ See 43 U.S.C. § 1782(b) (1994).

³⁰² H.R. 3909, 105th Cong. (1997).

³⁰³ See id. § 3.

³⁰⁴ Id.

³⁰⁵ See H.R. 3910, 105th Cong. § 201 (1998).

³⁰⁶ See Automobile National Heritage Area Act of 1998, Pub. L. No. 105 355, 112 Stat. 3247. Included within the boundary changes for the GSENM was the addition of the East Clark Bench Inclusion, which added approximately 6,400 acres to the GSENM. See Pub. L. No. 105 355 § 201(b), 112 Stat. 3247, 3253.

The chances of amending or repealing the Antiquities Act are minimal. It is highly doubtful that any President would sign a bill which would limit or revoke the authority and broad discretion that Congress provided the President under the [*96] Antiquities Act. Furthermore, the federal lands subject to the Antiquities Act are primarily located in the eleven western states.³⁰⁷ Consequently, it is likely the western delegation will have difficulty gaining the support of the eastern delegation in attempting to amend or repeal the Antiquities Act. The eastern delegation, whose constituents are for the most part not directly impacted by the Antiquities Act, is likely to determine that supporting amendment or repeal of the Antiquities Act is a bad move politically. Eastern constituents would probably view such action as anti-environmental. Accordingly, it is highly unlikely that any eastern delegate will be willing to jeopardize his or her congressional seat by casting an "anti-environmental" vote to amend or repeal a law that has little or no impact upon his or her constituents.

F. Practical Perspective of the GSENM Designation

In conjunction with the decision to utilize the Antiquities Act for the political advancement of the Clinton/Gore campaign, the Clinton Administration also had to select the area of southern Utah to designate as a national monument. Numerous areas were considered, including an area known as the Grand Gulch and lands adjacent to Canyonlands National Park, Arches National Park, and Glen Canyon National Recreation Area.³⁰⁸ However, the Clinton Administration finally selected the Grand Staircase area, Canyons of the Escalante, and the Kaiparowits Plateau. Presumably, the Grand Staircase and Canyons of the Escalante were selected for their remarkable landscape and beauty. The Kaiparowits Plateau, in contrast, was selected because it presented the threat needed to provide the designation of the GSENM with a sense of legitimacy. The alleged threat is the proposed Warm Springs Project of Andalex Resources, Inc. (Andalex).

Including the Kaiparowits Plateau within the GSENM facilitated the political advancement that the Clinton Administration sought to achieve through the designation of the GSENM because southern Utah is considered a shrine to environmentalists.³⁰⁹ In the 1970s, the environmental community vigorously fought the development of the Kaiparowits Coal Field when a consortium of electric utility [*97] companies (the consortium) proposed the Kaiparowits Power Project.³¹⁰ In 1976, due to changes in economic conditions, the Kaiparowits Power Project was canceled.³¹¹

In 1985, Andalex, a company that acquired the consortium's mineral leases, proposed the Warm Springs Project. This project included the Smoky Hollow Mine, an underground coal mine intending to utilize longwall mining technology to access the Kaiparowits Coal Field.³¹² An economic analysis concluded the State of Utah and its residents would benefit greatly from the development of the Warm Springs Project.³¹³ Environmental groups viewed the development of the Kaiparowits Coal Field as a threat to the region's potential for designation as a wilderness.³¹⁴ As such, they vowed to fight "as long as there's coal in

³⁰⁷ The eleven Western states include Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. See Coggins et al., *supra* note 7, at 12.

³⁰⁸ See Memorandum from Kathleen A. McGinty, Chair of Council on Environmental Quality to William J. Clinton, President of the United States 1 (Mar. 29, 1996); Email from J. Crutchfield to J. Glauthier (Apr. 3, 1996) (on file with author).

³⁰⁹ See Tom Turner, *Wild by Law: the Sierra Club Legal Defense Fund and the Places it has Saved* 45 (1990).

³¹⁰ See *id.* at 50-56. Basically, the Kaiparowits Coal Project proposed the development of four underground coal mines producing approximately nine million tons per year, a 3,000 megawatt power plant, and a new community of 14,000 to 15,000 people. See Governor's Office of Planning and Budget, *Andalex Resources and the Proposed Smoky Hollow Mine: a Fiscal Impact Analysis and Economic Overview* 18 (Utah 1993).

³¹¹ See Governor's Office of Planning and Budget, *supra* note 310.

³¹² See *id.* at 15-16, 18. The Smoky Hollow Mine proposes production of 2.5 million tons per year at full capacity. The coal would be shipped via truck to two railroad loadout facilities located outside the cities of Cedar City and Hurricane, and subsequently shipped to domestic and foreign markets. See *id.* at 15-16.

³¹³ See *id.* at 61.

³¹⁴ See generally Terry Tempest Williams & Stephen Trimble, *Writers of the West Speak on Behalf of Utah's Wilderness* (1995).

the ground" ³¹⁵ Accordingly, environmental groups have vigorously opposed the development of the Warm Springs Project.

In 1995, designation of Utah BLM wilderness almost occurred when Senate Bill 884 nearly passed. ³¹⁶ This bill proposed 2.2 million acres of wilderness. ³¹⁷ The fact that Senate Bill 884 nearly passed made the Clinton Administration nervous because it advocates designation of at least five million acres as wilderness. ³¹⁸ In response, the Clinton Administration's CEQ chair McGinty recommended to the President that he utilize the Antiquities Act to designate a national monument in southern Utah. Not only would such a designation prevent the development of the Warm Springs Project, but it would also facilitate designation of wilderness in southern Utah. ³¹⁹

In a memorandum to Leon Panetta, White House Chief of Staff, describing the possible designation of the GSENM, McGinty stated: "The purpose of the new monument designation would, in general, be to provide additional protection for scenic public lands with high scientific and historical value. More specifically, [*98] monument designation would grant the Interior Department additional leverage to forestall [the Warm Springs Project]." ³²⁰ In his designation speech, President Clinton stated that he was "concerned about a large coal mine proposed for the area . . . and that we shouldn't have mines that threaten our national treasures." ³²¹ Contrary to President Clinton's assertion, however, the Warm Springs Project did not present a threat to any national treasures, nor did it present any threat to the designation of wilderness in southern Utah.

With regard to wilderness designation, the Preliminary Draft Environmental Impact Statement (PDEIS) ³²² prepared for the Warm Springs Project pursuant to NEPA determined that the impacts to "the potential wilderness designation of the Wahweap and Burning Hills Wilderness Study Areas with mining-related construction and operation activities would be negligible to minor over both the short and long terms." ³²³ The PDEIS concluded that impacts associated with the Warm Springs Project for the most part would be potentially negligible or minor in regards to geology and topography, paleontology, hydrology, soils, vegetation, wildlife, noise, air quality, recreation, wilderness, and cultural resources. ³²⁴ The only potentially moderate or major impacts were associated with some aspects of transportation, visual resources/aesthetics, and socioeconomics. ³²⁵

It is important to note that the moderate or major socioeconomic impacts were the positive economic benefits associated with the Warm Springs Project. Assessing socioeconomic benefits associated with the Warm Springs Project, the PDEIS concluded that:

³¹⁵ Turner, *supra* note 309, at 63.

³¹⁶ See Lee Davidson, White House Secretly Worked on Grand Staircase for More Than a Year, *Deseret News*, Apr. 29, 1997, at A1.

³¹⁷ See S. 884, 104th Cong. (1995).

³¹⁸ See Letter from Bruce Babbitt to James V. Hansen 1 (July 24, 1996) (on file with author).

³¹⁹ See Kathleen A. McGinty, Testimony before the Subcommittee on National Parks, Forests, and Lands, Committee on Resources, U.S. House of Representatives 1 (Apr. 29, 1997), mentioned in 143 Cong. Rec. D401 01, D403 (1997) (on file with author).

³²⁰ Memorandum from Kathleen A. McGinty, Chair of Council on Environmental Quality, to Leon Panetta, White House Chief of Staff 2 (Sept. 9, 1996) (emphasis added) (on file with author).

³²¹ President William J. Clinton, Announcement of the designation of the Grand Staircase Escalante National Monument (Sept. 18, 1996) (emphasis added).

³²² A copy of the PDEIS was made available only as a result of a subpoena served on the Department of Interior by the House of Representatives, Committee on Resources, which requested the PDEIS to review whether the Warm Springs Project presented an actual threat justifying the President's use of the Antiquities Act. See H.R. Rep. No. 105 824 (1998).

³²³ U.S. Dept. of the Interior, Bureau of Land Management, Warm Spring Project, Preliminary Draft Environmental Impact Statement, 4 113 (Dec. 1995).

³²⁴ See *id.* at 4 151 to 56.

³²⁵ See *id.*

At full production over the life of the [Warm Springs] Project, the combined direct and secondary employment would create a total of 822 to 832 jobs[;]³²⁶

....

In 1992, average annual wage and salary earnings ranged from \$ 14,725 in Kane County to almost \$ 20,600 in Coconino County. The predicted average annual earnings of about \$ 35,000 for the direct [Warm Springs] [*99] Project employees would be considerably above prevailing wages in the region[;]³²⁷

.... At full production, the combined direct and secondary wage and salary earnings associated with the . . . [Warm Springs] Project are projected at about \$ 23.5 million annually[;]³²⁸

....

Purchases of locally available goods and services by the mine and trucking firm are estimated at about \$ 7.4 million annually[;]³²⁹

....

Net revenues to local governmental units, after accounting for projected increases in public service expenditures, were estimated at \$ 1.8 million annually[;]³³⁰

....

Indirect revenues accruing to the State [of Utah are] projected to average about \$ 2.25 million per year[;]³³¹

....

[Annual direct revenues accruing to the State of Utah in the form of] sales and use taxes would average about \$ 1.06 million . . . and the other revenues associated with the trucking operations would account for . . . \$ 0.95 million[;]³³²

....

The . . . [Warm Springs] Project would produce revenues to the Federal treasury [amounting to] . . . \$ 1.75 million annually from the retained share of mineral royalties, \$ 2.15 million in payments into the Federal Black Lung Program, and \$ 375,000 for the Abandoned Mine Land Reclamation Fund. Federal highway users' revenues would exceed \$ 1.24 million annually at full production.³³³

It is ironic that in deciding whether to approve or deny the Warm Springs Project--the very "threat" that President Clinton pointed to as the catalyst for the designation of the GSENM--the Clinton Administration's own agencies concluded that approval of the Warm Springs Project was the "preferred alternative" studied in the PDEIS.³³⁴ The political nature of the

³²⁶ Id. at 4 61.

³²⁷ Id. at 4 65 (citation omitted).

³²⁸ Id.

³²⁹ Id. (citation omitted).

³³⁰ Id. at 4 68.

³³¹ Id. at 4 72.

³³² Id. at 4 73.

³³³ Id. at 4 74 (citation omitted).

³³⁴ See id. at 2 1, 2 2, 2 3.

designation of the GSENM is accurately summarized in a report issued by the House of Representatives Committee on [*100] Resources, which has jurisdiction over the creation of national monuments pursuant to the Antiquities Act. This report states:

the only thing the President was trying to protect by designating . . . [the GSENM] was his chance to win reelection. The "threat" motivating the President's actions was electoral, not environmental . . . and it is ironic that in this case Andalex had more respect for the NEPA process than the Clinton Administration. ³³⁵

With the designation of the GSENM, President Clinton effectively prevented the development of an estimated: (1) sixty-two billion tons of coal, worth approximately \$ 221 to \$ 312 billion; (2) 2.6 to 10.5 trillion cubic feet of coal-bed methane, worth approximately \$ 2 to \$ 17.5 billion; and (3) 270 million barrels of oil, worth approximately \$ 20 million to \$ 1.08 billion. ³³⁶ In President Clinton's designation speech he recognized the importance of mining to our national economy and to our national security, but stated "we can't have mines everywhere." ³³⁷ This statement demonstrates President Clinton's ignorance of the rarity of quality coal deposits such as the Kaiparowits Coal Field, ³³⁸ and the elementary concept that mine locations are based upon the location of the resources, not vice-versa. In the spirit of preservation, President Clinton stated "let us always remember, the Grand Staircase-Escalante National Monument is for our children." ³³⁹ However, what the designation of the GSENM "has given our children is a legacy of continued energy dependance sic, marked by contrived shortages and crises, the full impact of which will be sharply felt in the years to come." ³⁴⁰

V. Conclusion

Ever since its enactment, the Antiquities Act has been abused numerous times by various Presidents. ³⁴¹ Today's federal land management practices demand [*101] public participation, which the Antiquities Act circumvents. Furthermore, there are numerous laws which are more efficient and effective in carrying out the protection of federal lands while providing for the development of natural resources.

While arguably within the letter of the Antiquities Act, President Clinton's designation of the GSENM was not within the spirit of the law. It is a leap from protecting the large ruins of the southwest as contemplated by the Antiquities Act to protecting "packrat middens," that were identified in the GSENM's proclamation. ³⁴² The creation of the GSENM was for political and not preservation purposes. With this political decision, President Clinton has effectively precluded the development of the Kaiparowits Coal Field, this nation's most precious coal resource. In the words of Utah's Senator Orrin Hatch, "the President may have statutory authority but doesn't have moral authority for the designation." ³⁴³

³³⁵ H.R. Rep. No. 105 824 (1998).

³³⁶ See *Utah Geological Survey Energy*, *supra* note 222, at iii.

³³⁷ Remarks Announcing the Establishment of the Grand Staircase Escalante National Monument at Grand Canyon National Park, Arizona, II Pub. Papers 1600, 1601 (Sept. 18, 1996).

³³⁸ See William Perry Pendley, Take No Prisoners, Land Rights Letter, Oct./Nov. 1996, at 14. There are no other coal fields in the United States remotely comparable to the quantity and quality of the Kaiparowits coal field. In fact, there exists in the world only two coal fields comparable to the Kaiparowits coal field one in Columbia and another in Indonesia. See Sarah Foster, The Utah Coal Lockup: A Trillion Dollar Lippo Payoff?, Land Rights Letter, Oct./Nov. 1996, at 4.

³³⁹ Proclamation No. 6920, *61 Fed. Reg. 50,225 (1996)*.

³⁴⁰ Foster, *supra* note 338, at 5.

³⁴¹ President Carter's Secretary of the Interior, Cecil Andrus, who assisted with the withdrawal of fifty six million acres in Alaska pursuant to the Antiquities Act, recently admitted that he misused the Antiquities Act, stating: "but it was legal and we did it to help get some stubborn Alaska congressmen to the table to work out a Park Service lands bill that they had stalled in the Congress." Christopher Smith, Andrus: The Art of the Deal, Salt Lake Trib., Oct. 26, 1998, at A1.

³⁴² See Proclamation No. 6920, *61 Fed. Reg. 50,224 (1996)*.

³⁴³ Orrin Hatch, Utah Delegation Remarks Proceeding President Clinton's Designation of the Grand Staircase Escalante National Monument (television broadcast, Sept. 18, 1996) (on file with author).

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