

## 43 Rocky Mt. Min. L. Inst. 4-1 1997

Rocky Mountain Mineral Law Foundation Annual and Special Institutes > Annual Institutes > (1997) Volume 43 > Chapter 4 (UP THE GRAND STAIRCASE: EXECUTIVE WITHDRAWALS AND THE FUTURE OF THE ANTIQUITIES ACT)

### UP THE GRAND STAIRCASE: EXECUTIVE WITHDRAWALS AND THE FUTURE OF THE ANTIQUITIES ACT

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#### § 4.01 Introduction<sup>1</sup>

On September 18, 1996, President Clinton stood on the south rim of the Grand Canyon in Arizona and proclaimed that 1-7 million acres of federal land in southern Utah would be designated as the Grand Staircase-Escalante National Monument.<sup>2</sup> There was no prior consultation with Congress or Utah state officials. There was, in fact, no public participation in the decision at all. On the day of the proclamation, Senator Hatch of Utah complained on the Senate floor:

Members from Utah's congressional delegation and our State Governor had to read about this proposal in the *Washington Post* [on September 7, 1996]. This is the first time we heard about it. There has been no consultation whatsoever in the development of the proposal. We have seen no maps; no boundaries; there have been no phone conversations; no TV or radio discussion shows; no public hearings; absolutely nothing from this President.<sup>3</sup>

Indeed, documents later obtained by Congress show that administration officials working on the monument decision tried to keep it a secret, fearing that if word leaked out, the designation would not happen-<sup>4</sup>

According to the Chair of the White House Council on Environmental Quality, President Clinton designated the Grand Staircase-Escalante National Monument because he believed the lands were in "jeopardy."<sup>5</sup> In the 104th Congress, there were competing bills to designate parts of southern Utah as wilderness- A bill supported by environmental groups (H.R. 1500) proposed to designate 5.7 million acres as wilderness. A bill sponsored by the Utah congressional delegation proposed to designate 1.8 million acres as wilderness.<sup>6</sup> The Administration advised Congress it would veto the Utah delegation's bill if passed.<sup>7</sup>

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<sup>1</sup> The author wishes to acknowledge the assistance of Chad Henderson, a summer associate at Holland & Hart, in preparing this paper.

<sup>2</sup> Proclamation No. 6920 (1996), reprinted in *61 Fed. Reg. 50,232 (Sept. 25, 1996)*. A map of the monument area is at the end of this paper.

<sup>3</sup> 142 Cong. Rec. S10827 (daily ed. Sept. 18, 1996) (statement of Sen. Hatch).

<sup>4</sup> See "Did Redford Know The Secret?" *U.S. News & World Rep.*, May 12, 1997, at 27:

The documents reveal that the proclamation was written by Charles Wilkinson, a University of Colorado law professor, who on July 26 was cautioned by Interior Department Solicitor John Leshy: "I can't emphasize confidentiality too much if word leaks out, it probably won't happen, so take care." On August 5, White House environmental chief Katie McGinty warned a presidential aide: "Any public release of the information would probably foreclose the president's option to proceed."

<sup>5</sup> Testimony of Kathleen A. McGinty before the Subcomm. on National Parks, Forests and Lands, House Comm. on Resources, April 29, 1997, available in 1997 WL 208547 [hereinafter McGinty Testimony].

<sup>6</sup> H.R. 1745, 104th Cong. § 2 (1995); see also H. Rep. No. 104 396 (1995) (describing Utah Public Lands Management Act of 1995, H.R. 1745).

Only Congress has the power to designate lands as wilderness.<sup>8</sup> But rather than wait for Congress to complete its deliberations on the Utah wilderness bills, President Clinton decided to declare a portion of the lands in dispute as a national monument. About two-thirds of the monument lands would have been designated wilderness in H.R. 1500;<sup>9</sup> about one-fifth of the monument lands would have been designated wilderness in the Utah delegation bill.<sup>10</sup>

Two facts make the Grand Staircase-Escalante monument designation particularly controversial. Perhaps they explain why administration officials wanted to avoid a public debate. First, within the monument boundaries lies the Kaiparowits Plateau. A vast area of about 600,000 acres, it has enormous mineral potential. The Utah Geological Survey estimates that the area contains over 11 billion tons of recoverable coal and two to four trillion cubic feet of gas.<sup>11</sup> Conoco, which has over 100 existing oil and gas leases in the monument area, believes that its leases may contain one billion barrels of oil.<sup>12</sup> In making his monument announcement, President Clinton specifically referred to a large underground coal mine proposed in the southern part of the Kaiparowits Plateau, saying "we can't have mines everywhere, and we shouldn't have mines that threaten national treasures."<sup>13</sup> There is little doubt that a principal objective of the monument designation was to try to prevent mineral development on the Kaiparowits Plateau.<sup>14</sup>

Second, within the monument boundaries are about 175,000 acres of land, and an additional 25,000 acres of mineral interests, owned by the State of Utah. When Utah became a state, the federal government granted Utah title to four sections within each township (generally sections 2, 16, 32, and 36). The purpose of the grant was to provide the state with a revenue source for public education, since the state would not be able to tax federal lands within the state. The state has a "binding perpetual obligation" to generate revenues from the granted lands-called "school trust lands"-for the support of public education.<sup>15</sup> To meet its trust obligation, the state has previously issued mineral leases on about one-half of its lands within the monument boundaries- As a practical matter, monument designation will make development of state leases more difficult because the lands are isolated 640-acre tracts. Consolidation of the lands with adjacent federal lands may in some cases be necessary for economic development.

The monument designation protects "valid existing rights" within the monument area.<sup>16</sup> In addition, President Clinton assured the State of Utah that his administration would try to expedite exchanges of federal lands outside the monument area for school trust lands inside the monument so that the state could receive revenue producing property elsewhere.<sup>17</sup>

<sup>7</sup> McGinty Testimony, *supra* note 5.

<sup>8</sup> See 16 U.S.C. §§ 1131 1136 (1994).

<sup>9</sup> State of Utah, School and Institutional Trust Lands Admin., Map, "Grand Staircase Escalante National Monument Trust Surface Ownership" (1997) (comparing monument's total 1.87 million acres to 1.3 million acres of Utah Wilderness Coalition's proposed wilderness areas within the monument).

<sup>10</sup> *Id.* (comparing monument's 1.87 million acres to 403,169 acres of the Utah congressional delegation's proposed wilderness found within the monument).

<sup>11</sup> Testimony of M. Lee Allison, State Geologist and Director of the Utah Geological Survey, before the Utah legislature, Oct. 16, 1996.

<sup>12</sup> Testimony of Robert E. Irelan, Conoco, before the Senate Energy and Natural Resources Committee, May 1, 1997, available in 1997 WL 222125 [hereinafter Irelan Testimony].

<sup>13</sup> Remarks by the President in Making Environment Announcement, Sept. 18, 1996 [hereinafter Remarks by the President].

<sup>14</sup> *Id.*; see also McGinty Testimony, *supra* note 5. The Utah wilderness bill supported by environmental groups would have designated most of the Kaiparowits Plateau as wilderness. The Utah congressional delegation's bill would not have designated that area as wilderness.

<sup>15</sup> *Andrus v. Utah*, 446 U.S. 500, 523 (1980).

<sup>16</sup> Proclamation No. 6920, *supra* note 2.

<sup>17</sup> See Remarks by the President, *supra* note 13. See also chapter 2 of this Proceedings, "The New Public Land Exchanges: Trading Development Rights in One Area for Public Resources in Another," by Murray B. Feldman, for further discussion of this subject, including the Grand Staircase Escalante exchange.

Nonetheless, if the federal government successfully prevents development on the Kaiparowits Plateau, Utah stands to lose more than one billion dollars in royalty revenue.<sup>18</sup>

In establishing the area as a national monument with no public participation or congressional involvement, President Clinton relied on the Antiquities Act of 1906.<sup>19</sup> In so doing, the President reignited a smoldering controversy that has spanned 50 years on the use and abuse of the Antiquities Act to withdraw lands from development. This paper analyzes the power of the executive branch, after enactment of the Federal Land Policy and Management Act of 1976, to withdraw lands from mineral development without public involvement or congressional approval. In addressing this issue, the paper examines the scope of the President's power under the Antiquities Act, challenges to controversial monument designations in the past, and past efforts to repeal or amend that Act. The paper then discusses the effect of national monument designation (and other executive withdrawals) on mineral development, particularly "valid existing rights" in the monument area. The paper concludes with a review of current efforts in Congress to amend the Antiquities Act to require public participation and congressional approval.

#### § 4.02 Executive Withdrawals After FLPMA

In the Federal Land Policy and Management Act of 1976 (FLPMA),<sup>20</sup> Congress substantially curtailed the power of the executive branch to withdraw public land from mineral development- Congress repealed "the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (*U.S. v. Midwest Oil Co.*, 236 U.S. 459)...;"<sup>21</sup> it repealed all but a handful of statutes authorizing executive withdrawals;<sup>22</sup> and it imposed detailed procedures on future withdrawals by the Secretary of the Interior.<sup>23</sup>

Except where otherwise authorized by statute, and except in an "emergency," FLPMA requires that all withdrawals of five thousand acres or more be preceded by an opportunity for a public hearing.<sup>24</sup> Moreover, the Secretary of the Interior must give notice of the withdrawal to both Houses of Congress no later than the effective date of the withdrawal.<sup>25</sup> With this notice, the Secretary must provide thorough information about the withdrawal, including the purpose for it, conflicting uses of the land, prior public involvement, and mineral potential.<sup>26</sup> The withdrawal terminates within ninety days if Congress adopts a concurrent resolution not approving the withdrawal.<sup>27</sup>

<sup>18</sup> See 142 Cong. Rec. S10827 (daily ed. Sept. 18, 1996) (statement of Sen. Hatch) ("a potential loss of \$1 billion to Utah schools"); Irelan Testimony, *supra* note 12 (estimating royalties and taxes of \$3 billion to state of Utah on oil development within the monument). The state receives a royalty on production from its own leases, as well as one half of the royalties paid on federal leases. 30 U.S.C. § 191 (1994).

<sup>19</sup> 16 U.S.C. § 431 (1994).

<sup>20</sup> 43 U.S.C. §§ 1701 1782 (1994).

<sup>21</sup> *Pub. L. No. 94 579*, § 704(a), 90 Stat. 2792. In *Midwest Oil*, the Supreme Court held that the President had implied authority to withdraw federal lands because Congress had been aware of executive withdrawals and had not intervened. *United States v. Midwest Oil Co.*, 236 U.S. 459, 480 81 (1915).

<sup>22</sup> *Pub. L. No. 94 579*, § 704(a), 90 Stat. 2792.

<sup>23</sup> 43 U.S.C. § 1714 (1994).

<sup>24</sup> *Id.* § 1714(h).

<sup>25</sup> *Id.* § 1714(c)(1).

<sup>26</sup> *Id.* § 1714(c)(2). The information required amounts to full disclosure of the ramifications of the Secretary's decision, analogous to an environmental impact statement required by the National Environmental Policy Act, 42 U.S.C. § 4332(2) (C). See David H. Getches, "Managing The Public Lands: The Authority of the Executive to Withdraw Lands," 22 *Nat. Resources J.* 279, 320 (1982).

<sup>27</sup> 43 U.S.C. § 1714(c)(1) (1994).

In the case of an emergency withdrawal-where "extraordinary measures must be taken to preserve values that would otherwise be lost"-the Secretary is not required to hold a public hearing before the withdrawal.<sup>28</sup> However, within three months the Secretary must provide Congress with the same detailed information as for other withdrawals of 5,000 acres or more.<sup>29</sup> An emergency withdrawal may not exceed three years.<sup>30</sup>

The only withdrawal statutes not repealed by FLPMA are the Antiquities Act, the Alaska Native Claims Settlement Act, the Fish and Game Sanctuaries Act, the Defense Withdrawal Act, and the Taylor Grazing Act.<sup>31</sup> The withdrawal authority of the Alaska Native Claims Settlement Act has since largely expired.<sup>32</sup> The Fish and Game Sanctuaries Act provides narrow withdrawal authority for "limited areas" within national forests, not chiefly suitable for agriculture, to be used as breeding places for game birds, game animals, and fish.<sup>33</sup> The Taylor Grazing Act does not authorize withdrawals of land from mineral development.<sup>34</sup> And the Defense Withdrawal Act requires congressional approval for defense withdrawals of five thousand acres or more.<sup>35</sup>

Consequently, after the enactment of FLPMA in 1976, the most important executive withdrawal authority other than FLPMA is the Antiquities Act.<sup>36</sup>

### § 4.03 The Antiquities Act

#### [1] Language and Legislative History

Section 2 of the Antiquities Act authorizes the President to withdraw lands for national monuments. It states:

The President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.<sup>37</sup>

The statute does not define any of its terms, such as "other objects of historic or scientific interest." Nor does it require the President to follow any particular procedures, such as a public hearing or consultation with Congress, before designating a national monument. So long as the lands have objects of historic or scientific interest, it appears that the President can

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<sup>28</sup> *Id.* § 1714(e).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See H. Rep. No. 94 1163, at 29, *reprinted in* 1976 U.S.C.C.A.N. 6175, 6203. The House report omits reference to the Fish and Game Sanctuaries Act, but that Act is not among the list of withdrawal statutes repealed. See *Pub. L. No. 94 579*, § 704(a), *90 Stat. 2792*; 1 *Am. L. of Mining* § 14.02[1][d] (2d ed. 1984).

<sup>32</sup> *43 U.S.C. § 1621(h) (1994)*. The only possible exception is *43 U.S.C. § 1616(d) (1)*. See Getches, *supra* note 26, at 315 n.210. In addition, when Congress passed the Alaska National Interest Lands Conservation Act in 1980, it provided that future executive branch withdrawals of more than 5,000 acres in the state of Alaska would not become effective until notice is given to Congress; further, the withdrawal terminates within one year unless Congress passes a joint resolution approving the withdrawal. *16 U.S.C. § 3213(a) (1994)*.

<sup>33</sup> *16 U.S.C. § 694 (1994)*.

<sup>34</sup> *43 U.S.C. § 315e (1994)*.

<sup>35</sup> *43 U.S.C. §§ 155 158 (1994)*.

<sup>36</sup> 1 *Am. L. of Mining* § 14.02[1][d] at 14 14 n.90; Getches, *supra* note 26, at 300.

<sup>37</sup> *16 U.S.C. § 431 (1994)*.

include them in a national monument. The only restriction is that the monument boundaries be limited to the "smallest area" necessary for protection of the historic or scientific objects.

Despite some of the broad terms used in the statute, the legislative history reveals that Congress had a limited purpose in mind: protection of small areas in the southwest United States containing prehistoric ruins and Indian artifacts. The legislative history of the Act begins in 1900.<sup>38</sup> Congress heard from archaeologists and others about the urgent need to preserve prehistoric ruins and relics from vandalism, especially the cliff dwellings and other sites in the southwest.<sup>39</sup> In a report on one of the first bills introduced, the House Committee on Public Lands noted: "The various archeological societies are very much interested in the preservation of these ruins, and the only practical way they can be preserved is by creating reservations of the land surrounding each ruin, and providing a penalty for any destruction of the same."<sup>40</sup> The bill proposed to set aside areas not to exceed 320 acres.<sup>41</sup>

Congressmen introduced four additional bills in 1900 that addressed preservation of antiquities. Each expressly sought to protect ancient ruins,<sup>42</sup> though each took a different approach, from mere penalties for theft and vandalism<sup>43</sup> to broad discretionary power given to the Secretary of the Interior to make withdrawals.<sup>44</sup> The Interior Department proposed a bill, reluctantly introduced by Representative Lacey, chairman of the House Committee on Public Lands. It authorized the President to set aside areas "for their scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest...." No limits were placed on the size of the reservation.<sup>45</sup> The House committee was not pleased with this request for a broad grant of executive authority.<sup>46</sup>

The 56th Congress took no action on these bills, but the various bills established the general outline of the debate: a focus on antiquities, disagreement about process, and the Interior Department's desire for broad executive discretion. In the following years, antiquities remained the focus of the lobbying effort. A 1904 Senate Report contained the testimony of eminent archaeologists and letters from universities across the nation decrying the destruction of historic relics found on public land.<sup>47</sup> A bill to protect antiquities, but with no mention of scenic, natural or scientific values, passed the Senate and despite wide support was held up in the House on the final day of the first session.<sup>48</sup> The bill had no success in the second session, and no action was taken on the several other bills introduced in the 58th Congress.<sup>49</sup>

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<sup>38</sup> See Ronald F. Lee, *The Antiquities Act of 1906*, at 47-57 (Nat'l Park Svc. 1970).

<sup>39</sup> H.R. Rep. No. 56-1104, at 1 (1900). The report discusses H.R. 10451, a bill "for the preservation of prehistoric monuments, ruins, and objects on public lands," and thus introduces the word "monument" into the nomenclature regarding this sort of preservation. *Id.* The report describes increased visitation to these once remote sites, resulting in more destruction of the sites and relics every year. *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 2.

<sup>42</sup> H.R. 8066, 56th Cong. (1900) (stating the purpose as "preservation of prehistoric monuments, ruins, and objects, and to prevent their counterfeiting"); H.R. 8195, 56th Cong. (1900) (stating the purpose "to preserve aboriginal antiquities and prehistoric ruins on the public lands"); H.R. 9245, 56th Cong. (1900) (stating the purpose "to segregate from public lands certain tracts on which are situated ancient houses and ruins and to provide protection for these"); and H.R. 11021, 56th Cong. (1900) (preserving "ancient ruins or relics").

<sup>43</sup> Lee, *supra* note 38, at 51 (discussing H.R. 8195) (citing legislative history found in Edmund B. Rogers, History of Legislation Relating to the National Park System through the 82d Congress (collection of photostats maintained by the U.S. Dep't of the Interior 1958)).

<sup>44</sup> *Id.* at 52-55.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 55.

<sup>47</sup> *Preservation of Historic and Prehistoric Ruins, Etc.*, S. Rep. No. 58-314 (1904) (containing the testimony and letters presented at a hearing before a subcommittee of the Senate Committee on Public Lands).

<sup>48</sup> Lee, *supra* note 38, at 62-64.

The antiquities legislation finally passed in 1906, during the 59th Congress- An eminent archeologist named Edgar Lee Hewett had drafted language to satisfy the objectives of the archaeological societies and the federal departments.<sup>50</sup> Hewett's compromise draft was introduced in both the House and Senate and quickly enacted as the Antiquities Act of 1906. His bill omitted the reference to "scenic beauty" and "natural wonders" (language from the earlier Interior proposal), but included the reference to "objects of historic or scientific interest." His bill also avoided specifying a maximum size for the monument designation, instead giving the President discretion to determine the "smallest area" necessary.

In reporting the Hewett bill that was ultimately enacted, the House Committee on Public Lands explained:

There are scattered throughout the Southwest quite a large number of very interesting ruins. Many of these ruins are upon the public lands, and the most of them are upon lands of but little present value. The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.<sup>51</sup>

The Report of the Senate Committee on Public Lands referred simply to the importance of preserving "historic and prehistoric ruins and monuments," said the "bill is carefully drawn," and recommended its passage.<sup>52</sup> It is therefore evident that the House and Senate committees with jurisdiction over the bill did not ascribe much importance to the phrase "other objects of historic or scientific interest," and did not anticipate the expansive interpretation Presidents would later give to that phrase.

Floor debate on the bill was brief, but reinforces the notion that Congress did not view Hewett's compromise bill as granting broad withdrawal authority. Representative Lacey, sponsor of the House bill and chairman of the House Public Lands Committee, answered another Representative's concerns regarding the bill's effect:

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

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

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

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

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

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

Mr. LACEY. Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst the other reserves the forests and the water courses.<sup>53</sup>

Finally, the legislative history irrefutably shows that scenic beauty was not to be a basis for national monument designation- The Interior Department had tried unsuccessfully to add "scenic beauty" and "natural wonders" to the antiquities bill in the early years of its consideration. Acknowledging this history, Frank Bond, the Chief Clerk of the General Land Office, stated at a National Park Service conference in 1911:

I have at times been somewhat embarrassed by reports of patriotic and public-spirited citizens who have strongly supported applications to create national monuments out of scenery alone.... The terms of the monument act do not specify scenery, nor remotely refer to scenery, as a possible raison d'etre for a public reservation.<sup>54</sup>

<sup>49</sup> *Id.* at 67.

<sup>50</sup> *Id.* at 68 71.

<sup>51</sup> H.R. Rep. No. 59 2224, at 1 (1906).

<sup>52</sup> S. Rep. No. 59 3797, at 1 (1906).

<sup>53</sup> 40 Cong. Rec. 7888 (1906).

<sup>54</sup> Lee, *supra* note 38, at 109.

## [2] Implementation

Just three months after signing the Antiquities Act into law, President Theodore Roosevelt declared the first national monument. Despite congressional focus on prehistoric ruins and Indian artifacts in the Southwest, the President's first monument was an area of 1,193 acres surrounding Devil's Tower, "a lofty and isolated rock" in Wyoming.<sup>55</sup> President Roosevelt cited this rock as an "extraordinary example of the effect of erosion" and a "natural wonder" of great scientific interest.<sup>56</sup> He thus set the stage for a broad interpretation of the term "scientific interest."

Within two years, Teddy Roosevelt's administration took full advantage of the "scientific" language in the Act. Of the first eleven national monuments proclaimed by early 1908, six were established for "scientific" purposes.<sup>57</sup> The last of these, the Grand Canyon National Monument, encompassing over 800,000 acres and established for "unusual scientific interest,"<sup>58</sup> was later described by a senator as a monument that "stretched [the statute] to the utmost limit."<sup>59</sup>

By 1970, eighty-seven national monuments had been proclaimed by successive presidents. Thirty-six of those were classified as "historic areas," fifty-one as "scientific areas."<sup>60</sup> Since 1970, the only new national monuments established by presidential proclamation are fifteen monuments in the state of Alaska, all by President Carter on December 1, 1978 (and all subsequently revoked by Congress in 1980 as part of the Alaska National Interest Lands Conservation Act), and the Grand Staircase-Escalante Monument by President Clinton on September 18, 1996-

Of the 103 national monuments established by presidential proclamation, sixty were 5,000 acres or less; seventeen were between 5,000 and 100,000 acres; and twenty-five covered more than 100,000 acres. Of the twenty-five monuments larger than 100,000 acres, seventeen were in Alaska. President Clinton's Grand Staircase-Escalante National Monument is the largest monument designation outside of Alaska.<sup>61</sup>

## [3] Controversial Designations

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<sup>55</sup> Proclamation No. 658, 34 Stat. 3236 (1906).

<sup>56</sup> *Id.*

<sup>57</sup> Devil's Tower National Monument, Proclamation No. 658, 34 Stat. 3236 (1906) (preserving a "natural wonder" of "historic and *great scientific* interest" encompassing 1,193 acres) (emphasis added); El Morro National Monument, Proclamation No. 695, 34 Stat. 3264 (1906) (preserving an area of "greatest historical value" encompassing 161 acres); Montezuma Castle National Monument, Proclamation No. 696, 34 Stat. 3265 (1906) (preserving a ruin of "greatest ethnological value" encompassing 161 acres); Petrified Forest National Monument, Proclamation No. 697, 34 Stat. 3266 (1906) (establishing a monument of "great scientific interest and value," encompassing 60,776 acres); Chaco Canyon National Monument, Proclamation No. 740, 35 Stat. 2119 (1907) (preserving ruins containing "innumerable and valuable relics of a prehistoric people" encompassing 10,643 acres); Cinder Cone National Monument, Proclamation No. 753, 35 Stat. 2131 (1907) (preserving an area of "great scientific interest" encompassing 5,120 acres); Lassen Peak National Monument, Proclamation No. 754, 35 Stat. 2132 (1907) (preserving an area "tracing the history of volcanic phenomena of that vicinity" encompassing 1,280 acres); Gila Cliff Dwellings National Monument, Proclamation No. 781, 35 Stat. 2162 (1907) (preserving "the best representative of the Cliff Dwellers' remains of that region," encompassing 160 acres); Tonto National Monument, Proclamation No. 787, 35 Stat. 2168 (1907) (preserving "two prehistoric ruins" encompassing 640 acres); Muir Woods National Monument, Proclamation No. 793, 35 Stat. 2174 (1908) (preserving "an extensive growth of redwood trees...of extraordinary scientific interest" encompassing 295 acres); Grand Canyon National Monument, Proclamation No. 794, 35 Stat. 2175 (1908) (preserving "an object of unusual scientific interest, being the greatest eroded canyon within the United States" encompassing 808,120 acres).

<sup>58</sup> Proclamation No. 794, 35 Stat. 2175 (1908).

<sup>59</sup> 89 Cong. Rec. 2234 (1943) (statement of Sen. Hayden).

<sup>60</sup> Lee, *supra* note 38, at 94 95.

<sup>61</sup> For a table listing all national monument proclamations, see Bureau of Land Management, "Monuments Established by Presidential Proclamation" (visited June 1, 1997) <<http://www.blm.gov/uhp/news/alerts/monuments.html>>.

### [a] The Jackson Hole National Monument

The first monument designation to draw the ire of Congress appears to have been President Franklin D. Roosevelt's 1943 designation of 210,950 acres as the Jackson Hole National Monument.<sup>62</sup> That designation, which covered lands adjacent to the already existing Grand Teton National Park, raised a firestorm in the State of Wyoming.<sup>63</sup> Wyoming even sued to rescind the designation.<sup>64</sup>

The controversy had its roots several years earlier- In 1929, Congress had established the Grand Teton National Park embracing 96,000 acres.<sup>65</sup> At that time, it was understood that there would be no further extension of the park boundaries.<sup>66</sup> Nonetheless, soon thereafter the National Park Service began seeking to expand the park boundaries to include about 30,000 acres of private land that John D- Rockefeller had purchased in the 1920s for the purpose of donating to the federal government.<sup>67</sup> Largely because of concerns in Wyoming over the loss of a private land tax base in Teton County, Congress refused to pass legislation expanding the park boundaries.<sup>68</sup> In November 1942, Mr- Rockefeller then wrote the Secretary of the Interior that he could no longer justify continuing to hold the lands unless he could be assured that they would soon be accepted by the federal government.<sup>69</sup> Consequently, in March 1943 President Roosevelt took the matter into his own hands and declared the area including the land owned by Mr. Rockefeller to be a national monument.

Immediately after learning of the President's action, the Wyoming congressional delegation complained bitterly.<sup>70</sup> They argued that only Congress can add lands to a national park, and that the Antiquities Act was not intended to enable the President to do indirectly what he cannot do directly.<sup>71</sup> Foreshadowing the controversy over 50 years later with the Grand Staircase-Escalante Monument, Representative Robertson noted: "The bureaucratic stronghold is such that the preparation of this proclamation was kept even from the Senate Public Lands Committee of which I am a member, and the first indication I had was in a long-distance call from a citizen of Jackson, Wyo."<sup>72</sup>

In 1944, Congress responded by passing a bill abolishing the Jackson Hole monument.<sup>73</sup> President Roosevelt pocket-vetoed the bill.<sup>74</sup> Roosevelt's pocket veto was criticized in many newspaper editorials, one of which stated: "Congress is reduced to the status, not of passing laws permitting the President to do certain things, but of attempting by two-thirds vote

<sup>62</sup> Proclamation No. 2578, 57 Stat. 731 (1943).

<sup>63</sup> 90 Cong. Rec. 9092 (1944) (statement of Rep. Case) ("this is a red hot flaming issue in the State of Wyoming").

<sup>64</sup> Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945), discussed below in § 4.03[4].

<sup>65</sup> S. Rep. No. 81 1938, at 2 (1950).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*; see also 89 Cong. Rec. 2233 (1943) (statement of Rep. O'Mahoney).

<sup>68</sup> 89 Cong. Rec. 2233 36 (1943).

<sup>69</sup> *A Bill to Abolish the Jackson Hole National Monument: Hearings on H.R. 2241 Before the House Comm. on Public Lands*, 78th Cong., 1st Sess. 252 (1943) (statement of Secretary of the Interior Harold L. Ickes).

<sup>70</sup> 89 Cong. Rec. 2233 36 (1943).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2236. See also S. Rep. No. 78 404, at 6 (1943) ("This monument was created, by Executive Order, without the previous knowledge of the Wyoming congressional delegation or the State officials, and in the face of the known strong opposition of the citizens of Wyoming.").

<sup>73</sup> H.R. 2241, 90 Cong. Rec. 9196 (1944). Representative Mott of Oregon said the bill would "correct what I consider to be one of the very worst examples of executive usurpation of legislative authority that has ever occurred in the history of our Government." 90 Cong. Rec. at 9183. Another Congressman stated that the monument's land consisted of "only a broad expanse of sagebrush" with no historical objects except "a cabin where it is said a horse thief was shot to death, according to the code of the old West." *Id.* at 9093 (statement of Rep. Jennings).

<sup>74</sup> 90 Cong. Rec. 9807 (1944).



to prevent the President from doing things- That is entirely antagonistic to the theory of American Government and representative democracy."<sup>75</sup>

Undeterred by the veto, Congress continued to consider bills to abolish the Jackson Hole monument.<sup>76</sup> In the meantime, from 1943 until 1950, Congress attached a provision to the Interior Department appropriations bill prohibiting the expenditure of funds for the administration of the monument.<sup>77</sup> In 1950, the Truman Administration and Congress reached a compromise on the issue that satisfied Wyoming's concern over the loss of a tax base and other impediments to adding the monument lands to the park boundaries.<sup>78</sup> Congress then added most of the lands to the Grand Teton National Park and terminated the monument designation.<sup>79</sup> In doing so, however, Congress amended the Antiquities Act to state: "No further extension or establishment of national parks or monuments in Wyoming may be undertaken except by express authorization of the Congress."<sup>80</sup> It stands as the only direct amendment to the Antiquities Act in its ninety year history-

The controversy over the Jackson Hole National Monument virtually closed the door on use of the Antiquities Act to withdraw federal land for national monuments. The Jackson Hole monument was the eighty-first monument to be created by presidential proclamation over a thirty-seven year period, 1906-1943. Over the next thirty-four years, only six monuments were declared, four of which were 1,000 acres or less. The only new monuments of any size were (1) the Chesapeake and Ohio Canal in Maryland (5,264 acres), created by President Eisenhower in his last days in office,<sup>81</sup> and (2) the Marble Canyon in Arizona (32,547 acres), which President Johnson established on his last day in office as an extension of the Grand Canyon national monument.<sup>82</sup>

## **[b] The Alaska National Monuments**

The next major confrontation over use of the Antiquities Act was when President Carter invoked the Act on December 1, 1978 to create fifteen new national monuments, and enlarge two existing ones, in the State of Alaska. The background for this controversy was that a prior withdrawal of millions of acres in Alaska was about to expire because Congress had not enacted legislation concerning Alaska's "national interest lands." To preserve the status quo pending further consideration of legislation, President Carter placed fifty-six million acres within seventeen different national monuments.<sup>83</sup> Unlike President Roosevelt's designation of the Jackson Hole Monument, and unlike President Clinton's designation of the Grand

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<sup>75</sup> 91 Cong. Rec. A105 (1945).

<sup>76</sup> See *A Bill to Abolish the Jackson Hole National Monument, Wyo.: Hearings on H.R. 1330 Before the Subcomm. on Public Lands of the House Comm. on Public Lands*, 80th Cong., 1st Sess. (1947).

<sup>77</sup> S. Rep. No. 81 1938, at 2 (1950).

<sup>78</sup> *Id.* at 1.

<sup>79</sup> Act of September 14, 1950, 64 Stat. 849 (1950).

<sup>80</sup> 16 U.S.C. § 431a (1994).

<sup>81</sup> Proclamation No. 3391, 75 Stat. 1023 (1961).

<sup>82</sup> Proclamation No. 3889, 83 Stat. 924 (1969). On that day, President Johnson also expanded the boundaries of two monuments in Utah and one in Alaska. He declined to accept recommendations to proclaim some seven million additional acres of land, mostly in Alaska, as national monuments. Lee, *supra* note 38, at 98-99.

<sup>83</sup> Secretary of the Interior Andrus also withdrew 110 million acres of Alaska land under the emergency withdrawal provisions of FLPMA, 43 U.S.C. § 1714(e). Most of the lands President Carter designated as national monuments were included in Secretary Andrus' emergency withdrawal. For a more complete discussion of the Alaska withdrawal controversy, see *Alaska v. Carter*, 462 F. Supp. 1155, 1156-58 (D. Alaska 1978), and Richard H. Johannsen, Comment, "Public Land Withdrawal Policy and the Antiquities Act," 56 Wash. L. Rev. 439, 453 n.112 (1981).

Staircase-Escalante Monument, President Carter did consult with Congress and did seek public comment on the possibility of monument designation-<sup>83.1</sup>

As with the Jackson Hole monument designation, however, President Carter's use of the Antiquities Act to create these monuments spawned litigation and attempts to amend the Antiquities Act (discussed below). In 1980, Congress terminated the Alaska national monument designations when it passed the Alaska National Interest Lands Conservation Act (ANILCA).<sup>84</sup> In ANILCA, Congress also provided that future executive branch withdrawals in Alaska of more than 5,000 acres (including those under the Antiquities Act) would not become effective until notice was provided in the Federal Register and to both Houses of Congress- Further, "[s]uch withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress."<sup>85</sup>

It took almost twenty years before another President would invoke the Antiquities Act.

#### [4] Judicial Interpretation

In the ninety year history of the Antiquities Act, five cases have dealt in some way with national monument designations. In these cases, the courts have sanctioned a broad interpretation of the Act (particularly the term "scientific interest"). Rightly or wrongly, the courts have also betrayed a real reluctance to interfere with the President's exercise of discretion under the Antiquities Act. Since Congress gave the President this power, and since Congress has largely acquiesced in a series of monument designations that appear to stretch the Act to the limit, the courts evidently feel that it is up to Congress to remedy any presidential abuse of power. No court has ever overturned a monument designation.

##### [a] *Cameron v. United States*

The first case raising an issue of the President's power under the Antiquities Act was *Cameron v. United States*.<sup>86</sup> There the government brought suit to remove a mining claimant from land on the southern rim of the Grand Canyon National Monument- The land, which the mining claimant asserted was a valid lode mining claim located before the monument was declared, was at the head of the Bright Angel Trail, over which visitors traverse to and from the bottom of the canyon. One of the claimant's defenses was that "the monument reserve should be disregarded on the ground that there was no authority for its creation."<sup>87</sup> The Supreme Court quickly disposed of this contention:

The act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.<sup>88</sup>

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<sup>83.1</sup> *The Antiquities Act and Federal Land Policy and Management Act Amendments of 1979: Hearing on S. 1176 Before the Subcomm. on Parks, Recreation, and Renewable Resources of the Senate Comm. on Energy and Natural Resources, 96th Cong., 1st Sess., at 50 (1979) (statement of Secretary Andrus) ("I did consult with Members of both Houses of Congress and both committees that had jurisdiction"; "it wasn't something that was secretly done in the dark of night"); Alaska v. Carter, 462 F. Supp. 1155, 1157 (D. Alaska 1978) (discussing public comment period on proposed monument designations).*

<sup>84</sup> 16 U.S.C. § 3209(a) (1994).

<sup>85</sup> *Id.* § 3213(a).

<sup>86</sup> 252 U.S. 450 (1920).

<sup>87</sup> *Id.* at 455.

<sup>88</sup> *Id.* at 455 56.

The Court did not discuss legislative history to the Antiquities Act, congressional intent on the meaning of "historic or scientific interests," or the language of the Act limiting the size of the area to be withdrawn.<sup>89</sup>

**[b] *Wyoming v. Franke***

The next case was the State of Wyoming's challenge to the Jackson Hole National Monument more than twenty years later. <sup>90</sup> Wyoming contended that the President had exceeded his authority under the Antiquities Act on three grounds: (1) the area did not have historic or scientific objects, (2) too large an area was designated, and (3) the designation usurped the power of Congress to decide whether lands should be made a national park-

The court held a trial and rejected the state's challenge. The government's evidence of objects of historic or scientific interest emphasized "trails and historic spots in connection with the early trapping and hunting of animals formulating the early fur industry of the West"; "structures of glacial formation and peculiar mineral deposits and plant life indigenous to the particular area"; and "a biological field for research of wildlife...."<sup>91</sup> The court intimated that the government had not established its position by a preponderance of the evidence; nonetheless it felt constrained to uphold the monument designation because it had "limited jurisdiction" to determine whether the President's action was arbitrary, capricious, or outside the scope of the Act.<sup>92</sup> The court concluded that if there is evidence of a "substantial character" upon which the President may have acted in finding objects of historic or scientific interest, it should not disturb the President's exercise of discretion.<sup>93</sup> The court essentially found it would take a compelling case to set aside a monument designation:

For example, if a monument were to be created on a bare stretch of sage-brush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest, the action in attempting to establish it by proclamation as a monument, would undoubtedly be arbitrary and capricious and clearly outside the scope and purpose of the Monument Act.<sup>94</sup>

In the court's view, this was a matter for Congress, not a court, to resolve: if the President's action went beyond the broad authority Congress had delegated, then it was up to Congress to pass "remedial legislation."<sup>95</sup> The court then added that what it had said about objects of historic or scientific interest applied equally to determining the size of the area withdrawn.<sup>96</sup>

**[c] *Cappaert v. United States***

Probably because the Antiquities Act was rarely invoked after the Jackson Hole controversy, it took another thirty years for the courts to hear a case raising an issue under the Act. In *Cappaert v. United States*,<sup>97</sup> the Supreme Court addressed whether designation of an underground pool of water (Devil's Hole) as part of the Death Valley National Monument reserved federal water rights- In ruling that the government did reserve water rights to protect a rare fish in the

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<sup>89</sup> According to Professor Getches, these matters were not fully developed in the parties' briefs. Getches, *supra* note 26, at 303.

<sup>90</sup> *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945).

<sup>91</sup> *Id.* at 895.

<sup>92</sup> *Id.* at 894, 896.

<sup>93</sup> *Id.* at 895.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 896.

<sup>96</sup> *Id.*

<sup>97</sup> 426 U.S. 128 (1976).

underground pool, the Court rejected an argument that the Antiquities Act only protected "archeological sites."<sup>98</sup> Citing the *Cameron* decision in 1920, the Court stated: "The pool in Devil's Hole and its rare inhabitants are 'objects of historic or scientific interest.'"<sup>99</sup>

**[d] *Alaska v. Carter***

The last two cases presenting Antiquities Act issues relate to President Carter's monument designations in Alaska on December 1, 1978. *Alaska v. Carter*<sup>100</sup> was actually filed before President Carter declared those monuments- The state sought a preliminary injunction to enjoin the federal government from closing the comment period on a draft supplemental environmental impact statement (EIS); the draft EIS presented alternative actions to preserve Alaska's national interest lands while Congress continued to consider legislation for those lands. One of the options included in the draft EIS was national monument designation under the Antiquities Act. The court denied the preliminary injunction.

With respect to the option to designate national monuments, the court held that the National Environmental Policy Act (NEPA)<sup>101</sup> does not apply to the President's exercise of power under the Antiquities Act, because the President is not a "federal agency."<sup>102</sup> The court also held that NEPA does not apply to recommendations made by the Secretary of the Interior to the President on national monument designation, when the President has requested those recommendations.<sup>103</sup> Since NEPA did not apply, the court would not extend the comment period on the draft EIS.<sup>104</sup>

**[e] *Anaconda Copper Co. v. Andrus***

A mining company affected by the Alaska monument designations also filed suit.<sup>105</sup> On motions for partial summary judgment, the court upheld the government's interpretation of the Antiquities Act on the objects subject to protection- (The court did not address the size of the monuments designated; that issue was not presented in the motions.) The court acknowledged the legislative history of the Act indicating a limited purpose, but relied on a pattern of broad presidential use of the Act and congressional acquiescence. In particular, Congress had a chance in FLPMA to curtail the President's exercise of power under the Antiquities Act and did not do so. The court also read *Cameron* and *Cappaert* as approving a liberal interpretation of the Act: that matters of "scientific" interest include geological formations, plant, animal, or fish life. The judge told counsel for Anaconda that he would have had an easier argument in 1906, "but too much has happened since, in Including Grand Canyon...."<sup>106</sup> The judge also commented, "I believe there are limitations on the exercise of presidential authority on the Antiquities Act. The outer parameters have not yet been drawn by judicial decision."<sup>107</sup>

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<sup>98</sup> *Id.* at 141 42.

<sup>99</sup> *Id.* at 142.

<sup>100</sup> 462 F. Supp. 1155 (D. Alaska 1978).

<sup>101</sup> 42 U.S.C. §§ 4321 4370(a) (1994).

<sup>102</sup> 462 F. Supp. at 1159 60.

<sup>103</sup> *Id.* at 1160.

<sup>104</sup> After President Carter announced his monument designations a few days later, the state amended its complaint to challenge those designations. The suit was eventually dismissed without a decision on the merits when Congress passed ANILCA in 1980. See discussion § 4.03[3][b] *supra*.

<sup>105</sup> *Anaconda Copper Co. v. Andrus*, 14 *Env't Rep. Cas.* (BNA) 1853 (D. Alaska 1980).

<sup>106</sup> *Id.* at 1855.

<sup>107</sup> *Id.* at 1854.

## [f] Pending Litigation

Three lawsuits have been filed challenging the Grand Staircase-Escalante National Monument: one by the Utah School & Institutional Trust Lands Administration,<sup>108</sup> one by the Utah Association of Counties,<sup>109</sup> and another by the Western States Coalition and the Mountain States Legal Foundation.<sup>110</sup> The suits raise several claims. Among them are first, that the monument designation violates the Antiquities Act (because no objects of true historic or scientific interest have been identified and, in any event, the area was not confined to the "smallest area" necessary); second, that if the monument designation does not violate the Antiquities Act, then the Act is unconstitutional because it delegates too much power to the President over federal lands; and third, that NEPA was violated because the Department of the Interior, a federal agency, first recommended the monument designation to President Clinton. Unless Congress passes legislation that moots these lawsuits (like it did in 1980 when it passed ANILCA and abolished the Alaska monuments), these cases promise to test the outer parameters of the President's authority to withdraw lands under the Antiquities Act.

### § 4.04 Past Efforts to Amend or Repeal the Antiquities Act

#### [1] The Wyoming Amendment

In response to designation of the Jackson Hole National Monument, Congress devoted most of its attention to bills abolishing the monument itself. In 1943, however, a bill was introduced and reported by the Senate Committee on Public Lands and Surveys that proposed to repeal section 2 of the Antiquities Act.<sup>111</sup> After discussing the Jackson Hole controversy, the report concludes: "The committee recommends the repeal of the statute lest it be used in other public-lands States as it has been used in the State of Wyoming."<sup>112</sup> It went on to state that Congress should participate in the process of making monument designations and "no legitimate purpose will be defeated by the restoration of congressional power proposed in this bill."<sup>113</sup> The bill did not make further progress in Congress-

The next year, while debating a bill to abolish the monument, Representative Fernandez of New Mexico argued that the only way to cure the situation was to either amend or repeal the Antiquities Act itself.<sup>114</sup> He offered an amendment to the bill that would have added the following language to the end of section 2 of the Antiquities Act:

*Provided, however,* That any proclamation hereafter made under authority of this act shall not become effective until approved by act of Congress if the lands embraced within or reserved as a part of the national monument created thereby exceed 10,000 acres in area.<sup>115</sup>

A point of order was made that the amendment was not germane to the bill before the House. The point of order was sustained because the amendment applied to monuments generally, not just the Jackson Hole monument.<sup>116</sup>

In 1945, the Utah legislature, perhaps displaying uncommon prescience, sent a concurrent memorial to the Congress urging that the Antiquities Act be repealed or amended to provide for monument designation only after sufficient public

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<sup>108</sup> Utah School & Institutional Trust Lands Admin. v. Clinton, No. 2:97CV 0492C (C.D. Utah filed June 25, 1997).

<sup>109</sup> Utah Ass'n of Counties v. Clinton, No. 2:97CV 0479B (C.D. Utah filed June 23, 1997).

<sup>110</sup> Western States Coalition v. Clinton, No. 2:96CV 0924G (C.D. Utah filed Oct. 31, 1996).

<sup>111</sup> See S. Rep. No. 78 296 (1943).

<sup>112</sup> *Id.* at 2.

<sup>113</sup> *Id.*

<sup>114</sup> 90 Cong. Rec. 9193 (1944).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 9193 94.

notice and hearing and approval by Congress- The resolution declared that the Antiquities Act does "not provide for the orderly democratic method of public hearings which makes it possible for all interests involved to be represented."<sup>117</sup>

Five years later, when Congress abolished the monument and added the lands to the Grand Teton National Park, it did amend the Antiquities Act, but only with respect to the State of Wyoming. The amendment requires an act of Congress to create or expand any national monuments in Wyoming.<sup>118</sup>

## [2] The Public Land Law Review Commission's Recommendation

In 1961, as he was leaving office, President Eisenhower declared a modest national monument for the Chesapeake and Ohio Canal in Maryland (about 5,000 acres). The designation apparently renewed opposition in Congress to the continuing exercise of authority under the Antiquities Act.<sup>119</sup> During the early 1960s, there were also several bills introduced that sought to assert Congress' role in withdrawal decisions- Congress had begun that process in 1958 with the National Defense Withdrawals Act.<sup>120</sup> In that Act, Congress required that Defense Department withdrawals of more than 5,000 acres had to be approved by Congress.<sup>121</sup> The bills introduced in the early 1960s proposed to extend that rule to nonmilitary public land withdrawals.<sup>122</sup> Legislation to address executive withdrawals was held in abeyance, however, pending a comprehensive study of public land law.

In 1964, Congress established the Public Land Law Review Commission (PLLRC or Commission).<sup>123</sup> Congress charged the PLLRC with preparing a study of existing laws governing public lands, and recommending changes to those laws.<sup>124</sup> The bipartisan commission consisted of 19 members: 13 from Congress (both Democrat and Republican) and six others appointed by the President.<sup>125</sup> In performing its task, the PLLRC retained outside experts who prepared detailed reports on many of the subject areas identified for analysis- One of those areas was the subject of executive withdrawals. Charles F. Wheatley, Jr., was chosen as the expert contractor for that subject. In 1969, he submitted a comprehensive 500-page report to the PLLRC.<sup>126</sup> It has been called the most complete analysis of public land withdrawals ever prepared.<sup>127</sup>

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<sup>117</sup> 91 Cong. Rec. 2801 (1945). During the 1930s and 1940s, Secretary of the Interior Ickes actually considered designating much of the land in southern Utah as the "Escalante National Monument." See Christopher Smith, "Grand Staircase National Monument: It's a New Name But an Old Idea," *Salt Lake Trib.*, at A1, Oct. 6, 1996. The Governor of Utah was aware of the idea and opposed it. *Id.* Interestingly, the lands on the Kaiparowits Plateau that form the heart of President Clinton's Grand Staircase Escalante National Monument and the most controversial part of it were not included in Secretary Ickes' proposal. *Id.*

<sup>118</sup> 16 U.S.C. § 431a (1994).

<sup>119</sup> Lee, *supra* note 38, at 98.

<sup>120</sup> 43 U.S.C. §§ 155 158 (1994).

<sup>121</sup> *Id.* § 156.

<sup>122</sup> See Withdrawal, Reservation, and Restriction of Public Lands: Hearings on H.R. 1785, H.R. 3342, H.R. 5252, H.R. 6377, H.R. 4060, and H.R. 8783 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs, 87th Cong., 2d Sess. (1961 & 1962).

<sup>123</sup> Pub. L. No. 88 606, 78 Stat. 982.

<sup>124</sup> *Id.* § 4.

<sup>125</sup> *Id.* § 3.

<sup>126</sup> Charles F. Wheatley, Jr., *Study of Withdrawal and Reservation of Public Domain Lands* (rev. 1969).

<sup>127</sup> Raymond A. Peck, Jr., "And Then There Were Non Evolving Federal Restraints on the Availability of Public Lands for Mineral Development," 25 *Rocky Mt. Min. L. Inst.* 3 1, 3 5 n.17 (1979).

The Wheatley Report identified two chief criticisms of the executive withdrawal power conferred by the Antiquities Act: (1) use of the Act to circumvent the requirement that only Congress can create a national park; and (2) overwithdrawal - withdrawing an area of land "far in excess of the amount needed to properly administer the reserved site."<sup>128</sup> Wheatley cited the Jackson Hole controversy as evidence of both problems and called it "the most frequently cited abuse of the Antiquities Act."<sup>129</sup> For the overwithdrawal problem, Wheatley also referred to withdrawals in Utah and western Colorado, "ostensibly for the preservation of dinosaur skeletons," that could have been restricted to a few hundred acres but amounted to hundreds of thousands of acres.<sup>130</sup>

The PLLRC submitted its report to the President and Congress in 1970.<sup>131</sup> The Commission wasted no time in setting forth its conclusion about national monuments- On page one, the report states: "Based on our study, however, we find that, generally, areas set aside by executive action as...national monuments...have not had adequate study and there has not been proper consultation with people affected or with the units of local government in the vicinity, particularly as to precise boundaries."<sup>132</sup> After discussing some of the background and history to the "withdrawals problem,"<sup>133</sup> the PLLRC recommended that large scale withdrawals of a permanent or indefinite term "be accomplished only by act of Congress-"<sup>134</sup> It went on specifically to identify national monuments as a withdrawal that should be reserved for congressional action.<sup>135</sup> Essentially, the PLLRC recommended repeal of the Antiquities Act-

Congressional response to the PLLRC's report culminated six years later with enactment of the Federal Land Policy and Management Act of 1976 (FLPMA).<sup>136</sup> As indicated above, in FLPMA Congress repealed implied executive withdrawal authority and nearly all withdrawal statutes; it also adopted procedural requirements governing withdrawals by the Secretary of Interior- However, Congress did not repeal the Antiquities Act. In *Anaconda Copper Co. v. Andrus*,<sup>137</sup> which upheld the government's broad interpretation of the Antiquities Act, the court relied heavily on Congress' failure to repeal that Act when it enacted FLPMA.

Why Congress did not repeal the Antiquities Act, as the PLLRC had recommended, is not explained in the legislative history. On the House side, Representative Aspinall, who had served as chairman of the PLLRC, introduced H.R. 7211 in 1971. That bill would have repealed the Antiquities Act.<sup>138</sup> While the bill was reported favorably by the House Committee on Interior and Insular Affairs, it received no significant support, and environmental groups opposed it.<sup>139</sup> The 92nd

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<sup>128</sup> Wheatley, *supra* note 126, at 464 65.

<sup>129</sup> *Id.* at 464.

<sup>130</sup> *Id.* at 465.

<sup>131</sup> Public Land Law Review Comm'n, *One Third of the Nation's Land* (1970).

<sup>132</sup> *Id.* at 1.

<sup>133</sup> *Id.* at 43 44.

<sup>134</sup> *Id.* at 54, Recommendation 8.

<sup>135</sup> *Id.* at 54.

<sup>136</sup> 43 U.S.C. §§ 1701 1782 (1994).

<sup>137</sup> 14 *Env't Rep. Cas. (BNA)* 1853, 1854 (D. Alaska 1980).

<sup>138</sup> See H.R. Rep. No. 92 1306, at 46 (1972), reprinted in *Staff of Senate Comm. on Energy and Natural Resources, Legislative History of the Federal Land Policy and Management Act of 1976 (Public Law 94 579)* 1257, 1302, Publication No. 95 99 (U.S. Government Printing Office 1978) [hereinafter *FLPMA Legislative History*].

<sup>139</sup> Jerome C. Muys, "The Unfinished Agenda of the Public Land Law Review Commission", *Public Land Law* 1 1, 1 9 (Rocky Mt. Min. L. Fdn. 1992).

Congress ended before the House considered H.R. 7211,<sup>140</sup> and Representative Aspinall failed in his reelection bid.<sup>141</sup> With Aspinall's defeat and the death of some of the House committee members, the push to implement the PLLRC's recommendations by the letter ended.<sup>142</sup> Indeed, no further FLPMA-type bills were actively considered in the House until four years later, in 1976-

In 1976, Representative Melcher introduced H.R. 13777, the "Federal Land Policy and Management Act of 1976."<sup>143</sup> This bill contained the procedural limitations on executive withdrawals, and the repeal of implied authority, that eventually became law- It did not, however, repeal the Antiquities Act.<sup>144</sup> The published legislative history does not reveal why the House removed the Antiquities Act repeal from the legislation originally proposed by Representative Aspinall.

On the Senate side, there appears to have been only one bill introduced after the PLLRC's report that adopted the Commission's withdrawal recommendations, including repeal of the Antiquities Act.<sup>145</sup> This bill, which was similar to Aspinall's bill in the House,<sup>146</sup> was opposed by the main public land agencies, the Departments of Interior and Agriculture.<sup>147</sup> The opposition to the withdrawal provisions of S. 2450 did not mention the Antiquities Act, but the Department of the Interior opposed curtailment of executive withdrawal authority "so long as there are the non-discretionary forms of public land appropriation."<sup>148</sup> S- 2450 was not reported by the Senate Committee on Interior and Insular Affairs. Over the next five years leading up to enactment of FLPMA, none of the bills considered by the Senate included any provisions regarding withdrawals.

Given the lack of legislative history explaining why Congress did not adopt the PLLRC's recommendation to repeal the Antiquities Act, it may be somewhat speculative to attribute reasons for Congress' decision. Nonetheless, two reasons seem plausible, if not likely. First, after the PLLRC issued its report, the Interior and Agriculture Departments analyzed the Commission's recommendations. Those Departments concurred in the Commission's general recommendation that only Congress should make large scale permanent withdrawals. However, they believed that two withdrawals- "areas set aside for scientific purposes [under the Antiquities Act], and areas set aside for protection of birds or animals (other than areas in the national wildlife refuge and game range system)"-should not always require congressional action.<sup>149</sup> It is logical that, in order to put together a bill supported by the principal public land management agencies, congressional staff responsible for drafting the bill decided not to tackle the matter of Antiquities Act authority-

<sup>140</sup> Eleanor R. Schwartz, "A Capsule Examination of the Legislative History of the Federal Land Policy and Management Act of 1976," 21 *Ariz. L. Rev.* 285, 293 (1979).

<sup>141</sup> Muys, *supra* note 139, at 19.

<sup>142</sup> *Id.*

<sup>143</sup> See *FLPMA Legislative History*, *supra* note 138, at 223.

<sup>144</sup> See H. Rep. No. 96-1163, at 29, reprinted in *FLPMA Legislative History*, *supra* note 138, at 431, 459.

<sup>145</sup> S. 2450, introduced on August 5, 1971 by Senators Allott and Jordan. Senators Allott and Jordan were members of the PLLRC.

<sup>146</sup> See S. Rep. No. 92-1163, at 6, reprinted in *FLPMA Legislative History*, *supra* note 138, at 1152, 1157.

<sup>147</sup> S. Rep. No. 92-1163 at 37-50, *FLPMA Legislative History*, *supra* note 138, at 1188-1201.

<sup>148</sup> *Id.* at 50, *FLPMA Legislative History*, *supra* note 138, at 1201.

<sup>149</sup> United States Bureau of Land Management, PLLRC ECR (Evaluation of Commission Recommendations) papers, Recommendation 8-1 (1970). The memorandum explains that "in some instances the need for withdrawal for these purposes is not permanent enough or fixed enough to justify legislative action," but also states: "Public participation in these decisions can still be provided." *Id.* The ECR papers also contain a November 13, 1970 memorandum from the Director of the National Park Service conveying the Park Service's view on Commission Recommendation No. 8. This memorandum concludes that because the Antiquities Act has "led to some friction with the Congress, some modification would be desirable such as consultation with appropriate committees prior to exercise of the authority. This is in fact the practice now followed by the National Park Service." While prior consultation with Congress was apparently the practice in 1970, it was not followed when President Clinton designated the Grand Staircase Escalante National Monument.



Second, when Congress was considering the legislation that became FLPMA (1971 to 1976), there was no live dispute over Antiquities Act withdrawals. The Jackson Hole controversy had occurred 30 years before, and only six monument designations-most very small in size—had been made since. Moreover, at that time the National Park Service had a policy of consulting with the appropriate committees in Congress before designating a national monument.<sup>150</sup> In other words, there did not seem to be any problem with the Antiquities Act as it had been applied in the previous three decades-

### [3] Response to the Alaska Monuments

The last effort to amend or repeal the Antiquities Act came after President Carter's Alaska monument designations. In 1979, seventeen Senators sponsored a bill that would have amended the Antiquities Act in two respects.<sup>151</sup> First, the bill proposed to define the phrase "objects of historic or scientific interest" to include only those objects "directly associated with human behavior and activities."<sup>152</sup> Second, it required monuments exceeding 5,000 acres to be approved by concurrent resolution of Congress.<sup>153</sup> Upon introducing this bill, the sponsoring Senators published in the Congressional Record excerpts from legislative history for the Antiquities Act showing that Congress did not intend to authorize the withdrawal of large areas-<sup>154</sup>

Hearings on the bill were held September 13, 1979.<sup>155</sup> No further action was taken, for the issue of national monuments in Alaska was resolved through the passage of ANILCA- During the consideration of ANILCA, Alaska insisted on including a provision that would prevent the further use of the Antiquities Act (and any other law) to withdraw lands in Alaska. Such a provision-called a "no more" clause-was in the House bill that was reported,<sup>156</sup> but not the Senate bill.<sup>157</sup> Ultimately, a compromise was reached placing procedural limits on the use of the Antiquities Act in Alaska-<sup>158</sup>

## § 4.05 Effect of Monument Designation (and other Executive Withdrawals) on Mineral Development

### [1] Future Leasing and Claim Location

Lands within national monuments created under the Antiquities Act are withdrawn from mineral leasing under the Mineral Leasing Act of 1920.<sup>159</sup> Whether other executive withdrawals remove the lands from mineral leasing depends on the language of the withdrawal order-<sup>160</sup> Unless the executive order specifically provides otherwise, the withdrawn lands are presumed to be available for leasing.<sup>161</sup> No lease will be issued, however, when mineral development would be inconsistent with the purpose for which the land was withdrawn-

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<sup>150</sup> *Id.*

<sup>151</sup> S. 1176, 96th Cong., 125 Cong. Rec. 24135 (1979).

<sup>152</sup> 125 Cong. Rec. at 24135.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 24136 37 (including the colloquy between Representatives Stephens and Lacey on the House floor in 1906).

<sup>155</sup> *The Antiquities Act and Federal Land Policy and Management Act Amendments of 1979: Hearings on S. 1176, supra note 83.1.*

<sup>156</sup> H. Rep. No. 96 97 (1979) (regarding H.R. 39).

<sup>157</sup> S. Rep. No. 96 413 (1980), reprinted in 1980 U.S.C.C.A.N. 5070.

<sup>158</sup> See 126 Cong. Rec. 21195, 21649 51 (1980) (statements of Sen. Tsongas regarding ANILCA compromises and addition of "no more" language).

<sup>159</sup> 30 U.S.C. § 181 (1994).

<sup>160</sup> 1 *Am. L. of Mining* § 14.03[2] (2d ed. 1984).

<sup>161</sup> *Id.*

The Antiquities Act does not expressly withdraw national monuments from location under the General Mining Law.<sup>162</sup> Nor does the mining law expressly provide that such lands are unavailable for location- The language of the proclamation creating a national monument therefore appears to determine whether lands are withdrawn from mining claim location. A proclamation reserving the lands "from appropriation and use of all kinds under all of the public land laws" has been construed as withdrawing the lands from mining claim location.<sup>163</sup> The proclamation for the Grand Staircase-Escalante National Monument withdraws the federal land within the monument boundaries from "entry, location, selection, sale, leasing, or other disposition under the public land laws...."<sup>164</sup>

Under section 204(b) of FLPMA, upon publication of a notice in the Federal Register that the Secretary of the Interior is considering a withdrawal, the land is segregated from the operation of the public land laws to the extent provided in the notice.<sup>165</sup> The segregative effect of the application terminates upon (1) rejection of the application by the Secretary, (2) withdrawal of lands by the Secretary, or (3) expiration of two years from the date of notice.<sup>166</sup> The actual language of a withdrawal determines whether the lands are removed from operation of the mining laws.<sup>167</sup>

## [2] Existing Mining Claims

National monument designations and other executive withdrawals invariably are expressly "subject to valid existing rights."<sup>168</sup> This means that, so long as a claimant can establish a valid "discovery" and compliance with other requirements of the General Mining Law before the segregative effect of the withdrawal took effect, he has valid existing rights to develop his claim.<sup>169</sup> Mining claimants have an implied right of access to their claims, which could be important in developing mining claims within an area subsequently withdrawn.<sup>170</sup>

## [3] Federal Mineral Leases

Unless subject to a stipulation that gives the government the right to deny development (e.g., a "no surface occupancy" stipulation), federal mineral leases grant the right to explore, develop and produce minerals.<sup>171</sup> The Secretary of the Interior thus lacks the power to deny development on such leases- Only Congress can deny development, by paying just compensation.<sup>172</sup> The Department accordingly recognizes that federal mineral leases qualify as "valid existing rights."<sup>173</sup>

<sup>162</sup> 30 U.S.C. §§ 21-54 (1994).

<sup>163</sup> *Cameron v. United States*, 252 U.S. 450, 455 (1920). In some cases, however, Congress has subsequently opened the lands to location of new mining claims. See Act of June 22, 1936, ch. 700, 49 Stat. 1817 (allowing mining in Glacier Bay National Monument).

<sup>164</sup> Proclamation No. 6920, *supra* note 2.

<sup>165</sup> 43 U.S.C. § 1714(b) (1994).

<sup>166</sup> *Id.*

<sup>167</sup> See 1 *Am. L. of Mining* § 14.03[1] (2d ed. 1984).

<sup>168</sup> *Id.* § 14.04[1][a]. President Clinton's Proclamation for the Grand Staircase Escalante National Monument is "subject to valid existing rights." See Proclamation No. 6920, *supra* note 2.

<sup>169</sup> See Solicitor's Opinion, M 36910, "The Bureau of Land Management Wilderness Review and Valid Existing Rights," 88 I.D. 909, 912-13 (1981), GFS(MIN) S0 3(1982); 1 *Am. L. of Mining* § 14.04[1][b] (2d ed. 1984).

<sup>170</sup> Solicitor's Opinion, M 36584, "Rights of Mining Claimants to Access Over Public Lands to Their Claims," 66 I.D. 361, 363 (1959); 4 *Am. L. of Mining* § 101.02[2] (2d ed. 1984).

<sup>171</sup> *Conner v. Burford*, 848 F.2d 1441, 1449-50 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 n.7 (D.C. Cir. 1983).

<sup>172</sup> *Union Oil Co. v. Morton*, 512 F.2d 743, 750-51 (9th Cir. 1975); *Western Colorado Congress*, 130 IBLA 244, 248, GFS(O&G) 24(1994).

The government cannot regulate the right to develop "to the point where the regulation unnecessarily interferes with enjoyment of the benefits of the right."<sup>174</sup>

There is a potential problem, however, with development of federal mineral leases within the boundaries of a withdrawn area. The Department of the Interior takes the position that, unlike mining claims, federal mineral leases do not have an implied right of access across other federal lands to reach the lease or to get minerals out.<sup>175</sup> If the Department denies access to a federal lease, the lessee may need to find access through another source, e-g., an R.S. 2477 right-of-way or the rights granted to state mineral lessees.<sup>176</sup>

#### [4] State Mineral Leases

One of the controversial features of the Grand Staircase-Escalante National Monument is that about 175,000 acres of state-owned land are interspersed within its boundaries. The federal government has no power to preclude development on state lands, but may regulate access across federal lands. It has been held that the state and its lessees have a right of access to reach state lands, and that the federal government may not regulate that access in a manner so restrictively "as to render the land incapable of full economic development."<sup>177</sup>

#### § 4.06 Future of the Antiquities Act

Past attempts to amend or repeal the Antiquities Act have failed. Congress has avoided the issue in part by adopting special provisions limiting the future use of the Antiquities Act in states where controversial monument designations have been made (Wyoming and Alaska). In the aftermath of President Clinton's designation of the Grand Staircase-Escalante National Monument, there is a renewed effort to change the Antiquities Act. That effort focuses not on whether areas of historic or scientific interest should be protected, but instead on the role of Congress and the public in participating in the monument decision.

On the day of the proclamation, Senator Hatch of Utah pointed out the complete lack of public participation in the decision-making process and complained: "the process the President is using is flawed and inherently unfair...."<sup>178</sup> The lack of public participation concerned many, including Senator Nickles, who spoke of the inequities of legislation by "Federal fiat."<sup>179</sup> After hearing testimony on how the monument decision was deliberately kept secret from Congress, state officials and the public, one Congressman even went so far as to exclaim in frustration: "It almost makes you wonder if we have people running our Government today who want to run things in the secret, shadowy way of the former Soviet Union or other dictatorships."<sup>180</sup> The legislature of the State of Arizona felt Utah's pain and sent Congress a memorial requesting that Congress amend the Antiquities Act to allow establishment of national monuments only with the express consent of Congress.<sup>181</sup>

<sup>173</sup> Solicitor's Opinion, supra note 169, 88 I.D. at 912.

<sup>174</sup> *Id.* at 914.

<sup>175</sup> Southern Utah Wilderness Alliance, 127 IBLA 331, 364 71, GFS(O&G) 26(1993); 2 *Law of Fed. Oil and Gas Leases* § 22.01 (1996). The *Washington Post* article first disclosing the potential monument designation on September 7, 1996 quotes an administration official as saying that a coal lease grants the right to mine coal, but does not necessarily grant "a right to get the coal off the lease." Tom Kenworthy, "President Considers Carving National Monument out of Utah Land," *Washington Post*, at A3, Sept. 7, 1996. Whether the Department's interpretation is correct is beyond the scope of this paper.

<sup>176</sup> See Thomas E. Meacham, "Public Roads over Public Lands: The Unresolved Legacy of R.S. 2477," 40 *Rocky Mt. Min. L. Inst.* 2 1 (1994).

<sup>177</sup> Utah v. Andrus, 486 F. Supp. 995, 1010 (D. Utah 1979).

<sup>178</sup> 142 Cong. Rec. S10827 (daily ed. Sept. 18, 1996) (statement of Sen. Hatch).

<sup>179</sup> 143 Cong. Rec. S3408 (daily ed. Apr. 22, 1997) (statement of Sen. Nickles).

<sup>180</sup> *Id.* at H1958 (daily ed. Apr. 29, 1997) (statement of Rep. Duncan).

<sup>181</sup> Senate Concurrent Memorial 1001, 143 Cong. Rec. S5182 (daily ed. June 2, 1997).

By May 1997, members of Congress introduced six bills to limit the President's power to withdraw lands for national monuments. Four of the bills addressed the Antiquities Act in general. The National Monument Fairness Act of 1997,<sup>182</sup> introduced by Senator Hatch of Utah, is short and to the point- It requires an act of Congress to establish a national monument in excess of 5,000 acres, and it requires consultation by the Secretary of the Interior with the governor of the state in which the proposed monument is located.<sup>183</sup>

The Public Land Management Participation Act of 1997,<sup>184</sup> introduced by Senator Murkowski of Alaska, amends the Antiquities Act with the express purpose to create extensive public and congressional involvement in the process to establish national monuments.<sup>185</sup> The bill requires public hearings, compliance with the National Environmental Policy Act, mineral surveys, and identification of existing rights held on the proposed lands.<sup>186</sup> Like his colleague's bill, Senator Murkowski's bill requires an act of Congress to transform a presidential recommendation into a national monument.<sup>187</sup> Upon introduction of the bill, Senator Murkowski stated that it is "intended to put the word 'public' and the populace back into public land management."<sup>188</sup>

The House introduced similar bills- Representative Chenoweth of Idaho introduced a bill to require an express act of Congress before creation of a national monument, regardless of size.<sup>189</sup> Representative Hansen of Utah introduced a House companion bill to Senator Hatch's National Monument Fairness Act with identical provisions.<sup>190</sup> The House Resources Committee reported the bill favorably on July 21, 1997, with an amendment increasing the maximum acreage for a presidential designation from 5,000 to 50,000 acres and setting a limit of one designation per state per year.<sup>191</sup> Two bills propose to prohibit the establishment of national monuments in two states, Idaho<sup>192</sup> and Washington.<sup>193</sup> These bills are similar to the special provision enacted in 1950 for the State of Wyoming.<sup>194</sup>

If past is prologue, Congress will struggle to pass a bill amending or repealing the Antiquities Act- It will have an even harder time overriding a likely veto by the President whose action led to the amendment. Nonetheless, there are several compelling reasons for Congress to undertake the task, and for the President to sign the bill.

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<sup>182</sup> S. 477, 105th Cong. (1997).

<sup>183</sup> *Id.*

<sup>184</sup> S. 691, 105th Cong. (1997).

<sup>185</sup> *Id.* § 2.

<sup>186</sup> *Id.* § 431b (amending the Antiquities Act, 16 U.S.C. § 431a (1994)).

<sup>187</sup> *Id.*

<sup>188</sup> 143 Cong. Rec. S3960 (daily ed. May 5, 1997) (statement of Sen. Murkowski).

<sup>189</sup> H.R. 596, 105th Cong. (1997).

<sup>190</sup> National Monument Fairness Act of 1997, H.R. 1127, 105th Cong. (1997).

<sup>191</sup> H.R. Rep. No. 105 191 (1997).

<sup>192</sup> Idaho Protection Act of 1997, S. 62, 105th Cong. (1997). The bill states, in its entirety: "Notwithstanding any other provision of law, no extension or establishment of a national monument may be undertaken in Idaho after the date of enactment of this Act without full public participation and an express Act of Congress." *Id.*

<sup>193</sup> H.R. 413, 105th Cong. (1997). This bill states, in its entirety: "No extension or establishment of a national monument may be undertaken in Washington State after the date of enactment of this Act without full public participation and an express Act of Congress." *Id.*

<sup>194</sup> 16 U.S.C. § 431a (1994).

First, those who argue against amending the Antiquities Act say that the President needs the power to act quickly to protect lands from threatened damage.<sup>195</sup> Under section 204(e) of FLPMA, the President (through the Secretary of the Interior) has all the power he needs to make an "emergency" withdrawal. Such a withdrawal does not require a public hearing or approval of Congress. The only real difference between a FLPMA emergency withdrawal and an Antiquities Act withdrawal is that the emergency withdrawal is limited to a three year period. Three years is ample time for Congress to address the situation, as Congress determined when it passed FLPMA.<sup>196</sup>

Second, the Antiquities Act power is inconsistent with the policies expressed in FLPMA mandating public participation in public land management decision-making.<sup>197</sup> In enacting FLPMA, "Congress clearly desired full public participation and input into the withdrawal process."<sup>198</sup> Ironically, while some environmental groups may favor presidential use of the Antiquities Act without public participation-perhaps on the theory that the ends justify the means-the environmental movement has long championed more public participation in public land decisions.<sup>199</sup> There is no sound reason that public participation should be viewed as critical to FLPMA and other public land statutes, but as unnecessary or even antagonistic to the Antiquities Act.<sup>200</sup>

Third, the Antiquities Act, as it has been applied and interpreted over the years, has gone far beyond its original intent. There are scarcely any lands in the West that could not be made to fit under an expansive view of "historic or scientific interest."<sup>201</sup> Under these circumstances, the President, however laudable his goals, can easily circumvent the requirement that only Congress can designate national parks and wilderness areas- In other words, the Antiquities Act now enables a President to do indirectly what he cannot do directly. That was not the purpose of the Antiquities Act. While Congress certainly has the power to rescind what it perceives to be a presidential abuse of power under the Act, the Jackson Hole monument history shows that that power is illusory without a two-thirds vote to override a veto.

Fourth, it is symptomatic of a flawed statute that Congress has to pass special legislation restricting the Act's use in a particular state, as it has done for Wyoming and Alaska. The result of Congress' past approach to this problem is that bills are being proposed preventing application of the Antiquities Act on a state-by-state basis. If the Act should not be applied in one state, it should not be applied in any state.

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<sup>195</sup> See H.R. Rep. No. 105 191, at 9 10 (dissenting views on the H.R. 1127) (1997); The Antiquities Act and Federal Land Policy and Management Act Amendments of 1979: Hearings on S. 1176, *supra* note 83.1, at 49 (statement of Secretary Andrus). In opposing restrictions on executive withdrawal authority during consideration of FLPMA, administration officials specifically argued that executive withdrawal authority is necessary to prevent nondiscretionary forms of public land appropriation (such as mining claim location). See Public Land Policy Act of 1971: Hearings on H.R. 7211 Before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. at 116 (1971) (statement of Harrison Loesch, Assistant Secretary of the Interior). However, the mineral development that President Clinton wants to prevent in the monument area coal, oil and gas is subject to the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1994), not the General Mining Law. Leasing under the Mineral Leasing Act is discretionary. *Udall v. Tallman*, 380 U.S. 1, 4 (1965). Moreover, federal coal and oil and gas leases have for the most part already been issued. In short, designating the monument area was not necessary to prevent nondiscretionary public land appropriation.

<sup>196</sup> Significantly, Congress resolved the tough Alaska lands issue within two years after the emergency withdrawals declared by Secretary Andrus and the monuments designated by President Carter.

<sup>197</sup> Gail L. Achterman & Sally K. Fairfax, "The Public Participation Requirements of the Federal Land Policy and Management Act," 21 *Ariz. L. Rev.* 501 (1979).

<sup>198</sup> Charles F. Wheatley, Jr., "Withdrawals Under the Federal Land Policy Management Act of 1976," 21 *Ariz. L. Rev.* 311, 321 22 (1979).

<sup>199</sup> Achterman & Fairfax, *supra* note 197, at 505 06.

<sup>200</sup> See Johannsen, *supra* note 83, at 457 63 (arguing that the Antiquities Act is inconsistent with the goals of FLPMA and should be repealed).

<sup>201</sup> See Getches, *supra* note 26, at 306 ("Of course it is difficult to imagine lands that would not feed some historic or scientific interest.").

Finally, there is the issue of power. Under the Property Clause of the Constitution,<sup>201.1</sup> Congress has plenary power over the public lands.<sup>202</sup> While a certain amount of that power is properly delegated to the executive branch, there are some decisions that Congress, not a single executive, should make- Designating national parks and wilderness areas fall in the category of decisions that Congress should make.<sup>203</sup> The same is true for withdrawals of large areas for national monuments. That is what the bipartisan Public Land Law Review Commission recommended after many years of careful study.<sup>204</sup> It is also what a noted conservationist, Representative Morris Udall of Arizona, said during hearings on FLPMA:

I have misgivings, however, about leaving wide open the power for any administrator in any administration, the power to take huge chunks of public land and withdraw them, even for good purposes- I think the specific 1969 withdrawals we were talking about this morning in the long run will be wise. The country will profit because this was done. And yet it troubles me, really bothers me that some one man in our system of government, without coming to Congress, without hearings, without justifying a new use for these lands, can have this power....I think the Congress ought to retain in its own hands the power to effect any of these large withdrawals.<sup>205</sup>

#### § 4.07 Conclusion

The issues raised by President Clinton's designation of the Grand Staircase-Escalante National Monument are not new. In fact, they are remarkably similar to the issues raised more than fifty years ago when President Roosevelt designated the Jackson Hole National Monument, and nearly thirty years ago by the Public Land Law Review Commission. It is no exaggeration to say that these issues go to the heart of our system of government and the management of our public lands.

The pending litigation challenging the designation of the Grand Staircase-Escalante Monument may finally define the outer limits of presidential authority under the Antiquities Act. But whatever those limits are, there is a larger issue that Congress must eventually confront-the future of the Antiquities Act.

At least until the 1940s, the Antiquities Act had a venerable place in public land history: it was a landmark statute responsible for setting aside some of the nation's exceptional places, including the Grand Canyon. Nonetheless, the Act now stands as an anachronism in this age of public participation and the reassertion by Congress of its Constitutional power to decide which public lands shall be preserved in a natural state and which lands shall be available to mineral development. No clear reason for the survival of the Antiquities Act sallies forth from decades of congressional records, reports, and bills. Congress delved deeply into public land law reform with FLPMA, but did not address the Antiquities Act.

Today, Congress again debates legislation to require an express act of Congress to establish a national monument. The outcome of this debate is uncertain, but concerns over the decision-making process-particularly the Administration's effort to keep the monument decision a secret-may finally prompt Congress to end or restrict executive withdrawal authority under the Antiquities Act. As President Harry S. Truman put it, "Secrecy and a free, democratic government don't mix."<sup>206</sup>

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<sup>201.1</sup> U.S. Const. art. IV, § 3, cl. 2.

<sup>202</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976).

<sup>203</sup> H.R. Rep. No. 96 1163, *supra* note 144, at 9.

<sup>204</sup> Public Land Law Review Comm'n, *One Third of the Nation's Land* 54 (1970).

<sup>205</sup> *Public Land Policy Act* of 1971: *Hearings on H.R. 7211 Before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. at 139 (1971) (statement of Rep. Udall).

<sup>206</sup> Merle Miller, *Plain Speaking: An Oral Biography of Harry S. Truman* ch. 35 (1974).

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