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## The Grand Staircase-Escalante National Monument and the Antiquities Act

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## NOTE

# THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT AND THE ANTIQUITIES ACT

*Ann E. Halden\**

## INTRODUCTION

On September 18, 1996, President Clinton issued a Proclamation declaring one million seven hundred thousand acres of Federal land in Utah a national monument.<sup>1</sup> Invoking the Antiquities Act of 1906 (the "Act"),<sup>2</sup> the President added the Grand Staircase-Escalante National Monument to the Act's list of areas declared national monuments.<sup>3</sup> This list includes the Grand Canyon, which was declared a national monument by Theodore Roosevelt in 1908.<sup>4</sup> While the Proclamation has been dubbed by many opponents as "[t]he mother of all land grabs,"<sup>5</sup> and "a flagrant move to circumvent the legislative process concerning the

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1. See Hillary Stout & Bruce Ingersoll, *Clinton Shields Some U.S. Lands in Utah From Development and Sets Policy Shift*, WALL ST. J., Sept. 19, 1996, at A4.

2. 16 U.S.C. §§ 430-433 (1994).

3. See President William J. Clinton, *President Clinton Delivers Remarks at Grand Canyon National Park, Arizona*, in NBC PROF. TRANSCRIPTS, Sept. 18, 1996, available in 1996 WL 11748680 [hereinafter Clinton, *Grand Canyon Remarks*].

4. See Grand Canyon National Monument, Arizona, Proclamation No. 794, 35 Stat. 2175 (Jan. 11, 1908); Proclamation No. 2022, 47 Stat. 2547 (Dec. 22, 1932); Proclamation No. 2393, 3 C.F.R. 150 (1938-1943), reprinted in 54 Stat. 2692 (Apr. 4, 1940).

5. *Utah Delegation Blasts Clinton Move On Monument*, CONGRESS DAILY/A.M., Sept. 19, 1996, available in 1996 WL 11367575 [hereinafter *Utah Delegation*] (quoting Senate Judiciary Chairman Orrin Hatch).

designation of land to be set aside for wilderness,"<sup>6</sup> the action is neither unprecedented nor the Act's largest reservation of federal land.<sup>7</sup> The relatively obscure Act has been used by past presidents to declare national monuments of areas of historic,<sup>8</sup> prehistoric,<sup>9</sup> and scientific interest.<sup>10</sup>

While there has been much controversy over declarations of national monuments under the Act, what effect, if any, the present declaration will likely have upon the actual use and potential for development of the land and its resources is yet to be seen. Several aspects of the Proclamation appear to qualify the possible effects of the reservation under the Act.

This Note will examine the presidential use and judicial interpretation of the Antiquities Act of 1906, with regard to reservations made under the Act which do not qualify as historic or prehistoric sites, but would be better categorized as scenic or conservation efforts. Part I will briefly examine the use and judicial interpretations of the Act that have served to expand it beyond Congress' original intent. Part II will examine the recent proclamation of President Clinton declaring the Grand Staircase-Escalante National Monument in Utah a national monument. This Note will examine what effects, if any, the Proclamation may have on the area in terms of the management and future

6. *Clinton Administration 'Surprises' Andalex On Utah Coal Project*, COAL WK., Sept. 23, 1996, available in 1996 WL 8590376 [hereinafter *Administration 'Surprises' Andalex*] (quoting Richard L. Lawson, President, Nat'l Mining Ass'n).

7. See *infra* Part I.E.

8. See, e.g., Edison Laboratory Nat'l Monument, New Jersey, Proclamation No. 3148, 3 C.F.R. 86 (1954-1958 Comp.), reprinted in 70 Stat. c49 (1956) (later redesignated together with Edison Home National Historic Site and adjacent lands as Edison National Historical Site by Pub. L. No. 87-628, 1, 76 Stat. 428 (1962)).

9. See, e.g., Dinosaur National Monument, Utah, Proclamation No. 1313, 39 Stat. 1752 (1915) (expanded into Colorado in Proclamation No. 2290, 3 C.F.R. 36 (1938-1943)). For a discussion of the Antiquities Act and the preservation of paleontological resources, see David J. Lazerwitz, *Bones of Contention: The Regulation of Paleontological Resources on the Federal Public Lands*, 69 IND. L.J. 601, 609-11 (1994).

10. See, e.g., Devil's Tower Nat'l Monument, Wyoming, Proclamation No. 658, 34 Stat. 3236 (1906).

uses of the land and the resources contained therein. This Note will conclude that, despite the charges of overreaching of presidential authority, it would appear that the Proclamation was a valid use of the Act. However, the limiting language of the Proclamation issued by President Clinton, should it be implemented, effectively serves to negate many of the protections monument status would provide. Thus, the declaration appears to be neither an abuse of presidential authority nor a great act to protect the natural wonders of the monument area. While the impact on the land remains to be seen, the President's declaration may greatly affect the Antiquities Act itself. Thus, a limit on future uses of the Act may be the true legacy of the Grand Staircase-Escalante National Monument.

## I. THE ANTIQUITIES ACT OF 1906

### A. *The Act and the Legislative History*

The Antiquities Act of 1906 reads:

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 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. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.<sup>11</sup>

The text of the Act provides neither specific procedure to declare a national monument, nor judicial review of a president's declaration of an area as a national monument.<sup>12</sup>

The legislative history of the Antiquities Act makes it clear that the original intent of Congress in enacting the Act was to pre-

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11. 16 U.S.C. § 431 (1995).

12. See Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 37 (1982).

serve objects of antiquity.<sup>13</sup> Archeological organizations lobbied several years for the Act, seeking to preserve "aboriginal antiquities located on federal lands."<sup>14</sup> However, the Department of the Interior lobbied for the inclusion of scientific and scenic areas within the Act, as well. Congress rejected the broader version of the Act, but was unable to pass the more limited proposal that would have protected only acts of antiquity "because of bureaucratic delays and disagreements between museums and universities seeking authority to excavate ruins on public lands."<sup>15</sup> The final bill was drafted by a prominent archeologist who was primarily interested in protecting prehistorical antiquities, but later broadened the draft to include the phrase "other objects of historic or scientific interest."<sup>16</sup> The final draft also differed from earlier versions in that it did not specifically limit the amount of land that could be reserved, instead including the direction that the areas set aside should be confined to "the smallest area compatible with the proper care and management of the objects to be protected."<sup>17</sup> Notwithstanding the absence of any spacial limits to the Act, Congress apparently intended that the area reserved be limited.<sup>18</sup>

Despite the original intent of the Act, it is clear that its use has been expanded beyond merely protecting areas of historic or prehistoric interest. Notwithstanding the fact that "[n]othing in the Act authorizes the creation of national monuments for scenic purposes or for general purposes of land conservation,"<sup>19</sup> the Act

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13. "Antiquities" are defined as "relics, monuments, etc. of the distant past." WEBSTER'S NEW WORLD DICTIONARY 61 (3d ed. 1988).

14. Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 450 (1981) (citing R. Lee, THE ANTIQUITIES ACT OF 1906, at 59-62 (1970)). The Johannsen article as a whole offers an unusually comprehensive discussion of the Antiquities Act.

15. *Id.*

16. *See id.* The importance of adding this phrase to the final version of the Antiquities Act can be seen in the court's focus upon the clause to conclude that Congress intended a broader grant of authority to reserve areas other than merely areas of historic and prehistoric interest. *See Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853, 1854 (D. Alaska July 1, 1980).

17. Antiquities Act of 1906, 16 U.S.C. § 431 (1995).

18. *See Johannsen, supra* note 14, at 450.

19. *Id.* at 450-51 n.85. The Chief Clerk of the General Land Office

has been repeatedly used as such, beginning with the initial use by President Theodore Roosevelt.

“[S]ince President Roosevelt promptly, by Proclamation, exercised his authority [to reserve land for conservation purposes], . . . that declaration of authority . . . established a pattern which has been followed by those who have occupied the office since. For 57 years that pattern has followed that broad exercise of presidential authority first announced by President Roosevelt . . . .”<sup>20</sup>

*B. The Grand Canyon and the First Test of The Antiquities Act*

President Theodore Roosevelt was the first President to withdraw land under the Act, reserving 818,560 acres as early as 1908 to create the Grand Canyon National Monument.<sup>21</sup> This created a precedent which other presidents later followed to create similarly large scenic national monuments under the Act.<sup>22</sup>

Roosevelt’s declaration led to the first test of the Act as a means of preserving areas for scenic or conservation purposes. In *Cameron v. United States*,<sup>23</sup> the Supreme Court upheld the authority of the President to declare the Grand Canyon a national monument under the Act. The Court stated that the Act empowered the President to reserve land “of historic or scientific interest.”<sup>24</sup> The Court found that the Grand Canyon qualified under this portion of the Act as “the greatest eroded canyon in the United States, if not in the world, . . . [which] has attracted wide attention among explorers and scientists, affords an unexampled

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was quoted during the first National Park Conference in 1911 as follows: “[The] terms of the [Antiquities Act] do not specify scenery, nor remotely refer to scenery as a possible *raison d’etre* for a public reservation.” (citing R. Lee, *THE ANTIQUITIES ACT OF 1906*, at 109 (1970), quoting F. Bond, *The Administration of National Monuments, in Proceedings of the National Park Conference held at Yellowstone National Park*, Sept. 11-12, 1911, at 80-81 (1912)).

20. *Anaconda Copper*, 14 Env’t Rep. Cas. (BNA) at 1854.

21. See Grand Canyon National Monument, *supra* note 3; Johannsen, *supra* note 14, at 452 & n.92 and accompanying text. This, however, was not the first withdrawal of land under the Act. In 1906, President Roosevelt created Devil’s Tower National Monument, containing 1,153 acres. See Proclamation No. 658, 34 Stat. 3236 (1906).

22. See Johannsen, *supra* note 14, at 452.

23. 252 U.S. 450, 455-56 (1920).

24. *Id.* at 455 (quoting the Act).

field for geologic study, [and] is regarded as one of the great natural wonders . . . .”<sup>25</sup> With these words the Court apparently approved the use of the Act for scenic and conservation purposes. Considering the fact that this would seemingly expand the Act beyond the original intent, it is surprising to note that this portion of the decision by the Supreme Court comprised only two paragraphs.<sup>26</sup>

The Supreme Court’s primary concern in *Cameron* was a defendant who allegedly established a mining claim in the area of the monument. In *Cameron*, the Court found that the inclusion of certain lands in a national monument withdrew that part “from the operation of the mineral land law, but there was a saving clause in respect of any ‘valid’ mining claim theretofore acquired.”<sup>27</sup> The Court laid out a test to determine if the mining claim would fall within the savings clause of the Act:

To make the claim valid, or to invest the locator with a right to the possession, it was essential that the land be mineral in character and that there be an adequate mineral discovery within the limits of the claim as located, . . . and to bring the claim within the savings clause in the withdrawal for the monument reserve the discovery must have preceded the creation of that reserve.<sup>28</sup>

While a valid mining claim gives the possessor certain rights, the Secretary of the Interior has the power to determine the validity of a claim “after proper notice and upon adequate hearing . . . .”<sup>29</sup> In *Cameron*, a hearing was held to determine whether a patent for the claim should have been issued shortly after the area was reserved as a monument.<sup>30</sup> The Secretary determined that there had been no adequate mineral discovery in the area, and that no evidence had been presented that would show the existence of a valuable mineral deposit. Consequently, the Secretary stated that no valid claim was made prior to the establishment of the monument.<sup>31</sup> The Court upheld the Secretary’s deci-

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25. *Id.* at 456.

26. *See id.* at 455-56.

27. *Id.* at 455.

28. *Id.* at 456 (internal citations omitted).

29. *Id.* at 460.

30. *See id.* at 456.

31. *See id.* at 461.

sion and his authority to make such a decision. The claim did not fall within the savings clause of the Act, because no valid claim existed prior to the establishment of the monument.<sup>32</sup>

### C. *Jackson Hole National Monument*

Perhaps more important than the Supreme Court's decision in *Cameron* was the litigation surrounding the Jackson Hole National Monument in *Wyoming v. Franke*,<sup>33</sup> which dealt with the scope of the President's power under the Act.

In 1943, President Franklin Roosevelt created the Jackson Hole National Monument.<sup>34</sup> This action was bitterly opposed by some within Congress and by the State of Wyoming.<sup>35</sup> The State of Wyoming brought suit in District Court charging, among other things, that "an attempt has been made to substitute, through the Antiquities Act, a National Monument for a National Park, the creation of which is within the sole province of the Congress, thereby becoming an evasion of the law governing the segregation of areas."<sup>36</sup> The court held that it cannot "take any judicial interest in the motives which may have inspired the Proclamation described as an attempt to circumvent the Congressional intent and authority in connection with such lands."<sup>37</sup> "Such discussions are of public interest but are only applicable as an appeal for Congressional action."<sup>38</sup>

The plaintiffs also claimed that the area designated as a national monument did not include any objects of historical or scientific interest.<sup>39</sup> The court stated that while there was conflicting evidence as to whether there really were any objects of scientific or historical interest, "[i]f there be evidence in the case of a substantial character upon which the President may have acted in

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32. *See id.* at 457-65.

33. 58 F. Supp. 890 (D. Wyo. 1945).

34. Proclamation No. 2578, 3 C.F.R. 327 (1938-1943), *reprinted in* 57 Stat. 731 (1943). This was later abolished and incorporated in Grand Teton National Park. 16 U.S.C. § 406(d-1).

35. *See Johannsen, supra* note 14, at 453.

36. *Franke*, 58 F. Supp. at 892.

37. *Id.* at 896.

38. *Id.* at 897.

39. *See id.* at 895.



declaring that there were objects of historic or scientific interest included within the area, it is sufficient upon which he may have based a decision.”<sup>40</sup> If there was evidence that the area contained no “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>41</sup> The court held that there was sufficient evidence in this case that the area contained objects of scientific or historical interest worthy of protection, and even though the court may agree with the plaintiff, if there is sufficient evidence to satisfy the “preponderance rule,” the “[c]ourt is bound.”<sup>42</sup> Thus, having found that the Proclamation fell within the scope of the Act, the court deferred to the President’s determination that the area contained “other objects of historic or scientific interest” after a very limited review of the facts presented.<sup>43</sup>

In deciding whether the President’s action was authorized under the Act, the court stated that the Proclamation was based upon the President exercising a power given to him by Congress, and therefore,

[f]or the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains. Under the Constitution it is exclusively for Congress, or those to whom it delegates authority, to determine what tariffs shall be imposed. Here the President acted in full conformity with the statute. No question of law is raised when the exercise of his discretion is challenged.<sup>44</sup>

Thus, the court held that the judiciary should not interfere in a conflict between the executive and legislative branches of the federal government.<sup>45</sup>

Concerning the area that had been reserved under the proclamation, the court went on to state: “[W]hat has been said with reference to the objects of historic and scientific interest applies

40. *Id.* at 895.

41. *Id.*

42. *Id.* at 896.

43. *Id.* at 894-96. *See also* Johannsen, *supra* note 14, at 456.

44. *Franke*, 58 F. Supp. at 896 (quoting *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940)).

45. *See id.*

equally to the discretion of the Executive in defining the area compatible with the proper care and management of the objects to be protected.”<sup>46</sup> Thus, it would appear that the deference given to a President’s proclamation that the area contains historical or scientific objects also applies to the decision of how much area is necessary for the monument.

D. *Devil’s Hole and the Reservation of Water Rights*

The next challenge to a reservation made for conservation purposes under the Act came thirty-one years later, in 1952, when President Truman created Devil’s Hole National Monument.<sup>47</sup> The Proclamation notes the “remarkable underground pool” and the preamble mentions the unique features of the pool, which contains a “peculiar race of desert fish.”<sup>48</sup> When landowners who lived near Devil’s Hole applied in 1970 for a permit to change the use of the water in several wells, a representative on behalf of the Park Service protested, stating that a study should be conducted to determine if the change would affect the water levels of Devil’s Hole, which had declined.<sup>49</sup> The landowners admitted that they drew water from the same source as Devil’s Hole, but asserted that the reservation of the area by the creation of the Devil’s Hole National Monument did not affect the water rights.<sup>50</sup>

In *Cappaert v. United States*, the Supreme Court stated:

[T]his court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.<sup>51</sup>

This right was found to vest on the date of the reservation.<sup>52</sup> However, the Court declared that when deciding whether there

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46. *Id.* at 896.

47. It was actually added to the Death Valley National Monument under Proclamation No. 2961, 3 C.F.R. 147 (1949-1953), *reprinted in* 66 Stat. c18 (1952).

48. *Id.*

49. *See Cappaert v. United States*, 426 U.S. 128, 134 (1976).

50. *See id.* at 135.

51. *Id.* at 138.

52. *See id.*

is an implicit water right when land is reserved by the Federal Government, "the issue is whether the Government intended to reserve unappropriated and thus available water."<sup>53</sup> In the case of the Devil's Hole National Monument, it was clear that this was the government's intention, since the Proclamation discussed the pool contained in Devil's Hole.<sup>54</sup> The Court qualified its holding by stating that "[t]he implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."<sup>55</sup> Despite the limiting language of the statement, this would once again appear to leave the decision up to the President's discretion. It is unclear whether, if ever challenged, a court would ever find that the government exceeded its implied reservation of water rights needed to maintain a monument area.

#### E. *The Alaska Withdrawals*

In 1978, President Carter created fifteen new national monuments, consisting of fifty-six million acres of land in Alaska.<sup>56</sup> "In one day, President Carter withdrew over four and a half times as much public land as the total land withdrawn under the Antiquities Act by all prior Presidents in seventy-two years."<sup>57</sup> This withdrawal came while Congress was attempting to pass land legislation to protect the areas in question.<sup>58</sup> Thus, the action was largely viewed as designed for conservation purposes rather than for preserving an area of historical or scientific interest.<sup>59</sup> President Carter's proclamation is considered by some to have been unprecedented and "an alarming extension of a disfavored statute already extended well beyond Congress' original intent."<sup>60</sup> The land withdrawal was, of course, challenged.

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53. *Id.* at 139.

54. *See id.* at 139-40.

55. *Id.* at 141.

56. Proclamation Nos. 4611-27, 3 C.F.R. 69-104 (1979), *reprinted in* 93 Stat. 1446-75 (1979). For a list of monuments created by President Carter and their respective acreage, *see* Johannsen, *supra* note 14, at 454 n.114.

57. Johannsen, *supra* note 14, at 455.

58. *See id.* at 453-54, 453 n.112.

59. *See id.* at 455 (footnote omitted).

60. *Id.* at 455-56.

### 1. NEPA Impact Assessment and the Antiquities Act

In *Alaska v. Carter*,<sup>61</sup> the State of Alaska sought a preliminary injunction to enjoin the government from closing the comment period on an environmental impact statement ("EIS").<sup>62</sup> In deciding whether the State of Alaska had shown the probability of success on the merits, it was necessary to decide whether the EIS requirements applied to the Presidential Proclamation.<sup>63</sup> The court held that the President is not required to file an impact statement, as required under the National Environmental Policy Act of 1969 ("NEPA").<sup>64</sup> The government contended that NEPA's EIS requirement only applied to "federal agencies." The government argued, and the court found persuasive, that the President is not a "federal agency" under NEPA, and therefore the EIS requirement did not apply to reservations made by presidential authority.<sup>65</sup> When Congress wished to impose duties upon the President, "that office was specifically mentioned."<sup>66</sup> The court noted that no precedents had been brought before the court "that hold that the President must file an environmental impact statement prior to acting under a specific delegation of Congressional authority such as is embodied in the Antiquities Act. Moreover, the doctrine of separation of powers prevents this court from lightly inferring a Congressional intent to impose such a duty on the President."<sup>67</sup>

While the State of Alaska conceded at oral argument that presidential actions under the Act are not subject to NEPA, they argued that the involvement of the Secretary of the Interior in the decision triggered the NEPA EIS requirements. The court found

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61. 462 F. Supp. 1155, 1160 (D. Alaska 1978).

62. *See id.* at 1156.

63. *See id.* at 1158. The court also decided whether the requirements applied to reservations made by the Secretary of the Interior. *See id.* at 1160-61.

64. 42 U.S.C. §§ 4321-4370(d) (1995). Under NEPA, agencies of the Federal government are required to prepare a detailed impact statement for legislative proposals and "other major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(C).

65. *See Carter*, 462 F. Supp. at 1159-60.

66. *Id.* at 1160.

67. *Id.*

the argument "absurd," since it would imply that the President would have to file papers and decide boundaries on his own to avoid the NEPA procedural requirements.<sup>68</sup> The court cited Article II, Section 2, Clause 1 of the Constitution as the authority for the President to obtain opinions regarding subjects relating to his duties.<sup>69</sup>

For a court to require that an [EIS] must be filed after the specified comment period before the President could receive the recommendations of the Secretary would raise serious constitutional questions. A familiar maxim of statutory construction is that 'when one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a clear statement of a contrary legislative intent.'<sup>70</sup>

To hold that NEPA procedural requirements are triggered when a president requests recommendations from the Secretary would burden and inhibit "the policy of open, frank discussion between subordinate and chief concerning administrative action."<sup>71</sup> Thus, the court held that such recommendations do not come under the NEPA EIS process.<sup>72</sup>

## 2. Challenge Based Upon Size of the Withdrawal and the Contravention of the Definition of the Act Itself

In *Anaconda Copper Co. v. Andrus*,<sup>73</sup> the Anaconda Copper Company, joined by the State of Alaska, challenged the land withdrawal by President Carter. The case is significant, despite the ultimate mootness of the claims,<sup>74</sup> due to the court's recognition

68. *See id.*

69. *See id.* Article II, Section 2, Clause 1 of the Constitution reads "[The President] may require the Opinion, in writing, of the principle Officer in each of the executive Departments, upon any subject relating to the Duties of their respective offices. . . ."

70. *Id.* (quoting *United States v. Thompson*, 452 F.2d 1333, 1337 (D.C. Cir. 1971)).

71. *Id.* (quoting *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1973)).

72. *See id.*

73. 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980).

74. Congress passed the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (codified as amended in scattered sections of 16 U.S.C. & 43 U.S.C.), which disposed of the re-

that “an initially vague statute can gain content over time through an interplay of executive and congressional action . . . .”<sup>75</sup> The President’s action which was in dispute in *Anaconda Copper* exceeded any prior withdrawals under the Antiquities Act. Some commentators suggested that the court should have reviewed whether the President exceeded the bounds of implied congressional consent.<sup>76</sup> “This inquiry would recognize that once courts approve a practice as authorized by implication, Presidents may be tempted to test the outer limits.”<sup>77</sup> The court, however, stated that Presidents had in the past used the Act expansively and the courts, including the Supreme Court, had approved of the expansive use of the Act.<sup>78</sup> Despite the fact that Congress knew of the expansive use of the Act, they had apparently acquiesced to such an expansion, as shown by their legislative inaction.<sup>79</sup> The court stated, however, that they were “not at this time deciding whether the authority of the President might have been exceeded in the area encompassed within the Proclamations now before us.”<sup>80</sup> Instead, the court’s review was limited to whether the Proclamations on their face exceeded the authority with reference to the objects that may properly be preserved under the Act.<sup>81</sup> The court found the proclamations sufficient to meet the requirements of the Act, concluding that ecological

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served land that was challenged before certain factual issues, such as the size of the area reserved, was decided. *See* Bruff, *supra* note 12, at 38 n.162.

75. Bruff, *supra* note 12, at 38-39.

76. *See id.* at 39.

77. *Id.*

78. *See Anaconda Copper*, 14 Env’t Rep. Cas. (BNA) at 1855. The court cited *Cameron v. United States*, 252 U.S. 450 (1920), discussed *supra* Part I.B, and *Cappaert v. United States*, 426 U.S. 128 (1976), discussed *supra* Part I.D.

79. *See Anaconda Copper*, 14 Env’t Rep. Cas. (BNA) at 1855. The court finds persuasive that Congress had an opportunity in 1976, when it passed the Federal Land Management and Policy Act, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 33 U.S.C. § 1701-84 (1982)) to restrict presidential authority under the Antiquities Act and did not. *See Anaconda Copper*, 14 Env’t Rep. Cas. (BNA) at 1854.

80. 14 Env’t Rep. Cas. (BNA) at 1854.

81. *See id.*

and geological areas could be declared monuments under the Act.<sup>82</sup>

"*Anaconda Copper's* added element is the willingness to read significance into congressional inaction when a visible executive practice, supported by judicial precedents, is not disturbed by Congress when it revises the statutes that govern closely related matters."<sup>83</sup> This statement may be what will prompt Congress to pass some sort of legislation to modify the Antiquities Act in the next few years in response to President Clinton's recent proclamation.

Another significant point in the *Anaconda Copper* decision is the court's statement regarding the limits of the President's authority under the Act. While explaining the limit of their inquiry in the case, the court stated:

[t]he parameters of presidential authority have not yet been fully defined. The Supreme Court has had the opportunity to do so in the *Cameron* case and again in *Cappaert*, but did not do so. And so I may say that 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>84</sup>

Although the court decided that the Proclamations do not violate the statute, the court reasoned that it has yet to be decided when a president may in fact exceed presidential authority under the Act. Thus, aside from Congressional action that may serve to limit the President's future authority under the Act, the reservations by President Clinton may serve as a basis for an attempt at a judicial pronouncement of the limits of presidential authority under the Act.<sup>85</sup>

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82. *See id.* at 1855.

83. Bruff, *supra* note 12, at 38 (italics added).

84. *Anaconda Copper*, 14 Env't Rep. Cas. (BNA) at 1854.

85. This, however, would seem unlikely if Congress fails to curtail presidential authority since the court may once again presume acquiescence by congressional silence, thus concluding that the President had not exceeded the authority delegated by Congress. Several lawsuits have been filed in response to the proclamation. *See* Jim Woolf, *New Suit Challenges Utah Monument*, SALT LAKE TRIB., Nov. 6, 1997, at A1 [hereinafter Woolf, *New Suit*].

## II. UTAH LAND WITHDRAWALS

A. *The Proclamation*

The reservation of 1.7 million acres of land in Utah by President Clinton in September 1996 is the most recent withdrawal of land under the Antiquities Act. By creating the Grand Staircase-Escalante National Monument, President Clinton has stirred up interest in the Act, and much controversy regarding the reservation. Possible court actions and charges that the declaration was mere election year politics have been aimed at the President's action. In his speech declaring the Grand Staircase-Escalante National Monument, President Clinton attempted to draw a parallel between the current reservation and that made by President Theodore Roosevelt when he created the Grand Canyon National Monument.<sup>86</sup> However, given the controversy and the possible challenges, it would have been perhaps better compared to the reservations made by President Franklin Roosevelt in creating the Jackson Hole National Monument and President Carter's Proclamations creating the various national monuments in Alaska.<sup>87</sup> Nonetheless, there are some characteristics of the Proclamation that distinguish it from previous land withdrawals.

It is obvious from the Proclamation itself that it was tailored to meet the requirements of the Act and the cases that have previously interpreted it. In declaring the national monument, President Clinton highlighted the geological, historical, and archeological features of the area that would justify declaring it a national monument.<sup>88</sup> In addition, the Proclamation stated that the 1.7 million acres reserved in the proclamation is "the smallest area compatible with the proper care and management of the objects to be protected."<sup>89</sup> Thus, on its face, the proclamation would appear to pass judicial scrutiny under *Wyoming v.*

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86. The President, in his speech given at the edge of the Grand Canyon declaring the National Monument stated "[i]t was President Roosevelt's wisdom and vision that launched the Progressive Era and prepared our Nation for the 20th century. Today, we must do the same for the 21st century." Clinton, *Grand Canyon Remarks*, *supra* note 3.

87. See *supra* Part I.B-C & E for the discussion of these withdrawals.

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

89. *Id.* at 50,225.



*Franke*<sup>90</sup> and *Anaconda Copper v. Andrus*.<sup>91</sup>

However, it should be noted that the court in *Anaconda Copper* expressed concern with the amount of area reserved by proclamation in Alaska, but stated that the Supreme Court had had the opportunity but failed to limit Presidential authority under the Act.<sup>92</sup> The court stated that it did "believe there are limitations," but, because that issue was beyond the scope of the limited inquiry before them, these limits on presidential authority under the Act have yet to be defined.<sup>93</sup> While this would appear to open a door to challenge President Clinton's Proclamation based upon its size,<sup>94</sup> Congress' failure to restrict presidential authority after the Alaskan withdrawals may once again be held to be a tacit approval of the extension of presidential authority under the Act.

#### B. *Effect On Uses*

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from entry, location, selection, sale, leasing, or other disposition under the public land laws, other than by exchange that furthers the protective purposes of the monument. Lands and interests in lands not owned by the United States shall be reserved as a part of the monument upon acquisition of title thereto by the United States.<sup>95</sup>

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90. See 58 F. Supp. 890, 895 (D. Wyo. 1945); see discussion *supra* Part I.C.

91. 14 Env't Rep. Cas. (BNA) 1853, 1853 (D. Alaska 1980). See discussion *supra* Part I.E.2.

92. See *Anaconda Copper*, 14 Env't Rep. Cas. (BNA) at 1854.

93. See *id.*

94. A court challenge disputing the legality of the size has in fact been mounted. See Woolf, *New Suit*, *supra* note 85.

95. Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (1996). The terms "withdrawal" and "reservation," both used in the proclamation, have some significance. In the realm of federal land management, [t]hese two [terms have] historically had different meanings. A 'withdrawal' merely removed lands or resources from disposition, while a 'reservation' committed the federal lands to a specific purpose. Although the difference may seem purely theoretical, 'reserved' water rights might attach only to lands that have been 'reserved,' and not to those withdrawn. These

The Proclamation states that it applies only to federal lands and will be open to multiple use to the public.<sup>96</sup> In addition, the Proclamation provides that “[n]othing in this proclamation shall be deemed to affect existing permits or leases for, or levels of, livestock grazing on Federal lands within the monument; existing grazing uses shall continue to be governed by applicable laws and regulations other than this proclamation.”<sup>97</sup> Aside from the statements in the Proclamation itself that would seem to guarantee the continued, unchanged right to use of the land by the public, uses such as grazing and recreation are not likely to be affected.<sup>98</sup> This is because the area was previously under Bureau of Land Management (“BLM”) supervision, and they are also charged with the future management of the area.<sup>99</sup>

While the monument designation will not limit recreation and other existing uses, it may affect the area by increasing the number of tourists who will travel to see the newly created monument. The local governments will have to deal with the problems associated with the increase in tourism, such as providing emergency services and increased law enforcement personnel.<sup>100</sup> This increase in tourism will undoubtedly cause a strain upon local governments and be yet another area in which the federal government will have to work with the local community to find an adequate solution.

### C. *Management of the Monument*

One important aspect of the Proclamation that distinguishes it from previous land withdrawals under the Act is the fact that the monument will be managed by the BLM, who previously man-

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rights arise when water [is] necessary to fulfill the purposes for which lands have been set aside.

Marla E. Mansfield, *A Primer Of Public Land Law*, 68 WASH. L. REV. 801, 821-22 (1993) (citations omitted).

96. See Clinton, *Grand Canyon Remarks*, *supra* note 3.

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

98. “Hunting, fishing and grazing will continue under existing law.” *Utah Delegation*, *supra* note 5.

99. *Id.*

100. See *The Grand Staircase-Escalante National Monument Oversight Hearing, Before the Subcomm. on Nat’l Parks and Public Lands*, 105th Cong. (1997) (statement of Louise Liston, County Commissioner, Garfield County, Utah).

aged the federal land. Most federal monuments are administered by the National Park Service, and this agreement is seen as a concession to those who opposed the proclamation.<sup>101</sup>

The Proclamation places the land under management of the Secretary of the Interior through the BLM.<sup>102</sup> The Secretary has three years to prepare a management plan and "promulgate such regulations for its management as he deems appropriate."<sup>103</sup> Thus, any future use of the land, whether it be recreational or developmental, would be subject to BLM procedures and any regulations which may be drawn up specifically for the site. Congress directed the Secretary of the Interior to submit a report by February 1, 1997, "that details the costs associated with the monument, the process for developing a management plan, and a description of how affected parties will be involved in the process for developing the management plan."<sup>104</sup> This directive echoes many of the concerns and criticisms of the Proclamation within and outside of Congress.<sup>105</sup> Since there was no public hearing or notice of the Proclamation (none is required by the statute), there has been a call for the participation of public and local officials in the planning and management of the monument.<sup>106</sup>

101. See *id.*; see also Sheryl Morris, *BLM Forms Team To Address Management Issues At Utah Monument*, INSIDE ENERGY/WITH FED. LANDS, Oct. 21, 1996, at 13, available in 1996 WL 14072454.

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

103. *Id.* at 50,225.

104. 142 CONG. REC. H11,644-01, H11,917 (1996). The BLM's budget request included an additional \$5 million for the added visitation and planning. See *1998 Budget: Administration Requests \$7.5 Billion in Fiscal 1998 Funding For Department*, Nat'l Env't Daily (BNA) (Feb. 7, 1997).

105. "The Administration recently created the Grand Staircase / Canyons of the Escalante National Monument without consultation with the Congress and without public comment." 142 CONG. REC. at H11,916.

106. "[T]he President chose to ignore his high public trust by unilaterally turning a huge part of our state into a national monument. [Having] ignored this basic obligation, . . . [he] now has the greater responsibility to carry out the next phase of this discussion with meaningful public involvement and process so that the best results can be achieved." *Administration 'Surprises' Andalex*, *supra* note 6 (quoting Utah Governor Leavitt).

D. *Effect on Valid Oil, Gas and Mining Claims Already in Existence*

One of the major areas of contention concerning the Proclamation is the existing mining claims contained within the monument area. While the Proclamation withdraws the area from further leasing, it acknowledges that “[t]he establishment of this monument is subject to valid existing rights.”<sup>107</sup> In response to concerns from Senator Robert Bennett, Interior Secretary Bruce Babbitt wrote a letter addressing the effects of the Proclamation regarding mining in the area.

[T]he only mineral interests of any significance I am aware of in the area are existing federal coal leases issued many years ago. Most of these leases have expired of their own terms, or have been relinquished, or are in the process of being canceled pursuant to law. . . . Two leases or lease groups remain.<sup>108</sup>

At the time of the Proclamation, at least one of the entities holding a valid coal lease had agreed to a land swap. PacifiCorp, an electrical power generator, volunteered to swap its leases, which would have been unexploitable due to the fact that the land had been classified as a wilderness study area.<sup>109</sup>

Another company with a valid existing lease is Andalex Resources Corp.<sup>110</sup> Andalex, a developer of a coal mining project in the section known as the Kaiparowitz Plateau, has been working with BLM for years and is currently in the final stages of an EIS regarding the development of a coal mine in the area. Had Pres-

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107. Proclamation No. 6920, 61 Fed. Reg. 50,223 (1996). Although the Supreme Court did deal with mining rights and reservations under the Antiquities Act in *Cameron v. United States*, 252 U.S. 450 (1920), the case dealt only with claims that had not been validly established before the withdrawal, and thus would not apply to a case where, as in the current situation, there were “valid existing rights” at the time of the withdrawal.

108. *Miners Blast Utah Monument As ‘Election-Year Politics’* By Clinton, INSIDE ENERGY/WITH FED. LANDS, Sept. 23, 1996, available in 1996 WL 8697307 [hereinafter *Miners Blast Monument*] (quoting letter from Bruce Babbitt to Sen. Robert Bennett). In addition to the corporate mining leases, the monument area contained Utah School-Trust Fund land, which the President assured would be traded for BLM lands of equal value off the monument site. See Mike Gorell, *Monument Is Costly, Expert Says*, SALT LAKE TRIB., Oct. 17, 1996, at A1.

109. See *Administration ‘Surprises’ Andalex*, *supra* note 6.

110. See *id.*

ident Clinton not established the area as a national monument, a favorable EIS would have permitted Andalex to pursue the additional permits needed for mining, building roads, and the proposed mining operation.<sup>111</sup> Despite the fact that BLM continues to manage the property, the designation of the area as a national monument may interfere with access and transportation to the mining area even if the EIS receives a favorable response from BLM.<sup>112</sup> "Andalex won't lose their right to mine, . . . [t]hey'll just lose the ability to transport the coal out if the government denies the permits to build roads over protected lands."<sup>113</sup> For about a decade, Andalex has been attempting to receive a permit for the underground mining project.<sup>114</sup> Responding to concerns of Utah state lawmakers prior to the Proclamation, Secretary Babbitt stated,

should the company continue to seek permission to move forward with its proposal [for a mine once the area is declared a national monument], a determination would have to be made whether the Andalex proposal is inconsistent with the purposes of the monument, and if so, whether, and to what extent the company has valid existing rights that would have to be addressed."<sup>115</sup>

Secretary Babbitt stated that while Andalex's mining claims may still be valid following the creation of the national monument, the company may be required to meet further environmental standards in relation to the monument.<sup>116</sup> "You can foresee ways in which if mining were to occur, there could be a significant impact on the objects that are to be protected. . . ."<sup>117</sup> The existing oil and gas leases cover approximately 140,000 acres of federal land, and 52,000 acres of land leased for coal.<sup>118</sup> "An

111. *See id.*

112. *See id.*

113. *Clinton Carves Out Monument; Utah Lawmakers, Industry Miffed*, MINE REG. REP., Sept. 23, 1996, available in 1996 WL 8390938 (quoting Alex Jordan, head of Utah Mining Ass'n).

114. *See id.*

115. *Miners Blast Monument*, *supra* note 108 (quoting Interior Secretary Babbitt).

116. *See Joe Salkowski, Act Makes Land in Utah A Monument 1.7 Million Acres Saved For Future, Clinton Says*, ARIZ. DAILY STAR, Sept. 19, 1996, at 1A.

117. *Id.* (quoting White House Spokesman Mike McCurry).

118. *See Morris*, *supra* note 101.

estimated 62 billion tons of high-quality coal is buried underneath the harsh terrain - considered the largest unmined coal reserve in the country."<sup>119</sup>

Should Andalex be unable to mine on its valid existing leases, or merely unable to transport any coal from the mine, some legal experts have expressed the view that they may have a takings claim against the government. If the Proclamation reduces the economic value of the property (the leases), it may constitute a taking.<sup>120</sup> In addition, regulatory diminishment of adequate access to valid mining claims can constitute a taking.<sup>121</sup> Thus, should BLM allow Andalex to mine but severely restrict its ability to move any coal out of the area by restricting its ability to build roads and transport the coal, the value of the mine would be severely diminished and Andalex may have a takings claim.<sup>122</sup>

A trade similar to the one agreed to with PacifiCorp has been reportedly offered to Andalex. Given the amount of money already invested by the company in the claim, there have been doubts expressed by the company that there would be land available that will give them a return on the money they have already

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119. Salkowski, *supra* note 116. Perhaps the biggest irony over the mining issue in the Utah monument area is that the reservation will lock up "62 billion tons of recoverable low-sulfur coal, [which] will lead to greater air pollution when utilities are forced to burn dirtier coal." 142 CONG. REC. S11,085 (daily ed. Sept. 20, 1996) (statement of Senator Murkowski). Thus, it has been asserted that preserving the area for one set of environmental motives may cause harm to another set of environmental concerns than if a limited mining operation were allowed. In addition, the senator brought up the point that when we restrict mining in the U.S. we are more dependant on imported coal from countries that may not have the technology and environmental protections as in the U.S. *See id.*

120. *See Andalex Puzzles Over Response to Clinton's Monument Action*, MINE REG. REP., Oct. 7, 1996 [hereinafter *Andalex Puzzles*] (citing John Martinez, Associate Law Dean at University of Utah).

121. *See* Philip F. Shuster & Robert F. Dierking, *Future Prospects For Mining And Public Land Management: The Federal "Retention-Disposal" Policy Enters The Twenty-First Century*, 26 ENVTL. L. 489, 548-49 (1996). A thorough discussion of the takings issues implicated by the Utah land withdrawals is beyond the scope of this Note.

122. For a discussion of regulatory takings, see Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases On the State Courts: Does The Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523 (1995).

invested in the leases.<sup>123</sup>

In addition to existing coal leases, there are numerous oil leases in the monument area. In March of 1997, Conoco, who holds numerous federal and state oil leases, received permission from the Utah Division of Oil, Gas and Mining to drill an exploratory well in a section of state-owned land within the monument area.<sup>124</sup> While the first exploratory well did find some natural gas, it did not yield the large amount of oil the company expected.<sup>125</sup> Any oil and gas find will have to be substantial to make any mining in this remote area worthwhile.

#### E. Water Claims

This proclamation does not reserve water as a matter of Federal law. I direct the Secretary to address in the management plan the extent to which water is necessary for the proper care and management of the objects of this monument and the extent to which further action may be necessary pursuant to Federal or State law to assure the availability of water.<sup>126</sup>

The President's statement regarding water rights appears to be another attempt to limit the effects of the Proclamation. Thus, it would appear that the language of President Clinton's Proclamation was intended to avoid any later charge that it contained an implied water right by stating that there was no reserved water right as a matter of law.<sup>127</sup> While no reserved or implied right would likely be found in this case given the President's statement, the Proclamation also states that the management plan developed by BLM should evaluate "the extent to which water is necessary for the proper care and management of the objects of

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123. See *Andalex Puzzles*, *supra* note 115. Andalex has reportedly abandoned the mine proposal and has begun to negotiate a land swap with BLM. See Jim Woolf, *S. Utah Drilling: Monument May Not Yield Coal, But Oil Could Yet Flow*, SALT LAKE TRIB., Mar. 28, 1997, at A1 [hereinafter Woolf, *S. Utah Drilling*].

124. See Woolf, *S. Utah Drilling*, *supra* note 123. "State lands scattered through the monument are not subject to the same strict regulations as surrounding federal lands." *Id.*

125. See Jim Woolf, *Conoco May Drill Again In Monument*, SALT LAKE TRIB., Dec. 19, 1997, at B1.

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

127. See *id.* See *supra* Part I.C for a discussion of water rights under areas designated monuments under the Antiquities Act.

this monument. . . .”<sup>128</sup> Given the fact that the Supreme Court in *Cappaert v. United States*<sup>129</sup> stated that the implied water right was limited to “only that amount of water necessary to fulfill the purpose of the reservation, no more,”<sup>130</sup> the statements by the President appear to do little to affect the existing law regarding water rights.<sup>131</sup> Even if an implied water right was later found, the courts have already limited the right to only the amount necessary.

#### F. *Response to the Proclamation*

##### 1. *Moves to Limit the Act*

The response from the public and Congress to President Clinton’s Proclamation has been mixed. Environmentalists praised the act as “without a doubt President Clinton’s boldest environmental initiative.”<sup>132</sup> However, there have been some serious charges aimed at the Proclamation and the Act itself. “There has been no consultation; no hearings; no town meetings; no TV or radio discussion shows; no input from federal land managers on the ground; no maps; no boundaries; no nothing.”<sup>133</sup> While concerns expressed in this statement may be valid, the Antiquities Act itself does not impose any set procedure to declare a national monument.<sup>134</sup> In response to this criticism, President Clinton has directed BLM to “work with state and local governments, [congressmen] . . . and the senators, and other interests to set up a land management process that will be good for the people of Utah and good for Americans.”<sup>135</sup>

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

129. 426 U.S. 128, 141 (1976).

130. *Id.* at 141, quoting *Arizona v. California*, 373 U.S. 546, 600-01 (1963).

131. However, the Congressional Daily reported that “Utah state water law, rather than Federal, will prevail in the [monument] area.” *Utah Delegation*, *supra* note 5. If this is so, it is unclear what effect it would have on the BLM’s decision of how much water is necessary.

132. Salkowski, *supra* note 116 (quoting Adam Werbach, Sierra Club President).

133. *Utah Delegation*, *supra* note 5 (quoting Utah Senator Orrin Hatch).

134. See *supra* Part I.A.

135. *Grand Canyon Remarks*, *supra* note 3.



Another criticism of the Proclamation is the statement that the President's "use of the relatively obscure 1906 Antiquities Act appears to be a flagrant move to circumvent the legislative process concerning the designation of land to be set aside for wilderness."<sup>136</sup> In response to similar complaints from Congress over President Theodore Roosevelt's Proclamation creating the Jackson Hole National Monument, the district court stated that "the burden is on Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in its Legislative branch."<sup>137</sup> Despite the disapproval, and at times outrage, at some of the Proclamations under the Act, no significant limitations have been put on the Act itself. Even the passage of the Federal Land Policy and Management Act ("FLPMA"),<sup>138</sup> which was intended to "restore land withdrawal authority to the legislature subject to limited delegations to the executive . . . failed to restrict the President's broad authority under the Antiquities Act."<sup>139</sup> The Proclamation by President Clinton may provoke Congress to break its silence and attempt to restrict the President's authority under the Act.

Recently, in response to President Clinton's Proclamation, several bills have been introduced in Congress aimed at limiting Presidential power to use the Act to create future monuments. One such bill, introduced by several senators, is called the Public Lands Protection Act.<sup>140</sup> The proposed legislation "provides that no extension or establishment of a national monument can be undertaken pursuant to the Antiquities Act without full compliance with the National Environmental Policy Act, NEPA, and the Endangered Species Act, and an affirmative act of Congress."<sup>141</sup>

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136. *Administration "Surprises" Andalex*, *supra* note 6 (quoting Richard L. Lawson, Nat'l Mining Ass'n President).

137. *Wyoming v. Franke*, 58 F. Supp. 890, 896 (D. Wyo. 1945).

138. 43 U.S.C. §§ 1207-1784 (1994).

139. Johannsen, *supra* note 14, at 457.

140. S. 2150, 104th Cong., (1996).

141. 142 CONG. REC. S11,540, S11,552 (daily ed. Sept. 27, 1996) (statement of Sen. Murkowski). The senator states that the reservation of land was "unquestionably a 'major Federal action' within the meaning of NEPA," and thereby requires an environmental impact state-

Another proposal to limit presidential power to reserve lands under the Act would limit the total acreage that may be reserved to 5,000 acres.<sup>142</sup> This proposal would appear to be in keeping with the original drafts of the Act, which also limited total reservable acreage.<sup>143</sup>

## 2. Moves to Limit the Effects of the Proclamation Itself

Recently, a bill has been introduced in the Senate to codify all of the limiting language that President Clinton included in the Proclamation.<sup>144</sup> This is an indication of how important that limiting language is considered by those who opposed the President's action. The bill ensures that BLM will manage the monument<sup>145</sup> and the "resources within the [m]onument in accordance with the principles of multiple use and sustained yield . . . using the principle of economic and ecological sustainability."<sup>146</sup> The bill provides for the preservation of grazing rights,<sup>147</sup> but not for express or implied federal water right, which will continue to be governed by Utah law.<sup>148</sup>

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ment. *See id.* at S11,552. However, the courts have held that Proclamations under the Antiquities Act do not require an environmental impact statement required by NEPA. *See infra* part I.E.1.

142. *See What Is The Historical Significance Of The Kaiparowits Plateau?*, 142 CONG. REC. H12,170-01 (daily ed. Sept. 28, 1996) (Statement of Sen. Hansen).

143. *See supra* Part I.A.

144. *See* S. 357, 105th Cong. (1997).

145. *See id.* § 4(b)(2).

146. *Id.* at § 4(a)(2). The bill refers to the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1702-1784 (1994), to define "multiple use" and "sustainable yield." *See* S. 357, § 3(6), (9). FLPMA defines "multiple use" as "the management of the 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. . . ." 43 U.S.C. § 1702(c). "Sustainable yield" is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." *Id.* at § 1702(h).

147. *See id.* § 6(a).

148. *See id.* § 8.

Should this bill pass, it would in effect negate many of the protections anticipated by monument status. The bill's proponents have asserted that it is merely an attempt to hold President Clinton to his assurances at the time the monument was created.<sup>149</sup>

#### CONCLUSION

The argument and propaganda which have been circulated in forums and through the press of the Nation, . . . largely concern a policy of segregating the area for its natural scenery and inherent beauty as a national playground or, in the alternative, a policy representing in effect an encroachment upon the State's sovereignty over lands within its boundaries by adding to the already large acreage of public lands over which the Federal Government exercises authority, more lands and more restrictive measures, thereby retarding the State's growth and development.<sup>150</sup>

While this quote may be mistaken for a statement regarding President Clinton's action declaring the Grand Staircase-Escalante National Monument, it is in fact a statement by the Wyoming District Court regarding the Jackson Hole National Monument.<sup>151</sup> In response to arguments for limiting presidential power under the Act, the court stated that "[s]uch discussions are of public interest but are only applicable as an appeal for Congressional action."<sup>152</sup>

As the brief history of the use and interpretation of the Antiquities Act of 1906 shows, President Clinton's Proclamation creating the Grand Staircase-Escalante National Monument was not unusual or the largest reservation under the Act. It seems likely, given the judicial precedents approving similar proclamations, that any court challenge would probably fail. The only recourse that may serve to limit any future uses of the Act would be Congressional action. The courts have repeatedly stated that Congressional inaction in limiting presidential authority under the Act indicates tacit approval of the expansion of the Act beyond the original intent.<sup>153</sup> Thus, should the proposed legislation pass,

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149. See 143 CONG. REC. S1571 (1997) (statement of Sen. Bennett).

150. *Wyoming v. Franke*, 58 F. Supp. 890, 896-97 (D. Wyo. 1945).

151. See *id.*

152. *Id.* at 897.

153. See *id.* at 896-97.

it would affect future reservations under the Act.

With regard to the effects upon the uses of the land within the new monument area in Utah, the qualifying language and the continued management of the land by BLM would indicate that there may be little change. As has been stated, grazing and recreational uses will not be limited.<sup>154</sup> The only real question appears to be the future of the coal, oil and gas development leases. Although the Proclamation does not explicitly invalidate the mining claims, the use and value of the claims could be limited should BLM choose to restrict access to the areas by prohibiting the building of roads. BLM has three years to develop a management plan for the area, and has not completely ruled out mining. As discussed, the legislation introduced in Congress that would codify the President's limiting instructions would in fact eliminate many of the protections monument status would provide. As the exploratory drilling shows, it is possible that mineral exploration will be allowed at least for pre-existing leases. There are, however, many obstacles in the form of new regulations and operating costs that may discourage leaseholders from pursuing their claims.

In sum, the future of the Grand Staircase-Escalante National Monument is unclear. Should Congress pass the proposed legislation, however, the greatest impact of the President's creation of this monument may be upon the Antiquities Act itself.

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154. See *supra* note 97 and accompanying text.