

# **RL30528: National Monuments and the Antiquities Act**

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## **ABSTRACT**

This report addresses the authority of the President to create national monuments on federal lands under the Antiquities Act of 1906. It discusses aspects of the Act that have been controversial. These include the size and types of resources protected; the level of threat to designated areas; effects of proclamations on land uses; consistency of the Act with the withdrawal, public participation, and environmental review aspects of other laws; monument management by agencies other than the National Park Service (NPS); and the constitutionality of the Act. It also provides background on the four monuments President Clinton created or enlarged by proclamation on January 11, 2000, and discusses the land uses permitted within these monuments. It provides similar information for the Giant Sequoia National Monument created on April 15, 2000. The report discusses possible future monument designations, especially the possibility of "national landscape monuments." It briefly identifies options for Congress related to presidential designation of monuments. This report will be updated as events may require. For additional information on national monuments, especially the Grand Staircase-Escalante National Monument, see CRS Report 98-993 ENR and CRS General Distribution Memorandum, *Legal Issues Raised by the Designation of the Grand Staircase Escalante-National Monument*.

## **Summary**

The Antiquities Act of 1906 (16 U.S.C. §§431-433) authorizes the President to create national monuments on federal lands that contain historic landmarks, historic and prehistoric structures, or other objects of historic or scientific interest. The President is to reserve "the smallest area compatible with the proper care and management of the objects to be protected." The Act was designed to quickly protect federal lands and resources. Presidents have proclaimed more than 100 monuments totaling about 70 million acres. Many of these have been modified by Congress, *e.g.* by conversion to national parks. Congress also has created monuments.

Presidential establishment of national monuments sometimes has been controversial. An example is the 1.9 million acre Grand Staircase-Escalante National Monument in Utah, established by President Clinton in 1996. Recent attention in Congress has centered on the size and types of resources protected; the

level of threat to designated areas; effects of proclamations on land uses; consistencies of the Act with the withdrawal, public participation, and environmental review aspects of other laws; the agency that manages the monuments; and the constitutionality of the Act.

On January 11, 2000, President Clinton created three new monuments and enlarged an existing one: the Grand Canyon-Parashant National Monument (Arizona), with 1,014,000 acres of federal land; the Agua Fria National Monument (Arizona), with 71,100 acres of federal land; the California Coastal National Monument (California), acreage unspecified; and the Pinnacles National Monument, which was enlarged by 7,900 acres. President Clinton selected BLM as manager of the three new monuments, although the NPS shares management for Grand Canyon-Parashant. NPS also will manage the additional Pinnacles land. On April 15, 2000, President Clinton created the Giant National Monument (California), with 327,769 acres of federal land. The Monument will be managed by the Forest Service, an agency in the Department of Agriculture.

National monuments are established or enlarged subject to valid existing rights, and in general land uses may continue if they are not precluded by the proclamations, and do not conflict with the purposes of the monuments. The proclamations and supporting documents address land uses. For instance, new mining claims and mineral and energy leases are barred and grazing is allowed. In some cases, water rights are reserved for the federal government.

The Administration has expressed interest in creating additional monuments, especially "national landscape monuments." These monuments evidently would protect complete landscapes and whole ecosystems that are "distinct and significant." Indications are that they would be created on BLM lands and managed by BLM. The possibility of more monuments has both won support and revived concerns. Congress has a variety of options to address the concerns, some of which have been pursued in legislation. Supporters favor the Act in its present form as applied by current and previous Administrations.

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## Introduction

Presidential establishment of national monuments under the Antiquities Act of 1906 (16 U.S.C. §§431 *et seq.*) sometimes has been controversial. Displeasure with President Franklin Roosevelt's proclaiming the Jackson Hole National Monument in Wyoming (1943) prompted litigation on the extent of presidential authority under the Antiquities Act, as well as a 1950 law to prohibit future establishment of national monuments in Wyoming except as authorized by Congress. President Carter's Alaska withdrawals (1978) also were challenged in the courts and led to provisions of law requiring congressional approval for monument withdrawal in Alaska larger than 5,000 acres.<sup>1</sup> President Clinton's proclamation of the Grand Staircase-Escalante National Monument (1996) triggered several lawsuits, a law to exchange lands, and proposals to amend or revoke presidential authority under the Antiquities Act. In the past, initial opposition to some monument designations turned to support over time, and some of the most controversial monuments later were enlarged and redesignated as national parks.

On January 11, 2000, President Clinton issued proclamations creating three new monuments and expanding one existing monument. The new monuments are the Grand Canyon-Parashant National Monument (Arizona), the Agua Fria National Monument (Arizona), and the California Coastal National Monument (California). The enlarged monument is the Pinnacles National Monument (California). On April 15, 2000, President Clinton created another new monument, the Giant Sequoia National Monument (California). The Administration also has expressed interest in creating additional monuments, especially "national landscape monuments." These monuments evidently would protect complete landscapes and whole ecosystems that are "distinct and significant." Indications are that they would be created on Bureau of Land Management (BLM) lands and managed by BLM. The recent proclamations and the possibility of additional proclamations during 2000 have generated congressional discussion on presidential authority to create monuments.

Recent legislative and oversight attention in Congress has centered on the size of the areas and types of resources protected, as well as on the level of threat to the areas. The effect of proclamations on land uses, both extractive and recreational, also has been controversial. Also discussed has been the lack of consistency between the Antiquities Act and the policies established in other laws, especially the land withdrawal provisions of the Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C. §1701 *et seq.*),<sup>2</sup> the environmental reviews required by the National Environmental Policy Act (NEPA, 42 U.S.C. §4321 *et seq.*), and the public participation requirements of NEPA and major land management laws. A main focus has been not only the lack of a requirement for public participation and environmental review in presidential creation of monuments, but, as a practical matter, insufficient consultation with Congress, state and local government officials, and the public during the designation process. Management by BLM or the U.S. Forest Service (Department of Agriculture), rather than the National Park Service (NPS), has been an issue, and the constitutionality of the Antiquities Act also has been questioned.

Congress has a variety of options to address these concerns, some of which have been pursued in legislation. They include repealing the Antiquities Act, amending the Act to restrict presidential authority, overturning or amending the creation of a particular monument, and enacting legislation to protect land through other designations. Among the measures under consideration this session are bills to encourage public participation in the monument designation process, and to require congressional approval of monument designations and promote presidential creation of monuments in accordance with certain federal land management and environmental laws.

## The Antiquities Act of 1906

The Antiquities Act of 1906 authorizes the President to proclaim national monuments on federal lands that contain "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." The President is to reserve "the smallest area compatible with the proper care and management of the objects to be protected" (16 U.S.C. §431). Congress subsequently has limited the President's authority by requiring congressional authorization for extensions or establishment of monuments in Wyoming (16 U.S.C. §431 a), and making withdrawals in Alaska exceeding 5,000 acres subject to congressional approval (16 U.S.C. §3213).

The Antiquities Act was a response to concerns over theft from and destruction of archaeological sites, and was designed to provide an expeditious means to protect federal lands and resources. President Theodore Roosevelt used the authority in 1906 to establish Devil's Tower in Wyoming as the first national monument. Fourteen of the 17 Presidents since 1906 have proclaimed more than 100 monuments in total, including Grand Canyon, Grand Teton, Zion, Olympic, Statue of Liberty, and Chesapeake and Ohio Canal.<sup>3</sup> Many presidentially-designated monuments later became national parks through acts of Congress. Congress also has created or modified monuments, for instance, by changing the boundaries.

Monuments vary widely in size. While more than half initially involved less than 5,000 acres, monuments have ranged from less than 1 acre to nearly 11 million acres. The largest monument (the Wrangell-St. Elias National Monument) was created as part of President Carter's 1978 withdrawal of 56 million acres of land in Alaska to establish 15 new monuments and enlarge 2 others.<sup>4</sup> Monuments have been proclaimed in about two dozen states and the Virgin Islands. About 10% of all federal land—approximately 70 million acres—has been protected by the Antiquities Act.<sup>5</sup>

In 1996, President Clinton proclaimed the Grand Staircase-Escalante National Monument in Utah.<sup>6</sup> This monument, now 1.9 million acres, was the largest monument outside Alaska when first proclaimed, and has been controversial since its inception.<sup>7</sup> On January 11, 2000, President Clinton again used his authority under the Antiquities Act, issuing four proclamations to create three new monuments and enlarge an existing one. Most recently, on April 15, 2000, President Clinton created another new monument, the Giant Sequoia National Monument, for a total of five new monuments (and one enlarged monument) to date during this Administration. These monuments are discussed below, following the section on issues related to the authority of the President to create monuments under the Antiquities Act.

## **Monument Issues and Controversies**

### **Monument Size**

In establishing a national monument, the President is required by the Antiquities Act to reserve "the smallest area compatible with the proper care and management of the objects to be protected" (16 U.S.C. §431). Several Presidents have established large monuments. Examples of large monuments include Katmai, established in 1918 with 1,088,000 acres; Glacier Bay, created in 1925 with 1,379,316 acres; most of the Alaska monuments proclaimed in 1978, the largest being the Wrangell-St. Elias Monument with 10,950,000 acres; and Grand Staircase-Escalante, established in 1996 with approximately 1,900,000 acres.

Critics assert that large monuments violate the Antiquities Act, in that the President's authority regarding size was intended to be narrow and limited. They charge that the Act was intended to protect specific items of interest, especially archaeological sites, and the small areas surrounding them. They support this view with the legislative history of the Act, where proposals to limit a withdrawal to 320 or 640 acres were considered. The more general language enacted apparently was preferred to provide the President more flexibility.

Defenders of large monuments argue that the Antiquities Act gives the President discretion to determine the acreage necessary to ensure protection of resources. They also note that after considering the issue in the early 1900s, Congress deliberately rejected a restriction on the President's authority to set the size of the withdrawal. Further, they assert that preserving objects of interest may require withdrawal of sizeable tracts of surrounding land to preserve the integrity of the objects and the interactions and relationships among them.

The courts generally have deferred to the President's judgment as to proper size. However, the case law on this subject is not extensive, and it is uncertain what conclusion a court would reach in any particular case in the future.<sup>8</sup>

### **Objects Protected**

Under the Antiquities Act, the President can establish monuments on federal land containing "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." Some proclamations have identified objects needing protection, while others have referred more generally to scenic, scientific, or educational features of interest.

Some assert that the original purpose of the Act was to protect specific objects, particularly objects of antiquity such as cliff dwellings, pueblos, and other archeological ruins in the Southwest (hence the name "Antiquities Act"). They claim that Presidents have used the Act for impermissibly broad purposes, such as general conservation, recreation, scenic protection, or protection of living organisms, and that such purposes are more appropriate for a national park or other designation established by Congress. Supporters of current presidential authority counter that the Act does not limit the President to protecting ancient relics, and note that "other objects of historic or scientific interest" is broad wording that grants considerable discretion to the President.

A review of legal challenges on this issue also shows a general deference to presidential determinations of objects appropriate for protection. In one case, the Supreme Court upheld the creation of the Grand Canyon National Monument in apparent agreement with the President's assertion that the Grand Canyon "is an object of unusual scientific interest."<sup>9</sup> However, in another case a lower court did note in dicta (that is, not as part of the holding), that there might be circumstances in which a President might be held to have exceeded his authority.<sup>10</sup> Thus, the outcome of any future legal challenge in this area is not completely certain.

### **Level of Threat**

Presidents sometimes have cited threats to resources in support of establishing monuments, although imminent threat is not expressly required by the Antiquities Act. In his remarks designating the Grand Staircase-Escalante National Monument, for instance, the President expressed concern about work underway for a large coal mining operation that, according to the President, could damage resources in the area. Sometimes the noted threats appear less immediate, as for the lands included in the Grand Canyon-Parashant Monument (proclaimed January 11, 2000) which "could be increasingly threatened by potential mineral development," according to the Administration.

Presidential creation of monuments in the absence of impending threats to resources troubles those who believe that the law is intended to protect objects that are endangered or threatened. They charge that Presidents have established monuments to support environmental causes, limit development, and score political gains, among other reasons. Those who contest these charges note that the Antiquities Act lacks a requirement that objects be immediately threatened or endangered. Others cite the pervasive dangers of development and growth as sufficient grounds for contemporary presidential action.

### **Effects on Land Use**

Monument designation applies to federal lands, but in some cases designation may have implications for uses on non-federal lands. Designation can affect pre-designation land uses on federal lands by limiting or prohibiting existing or potential development or recreational uses. A common concern is the effect of monument designation on mineral and energy leases and mining claims on federal lands. Monument designation potentially could result in new constraints on development of existing leases and permits, as well as bar new leases, claims, and permits. Mineral activities may have to adhere to a higher standard of environmental review, and probably a higher cost of mitigation, to ensure compatibility with the monument designation.

Another concern is the potential or actual restriction on commercial timber cutting as a result of designation. For instance, future timber production is expressly precluded in the Giant Sequoia National Monument, although certain current logging contracts can be implemented. Logging supporters assert that forests can be used sustainably, and that concerns raised by environmentalists as grounds for limiting commercial timber operations do not reflect modern forestry practices. Others point to the emphasis on protection of resources that designation should connote, especially if a new monument is a

part of the National Park System.

Other concerns have included the possible effects of monument designation on grazing, hunting, and off-road vehicle use. The proclamations or subsequent management plans might restrict such activities in order to protect monument resources.

States and counties historically have viewed restrictions on federal lands as threatening economic development in their jurisdictions. They argue that local communities are hurt by the loss of jobs and tax revenues that result from removing lands from future mineral exploration, timber development, or other activities. Some argue that energy development limitations could leave the United States more dependent on foreign oil.

Advocates of creating monuments claim there are positive economic impacts resulting from designation, including increased tourism and recreation, which exceed the benefits of traditional economic development. Others allege that the public interest value of environmental protection outweighs any economic benefit that could have resulted from development. Some maintain that development is insufficiently limited by monument designation, through the preservation of valid existing rights for particular uses, such as grazing and mining. Areas need to be left intact for future generations, they argue.

The inclusion of state or private lands among federal lands within a monument's borders also has been a source of controversy. Monument proponents assert that state and private lands are not affected by monument designation, since the Antiquities Act applies only to federal land. The Solicitor of the Department of the Interior asserted this view in testimony before Congress, stating that the Antiquities Act applies only to federal lands and that monument designations cannot bring state or private lands into federal ownership.<sup>11</sup> However, others view development of private or state-owned land as being more difficult following the creation of a monument, because such development might be incompatible with the purposes for which the monument was created. Monument supporters also note that if state or private land owners within a monument fear or experience difficulties, they can pursue land exchanges with the federal government.

### **"Consistency" of Antiquities Act with NEPA and FLPMA**

The Federal Land Policy and Management Act of 1976 (FLPMA) authorizes the Secretary of the Interior to make certain land withdrawals under specified procedures. It requires congressional approval for withdrawals that exceed 5,000 acres, but in a manner that is likely to be an unconstitutional legislative veto provision under the ruling in *Immigration and Naturalization Service v. Chadha*.<sup>12</sup> FLPMA also contains notice and hearing procedures for withdrawals of less than 5,000 acres. In enacting FLPMA, Congress not only imposed limits on the ability of the Interior Secretary to make withdrawals, but took back much of the express and implied withdrawal authority previously granted to the President.

Critics argue that the Antiquities Act is inconsistent with these provisions, and therefore inconsistent with the intent of FLPMA to restore control of public land withdrawal policy to Congress. They assert that Congress is the appropriate body to make and implement land withdrawal policy, and that Congress intended to review and retain veto control over all executive withdrawals exceeding 5,000 acres. Many believe that the Antiquities Act is no longer needed, because since 1906 Congress has enacted not only FLPMA but other legislation dealing with management and protection of public lands. Challengers to this view note that Congress did not repeal or amend the Antiquities Act despite extensive consideration of all executive withdrawal authorities. They believe it was the clear intent of Congress to retain presidential withdrawal authority under the Antiquities Act; if the legislative sentiment has changed, it is up to Congress to change the law.

Similarly, critics note that recent establishments of monuments were accomplished by the President without the environmental studies required of agencies for "major federal actions" under the National Environmental Policy Act (NEPA), or the opportunities for public participation that NEPA, FLPMA, and other land management laws provide. Here, too, it can be noted that the statutes in question do not pertain to the actions of a President under the Antiquities Act (as opposed to an agency), and that the

Antiquities Act is silent as to procedures a President must follow to proclaim a new monument. Some urge that procedures for environmental review and public participation should be added to the monument designation process so that significant withdrawals (with resulting effects on existing uses) would not be made without scientific and public input.

Others counter that such changes would impair the ability of the President to take action quickly to protect objects and lands, thereby avoiding possible damage and speculative establishment of rights.<sup>13</sup> They assert that participation requirements are not needed in law because Presidents typically consult with government officials and the public before establishing monuments. Further, they charge that NEPA applies to proposed actions that might harm the environment, not to protective actions such as monument designation. Some believe that NEPA requirements are unnecessary for monument designation because once monuments are created, detailed management plans are developed in accordance with NEPA.<sup>14</sup>

### **Monument Management**

Although most monuments are managed by the National Park Service (NPS), Congress has created some monuments that are managed by other agencies. In 1996, President Clinton created the Grand Staircase-Escalante National Monument and assigned its management to BLM, the first such area administered by BLM. President Clinton also selected BLM as manager of the three monuments created in January 2000, although in one case management is shared with the NPS.

It appears that BLM was chosen to manage several monuments because the federal lands already were under BLM management, and were intended to be both protected and managed for multiple uses. Multiple uses include recreation; range; timber; minerals; watershed; fish and wildlife; and protecting scenic, scientific, and historical values. Mineral development, timber, and hunting are the principal uses that would be legally compatible with BLM management but not with NPS management. All four BLM proclamations protect valid existing rights, which would allow development to proceed. However, they also preclude *new* mineral and energy development, and hence are similar to NPS units in that respect. Grazing is another land use typically allowed on BLM lands, but often precluded on NPS lands even though it is allowed under statute.<sup>15</sup> All four BLM monuments permit grazing. It could be argued that having BLM manage monuments, rather than NPS, generally allows for more flexible management. That is, under the BLM interim management policy, uses generally would be permitted unless shown to be detrimental to the monuments, while in NPS units, uses are more likely to be prohibited unless shown to be beneficial.

In creating the Giant Sequoia National Monument on April 15, 2000, President Clinton selected the Forest Service as the managing agency. It appears that the Forest Service was chosen to manage the monument in part because the federal lands were under Forest Service management. The Forest Service also has expertise in forest management relevant to mitigating certain forest conditions and restoring natural forest resilience, factors that are cited by the proclamation as important management considerations.

The President's authority to choose a management agency other than NPS has been questioned. Before 1933, monuments were managed by different agencies, including the War Department and the Department of Agriculture. In 1933, President Franklin D. Roosevelt, by Executive Order 6166, consolidated management of national monuments in the NPS. Most, and possibly all, existing monuments were transferred to the NPS, and no monuments presidentially-created between 1933 and 1978 were managed outside the NPS. Two of the Alaska monuments created by President Carter in 1978 were managed by the Forest Service (which is in the Department of Agriculture), and two were managed by the Fish and Wildlife Service (FWS). Management by FWS does not appear to have been contentious. However, management of the two Alaska monuments by the Forest Service was controversial, and the NPS and the Department of Agriculture agreed to enter into a memorandum of understanding on managing the monuments. The two monuments subsequently were given statutory approval (in ANILCA) for Forest Service management.

A review of the legal analyses on this issue, especially a 1980 Opinion from the Office of Legal Counsel, appears to indicate some flexibility in choosing management of post-1933 monuments. However, other

legal considerations cast doubt on the issue, notably whether management by other agencies may constitute a reorganization which would require congressional approval.<sup>16</sup>

Some assert that the authority of the President under the Antiquities Act carries with it discretion to choose the managing agency. They contend that there is no exclusive authority for the NFS to manage monuments. Others argue that management by an agency other than NFS is a transfer of part of the current functions of the NFS. They note that the transfer of an agency function, especially to another department, constitutes a reorganization of government, and that the President currently lacks reorganization authority. Others allege that establishing a new monument under another agency would not constitute a reorganization because management of current NFS units, and the general authority of the NFS to manage monuments, would be unaffected. Even if placing management authority under a department other than the Department of the Interior might constitute a reorganization, the President nevertheless might be able to move a function of the NFS to the BLM under congressionally-approved authority allowing transfers of functions within the Department of the Interior. (Reorganization Plan No. 3 of 1950). The designation of the Giant Sequoia National Monument, with management by the Forest Service in the Department of Agriculture, may raise this issue anew.

### **Other Legal Issues**

The "Property Clause" of the Constitution (Article IV, sec. 3, cl. 2) gives Congress the authority to dispose of and make needful rules and regulations regarding property belonging to the United States. Some have asserted that the Antiquities Act is an unconstitutionally broad delegation of Congress' power, because the President's authority to create monuments is essentially limitless since all federal land has some historic or scientific value. Others believe the Act would be upheld if challenged on this basis because it has been in effect for so long and because courts have upheld other broad delegations of property authority; for example, the Mining Law of 1872, which allows state and local laws and customs to supplement federal law.

Several cases were filed challenging the designation of the Grand Staircase- Escalante National Monument on various grounds. The Utah Association of Counties (UAC) filed suit asking the court to set aside the presidential proclamation on the grounds that: 1) the President violated the Antiquities Act and the separation of powers doctrine by withdrawing public lands from the application of the mining laws and mineral leasing laws when Congress reserved this power to the Secretary of the Interior; 2) the President exceeded his constitutionally delegated authority under the Act to achieve wilderness preservation of lands when Congress reserved that authority to itself; 3) the President exceeded his authority under the Act to reserve only the "smallest area" compatible with protection of specific objects; 4) the chair of the Council on Environmental Quality failed to implement and enforce NEPA and worked with defendants Secretary Babbitt and the Department of the Interior to avoid complying with NEPA; and 5) Secretary Babbitt and the Interior Department violated federal law by recommending the creation of the Monument without complying with procedures imposed by federal law.

A second suit was filed by the Utah Schools and Institutional Trust Lands Administration (SITLA). It alleged that the President exceeded his authority under the Act and the Constitution when he created the monument; the Interior Department violated FLPMA and NEPA during the course of designation; and the withdrawal violated the Utah Enabling Act of 1894 and the "Equal Footing" doctrine.

The Mountain States Legal Foundation also filed suit alleging that the President's creation of the monument violated the Antiquities Act because 1) the President did not confine the withdrawal to the smallest area compatible with the purpose; 2) the President did not confine it to objects of scientific and historic interest; and 3) his actions were arbitrary and capricious in that he exceeded his authority under the Constitution. This suit also alleges that all defendants violated FLPMA, the Federal Advisory Committee Act, the Anti-Deficiency Act, and the Constitution.

The cases were consolidated, but the SITLA case was settled and has been dismissed. The others are being heard in the U.S. District Court for Utah, but have not moved very far toward decision. The United States asked the court to rule first on the question of whether Congress could be said to have ratified the creation of the Monument through several enactments since its creation. The court was asked to rule on a



motion to dismiss on the question of ratification, in which context the court must *assume* that all of plaintiffs assertions are correct-notably that the President exceeded his authority. In that context, the court found Congress's actions insufficient to constitute ratification and declined to dismiss the case on that ground. The United States has asked the Court of Appeals for the 10th Circuit to certify the ratification question for appeal before the rest of the cases are heard, but there is no ruling yet and no indication of when the lower court might rule on the other issues.

A suit also has been filed in the United States District Court for Arizona challenging the Grand Canyon-Parashant National Monument. It asserts that under the "enclave clause" of the Constitution, the United States does not lawfully own the lands involved,<sup>17</sup> and that the delegation of authority to the President by Congress with the subsequent reservation of the Monument "violates the federalism principle of political accountability."

## **Four Monuments Established or Enlarged on January 11, 2000 <sup>18</sup>**

### **Proclamations**

On January 11, 2000, President Clinton proclaimed 3 new national monuments and enlarged a fourth. The new monuments are the Grand Canyon-Parashant National Monument, the Agua Fria National Monument, and the California Coastal National Monument. The enlarged monument is the Pinnacles National Monument.

The Grand Canyon-Parashant National Monument was established in Northwestern Arizona on 1,014,000 acres of federal land. The monument includes canyons, mountains, and buttes on the north rim of the Grand Canyon, and contains geological, biological, historic, paleontological, and archaeological resources. It encompasses the lower portion of the Shivwits Plateau, a watershed of the Colorado River and Grand Canyon.

The Agua Fria National Monument was created on 71,100 acres of federal land in Arizona, about 40 miles north of Phoenix. The monument includes two mesas and the canyon of the Agua Fria River. The land contains prehistoric ruins including petroglyphs, agricultural areas, and rock pueblos; historic sites; and biological and scientific resources.

The third new monument, the California Coastal National Monument, is comprised of thousands of federally-owned islands, rocks, reefs, and pinnacles above mean high tide within 12 miles of the California shoreline. The lands, which extend the length of the California coast, contain biological resources and geological formations and provide feeding and nesting grounds for sea mammals and birds. Because of the scattered land area, the total acreage is not readily available.

The Pinnacles National Monument, located south of San Jose, California, was expanded by some 7,900 federal acres. The monument was originally proclaimed in 1908 to preserve rock formations and a series of caves underlying them, and has been expanded several times. The current expansion includes additional pieces of the faults that created the geological formations throughout the monument, the headwaters that drain into the basin of the monument, and a biological system of plant and animal communities. The expanded monument now consists of approximately 24,165 acres.

### **Monument Size**

The size of the Grand Canyon-Parashant Monument is about twice that originally contemplated, while the Agua Fria Monument is about half the amount originally intended, according to a January 11, 2000, press briefing by the Secretary of the Interior. The Secretary explained that the sizes evolved as a result of hearings and studies in the two areas. The proclamations for all four monuments repeat the language of the Antiquities Act, that the acreage reserved is the "smallest area compatible with the proper care and management of the objects to be protected." Among other reasons, supporting documents assert that the lands surrounding the identified objects are included to maintain the relationships among the objects and the remoteness that allows them to exist. Also mentioned are that biological objects need preservation of

an entire ecosystem, and that management of a series of discrete sites is more difficult than managing a larger, contiguous area.

The Administration cited threats to resources in support of the proclamations. For instance, vandalism was reported at the Agua Fria National Monument, while the Grand Canyon-Parashant area "could be increasingly threatened by potential mineral development," according to a White House Press Release (January 11, 2000).

Non-federal lands are included within the boundaries of the monuments, except for the California Coastal Monument. Specifically, Grand Canyon-Parashant contains approximately 23,000 acres of state land and 9,000 acres of private land; Agua Fria, 1,440 acres of private land; and Pinnacles, 2,850 acres of private land. For Pinnacles, the amount of private land constitutes a sizeable portion of the land within the boundaries of the expanded area.<sup>19</sup>

The Administration has indicated that the monument designation does not apply to these non-federal lands. The proclamations state that these non-federal lands will become part of the monument if the federal government acquires title to the lands from the current owners, and also authorize land exchanges to further the protective purposes of the monuments. For monuments other than Pinnacles, BLM is to consider not only land exchanges but land or easement acquisitions to enhance the purposes of the monuments, according to an interim management policy. The policy also provides that activities on non-monument lands that damage the monument be reported "to the responsible management official for appropriate action."<sup>20</sup>

### **Monument Management**

The Pinnacles Monument was being managed by the NPS before the current expansion, and the NPS also will manage the additional 7,900 acres. The expansion lands were being managed by the BLM before the proclamation.

Before the Grand Canyon-Parashant Monument was created, the land within its boundaries was being managed by the NPS (within the Lake Mead National Recreation Area) and BLM (the other lands). The two agencies are to manage the new monument jointly, and prepare an agreement for sharing related resources. The NPS will continue to have primary management authority over the land within the Lake Mead National Recreation Area (206,000 acres), and the BLM will have primary authority over the rest (808,000 acres).

The proclamations assign BLM responsibility for managing the Agua Fria and California Coastal Monuments. All monument lands within Agua Fria were being managed by BLM at the time of the designation. The lands within the California Coastal Monument also have been under BLM jurisdiction. However, the California State Department of Fish and Game has been managing the lands within California Coastal on behalf of BLM, under a memorandum of understanding. Management by the state agency is expected to continue (with any necessary revisions to the memorandum of understanding).

### **Land Uses**

The presidential proclamations and accompanying Administration statements address land uses within the monuments. An interim management policy for all newly-created BLM monuments, also issued January 11, 2000, provides additional guidance for the three BLM monuments pending approval of a management plan for each monument under BLM's planning process. The NPS is preparing a transition plan to clarify NPS management principles in the Pinnacles expansion area, to be followed by a revised general management plan for the whole Pinnacles Monument. The overriding management goal for all monuments is protection of the objects described in the proclamations.

The proclamations establish or enlarge the monuments subject to valid existing rights. Also, existing uses of the land that are not precluded by the proclamations, and do not conflict with the purposes of the monuments, generally may continue. Supporting documents for the BLM monuments state that the exercise of such rights could be regulated where necessary to protect a monument under BLM

administration.

**Mineral Development.** Subject to valid existing rights, the proclamations bar *new* mineral leases, mining claims, prospecting or exploration activities, and oil, gas, and geothermal leases, by withdrawing the lands within the monuments from entry, location, selection, sale, leasing, or other disposition under the public land laws, the mining laws, and all laws relating to mineral and geothermal leasing. BLM advises us that there are no existing mineral or energy leases on the federal lands within the new monuments or Pinnacles expansion lands. However, there are 27 mining claims within Grand Canyon-Parashant and 8 mining claims on Agua Fria lands. The interim BLM policy allows surface disturbance and reclamation activities under current mining permits, but permits that are not consistent with monument purposes will not be extended. Surface disturbance is generally limited or not allowed on NPS lands.

**Withdrawals Preserved.** For all four monuments, existing withdrawals, reservations, and appropriations continue, but the monument becomes the dominant reservation. This generally requires that uses be managed to protect monument values, and if there is a conflict with authorized uses, protection of the monument governs.

**Grazing.** The proclamations for the Agua Fria and Grand Canyon-Parashant Monuments state that laws, regulations, and policies followed by BLM in issuing and administering grazing leases on its lands will continue. BLM is to continue to issue and administer grazing leases within the Lake Mead National Recreation Area of the Grand Canyon-Parashant Monument, in accordance with the law establishing that area.<sup>21</sup> The BLM interim policy also generally allows livestock grazing in BLM monuments in accordance with existing permits and leases. When the proclamations were issued, no grazing occurred on lands within the California Coastal Monument, but virtually all of the BLM lands within the Grand Canyon-Parashant and Agua Fria Monuments were within grazing allotments. Some of the NPS lands within the Grand Canyon-Parashant Monument also were under grazing allotments. Grazing may continue to be permitted in the expanded Pinnacles area, under the proclamation, though it is not allowed elsewhere in the monument.

For all monuments, adjustments to current grazing permits and leases could be made under existing laws, policies, and procedures. For instance, adjustments could be made to ensure that proper stocking levels are not exceeded, which the BLM interim management policy characterizes as of "paramount importance."

**Timber.** The four proclamations imply that timber cutting is precluded, through a general prohibition against removing any "feature" of the monuments. In practice, no commercial timber operations were underway on the lands included in the monuments, according to BLM and the NPS; little or no commercial timber exists in these areas.

**Water Rights.** Subject to other valid existing water rights, water rights necessary to protect monument objectives are reserved for the federal government in the proclamations for Agua Fria and Pinnacles. The proclamations do not relinquish or reduce any federal water use or rights that existed prior to the establishment of the monuments. The proclamation for Grand Canyon-Parashant expressly does not reserve federal water rights, but does not relinquish any existing federal water rights. Federal land management agencies are to work with state authorities to ensure that sufficient water is available for the monument. According to Administration documents, most of the objects to be protected do not require water. The proclamation for the California Coastal Monument does not address water rights. Federal reserved water rights often have been controversial, but frequently have been asserted and upheld with respect to management of national monuments and parks.

**Fish and Wildlife.** With regard to fish and wildlife, existing authority of the state of Arizona for fish and wildlife management on federal lands within the two Arizona monuments would continue. This means that the state can regulate fish and wildlife on federal lands, notably fishing and hunting, except as overridden or modified by the Secretary. Hunting will be banned in the expanded Pinnacles Monument area, as is typically the case on NFS lands under general NFS authorities. Hunting had been allowed when the land was managed by BLM. While not explicitly stated, existing fish and wildlife authority is generally not affected by the proclamation for the California Coastal Monument. According to the Administration, the

proclamation does not affect federal or state authority over fishing, oil and gas development, or other uses of adjacent water. However, the proclamation protects federally-owned features in the "near-shore ocean zone" for 12 miles from shore, in part to provide for feeding and nesting habitat. This may raise questions as to regulation of fisheries between the state, the Department of Commerce, and the Department of the Interior.

On a related issue, the interim policy for the BLM monuments provides that existing agreements with the Animal and Plant Health Inspection Service regarding animal damage control should be modified to target individual predators, rather than predator populations.

**Off-Road Vehicle Use.** The proclamations for the Grand Canyon-Parashant and Agua Fria Monuments prohibit using motorized and mechanized vehicles off road, except for emergency or authorized administrative purposes. A prohibition on off-road vehicle use had been in existence in both areas, but may not have been fully implemented. The interim policy for BLM monuments generally bars motorized and mechanized vehicles off road, and states that management discretion should be used where necessary to protect monument resources, such as through emergency closures. Off-road vehicle use does not appear to be an issue in the California Coastal Monument because of the offshore nature of the monument. Although the proclamation does not address this issue, recreational vehicle use off road is not allowed in the Pinnacles expansion area, according to the NPS, as is typical for NPS lands.

**Wilderness.** BLM wilderness study areas included in the Pinnacles expansion area, comprising 5,949 acres, will continue to be managed under §603 of FLPMA, although FLPMA does not generally apply to the NPS. Areas already designated as wilderness within the Grand Canyon-Parashant National Monument, totaling about 95,000 acres, will continue to be managed as wilderness.

## Giant Sequoia National Monument

On April 15, 2000, President Clinton proclaimed the Giant Sequoia National Monument in California on 327,769 acres of federal land.<sup>22</sup> With the inclusion of non-federal lands, the monument boundaries would be larger; non-federal lands within the boundaries would become a part of the monument upon acquisition by the United States, under the proclamation. The proclamation protects groves of giant sequoias, geological formations, limestone caverns, paleontological resources, archaeological sites, historic remnants, and diverse ecological components, among other features. Previous withdrawals and reservations are preserved; however, the monument is the dominant reservation.

The monument will be managed by the Secretary of Agriculture, along with the underlying Sequoia National Forest, acting through the Forest Service. The Secretary of Agriculture, in consultation with the Secretary of the Interior, is to develop a management plan within three years and may develop special management rules and regulations governing the monument. The Secretary, in consultation with the National Academy of Sciences, is to appoint a scientific advisory board to assist in developing the initial management plan for the monument.

The management plan is to contain a transportation plan that provides for visitor enjoyment and education. Motorized vehicle use is permitted on designated roads. No new roads or trails are to be authorized, except to further the protective purposes of the monument, and roads and trails may be closed or altered before the management plan is issued in order to protect monument objects. Motorized vehicle use is permitted on trails until the end of the year 2000.

The proclamation preserves valid existing rights and addresses land uses. The lands are withdrawn from new mineral development. New timber production is precluded, and no part of the monument can be used to calculate sustained yield of timber from the Sequoia National Forest. Timber sales under existing contracts and those with a decision notice signed between January 1, 1999 and December 31, 1999, may be completed under the terms of the decision notice and contract. Some trees may be removed as needed for ecological restoration, maintenance, or public safety. The proclamation also refers to the need for "restoration" activities to counteract the effects of previous fire suppression and logging.

Current laws, regulations, and policies will apply to qualifying timber sales under contract and to grazing

permits. Federal water rights are expressly reserved, and any previous water rights are not relinquished or reduced. Existing special use authorizations may continue. The existing authority of the state of California for fish and wildlife management is preserved.

### **Future Designations: National Landscape Monuments**

The Administration has expressed interest in creating additional monuments, at times referring to them as national landscape monuments.<sup>23</sup> National landscape monuments evidently would protect integrated landscapes and ecosystems that are "distinct and significant," in contrast with existing monuments, which Interior Secretary Babbitt called "curiosities" that stand out from the landscape because of their beauty or geographic or historical value. The Administration believes additional monuments are needed because of the increasing urbanization of the West, citing population growth and commercial development as threats to the land and its resources.

According to the Secretary, national landscape monuments would be created on BLM lands and would be administered by BLM. Secretary Babbitt seeks to develop the BLM's role in land protection, broadening the agency's traditional focus on mining and grazing and other extractive land uses. The goal is for monuments and other protected areas administered by the BLM to become part of a new national system of conservation lands, along the lines of systems managed by the NFS and the Fish and Wildlife Service. The Secretary also asserts that keeping management with BLM is important to increase the pride and direction of the agency.

The Secretary contrasted national landscape monuments with national park system units administered by the NF S. The landscape monuments apparently would serve outdoor recreationists but would not be set up for large numbers of visitors; they typically would lack visitor centers, guides, overnight accommodations, and fees, so that they would present "an adventure" for visitors. Land uses would not be as restricted as in units of the national park system. Secretary Babbitt has stated that "destructive and incompatible uses" would be barred. Mining likely would be prohibited, but hunting or grazing may be allowed in particular monuments as compatible with the protection of a large landscape.

The Administration has cited frustration with the slow pace of legislated land protection as justification for the President to create additional monuments. Secretary Babbitt has stated that the President will use his authority under the Antiquities Act to designate additional monuments if areas of interest to the Administration are not protected through the legislative process. Many view the creation of additional monuments as part of a larger Administration plan to protect more land.

The expectation that the President will create additional monuments has revived past concerns and raised new ones. In some areas under consideration for monument status, there has been significant opposition from those who fear restrictions on land use. The prospect of withdrawing more lands from mining, for instance, has angered mining industry supporters. Some government officials have expressed concern about presidential action in their states. Others denounce presidential action as political rather than necessary for land protection. Concern also could be raised as to whether essentially "open space" monuments are authorized by the Antiquities Act. In contrast, environmental and conservation groups

- generally have favored additional monuments, and in some Western communities there is considerable public support for conservation and protection of open spaces.

Secretary Babbitt identified the recently-created Agua Fria and Grand Canyon- Parashant Monuments as national landscape monuments, although it does not appear that this label was applied upon their creation. With respect to the creation of future monuments, the Interior Department has stated that no official list of sites under consideration is available. However, Administration statements and press articles identify a number of areas spread throughout the West that are being evaluated for monument designation, at times calling them national landscape monuments.

For instance, Secretary Babbitt has stated that a monument might be created in the Canyon of the Ancients area in Southwestern Colorado. This monument would not protect isolated ruins, but rather the whole landscape, to facilitate an understanding of how communities lived in spiritual and physical

equilibrium with the landscape. The Secretary referred to the area as an "anthropological ecosystem." Some of the other areas of BLM lands that have been reported as under consideration include: in Arizona, the Las Cienegas; in California, the Santa Rosa and San Jacinto Mountains, and the Carrizo Plain; in Colorado, lands near the Colorado National Monument; in Montana, the Upper Missouri Breaks; and in Oregon, the Steens Mountain and Soda Mountain. Congress is considering protecting some of these areas through legislation that would designate the areas in a various ways.

### **Options for Congress**

Supporters of the President's authority under the Antiquities Act claim that the Act has been used throughout the century by Presidents of both parties to protect important federal lands and resources. They defend the President's ability to take prompt action under the Act to protect vulnerable and valuable areas and resources on federal lands. They assert that, in the past, even controversial presidential designations usually have been accepted, supported, and occasionally expanded over time, and that currently there is widespread public support for land protection initiatives such as monument designation. They further note that even previous Congresses that focused on the authority of the President to withdraw lands left the Antiquities Act intact, and that the courts thus far have supported past presidential actions under the Act. They believe that changes to the Antiquities Act are neither necessary nor desirable.

Critics have put forward a number of alternatives, some of which are contained in legislation introduced in the 106<sup>th</sup> Congress. One alternative would require consultation with the public, local and state officials, and/or Congress before the President establishes a monument. Or, the President could be required to obtain the approval of Congress or other government officials for all monument designations, or for those of a particular size or having specific characteristics. Procedures could be mandated for conducting environmental analyses or other studies, identical to or based on those contained in NEPA.

One measure to amend the Antiquities Act is H.R. 1487, which states that to the "extent consistent with the protection of the sites being designated, the President is required to: 1) solicit public participation and comment in the development of a monument declaration, and 2) "to the extent practicable," consult with the Governor and congressional delegation of the state or territory in which lands considered for designation are located, at least 60 days before a monument designation. In addition, NEPA is to apply to the development of any management plan for new national monuments. The bill passed the House on September 24, 1999 (408-2), and was reported without amendment by the Senate Committee on Energy and Natural Resources (March 28, 2000). The Administration has pledged to veto the bill.

Another measure, S. 729, was introduced and referred to the Senate Committee on Energy and Natural Resources on March 25, 1999. It would establish a procedure for the Interior and Agriculture Secretaries to make recommendations to the President as to monument creation, and for the President in turn to make recommendations and submit maps to Congress. Presidential recommendations would be effective "only if the declaration is approved by Act of Congress." The bill also would require the Secretaries to establish processes for public comment. It states that before making their recommendations to the President, the Secretaries are to ensure, "to the maximum extent practicable," compliance with applicable federal land management and environmental laws, and to conduct other reviews and mineral surveys. Studies and recommendations are to be conducted in accordance with NEPA.

Other alternatives to amend the Antiquities Act directly that have been put forth by critics include: (1) Congress may repeal the Antiquities Act outright, so that it alone can create monuments; (2) Congress could enact legislation to impose a range of restrictions on presidential authority under the Antiquities Act, for example, to include limitations on the size or duration of withdrawals; or (3) Congress could prohibit or restrict withdrawals in particular states, as has been done for Wyoming and Alaska.

Rather than amend the Antiquities Act, opponents also have suggested that Congress overturn or amend a particular presidentially-created monument through subsequent legislation, as has been done occasionally in the past. They point out that Congress also can control implementation of the Antiquities Act through its authority over programs and funds to administer monuments. Additionally, critics propose

that Antiquities Act designations might be prevented by congressional establishment of conservation areas, wilderness areas, heritage areas, or other conservation units.

### Footnotes

1 These provisions were enacted as part of the Alaska National Lands Conservation Act of 1980 (ANILCA), P.L. 96-487.

2 This law applies to the lands managed by the Bureau of Land Management (BLM) and actions taken by the Secretary of the Interior.

3 A list of monuments created by the President from 1906 through 1999 is contained in U.S. Congress, House Committee on Resources, Subcommittee on National Parks and Public Lands, *H.R. 1487, The National Monument NEPA Compliance Act*, 106<sup>th</sup> Cong., 1<sup>st</sup> sess., June 17, 1999 (Washington: GPO, 1999), pp. 24-44. Information on monuments created by both the President and Congress is contained in the notes following 16 U.S.C. §431.

4 Congress rescinded these withdrawals and reestablished them as national monuments or other protective designations (such as national park) in §1322 of ANILCA.

5 Most of this acreage is no longer in monument status because it has been included by Congress in other protective designations, especially through enactment of ANILCA.

6 Proc. 6920, September 18, 1996; 61 Fed. Reg. 50,223 (September 24, 1996). This monument was initially reported at 1.7 million acres, but was recalculated by BLM and also modified by act of Congress.

7 For more information on this monument, see CRS Report 98-993, *Grand Staircase- Escalante National Monument*.

8 For more information on monument size and other legal issues, see CRS Congressional Distribution Memorandum, *Legal Issues Raised by the Designation of the Grand Staircase- Escalante National Monument*, by Pamela Baldwin, December 13, 1996. The memorandum addresses the types of objects protected, designation procedures, BLM as monument manager, and whether non-NFS management constitutes a reorganization requiring congressional approval.

9 *Cameron v. United States*, 252 U.S. 450, 455-456 (1920).

10 *Wyoming v. Franke*, 58 F. Supp. 895 (D. Wy. 1945).

11 See *infra* note 3, pp. 53 and 55.

12 62 U.S. 919 (1983).

13 The status quo of BLM-managed lands could be maintained because §204(e) of FLPMA (43 U.S.C. 1714(e)), authorizes the Secretary to temporarily withdraw BLM lands for a period of up to two years. Comparable authority does not exist with respect to lands managed by other agencies.

14 The House and Senate have pursued diverse measures related to the authority of the President to create national monuments. Two measures on the issues raised in this section are covered below under "Options for Congress."

15 As a general matter, grazing may be allowed in NFS units under 16 U.S.C. §3, unless it is prohibited by the statute creating the unit or the Secretary of the Interior finds grazing would be detrimental. In practice, grazing often is not allowed. However, some statutes authorizing park units specifically allow for grazing in these units.

16 4B Op. Off. Legal Counsel 396 (February 8, 1980). Also, see *infra* note 8.

17 As the Supreme Court noted in *Kleppe v. the United States* (426 U.S. 529, 542-543 (1976)), this assertion mixes analysis of the provision regarding *legislative* jurisdiction over lands within states with the authority of the federal government to *own* lands. See CRS Report RL30126, *Federal Land Ownership: Constitutional Authority; the History of Acquisition, Disposal, and Retention; and Current Acquisition and Disposal Authorities*, at 2-3 (1999).

18 The relevant presidential proclamations are as follows: for the Grand Canyon-Parashant National Monument, Proc. No. 7265; for the Agua Fria National Monument, Proc. No. 7263; for the California Coastal National Monument, Proc. No. 7264; and the Pinnacles National Monument, Proc. No. 7266. They are all published at 65 Fed. Reg. 2821-2834 (January 18, 2000).

19 Monument boundaries contain this non-federal acreage in addition to the federal acreage stated above.

20 The interim management policy is available on BLM's website at [ <http://www.az.blm.gov/interimgt.htm> ].

21 16 U.S.C. §46011-3.

22 This proclamation had not been assigned a number before this report was printed. However, the text is available on the White House website at [<http://www.whitehouse.gov/>].

23 Much of the description in this section is derived from remarks of Interior Secretary Bruce Babbitt at the University of Denver Law School on February 17, 2000, available on the website of the Department of the Interior at [ <http://www.doi.gov/news/000222b.html> ].