

# CRS Report for Congress

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## Authority of a President to Modify or Eliminate a National Monument

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### Summary

President Clinton created a number of new national monuments, using authority given the President under the Antiquities Act of 1906. Many of the designations were controversial and renewed discussion of that Act and whether a President can modify or eliminate a Presidentially created national monument. This report examines that question. The report is not expected to be updated.

Both the President and the Congress currently can create “national monuments,” a type of conservation unit created from federal lands. Since 1933 and until recently, monuments were managed by the National Park Service in the Department of the Interior. President Clinton has created a number of new national monuments and has charged agencies other than the National Park Service with the management of several of them.<sup>1</sup> The President exercised the authority given the President under the Antiquities Act of 1906,<sup>2</sup> but the creation of the new monuments proved controversial, both with respect to particular areas designated and with respect to the process by which the monuments were created.<sup>3</sup>

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<sup>1</sup> For a discussion of national monuments in general, and of those created by President Clinton, see: (name redacted) and (name redacted), report for Congress RL30528, *National Monuments and the Antiquities Act*. As to whether assignment of management of a national monument by an agency other than the National Park Service might constitute a “reorganization” of the government, see (name redacted), General Distribution Memorandum: *Legal Issues Raised by the Designation of the Grand Staircase-Escalante National Monument*, December 13, 1996.

<sup>2</sup> Act of June 8, 1906, ch. 3060, 34 Stat. 225, codified at 16 U.S.C. §§ 431-433.

<sup>3</sup> Because the Antiquities Act involves action by the President, Presidential designation of a national monument does not trigger the procedures usually required under the National Environmental Policy Act (NEPA). The Antiquities Act is silent as to procedures to create a national monument, stating only that the President shall “proclaim” one. Critics assert that declaring monuments, especially large ones, without the usual environmental studies and public participation is out-of-step with other federal land actions, and proposals to modify the Antiquities (continued...)

Under Article IV of the Constitution, Congress has the power to make needful rules and regulations regarding the territory and property of the United States. Over the years, Congress delegated considerable land management authority to the President, including the authority in the Antiquities Act for the President “in his discretion to declare by public proclamation ... national monuments.” Strong Presidents expanded on the authorities delegated by Congress and many withdrawals and reservations were made that critics charged exceeded the delegated powers.

Eventually, Congress reasserted control over withdrawals and reservations of public lands by limiting actions that could be taken by the President or the Secretary of the Interior. This posture is especially evident in the land management statutes enacted in 1976, most notably in the Federal Land Policy and Management Act of 1976 (FLPMA),<sup>4</sup> which required certain approvals of Congress for large withdrawals, repealed many previous statutory authorities of the President, and even repealed any authority of the President to make withdrawals implied by the acquiescence of Congress in the actions of previous Presidents.<sup>5</sup> However, FLPMA conspicuously left the Antiquities Act in place, with no discussion of why that choice was made. The FLPMA provisions regarding Secretarial withdrawal authority may shed additional light on the issue of revocation and will be discussed further below.

Although few monuments have ever been abolished by Congress (as opposed to being folded into another conservation designation), and no monument has ever been terminated by a President,<sup>6</sup> the question has arisen as to whether a President lawfully *could* modify a previously designated monument. At first glance, it would appear that this question should be answered in the affirmative since Presidents certainly have modified or revoked executive orders, and at times executive orders and proclamations have been used

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<sup>3</sup> (...continued)

Act have been submitted in the Congress. Opponents of these proposals argue that the Antiquities Act should not be changed because it provides a valuable avenue to take prompt protective actions to safeguard valuable national treasures and monuments typically provide economic benefits to surrounding communities.

<sup>4</sup> Act of October 21, 1976, Pub. L. No. 94-579, 90 Stat. 2743, codified in part at 43 U.S.C. §§ 1701 *et seq.*

<sup>5</sup> Uncodified section 704(a) reads in part: “Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459) and the following statutes and parts of statutes are repealed: ....”

<sup>6</sup> See comments of John Leshy at: Press Briefing by George Frampton, Acting Chair of the Council on Environmental Quality and John Leshy, Solicitor of the Department of the Interior, June 9, 2000.

interchangeably to carry out land actions.<sup>7</sup> But some see the proclaiming of a national monument as a special category of action that may not simply be undone.

When a President issues a proclamation on matters either within the President's inherent powers or to execute a delegated authority, the proclamation has the force of law.<sup>8</sup>

An attorney general's opinion concluded that a President could validly *modify* a monument because the Antiquities Act directs that a monument "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."<sup>9</sup> Numerous Presidents have modified previously created monuments. However, the Opinion also concluded that a President could not *eliminate* or terminate a monument established by previous Presidential action. The Opinion noted that there was no separate statutory authority for the President to revoke or terminate a monument, and therefore any authority that existed for this purpose must be implied by the other powers given the President in the Antiquities Act. The Opinion then reasoned that because the President had no inherent authority over lands, the President was acting only with authority delegated to him by Congress; a monument reservation was therefore equivalent to an act of Congress itself; and the President was without power to revoke or rescind a monument reservation.

In this regard, the Opinion cited a previous opinion that concluded that a President could not revoke a reservation of land made pursuant to a delegation of congressional authority, because doing so would be repealing or altering an act of Congress.<sup>10</sup> The

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<sup>7</sup> The Antiquities Act authorizes the President to "proclaim" monuments. It does not appear that the form of the President's action – a proclamation rather than an executive order – is significant. One congressional study distinguished the two instruments by stating that an executive order relates to actions within the executive branch and a proclamation typically affects citizens and "since the President has no power and authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President's proclamations are at best hortatory so far as the general public is concerned unless they are based on statutory or Constitutional authority." *Executive Orders and Proclamations: A Study of a Use of Presidential Powers*, Committee on Government Operations, 85th Congress, 1st Sess. at vii (December, 1957). However, both types of instruments have been used to create forest reserves. (See *Establishment and Modification of National Forest Boundaries – A Chronologic Record 1891-1973*. Compiled by the Forest Service, Department of Agriculture. (1973).) For example, the Act of March 3, 1891, ch. 561, 26 Stat. 1103 authorized the President to proclaim forest reserves, which reserves were created variously by proclamations and executive orders, a fact that was reflected in the 1897 act (Act of June 4, 1897, ch. 2, 30 Stat. 11, 36) that authorized the revocation or vacating of executive orders or proclamations creating forest reserves under the 1891 Act.

<sup>8</sup> See *Jenkins v. Collard*, 145 U.S. 546, 560-561 (1891) and cases involving executive orders: *e.g.* *Independent Meat Packers Ass'n v. Butz*, 526 F. 2d 228, 234 (8th Cir. 1975), cert denied 424 U.S. 966 (1976); *Gnotta v. United States*, 415 F. 2d 1271, 1275 (8th Cir. 1969).

<sup>9</sup> 39 Op. Atty. Gen. 185 (1938) (Opinion).

<sup>10</sup> *Id.*, at 187, citing 10 Op. Atty. Gen. 359, 364 (1862) (an opinion cited with approval in 17 Op. Atty. Gen. 168 (1881) and 36 Op. Atty. Gen. 75, 79 (1929)), which stated: "... A duty properly (continued...)

Opinion distinguished the authority of a President to make general temporary land withdrawals or to create forest reserves, because both of those statutes provided express authority for the President to modify or eliminate reservations made pursuant to those acts.<sup>11</sup> All of these opinions are old and may reflect a more limited view of Presidential authority over land that might have changed over the years.<sup>12</sup>

Section § 204(j) of FLPMA, the Act that repealed most of the withdrawal authorities of the President and Secretary of the Interior and imposed new Congressional controls over large withdrawals that might be made by the Secretary after 1976, also specified that the Secretary could not make, modify, or revoke any withdrawal created by Act of Congress or “modify or revoke any withdrawal creating national monuments under the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431-433) ....” This provision came from the House bill, H.R. 13777, as introduced and as reported. The relevant committee report states:

“[the bill] would also specifically reserve to Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act .... These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.”<sup>13</sup>

The conference report does not mention the provision.

The FLPMA language addresses only actions of the Secretary, while the Antiquities Act is worded in terms of actions the President may take. Presidential proclamations creating national monuments typically read that they “hereby” withdraw or reserve lands – *i.e.* are a current withdrawal by the President. Arguably any subsequent actions taken by a Secretary to carry out the withdrawals are more in the nature of record changes to

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<sup>10</sup> (...continued)

performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.”

<sup>11</sup> *Id.*, at 188. The 1910 Act is the Act of June 25, 1910, ch. 421, 36 Stat. 847, the “Pickett Act,” which is one of the statutes whose authority the President expanded with the acquiescence of Congress, and the Act of June 4, 1897, ch. 2, 30 Stat. 11, 36, which expressly authorized the revocation or vacating of executive orders or proclamations creating forest reserves under the Act of March 3, 1891, ch. 561, 26 Stat. 1103 (codified at 16 U.S.C. § 471 until its repeal by FLPMA in 1976). In the National Forest Management Act (Pub. L. 94-588, 90 Stat. 2949, 2957), Congress provided that forest reserves could only be returned to the public domain by an act of Congress. 16 U.S.C. 1609(a).

<sup>12</sup> This is especially true with respect to authorities which Presidents applied expansively in a pattern of actions to which Congress acquiesced. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). However, there has been no pattern or even an instance of Presidential revocation of monument designations. In addition, arguably the era of expansive Presidential powers was reversed by FLPMA.

<sup>13</sup> H.R. Rep. 94-1163 at 9 (1976).

reflect withdrawals already legally made by the President. If a President were to attempt to revoke a monument declaration, presumably the revoking proclamation would similarly terminate the previous withdrawals, and subsequent actions taken by a Secretary to reflect that revocation again could be characterized as merely record-keeping changes made to reflect the action already taken. If the President lacks authority to revoke monuments and monument withdrawals, then this distinction between withdrawals of a President versus withdrawals of a Secretary does not matter.

However, it appears from the breadth of the committee report language that Congress may have believed that controlling revocations by the Secretary in this regard would operate to control the revocation of national monument withdrawals – i.e. to control the actions of the President. If this was the understanding of Congress, it may be possible to argue that the general controls in FLPMA over large withdrawals made by the Secretary were also intended to control withdrawals made by the President under the 1906 Act. Arguably, the last part of the committee report language seems to indicate that Congress may have believed its withdrawal language was in fact adequate to control Presidential withdrawals.

Whether this is a fair reading of FLPMA and whether controlling withdrawals or revocations made by the Secretary effectively controls the President under the Antiquities Act are issues that are not clear. Arguably the FLPMA language was not effective in this regard because courts are reluctant to find statutes repealed by implication<sup>14</sup> and this would seem especially true of a statute that so carefully and extensively repealed or modified so many other acts, but did not amend or repeal the Antiquities Act. In addition, uncodified section 701(a) of FLPMA expressly states that the Act should not be construed to repeal any existing law by implication, and Presidents have created large-acreage monuments since enactment of FLPMA.

*Summary.* We have found no cases deciding the issue of the authority of a President to revoke a national monument. While in FLPMA Congress expressly limited the authority of the Secretary of the Interior to revoke monument withdrawals and reservations, that language arguably does not affect the President's authority under the 1906 Act, which FLPMA neither amended nor repealed. No President has ever revoked a previously established monument. That a President can modify a previous Presidentially-created monument seems clear. However, there is no language in the 1906 Act that expressly authorizes revocation; there is no instance of past practice in that regard, and there is an attorney general's opinion concluding that the President lacks that authority.

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<sup>14</sup> TVA v. Hill, 437 U.S. 153, 189 (1977), quoting Morton v. Mancari, 417 U.S. 535, 549 (1974).

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