



National Monuments and the Antiquities Act

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Summary

The Antiquities Act of 1906 authorizes the President to proclaim 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 protect federal lands and resources quickly, and Presidents have proclaimed about 130 monuments. Congress has modified many of these proclamations and has abolished some monuments. Congress also has created monuments under its own authority.

Presidential establishment of monuments sometimes has been contentious—for example, President Franklin Roosevelt’s creation of the Jackson Hole National Monument in Wyoming (1943); President Carter’s massive Alaskan withdrawals (1978); and President Clinton’s establishment of 19 monuments and enlargement of three others (1996-2001). The Obama Administration’s consideration of areas for possible monument designation has renewed controversy over the Antiquities Act.

Issues have included the size of the areas and types of resources protected; the effects of monument designation on land uses; the level and types of threats to the areas; the inclusion of nonfederal lands within monument boundaries; the act’s limited process compared with the public participation and environmental review aspects of other laws; and the agency managing the monument.

Opponents have sought to revoke or limit the President’s authority to proclaim monuments. The 112th Congress is currently considering proposals to limit the President’s authority to create monuments. Some bills—H.R. 845 (Montana), H.R. 846 (Idaho), and S. 144 (Nevada)—would block monuments from being declared by the President in a particular state. One bill—H.R. 302—would require state approval before a monument was proclaimed by the President. Others—H.R. 817 and S. 122—would require congressional approval. Two other bills would require congressional approval and also would create extensive procedures for the President and the Secretary of the Interior to follow before a monument could be designated by the President—H.R. 758; S. 407. Monument supporters favor the Antiquities Act in its present form, asserting that the public and the courts have upheld monument designations and that many past designations that initially were controversial have come to be supported. They contend that the President needs continued authority to promptly protect valuable resources on federal lands from potential threats.

Contents

Introduction	1
The Antiquities Act of 1906	1
Monument Issues and Controversies	3
Monument Size	4
Establishment Criteria	5
Inclusion of Nonfederal Lands	6
Effects on Land Use	7
“Consistency” of Antiquities Act with NEPA and FLPMA	8
Monument Management	9
Administration Activity	10
Legislative Activity	11

Contacts

Author Contact Information	12
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Introduction

Presidential establishment of national monuments under the Antiquities Act of 1906 (16 U.S.C. §§ 431-433) has protected valuable sites, but also has been contentious. Litigation and legislation related to the law have been pursued throughout its history. To give one historical example, displeasure with President Franklin Roosevelt's proclaiming of the Jackson Hole National Monument in Wyoming in 1943 prompted litigation on the extent of presidential authority under the Antiquities Act, and led to a 1950 law prohibiting future establishment of national monuments in Wyoming unless Congress made the designation.¹ As another example, President Carter's establishment of monuments in Alaska in 1978 also was challenged in the courts and led to a statutory requirement for congressional approval of land withdrawals² in Alaska larger than 5,000 acres.³ President Clinton's proclamation of the Grand Staircase-Escalante National Monument in 1996 triggered several lawsuits, a law authorizing land exchanges,⁴ and proposals to amend or revoke presidential authority under the Antiquities Act. President George W. Bush's designation of a marine national monument in 2009 led to a legal challenge claiming that fishing rights had been lost. To date, no court challenges have succeeded in undoing a presidential designation.

Additionally, initial opposition to some monument designations has turned to support over time. Some controversial monuments later were enlarged and redesignated as national parks by Congress, and today are popular parks with substantial economic benefit to the surrounding communities. For instance, the Grand Canyon National Monument, proclaimed in 1908 and the subject of a legal challenge, is now a world-famous national park.

Various issues regarding presidentially created monuments have generated controversy, lawsuits, and legislative proposals to limit the President's authority. Issues include the size of the areas and types of resources protected, the level and types of threats to the areas, the inclusion of nonfederal lands within monument boundaries, restrictions on land uses that may result, the manner in which the monuments were created, and the selection of the managing agency. Recent Congresses have considered, but not enacted, bills to restrict the President's authority to create monuments and to establish a process for input into monument decisions. Monument supporters assert that changes to the Antiquities Act are neither warranted nor desirable. They believe that the act serves an important purpose in preserving resources for future generations. Additionally, courts have supported presidential actions. The Obama Administration's interest in exploring areas for national monument designation has renewed controversies and legislative efforts in the 112th Congress to restrict the President's authority to proclaim national monuments.

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

¹ 16 U.S.C. § 431a.

² A withdrawal is an action that restricts the use or disposition of public lands.

³ This provision was enacted as part of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), P.L. 96-487; see 16 U.S.C. § 3213.

⁴ P.L. 105-335.

proper care and management of the objects to be protected.”⁵ Congress subsequently limited the President’s authority by requiring congressional authorization for extensions or establishment of monuments in Wyoming,⁶ and by making withdrawals in Alaska exceeding 5,000 acres subject to congressional approval.⁷

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. Fifteen of the 19 Presidents⁸ since 1906 have created 128 monuments in total, including the Grand Canyon, Grand Teton, Zion, Olympic, the Statue of Liberty, and the Chesapeake and Ohio Canal.⁹ President Franklin Roosevelt used his authority the most often—on 28 occasions. President George W. Bush proclaimed the most monument acreage, virtually all in marine areas. Many areas initially designated as national monuments were later made into national parks.

Monuments vary widely in size. While about half of the presidential monument proclamations involved less than 5,000 acres, they have ranged from less than 1 acre to about 89 million acres.¹⁰

Congress, too, may create national monuments on federal lands, and has done so on many occasions. Supporters of congressional, rather than presidential, action note that Congress has unlimited authority under the Constitution to make rules regarding federal lands,¹¹ and is not restricted by the Antiquities Act. For instance, Congress could allow more land uses than are typical for national monuments created by the President, such as by allowing new commercial development, or could choose to provide additional protections. Some believe that legislation (as opposed to presidential action) is more likely to involve the input of local and other citizens.

Congress also has modified monuments (including those created by the President), for instance, by changing their boundaries. Congress has abolished some monuments outright¹² and converted others into different protective designations, such as national parks. Almost half of the current national parks were first designated as national monuments.¹³

⁵ 16 U.S.C. § 431.

⁶ 16 U.S.C. § 431a.

⁷ 16 U.S.C. § 3213.

⁸ Since 1906, the Presidents who have not used this authority are Richard M. Nixon, Ronald Reagan, George H. W. Bush, and Barack Obama.

⁹ Monuments created by Presidents from 1906 through 2006 are listed chronologically on the website of the National Park Service at <http://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm>.

¹⁰ The African Burial Ground National Monument, established by President George W. Bush in 2006 in New York City, is 0.345 acres. The Papahānaumokuākea Marine National Monument, proclaimed by President George W. Bush, is approximately 89 million acres in the Pacific Ocean. The largest national monument proclaimed on land was the Wrangell-St. Elias National Monument in Alaska, with 10.95 million acres. It was redesignated as a national park and national preserve two years after it was proclaimed.

¹¹ U.S. Const. Art. IV, sec. 3: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”

¹² For example, the Fossil Cycad National Monument in South Dakota was abolished by an Act of August 1, 1956, and the area was transferred to the Bureau of Land Management to be administered under the public land laws. As another example, the Papago Saguaro National Monument in Arizona was abolished by an Act of April 7, 1930, and the area was conveyed to the state of Arizona for park, recreational, and public purposes.

¹³ See the list of monuments created by Presidents from 1906 through 2006 on the website of the National Park Service (continued...)

Monument Issues and Controversies

Presidential authority to create monuments has generated concern among some Members of Congress, state and local officials, user groups, and others. Controversies in Congress are focused on a perceived 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),¹⁴ the environmental reviews required by the National Environmental Policy Act (NEPA),¹⁵ and the public participation requirements of NEPA, FLPMA, and other laws. Criticism also has been expressed by those who oppose restrictions on land uses, both extractive (e.g., mining) and recreational (e.g., off-road vehicle use), as a result of monument proclamations. Critics also have challenged the size of the areas and types of resources that would be protected.

Among the monument measures considered during recent Congresses were bills to impose restrictions on presidential authority, such as those to limit the size or duration of withdrawals; to prohibit or restrict withdrawals in particular states; to encourage public participation in the monument designation process; to revoke the President's authority to designate monuments or require congressional approval of some or all monument designations; or to promote presidential creation of monuments in accordance with certain federal land management and environmental laws. Measures also were introduced to change land uses within monuments and to alter monument boundaries.

Supporters of the Antiquities Act assert that changes to the act are neither warranted nor desirable. They contend that previous Congresses that focused on this issue were correct in not repealing the Antiquities Act. They note that Presidents of both parties have used the authority for over a century to protect valuable federal lands and resources expeditiously, and they defend the President's ability to take prompt action to protect areas that may be vulnerable to looting, vandalism, commercial development, and other permanent changes. While the Secretary of the Interior can make temporary emergency withdrawals of BLM lands,¹⁶ there is no comparable authority with respect to national forest lands or other federal lands. Defenders also note that some past designations that initially were contentious have come to be widely supported over time. They contend that large segments of the public support land protection, such as through monument designations, for the recreational, preservation, and economic benefits that such designations often bring.

A primary objection to national monuments is that the declaration changes the property from being federal land available for multiple uses to being a national monument with possible restricted uses. The legal challenge to the Grand Teton National Monument was premised on the state's loss of revenue from taxes and grazing fees.¹⁷ Courts have found that, for monuments

(...continued)

at <http://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm>.

¹⁴ 43 U.S.C. § 1701 *et seq.* This law applies primarily to the lands managed by the Bureau of Land Management and actions taken by the Secretary of the Interior, although some provisions also apply to the lands managed by the Forest Service and the Secretary of Agriculture.

¹⁵ 42 U.S.C. § 4321 *et seq.*

¹⁶ 43 U.S.C. § 1714.

¹⁷ *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945).

established under the Antiquities Act, agencies are afforded broad rights to protect the resources of the site, and that the loss of income is not a legal basis to reject a monument designation.¹⁸ The broad rights to protect monument resources at the time of creation can include water rights.¹⁹

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.”²⁰ Many monuments have been quite small, but several Presidents have established large monuments, especially in Alaska. Examples of large monuments include Katmai, established in 1918 with 1.1 million acres; Glacier Bay, created in 1925 with 1.4 million acres; most of the Alaska monuments proclaimed in 1978, the largest being Wrangell-St. Elias, with nearly 11 million acres; and Grand Staircase-Escalante, established in 1996 with 1.7 million acres. Most recently, President George W. Bush established large marine monuments, namely the Papahānaumokuākea Marine National Monument, with approximately 89 million acres; the Marianas Trench Marine National Monument, with 60.9 million acres; the Pacific Remote Islands Marine National Monument, with 55.6 million acres; and the Rose Atoll Marine National Monument, with 8.6 million acres.²¹ The Bush Administration claimed that the latter three areas formed the largest protected ocean area in the world.²²

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 Congress intended the act 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, in which proposals to limit a withdrawal to 320 or 640 acres were mentioned but not enacted. They contend that some of the monument designations were greater than needed to protect particular objects of value, and that the law was not intended to protect large swaths of land or ocean.

Defenders observe that the Antiquities Act gives the President discretion to determine the acreage necessary to ensure protection of the resources in question, which can be a particular archaeological site or larger features or resources. The Grand Canyon, for example, originally was a national monument measuring 0.8 million acres; President Theodore Roosevelt determined that this large size was necessary to protect the “object” in question—the canyon. Defenders also note that after considering the issue in the early 1900s, Congress deliberately rejected proposals to restrict 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.

¹⁸ *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945).

¹⁹ *Cappaert v. United States*, 426 U.S. 128 (1976) (regarding Death Valley National Monument); *High Country Citizens’ Alliance v. Norton*, 448 F. Supp. 2d 1235 (D. Colo. 2006) (referring to Black Canyon of the Gunnison National Monument).

²⁰ 16 U.S.C. § 431.

²¹ All monument sizes listed are approximate. Also, the sizes of marine monuments typically have been identified in square miles, rather than acres. A square mile is equal to 640 acres.

²² For information on protection of ocean areas, including current issues, programs, and administrative and congressional action, see CRS Report RL32154, *Marine Protected Areas: An Overview*, by Harold F. Upton and Eugene H. Buck.

The courts have deferred to the President's judgment as to the proper size for a monument. For example, the lawsuit challenging the Grand Sequoia National Monument was based in part on the monument's size (327,769 acres) not being "the smallest area compatible with proper care and management," as required by the act.²³ The court found no factual basis for the argument that the size did not meet the standards of the act.

Establishment Criteria

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."²⁴ Some proclamations have identified particular objects needing protection, while others have referred more generally to scenic, scientific, or educational features of interest.

Presidents sometimes have cited threats to resources (e.g., natural and cultural) to support 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, President Clinton expressed concern about work underway for a large coal mining operation that, he asserted, 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.²⁵ In other cases, threats were reported by the press or private organizations. For instance, the National Trust for Historic Preservation had identified the (subsequently proclaimed) President Lincoln and Soldiers' Home National Monument as one of the country's most endangered historic properties.

Presidential creation of monuments in the absence of immediate threats to resources troubles those who believe that the law is intended to protect objects that are in immediate peril of permanent harm. They contend that Presidents have established monuments to support environmental causes, limit development, and score political gains, among other reasons. Those who contest those 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, looting, and vandalism as sufficient grounds for contemporary presidential action.

Some critics charge that, because the original purpose of the act was to protect specific objects, particularly objects of antiquity such as cliff dwellings, pueblos, and other archeological ruins (hence the name "Antiquities Act"), Presidents have used the act for excessively broad purposes, such as general conservation, recreation, scenic protection, or protection of living organisms. These purposes, they contend, 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 maintain that "other objects of historic or scientific interest" is broad wording that grants considerable discretion to the President.

Courts, including the U.S. Supreme Court, have upheld under the Antiquities Act both the designation of particular monuments and the President's authority to create monuments. In a

²³ *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002).

²⁴ 16 U.S.C. § 431.

²⁵ The White House, Office of the Press Secretary, *Grand Canyon-Parashant National Monument*, January 11, 2000.

decision addressing one of the first national monuments proclaimed—the Grand Canyon—the Supreme Court upheld the President’s authority under the Antiquities Act.²⁶ The Court found that the act gave the President the authority to preserve lands with cultural or scientific interest.²⁷ Since then, courts have given great deference to this presidential authority, holding that courts have only a limited review of a presidential proclamation provided that it states the natural or historic interest and that the area is the minimum amount needed to protect those interests.²⁸ The courts also have ruled that the act may protect natural wonders and wilderness values.²⁹

Inclusion of Nonfederal Lands

It is an unresolved issue whether the Antiquities Act allows the President to declare a national monument on lands not owned by the federal government. To date, no presidential declaration of a monument has converted private property to federal property. However, some private inholdings occur within national monuments.

The Antiquities Act initially states that it applies to lands *owned or controlled* by the federal government. However, it also states that, where the objects to be preserved are on privately owned lands, the property “may be relinquished to the Government.”³⁰ It is not clear whether relinquishment must be voluntary (via donation, purchase, or exchange) or may include condemnation. Courts have only discussed the issue as a side matter to the dispute they were resolving. In two such cases, the courts have indicated that relinquishment should be interpreted as a voluntary surrender of property. The more recent decision, in 2008, stated that the Antiquities Act “does not authorize government officials forcibly to take private property to provide such care or to enter private land.”³¹ In 1978, the Supreme Court described the Antiquities Act as applying solely to federal property: “A reservation under the Antiquities Act thus means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another.”³²

In some cases, nonfederal lands are contained within the outer boundaries of a monument, although the ownership does not change by the monument designation. This inclusion is a source of controversy. The Clinton Administration indicated that the monument designation does not apply to nonfederal lands. The Solicitor of the Department of the Interior (DOI) asserted this view in 1999 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.³³

²⁶ *Cameron v. United States*, 252 U.S. 450 (1920).

²⁷ *Ibid.*, p. 455.

²⁸ *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002) (regarding Giant Sequoia National Monument).

²⁹ *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132, 1138 (D.C. Cir. 2002) (regarding six monuments in four states).

³⁰ 16 U.S.C. § 431.

³¹ *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008).

³² *California v. U.S.*, 436 U.S. 32, 40 (1978) (regarding Channel Islands National Monument).

³³ Testimony of John D. Lesly, at House Committee on Resources, Subcommittee on National Parks and Public Lands, hearings on H.R. 1487, *The National Monument NEPA Compliance Act*, 106th Cong., 1st sess., June 17, 1999, p. 53 and p. 55.

Some monument proclamations have stated that nonfederal lands will become part of the monument if the federal government acquires title to the lands from the current owners.³⁴

Some, however, note that, while private or state-owned lands are technically not part of the monument, development of such land located within monuments is difficult because such development might be incompatible with the purposes for which the monument was created or constrained by management of the surrounding federal lands.³⁵ Monument supporters note that if state or private landowners within a monument fear or experience difficulties, they can pursue land exchanges with the federal government. Some monument proclamations have authorized land exchanges to further the protective purposes of the monument.³⁶

Effects on Land Use

The overriding management goal for all monuments is protection of the objects described in the proclamations. Monument designation can limit or prohibit land uses, such as development or recreational uses. Limitations or prohibitions may be included in the proclamations themselves, accompanying administration statements, management plans developed by the agencies to govern monument lands, agency policies, or other sources. Some use issues may not arise for particular monuments given their distinctive characteristics, for instance, their small size or water-based nature. In general, existing uses of the land that are not precluded by the proclamations, and do not conflict with the purposes of the monument, may continue.

Monument proclamations since 1996 typically have had protections for valid existing rights³⁷ for land uses, but the extent to which designations may affect existing rights is not always clear. A common concern is that monument designation potentially could result in new constraints on development of existing mineral and energy leases, claims, and permits. There are fears that mineral activities may have to adhere to a higher standard of environmental review, and will have a higher cost of mitigation, to ensure compatibility with the monument designation.

Most of these monument proclamations have barred *new* mineral leases, mining claims, prospecting or exploration activities, and oil, gas, and geothermal leases, subject to valid existing rights. This has been accomplished by language to withdraw the lands within the monuments from entry, location, selection, sale, leasing, or other disposition under the public land laws, mining laws, and mineral and geothermal leasing laws.

Another concern is whether commercial timber cutting will be restricted as a result of designation. For instance, future timber production was expressly precluded in the Giant Sequoia

³⁴ Nearly all of President Clinton's monument proclamations had such a provision. See, for example, the monument proclamations for the Agua Fria, Canyons of the Ancients, Sonoran Desert, and Upper Missouri River Breaks National Monuments. These monument proclamations are on the website of the BLM, under the respective monument listings, at http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/monuments.html.

³⁵ See, for example, *Wilkenson v. Department of the Interior*, 634 F. Supp. 1265 (D. Col. 1986) (federal government could not completely restrict travel on a pre-existing right of way through a national monument).

³⁶ President Clinton's monument proclamations typically contained such a provision. See, for example, the monument proclamations for the Agua Fria, Canyons of the Ancients, Sonoran Desert, and Upper Missouri River Breaks National Monuments. These monument proclamations are on the website of the BLM, under the respective monument listings, at http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/monuments.html.

³⁷ The term *valid* has been interpreted by the Supreme Court in the context of a mine within a national monument as meaning there were valuable, workable deposits of ore present. *Cameron v. United States*, 252 U.S. 450 (1920).

National Monument proclaimed by President Clinton in 2000, although certain then-current logging contracts could be completed. In many other cases, the proclamations have implied, through a general prohibition against removing any “feature” of the monuments, that timber cutting is precluded.³⁸ Some assert that restrictions are needed to protect the environmental, scenic, and recreational attributes of forests preserved under the Antiquities Act. Logging supporters do not address the protection provisions of the act directly, but 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.

Motorized and mechanized vehicles off-road are prohibited (except for emergency or authorized purposes) under the proclamations for many newer monuments, particularly those issued by President Clinton. Otherwise, the management plans for monuments typically address whether to allow vehicular travel on designated routes or in designated areas, or to close routes or areas to vehicular use in those monuments where such use is not expressly prohibited. In some areas that have become monuments, off-road vehicles have been allowed, at least in some places.

Other concerns have included the possible effects of monument designation on hunting, fishing, and grazing. Some proclamations have restricted such activities to protect monument resources, and monument management plans may impose additional restrictions. For instance, proclamations for some marine monuments established by President George W. Bush have restricted or prohibited commercial and recreational fishing. Provisions on grazing have been controversial in some cases, with some asserting that grazing has been unnecessarily curtailed while others claim that grazing has not been sufficiently limited to prevent ecological damage.

States and counties frequently have viewed restrictions on federal lands in their jurisdictions as threats to economic development. They maintain that local communities are hurt by the loss of jobs and tax revenues that results from prohibiting/restricting future mineral exploration, timber development, or other activities. Some believe that limitations on energy exploration could leave the United States more dependent on foreign oil.

Advocates of creating monuments claim that economic benefits resulting from designation, including increased tourism, recreation, and attracting new businesses and residents, may exceed the benefits of traditional economic development. Others allege that the public interest value of continued environmental protection outweighs any temporary economic benefit that could result from development. Some want more restrictions on development.

“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. In enacting FLPMA, Congress not only limited the ability of the Interior Secretary to make withdrawals, but repealed much of the express and implied withdrawal authority previously granted to the President by several earlier laws.

³⁸ President Clinton’s monument proclamations typically contained such a provision. See, for example, the monument proclamations for the Agua Fria, Canyons of the Ancients, Sonoran Desert, and Upper Missouri River Breaks National Monuments. These monument proclamations are on the website of the BLM, under the respective monument listings, at http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/monuments.html.

Critics of the Antiquities Act maintain that the act is inconsistent with FLPMA's intent of restoring control of public land withdrawals 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. On the other hand, in enacting FLPMA, Congress did not explicitly repeal or amend the Antiquities Act, despite extensive consideration of all executive withdrawal authorities. Supporters of the act assert that it was the clear intent of Congress to retain presidential withdrawal authority under the Antiquities Act.

Similarly, critics note that monuments have been proclaimed without the environmental studies required of agencies for "major federal actions" under NEPA, or the review of a public purpose and opportunity for public participation that FLPMA provides. However, neither NEPA³⁹ nor FLPMA applies to the actions of a President (as opposed to an action of an agency), and the Antiquities Act is silent as to the procedures a President must follow to proclaim a new monument. Some want to add procedures for environmental review and public participation to the monument designation process so that significant withdrawals (with resulting effects on existing uses) would not be made without scientific, economic, 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 to the resources.⁴⁰ They assert that participation requirements are not needed in law because Presidents typically consult with government officials and the public before establishing monuments. Some believe that NEPA requirements are unnecessary for monument designation because once monuments are created, detailed management plans are developed in accordance with NEPA.

Monument Management

Although most monuments are managed by the National Park Service (NPS), both Congress and the President have created monuments managed by other agencies. For example, in 1996 President Clinton created the Grand Staircase-Escalante National Monument and assigned its management to BLM, the first such area administered by BLM. Also, President George W. Bush selected the Fish and Wildlife Service (FWS), the National Oceanic and Atmospheric Administration in the Department of Commerce, and other agencies to manage marine monuments. In most cases, the monuments were assigned to be managed by the agency that had responsibility for the area before the designation, although that was not always the case. For example, although the area within the Minidoka Internment National Monument was managed by the Bureau of Reclamation before designation, the proclamation designating the monument changed the management authority to the NPS.

The President's authority to choose a management agency other than NPS has been questioned. Before 1933, monuments were managed by different agencies, but in that year President Franklin Roosevelt consolidated management of national monuments in the NPS. Following the 1933 consolidation, it was not until 1978 that a presidentially created monument was managed by an

³⁹ See *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978) (NEPA does not apply to presidential proclamation under the Antiquities Act).

⁴⁰ 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.

agency other than the NPS. In 1978, two of the Alaska monuments created by President Carter were directed to be managed by the Forest Service, part of the U.S. Department of Agriculture, and two were managed by FWS. Assigning management to the Forest Service was controversial, and the two monuments were ultimately given statutory direction for Forest Service management.⁴¹

The Supreme Court has suggested that it is entirely proper to switch management of federal lands among federal agencies. As noted earlier, in its decision regarding the Channel Islands National Monument, the Court said that the Antiquities Act could mean that the “land is shifted from one federal use, and perhaps from one federal managing agency, to another.”⁴² A 1980 opinion from the Office of Legal Counsel (Department of Justice) appears to indicate that the President may have some flexibility in choosing the managers of post-1933 monuments.⁴³ Others also assert that the authority of the President under the Antiquities Act carries with it discretion to choose the managing agency. Some critics contend that management by an agency other than the NPS is an illegal transfer of the current functions of the NPS. Others counter that establishing a new monument under another agency would not constitute a reorganization because management of current NPS units, and the general authority of the NPS to manage monuments, would be unaffected. Even if placing management authority under a department other than the DOI might constitute a reorganization, the President nevertheless might be able to move a function of the NPS to other DOI agencies under congressionally approved authority allowing transfers of functions within DOI.⁴⁴

Administration Activity

Most Presidents since 1906 have used the authority in the Antiquities Act to establish or expand national monuments. Recently, an Obama Administration evaluation of whether to designate or expand national monuments drew controversy. In February 2010, an Administration “internal draft” document regarding possible national monuments was obtained by some Members of Congress.⁴⁵

The internal draft document identified 13 sites for possible new monument designations and one monument for possible expansion.⁴⁶ The areas are in nine states: Arizona, California, Colorado, Montana, Nevada, New Mexico, Oregon, Utah, and Washington. The document also identified three areas in Alaska and Wyoming as worthy of protection, but as ineligible for monument designation because of the restrictions in law on the President’s authority in those states.

⁴¹ The two monuments were given statutory approval as part of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), P.L. 96-487.

⁴² *California v. United States*, 436 U.S. 32, 40 (1978).

⁴³ 4B Op. Off. Legal Counsel 396 (February 8, 1980).

⁴⁴ Reorganization Plan No. 3 of 1950. The plan is available on the web at http://www.law.cornell.edu/uscode/search/display.html?terms=reorganization%20plan%20no.%203%20of%201950&url=/uscode/html/uscode05a/usc_sup_05_5_10_sq4notes.html.

⁴⁵ E&E News PM, *Document Shows Obama Admin Exploring 14 New Monuments*, February 18, 2010.

⁴⁶ See *Prospective Conservation Designation: National Monument Designations Under the Antiquities Act* (undated), internal draft, available online at http://robbishop.house.gov/UploadedFiles/states_for_designation.pdf.

Concerns have centered on whether the Administration was planning to designate national monuments without input from Congress, local and state governments, residents of the affected areas, and the general public. Fear that the Administration had not intended to consult on its monument considerations originated with the notation on the document that it was “not for release,” although that notation could have been used because the document was a draft. Other concerns have echoed the traditional conflicts regarding the establishment of monuments—effects on land uses, monument size, and the type of objects protected.

The Administration subsequently expressed an intent to use a collaborative process in evaluating areas for monument status. The Secretary of the Interior stated an interest in working with land users, local governments, governors, and Congress with regard to using and protecting federal lands.⁴⁷ Others noted that the Administration’s intent to collaborate had been expressed on the “internal draft” itself, which states at the outset that areas identified “may be good candidates for National Monument designation under the Antiquities Act; however, further evaluations should be completed prior to any final decision, including an assessment of public and Congressional support.”⁴⁸ Still others noted that agency draft documents typically are not available for release.

Legislative Activity

Given the recurring controversies over presidential establishment of national monuments, Congresses have evaluated whether to abolish, limit, or retain unchanged the President’s authority to establish monuments under the Antiquities Act. Legislation to require congressional approval of presidential recommendations for national monuments has been considered over the past decade or so. Some bills have sought to amend the Antiquities Act to make presidential designations of monuments exceeding a certain size, such as 5,000 or 50,000 acres, ineffective unless approved by Congress within two years.⁴⁹ Some measures proposed to establish a process for public input into presidential monument designations and to require presidential monument designation to comply with NEPA and/or with monument management plans to be developed in accordance with NEPA.⁵⁰

Bills to restrict the President’s authority to proclaim national monuments have been introduced in the 112th Congress. Some bills would prohibit the President from establishing or expanding national monuments in particular states.⁵¹ Other bills focus on the authority for monument designation. One bill, H.R. 302, would require the governor and state legislature to consent to a monument before the President could designate it. Two bills, H.R. 817 and S. 122, would make the President’s authority to designate monuments subject to congressional approval. S. 122 also would require certification that the designation complied with NEPA, although the effect of that is unclear since NEPA does not apply to either presidential or congressional actions.

⁴⁷ E&E News PM, *Obama Admin Has ‘No Secret Agenda’ on Monuments—Salazar*, February 22, 2010.

⁴⁸ *Prospective Conservation Designation: National Monument Designations Under the Antiquities Act* (undated), internal draft, available online at http://robbishop.house.gov/UploadedFiles/states_for_designation.pdf.

⁴⁹ See, for example, H.R. 2386 (108th Congress); H.R. 1127 (105th Congress); and S. 477 (105th Congress).

⁵⁰ See, for example, H.R. 2386 (108th Congress); H.R. 1487 (106th Congress); and S. 691 (105th Congress).

⁵¹ See H.R. 845 (Montana); H.R. 846 (Idaho); S. 144 (Nevada). For examples of the same type of bill in the 111th Congress, see H.R. 4703 (California); H.R. 4716 (Colorado); H.R. 4754 (Montana); H.R. 4675/S. 3041 (Nevada); H.R. 5135 (Oregon); and H.R. 4651/S. 3016 (Utah).

Other legislation in the 112th Congress, H.R. 758 and S. 407, would require congressional approval of a monument proclamation within two years, or the proclamation would be ineffective. Further, if Congress did not approve the monument, the President would be barred from issuing a monument proclamation that is “substantially similar” to it. The Senate bill expressly states that it would not affect the current statutory limitations on the President in creating monuments in Wyoming and Alaska.

H.R. 758 and S. 407 also would establish procedures for the President and the Secretary of the Interior to follow before a proclamation could be implemented.⁵² They would amend the Antiquities Act using similar language to require the President to prepare a report to Congress discussing the economic impacts of the designation, including federal, local, and state tax revenues lost or gained; impacts on existing uses such as hunting, grazing, horseback riding, timber production, mining, and off highway vehicle use; and an analysis of the impact on energy security, including an estimate of the number of barrels of oil, tons of coal, or cubic feet of natural gas that would become unavailable if the monument were approved. Further, the bills would create new procedures, including public hearings; notice and comment procedures; publication of reports and comments; and notices to the governor and officials of local and tribal governments. Both bills seek to restrict the size of the monument that the President could designate, through changing the Antiquities Act from “the smallest area *compatible with* the proper care and management of the objects to be protected” to “the smallest area *necessary to ensure*” (S. 407) or “the smallest area *essential to ensure*” (H.R. 758) (emphasis added in all examples).

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⁵² See also, H.R. 5580 (111th Congress).