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PROCLAMATIONS, NATIONAL MONUMENTS, AND THE SCOPE OF JUDICIAL REVIEW UNDER THE ANTIQUITIES ACT OF 1906

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INTRODUCTION

Almost a century ago, Congress passed the Antiquities Act of 1906 (“Antiquities Act” or “Act”) authorizing the President, by proclamation, to set aside federal lands as national monuments.¹ At its inception, the Act’s sponsors envisioned the designation of national monuments in the Southwest of limited size, but the Act has been applied broadly and become “a significant executive tool to shape sometimes controversial conservation policies.”² Between the passage of the Act in 1906 and 2001, fourteen presidents created 123 national monuments.³ Examples include Craters of the

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¹ Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225 (1906) (codified at 16 U.S.C. §§ 431-433 (2000)).

² Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, 20 W. HIST. Q. 281, 285 (1989); see also Albert C. Lin, *Clinton’s National Monuments: A Democrat’s Undemocratic Acts?*, 29 ECOLOGY L.Q. 707, 713 (2002) (“From the outset, and notwithstanding the primary motivations behind the Act’s passage, presidential exercise of the Act’s authority has not been limited to protecting archaeological objects or small geographical areas.”); James R. Rasband, *Utah’s Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 500 (1999) (describing the Act as “one of the most powerful conservation tools of this century”). See generally RONALD F. LEE, *THE STORY OF THE ANTIQUITIES ACT OF 1906*, 47-77 (1970) (discussing the legislative history of the Act), available at <http://www.cr.nps.gov/aad/PUBS/LEE/Index.htm> (last visited Sept. 1, 2004).

³ Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 488 (2003). President Clinton created nineteen national monuments, more than any of his predecessors since the enactment of the Act. Sanjay Ranchod, Note, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 537 (2001).

Moon in Idaho,⁴ Chaco Canyon in New Mexico,⁵ and Grand Staircase-Escalante in Arizona.⁶ National monuments designated under the Act are located in twenty-eight states, the District of Columbia, and one territory, encompassing approximately seventy million acres of land.⁷

Throughout its nearly one hundred year history, the Antiquities Act has come under criticism on several fronts.⁸ For example, the Act provides that in designating a national monument, the President is required to set aside "the smallest area compatible with the proper care and management of the objects to be protected."⁹ Critics have argued that the designation of large monuments violates this requirement.¹⁰ Some maintain that the original purpose of the Act was solely to protect objects of antiquity and that Presidents have used it for broad purposes, more in line with national parks, or other congressional designations, than with national monuments.¹¹ Others contend

⁴ Proclamation No. 1694, 43 Stat. 1947 (May 2, 1924).

⁵ Proclamation No. 740, 35 Stat. 2119 (March 11, 1907).

⁶ Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 18, 1996). Grand Staircase-Escalante National Monument, the largest monument ever created in the continental United States, encompasses 1.7 million acres. Ranchod, *supra* note 3, at 536.

⁷ Squillace, *supra* note 3, at 488. Many of the country's most prized national parks, such as Glacier Bay, Bryce Canyon, Zion, and the Grand Canyon started out as national monuments. *Id.* at 488-89.

⁸ See Scott Y. Nishimoto, *President Clinton's Designation of the Grand Canyon-Parashnat National Monument: Using Statutory Interpretation Models to Determine the Proper Application of the Antiquities Act*, 17 J. ENVTL. L. & LITIG. 51, 54 (2002) ("Since its inception, the Act has protected valuable sites, but has also generated its share of controversy and criticism.").

⁹ 16 U.S.C. § 431 (2000).

¹⁰ CAROL HARDY VINCENT & PAMELA BALDWIN, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT, CONG. RES. SERV. REP. NO. RL30528, at 4 (Apr. 17, 2001) ("Critics assert that large monuments violate the Antiquities Act, in that the President's authority regarding size was intended to be narrow and limited."); Nishimoto, *supra* note 8, at 68 ("[C]ritics argue that there is no standard for what 'smallest area compatible' means, which gives the President an excessive amount of discretion.").

¹¹ See VINCENT & BALDWIN, *supra* note 10, at 5 (noting that some critics "claim that Presidents have used the Act for impermissibly broad purposes, such as

that Congress intended the Antiquities Act to allow the President to designate national monuments when there are impending threats to resources, but that occasionally it has been used instead for political reasons.¹² Still others argue that the Act represents an unconstitutionally broad delegation of Congress's power under the Property Clause.¹³

Notably, there have been only a handful of cases that address challenges to or otherwise touch upon the scope of national

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.”). See also Justin James Quigley, *Grand Staircase-Escalante National Monument: Preservation or Politics?*, 19 J. LAND RESOURCES & ENVTL. L. 55, 88-89 (1999) (“While the Antiquities Act does not define object, it is commonly understood to mean ‘anything that is visible or tangible.’ Therefore, the intent of the Antiquities Act is only to protect specific ascertained objects, not unknown resources.”) (footnote omitted); Richard M. Johannsen, Comment, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 450 (1981) (“Congress . . . intended to limit the creation of national monuments to small reservations surrounding specific ‘objects.’”) (footnote omitted).

¹² See VINCENT & BALDWIN, *supra* note 10, at 5 (“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.”); Ranchod, *supra* note 3, at 583 (noting how critics of some of President Clinton’s national monument designations “denounce[d] the political nature of their timing.”).

¹³ U.S. CONST. art. IV, § 3, cl. 2. (“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.”). See VINCENT & BALDWIN, *supra* note 10, at 8 (“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.”). See also Janice Fried, *The Grand Staircase-Escalante National Monument: A Case Study in Western Land Management*, 17 VA. ENVTL. L. J. 477, 515 (1998) (noting that “[a]n alternative legal challenge to the creation of Grand Staircase-Escalante National Mo[nu]ment [was] that the Antiquities Act was an unlawful delegation of congressional power to the executive branch.”).

monument designations under the Antiquities Act.¹⁴ This Article, which is divided into two parts, analyzes those cases and discusses the limited scope of judicial review over presidential proclamations under the Act. The Article first provides a general overview of the Act, the nature and scope of presidential proclamations, the types of national monuments that have been created, and the limits on land use that typically follow a monument designation. It then discusses the few cases that have confronted challenges to proclamations establishing national monuments and examines how the deferential judicial review accorded by the courts in those cases is consistent with separation of powers principles.

I. OVERVIEW

In 1906, Congress passed the Antiquities Act, both to respond to concerns over damage to archaeological sites and provide a swift means to safeguard federal resources and lands.¹⁵ In pertinent

¹⁴ See *United States v. California*, 436 U.S. 32, 40-41 (1978); *Cappaert v. United States*, 426 U.S. 128, 141-42 (1976); *Cameron v. United States*, 252 U.S. 450, 455-56 (1920); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002), *cert. denied*, 124 S.Ct. 61 (2003); *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), *cert. denied*, 124 S.Ct. 63 (2003); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001); *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004); *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980); *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978); *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945).

¹⁵ See VINCENT & BALDWIN, *supra* note 10, at 4 ("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."); Squillace, *supra* note 3, at 477 ("Most commentators who have considered the Act and its legislative history have concluded that it was designed to protect only very small tracts of land around archaeological sites.") (footnote omitted). See also Matthew W. Harrison, *Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument – A Call for a New Judicial Examination*, 13 J. ENVTL. L. & LITIG. 409, 413-14 (1998) ("The main purpose behind the Act was to protect specific items of antiquity, such as ruins, pottery, and picture graphs. The scientific community aimed to protect ancient American Indian ruins that were being lost, destroyed, or exploited as the United States was being explored and developed.") (footnotes omitted).

part, the Act authorizes the President, “in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest¹⁶ that are situated upon the lands owned or controlled by the Government of the United States to be national monuments.”¹⁷ When exercising discretion to establish national monuments, the Act further provides that the President “may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”¹⁸

The plain language of the Act confers upon the President the authority to designate national monuments without public participation, congressional review, or any other procedural prerequisite.¹⁹ While there has been no judicial decision addressing

¹⁶ This last phrase “other objects of historic or scientific interest,” as reflected in the discussion below, “has proved dispositive in the cases that have supported an expansive interpretation of the Antiquities Act.” Squillace, *supra* note 3, at 481 (footnote omitted); Johannsen, *supra* note 11, at 451 (making a similar observation); *cf.* Rasband, *supra* note 2, at 501 (noting that “as soon as the Act was enacted, presidents began to rely on its language allowing withdrawal of ‘other objects of historic or scientific interest’ to accomplish much larger withdrawals.”) (footnote omitted).

¹⁷ 16 U.S.C. § 431 (2000). Under the Act there are restrictions on the designation of national monuments in Wyoming. *See* 16 U.S.C. § 431a (“No further extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.”). In Alaska, congressional approval is required for withdrawals of more than 5,000 acres. 16 U.S.C. § 3213 (2000). *See also* Nishimoto, *supra* note 8, at 55 (“[T]he Alaska National Lands Conservation Act of 1980 (‘ANILCA’) . . . requires congressional approval for designations of national monuments in Alaska exceeding 5,000 acres (16 U.S.C. 3123).”) (footnote omitted); Lin, *supra* note 2, at 717 (“ANILCA also made potential future withdrawals in Alaska under the Antiquities Act of more than 5,000 acres subject to congressional approval.”) (footnote omitted). *But see* Squillace, *supra* note 3, at 506 (“ANILCA, however, prohibits new withdrawals in excess of 5,000 acres. It does not preclude a mere national monument designation that does not include a withdrawal of lands.”) (footnotes omitted).

¹⁸ 16 U.S.C. § 431 (2000).

¹⁹ *See* Fried, *supra* note 13, at 512 (“The Act allows the President to create national monuments without congressional review, public participation, or any other procedural requirements.”) (footnote omitted); Ranchod, *supra* note 3, at

the question of revocation, a 1938 Attorney General's opinion has led most legal commentators to conclude that, once established,²⁰ a President cannot rescind or revoke the reservation associated with a national monument.²¹ Whether the President may modify

540 (“[T]he Antiquities Act includes no requirements for notice or public participation, and includes no processes for facilitating congressional oversight.”) (footnotes omitted); David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 300 (1982) (“The Antiquities Act gave the President authority to withdraw lands with no limits on duration, unhindered by any procedural requirements, with no provision for congressional review, and with no fixed acreage limitation.”) (footnotes omitted).

²⁰ In response to the question of whether President Roosevelt could abolish the Castle-Pinckney National Monument, which had been previously created by President Coolidge, Attorney General Homer Cummings concluded that President Roosevelt lacked such authority. Proposed Abolishment of Castle Pickney Nat'l Monument, 39 Op. Att'y Gen. 185-89 (1938). He reasoned:

The grant of power to execute a trust, even discretionally, by no means implies the further power to undo it when it has been completed. A duty properly 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.

Id. at 187.

²¹ *Id.*; see Squillace, *supra* note 3, at 554 (“[I]t is both logical and appropriate to construe the Antiquities Act to allow a President to protect resources, but to deny a President the authority to undo those protections.”) (footnote omitted); James R. Rasband, *The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 619, 626 (2001) [hereinafter *Future of the Antiquities Act*] (“The Antiquities Act . . . gives only express withdrawal authority and gives no authority to revoke. It thus seems logical that a court would be much more reluctant to find implied authority to revoke a proclamation issued pursuant to a specific congressional directive.”); Quigley, *supra* note 11, at 79 (noting that after a President establishes a national monument, he is “without power to revoke or rescind the reservation.”) (quoting 39 Op. Att’y Gen. 185, 188 (1938)); PAMELA BALDWIN, AUTHORITY OF A PRESIDENT TO MODIFY OR ELIMINATE A NATIONAL MONUMENT, CONG. RES. SERV. REP. NO. RS20647, at 3 (Aug. 3, 2000) (concluding that “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.”).

the size of a monument remains more of an open question in academic circles.²²

Lastly, it bears noting that in 1976, Congress passed the Federal Land Policy and Management Act ("FLPMA"),²³ legislation that requires congressional approval for withdrawals of land in excess of 5,000 acres by the Secretary of the Interior.²⁴ FLPMA also provides hearing and notice provisions for withdrawals by the Secretary of less than 5,000 acres.²⁵ Significantly, when it enacted

See also Nishimoto, *supra* note 8, at 93 ("No President has ever revoked a national monument created under the Antiquities Act and no President has ever tried. This is probably due to the fact that, even assuming the President had the authority to undo a predecessor's designation, the political repercussions would be extremely high.") (footnote omitted).

²² Compare Squillace, *supra* note 3, at 566 (arguing that, under controlling authority, even assuming the President has the power to modify an existing national monument, that power "is limited to boundary adjustments that are necessary to reflect 'the smallest area compatible with the proper care and management of the objects to be protected.'" (footnote omitted) and Lin, *supra* note 2, at 711-12 ("Once the President establishes a monument, he is without power to revoke or rescind the reservation, although it remains uncertain whether the President may reduce a monument in size.") (footnote omitted), and Ranchod, *supra* note 3, at 554 ("The extent to which a national monument that was created by presidential proclamation can be changed by a subsequent president is unclear, since only expansions and small reductions of existing documents have ever been attempted.") (footnote omitted) with Nishimoto, *supra* note 8, at 55 (noting that the Act "authorizes the President to reduce the size of existing national monuments to conform with the 'smallest area compatible with the proper care and management of the objects to be protected' clause.") (footnote omitted) and BALDWIN, *supra* note 21, at 3 ("That a President can modify a previously Presidentially-created monument seems clear."). *See generally* *Future of the Antiquities Act*, *supra* note 21, at 627, (noting that the opinion of the Attorney General "and a 1947 Interior Decision opined that a president has the power to reduce the size of a monument because of the requirement in the Antiquities Act that monuments be confined to 'the smallest area compatible with the proper care and management of the objects to be protected.'" (footnotes omitted)).

²³ Pub. L. No. 94-579, § 704, 90 Stat. 2743, 2792 (1976) (codified as amended at 43 U.S.C. §§ 1701-1785 (2000)).

²⁴ *See* 43 U.S.C. § 1714(c)(2000).

²⁵ *Id.* at §§ 1714(b)(1) & (h). *See generally* Johannsen, *supra* note 11, at 442-49 (discussing congressional policies underlying FLPMA and its land withdrawal provisions).

FLPMA, Congress did not amend or repeal its delegation to the President to withdraw lands under the Antiquities Act.²⁶

A. Presidential Proclamations

A proclamation is the means under the Act by which a President is authorized to establish national monuments and, like its sibling the “executive order,”²⁷ is a species of executive directive that has enjoyed a long history.²⁸ In 1936, Congress passed the Federal Register Act, legislation requiring executive orders and presidential proclamations “of general applicability and legal effect” to be published in the *Federal Register* unless the President concludes otherwise on account of national security or other specified reasons.²⁹ The routing and form of proclamations and executive orders is itself established by an executive order, which identifies the Director of the Office of Management and Budget as

²⁶ See Ranchod, *supra* note 3, at 548 (noting that the “Antiquities Act was mysteriously left intact, and is the most important statute authorizing executive withdrawals to survive the FLPMA’s sweeping repeal of executive authority.”); Fried, *supra* note 13, at 516 (“Although Congress repealed all other executive withdrawal authority when enacting FLPMA, the Antiquities Act was intentionally and specifically excluded.”) (footnotes omitted). See also John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 298 (2001) (arguing that FLPMA represents a congressional endorsement of executive withdrawal authority).

²⁷ See Ranchod, *supra* note 3, at 541 (“In general, executive orders direct the president’s subordinates within the federal government to take some action on particular matters, while presidential proclamations address the public in general, and are used primarily when required by statute, in the field of foreign affairs, and for ceremonial purposes.”) (footnote omitted).

²⁸ See Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 273 (2001) (“From the founding of the nation, American Presidents have developed and used various types of presidential or executive ‘directives.’ Although executive orders and presidential proclamations are the best known directives, many other documents have a similar function and effect.”) (footnotes omitted).

²⁹ See 44 U.S.C. § 1505(a) (2000). In addition to their publication in the *Federal Register*, executive orders and proclamations have been annually published since 1938 in the *Code of Federal Regulations*, and since 1941 in the *U.S. Code Congressional and Administrative News*. See Nishimoto, *supra* note 8, at 62.

the person responsible for coordinating and guiding the process.³⁰

B. National Monuments

Unlike national parks, which are preserved because of their national character and outstanding scenery, national monuments “are reserved because of their historic, prehistoric, or scientific interest.”³¹ They can be established by an act of Congress or, as noted previously, by a presidential proclamation under the Antiquities Act.³² Typically, while management of national

³⁰ See Exec. Order No. 11,030, 3 C.F.R. 610 (1959-1963), *reprinted in* 44 U.S.C. § 1505 (2000). One commentator has described the mechanics of the process as follows:

First, the executive branch must coordinate with the Office of Management and Budget (“OMB”) regarding the proposed executive order [or proclamation]. Second, the General Counsel for OMB must circulate the proposed order [or proclamation] to interested departments, agencies, and parts of the White House staff that it concerns. If there is a policy disagreement regarding the proposed executive order [or proclamation], OMB is to determine and design a dispute resolution process to address the issues of disagreement. Third, the Director of OMB is to send the proposed executive order [or proclamation] to the Office of Legal Counsel of the Department of Justice. The Office of Legal Counsel, on behalf of the Attorney General, issues an opinion on whether the proposed executive order [or proclamation] is “acceptable for form and legality.” Fourth, the Office of Legal Counsel sends the proposed order [or proclamation] back to the White House for the President’s signature. Finally, the “White House Clerk then transmits the signed Executive Order to the Office of the Federal Register for numbering and publication.”

Nishimoto, *supra* note 8, at 63; see Gaziano, *supra* note 28, at 293 (discussing process).

³¹ National Park Service & U.S. Department of the Interior, *Glimpses of Our National Monuments*, (U.S. Printing Office 1930) at http://www.cr.nps.gov/history/online_books/glimpses2/glimpses0.htm at “General Introduction” (last modified Oct. 19, 2000) [hereinafter *Glimpses of Our National Monuments*].

³² See Nishimoto, *supra* note 8, at 64-65 (noting that “national monuments can be designated by Congress *and* by presidential executive orders under the authority of the Antiquities Act of 1906”). Congress has established 29 national monuments. *Id.* at 66.

monuments has been given to the National Park Service, such authority has also been delegated to agencies such as the Forest Service and Bureau of Land Management.³³

There are four general types of national monuments: historic, prehistoric, biologic, and geologic.³⁴ Prehistoric and historic national monuments contain the ruins of the homes of those who lived in the United States before the arrival of European settlers, as well as the ruins of structures built by those early settlers including, for example, the Spanish missions of the Southwest.³⁵ Geologic monuments hold fossil remains of prehistoric reptilian life, as well as limestone caves, petrified plants and trees, and other volcanic phenomena.³⁶ Biologic national monuments provide habitat for plant or animal life.³⁷

The designation of federal land as a national monument will generally affect its use.³⁸ The President has the discretion to

³³ See Lin, *supra* note 2, at 712 (“Although management of national monuments has been vested for the most part in the National Park Service . . . such management responsibilities have also been delegated to other agencies, including the Bureau of Land Management . . . and the Forest Service.”) (footnote omitted); VINCENT & BALDWIN, *supra* note 10, at 7 (noting how Bureau of Land Management (“BLM”) was chosen to manage several monuments designated by President Clinton “because the federal lands already were under BLM management, and were intended to be both protected and managed for multiple uses.”) There appears to be some question, however, as to whether an agency other than the National Park Service may manage a national monument. See VINCENT & BALDWIN, *supra* note 10, at 8; Squillace, *supra* note 3, at 520-33; Fried, *supra* note 13, at 507-12.

³⁴ *Glimpses of Our National Monuments*, *supra* note 31 (General Introduction).

³⁵ *Id.*

³⁶ *Id.* Bryce Canyon National Monument in Utah is an example of a geologic national monument. Nishimoto, *supra* note 8, at 65.

³⁷ *Glimpses of Our National Monuments*, *supra* note 31 (Introduction). Joshua Tree National Monument in California is an example of a biologic national monument. Nishimoto, *supra* note 8, at 66. See generally ROSS W. GORTE, FEDERAL LAND AND RESOURCE MANAGEMENT: A PRIMER, CONG. RES. SERV. REP. NO. RS20002, at 2 (Dec. 22, 1998) (“National monuments are established to preserve specific natural resources of historic, cultural, or scientific interest, including outstanding geologic formations (*e.g.*, unusual caves or dunes) or may include unique ecological communities and wildlife habitat.”).

³⁸ See Squillace, *supra* note 3, at 514-15 (“In general . . . virtually all monument proclamations contain very similar language warning ‘all unauthorized persons

identify land uses in a national monument “but those uses must satisfy the Act’s requirement of ‘proper care and management of the objects to be protected.’”³⁹ For example, lands that acquire national monument status may have new constraints placed upon them with respect to existing or future mineral and energy leases.⁴⁰ Other possible effects include restrictions on the harvesting of timber, as well as grazing and hunting.⁴¹

Having completed a cursory review of the Act, the mechanics of presidential proclamations, and the types of national monuments that have been established, as well as how such designations affect land use, the discussion now turns to separation of powers principles. That discussion is followed by an analysis and synthesis of the cases that have addressed legal challenges to national monument designations under the Act.

not to appropriate, injure, destroy, or remove any feature’ of the monument, and ‘not to locate or settle upon any of the lands thereof.’”) (footnote omitted); Nishimoto, *supra* note 8, at 53 (“Designating an area as a national monument affords the area greater protection than existing federal laws and regulations by restricting or prohibiting industrial and recreational use of federal lands.”) (footnote omitted).

³⁹ Lin, *supra* note 2, at 712 (footnote omitted).

⁴⁰ See VINCENT & BALDWIN, *supra* note 10, at 5 (“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.”); Nishimoto, *supra* note 8, at 53 (“Most national monuments include a ban or restriction on vehicle use, mining, oil drilling, grazing, hunting, and logging.”) (footnote omitted); *cf.* Squillace, *supra* note 3, at 516 (“At a minimum, all national monument lands are off limits to new mineral leasing under the express terms of the Mineral Leasing Act.”) (footnote omitted); Ranchod, *supra* note 3, at 572 (“New mining, oil and gas drilling, logging, and other intensive commercial extractive uses are generally prohibited in landscape monuments.”) (footnote omitted).

⁴¹ See VINCENT & BALDWIN, *supra* note 10, at 5-6 (“Another concern is the potential or actual restriction on commercial timber cutting as a result of designation . . . Other concerns have included the possible effects of monument designation on grazing, hunting, and off-road vehicle use.”); GORTE, *supra* note 37, at 2 (“Permitted and prohibited uses in national monuments are largely the same as in the national parks: many recreation uses are allowed, although hunting may be restricted or forbidden. Wood cu[tt]ing and most commercial activities are usually curtailed (but mineral extraction may be allowed).”).

C. Separation of Powers

The Constitution reflects the Framers' intent to "divide the delegated powers of the new Federal Government into three defined categories" with the expectation "that each branch of government would confine itself to its assigned responsibility."⁴² Consistent with this intent, Article I vests "[a]ll legislative Powers" in Congress.⁴³ This grant of power is tempered by the executive branch's authority under Article II to implement legislation.⁴⁴ Whether an action by either the legislative or executive branch exceeds the authority delegated to that branch under the Constitution involves "a delicate exercise of constitutional interpretation" by the Supreme Court,⁴⁵ which, under Article III, is the final authority of such matters.⁴⁶ Lastly, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."⁴⁷

Congress is entrusted with the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."⁴⁸ This power is "without limitations,"⁴⁹ and the Antiquities Act is illustrative of "a proper

⁴² *INS v. Chadha*, 462 U.S. 919, 951 (1983).

⁴³ U.S. CONST. art. I, § 1. *See Loving v. United States*, 517 U.S. 748, 758 (1996) (recognizing that the "lawmaking function belongs to Congress and may not be conveyed to another branch or entity"); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.").

⁴⁴ U.S. CONST. art. II, §§ 1 & 3; *cf. Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("[T]he Constitution does not permit Congress to execute the laws.").

⁴⁵ *Nixon v. United States*, 506 U.S. 224, 238 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

⁴⁶ U.S. CONST. art. III, § 2, cl. 1-2. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that the judiciary is the branch that has the authority "to [s]lay what the law is").

⁴⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

⁴⁸ U.S. CONST. art. IV, § 3, cl. 2.

⁴⁹ *United States v. San Francisco*, 310 U.S. 16, 29 (1940). This includes, of course,

delegation of congressional authority to the President under the Property Clause.⁵⁰ Where the authorizing statute or another statute does not place any limits on the discretion of the President to act, separation of powers concerns altogether bar a review of that decision by the courts for abuse of discretion.⁵¹ In the case of the Antiquities Act, while it grants the President broad discretion, and separation of powers concerns are present, the statute also contains some restrictions. Judicial review “is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority.”⁵²

the power to create national monuments. *See* GORTE, *supra* note 37, at 2 (“National monuments may be established by an Act of Congress, although most have been established by presidential proclamation under the authority of the 1906 Antiquities Act.”).

⁵⁰ *Tulare County v. Bush*, 185 F. Supp. 2d 18, 26 (D.D.C., 2001). *See* *Yakus v. United States*, 321 U.S. 414, 425-26 (1944) (recognizing that delegation is constitutionally permissible if Congress provides standards to guide the authorized action such that one reviewing the action could recognize “whether the will of Congress has been obeyed.”). *See also* *Ranchod*, *supra* note 3, at 547 (“Congress may authorize withdrawals by the executive branch for a specific purpose, such as designation of national monuments under the Antiquities Act.”); *Fried*, *supra* note 13, at 515-16 (“Because the 1906 Act has been in effect for so long, and since courts have upheld other statutes that have granted broad delegations to the President, it is unlikely that a court would find the Antiquities Act . . . to be an unlawful delegation of congressional power.”) (footnotes omitted).

⁵¹ *See* *Dalton v. Specter*, 511 U.S. 462, 474 (1994) (recognizing that although a claim that the President has violated a statutory mandate may be judicially reviewable outside the framework of the Administrative Procedures Act, “such review is not available when the statute in question commits the decision to the discretion of the President”); *United States v. George S. Bush & Co.*, 310 U.S. 371, 379 (1940) (holding that manner by which President addressed problem of foreign exchange value under the Tariff Act of 1930 was not “open to scrutiny” by the Court because the statute granted the President authority to exercise his judgment in arriving at such value); *cf.* *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996) (“*Dalton’s* holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President’s exercise of that authority, judicial review of an abuse of discretion claim is not available.”).

⁵² *Mountain States*, 306 F.3d at 1136; *see* *Tulare County*, 306 F.3d at 1141

II. THE CASE LAW

The cases involving challenges to the designation of national monuments under the Act emanate from the Supreme Court, circuit appellate courts, and district courts. The following section analyzes cases from each of these courts.

A. Supreme Court Precedent

In *Cameron v. United States*,⁵³ the first Supreme Court case to address the Act, the government sought to enjoin Ralph A. Cameron and others from occupying and using a lode mining claim in the Grand Canyon National Monument.⁵⁴ The opinion primarily discussed legal challenges to the Secretary of the Interior's decision rendering the mining claim invalid. The Court first considered, however, whether President Theodore Roosevelt even had authority to create the Grand Canyon National Monument in the first place.⁵⁵ The Court swiftly found that the Act empowered the President to designate "objects of historic or scientific interest" and the Grand Canyon easily met that standard.⁵⁶

(reviewing complaint "to determine whether it contain[ed] factual allegations to support an *ultra vires* claim that would demonstrate the district court erred in declining to engage in a factual inquiry to ensure that the President complied with the statutory requirements"); *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d at 1186 ("Although judicial review is not available to assess a particular exercise of presidential discretion, a Court may ensure that a president was in fact exercising the authority conferred by the act at issue.").

⁵³ 252 U.S. 450 (1919).

⁵⁴ *Id.* at 454-55.

⁵⁵ *Id.* at 455.

⁵⁶ *Id.* The Court reasoned:

The Grand Canyon, as stated in [the President's] proclamation, "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.

Id. at 455-56. See Squillace, *supra* note 3, at 492 (noting that "the clear

The next Supreme Court case which considered the application of the Act was *Cappaert v. United States*.⁵⁷ The petitioners in *Cappaert*, who owned a ranch near Death Valley National Monument, began pumping groundwater from an underground basin that also served as the source of water for Devil's Hole, a prehistoric limestone cavern which was part of the Monument.⁵⁸ The government sought and obtained an injunction to limit petitioners' pumping activities from certain wells for domestic purposes, and also from specific locations near Devil's Hole, on the theory that the lower water level was threatening the survival of a unique species of fish in the pool.⁵⁹ As in *Cameron*, the opinion in *Cappaert* primarily discussed issues extraneous to the application of the Act (in this case, the scope of the implied reservation of water rights doctrine).⁶⁰ Petitioners similarly argued that the President had no authority to reserve the pool found in Devil's Hole because the Act was limited to the protection of archaeological sites.⁶¹ The Court summarily rejected this contention, finding that the pool and the rare inhabitants of Devil's Hole squarely fell within the ambit of "objects of historic or scientific interest."⁶²

Most recently, the Supreme Court touched upon the application of the Antiquities Act in *United States v. California*.⁶³ The question confronting the Court there was whether the United States or California had dominion over the waters and submerged lands within the Channel Islands National Monument, which comprised Anacapa and Santa Barbara Islands and one-mile belts

implication of the Court's decision was that the size of the monument was not disqualifying if the 'protected object' was otherwise of 'scientific interest'" (footnote omitted); Ranchod, *supra* note 3, at 549 ("The conclusion that a behemoth geologic feature could qualify as a monument set the stage for unrestrained application of the Act by subsequent presidents.").

⁵⁷ 426 U.S. 128 (1976).

⁵⁸ *Id.* at 131-33.

⁵⁹ *Id.* at 135-36.

⁶⁰ *Id.* at 138.

⁶¹ *Id.* at 141-42.

⁶² *Cappaert*, 426 U.S. at 142.

⁶³ 436 U.S. 32 (1978).

surrounding the islands.⁶⁴ The Court ruled that President Truman had the authority under the Antiquities Act to reserve the waters and submerged lands as part of the national monument, but the Submerged Lands Act subsequently had conveyed those waters and lands to California.⁶⁵ The opinion in *California* is instructive with respect to the Antiquities Act because the Court recognized that, although the Act refers to “lands,” it authorizes the reservation of waters located on or over federal lands.⁶⁶

B. Circuit Court Precedent

The United States Court of Appeals for the Tenth Circuit has addressed the question of standing under the Act in the case of interveners who alleged an interest in supporting a national monument designation. The United States Court of Appeals for the District of Columbia Circuit confronted broad challenges to the President’s authority under the Antiquities Act on two occasions. At issue in these three cases, discussed below, were proclamations by President Bill Clinton establishing monuments in the West.

The only appellate opinion to date addressing the question of standing under the Act by an intervener seeking to join suit is *Utah Association of Counties v. Clinton*.⁶⁷ This appeal arose from a consolidated case involving two actions brought in the United States District Court for the District of Utah seeking injunctive

⁶⁴ *Id.* at 33-34. This monument was originally established by President Franklin Delano Roosevelt in 1938 and enlarged by President Truman in 1949. *Id.*

⁶⁵ *Id.* at 36-37.

⁶⁶ *Id.* at 36 n.9. Towards the end of its opinion, the Court pointed out that the Submerged Lands Act “provides for the retention by the United States of its navigational servitude and its ‘rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.’” *California*, 436 U.S. at 41 n.18. One commentator argues that this observation supports the view that the submerged lands which were conveyed are still part of the monument since the Court made no explicit finding to the contrary and “some ‘control’ over the lands is all that is required to allow designation of a national monument.” Squillace, *supra* note 3, at 518-19 n.287.

⁶⁷ 255 F.3d 1246 (10th Cir. 2001).

and declaratory relief in connection with the designation of Grand Staircase Escalante National Monument in 1996.⁶⁸ Petitioners, tourism-related businesses and environmental organizations, sought mandatory or permissive intervention under Fed. R. Civ. P. 24(a) & (b) and the district court denied their motion.⁶⁹

The United States Court of Appeals for the Tenth Circuit reversed the district court's ruling, finding that, under the governing standard,⁷⁰ petitioners were entitled to intervene as a matter of right.⁷¹ The court of appeals held that petitioners had demonstrated an interest sufficiently related to the pending action "by virtue of their support of [the monument's] creation, their goal of vindicating their conservationist vision through its preservation, their use of the monument in pursuit of that vision, and their economic stake in its continued existence."⁷² Insofar as the ability of the government to represent adequately the interests of the organizations, the court pointed out that the case law made clear that the "government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation."⁷³ With regard to the environmental organizations and tourism-related businesses at issue in the case, the court found that the government's failure to take a position on the motion to intervene

⁶⁸ *Id.* at 1248-49. See Rasband *supra* note 2, at 514-16 & nn. 148-54 (discussing arguments raised in the consolidated cases); VINCENT & BALDWIN, *supra* note 10, at 8.

⁶⁹ *Utah Ass'n of Counties v. Clinton*, 255 F.3d at 1249.

⁷⁰ Fed. R. Civ. P. 24(a) states, in pertinent part:

Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Id.

⁷¹ *Utah Ass'n of Counties v. Clinton*, 255 F.3d at 1256.

⁷² *Id.* at 1252.

⁷³ *Id.* at 1255-56.

buttressed the view that the putative interveners' interests would not be adequately represented.⁷⁴

The next two reported appellate opinions concerning the Act emanate from the United States Court of Appeals for the District of Columbia Circuit. First, in *Mountain States Legal Foundation v. Bush*,⁷⁵ petitioners challenged President Clinton's designation of six national monuments.⁷⁶ The challenge was partly on the grounds that the President had acted *ultra vires* because, under the Property Clause, the Constitution granted Congress the sole power to make rules and regulations respecting federal property and to dispose of said property.⁷⁷ The district court dismissed the complaint, finding that the Property Clause was not at issue and that "[u]pon facial review . . . the President . . . had not acted *ultra vires*."⁷⁸

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal, holding that no *ultra vires* claim predicated on a Property Clause violation could be established because "the President exercised his delegated powers under the Antiquities Act, and that statute include[d] intelligible principles to guide the President's action."⁷⁹ The court also

⁷⁴ *Id.* at 1256 ("The government has taken no position on the motion to intervene in this case. Its silence on any intent to defend the interveners' special interests is deafening.") (internal quotation omitted). See also Squillace, *supra* note 3, at 536-38 (discussing standing).

⁷⁵ 306 F.3d 1132 (D.C. Cir. 2002), *cert. denied*, 24 S.Ct. 61 (2003).

⁷⁶ The monuments challenged were: the Grand Canyon-Parashant National Monument, the Ironwood Forest National Monument, and the Sonoran Desert National Monument in Arizona; the Canyons of the Ancients National Monument in Colorado; the Cascade-Siskiyou National Monument in Oregon; and the Hanford Reach National Monument in Washington. *Id.* at 1133-34.

⁷⁷ *Id.* at 1134.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1137. The court observed that "[n]othing in the record . . . indicated any infirmity in the challenged Proclamations. Each Proclamation identified particular objects or sites of historic or scientific interest and recited grounds for the designation that comported with the Act's policies and requirements." *Id.* It declined to address whether the President had abused his discretion under the Act because petitioners had not adequately pled such a claim in their complaint. *Id.* The Attorney General stated in a brief opposing the petition for a writ of certiorari in *Mountain States* that:

rejected, as a matter of law, the argument that the Act contemplated the designation of only “rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts.”⁸⁰ In support of its ruling, the court of appeals relied on Supreme Court precedent interpreting the Antiquities Act as allowing presidential designation of the Grand Canyon and comparable sites as national monuments.⁸¹

Similarly, in *Tulare County v. Bush*,⁸² petitioners challenged the designation of Giant Sequoia National Monument, arguing in part that the proclamation violated the Act because it failed to identify objects of historic or scientific interest with reasonable specificity, designated improper objects, and was not limited in size.⁸³ Petitioners also maintained that absent judicial review, the delegation of legislative power to the President under the Act was unconstitutional.⁸⁴ The district court dismissed the complaint for

Even if petitioners had timely pleaded a claim that the President abused his discretion in applying the Antiquities Act standards to the designations at issue here, petitioners would not be entitled to judicial review of that contention. Even as a general matter, waivers of sovereign immunity must be express . . . and there is no waiver of sovereign immunity for such a claim. But in addition, ‘[o]ut of respect for the separation of powers and the unique constitutional position of the President,’ this Court ‘would require an express statement by Congress before assuming it intended the President’s performance of his statutory duties to be reviewed for abuse of discretion.’ . . . Neither the Antiquities Act nor any other federal statute authorizes abuse-of-discretion review of the President’s designation of national monuments under the Act. Petitioners’ abuse-of-discretion claim therefore would not be justiciable even if it had been pleaded in a timely and adequate manner.

Brief of Federal Respondent, at 8-9, available at <http://www.usdoj.gov/osg/briefs/2003/Oresponses/2002-1590.resp.pdf>.

⁸⁰ *Mountain States*, 306 F.3d at 1137.

⁸¹ *Id.* The court also rejected the contention that the proclamations defied the purpose of other federal statutes designed to protect environmental and archaeological values, finding that federal laws may provide “overlapping sources of protection.” *Id.* at 1138.

⁸² 306 F.3d 1138 (D.C. Cir. 2002).

⁸³ *Id.* at 1140-41.

⁸⁴ *Id.* at 1141.

failure to state a claim,⁸⁵ and the court of appeals affirmed.⁸⁶

Preliminarily, the court of appeals found that the proclamation sufficiently identified objects of scientific interest and historic sites as required by the statute.⁸⁷ As to the contention that the inclusion of items such as ecosystems and scenic vistas contravened the types of designations permitted under the Act, the court held that, under *Cappaert*, the President's authority was "not limited to protecting only archaeological sites."⁸⁸ The court also found that the Act "[did] not impose upon the President an obligation to make any particular investigation" regarding the scope and size of the designated memorial and that petitioners had not identified, with sufficient particularity, lands that had been improperly designated.⁸⁹ Lastly, with respect to judicial review, the court followed the rationale of *Mountain States* and held that no violation of the Property Clause could be established because the President had exercised authority under the Antiquities Act which contained "intelligible principles" to circumscribe his discretion.⁹⁰

C. District Court Precedent

There have been four district court decisions addressing challenges to the designation of national monuments. They involved President Clinton's designation of the Grand Staircase-Escalante National Monument, President Franklin Delano

⁸⁵ *Tulare County*, 185 F. Supp. 2d at 21.

⁸⁶ *Tulare County*, 306 F.3d at 1140.

⁸⁷ *Id.* at 1141. The court observed:

The Proclamation lyrically describes "magnificent groves of towering giant sequoias," "bold granitic domes, spires, and plunging gorges," "an enormous number of habitats," "limestone caverns and . . . unique paleontological resources documenting tens of thousands of years of ecosystem change," as well as "many archaeological sites recording Native American occupation . . . and historic remnants of early Euroamerican settlement."

Id.

⁸⁸ *Id.* at 1142.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1143.

Roosevelt's designation of Jackson Hole National Monument, and President Jimmy Carter's designation of national monuments in Alaska. These decisions are discussed in detail below.

In *Utah Association of Counties v. Bush*,⁹¹ a consolidated action, plaintiffs alleged that President Clinton's designation of the Grand Staircase-Escalante National Monument was improper on several grounds.⁹² First, plaintiffs maintained that the Antiquities Act was unconstitutional because it violated the delegation doctrine.⁹³ In a related argument, plaintiffs contended that President Clinton had acted *ultra vires* because, under the Property Clause, the authority to manage federal lands rested exclusively with Congress.⁹⁴ Plaintiffs also argued that the President had violated the standards set forth in the Act and that his action contravened Executive Order 10,355, which delegated authority to withdraw or reserve lands to the Secretary of the Interior,⁹⁵ the Wilderness Act of 1964, which grants Congress the power to designate wilderness areas,⁹⁶ and a host of other laws.⁹⁷

⁹¹ 316 F. Supp. 2d. 1172 (D. Utah 2004).

⁹² *See id.* The court issued its opinion following the resolution of the appeal in *Utah Ass'n of Counties v. Clinton*, 255 F.3d at 1246; new defendants were substituted to reflect the change of administration. *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d at 1176 n.1.

⁹³ *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d at 1176 n.1.

⁹⁴ *Id.* at 1176-77.

⁹⁵ Executive Order 10355 delegated to the Secretary of the Interior "the authority vested in the President by . . . [the Pickett Act], and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States . . . for public purposes. . . ." Exec. Order No. 10,355, 17 Fed. Reg. 4831 (May 26, 1952).

⁹⁶ The Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131-36 (2000)), established a National Wilderness Preservation System in order to "secure for the American people of present and future generations the benefits of an enduring resource of wilderness." 16 U.S.C. § 1131(a)(2000). Only Congress can designate public land as a wilderness area, which is defined under that act, in part, as "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain." *Id.* at § 1131(c).

⁹⁷ *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d at 1176-77. The other laws plaintiffs maintained were violated were the National Environmental Policy Act, the Federal Land Policy and Management Act, the Federal Advisory Committee Act, and the Anti-Deficiency Act. *Id.* at 1177.

The court rejected all of these contentions and entered judgment for the defendants.⁹⁸

The court found that Congress had not violated the non-delegation doctrine because the Act provided sufficient standards to guide the President when exercising discretion in establishing a monument.⁹⁹ Accordingly, the President had not acted *ultra vires* because the Property Clause repeatedly had been construed as permitting Congress to delegate its authority under it.¹⁰⁰ As to the contention that the President had violated the Act, the court noted that the scope of judicial review was limited to whether he had acted within his statutory authority.¹⁰¹ In the case sub judice, it was "evident from the language of the Proclamation that the President exercised the discretion lawfully delegated to him by Congress under the Antiquities Act, and that finding demarcate[d] the outer limit of judicial review."¹⁰²

Lastly, the court rejected the argument that Executive Order 10,355 could legally be interpreted to eliminate the President's withdrawal authority because such a reading would be inconsistent with the express will of Congress.¹⁰³ As to the Wilderness

⁹⁸ *Id.* at 1200-01.

⁹⁹ *Id.* at 1190-91 ("The Antiquities Act sets forth clear standards and limitations. The Act describes the types of objects that can be included in national monuments and a limitation on the size of monuments.").

¹⁰⁰ *Id.* at 1185-86. Plaintiffs additionally argued that because Grand Staircase-Escalante National Monument included privately owned land, federal monies had been expended to acquire such land in violation of the Spending Clause. *Id.* The court rejected this contention reasoning that the proclamation provided for the eventuality that private land could at some point in the future become part of the monument, but as of then, no federal monies had been expended to acquire such land. *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d at 1185-86.

¹⁰¹ *Id.* at 1186 ("[A]lthough this Court is without jurisdiction to second-guess the reasons underlying the President's designation of a particular monument, the Court may still inquire into whether the President, when designating this Monument, acted pursuant to the Antiquities Act.").

¹⁰² *Id.* ("The language of the Proclamation clearly indicates that the President considered the principles that Congress required him to consider: he used his discretion in designating objects of scientific or historic value, and used his discretion in setting aside the smallest area necessary to protect those objects.").

¹⁰³ *Id.* In support of its ruling, the court reasoned:

The use of executive orders may be employed by the President

Act, the court found that although a high percentage of the land involved in the creation of the Grand Staircase-Escalante National Monument could qualify as wilderness under that Act, the President had designated a national monument and not “wilderness.”¹⁰⁴ Furthermore, any overlapping protection provided to the lands by the Wilderness Act did not detract from the President’s authority to establish national monuments.¹⁰⁵

Another case involving a legal challenge to a monument established under the Antiquities Act was *Wyoming v. Franke*.¹⁰⁶ There, the State of Wyoming disputed President Roosevelt’s Proclamation designating Jackson Hole National Monument on the grounds that the area did not contain “objects of an historic or scientific interest [as] required by the Act” and that the proclamation was “not confined to the smallest area compatible

in carrying out his constitutional obligation to see that the laws are faithfully executed and to delegate certain of his duties to other executive branch officials, but an executive order cannot impose legal requirements on the executive branch that are inconsistent with the express will of Congress. Executive Order 10355 by its express terms does not eliminate the President’s authority, as granted specifically to the President by Congress. . . . Whatever else may be said about the possible reach of Executive Order 10355, it is undisputed that since its passage in 1952 there have been 20 presidential proclamations creating national monuments and none have transferred the exercise of withdrawal authority to the Secretary of the Interior.

Id.

¹⁰⁴ *Id.* at 1192. (“It is undisputed that the President’s designation of the Grand Staircase Monument was made pursuant to his authority under the Antiquities Act. All of the land found within the boundaries of the Monument is part of the Monument, regardless whether it could also qualify as wilderness.”).

¹⁰⁵ *Utah Ass’n of Counties v. Bush*, 316 F.3d at 1184-85. As to plaintiffs’ claims under the National Environmental Policy Act, the Federal Land Policy and Management Act, the Federal Advisory Committee Act, and the Anti-Deficiency Act, the court found that since none of those statutes provided private rights of action, judicial review would only be available for “final agency action” under the Administrative Procedures Act (“APA”). *Id.* at 1194. Because the President is not considered an agency, however, actions taken by him are not subject to judicial review under the APA. *Id.* at 1194-95.

¹⁰⁶ 58 F. Supp. 890 (D. Wyo. 1945).

with the proper care and management of a National Monument.”¹⁰⁷ The district court rejected both of these arguments, finding that as long as there was evidence “of a substantial character” presented in conjunction with the President’s determination that there were objects of scientific or historic interest in the public lands at issue, and also in defining the area compatible with the care and management of said objects, any further judicial review with respect to the President’s exercise of discretion under the Act was not permitted.¹⁰⁸ The court further noted that given the nature of the controversy, the “burden [wa]s on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in its Legislative branch.”¹⁰⁹

The final two district court cases pertaining to the Antiquities Act concerned President Carter’s designation of national monuments in Alaska. In *Alaska v. Carter*,¹¹⁰ the State of Alaska sought injunctive relief in connection with the proposed designation of national monuments, in part alleging violations of the National Environmental Policy Act (“NEPA”).¹¹¹ The court ruled that because the President was “not a federal agency,” he was not subject to NEPA’s environmental impact statement requirements.¹¹² The doctrine of separation of powers also counseled against “inferring a Congressional intent to impose such a duty on the President.”¹¹³ Lastly, because the recommendation made by the

¹⁰⁷ *Id.* at 892.

¹⁰⁸ *Id.* at 895-96. In dicta, the court noted that

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

Id. at 895.

¹⁰⁹ *Id.* at 896.

¹¹⁰ 462 F. Supp. 1155 (D. Alaska 1978).

¹¹¹ *Id.* at 1156-59. See Quigley, *supra* note 11, at 82-84 for additional background on this case.

¹¹² *Carter*, 462 F. Supp. at 1159-60.

¹¹³ *Id.* at 1160. The court reasoned:

Department of the Interior was furnished pursuant to the President's request,¹¹⁴ the Department did not have to file an impact statement and, for a court to hold otherwise, "would raise serious constitutional questions."¹¹⁵

In *Anaconda Copper Company v. Andrus*,¹¹⁶ a copper company and the State of Alaska challenged the designations of Admiralty Island National Monument, the Gates of the Arctic National Monument, and the Yukon Flats National Monument.¹¹⁷ Petitioners argued, in part, that the designations exceeded the scope of the President's authority under the Act.¹¹⁸ In granting partial summary judgment for the United States on the construction of the Act, the court reviewed the Act's legislative history and concluded that the President's authority to establish national monuments was not limited to historic and prehistoric structures and historic landmarks alone.¹¹⁹ The court noted that, to the contrary, the President's authority was "much enlarged by the extent of authority to declare by point of Proclamation public monuments for other objects of historic or scientific interest."¹²⁰ The court also found that executive and congressional practice since the enactment of the Act supported this broader interpretation of the grant of authority conferred to the

A familiar maxim of statutory construction is that "when one interpretation of a statute would create a substantial doubt as to the statute's constitutional validity, the courts will avoid that interpretation absent a 'clear statement' of contrary legislative intent." Applying the impact statement process to [the Secretary of the Interior's] recommendations necessarily burden and inhibit "the policy of open, frank discussion between subordinate and chief concerning administrative action."

Id. (internal citations omitted).

¹¹⁴ See U.S. CONST. art. II, § 2, cl. 1. ("[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .").

¹¹⁵ *Carter*, 462 F. Supp at 1160.

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

¹¹⁷ *Id.* at 1854.

¹¹⁸ *Id.* at 1853-54.

¹¹⁹ *Id.* at 1853-55.

¹²⁰ *Id.* at 1854-55.

President.¹²¹ The court concluded that while the “outer parameters” of presidential discretion under the Act had “not yet been drawn by judicial decision,” the proclamations at issue had not exceeded the President’s authority.¹²²

D. Synthesis of the Case Law

The cases demonstrate several points regarding the President’s power to designate national monuments under the Antiquities Act. First, while judicial review is available,¹²³ courts have limited their review to the question of whether the President has facially exercised his discretion in accordance with the Act’s standards, and in doing so, have broadly interpreted the authority of the President to designate national monuments under the Act.¹²⁴

¹²¹ *Id.* at 1854. On the congressional side, the court found significant that, when enacting FLMPA, “Congress did not curtail or restrict the exercise of presidential authority.” *Anaconda Copper*, 14 Env’t Rep. Cas. (BNA) at 1854.

¹²² *Id.* at 1854-55; see also PAMELA BALDWIN, PRESIDENTIAL AUTHORITY TO CREATE A NATIONAL MONUMENT ON THE COASTAL PLAIN OF THE ARCTIC NATIONAL WILDLIFE REFUGE, CONG. RES. SERV. REP. NO. RS20602, at n.4 (June 19, 2000) [hereinafter PRESIDENTIAL AUTHORITY] (“[Andrus] concluded that, although the Act limited the authority of the President as to size and subject matter of withdrawals, the outermost parameters of that authority had not yet been articulated and the withdrawals before the court did not exceed the authority of the President.”).

¹²³ See, e.g., *Mountain States*, 306 F.3d at 1136. (“[Judicial] review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority.”); *Utah Ass’n of Counties v. Bush*, 316 F. Supp. 2d at 1186 (“Although judicial review is not available to assess a particular exercise of presidential discretion, a Court may ensure that a president was in fact exercising the authority conferred by the act at issue.”); *Tulare County*, 185 F. Supp. 2d at 25 (“court[s] can evaluate whether President Clinton exercised his discretion in accordance with the standards of the Antiquities Act, this court cannot review the President’s determinations and factual findings.”); *Anaconda Copper*, 14 Env’t Rep. Cas. (BNA) at 1853 (“[This court] reject[s] the view that the only limitation upon the exercise of presidential authority under Section 2 of the Antiquities Act . . . is the paramount power of Congress in its undoubted authority to provide for the disposition and use of public lands.”).

¹²⁴ See *supra* Part IV. See also Getches, *supra* note 19, at 306 (“[T]he Cameron

Second, in considering a challenge, courts will focus on the Act's two substantive components. With respect to what qualifies as "historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest,"¹²⁵ it is clear that the President's authority is not limited solely to the designation of archaeological sites.¹²⁶ Designation of public lands that contain geological phenomena¹²⁷ or particular ecosystems will meet the test.¹²⁸ With respect to the second substantive requirement, that

decision seemed to license a liberal use of the Antiquities Act to withdraw large blocks of public lands in the name of preserving 'objects of historic or scientific interest.' Of course, it is difficult to imagine lands that would not feed some historic or scientific interest."); Rasband, *supra* note 2, at 501-04 (discussing broad judicial interpretation of the Act).

¹²⁵ 16 U.S.C. § 431 (2000).

¹²⁶ See *Tulare County*, 306 F.3d at 1142 (recognizing that the President's authority under the Act "is not limited to protecting only archaeological sites."); *Anaconda Copper*, 14 Env't Rep. Cas. (BNA) at 1853 ("[S]omething more than historical landmarks, historic and prehistoric structures might be encompassed within a national monument."); cf. *Mountain States*, 306 F.3d at 1137 (rejecting the argument that only "rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts" may be designated as national monuments). See also PRESIDENTIAL AUTHORITY, *supra* note 122, at 2 ("Historically, although many national monuments preserve historical sites, many have been made to protect natural and biological phenomena as well. The authority to create national monuments to protect areas of natural or biological interest has been upheld by the Supreme Court on several occasions.").

¹²⁷ See *California*, 436 U.S. at 34 (noting how Anacapa and Santa Barbara Islands "contain[ed] fossils of Pleistocene elephants and ancient trees, and furnish[ed] noteworthy examples of ancient volcanism, deposition, and active sea erosion" (internal quotation omitted); *Cameron*, 252 U.S. at 456 (1920) (noting how the Grand Canyon "affords an unexampled field for geologic study"); *Franke*, 58 F. Supp. at 895 (finding that Jackson Hole National Monument contained, *inter alia*, "structures of glacial formation"). See also Getches, *supra* note 19, at 303 ("By the time of the *Cameron* decision, at least nine other large national monuments had been set aside under the Act to preserve various geological phenomena, not for protecting ruins as contemplated by Congress.") (footnote omitted).

¹²⁸ See *Cappaert*, 426 U.S. at 142 (finding that *cyprinodom diabolis*, also known as Devil's Hole pupfish, was an object of scientific or historic interest); *Franke*, 58 F. Supp. at 895 (finding that Jackson Hole National Monument contained "plant life indigenous to the particular area" and provided "a biological field for

the designation of the national monument “be confined to the smallest area compatible with the proper care and management of the objects to be protected[.]”¹²⁹ courts generally accord to the President’s factual determinations substantial judicial deference.¹³⁰ Finally, in addition to the government defending a presidential national monument designation, challengers may also confront third-party interveners such as environmental organizations.¹³¹

CONCLUSION

At different points in its history, the operation of the Antiquities Act has raised concerns about procedural fairness.¹³² Some argue that the Act has been used “to deny the

research of wild life in its particular habitat . . . involving a study of the origin, life, habits and perpetuation of the different species of wild animals”); *Anaconda Copper*, 14 Env’t Rep. Cas. (BNA) at 1854 (“Obviously, matters of scientific interest . . . which may involve plant, animal or fish life are within . . . reach of the presidential authority under the Antiquities Act.”). *See also* Ranchod, *supra* note 3, at 569 (noting how most of the national landscape national monuments created by President Clinton “protect natural ecosystems”) (footnote omitted).¹²⁹ 16 U.S.C. § 431 (2003).

¹³⁰ *Franke*, 58 F. Supp. at 896; *cf. Tulare County*, 306 F.3d at 1142 (noting that “the Antiquities Act does not impose upon the President an obligation to make any particular investigation” regarding the smallest area necessary for the management and care of objects to be protected). *See also* Getches, *supra* note 19, at 308 (“So long as the historic or scientific nature of the area can be justified, a decision to include a reasonable amount of surrounding territory would seem to be within the scope of executive discretion that is shielded from judicial disturbance.”); PRESIDENTIAL AUTHORITY, *supra* note 122, at 2 (“Although courts today might prove to be less deferential to a President, it is still true that the President has broad discretion under the 1906 Act and, although the issue is not free from doubt, successfully challenging a monument based on its size appears difficult.”).

¹³¹ *See, e.g., Utah Ass’n of Counties v. Clinton*, 255 F.3d at 1248-49.

¹³² *See* Lin, *supra* note 2, at 719 (noting that “proceduralist objections stem from a concern that the Act disregards democratic principles and usurps power from state and local authorities”); *Future of the Antiquities Act*, *supra* note 21, at 620 (noting that presidential use of the Act regularly triggers “concern about procedural fairness”); Leshy, *supra* note 26, at 305 (“Opponents of President Clinton’s uses of executive authority to conserve federal lands have focused not nearly so much on what he ha[d] done as on how he ha[d] done it.”).

American people the right to have input in public lands decisions.”¹³³ Others counter that “it is arguably the very lack of process that has allowed the Antiquities Act to serve the American people so well over its long history.”¹³⁴ This much, however, is

¹³³ *H.R. 1487, the National Monument NEPA Compliance Act: Hearing on H.R. 1487 Before the Subcommittee on National Parks and Public Lands of the House Committee On Resources*, 106th Cong. 9 (1999) (statement of Rep. Jim Hansen). See Squillace, *supra* note 3, at 539 (noting that much of the criticism following the designation of the Grand Staircase—Escalante National Monument concerned the “Administration’s failure to consult adequately with state officials, and the statute’s failure to establish a public process before a proclamation is issued”) (footnote omitted); Quigley, *supra* note 11, at 100-01 (“Today’s federal land management practices demand public participation, which the Antiquities Act circumvents. Furthermore, there are numerous laws which are more efficient and effective in carrying out the protection of federal lands while providing for the development of natural resources.”).

¹³⁴ Squillace, *supra* note 3, at 476. See Getches, *supra* note 19, at 306 (“President Carter’s 1978 action setting aside millions of acres in Alaska as national monuments was in response to Congress’s failure to take action to protect national interest lands in Alaska which, absent executive action, would have opened them to disposal and development.”) (footnotes omitted); Ranchod, *supra* note 3, at 583-84 (“[C]ongressional decision-making usually favors local interests, who may oppose restrictions on extractive use over national interests. In contrast, the president is the only elected official chosen by a nationwide constituency and who has the freedom and authority to act in the national interest, considerably more quickly than Congress.”) (footnote omitted); Press Release, Office of Management and Budget, H.R. 1127 National Monument Fairness Act of 1997 (Sept. 30, 1997), available at <http://www.whitehouse.gov/omb/legislative/sap/105-1/HR1127-h.html> (last viewed Sept. 21, 2004) (opposing H.R. 1127 and noting “that without the President’s authority to act quickly, many of America’s grandest places would never have been protected and preserved for future generations”). One commentator observes:

Antiquities Act withdrawals . . . may be the very kinds of decisions that are more suitably made by the chief executive in our representative democracy. The President serves a national constituency, certainly more so than individual members of Congress, and the federal lands are owned by the American public as a whole. The President, being less subject to pressures from local interests, is arguably better situated to make decisions from a national perspective.

Lin, *supra* note 2, at 737 (footnotes omitted); Leshy, *supra* note 26, at 302 (“The President—the only public official elected by all the people in the country—has

clear: judicial review of a proclamation designating a national monument under the Act is limited.¹³⁵ Congress, however, has “many tools to ensure that executive abuses will not stand.”¹³⁶ For example, Congress can amend or overturn the creation of a national monument.¹³⁷ More broadly, Congress could seek to repeal the Antiquities Act or amend it to restrict the President’s exercise of discretion thereunder,¹³⁸ but may need a supermajority to effect

more freedom to take a longer and broader view, to be more guided by a sense of how the proposal would be regarded in the future by all the people in the country.”).

¹³⁵ See Squillace, *supra* note 3, at 513-14 (noting that “it remains unlikely that any court will overturn a presidential proclamation declaring a national monument, absent compelling evidence that the area designated lacks objects of historic or scientific interest.”) (footnote omitted); Getches, *supra* note 19, at 306 (“Short of a clear abuse of discretion, it appears that the courts will not be lured into disputes that demand neat interpretations of the Act.”); Nishimoto, *supra* note 8, at 87 (noting that “courts have interpreted broadly the President’s authority to declare national monuments under the Antiquities Act since its first challenge in 1920 over President Theodore Roosevelt’s designation of the Grand Canyon.”) (footnote omitted); Rasband, *supra* note 2, at 501 (“[The] conservation track record of the Antiquities Act must . . . be viewed in light of the fact that there has never been a successful legal challenge to any presidential use of the Act.”).

¹³⁶ Leshy, *supra* note 26, at 304.

¹³⁷ See Squillace, *supra* note 3, at 550 (“The Congress of the United States has the constitutional responsibility to make all needful rules governing the public lands, and there is no doubt that Congress may use this authority to alter or repeal monument designations created by the President.”); Nishimoto, *supra* note 8, at 94 (“Congress has the power to designate national monuments, change monument boundaries, re-designate monuments as national parks, and abolish monuments.”) (footnote omitted); Lin, *supra* note 2, at 728 (“Congress may express its disapproval of a monument designation by . . . modifying or even reversing a presidential designation to which it objects.”) (footnote omitted); *Future of the Antiquities Act*, *supra* note 21, at 629 (“[T]here is no question of Congress’ power to revoke or modify a national monument designation.”)

¹³⁸ See VINCENT & BALDWIN, *supra* note 10 at 3 (noting that Congress’s options “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”); Quigley, *supra* note 11, at 84-85 (discussing bills introduced in connection with the designation of Jackson Hole National Monument and seventeen monuments established by President Carter to limit or repeal the Act); Johannsen, *supra* note 11, at 463

such changes.¹³⁹ Another avenue available to Congress is found in its power to appropriate funds.¹⁴⁰ In the end, “[c]ongressional correction remains the most potent check on excesses under the Antiquities Act.”¹⁴¹

(arguing that the Act “should be repealed, and Congress should reassert its exclusive power to create national monuments”) (footnotes omitted).

¹³⁹ Ranchod, *supra* note 3, at 552. As explained by one commentator:

It is difficult for Congress to quickly change a monument without presidential approval. Although a majority vote of Congress is sufficient to pass legislation (and provide authority to the president), it is generally insufficient to weaken protection for a national monument because any president can be expected to veto legislation weakening a monument he created. A two-thirds vote of both houses of Congress is needed to override a presidential veto. Therefore, Congress effectively needs a supermajority vote to rein in any abuse of executive authority, and to reverse or weaken a monument designation.

Id.; Lin, *supra* note 2, at 728-29 (“Admittedly, it may be difficult for Congress to muster the two-thirds majority necessary to overcome a presidential veto.”) (footnote omitted).

¹⁴⁰ Ranchod, *supra* note 3, at 553 (“Congress has blocked funding for specific national monuments to express its displeasure with executive action on several occasions.”); Squillace, *supra* note 3, at 500 (“A President might be able to preserve the status quo on public lands through a monument proclamation, but he might be denied the money that was needed to protect the monument’s resources.”); Fried, *supra* note 13, at 487 (“Following the designation of Jackson Hole National Monument, Congress attached riders to every appropriation bill for the Interior Department from 1944 to 1948, forbidding spending any federal monies for management or upkeep of the monument.”) (footnote omitted); Nishimoto, *supra* note 8, at 94 (“Congress can . . . influence the management of monuments by attaching a rider to appropriations bills stating that no funds may be spent to enforce the monument designations.”).

¹⁴¹ Getches, *supra* note 19, at 306 (footnote omitted); see *Franke*, 58 F. Supp. at 896 (“[If] the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice . . .”).