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The Future of the Antiquities Act

James R. Rasband*

When President Roosevelt used the Antiquities Act¹ in 1943 to set aside Jackson Hole National Monument,² there was a firestorm of protest. But, seven years later Congress added the monument lands to the Grand Teton National Park,³ albeit with an amendment to the Antiquities Act prohibiting any additional monument designations in Wyoming.⁴ Likewise, when President Johnson in January of 1969, just ninety minutes before he was to leave office, signed Antiquities Act proclamations adding some 264,000 acres to Arches⁵ and Capitol Reef National Monuments,⁶ the reaction in Utah was outrage. Senator Wallace Bennett's criticism was illustrative. He protested that the proclamations were a "last gasp attempt to embalm a little more land in the West," and were "unilateral . . . with no notice whatsoever, without hearing any interested group, without prior consultation with Congress and without consultation or discussion with state officials."⁷ But when the Federal Land Policy Management Act (FLPMA)⁸ was debated and passed only seven years later in 1976, there was nary a word about the Antiquities Act. Indeed, although FLPMA specifically eliminated several sources of executive withdrawal authority, it left the Antiquities Act untouched.

Given this history, it seems legitimate to ask whether anyone will be as concerned about the Antiquities Act twenty years from now. Will all of the concerns about the Clinton administration's use of the Antiquities Act simply fade into history? Twenty years from now will anyone care that the Grand Staircase and other landscape monuments⁹ were set aside with little, if any, public

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

² Exec. Procl. 2578, 57 Stat. 731 (1943).

³ Pub. L. No. 81-787, 64 Stat. 849 (1950).

⁴ 16 U.S.C. § 431(a) (1994).

⁵ Exec. Procl. 3887, 83 Stat. 920 (1969).

⁶ Exec. Procl. 3888, 83 Stat. 922 (1969).

⁷ Gordon Elliot White, *Hearings Due on Land Plan*, *Deseret News* B1 (Jan. 22, 1969); *Bennett Blasts LBJ 'Land Grab' to Expand 2 Monuments in Utah*, *Salt Lake Trib.* § 2 at 17 (Jan. 22, 1969).

⁸ Pub. L. 94-579, 90 Stat. 2743 (1976) (codified at 43 U.S.C. §§ 1701-1784).

⁹ President Clinton has proclaimed ten monuments. See *Grand Staircase-Escalante National Monument*, Exec. Procl. 6920, 3 C.F.R. 64 (Sept. 24, 1996) (withdrawing approximately 1.7 million acres); *Grand Canyon-Parashant National Monument*, Exec. Procl. 7265, 65 Fed. Reg. 2825 (Jan. 11, 2000) (withdrawing approximately 1,014,000 acres in northern Arizona adjacent to Grand Canyon National Park); *California Coastal National Monument*, Exec. Procl. 7264, 65 Fed. Reg. 2821 (Jan. 11, 2000) (withdrawing thousands of small islands, rocks, and reefs off the coast of California); *Agua Fria National Monument*, Exec.

participation and by a process so lacking in the procedural protections afforded elsewhere in natural resource law that even admirers of the monuments admit to some discomfort? To give an affirmative answer to these queries would seem to be blind optimism. If history is any guide, it seems most likely that twenty, or even ten, years from now most will look out upon the dramatic western landscapes that have been set aside and be grateful. The dubious means of their designation will be unknown and forgotten to all but a few and the Antiquities Act will return to the president's shelf and be a subject of discussion primarily among law professors who teach in the public lands area.

Why is it that presidential use of the Antiquities Act triggers over and over the same concern about procedural fairness and yet the act has still not been repealed or amended? One part of the answer is clear; a vast majority like the results and thus any squeamishness about the means is rather quickly forgotten. The public preference for preserving natural wonders is not new, but it has increased dramatically in the last forty years. Between 1950 and 1999, recreation visits to national forest system lands went from 27.4 million to over 287 million;¹⁰ and total visitor days on BLM lands climbed from 31,170,000 in 1972 to 65,657,000 in 1999.¹¹ As Jan Laitos at the University of Denver law school has suggested, recreation and preservation are now the dominant uses of the public lands.¹² Hal Rothman, an environmental historian at the University of Nevada at Las Vegas, states this same conclusion more bluntly:

Procl. 7263, 65 Fed. Reg. 2817 (Jan. 11, 2000) (withdrawing approximately 71,000 acres of mesas and canyons near Flagstaff, Arizona); *Giant Sequoia National Monument*, Exec. Procl. 7295, 65 Fed. Reg. 24095 (Apr. 15, 2000) (withdrawing approximately 38,000 acres of the Sequoia National Forest in California); *Canyons of the Ancients National Monument*, Exec. Procl. 7317, 65 Fed. Reg. 37243 (June 9, 2000) (withdrawing approximately 164,000 acres in the Four Corners region of southwest Colorado); *Cascade Siskiyou National Monument*, Exec. Procl. 7318, 65 Fed. Reg. 37249 (June 9, 2000) (withdrawing approximately 52,000 acres of the Cascade Range along the Oregon-California border); *Hanford Reach National Monument*, Exec. Procl. 7319, 65 Fed. Reg. 37253 (June 9, 2000) (withdrawing approximately 195,000 acres in southeast Washington along the Columbia River); *Ironwood Forest National Monument*, Exec. Procl. 7320, 65 Fed. Reg. 37259 (June 9, 2000) (withdrawing approximately 129,000 acres in the Sonoran Desert northwest of Tucson). President Clinton also created the *President Lincoln and Soldiers' Home National Monument* (Armed Forces Retirement Home), Exec. Procl. 7329, 65 Fed. Reg. 43673 (July 7, 2000) (classic 2.3 acre designation), and enlarged the boundaries of the *Pinnacles National Monument* in California, Exec. Procl. 7266, 65 Fed. Reg. 2831 (June 9, 2000) (withdrawing approximately 8,000 additional acres).

¹⁰ Charles I. Zinser, *Outdoor Recreation: United States National Parks, Forests, & Public Lands* 301 (John Wiley & Sons, Inc. 1995).

¹¹ Bureau of Land Management, *Public Land Statistics* (1999) (available at <<http://www.blm.gov:80/natacq/pls99/99pl4-1.pdf>>). For a more thorough discussion of the growth of recreation on the public lands and its implications for public lands policy, see James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 *Envtl. L.* 1, 24-27 (2001).

¹² Jan G. Laitos & Thomas A. Carr, *The Transformation of Public Lands*, 26 *Ecology L.Q.* 140, 144 (1999).

The truth is hard, but clear. The rural West has become a playground, a colony the rest of us visit when we want to relax or indulge our fantasies. We camp, hike, swim, boat, bike, ski, hunt, fish and ATV throughout the rural West, making our living, and lives in its increasingly stretched out and stunningly dense cities. . . .¹³

Alongside and partly because of this increasing public preference for preservation and recreation, the West has experienced a population boom.¹⁴ The influx has occurred largely in the cities of the West, and the suburban and exurban areas that surround them, resulting in a number of "urban archipelagoes,"¹⁵ the name given by demographers to places like Colorado's Front Range and Utah's Wasatch Front, which are areas of high population density surrounded by rural areas with declining populations.¹⁶

Any speculation about the future of the Antiquities Act must take account of both this altered demographic and the increasing public preference for recreation and preservation. With an eye toward that changing social context, this essay hazards a few guesses about what the future of the act will be, and then optimistically suggests what the future of the act should be.

I. THE NEAR-TERM FUTURE OF THE ANTIQUITIES ACT

In the immediate aftermath of the Grand Staircase-Escalante National Monument (Monument) proclamation and Secretary of Interior Bruce Babbitt's assurances of a more open process in the future,¹⁷ one might have been tempted to predict that change was ahead for the Antiquities Act, that stung by the wide criticism of its approach, the administration would agree that local participation was critical to a fair withdrawal process. To the extent one had such a hope, it has proved largely unfounded. Admittedly, since the Monument proclamation, Secretary Babbitt has done more to allow local citizens and local governments to comment upon potential designations, probably more than has been done by any previous administration seeking to use the Antiquities Act.¹⁸ Unfortunately,

¹³ Hal Rothman, *Do We Really Need the Rural West?*, 32 High Country News 17 (Apr. 24, 2000).

¹⁴ A. Dan Tarlock & Sarah B. Van de Wetering, *Growth Management & Western Water Law: From Urban Oasis to Archipelagoes*, 5 Hastings W.-N.W. J. Envtl. L. & Policy 163 (1999).

¹⁵ *Id.*

¹⁶ *Id.* at 165.

¹⁷ See Steve DiMeglio, *Clinton Looks West in Search of a Legacy*, Gannett News Serv. (May 29, 2000) (available in 2000 WL 4400274) (quoting Secretary Babbitt: "What I've said to everybody in the West after Escalante is that it won't happen again on my watch").

¹⁸ Secretary Babbitt, for example, did allow Representative Mary Bono and local officials to develop a proposal for a new national monument in the Santa Rosa and San Jacinto mountains of southern California. See Jacqueline Newmyer, *House OKs Palm Springs-area National Preserve Environment: Developers and*

it is still the case that the approach has not been collaborative in any real sense. The administration announces its intentions and invites the affected state and community to develop legislation that meets the administration's objectives. If the legislation is not to its liking or is too slow in developing, the monument is simply declared.¹⁹

For the immediate future, this sort of illusory participation seems to be the primary "change" triggered by the Monument designation. It is not, of course, a real or lasting change to the Antiquities Act. Indeed, when it comes to amending the act, the administration has adamantly opposed every effort to include procedural protections, including the most tepid of participation obligations. It has even threatened to veto House Bill (H.R.) 1487 which would amend the Antiquities Act to require the president to "solicit public participation and comment" but only "to the extent consistent with" achieving the protective purposes of the act.²⁰ It also requires the president to "consult with the Governor

Outdoors Activists Both Worked to Set Aside 272,000 Mountain Acres, Senate and Administration Approval Is Also Expected, L.A. Times A4 (July 26, 2000) (reporting on this agreement). The House has passed the bill and Senate approval awaits. *See id.* The president, however, has promised to designate a monument if the bill is not passed this session. *See Jennifer Bowles, Inland Environmentalists Not All Gore Enthusiasts: He May Face Protests from Erstwhile Allies When the Democrats Meet Next Week*, The Press-Enterprise A9 (Aug. 9, 2000) (reporting the President's vow). A similar approach is illustrated by Colorado Representative Scott McInnis's bill to create Colorado Canyons National Conservation Area. The bill, which proposes protection for some 200,000 acres along the Colorado-Utah line near Grand Junction, resulted from compromises with the Interior Department and has also passed the House and only needs Senate approval. *See House OK's Preservation Measure*, Salt Lake Trib. A7 (July 26, 2000) (discussing this legislation). Similar legislation has been developed for Steens Mountain in Oregon. *See H.R. Subcomm. on Natl. Parks & Pub. Lands, Hearing on H.R. 4828, Steens Mountain Cooperative Management and Protection Area* (July 18, 2000) (available in 2000 WL 23831475) (statement of Molly McUsic, counselor to the secretary) (promising administration support if "important modifications are made").

¹⁹ *See H.R. Subcomm. on Natl. Parks & Public Lands, Hearing on Shivwits Plateau and Utah Wilderness* (Oct. 19, 1999) (available in 1999 WL 992693 (testimony of Sec. Babbitt) (vowing no more surprises, but emphasizing that he will only support legislation "that I think is reasonable, and that meets up to the objectives of this administration") and (statement of Ariz. Rep. Bob Stump) (expressing efforts to craft a plan with local input and testimony of Secretary Babbitt rejecting the proposal as inadequate); Sen. Comm. on Energy & Nat. Resources, *Hearings on Energy Costs and Foreign Dependency* (June 15, 2000) (statement of Sen. Ben Knighthorse Campbell) (observing that the "public process" prior to the designation of the Canyons of the Ancients National Monument consisted only of his opportunity to first introduce a bill proposing to withdraw the land the secretary promised to designate).

²⁰ *Compare H.R. 1487*, 106th Cong. (1999) *Senate Energy Committee Approves Weaker Version of Monument Bill*, Inside Energy/with Fed. Lands 14 (Oct. 25, 1999) (available in 1999 WL 12810767) ("An Interior Dept. spokesman has said his department would recommend Clinton veto even the House bill as a restriction on presidential powers.") *with H.R. Subcomm. on Natl. Parks & Pub. Lands, Hearing on H.R. 1487* (June 17, 1999) (available in 1999 WL 20009065) (statement of John D. Lesly) (opposing earlier version of H.R. 1487 which included requirement that an environmental impact statement be prepared). The administration has also opposed other efforts to amend the Antiquities Act, albeit ones with more significant limitations on executive power. *Compare also H.R. 1127*, 105th Cong. (1997) (requiring congressional approval and comments from the appropriate governor before designation of a national monument in excess of 5,000 acres); S. 477, 105th Cong. (1997) (containing the same language as H.R. 1127, 105th Cong. (1997)); S. 62, 105th Cong. (1997) (requiring an act of Congress and public participation before extending or establishing a national monument in Idaho); *and S. 691*, 105th Cong. (1997) (requiring an act of Congress and public participation

and congressional delegation of the State . . . in which the lands are located,” but only “to the extent practicable.”²¹ H.R. 1487 is so watered-down as to be almost meaningless. In fact, evidence of just how meaningless is indicated by the House vote of 408-2 in favor.²² Yet even this almost plaintive request is threatened with a veto. That veto threat says everything one needs to know about the future of participation and the likelihood of any meaningful amendment of the Antiquities Act for the remainder of the current administration.

Speculating about the chances for genuine local participation for the remainder of the current administration would not be particularly interesting if the president were not expected to declare any more monuments, but he almost surely will. Just last month Secretary Babbitt recommended a 661,000 acre addition to the Craters of the Moon National Monument in Idaho and that 293,000 acres in northern Arizona be set aside as the Vermillion Cliffs National Monument.²³ Likewise, under pressure from the administration, Congress has been moving to protect the Santa Rosa and San Jacinto mountains in California, Steens Mountain in Oregon, and the Colorado Canyons area near Grand Junction.²⁴ If that legislation fails, those areas are also likely to be proclaimed monuments. The Carrizo Plain in California’s Central Valley and the Missouri Breaks area have also been identified as areas under consideration for monuments.²⁵ Last month it was reported that at the Democrats’ recent convention, Secretary Babbitt told the Utah delegation that he would work only on known proposals until the end of his term.²⁶ Although this report suggests that only the above-mentioned areas are monument possibilities, it is difficult to know precisely what Secretary Babbitt’s reference to known proposals meant because he has refused to provide a definitive list of potential monuments. Perhaps the

before designation of any national monument), with Sen. Subcomm. on Natl. Parks, Historic Preservation, & Recreation (Feb. 12, 1998) (available in 1998 WL 61440) (statement of John D. Leshy) (testifying against all three bills and opposing “new formal procedural requirements for notice, consultation and Congressional action” on the grounds that it would “increase the incentive to rush to establish rights or exploit resources that could irreparably harm the features and values to be preserved”). Among other attempts to amend the Antiquities Act which did not receive the support of the administration are S. 729, 106th Cong. (1999) (requiring public participation, survey of resource values, and approval by act of Congress) and H.R. 4121, 106th Cong. (2000) (prohibiting any president from designating more than one national monument and requiring congressional approval within two years for the designation to become effective).

²¹ H.R. 1487, 106th Cong. § B (1999).

²² Thomas, a service of the Library of Congress, *Bill Summary and Status for 106th Congress*, <<http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR01487:@@@x>> (accessed Mar. 14, 2001).

²³ See *Babbitt Recommends Two New Monuments*, Pub. Lands News 5-6 (Aug. 18, 2000).

²⁴ See *supra* n. 18 (discussing this legislation).

²⁵ See Charles Levendowsky, *National Monuments: Despite Objections in the West, Most Americans Support Designations*, Desert News AA01 (Feb. 6, 2000) (discussing these two and other areas under consideration for national monument status).

²⁶ *No Surprise Monuments, Utah Delegates Promised*, Salt Lake Trib. A10 (Aug. 15, 2000).

most interesting question is whether the Arctic National Wildlife Refuge falls outside his reference to known proposals.

Aside from speculating on specific areas to be designated, predicting the near-term future of the Antiquities Act does not seem particularly difficult. The act is likely to remain unamended and aggressively employed, and local participation will remain minimal and largely illusory.

II. THE ANTIQUITIES ACT IN THE NEXT ADMINISTRATION

Perhaps the more interesting question in the midst of the presidential campaign is what will happen to the Antiquities Act in the next administration. If Vice-President Gore is elected, it is hard to know whether the act will be such a centerpiece of his public lands policies. He has certainly been supportive of President Clinton's proclamations and thus it seems a bit optimistic to conclude that he would be more amenable to adding procedural protections to the act. If Governor Bush is elected, however, the potential for change is significantly increased. If he were elected and if the Republicans maintained control of Congress, there is a possibility that the Antiquities Act would be repealed or at least amended to require additional participation. Governor Bush has suggested on a number of occasions that greater local participation in monument decisions is important. And the Republican platform (admittedly not a blueprint for policy in the Bush administration) promises to actively involve Congress and affected states and local communities in monument decisions.²⁷ Nevertheless, if the Antiquities Act issue is not taken up early in a Bush administration, history suggests that the issue might not be taken up at all. Legislators will get little credit for fixing an act that is unlikely to be put to significant use during a Bush administration, and will thus have little reason to sacrifice much else on their legislative agendas.

III. THE POWER TO REVOKE OR DIMINISH NATIONAL MONUMENTS

A. Presidential Power to Revoke or Diminish National Monuments

The impact of a Bush presidency on the Antiquities Act was recently made more intriguing because of comments made by his vice-presidential nominee, Dick Cheney. Although Cheney was careful to note that he was not

²⁷ Republican Party Platform (adopted July 2000), *American Partners in Conservation and Preservation: Stewardship of Our Natural Resources, Public Lands for the Public Good* <<http://ucsub.colorado.edu/~curepub/platform/resources.html#property>> (accessed Mar. 16, 2001).

speaking for Governor Bush, he suggested that President Clinton's monument decisions would be reviewed, presumably with an eye toward rescinding or diminishing some of the monuments.²⁸ Cheney's remarks raise interesting questions about whether a president would have the power to accomplish that result. Before delving into this question, however, it is worth noting how unlikely it is, as a practical matter, that a President Bush would choose to revoke existing monuments. Like any good politician, he would surely be aware that, even in the western states, the majority of voters will be reluctant to shift public lands from the preservation and recreation category back to the extractive use category.

Could a President Bush unilaterally, and without congressional participation, revoke the monuments established by President Clinton? Any revocation of an existing monument would surely be subjected to an immediate legal challenge. My guess is that the challenge would be successful. Although presidents clearly have the power to revoke executive orders issued pursuant to their Article II executive powers,²⁹ when a president proclaims a national monument, he is not exercising authority vested in the executive branch. He is acting pursuant to powers delegated to him by Congress in the Antiquities Act. Accordingly, whether a president may revoke a national monument depends on whether Congress intended the president to have that power. On its face, the Antiquities Act does not appear to be a two-way delegation. It expressly delegates to the president authority to "declare" a national monument and to "reserve" the land necessary to care for and manage that monument,³⁰ but says nothing about a president's authority to revoke an existing monument.

Because there is no express delegation, a president would need to prove that a power to revoke can be *implied* from the language of the act or can be derived from some inherent executive authority over the public lands. The Supreme Court has never suggested that the president has inherent withdrawal authority. Although it is conceivable that a president could cobble together some sort of argument for inherent authority over the public lands for military purposes, it is hard to imagine a court recognizing inherent executive authority to revoke or create a national *landscape* monument. Courts, however, have been willing in some instances to recognize an implied power to revoke a prior withdrawal. Executive order Indian reservations, for example, were often eliminated or reduced in size by unilateral presidential action, at least until Congress legislated to prohibit such boundary changes.³¹ The major difference in those cases, however, is that the executive power to *create* the reservation had

²⁸ *Cheney Says Monuments Could be Rescinded*, Salt Lake Trib. A1 (August 25, 2000).

²⁹ U.S. Const. art. II.

³⁰ 16 U.S.C. § 431.

³¹ *U.S. v. S. P. Transp. Co.*, 543 F.2d 676, 686-87 (9th Cir. 1976).

also been *implied*. Indeed, the power to create the reservations had not even been implied from a statute, as has arguably been the case with the broad construction given to the Antiquities Act, but from long congressional silence and acquiescence to prior executive order Indian reservations.³² It thus appears that if a withdrawal is accomplished by executive authority implied from congressional silence, a court will be more willing to recognize implied authority in the executive to undo what it has already done. The Antiquities Act, however, 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.

This logic is confirmed in part by how Congress, in FLPMA, handled the secretary of the interior's power to revoke or modify prior withdrawals. FLPMA gave the secretary fifteen years (until 1991) to modify or revoke certain previous withdrawals.³³ However, the act specifically provided that the secretary "shall not . . . modify or revoke any withdrawal creating national monuments under the [Antiquities Act]".³⁴ As one court noted, FLPMA's limitation on the secretary's withdrawal power was designed to replicate the secretary's power prior to FLPMA: the secretary, and presumably the president, could revoke withdrawals made pursuant to *implied* executive authority, but not those withdrawals accomplished by a specific act of Congress.³⁵

Because a monument is a withdrawal accomplished by a specific act of Congress, it seems likely that a court would deny a president the power to revoke a prior national monument designation. This conclusion is necessarily tentative because no judicial decision has addressed the issue. The only pronouncement on the president's power to revoke a national monument is a 1938 attorney general opinion which concluded that the Antiquities Act did not give a president authority to revoke a prior monument proclamation.³⁶ Beyond this opinion, which is of quite limited precedential value, there is an additional reason why a court might be reluctant to recognize in the Antiquities Act an implied power to revoke. In several other turn-of-the-century statutes delegating withdrawal power to the president, Congress specifically included a provision allowing the president or the secretary of the interior to revoke a prior withdrawal. For example, the Act of June 25, 1910, commonly known as the Pickett Act,³⁷ gave the president authority to "temporarily" withdraw public lands but also provided that those

³² *Id.* at 686.

³³ 43 U.S.C. § 1714(l)(1).

³⁴ *Id.* § 1714(j).

³⁵ *Pacific Legal Found. v. Watt*, 529 F. Supp. 982, 998-99 (D. Mont. 1981).

³⁶ *Proposed Abolishment of Castle Pinckney Nat'l Monument*, 39 Op. Atty. Gen. 185, 187 (1938).

³⁷ 36 Stat. 847 (1910) (codified at 43 U.S.C. § 141) (repealed by Pub. L. No. 94-579, § 704(a) (1976)).

withdrawals were to “remain in force until revoked by him or an Act of Congress.”³⁸ Similar revocation provisions exist in the Carey Act of 1894,³⁹ and the Reclamation Act of 1902.⁴⁰ If Congress understood the authority to withdraw to contain the implied authority to revoke, the revocation permission in the Pickett Act and these other statutes would have been mere surplusage. The language of these acts indicates that Congress knew what to say if it wanted to give the president authority to revoke one of his own withdrawals, and it did not say it in the Antiquities Act.

Ultimately, the resolution of the revocation issue would turn on the courts’ view of executive power over the public lands and how closely the courts choose to guard congressional prerogatives by narrowly construing delegations. In this vein, any litigation challenging a monument revocation would present some interesting ironies. On the one hand, those who now rely on inherent executive authority, or more often, on congressional acquiescence and silence, to support presidential use of the Antiquities Act that ranges far beyond its original purpose of preserving archeological sites, would find themselves arguing that the executive’s power over the public lands is limited to express congressional delegations. On the other hand, those, like Secretary Cheney, who decry the use of the act as an end-run around Congress, would be supporting the president’s power to do precisely that. Indeed, if a court were to read into the Antiquities Act presidential power to revoke a proclamation, it might prove a pyrrhic victory for those who support revocation because it would suggest that the president has some inherent power to withdraw public lands in the future.

Although the same reasoning that prohibits revocations would at first glance seem to apply to reductions in monument size, both the Attorney General’s 1938 Opinion, and a 1947 Interior Decision⁴¹ 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.”⁴² Neither of these sources explain their reasoning, but their view seems to be that this language creates a continuing, as opposed to a one-time, duty to consider whether less acreage would be sufficient to fulfill the act’s protective purpose. Separating the revocation question from the acreage-reduction question has support in the text of the act. The act explicitly separates the power to designate “structures[] and other objects” from the power to “reserve” the land necessary to protect the

³⁸ *Id.*

³⁹ Ch. 301, § 4, 28 Stat. 422 (1894) (codified at 43 U.S.C. § 641).

⁴⁰ 32 Stat. 388 (1902) (codified at 43 U.S.C. § 416).

⁴¹ *National Monuments*, 60 Int. Dec. 9 (1947).

⁴² 16 U.S.C. § 431.

objects.⁴³ These two issues have largely been treated as one by the courts, in part because in the case of the landscape monuments that have been challenged, the land itself has been the primary object to be protected. Nevertheless, the courts may be more willing to separate the object and acreage determinations where the question is the president's power to revoke or diminish the size of an existing monument.

In fact, there would be a certain symmetry to affording the executive broader authority to diminish rather than revoke an existing monument. As discussed above, presidents have traditionally had power to modify or revoke prior executive withdrawals that were accomplished pursuant to authority *implied* from congressional silence and acquiescence. Everyone who has studied the legislative history of the Antiquities Act concedes that Congress did not intend the act to authorize broad landscape-level withdrawals. The only potential authority for such landscape monuments is the long-term congressional acquiescence in such withdrawals which dates back to the presidency of Theodore Roosevelt.⁴⁴ Reducing the acreage of landscape monuments would thus be akin to modifying a withdrawal based on *implied* executive authority rather than on a specific act of Congress.

In the end, these fine distinctions between the power to revoke and the power to reduce are likely to be purely academic. Even if a President Bush could act to modify or revoke some of President Clinton's monument designations, the political demographics suggest that he is extremely unlikely to do so. For this same reason, it seems unlikely that a President Bush will propose cutting appropriations for the management of existing monuments. This approach has been employed by Congress in the past. Congress refused to fund the Jackson Hole National Monument for seven years⁴⁵ and denied funding to the Chesapeake and Ohio (C&O) Canal National Monument in Washington, D.C. for almost ten years.⁴⁶ More likely than such a frontal funding assault on the monuments, is the possibility that a Bush Interior Department would employ some of the same sort of foot-dragging practices employed by Secretary Babbitt on mineral

⁴³ *Id.*

⁴⁴ Roosevelt promptly put the Antiquities Act to use to create the Devil's Tower National Monument in September 1906. Exec. Procl. 658, 34 Stat. 3236 (1906). Soon thereafter he proclaimed the Grand Canyon National Monument. Exec. Procl. 794, 35 Stat. 2175 (1908).

⁴⁵ James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation*, 70 U. Colo. L. Rev. 483, 502 n. 90 (1999) (discussing legislation prohibiting the Interior Department from spending any funds to manage the Jackson Hole National Monument).

⁴⁶ See Barry Mackintosh, *C&O Canal: The Making of a Park 90-102* (U.S. Dept. of Int., History Div. 1991) (discussing how Congress effectively denied funding and development of the C&O Canal National Monument between January 18, 1961, the date of its proclamation by President Eisenhower, until January 8, 1971, when the monument became the C&O Canal National Historical Park).

examinations.⁴⁷ Resources would simply be shifted within the department to promote more development-oriented objectives.

B. Secretarial Power to Revoke or Diminish National Monuments

Just as Governor Bush, if elected President, would not likely be able to rescind a prior monument designation, another interior secretary will also lack the power to do so. No federal law gives the secretary power to modify or revoke national monuments. Indeed, even during FLPMA's now-expired fifteen-year window for modifying or revoking prior withdrawals, the secretary, as mentioned above, was specifically prohibited from modifying or revoking any national monument.⁴⁸ This is not to say that a new interior secretary could not have any impact on an existing monument. With respect to the Monument, for example, the Bureau of Land Management (BLM) could make adjustments to its management plan,⁴⁹ although the adjustments would probably be limited to those still intended to accomplish the protective purposes of the proclamation.⁵⁰

C. Congressional Power to Revoke or Diminish National Monuments

Finally, there is no question of Congress' power to revoke or modify a national monument designation. Congress has plenary power over the public lands under the Property Clause⁵¹ and Congress has abolished a number of

⁴⁷ *Indep. Mining Co. v. Babbitt*, 885 F. Supp. 1356, 1358-59 (D. Nevada 1995), *aff'd* 105 F.3d 502 (9th Cir. 1997) (discussing how Secretary Babbitt slowed the patent issuance process to a crawl by terminating the practice of allowing miners to contract out the mineral examination process and then creating a byzantine and inefficient process of secretarial review).

⁴⁸ 43 U.S.C. § 1714(j).

⁴⁹ FLPMA provides that the secretary of the interior is to "develop, maintain, and, when appropriate, revise land use plans . . . for the use of the public lands, . . . regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses." 43 U.S.C. § 1712(a). "The term 'public lands' means any land . . . administered by the Secretary of the Interior through the Bureau of Land Management." *Id.* at § 1702(e). Thus, the Monument is still part of the "public lands" under FLPMA and the secretary may revise the land use plan even if the land was "previously . . . withdrawn" for another purpose. *Id.* § 1712(a).

⁵⁰ Because the Monument is the first to be managed by the BLM, it is not entirely clear how the BLM will interpret its management responsibilities. FLPMA requires the secretary of the interior to "manage the public lands under principles of multiple use and sustained yield," but it also requires that where public land "has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law." 43 U.S.C. § 1732(a). The current management plan for the Monument provides that the "Proclamation governs how the provisions of [FLPMA] will be applied within the Monument." *Grand Staircase-Escalante National Monument Approved Management Plan Record of Decision* 3 (U.S. Dept. of Int., Bureau of Land Mgt. 2000). Elsewhere, the plan provides that it was "prepared in accordance with" both the proclamation and the land use planning requirements of FLPMA. *Id.* at vii, 3. The interesting question for the future is how the BLM will implement the purposes of the proclamation within the framework of FLPMA.

⁵¹ U.S. Const. art IV, § 3, cl. 2.

monuments in the past, although typically only to include the monument lands within a national park instead.⁵² Accordingly, one final option open to a President Bush would be to encourage Congress to rescind or modify one of the Clinton monuments and then sign that legislation into law. Again, political realities suggest that such a course is unlikely. As his election-year comments have indicated, Governor Bush understands the political reality that monuments are popular and that there are more votes to be had in the urban areas of the West than in rural areas. This understanding would be unlikely to change if he were elected.

IV. WHAT IF THE ANTIQUITIES ACT WERE REPEALED?

Although a President Bush would be unlikely to revoke existing monuments, there is, as suggested above, a higher probability that he would support repealing or amending the Antiquities Act. It would be somewhat surprising if Congress actually voted to repeal the act altogether. But what if Congress did? Would the sky fall? Would preservation stop? To listen to the supporters of the Antiquities Act one might think so. But that would not be the case.

Even without the Antiquities Act, presidents committed to conservation could still accomplish their objectives. The fact is that FLPMA's withdrawal provisions are wholly adequate to the preservation task and have the added benefit of confirming a democratic and participatory approach to withdrawal decisions.⁵³ Although many supporters of the Antiquities Act believe in participation, and even admit to being troubled by the lack of process protections in the act, they remain willing to cast aside that principle because of the significant preservation benefits achieved through the act. But it is not at all clear that preserving our public lands actually requires such a sacrifice of principle.

The arguments that the Antiquities Act is indispensable are dubious. The first claim that is almost always made with respect to the necessity of the act is a historical one. Supporters point to important withdrawals like the Grand Canyon and Jackson Hole and argue that they could not have been accomplished without the act.⁵⁴ This argument is not necessarily wrong, it is just not

⁵² See Charles F. Wheatley, Jr., *Study of Withdrawals and Reservations of Public Domain Lands* 259 (unpublished study, rev. ed., Sept. 1969) (copy on file with U. of Utah Law Lib.); 16 U.S.C. § 406(d)(1) (including Jackson National Monument within Grand Teton National Park).

⁵³ 43 U.S.C. § 1714(c).

⁵⁴ John D. Leshy, *Putting the Antiquities Act into Perspective*, in *Visions of the Grand Staircase-Escalante*, 83, 84-86 (Robert B. Keiter, Sarah B. George, & Joro Walker eds., Utah Museum of Nat. History & Wallace Stegner Ctr. 1998).

particularly relevant. Those withdrawals were made prior to FLPMA and thus only beg the question whether FLPMA could accomplish the same task while retaining process protections.

A second common argument in favor of the Antiquities Act is that the act is critical because it allows the president to respond rapidly to emergency situations where the public lands are threatened with irreparable harm. This is a red herring. As a factual matter, it is difficult for the current administration to rely on this emergency rationale. The president's proclamations were not triggered by changes in public land uses that created an immediate threat. Mostly, what was happening prior to the withdrawals was the same thing that had been happening for years. Surely, emergent circumstances could arise, but the Antiquities Act is not even necessary for a real emergency. FLPMA specifically allows the secretary of the interior to make an emergency withdrawal of any amount of lands for a period not to exceed three years.⁵⁵ Thus, in a real emergency, FLPMA already allows circumvention of public participation.

Once the emergency rationale for the Antiquities Act is disposed of, the real questions about the act's legitimacy come to the forefront. If FLPMA's emergency provisions would give Congress three years to consider the threat to the land, why should not Congress, which is charged by the Property Clause with the management of the public lands, make the withdrawal decision? The answer that supporters of the act give to this question is an interesting one. They could just state the obvious: they do not want Congress to make the decision because Congress might not favor the withdrawal. But this is not generally the argument they make because it contains the implicit admission that a designation is contrary to the will of the public's representatives in Congress. Supporters of the act make a more sophisticated argument. They assert that the public and majority in Congress would indeed support preservation legislation but that the majority's will is thwarted by sharp legislative maneuvering, particularly the ability of long-standing committee chairmen from public lands states who have the ability to bottle-up protective legislation in committee.⁵⁶ This frustration is legitimate and reflects historical reality. That is precisely what led President Eisenhower to declare the C&O Canal National Monument in Washington, D.C. and President Roosevelt to declare the Jackson Hole National Monument.⁵⁷ Moreover, given the increasing public preference for recreation and preservation of the public lands, it does indeed appear that a current and growing majority in Congress would support greater preservation.

⁵⁵ 43 U.S.C. § 1714(e).

⁵⁶ Leshy, *supra* n. 54, at 86.

⁵⁷ *Id.*

Nevertheless, this legitimate concern is not a legitimate argument for the necessity of the Antiquities Act because FLPMA was again designed to answer this concern. FLPMA allows the secretary to make withdrawals of any acreage for a period of up to twenty years unless Congress within ninety days rejects it by a concurrent resolution.⁵⁸ Moreover, FLPMA specifically prohibits the committee to which the withdrawal is referred from bottling up the vote on the resolution if any proponent demands a discharge of the withdrawal issue.⁵⁹ Thus, FLPMA provides a mechanism to circumvent committee roadblocks and actually test Congress' support for the withdrawal. Although there are serious constitutional questions about the validity of FLPMA's legislative veto after the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*,⁶⁰ if the legislative veto were invalidated and held to be severable, the secretary's FLPMA withdrawal authority would even be strengthened.

If FLPMA allows for withdrawals in emergent circumstances and allows the secretary of the interior to demand an up-or-down congressional vote, why do the act's supporters hold on so tenaciously? It is possible that they simply regard as insufficient the twenty years of protection created by a secretarial withdrawal under FLPMA and prefer the absence of a time limit under of the Antiquities Act. But Antiquities Act withdrawals can themselves be overturned by Congress. Moreover, if act supporters are correct, and they surely are, that even disputed monuments quickly become national treasures, it is extremely unlikely that Congress, after twenty years, would not finally ratify the withdrawal. Thus, the distinction between a twenty-year withdrawal and a "permanent" one hardly seems like a stirring reason for maintaining the act. More importantly, it is a particularly weak reason for rejecting public participation in a monument's creation. In the end, there is no legitimate reason for rejecting FLPMA's withdrawal model, or, at very least, for not amending the Antiquities Act to create similar process protections.

V. "CONQUEST BY CERTITUDE"

In his recent book, *Fire on the Plateau*, Charles Wilkinson contends that many of the harms suffered by the Indian peoples and the lands of the Colorado Plateau were a result of "a large body of people from Brigham Young to Nathan Meeker to John Collier to Wayne Aspinall to Stewart Udall—men who knew to an absolute certainty what was right for the Colorado Plateau."⁶¹ Professor

⁵⁸ 43 U.S.C. § 1714(c)(1).

⁵⁹ *Id.*

⁶⁰ 462 U.S. 919 (1983).

⁶¹ Charles F. Wilkinson, *Fire on the Plateau: Conflict & Endurance in the American Southwest*, 309

Wilkinson concludes that the history of the American West has been one of "conquest by certitude." His "conquest by certitude" thesis seems a largely accurate characterization of public lands policy in the nineteenth century. Confident in the moral, economic, and scientific wisdom of manifest destiny; Americans were sure about what was the best use of the public lands and what was best for the Indian tribes who dwelled there.⁶²

The more interesting question is whether Professor Wilkinson's thesis remains applicable today. Specifically, is aggressive use of the Antiquities Act a repetition of this historical pattern of conquest by certitude? Should we be so certain about the altruism and correctness of our new preservation preference that we eschew any legal obligation to consult with those rural communities that have developed real and lasting attachments to the public lands, at least in part because of their reliance on public policies that encouraged that attachment? If so, we are forgetting that our nineteenth century predecessors believed with just as much conviction that settling and developing those lands was the right thing to do. How much difference really exists between our motives and those of our nineteenth century counterparts? Do we simply prefer different public lands amenities?

If our new public lands agenda runs the same risk of conquest by certitude, what is the answer? Must preservation-minded withdrawals take a back seat to natural resource extraction? Not necessarily. The solution is not to abandon the preservation preference but to exhibit more skepticism about its achievement. At a minimum, skepticism implies a willingness constantly to question the necessary scope of our public lands aspirations and our means for achieving them. In the withdrawal context, some of that questioning should be directed at rural communities in the form of public participation requirements and in the form of impact studies, both of which are components of the FLPMA withdrawal process.⁶³ These ideas of public participation and impact studies are neither novel nor earth-shattering, except apparently in the case of the Antiquities Act.

Indeed, before he became secretary of the interior, then-Arizona Governor Babbitt argued that the federal government abused its power when it denied local participation:

If President Reagan and Secretary Watt are serious about efforts to establish a "good neighbor policy" between Washington and the West, they should work to strengthen, not weaken, mechanisms for joint

(Island Press 1999).

⁶² For a more thorough exposition of the implications of Professor Wilkinson's certitude thesis for current public lands policy, see Rasband, *supra* n. 11, at 60-93.

⁶³ 43 U.S.C. § 1714(c)(2).

decisionmaking on public lands. In particular, the states must be given a more meaningful role in planning development on federal lands within their borders. . . . What angers most westerners is not the fact of federal ownership, but the federal government's insistence that it is entitled to exercise power "without limitation." When this sovereign power is wielded by a continually changing parade of federal administrators, each with a different agenda, the situation becomes intolerable.⁶⁴

Secretary Babbitt was right to criticize Secretary Watt for Watt's repeated end-runs around Congress and state and local governments. Unfortunately, Secretary Babbitt's use of the Antiquities Act has been more of the same.

Ultimately, the test for those of us who favor the new dominant uses of preservation and recreation is whether this time we can exhibit less certitude and more skepticism about our public lands preference by recognizing the interests of the communities who are a part of the fabric of those lands. Amending or repealing the Antiquities Act, and instead adhering to the FLPMA withdrawal process, would be a good beginning.

⁶⁴ Bruce Babbitt, *Federalism & the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 *Envtl. L.* 847, 857-58 (1982).