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Multiple Use Policies in the Grand Staircase-Escalante National Monument: Is Clinton's Promise Legitimate or Mere Political Rhetoric?*

I. INTRODUCTION

Due to Southern Utah's tremendous population growth, water demand in Washington County is expected to exceed existing supplies between the year 2000 (without conservation) and 2005 (with conservation).¹ As local government agencies, tribal leaders and the federal government prepare to meet the demands of this growth, administrators have proposed several water development projects. The project identified as having the greatest long-term benefit is the Lake Powell Pipeline,² which would deliver a portion of Utah's Upper Colorado river water from Lake Powell to a reservoir near St. George, Utah.³ As proposed, the pipeline would traverse a 120-mile stretch of land, including a portion of the Grand Staircase-Escalante National Monument (the Grand Staircase Monument or the Monument).⁴ Prior to pipeline construction, however, a right-of-way permit through the Grand Staircase Monument must be obtained.⁵ Whether a right-of-way permit can feasibly be obtained in light of the Monument's governing law remains unanswered. This paper considers the possible outcomes.

In 1996, President Clinton exercised his authority under the Antiquities Act and set aside 1.7 million acres of land in southeastern Utah as the Grand Staircase-Escalante National Monument.⁶ Under the Antiquities Act of 1906, Congress granted the President broad authority to with-

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1. BOYLE ENG'G CORP. ET AL., WASHINGTON COUNTY WATER CONSERVANCY DISTRICT, LAKE POWELL PIPELINE FEASIBILITY STUDY 8 (1995). This information is based on a Population Management Study prepared in 1994 for WCWCD. The study "assumed three growth scenarios based on different land-use and zoning assumptions." Based on a medium growth scenario, water demand in Washington County is estimated to reach 213,000 AF/year by 2040. *Id.* at 7-8.

2. *See id.* at 7.

3. *See id.* at 6.

4. *See id.* Figure 4.1.

5. The pipeline would also traverse portions of land owned by the state of Utah, the state of Arizona, Indian reservation land and land under private ownership. Prior to construction, appropriate right-of-ways over these lands must also be obtained in compliance with applicable laws. This paper, however, is limited to a discussion of laws applicable to the land within the Grand Staircase-Escalante National Monument.

6. Proclamation No. 6920, 61 Fed. Reg. 50,225 (Sept. 18, 1996).

draw land from the public domain for the purpose of preservation.⁷ In accordance with this authority, Clinton created the Grand Staircase Monument, stating that lands within the Monument borders were to be withdrawn to protect the land's scientific, historical and geological qualities, and that the land was to be managed in furtherance of this protective purpose.⁸

Creation of the Monument was bitterly opposed by many Utahns who felt that Clinton thwarted their efforts to prevent much of the public land within Utah from being designated as wilderness.⁹ While determined to make the withdrawal, Clinton was not completely unresponsive to Utahns' frustration. At the designation event, he presented several concessions regarding the Monument's creation and management in an attempt to lessen the designation's sting and to dampen vitriolic hostility. As part of this conciliatory action, Clinton designated the Bureau of Land Management (BLM) as the agency responsible for the Monument's management.¹⁰ Because the BLM has traditionally favored resource development and extractive uses over preservation, Clinton recognized that Utahns would prefer BLM management over management by the National Park Service (NPS), the agency which traditionally has managed national monuments. Unlike the BLM, the NPS clearly has advocated preservation over extractive uses of the land.¹¹

The language of Clinton's Grand Staircase Monument Proclamation (the Proclamation) directed the Secretary of the Interior, through the BLM, to develop a management plan "as he deems appropriate," pursuant to "applicable legal authorities."¹² The phrase "applicable legal authorities," however, is ambiguous for the following reason. The BLM manages its lands under the broad multiple use-sustained yield mandate of the Federal Land Management Policy Act of 1976 ("FLPMA"), which requires the BLM to evaluate "ecological and environmental considerations within a broader framework of multiple use management objectives" such as mining, hunting and grazing.¹³ In accordance with this philosophy, the BLM has traditionally permitted extractive activities such as

7. Carol Hardy Vincent and Pamela Baldwin, Congressional Research Service, *RL30528: National Monuments and the Antiquities Act* (visited March 10, 2001) <<http://www.cnie.org/nle/pub-15.htm>>.

8. Proclamation, *supra* note 6.

9. James R. Rasband, *Utah's Grand Staircase: The Right Path To Wilderness Preservation?* 70 U. COLO. L. REV. 483, 508 (1999).

10. *See id.* at 513.

11. *See id.*

12. Proclamation, *supra* note 6, at 50225.

13. Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 24 (1997).

mining, forestry and grazing on public lands.¹⁴ In comparison, however, the Antiquities Act mandates adherence to principles of preservation and NPS operates under these principals as well, permitting extractive uses only after the applicant has demonstrated that such uses will not harm the land or its resources.¹⁵

Thus, in preparing a management plan according to applicable legal authorities, must the BLM's Secretary develop a plan according to the Antiquities Act's preservationist policies or according to FLPMA? May he choose one or the other, or must the two be blended? Furthermore, if the Secretary chooses, or even leans towards, one philosophy over the other, will he be held liable for non-compliance with the Antiquities Act or for deviating from FLPMA's multiple use-sustained yield mandate?

This paper will examine the scope of Clinton's authority under the Antiquities Act and evaluate whether policies behind FLPMA or the Antiquities Act govern the Grand Staircase Monument. Part I discusses the Antiquities Act, the philosophy behind its creation, and the traditional manner in which authority under the Act has been exercised to make withdrawals. Part II examines events leading up to the Grand Staircase Monument withdrawal, the Proclamation's language, and Clinton's attempt to appease Utahns by naming the BLM as the Monument's managing agency. Part III identifies the conflict between FLPMA's multiple use-sustained yield principles and the Antiquities Act's preservationist policies, determining that, as the statutes are currently interpreted, it is not feasible for the BLM to conform with both laws. Part IV examines the limitations of Clinton's authority under the Antiquities Act, finding that the President may only withdraw land for the purpose of preservation. In light of this limitation, Part IV also explores Clinton's intent behind the Monument's creation as well as his concession of BLM management, concluding that Clinton intended to preserve the land and that his multiple use language was pure political rhetoric that obscured his intent. As evidence of this confusion, the BLM's attempt to implement both philosophies into the Monument's management plan will be analyzed, and the plan's resulting inadequacies will be evaluated. The final section proposes solutions to bring the Monument into conformance with existing law, examining the feasibility of Washington County's obtaining a right-of-way permit under each solution.

14. Vincent, *supra* note 7.

15. *See id.*

II. THE ANTIQUITIES ACT: ITS PURPOSE, SCOPE AND APPLICATION

A. The Language of the Act

Passed by Congress in 1906, the Antiquities Act states in pertinent part:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and 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.¹⁶

The Act grants the President authority to withdraw land from the public domain subject to certain limitations: (1) he may act solely to protect and preserve the land; (2) he may withdraw only land containing historic, geological or scientific resources; and (3) his withdrawal must be limited to the smallest amount of acreage necessary to protect those resources.¹⁷ These factors, while limiting presidential abuse under the Act, remain undefined by Congress or regulation and have been interpreted broadly by the courts.¹⁸ While Congress originally passed the Act for the purpose of protecting archaeological sites from theft and destruction,¹⁹ the authority granted in the Act remains broad and undefined.²⁰

16. 16 U.S.C. § 431 (1994).

17. *Id.*

18. See Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 1042 (2000).

19. An excerpt from a House report states: "The bill proposes to create small reservations . . . for the preservation of these interesting relics of prehistoric times." 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, 415 (1998) (citing H.R. REP. NO. 59-2224, pt. 1, at 1).

20. The Act permits presidents to make withdrawals (1) for the purpose of preservation, (2) of land containing historic, geological or scientific resources, (3) by withdrawing only the amount of acreage necessary to protect these objects.

B. Historical Exercise of Authority under the Antiquities Act

1. Antiquities Act withdrawals

Since 1906, presidents of both parties have exercised their authority extensively under the Act, withdrawing millions of acres from the public domain.²¹ In correspondence with the Antiquities Act's expansive language and with the Court's broad interpretation of the President's power under the Act, proclamations declaring the withdrawal of national monuments characteristically contain equally broad, undefined language. One example is the Bryce Canyon National Monument created by President Warren G. Harding in 1923.²² Recognizing that the land, prior to designation, was within National Forest lands and in order to make certain that monument land would be particularly preserved, President Harding stated that:

The reservation made by this proclamation is not intended to prevent the use of the lands for National Forest purposes under the proclamation establishing the Powell National Forest, and the two reservations shall both be effective on the land withdrawn, but the National Monument hereby established shall be the dominant reservation and *any use of the land which interferes with its preservation or protection as a National Monument is hereby forbidden.*²³

Clearly President Harding withdrew the land to preserve it, and his sweeping language expressly prohibited activities extractive in nature. This language is typical of that used in other Antiquities Act withdrawals adding to the Antiquities Act's pointed preservationist language the substantiating weight of historical interpretation.

2. Appointment of a managing agency for the monuments

Initially no single federal agency was granted over-riding discretion to manage the monuments, which were supervised by various agencies including the War Department and the Department of Agriculture.²⁴ In 1933, however, President Franklin D. Roosevelt altered this practice and consolidated management of the monuments in the National Park Ser-

21. See *id.* at 986. In Utah alone, land has been withdrawn for thirteen monuments.

22. Proclamation No. 1664, 43 Stat. 1914 (1923). This Monument was later incorporated into the National Park System.

23. *Id.* (emphasis added).

24. See Vincent, *supra* note 7.

vice.²⁵ Under authority which granted him the power to reorganize various functions within the executive branch of government, President Roosevelt directed by Executive Order that "all functions of administration of . . . national monuments . . . are consolidated in an Office of National Parks, Buildings, and Reservations in the Department of the Interior."²⁶ Although Roosevelt issued the Order primarily to promote efficiency and cost-effective management within the federal government, management of the monuments by the National Park Service was nonetheless mandated by statute and has become standard. As a result, the NPS has managed every monument until Clinton's withdrawals with only limited exception.²⁷

C. Limitations on Presidential Authority to Withdraw Land from the Public Domain

Article IV of the Constitution grants Congress authority to "make all needful Rules and Regulations regarding the territory or other Property belonging to the United States."²⁸ Occupied by its other duties, however, Congress delegated considerable land management authority to the President, including the authority to withdraw land as national monuments. Much of this authority was delegated by Congressional acquiescence, and presidents have traditionally made withdrawals of land without reference to statutory authority both before and after the passage of the Antiquities Act in 1906.²⁹ In 1909, President Taft temporarily withdrew, without citing statutory authority, over three million acres of public land from development. When challenged, Taft's action was reviewed by the Supreme Court, who upheld the President's action and stated "that his authority was implicitly allowed by Congressional acquiescence based on the Executive's long continued practice of making withdrawals without express statutory authority."³⁰

In 1976, however, Congress reasserted control over withdrawals of public land by enacting FLPMA.³¹ This statute specifically overruled the Supreme Court's recognition of doctrine of implied consent.³² In addition, FLPMA severely limited the President's authority to make with-

25. See Exec. Order No. 6166 (1933).

26. *Id.* at § 2.

27. See Vincent, *supra* note 7.

28. U.S. Const. art. IV.

29. See Zellner, *supra* note 18 at 1037-1038.

30. *Id.* at 1038 (citing *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915)).

31. See 43 U.S.C. §§ 1701-1785 (2000).

32. See *id.* at § 1714.

drawals³³ by permitting withdrawals only after compliance with specific restrictions and also requiring Congress' consent.³⁴

Interestingly, Congress did not repeal the Antiquities Act. Although Congress made no explanation for its inaction, one possible explanation is that it left the Act in place because, unlike the doctrine of implied consent, the Act limits the President's authority to make withdrawals, despite the Court's broad reading of the Act's language. For whatever reason, the Act remains on the books, its expansive language coexisting alongside confined restrictions imposed under FLPMA.

D. Regulation of Land Withdrawn Under Antiquities Act Authority

As stated above, land withdrawn under Antiquities Act authority has been traditionally managed by the National Park Service. Because the NPS adheres to a philosophy of preservation that closely parallels the Antiquities Act's preservationist mandate, the NPS, unlike the BLM with its policy of multiple use-sustained yield,³⁵ is uniquely suited for monument management.³⁶

As directed under the Antiquities Act³⁷ and in accordance with its mandate of preservation under its Organic Act,³⁸ the NPS has promulgated detailed regulations for each monument. The regulations contain a list of uses and activities both permitted and prohibited in each monument as well as conditions for obtaining a permit for each authorized use.³⁹ While extractive activities have been traditionally prohibited, typical permitted uses include snowmobiling, hiking, climbing and fishing.⁴⁰

33. See Vincent, *supra* note 7.

34. See Zellener, *supra* note 18, at 1039-1040.

35. See *id.* at 235.

36. See Coggins, *supra* note 15, at 239.

37. See 16 U.S.C. § 432 (2000).

38. See 16 U.S.C. § 1 (2000). In § 1 of this statute, Congress directed the NPS to "conserve the scenery and the natural and historic objects and the wild life and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

39. See 36 C.F.R. § 7 et seq. (2000).

40. See *id.*

II. THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT: CLINTON'S DECLARATION AND CONCESSION

A. Public Opposition

Even as Clinton prepared to designate the Grand Staircase Monument, many Utahns opposed it. The designation of monuments in Utah was certainly not unique,⁴¹ and Utah residents had experienced firsthand the results of Antiquities Act withdrawals through twelve prior reservations.⁴² Traditionally pro-development, Utahns were not eager to additional land withdrawn for the purpose of preservation.⁴³

B. The Proclamation and Clinton's Concession

On September 18, 1996, President Clinton withdrew 1.7 million acres of public land in southern Utah as the Grand Staircase-Escalante National Monument.⁴⁴ The withdrawal Proclamation made by presidential authority under the Antiquities Act states in pertinent part that:

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from entry, location, selection, sale, leasing, or other disposition under the public land laws, other than by exchange that furthers the protective purposes of the monument. . . . The Secretary of the Interior shall manage the monument through the Bureau of Land Management, pursuant to applicable legal authorities, to implement the purposes of this proclamation.⁴⁵

Even as President Clinton made the withdrawal he was cognizant of many Utahns' anger. In an attempt to appease Clinton made an extraor-

41. In fact, the idea to create a Monument in southeastern Utah was not new. As early as the 1930's, Harold Ickes, Secretary of the Interior under President Roosevelt, had proposed withdrawal of 4.4 million acres to be known as the Escalante National Monument. Because of considerable local opposition, however, the idea was dropped. Rasband, *supra* note 9, at 488-490.

42. See National Park Service, "Antiquities Act of 1906" (visited Sept. 18, 2001) <www.cr.nps.gov/history/antiq.htm>. Natural Bridges Monument in 1908, Mukuntuweap in 1909, Rainbow Bridge in 1910, Dinosaur Monument in 1915, Zions National Monument in 1918 (which incorporated Mukuntuweap), Timpanogos Cave, Hovenweep and Bryce Canyon Monuments in the early 1920's, Arches National Monument in 1929, Cedar Breaks Monument in 1933, Capitol Reef Monument in 1937, the expansion of Zions in 1937.

43. For a thorough review of the history leading up to the designation see Rasband, *supra* note 9.

44. See Proclamation, *supra* note 6.

45. *Id.*

dinary concession.⁴⁶ After stating that the land was withdrawn from the public domain and after acknowledging the Monument's protective purpose, Clinton appointed the BLM as the Monument's managing agency. Specifically, he stated that the BLM was to "implement the purposes" of the Proclamation and to prepare a monument management plan and promulgation of regulations as deemed appropriate.⁴⁷

Clinton's choice of the BLM to manage the Monument was clearly unusual. In fact, it was the "first time in history that the Bureau has been given responsibility to manage a National Monument."⁴⁸ Clinton seemingly expected that, in choosing the extractive-oriented BLM, instead of the preservation-oriented NPS as the Monument administrator, the opposition's fear the land was being withdrawn to prevent use and development would be abated, and that public outcry against the Monument would die down. To strengthen the impact of his concession President Clinton stated in his declaration speech that the Monument would "remain open for multiple uses including hunting, fishing, hiking, camping and grazing,"⁴⁹ presumably in accordance with BLM management policies. Initially this statement seems simplistic: the land was withdrawn from the public domain to create a national monument (thus satisfying preservationists), but extractive uses would still be permitted (thus satisfying opponents). In reality, however, Clinton's statement unleashed a hidden conflict.

III. THE CONFLICT

A. The Bureau of Land Management and its Multiple Use-Sustained Yield Mandate Versus the National Park System and its Preservationist Approach

In essence, the BLM is an agency dedicated to promoting extractive uses of the public lands. In fact, the BLM considered "itself a multiple use-sustained yield manager long before it was given statutory authoriza-

46. The President and Secretary of the Interior, Bruce Babbitt, were concerned over efforts by Republicans to prevent the land at issue from being designated as wilderness. Therefore, they began considering a possible withdrawal of the land under the Antiquities Act, chiefly because the Act's broad powers permitted the President to make the withdrawal without Congress' consent and previous challenges to Presidential withdrawals had been unsuccessful.

47. *See id.*

48. BUREAU OF LAND MANAGEMENT, GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT APPROVED MANAGEMENT PLAN, vi (2000).

49. Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona, 32 WEEKLY COMP. PRES. DOC. 1787 (Sept. 18, 1996).

tion."⁵⁰ In 1976, however, FLPMA was enacted and the agency came under congressional mandate to further implement that philosophy.

As stated in FLPMA, Congress defines multiple use as "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources."⁵¹ "Sustained yield" is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."⁵² Thus, according to FLPMA, the BLM must provide for the needs of the American people by managing the public lands in compatible combinations of various uses: outdoor recreation, range, timber, watershed, wildlife, minerals and natural values, and must achieve annual—high level production of each of these renewable resources.⁵³ While FLPMA does permit consideration of "'natural scenic, scientific and historical values' of the land"⁵⁴—a factor arguably preservationist in nature, it must be noted that consideration of these values is only one of many competing considerations, nearly all of which are extractive in nature. And while FLPMA requires consideration of values beyond economics, the multiple use-sustained yield mandate has traditionally been executed in a utilitarian fashion.⁵⁵ Professor Rasband stated that these multiple use and sustained yield definitions are extremely elastic and "that elasticity is precisely what has allowed for so much resource development on the public lands under the 'multiple use' banner."⁵⁶

Interestingly, while FLPMA requires consideration of a wide range of possible uses, the principle of combination has been neglected by development-minded conservatives who advocate continuation of government subsidies for their chosen use, such as grazing or timber. Professor Coggins, however, recognized the spirit behind Congress' mandate as it directed the BLM to temper the concept of utilitarianism and consider all

50. Coggins, *supra* note 15, at 267-268.

51. 43 U.S.C. § 1702(c) (2000). The concept of multiple use-sustained yield was first embodied in the Multiple Use-sustained Yield and Sustained Yield Act, 16 U.S.C. § 528 (1960). Note that when Congress passed FLPMA with its multiple use-sustained yield mandate, this philosophy was never made applicable to the Antiquities Act, nor did Congress pass legislation requiring the NPS to implement multiple use-sustained yield principles in its management of the various monuments.

52. 43 U.S.C. § 1702(h) (2000).

53. See Coggins, *supra* note 15, at 230. While Wilderness is not listed as a resource, designation of wilderness study areas is provided for under the Wilderness Act. *Id.* at 253.

54. 43 U.S.C. § 1702(c).

55. Coggins, *supra* note 15, at 239. As the population settled the West, the people's needs were primarily economic in nature. In recent years, preservation of land for its aesthetic value has slowly been recognized as a "need," however, preservation has been primarily entrusted to the NPS, while the BLM has continued its utilitarian-style management.

56. Rasband, *supra* note 9, at n.220.

legally compatible uses. He urged the BLM to integrate utilization of these uses to meet the needs of the American people while exercising care to ensure that one use is not favored over another.⁵⁷ Professor Coggins specifically stressed the balancing required under FLPMA and emphasized the need to prevent political and lobbying pressures from exerting undue influence in decision-making while maintaining a rational balanced view of all pertinent concerns.⁵⁸ Even with this balancing the multiple use-sustained yield philosophy inherently promotes extractive use of the public land resource, and the BLM has traditionally preferred extraction over the more balanced approach advocated by Professor Coggins.

In contrast, the National Park Service is oriented towards preservationist principles. It is endowed by its Organic Act⁵⁹ with the mission to "preserve the scenery, wildlife, and other attributes of 'parks, monuments, and reservations' for the benefit of present and future generations."⁶⁰ Regarding the NPS, Professor Coggins has stated,

The NPS enjoys a unique niche in the pantheon of federal land management agencies. Its mission is far more circumscribed than those of the Fish and Wildlife Service (FWS), the Bureau of Land Management (BLM), and the Forest Service (FS). These all have some responsibilities for production of commodities from the natural resources under their jurisdictions; the NPS does not. Consequently, the NPS is relatively immune from the political pressures imposed by loggers and miners . . . Further, the NPS is far more visible (and politically pro-

57. It is interesting to note that, "Congress did not specify which of them, if any, are to have priority." Professor Coggins stated that, "three aspects stand out from the failure to specify":

1. The needs are clearly not limited to subsistence requirements or economic desires.
2. Scope and generality—the statute does *not* refer to such specific goals as subsidizing the timber industry, supporting local economies, developing regional industries or commerce, producing energy, subsidizing the livestock industry, providing facilities for nature lovers, and so forth . . . No one industry or group or area is given favored treatment by the statute in the allocation of resources.
3. Congress directed management of resources in "combination" giving due "consideration" to the "relative value of the various resources." Congress did *not* say how much consideration is "due" or in what form or by what procedure. . . . not the one that is politically acceptable or merely adequate. To determine the best combination, a rational process of selection is requisite.

Coggins, *supra* note 15, at 258-59 (emphasis added).

⁵⁸ *Id.*

59. See 16 U.S.C. § 1 (2000).

60. George Cameron Coggins and Robert L. Glicksman, *The National Park System: Concessions Law and Policy in the National Park System*, 74 DENV. U.L. REV. 729, 733-34 (1997).

tected) than other agencies because it is the custodian of the nation's most beloved scenic treasures.⁶¹

Clearly the philosophy of the NPS differs fundamentally from that of the BLM. As an apt comparison, it has been said that under BLM management "uses generally would be permitted unless shown to be detrimental to the monuments, while in NPS units, uses are more likely to be prohibited unless shown to be beneficial."⁶²

Besides appeasing vitriolic critics, perhaps Clinton had an additional motivation in designating the BLM as the manager of the Monument. The Salt Lake Tribune opined that,

Many within the Interior [Department] saw the selection of the BLM to run the monument as an attempt by the Interior Secretary Bruce Babbitt to "green up" the BLM and provide new direction to an agency that has had trouble finding its niche in the increasingly non-extractive New West.⁶³

Whether Clinton's directive for the BLM to manage the Monument will succeed in "greening up" the agency depends on the principles the BLM implements in its management.⁶⁴ If the BLM is to manage the Monument in accordance with principles of preservation, perhaps Clinton will have succeeded. However, if, as it appears from Clinton's concession, the Monument is to be managed in accordance with the BLM's traditional multiple use-sustained yield policy, then the BLM will continue in its traditional role.

61. *Id.* at 735.

62. Vincent, *supra* note 7.

63. Christopher Smith, *Utah Monument a Grand Snub of Park Service?*, SALT LAKE TRIBUNE, May 3, 1999, (visited March 13, 2001) <<http://www.sltrib.com/1999/may/05031999/utah/102602/htm>>.

64. Whether Clinton possesses the authority to "green up" the BLM at all is an even broader question. Critics claim that, in choosing the BLM to manage the Monument, Clinton executed a "reorganization of government" by transferring current functions of the National Park Service to the BLM. If the transfer of Monument management between agencies does constitute a "transfer of agency function," that act would require statutory authority beyond the authority granted under the Antiquities Act, and Clinton never claimed to be acting under any other authority when he made the Proclamation. On the other hand, one could argue that discretion to choose a managing agency for the monument is not a sufficient delegation to constitute a transfer of functions, but is contained within the authority granted to the President under the broad language of the Antiquities Act. However, while critics have raised the issues, courts have not yet decided the issue. For the purpose of this paper, we will assume that Clinton's designation of the BLM as the Monument's managing agency does not constitute a reorganization of government.

*B. The Antiquities Act's Mandate to Preserve:
The Limit of the President's Authority*

In spite of Clinton's apparent tolerance for extractive uses in the GSENM, the language of the Antiquities Act mandates preservation, as demonstrated by the following principles first, the language of the Antiquities Act permits land to be withdrawn for protective purposes;⁶⁵ second Presidential withdrawals under the Act demonstrate a history of withdrawals clearly made to preserve; third Monuments were traditionally managed by the NPS, an agency vested with duty to preserve; and fourth NPS regulations generally prohibit extractive uses, clearly embracing principles of preservation while eschewing the policy of multiple use-sustained yield.⁶⁶

There is no doubt the Antiquities Act permits withdrawals solely for the purpose of preservation. Because of this, presidential authority under the Act extends only to withdrawals made for that purpose; withdrawals which perpetuate extractive uses lie outside the scope of Antiquities Act authority.

C. The Conflict

On one hand, the Antiquities Act grants the President authority to withdraw land solely for the purposes of preservation. On the other, President Clinton directed the BLM to act as the Monument's manager and stated expressly that the land would remain open for uses in accordance with multiple use-sustained yield principles. The conflict and the resultant ambiguity is illustrated in the following excerpt from a Salt Lake Tribune article:

There is confusion and concern among agency employees "about whether Grand Staircase Escalante will be managed under the same constrictions as other national monuments. . . . One group believes that the name national monument affords a certain level of protection, that the title protects the place[.] . . . The other group believes the assignment of BLM to manage the monument protects the status quo, that the things that have been going on will continue. Each group's particular outcomes cannot coexist, so at least one of those groups has been given a placebo."⁶⁷

65. See 16 U.S.C. § 431 (1994).

66. See 36 C.F.R. § 7 et seq. (2000).

67. Smith, *supra* note 51.

This statement aptly describes the two camps, one of whom must have been misled by President Clinton. Did Clinton intend for the Monument to be managed in accordance with multiple use-sustained yield principles, thus maintaining the status quo and deceiving environmentalists who trusted that land within a national monument would be preserved, and if he did, did Clinton possess the authority to make that designation? Or, was the BLM's name and multiple use-sustained yield policies used as a pretext to hide Clinton's intent that the Monument be managed under the principle of preservation? To answer these questions, the details surrounding the Monument's creation and the BLM's consequent actions in managing the Monument must be examined.

IV. PRESIDENT CLINTON AND THE MULTIPLE USE MANDATE: GIVING UTAHNS THE PLACEBO

A. The Proclamation and Declaration Speech

Unlike previous monument proclamations, which do not name a managing federal agency, the Grand Staircase Monument Proclamation specifically directs that "the Secretary of the Interior shall manage the monument through the Bureau of Land Management, pursuant to applicable legal authorities, to implement the purposes of this proclamation."⁶⁸ That statement contains conflicting directives: first, the Monument is to be managed by the BLM, apparently according to traditional multiple use-sustained yield principles, and second, the Monument is to be managed in a manner which implements the purposes of the withdrawal, i.e. preservation under the Antiquities Act. Thus, from the outset, the Secretary of the Interior is faced with an irreconcilable task.

President Clinton's declaration speech muddies the water even further. He stated, "I am concerned about a large coal mine proposed for the area. Mining jobs are good jobs, and mining is important to our national economy and to our national security. But we can't have mines everywhere, and we shouldn't have mines that threaten our national treasures."⁶⁹ Clinton clearly intimated that mining, a use legally compatible with multiple use principles, was not an acceptable use within the Monument. In fact, prevention of mining in the Kaiparowits area was a key reason behind the Monument's establishment.⁷⁰ On the other hand,

68. Proclamation, *supra* note 6.

69. Remarks by the President, *supra* note 50, at 1787.

70. Professor Rasband stated: "Unlike the lands adjacent to Arches and Canyonlands, which were not endangered, in the case of the Kaiparowits, the Administration could point to a reason for the designation: Andalex, a Dutch-owned company, had federal coal leases on the plateau that it was

Clinton promised in his speech that, "the land will remain open for multiple uses including hunting, fishing, hiking, camping and grazing."⁷¹ An article published in the Salt Lake Tribune stated,

Although [the designation of the Grand Staircase Monument] was ballyhooed as a conservation protection measure reminiscent of Teddy Roosevelt, Clinton's proclamation creating Grand Staircase Escalante allowed all but one existing use—a proposed coal mine—to continue unabated. The BLM-run monument will remain open to activities traditionally prohibited in areas managed by the Park Service.⁷²

While it is clear that hunting, fishing, hiking, camping and grazing are uses compatible with BLM multiple use-sustained yield management, they are certainly not in conformance with traditional preservationist principles.⁷³

B. Clinton's Directive to the Secretary of the Interior

Furthermore, Clinton's speech directed the Secretary of the Interior to prepare a management plan for the Monument "as he deems appropriate."⁷⁴ The directive to develop a management plan as deemed appropriate grants the secretary some flexibility, although he is required to manage "pursuant to applicable legal authorities."⁷⁵ The secretary's duties are ambiguous. Is he to develop a management plan in accordance with FLPMA's multiple use mandate or a plan to manage according to the preservationist policies embodied in the Antiquities Act? Alternatively, must the secretary implement a blend of the two philosophies? Furthermore, if the secretary does choose one philosophy or the other, will he be held derelict in his duty for non-compliance with Antiquities Act principles or for deviating from FLPMA's multiple use-sustained yield mandate?

These questions create an ambiguity that could be interpreted to have two vastly different meanings: (1) Clinton used the term "multiple use-sustained yield" as political rhetoric while intending the actual implementation of preservationist principles; or (2) Clinton intended multiple

proposing to develop." Rasband, *supra* note 9, at 506.

71. Remarks by the President, *supra* note 50, at 1787.

72. See Smith, *supra* note 51.

73. See Vincent, *supra* note 7.

74. Proclamation, *supra* note 6.

75. See *id.*

use-sustained yield to be the rule, despite the Antiquities Act's preservationist mandate.

Based on the text of the Antiquities Act and looking at previous withdrawals under the Act, Clinton must have been aware of the Act's clear purpose, and history shows that Clinton withdrew the land in part to prevent coal development in the area.⁷⁶ Therefore, Clinton would not have truly intended that the Monument be governed by multiple use-sustained yield principles. Instead, Clinton's designation speech was deliberately ambiguous and misleading, calculated to sooth Utah's fears. And the deception worked, more completely than he had expected as even the BLM failed to adhere to the preservationist plan intended by Clinton, producing instead a management plan convoluted with an unconvincing mix of multiple use-sustained yield and preservationist principles.

C. The BLM's Management Plan

The final draft of the Grand Staircase Monument Management Plan ("the Plan") was approved on November 1999, effective February 2000. The Plan's text gives insight into the BLM's interpretation of Clinton's directive, as well as whether the BLM, confused by Clinton's ambiguous rhetoric, attempted either to reconcile the two competing philosophies or simply ignored the conflict.

1. Preservationist language in the Plan

In pertinent part, the Overview of the Plan states:

The Proclamation and the Antiquities Act provide a clear mandate for this plan—to protect the myriad historic and scientific resources in the Monument. To meet this objective, the Monument will be managed according to two basic principles. First and foremost, the Monument will remain protected in its primitive, frontier state. The BLM will safeguard the remote and undeveloped character of the Monument, which is essential to the protection of the scientific and historic resources. Second, the Monument will provide opportunities for the study of scientific and historic resources. . . . The BLM will support and encourage scientific study, as long as it does not conflict with the protection and preservation of Monument resources.⁷⁷

⁷⁶ See *supra* text accompanying note 46.

⁷⁷ Approved Management Plan, *supra* note 49, at iv.

The purpose of the Management Plan is based on "two basic precepts [that] 'provide the overall vision for future management of this very special place.'"⁷⁸ The foremost purpose is to retain the Monument as a frontier, unique and untrammled. Second, the Monument provides a "spectacular array of scientific and historic resources." Looking at these statements, it appears that the BLM, under FLPMA's mandate, has interpreted "needs" of the people in relation to the Monument as: to retain a portion of the West as frontier (a non-renewable resource), most plausibly for its aesthetic value as well as for its sentimental value as a vestige of the earlier "wild west," and to provide researchers/historians with an opportunity to examine unique artifacts and objects of scientific interest. Note that both of these uses are oriented towards preservation.

The chief methods contemplated in the Plan to safeguard the land as a frontier are (1) minimization of visitor facilities; (2) permitting only limited access by motorized vehicles to vast areas of the Monument; and (3) curtailment of any other activity that does not serve to protect the land. Even scientific study, the other primary purpose of the Proclamation,⁷⁹ will be curtailed to the extent that it conflicts with the preservation of Monument resources, and activities such as climbing and hiking in the Monument will be periodically prohibited in order to prevent possible resource disturbance.⁸⁰ Commercial forestry and mining are completely prohibited.⁸¹

Because President Clinton created the Monument subject to valid existing rights, the Plan recognizes the existence of these rights, but permits their exercise only in accordance with exacting restrictions.⁸² For exam-

78. *Id.* at iv.

79. Proclamation, *supra* note 6.

80. Approved Management Plan, *supra* note 49, at xxxvi.

81. *See id.* at xxviii, li.

82. In order to avoid a taking, the Monument had to be declared "subject to existing rights." However, this does not prevent the President or the Secretary of the Interior to place restrictions on the exercise of those rights. In the case of a Monument made for the purposes of preservation, such restrictions are to be expected. As Professor Rasband stated:

The Secretary of the Interior and the courts have thus interpreted the same "valid existing rights" language in FLPMA to mean that the exercise of a valid existing right may be restricted by applicable statutes and regulations, as long as the restriction does not "make economic development completely unprofitable;" essentially, as long as it does not constitute a Fifth Amendment taking. And as arduous as it is to succeed on a regulatory takings claim for private land, it is even more difficult where the federal government owns the underlying fee title. In the end, therefore, the "valid existing rights" language probably does more to protect the federal treasury than rights holders. The language ensures that the withdrawal itself will not be construed as a taking, but allows a variety of restrictions to avoid degradation or impairment of the lands within the Monument.

ple, the Plan states the BLM has not reached a final decision on the extent to which grazing will be permitted in the Monument although valid grazing permits are currently in existence.⁸³ The Plan requires completion of assessments for existing grazing allotments as well as preparation of new allotment management plans (subject to detailed restrictions) before the BLM will determine whether grazing can continue.⁸⁴ If grazing in a particular area harms the land or its ecosystem, permit extensions will likely be denied.⁸⁵

With regard to mining claims existing at the time of the withdrawal, the Management Plan states that the BLM intends to vigorously examine all claims to “ensure that all ‘required actions, filings, and fees are in full compliance with the law.’”⁸⁶ Incomplete compliance with any requirement will result in termination of the claim-holder’s rights. Even after the applicant has demonstrated compliance, however, the BLM will continue to monitor activities through its Inspection Program, using a “NEPA (National Environmental Policy Act) analysis to determine potential impacts on the Monument resources that this Plan is required to protect.”⁸⁷ As impacts on Monument resources are identified, the BLM will either work with the individual to find alternatives to the action (which introduces the possibility of expensive mitigation) or may prohibit the activity entirely.⁸⁸

2. *Statements favoring multiple use-sustained yield*

While the Plan does implement principles of preservation, it also permits multiple use-sustained yield activities. Regarding these uses, the Salt Lake Tribune stated: “Clinton’s proclamation creating Grand Staircase Escalante allowed all but one existing use—a proposed coal mine—to continue unabated [albeit more limited in scope]. The BLM-run monument will remain open to activities traditionally prohibited in areas managed by the Park Service.”⁸⁹

The Plan permits several of the uses enumerated in FLPMA’s multiple use definition. For example, the Plan recognizes the rights existing at the time of the Monument’s designation and permits their exercise, subject to compliance with permit requirements and restrictions. Grazing is

Rasband, *supra* note 9, at 519-521.

83. See Approved Management Plan, *supra* note 49, at iv.

84. See *id.* at 40-43.

85. See *id.*

86. *Id.* at 51.

87. *Id.* See *infra* note 104 for a brief explanation of NEPA and its requirements.

88. See *id.* at 51.

89. Smith, *supra* note 51.

regularly prohibited under strict preservationist management. In addition, while the Plan prohibits commercial timber harvesting,⁹⁰ another enumerated use under FLPMA, “fuelwood harvesting, post cutting, and Christmas tree cutting will be allowed by permit only within designated areas.”⁹¹ Here again, the Plan permits extractive uses compatible with FLPMA’s multiple use-sustained yield mandate. The Plan also permits hunting, fishing and traditional mining, where those rights existed at the time of the withdrawal.⁹² Thus, in spite of preservationist-oriented objectives contained within the Plan, the influence of BLM’s traditional policy of multiple use-sustained yield is clearly visible.

3. *The BLM’s unrealistic attempt to justify its plan*

In the midst of this confusing juxtaposition of contradictory philosophies, the BLM has innocently attempted to blend the two. The Plan states:

The Proclamation, which is the principal direction for management of the Monument, clearly dictates that the BLM manage the Monument for “the purpose of protecting the objects identified.” All other considerations are secondary to that edict. The Proclamation governs how the provisions of FLPMA will be applied within the Monument. FLPMA directs the BLM to manage public land on the basis of multiple use-sustained yield and “in a manner that will protect the quality of scientific, scenic, historic, ecological, environmental, air and atmospheric, water resources, and archaeological values.” The term “multiple use-sustained yield” refers to the “harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment.” Multiple use-sustained yield involves managing an area for various benefits, recognizing that the establishment of land use priorities and exclusive uses in certain areas is necessary to ensure that multiple use-sustained yields can occur harmoniously across a landscape.⁹³

This statement demonstrates the BLM’s inability to articulate its management policy for the Monument. The language from the Proclamation restates the primary purpose of the withdrawal: to protect and preserve land containing historical, geologic and scientific objects. The next

90. See Approved Management Plan, *supra* note 49, at xxviii.

91. *Id.* at xxviii-xxix.

92. See *id.* at v.

93. *Id.* at iii.

sentence, however, states that the Monument is to be administered according to FLPMA and its multiple use-sustained yield mandate, a mandate permitting extractive uses which necessarily interfere with preservationist principles.

While the BLM's definition of "multiple use" is similar to Congress' definition in FLPMA, the BLM completely omits reference to sustained yield. FLPMA defines "sustained yield" as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."⁹⁴ Under FLPMA, the principles of multiple use and sustained yield are inseparable, under the BLM's plan, sustained yield is simply omitted.

Thus, in an apparent attempt to reconcile conflicting mandates, the BLM seems to create its own directive for the Monument, ignoring the reality that multiple use-sustained yield is utilitarian by decree, and mandating, at least to some extent, consumption, a principle entirely at odds with preservation under the Antiquities Act.⁹⁵

While the BLM's actions are confusing, possible motivations behind the BLM's conduct can be hypothesized. Perhaps the BLM, recognizing the mandate to preserve, never actually intended to implement its multiple use-sustained yield rhetoric in the Monument but simply laced the Plan with multiple use-sustained yield language in an attempt to conceal its preservationist management. The Plan's language clearly intimated that multiple use-sustained yield activities would be permitted in the Monument just as Clinton had done in his designation speech. However, this interpretation of FLPMA is extremely narrow. In practice, extractive use activities, while permitted on paper, could easily be prohibited through restrictive permitting and a NEPA finding of significant impact. It appears possible that the BLM's multiple use-sustained yield language was also political rhetoric to placate opponents while the BLM managed the Monument according to preservationist principles.

Alternatively, while it is clear that the BLM recognized the conflict at least to some degree (as evidenced by the Salt Lake Tribune account of employee concern over management principles),⁹⁶ perhaps the BLM ignored the conflict because the Monument's designation was already markedly controversial. The BLM had been chosen to manage the

94. 43 U.S.C. § 1702(h) (2000).

95. While some have raised the question whether the BLM could simply direct that multiple use of public lands means preservation within the Monument boundaries and extraction outside them, that policy would not be permissible under FLPMA. FLPMA requires that all possible uses of the land be examined and permitted in a combination that best meets the needs of the American people. Nothing in FLPMA permits exclusion of all other uses in order to preserve the land.

96. See Smith, *supra* note 51.

Monument as a concession to Utahns, and bringing the conflict to light would have engendered additional strife thus negating the concession's value. Furthermore, as the West becomes increasingly oriented away from extraction, federal agencies which have traditionally been extraction-oriented, are worried about losing their influence and control over land, as well as their budget.⁹⁷ By ignoring the conflict, the BLM would not only retain control over a vast area of the public land, but would extend its power by obtaining management authority over national monuments as well.

D. The Present State of Affairs

Based on the foregoing analysis, the BLM is in a quandary. Presidential authority under the Antiquities Act may only be exercised to withdraw land for the purposes of preservation. However, in direct conflict with these principles, Clinton directed the BLM to manage the Monument in accordance with principles of multiple use-sustained yield. While Clinton's authority under the Antiquities Act is clearly limited to making withdrawals for the purpose of preservation, the BLM followed Clinton's directive literally, choosing to manage according to Clinton's rhetoric and not according to the limits of his authority. The Monument, however, cannot be managed in accordance with both principles because the two principles fundamentally conflict.

The conflict can, however, be resolved by determining which law governs the Grand Staircase Monument, as well as by correctly interpreting pertinent statutes. Because the President's authority to make the withdrawal originated in the Antiquities Act, that Act necessarily supercedes any conflicting peripheral directives—i.e. Clinton's mandate for the BLM to govern under FLPMA.⁹⁸ With regard to the withdrawal, Clinton's authority is limited to actions consistent with Antiquities Act objectives. While his initial withdrawal of the land was made for preservation within the scope of his Antiquities Act's authority, Clinton's designation of the BLM to manage the Monument (interpreted by the BLM to require management under FLPMA's multiple use-sustained yield mandate) was not consistent with Antiquities Act objectives. The peripheral conflicting directive of BLM management must therefore give way

97. The Salt Lake Tribune also stated, "Much of the debate [over the Grand Staircase Monument's management] is colored by the increasing tension among federal land agencies. Management missions are overlapping and historic division of powers are fading at a time when each agency is fighting for its piece of a shrinking budget pie." Smith, *supra* note 51.

98. While FLPMA specifically overrules the doctrine of Congress acquiescence as defined in *Midwest Oil*, 236 U.S. 459, FLPMA specifically recognizes the validity of the Antiquities Act. See 43 U.S.C. § 1714 (2000).

to the governing law—the Antiquities Act. Because of this, the designation of the Monument's managing agency was made without the requisite authority and is therefore void, and the BLM's current management under a combination of multiple use-sustained yield and preservation is not in accordance with the Monument's governing law.⁹⁹

From this analysis, it seems that Clinton achieved both of his goals. In choosing the BLM as managing agency for the Monument and by using multiple use-sustained yield rhetoric in his speech, he quelled, at least to some degree, opposition against the Monument. In reality, however, Clinton withdrew the land under authority that mandated management under preservationist principles leaving no room for implementation of multiple use-sustained yield policies. Thus, Clinton's promise to Utahns cannot be legally implemented.¹⁰⁰

As Utahns begin to recognize this placebo they will be left with few alternatives. As will be discussed below, several options are available to remedy the conflict, although alternatives incorporating multiple use-sustained yield principles into Monument management are sparse.

V. POSSIBLE SOLUTIONS TO THE CONFLICT AND IMPLICATIONS FOR THE LAKE POWELL PIPELINE

In the midst of this conflict, Washington County must obtain additional water and the Lake Powell Pipeline is the County's most viable solution. As proposed, the pipeline would traverse Monument lands¹⁰¹ running partly within the Highway 89 utility corridor and partly outside the corridor, following a shortened route across Buckskin Mountain.¹⁰² Prior to construction of the pipeline, however, right-of-way permits both within the utility corridor and across Buckskin Mountain must be obtained. In light of the present conflict, it is questionable whether, and under what circumstances, the right-of-way permit would be issued. The outcome of that determination depends upon the manner in which the conflict is resolved.

99. This depends, of course, on whether the provision containing Clinton's directive to the BLM is severable from the Proclamation; an issue not previously litigated. If the directive is severable, the withdrawal would be valid while the directive for BLM management would be void. If, however, the provision is not severable, then Clinton's entire designation could be void as an action outside the scope of his authority. Due to length restraints, this paper will not address this issue. See 2 SUTHERLAND STAT. CONST. § 44 (5th ed. 1999).

100. As Professor Rasband stated, "the President's careful use of the term 'multiple use', a public lands term of art, in his speech at the Grand Canyon was likely only an election-season shading of what was otherwise a plain effort to eliminate multiple use in the Monument area." Rasband, *supra* note 9, at 531.

101. See LAKE POWELL PIPELINE FEASIBILITY STUDY, *supra* note 1, at 4.

102. See *id.* at Figure 4.1A

A permit cannot be issued until the BLM's objectives concerning the Monument are made clear. Prior to right-of-way permit issuance, an applicant must comply with the National Environmental Policy Act (NEPA).¹⁰³ NEPA requires an examination, not only of direct and indirect effects of the project on the land,¹⁰⁴ but also of possible conflicts between the proposed action and the objectives of federal, regional, state and local land use plans, policies and controls for the area concerned.¹⁰⁵ If the BLM's objective for the Monument is to implement principles of multiple use-sustained yield, then mitigation for surface disturbance will be required in a lesser degree than if the objectives of Monument management are preservation and protection, if issued at all. Thus, the characterization of the managing agency's objectives is vitally important in order to identify the extent of mitigation that may be required by NEPA prior to permit issuance.

A. Possible Solutions

In light of the conflicting statutes, remedial action must be taken. Several options are available: (1) the BLM could continue the status quo; (2) the BLM could manage the Monument in accordance with principles of preservation under FLPMA § 704 and in accordance with the Antiquities Act; (3) the current President could modify the withdrawal by directing the National Park Service to act as managing agency; (4) the President could issue an Executive Order directing the BLM to manage for preservation under FLPMA § 704; or (5) Congress could pass legislation mandating that the Monument be managed under principles of multiple use-sustained yield in spite of the Antiquities Act's directive.

1. Preservation of the status quo

The BLM has already begun implementing its Management Plan for the Monument,¹⁰⁶ attempting to mesh preservationist and multiple use-sustained yield philosophies. The BLM could probably move forward, ignoring the Plan's inconsistencies. However, this would not be wise.

103. See 42 U.S.C. §§ 4321-4370 (2000). Briefly, the NEPA is triggered when any agency of the Federal Government undertakes a "major federal action" that will have a "significant impact" on the environment. *Id.* If this occurs, the agency is required to perform a detailed analysis of the environmental impacts of a proposed action, prior to action approval. While NEPA does not mandate environmentally safe action on the part of agencies, NEPA does require that agencies be aware of environmental impacts before acting.

104. See 42 U.S.C. § 1508.8 (2000).

105. See *id.*

106. See generally Approved Management Plan, *supra* note 49.

Although no critic has yet raised the issue of whether the multiple use-sustained yield principles mandated under FLPMA inherently conflict with the Antiquities Act's preservationist mandate, critics are busily challenging the President's authority to choose the Monument's managing agency,¹⁰⁷ the continued need for the Antiquities Act in light of FLPMA's withdrawal requirements,¹⁰⁸ the designation of the Monument without NEPA compliance,¹⁰⁹ and whether the size of the land withdrawn was impermissibly large.¹¹⁰ It seems inevitable that critics will eventually seize on this conflict as well. The better plan would be for the BLM to officially recognize the problem, and in spite of possible political censure, take steps to implement a solution to correct it.

The BLM will undoubtedly be reluctant to move forward in this manner. Delaying official recognition until critics publicize the issue could embarrass the BLM and Interior Department officials as critics highlight the BLM's apparent inability to interpret its organic statute. By delaying the BLM will also waste funds, as money will be spent on multiple use-sustained yield activities that could otherwise be put towards preservation and risk losing its allotted share of the budget. To avoid these consequences, the BLM should recognize and acknowledge the conflict, take efficient steps to ameliorate the problem, and then move forward. Continuance of the status quo is not a desirable course of action, nor does it bring the Grand Staircase Monument management into compliance with governing law.

The question then arises: If the BLM continues the status quo, will Washington County be able to obtain needed right-of-way permit through the Monument? The answer is, most likely, yes. Because the current BLM Management Plan includes elements of multiple use-sustained yield policies, a right-of-way permit will most likely be granted, subject to some alterations. The Management Plan actually references the proposed pipeline, stating that "location of the proposed Lake Powell to Sand Hollow water pipeline within [the Highway 89] utility corridor is a possibility."¹¹¹ However, evaluation of the pipeline in accordance with NEPA and applicant compliance with additional restrictions, such as the "Standard Procedures for Surface Disturbing Projects and Proposals" are required prior to permit issuance.¹¹² If a finding is made that the pipeline will significantly impact resources within the Monument, mitigating

107. See Vincent, *supra* note 7.

108. See *id.*

109. See *id.*

110. See *id.* at 8.

111. Approved Management Plan, *supra* note 49, at 1 (emphasis added).

112. See *id.* at lxxxiv.

measures will have to be implemented to protect the land. Because a NEPA analysis has not been completed, however, it is difficult to ascertain whether objects of historic, scientific or geologic interest lie within the utility corridor. However, because the land has already been significantly disturbed by the Highway itself, a right-of-way permit for the portion of pipeline traversing the utility corridor would likely be issued.¹¹³

The Plan does not, however, contemplate issuance of a right-of-way permit across Buckskin Mountain for the shortened portion of the pipeline route. This land lies within the area of the Monument specified as the Outback Zone¹¹⁴ and obtaining a right-of-way permit through this area may be difficult in spite of the Plan's partial integration of multiple use-sustained yield standards. The Outback Zone is "intended to provide an undeveloped, primitive and self-directed visitor experience while accommodating motorized and mechanized access on designated routes."¹¹⁵ The Plan does not contemplate issuance of any right-of-way permits specifically through the Outback Zone and it is likely that a NEPA evaluation would show significant disturbance of undeveloped, protected areas.

Washington County could most likely mitigate these impacts by re-aligning the pipeline to stay within the Highway 89 corridor through Monument land. While this could significantly increase the project's expense, re-alignment would make permit issuance feasible. In addition, because the Monument is managed, at least in part, according to principles of multiple use-sustained yield, the BLM would tolerate a higher level of disturbance to Monument resources than it would under a preservationist regime. Therefore, if the BLM continues the status quo, a right-of-way permit would most likely be issued.

2. *BLM Management of the Monument in accordance with principles of preservation*

While preservation of the status quo is not a legally viable alternative, a resolution to the conflict does exist within FLPMA. Although Clinton clearly stated that the Monument would be managed according to principles of multiple use-sustained yield,¹¹⁶ the Proclamation itself does not explicitly require implementation of these principles. The Proclamation states that the Monument is to be managed "pursuant to applicable

113. This analysis is obviously superficial, as an in-depth study of the physical impacts of the pipeline has not yet been completed. The Pipeline Feasibility Study touches briefly on the pipeline's environmental impacts, but the NEPA compliance process, because of its detail and complexity, will not be thoroughly analyzed here due to insufficient scientific/geological information.

114. See Approved Management Plan, *supra* note 49, at ix.

115. *Id.*

116. See Remarks by the President, *supra* note 50.

legal authorities,”¹¹⁷—i.e. pursuant to the Antiquities Act and FLPMA. However, in a provision ignored by the BLM, FLPMA does not require exclusive implementation of multiple use-sustained yield principles; rather, it directs that, when the land to be managed is governed by other laws, the BLM should implement those principles accordingly.¹¹⁸ FLPMA’s language states: “The Secretary shall manage the public lands under principles of multiple use and sustained yield . . . except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.”¹¹⁹ This language permits the BLM to manage land according to principles of preservation (as mandated by the Antiquities Act) that otherwise conflict with the multiple use-sustained yield philosophy. Thus, the BLM could manage the Monument according to the Antiquities Act’s preservationist directive and still be in compliance with FLPMA, bringing Clinton’s directive for BLM management into compliance with governing law. The BLM could not, however, use this language to manage the Monument in accordance with multiple use-sustained yield principles because such management would conflict with the fundamental purpose of the Antiquities Act, rendering the Management Plan void as outside the scope of the President’s authority under the Act.

President Clinton did not mention this statutory language in his declaration speech, where he chose to highlight the BLM’s management policy of multiple use-sustained yield in order to enhance the value of his concession in the public eye. Further, this statutory language is never mentioned in the BLM’s Management Plan. Instead of using this language to correctly illustrate the compatibility of the Antiquities Act and FLPMA, the BLM ignored it and attempted to shove FLPMA’s multiple use-sustained yield policy into the preservationist glove.

This solution has both positive and negative repercussions. On one hand, the BLM’s acknowledgment of its error would certainly place the agency in an unfavorable light politically, as critics may accuse the BLM of taking covert action to extend its sphere of influence or to support the President in an unauthorized act. The Department of the Interior may then be hesitant to permit the BLM to expand its management of the public lands. In addition, the Monument’s Management Plan would have to be re-drafted, causing confusion during the interim period and additional expense to taxpayers.

117. Proclamation, *supra* note 6, at 50225.

118. 43 U.S.C. § 1732(a) (2000).

119. *Id.*

Additionally, any acknowledgment by the BLM that it erred in attempting to manage the Monument according to multiple use-sustained yield principles would effectively negate the anger-dispersing value of Clinton's concession. While the BLM's designation as managing agency may have placated those who opposed the Monument, recognition that the designation did not actually leave the land open to extractive uses would certainly renew public outcry. However, the withdrawal has already been made and BLM management procedures are in place. Thus, while a renewal of public displeasure over the Monument may motivate Congress to act to alter the withdrawal,¹²⁰ a renewal of opposition to the Monument would not politically injure President Clinton as he has already left office.

By acknowledging that FLPMA provides for management under principles other than multiple use-sustained yield, the BLM would correct the error under which it is operating. This would prevent litigation when the conflict is eventually publicized and would also allow for correction of the problem as the newly approved Management Plan is first being implemented. This resolution is clearly preferable to other options because it would alleviate the need to make formal alterations by presidential or congressional action.¹²¹ Inconsistencies in Monument management could be resolved internally by the BLM, lessening the burden on Congress and the President. While this solution to the problem would alleviate the conflict with the least expense and inconvenience to the government, it is unlikely the BLM will adopt this solution.

If, however, this solution was adopted and preservation became the rule, it is questionable whether a right-of-way permit across the Monument would be issued. While the pipeline could feasibly be constructed completely within the Highway 89 utility corridor, the degree of resultant surface disturbance would cause damage to Monument resources and agency administrators would certainly not favor the sight of a naked pipeline traversing pristine, untrammelled land. Burying the pipeline would not be a preferable alternative, as it would significantly disturb the land. Because preservationist management prohibits damage to the land where possible, these impacts may either prevent permit issuance or may result in such stringent mitigation requirements that the cost of compliance would outweigh the benefit of the pipeline.

120. See discussion *infra* Part V.A.4

121. See discussion *infra* Parts V.A.3, V.A.4.

3. *Presidential authority to alter the Monument*

While no president has attempted to eliminate an existing National Monument,¹²² many presidents have modified National Monuments,¹²³ including President Clinton, who expanded both the Pinnacles National Monument and the Giant Sequoia National Monument.¹²⁴ While presidents have traditionally acted to alter the monument's size,¹²⁵ a president would most likely have authority to alter the Grand Staircase Monument withdrawal because the Monument, as presently existing, is not in compliance with applicable law.

In order to bring Monument management into accordance with governing law, the current President could potentially take action to resolve the conflict by altering the Grand Staircase Monument in three distinct ways:

First, the President could issue an executive order expressly requiring that the Monument be managed under principles of multiple use-sustained yield. This, however, would not be a valid exercise of the President's authority under the Antiquities Act because, as discussed previously, any presidential directive peripheral to the initial Antiquities Act withdrawal must comply with the Antiquities Act. Because the Act permits withdrawal of the land solely for purposes of preservation, and because the principles of multiple use-sustained yield are incompatible with the Antiquities Act's mandate, an order expressly implementing principles of multiple use-sustained yield would be void as an act outside the scope of the President's authority.

Second, the President could issue an executive order retaining the BLM as manager but specifying that the Monument be administered to preserve the land and the objects protected under the Proclamation. In support of this order the President could cite to FLPMA § 1732, which permits deviation from multiple use-sustained yield principles where the

122. Whether a President has the authority to eliminate a National Monument is an issue open to debate. See Baldwin, *supra* note 31; 39 OP. ATTY. GEN. 185 (1938) (stating that a President does not possess authority requisite to eliminate a National Monument; Jim Woolf, "Monuments Rescindable, Says Expert; But Undoing Clinton Designations May Not be Worth Bush's Trouble," SALT LAKE TRIBUNE, Sept. 3, 2000, at LEXIS, News Library, Salt Lake Tribune File. (stating that a President *does* possess this authority). To date the issue has not been litigated, but, under the present political climate, an act to rescind the withdrawal by the current President seems unlikely. President Bush, as a Republican, is likely uneager to incur the wrath of environmentalists by attempting to eliminate national Monuments and, if he did, the political costs of rescission could be heavy. Because of this, President Bush would most likely modify the withdrawal before rescinding it outright.

123. See *id.*

124. See Vincent, *supra* note 7.

125. The Antiquities Act directs that a monument 'in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.' 16 U.S.C. § 431 (1994).

land is “dedicated to specific uses according to any other provisions of law.”¹²⁶ This alternative would effectively permit the BLM to manage the Monument in accordance with applicable law—both the Antiquities Act and FLPMA. Should such an order be issued, the BLM would most likely need to issue a new Management Plan for the Monument, which would expend additional government resources and would take time. However, the order would bring Monument management into compliance with governing law and would cause less administrative disturbance than other alternatives, except BLM-initiated action. However, while this option is legally feasible and would bring the Monument’s management into compliance with applicable law, it is unlikely that President Bush would act in this manner. In order to retain the favor of conservative Republican constituents, President Bush is likely to favor extractive uses.

Third, President Bush could modify the Grand Staircase Monument by issuing an Executive Order designating the National Park Service as the proper agency to manage the Monument. If such an order were issued, the Monument could be properly managed under principles of preservation in accordance with the Proclamation and the Antiquities Act. This action is clearly feasible, but would require a significant amount of time and money to transfer management between agencies and to create a new Management Plan. In addition, it is unlikely that President Bush, a moderate Republican and a man in need of conservative support, would anger Utahns by taking this action. It is more likely that the President would wait for Congress to act and then quietly sign the change into law, allowing Congress to take the blame.

If, however, the President altered the Monument and preservation became the official governing law, it is unlikely that the BLM would issue a right-of-way permit over Monument lands. Management according to a preservationist regime generally excludes activities that may harm Monument resources, and construction of the pipeline would most likely cause significant disturbance to Monument resources, not to mention the unsightly view of a pipeline running through unspoiled Monument lands.

4. *Congressional authority to alter the Monument*¹²⁷

In the wake of the Grand Staircase Monument designation, at least eight bills are pending in Congress.¹²⁸ Utah Senator Bennett’s bill, enti-

126. 43 U.S.C. § 1732(a) (2000).

127. “Legislative efforts in the wake of a president’s use of the Antiquities Act are hardly new. In fact, after President Franklin Roosevelt’s designation of the Jackson Hole National Monument, Congress amended the Act to exempt the State of Wyoming from any further designations.” Rasband, *supra* note 9, at 530.

ted, "A Bill to authorize the Bureau of Land Management to manage the Grand Staircase-Escalante National Monument, and for other purposes,"¹²⁹ is the most pertinent bill for this paper. The Bill seeks to codify the concessions made in President Clinton's declaration speech¹³⁰ by stating that, "in accordance with Proclamation 6920 . . . Federal land within the Monument should remain open for multiple uses."¹³¹ The Bill contains a definition of the principles of multiple use and sustained yield as defined in FLPMA and further states:

[The BLM] shall manage the resources within the Monument in accordance with the principles of multiple use and sustained yield (including recreation, range, timber, minerals, oil and gas, watershed, wildlife, fish, and natural scenic, scientific, and historical values), using principles of economic and ecologic sustainability.¹³²

While the Bill was not passed during the last congressional session,¹³³ if it were re-introduced, President Bush would most likely ratify it, unlike President Clinton who would have surely vetoed the Bill because of its multiple use language.¹³⁴ If the Bill passes, multiple use-sustained yield principles will become the legally valid mandate for Monument management in spite of the Antiquities Act.

A resolution by Congress, in addition to being a legally viable solution, would also be feasible politically. While the President possesses au-

128. See *id.* at 531-32. In fact,

[N]o less than [eight] bills have been introduced in Congress seeking to limit the President power to designate the national monuments. Two of the bills are similar to the Antiquities Act amendment that exempted Wyoming, in that they are merely a particular representative's effort to avoid having his state's ox gored. One bill provides for several minor adjustments to the Monument's boundaries. Four bills, in contrast, constitute broad attacks on the Antiquities Act. The National Monument Fairness Act of 1997, introduced by Representative Hansen of Utah and actually passed by the House, and a companion Senate bill of the same name, introduced by Senator Hatch of Utah, would require an act of Congress to establish any national monument over 50,000 acres. Representative Chenoweth of Idaho also introduced a bill requiring an express act of Congress to create a national monument. A third approach was offered by Senator Murkowski of Alaska. His Public Lands Management Participation Act of 1997 provides for public notice and requires compliance with all applicable federal land management and environmental statutes.

Id.

129. 143 CONG. REC. S1571 (daily ed. 1997).

130. See Remarks by the President, *supra* note 50.

131. See 43 U.S.C. § 1732(a)2(3).

132. 43 U.S.C. § 1732(a)4(a)(2).

133. See Rasband, *supra* note 9, at n.225.

134. See *id.* at 531.

thority under the Antiquities Act to modify withdrawals, action by Congress would represent a balanced determination of the people's will, more than a unilateral action by the Executive. In addition, it would be easier for Congress to spread the blame of the action, or to diffuse political disapproval of a change in Monument management, either from Republicans or Democrats, among its members than it would for the President to explain his action. However, as evidenced by the failure of Senator Bennett's bill last session, passing legislation can be difficult, especially when the issue is politically sensitive. A resolution by Congress may be difficult to reach, may be a lengthy, drawn-out process, or may only occur if significant "pork" is attached to the bill.

If either Congress or the President acts to require the BLM to manage for preservation, that action could result in a significant shift in focus for the agency. The question arises whether, as a policy matter, the nation is prepared for the BLM, the conservative's last extractive-use bastion, to turn preservationist. Historically, the nation promoted development of the West and subsidized those who engaged in extractive activities with the BLM's endorsement. With the end of the frontier, however, the extractive hey-day has ended and the nation has begun to prefer preservation instead of extraction. Conversion of the BLM, the last truly extractive agency, into a preservationist agency would mark the end of the West and the nation's passion for development of the public lands. Perhaps the people are ready for that change.

If Congress does act to make multiple use-sustained yield the rule within the Grand Staircase Monument, a right-of-way permit for Washington County would almost certainly be issued. Under multiple use-sustained yield management extractive uses are permitted and the surface disturbance resulting from pipeline construction would not prevent issuance of a right-of-way permit.

VI. CONCLUSION

Currently, the BLM is not managing the Grand Staircase Monument in compliance with governing law. Although the Antiquities Act clearly mandates preservation, the BLM, in response to President Clinton's multiple use rhetoric, attempted to merge preservation principles with FLPMA's multiple use-sustained yield principles, creating a quasi-preservationist, quasi-multiple use-sustained yield convolution that clearly violates the Antiquities Act.

While several alternatives exist which would bring Grand Staircase Monument management into compliance with existing law, the best and simplest solution is for the BLM to implement § 704 of FLPMA. This

section permits the BLM to manage land that has been dedicated to a particular purpose according to the law that governs that portion of land, which, for the Grand Staircase Monument, is the Antiquities Act. Thus, the BLM could, in compliance with the Antiquities Act and FLPMA, manage the Monument for preservation.

Judging by the BLM's prior actions, however, it is unlikely that the BLM will take such action. In that case, the President could issue an Executive Order or Congress could modify the Grand Staircase Monument grant.

No matter the source of the action, if the conflict is resolved in favor of preservationist management, administered either by the BLM or the NPS, a permit will most likely not be issued to Washington County for the proposed pipeline because of the project's potential harm to Monument resources. If a permit were issued under this regime, mitigation requirements would be stringent, possibly outweighing the benefit of the pipeline's path through the Grand Staircase Monument. On the other hand, if Congress amends the withdrawal and FLPMA becomes the governing law, a right-of-way permit through Grand Staircase Monument lands would almost certainly be issued, possibly subject to minor mitigation requirements. The conflict, however, must be resolved to bring the Grand Staircase Monument into compliance with governing law, and it is in Washington County's best interests to encourage a speedy resolution to the problem.

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