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The Antiquities Act has a Modern Impact: The Downsizing of Two National Monuments could have Lasting Consequences on Public Federal Lands

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*April 23, 2018*Shannon Rutherford, *Staff Editor*^[1]

In September 2017, the Interior Secretary Ryan Zinke recommended that President Trump modify ten national monuments created by his predecessors.^[2] The recommendations included shrinking the boundaries of four national monuments and the Secretary's set of recommendations for the listed monuments emphasized permitting "traditional uses" that are currently restricted within the monuments' boundaries, such as "grazing, logging, coal mining and commercial fishing."^[3] The memorandum highlighted the language of the Antiquities Act of protecting sites through "the smallest area compatible with the proper care and management of the objects to be protected,"^[4] which is frequently used to defend the President's power to both designate and abolish a national monument.

The U.S. Constitution's Property Clause gives Congress exclusive "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."^[5] It remains well established that when exercising this power, Congress may manage public land. Using the Property Clause, Congress delegated part of its authority to the President under the Antiquities Act of 1906.^[6] Congress authorized the President "in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic and scientific interest that are situated upon lands owned or controlled by the United States to be national monuments," and to "reserve parcels of land as a part of the national monuments" that comprise "the smallest area compatible with the proper care and management of the objects to be protected."^[7] Since this delegation of authority, presidents have declared by proclamation 157 national monuments.^[8]

Following the Secretary's memorandum, President Trump signed two proclamations on December 4, 2017 that dramatically reduced the size of two national monuments in Utah—The Bears Ears National Monument and the Grand Staircase-Escalante National Monument.^[9] Past presidents have reduced national monuments, however, this proclamation marked the largest attempt in history to downsize national monument designations.^[10] Bears Ears, a last-minute national monument designated by former President Obama, is slated to be shrunk by 85%, and Grand Staircase-Escalante, a President Clinton monument designation, is slated to be shrunk by around 46%.^[11]



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There have been a “flurry” of lawsuits following this announcement in an attempt to block the substantial cuts to the monuments.^[12] After the proclamation to reduce the size of the two national monuments, The Wilderness Society and a coalition of other environmental groups filed suit against President Trump, Secretary Zinke, and the Director of the Bureau of Land Management, Brian Steed in the District Court for the District of Columbia.^[13] The question of whether the President has the authority to reduce the size of a national monument remains unsettled, but the implications of this suit could greatly alter the course of federally protected lands. Though it remains relatively uncertain of whether the President has the authority to reduce a national monument, the D.C. Circuit has held that judicial review of a monument designation is available to ensure that the proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority.^[14] Further, it was held in a subsequent case that the inclusion of ecosystems and scenic vistas does not violate the Act, and that the President does not have to make any particular investigation into the size of the designated area, which essentially has been read out of other past decisions.^[15]

The current suit claims that the President exceeded his authority under the Antiquities Act by proclaiming a reduction in the two monuments and that the President’s action purports to “overturn congressional legislation that added lands to the [Grand Staircase-Escalante] Monument.”^[16] It remains largely disconcerted whether a President can unilaterally reduce a monument, but many scholars believe the President has a very powerful ratchet that is only given one way.^[17] In the lawsuit, it is argued that the President’s power is limited to “*declare...national monuments*” and “*reserve parcels of land as a part of the national monuments*.”^[18] This view interpreting the language of the statute narrowly is common among proponents of protecting monuments. Those proponents believe Congress did not authorize the President to abolish national monuments, in whole or part, once they have been designated; however, the Act is not clear on who possesses that power.^[19] Currently, there has not been a president that has ever revoked a national monument proclamation and it has been suggested that the President does not have the implied authority to do so.^[20]

The areas cut out of the Utah monuments are believed to be rich in oil, coal, and uranium which further pronounces the current Administration’s view of trying to reduce the importation of oil and reviving the coal industry while bringing more American jobs to the energy sector.^[21] However, the day after the announcement, Utah’s governor and several House Republicans proposed banning mineral extraction within the original border of Bears Ears.^[22] This could potentially derail the administration’s plans because most of the areas thought to have the most oil and gas are within the original borders, and oil and gas regulation is generally left to the states.^[23] When the Court hears this case, it will have the opportunity to settle the long debate of whether a President can substantially modify a national monument proclamation, and, if so, under what circumstances. Further, the outcome of this case will determine on how the Antiquities Act is read as a whole. The outcome, though, will have lasting consequences on future public land designations and preservation, particularly in the western United States.

^[1] J.D Expected May 2019.

^[2] Juliet Eilperin, *Shrink at least 4 national monuments and modify a half-dozen others, Zinke tells Trump*, WASH POST (Sept. 17, 2017) https://www.washingtonpost.com/national/health-science/shrink-at-least-4-national-monuments-and-modify-a-half-dozen-others-zinke-tells-trump/2017/09/17/a0df45cc-9b48-11e7-82e4-f1076f6d6152_story.html?utm_term=.8ab6ebb54809.

^[3] *Id.*

^[4] The Antiquities Act of 1906, 54 U.S.C. § 320301(b) (2016); Memorandum from the Secretary of the Interior Ryan Zinke on the Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act to the President <https://assets.documentcloud.org/documents/4052225/Interior-Secretary-Ryan-Zinke-s-Report-to-the.pdf>.

^[5] U.S. Const. art. IV, § 3, cl. 2.

^[6] The Antiquities Act of 1906, 54 U.S.C. § 320301

^[7] The Antiquities Act of 1906, 54 U.S.C. § 320301 (a)-(b)

^[8] See, e.g., Robinson Meyer, *It’s More than Just a Monument*, THE ATLANTIC (Dec. 4, 2017).

^[9] See, e.g., Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017) <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html>.

^[10] Meyer, *supra* note 6.

^[11] See, e.g., John Dawsey & Juliet Eilperin, *Trump shrinks two huge national monuments in Utah, drawing praise and protests*, WASH. POST (Dec. 4, 2017)

https://www.washingtonpost.com/politics/trump-scales-back-two-huge-national-monuments-in-utah-drawing-praise-and-protests/2017/12/04/758c85c6-d908-11e7-b1a8-62589434a581_story.html?utm_term=.e93383d37653.

^[12] Brady McCombs & Michelle Price, *Patagonia joins lawsuit to block Trump's cuts to Utah's Bears Ears*, USA TODAY (Dec. 6, 2017) <https://www.usatoday.com/story/news/politics/2017/12/06/patagonia-president-trump-national-monuments-bears-ears/929468001/>.

^[13] *Wilderness Society v. Trump*, 1:17-cv-02587 (D.C. Cir. Dec. 4, 2017).

^[14] *See Mt. States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002).

^[15] *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002); see also, *Cameron v. U.S.*, 252 U.S. 450 (1920) (the court essentially read out the "smallest area compatible" limitation of the Antiquities Act).

^[16] *See Wilderness Society*, 1:17-cv-02587 at 6.

^[17] Alexandra M. Wyatt, Cong. Research Serv., *Antiquities Act: Scope of Authority for Modification of National Monuments* (2016) https://www.peer.org/assets/docs/12_5_16_CRS_memo.pdf.

^[18] *See Wilderness Society*, 1:17-cv-02587 at 21 (emphasis added).

^[19] *See, e.g.*, Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473 (2003)

^[20] *See Wyatt, supra* note 16 at 3; see also 39 U.S. Op. Atty. Gen. 185, 189 (1938).

^[21] Press Release, The White House, *President Donald J. Trump Unleashes America's Energy Potential* (June 27, 2017) <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-unleashes-americas-energy-potential/>.

^[22] Laris Karklis, Bonnie Berkowitz & Tim Meko, *Areas cut out of Utah monuments are rich in oil, coal, uranium*, WASH. POST (Dec. 7, 2017) https://www.washingtonpost.com/graphics/2017/national/utah-monuments/?utm_term=.0e6c3db7d0e3.

^[23] *Id.*

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