Intro:

Welcome to Clean Law from the Environmental and Energy Law Program at Harvard Law School. In this episode, EELP senior staff attorney Sara Dewey speaks with Andy Mergen, faculty director of the Emmett Environmental Law and Policy Clinic at Harvard Law School and former chief of the appellate section of the Environment and Natural Resources Division at the Department of Justice. Andy and Sara discussed the origin and evolution of presidential authority to designate national monuments under the Antiquities Act, how Congress and the courts have responded to these designations over the act's 118 year history, present day legal challenges to the Bears Ears and Grand Staircase-Escalante National Monuments, and what could be ahead for monuments in the Supreme Court. We hope you enjoy this episode.

Sara Dewey:

Welcome to Clean Law. I'm Sara Dewey, an attorney with Harvard Law School's Environmental and Energy Law Program, and I'm thrilled to speak today with Andy Mergen, faculty director of the Emmett Environmental Law and Policy Clinic at Harvard Law School and former chief of the Environment and Natural Resources Division's appellate section at the Department of Justice. Andy, thanks so much for speaking with me today.

Andy Mergen:

Good morning. I'm thrilled to be here.

Sara Dewey:

As we anticipate the September oral arguments for the Tenth Circuit challenge to Bears Ears and Grand Staircase-Escalante monuments in Utah. I think this is a great time to talk about how we got here, what to look for in oral argument and the key issues we're following in this case and other public lands litigation. So I'd love to start with your experience working on public lands cases at the Department of Justice over your long career there. Can you talk a little bit about the Antiquities Act cases you worked on and how they shape your thinking about the challenges that we're seeing to the act today?

Andy Mergen:

Yeah, of course. So I spent 33 years at the Environment and Natural Resources Division and during that time from about 2000 on, I supervised the Public Lands Docket in the appellate section. So I was involved in the defense of the Clinton-era monuments that went to the DC Circuit during the Clinton administration. I worked on the Northeast Canyons Monument challenge more recently, and so I've been around the monuments issues a long time. There has been a lot of monuments litigation over the years. My colleague, Todd Kim, who is currently head of the environment and Natural Resources Division, worked on an early challenge to Grand Staircase in the Tenth Circuit. So these challenges have been around a long time.

Sara Dewey:

So before we get to the current cases, let's talk about the statute itself. The act was passed in 1906 during the Roosevelt administration to protect, and now I'm quoting from the act, "Historic landmarks, historic and prehistoric structures, and other objects of historic and scientific interest."

Andy Mergen:

Just to focus specifically on the text of the act briefly, the act says that the president is authorized in his discretion to declare by public proclamation, historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest. It's this historic and scientific interest that has become very, very important in the history of the Antiquities Act. And furthermore, the act contains this phrase that is frequently a source of controversy that these objects that are protected by the monuments are intended to be confined to the smallest area compatible with the proper care and management of the objects to be protected. Now, when Congress enacted the Antiquities Act, there were two important broadenings of prior legislation. One, it expanded it to include the scientific interests, objects of scientific interests, and two, although it includes the language about smallest area compatible, it does not have a specific acreage determination. That was in earlier versions of the legislation. But at the end of the day, Congress really intended to invest a tremendous amount of discretion in the president in making a determination about the smallest area compatible with the protection of those objects.

Sara Dewey:

The origins of the act are an interesting story, so I'd love for you to share a bit of that history for our listeners.

Andy Mergen:

Yeah, it's a really interesting story and I won't spend a lot of time on it, just to say that at various times it engaged a number of the leading public intellectuals is the time. It's very much a statute that is a hallmark of progressive-era conservation statutes. It envisions a very robust executive, which was common at the time. Here I'm doing this podcast at Harvard Law School and just a block or two away, Frederick Ward Putman, who is a very influential American archeologist in the late-19th and early-20th century, played an important role in getting the Antiquities Act started. He worked with a famous American geologist of the period, Grove Karl Gilbert, one of the most innovative geologists at the time who had worked on the Wheeler Survey in the American West and had gotten to know the richness of American antiquities.

And from that early effort, an archeologist named Edgar Lee Hewett became involved in the efforts and they engaged with a prominent Iowa Republican congressman named John Lacey, a powering figure in terms of American conservation who took it upon himself to really pull the Antiquities Act across the finish line. Now, I think when we look at the Antiquities Act through our modern eyes, we see this as investing a lot of power in the president. And I think we'll come back to that as we talk about the act and the challenges to the act because the president alone declares these national monuments. But at the time, the ability of the president to reserve or withdraw land was not at all controversial. In fact, it was very consistent with the practice of presidents sort of pulling and setting aside land. So there would've been nothing sort of unusual about the power invested in the president by this act, judging by the standards of 1906.

And also the act evolved and we'll talk about that in a little bit. So it started off with these American archeologists and folks concerned about American antiquities seeking to prevent those artifacts from being looted. These folks were very inspired by European efforts to preserve antiquities like Stonehenge, or whatever. But it evolved into something broader. As you noted, the language covers not just historic and prehistoric structures, but also objects of historic or scientific interest, and that was very deliberate. The act went through some narrower versions just tailored to antiquities and was broadened out to include these objects of scientific interests as well.

Sara Dewey:

Starting with President Roosevelt, over time, presidents from both political parties have used the act to designate, I think 163 monuments, including some vast marine areas in more recent administrations. And about half of the national parks, including some of the most beloved, the Tetons, the Olympics, Acadia, Grand Canyon started as monuments. So can you talk a little bit more about how presidents have interpreted and acted on this authority over time, starting with that kind of grounding in the legislation itself?

Andy Mergen:

Yeah, so early on, some of the earliest monuments, as you notice, the Devil's Tower, Grand Canyon, Mount Olympus, which turns into Olympic National Park. So those are some of the early ones, and almost every president, not every president, has engaged in the creation of monuments over time. Those early efforts preserved some of the crown jewels, as you note of our park system parks that everyone has visited or everyone aspires to visit because of their beauty and grandeur. And later on, presidents took this on as something cool that they could do. We talk about sort of limiting principles behind the act, and it's important to flesh out one right at the start, which is that the president can only declare a national monument of lands that are already in federal possession or federal ownership. So that's very much a limiting principle. And so when the president declares these lands that the federal government already manages to be a national monument, he's elevating them.

And as you note, one of the biggest monuments was created by George W. Bush, the Northeastern Hawaiian Islands, Papahānaumokuākea National Monument. That's a huge area because it encompasses not just Laysan Island and Midway, but all of the ocean around it. And presidents have understood this to be a good way to firm up their sort of conservation bona fides, President Obama focused on some monument designations that sort of elevated key moments in American history, some Reconstruction-era monuments, the Stonewall Monument in New York. So presidents have used this power and understood this power to advance their bona fides as conservation presidents, to direct Americans to key elements of American history. But it's also true that monument designation has often been controversial. So we mentioned Grand Teton and the designation of Grand Teton was controversial at the time. I think most people value Grand Teton as a national park today, but it was very controversial at the time, and Congress immediately followed that monument with legislation that prohibits the president from designating a monument in Wyoming.

So when Congress doesn't like what the president does here, they can respond. President Carter used his power under the Antiquities Act to sort of force Congress into addressing some key issues related to the state of Alaska and the management of lands in Alaska. And that was very controversial at the time, but it did prompt an amazing conservation bill, the Alaska National Interest Lands Conservation Act, which preserved some of those monuments designated by President Carter and also advanced a resolution of some longstanding issues in Alaska. And that was controversial at the time, for sure. So all monuments are not accepted by all elements of American society, but by and large presidents have understood that this is a very cool power to exercise. And I would say probably most Americans don't have too many gripes about the exercise of this power.

Sara Dewey:

And can you say a little bit more about why you think it's important for the president to have this authority distinct from the congressional role in managing public lands? I mean, given this back and forth over history that we've seen, I think they're in dialogue with each other, but why do you see that this kind of specific authorization is so important?

Andy Mergen:

We talk about we have three branches of government and two of those branches are political, democratic, responsive to an electorate. And when the president sets aside lands as national monuments, people have elected the president, they have an idea about what his or her agenda might be. And in that way, I think it's a really interesting conservation tool because it very expressly ties a conservation decision to this powerful figure in our constitution. And at the time, as I said, I think what we sometimes get lost about the debates about the Antiquities Act, at the time these presidential reserves and withdrawals was a pretty common tool. It's fallen out of use except for the Antiquities Act, which Congress has not changed since its inception over 100 years ago, has limited in the case of Wyoming monuments and has responded to presidential action in the case of the Alaska National Interest Lands Conservation Act.

But by and large, I think most Americans are satisfied. And the thing about these lands, they have to be federal lands in the first instance, is that they belong to all of us. That all Americans can claim an interest in the Grand Canyon, in Devil's Tower. And these battles about monuments that we're going to turn to like the Utah monuments are hyperlocal focused, they're teed into local objections. But these lands, they belong to all Americans and I think the president exercising this power is a potent reminder of that fact.

Sara Dewey:

So before we turn to present day, we'll talk about how the Court has handled monuments controversies in the past. So there are two cases in which the act has made to the Supreme Court. The first is *Cameron v. United States* in 1920, which was about a mining claim on the rim of the Grand Canyon and the holder of that claim trying to charge tourists crossing over that piece of land, and then *Cappaert versus United States* from 1976 about water for a rare pupfish in Devil's Hole in Nevada. And in both cases, the Court upheld the president's Antiquities Act authority and really helped establish the bounds of that authority. So could you talk a little bit about those cases?

Andy Mergen:

Yeah, and actually I would include a third case here as well, but let's start with the *Cameron* case. This is the Grand Canyon case, and it does have a colorful history of a person trying to monetize their interests in the canyon. And one of the issues in the litigation there before the Supreme Court was whether the canyon itself was an object. So this has been a constant theme in challenges under the Antiquities Act, and the Court had no problem upholding the Grand Canyon designation that the canyon itself, this incredibly magnificent geologic feature was a legitimate scientific object for purposes of the act. *Cappaert,* it's a really important case. I don't think it gets the attention it deserves because it's an important Endangered Species Act case. It's an important water rights case, and it's an important monuments case and at issue there was pumping that would have put in peril the Devil's Hole pupfish, this object of scientific interest in the Death Valley National Monument, and the Court upheld the restrictions on pumping to preserve the fish.

I encourage everyone to go check this place out. It doesn't stand out quite like Devil's Tower or the Grand Canyon. It's a water feature in Nevada. Most of Death Valley National Park now is in California, but this piece is in Nevada where the Devil's Hole is, and it's an incredibly important hydrologic feature. The groundwater there is incredibly deep. The water is very warm. When there are earthquakes in Tokyo, they can record it at Devil's Hole. It's an area that teaches us a lot about earth science. It's also an area of considerable endemism, not just for fish species, although there are several species of pupfish there. So an incredibly interesting area. When the Court upholds and protects that monument in the face of the fish can't be a scientific object, this goes too far, it infringes on water rights, it's a really profound decision. And the brief was filed by Bork who was solicitor general at the time.

The case was argued by Ray Randolph, who's a fairly conservative judge on the DC Circuit, and their brief is a full-throated defense of the Antiquities Act, of the Endangered Species Act of all of these great values. And the third case I just mentioned very briefly is the *US v. Alaska*, an original action before the Supreme Court in 2005 involving sort of the boundaries of Glacier Bay National Park, which was set aside as a national monument. A couple of things that are important there, which is that the Court recognizes that Glacier Bay is a legitimate monument. It has whales, it has wildlife, it has these geologic features. And the state of Alaska in this case was represented by John Roberts who represented Alaska in litigation for many years. And I think that in part explains Chief Justice Roberts' particular interest and knowledge of the Antiquities Act.

Sara Dewey:

We're now in a moment of strong legal opposition to the Antiquities Act from some parts of the right. And since Chief Justice Roberts wrote in the denial of a cert petition about the boundlessness of the act, advocates have been looking for a case to bring to narrow this presidential authority. You talked a little bit about the fact that this is federal land is one of the limiting principles. Are there other ways you'd describe the bounds of presidential authority under the Antiquities Act and how Chief Justice Roberts might be thinking about that?

Andy Mergen:

Yeah, just a word about this particular controversy, President Obama declared the Northeast Canyons and Seamounts Marine National Monument, an area here off of the East coast. It's a pretty remote area. It has this interesting bathymetry, it has these canyons and seamounts that's important for wildlife. As we know, underwater features can concentrate wildlife in a way that supports whales and other charismatic fauna and uncharismatic, but important sea creatures. So this monument was declared to be administrated by NOAA, the agency within the Commerce Department that deals with marine features. And it was challenged and the challenge is interesting. It was challenged by fishermen. The monument is closed to fishing. And so they alleged that they were harmed by this and some of their arguments related to the president's authority. The Antiquities Act has traditionally been understood to apply to lands, federal lands. And so the question is when all of the features are underwater, does that count as lands?

And then also some of the monument's boundaries are in the exclusive economic zone. So we understand also that the act applies to lands that are under federal control. And when you're in the EEZ, is there sufficient federal control for purposes of the Antiquities Act? So some really interesting legal issues. Also, the traditional challenge, which is that the monument's too big for the objects, et cetera, that these aren't appropriate objects for the Antiquities Act. And the DC Circuit upheld the act, I should say that I am on the briefs in that case. And so was involved in defending that

particular monument. DC Circuit upholds the monument as did the lower court, DDC and a cert petition is filed and the cert petition, the government files its response and then there's no action. The case sits up there for a long time, which if you're a lawyer trying to hold off a cert grant, that's very concerning.

The longer you go without hearing from the Court, the more anxiety it produces. And so finally, this decision issues and cert is denied, but Chief Justice Roberts alone issues a statement regarding respecting the denial of cert. And Chief Justice Roberts is, I think most lawyers know is an excellent writer. He's a really gifted communicator and he does a good job of sort of saying, "I don't understand why the president has the powers under the Antiquities Act, because I don't think of seamounts and canyons as antiquities." And I don't think that's the dictionary definition. And then he sort of expresses some concern. The act requires that the boundaries of a monument be the smallest compatible with protection of the objects. And he sort of raises this alarm that presidents have gone too far in designating enormous areas under this authority of Antiquities Act.

And by issuing the statement, he's sort of sending up like, I'm an old guy, I'll just say the bat signal to folks who are opponents of the Antiquities Act or lawyers who are anxious to get a case before the Supreme Court. And they read this and they say, yes, we should be looking and challenging this act because the Chief Justice is signaling that he is interested in hearing a challenge down the line. And so that's where we find ourselves now. And I do think it's interesting that of all of the justices on the Supreme Court, the one justice who has actually litigated an Antiquities Act case would be the Chief Justice. So no surprise then that he's the one who puts the marker down because he represented the state of Alaska in the Glacier Bay litigation.

Sara Dewey:

Great. That's helpful. So before we turn to the Utah case, let's talk about one more case in the Supreme Court, which was that earlier this year, the Court decided not to grant cert on the Cascade-Siskiyou National Monument cases, and those were two favorable decisions for the government and for the authority of the Antiquities Act in the DC Circuit and the Ninth Circuit and Justices Kavanaugh and Gorsuch indicated that they would've granted cert. So what do you make of the decision not to grant cert there, and do you think it was the wrong case or a shift in the appetite to address this issue in the Court? How are you thinking about that?

Andy Mergen:

Yeah, so that's a really interesting case. And again, I should say that full disclosure, I worked on both of those cases in the DC and Ninth Circuits. And so the issue in both cases is the same. They just arise in different circuits. One out of DC and one out of the Ninth Circuit, and they relate to a particular monument in Oregon that consists in part of lands that are governed under an old statutory regime called the O&C Act, Oregon and California Act. When the West was settled, Congress especially understood that we needed transcontinental railways, that the railroads were going to boost our economy. This is all along in our history, we've seen technologies that become very, very important as economic engines and the railroads were that engine. And in order to subsidize the enormous amount of capital that it takes to build a railroad, railroads got public lands that they could then dispose of or utilize, as a subsidy for this work that they're doing.

And the O&C lands were lands that are mostly now managed, I think entirely managed by the Bureau of Land Management in the Department of Interior that had initially been given to the O&C railroads and then came back into federal ownership. And what's interesting about the O&C Act is that it says that it arguably makes timber harvest the primary purpose of the act. And so the

challenge in these cases to the monument is that it's inconsistent with the O&C Act because once the monument's designated, timber can't be harvested, and these are interesting cases, but they're hyperlocal. They deal with this one particular statute in this one particular location. Now, very, very good lawyers looked at these decisions and said, "We know that Chief Justice Roberts is very interested in Antiquities Act. These are an Antiquities Act case, so we should spin them to get his attention."

And the very good lawyers on this case were Paul Clement and Don Verrilli, both of whom had served as solicitor general, Clement for Bush and Verrilli for Obama. And so they made a pitch that these cases were the right cases to get Antiquities Act issues resolved by the Court. But they're really not, because they deal very much specifically with this O&C Act. So maybe not a surprise, that cert is denied. Somewhat interesting that two Justices thought cert should be granted, which again, I think adds fuel to the fire that there's some hunger on the part of the Court to hear some Antiquities Act cases, but pretty clear that the O&C Act cases were too particular to raise the sorts of issues that Chief Justice Roberts flagged in the Northeast Canyons case.

Sara Dewey:

Let's turn now to the Antiquities Act cases in Utah and Arizona. Starting with Bears Ears and Grand Staircase-Escalante in Utah, these monuments were designated by Presidents Obama and Clinton respectively, and then drastically narrowed under Trump and restored by President Biden. They have incredible cultural, ecological, and historic value and a particular importance to many of the Tribes in the region. Could you talk about the significant role of the Tribes?

Andy Mergen:

I think one of the things that's really important when we talk about federal public lands, lands that are under federal management, which these lands are, we've noted that only federal lands can become available as national monuments, is that we have written out of the history of our lands in a very profound way the Native Peoples who lived here. All of these lands were occupied at contact and they continue to be occupied and utilized by vibrant Tribal societies today. But so much of what we call natural resources law or public land law has erased the people from the landscape, even though they're still here living consistent with their cultural values and utilizing the lands in the same ways that they have since time immemorial. And the Bears Ears monument is particularly interesting. Here at Bears Ears, we have the sort of traditional cliff dwellings and prehistoric sites that the drafters of the Antiquities Act were concerned about.

And early on, the Bears Ears region was identified as a place that would qualify as a national monument, but it did not become a national monument until the Obama administration. And what brought the Bears Ears area over the line as a national monument is the participation of the Tribes. And there are five Tribes for whom this area is particularly important. That would be Hopi, the Navajo Nation, the Pueblo of Zuni, the Ute Mountain Ute Tribe, and the Ute Tribe all have strong cultural ties to this area. And they really pushed forward this monument, which is, if you think about it truly profound in that so many of the other monuments were sort of focused on the past to the extent that they dealt with areas that were of traditional cultural importance to the Tribes. The initial monuments were focused on these structures belonging to the quote, unquote, "ancients."

But with Bears Ears, the Tribes themselves moved and persuaded the federal government that a monument here was important and persuaded the Obama administration. And that's very much captured in both the Obama and Biden proclamations for this monument, which lay out in considerable detail the cultural connections, the sacredness, the historical connections to these

lands. And I think what's really, really profound about Bears Ears in particular is that this is a time in which the federal government is specifically recognizing the current ties to these lands, the vibrant communities that have had a traditional attachment and continue to have an attachment to these lands.

Sara Dewey:

Thanks, Andy. In the Tenth Circuit case challenging these monuments, oral argument will be held in September and in district court, a judge dismissed the lawsuits from the state of Utah and counties and private landowners saying that the court didn't have authority to review the designations. And now here we are with the state of Utah leading this appeal to the Tenth Circuit. The government is arguing that the monument designations are not reviewable by courts, and also that petitioners lack standing. Let's start with the sovereign immunity argument. Can you say more about this argument and what you make of it?

Andy Mergen:

Yeah, no, I mean, first I just sort of say hopefully there are some law students listening to this podcast and the issues in this case show why all of us here who teach environmental law or natural resources law at Harvard encourage you also to take federal courts, because buried in this case are a lot of really interesting federal jurisdiction questions. And the first of which you've raised is this issue of sovereign immunity, the notion that this at the end of the day is an action by the president, not by an agency. Law students and lawyers know that agency actions are reviewable under the Administrative Procedure Act, a game changer in 1946, which introduces what I think is understood to be a presumption of reviewability for agency action. But the president is not an agency and presidential action has long been understood to be immune in a wide variety of circumstances.

And so here the government has pressed in the district court and presses again in the Tenth Circuit, a fairly aggressive sovereign immunity argument. This is one of the elements of these cases, which will be argued as you note on September 26th at the University of Colorado Law School. So open to the public in the courtroom at University of Colorado in Boulder. And this sovereign immunity argument is interesting because in previous challenges to the monuments like the Northeast Canyons and the Clinton-era monuments that were challenged in the DC Circuit roughly contemporaneously with their creation, the courts allowed for review. It's a pretty narrow review. It's sort of like, does it look like the president adhered to the statutory commands? But in the Tenth Circuit, the government is arguing, not even that review is available. Now, I will say, having worked on the DC Circuit cases, that there's a body of case law in the DC Circuit that would have made the argument that the government's advancing in the Tenth Circuit very difficult.

There's a case called *Reich* from the Clinton era that allows for a non-statutory review of presidential actions in certain circumstances. To my knowledge, there is no equivalent case in the Tenth Circuit. So the government is free to make this argument. And this is interesting in part because the government has, I think, some 41 amicus in the case, 41 groups supporting the creation of these monuments, which I think also underscores the general popularity of these monuments. But these amicus, none of them are supporting the government's sovereign immunity argument for the obvious reason that they're worried that there might come a president who's not favorably inclined to monuments and they want to be able to obtain judicial review. But it also allows for an opening for the plaintiffs here to argue that what the district court did is completely wrong and nobody agrees with the government's argument, which is somewhat unfortunate as a former government lawyer.

Sara Dewey:

And what other issues will you be watching most closely in this case?

Andy Mergen:

Well, I think the standing arguments are powerful. One of the things too, we go back to the notion that the opponents of the monuments always say that these monuments are dramatic and unheralded, et cetera, et cetera. But at the end of the day, we're talking about federal lands. So if you're grazing on federal lands, you're doing that with the government's permission. If you are mining on federal lands, you are doing that with the government's permission. So I think in a lot of regards, it's very hard to show standing, and I think the government has decent standing arguments. And for an environmental lawyer, the 23-24 Supreme Court term was something of a disappointment. But as a lawyer who thinks that standing is a doctrine that has utility, the Court has rendered some decisions that should put some wind in the government's sails. In so far as standing is concerned, and we'll pay a lot of attention to those issues. The opponents to these monuments basically argue as if those arguments are completely frail and without force, they want to get to the merits as quickly as possible.

Sara Dewey:

And in oral argument in particular, what will you be listening for?

Andy Mergen:

I'll definitely be interested to see how seriously the panel takes the sovereign immunity arguments. I mean, I do think there are serious arguments. I think that folks have sort of said, well, the DC Circuit rule is the better rule, and I understand why people make that argument. But the DC Circuit rule very much is derived from DC Circuit precedents, existing precedents. So it'll be interesting to see how seriously they take that. And if they disagree, if the panel disagrees with the government's sovereign immunity and standing arguments, then I think the right result is to remand back to the district court. The district court said, no waiver of sovereign immunity, not reviewable. If the Court disagrees, it should send it back, but that's not what the opponents want. They have briefed this up to get it to the merits, to the panel. And so I'll be very interested to see what the panel thinks about if they disagree with the government on sovereign immunity, what the right remedy is.

And how people feel about that will depend entirely on whether they think it's a good panel or not. Because if it's a good panel for the government and for the monument boosters, for the Tribes, for the environmental groups, then people will be sort of content maybe to allow the panel to reach the merits. For the opponents, I don't think it matters very much because I think their goal is to get it to the Supreme Court, and they will keep knocking at that door. So if there's a remand, they may nonetheless try to get it to the Supreme Court because that's where they understand their allies are. And this case has always been, it is being briefed and argued as a Supreme Court case. That's where the opponents want to end up at the end of the day.

Sara Dewey:

Well, that gives us lots of good things to watch for in September. Andy, can you talk a little bit about the role of environmental groups as interveners in this case?

Andy Mergen:

I think the role of the environmental groups is to remind us that these are everyone's lands. I mean, I've spent a lot of time in Grand Staircase. I was involved in some litigation that required me to spend a lot of time in that area. I got to know some of the people who are very upset about this monument declaration, Grand Staircase. And when President Clinton declared the monument, he did it from Arizona, not from Utah. The monument is in Utah, but they did the ceremony with Secretary of Interior Babbitt, et cetera, in Arizona because they knew that there was so much local opposition. Now, whether that local opposition really persists today, I wonder, because if you go to Grand Staircase, you'll see, unsurprisingly, an enormous business community established to serve the many, many visitors from the US and all over the world that come to enjoy that area.

But at the time, it was very controversial. And I think what the national environmental groups and the local environmental groups remind us is these lands belong to all of us. There were federal lands before, they're federal lands now, and they belong no less to people in Roxbury than people in Utah. And I'm excited to note that I've only been at Harvard a very short period of time, but one of my students is on the brief for the Native American Rights Fund, so that's exciting.

Sara Dewey:

Very cool.

Andy Mergen:

One of my students is on the amicus brief for the paleontologists who make a very strong point about the incredible paleontological resources in this area, resources that can tell us a lot about Earth history and our past. It's very exciting to have our students engaged, and the role of these groups is really important.

Sara Dewey:

So let's turn to the Arizona case that's challenging the ancestral footprints of the Grand Canyon Monument in District court. These lands are beyond the boundaries of the Grand Canyon National Park, and they have incredible cultural and spiritual significance to numerous Tribes as well as incredible ecological value. And in this case, challenges were brought by the Arizona legislature, the state treasurer, counties and towns, and a rancher seeking to declare the monument or the Antiquities Act itself unconstitutional. And the federal government is arguing that the plaintiffs lack standing. And I should also mention that the Arizona governor and AG have intervened in the case in support of the monument designation. Like with the Utah case, there are state and local government actors and private landowners challenging the designation. And so in this case, what do you make of the petitioners' standing arguments?

Andy Mergen:

I mean, one thing that's notable about the Arizona Proclamation is that it recognizes that some of these rights can persist. In certain circumstances, grazing rights can persist, mining rights can persist. The proclamation is very clear that it is not intended to upset existing water rights regimes. So all of those things I think make the standing arguments more difficult in this case. And so the arguments related to standing seem speculative, and that's what's going to be sorted out. And then again, a plug for federal courts, there's this other really interesting issue related to the intervention of the governor who's basically arguing that you have in Arizona, I think what people would call a purple state. Sometimes it leans red, sometimes it leans blue. It has a pretty conservative legislature, it has a Democratic AG and a Democratic governor who are essentially arguing that

they're the only people who have standing to challenge this designation. And I think that adds another layer of complexity to this case that makes it definitely worth following.

And again, I sort of come back to the notion that one of the things that criticisms of this act is that it invests enormous power in the president to do these things. And Paul Begala, who was an advisor for President Clinton once quipped that this is an act that with a stroke of the pen, the president could do something really dramatic. But these are federal lands at the end of the day, they're lands that belong to everybody. And then also, unlike some other areas where we sort of say, well, there's the backstop of Congress, in the Antiquities Act, Congress has never changed the act and the backstop has been applied. It was applied in Wyoming where the president is without the power to declare a monument, and it was applied in the Alaska lands circumstance.

So Congress is a backstop here. I think that's the way that these issues should be resolved. Their general performance in this area has been to take incredibly popular national monuments and turn them into national parks. That's where Congress has been the most active. But Congress has also said, "Too much. You've gone too far." And I think that in our system is the right way to settle these things out. And so I'm not surprised that there are robust standing arguments here because I think that, again, these are federal lands. There's a lot of stuff built into the Arizona proclamations that are going to make the standing arguments difficult and people who are unhappy have recourse through Congress.

Sara Dewey:

So looking ahead, if either one of these cases in Utah or Arizona wends its way to the Supreme Court, what concerns you most about that? Or what will you be watching for?

Andy Mergen:

I feel strongly, and this is going to come as a surprise to nobody, because I will own my priors as somebody who spent a part of my career defending these designations. So I think that they are lawful. I'm really glad you asked this question because this has been a momentous term in the Supreme Court. We're still sort of sorting it out. And one of the things that we talk about is sort of like originalism focus on statutory text. And I think the people who are challenging these monuments think they have winning arguments on the text, and they're focused on objects and the language in the act that says it has to be the smallest area compatible with the protection and preservation of those objects. And so they feel like they've really got strong textual arguments. But one of the things that we've learned a lot this Court's term is that, one, I think those arguments are less powerful than they think because we have the legislative history that we've discussed as to how we got to objects.

With the smallest area compatible, the Congress rejected precise limits on that and invested in the president a lot of discretion in terms of how big that area is. And that's discretion that I think should be unreviewable. And I think conservatives should probably embrace that view. And then the other part of it though, is that as we talk about interpretation and textualism and originalism, great force has been placed on the contemporary understanding of legislation. And here, this is where monument defenders have a really, really good record to fall back on. You have the example of the Devil's Tower. You have the example of the Grand Canyon. You have the example of Mount Olympus, which in part was focused on particular wildlife features.

So the haters, that's what I'm going to call the people who want to take down the monuments, they say, "Well, you can't have animals and ecosystems are too broad, and it's really just about an

object, which is like a singular, particular thing." But I think that's pretty firmly rebutted by the contemporary understanding of the act. And the Court has told us, and on several occasions, that contemporary understanding of the act matters a lot. And so I would urge the Supreme Court to deny cert in all of these cases.

Sara Dewey:

So one final question, Andy, what do you think a narrowed Antiquities Act authority could look like for land conservation in the future if the Court did take one of these cases?

Andy Mergen:

Well, one, I don't even want to contemplate that possibility, but if I had to, I just sort of think that what we would get is very lengthy proclamations that would detail a large number of objects, and I would hope that the president could accomplish the same goals. It's just unfortunate that would be a longer, more complicated document to do it. I think these bland preservation enactments, they're really important because Congress can erase any one of them in any time it gets its act together and agrees to do it. And when we talk about Devil's Hole pupfish, which is in the Devil's Hole area, which is in the Ash Meadows National Wildlife Refuge, that area is now a focus of lithium mining, which can be a very big consumer of water, so those threats don't go away.

The proclamations, monument proclamations, they do go a long way in preserving the landscape. But the threats, they're sort of omnipresent. Remarkably on August 20th, the state of Utah filed a complaint before the Supreme Court, which a state can do in exceptional circumstances where it's suing the United States, alleging that all of the lands managed by the Bureau of Land Management in Utah should be managed by the state, and that the United States is without authority to possess those lands managed by the Bureau of Land Management. I think this lawsuit, which has gotten a lot of press, is very farfetched, but it, I think, well demonstrates the never-ending antagonism on the parts of a few people to public land management.

But the president having the foresight to protect areas like Grand Teton, Acadia, Grand Canyon, it really gives a hope for a whole generation of people to enjoy these things. And the threats never go away, and Congress can erase it, but without the president's action, I'd query whether we would have a Grand Teton Park or an Acadia Park, et cetera, et cetera.

To end on a hopeful note, on August 16th, President Biden designated a National Monument at the site of a 1908 race riot in Springfield, Illinois. A heavy subject to be sure, but that monument will help tell a painful but important story of the civil rights movement because out of that riot, the NAACP is born. And the president in his proclamation makes plain that it's important to tell these stories. Stories about resilience and change coming out of tragedy and changes that are positive for all Americans. And they tell us a lot about the vibrancy of our cultures. Just as the Bears Ears National Monument sends a strong signal about the vibrancy of the Native cultures that have utilized Bears Ears since time immemorial. These painful moments in our history often result in important positive changes. And monuments are a great place to teach those moments of history. And I think that it's important to end on the president using his powers under the Antiquities Act to designate a monument that tells an important story of our past.

Sara Dewey:

Yeah. Well, Andy, thank you so much for speaking with me today. I really enjoyed our conversation.

Andy Mergen:
Thank you.