UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HOPI TRIBE, *et al*., Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al*., Defendants.	Case No. 1:17-cv-02590 (TSC)
UTAH DINÉ BIKÉYAH, *et al*., Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al*., Defendants.	Case No. 1:17-cv-02605 (TSC)
NATURAL RESOURCES DEFENSE COUNCIL, *et al*., Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al*., Defendants.	Case No. 1:17-cv-02606 (TSC) CONSOLIDATED CASES

AMICUS CURIAE BRIEF OF LAW PROFESSORS SUPPORTING PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES, AND REGULATIONS

SCHOLARLY AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF INTEREST

Amici are law school professors who are experts in the fields of public land law and natural resources law. Most have written and published extensively in these fields. Through our teaching and scholarship, we promote understanding of the law governing management of federal public lands, and the history of the law's development. This case presents a fundamental question about the administration of the Antiquities Act of 1906 (Act of June 8, 1906, c. 3060, *codified as amended at* 54 U.S.C. § 320301, *et seq.*). Central to the resolution of this case is an understanding of the history of public land law and the manner in which Congress has allocated authority in its various delegations of power to the executive branch. The undersigned professors and those listed in the appendix are uniquely situated to assist the court in resolution of the case. This Brief is filed pursuant to D.C. Local Rule 7(o).[1]

SUMMARY OF ARGUMENT

President Obama established the Bears Ears National Monument on December 28, 2016 pursuant to his authority under the Antiquities Act of 1906. Just under a year later, President Trump signed a proclamation that replaced the 1.35 million-acre Bears Ears with two much smaller monuments, comprising a total of only 201,397 acres. President Trump's proclamation went much further than adjusting the Bears Ears boundaries. It revoked the external boundaries, reduced the total acreage by 85%, and purported to create two newly named monuments. The issue in this case is whether President Trump's "repeal and replace" of Bears Ears was authorized by the Antiquities Act. The answer is no. The Act's plain text authorizes only

[1] The undersigned counsel for Law Professors are the sole authors of this brief, and no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no other person contributed money that was intended to fund preparing or submitting this brief.

designations, not repeals or modifications of monuments, and the Act's purpose and legislative history confirm this narrow delegation of congressional authority. In addition, Congress's major reform of public land laws in the 1970s created a comprehensive statutory and administrative regime for public lands management that leaves no room for capricious executive authority that is unauthorized by statute.

Modern federal public lands management is largely a creature of legislation. At first federal lands were generally left open for unpermitted public use, but since the earliest days of federal conservation policy, public lands management depended on Congress's delegations of authority to the Executive. The Forest Reserve Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (1891), *repealed by* Pub. L. No. 94-579, 90 Stat. 2791 (1976); the Forest Service Organic Act of June 4, 1897, ch. 2 § 1, 30 Stat. 34, 36 (1897), *repealed in part by* National Forest Management Act of 1976, Publ. L. No. 94-588, § 9, 90 Stat. 2949, 2957 (1976) (codified in 16 U.S.C. § 1609(a)); and the Pickett Act of 1910, ch. 421, § 1, 36 Stat. 847 (1910) all delegated authority to the President to withdraw lands for protective purposes. The latter two statutes provided executive authority to move lands in and out of withdrawn status. Sandwiched in between the Organic Act and Pickett Act was the Antiquities Act, which like the 1891 Reserve Act, granted the President the authority to withdraw lands, but not to remove them from that status. Instead, Congress reserved that power to itself. Congress has never modified that position, and instead has reinforced it over the years. Since the 1970s, Congress has created a comprehensive management scheme for public lands with only very narrow delegations of unilateral Executive authority. The Antiquities Act of 1906 is one such delegation, but as its text, purpose, and legislative history demonstrate, only for the protective purpose of withdrawals. Judicial deference to presidential proclamations is justified when the President stays within

Congress's express parameters of establishing monuments to protect objects of historic or scientific interest. It is unwarranted when, as here, the President exceeds his delegated authority under the Antiquities Act and eviscerates those protections.

I. The Antiquities Act authorizes the President to designate national monuments, but does not include the power to revoke or shrink national monuments.

A. The Antiquities Act's plain text includes only the power to designate monuments.

The Antiquities Act of 1906 constitutes a narrow delegation of Congress's constitutional authority over federal lands. The Act provides: "The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301(a). The Act further authorizes the President to "reserve parcels of land as a part of the national monuments." 54 U.S.C. § 320301(b). By its plain language, the Antiquities Act authorizes the President only to "declare . . . national monuments," and "reserve parcels," not to un-declare monuments or reverse the reservation of lands included within monuments.

When statutory language is plain and unambiguous, as it is here, there is no need to look further to discern congressional purpose. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (cautioning against speculation regarding congressional intent). The Act's plain text could therefore be the beginning and end of the question whether Presidents have the power to revoke or otherwise undermine previous monument proclamations. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 259 n.3 (2010) ("reliance on legislative history is unnecessary in light of the statute's unambiguous language."). Because legislative history and the principal administrative interpretation of the Act provide even further support for

the conclusion that the President is not authorized to revoke or repeal monument designations, they are discussed below.

B. Legislative history and administrative interpretations support the Act's plain text.

Congress's multiple protective purposes were reflected in the final version of the Antiquities Act, which authorized designation of "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." 54 U.S.C. § 320301(a). The initial impetus for legislation was extreme looting and destruction of Native American archeological sites, particularly in the Southwest and four corners region (where Bears Ears is located). *See* RONALD F. LEE, THE ANTIQUITIES ACT OF 1906, at 47 (1970). But even the earliest legislative proposals included broader protective purposes. One of the first proposed bills included protection for objects of scenic and scientific interest and natural wonders, as well as aboriginal antiquities. *See id*. at 48-51 (discussing H.R. 8066, 56th Cong. (1900)). Subsequent bills were drafted more narrowly, prohibiting acts of harming an "aboriginal antiquity" on federal land, or authorizing land reservations only up to 320 acres. *See* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473 (2003) (citing H.R. 8195, 56th Cong. (1900), and H.R. 9245, 56th Cong. (1900)). Department of the Interior officials responded with a broad proposal to authorize the President to set aside lands for expansive landscape protection purposes. *Id.* at 479–80 (citing H.R. 11021, 56th Cong. (1900)); *see* LEE, *supra* at 52–55. The bill that ultimately became the Antiquities Act reflected the more expansive view; it included authority to protect not only archeological sites, but also "objects of historic or scientific interest," and did not include any acreage limitations. 54 U.S.C. § 320301(a) (Supp. 2017).

The Supreme Court, in the first case to review a monument designation under the Antiquities Act, affirmed the broad protective purpose of the statute. In *Cameron v. United*

States, 252 U.S. 450, 454–55 (1920), Ralph Cameron, a miner and entrepreneur who had staked claims throughout the South Rim of the Grand Canyon, challenged President Theodore Roosevelt's 1908 Proclamation of the 808,000-acre Grand Canyon National Monument. The Supreme Court upheld the Monument, concluding, "The Grand Canyon . . . 'is an object of unusual scientific interest.' It is the greatest eroded canyon in the United States . . . is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders . . . ." *Cameron*, 252 U.S. at 455–56. The Court did not discuss whether the monument was "confined to the smallest area compatible with the proper care and management of the objects to be protected." *See* 54 U.S.C. § 320301(b). However, one can surmise from the quoted text that the Court believed the standard was quite easily met. *See also* JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION 57–60 (1987) (discussing Cameron's claims against the federal government). As *Cameron* and subsequent courts have held, the Antiquities Act's text and legislative history support presidential authority to protect objects of landscape scale. *See Cameron*, 252 U.S. at 455-56; *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002) (dismissing complaint for failure to allege facts supporting claim that Monument was not "smallest area compatible with proper care and management of the objects to be protected"); *Utah Ass'n of Ctys. v. Bush*, 316 F.Supp.2d 1172, 1179 (D. Utah 2004) (noting that "several presidents have used the Act to withdraw large land areas for scenic and general conservation purposes.").

C. Congress did not delegate authority to revoke or modify monuments.

Devoid from the Act's text and history, however, are any indication that Congress authorized the President to revoke or modify monuments. Those powers were reserved by

Congress to itself and have been exercised by Congress on several occasions. *See, e.g.,* Act of Mar. 29, 1956, Pub. L. No. 84–447, 70 Stat. 61 (1956) (revoking Castle Pinckney National Monument); An Act to Authorize the Exchange of Certain Lands at Black Canyon of the Gunnison National Monument, Colorado, Pub L. No. 85–391, 72 Stat. 102 (1958); An Act to Establish Grand Canyon National Park, in the State of Arizona, Pub. L. No. 65–277, 40 Stat. 1175 (1919). *See also*, John Ruple, *The Trump Administration and Lessons Not Learned from Prior Presidential National Monument Modifications*, 43 HARV. ENVT'L. L. REV. 32 (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272594 (discussing Congress's rejection of various bills that would have authorized the President to modify Monument Proclamations).

Several public lands statutes from the same era as the Antiquities Act, by contrast, do authorize the President to reverse previous withdrawals. The first statute authorizing the President to establish forest reserves, passed in 1891, did not contain modification or revocation authority. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103, *repealed by* Pub. L. No. 94-579, 90 Stat. 2791 (1976). But in 1897 Congress amended the statute when it passed the Forest Service Organic Act (also known as the Organic Administration Act, *see United States v. New Mexico*, 438 U.S. 696, 707 (1978)), which explicitly added such authority, authorizing the President "at any time to modify any Executive order [establishing a forest reserve] and . . . reduce the area or change the boundary lines of such reserve . . . ." Act of June 4, 1897, ch. 2 §1, 30 Stat. 34, 36 (1897), *repealed in part by* National Forest Management Act of 1976, Pub. L. No. 94–588, § 9, 90 Stat. 2949, 2957 (1976) (codified in 16 U.S.C. § 1609(a)). Representative John Fletcher Lacey, the advocate for the quoted language and the primary sponsor of the Antiquities Act, explained that express delegation of revocation/modification authority was necessary

because Congress previously delegated only the power to create forest reservations. 29 CONG. REC. 2677 (1897) (statement of Rep. Lacey). Representative Lacey observed: "The act of 1891 gave him the power to create a reserve, but *no power to restrict it or annul it*, and there ought to be such authority vested in the President of the United States." *Id*. (emphasis added).

Similarly, the Pickett Act of 1910 authorized the President to withdraw land for public purposes with "such withdrawals . . . [to] remain in force *until revoked by him or by an Act of Congress*." Pickett Act, ch. 421, § 1, 36 Stat. 847 (1910), *repealed by* Pub. L. No. 94–579, § 704(a), 90 Stat. 2743, 2792 (emphasis added). In another instance, Congress directed the creation of Colonial National Monument, Act of July 3, 1930, ch. 837, §2, 46 Stat. 855 (1930), and included a proviso explicitly granting authority to enlarge or diminish the Monument's boundaries. *See* Proclamation No. 2055, 48 Stat. 1706 (Aug. 22, 1933) (changing boundaries as authorized by congress). *See also* Ruple, *supra*, at 28–29 (canvassing a number of other similar laws). These examples demonstrate that when Congress intended to authorize revocations of or changes to protected status, it provided that authority to the President explicitly. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (courts "presume[] that where words differ . . . "'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"), *quoting Russello v. United States*, 464 U.S. 16, 23 (1983). The Antiquities Act contains no such authorization.

This reading is also consistent with the only administrative construction of the Antiquities Act that addresses directly the question of the President's authority to revoke a monument.[2] *See* Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 Op. Att'y Gen.

[2] The Department of the Interior issued varying opinions between 1915 and 1947 on whether the President had the power to reduce monuments, with some saying yes and some saying no. *See* Ruple, *supra*, at 36. As internal executive branch opinions that contradict one another, they do

185, 185–86 (1938). In this Attorney General's Opinion, Homer Cummings evaluated the recommendation from the Acting Secretary of the Interior that President Roosevelt revoke the 3.4-acre Castle Pinckney National Monument, which had been established by President Coolidge in 1924. Castle Pinckney was the site of the first takeover of Union property by the Confederacy in the Civil War, but apparently virtually no one supported its designation as a monument. *Id*. at 186. Cummings noted, "My predecessors have held that if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation." *Id*. Because Congress only authorized the creation of monuments in the Antiquities Act, Cummings advised the Secretary of the Interior that an act of Congress would be required to remove the Monument's status. The Monument designation was eventually extinguished by Congress, and the property was transferred to the State of South Carolina. Act of Mar. 29, 1956, Pub. L. No. 84–447, 70 Stat. 61 (1956).

This historical backdrop of the Antiquities Act and other federal public land laws of that era clarifies that the President may not supplement the congressional delegation of power to create national monuments with an unmoored assumption of power to eliminate or modify them. "The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin v. Texas*, 552 U.S. 491, 524–25 (2008) (*citing Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). In the public lands arena, the Constitution clearly vests authority in the Congress. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States"). Congress has carefully

---

not warrant much attention, let alone deference. *See id.*

delegated to the President and delineated a role in making withdrawals of land for various public purposes. In exercising his authority to establish national monuments the President should be afforded great deference from the courts, but only so long as the President is carrying out a power delegated to him by Congress. Here, however, the President's revocation of the Bears Ears National Monument is incompatible with the expressed will of Congress, which provided only a limited delegation to create monuments for protective purposes, and not the power to revoke or modify them. *See D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1248 (D.C. Cir. 1971) (deference to executive action is warranted but only up to the point that the executive is acting "in the manner prescribed by statute, without reference to irrelevant or extraneous considerations.").[3]

D. Uncontested prior revisions and reductions cannot be construed to modify the Antiquities Act.

No President has ever attempted to revoke a national monument, and until President Trump's radical reduction of Bears Ears and Grand Staircase Escalante National Monuments, no President had reduced a monument for fifty-five years. During those decades, Congress passed virtually all of the nation's major environmental statutes, including the modern public lands statutes which, as discussed in Part II, *infra*, clarify the very limited role for unilateral

[3] The United States has asserted that the President's revocation of Bears Ears was merely a diminishment aimed at compliance with the Antiquities Act's "smallest area compatible" language. This argument is unavailing first because the Act does not authorize diminishments, let alone revocations, for any purpose, and therefore deference is not warranted. Second, public records requests have revealed that the Presiden's actions were not based on any review or assessment of objects needing protection, but rather concerns about limitations on extractive activities, the very activities that could threaten the objects. *See* Eric Lipton & Lisa Friedman, *Oil Was Central in Decision to Shrink Bears Ears National Monument, E-mails Show*, N.Y. TIMES (Mar. 2, 2018), https://www.nytimes.com/2018/03/02/climate/bears-ears-national-monument.html (describing e-mails from Senator Hatch advocating monument reductions based on maps with oil and gas sites within Bears Ears).

Presidential action. Before 1964, however, Presidents adjusted monument boundaries roughly twenty times. *See* Ruple, *supra*, at 42. None of these boundary modifications were challenged in court, and the last modification took place over a half-century ago. The question of whether Congress acquiesced in these acts has therefore never been addressed. The Court is generally skeptical of congressional acquiescence arguments. *See Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001) ("Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care."). And here, there is little reason to speculate that congressional silence, now fifty-five years stale, adds anything to the Act's plain text and purpose. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. at 1725 ("it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that . . . it never faced.").

The Court's reluctance to conclude that Congress has acquiesced in executive actions that lack specific congressional authority stems from separation of powers concerns. *See Youngstown v. Ohio*, 343 U.S. 579, 587 (1952). When it is unclear whether the President can act, the Court looks to Congress's "exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution" *Id*. at 588. Congress's power in the public lands context is broad, providing further reason not to stray outside of the legislative branch's express delegations to the President. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (Court has "repeatedly observed that [the] power over the public land thus entrusted to Congress is without limitations" (citations and internal quotations omitted)).

To the extent that congressional acquiescence has controlled in public lands law, it has been to authorize protective acts by the President, not actions reversing withdrawals or

reservations. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) (upholding presidential authority to withdraw lands as naval petroleum reserve, a power since revoked by Congress in the Federal Land Policy and Management Act (FLPMA), Act of Oct. 21, 1976, Pub. L. No. 94–579, § 704, 90 Stat. 2743, 2792 (1976)). *Midwest Oil* recognized withdrawal authority in aid of legislation to prevent valuable oil reserves on the public lands from being appropriated by private interests who would sell the oil back to government. 236 U.S. at 466–67 (The Director of the U.S. Geological Survey reported that "there would appear to be an immediate necessity for assuring the conservation of a proper supply of petroleum for the Government's own use[.]"). The Court upheld the President's protective power based on a steady and unbroken chain of executive orders withdrawing land for Indian reservations and bird reserves. *Id*. at 470–71. There had been forty-four bird reserves established between the first in 1903 (Pelican Island) and the date of the Midwest Oil withdrawal in 1909. Most of the one hundred executive orders creating Indian reservations were made after the end of treaty-making with Indian tribes in 1871. *See* 25 U.S.C. § 71. This consistent and protective practice was known to Congress and found to be implicitly approved. *Midwest Oil*, 236 U.S. at 474. *See* PAUL W. GATES, PUBLIC LAND LAW REVIEW COMMISSION, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 737 (U.S. Gov't Printing Office 1968). There is no similar protective action at issue here, nor anything resembling a protective goal.

Prior reductions are therefore largely irrelevant to the legal questions at issue in this case. Further, that none occurred from 1964 until 2017 reflects broader trends in public lands law. (As discussed in Part II below, these include comprehensive congressional review of public lands management culminating in substantial statutory reform, as well as expanded congressional tools for preservation and withdrawal.) The absence of presidential boundary adjustments in recent

times also reflects improved surveys and mapping. Many of the early changes were required to correct mistakes in object location. *See* Ruple, *supra*, 43–49 (Navajo National Monument 1909 boundaries adjusted to correct mistakes in hand-drawn map; Petrified Forest National Monument 1906 boundaries modified to reflect surveys more accurately locating petrified wood; Great Sand Dunes National Monument revised because certain identified lands did not even exist). These and other boundary adjustments are a far cry from President Trump's dramatic re-write of Bears Ears, which eliminated the original boundaries, established two much smaller monuments, and reduced the protected acreage by eighty-five percent.

There is one monument reduction worth considering in more depth, if only because its size invites comparison to President Trump's actions. More than one hundred years ago, on May 11, 1915, President Woodrow Wilson reduced Mt. Olympus National Monument by nearly half its acreage, eliminating 311,280 acres from the Monument and returning them to the Olympic National Forest, Proclamation No. 1293, 39 Stat. 1726 (1915). Yet the reasons for this reduction were particular and extraordinary, and at least arguably supported by the President's Article II powers. *See* U.S. CONST., art. II, § 2, cl. 1. World War I broke out after the monument's designation, and timber was in high demand. Sitka Spruce, which grows only in the temperate rain forests of the Pacific Northwest, resists splintering when struck by bullets, and was therefore essential for constructing airplanes during war time. *See* Gerald W. Williams, *The Spruce Production Division,* FOREST HISTORY TODAY 3 (Spring 1999); GAIL E. H. EVANS & GERALD W. WILLIAMS, OVER HERE, OVER HERE: THE ARMY'S SPRUCE PRODUCTION DIVISION DURING THE WAR TO END ALL WARS (1984). After the monument reduction, the United States went so far as to establish the "Spruce Production Division" of the U.S. Army, and built special rail lines to transport the cut Spruce to timber mills for processing. Gerald W. Williams, *The Spruce*

Production Division, FOREST HISTORY TODAY 4 (Spring 1999). President Wilson's reduction of Mt. Olympus, undertaken to respond to war-time exigencies and nonetheless of questionable legality, was later reversed by Congress, and today Mt. Olympic National Park comprises 922,560 acres, including most of the areas that had been removed for emergency logging purposes. *See* An Act to Establish the Olympic National Park, in the State of Washington, Pub. L. No. 75–778, 52 Stat. 1241 (1938).

No such exigencies explain or justify President Trump's evisceration of Bears Ears National Monument. There is no military action, and there are no national emergencies warranting the reversal of protections for Bears Ears' prolific and irreplaceable objects of historic and scientific interest. Therefore, there is no meaningful precedent for President Trump's actions, and little to be gleaned from the absence of challenges to prior monument reductions, which ended more than a half-century ago and for the most part reflected deficiencies in mapping and object location that long ago ceased to pertain.

II. The Antiquities Act's clear text is consistent with Congress's comprehensive statutory scheme for federal lands management.

Congress undertook sweeping reform of federal public land laws in the 1970s, passing the Federal Land Policy and Management Act (FLPMA) and the National Forest Management Act (NFMA) National Forest Management Act of 1976, Pub. L. No. 94–588, § 9, 90 Stat. 2949, 2957 (1976) (codified in 16 U.S.C. § 1609(a). These statutes were heavily influenced by the recommendations of the Public Land Law Review Commission and its final report, ONE THIRD OF THE NATION'S LANDS: A REPORT TO THE PRESIDENT AND TO THE CONGRESS (U.S. Gov't Printing Office 1970). The Commission was tasked with reviewing all of the natural resources owned by the federal government "to assure that no facet of public land policy was being overlooked." *Id*. at ix. The reform effort was a response to changing views about priorities for

the nation's public lands in the post-World War II period, including heightened interest in recreation and conservation. *See id*.

In response, Congress mandated comprehensive management for the vast majority of federal lands. Together, Bureau of Land Management and Forest Service lands comprise over 440,000,000 acres of the 621,000,000 total acres of lands owned by the United States. CAROL HARDY VINCENT, ET AL., CONG. RESEARCH SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 21, Table 5 (2017). To manage those lands, FLPMA and NFMA vest the Bureau of Land Management and Forest Service with broad powers through a detailed process that provides for ample public participation. Congress reserved for itself other decisions about modifying protective status and required that management decisions be made in a tiered process emphasizing long term planning. *See* 43 U.S.C. § 1701(a)(2) ("national interest will be best realized if the public lands and their resources are . . . inventoried and their present and future use is projected through a land use planning process[.]"); and 16 U.S.C. §§ 1602, 1603, 1604 (mandating comprehensive forest land resource inventories and land and resource management plans).

A. FLPMA and Bureau of Land Management Lands.

The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1784, was a comprehensive overhaul of federal public land laws, including the administrative withdrawal provisions. FLPMA was based in large part on recommendations made in ONE THIRD OF THE NATION'S LAND, *supra*, at 1-9; *Legislation to Revise the Public Land Laws, Hearing before the Committee on Interior and Insular Affairs*, 92nd Cong. 1st Sess. on S. 921, 2401 and 2743 at 214 (Mar. 22, 1972). *See Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 855 (9th Cir. 2017), *cert. denied*, No. 17-1290 (Oct. 1, 2018) ("In response to the PLLRC's recommendations, Congress in

1976 enacted FLPMA."). The Report recommended that Congress reserve to itself "exclusive authority to withdraw or otherwise set aside public lands for specified limited-purpose uses" and revisit the existing delegations of authority that could be made without legislative action. ONE THIRD OF THE NATION'S LANDS, *supra*, at 2.

Congress took this recommendation and completely revamped Executive withdrawal authority, replacing it with detailed and specific delegations to the Secretary. 43 U.S.C. § 1714. *See* Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 548 (2001) ("The FLPMA revoked almost all sources of executive withdrawal authority (twenty-nine statutes in all), overruled implied executive withdrawal powers approved of in *Midwest Oil,* and prohibited the executive from making any withdrawal requiring an act of Congress."). Left intact, however, was the President's authority in the Antiquities Act, along with an express provision precluding any modifications or amendments to existing Monuments by the Secretary of the Interior. 43 U.S.C. § 1714(j).[4] This narrow exception for the Antiquities Act reflects Congress's emphasis on preserving nimble executive authority *to protect* valuable historic and scientific resources, but otherwise to reserve to Congress and the agency broader multiple use management decisions. Similar limitations were put in place with respect to the Wildlife Refuge System. *Id*. Congress's intent to reserve to itself any modification or revocation authority is made clear from the House Report, which stated:

> With certain exceptions, [the bill] will repeal all existing law relating to

[4] This provision makes little sense as the Secretary of the Interior never was delegated authority to establish national monuments—much less alter their boundaries. A review of the legislative history reveals that this was either a drafting error on the part of Congress, or an attempt to clarify that Congress reserved the authority to alter monument boundaries to itself. Mark Squillace, Eric Biber, Nicholas S. Bryner & Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 60–64 (2017).

> executive authority to create, modify, and terminate withdrawals and reservations. . . . *It would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act* and for modification and revocation of withdrawals adding lands to the National Wildlife Refuge System. These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.

H.R. Rep. No. 94–1163, 94th Cong., 2nd Sess., at 9 (May 15, 1976) (emphasis added).

Other provisions of FLPMA highlight the importance of long-term planning to support prudent federal land management. Land use plans were mandated for the public lands "regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses." 43 U.S.C. § 1712(a). Congress embraced this planning policy because it found that "the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts." 43 U.S.C. § 1701(a)(2). It is significant that the same Congress that reworked the withdrawal statutes left intact the delegated authority under the Antiquities Act and emphasized the importance of planning efforts to serve the national interest. Construing the Antiquities Act to permit a President to move lands in and out of a prior protected designation is inconsistent with the congressional scheme, serves no protective role, and disrupts the processes delegated to the agencies. *See* Squillace, et al., *supra*, note 4.

B. FLPMA and the General Mining Law of 1872.

Congress also imposed limited requirements on mining in FLPMA. The General Mining Law of 1872, 30 U.S.C. § 22, was passed during an era when Congress encouraged the opening and disposition of public lands. It has survived Congress's wholesale changes in public lands management with relatively little change. The Mining Law allows for miners' self-initiated

entry, exploration, and eventual appropriation of unreserved public lands, which it declares to be "open" for development under the law unless otherwise reserved or withdrawn. *See* 30 U.S.C. §§ 22–30; *see also United States v. Shumway*, 199 F.3d 1093, 1099–1100 (9th Cir. 1999) (outlining steps to locate a mining claim). FLPMA imposed initial filing and annual reporting requirements to allow the agencies to keep better track of illegitimate mining claims. *See* 43 U.S.C. § 1744. Nonetheless, lands not withdrawn from entry and location under the mining law are susceptible to serious impacts with little to no agency supervision. Initial entry onto public lands for the purpose of prospecting is permissible, and can result in vested usufructuary rights as against other prospectors. *See Union Oil Co. v. Smith*, 249 U.S. 337, 348 (1919); JOHN LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION (1987). If a valuable mineral is discovered, the claimant acquires a vested right to the mineral property as well as certain surface rights. *See Union Oil*, 249 U.S. at 347–48.

The Mining Law is therefore one example of how the unilateral presidential authority to designate monuments makes a significant difference. Presidential proclamations may withdraw lands from entry under the mining law, under which mining otherwise may occur with limited regulatory oversight or environmental regulation by federal land management agencies. 43 U.S.C. § 1732(b) ("Except as provided . . . in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."). *See also* 43 U.S.C. § 1712(e)(3) (prescribing limited authority for withdrawal of land from operation of the Mining Law, but leaving the Antiquities Act authority in place). The durability of the 1872

Mining Law makes the power to establish national monuments and thereby protect areas from environmental degradation especially important, but such protective measures are always subject to congressional modification or reversal.

C. NFMA and Forest Service Lands.

Congress's deliberate management approach to forest service lands has an even longer pedigree. Congress first authorized the designation of federal lands as forest reserves in 1891. *See* Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103 (1891). In 1897, Congress modified the 1891 act in three significant ways. First, as discussed above, it delegated to the President the power to modify or revoke forest reserves, which had been absent from the 1891 statute. Act of June 4, 1897, 30 Stat. at 36 (1897), codified in 16 U.S.C. § 473, *repealed in part by* National Forest Management Act of 1976, Pub. L. No. 94–588, § 9, 90 Stat. 2949, 2957 (1976), codified in 16 U.S.C. § 1609(a). Second, the 1897 statute established guidelines for forest management and timber sales, directing the Secretary of Agriculture to establish rules and regulations to comply with congressional directives. *See id*. (codified in 16 U.S.C. § 476). Third, the Act also granted the Secretary of Interior broad comprehensive management authority over the forest reserves, including the authority to enact rules and regulations governing their occupancy and use. *See id*. (codified in 16 U.S.C. § 551). In 1905, Congress transferred management of forest reserves to the Department of Agriculture, *see* Transfer Act, Act of Feb. 1, 1905, ch. 288, §1, 33 Stat. 628 (1905), consolidating in that agency the power to regulate forest reserves "'to make provisions for the protection against destruction by fire and depredations . . . and to preserve the forests thereon from destruction….'" *United States v. Grimaud*, 220 U.S., 506, 514 (1911). *See also Light v. United States*, 220 U.S. 523 (1911) (upholding federal power to withdraw lands for forest purposes and regulate their use for grazing purposes).

In 1960, Congress further clarified the Forest Service's marching orders in the Multiple-Use and Sustained-Yield Act (MUSY) (Act of June 12, 1960, Pub. L. No. 86–517, § 2, 74 Stat. 215 (1960), codified in 16 U.S.C. § 529)). MUSY requires that forest lands be managed for a variety of uses and potentially competing needs, including outdoor recreation, range, timber, watershed, and fish and wildlife habitat. *Id.* at § 528. In directing the Forest Service to maintain "in perpetuity [ ] a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land," *id.* at § 531(b), Congress sought to encompass varying values and uses for national forests in its land management directive.

Congress gave even more detailed and comprehensive directions to the forest service and other natural resource agencies in the National Forest Management Act of 1976. The purpose of NFMA is to require plans for each national forest, to set standards for timber sales, and to establish broad, substantive policies for timber harvesting. With those goals in mind, the NFMA aims to protect national forests from permanent damage caused by excessive clear-cutting and logging, and to provide for diversity of plant and animal life. 16 U.S.C. § 1604(g)(3)(B); *see also Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1056 (9th Cir. 2012). Under NFMA's comprehensive policy, the Forest Service possesses broad discretionary authority for the land's multiple uses, and courts generally uphold Forest Service discretionary decisions.

D. Implications for presidential power.

Congress's detailed and exhaustive management schemes in FLPMA, MUSY and NFMA characterize its agenda to move away from unilateral presidential discretionary authority over public lands and instead to delegate management to the governing agencies. This shift reflects Congress's intent to expressly grant discretionary authority to the agency immediately equipped

to respond to changing circumstances and best suited to ensure lands are managed accordingly. Within this comprehensive vision, Congress expressly preserved the single presidential power to establish monuments under the Antiquities Act for protective purposes, while clarifying that the Act contains no authorization to revoke, modify, or otherwise unravel monuments that have been proclaimed.

CONCLUSION

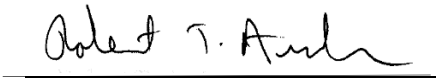
No President until now has attempted to revoke a national monument. No President has changed monument boundaries for more than half a century. The reasons for this are two-fold. First, the Antiquities Act delegates to the President a narrow protective power to establish monuments and does not include the power to revoke or reduce them. Second, the broader scheme of public land law reinforces the very limited role that Congress has delegated to the President. Legislation, accompanied by detailed management regimes, has displaced presidential authority, and the power to modify protective status or withdrawals rests either with Congress itself or the agencies.

The President therefore lacks the legal authority to reverse or shrink monuments. Further there is no purpose served by inventing an executive power in this context. If such a power is recognized, national monuments proclaimed by one president could be reversed by the next, and so on, in a potentially endless political game of tit-for-tat. The Antiquities Act does not authorize such actions, and Congress has made clear its substantive priorities for retention and management of the public lands, expressed through its comprehensive legislative scheme. Unaccountable presidential actions that undermine the Antiquities Act's protective goals have no place in the Act itself, nor in the broader legislative domain for public lands.

November 16, 2018

Respectfully submitted,

Sarah Krakoff*
University of Colorado Law School
Campus Box 401 UCB
Boulder, CO 80309
(303) 492-2641
Sarah.Krakoff@colorado.edu



Robert T. Anderson
D.C. Bar No. 451551
University of Washington School of Law
Box 353020
Seattle, Washington 98195
boba@uw.edu
206-685-2861

* Pro Hac Vice Motion Pending

APPENDIX

Public Land and Natural Resources Law Professors

Adell L. Amos, Associate Dean
Clayton R. Hess Professor of Law
University of Oregon, School of Law

Robert T. Anderson
Oneida Indian Nation Visiting Professor of Law
Harvard Law School

Charles I. Stone Professor of Law
Director, Native American Law Center
University of Washington School of Law

Eric Biber
Professor of Law
University of California, Berkeley

Bret Birdsong
Professor of Law
William S. Boyd School of Law
University of Nevada Las Vegas

Michael C. Blumm
Jeffrey Bain Faculty Scholar & Professor of Law
Lewis and Clark Law School

Robert L. Glicksman
J.B & Maurice C. Shapiro Professor of Environmental Law
The George Washington University Law School

Sam Kalen
Centennial Distinguished Professor
University of Wyoming College of Law

Christine A. Klein
Chesterfield Smith Professor of Law & University Term Professor
University of Florida Levin College of Law

Sarah Krakoff
Moses Lasky Professor of Law
Board Chair, Getches-Wilkinson Center
University of Colorado Law School

John D. Leshy
Distinguished Professor Emeritus
U.C. Hastings College of Law

Monte Mills
Associate Professor of Law and
Co-Director, Margery Hunter Brown Indian Law Clinic
Alexander Blewett III School of Law, University of Montana

Mark Squillace
Raphael J. Moses Professor of Law
University of Colorado Law School

Sandra B. Zellmer
Professor and Director of Natural Resources Law Clinics
Alexander Blewett III School of Law, University of Montana School of Law