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## The Transformation of the Antiquities Act: A Call for Amending the President's Power Regarding National Monument Designations

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COMMENT

THE TRANSFORMATION OF THE ANTIQUITIES ACT: A CALL FOR AMENDING THE PRESIDENT’S POWER REGARDING NATIONAL MONUMENT DESIGNATIONS

ANDREW DIAZ\*

“It is not what we have that will make us a great nation, it is the way in which we use it.”<sup>1</sup>

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<sup>1</sup> DAVID McCULLOUGH, MORNINGS ON HORSEBACK: THE STORY OF AN EXTRAORDINARY FAMILY, A VANISHED WAY OF LIFE AND THE UNIQUE CHILD WHO BECAME THEODORE ROOSEVELT 349 (1981) (a quote by Theodore Roosevelt made in his Address to Ranchers in North Dakota on July 4, 1886).

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## INTRODUCTION

Over the past few decades, environmental awareness has been on the rise in the United States, and this rise has led to numerous environmental laws being passed at the state and federal level.<sup>2</sup> These laws were passed to address specific environmental concerns, ranging from the protection of plant and wildlife to the preservation of the land and its natural resources.<sup>3</sup> Overall, these laws have enjoyed the public’s support, due in large part to the fact that today most Americans favor stricter environmental laws and regulations.<sup>4</sup> However, despite the overall support, some environmental issues do elicit more controversy than others; one such issue is the way in which land is used.<sup>5</sup> Disagreements arise regarding how much protection should be afforded to public land, including how much land to set aside and the scope of restrictions placed upon its use.<sup>6</sup> Despite the many different competing interests in how the country’s land is used, it is the duty of this nation’s people to use the land in the most sustainable way possible. A sustainable approach will ensure that future generations will continue to have access to important natural resources while still being able to enjoy the land’s natural beauty. Through the use of the many different environmental laws, this goal can be achieved; one of these laws being the Antiquities Act (“Act”).

On April 26, 2017, President Donald Trump issued Executive Order 13792 (“Order”), entitled “Review of Designations Under the Antiquities Act.”<sup>7</sup> The Order directed Secretary of the Interior Ryan Zinke (“the Secretary”) to review national monument designations made since 1996 that fell into the following categories: designations larger than 100,000 acres in size, designations expanded to cover more than 100,000 acres, or des-

<sup>2</sup> See generally Brian Clark Howard, *48 Environmental Victories Since the First Earth Day*, NATIONAL GEOGRAPHIC (Apr. 18, 2018), <https://news.nationalgeographic.com/2016/04/160422-earth-day-46-facts-environment/> (listing some of the most significant environmental protection laws since 1970).

<sup>3</sup> *Id.*

<sup>4</sup> Kristen Bialik, *Most Americans favor stricter environmental laws and regulations*, PEW RESEARCH CENTER (Dec. 14, 2016), <http://www.pewresearch.org/fact-tank/2016/12/14/most-americans-favor-stricter-environmental-laws-and-regulations/>.

<sup>5</sup> See generally Brian Clark Howard, *Why Federal Lands Are So Wildly Controversial in the West*, NATIONAL GEOGRAPHIC (Jan. 4, 2016), <https://news.nationalgeographic.com/2016/01/160104-oregon-protest-malheur-national-wildlife-refuge/> (explaining the controversy surrounding the use and management of federally owned land in the western half of the United States).

<sup>6</sup> *Id.*

<sup>7</sup> Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20,429 (Apr. 26, 2017).

ignations or expansions that the Secretary determined were made without public outreach and coordination with the relevant stakeholders.<sup>8</sup> In reviewing these designations, the Order instructed the Secretary to consider the effects that the designation has had, along with the concerns of those affected by it.<sup>9</sup> The Order called for the Secretary to produce a final report that included recommendations for presidential actions, legislative proposals, or other measures consistent with the law that would achieve the purpose of the Order.<sup>10</sup> The Order's stated purpose was to ensure that such designations were made in accordance with the Act's requirements and original objectives; in addition, it was supposed to help ensure that the appropriate balance between protection and use of the land is reached.<sup>11</sup> Secretary Zinke reviewed eight national monuments in six states and submitted his recommendations to the President on August 24, 2017.<sup>12</sup>

In response to Secretary Zinke's recommendations, President Trump announced major size reductions to two national monuments on December 4, 2017.<sup>13</sup> The two monuments, both located in Utah, were Bears Ears National Monument and Grand Staircase-Escalante National Monument.<sup>14</sup> The presidential proclamations reduced these monuments in size by 85% and 46%, respectively.<sup>15</sup> Although Presidents have reduced the size of national monuments in the past, the practice is not common,<sup>16</sup> especially when it comes to significant reductions.<sup>17</sup> These two presidential proclamations could just be the beginning of what is to come. Additional national monuments could face a similar fate as the two in Utah, or could be abolished altogether. In order to provide certainty to future des-

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (The Secretary was instructed to consider the requirements and objectives of the Act; whether designated lands were appropriately classified under the Act; the effects of a designation on the available uses of designated Federal lands; the effects of designation on the use and enjoyment of non-federal lands within or beyond monument boundaries; concerns of state, tribal, and local governments affected by a designation; and the availability of federal resources to properly manage designated areas.).

<sup>10</sup> *Id.* at 20,430.

<sup>11</sup> *Id.* at 20,429.

<sup>12</sup> *Secretary Zinke Sends Monument Report to The White House*, U.S. DEP'T OF THE INTERIOR (Aug. 24, 2017), <https://www.doi.gov/pressreleases/secretary-zinke-sends-monument-report-white-house>.

<sup>13</sup> *Remarks by President Trump on Antiquities Act Designations*, WHITE HOUSE (Dec. 4, 2017, 12:20 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-antiquities-act-designations/>.

<sup>14</sup> *Id.*

<sup>15</sup> Hannah Nordhaus, *What Trump's Shrinking of National Monuments Actually Means*, NATIONAL GEOGRAPHIC (Feb. 2, 2018), <https://news.nationalgeographic.com/2017/12/trump-shrinks-bears-ears-grand-staircase-escalante-national-monuments/>.

<sup>16</sup> *See id.*

<sup>17</sup> *See id.*

ignations, the Act should be amended to include more concrete guidelines on how a president may designate national monuments.

Part I of this Comment discusses the background of the Antiquities Act, including: the legislature's intent in drafting the Act, changes to the law, and how it has been used throughout the years. This section then discusses various legal challenges to designations made under the Antiquities Act and looks at why these designations are sometimes controversial. Part II discusses the calls by many politicians to either amend or repeal the Act and explains why current proposed legislation is insufficient. This Comment critiques the proposed legislation and calls for the passage of sensible legislation that would require a more transparent designation process while also implementing more concrete requirements for how national monuments are modified or designated. Part III concludes by explaining why the Antiquities Act should be amended, not repealed, in order to ensure the protection of public lands for future generations.

## I. AN OVERVIEW OF THE ANTIQUITIES ACT OF 1906

### A. THE PRESIDENT'S POWER TO DESIGNATE NATIONAL MONUMENTS

The power of the President of the United States to designate national monuments is derived from the Antiquities Act of 1906.<sup>18</sup> The Antiquities Act was passed by Congress and signed into law by President Theodore Roosevelt on June 8, 1906.<sup>19</sup> The Act's purpose was to prevent the looting of Native American artifacts, which had become prevalent at that time.<sup>20</sup> The Act sought to achieve this goal by giving the President the authority to set aside federal land to be designated as a national monument.<sup>21</sup> The President was given the power to declare by proclamation that "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States [are] to be national monuments."<sup>22</sup> Further, the language in the Act stated that the area of the land reserved "shall be confined to the smallest area compatible with proper care and management of the objects to be protected."<sup>23</sup>

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<sup>18</sup> *American Antiquities Act of 1906*, NAT'L PARK SERV., <https://www.nps.gov/subjects/legal/american-antiquities-act-of-1906.htm> (last updated June 22, 2017).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Antiquities Act of 1906, 16 U.S.C. §§ 431-33 (repealed 2014).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

In 2014, the Antiquities Act was amended and codified in Title 54 of the United States Code, sections 320301 through 320303.<sup>24</sup> The amended language of the newly codified statute declared that, “[t]he 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.”<sup>25</sup> Similar to the original Antiquities Act, the statute also declared that “the limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>26</sup> One noteworthy change that was incorporated into the amended Act was the explicit limitation on the “extension or establishment of national monuments in Wyoming . . . except by express authorization of Congress.”<sup>27</sup> In other words, the new statute banned the President from unilaterally designating national monuments in Wyoming; today the President needs authorization from Congress prior to designating national monuments in that state.<sup>28</sup> Overall, there were no major amendments to the Act’s language; specifically, there were no additional limits placed on the President’s power to designate national monuments.<sup>29</sup>

## B. CHALLENGES TO THE ANTIQUITIES ACT

Presidential authority to designate large areas of public land to create national monuments has, at times, been a highly controversial issue.<sup>30</sup> Although originally created to protect objects of antiquity, such as objects of cultural and historical significance, the Antiquities Act has also been used to protect areas of natural significance.<sup>31</sup> Those challenging such designations claim that the President is going beyond the scope of his authority granted under the Antiquities Act; in essence, that the President is abusing his power.<sup>32</sup>

<sup>24</sup> 54 U.S.C. §§ 320301-320303 (West 2014).

<sup>25</sup> *Id.* § 320301(a).

<sup>26</sup> *Id.* § 320301(b).

<sup>27</sup> *Id.* § 320301(d). In 1950, an amendment to the Antiquities Act of 1906 added this limitation to the President’s power to designate national monuments in the state of Wyoming. Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 498 (2003).

<sup>28</sup> *See* 54 U.S.C. § 320301(d).

<sup>29</sup> Compare Antiquities Act of 1906, with 54 U.S.C. §§ 320301-32303.

<sup>30</sup> Mark C. Rutzick, *Modern Remedies for Antiquated Laws: Challenging National Monument Designations Under the 1906 Antiquities Act*, 11 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 29, 29 (2010), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/JZDXF0g3mpDDwtBdh2FIFGxltrgYQsXRrNm9P6o7.pdf>.

<sup>31</sup> Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553, 563 (2018).

<sup>32</sup> *Id.* at 590-99.

Since the Act's passage, there have been numerous court cases challenging the validity of several designations. Plaintiffs have argued that certain designations violate the Constitution, the Antiquities Act itself, and other various federal statutes.<sup>33</sup> One example is a 2004 case challenging President Clinton's designation of Grand Staircase-Escalante National Monument in Utah.<sup>34</sup> The designation was controversial because of the vast size of land designated: 1.7 million acres.<sup>35</sup> The Utah Association of Counties brought suit against the President and the United States claiming, among other things, that the President's designation violated the Antiquities Act.<sup>36</sup>

When the court analyzed the claim that the Grand Staircase-Escalante designation violated the Antiquities Act, it first examined the original purpose of the Act and its use throughout the years.<sup>37</sup> The court noted that every legal challenge to designations has been unsuccessful and that courts have consistently found that the President clearly acted within his discretionary power pursuant to the Act.<sup>38</sup> The court explained that Supreme Court precedent clearly establishes that judicial review in these circumstances is limited to determining whether the President did in fact invoke his powers under the Act.<sup>39</sup> The court reasoned that to go beyond this simple inquiry would result in the President's judgment being substituted with its own.<sup>40</sup> Thus, the President continues to have broad discretion under the Act, and courts may not review the President's reasoning in designating a national monument.<sup>41</sup>

As to the other claims, the district court found that the Antiquities Act did not violate the non-delegation doctrine<sup>42</sup> because in passing the law, Congress set forth clear standards and limitations.<sup>43</sup> These standards are set out in the Act's provisions, which state what can be included in national monuments and how large the monuments can be.<sup>44</sup> Further, the

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<sup>33</sup> Rutzick, *supra* note 30, at 31.

<sup>34</sup> Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172 (D. Utah 2004).

<sup>35</sup> *Id.* at 1176.

<sup>36</sup> *Id.* at 1176-77.

<sup>37</sup> *Id.* at 1177-78.

<sup>38</sup> *Id.* at 1179.

<sup>39</sup> *Id.* at 1183.

<sup>40</sup> *Id.* at 1183-84.

<sup>41</sup> *Id.* at 1184 ("Only Congress has the power to change or revoke the Antiquities Act's grant of virtually unlimited discretion to the President.").

<sup>42</sup> "The non-delegation is a principle in administrative law that Congress cannot delegate its legislative powers to other entities." *Nondelegation Doctrine*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/nondelegation\\_doctrine](https://www.law.cornell.edu/wex/nondelegation_doctrine) (last visited Mar. 4, 2019).

<sup>43</sup> Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d at 1190-91.

<sup>44</sup> *Id.* at 1191.

federal statutes<sup>45</sup> that the plaintiffs claimed were violated do not provide for a private right of action.<sup>46</sup> The court noted that the only way that the plaintiffs could have complained of a violation was through the Administrative Procedure Act (“APA”).<sup>47</sup> However, the court explained that the APA requires a finding of final agency action,<sup>48</sup> and since the President is not a federal agency, his actions do not constitute final agency actions.<sup>49</sup> Thus, the APA does not apply to the President’s designations of national monuments under the Act.<sup>50</sup>

In addition to judicial challenges, there have also been calls to amend or repeal the Antiquities Act.<sup>51</sup> Congress has proposed multiple bills which seek to either limit the President’s power under the Act or eliminate the power altogether.<sup>52</sup> However, none of these bills have been passed.<sup>53</sup> Likewise, judicial challenges have also been unsuccessful because courts have consistently upheld the President’s discretionary power to designate national monuments.<sup>54</sup> The President’s power to designate national monuments remains highly controversial and divisive,<sup>55</sup> especially for those that are affected by such designations.<sup>56</sup>

### C. THE CONTROVERSY SURROUNDING THE ANTIQUITIES ACT

Presidential designations of national monuments can be very controversial, especially when designations include large areas of land.<sup>57</sup> The Antiquities Act allows the President, in his discretion, to create national monuments with only minor limitations.<sup>58</sup> One limitation that the Act does place on the President’s power to designate a national monument is that the monument may only be created to protect “historic landmarks,

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<sup>45</sup> These federal statutes included the National Environmental Policy Act, Federal Land Policy and Management Act, Federal Advisory Committee Act, and Anti-Deficiency Act. *Id.* at 1184.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Mark Squillace, *The Endangered Antiquities Act*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/opinion/the-endangered-antiquities-act.html>.

<sup>52</sup> CAROL HARDY VINCENT, CONG. RESEARCH SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 11 (last updated Nov. 30, 2018), <https://fas.org/sgp/crs/misc/R42346.pdf>.

<sup>53</sup> *See id.*

<sup>54</sup> Rutzick, *supra* note 30, at 30.

<sup>55</sup> *See e.g.*, VINCENT, *supra* note 52, at 1-3.

<sup>56</sup> *Id.* at 11.

<sup>57</sup> *Id.* at 4-5.

<sup>58</sup> *But see* John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. ON REG. 617, 624-26 (2018) (discussing the legal significance of the Act’s language and arguing that such language “was not meant to include vast scenic or geological parks”).

historic and prehistoric structures, and other objects of historic or scientific interest.”<sup>59</sup> Although the specificity of the terms “historic landmarks” and “historic and prehistoric structures” limit designations, the vagueness of “other objects of historic or scientific interest” ultimately gives the President broad discretion in what he may designate as a national monument.<sup>60</sup> A second limitation is that designations must not exceed the area necessary to protect the objects of interest.<sup>61</sup> As is the case with the vague language of what constitutes objects to be protected, “smallest area necessary” also gives the President broad discretion in determining what size a monument needs to be in order to protect the objects of interest that are located there.<sup>62</sup> Together, these broad and vaguely worded limitations allow the President to exercise a lot of discretion when designating a national monument.<sup>63</sup>

Aside from the Act’s language giving the President broad discretion, designations are also controversial in that they can affect many different groups of people with many different competing interests.<sup>64</sup> Some of these interests include Native American tribal rights, rights of local residents to access and use the land, economic possibilities, federal land ownership, and the need for environmental protection.<sup>65</sup> These issues often arise when large areas of public land are designated as national monuments and restrictions are placed on its use.<sup>66</sup> One example was the designation of Bears Ears National Monument (“Bears Ears”).<sup>67</sup> Bears Ears was seen as especially controversial because of when it was designated and the amount of land it encompassed.<sup>68</sup> Bears Ears was designated by President Barack Obama on December 28, 2016,<sup>69</sup> less than a month before he left office. The new monument, located in San Juan County, Utah, comprised of approximately 1.35 million acres of land.<sup>70</sup>

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<sup>59</sup> *Id.* (arguing that such language was not intended to allow large-sized designations).

<sup>60</sup> *But see id.* (arguing that the purpose of the Antiquities Act was to preserve “sites made historic by human endeavors and not geologic ‘history’”).

<sup>61</sup> *Id.* at 625-26.

<sup>62</sup> *But see id.* at 625-26 (arguing that this “provision was added to provide flexibility for special situations and not to allow a million-acre designation”).

<sup>63</sup> *Id.* at 628-29 (explaining that “[m]uch legal scholarship . . . defends a broad interpretation of the Antiquities Act that supports virtually unchecked presidential discretion to create or expand vast national monuments”).

<sup>64</sup> Squillace, *supra* note 27, at 550-51.

<sup>65</sup> FRANCIS P. MCMANAMON, *ARCHAEOLOGICAL METHOD AND THEORY: AN ENCYCLOPEDIA* 33-35 (Linda Ellis ed., 2000).

<sup>66</sup> Howard, *supra* note 5.

<sup>67</sup> Yoo & Gaziano, *supra* note 58, at 655.

<sup>68</sup> *Id.* at 618.

<sup>69</sup> Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

<sup>70</sup> *Bears Ears National Monument Questions and Answers*, U.S. FOREST SERV. 4, <https://www.fs.fed.us/sites/default/files/bear-ears-fact-sheet.pdf> (last visited Oct. 25, 2018).

In addition to the timing and the size of President Obama's designation, local residents argued that the designation limited their access to the land and described it as a "federal land grab."<sup>71</sup> Local residents were especially concerned about their access to the land because they used it for ranching.<sup>72</sup> In a 2016 economic report to the Governor of Utah, the Utah Economic Council found that the food and agriculture sector contributed more than \$17 billion to the state's economy.<sup>73</sup> The cattle sector alone made up about 40% of Utah's economy.<sup>74</sup> Furthermore, food and agriculture businesses generated more than 80,000 jobs for the state.<sup>75</sup> Of the 45-million acres of rangeland suitable for livestock, 33-million acres are owned by the federal government;<sup>76</sup> thus, ranchers claimed that designations such as Bears Ears have devastating effects on ranching in Utah, and in turn, the overall economy of the state.<sup>77</sup>

Also, the abundance of natural resources often located in and around national monuments is of great concern. Opponents point to the rich deposits of natural resources located in areas that are designated as national monuments.<sup>78</sup> Before the Bears Ears designation, the American Petroleum Institute ("API") sent letters to the chairmen of both the Senate Energy and Natural Resources Committee and to the House Natural Resources Committee urging Congress "to re-examine the role and purpose of the Antiquities Act with a focus on the economic consequences to the affected state and communities."<sup>79</sup> API argued that having access to land that could be developed into potential energy sources was vital.<sup>80</sup> According to API, national monument designations limited access to the land that fell within the monument's boundary and explained that, "[i]n most every instance, designation . . . has resulted in a prohibition of the search for or development of energy sources from such land."<sup>81</sup>

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<sup>71</sup> John Flesher, *AP Explains: National Monuments and Why They're Divisive*, U.S. NEWS (Dec. 4, 2017, 8:16 PM), <http://www.chicagotribune.com/sns-bc-us—ap-explains-trump-national-monuments-20171204-story.html>.

<sup>72</sup> Letter from Randy N. Parker, Chief Exec. Officer, Utah Farm Bureau, to Sally Jewell, Sec'y of the Interior (July 16, 2016) (on file with Comm. on Energy and Nat'l Res.).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Letter from Erik Milito, Grp. Dir., Upstream & Indus. Operations, Am. Petroleum Inst., to Lisa Murkowski, Chairman, S. Energy and Nat'l Res. Comm., and to Rob Bishop, Chairman, H. Nat'l Res. Comm. (Jan. 13, 2017) (on file with Am. Petroleum Inst.).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

However, on the other side of the debate are those who support the President's power to designate national monuments.<sup>82</sup> These supporters see presidential designations of national monuments as a way of protecting the land when Congress refuses to act, or is simply unable to do so.<sup>83</sup> An example of Congress's inaction can be seen in Bears Ears.<sup>84</sup> For many years, the Bears Ears Inter-Tribal Coalition ("Coalition")<sup>85</sup> wanted Congress to pass legislation that would ensure that their ancestral land was protected, in order to preserve their strong cultural ties to Bears Ears.<sup>86</sup> These cultural ties to Bears Ears are evidenced by the more than 100,000 archaeological sites, which include many items of historical importance, ranging from projectile points to cliff dwellings.<sup>87</sup> Despite the cultural and historical significance of the land, the Coalition was unsuccessful in securing protection from Congress.<sup>88</sup> Congress's inaction led the Coalition to seek protection through other means.<sup>89</sup> Eventually, through President Obama's proclamation that established Bears Ears, the Coalition received the protection it sought.<sup>90</sup>

On December 4, 2017, President Donald Trump issued a presidential proclamation announcing that the size of Bears Ears would be reduced, despite strong opposition.<sup>91</sup> The proclamation listed several factors that the President considered when he determined the size of the reduction. These factors included: the uniqueness and nature of the objects at the site, the nature of the needed protection, and the protection provided by other laws currently in place.<sup>92</sup> To support the reduction, the proclamation stated that some objects listed in the original proclamation by President Obama were not unique to the monument; not of significant

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<sup>82</sup> See generally Denise Ryan, *Five Reasons We Support the Antiquities Act*, NAT'L TR. FOR HISTORIC PRES. (Mar. 29, 2014), <https://savingplaces.org/stories/five-reasons-support-antiquities-act#.XH5XAVNKjOQ>.

<sup>83</sup> *Id.*

<sup>84</sup> See generally *5-Year Timeline of Tribal Engagement to Protect Bears Ears*, BEARS EARS INTER-TRIBAL COALITION, <https://bearscoalition.org/timeline/> (last visited Mar. 4, 2019).

<sup>85</sup> The Bear Ears Inter-Tribal Coalition is comprised of several Native American tribes, these tribes include: the Navajo Nation, Hopi, Ute Mountain Ute, Ute Indian Tribe, and the Pueblo of Zuni. *Who We Are*, BEARS EARS INTER-TRIBAL COALITION, <http://bearscoalition.org/about-the-coalition> (last visited Sept. 18, 2018).

<sup>86</sup> *Proposal to President Barack Obama for the Creation of Bears Ears National Monument*, BEARS EARS INTER-TRIBAL COALITION 1 (Oct. 15, 2015), <http://www.bearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf> [hereinafter INTER-TRIBAL COALITION'S PROPOSAL].

<sup>87</sup> Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

<sup>88</sup> INTER-TRIBAL COALITION'S PROPOSAL, *supra* note 86, at 1-4.

<sup>89</sup> *Id.* at 8-13.

<sup>90</sup> *About the Monument*, BEARS EARS INTER-TRIBAL COALITION, <https://bearscoalition.org/about-the-monument/> (last visited Mar. 5, 2019).

<sup>91</sup> Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017).

<sup>92</sup> *Id.*

scientific or historic interest; and, were not under any threat of damage or destruction at the time of the designation.<sup>93</sup> Additionally, multiple laws enacted after the Antiquities Act provided specific protection for archaeological, historical, cultural, paleontological, as well as plant and animal resources.<sup>94</sup> Put simply, the proclamation declared that some of the objects within Bears Ears did not warrant protection under the Act and that such a large area was not warranted.<sup>95</sup> Overall, President Trump's modification of Bears Ears reduced its size by 85%, from 1.35 million acres down to 201,876 acres.<sup>96</sup>

Bears Ears in Utah exemplifies the conflict surrounding national monument designations under the Antiquities Act. On one side of the debate are those who seek protection and preservation of the land, such as environmentalists or Native American tribes that have cultural ties to the land.<sup>97</sup> On the other side, opponents include local residents who are affected by the designations, along with companies who seek access to the land for its natural resources.<sup>98</sup> These individuals argue that presidential designations are one-sided because they do not take into account the concerns of local residents who will be directly affected.<sup>99</sup> Furthermore, local residents argue that these designations limit their access to land that they have a right to use.<sup>100</sup> In addition, opponents point to the fact that many designations come late in a President's second term when there are no political ramifications for the President's action.<sup>101</sup> Many opponents of designations either support reductions in the size of large monuments or support limits on the President's power to designate monuments.<sup>102</sup>

President Trump's proclamation that reduced the size of Bears Ears faces judicial challenges by many that claim he does not have the power to reduce or abolish national monuments.<sup>103</sup> Although Congress expressly granted the President the power to designate national monuments under the Antiquities Act of 1906, Congress was silent on whether the

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 58,082.

<sup>95</sup> *Id.*

<sup>96</sup> Nordhaus, *supra* note 15.

<sup>97</sup> *See id.*

<sup>98</sup> *Id.*

<sup>99</sup> *See The Potential Impacts of Large-Scale Monument Designations: Field Hearing Before the S. Comm. on Energy & Nat. Res.*, 114th Cong. 6 (2016) [hereinafter *Hearings*] (opening statement of Sen. Mike Lee, Member, S. Comm. on Energy & Nat. Res.).

<sup>100</sup> *See* VINCENT, *supra* note 52, at 8-9.

<sup>101</sup> *Hearings*, *supra* note 99, at 16 (statement of Rep. Rob Bishop).

<sup>102</sup> VINCENT, *supra* note 52, at 3.

<sup>103</sup> Kirk Siegler, *Was It 'Illegal' for Trump to Shrink Utah's Monuments? The Battle Begins*, NPR (Dec. 5, 2017, 5:17 AM), <https://www.npr.org/2017/12/05/568507002/legal-challenges-mount-after-trumps-reduction-of-national-monuments>.

President could abolish or reduce the size of monuments.<sup>104</sup> Multiple congressional bills have been proposed to address this lack of clarity, and seek to either limit the President's authority under the Act or implement additional requirements into the designation process; however, none of these bills have been passed.<sup>105</sup> In addition to these attempts to amend the Act, there have been judicial challenges to several designations made under the Act.<sup>106</sup> Although courts have consistently upheld designations, more judicial challenges in the future are likely, especially challenges to reductions of existing monuments.<sup>107</sup> Until the Act is amended, the uncertainty surrounding designations will continue to exist.

## II. THE FUTURE OF THE ANTIQUITIES ACT

### A. CURRENT PROPOSED LEGISLATION AND ITS EFFECT ON THE ANTIQUITIES ACT

Recently, both the House and the Senate have proposed several bills seeking to amend the Antiquities Act by adding new requirements to the process of national monument designation, limiting the President's power to designate monuments, or abolishing his power altogether.<sup>108</sup> The following section discusses the current proposed legislation and how it would amend the Act.

The first bill, known as the Nevada Land Sovereignty Act, seeks to prohibit the further extension or establishment of national monuments in the State of Nevada unless there is express authorization by Congress.<sup>109</sup> The bill would amend the statute by inserting language that expressly states that national monument designations are prohibited in Nevada, as was done for Wyoming.<sup>110</sup> Likewise, Minnesota's Economic Rights in the Superior National Forest Act seeks to prohibit the extension or establishment of national monuments on National Forest System lands in the State of Minnesota except by express authorization of Congress.<sup>111</sup> Bills such as these seek to limit the President's power by requiring authoriza-

<sup>104</sup> Antiquities Act of 1906, 16 U.S.C. §§ 431-33 (repealed 2014).

<sup>105</sup> Mark Squillace, *The Looming Battle Over the Antiquities Act*, HARV. L. REV. BLOG (Jan. 6, 2018), <https://blog.harvardlawreview.org/the-loomng-battle-over-the-antiquities-act/>.

<sup>106</sup> Rutzick, *supra* note 30, at 30.

<sup>107</sup> See Siegler, *supra* note 103.

<sup>108</sup> John D. Leshy & Mark Squillace, *The Endangered Antiquities Act*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/opinion/the-endangered-antiquities-act.html>.

<sup>109</sup> Nevada Land Sovereignty Act, H.R. 243, 115th Cong. (1st Sess. 2017); S. 22, 115th Cong. (1st Sess. 2017).

<sup>110</sup> 54 U.S.C. § 320301(d).

<sup>111</sup> Minnesota's Economic Rights in the Superior National Forest Act, H.R. 3905, 115th Cong. § 2 (1st Sess. 2017).

tion from Congress but leave open the question of how to institute such authorization.<sup>112</sup> Additionally, these bills go against the original intent of the Act: to give the President the power and discretion to designate national monuments.<sup>113</sup>

Another bill, the Public Input for National Monuments Act, would require compliance with the National Environmental Policy Act (“NEPA”) as a condition that must be met before the President could exercise his discretion to designate a national monument.<sup>114</sup> NEPA is a federal law that requires federal agencies to conduct a study assessing the environmental impacts of their proposed actions prior to making decisions.<sup>115</sup> These evaluations must also include social and economic impacts related to the proposal.<sup>116</sup> In addition, the NEPA process involves a period of review, during which the public may comment on the proposed action.<sup>117</sup> NEPA further requires that before a decision can be made the public’s comments must be addressed.<sup>118</sup> Although this amendment would require an assessment of the proposed designation’s environmental impact, and incorporates a process for public input, it still fails to address other issues, such as: how large can designations be or whether the President may reduce or abolish prior designations.<sup>119</sup>

The Outer Continental Shelf Energy Access Now Act (“OCEAN Act”) proposed amending the Act to terminate the President’s authority to establish marine national monuments, but would not affect existing marine national monuments.<sup>120</sup> Although the current version of the Act is silent as to designations of marine national monuments, Presidents have used the Act to designate such monuments.<sup>121</sup> One such notable designation was Papahānaumokuākea Marine National Monument by President George W. Bush.<sup>122</sup> The marine monument is located northwest of the

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<sup>112</sup> *See id.*

<sup>113</sup> NAT’L PARK SERV., *supra* note 18.

<sup>114</sup> Public Input for National Monuments Act, H.R. 2074, 115th Cong. § 2 (1st Sess. 2017).

<sup>115</sup> *What is the National Environmental Policy Act?*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last updated Jan. 24, 2017).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See* Public Input for National Monuments Act, H.R. 2074, 115th Cong. § 2 (1st Sess. 2017).

<sup>120</sup> Outer Continental Shelf Energy Access Now Act, H.R. 2157, 115th Cong. § 2(b)(1) (1st Sess. 2017); S. 956, 115th Cong. § 2(e)(2) (1st Sess. 2017).

<sup>121</sup> Arnold Porter & Kaye Scholer, *Legal Analysis of the Antiquities Act and Marine Monuments*, NAT’L PARKS CONSERVATION ASS’N, 1 (Aug. 9, 2017), <https://www.npca.org/resources/3210-legal-analysis-of-the-antiquities-act-and-marine-monuments>.

<sup>122</sup> *Papahānaumokuākea Expands, Now Largest Conservation Area on Earth*, NAT’L MARINE SANCTUARIES (Aug. 2016), <https://sanctuaries.noaa.gov/news/aug16/president-announced-expansion-of-papahanaumokuakea-marine-national-monument.html>.

Hawaiian islands and encompasses 583,000 square miles.<sup>123</sup> Although this proposed amendment adds some clarification to the Act, by explicitly stating what the President cannot do,<sup>124</sup> it is still too narrow because it only addresses one small aspect of the Act.

Rather than abolish the President's power to designate federal land as national monuments altogether, more complex pieces of legislation seek to amend the designation process. The Improved National Monument Designations Process Act calls for congressional approval of proposed national monuments, places a prohibition on restricting the public use of national monuments, and calls for the establishment of a set of requirements that pertain to the declaration of marine national monuments.<sup>125</sup> Specifically, this bill would require that, before the President exercises his power to designate national monuments, he must first not only obtain congressional approval but also comply with NEPA.<sup>126</sup> Moreover, the legislature of the state where the national monument is to be located must approve the designation.<sup>127</sup> Regarding marine national monuments, the bill would impose similar requirements before a presidential designation.<sup>128</sup> In addition, the statute would prohibit the Secretary of the Interior from implementing any restrictions on the public use of a marine national monument until after a mandatory review period was completed, during which citizens could submit their input, and the designation would have to obtain congressional approval.<sup>129</sup>

Similarly, the National Monument Designation Transparency and Accountability Act of 2017 would amend the Act to require congressional and state approval of national monument designations and compliance with NEPA.<sup>130</sup> The proposed statute would also prohibit the Secretary from implementing any restrictions on the public use of the national monument until the expiration of an appropriate review period, during which the public could submit their input and Congress would have to approve the designation.<sup>131</sup>

The Marine Access and State Transparency Act also calls for congressional approval and compliance with NEPA before the President can

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<sup>123</sup> *Id.*

<sup>124</sup> H.R. 2157 § 2(b).

<sup>125</sup> Improved National Monument Designations Process Act, S. 33, 115th Cong. (1st Sess. 2017).

<sup>126</sup> *Id.* § 2(a)(1).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* § 2(a)(2).

<sup>129</sup> *Id.* § 2(b).

<sup>130</sup> National Monument Designation Transparency and Accountability Act of 2017, S. 132, 115th Cong. § 2(1) (1st Sess. 2017); H.R. 2284, 115th Cong. § 2(1) (1st Sess. 2017).

<sup>131</sup> National Monument Designation Transparency and Accountability Act of 2017, S. 132, 115th Cong. § 2(1) (1st Sess. 2017); H.R. 2284, 115th Cong. § 2(2) (1st Sess. 2017).

designate a national monument.<sup>132</sup> Furthermore, the President may not designate any area in the Exclusive Economic Zone<sup>133</sup> to be a marine national monument unless the designation is specifically authorized by an act of Congress and the President has submitted a proposal to the governor of each state that is located within 200 nautical miles of the proposed monument.<sup>134</sup> In addition, the President may not place restrictions on the public use of any area in the Exclusive Economic Zone designated as a national monument until the expiration of a review period.<sup>135</sup>

The most complex piece of proposed legislation is the National Monument Creation and Protection Act.<sup>136</sup> The bill proposes major amendments to the Act, including a limitation on the size of national monuments and what eligible objects can be designated.<sup>137</sup> Specifically, the act would strike the current language that states, “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest,” and replace it with “object or objects of antiquity.”<sup>138</sup> The term “objects or objects of antiquity” is defined as “relics, artifacts, human or animal skeletal remains, fossils (other than fossil fuels), and certain buildings constructed before the date of . . . enactment.”<sup>139</sup> The term does not include “natural geographic features and objects not made by humans, except fossils (other than fossil fuels) or human or animal skeletal remains.”<sup>140</sup> This language alone is a major restriction on what can be designated as a national monument. It would prevent designations of land simply because of its natural importance.

The National Monument Creation and Protection Act also calls for removing the provision in the Act that states “confined to the smallest area compatible with the proper care and management of the objects to be protected,” and replacing it with actual size limitations to remove any ambiguity caused by the previous phrasing.<sup>141</sup> The size limitation would

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<sup>132</sup> Marine Access and State Transparency Act, H.R. 1489, 115th Cong. § 2(a)(2) (1st Sess. 2017).

<sup>133</sup> Exclusive Economic Zone of the United States of America, 48 F.R. 10,605 (Mar. 10, 1983) (The Exclusive Economic Zone of the United States is “a zone beyond its territory and adjacent to its territorial sea . . . [where] a coastal State may assert certain sovereign rights over natural resources and related jurisdiction . . . . The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.”).

<sup>134</sup> H.R. 1489 § 2(b).

<sup>135</sup> *Id.*

<sup>136</sup> National Monument Creation and Protection Act, H.R. 3990, 115th Cong. (1st Sess. 2017).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* § 2(1).

<sup>139</sup> *Id.* § 2(3)(n)(3)(A)(i)-(v).

<sup>140</sup> *Id.* § 2(3)(n)(3)(B)(i)-(ii).

<sup>141</sup> *Id.* § 2(2).

state that the President may not declare a national monument “that is more than 640 acres and whose exterior boundary is less than 50 miles from the closest exterior boundary of another national monument.”<sup>142</sup> The statute does provide exceptions for designations that are larger than 640 acres, however, there are additional requirements that must be met.<sup>143</sup> For national monument designations larger than 640 acres but less than 5,000 acres, a review under NEPA must be conducted.<sup>144</sup> For designations between 5,000 and 10,000 acres, an environmental assessment or environmental impact statement must be prepared in accordance with NEPA.<sup>145</sup> Lastly, for designations larger than 10,000 but smaller than 85,000 acres, there must be approval by the elected governing body of each county, and by the legislature and governor of each state where the monument would be located.<sup>146</sup> The National Monument Creation and Protection Act would also allow an exception for emergency designations of any acreage amount “to prevent imminent and irreparable harm to the object or objects of antiquity to be protected by the designation.”<sup>147</sup> However, these emergency designations would have a one-year limitation, can only be designated once, and may not be permanently designated as a national monument.<sup>148</sup>

Additionally, the National Monument Creation and Protection Act would allow the President to reduce the size of declared monuments by 85,000 acres or less.<sup>149</sup> Reductions of more than 85,000 acres would be allowed if approved by the elected governing body of each county, the legislature, and governor of each state where the monument is located.<sup>150</sup> The National Monument Creation and Protection Act also requires that the reduction is reviewed under NEPA.<sup>151</sup> Overall, this proposed bill calls for a complete rewriting of the Act. Not only does it restrict designations to 85,000 acres in size and from being located within 50 miles of the nearest monument, it also drastically limits what can be designated as a monument, and being a place of natural beauty is not enough.<sup>152</sup> In addition, the President would be allowed to reduce the size of monuments by up to 85,000 acres without any restrictions.<sup>153</sup> Essentially, the

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<sup>142</sup> *Id.* § 2(3)(e)(1)-(2).

<sup>143</sup> *Id.* § 2(3)(e)-(h).

<sup>144</sup> *Id.* § 2(3)(f)(3).

<sup>145</sup> *Id.* § 2(3)(g)(2).

<sup>146</sup> *Id.* § 2(3)(h)(3).

<sup>147</sup> *Id.* § 2(3)(i)(1).

<sup>148</sup> *Id.* § 2(3)(i)(2)-(3).

<sup>149</sup> *Id.* § 2(3)(j)(1).

<sup>150</sup> *Id.* § 2(3)(j)(2).

<sup>151</sup> *Id.* § 2(3)(j)(2)(B).

<sup>152</sup> *See id.* § 2(3)(n)(3)(B)(i).

<sup>153</sup> *Id.* § 2(3)(j)(1).

National Monument Creation and Protection Act would make it easier to reduce national monuments in size but have less impact on how one can be created.

B. A CALL FOR SENSIBLE LEGISLATION: AMENDING THE ANTIQUITIES ACT

Although some of the proposed bills currently in the House and the Senate seek to amend the Act by addressing certain issues surrounding it, not one of the bills sufficiently addresses all the issues. To remedy the uncertainty surrounding designations and modifications of national monuments, an amendment to the Act must address the following: The President's authority to reduce or abolish prior designations, requirements that must be met before the designation of a national monument, limits on the size and manner of designations, and a process for designating or modifying monuments. To accomplish this, the Act's text should be amended to include specific requirements that must be met before the President designates a monument, as well as language that either explicitly authorizes or prohibits modification. Guidelines outlining a formal process for designating or modifying a national monument will help ensure that fully informed decisions are made. The following sections discuss the form these changes may take and the potential results.

1. *Designation of National Monuments*

One controversial aspect of the Act is the current power of the President to designate monuments of virtually unrestricted size.<sup>154</sup> President Trump's executive order specifically called for review of designations that cover more than 100,000 acres or designations that have been expanded to cover more than 100,000 acres.<sup>155</sup> Although the Act's current language requires national monuments to be limited to "the smallest area compatible with the proper care and management of the objects to be protected," no court has found a designation to violate this requirement, and the courts have held that they have no power to do so.<sup>156</sup>

Sensible legislation should impose limits on the size of national monument designations and could do so in several ways. One option would require that the designation's size be "reasonable," similar to the current language of the statute.<sup>157</sup> What constitutes reasonable depends

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<sup>154</sup> See Exec. Order No. 13792, 82 Fed. Reg. 20429, 20430 (2017).

<sup>155</sup> *Id.*

<sup>156</sup> Rutzick, *supra* note 30, at 30-32.

<sup>157</sup> See generally VINCENT, *supra* note 52, at 11-12 (discussing recent legislative activity regarding amending the President's power to designate national monuments).

on the circumstances surrounding the proposed designation; it would be a factual determination that would differ from case to case.<sup>158</sup> Under this approach, for a designation to meet the “reasonable” size standard, it must be shown that “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” are located throughout the entire proposed area. The ambiguity of the term “reasonable” raises the question of what happens if a President makes a designation that does not seem to be reasonable in size. In that case, the Act would have to allow for judicial review, otherwise, the same problem that arises under the current version of the Act would remain.

Another option for placing a limit on the size of the designation would be to include a numerical limit. For example, a limit of 100,000 acres could be included in the statute.<sup>159</sup> The President would have the power to designate a larger area, but only if authorized by Congress.<sup>160</sup> Although, creating a concrete numerical size limit may pose a problem because there are different circumstances and needs that arise with each designation. However, it would be a better option than the “reasonable” standard outlined above because a numerical limit provides a concrete restriction on the size of the designation. If the “reasonable” standard were implemented, it would most likely result in a multitude of judicial challenges to designations.

Sensible legislation should also amend the current language of the statute pertaining to what objects are included for designation as national monuments under the Act. The Act, as it currently stands, contains vague language, such as “other objects of historic or scientific interest.”<sup>161</sup> As discussed above, the language is vague and has resulted in controversial designations of vast size.<sup>162</sup>

A proposed amendment to the Act could address this problem in several ways. One option would be to simply strike this language from the text of the Act. This would leave historic landmarks, historic structures, and prehistoric structures as the only objects that could be designated as national monuments. This option places an extreme limit on the President’s discretion. A second option would be to specifically list all

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<sup>158</sup> See generally 54 U.S.C. § 320301(a)-(b) (current language in the statute already gives the President the discretion to designate national monuments to protect historic landmarks and other objects of historic or scientific interest).

<sup>159</sup> See generally National Monument Creation and Protection Act, H.R. 3990, 115th Cong. (1st Sess. 2017) (this bill is one of several proposed amendments in recent years seeking to put an actual limitation on the size of designations).

<sup>160</sup> See generally *id.* § 2(3)(h)(3) (proposing a similar restriction on larger monument designations).

<sup>161</sup> See 54 U.S.C. § 320301.

<sup>162</sup> See Yoo & Gaziano, *supra* note 58, at 628-29 (discussing that supporters of large-scale designations “justify the broad presidential use of the Antiquities Act on . . . its broad language”).

the objects that could be designated as national monuments.<sup>163</sup> Although this option would provide concrete guidelines, it may prove difficult because a specific list would likely be long, and it may also require constant revisions to add additional objects. The last option, and perhaps the most effective, would be to include a list of objects that are excluded from designation.

Another requirement that legislation should impose for the designation of a national monument is compliance with NEPA, or a similar process, to ensure that a proper assessment of the potential impacts is conducted before the President makes a designation.<sup>164</sup> The assessment should consider the environmental, social, and economic impacts of the proposed designation. Additionally, like with NEPA, the review process should allow for public comment and should require responses to these comments.<sup>165</sup> Although courts have found that NEPA does not automatically apply to actions taken by the President,<sup>166</sup> Congress can still require the President to comply with NEPA if it expressly states so in the Act.<sup>167</sup>

In addition to allowing for the potential impacts of the designation to be assessed, the process would also likely prevent last-minute designations by exiting Presidents<sup>168</sup> because a review process requires notice to individuals likely to be affected by the proposed action and must follow a mandatory timeframe.<sup>169</sup> Thus, a President would be prevented from making an unexpected, last-minute designation.

Even though public input and environmental assessment would likely result in more informed decision-making, the process does have its downsides. Not only would this process raise the costs of designating monuments, but the final authority on whether to make the designation would remain with the President, regardless of the assessment's findings.<sup>170</sup>

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<sup>163</sup> See H.R. 3990 (proposing such an option).

<sup>164</sup> Yoo & Gaziano, *supra* note 58, at 649-650.

<sup>165</sup> See generally *National Environmental Policy Act Review Process*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last updated Jan. 24, 2017).

<sup>166</sup> *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1194-95 (D. Utah 2004).

<sup>167</sup> See *id.* at 1184.

<sup>168</sup> See generally *Hearings*, *supra* note 99, at 16 (statement of Rep. Rob Bishop discussing abuse of discretion).

<sup>169</sup> See generally U.S. ENVTL. PROT. AGENCY, *supra* note 165 (outlining the NEPA review process).

<sup>170</sup> See generally *The NEPA Review Process*, NAT'L PRES. INST., <https://www.npi.org/NEPA/process> (last visited Mar. 4, 2019) (explaining that NEPA "does not require a particular result; it does not require that the best alternative from an environmental perspective be selected").

## 2. *Modification of Prior Designations—Abolishment or Reduction*

One of the biggest questions regarding the Act is whether it allows the President to reduce the size of national monuments or rescind the designations altogether.<sup>171</sup> The current language of the Act is silent on the President's authority to reduce or rescind prior designations.<sup>172</sup> As discussed above, this silence has led to conflicting interpretations.<sup>173</sup> One interpretation is that because the Act does not explicitly give the President the power to modify prior designations, he does not have the authority to do so.<sup>174</sup> The other interpretation is that since the President is authorized to designate national monuments, it is only logical that he also has the authority to reduce or abolish prior designations.<sup>175</sup> To resolve this conflict, Congress could either expressly grant the President the power to modify prior designations or expressly prohibit such action. However, if Congress passed legislation that expressly grants the President the authority to modify prior designations, requirements must be in place to prevent arbitrary modifications.

As some scholars on this topic have concluded, it seems only logical that since the President has the power to designate national monuments, he also has the authority modify prior designations.<sup>176</sup> This express grant of power would allow future Presidents to modify designations based upon changed circumstances.<sup>177</sup> Although designations can currently be modified by Congress pursuant to their power in the Property Clause,<sup>178</sup> this amendment would allow for modification by the President in situations when Congress fails to act. However, if the President is expressly granted this power, there should be limits and requirements in place, like there is for making designations.

One such requirement should be that the President could modify designations, either by reducing or abolishing them, only after a review has been conducted. This review may take several different forms. One option would be to implement compliance with NEPA or a similar environmental assessment process when attempting to modify designa-

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<sup>171</sup> See Yoo & Gaziano, *supra* note 58, at 633-39.

<sup>172</sup> *Id.* at 632.

<sup>173</sup> *Id.* at 632-33.

<sup>174</sup> *Id.* at 631.

<sup>175</sup> See *id.* at 639.

<sup>176</sup> *Id.* at 659.

<sup>177</sup> See generally *id.* at 659-65 (discussing the President's power to reduce the size of prior designations).

<sup>178</sup> See generally Thomas W. Merrill, *Property Clause*, HERITAGE GUIDE TO THE CONSTITUTION, <https://www.heritage.org/constitution/#!/articles/4/essays/126/property-clause> (last visited Mar. 4, 2019) (explaining that the Property Clause is "[t]he primary constitutional authority for the management and control" of federal land).

tions.<sup>179</sup> Another option would be to implement a system of periodic review, which could be done on an annual basis or after a set number of years.<sup>180</sup> Although these periodic reviews would not be as detailed as an initial review,<sup>181</sup> they would allow for the accounting of changed circumstances to help determine if the designation or the restrictions on the land are still necessary.<sup>182</sup> By doing this, periodic review would help create a path for modification of monuments in the future. Based upon the findings of a periodical review, if a President wishes to pursue modification of the designation, he must continue to comply with the NEPA process before taking such action. Just as this process would help ensure that potential impacts of designations are evaluated before designating a national monument, it would similarly help to ensure that the impacts of modifying designations are also properly assessed.

Additionally, a more stringent standard should be implemented that must be met before a President can modify prior designations. This standard should require that the President justify any modification with specific findings after review.<sup>183</sup> Examples of justification for modifying designations could include changed circumstances that show that the entire size of the monument is no longer necessary or that there is a better use for the land.<sup>184</sup> Although this heightened standard would limit when the President could modify designations, it may possibly lead to more judicial challenges claiming that reduction or abolishment was not justified, or was not based upon sufficient evidence.

Lastly, limitations on the size of reductions by a President and a prohibition on abolishment should be implemented. A limitation on the size of the reduction would help ensure that designations are not reduced in a way that would render them ineffective. Similar to limits on how much land could be designated, there should be a numerical limit on the

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<sup>179</sup> National Monument Creation and Protection Act, H.R. 3990, 115th Cong. (1st Sess. 2017) (bill proposing such a review process).

<sup>180</sup> See generally *The Federal Land Policy and Management Act of 1976*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT. 10-11 (Oct. 2001), <https://www.blm.gov/or/regulations/files/FLPMA.pdf> (discussing the Secretary of the Interior's review of lands withdrawn pursuant to the Federal Land Policy and Management Act).

<sup>181</sup> See generally *id.*

<sup>182</sup> *Id.* Reports would be prepared by the agency responsible for overlooking the monument. Periodical review may allow for review of land use permits such as grazing and natural resource extraction. Also, these periodical reviews could help ensure that the purpose and goals of the designations are being properly met (i.e. the agency is properly managing the monument).

<sup>183</sup> See generally *id.* at 19 (discussing similar requirements and limitations on the Secretary of the Interior's power to withdraw federal lands pursuant to the Federal Land Policy and Management Act).

<sup>184</sup> See *id.*

size of reductions.<sup>185</sup> A condition could also be implemented that would allow for reductions beyond the numerical limit, but such reductions must be approved by Congress.<sup>186</sup> For the extreme action of abolishing monuments, legislation should prohibit the President from taking such action and leave the possibility of abolishment to Congress instead.<sup>187</sup> Although requirements cannot be placed on Congress for abolishing or reducing the size of designations, Congress should conduct an assessment before making such a decision. Even if Congress did not incorporate an assessment before modification, a periodical review may help provide valuable information that Congress can use in making their decision. Overall, an amendment such as this would allow for the development of a process that would ensure that designations are properly serving their intended purpose.

### III. CONCLUSION

The question of federal land use, especially the designation of national monuments by the President through the Act, is a complex issue. There are many competing interests, which makes finding a solution difficult. As was the case with Bears Ears, many see designations of large areas of land as a federal land-grab or as the federal government imposing its will on the people of that state.<sup>188</sup> This is especially true in a state like Utah, where the federal government owns 63.1% of the land.<sup>189</sup> Overall, the federal government owns about 27.4% of all land in the United States.<sup>190</sup>

The power of the President to designate national monuments under the Act has long been a controversial issue.<sup>191</sup> There have been numerous judicial challenges to the Act and many proposed House and Senate Bills that sought to amend it.<sup>192</sup> To address uncertainty surrounding designations and the modifications, the Act should be amended to provide for more discernible guidelines that would define what a President can

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<sup>185</sup> See National Monument Creation and Protection Act, H.R. 3990, 115th Cong. § 2(3)(j) (1st Sess. 2017) (bill proposing such limitations).

<sup>186</sup> *Id.*

<sup>187</sup> See generally Mark Squillace, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. 55, 57 (2017) (arguing that the Antiquities Act does not grant the President the power to revoke a national monument).

<sup>188</sup> Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1386-89 (2002).

<sup>189</sup> CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R43246, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 8 (2017), available at <https://fas.org/sgp/crs/misc/R42346.pdf>.

<sup>190</sup> *Id.* at 9.

<sup>191</sup> Squillace, *surpa* note 5.

<sup>192</sup> VINCENT, *surpa* note 52, at 1-2.

and cannot do in regards to designations. The amendment should also allow for a more transparent process, that would involve public input, to ensure proper decisions on how designations are made can be achieved. Overall, amending the Act to include further requirements and guidelines would provide certainty in the designation.

The Antiquities Act was enacted to give the President the power to designate federal land as a national monument in order to protect objects of historic or scientific interest.<sup>193</sup> Over the years, Presidents have expanded this power by protecting entire natural landscapes.<sup>194</sup> Likewise, Presidents have used the Act to reduce the size of prior designations.<sup>195</sup> Regardless of how the issues surrounding the use of the Act are addressed, it is important that the Act remain in effect. The Antiquities Act is one part of a system that helps ensure that federal land and the objects upon it are protected for future generations.

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<sup>193</sup> NAT'L PARK SERV., *supra* note 18.

<sup>194</sup> Yoo & Gaziano, *supra* note 58, at 628.

<sup>195</sup> Nordhaus, *supra* note 15.

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