

The Antiquities Act

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“The reason to preserve nature is that we need it. We need wilderness of all kinds, large and small, public and private. We need to go now and again into places where our work is disallowed, where our hopes and plans have no standing.”

Wendell Berry

“What have future generations ever done for us?”

Groucho Marx

I. Background & History

In 1823, Navajo Indians raided a group of settlements in what is now New Mexico.¹ The Treaty of Cordoba had been signed just two years before, declaring Mexican independence from Spain, though Spain refused to recognize the independence. The area of New Mexico was constantly plagued with threats from local tribes, so the Spanish officials were prepared to deal with the raiding Navajo.² A Spanish military officer named José Antonio Vizcarra pursued the raiders west up a dry wash that goes on for nearly fifty miles in the arid region northwest of Albuquerque.³ The area is sparsely vegetated, has almost no water except when rare rains pour down the canyon, and probably represented a useful escape route for the Navajo.⁴ After a four-day expedition up the wash, the canyon deepening and widening by the mile, the group would have come to the ruins of Hungo Pavi, a 60 meter long structure at the base of the cliff.⁵ While the Spanish likely saw archeological ruins frequently, the scale and architecture of the structure would have been unlike anything else in the region. Two miles later, the party discovered what may be one of the greatest discoveries of the American Southwest, Pueblo Bonito. The ruins of the likely capital of Pueblo culture are a massive, beautifully geometrical structure, half-moon shaped, and filled with a trove of Native American artifacts.⁶ This accidental discovery began a chain of events that would involve a devious cowboy, a pious archeologist, a greedy miner, and thirty-five very lonely fish, and would end in Republican and Democratic presidents working together to form the largest reserves the world has ever seen.

The nineteenth century was a lawless time for the American West, and the world of antiquities was no exception. By the time that Smithsonian scholars investigated Chaco Canyon, the home of Hungo Pavi and Pueblo Bonita, in the 1870s, there were few restrictions on taking artifacts from historical sites.⁷ If a site was on federal land, a citizen needed only to ask their

congressman to petition the General Land Office (GLO, precursor to the Bureau of Land Management) for permission.⁸ Museums and private collectors alike treated sites as first-come-first-serve banquets of archeological treasures. In Chaco Canyon, the American Museum of Natural History (AMNH) commissioned the Hyde Expedition, led by the brothers Talbot and Fred Hyde, to excavate the ruins.⁹ The goal was to collect as many artifacts as possible to bring back to the museum. Richard Wetherill was a prominent figure who partnered with the Hydes. Born to a Colorado ranching family, his swashbuckling approach to archeology garnered him prestige in the field but disdain from the scientific community.¹⁰ He is credited with the discovery of Cliff Palace in Mesa Verde and Kiet Seel in Northern Arizona.¹¹ These were not enough, however, to appease the professors of eastern universities, who saw archeology as the domain of academia, and feared Wetherill's selling off priceless artifacts.¹²

The Hyde expedition successfully stripped over 60,000 artifacts from Pueblo Bonito alone, and shipped them back to the AMNH.¹³ The GLO feared that the Hydes and Wetherill were selling artifacts at trading posts they set up nearby, but could never prove it.¹⁴ When the expedition finished, the Hydes and Wetherill attempted to establish ownership over the area through the Homestead Act.¹⁵ Since it passed in 1862, this act gave millions of acres of land in the west to private owners.^{16 17} Traditionally, homesteads were allowed to any person who filed a permit, improved the land, and stayed there for at least five years.¹⁸ The GLO was able to strip the homestead from Wetherill in 1902, showing that he had not planted sufficient acreage.¹⁹ This was a signal for a change in the way the GLO dealt with private land use in the West, from deference to private use to protection for public good.

Reverend Henry Mason Baum was probably the polar opposite of Richard Wetherill. He was an educated easterner, and editor of the American Church Review.²⁰ Though he too lacked

academic credentials, he founded the Records of the Past Exploration Society in 1900, which attracted academics to his cause.²¹ Baum traveled to Chaco Canyon, where he found Wetherill living illegally next to Pueblo Bonito, blatantly exploiting the archeology for his gain, and it seemed to spur the Reverend to immediate action.²² In 1903, Baum urged the appointment of a custodian to ensure that excavation of nearby Canyon de Chelly was done correctly.²³ In 1904, Baum's legislation for the protection of antiquities was proposed in the House by Rep. Rodenburg of Illinois²⁴ and in the Senate by Sen. Lodge of Massachusetts.²⁵ The bill would have given the Secretary of the Interior responsibility for issuing permits to excavate any spot on federal land. It competed with a similar bill that would give that authority to the Smithsonian Institution.^{26 27}

Support was high for the bills, and Baum's bill quickly passed the Senate.²⁸ However, infighting in the House subcommittee examining the bill critically stalled its passage.²⁹ The Smithsonian had more influence in Congress than Baum, and it appears that this made the difference. The congressional session was nearing a close, so a delay could be all that was needed to stop the bill.³⁰ The Assistant Secretary of the Smithsonian convinced Rep. Alexander of New York to oppose a voice vote that would speed approval of the bill.³¹ Baum quickly went to work persuading Alexander, but by the time he came around, Rep. Adams of Pennsylvania had objected.³² To Baum's frustration, the bill died in the House as the session finished.³³

The man who would come to conclude the issue was named Edgar Hewett. He was an archaeologist working at the Pajarito plateau north of Santa Fe.³⁴ He had a healthy mix of Wetherill's southwest knowledge and Baum's academic credentials, with added ties to important persons.³⁵ Hewett personally introduced John Lacey of Iowa to Chaco Canyon, and apparently

made a strong impression.³⁶ Lacey is famous for the Lacey Act of 1900, which provided a legal framework for controlling the trade in plants and animals.³⁷ Lacey's support, along with that of W.A. Richards, the commissioner of the GLO, were instrumental in getting the new bill to Congress.³⁸ In hindsight, Baum's failure was likely the nation's gain. Hewett pointed out many flaws in the earlier bill. He noted three shortcomings: the bill's language was too exclusive of qualified authorities to excavate, the requirements for continuous fieldwork were unreasonable, and the bill restricted land preservation to 640 acres per site.³⁹ Moreover, the system would, in effect, only serve to impose restrictions on the system for protection currently in place. At the time, the Secretary of the Interior could make temporary reservations of land to quickly protect an important area.⁴⁰ Hewett sought to improve that power, not restrict it.

Baum's bill was reintroduced to the next session of Congress, but it again died in 1905.⁴¹ In late 1905, Hewett convinced the American Anthropological Society to support his bill over Baum's.⁴² He argued that his new version fixed the problems of Baum's bill. In addition, it would avoid the battles over sole custody of antiquities by allowing the department that administered the land to be in charge of the reservations declared on it.⁴³ This meant the department of Interior for Parks, Agriculture for Forests, and War (now Army) for military reserves. John Lacey introduced the bill in the House⁴⁴, and Thomas Patterson of Colorado did the same in the Senate⁴⁵.

While Hewett's bill, An Act for the Preservation of American Antiquities, would be of great import to land use in coming years, it faced surprisingly little opposition. The passage through both houses was likely aided by several factors. First, President Roosevelt's influence in bringing the topic of conservation to the fore likely swayed the conversation. Second, the bill had powerful sponsors. Lacey had the political power to push the bill through the House, and the

Coloradoan Patterson helped to allay the fears of other Southwest Senators.⁴⁶ Congressmen in both houses feared the *carte blanche* that would be handed to the president. However, this was not new territory. The Forest Reserve Act of 1891 granted the president the power to unilaterally set aside forest reserves.⁴⁷ When Rep. Stephens of Texas asked Hewett if the Antiquities Act would similarly allow the President to “tie up” land, Hewett replied that his law was entirely different.⁴⁸ Indeed, while the Antiquities Act has been challenged frequently for setting aside land, the acreage of land has not approached the 193 million acres set aside for National Forests.⁴⁹ President Roosevelt signed the Antiquities Act into law in 1906 and then, to the probable dismay of Rep. Stephens, promptly used it to declare 18 national monuments totaling over a million acres.⁵⁰

II. Summary of Provisions

The Antiquities Act⁵¹ is a short statute, which makes its wide-reaching implications all the more impressive. The law is divided into four sections. The first establishes punishments for the damage or removal of antiquities. It includes ruins and monuments, but does not further define antiquities. It sets the maximum limits of punishments as five hundred dollars and ninety days imprisonment. The third and fourth sections authorize the secretaries of Interior, Agriculture, and War to issue permits to collect antiquities for science or education. These secretaries are authorized to promulgate rules and regulations to carry out the act.

The second section, the focus of this paper, authorizes the President to declare National Monuments. There are only three restrictions on what may be declared a monument, and the language seems to sign over a large amount of authority in making monuments to the President. The first restriction is that the monument must be a historic landmark, a historic or prehistoric structure, or an object of historic or scientific interest. While the first two may be restrictive, the

final category seems designed to be (and historically has been) broadly interpreted. The second restriction states that the monument may only be declared on lands that are owned or controlled by the U.S. government, but this is followed by a provision authorizing the Secretary of the Interior to negotiate the relinquishment of private claims to the government if it is necessary for proper care and management. The final restriction is that the reserve “shall be confined to the smallest area compatible with the management and care of the objects to be protected.”

The law was written to give the President broad discretion to protect objects of interest without the process that Congress would need to follow. This makes sense in the historical context of Chaco Canyon, where the time required to protect land by an act of Congress would have resulted in the loss of many of the treasures in the region. However, this broad discretion has been the source of controversy from the law’s inception all the way to today.

III. Major Amendments

While there have been changes in the application of this law, there has only been one amendment.⁵² The amendment is peculiar in that it is only relevant to the use of the Antiquities Act in the state of Wyoming. In 1943, President Franklin D. Roosevelt issued Proclamation No. 2578, declaring 221,610 acres of land in Wyoming as Jackson Hole National monument.⁵³ The monument contained over 32,000 acres donated by John D. Rockefeller, and enclosed over 17,000 acres of private land.⁵⁴ This monument faced heavy opposition from Wyomans⁵⁵, who argued that the designated land did not hold any special interest except for ranching.⁵⁶ In the same year it was proclaimed, Wyoming congressmen introduced *A Bill to Abolish the Jackson Hole National Monument*.⁵⁷ The bill was a source of heavy debate, but passed through Congress

in 1944, only to suffer a pocket veto by President Roosevelt.⁵⁸ To appease Wyoming, Congress neglected to appropriate funds to Jackson Hole for the next seven years.⁵⁹

Wyoming next tried to seek relief in the courts. In 1945 the Wyoming district court heard the suit of the state of Wyoming versus Franke, the official in charge of the monument at that time.⁶⁰ The plaintiffs stated several grievances, but most critically that the monument was illegal because it violated the language of the Antiquities Act in that there were no historic landmarks, historic or prehistoric structures, and no objects of historic or scientific interest on the site.⁶¹ The defendants offered evidence that there were indeed ample historically and scientifically important spots within the site.⁶² The court found in favor of the defendant, arguing that the act gives broad discretion to the President to determine whether or not objects are of sufficient interest.⁶³ They stated that any other finding would amount to the judicial interfering with the executive department.⁶⁴

The court's decision secured the future of Jackson Hole, but without funding, it was still in limbo. This condition persisted until Congress was able to compromise with President Truman in 1950.⁶⁵ Jackson Hole was merged into Grand Teton National Park, and Congress passed the amendment prohibiting any further creation or extension of parks or monuments in Wyoming without the approval of Congress.⁶⁶ ⁶⁷ A more recent attempt to amend the law was H.R. 1459, the Ensuring Public Involvement in the Creation of National Monuments Act, which passed the House, but died in the Senate.⁶⁸ This attempt would have restricted the creation of monuments to one per state per four year Presidential term, required consent if the monument contained private property, and added National Environmental Policy Act (NEPA) review if the monument is over 5,000 acres.⁶⁹

IV. Summary of Applicable Regulations

The regulations directly relevant to the Antiquities Act as codified in the CFR pertain mostly to the investigation and collection of antiquities, not to the president's monument declaration power, so will only be treated briefly here.⁷⁰ Section 3.1 specifies that the Secretaries of Agriculture, Army, and Interior shall have jurisdiction over antiquities (including monuments) on forest reserves, military reservations, and all other government lands, respectively. Sections 3.2-3.14 describe the rules for permitting and doing fieldwork on antiquities. Section 3.15 gives permission to the same three secretaries to arrest anyone harming an antiquity, and section 3.16 permission to seize anything those individuals may have collected. Finally, section 3.17 provides that all collected antiquities must be displayed in public museums.

Further regulations promulgated by the Departments can be found in titles 43 and 36.⁷¹ Title 43 details important regulations of the powers of the Secretary of the Interior. For instance, due to the Federal Land and Policy Management Act (FLPMA), the Secretary is prohibited from modifying or revoking any withdrawal creating national monuments by the president (s2300.0).⁷² Section 2641 details the federal lands, including monuments, which may not be conveyed. However, section 2568 deals with allotments to Alaska native veterans. Under the Alaska Native Claims Settlement Act, veterans may receive small parcels of land, even within monuments, as long as they comply with conservation goals.⁷³ Section 3811.2 withdraws national parks and monuments from new mining claims. Title 36, section 9 deals with existing mining claims in certain monuments, preventing expansion of mining after the Mining in the Parks Act of 1976.⁷⁴

V. Major Court Cases Interpreting the Law

Section two of the Antiquities Act has frequently been the target of lawsuits. The suits come from the conflict between the federal government and citizens of the areas affected by monuments, as in *Wyoming v. Franke*.⁷⁵ I will focus on three cases that formed the foundation for interpreting the Antiquities Act, and whose decisions led to the widespread use of the act in recent years.

Challenge to the Antiquities Act did not take long. The same year it passed, Ralph Henry Cameron, with echoes of Richard Wetherill, was using his mining claims in the Grand Canyon to extract tolls from tourists on the Bright Angel Trail.⁷⁶ Theodore Roosevelt declared Grand Canyon National Monument in 1908, protecting over a million acres between the north and south rim sections.⁷⁷ There was a clause in the proclamation of the monument protecting valid claims discovered before the monument was declared.⁷⁸ In a public hearing in 1909, Secretary of the Interior James Garfield declared that Cameron's mining claims were invalid, then later also rejected Cameron's renewed application for a patent to the claim.⁷⁹ After two rejections, Cameron gave up trying to comply with the law, and continued to occupy the claims and use them to gouge visitors to the canyon.⁸⁰ The government brought suit against Cameron to enjoin him from occupying, using for business, asserting any right to, or interfering with public use of the land he owned within the monument.⁸¹ The case was upheld at the District Court and the Circuit Court of Appeals, but Cameron appealed each time, and the case moved to the Supreme Court in 1920.⁸²

Cameron brought two claims as the reasoning for his appeal.⁸³ First, he claimed that the monument reserve was not valid because there was no authority for its creation.⁸⁴ The court summarily rejected this claim in a short, but important opinion. The court reasoned that the Antiquities Act gives power to the president to establish reserves for "objects of historic or

scientific interest.”⁸⁵ They asserted that the Grand Canyon is clearly an object of great scientific interest given its unique geology.⁸⁶ Therefore, it is a valid monument. Cameron’s second claim, that the Secretary of the Interior did not fairly declare his mining claim invalid, was dealt with in much greater detail, but probably with fewer implications.⁸⁷ The Cameron decision affirmed Roosevelt’s precedent that the Antiquities Act would not be confined to small reservations for curiosities, but could legally be used to protect large areas of scientifically important land.

The Antiquities Act’s next challenge in the Supreme Court did not occur until 1976, but involved a monument declared in 1952 by President Truman.⁸⁸ Devil’s Hole is a small 40-acre parcel of land reserved as a detached component of Death Valley National Monument (now Death Valley National Park).⁸⁹ Though the parcel is some ten miles from the border of Death Valley, it is considered connected because it is the last known remnant of the Death Valley lake system that once covered the area.⁹⁰ Devil’s Hole was specifically preserved to protect the lake remnant and its inhabitant, the Devil’s Hole pupfish. This fish, endemic to the tiny monument, has a population that has dipped as low as 35 in 2013.⁹¹

In 1968, the Cappaert family began pumping groundwater from wells on their 12,000-acre ranch adjacent to Devil’s Hole.⁹² The water level in Devil’s Hole immediately began dropping, threatening the pupfish.⁹³ Since the Endangered Species Act had yet to be passed, in 1971 the United States sought an injunction to stop pumping from wells it determined were linked to Devil’s Hole, on the grounds that the waters in the Hole were reserved to the United States.⁹⁴ Cappaert conceded that the wells were likely linked, but denied that the United States had water rights in Devil’s Hole.⁹⁵ The District Court found that the US did have water rights, and issued an injunction that limited withdrawals past a certain critical level.⁹⁶ Upon Cappaert’s appeal, the Court of Appeals affirmed, and the case moved to the Supreme Court.⁹⁷

As with the *Cameron* case, the *Cappaert v. United States* decision dealt mostly with issue of resource use, not the validity of the monument. A mere one paragraph was devoted to Cappaert's claim that the Antiquities Act only applies to archeological sites, and the rest of the five-page decision deals with water rights. The court summarily rejected Cappaert's challenge, citing *Cameron*, and simply stating that the pool and its inhabitants are "objects of historic or scientific interest."⁹⁸ In terms of water rights, the court upheld the lower courts in finding that the reservation of Devil's Hole indeed granted water rights to the federal government.⁹⁹

The next major challenge to the President's rights under the Antiquities Act came just two years later. Unlike *Cameron* and *Cappaert*, *Alaska v. Carter* was not a suit brought by the federal government, but a suit by the state of Alaska against the President who made the monument reservations.¹⁰⁰ Presidents in the first half of the 1900s made extensive use of the Antiquities Act, reserving an average of 272,177 acres per year between 1906 and 1949.¹⁰¹ Between 1950 and 1977, however, the reservations dropped to an average of just 2,083 acres per year.¹⁰² President Carter's actions in Alaska completely changed that. However, it is worth noting that it was Congressional dysfunction that led to Carter's huge withdrawals, not his desire to bypass the democratic system.

In 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA).¹⁰³ The Act allowed Alaskan Natives to select 44 million acres for reservation, and additionally allowed the Secretary of the Interior to temporarily withdraw 83 million acres for study to determine which would be suitable to add to the National Parks system.¹⁰⁴ The 83 million acres withdrawal took place in 1973, and had a five-year deadline.¹⁰⁵ The bill to complete the withdrawal in 1978 passed easily through the House 277-31, but in the Senate, it never got a full vote, and the Congressional session ended.¹⁰⁶ This mishap would mean that all of the area would be

immediately open to development as soon as 1978 passed. A task force appointed by the Secretary of the Interior developed a plan to protect the lands using administrative and executive actions, including action under the Antiquities Act.¹⁰⁷ When the State of Alaska sued during the comment period, the Secretary of the Interior determined that an emergency existed, and immediately withdrew over 100 million acres in Alaska under authority given to him by FLPMA.^{108 109}

The state of Alaska opposed the reservation of land and hoped to prevent the President and Secretary of the Interior from closing the comment period on the land withdrawals until 90 days after October 30, 1978.¹¹⁰ Alaska hoped that this period and a requirement of NEPA review would delay the monuments enough for development to begin in regions enough to discourage further withdrawals. The District Court considered Alaska's claims that the Secretary of the Interior and President's actions required NEPA review, and that the comment period was illegally short.¹¹¹ The critical question for the Antiquities Act was whether or not monument designations were subject to NEPA review. While NEPA review is important to prevent environmental damage in many cases, it would have slowed the monument designation process, and weakened the capacity of the Antiquities Act to function in emergency situations. The court found that the President's actions were not subject to NEPA review, since NEPA applies only to "federal agencies".^{112 113} The state countered that, since the Secretary of the Interior had advised the President, NEPA was triggered.¹¹⁴ The court wrote that this argument "approached the absurd," and added that requiring NEPA before the President could receive advice would raise constitutional questions.¹¹⁵ They cited *United States v. Thompson* as showing the maxim that the preferable interpretation of a statute is the one that does not raise questions of constitutional validity.^{116 117} The questions of the validity of the comment period failed on merits, and also

failed to demonstrate irreparable injury, as would have been required for an injunction.¹¹⁸ The court's opinion was delivered on November 27, 1978, and on December 1, 1978, James Carter protected 56 million acres of American land, an achievement that will likely never be surpassed.^{119 120}

VI. Applicable Major Agency Policies Interpreting the Law

Monuments as Parks

The National Parks Service treats monuments as functionally equivalent to National Parks, as provided in the Organic Act, which established the Park System.^{121 122}

No surprises policy

Under President Clinton, Secretary of the Interior Bruce Babbitt initiated a “no surprises” policy regarding monument designation.¹²³ Babbitt offered to 1) visit any area a monument was being considered, 2) meet with officials and the public about monuments, and 3) give local members of Congress and Senators the chance to protect the area in Congress before recommending monument designation.¹²⁴

Private lands enclosed by parks

When monuments are created, they may only contain federal land, but they may enclose private land. That is, private land may be left as a sort of island within the monument. This creates challenges for access as well as risk to the monument. The Bureau of Land Management (BLM) requires that any activities that may damage the monument must be reported, even on private land.¹²⁵

Resource Management Plans

The BLM has a policy of creating Resource Management Plans to describe and plan for

management of important resources on their land, including monument land.¹²⁶

Existing mining claims

Agencies continue to permit operation of mining claims that existed before the designation of a National Monument, as long as those claims do not harm the monument or park, as pursuant to the Mining in the Parks Act.¹²⁷ For instance, the Forest Service Manual details rules for determining which mining operations may continue in Alaska in section 2800.¹²⁸

VII. Status of the Law's Implementation

Presidents have used the Antiquities Act 157 times since 1906 (Figures 1 and 2).¹²⁹ As noted in section III, the pattern of monument creation has been erratic, with most preservation happening in the first half of the 19th century, and bursts in 1978 and after 1996. Carter withdrew the majority of land by acreage in 1978, but this graph does not include the over 763,000,000 acres (1,193,000 sq. mi.) of marine habitats protected by Presidents Bush Jr. and Obama.¹³⁰ By a long margin, the four marine national monuments represent the largest preservation efforts in American History, and likely world history.

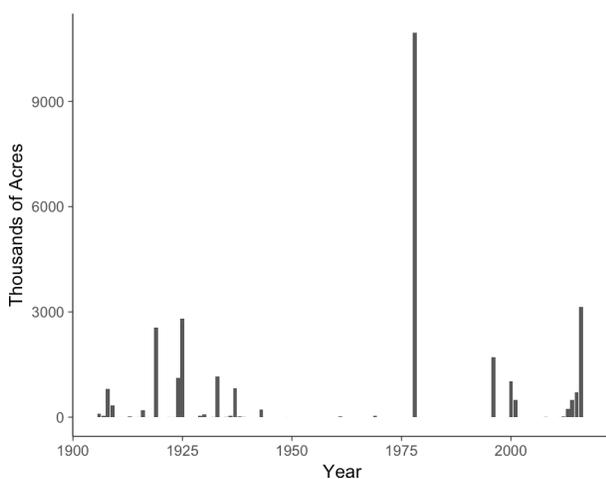


Figure 1: Total acres preserved each year under the Antiquities Act. Does not include marine reservations, which would be over nine times larger than all others combined.

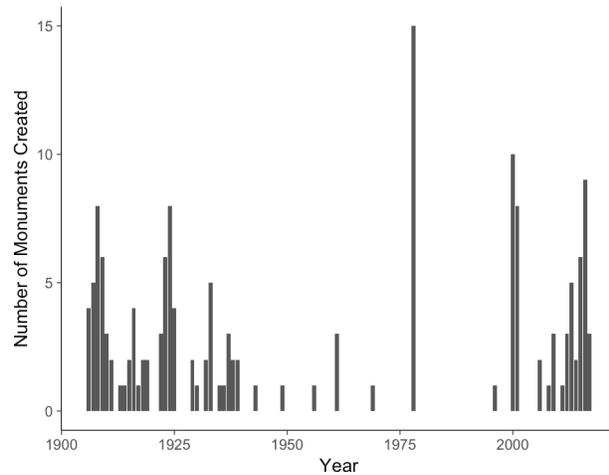


Figure 2: Number of times the Antiquities Act has been used each year.

Not all of the reservations of National Monuments remain monuments. Many have been folded into other reserves like National Historic Parks, or made into parks in their own right. The National Parks Grand Canyon, Olympic, Zion, Bryce Canyon, Arches, and Death Valley began as Monuments, to name a few.¹³¹ Several have been reduced in size. For instance, Petrified Forest lost 25,000 acres under President Taft, apparently to better comply with the requirement that monuments be of the smallest size compatible with the care of the antiquities.^{132 133} However, this reduction has happened only 21 times, and for relatively small acreage.¹³⁴ Of the 157 monuments declared, Congress has removed just 11 in the history of the Antiquities Act.¹³⁵ Of these 11, all but 3 are now state parks or forest.¹³⁶ The 3 abolished parks total just 783 acres.¹³⁷

The lack of significant loss of monuments is not for lack of effort. Legal challenges to the Antiquities Act have persisted even as they are continuously defeated. On several occasions, the Congressional Research Service has issued reports on the scope of the President's power under the Antiquities Act.¹³⁸ A recent report in 2016 concluded that there is no precedent for Presidential revocation of a monument, but no clear legal consensus exists.¹³⁹ President F.D. Roosevelt's Attorney General, Homer Cummings, concluded that there is no statutory authority for the President to revoke monuments.¹⁴⁰ Since Cummings did not find implied authority for revocation, he concluded that the president does not have this authority.¹⁴¹ However, since it has never been legally challenged, the report concluded that the issue has not decided.¹⁴²

Including marine reserve expansions, President Obama's use of the Antiquities Act far surpasses even Carter's. Obama used the act some thirty times to protect over 8,487,470 acres on land, and 544,692,480 acres of marine habitats.¹⁴³ The most vocal opposition so far has been to the 1,350,000 acre Bear's Ears National Monument in Utah. The monument joins southern

Utah's already heavily preserved southeast, adjacent to Clinton's Grand Staircase-Escalante and Canyons of the Ancients National Monuments. Importantly, the monument is north of the large Hopi, Navajo, and Ute reservations. Representatives of tribes have formed the Bear's Ears Inter-Tribal Coalition to support the protection of the monument in Utah since it would contain many sites that are important archaeologically and to the sacred traditions of the tribes.¹⁴⁴ However, others in Utah want the region to remain open to drilling for fossil fuels and mining.

Representative Rob Bishop of Utah, chair of the House Committee on Natural Resources, has advocated President Trump removing the monument by executive order.¹⁴⁵ Utah Attorney General Sean Reyes has said that he will attempt to sue to overturn the monument, though he has not said on what grounds.¹⁴⁶ It appears that President Trump has heard Utah's complaints about Bear's Ears, and will be considering working to reduce it in size.¹⁴⁷

Given the long history of the courts upholding Presidential discretion in declaring monuments, it is unlikely that Bear's Ears or other recently created monuments will be abolished. The legacy of the Antiquities Act is a long history of preservation of America's natural spaces. The courts have continuously upheld the plain language of the act; that it gives broad discretion to the President to protect land. Reservations of National Monuments have led to the creation of some of the most important parks in the country, and for the most part, Americans seem to support them, even when they disagree over presidential powers. Thanks to the deft hand of Edgar Hewett and the political expertise of John Lacey, what began in Chaco Canyon at the end of the 19th century has led through twists and turns to the preservation of nearly a billion acres, or around two percent of the earth's surface. The story of the Antiquities Act is the story of the vast expansion of executive power at the expense of American business interests, but it is also the story of the change in American views on the land; from the

domination of nature to the conservation of resources; from theft from our future to preservation for centuries to come.

ENDNOTES

¹ Reed, Paul F. *The Puebloan Society of Chaco Canyon*. Greenwood Publishing Group, 2004.

² *Id.*

³ Reed, Paul F. *The Puebloan Society of Chaco Canyon*. Greenwood Publishing Group, 2004.

⁴ *Id.*

⁵ Lister, Robert H., and Florence Cline Lister. *Chaco Canyon: archaeology and archaeologists*. UNM Press, 1984.

⁶ *Id.*

⁷ Lister, Robert H., and Florence Cline Lister. *Chaco Canyon: archaeology and archaeologists*. UNM Press, 1984.

⁸ Hal Rothman. *Preserving Different Pasts: The American National Monuments*. University of

⁷ *Id.* at 1

⁸ Hal Rothman. *Preserving Different Pasts: The American National Monuments*. University of Illinois Press, 1989.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1

¹² *Id.* at 8

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 12 Stat. 392

¹⁶ *Id.*

¹⁷ Shanks, Trina RW. "The Homestead Act: A major asset-building policy in American history." *Inclusion in the American dream: Assets, poverty, and public policy* (2005): 20-41.

¹⁸ *Id.*

¹⁹ *Id.* at 8

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ H.R. 13349, 58th Congress (1904)

²⁵ S. 5603, 58th Congress (1904)

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- ²⁶ S. 4127, 58th Congress (1904)
- ²⁷ H.R. 12447, 58th Congress (1904)
- ²⁸ *Id.* at 8
- ²⁹ *Id.*
- ³⁰ *Id.*
- ³¹ *Id.*
- ³² *Id.*
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ *Id.*
- ³⁶ Hartz, Donna, and George Hartz. *Arizona's National Parks and Monuments*. Arcadia Publishing, 2013.
- ³⁷ 16 U.S.C. §§ 3371-3378
- ³⁸ *Id.* at 8
- ³⁹ *Id.*
- ⁴⁰ *Id.*
- ⁴¹ *Id.*
- ⁴² *Id.*
- ⁴³ *Id.*
- ⁴⁴ H.R. 11016, 59th Congress (1906)
- ⁴⁵ S. 4698, 59th Congress (1906)
- ⁴⁶ *Id.* at 8
- ⁴⁷ 16 U.S.C. ch. 2, subch. I § 471
- ⁴⁸ *Id.* at 8
- ⁴⁹ U.S. Forest Service. *The U.S. Forest Service – An Overview*, U.S. Forest Service (2013)
- ⁵⁰ National Park Service, *Antiquities Act 1906-2016: maps, facts, & figures*. (2016) available at: <https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm>
- ⁵¹ 54 U.S.C. § 320301 – 320303; 34 Stat. 225; PL 59-209
- ⁵² 54 U.S.C. § 320301(d); 16 USCS 431a
- ⁵³ 57 Stat. 731
- ⁵⁴ Squillace, Mark. "The monumental legacy of the Antiquities Act of 1906." *Ga. L. Rev.* 37 (2002).

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- ⁵⁵ A citizen of Wyoming. See Dissent in *Montana v. Wyoming*, 131 S. Ct. 1765 (2011)
- ⁵⁶ *Id.* at 54
- ⁵⁷ H.R. 2241, 78th Cong. 3 (1943)
- ⁵⁸ *Id.* at 54
- ⁵⁹ *Id.*
- ⁶⁰ *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyoming 1945)
- ⁶¹ *Id.*
- ⁶² *Id.*
- ⁶³ *Id.*
- ⁶⁴ *Id.*
- ⁶⁵ *Id.* at 54
- ⁶⁶ *Id.* at 52
- ⁶⁷ *Id.* at 50
- ⁶⁸ H.R. 1459, 113th Congress (2013)
- ⁶⁹ *Id.*
- ⁷⁰ 43 CFR 3
- ⁷¹ e-CFR Title 43, Subtitle B, Chapter II, e-CFR Title 36, Chapters I-III
- ⁷² 43 U.S.C 35 § 1701 et. seq.
- ⁷³ 43 U.S.C. § 1601
- ⁷⁴ 16 U.S.C. § 1901
- ⁷⁵ *Id.* at 60
- ⁷⁶ *Id.* at 54
- ⁷⁷ *Id.* at 50
- ⁷⁸ *Id.* at 54
- ⁷⁹ *Cameron v. United States*, 252 S. Ct. 450 (1920)
- ⁸⁰ *Id.* at 54
- ⁸¹ *Id.* at 79
- ⁸² *Id.*
- ⁸³ *Id.*
- ⁸⁴ *Id.*
- ⁸⁵ *Id.*
- ⁸⁶ *Id.*

⁸⁷ Id.

⁸⁸ 47 Stat. 2554

⁸⁹ Id.

⁹⁰ Id.

⁹¹ U.S. Fish and Wildlife Service, *Devil's Hole Pupfish* (2013) available at: https://www.fws.gov/nevada/protected_species/fish/species/dhp/dhp.html

⁹² *Cappaert v. United States*, 426 S. Ct. 128 (1976)

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ Id.

¹⁰⁰ *Alaska v. Carter*, 462 F. Supp. 1155, (D. Alaska 1978)

¹⁰¹ Id. at 50

¹⁰² Id.

¹⁰³ 43 U.S.C. § 1601 et seq.

¹⁰⁴ Id. at 54

¹⁰⁵ Id.

¹⁰⁶ 124 Cong. Rec., H4238-39 (daily ed. May 19, 1978).

¹⁰⁷ Id. at 54

¹⁰⁸ Id.

¹⁰⁹ Id. at 72

¹¹⁰ Id. at 100

¹¹¹ Id.

¹¹² Id.

¹¹³ 42 U.S.C. § 4331

¹¹⁴ Id. at 100

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ *United States v. Thompson*, 452 F.2d 1333, 1337 (D.C. Cir. 1971)

¹¹⁸ Id. at 100

¹¹⁹ Proclamations 4611-4627, 93 Stats. 1447-1473

¹²⁰ The latter Bush and Obama protected much more, but in marine reserves

¹²¹ National Park Service, *Management Policies 2006*, ISBN 0-16-076874-8

¹²² 16 U.S.C. § 1

¹²³ Id. at 54

¹²⁴ Id.

¹²⁵ Bureau of Land Management, *Interim Management Policy for Newly Created National Monuments* (Jan. 11 2000).

¹²⁶ Bureau of Land Management, *Land Use Planning*, Manual Transmittal Sheet, Subject 1601, Release 1-1666 (Nov. 22, 2000).

¹²⁷ Id. at 74

¹²⁸ U.S. Forest Service, *FSM 2800 – Minerals and Geology*, Forest Service Manual Alaska Region (Region 10) Juneau, Alaska. Supplement No.: R-10 2800-2014-1.

¹²⁹ Id. at 50

¹³⁰ Id.

¹³¹ Id.

¹³² Id.

¹³³ Proclamation 1167, 37 Stat. 1716 (July 31, 1911)

¹³⁴ Id. at 50

¹³⁵ Id.

¹³⁶ Id.

¹³⁷ Id.

¹³⁸ All relevant CRS Reports available at:

https://www.everycrsreport.com/reports/R41330.html#_Toc473555577

¹³⁹ Wyatt, Alexandra M. *Antiquities Act: Scope of Authority for Modification of National Monuments*. (2016) Congressional Research Service R44687

¹⁴⁰ 39 Op. Att’y Gen. 185, 187 (1938)

¹⁴¹ Id.

¹⁴² Id. at 139

¹⁴³ Id. at 50

¹⁴⁴ Bear’s Ears Inter-Tribal Coalition. *The Tribal Proposal to President Obama for the Bears Ears National Monument*, (Oct. 15, 2015). Available at: <http://www.bearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf>

¹⁴⁵ Siegler, Kirk. *Utah Representative Wants Bears Ears Gone And He Wants Trump To Do It*, NPR News. (2017) Available at: <http://www.npr.org/2017/02/05/513492389/utah-representative-wants-bears-ears-gone-and-he-wants-trump-to-do-it>

¹⁴⁶ Utah Office of the Attorney General, *Utah AG Sean Reyes Condemns President Obama's Designation of Bears Ears National Monument*, (Dec. 28, 2016). Available at: <https://attorneygeneral.utah.gov/tag/bears-ears>

¹⁴⁷ Eilperin, Juliet. *Trump is eager to undo sacred tribal monument, says Orrin Hatch*, Washington Post, Jan. 27 2017. Available at: https://www.washingtonpost.com/news/energy-environment/wp/2017/01/27/hatch-trump-is-eager-to-work-with-gop-lawmakers-to-undo-sacred-tribal-monument/?utm_term=.7688cfc3171e