

## Chapter 21

# STROKE OF THE PEN, LAW OF THE LAND?

James R. Rasband  
J. Reuben Clark Law School  
Brigham Young University  
Provo, Utah

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## § 21.01 Introduction\* \*\*

With an increasingly partisan divide in Congress,<sup>1</sup> and with the Republicans in control of the House for the last six years of his presidency,<sup>2</sup> President Barack Obama turned more and more to executive power to pursue his agenda. This was true in a number of areas,<sup>3</sup> including with respect to the public lands. Perhaps the most prominent manifestation of this was his use of the Antiquities Act of 1906 (Antiquities Act),<sup>4</sup> which authorizes the president, in his discretion, to “declare by public proclamation 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 Federal Government to be national monuments.”<sup>5</sup> President Obama proclaimed more national monuments covering more acres than any president in history.<sup>6</sup> As has often been the case historically, President Obama’s proclamations drew strong protests from some in public land communities near the monuments and from many in the congressional delegations of

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<sup>1</sup>See Philip Bump, “The Unprecedented Partisanship of Congress, Explained,” *Wash. Post* (Jan. 13, 2016) (graphical depictions of increasing partisan divide as Democratic Party representatives have become more liberal on average and Republican Party representatives more conservative on average).

<sup>2</sup>See Carl Hulse, “Taking Control, G.O.P. Overhauls Rules in House,” *N.Y. Times* (Jan. 5, 2011).

<sup>3</sup>See James Surowiecki, “The Perils of Executive Action,” *The New Yorker* (Aug. 8 & 15, 2016) (noting the use of executive power to, among other things, “commit the U.S. to the Paris Agreement on climate change, to institute the Clean Power Plan to reduce emissions, to restrict new energy exploration in the Arctic Ocean and new coal leases on government land, to cap many student-loan payments, and to tighten rules on gun sales”).

<sup>4</sup>54 U.S.C. §§ 320301–320303 (previously codified at 16 U.S.C. §§ 431–433).

<sup>5</sup>*Id.* § 320301(a). For a brief overview of the Antiquities Act and the controversies it has spawned, see Carol Hardy Vincent, Cong. Research Serv., “National Monuments and the Antiquities Act” (CRS Report R41330 Sept. 7, 2016).

<sup>6</sup>See Nat’l Parks Conservation Ass’n, “Monuments Protected Under the Antiquities Act” (Jan. 13, 2017), <https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act> (providing downloadable lists of all monuments, including enlargements and diminishments by date, as well as total acres affected). President Obama proclaimed 29 national monuments. President Clinton proclaimed the second-most, with 19 national monuments. See *id.*; see also Keith Collins, “Map: Obama Established More National Monuments than Any Other President,” *Quartz* (Jan. 12, 2017) (providing maps and graphics on total acres designated as monuments). A significant part of the acreage proclaimed by President Obama came in the form of marine national monuments.

the states containing the monuments.<sup>7</sup> The frustration triggered calls to amend the Antiquities Act<sup>8</sup> and requests that President Donald Trump, by his own stroke of the pen, reverse President Obama's proclamations and terminate or modify the monuments.<sup>9</sup> The most prominent of these efforts, although certainly not the only one,<sup>10</sup> has been with the Bears Ears National Monument in Utah, which was proclaimed by President Obama a few short weeks before President Trump's inauguration.<sup>11</sup>

Threats to abolish prior monuments are not new. Then vice-presidential nominee Dick Cheney, during the 2000 campaign, indicated that President Bill Clinton's monument decisions would be reviewed with an eye toward rescinding or diminishing monuments he had proclaimed.<sup>12</sup> Despite the requests and threats, however, no president has ever revoked a national monument. Several presidents have diminished the size of monuments but these diminishment have not been challenged.<sup>13</sup> Consequently, no court has had an opportunity to address whether the president has authority to revoke or diminish a monument proclaimed under the Antiquities Act. That may be about to change.

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<sup>7</sup>See James R. Rasband, "The Future of the Antiquities Act," 21 *J. Land Resources & Envtl. L.* 619, 619–20 (2001) (describing the firestorm of protest that has greeted so many monument proclamations); James R. Rasband, "Antiquities Act Monuments: The Elgin Marbles of Our Public Lands?" in *The Antiquities Act: A Century of Archaeology, Historic Preservation, and Nature Conservation* 137–38 (David Harmon et al. eds., 2006) (describing this same pattern).

<sup>8</sup>See, e.g., News Release, U.S. Senate Comm. on Energy & Natural Res., "28 Senators Introduce Bill to Reform Monument Designation Process" (Jan. 5, 2017).

<sup>9</sup>See, e.g., H.R. Con. Res. 12, 62d Leg., Gen. Sess. (Utah 2017) (concurrent resolution asking Utah's congressional delegation to support legislation to reduce or modify the boundaries of the Grand Staircase-Escalante National Monument); H.R. Con. Res. 11, 62d Leg., Gen. Sess. (Utah 2017) (concurrent resolution requesting the President to undo the Bears Ears National Monument).

<sup>10</sup>Maine Governor, Paul LePage, for example, asked President Trump to "undo" President Obama's proclamation of the Katahdin Woods and Waters National Monument in Maine or to allow Maine to manage the monument in place of the National Park Service. See James B. Coffin ed., "Think Tank Thinks Trump Has Authority to Undo Monuments," 42:7 *Pub. Lands News* 15, 16 (Apr. 7, 2017). New England fishermen filed suit objecting to President Obama's designation of the 4,913-square-mile Northeast Canyons and Seamounts National Marine Monument and filed suit challenging his authority to do so beyond the 12-mile territorial sea limit. *Id.*

<sup>11</sup>See Lisa Riley Roche, "Hatch Tells State Lawmakers Trump Looking at Bears Ears, Grand Staircase," *Deseret News* (Feb. 22, 2017); Juliet Eilperin, "Trump Is Eager to Undo Sacred Tribal Monument, Says Orrin Hatch," *Wash. Post* (Jan. 27, 2017).

<sup>12</sup>See "Cheney Says Monuments Could Be Rescinded," *Salt Lake Trib.* (Aug. 25, 2000).

<sup>13</sup>See *infra* notes 102–06 and accompanying text (discussing these diminishment).

On April 26, 2017, President Trump issued an executive order requiring the Secretary of the Interior to conduct a review of all monuments proclaimed since January 1, 1996,<sup>14</sup> with a focus on monuments over 100,000 acres.<sup>15</sup> This includes 27 national monuments encompassing 11.25 million acres of public land and 217.9 million acres of seabed.<sup>16</sup> The review, among other things, is to determine whether the original proclamations were “made in accordance with the requirements and original objectives of the [Antiquities] Act and appropriately balance the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities.”<sup>17</sup> The order directs the Secretary to provide a final report to the President in 120 days and to issue an interim report within 45 days focusing on the Bears Ears National Monument.<sup>18</sup> The reports were to “include recommendations for such Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out the policy set forth in section 1 of this order.”<sup>19</sup> Secretary Zinke has now recommended that the Bears Ears National Monument be reduced in size, although he

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<sup>14</sup>This date sweeps in all of the national monuments proclaimed during the Clinton administration, the first of which was the Grand Staircase-Escalante National Monument on September 18, 1996. *See* Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 18, 1996). Of all the Clinton-era monuments, this one has continued to draw the most fire. *See, e.g.*, Benjamin Wood, “Utah Senate Approves Call to Shrink Grand Staircase-Escalante National Monument,” *Salt Lake Trib.* (Feb. 9, 2017) (reviewing state senators’ support for reviewing and possibly shrinking the monument).

<sup>15</sup>Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (Apr. 26, 2017) (requiring review of designations covering “more than 100,000 acres” and designations “made without adequate public outreach and coordination with relevant stakeholders”).

<sup>16</sup>*See* Press Release, U.S. Dep’t of the Interior (DOI), “Interior Department Releases List of Monuments Under Review, Announces First-Ever Formal Public Comment Period for Antiquities Act Monuments” (May 5, 2017) (listing monuments under review). Some have questioned whether the Antiquities Act delegated authority to proclaim marine national monuments. The Act allows the president to declare as a monument landmarks, structures, and objects that are “situated on land owned or controlled by the Federal Government . . .” 54 U.S.C. § 320301(a). The question is whether the lands within the U.S. exclusive economic zone (EEZ) are really lands owned or controlled by the federal government as a result of federal regulatory control over the area. *See* John Yoo & Todd Gaziano, *Am. Enter. Inst.*, “Presidential Authority to Revoke or Reduce National Monument Designations,” at 12–13 (Mar. 2017). *But see* Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183 (2000) (concluding that the president has the authority to proclaim a national monument in both the territorial sea—3 to 12 nautical miles from shore—and in the EEZ—12 to 200 nautical miles from shore).

<sup>17</sup>Exec. Order No. 13,792, § 1.

<sup>18</sup>*Id.* § 2(d), (e). The interim report may also summarize findings on “such other designations as the Secretary determines to be appropriate for inclusion . . .” *Id.* § 2(d).

<sup>19</sup>*Id.* § 2(d), (e).

has indicated that further time is necessary to determine the contours of any reduction.<sup>20</sup>

This chapter considers whether President Trump, or any president, has the authority to abolish, diminish, or modify prior national monument proclamations. Before addressing those questions, however, the chapter begins by outlining the basic distribution of authority over the public lands between Congress and the executive branch. Although Congress has essentially plenary power over public land law and policy, historically the president and executive branch have exercised a great deal of authority over the public lands, either as a result of congressional delegation or because of congressional acquiescence. Perhaps the most prominent example of power via delegation is the Antiquities Act.

The chapter then considers whether the authority delegated to the president by Congress in the Antiquities Act is a one-way street or also includes the power to abolish or modify previously proclaimed national monuments. It also considers whether, even if the president lacks power to revoke or modify a prior withdrawal, a president can effectively undo monument proclamations by other means.

### § 21.02 Executive Authority over the Public Lands

The Property Clause of the U.S. Constitution allocates primary control over the public lands to Congress, giving it the power to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>21</sup> Thus, it is Congress, and not the executive, that controls public land policy, including decisions about whether to withdraw land from entry.<sup>22</sup> Congress may exercise its constitutional power to create a national park, a national forest, or a wilderness area. Alternatively, Congress can pass legislation—such as the Antiquities Act or the withdrawal procedures under section 204 of the Federal Land

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<sup>20</sup>See Press Release, DOI, “Secretary Zinke Submits 45-Day Interim Report on Bears Ears National Monument and Extends Public Comment Period” (June 12, 2017).

<sup>21</sup>U.S. Const. art. IV, § 3, cl. 2.

<sup>22</sup>Historically the term “withdrawal” has referred to the removal of land from the applicability of a particular disposition statute. Federal land, for example, might be withdrawn from entry for mineral exploration. A withdrawal does not decide the purpose for which the federal land will be used. It simply eliminates one potential use. Withdrawals are distinct from “reservations,” which occur when the government decides to retain public lands for a specified purpose, such as a national park. In practice distinguishing withdrawals from reservations has not always been easy. The broader the withdrawal, the more like a reservation the withdrawal looks. See generally Samuel Trask Dana & Sally K. Fairfax, *Forest and Range Policy* 29–30 (2d ed. 1980); see also 43 U.S.C. § 1702(j) (FLPMA’s definition of “withdrawal”).

Policy and Management Act of 1976 (FLPMA)<sup>23</sup>—delegating to the executive branch the authority to withdraw lands.<sup>24</sup>

Congress, of course, can also reverse prior executive actions on the public lands. Historically, however, Congress has done so only infrequently, presumably because it has often approved of executive action but also partly because doing so requires overcoming various procedural hurdles. If the president who took the action is still in office, for example, Congress must pass any reversal by a veto-proof majority. Even when there is an administration of the same political party, a congressional opponent of the prior president's action must adduce a filibuster-proof majority of 60 votes in the Senate. Thus, changes in public land law and policy often result from executive action rather than congressional action. The result can be a tug-of-war where notice-and-comment rulemaking, regulatory guidance, and land use planning cycle back and forth to reflect the competing priorities of different presidential administrations.<sup>25</sup>

Contrary to the historical trend, the current Congress has been quite active in reversing President Obama's public land policies. It has done so by taking advantage of the Congressional Review Act (CRA),<sup>26</sup> which allows for circumvention of some of the procedural hurdles described above. Specifically, the CRA authorizes the House and Senate to pass a resolution by a simple majority repealing regulations issued in the last 60 legislative or session days of the House or Senate, respectively.<sup>27</sup> Prior to the Trump

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<sup>23</sup>43 U.S.C. §§ 1701–1782.

<sup>24</sup>For an overview of executive withdrawal authority, see John F. Shepherd & Shawn T. Welch, "Public Land Withdrawals: The Age-Old Struggle Over Federal Land Management Policy Continues," 61 *Rocky Mt. Min. L. Inst.* 9-1 (2015); Susan M. Mathiascheck, Amy B. Chasanov & Dawn Miller, "I'm Still Standing: Future Public Land Withdrawals and Industry's Million-Acre Challenge," 59 *Rocky Mt. Min. L. Inst.* 23-1 (2013); Laura Lindley & Robert C. Mathes, "Formal and De Facto Federal Land Withdrawals and Their Impacts on Oil and Gas and Mining Development in the Western States," 48 *Rocky Mt. Min. L. Inst.* 25-1 (2002); John F. Shepherd, "Up the Grand Staircase: Executive Withdrawals and the Future of the Antiquities Act," 43 *Rocky Mt. Min. L. Inst.* 4-1 (1997); David H. Getches, "Managing the Public Lands: The Authority of the Executive to Withdraw Lands," 22 *Nat. Resources. J.* 279 (1982); Charles F. Wheatley, Jr., "Withdrawals Under the Federal Land Policy Management Act of 1976," 21 *Ariz. L. Rev.* 311 (1979).

<sup>25</sup>See, e.g., Anne Joseph O'Connell, "Agency Rulemaking and Political Transitions," 105 *Nw. U. L. Rev.* 471 (2011); Robert L. Glicksman, "Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations," 34 *Envtl. L.* 1143 (2004); James Rasband et al., *Natural Resources Law and Policy* 1092–1118 (3d ed. 2016) (illustrating this phenomenon in the case of grazing regulation).

<sup>26</sup>5 U.S.C. §§ 801–808.

<sup>27</sup>*Id.* § 801(d)(1); see also Christopher M. Davis & Richard S. Beth, "Agency Final Rules Submitted on or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress," *CRS Insight* (Dec. 15, 2016) (calculating 60 legislative days).

administration, the CRA had been used just once, in 2001, at the start of the George W. Bush presidency to reverse a Clinton administration ergonomics rule.<sup>28</sup> The current Congress has now passed, and President Trump has signed, 14 resolutions reversing Obama administration regulations.<sup>29</sup> Among those resolutions is one reversing the Stream Protection Rule,<sup>30</sup> another reversing an Obama administration rule limiting hunting and fishing in national wildlife refuges in Alaska,<sup>31</sup> and a third reversing the Bureau of Land Management's (BLM) "Planning 2.0" rule.<sup>32</sup>

The CRA has proven to be a powerful tool. Not only does it allow Congress to avoid the normal procedural obstacles associated with passing legislation but it also forbids an agency from producing a new rule "substantially" like the old one.<sup>33</sup> Thus, future administrations will not be able to reverse regulatory course back to the overridden rule. In place of a regulatory tug-of-war, a CRA resolution locks in a regulatory framework until Congress itself decides to move in a different direction. The Trump administration's aggressive use of the CRA may well adjust the incentives

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<sup>28</sup>See Note, "The Mysteries of the Congressional Review Act," 122 *Harv. L. Rev.* 2162, 2172 (2009) (discussing the reversal of a Clinton administration ergonomics rule).

<sup>29</sup>See Ctr. for Progressive Reform, "CRA by the Numbers," [http://www.progressive-reform.org/CRA\\_numbers.cfm](http://www.progressive-reform.org/CRA_numbers.cfm) (listing all CRA resolutions signed by President Trump and also all CRA resolutions introduced in the 115th Congress).

<sup>30</sup>See H.R.J. Res. 38, Pub. L. No. 115-5, 131 Stat. 10 (2017), *reversing* Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016).

<sup>31</sup>See H.R.J. Res. 69, Pub. L. No. 115-20, 131 Stat. 86 (2017), *reversing* Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska, 81 Fed. Reg. 52,248 (Aug. 5, 2016).

<sup>32</sup>See H.R.J. Res. 44, Pub. L. No. 115-12, 131 Stat. 76 (2017), *reversing* Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016); *see also* John C. Ruple, "The Rise and Fall of Planning 2.0 and Other Developments in BLM Land Management Planning," 63 *Rocky Mt. Min. L. Inst.* 22-1 (2017). The Planning 2.0 rule, which was to be effective January 11, 2017, was designed to improve, among other things, the planning process by increasing public involvement early in the process, requiring consultation with Indian tribes during the preparation or amendment of a resource management plan, requiring use of "high quality information," and increasing flexibility to determine the scope of relevant planning areas. *See* 81 Fed. Reg. at 89,580-81. Critics of the rule raised a variety of concerns but focused on the argument that the new rule would marginalize the role of state and local governments in the planning process, a role mandated by FLPMA. *See* 43 U.S.C. § 1712(c)(9).

<sup>33</sup>The Center for Biological Diversity has filed suit against the reversal of the rule regarding hunting and fishing in wildlife refuges in Alaska, arguing that the CRA is an unconstitutional violation of separation of powers principles, because it prevents a federal agency from carrying out its legal duty. *See* James B. Coffin ed., "Enviros Challenge Constitutionality of Reg Reversals," 42:9 *Pub. Lands News* 9 (May 5, 2017); Complaint for Declaratory Relief, Ctr. for Biological Diversity v. Zinke, No. 3:17-cv-00091 (D. Alaska Apr. 20, 2017). This argument seems unlikely to succeed because it is Congress, by statute, that defines the scope of an agency's implementation of statutory language.

for end-of-term rulemaking and push “midnight” rules toward just prior to the CRA’s 60-day window. This would at least obligate a subsequent administration looking to change course to go through notice-and-comment rulemaking.<sup>34</sup> Perhaps more importantly, it would avoid the risk that the regulatory pendulum would not be able to swing back without congressional intervention.

Although the Property Clause allocates authority over the public lands to Congress, the executive branch has not always, or even generally, taken a narrow view of its own power over the public lands. Typically, it has not claimed inherent authority over public lands under Article II of the Constitution.<sup>35</sup> More often, the president and executive agencies have relied upon generous conceptions of congressional delegation. In some cases, as with the Antiquities Act, the president has expanded upon a congressional delegation of withdrawal authority. In other cases, the executive branch simply acted to withdraw public lands and then relied on congressional acquiescence. In its classic decision in *United States v. Midwest Oil Co.*, the Supreme Court affirmed that congressional delegation could be found by virtue of congressional silence or acquiescence in prior executive withdrawals.<sup>36</sup>

*Midwest Oil* considered whether the President had authority to withdraw lands from entry under the Oil Placer Act<sup>37</sup> and set them aside as a naval petroleum reserve. The Court concluded that congressional acquiescence in the President’s withdrawal amounted to an implied delegation of withdrawal authority.<sup>38</sup> The Court’s decision in *Midwest Oil* confirmed the validity of a range of prior executive withdrawals, including 99 Indian reservations and 44 bird refuges. The implied executive withdrawal authority recognized in *Midwest Oil* was augmented by congressional enactment of the 1910 Pickett Act that gave the president authority to withdraw public

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<sup>34</sup>It is noteworthy that one reason why the effort to use the CRA to reverse the Obama administration’s rule limiting methane emissions from oil and gas production on the public lands failed by one vote in the Senate was Arizona Senator John McCain’s concern that doing so would have made any regulation of methane waste difficult in the future. McCain believed it would be better for the DOI to issue a new rule. See Valerie Volcovici, “Bid to Revoke Obama Methane Rule Fails in Surprise U.S. Senate Vote,” *Reuters* (May 10, 2017).

<sup>35</sup>*But see* *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (rejecting President William Howard Taft’s argument for inherent withdrawal authority).

<sup>36</sup>*Id.* at 481.

<sup>37</sup>Act of Feb. 11, 1897, ch. 216, 29 Stat. 526.

<sup>38</sup>*Midwest Oil*, 236 U.S. at 475.

lands from all uses except mineral entry for “public purposes to be specified in the orders of withdrawals.”<sup>39</sup> Using these various sources of authority, presidents and Secretaries of the Interior withdrew millions of acres of public lands from various forms of entry.<sup>40</sup>

Among the various sources of executive authority, the Antiquities Act has probably been the most powerful tool for presidential preservation efforts. As initially enacted, the Antiquities Act was focused on allowing the president to make small withdrawals of public lands in order to protect prehistoric ruins and Indian artifacts. The following colloquy with Representative John F. Lacey, who chaired the House Committee on the Public Lands and sponsored the Act, illustrates this focus:

Mr. STEPHENS of Texas. How much land will be taken off the market in the Western States by the passage of the bill?

Mr. LACEY. Not very much. The bill provides that it shall be the smallest area necessary for the care and maintenance of the objects to be preserved.

Mr. STEPHENS of Texas. Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?

Mr. LACEY. Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst the other reserves the forests and the water courses.<sup>41</sup>

Despite this focus, the Act also contained language that suggested a broader delegation of authority. As early as 1900, the U.S. Department of the Interior (DOI) had promoted versions of the Antiquities Act that would allow proclamations to protect areas “for their scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest . . .”<sup>42</sup> While these DOI-sponsored bills were met with skepticism and never made it past the House Resources Committee, the version of the bill that became law in 1906 did retain the reference to “objects of historic

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<sup>39</sup> Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (repealed 1976).

<sup>40</sup> See generally Getches, *supra* note 24; 2 George Cameron Coggins & Robert L. Glicksman, *Pub. Nat. Resources L.* § 14:10 (2d ed. 2017).

<sup>41</sup> 40 Cong. Rec. 7888 (June 5, 1906). For an examination of the legislative history of the Antiquities Act, see Getches, *supra* note 24, at 301–02; Shepherd, *supra* note 24, at 4–8 to 4–13; Ronald F. Lee, *The Antiquities Act of 1906* (Nat’l Park Serv. 1970).

<sup>42</sup> Mark Squillace, “The Monumental Legacy of the Antiquities Act of 1906,” 37 *Ga. L. Rev.* 473, 480 (2003) (quoting H.R. 11021, 58th Cong. § 1 (1900)); see also Lee, *supra* note 41.

or scientific interest.”<sup>43</sup> Thus, it is perhaps not surprising that, as soon as it was enacted, presidents relied on this language in the Act to accomplish much larger withdrawals. Within two years, President Theodore Roosevelt had proclaimed 11 national monuments, including 800,000 acres as the Grand Canyon National Monument, most often pointing to the Act’s “scientific interest” language to justify the withdrawal.<sup>44</sup> Since its enactment in 1906, presidents have used the Antiquities Act 157 times to proclaim national monuments.<sup>45</sup> The conservation track record of the Antiquities Act must also be weighed in light of the fact that there has never been a successful legal challenge to any presidential use of the Act.<sup>46</sup>

The broad withdrawal authority exercised by the executive branch has generated significant tension over the years. Those whose interests were negatively impacted by such withdrawals argued that it was Congress, and not the executive, that should be the primary arbiter of what uses were allowed on the public lands. After all, they said, the Property Clause gives Congress the power to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>47</sup> Proponents of executive authority, on the other hand, argued that the executive and its land management agencies were better situated to act quickly to preserve the public interest in the public lands and that Congress could always reverse executive withdrawals if it chose to do so. When Congress passed FLPMA in 1976, it attempted to deal with this conflict. It did so by repealing portions of the Pickett Act and 29 other statutes granting executive withdrawal authority, as well as by specifically rejecting the

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<sup>43</sup>54 U.S.C. § 320301; see Lee, *supra* note 41 (detailing this legislative history and the competition between the DOI and the Bureau of American Ethnology of the Smithsonian Institution to have supervision of the monuments that would be proclaimed, with the former focused on national park-type monuments and the latter focused more narrowly on antiquities).

<sup>44</sup>See Shepherd, *supra* note 24, at 4-14 n.57; see also Proclamation No. 794, 35 Stat. 2175 (1908) (proclaiming the Grand Canyon as a national monument). In *Cameron v. United States*, the Supreme Court agreed that the Grand Canyon was appropriately deemed an object of “scientific interest.” 252 U.S. 450, 455 (1920).

<sup>45</sup>See Nat’l Parks Conservation Ass’n, *supra* note 6 (providing download link for detailed list of all monuments, including enlargements and diminishments by date, as well as total acres affected).

<sup>46</sup>See James R. Rasband, “Utah’s Grand Staircase: The Right Path to Wilderness Preservation?” 70 *U. Colo. L. Rev.* 483, 501-04 (1999) (discussing court decisions through 1999 rejecting challenges to various monuments); see also *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2001) (rejecting a challenge to Giant Sequoia National Monument); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1138 (D.C. Cir. 2002) (rejecting challenges to six national monuments).

<sup>47</sup>U.S. Const. art. IV, § 3, cl. 2.

president's implied withdrawal authority under *Midwest Oil*.<sup>48</sup> Congress, however, left untouched the president's authority to create national monuments under the Antiquities Act. It also enacted, in section 204 of FLPMA, elaborate procedures under which the Secretary of the Interior could withdraw public lands subject to congressional veto.<sup>49</sup>

### § 21.03 Can Monuments Be Abolished or Modified?

As described above, the Antiquities Act authorizes the president, in his discretion, to “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>50</sup> Because proclamations are functionally the same as an executive order,<sup>51</sup> and because presidents routinely revoke the executive orders of a prior president,<sup>52</sup> at first blush it may seem obvious that a president can revoke a prior president's proclamation of a national monument. But unlike most executive orders, which direct executive branch subordinates to take a particular action, the proclamation of a national monument is done as a result of a statutory delegation. Thus, the scope of executive authority depends primarily on the authority delegated by Congress to the president. In simple terms, does the Antiquities Act provide for a one-way delegation to create monuments, with Congress retaining for itself the sole authority to revoke, diminish, or modify a monument?

Most of the commentators who have written about whether a president has authority to revoke a monument have concluded the president lacks

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<sup>48</sup>See FLPMA § 704(a), 90 Stat. at 2792.

<sup>49</sup>See 43 U.S.C. § 1714 (providing different procedures for emergency withdrawals of up to three years, withdrawals of less than 5,000 acres, and withdrawals of more than 5,000 acres for up to 20 years).

<sup>50</sup>54 U.S.C. § 320301(a).

<sup>51</sup>See John Contrubis, Cong. Research Serv., “Executive Orders and Proclamations,” at 1–2 (CRS Report 95-772 A, updated Mar. 9, 1999) (noting that the difference between executive orders and proclamations is one of form rather than substance).

<sup>52</sup>President Trump, for example, issued an executive order directing the Secretary of the Interior to terminate the coal leasing moratorium declared by former Secretary Sally Jewell. See Exec. Order No. 13,783, § 6. As another example of the standard executive order tug-of-war between successive administrations, right after he took office, President Trump issued an executive order blocking foreign aid or federal funding for international nongovernmental organizations that provide or “promote” abortions; this reversed an executive order from President Obama, which, in turn, had reversed President George W. Bush's executive order. See Jessie Hellmann, “Trump Reinstates Ban on US Funding for Abortions Overseas,” *The Hill* (Jan. 23, 2017).

the power to do so.<sup>53</sup> I reached this same conclusion when I considered this issue in 2001,<sup>54</sup> and it remains my best judgment, setting aside the fairly unique situation of President Obama's expansion of the Cascade-Siskiyou National Monument to include approximately 40,400 acres of land set aside under the Oregon and California Revested Lands Act of 1937 (O&C Act),<sup>55</sup> which required that the lands be managed for sustained yield of their timber.<sup>56</sup> For reasons described below, I also continue in my view that a president likely has the power to modify or reduce a prior national monument proclamation.

My prior analysis, and that of other commentators, focused on Congress's intent as reflected in the Antiquities Act. This is surely the proper touchstone but, in reconsidering this question, I have found it instructive to look at the Act through the lens the Supreme Court has employed to consider executive power more generally—the framework first set forth by Justice Robert Jackson in his famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>57</sup> also known as the *Steel Seizure* case.

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<sup>53</sup>See Squillace, *supra* note 42, at 555; see also Albert C. Lin, “Clinton’s National Monuments: A Democrat’s Undemocratic Acts?” 29 *Ecology L.Q.* 707, 711–12 (2002); Pamela Baldwin, Cong. Research Serv., “Authority of a President to Modify or Eliminate a National Monument,” at 3–5 (CRS Report RS20647 Aug. 3, 2000).

<sup>54</sup>James R. Rasband, “The Future of the Antiquities Act,” 21 *J. Land Resources & Envtl. L.* 619, 624–29 (2001).

<sup>55</sup>43 U.S.C. §§ 2601–2605 (also known as the Oregon and California Sustained Yield Act).

<sup>56</sup>See Proclamation No. 9564, 82 Fed. Reg. 6145 (Jan. 12, 2017). Including the O&C Act lands in the expansion has been challenged by the Association of O&C Counties. See Complaint, *Ass’n of O&C Counties v. Trump*, No. 1:17-cv-00280 (D.D.C. Feb. 13, 2017). The propriety of the President’s action is beyond the scope of this chapter, but the U.S. Court of Appeals for the Ninth Circuit has previously held that exempting timber resources to serve as wildlife habitat was “inconsistent with the principle of sustained yield.” *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1183 (9th Cir. 1990). Proponents of the expansion have pointed out that subsequent to the *Headwaters* decision, however, the Ninth Circuit has found that environmental laws are applicable to O&C Act lands, even if such laws require a limitation on timber production. See *Portland Audubon Soc’y v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1992) (deciding that O&C Act lands were subject to NEPA); *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. 1291, 1313–14 (W.D. Wash. 1994) (finding O&C Act lands subject to the Endangered Species Act of 1973 (ESA)); see also Michael C. Blumm, Opinion, “Oregon’s Monuments Need Protection from Logging,” *High Country News* (May 4, 2017). This argument seems stronger for statutes passed after the O&C Act rather than before, as was the case with the Antiquities Act. Moreover, in contrast to the ESA, the Antiquities Act permits but does not command preservation. Thus, it is harder to discern congressional intent, or acquiescence, to override the purposes of the O&C Act.

<sup>57</sup>343 U.S. 579 (1952).

## [1] The Test for Presidential Executive Orders: The *Youngstown* Framework

The *Youngstown* case arose when President Harry Truman attempted to seize domestic steel mills that were subject to labor strikes during the Korean War.<sup>58</sup> A majority of justices agreed that President Truman lacked authority to do so but Justice Jackson's concurring opinion provided the test that future courts would employ.<sup>59</sup> He wrote: "Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress."<sup>60</sup> He then laid out a tripartite framework for considering appropriate deference to presidential action:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. . . .
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>61</sup>

As discussed below, categories one and three of this *Youngstown* framework require an analysis of congressional intent. Category two with its "twilight" metaphor is more elusive. In all three categories, however, implying congressional intent through indifference or acquiescence is a key factor that has received insufficient consideration in commentary about the propriety of an abolition, reduction, or modification of an existing national monument.

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<sup>58</sup>*Id.* at 583.

<sup>59</sup>*See* *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Medellin v. Texas*, 552 U.S. 491, 525 (2008); *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown Sheet & Tube Co. v. Sawyer*." (citation omitted)).

<sup>60</sup>*Youngstown*, 342 U.S. at 635 (Jackson, J., concurring).

<sup>61</sup>*Id.* at 635–38 (footnote omitted).

## [2] Did Congress Expressly or Impliedly Delegate to the President the Authority to Revoke National Monuments?

Justice Jackson's first category invites consideration of whether the Antiquities Act expressly or impliedly gives the president authority to revoke or modify a monument. His third category is the flip side of this question: Did Congress expressly or impliedly disable the president from doing so? On its face,<sup>62</sup> the Antiquities Act contains no explicit authorization to revoke an existing monument. Nor does the Act expressly prohibit revocation.

Despite the absence of any express authority to abolish a monument, a president could argue that the authority to proclaim a monument must include the authority to return the land to its status quo prior to becoming a monument because the greater power necessarily includes the lesser.<sup>63</sup> However, in several other turn-of-the-century statutes delegating withdrawal power to the president, Congress specifically included a provision allowing the president or the Secretary of the Interior to revoke a prior withdrawal. For example, the Pickett Act gave the president authority to "temporarily" withdraw public lands but also provided that those withdrawals were to "remain in force until revoked by him or an Act of Congress."<sup>64</sup> Similar revocation provisions exist in the Carey Act of 1894<sup>65</sup>

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<sup>62</sup>The first two sections of the Act are most pertinent:

(a) Presidential declaration.—The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.

(b) Reservation of land.—The President may reserve parcels of land as a part of the national monuments. 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.

54 U.S.C. § 320301.

<sup>63</sup>See, e.g., *W. Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting) ("Even in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way."); Michael Herz, "Justice Byron White and the Argument that the Greater Includes the Lesser," 1994 *BYU L. Rev.* 227, 227 (discussing the "tremendously attractive" greater-lesser argument in the context of its usage by Justice White).

<sup>64</sup>Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (repealed 1976). Another reading of this Pickett Act language is that Congress was simply stating its understanding of existing authority. There would have been no other reason for stating that withdrawals remained in force until "an Act of Congress" because that was unquestionably true and thus the same might be said of the recitation of the revocation power of the president.

<sup>65</sup>43 U.S.C. § 641 ("[T]he Secretary of Interior with the approval of the President is . . . authorized and empowered . . . to contract and agree . . . with each of the States . . . binding

and the Reclamation Act of 1902.<sup>66</sup> If Congress understood the authority to withdraw to contain the implied authority to revoke, the revocation permission in these other statutes would have been mere surplusage. The language of these Acts thus indicates that Congress knew what to say if it wanted to give the president authority to revoke one of his own withdrawals, and it did not say it in the Antiquities Act.<sup>67</sup>

The existence of these other statutes granting revocation authority was one of the key drivers of Attorney General Homer Cummings's 1938 Attorney General Opinion that addressed a proposal to abolish the Castle Pinckney National Monument.<sup>68</sup> Cummings opined that, if Congress wanted to grant the president authority to revoke a monument, it would have expressly done so within the statute.<sup>69</sup> In addition to the Pickett Act, Carey Act, and Reclamation Act cited above,<sup>70</sup> Cummings noted that the Forest Service Organic Administration Act of 1897 provided that the president was authorized to "*modify* any Executive order establishing any forest reserve by reducing its area or by vacating it altogether."<sup>71</sup> In Cummings's view, which is not binding on the president,<sup>72</sup> Congress's failure (or its affirmative decision) in the Antiquities Act not to grant the president

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the United States to donate, grant, and patent to the State . . . desert lands . . ." and if certain conditions are not met the "Secretary of the Interior, in his discretion, *may restore such lands to the public domain . . .*" (emphasis added)).

<sup>66</sup>Ch. 1093, § 3, 32 Stat. 388, 388 ("[T]he Secretary of Interior shall . . . withdraw from public entry the lands required for any irrigation works . . . and *shall restore to public entry any of the lands so withdrawn* when, in his judgment, such lands are not required for the purposes of this Act." (emphasis added)). This provision is codified as amended at 43 U.S.C. § 416.

<sup>67</sup>Rasband, *supra* note 54, at 625–27 (reviewing these statutes).

<sup>68</sup>Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188 (1938) (1938 AG Opinion).

<sup>69</sup>*Id.*

<sup>70</sup>See § 21.03[2], *supra*.

<sup>71</sup>1938 AG Opinion, *supra* note 68, at 188 (emphasis added); see 16 U.S.C. § 473 (authorizing the president to "revoke, modify, or suspend any and all Executive orders and proclamations" establishing national forests).

<sup>72</sup>See Michael Herz, "Imposing Unified Executive Branch Statutory Interpretation," 15 *Cardozo L. Rev.* 219, 228 (1993) ("Certainly the President may ignore that advice—indeed, the combination of the Take Care Clause and the oath of office may obligate him to reject advice with which he disagrees." (emphasis omitted) (footnotes omitted)); Trevor W. Morrison, "Stare Decis in the Office of Legal Counsel," 110 *Colum. L. Rev.* 1448 (2010) (reaching same conclusion).

similar authority to revoke a monument is best read as congressional intent that the president have only the authority to create monuments.<sup>73</sup>

Although Cummings's view has been seconded by most scholarly commentary, a recent article suggested that the president has authority to revoke a monument.<sup>74</sup> The commentators, who make several arguments, assert the Antiquities Act's legislative history shows that the primary purpose of the Act was "to provide a power to the president to prevent the destruction and looting of artifacts until they were excavated and safeguarded or until Congress could consider long-term measures regarding the site."<sup>75</sup> Thus, they say, "a later president could reasonably conclude that Congress declined the opportunity to legislate on the land or objects in an earlier monument designation or that they were now safeguarded, such as by excavation and display in a museum."<sup>76</sup> However, it seems equally plausible to read congressional silence (or congressional failure to revoke) as approval of a monument or as satisfaction with the protection afforded to the designated objects.

The commentators also argue in favor of a general principle that "the authority to execute a discretionary government power usually includes the power to revoke it—unless the original grant expressly limits the power of revocation."<sup>77</sup> As an example of this principle, they note that a statute giving an agency authority to promulgate regulations is presumed to include the authority to repeal and change those regulations, particularly if the regulation is contrary to statutory intent.<sup>78</sup> They also observe that, although Article I, Section 7 of the Constitution provides only the process for *enacting* a statute, the power to repeal a statute is necessarily concomitant.<sup>79</sup> Similarly, Article II, Section 2 of the Constitution sets forth a process

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<sup>73</sup>In reaching his conclusion, Cummings relied in part on an Attorney General Opinion offered in 1862, which reviewed President Abraham Lincoln's reservation of a military fort in Illinois pursuant to an 1809 statute. See 1938 AG Opinion, *supra* note 68, at 187 ("A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can." (quoting Rock Island Military Reservation, 10 Op. Atty. Gen. 359, 364 (1862))).

<sup>74</sup>See Yoo & Gaziano, *supra* note 16.

<sup>75</sup>*Id.* at 7.

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

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

<sup>78</sup>*Id.* at 7–8.

<sup>79</sup>*Id.* at 8.

by which the president can nominate and, with the advice and consent of the Senate, appoint judges, ambassadors, and certain executive branch officials; yet the Constitution does not address the removal of such officers by the president. The power to revoke an appointment is presumed.<sup>80</sup>

The latter two examples of implied authority to revoke are distinguishable because the power to repeal a statute or remove an appointed officer would not exist if not implied; whereas in the case of the Antiquities Act, the power of the president is delegated by Congress and there is no question Congress itself retains the authority to revoke a monument.<sup>81</sup> The implied continuing authority to modify regulations to fulfill statutory purposes is closer to the mark but does not account for the fact that Congress chose to include revocation authority in other public land statutes from the same era.<sup>82</sup> On balance, the most plausible interpretation of the Antiquities Act is that Congress did not intend to give the president authority to revoke a national monument.

### **[3] Did Congress Expressly or Impliedly Delegate to the President the Authority to Modify or Diminish National Monuments?**

Although Congress may not have granted a president authority to *revoke* a monument, the president would be on a firmer foundation if he *diminished* or *modified* a monument.

#### **[a] Does the Antiquities Act Expressly Delegate the Authority to Diminish a Monument's Size?**

In the case of reductions in a monument's size, one interpretation of the Antiquities Act is that Congress *expressly* delegated such modification authority to the president. As noted above, the Antiquities Act provides that the parcels of land reserved in a proclamation "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."<sup>83</sup> In his 1938 Attorney General Opinion, Homer Cummings suggested this language allows the president to shrink an existing monument down to the smallest area needed to protect the objects

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<sup>80</sup>*Id.* at 9.

<sup>81</sup>Congress has terminated a number of national monuments. *See, e.g.*, Act of May 17, 1954, ch. 203, 68 Stat. 98 (Shoshone Cavern); Act of Apr. 7, 1930, ch. 107, 46 Stat. 142 (Papago Saguaro); Act of Mar. 29, 1956, ch. 104, 70 Stat. 61 (Castle Pinckney); Act of Aug. 3, 1950, ch. 530, 64 Stat. 404 (Holy Cross).

<sup>82</sup>*See supra* notes 64–66 and accompanying text (discussing these statutes).

<sup>83</sup>54 U.S.C. § 320301(b).

listed in the proclamation.<sup>84</sup> This interpretation finds some support in the legislative history of the Antiquities Act. As discussed previously, there is substantial evidence in the Act's legislative history that the Act was originally focused on allowing monuments to encompass only small tracts of public land.<sup>85</sup>

Despite this history, it is unclear whether the “smallest area compatible” language creates a continuing, as opposed to a one-time, duty to consider whether less acreage would be sufficient to fulfill the Antiquities Act's protective purpose. Moreover, in the case of landscape-level monuments, the proclamations are careful to describe in sweeping terms the “objects of historic or scientific interest” to be protected. The beautifully written Bears Ears National Monument proclamation, for example, refers to the “land,” the “landscape,” the “area's stunning geology,” the “paleontological resources,” the “diversity of the soils,” and the wonders of the region from “earth to sky.”<sup>86</sup>

Recall that the Antiquities Act separates the power to designate “structures . . . and other objects”<sup>87</sup> from the power to “reserve” the land necessary to protect the objects.<sup>88</sup> In the case of landscape-level monuments, like Bears Ears, however, the “object” to be protected includes the very acreage proclaimed as a monument. Thus, even if the Act expressly permits

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<sup>84</sup>See 1938 AG Opinion, *supra* note 68, at 188; *see also* National Monuments, 60 Interior Dec. 9, 10 (1947) (opining that a president has the power to reduce the size of a monument because of the requirement in the Antiquities Act that monuments be confined to “the smallest area compatible with the proper care and management of the objects to be protected” (quoting 16 U.S.C. § 431 (now 54 U.S.C. § 320301)). *But see* Squillace, *supra* note 42, at 555 (the language of the Antiquities Act “cannot rightfully be construed to authorize a future President to diminish the size of a monument” because “an original monument proclamation, by definition, represents the judgment of a president that the area protected is the ‘smallest area compatible with the proper care and management’ of the protected objects. Otherwise the proclamation would be invalid on its face.” (footnote omitted) (quoting 1938 AG Opinion, *supra* note 68, at 188)).

<sup>85</sup>See *supra* notes 41–43 and accompanying text (discussing the legislative history); *see also* Squillace, *supra* note 42, at 484; Kelly Y. Fanizzo, “Separation of Powers and Federal Land Management: Enforcing the Direction of the President Under the Antiquities Act,” 40 *Env'tl. L.* 765, 823–24 (2010).

<sup>86</sup>Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

<sup>87</sup>54 U.S.C. § 320301(a).

<sup>88</sup>*Id.* § 320301(b). Section 320301(b) does not even require the president to reserve any land to protect an object of historic or scientific interest but only indicates that the president “*may* reserve parcels of land as a part of the national monuments.” *Id.* (emphasis added). The discretionary “*may*” also suggests some authority to remove parcels when they are not necessary to protect the identified objects. *See generally* Yoo & Gaziano, *supra* note 16 (making this argument). Again, if the parcel is essentially the object, this argument is more challenging.

reductions in monument size based on an evaluation of the acreage necessary to protect the relevant objects, this language may not give a president much space to reduce the size of a landscape-level monument because the dedicated parcels of land are themselves among the objects to be protected.

**[b] Does the Antiquities Act *Impliedly* Delegate the Authority to Diminish a Monument’s Size?**

If there are challenges for the claim that the Antiquities Act provides *express* authority to reduce the size of a monument, the argument for *implied* diminishment authority is stronger. The reason, as discussed below, is that Congress has acquiesced in prior diminishments, and acquiescence has traditionally been important to establishing presidential power and congressional intent under both part one and part two of the *Youngstown* framework.<sup>89</sup>

Determining whether congressional inaction equates to approval or disapproval of executive action can be difficult because congressional silence can occur for a number of reasons.<sup>90</sup> Thus, courts must weigh a variety of factors in determining the meaning of congressional inaction. *Dames & Moore v. Regan* illustrates this weighing process.<sup>91</sup> At the conclusion of the Iran hostage crisis, President Jimmy Carter, and subsequently President Ronald Reagan, entered an agreement with Iran by executive order requiring the nullification of any attachments held on Iranian assets, the suspension of all Iran-related claims filed in U.S. courts, and the establishment of a claims tribunal.<sup>92</sup> *Dames & Moore International*, a company with an attachment on Iranian property, filed a claim asserting the President lacked power to nullify attachments and suspend claims.<sup>93</sup>

The President cited two sources of authority—the International Emergency Economic Powers Act (IEEPA) and the Hostage Act—but the Court concluded neither statute gave the President authority to *suspend* U.S. claims.<sup>94</sup> Nevertheless, the Court stated that “Congress cannot anticipate and legislate with regard to every possible [executive] action” and therefore “failure of Congress specifically to delegate authority does not . . . imply

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<sup>89</sup>See *supra* note 61 and accompanying text.

<sup>90</sup>See Edward T. Swaine, “The Political Economy of *Youngstown*,” 83 *S. Cal. L. Rev.* 263, 326–27 (2010).

<sup>91</sup>453 U.S. 654 (1981).

<sup>92</sup>*Id.* at 664–67.

<sup>93</sup>*Id.* at 666–68.

<sup>94</sup>*Id.* at 674–75.

‘congressional disapproval’ of action taken by the Executive.”<sup>95</sup> Instead, said the Court, Congress’s inaction may be reasonably viewed as inviting the President to act independently when (1) “the inferences to be drawn from the character of the legislation Congress has enacted in the area” show “congressional acceptance of a broad scope for executive action,” (2) “there is a history of congressional acquiescence” in the matter, and (3) “no contrary indication of legislative intent” exists.<sup>96</sup>

Based upon these three factors, the *Dames & Moore* Court concluded that the President’s executive order was constitutional.<sup>97</sup> First, after reviewing the language of IEEPA and the Hostage Act, the Court determined that the legislation intended to give the President “broad” authority and discretion in circumstances of national emergency or security.<sup>98</sup> Next, the Court reviewed the “longstanding practice of settling . . . claims by executive agreement without the advice and consent of the Senate” and found that “Congress ha[d] implicitly approved the practice of claim settlement by executive agreement” through the enactment of the International Claims Settlement Act.<sup>99</sup> Further, by frequently amending this Act, Congress demonstrated its “continuing acceptance of the President’s claim settlement authority.”<sup>100</sup> Finally, the Court concluded that “Congress ha[d] not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement.”<sup>101</sup>

Applying these factors to the Antiquities Act and its application over the years, it turns out that there is a long-established history of congressional inaction relating to modifications of national monuments. Presidents have diminished the size of national monuments 18 times.<sup>102</sup> The most prominent reduction came in 1915 when President Woodrow Wilson reduced almost in half the size of the Mount Olympus National Monument

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<sup>95</sup>*Id.* at 678 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)).

<sup>96</sup>*Id.* at 677–79, 686.

<sup>97</sup>*Id.* at 686.

<sup>98</sup>*Id.* at 677.

<sup>99</sup>*Id.* at 679–80.

<sup>100</sup>*Id.* at 681.

<sup>101</sup>*Id.* at 687.

<sup>102</sup>See Nat’l Park Serv., “Antiquities Act 1906–2006: maps, facts, & figures,” <https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm>; see also Proclamation No. 1186, 37 Stat. 1733 (1912) (shrinking the size of the Navajo National Monument); Proclamation No. 2454, 55 Stat. 1608 (1941) (reducing the Wupatki National Monument); Proclamation No. 3138, 21 Fed. Reg. 4035 (June 13, 1956) (reducing the Great Sand Dunes National Monument by 9,880 acres (about 25% of its 35,538 total) and adding 960 acres); Proclamation

(now Olympic National Park) because of concerns that World War I would create “an urgent need for timber supplies, including spruce for airplane construction.”<sup>103</sup> President Calvin Coolidge reduced Mount Olympus by another 640 acres to build a dam on the Elwha River.<sup>104</sup> Similarly, relying on a solicitor’s opinion citing the “smallest area compatible” language, President Franklin Roosevelt reduced the original 273,145 acres of President Coolidge’s Grand Canyon National Monument by 71,854 acres due to pressure from ranchers and Congress.<sup>105</sup> Likewise, President Dwight Eisenhower reduced the size of the Glacier Bay National Monument partly because he concluded some of the lands were “suitable for national-forest purposes.”<sup>106</sup>

With each of these reductions, the president was not just making a calibrated judgment that a smaller area could adequately protect the relevant “objects of historic or scientific interest”—a judgment that itself could support a modification power. Instead, the reductions are examples of the president concluding that land previously withdrawn under the Antiquities Act would be better used in a way not contemplated by the original proclamation. Congress never took action to reverse these presidential actions; nor has there been a judicial challenge to these actions.<sup>107</sup>

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No. 3307, 73 Stat. c69 (1959) (reducing Colorado National Monument); Proclamation No. 3360, 74 Stat. c79 (1960) (shrinking Arches National Monument because monument had lands that had no known scientific or historic value); Proclamation No. 3344, 74 Stat. c56 (1960) (reducing Black Canyon of the Gunnison National Monument).

<sup>103</sup>Gail H.E. Evans, Nat’l Park Serv., “Historic Resource Study: Olympic National Park,” at app. A (1983); *see also* Proclamation No. 1293, 39 Stat. 1726 (1915). Three weeks before President Wilson’s reduction by proclamation, his solicitor general issued an opinion concluding that the President had requisite authority to restore monument lands to the public domain. DOI, Opinion Letter (Apr. 20, 1915) (cited in Solicitor’s Opinion M-27657 (Jan. 30, 1935)).

<sup>104</sup>*See* DOI, “Draft Environmental Impact Statement: Proposed Master Plan: Olympic National Park, Washington,” at 44 (July 26, 1973); Proclamation No. 1862, 45 Stat. 2984 (1929).

<sup>105</sup>Proclamation No. 2393, 54 Stat. 2692 (1940); *see also* Solicitor’s Opinion M-27657 (Jan. 30, 1935). Similarly, President Dwight Eisenhower reduced President Hoover’s proclaimed Great Sand Dunes National Monument by a total of 8,920 acres because “it appears that retention of certain lands within the monument is no longer necessary for [its] purpose; and . . . it appears that it would be in the public interest to exclude such lands from the monument.” Proclamation No. 3138, 21 Fed. Reg. 4035, 4035 (June 13, 1956).

<sup>106</sup>Proclamation No. 3089, 20 Fed. Reg. 2103, 2104 (Apr. 5, 1955). Another reason for the diminishment was that certain lands were “now being used as an airfield for national-defense purposes . . .” *Id.* at 2103.

<sup>107</sup>Commentators point out that the Supreme Court has cited these changes in describing challenges to monuments, at least implicitly assuming the reductions were valid. *See*

In addition to its acquiescence in reducing the size of national monuments on 18 occasions, Congress has twice amended the Antiquities Act without moving to limit the president's power either to proclaim or to revoke or to modify.<sup>108</sup> Most prominently, in the aftermath of President Franklin Roosevelt's proclamation of the Jackson Hole National Monument, there was great outcry in Wyoming and thereafter Congress refused to appropriate funds to manage the monument.<sup>109</sup> In 1950, Congress finally passed an act that converted the monument to the Grand Teton National Park, but the political price was an amendment to the Antiquities Act providing that "[n]o extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress."<sup>110</sup> Because Congress was presumably aware of prior reductions of monuments by presidential proclamation, its failure to prohibit presidential reductions, diminishment, or revocations of monuments within Wyoming could be read to suggest a retention of presidential authority to do just that.<sup>111</sup>

Although congressional acquiescence in presidential reductions suggests presidential power, recall that *Dames & Moore* also provided that similar statutes were probative of congressional intent. As described above, in four public land withdrawal statutes passed in some proximity to the Antiquities Act, Congress gave the president or the Secretary discretion to modify and revoke executive withdrawals made under those acts.<sup>112</sup> This cuts against reading congressional silence as presidential authorization to reduce monuments.

Another factor that potentially cuts against finding congressional acquiescence in presidential diminishment of national monuments is that the last presidential diminishment by presidential proclamation occurred over 50 years ago, when President John F. Kennedy reduced Bandelier National

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Yoo & Gaziano, *supra* note 16, at 14–15; *see also* *Alaska v. United States*, 545 U.S. 75 (2005) (noting President Eisenhower's reduction of the size of Glacier Bay National Monument).

<sup>108</sup>54 U.S.C. § 320301.

<sup>109</sup>From 1943 until 1950, Congress attached a provision to the DOI appropriations bill prohibiting any funds from being used to manage the monument. *See* S. Rep. No. 81-1938, at 4 (1950); *see generally* Shepherd, *supra* note 24, at 4-15 to 4-18 (describing this dispute).

<sup>110</sup>54 U.S.C. § 320301(d).

<sup>111</sup>Congress limited the president's power under the Act a second time when it restricted new unilateral designations in Alaska above 5,000 acres. 16 U.S.C. § 3213. This amendment also did not rescind or mention the president's authority to modify or revoke monuments. *Id.*

<sup>112</sup>*See supra* notes 64–66, 71 and accompanying text (discussing these provisions in the Pickett Act, Forest Service Organic Administration Act, Reclamation Act, and Carey Act). *But see supra* note 64 (noting that the Pickett Act language can also be read as recognizing existing executive authority).

Monument in New Mexico by approximately 1,043 acres on May 27, 1963.<sup>113</sup> One reason for this change may be that, starting with President Carter’s administration, presidents began explicitly stating that the area described in the new proclamations under the Act was the “smallest area” needed to protect the proposed historical or scientific objects.<sup>114</sup> Given this change, presidents may have felt restricted in making “right-sizing” modifications.

Section 204(j) of FLPMA<sup>115</sup> is also probative of the question of congressional acquiescence to presidential monument modifications. Of course, FLPMA, which was passed in 1976, does not tell us about the intent of the 1906 Congress that passed the Antiquities Act. But in trying to read subsequent congressional acquiescence to presidential action, which is an important part of Justice Jackson’s *Youngstown* test, Congress’s approach to withdrawals in FLPMA is relevant.

As noted above, in FLPMA Congress revoked 29 delegations of executive withdrawal authority as well as the president’s implied withdrawal authority under *Midwest Oil*.<sup>116</sup> At the same time, Congress chose not to amend the Antiquities Act. In fact, the only mention of the Antiquities Act is found in section 204(j), which provides that “[t]he Secretary [of the Interior] shall not . . . modify or revoke any withdrawal creating national monuments under [the Antiquities Act].”<sup>117</sup>

Recent scholarly commentary following President Trump’s monument review announcement<sup>118</sup> has focused on this language in section 204(j) as evidence that a president lacks authority to abolish or diminish a national monument.<sup>119</sup> On its face, relying on section 204(j) to find a limit on *presidential* power may seem odd because the text indicates Congress chose to limit only the *Secretary’s* power to modify or revoke a monument.

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<sup>113</sup>See Nat’l Park Serv., *supra* note 102.

<sup>114</sup>See, e.g., Proclamation No. 4611, 93 Stat. 1446 (1978); see also Squillace, *supra* note 42, at 555 (describing this practice beginning with President Carter’s Alaska monuments).

<sup>115</sup>43 U.S.C. § 1714(j).

<sup>116</sup>See Sandra Zellmer, “A Preservation Paradox: Political Prestidigitiation and an Enduring Resource of Wilderness,” 34 *Envtl. L.* 1015, 1060 (2004).

<sup>117</sup>43 U.S.C. § 1714(j).

<sup>118</sup>See *supra* notes 14–20 and accompanying text (discussing President Trump’s order to review monuments created since 1996).

<sup>119</sup>See Mark Squillace et al., “Presidents Lack the Authority to Abolish or Diminish National Monuments,” 103 *Va. L. Rev. Online* 55 (2017); Eric Biber et al., “National Monuments: Presidents Can Create Them, but Only Congress Can Undo Them,” *The Conversation* (Apr. 27, 2017).

Congress could certainly have limited *presidential* authority, but it chose not to do so.

These commentators, however, have pointed out that section 204(j) originated from House Bill 13777, the committee report for which indicated that the bill “would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act . . . . These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.”<sup>120</sup> Although the legislative history makes clear that Congress was committed to constraining the *Secretary’s* authority to make, modify, or revoke withdrawals,<sup>121</sup> it is not clear that Congress engaged with the question whether to similarly restrict *presidential* authority.

A simpler explanation for the language limiting secretarial authority is that section 204(a) specifically “authorized [the Secretary] to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of [section 204].”<sup>122</sup> Having granted authority to the Secretary in section 204(a), Congress needed to define and limit that authority elsewhere in section 204. Thus, section 204(j)’s restriction on secretarial modification or revocation of a national monument, just like section 204(j)’s restriction on secretarial modification or revocation of “any withdrawal created by Act of Congress,”<sup>123</sup> is more plausibly one of the “limitations” on secretarial authority that became necessary once Congress granted such authority to the Secretary in section 204(a).<sup>124</sup>

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<sup>120</sup>H.R. Rep. No. 94-1163, at 9 (1976).

<sup>121</sup>For a detailed discussion of the legislative history, see Squillace et al., *supra* note 119, at 61–64. Professor Squillace and his co-authors suggest that section 204(j)’s focus on limiting *secretarial* authority rather than *presidential* authority is vestigial text and a drafting error from an earlier version that would have amended the Antiquities Act to transfer monument designation authority from the president to the Secretary. *See id.* at 62–63.

<sup>122</sup>43 U.S.C. § 1714(a).

<sup>123</sup>*Id.* § 1714(j). Section 1714(j) provides:

The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments . . . ; or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act.

*Id.*

<sup>124</sup>In the absence of section 204(a)’s grant of secretarial authority, no one would have believed the Secretary had authority to modify or revoke a withdrawal created by Congress. Thus, it seems unlikely that the limitation on the Secretary’s authority to modify or revoke a monument is merely a vestigial remnant of a proposal to shift monument designation authority to the Secretary. *See* Squillace et al., *supra* note 119, at 62–63. More likely, Congress

As discussed above, reading congressional silence or other congressional actions with an eye toward discerning Congress's acquiescence to presidential modification of monuments is challenging. Nevertheless, congressional acquiescence in 18 presidential reductions,<sup>125</sup> and Congress's subsequent amendments to the Antiquities Act without restricting reductions in monument size, may well constitute the sort of "long-continued" and "unbroken" history that *Dames & Moore* suggests creates a strong presumption that Congress has consented to presidential reductions in monument size.<sup>126</sup> The original focus of the Antiquities Act to provide for small withdrawals to protect prehistoric ruins and Indian artifacts<sup>127</sup> also lends support to presidential diminishment authority. On balance, therefore, application of the *Youngstown* framework suggests that a president has the authority to reduce the size of a monument.

If the president does indeed have authority to modify an existing monument, then, as a practical matter, it is not clear a president would be particularly concerned about the lack of authority to abolish a monument. For most monuments there is agreement among all parties that some objects and some portion of the area within the monument boundaries deserve protection.<sup>128</sup> In such circumstances, the politics would rarely seem to point in the direction of complete revocation.

#### [4] Modification Through Management

Limiting the power of the president and of executive agencies sometimes seems like a whack-a-mole game. No matter how many times one hits the mole, it pops up somewhere else. One commentator once wrote:

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understood that, prior to section 204(a)'s delegation of authority to "make, modify, extend, or revoke withdrawals," the Secretary lacked authority to revoke or modify a monument just like the Secretary lacked authority to revoke or modify a national park.

<sup>125</sup>See *supra* note 105 and accompanying text.

<sup>126</sup>*Dames & Moore*, 453 U.S. at 686 ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . .'" (alterations in original) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915))); see also *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) (suggesting that when there exists "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," then the inaction "may be treated as a gloss on 'executive Power' vested in the President by s 1 of Art. II").

<sup>127</sup>See *supra* notes 41–43 and accompanying text.

<sup>128</sup>For example, much of the acreage proclaimed as part of the Bears Ears National Monument was included as part of the Utah Public Lands Initiative supported by the Utah congressional delegation, albeit with less protective management. See John C. Ruple, Robert B. Keiter & Andrew Ognibene, "National Monuments and National Conservation Areas: A Comparison in Light of the Bears Ears Proposal" (Stegner Ctr. White Paper No. 2016-02, Sept. 9, 2016) (comparing the two proposals).

Consider a maxim, the Law of Conservation of Administrative Discretion. This Law holds that when administrative discretion is confined in one way, it will emerge somewhere else—and in at least an equal amount. The Law reflects basic human nature—the desire of a bureaucrat to perform his or her statutory mission with any means that might be available. It is often evident in public land law.

....

... The Conservation Law says that relatively confining, time-consuming, and expensive procedures will yield to less formal ones whenever the administrator's goals, or most of them, can still be realized. ...

....

In the public lands field, the Conservation Law tends to shift decisions away from forms that are fully reviewed under administrative law principles and toward those that are reviewed more gently, or not at all. Thus, Presidents have gathered discretion into their own hands under the Antiquities Act, where it is safest from challenge.<sup>129</sup>

If this maxim is correct, it seems appropriate to consider what other actions a president might take, if legally foreclosed from reducing a monument's size, to produce largely the same effect through another means. As the maxim suggests, a president committed to reversing the impact of a monument has power, even in the absence of a formal revocation or reduction.

Although the Secretary of the Interior is obligated to manage a monument to accomplish the purposes set forth in the proclamation creating the monument,<sup>130</sup> the Secretary is also obligated to protect "valid existing rights" within a monument.<sup>131</sup> Among those valid existing rights are grazing permits, federal mineral leases, unpatented mining claims, and other state and private lands within the monument boundaries. Although the scope of protection for valid existing rights is actually rather limited—in essence valid existing rights may be restricted as long as the restriction

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<sup>129</sup>Harold H. Bruff, "Executive Power and the Public Lands," 76 *U. Colo. L. Rev.* 503, 516–18 (2005) (footnote omitted).

<sup>130</sup>See, e.g., Proclamation No. 9558, 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016) ("The Secretary of Agriculture and the Secretary of the Interior . . . shall manage the monument through the U.S. Forest Service . . . and the [BLM], pursuant to their respective applicable legal authorities, to implement the purposes of this proclamation.")

<sup>131</sup>See, e.g., *id.* ("The establishment of the monument is subject to valid existing rights, including valid existing water rights."). The protection of valid existing rights is required under FLPMA, see 43 U.S.C. § 1701(h), and the Wilderness Act, see 16 U.S.C. § 1133(c), (d)(3). In fact, over 100 statutes in the *United States Code* employ the term "valid existing rights." See James N. Barkeley & Lawrence V. Albert, "A Survey of Case Law Interpreting 'Valid Existing Rights'—Implications for Unpatented Mining Claims," 34 *Rocky Mt. Min. L. Inst.* 9-1, 9-6 n.7 (1988). For an overview of the valid existing rights issue, see David Deisley, "Valid Existing Rights: Legal and Practical Realities," 44 *Rocky Mt. Min. L. Inst.* 24-1 (1998).

does not go so far as to constitute a Fifth Amendment taking<sup>132</sup>—the Secretary’s treatment of valid existing rights could limit a monument’s impact.

As one example, a president’s authority in proclaiming a monument to withdraw lands from entry applies only to lands “owned or controlled by the Federal Government.”<sup>133</sup> It does not apply to lands within the monument’s boundaries that are owned by the state, typically in the form of state trust lands, or by private parties. This is why the president and his administration are typically eager to work out some sort of exchange by which the state in-held parcels are traded for federal land elsewhere in the state.<sup>134</sup> However, until an exchange, the federal government is obligated to provide access to in-held state school trust lands<sup>135</sup> and to private property surrounded by federal land.<sup>136</sup>

Although the scope of access granted would be bounded by the obligation to manage to achieve the purposes set forth in the monument proclamation, a Secretary hostile to the monument’s protective purpose and

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<sup>132</sup>See *Stupak-Thrall v. United States*, 89 F.3d 1269, 1270 (6th Cir. 1996) (en banc) (Moore, J., concurring) (“All authorities are in agreement that the ‘subject to valid existing rights’ language was essentially designed to restrain agencies from effecting a taking.”); *Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979) (“[S]uch regulation cannot be so restrictive as to constitute a taking.”). In the end, the “valid existing rights” language probably does more to protect the federal treasury than the rights holders.

<sup>133</sup>54 U.S.C. § 320301(a).

<sup>134</sup>See, e.g., Proclamation No. 9558, 82 Fed. Reg. 1139, 1144 (Dec. 28, 2016) (charging the Secretary to explore “an exchange of land currently owned by the State of Utah and administered by the Utah School and Institutional Trust Lands Administration within the boundary of the monument for land of approximately equal value managed by the BLM outside the boundary of the monument”). Section 2 of the Antiquities Act anticipates and approves of such exchanges. See 54 U.S.C. § 320301(c) (“When an object is situated on a parcel covered by a bona fide unperfected claim or held in private ownership, the parcel, or so much of the parcel as may be necessary for the proper care and management of the object, may be relinquished to the Federal Government and the Secretary may accept the relinquishment of the parcel on behalf of the Federal Government.”). See generally Rasband, *supra* note 46, at 527–29 (describing exchange with the State of Utah following the proclamation of the Grand Staircase-Escalante National Monument).

<sup>135</sup>See *Andrus*, 486 F. Supp. at 1011 (holding that the federal government must permit an access road to a state school section in a wilderness study area but must not allow that same construction to impair the area’s potential wilderness characteristics); Coggins & Glicksman, *supra* note 40, at § 15:10 (discussing state access to landlocked state lands).

<sup>136</sup>Access to private inholdings is more complex. See Coggins & Glicksman, *supra* note 40, at §§ 15:11 to 15:16 (discussing access to private inholdings). If not along an R.S. 2477 right-of-way, an inholder likely needs to apply to the BLM for a right-of-way. Under FLPMA, the BLM can choose not to grant the right-of-way, see 43 U.S.C. § 1761, or to impose restrictions that will “minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment,” *id.* § 1765(a) (setting forth the terms and conditions under which the Secretary may permit a right-of-way over BLM lands). Either decision, of course, would be subject to a takings claim.

inclined to a broader understanding of valid existing rights would retain some discretion to be more generous to state and private parties seeking access to their in-held parcels.

### § 21.04 Conclusion

The Antiquities Act has long had power beyond the confines of its language. Presidents have used it to set aside large, landscape-level monuments despite the Act's primary focus on prehistoric ruins and artifacts. Similarly, presidents have significantly reduced the size of monuments despite the absence of any language in the Act expressly granting such power. Now that President Trump has ordered a review of monuments created since 1996, a new chapter in the meaning of the Act may be about to be written. Depending on how the courts choose to read congressional silence, which is always a tricky proposition, national monuments may prove to be less permanent than once envisioned. If so, executive energy may turn toward the withdrawal procedure under section 204 of FLPMA, which recently received a boost because its legislative veto provisions have been ruled unconstitutional and severable.<sup>137</sup> If national monuments are less secure, it may also require Congress to play a more active role in preserving our public lands.

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<sup>137</sup>In *Yount v. Salazar*, 933 F. Supp. 2d 1215 (D. Ariz. 2013), the court relied on the Supreme Court's decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), and held that the legislative veto provision in section 204(c) of FLPMA was unconstitutional because the Constitution requires that before a bill may become a law, it must be presented to the president for signature or veto—the so-called presentment requirement. *Yount*, 933 F. Supp. 2d at 1220. The court then held that the legislative veto provision was severable from the rest of the Secretary's withdrawal authority in section 204(c), reasoning that FLPMA's severability clause and the presumption of severability of unconstitutional provisions if what remains can be fully operative as a matter of law overcame the plaintiffs' arguments from the structure and history of FLPMA. *Id.* at 1220–35. One factor that will make the use of section 204 withdrawals more attractive is that section 204 does not appear to provide any authority for reversing withdrawals.