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Enough is Enough:

It's Time to Abolish the Antiquities Act of 1906

THE ISSUE IN BRIEF

Antiquities Act of 1906

The President of the United States is authorized, 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 Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

EXECUTIVE SUMMARY

With less than a month to go in office, President Obama set aside 1.65 million acres of federal land under the Antiquities Act of 1906. Neither Congress nor the local communities affected by these new national monuments were consulted.

President Obama was particularly audacious in his use of the Antiquities Act of 1906—setting aside a record 553 million acres of federal land and water for special protection, but other Presidents have also made liberal use of this law in the waning days of their administrations. President Johnson, for example, added 264,000 to Arches and Capitol Reef National Monuments ninety *minutes* before he left office. These Presidential Proclamations routinely spark outrage from the local communities (and their legislators) who are offered no procedural protections.

President Trump can and should examine President Obama's monument designations to determine whether they are consistent with the Antiquities Act. If they are not, he should rescind or modify them.

Congress, too, can and should act. Under the Property Clause of the United States Constitution, Congress is given sole authority to manage federal lands. There is no question that Congress can rescind the monument designations. But it should go much farther and repeal the Antiquities Act of 1906.

MORE INFORMATION

History of the Antiquities Act

The Antiquities Act of 1906 originally was enacted to protect Native American dwellings and burial sites in the Southwest. During the late nineteenth century, a booming market for original artifacts developed, leading to widespread looting of Native American ruins by "pot hunters." Archeologists noted the extent of the practice, observing that "there is scarcely an ancient dwelling site or cemetery that has not been vandalized by 'pottery diggers' for personal gain." Further, the Homestead Act still allowed for claims making it possible for notable ruins like Gran Quirviram, a 17th century Spanish mission ruin in Socorro County, New Mexico, to end up in private hands.

As a result of these concerns, the Antiquities Act of 1906 criminalized the unauthorized excavation or appropriation of any historic ruin or object of antiquity. It also authorized the President of the United States to, in his discretion, declare by public proclamation "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" to be national monuments. The President also may reserve "parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."

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Even advocates for the robust preservation of federal lands, however, acknowledge that the Antiquities Act was never intended to cordon off huge swaths of the West, but rather to withdraw small parcels of land in aid of preserving archaeological sites. The statutory text imposes two important limitations. First, the President is authorized only to preserve specific "objects" of historical or scientific interests. Second, the authority over adjacent land is limited to "to the *smallest area* compatible with the proper care and management of the objects to be protected."

The legislative history confirms that the 1906 Congress did not envision the withdrawal of some 1.65 million acres of federal land (much less 555 million acres of federal lands and waters). The House Report indicated that the bill was intended to protect specific historical and scientific objects. It stated that the Antiquities Act was meant to "create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times."

Indeed, prescient legislators were concerned that the Antiquities Act might someday be used to constrain resource development in the West. Representative Stephens of Texas asked, "How much land will be taken off the market in the Western States by passage of the bill?" The Bill's Sponsor, Representative Lacey, responded, "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." Representative Lacey went on to reject out-of-hand the now-prophetic suggestion that the Antiquities Act might be used to tie up "seventy or eighty million acres of land in the United States." "Certainly not," he replied, because the Act was intended merely to "preserve … old objects of special interest."

Judicial Abdication

The Antiquities Act has been a popular statute among American Presidents. Presidents have proclaimed over 100 monuments totaling some 70 million acres of land (not including water). Some large monuments include Wrangell-St. Elias Monument in Alaska with 10,950,000 acres and Grand Staircase-Escalante with nearly two million acres. A number of these designations have been controversial. President Franklin Roosevelt's creation of the Jackson Hole National Monument resulted in a law prohibiting the future establishments of national monuments in Wyoming. Similarly, President Carter's designation of 56 million acres of land in Alaska resulted in a statute requiring congressional approval for monuments greater than 5,000 acres in the 49th state. President Clinton's designation of the Grand Staircase-Escalante National monument was particularly controversial as it set aside a huge parcel of land, thereby restricting permanently the mining of the largest reserve of American clean coal.

Notwithstanding textual limitations of the Antiquities Act, executives have aggressively pursued preservation via the Antiquities Act, and the Supreme Court has blessed nearly carte blanche authority. In the first challenge, *Cameron v. United States*, the United States filed suit against Cameron who sought to exclude visitors from a section of the Grand Canyon rim in 1920. In defense, Cameron argued that the designation by President Theodore Roosevelt of an 800,000-acre national monument to protect the Grand Canyon was invalid under the Antiquities Act. Cameron had good arguments: the designation arguably was not an "object" as required by the Act, and the 800,000-acre site appeared extravagant in contrast to the Act's requirement of the "smallest area" necessary to protect the object. Nonetheless, in just three sentences, the Supreme Court rejected Cameron's argument, deferring to the President's determination that the Grand Canyon was "an object of unusual scientific interest" and failing to address the vast size of the monument at all.

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The second Supreme Court case, *Cappaert v. United States*, involved Devil's Hole National Monument in Nye County, Nevada. The Federal Government again filed suit against a landowner alleging that the withdrawal of water from private ranchland was threatening the survival of the rare "pupfish" who called the deep underground hole home. The landowner argued that the monument was invalid because the Antiquities Act authorized protection only of archeological sites. In one sparse sentence, the Supreme Court disagreed, finding that the pool and its inhabitants qualified for protection.

Although neither Supreme Court opinion gives a rationale for the Court's extreme deference, the Antiquities Act does state that the President may create national monuments "in his discretion." The Act goes on, however, to set clear limitations on that discretion. The monument must be an "object" of historical or scientific value. And any reserved land must be the "smallest" possible for the preservation of such object. In deferring entirely to the President, the Court abdicated its duty to enforce the text of the Antiquities Act.

Indeed, it is questionable whether Congress itself has the authority to grant authority over federal lands to the President without limitation. The nondelegation doctrine provides that congressional statues must contain an intelligible principle guiding executive action. While the doctrine does not currently provide a high bar, Congress may not delegate away its constitutional authority without *any* guidance.

One possible way to understand the Court's reticence is the long practice of aggressive monument designation without congressional interference. One could argue that Congress has acquiesced to the executive and Court's broad view of the Antiquities Act. But acquiescence arguments do not ordinarily trump clear textual limitations.

In short, there are very good reasons to think that the Supreme Court has gotten the Antiquities Act wrong. As a result, the current judicial precedent grants sole discretion to the President regarding both the subject and size of national monuments—while failing to recognize that the Antiquities Act provides zero protection to affected communities.

Devastating Local Impacts

There's no doubt land-grabs like President Obama's are popular with the vast majority of the American public—at least those outside the designated areas. Tourists from all over the country, and indeed world, can recreate in these vast swaths of federal land. But the affected communities have no opportunity for input, and the designation often comes with catastrophic consequences.

In contrast to the other federal laws that provide for land preservation, the Antiquities Act affords zero procedural protections for those in the affected areas. The local communities often are not notified, and neither they nor their congressional representatives have any say in the creation or size and scope of the national monument.

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And make no mistake, when the President single-handedly designates a large national monument, the local communities pay the price. The designation comes with additional restrictions on road access, grazing, and often makes use of natural resources like oil and gas impossible.

Consider the Grand Staircase-Escalante National Monument. As a law review article by Erik Rusnik explains, that monument sits above an astounding 62 billion tons of coal and 270 million barrels of oil. These resources are valuable—the coal alone is worth as much as $1 trillion. A number of oil companies held oil and gas leases and were in extensive negotiations with the Bureau of Land Management regarding drilling permits. In particular, Andalex Resources Corporation was negotiating a drilling plan that would have created an estimated one thousand new jobs. The monument designation halted the plans, freezing the nation's largest reserve of clean, low-sulfur coal. Gone were the anticipated new jobs as well as property taxes, sales taxes, and royalty payments. The unemployment rates in the affected

counties of Kane and Garfield were double and triple, respectively, the state average. At the time of the monument, the average annual income of a Kane County family was $28,000. And, according to locals, economic conditions have worsened after the monument designation. At the very least, these local communities should have been notified and consulted before the designation.

The Irrelevancy of the Antiquities Act

There is no reason for the Antiquities Act to remain on the books. A plethora of federal statutes adequately protect the United States' important interests in historical sites and sensitive federal land and water. It is high time for the Antiquities Act to go the way of other historical relics, and for Congress, once and for all, to forbid the executive from singlehandedly repurposing vast swaths of federal lands in the West.

Over time, different bills have been introduced in Congress to put firm limits on the executive's authority under the Antiquities Act. The Act could be limited to 5,000 acres per monument (as it has been in Alaska) or to a total of 50,000 acres per year. But the reality is that there is no need for a land preservation statute that short-circuits local input. Other federal statutes adequately protect sensitive sites and lands—and those statutes come with procedural protections.

The Antiquities Act is not necessary to preserve historical and scientific treasures because other federal statues are sufficient for the task. The National Park Service Organic Act of 1916, for example, requires the National Park Service to preserve, among other things, "historic objects" on federal lands. The Wilderness Act of 1964 "preserv[es] the wilderness character" of large tracts of federal land (at least 5,000 acres) "in their natural condition." The Wild and Scenic Rivers Act of 1969 "preserve[s] selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes." The Endangered Species Act of 1973 protects endangered and threatened species and their sometimes extensive habitat recognizing their historical and scientific value.

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Most importantly, The Federal Land Policy and Management Act of 1976 is a comprehensive legislative plan that addresses the management of federal lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental ... and archeological values." The FLPMA allows for the withdrawal of federal lands and the designation of "areas of critical environmental concern."

In short, there are a number of federal statutes that protect sensitive historical and environmental lands. Nor is there a worry about immediacy. If emergency protections are required, FLPMA allows

the Secretary of the Interior to withdraw any amount of land for a period not to exceed three years without public participation. All of these more modern statutes, however, come with procedural protections. They require public notice and comment. And many require congressional approval of land withdrawals.

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The preservation of sensitive public lands and procedural protections for the local communities are both important principles. Indeed, the Public Land Law Review Commission was established in 1964 to review federal public land laws and recommend a public land policy. That bipartisan commission recommended that large-scale withdrawals of public lands should be made only by Congress. Further, *all* withdrawals should come with procedural protections to “insure proper justification for proposed withdrawals, provide for public participation in their consideration, and establish criteria for executive action.”

CONCLUSION

Even those in favor of a robust protection of federal land agree that the Antiquities Act was never meant to set aside huge tracts of land in the West. Neither the text nor the statute's history can be stretched so far—but the courts have largely abdicated their authority to review any designation, and egregious abuses of the Act go unchecked. Further, given the proliferation of federal statutes that protect the land and environment on federal lands and waters, the Act is no longer necessary. Congress should repeal the Antiquities Act of 1906.