

# THE TRUMP ADMINISTRATION AND LESSONS NOT LEARNED FROM PRIOR NATIONAL MONUMENT MODIFICATIONS

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*On December 4, 2017, President Trump issued a presidential proclamation that “modified and reduced” the 1.7-million-acre Grand Staircase-Escalante National Monument in Utah, carving the original monument into three smaller monuments. On the same day, President Trump “modified and reduced” the 1.3-million-acre Bears Ears National Monument, also in Utah. The President’s actions, which reflect the two largest presidential reductions to a national monument that have ever been made, open lands excluded from the monuments to mineral exploration and development, reduce protection for resources within the replacement monuments, and diminish the role that Native American tribes play in management of Bears Ears. President Trump’s decision to drastically reduce the two monuments has spurred a vigorous and ongoing debate over the legality of his actions, centering on whether the Antiquities Act and congressional actions implicitly granted the President with authority to revisit and revise prior monument decisions.*

*This Article undertakes a survey of prior presidential reductions to determine whether, and to what extent, there exists a historical pattern of presidential action sufficient to support the congressional acquiescence argument. I find that the historical record does not support the argument that Congress generally acquiesced to reductions by proclamation. Most prior reductions were small in size, and many, if not most, likely did not rise to the attention of Congress. Congress repeatedly voted down bills to grant Presidents the authority to reduce monuments, and more than fifty years have passed since the last presidential reduction to a monument. During the intervening decades, Congress expressly constrained the executive branch’s discretionary power over public lands. Past reductions, moreover, can be classified either as minor boundary adjustments to early monuments that were designated on unsurveyed lands, revisions intended to improve resource protection rather than to accommodate commodity production, or as adjustments made under the President’s Article II war powers in relation to the two World Wars. President Trump’s reductions, which are the largest in history, check none of those boxes and therefore lack the historical precedent needed to support congressional acquiescence.*

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## INTRODUCTION

On December 4, 2017, President Trump issued a presidential proclamation that “modified and reduced” the 1.7-million-acre Grand Staircase-Escalante National Monument in Utah, carving the original monument, which was approximately the size of Delaware, into three smaller monuments.<sup>1</sup> Together, the three smaller monuments protect about half of the original monument’s area. On the same day, President Trump “modified and reduced” the 1.3-million-acre Bears Ears National Monument,<sup>2</sup> also in Utah, which President Obama had set aside less than a year earlier at the request of five Native American Tribes.<sup>3</sup> Reductions to Bears Ears removed approximately eighty-five percent of the land from the original monument, replacing it with two smaller monuments.<sup>4</sup> The President’s actions, which reflect the two largest presidential reductions to a national monument that have ever been made,<sup>5</sup> open lands excluded from the monuments to mineral exploration and development, reduce protection for resources within the replacement monuments, and diminish the role that Native American tribes play in management of Bears Ears.

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1. Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017) [hereinafter Grand Staircase-Escalante Modification Proc.]. 1.7 million acres reflects the size of the monument as originally designated. A subsequent land exchange with the state of Utah expanded federal land ownership by approximately 200,000 acres. *See* Utah Schools and Land Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. 3139 (1998).
  2. Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 8, 2017) [hereinafter Bears Ears Modification Proc.].
  3. *See* Proclamation No. 9558, 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016) [hereinafter Bears Ears Proc.]; Jonathan Thompson, *Bears Ears a Go—But Here’s Where Obama Drew the Line*, HIGH COUNTRY NEWS (Dec. 29, 2016), <https://perma.cc/2E46-KHGY>.
  4. *See* Bears Ears Modification Proc., *supra* note 2, at 58,084–85.
  5. *See* Richard Gonzalez, Kirk Siegler & Colin Dwyer, *Trump Orders Largest National Monument Reduction in U.S. History*, NPR (Dec. 4, 2017), <https://perma.cc/G5P2-KAJ3>.

Before President Trump acted, it had been fifty-five years since a President last removed land from a national monument.<sup>6</sup> Every national monument that was previously reduced by presidential action involved a monument that had been set aside before 1940, and most over a decade earlier, at a time when information about both the objects to be protected by the monument and the landscape those objects occupied was often limited and imprecise. The President's legal authority for these prior monument reductions was never tested in court.

President Trump's decision to drastically reduce the two monuments has spurred a vigorous and ongoing debate over the legality of his actions.<sup>7</sup> The five Native American Tribes that had proposed Bears Ears, as well as multiple scientific, conservation, and environmental organizations, quickly sued to invalidate President Trump's reductions to Bears Ears.<sup>8</sup> Scientific, conservation, and environmental organizations also immediately challenged the reductions to the Grand Staircase-Escalante National Monument.<sup>9</sup> Others moved to intervene in support of the Trump administration;<sup>10</sup> and still others, including 118 members of Congress and the Attorneys General from eleven states, filed amicus briefs in support of the plaintiffs,<sup>11</sup> setting up a battle over presidential power that appears destined for the Supreme Court.

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6. See Proclamation No. 3539, 28 Fed. Reg. 5405 (June 1, 1963) [hereinafter 1963 Bandelier Revision Proc.].
  7. See Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55 (2017); James R. Rasband, *Stroke of the Pen, Law of the Land?*, 63 ROCKY MTN. MIN. L. INST. § 21-1 (2017); Pamela Baldwin, *Presidential Authority to Modify or Revoke National Monuments* (Sept. 17, 2017) (unpublished manuscript), <https://perma.cc/YU7T-MHQF>; Bruce Fein & W. Bruce DeValle, *Distorting the Antiquities Act to Aggrandize Executive Power—New Wine in Old Bottles* (Nov. 30, 2017) (unpublished manuscript) (on file with author); Todd Gaziano & John Yoo, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. REG. 617 (2018); Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553 (2018).
  8. See Complaint for Injunctive and Declaratory Relief, Hopi Tribe v. Trump, 1:17-cv-02590 (D.D.C. Dec. 4, 2017), 2017 WL 6033876; Complaint for Declaratory and Injunctive Relief, Utah Diné Bikéyah v. Trump, 1:17-cv-02605 (D.D.C. Dec. 6, 2017); Complaint for Declaratory and Injunctive Relief, Nat. Res. Def. Council v. Trump, 1:17-cv-02606 (D.D.C. Dec. 7, 2017), 2017 WL 6055337.
  9. See Complaint for Injunctive and Declaratory Relief, Wilderness Soc'y v. Trump, 1:17-cv-02587 (D.D.C. Dec. 4, 2017); Complaint for Declaratory and Injunctive Relief, Grand Staircase-Escalante Partners v. Trump, 1:17-cv-02591 (D.D.C. Dec. 4, 2017).
  10. See, e.g., Defendant-Intervenor's Motion to Intervene, Utah Diné Bikéyah v. Trump, 1:17-cv-02605 (D.D.C. Jan. 11, 2018).
  11. See Brief of Members of Congress as Amici Curiae Supporting Plaintiffs, Wilderness Soc'y v. Trump, 1:17-cv-02587 (D.D.C. Nov. 19, 2018) (consolidated cases); Brief of the States of Washington, California, Hawaii, Maine, Maryland, New Mexico, New York, Oregon, Rhode Island, and Vermont, and the Commonwealth of Massachusetts as Amici Curiae Supporting Plaintiffs' Opposition to Federal Defendants' Motion to Dismiss, Hopi Tribe v. Trump, 1:17-cv-02590 (D.D.C. Nov. 19, 2018) (consolidated cases).

The plaintiffs contend that the Constitution reserves to Congress the power over our public lands, and with it, the power to revise national monuments.<sup>12</sup> While Congress authorized the President to *create* national monuments when it enacted the Antiquities Act of 1906,<sup>13</sup> Congress had no reason to delegate away the power to *revise* those monuments. To now endow a President with such far reaching powers absent clear congressional intent, they contend, would both upset the balance of power between the legislative and executive branches, and create a cloud of uncertainty over the future of long-protected lands—neither of which Congress could have reasonably intended. The plaintiffs also argue that sweeping public land law reforms enacted in 1976 evidence Congress’ desire to rein in the President’s assertion of power over the public lands.

President Trump, in reducing the monuments, argues that some of the objects identified in the original monument proclamations are not “unique to the monument[s], and some of the particular examples of these objects within the monument[s] are not of significant scientific or historic interest,”<sup>14</sup> whereas other objects are not under threat or are adequately protected by other laws.<sup>15</sup> The original monuments were therefore, in President Trump’s eyes, not confined to the smallest area necessary to protect monument resources, as required by the Antiquities Act. The President’s supporters correctly note that in passing the Act, Congress did not expressly deny the President the power to revise monument boundaries. They then contend that the explicit grant of power to create national monuments should include an implicit grant of authority to revisit and revise prior decisions anytime a President sees fit. Supporters of the President’s reductions go on to argue that in light of ambiguous statutory language, courts should consider Congress’ failure to object to twenty or so prior presidential reductions to national monuments. This failure, they assert, evidences congressional acquiescence in the President’s assumption of power to revise or repeal a national monument.

In the debate surrounding President Trump’s monument reductions, a critical and as-yet-unanswered question is whether prior presidential monument reductions create precedent for contemporary actions through the doctrine of congressional acquiescence. This Article undertakes a survey of prior presidential reductions to determine whether, and to what extent, there exists a historical pattern of presidential action sufficient to support the congressional acquiescence argument. I find that the historical record does not support the argument that Congress generally acquiesced to reductions by proclamation.

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12. See, e.g., Complaint for Injunctive and Declaratory Relief, *Hopi Tribe v. Trump*, *supra* note 8, at 1. Substantially the same argument is made in the other complaints cited *supra* notes 8–9.

13. 54 U.S.C. §§ 320301–320303 (2014).

14. *Bears Ears Modification Proc.*, *supra* note 2, at 58,081–82.

15. *Id.*

Most prior reductions were small in size, and many, if not most, likely did not rise to the attention of Congress. Congress repeatedly voted down bills to grant Presidents the authority to reduce monuments, and more than fifty years have passed since the last presidential reduction to a monument. During the intervening decades Congress expressly constrained the executive branch's discretionary power over public lands. Past reductions, moreover, can be classified either as minor boundary adjustments to early monuments that were designated on unsurveyed lands, revisions intended to improve resource protection rather than to accommodate commodity production, or as adjustments made under the President's Article II war powers in relation to the two World Wars. President Trump's reductions, which are the largest in history, check none of those boxes and therefore lack the historical precedent needed to support congressional acquiescence.

Part I introduces the Antiquities Act and the Bears Ears and Grand Staircase-Escalante National Monuments. Part II discusses arguments for and against the President's authority to reduce national monuments. Part III analyzes prior monument reductions and failed legislative efforts to grant the authority to reduce monuments, finding no precedent for President Trump's recent actions. The Article concludes that Congress appeared intent on reserving broad discretion to revise national monuments for itself. At best, Congress may have acquiesced to a President's minor updates to monument boundaries where those revisions helped improve resource protection, or were made in response to existential threats to national security. Even that acquiescence—if it existed at all—ended with the enactment of the Federal Land Policy and Management Act of 1976 ("FLPMA").<sup>16</sup> Any prior acquiescence, moreover, involved justifications that have little relevance to reductions to the Bears Ears and Grand Staircase-Escalante National Monuments. President Trump's monumental reductions stand alone, lacking a stable legal foundation or the precedential support needed to demonstrate congressional acquiescence.

## I. THE ANTIQUITIES ACT AND THE TRUMP MONUMENT REVIEW

On April 26, 2017, President Trump directed Secretary of the Interior Ryan Zinke to review certain designations and expansions of prior national monuments for compliance with the Antiquities Act of 1906 and for conformity with administration policy.<sup>17</sup> The Secretary was directed to review monuments designated after January 1, 1996, if they exceeded 100,000 acres in size, or if, in the Secretary's opinion, they had been set aside without adequate public input.<sup>18</sup> Secretary Zinke reviewed twenty-seven monuments and, after review,

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16. Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended in scattered sections of the U.S.C.).

17. Exec. Order No. 13,792, 82 Fed. Reg. 20,429 § 2 (Apr. 26, 2017).

18. *Id.*

recommended boundary reductions and management changes for six national monuments, and management changes to four additional monuments.<sup>19</sup> On December 4, 2017, President Trump reduced two of the monuments identified in Secretary Zinke's report: Bears Ears and Grand Staircase-Escalante.<sup>20</sup> As of the writing of this paper, no action has been taken on the other monuments recommended for management changes or reduction.<sup>21</sup>

The following section reviews the statute that authorizes the President to designate national monuments, describes the two monuments that President Trump reduced in size, and then briefly addresses the protections afforded to the objects identified in a national monument proclamation.

### A. *The Antiquities Act of 1906*

Congress enacted the Antiquities Act of 1906<sup>22</sup> largely in response to concerns over looting and desecration of Native American sites in the Southwestern United States.<sup>23</sup> In passing the Antiquities Act, Congress delegated to the President the unilateral and discretionary authority to:

[D]eclare 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. . . . The limits of the parcels

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19. See Memorandum from Ryan Zinke, Sec'y of the Interior, to President Trump, Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act 9–18 (Aug. 24, 2017), <https://perma.cc/JZQ3-MA3Y> [hereinafter Memorandum from Secretary Zinke].
  20. See Grand Staircase-Escalante Modification Proc., *supra* note 1; Bears Ears Modification Proc., *supra* note 2.
  21. On April 28, 2017, President Trump also directed the Secretary of Commerce to review eleven National Marine Sanctuaries and Marine National Monuments designated pursuant to the Antiquities Act during the preceding ten-year period. See Exec. Order No. 13,795, 82 Fed. Reg. 20,815 § 4(b) (Apr. 28, 2017). The Secretary of Commerce was directed to assess the acreage impacted by these designations; the cost of managing the designations; the adequacy of consultation with federal, state, and tribal entities prior to designation; and “the opportunity costs associated with potential energy and mineral exploration and production from the Outer Continental Shelf, in addition to any impacts on production in the adjacent region.” *Id.* at § 4(b)(i). The Secretary was not directed to assess Antiquities Act compliance with respect to these sanctuaries and monuments. The results of this review were due to the President on October 5, 2017, and have not been released to the public. The President has not taken action based on those recommendations as of the writing of this paper.
  22. 54 U.S.C. §§ 320301–320303 (2014).
  23. See Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 477–78 (2003); Robert B. Collins & Dee F. Green, *A Proposal to Modernize the American Antiquities Act*, 202 SCIENCE 1055, 1055 (1978).

shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.<sup>24</sup>

Since 1906, Presidents have relied on this authority to designate 157 national monuments, which are spread across thirty-two states, the District of Columbia, and several U.S. territories.<sup>25</sup> Sixteen Presidents, Republicans and Democrats alike, have utilized this authority.<sup>26</sup> Some of our most iconic national parks began as national monuments, including the Grand Canyon in Arizona, Arches in Utah, Olympic in Washington State, Acadia in Maine, and Grand Teton in Wyoming.<sup>27</sup>

The two key requirements of the Act—that monuments be set aside to protect “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest,”<sup>28</sup> and that monuments be “confined to the smallest area compatible with the proper care and management of the objects to be protected”<sup>29</sup>—have both been construed broadly by the courts.

In 1920, the U.S. Supreme Court upheld the presidential designation of the Grand Canyon National Monument.<sup>30</sup> President Roosevelt had set aside the 808,120-acre monument twelve years earlier to protect “the greatest eroded canyon within the United States.”<sup>31</sup> Ralph Cameron, a local miner who would go on to represent Arizona in the U.S. Senate, disputed the designation. The United States sued to enjoin Mr. Cameron from interfering with public use of lands within the newly-minted Monument. Mr. Cameron initially argued that the canyon was “not an historic landmark, nor an historic or prehistoric structure nor an object of historic or scientific interest nor an antiquity in the sense intended and contemplated by Congress,” and that because of its size, “the limits of the said pretended monument are not confined to the smallest area com-

24. 54 U.S.C. § 320301(a), (b) (2014).

25. See *Antiquities Act 1906–2006: Maps, Facts and Figures*, NAT'L PARK SERV., <https://perma.cc/6HYG-4HJY> [hereinafter MONUMENTS LIST]; see also NAT'L PARK SERV., LISTING OF ACREAGE (SUMMARY) (2017), <https://perma.cc/P66E-C2G9> [hereinafter LISTING OF ACREAGE]; NAT'L PARKS CONSERVATION ASS'N, ANTIQUITIES ACT DESIGNATIONS AND RELATED ACTIONS (on file with author) (no date). It was difficult to accurately calculate the acreage of early national monuments because of incomplete and inaccurate surveys. This resulted in inconsistent reports of monument size between various sources. Where acreage calculations depart, this Article cites first to monument proclamations, then to National Park Service Statistics, and then to information provided by the National Parks Conservation Association.

26. See MONUMENTS LIST, *supra* note 25.

27. See *id.*

28. 54 U.S.C. § 320301(a) (2014).

29. *Id.* § 320301(b).

30. *Cameron v. United States*, 252 U.S. 450 (1920).

31. Proclamation No. 794, 35 Stat. 2175 (Jan. 11, 1908) [hereinafter Grand Canyon Proc.].

patible with the proper care and management of the canyon.”<sup>32</sup> Both the district court and the court of appeals held for the government.<sup>33</sup> The Supreme Court affirmed, concluding that the Antiquities Act empowered the President “to establish reserves embracing ‘objects of historic or scientific interest,’”<sup>34</sup> and that the Grand Canyon:

“is an object of unusual scientific interest.” It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, [and] is regarded as one of the great natural wonders.<sup>35</sup>

Fifty-six years later, in the only other challenge to the Antiquities Act to reach the Supreme Court, the Court again gave “objects of historic or scientific interest” a broad reading, concluding that an endemic fish species and the pool it inhabited in the Death Valley National Monument in California were objects of historic or scientific interest within the meaning of the Antiquities Act.<sup>36</sup> In 2002, the D.C. Circuit Court of Appeals similarly held that “ecosystems and scenic vistas” are appropriate objects for protection under the Antiquities Act.<sup>37</sup> Indeed, no challenge to a national monument designation has ever prevailed in court.<sup>38</sup>

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32. Answer to Amended Complaint at 11, *Cameron v. United States*, E. No. 10—Prescott (D. Ariz. July 28, 1916).
33. *Cameron*, 252 U.S. at 454.
34. *Id.*
35. *Id.* at 455–56.
36. *Cappaert v. United States*, 426 U.S. 128, 142 (1976).
37. *Tulare Cty. v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002).
38. See *Cappaert*, 426 U.S. 128 (Devil’s Hole); *Cameron*, 252 U.S. 450 (Grand Canyon); Utah Ass’n of Ctys. v. Bush, 316 F. Supp. 2d 1172 (D. Utah 2004), *appeal dismissed for lack of standing*, 455 F.3d 1094 (10th Cir. 2006) (Grand Staircase-Escalante); *Tulare Cty.*, 185 F. Supp. 2d 18, 27 & n.2 (D.D.C. 2001), *aff’d*, 306 F.3d 1138 (D.C. Cir. 2002) (Giant Sequoia); *Anaconda Copper Co. v. Andrus*, No. A79-161 Civil, 1980 U.S. Dist. LEXIS 17861 (D. Alaska July 1, 1980) (several Alaskan national monuments); *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978) (several Alaskan national monuments); *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945) (Jackson Hole). In the most recent challenge to a national monument, *Mass. Lobstermen’s Assoc. v. Ross*, No. 17-402 (JEB), 2018 WL 4853901 (D.D.C. Oct. 5, 2018), the court held that the Antiquities Act includes the power to designate monuments on submerged ocean lands. *Id.* at \*8. More germane to the challenge to the Trump Administration’s monument reductions, the court also held that review of the decision to create national monuments “would be available only if the plaintiff were to offer plausible and detailed factual allegations that the President acted beyond the boundaries of authority that Congress set.” *Id.* at \*4. That is precisely the question raised in the Bears Ears and Grand Staircase-Escalante National Monument litigation.

The Antiquities Act authorizes the President to “reserve parcels of land as part of the national monuments.”<sup>39</sup> Relying on this authority, national monument proclamations invariably withdraw lands within a monument from availability for disposal or future mineral development.<sup>40</sup> Monument proclamations also frequently specify other protections, like limitations on construction of new roads, that are intended to protect monument resources.<sup>41</sup> More specific management requirements are developed through a planning process that normally begins shortly after monument designation.<sup>42</sup>

The Grand Staircase-Escalante National Monument is managed by the Bureau of Land Management (“BLM”), and Bears Ears is managed jointly by the BLM and the U.S. Forest Service. Objects and lands in both monuments enjoy further protections because other federal laws recognize the overriding conservation purpose behind national monument designations. FLPMA,<sup>43</sup> which forms the foundation for public land management, requires that where a tract of BLM-managed public land “has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law”<sup>44</sup> rather than the BLM’s multiple-use, sustained-yield mandate.

In addition, monuments managed by the BLM enjoy further protections by virtue of their inclusion in the National Landscape Conservation System (“NLCS”),<sup>45</sup> which Congress established in 2009 to “conserve, protect, and restore nationally significant [BLM-managed] landscapes that have outstanding cultural, ecological, and scientific values for the benefit of current and future generations.”<sup>46</sup> The Secretary of the Interior is directed to manage the system “in a manner that protects the values for which the components of the system were designated.”<sup>47</sup> Therefore, even if a monument proclamation does not expressly preclude certain activities, the Secretary can authorize those actions only

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39. 54 U.S.C. § 320301(b) (2014).

40. *See, e.g.*, Bears Ears Proc., *supra* note 3, at 1143; Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (Sept. 18, 1996) [hereinafter Grand Staircase-Escalante Proc.].

41. *See, e.g.*, Bears Ears Proc., *supra* note 3, at 1145.

42. *See, e.g., id.* at 1143–44. Where national monument management plans already exist, changes in management requirements applicable to lands excluded from a monument may require an update to management plans and an environmental review before they can take effect, but this issue is beyond the scope of the current paper.

43. Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended in scattered sections of the U.S.C.).

44. 43 U.S.C. § 1732(a) (2012).

45. National monuments were designated part of the NLCS. 16 U.S.C. § 7202(b)(1)(A) (2012). The NLCS has been renamed the National Conservation Lands System. Because the statute creating the National Conservation Lands System has not been amended to reflect the change in terminology, this paper retains the older terminology to avoid confusion.

46. Pub. L. No. 111-11, tit. II, § 2002(a), 123 Stat. 1095, 1095 (2009) (codified at 16 U.S.C. § 7202(a) (2012)).

47. *Id.* at § 7202(c)(2).

if they do not harm monument resources. The NLCS thus places a thumb on the multiple-use scale, guaranteeing that protection of the objects identified in the monument proclamation is the primary management objective. This conservation emphasis disappears when BLM lands are eliminated from a monument.

The breadth of authority granted in the Antiquities Act also affords the President extraordinary latitude, not only to specify mineral withdrawals in monument proclamations, but also to incorporate place-specific language in national monument proclamations. President Obama, for example, recognized state primacy in water rights permitting<sup>48</sup> and wildlife management.<sup>49</sup> He also recognized the importance of maintaining existing infrastructure<sup>50</sup> and continuing ongoing livestock grazing.<sup>51</sup> Recent national monument proclamations also invariably require managers to create a management plan in consultation with state, local, and tribal governments, ensuring that those closest to the land have a voice in how that land is managed.<sup>52</sup> All Obama-era proclamations involving significant public land acreage include language specifically protecting Native Americans' rights to access and use national monuments.<sup>53</sup> Recent monument

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48. See, e.g., Proclamation No. 9297, 80 Fed. Reg. 41,969, 41,973 (July 10, 2015) [hereinafter Basin and Range Proc.].
  49. See, e.g., Proclamation No. 9232, 80 Fed. Reg. 9975, 9979 (Feb. 24, 2015).
  50. See, e.g., Proclamation No. 8946, 78 Fed. Reg. 18,783, 18,785 (Mar. 25, 2013) [hereinafter Río Grande Del Norte Proc.] (protecting utility line rights-of-way within the monument); see also Proclamation No. 9559, 82 Fed. Reg. 1149, 1152 (Jan. 5, 2017) [hereinafter Gold Butte Proc.] (authorizing “operation, maintenance, replacement, modification, or upgrade” of utilities).
  51. See, e.g., Bears Ears Proc., *supra* note 3, at 1145 (“Laws, regulations, and policies followed . . . in issuing and administering grazing permits or leases on lands under their jurisdiction shall continue to apply.”).
  52. See, e.g., Proclamation No. 9298, 80 Fed. Reg. 41,975, 41,979 (July 10, 2015) [hereinafter Berryessa Snow Mountain Proc.] (providing for “public involvement in the development of the management plan including, but not limited to, consultation with tribal, State, and local governments.”).
  53. See, e.g., Proclamation No. 9476, 81 Fed. Reg. 59,121, 59,127 (Aug. 24, 2016) (establishing Katahdin Woods and Waters National Monument) (“The Secretary shall, to the maximum extent permitted by law and in consultation with Indian tribes, ensure the protection of Indian sacred sites and cultural sites in the monument and provide access to the sites by members of Indian tribes for traditional cultural and customary uses.”). A number of other proclamations contain substantively identical language. See Gold Butte Proc., *supra* note 50, at 1153; Bears Ears Proc., *supra* note 3, at 1145; Proclamation No. 9396, 81 Fed. Reg. 8379, 8383 (Feb. 12, 2016) (establishing Sand and Snow National Monument); Proclamation No. 9395, 81 Fed. Reg. 8371, 8375 (Feb. 12, 2016) (Mojave Trails); Proclamation No. 9394, 81 Fed. Reg. 8365, 8367 (Feb. 12, 2016) (Castle Mountains); Berryessa Snow Mountain Proc., *supra* note 52, at 41,979; Basin and Range Proc., *supra* note 48, at 41,972–73; Browns Canyon Proc., *supra* note 49, at 9979; Proclamation No. 9131, 79 Fed. Reg. 30,431, 30,435 (May 21, 2014) (Organ Mountains-Desert Peaks); Proclamation No. 8947, 78 Fed. Reg. 18,789, 18,791 (Mar. 25, 2013) (San Juan Islands).

proclamations also specifically address Native American use of forest products, firewood, and medicinal plants, where those issues have regional significance.<sup>54</sup> Unless provided for by other laws, these directives fall away when a monument is undone.

### B. *The Grand Staircase–Escalante National Monument*

On September 18, 1996, President Clinton designated the 1.7-million-acre Grand Staircase–Escalante National Monument to protect a “spectacular array” of sensitive scientific, historic, prehistoric, archaeological, paleontological, cultural, and natural resources.<sup>55</sup> The proclamation also withdrew lands within the monument from mineral development or disposal.<sup>56</sup> President Clinton described the monument, which was the last place in the continental United States to be mapped, as an unspoiled frontier and a “geologic treasure” teeming with “world class paleontological sites,” a place “rich in human history,” and containing “an extraordinary number of areas of relict vegetation, many of which have existed since the Pleistocene.”<sup>57</sup> Indeed, the monument has produced discoveries of over forty-five new paleontological species, including twelve new species of dinosaurs.<sup>58</sup>

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54. Proclamation No. 9194, 79 Fed. Reg. 62,303, 62,306 (Oct. 10, 2014) (establishing San Gabriel Mountains National Monument) (guaranteeing monument access for “traditional cultural, spiritual, and tree and forest product-, food-, and medicine-gathering purposes”); Río Grande Del Norte Proc., *supra* note 50, at 18,785–86 (“ensur[ing] the protection of religious and cultural sites in the monument and provid[ing] access to the sites by members of Indian tribes for traditional cultural and customary uses . . . [not precluding the] traditional collection of firewood and piñon nuts in the monument for personal non-commercial use consistent with the purposes of this proclamation.”); Proclamation No. 8868, 77 Fed. Reg. 59,275, 59,277 (Sept. 21, 2012) (Chimney Rock National Monument) (to “protect and preserve access by tribal members for traditional cultural, spiritual, and food- and medicine-gathering purposes, consistent with the purposes of the monument, to the maximum extent permitted by law.”).
55. Grand Staircase–Escalante Proc., *supra* note 40, at 50,223.
56. *Id.* at 50,225. Public lands were commonly disposed of via grants to states, railroads, homesteaders, miners, returned military veterans, and others. For a background on public land disposal laws, see PAUL W. GATES, PUBLIC LAND LAW REVIEW COMMISSION, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).
57. Grand Staircase–Escalante Proc., *supra* note 40, at 50,223–24.
58. See Jeffrey G. Eaton & Richard L. Cifelli, *Review of Late Cretaceous Mammalian Faunas of the Kaiparowits and Paunsaugunt Plateaus, Southwestern Utah*, in AT THE TOP OF THE GRAND STAIRCASE: THE LATE CRETACEOUS OF SOUTHERN UTAH 319–28 (Alan L. Titus & Mark A. Loewen eds., 2013); Alan L. Titus, Jeffrey G. Eaton & Joseph Sertich, *Late Cretaceous Stratigraphy and Vertebrate Faunas of the Markagunt, Paunsaugunt, and Kaiparowits Plateaus, Southern Utah*, 3 GEOLOGY INTERMOUNTAIN WEST 229, 229–91 (2016), <https://perma.cc/EUX6-RG2R>.

The Grand Staircase-Escalante was the first national monument to be managed by the BLM.<sup>59</sup> Previously, when monuments were proclaimed on BLM-managed lands, monument administration was turned over to the National Park Service.<sup>60</sup> In keeping management of the Grand Staircase-Escalante with the BLM, President Clinton sent a clear message to the BLM that conservation was an important part of the agency's mission, offering it "a highly visible opportunity to demonstrate its stewardship."<sup>61</sup> Retaining BLM management also attempted to send a message to rural residents that the administration had heard their concerns and that monument management would be less restrictive than might have occurred had management been turned over to the National Park Service.<sup>62</sup>

Monument designation was received favorably by environmental groups, who "view[ed] it as an important step forward in permanently protecting southern Utah's vulnerable landscapes."<sup>63</sup> State and local politicians, on the other hand, "uniformly condemned the decision, labeling it a land grab, crass political opportunism, and much worse."<sup>64</sup> These criticisms resulted from the perceived lack of state input in the designation<sup>65</sup> and the economically valuable mineral resources that were made unavailable for development as a result of the designation.<sup>66</sup>

The monument also surrounded approximately 200,000 acres of state trust lands<sup>67</sup>—managed by the state to generate revenue in support of public schools

59. See Squillace, *supra* note 23, at 509.

60. For example, Capitol Reef National Monument in Utah was originally set aside out of public lands, and the National Park Service was charged with monument management. See Proclamation No. 2246, 50 Stat. 1856, 1867 (Aug. 2, 1937). Congress later elevated the monument to National Park status. Act of Dec. 18, 1971, Pub. L. No. 92-207, 85 Stat. 739 (1971).

61. Memorandum from Bruce Babbitt, Sec'y of the Interior, to the Director, Bureau of Land Mgmt. 1 (Nov. 6, 1996) (on file with author).

62. See, e.g., Transcript of Utah State Historical Society Oral History Program Interview with John D. Leshy 12 (Apr. 1, 2014) (on file with author) ("Part of the idea of a BLM monument is that it is somewhat different from a park; in part because it allows hunting and tolerates some other uses you may not tolerate in a Park.").

63. Robert B. Keiter, *The Monument, The Plan, and Beyond*, 21 J. LAND, RES. & ENVTL. L. 521, 524-25 (2001).

64. *Id.*

65. See, e.g., Joe Judd, *County Collaboration with the BLM on the Monument Plan and its Roads*, 21 J. LAND, RES. & ENVTL. L. 553 (2001). But the Solicitor for the Department of the Interior recounts meeting with members of the Utah congressional delegation in advance of the designation to incorporate their concerns into the proclamation. See Interview with John D. Leshy, *supra* note 62.

66. Janice Fried, *The Grand Staircase-Escalante National Monument: A Case Study in Western Land Management*, 17 VA. ENVTL. L.J. 477, 489 (1998).

67. Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?*, 29 ECOLOGY L.Q. 707, 723 (2002).

and institutions<sup>68</sup>—that many locals looked to with a hope of jobs to come. Those opposed to the designation noted that some believed the monument to contain sixty-two billion tons of coal, between three and five billion barrels of oil, and two to four trillion cubic feet of natural gas,<sup>69</sup> estimated to be worth between “tens to hundreds of billions of dollars.”<sup>70</sup>

Recognizing that monument designation made development of state trust land inholdings more difficult, President Clinton stated that the monument “should not and will not come at the expense of Utah’s school children,” and directed the federal government to promptly respond to a request by the State of Utah to trade its inholdings for federal lands outside of the monument that were more appropriate for development.<sup>71</sup> President Clinton also directed the Secretary of the Interior to resolve “reasonable doubts” as to land value in favor of Utah’s trust lands.<sup>72</sup> Barely eighteen months later, the Secretary of the Interior and the Governor of Utah agreed to such an exchange.<sup>73</sup> Enacted into law on October 31, 1998, the Utah Schools and Land Exchange Act<sup>74</sup> authorized the largest land exchange in the history of the lower forty-eight states.<sup>75</sup> Utah conveyed to the federal government 376,739 acres of school trust lands both inside and outside of the Monument in return for 138,647 acres of federal land; mineral rights to roughly 160 million tons of coal and 185 billion cubic feet of coal bed methane; the right to \$13 million in potential future coal rents and royalties; and \$50 million in cash.<sup>76</sup>

Despite the administration’s efforts to minimize the adverse impacts of the monument designation, federal agencies’ management of the Grand Staircase-Escalante National Monument remained a source of deep resentment in much of Utah. When Donald J. Trump was elected President, Utah’s political establishment aggressively lobbied the new President to greatly reduce the Monu-

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68. UTAH CODE ANN. § 53C-1-102 (West 2018); *see also* Nat’l Parks Conservation Ass’n v. Bd. of State Lands, 869 P.2d 909, 916–17 (Utah 1994).

69. Janice Fried, *supra* note 66, at 489.

70. *Id.*

71. President William J. Clinton, Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona (Sept. 18, 1996), *in* 32 WEEKLY COMP. PRES. DOC. 1785, 1787 (1996).

72. John W. Andrews, *Swapping with the Feds: An Updated Look at Federal Land Exchanges*, 51 ROCKY MTN. MIN. L. INST. § 8.03[2] (2004).

73. An argument can be made that the congressionally authorized land exchange, the resulting boundary adjustment, and a second congressional boundary revision ratified President Clinton’s designation, converting a presidential action into a congressional action that could only be undone by Congress. *See* Squillace, *supra* note 23, at 550–51. This argument, however, is beyond the scope of this paper and left for another day.

74. Pub. L. No. 105-335, 112 Stat. 3139 (1998).

75. President William J. Clinton, Statement on Signing the Utah Schools and Land Exchange Act of 1998 (Oct. 31, 1998), 1998 U.S.C.C.A.N. 715 (1998).

76. H.R. REP. NO. 105-598, at 4 (1998).

ment.<sup>77</sup> President Trump heeded those requests, and on December 4, 2017, signed a presidential proclamation carving the Monument into three smaller units that together encompass little more than half the area of the original monument, while excluding 876,598 acres of land protected by President Clinton twenty-one years earlier.<sup>78</sup>

In addition to reducing the monument, President Trump's proclamation dramatically changed its management. The 1996 proclamation creating the monument withdrew all federal lands within its boundary from availability for future mineral leasing or mining claims.<sup>79</sup> The 2017 proclamation makes "the public lands excluded from the monument reservation . . . open to: (1) entry, location, selection, sale or other disposition under the public land laws; (2) disposition under all laws relating to mineral and geothermal leasing; and (3) location, entry, and patent under the mining laws."<sup>80</sup>

Although the 2017 proclamation justifies the modification by arguing that "the existing boundaries of the monument are not 'the smallest area compatible with the proper care'" of protected objects,<sup>81</sup> science and conservation interests report that valuable paleontological resources are now unprotected:

At least 700 scientifically important fossil sites have been excluded by the new monument boundaries. . . . Most of the formations containing fossils from the Cenomanian through Santonian ages have been excluded. The Dakota (also known as Naturita) and Tropic Shale Formations have been almost entirely excluded, and parts of the Wahweap Formation have been excluded, including the site where the unique horned dinosaur *Machairoceratops* was discovered, where the only known specimen of a new species of nodosaur was discovered, and where there is a major hadrosaur bonebed. The Tropic Shale is one of the only fully marine geological units in the Monument—from when this region was covered by water eons ago—and is part of the Late Cretaceous sequence of ecosystems referred to in the 1996 Proclamation. Large portions of the petrified forest referred to in the 1996 Proclamation have been excluded.

All of the Naturita (Dakota) Formation mammal localities from Bulldog Bench outside of Cannonville have been removed from the Monument. Outside of Henrieville, the Smoky Hollow Member of the Straight Cliffs, a premier microvertebrate locality (site with tiny fossils that represent small and often rare species) has been eliminated

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77. See Darryl Fears, *Bears Ears is a National Monument Now. But it will Take a Fight to Save it*, WASH. POST (Mar. 22, 2017), <https://perma.cc/R745-WQQC>.

78. See Grand Staircase-Escalante Modification Proc., *supra* note 1, at 58,093.

79. Grand Staircase-Escalante Proc., *supra* note 40, at 50,225.

80. Grand Staircase-Escalante Modification Proc., *supra* note 1, at 58,093.

81. *Id.* at 58,090 (quoting the Antiquities Act 54 U.S.C. § 320301(b) (294)).

from the Monument. The “type” area of the Kaibab Limestone geological unit—where the defining characteristics of the bed are studied in a particular location and then used to trace the bed over sometimes large distances—is excluded by the new boundaries.<sup>82</sup>

As David Polly, President of the Society of Vertebrate Paleontologists explains, “[t]he rock layers of the monument are like pages in an ancient book. If half of them are ripped out, the plot is lost.”<sup>83</sup>

### C. Bears Ears National Monument

On December 28, 2016, President Obama designated the Bears Ears National Monument in southeastern Utah. President Obama poetically described the twin buttes for which the monument was named and “the surrounding deep sandstone canyons, desert mesas, and meadow mountaintops, which constitute one of the densest and most significant cultural landscapes in the United States.”<sup>84</sup> As the President explained, “[f]rom earth to sky, the region is unsurpassed in wonders.”<sup>85</sup> It is “vibrant . . . diverse . . . and ruggedly beautiful,”—home to “stunning geology, from sharp pinnacles to broad mesas, labyrinthine canyons to solitary hoodoos, and verdant hanging gardens to bare stone arches and natural bridges.”<sup>86</sup> It is also a landscape that is “profoundly sacred to many Native American tribes.”<sup>87</sup>

Proposals to create a national park or national monument that would have included the Bears Ears area date to at least 1935.<sup>88</sup> Near the beginning of the Obama Administration, a memorandum was leaked to the press identifying Cedar Mesa, which is the heart of the Bears Ears area, as a potential national monument. This generated fierce opposition from Utah’s governor and congressional delegation.<sup>89</sup> Opposition to the potential designation, and the development restrictions that it could entail, inspired the Utah congressional delegation to develop their own land management plan. This plan, dubbed the

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82. Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgement at 16, *Grand Staircase Escalante Partners v. Trump*, No. 1:17-cv-02591-TSC (D.D.C. Jan. 20, 2018).

83. Tay Wiles, *Monument Reductions Threaten Future Dinosaur Discoveries*, HIGH COUNTRY NEWS (Jan. 30, 2018), <https://perma.cc/3MBZ-MEWD>.

84. Bears Ears Proc., *supra* note 3, at 1139.

85. *Id.* at 1141.

86. *Id.* at 1139–40.

87. *Id.* at 1139.

88. See SAMUEL J. SCHMIEDING, NAT’L PARK SERV., FROM COMPROMISE TO COOPERATION: THE ADMINISTRATIVE HISTORY OF CANYONLANDS NATIONAL PARK 55–56 (2008).

89. See Thomas Burr, *Two More Monuments Planned in Utah?: Bishop Points to a Memo, but Interior Says It’s a Draft*, SALT LAKE TRIBUNE (Apr. 19, 2010), <https://perma.cc/NGN2-ZJXM>.

Public Lands Initiative (“PLI”), proposed protective designations for some areas in a bid to use them as “currency” for securing guarantees that other areas would be open for commodity development.<sup>90</sup> While Native Americans initially sought to collaborate in the PLI, they soon concluded that their voices were not being heard and decided instead to pursue their own land management proposal.<sup>91</sup> The Bears Ears Inter-Tribal Coalition,<sup>92</sup> which had come together to advocate for the landscape and in an attempt to collaborate on the PLI, developed and submitted to President Obama its own proposal to create a 1.9 million-acre national monument.<sup>93</sup> After more than two years of meetings with a wide range of stakeholders, and the failure of the PLI, President Obama designated the 1.35 million-acre Bears Ears National Monument—the first national monument ever designated at the request of Native Americans.<sup>94</sup> As part of the designation, President Obama withdrew lands within the monument area from availability for mineral leasing or development.<sup>95</sup>

Lands and resources within the Bears Ears National Monument are extraordinary by any measure. As the congressionally chartered National Trust for Historic Preservation describes:

[T]he public lands of San Juan County[, Utah] are among the most culturally significant in the country. Cedar Mesa . . . [has] archaeological site densities that rival and perhaps exceed those found within many nearby national parks and monuments. Also contributing to San Juan County’s cultural significance is the resource diversity, ranging from evidence of Paleoindian occupation more than 11,000 years ago to the Hole-in-the-Rock Trail pioneered by Mormon settlers in the late 19th century. Finally, perhaps nowhere in the United States are so many well-preserved cultural resources found within such a striking and relatively undeveloped natural landscape.<sup>96</sup>

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90. Krista Langlois, *Bishop’s ‘Grand Bargain’ in Utah is no deal, say enviros*, HIGH COUNTRY NEWS (Feb. 22, 2016), <https://perma.cc/V7PB-F976>.
91. Keith Schneider, *Native Americans rewrote the playbook for preserving public land—and Trump is trying to erase it*, L.A. TIMES (Nov. 26, 2017), <http://perma.cc/BXR4-5MCQ>.
92. See, e.g., BEARS EARS INTER-TRIBAL COALITION, *Tribes Uniting to Protect Bears Ears*, <https://perma.cc/XS33-5XTG>. The Coalition is comprised of the Hopi Tribe, Navajo Nation, Ute Indian Tribe, Ute Mountain Ute Tribe, and Pueblo of Zuni. More than two dozen additional tribes and the National Congress of American Indians all formally support the Coalition. See *id.*
93. BEARS EARS INTER-TRIBAL COALITION, PROPOSAL TO PRESIDENT BARACK OBAMA FOR THE CREATION OF BEARS EARS NATIONAL MONUMENT 1 (Oct. 15, 2015), <https://perma.cc/W55E-Y4R6>.
94. Bears Ears Proc., *supra* note 3.
95. *Id.* at 1143.
96. Letter from Barbara Pahl, Western Vice President, Nat’l Trust for Historic Pres., to Congressmen Rob Bishop, Jason Chaffetz, & Chris Stewart (July 10, 2013) (on file with author).

The National Trust for Historic Preservation also testified before Congress that “Bears Ears is one of the most significant cultural landscapes in the United States and a landscape that is home to more than 100,000 cultural and archaeological sites, many of which are sacred to tribal communities across the region.”<sup>97</sup>

The presidential proclamation creating the monument goes to great lengths to describe this culturally, historically, and scientifically rich landscape. But what set this proclamation apart was the way in which it afforded the Tribes a voice in monument management, carefully describing the monument’s importance to Native American communities and establishing a Tribal Commission to “provide guidance and recommendations on the development and implementation of management plans.”<sup>98</sup> The Commission was composed of one government-appointed representative from each of the five Tribes that had come together to create the proposal and who claimed the landscape as part of their ancestral home.

In repealing the 1.35 million-acre Bears Ears National Monument and replacing it with two smaller monuments totaling 201,876 acres, President Trump reduced the protected area by approximately eighty-five percent.<sup>99</sup> Further, in identifying two prominent archaeological sites that continue to be protected as “non-contiguous parcels of land” to be included in the newly formed Shash Jaá National Monument, the proclamation highlighted the location of these remote and sensitive sites, thus making them more vulnerable to looting and over-visitation.<sup>100</sup> In addition, the plaintiffs contend that “tens of thousands of historic and pre-historic structures, cliff dwellings, rock art panels (pictographs and petroglyphs), kivas, open service sites, pueblos, towers, middens, artifacts, ancient roads, historic trails, and other archaeological resources” have lost protection due to President Trump’s actions.<sup>101</sup> This amounts to a loss of protection for approximately seventy-three percent of documented archaeological sites from the monument.<sup>102</sup>

The reduction also allegedly reduced protections for paleontological, recreation, geological, and ecological objects of cultural, scenic, and scientific interest,<sup>103</sup> as exemplified by the recent discovery of “[o]ne of the world’s richest troves of Triassic-period fossils” in an area that was part of the Bears Ears

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97. *Utah Public Lands Initiative Act: Hearing on H.R. 5780 Before the H. Subcomm. on Fed. Lands of the H. Comm. on Nat. Res.*, 114th Cong. 68 (Sept. 14, 2016) (testimony of Stephanie K. Meeks, President and CEO, National Trust for Historic Preservation).

98. Bears Ears Proc., *supra* note 3, at 1144.

99. Bears Ears Modification Proc., *supra* note 2, at 58,085.

100. *Id.* at 58,083.

101. Complaint for Declaratory and Injunctive Relief at 55–56, *Utah Diné Bikéyah v. Trump*, 1:17-cv-02605 (D.D.C. Dec. 6, 2017).

102. *Id.* at 58.

103. *Id.* at 57–58.

National Monument, but that is excluded from the smaller replacement monuments.<sup>104</sup> This site, which “may be the densest area of Triassic period fossils in the nation, maybe the world,” contains the remains of long-extinct fossilized crocodile-like creatures that roamed the earth more than 200 million years ago.<sup>105</sup>

Also, as with the Grand Staircase-Escalante National Monument, President Trump reinstated mineral leasing and development rights within Bears Ears, making previously protected lands available for these purposes sixty days after the date of the new proclamation.<sup>106</sup>

#### D. *Justifying Monumental Reductions*

In his April 26, 2017 Executive Order directing Secretary Zinke to review prior national monuments designations, President Trump set forth seven criteria for evaluation:

- (i) the requirements and original objectives of the Act, including the Act’s requirement that reservations of land not exceed “the smallest area compatible with the proper care and management of the objects to be protected”;
- (ii) whether designated lands are appropriately classified under the Act as “historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest”;
- (iii) the effects of a designation on the available uses of designated Federal lands, including consideration of the multiple-use policy of section 102(a)(7) of the Federal Land Policy and Management Act (43 U.S.C. 1701(a)(7)), as well as the effects on the available uses of Federal lands beyond the monument boundaries;
- (iv) the effects of a designation on the use and enjoyment of non-Federal lands within or beyond monument boundaries;
- (v) concerns of State, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected States, tribes, and localities;
- (vi) the availability of Federal resources to properly manage designated areas; and
- (vii) such other factors as the Secretary deems appropriate.<sup>107</sup>

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104. Darryl Fears & Juliet Eilperin, *Spectacular Fossils Found at Bears Ears—Right Where Trump Removed Protections*, WASH. POST (Feb. 22, 2018), <https://perma.cc/P375-U97K>.

105. *Id.*

106. Bears Ears Modification Proc., *supra* note 2, at 58,085.

107. Exec. Order 13,792, 82 Fed. Reg. 20,429–30 (Apr. 26, 2017).

Criteria (i) and (ii) reflect requirements contained in the Antiquities Act.<sup>108</sup> Criteria (iii) through (vii) are completely unmoored from any identified statutory authority, reflecting instead the policy priorities of the new administration.

The President clearly has the right to direct the Secretary of the Interior to undertake a review based on any criteria that the President chooses. The President may also reasonably consider those factors when deciding whether to designate a new national monument. But as Part II explains, the President's authority to revise existing national monuments is limited to authority granted to him by Congress through the Antiquities Act. President Trump's Executive Order appears to create five new extra-statutory requirements for monument designation, and then impose those criteria on prior presidential decisions. In so doing, he may have impermissibly blurred the line between implementing the Antiquities Act and imputing new criteria into an existing law—assuming for the moment that the Antiquities Act authorizes a President to revise a monument. It is also unclear whether a president can stand in judgement of factual determinations made by his predecessors under congressionally delegated authority without impermissibly intruding on a judicial function.

Secretary Zinke's final report summarizing his findings appears to have been heavily influenced by the Trump Administration's pro-development policies. As the Report explains:

When landscape areas are designated and reserved as part of a monument, objects and large tracts of land are overlain by a more restrictive management regime, which mandates protection of the objects identified. This has the effect of narrowing the range of uses and limiting BLM's multiple-use mission. As a result, absent specific assurances, traditional uses of the land such as grazing, timber production, mining, fishing, hunting, recreation, and other cultural uses are unnecessarily restricted. Such action especially harms rural communities in western states given that these towns have historically benefited and been economically sustained by grazing, mining, and timber production on nearby public lands.<sup>109</sup>

Secretary Zinke also opined that “[i]t appears that certain monuments may have been designated to prevent economic activity such as grazing, mining, and timber production rather than to protect specific objects.”<sup>110</sup> With respect to the Grand Staircase-Escalante National Monument, the Secretary noted that

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108. See 54 U.S.C. § 320301 (2014).

109. Memorandum from Secretary Zinke, *supra* note 19, at 7. It is also noteworthy that in describing the BLM's “multiple-use mission,” the Secretary dropped the “sustained yield” requirement contained in the same statutory clause. See 43 U.S.C. § 1701(a)(7) (2012).

110. Memorandum from Secretary Zinke, *supra* note 19, at 7.

“[a]reas encompassed within [the monument] contain an estimated several billion tons of coal.”<sup>111</sup>

In shrinking the Grand Staircase-Escalante National Monument, President Trump appeared to recognize the tension between the criteria he set forth for the monument review and the authority contained in the Antiquities Act. President Trump’s proclamation reducing the Grand Staircase-Escalante National Monument overtly focused on whether the boundary was the smallest necessary to protect the objects identified in the proclamation. As he explained:

[M]any of the objects identified by Proclamation 6920 are not unique to the monument, and some of the particular examples of those objects within the monument are not of significant historic or scientific interest. Moreover, many of the objects identified by Proclamation 6920 are not under threat of damage or destruction such that they require a reservation of land to protect them; in fact, many are already subject to Federal protection under existing law and agency management designations.<sup>112</sup>

He then concluded “that the current boundaries of the Grand Staircase-Escalante National Monument established by Proclamation 6920 are greater than the smallest area compatible with the protection of the objects for which lands were reserved and, therefore, that the boundaries of the monument should be reduced.”<sup>113</sup> The lands thus eliminated from the monument were also reopened for mineral development.<sup>114</sup>

Reducing the acreage subject to the mineral withdrawals is notable because claims of lost opportunities to mine coal beneath the Grand Staircase-Escalante National Monument were among Utah’s chief arguments for shrinking the monument—and Utah’s congressional delegation fought hard for access to that coal.<sup>115</sup> President Trump has also pledged to revive the coal industry,<sup>116</sup> and has “focused on expanding oil, gas, and coal development and sweeping away Obama-era environmental initiatives that the administration contends hurt America’s energy industry.”<sup>117</sup> Under President Trump’s direction to evaluate “the effects of a designation on the available uses of designated Federal lands,”<sup>118</sup> the Office of the Secretary of the Interior, as part of its national mon-

111. *Id.* at 13.

112. Grand Staircase-Escalante Modification Proc., *supra* note 1, at 58,090.

113. *Id.* at 58,091.

114. *See id.* at 58,093.

115. Brian Maffly, *What Does Kane County Want in a Redrawn Grand Staircase-Escalante Monument?*, SALT LAKE TRIBUNE (Nov. 21, 2017), <https://perma.cc/3FQ5-AYTZ>.

116. *Id.*

117. Eric Lipton & Lisa Friedman, *Oil Was Central in Decision to Shrink Bears Ears Monument, Emails Show*, N.Y. TIMES (Mar. 2, 2018), <https://perma.cc/8KNL-KNQV>.

118. Exec. Order No. 13,792, Fed. Reg. 20,429 (Apr. 26, 2017).

ument review, “developed a series of estimates on the value of coal that could potentially be mined from a section of the Grand Staircase called the Kaiparowits plateau. As a result of Mr. Trump’s action, major parts of the area are no longer a part of the national monument.”<sup>119</sup> Reductions to the monument would, in the words of Utah’s Senator Orrin Hatch, “allow coal mining in the Kaiparowits Plateau.”<sup>120</sup>

As with the Grand Staircase-Escalante National Monument, in his proclamation reducing Bears Ears President Trump concluded that “[s]ome of the objects Proclamation 9558 identifies are not unique to the monument, and some of the particular examples of these objects within the monument are not of significant scientific or historic interest.”<sup>121</sup> He therefore decided that:

Given the nature of the objects identified on the lands reserved by Proclamation 9558, the lack of a threat of damage or destruction to many of those objects, and the protection for those objects already provided by existing law and governing land-use plans, I find that the area of Federal land reserved in the Bears Ears National Monument established by Proclamation 9558 is not confined to the smallest area compatible with the proper care and management of those objects.<sup>122</sup>

Also like the Grand Staircase-Escalante National Monument, increasing access to minerals appeared to be a motivating factor behind monument reductions. The *Washington Post* reported that Energy Fuels Resources, which owns the only operating uranium mill in the United States,

hired a team of lobbyists at Faegre Baker Daniels—led by Andrew Wheeler, who is awaiting Senate confirmation as the Environmental Protection Agency’s deputy secretary—to work on the matter and other federal policies affecting the company. . . . The company’s vice president of operations, William Paul Goranson, joined Wheeler and two other lobbyists, including former congresswoman Mary Bono (R-Calif.), to discuss Bears Ears in a July 17 meeting with two top Zinke advisers. . . . “They heard what we had to say about the job losses, etc.,” [Goranson] said. Zinke’s deputies “were pretty positively disposed to” the idea of spurring future domestic uranium production.<sup>123</sup>

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119. Lipton & Friedman, *supra* note 117, at 3.

120. Thomas Burr & Brian Maffly, *Trump Headed to Utah in December With Plans to Shrink Bears Ears and Grand Staircase*, SALT LAKE TRIBUNE (Oct. 28, 2017), <https://perma.cc/YY77-NX9G>.

121. Bears Ears Modification Proc., *supra* note 2, at 58,081.

122. *Id.* at 58,082.

123. Juliet Eilperin, *Uranium Firm Urged Trump Officials to Shrink Bears Ears National Monument*, WASH. POST (Dec. 8, 2017), <https://perma.cc/9DAA-VNC2>; see also Brian Maffly, *Uranium Mill Pressed Trump Officials for Bears Ears Reductions, Records Show*, SALT LAKE

Emails between Senator Hatch's staffers and the Department of the Interior show that Energy Fuels Resources emailed the maps to Senator Hatch indicating the areas it wanted removed from the monument.<sup>124</sup> Senator Hatch then lobbied the Department of the Interior to remove land that contained oil and natural gas deposits from the monument,<sup>125</sup> and "[t]he map that Mr. Hatch's office provided, which was transmitted about a month before Interior Secretary Ryan Zinke publicly initiated his review of national monuments, was incorporated almost exactly into the much larger reductions President Trump announced in December."<sup>126</sup>

As Part III shows, the Trump administration's reasons for reductions to both Bears Ears and the Grand Staircase-Escalante national monuments have little if any historic precedent.

## II. THE PRESIDENT'S POWER TO REDUCE OR REPEAL A NATIONAL MONUMENT

Whether President Trump exceeded his authority in reducing the Bears Ears and the Grand Staircase-Escalante National Monuments will likely turn on how courts interpret the Antiquities Act.<sup>127</sup> Professor Squillace and others have carefully reviewed the Act's legislative history and argue persuasively that Congress did not intend for Presidents to radically revise national monuments.<sup>128</sup> This Part builds on that work, combining a textual review of the Act with a discussion of historical context to ascertain congressional intent and concluding that Congress did not intend for Presidents to revise national monuments in radical and unilateral ways. Part III takes this analysis further and asks

TRIBUNE (Dec. 13, 2017), <https://perma.cc/J4K6-SFRA>. Andrew Wheeler was confirmed as Deputy Administrator of EPA on April 12, 2018, and on November 16, 2018, President Trump announced that he would nominate Wheeler to head EPA. *See* Lisa Friedman, *Trump Says He'll Nominate Andrew Wheeler to Head the E.P.A.*, N.Y. TIMES (Nov. 16, 2018), <https://perma.cc/US76-A9FC>.

124. *See* Maffly, *supra* note 123.

125. *See* Lipton & Friedman, *supra* note 117.

126. *Id.*; *see also* Brian Maffly, *Oil and Coal Drove Trump's Call to Shrink Bears Ears and Grand Staircase, According to Insider Emails Released by Court Order*, SALT LAKE TRIBUNE (Mar. 2, 2018), <https://perma.cc/3GRC-BWUR>.

127. A President's power to expand a national monument does not appear to be in question, as the President does so by issuing a new proclamation consistent with his delegated authority under the Antiquities Act. The new proclamation identifies the resources to be protected and the area that he deems necessary to protect those resources, again consistent with the requirements set forth in the Antiquities Act. The Department of Justice concedes that "[n]o authority has been asserted by the President to support the Proclamation [reducing Bears Ears National Monument] in the event the Antiquities Act is held not to authorize it." Memorandum in Support of Federal Defendants' Motion to Dismiss at 41, *Hopi Tribe v. Trump*, 1:17-cv-02590 (D.D.C. Dec. 6, 2017) (consolidated cases).

128. *See* Squillace, *supra* note 23, at 583; *see also* Squillace et al., *supra* note 7, at 56.

whether, regardless of the original intent of Congress, that body acquiesced in a broader assertion of power by the President.

The President's authority, "as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'"<sup>129</sup> Beginning with the Constitution, the Property Clause states that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States."<sup>130</sup> According to the Supreme Court, the Property Clause "implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise."<sup>131</sup> The Constitution contains no grant of power over our public lands to the President, who must therefore obtain congressional authorization before acting in this arena.

In passing the Antiquities Act, Congress made such a grant, delegating to the President the discretionary authority to:

[D]eclare 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. . . . The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.<sup>132</sup>

Neither the Antiquities Act itself nor the legislative hearings leading up to its passage mention monument reductions or revocation. The question therefore becomes how to interpret that silence. A number of factors indicate that an expansive reading of presidential power would be contrary to the text and purpose of the Act. While passage of the Antiquities Act recognized a compelling need for quick action to protect sensitive resources, there was no comparable need to swiftly reduce protected areas and therefore no reason for Congress to divest itself of those powers. In other statutes authorizing the President to make public land designations, Congress expressly authorized the President to revise those designations. The choice to not include such language in the Antiquities Act therefore appears intentional. Congress, moreover, repeatedly rejected legislation that would have empowered the President to revise national monument boundaries, indicating both that it knew the President lacked such powers and that it intended to retain revisionary power for itself. Executive branch docu-

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129. *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)); see also *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981).

130. U.S. CONST. art. IV, § 3, cl. 2.

131. *Wis. Cent. R. Co. v. Price Cty.*, 133 U.S. 496, 505 (1890) (citing *Van Brocklin v. Anderson*, 117 U.S. 151, 168 (1886)).

132. 54 U.S.C. § 320301(a), (b) (2014).

ments also demonstrate that, until recently, Presidents understood and accepted these limitations on the scope of their delegated power.

*A. The Antiquities Act: To Promote Swift and Expansive Action*

Congress passed the Antiquities Act because treasured landscapes and the irreplaceable objects that they contain often were under threat from unconstrained exploitation.<sup>133</sup> Swift action was required in the face of pressing threats, and Congress was poorly suited to the fact-finding required to identify the myriad sites at risk or to formulate the site-specific protections each site required.<sup>134</sup> Congress, therefore, granted that power and responsibility to the President.

According to the Supreme Court, any delegation of power by Congress to the executive branch must have “clear expression or implication.”<sup>135</sup> Such a delegation to the executive branch should therefore be “directly conferred and not left to be guesses from a circumlocution of words or to be picked out of a questionable ambiguity.”<sup>136</sup> The power to “declare” a monument is the power to “set forth” and create.<sup>137</sup> It cannot be interpreted to include the power to revoke, reduce, or shrink without ignoring the plain meaning of the term.

Historic context supports this plain meaning interpretation. In the case of the Antiquities Act, while swift action may be required to protect sensitive resources from imminent harm, there is no comparable need for swift action to reduce or rescind a national monument. Congress had no reason to divest itself of its constitutional authority over the fate of such decisions, and divestiture of constitutional authority should not be found based on congressional silence. The separation of powers set forth in our Constitution is too important to disassemble by implication. To now endow a President with near limitless power to unilaterally alter national monuments also infuses unnecessary uncertainty into public land management. This is surely not what Congress intended.

Reducing landscape-scale monuments that contain tens or even hundreds of thousands of artifacts and irreplaceable resources to multiple mini-monuments, as was done at Bears Ears, may also call undue attention to the sensitive archaeological sites than many monuments are designed to protect, contravening congressional intent by inviting looting and defeating the very purpose of designating the monument. Indeed, President Trump’s proclamation identifies two isolated and sensitive cliff dwellings by name and maps their location, attracting visitors to sensitive sites that were previously protected by their remote

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133. See Squillace, *supra* note 23, at 477–86.

134. GENERAL LAND OFFICE, ANNUAL REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE TO THE SECRETARY OF THE INTERIOR 59–60 (1904).

135. *Cochnow v. United States*, 248 U.S. 405, 407 (1919).

136. *Id.* at 408.

137. WEBSTER’S COLLEGIATE DICTIONARY 225 (1898).

location and relative anonymity. Congress implicitly recognized that the threats facing resource-rich landscapes can be compelling and that entire landscapes may require protection as national monuments. To this end, on twenty-five occasions Congress ratified landscape-scale monuments by incorporating them into national parks, national preserves, or other more-protective designations.<sup>138</sup>

This does not imply that those seeking to modify either a national monument boundary or management of the lands within monument boundaries are without redress. Congress has the power to revise or even eliminate a national monument. In 1930, for example, Congress transferred Papago Saguaro National Monument to the state of Arizona,<sup>139</sup> and three years later, it was replaced with the much larger Saguaro National Monument.<sup>140</sup> In 1955, Congress eliminated the Old Kasaan National Monument in Alaska after the totem poles that the monument was designated to protect had been moved to a museum.<sup>141</sup> Similarly, in 1956, Congress eliminated the Castle Pinckney National Monument in South Carolina, which had fallen into disrepair and was no longer devoted to historic preservation.<sup>142</sup> But decisions about the fate of national monuments appear best left, and intentionally left, to the more deliberative halls of Congress.

### B. *Laws Authorizing Presidents to Revise Other Land Designations*

Congress has demonstrated that it knows how to enact laws that allow the President to protect land and afford the President the ability to later revisit those designations if circumstances changed. Congress included such two-way authorities in other statutes, and had they intended to grant the President the power to revise or revoke national monuments, Congress could have adopted that approach in the Antiquities Act. But, Congress did not do so. The Court “presume[s] that where words differ [between statutes] . . . Congress acts intentionally and purposefully in the disparate inclusion or exclusion.”<sup>143</sup> The different choice of language used in the Antiquities Act should be respected.

The practice of Congress authorizing the President to set aside public lands and to subsequently revise those reservations predates the Antiquities Act.

138. See NAT'L PARKS CONSERVATION ASS'N, *supra* note 25.

139. See Act of Apr. 7, 1930, Pub. L. No. 71-92, 46 Stat. 142 (1930) (abolishing Papago Saguaro National Monument).

140. See Proclamation No. 2032, 47 Stat. 2557 (Mar. 1, 1933).

141. See Act of July 26, 1995, Pub. L. No. 84-179, 69 Stat. 380 (1955) (abolishing Old Kasaan National Monument); see also Bob Janiske, *Pruning the Parks: Moving the Totems Changed Everything for Old Kasaan National Monument (1916-1955)*, NATIONAL PARKS TRAVELER (Oct. 25, 2009), <https://perma.cc/ZL89-W57M>.

142. See Act of Mar. 29, 1956, Pub. L. No. 84-447, 70 Stat. 61 (1956) (abolishing Old Pinckney National Monument); see also S. REP. NO. 84-1656 (1939).

143. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

In 1884, for example, Congress empowered the President to determine whether lands within military reservations “[had] become useless for military purposes” and turn such “useless” land over to the Secretary of the Interior for “disposition.”<sup>144</sup> In the Appropriations Act of 1889, Congress recognized the President’s power to reserve lands from settlement and said that “the President may at any time in his discretion by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead laws.”<sup>145</sup>

In the Department of Agriculture Appropriations Act of 1898,<sup>146</sup> Congress stated that:

The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.<sup>147</sup>

Later that same year, Congress, in an act extending the homestead laws to the District of Alaska, stated that “the President is authorized and empowered, in his discretion, by Executive order from time to time to establish or discontinue land districts in the District of Alaska, and to define, modify, or change the boundaries thereof, and designate or change the location of any land office therein.”<sup>148</sup>

In 1910, just four years after passage of the Antiquities Act, Congress passed the Pickett Act,<sup>149</sup> allowing the President to “temporarily withdraw [land] from settlement, location, sale, or entry” for “water-power sites” or for other purposes “until revoked by him or by an Act of Congress.”<sup>150</sup>

Section 10 of the Stock-Raising Homestead Act of 1916<sup>151</sup> allowed the President to withdraw from availability for disposal pursuant to laws like the Homestead Act of 1862,<sup>152</sup> “[l]ands containing water holes or other bodies of water needed or used by the public for watering purposes” pursuant to the process set forth in the Pickett Act.<sup>153</sup> By incorporating the Pickett Act’s withdrawal and revocation provisions into the Stock-Raising Homestead Act,

144. Act of July 5, 1884, 23 Stat. 103, 103 (1884).

145. Act of Oct. 2, 1888, 25 Stat. 505, 527 (1888) (repealed 1976).

146. 30 Stat. 11 (1897).

147. *Id.* at 36.

148. Act of May 14, 1898, 30 Stat. 409, 414 (1898).

149. Pub. L. No. 61-303, 36 Stat. 847 (1910) (repealed 1976).

150. *Id.* at 847.

151. Pub. L. No. 64-290, 39 Stat. 862 (1916).

152. Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862) (codified as amended at 43 U.S.C. §§ 161–284 (1970)) (repealed 1976).

153. Pub. L. No. 64-290, § 10, 39 Stat. 862, 865 (1916) (codified as amended at 43 U.S.C. § 300 (1970)) (repealed 1976).

Congress allowed the President to reserve and revoke water reservations under that Act. Congress incorporated the same language into Section 9 of the Act, which required notations on all coal and mineral patents indicating that they too were subject to the Pickett Act's withdrawal and withdrawal revocation procedures.<sup>154</sup>

In 1928, Congress passed the Colorado River Compact Act, authorizing the Secretary of the Interior to withdraw all lands that were suitable for irrigation and reclamation *until* he determined that such lands should be made available for disposal under provisions of reclamation law.<sup>155</sup> Similarly, Congress passed the Rio Grande Compact Amendment Act in 1935, authorizing the President to “withdraw from sale, public entry or disposal” any such lands he deemed necessary to fulfill the compact, “[p]rovided, [t]hat any such withdrawal may subsequently be revoked by the President.”<sup>156</sup>

Congress was even more direct in 1940 when it empowered the President “to reserve and set aside from all forms of location, entry, or appropriation any national-forest lands . . . and such reservations shall remain in force until revoked by the President or by an Act of Congress.”<sup>157</sup> Congress, on at least two occasions, also granted executive branch officials the right to grant and later revoke easements and rights-of-way across public lands and reservations.<sup>158</sup>

Had Congress intended to endow the President with the power not only to create national monuments, but to later reduce or repeal them, Congress could have adopted these established models or amended the Antiquities Act to include such provisions. But Congress included no such language in the Antiquities Act, and their choice of words should be given effect.

### C. *Bills Authorizing Presidents to Modify National Monument Proclamations*

Congressional efforts to grant the President or other executive branch officers the power to revise national monuments are also telling. In the rare instances that Congress did empower the President or his subordinates to revise a monument, Congress did so only on a narrow monument-specific basis and in light of a clearly articulated public benefit. Congress has never authorized the President to make wholesale or discretionary national monument reductions or modifications.

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154. See Pub. L. No. 64-290, § 9, 39 Stat. 862, 864 (1916) (codified as amended at 43 U.S.C. § 299 (a) (2012)).

155. Act of Dec. 21, 1928, 45 Stat. 1057, 1063 (1928).

156. Act of Aug. 19, 1935, 49 Stat. 660, 661 (1935).

157. Act of May 28, 1940, 54 Stat. 224 (1940).

158. See Act of Feb. 15, 1901, 31 Stat. 790 (1901) (authorizing Secretary of the Interior to permit rights of way through certain parks and lands) (codified as amended at 43 U.S.C. § 959 (2012)); Act of Mar. 4, 1911, Pub. L. No. 61-478, 36 Stat. 1235, 1253-54 (1911) (making appropriations for Department of Agriculture, fiscal year 1912).

On at least five occasions Congress authorized the executive branch to revise monument boundaries as part of land exchanges that removed non-federal inholdings from monuments or that allowed monument managers to acquire lands needed for monument management. As discussed further in Part III, Congress in 1958 authorized the Secretary of the Interior to trade lands within the Black Canyon of the Gunnison National Monument for private lands that were needed “in order to facilitate administration of such monument.”<sup>159</sup> The acquired lands allowed the Park Service to improve the main road through the monument which provided access to the canyon that inspired the monument’s designation and to develop a much-needed monument headquarters area as well as picnic and campground facilities.<sup>160</sup>

Congress approved similar exchanges and boundary revisions involving Scotts Bluff National Monument in Nebraska<sup>161</sup> and at Montezuma Castle National Monument in Arizona.<sup>162</sup> At Scotts Bluff, the existing boundary did not follow natural and developed features like “draws, ridges, rivers and irrigation ditches. . . . A more practicable boundary . . . could facilitate protection, obviate the need for considerable fencing, and provide a more esthetic transition from the natural conditions of the monument to the cultivated or developed areas beyond its boundaries.”<sup>163</sup> The lands added to the monument foreclosed development of a dump, borrow pit, and utilities along the monument’s boundary while also including Dome Rock, a prominent geologic feature that was bisected by the existing boundary.<sup>164</sup> Excluded lands included “privately owned land . . . that ha[d] no known scenic, scientific, or historic values. Some of it is highly productive irrigated land which does not appear prominently in the vies of a visitor to the monument.”<sup>165</sup>

Years earlier, in 1930, Congress also authorized the President to designate the Colonial National Monument in Virginia<sup>166</sup> and to later expand and adjust that monument’s boundaries as needed when state, private, and other federal lands were made part of the monument.<sup>167</sup> Notably, in proclaiming Colonial National Monument, President Hoover relied not on the Antiquities Act, but

159. Act of May 1, 1958, Pub. L. No. 85-391, 72 Stat. 102, 102 (1958) (authorizing exchange of lands at Black Canyon of Gunnison National Monument).

160. See U.S. DEP’T OF THE INTERIOR, SUPERINTENDENT’S ANNUAL REPORT BLACK CANYON OF THE GUNNISON NATIONAL MONUMENT 1956 FISCAL YEAR 3 (May 18, 1956) (on file with author).

161. See Act of June 30, 1961, Pub. L. No. 87-68, 75 Stat. 148 (1961).

162. See National Parks and Recreation Act of 1978, Pub. L. No. 95-625, tit. III, § 301(13), 92 Stat. 3467, 3474 (1978).

163. S. REP. NO. 87-432, at 3 (1961).

164. *Id.*

165. *Id.*

166. See Act of July 3, 1930, Pub. L. 71-510, 46 Stat. 855 (1930).

167. See Act of Mar. 3, 1931, Pub. L. No. 71-792, 46 Stat. 1490 (1931).

on special authority given to him under the 1930 Act.<sup>168</sup> When he modified the boundary in 1933 to accommodate a re-routed Parkway between Williamsburg and Jamestown Island, he again did so based on authority expressly delegated to him by Congress rather than any authority rooted in the Antiquities Act.<sup>169</sup> Any adjustment to the Colonial National Monument therefore did not implicate the Antiquities Act. Similarly, in 1998, Congress ratified a previously negotiated exchange between the Department of the Interior and the State of Utah that involved lands within the Grand Staircase-Escalante National Monument.<sup>170</sup> However, as discussed *infra* in Part III.A, Congress has repeatedly refused to grant presidents the power to remove lands from national monuments without Congressional approval. There can be little question that Congress understood that the President lacked the power to radically reshape national monuments.

#### D. Executive Branch Understanding of Congressional Intent

Even the executive branch has historically taken a dim view of the President's power to repeal a national monument and to return reserved lands to the public domain. The only opinion that directly addresses the President's authority to reduce or repeal national monuments was written by Attorney General Cummings in 1938. President Franklin Roosevelt attempted to repeal Castle Pinckney National Monument and grant the land to South Carolina because the fort for which the monument was proclaimed had fallen into disrepair and "the public has not manifested any great interest in it as an object of historical importance."<sup>171</sup> He abandoned the effort in favor of congressional action after Attorney General Cummings opined that the President was "without the authority to issue the proposed proclamation."<sup>172</sup>

Attorney General Cummings explained that when the President created a national monument, he was acting under authority delegated to him by Congress. As such:

[The monument] was in effect a reservation by the Congress itself, and the President therefore was without the power to revoke or rescind the reservation. . . . "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

168. See Proclamation No. 1929, 46 Stat. 3041 (Dec. 30, 1930) (citing Pub. L. No. 71-510, 46 Stat. 855 (1930)).

169. See Proclamation No. 2055, 48 Stat. 1706 (Aug. 22, 1933).

170. See *supra* notes 71-76 and accompanying text.

171. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 186 (1938).

172. *Id.* at 189.

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. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.”<sup>173</sup>

Although the first to address presidential authority to reduce or revoke national monuments, Attorney General Cumming was building on previous opinions addressing other categories of protected federal lands and holdings that the President may not dispose of or return to the public domain.<sup>174</sup> For instance, in 1881, Attorney General MacVeagh concluded that where the President relies on statutory authority to reserve public lands for a public purpose, “he is to be regarded as acting by authority of Congress . . . which alone can authorize such disposition of the public domain. It cannot, therefore, be diverted from that use . . . except by the same authority.”<sup>175</sup> Implied in Attorney General MacVeagh’s opinion is the understanding that the expressed power to designate does not include any implicit power to undo.

This conclusion comports with Attorney General Bates’ 1862 opinion, which determined that the President wholly derives his authority to appropriate land to a public or governmental purpose from congressional delegation. In Attorney General Bates’ view, the President’s power to appropriate land comes “not from any power over the public lands inherent in his office, but from an

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173. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att’y Gen. 185, 187 (1938) (quoting Rock Island Military Reservation, 10 Op. Att’y Gen. 359, 364 (1862)). The Attorney General also concluded that while the President may have the power to revise a national monument to ensure that it was “‘confined to the smallest area compatible with the proper care and management of the objects to be protected,’ it does not follow from his power so to confine that area that he has the power to abolish a national monument entirely.” *Id.* at 188 (quoting 54 U.S.C. § 320301 (b) (2014)). The Attorney General’s comment about the President’s authority to reduce a monument was both cursory in nature and irrelevant to the issue he was asked to determine, namely the President’s authority to eliminate a monument. It also appears to have little relevance to Bears Ears and Grand Staircase-Escalante, where thousands of resources identified in the original monument proclamations were left with significantly less protection. President Trump’s reductions are not a case of confining a monument to the smallest area necessary to protect sensitive resources. They are a case of eliminating protections for thousands of irreplaceable objects of historic and scientific import. *See supra* notes 71 & 88–94 and accompanying text.
174. *See* Disposition of Abandoned Lighthouse Sites, 32 Op. Att’y Gen. 488, 490 (1921); Camp Hancock—Transfer from War Department to Department of Agriculture, 28 Op. Att’y Gen. 143, 144 (1910); Naval Reservation—Restoration to Public Domain, 21 Op. Att’y Gen. 120 (1895); Rock Island Military Reservation, 10 Op. Att’y Gen. 359 (1862).
175. Military Reservation at Fort Fetterman, 17 Op. Att’y Gen. 168, 168 (1881); *see also* Camp Wright, California, 16 Op. Att’y Gen. 121, 123 (1878) (“[I]f lands have been once set apart by the President in an order for military purposes, they cannot again be restored to the condition of public lands . . . except by an authority of Congress.”).

express grant of power from Congress.”<sup>176</sup> Thus, the President “ha[s] no power to take [lands already appropriated for a public purpose] out of the class of reserved lands, and restore them to the general body of public lands.”<sup>177</sup> The reasoning was simple: “If the President could not [remove lands from the public domain] without the aid of Congress, neither could he annul the same work without the same aid.”<sup>178</sup>

The Department of the Interior has also addressed the President’s authority to repeal or replace national monuments, though its conclusions have been inconsistent. Opinions from 1915,<sup>179</sup> 1935,<sup>180</sup> and 1947<sup>181</sup> contend that the President could revise monument boundaries. But two opinions from 1924,<sup>182</sup> and another from 1932,<sup>183</sup> contend that the President could not, as does a 1943 opinion involving Olympic National Park.<sup>184</sup>

The importance of these opinions is questionable because “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.”<sup>185</sup> Having reversed itself on four separate occasions, and having little incentive to disclaim power, opinions of the executive branch merit little deference. The 1935 opinion is especially suspect because the Solicitor of the Department of Interior was asked to opine on the legality of three prior reductions to Mount Olympus National Monument dating to 1912 and totaling over 300,000 acres. As an executive department official, the solicitor had little incentive to restrain executive power, especially when it meant calling into question twenty-three years of management, including the legality of timber sales that had occurred over the intervening years.

176. Rock Island Military Reservation, 10 Op. Att’y Gen. 359, 363–64 (1862).

177. *Id.*

178. *Id.*

179. Letter from Preston West, Solicitor, Dep’t of the Interior, to the Sec’y of the Interior (Apr. 20, 1915) (on file with author).

180. Dep’t of the Interior M. Opp. 27,657 (Jan. 30, 1935). One cannot help but wonder whether this opinion was influenced, at least in part, by practical concerns over upending twenty-three years of settled expectations, as it was the only opinion to reflect back on the legality of prior reductions.

181. National Monuments, 60 Interior Dec. 9, 10 (July 21, 1947).

182. Dep’t of the Interior M. Opp. 12,501 (June 3, 1924); Opinion of F.M. Goodwin, Asst. Sec’y, Dep’t of the Interior, Extension of Irrigation Canals Over Lands Within a National Monument, 50 Pub. Lands Dec. 569 (June 27, 1924).

183. Dep’t of the Interior M. Opp. 27,025 (May 16, 1932).

184. 58 Interior Dec. 480 (June 20, 1943).

185. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (internal citations omitted); *see also Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (“[T]he case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.”).

Finally, in 2002, the George W. Bush administration also asserted before the U.S. Supreme Court that the power of abolish national monuments resides solely with Congress. As the administration's brief eloquently explains:

Congress's intent could not be more clear. Congress broadly authorized the President to establish national monuments. . . . The establishment of a national monument was intended to be permanent—both because the statute specified that the purpose of the establishment was to preserve the national monuments unimpaired for future generations and because only Congress could abolish a national monument. Congress was well aware of the need for legislation to abolish national monuments.<sup>186</sup>

Permanence is important. Congress could hardly have intended for national monuments to become political footballs, protected by one administration only to be eliminated by the next, and subject to potential re-establishment and re-diminishment by subsequent administrations. Presidents, until Donald Trump, also appear to have had similar expectations. On at least twenty-two occasions, Presidents have temporarily withdrawn federal lands from availability for disposal or mineral development while they reviewed the land's suitability for inclusion in a national monument.<sup>187</sup> Had Presidents intended monuments

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186. Memorandum in Support of Motion of the U.S. for Partial Summary Judgment on Count IV of the Amended Complaint at 44, *Alaska v. United States*, 546 U.S. 413 (2006) (No. 128, Original). Two committees of the U.S. House of Representatives had also stated as much in clear and unequivocal terms—a monument declaration “will be permanent unless it is modified by Congress.” H.R. REP. NO. 96-97, pt. 2, at 93 (1979); *see also* H.R. REP. NO. 96-96, pt. 1, at 393 (1979); OFFICE OF TECHNOLOGY ASSESSMENT, ANALYSIS OF LAWS GOVERNING ACCESS ACROSS FEDERAL LANDS: OPTIONS FOR ACCESS IN ALASKA 4 (1979).

187. Exec. Order No. 3297 (June 30, 1920) (Woodrow Wilson); Exec. Order No. 3314 (July 26, 1920) (Woodrow Wilson); Exec. Order No. 3345 (Oct. 23, 1920) (Woodrow Wilson); Exec. Order No. 3450 (May 3, 1921) (Warren Harding); Exec. Order No. 3650 (Mar. 20, 1922) (Warren Harding); Exec. Order No. 3743 (Sept. 30, 1922) (Warren Harding); Exec. Order No. 3755 (Nov. 17, 1922) (Warren Harding); Exec. Order No. 3976 (Mar. 22, 1924) (Calvin Coolidge); Exec. Order No. 3983 (Apr. 1, 1924) (Calvin Coolidge); Exec. Order No. 4103 (Nov. 20, 1924) (Calvin Coolidge); Exec. Order No. 5038 (Feb. 2, 1929) (Calvin Coolidge); Exec. Order No. 5105 (May 3, 1929) (Herbert Hoover); Exec. Order No. 5201 (Oct. 3, 1929) (Herbert Hoover); Exec. Order No. 5276 (Feb. 7, 1930) (Herbert Hoover); Exec. Order No. 5339 (Apr. 25, 1930) (Herbert Hoover); Exec. Order No. 5408 (July 25, 1930) (Herbert Hoover); Exec. Order No. 5573 (Mar. 7, 1931) (Herbert Hoover); Exec. Order No. 6212 (July 25, 1933) (Franklin Roosevelt); Exec. Order No. 6285 (Sept. 14, 1933) (Franklin Roosevelt); Exec. Order No. 6361 (Oct. 25, 1933) (Franklin Roosevelt); Exec. Order No. 6477 (Dec. 6, 1933) (Franklin Roosevelt); Exec. Order No. 7888, 3 Fed. Reg. 1131 (May 16, 1938) (Franklin Roosevelt). On April 24, 1943, President Roosevelt delegated to the Secretary of the Interior the authority to make all public land withdrawals that were otherwise within the President's power. Exec. Order No. 9337, 8 Fed. Reg. 5516 (Apr. 24, 1943).

to be temporary in nature they would not have gone through this unnecessary and redundant two-step process.

When taken together with other evidence, the weight of opinion by prior administrations appears to support an understanding that Congress did not intend to endow the President with the power to radically reduce national monuments. One important exception exists, and that is where we turn next.

### III. PRIOR PRESIDENTIAL NATIONAL MONUMENT REDUCTIONS AND REVISIONS, AND CONGRESSIONAL ACQUIESCENCE

The strongest argument in favor of the President's power to revise a national monument may arise from the twenty or so prior presidential national monument reductions and the failure of Congress to object to those presidential actions. These prior reductions were never challenged in court, however, and no court has yet ruled on their legality. Although there may be circumstances in which congressional acquiescence in monument reductions can create a presumption in favor of such presidential powers, any such power should be limited by subsequent legislative action and the narrow facts surrounding prior reductions<sup>188</sup>—and both of these factors argue against the President's power to reduce the Bears Ears and the Grand Staircase-Escalante National Monuments.

More than a century ago, the Supreme Court in *United States v. Midwest Oil Co.* held that a congressional delegation of power to the President can be found by virtue of congressional acquiescence in prior executive actions.<sup>189</sup> *Midwest Oil* considered whether the President had authority to set aside lands as a naval petroleum reserve. While Congress had not expressly authorized the President to withdraw the lands at issue from operation of laws authorizing the sale or disposal of the public lands,<sup>190</sup> the Supreme Court concluded that congressional acquiescence in 109 executive orders establishing or enlarging military reservations, 99 executive orders establishing or enlarging Indian reservations, and 44 executive orders establishing bird refuges indicated acquiescence in an implied power to reserve public lands from development.

As the Court explained, Congress had “uniformly and repeatedly acquiesced in the [presidential] practice” of withdrawing lands by executive order for myriad purposes without explicit statutory authorization.<sup>191</sup> Presidents had issued “a multitude of orders extending over a long period of time, and affecting vast bodies of land, . . . [and t]hese orders were known to Congress, as princi-

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188. Any delegation of authority by Congress to the executive branch must have “clear expression or implication.” *Cochnower v. United States*, 248 U.S. 405, 407 (1919).

189. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

190. Public lands were commonly disposed of via grants to states, railroads, homesteaders, miners, returned military veterans, and others. For a background on public land disposal laws, see GATES, *supra* note 56.

191. *Midwest Oil*, 236 U.S. at 471.

pal, and in not a single instance was the act of the agent disapproved.”<sup>192</sup> If Congress had objected to the withdrawals, it would not have allowed these “unauthorized acts . . . to be so often repeated as to crystallize into regular practice.”<sup>193</sup> Inaction by Congress had therefore raised the presumption that “the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of public lands.”<sup>194</sup> The Court accordingly concluded that Congress’ silence constituted “acquiescence . . . equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.”<sup>195</sup>

Notably, *Midwest Oil* and the examples cited therein all involved assertions of power by the President that were intended to reserve public lands from disposal or development.<sup>196</sup> Here, as administration emails show, the President reduced reservations in furtherance of his policy of “energy dominance”<sup>197</sup>—precisely the opposite of what the Court addressed in *Midwest Oil*. The history of failed bills designed to enhance presidential power, and modern legislative changes to management of federal lands, moreover, point to the conclusion that Congress did not acquiesce to broader presidential powers than it specifically granted under the Antiquities Act.

#### *A. Failed Efforts to Grant Presidents the Power to Revoke or Reduce National Monuments*

Courts are generally reluctant “to attribute significance to the failure of Congress to act on particular legislation,”<sup>198</sup> because “several equally tenable references may be drawn from such inaction.”<sup>199</sup> However, “prolonged and acute awareness” of an issue can support a conclusion that Congress rejected propositions contained in the legislation.<sup>200</sup> In the case of the Antiquities Act, Congress has repeatedly and pointedly rejected efforts to delegate broad power to reduce national monuments to the President.

Seven times, members of Congress have introduced legislation that would grant the President such power. Each time, those efforts failed.<sup>201</sup> The first bills proposing to grant the President the power to reduce national monuments date

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192. *Id.* at 475; *see also id.* at 479–80 (concluding that Congress’ failure to object to numerous expansive land withdrawals “furnish[ed], in and of themselves, ample proof of congressional recognition of the power to withdraw.”).

193. *Id.* at 472–73.

194. *Id.* at 474.

195. *Id.* at 481.

196. *Id.* at 469–70.

197. *See* Lipton & Friedman, *supra* note 117; Maffly, *supra* note 126.

198. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969).

199. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994).

200. *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983).

201. For the most recent attempt, *see* H.R. 3990, 115th Cong. § 2 (2017).

from 1925. By the early 1920s, the Department of the Interior was working hard to bring irrigation water to the Gila River Indian Reservation in Arizona. Congress had already appropriated funds and substantial work had been completed on that project,<sup>202</sup> but to complete the system the Department of the Interior needed to construct a canal through Casa Grande National Monument.<sup>203</sup> In 1924, the Assistant Secretary of the Department of the Interior issued an opinion concluding that only Congress could authorize an irrigation lateral through the monument. As he explained:

I am of the impression that this canal would not injure the reservation and that it is probably desirable and perhaps even essential from an engineering standpoint that it be constructed along the line laid down. Authority to do this can doubtlessly be obtained at the next session of Congress. In my opinion, the Department has no power to authorize the construction under present law.<sup>204</sup>

Congress took up the issue the next year, when Senator Harreld of Oklahoma introduced a bill to remove from the monument the land through which the canal would pass. Senator Harreld's bill stated that "hereafter the President of the United States is authorized in his discretion to eliminate lands from national monuments by proclamation."<sup>205</sup> The bill died in committee. Senator Harreld reintroduced his bill the next year and it was enacted into law—but only after the Senate struck the provision regarding presidential authority to eliminate lands from national monuments.<sup>206</sup> That was the only amendment to Senator Harreld's bill.

In 1925, Senator Ladd of North Dakota and Representative Sinnott of Oregon introduced separate bills authorizing the President to restore to the public domain any national monument lands that were no longer needed for monument purposes.<sup>207</sup> Both bills pertained only to presidential monument reductions, and both bills died in committee.

In 1930, Senator Nye of North Dakota unsuccessfully tried to grant the President the power to "enlarge or diminish" the Colonial National Monument "by subsequent proclamation."<sup>208</sup> Finally, in 1933, Representative Arentz of Nevada introduced a bill to authorize the President to adjust the boundaries of

202. See S. REP. NO. 69-423 (1926).

203. See Opinion of F.M. Goodwin, Asst. Sec'y, Dep't of the Interior, *Extension of Irrigation Canals Over Lands Within a National Monument*, 50 Pub. Lands Dec. 569 (1924).

204. *Id.* at 571. Note, however, that the solicitor based his opinion on the Act of Mar. 3, 1921, 41 Stat. 1353 (1921), rather than on the Antiquities Act.

205. S. 3826, 68th Cong. (1925).

206. See S. 2703, 69th Cong. (1926).

207. See S. 3840, 68th Cong. (1925); H.R. 11,357, 68th Cong. (1925).

208. S. 4617, 71st Cong. (1930).

Death Valley National Monument via presidential proclamation.<sup>209</sup> This bill never made it out of the House of Representatives.

On October 6, 2017, Congressman Rob Bishop introduced the “National Monument Creation and Protection Act” that would, among other features, authorize a President to unilaterally reduce a monument by up to 85,000 acres and to make larger reductions to a monument with the approval of the state where the monument resides.<sup>210</sup> Congressman Bishop’s bill did not reach the floor for a vote. If Congressman Bishop’s bill should succeed in future years, presidential power to reduce national monuments would, of course, be altered dramatically. Until that happens, however, the failure of numerous efforts to grant broad powers to the President indicates that Congress has reserved authority to reduce or revise national monuments to itself.

*B. The Impact of the Federal Land Policy and Management Act (FLPMA)*

Failed bills notwithstanding, it is true that Congress did not unequivocally bar Presidents from revising or reducing monuments in the Antiquities Act. Subsequent legislation, however, indicates that Congress intended to limit any implied power to revise national monuments that may have been assumed by the President.

In 1976, Congress enacted FLPMA,<sup>211</sup> which “so changed the laws and the context within which to interpret withdrawal authority as to render pre-FLPMA presidential practices of little relevance.”<sup>212</sup> FLPMA codifies a national policy under which “the Congress exercise[s] its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and delineate the extent to which the Executive may withdraw lands without legislative actions.”<sup>213</sup> In remaking public lands policy, Congress repealed over 300 statutes or parts of statutes involving public lands,<sup>214</sup> including twenty-nine “statutes or parts of statutes that had provided withdrawal authority to the President.”<sup>215</sup> FLPMA also expressly repealed “the implied authority of the President to make withdrawals and reservations resulting from acquies-

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209. See H.R. 14,646, 72d Cong. (1933).

210. H.R. 3990, 115th Cong. § 2(j) (2017).

211. Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified as amended in scattered sections of the U.S.C.).

212. Baldwin, *supra* note 7, at 2.

213. 43 U.S.C. § 1701(a)(4).

214. Pub. L. No. 94-579, tit. VII, §§ 702–707, 90 Stat. 2743, 2787–94 (1976) (amending scattered sections of the U.S.C.).

215. *Id.*; see also Baldwin, *supra* note 7, at 2.

cence of the Congress.”<sup>216</sup> Congress, however, left intact the President’s Antiquities Act power to designate national monuments.

Congress also directed that the Secretary of the Interior cannot “modify or revoke any withdrawal creating national monuments,” a clear reassertion of congressional authority and limitation on executive branch power.<sup>217</sup> This provision is puzzling, however, because the Secretary never had the power to create national monuments, and denying the Secretary the power to revise decisions that he could not make hardly seems necessary. Several public land law professors contend that the provision limits broader executive branch power.<sup>218</sup> As they point out,<sup>219</sup> committee hearings on early drafts of what would become FLPMA indicate a mistaken belief that the Secretary of the Interior created national monuments, and that some in Congress feared that a future secretary might modify or revoke monuments.<sup>220</sup> While misunderstandings regarding secretarial authority were resolved, the professors argue that Congress may have failed to update all relevant sections of the statutory text as the bill’s authors moved on to other sections of a very long and complex statute.<sup>221</sup>

Alternatively, Congress may have recognized that it had, on occasion, authorized the Secretary of the Interior to modify national monuments. Congress had, for example, authorized the Secretary to “revise the boundaries of the Scotts Bluff National Monument so as to exclude from it certain private and Federal lands and substitute other private lands more essential to the purposes of the monument.”<sup>222</sup> Congress had similarly authorized the Secretary to “adjust and redefine the exterior boundaries” of Badlands National Monument to “consolidate Federal land ownership therein.”<sup>223</sup> Accordingly, Congress may have sought to clarify that no broader grant of power was intended.

Retired Congressional Research Service attorney Pamela Baldwin provides an even more compelling explanation. A 1952 Executive Order conferred on the Secretary of the Interior “all of the delegable authority of the President to

216. Pub. L. No. 94-579, tit. VII, § 704(a), 90 Stat. 2743, 2792 (1976) (amending scattered sections of the U.S.C.).

217. Pub. L. No. 94-579, tit. II, § 204(j), 90 Stat. 2743, 2754 (1976) (codified as amended at 43 U.S.C. § 1714(j) (2012)).

218. See, e.g., Squillace et al., *supra* note 7, at 65.

219. See, e.g., *id.* at 61.

220. See *Public Land Policy & Management Act of 1975: Hearing on H.R. 5224 Before the Subcomm. on Pub. Lands of the H. Comm. on Interior & Insular Affairs*, 94th Cong. 88–93 (May 6, 1975). Later statements indicate that subcommittee members understood that the Secretary possessed delegated authority to propose monuments, but that the President ultimately proclaimed monuments. See *Public Land Policy & Management Act of 1975: Hearing on H.R. 5224 & H.R. 5622 Before the Subcomm. on Pub. Lands of the H. Comm. on Interior & Insular Affairs*, 94th Cong. 184 (June 6, 1975).

221. Squillace et al., *supra* note 7, at 62–64.

222. Pub. L. No. 87-68, 75 Stat. 148, 148 (1961).

223. Pub. L. No. 82-328, 66 Stat. 65, 65 (1952).

make, modify and revoke withdrawals and reservations with respect to lands of the public domain owned and controlled by the United States in the continental United States or Alaska.”<sup>224</sup> Congress may have had concerns regarding the Order’s reach while it was debating and drafting FLPMA.<sup>225</sup>

These readings all comport with the House Committee Report circulated in advance of floor debate about FLPMA. That report states that section 204 “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>226</sup>

Plainly, Congress was intent in reining in executive branch power over public lands, and a strong case can be made that Congress intended to reserve to itself the authority to modify and revoke withdrawals for national monuments. A careful review of prior reductions to national monuments also raises serious questions of both the pattern of facts underlying reductions and congressional knowledge regarding prior reductions made by U.S. Presidents.

### C. *Prior Presidential National Monument Reductions and Revisions*

Presidents have reduced national monument boundaries on approximately twenty occasions without congressional objection. None of these reductions were ever contested in court, so their legality remains untested, and it is axiomatic that “[p]ast practice does not, by itself, create power.”<sup>227</sup> Courts, moreover, are generally skeptical of congressional acquiescence arguments.<sup>228</sup> It could still be argued however that Congress, under *Midwest Oil*, accepted the President’s actions as lawful up until 1976 and the enactment of FLPMA. In order to evaluate the merits of this argument, it is necessary to examine the circumstances surrounding past presidential revisions and reductions. This is the task we turn to next.

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224. Baldwin, *supra* note 7, at 17 (quoting Exec. Order No. 10,355, 43 C.F.R. § 2300.0-3 (1952)).

225. Those concerns, while pressing in the leadup to FLPMA’s passage, were laid to rest almost three decades later, when, in a challenge to the Grand Staircase-Escalante National Monument, the Federal District Court held that the 1952 Executive Order did not apply to the Antiquities Act. *See Utah Ass’n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1195–1200 (D. Utah 2004).

226. H.R. REP. NO. 94-1163, at 9 (May 15, 1976).

227. *Medellín v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

228. *See Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 169 (2001) (“Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care.”).

This Section reviews the presidential proclamations affecting prior reductions, correspondence leading up to the reductions, congressional and administrative documents, and scholarly publications discussing the monuments involved in order to better understand the size, scope, and intent undergirding the reductions. Notably, this research unearthed very little congressional discussion of monument reductions, raising a threshold question of whether, as required by *Midwest Oil*, Congress was sufficiently aware of the reductions to grant its approval. Knowledge of an action is, of course, a prerequisite to acquiescence in its legality.<sup>229</sup> Additionally, the President's implied power to reduce a national monument, if it ever existed, may have ebbed away in the half-century since the last presidential monument reduction, and in light of congressional reassertion of its comprehensive authority over public lands through FLPMA. But if an implied power to reduce a national monument survives, that power should be limited by the scope of what was previously accepted by Congress. Revisions that correct mapping errors and that result in better protection for monument resources, for example, provide little support for revisions intended to increase commodity production by reducing protections for monument resources. Understanding the facts surrounding prior monument reductions is therefore critical to understanding the scope of the President's power to reduce a national monument, if that power indeed exists.

Prior presidential monument reductions fall into three overlapping categories: (1) reductions that were intended to correct mapping errors, or errors and omissions in the initial proclamation; (2) reductions responding to new information; or (3) reductions that were made based on authority other than the Antiquities Act, such as the President's Article II power as Commander in Chief. Together, these three categories reflect changes that were generally intended to enhance or improve management of the objects for which the monuments were proclaimed, and often reflect a determination that those objects would not experience reduced protections.

### 1. *Correcting Errors and Omissions in the Original Monument Proclamation*

The challenges involving public land surveys form an important backdrop for the discussion that follows. Until now, every national monument that has been reduced by presidential action was designated before 1940, and most at least a decade prior to that.<sup>230</sup> Describing accurately the lands included in early national monuments was a recurring challenge for U.S. Presidents. Maps available at the time of early monument designations were often of poor quality, complicating efforts to describe both the objects to be protected and the land-

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229. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915).

230. See NAT'L PARKS CONSERVATION ASS'N, *supra* note 25.

scape containing those objects. This frequently resulted in errors in monument boundary descriptions, and also often resulted in inadvertent inclusion of non-federal lands within these federal reserves.

As of 1930, over 50 million acres of public lands had yet to be surveyed, and most of the unsurveyed land was in the West, where all of the revised monuments are located.<sup>231</sup> Roughly half of the national monuments that were revised by Presidents included unsurveyed portions of the public domain.<sup>232</sup> The lack of formal surveys created significant challenges both in describing the location of the objects to be protected, and in defining monument boundaries. Even when surveys had been completed prior to monument designation, they were often riddled with errors. As Paul Gates explained in his seminal 1968 work on public land law:

Many of the surveys were done carelessly, some indeed fraudulently, and were inaccurately marked only by perishable or easily removed corners such as blazes on trees, wooden stakes lightly driven into the soil, or small mounds of earth raked upon the prairie. . . . [A surveyor working in California reported:] “[t]he surveys on the east side of the Santa Clara Valley are wretchedly done. I have yet to find a single survey that measures a mile accurately, and I have yet to find the first corner-stone.” . . . Another California surveyor . . . reported cases where lines were from a quarter to a full mile from meeting. . . . Months or years after the original surveys, when landowners could find no evidence of corners or learned that the lines had been inaccurately run, the Land Office had to order resurveys, sometimes three or four times.<sup>233</sup>

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231. COMM. ON THE CONSERVATION AND ADMIN. OF THE PUB. DOMAIN, REPORT OF THE COMMITTEE ON THE CONSERVATION AND ADMINISTRATION OF THE PUBLIC DOMAIN 9 (1931). Alaska was not admitted to the Union until 1959, and unmapped land in Alaska would have greatly increased this figure.

232. For examples of national monument proclamations that include unsurveyed lands or maps identifying unsurveyed lands, see Proclamation No. 1875, 46 Stat. 2988 (Apr. 12, 1929) [hereinafter *Arches Proc.*]; Proclamation No. 1322, 39 Stat. 1764 (Feb. 11, 1916) [hereinafter *Bandelier Proc.*]; Proclamation No. 1694, 43 Stat. 1948 (May 2, 1924) [hereinafter *Craters of the Moon Proc.*]; Proclamation No. 1994, 47 Stat. 2506 (Mar. 17, 1932) [hereinafter *Great Sand Dunes Proc.*]; Proclamation No. 869, 35 Stat. 2274 (Mar. 2, 1909) [hereinafter *Mount Olympus Proc.*]; Proclamation No. 804, 35 Stat. 2183 (Apr. 16, 1908) [hereinafter *Natural Bridges Proc.*]; and Proclamation No. 1640, 42 Stat. 2285 (Oct. 14, 1922) [hereinafter *Timpanogos Proc.*]. To get around this problem, some national monument proclamations describe lands in terms of degrees, minutes, and seconds rather than in accordance with the Public Land Survey System. *See, e.g.*, Proclamation No. 1733, 43 Stat. 1988, 1989 (Feb. 26, 1925) [hereinafter *Glacier Bay Proc.*]; Proclamation No. 1487, 40 Stat. 1855 (Sept. 24, 1918) [hereinafter *Katmai Proc.*]; *Natural Bridges Proc.*, *supra*.

233. GATES, *supra* note 56, at 421.

In 1970, the Public Land Law Review Commission recommended “[a]n intensified survey program to locate and mark boundaries of all public lands.”<sup>234</sup> As the Commission explained:

Erroneous or fraudulent early surveys, as well as impermanent survey markers, which can no longer be located, require substantial resurveys of public land boundaries. There are, for example, as estimated 272,000 miles of boundary between national forests and other ownership. Of these, approximately 253,000 miles need to be established or reestablished. The magnitude of the problem is greater with respect to lands administered by the Bureau of Land Management.<sup>235</sup>

Problems associated with incomplete or inaccurate land surveys continue to plague the BLM to this day. For instance, in 2016, the Bureau spent \$5.9 million on surveys associated with land tenure adjustments and to resolve trespass or jurisdictional disputes.<sup>236</sup>

Given that all revised monuments aside from Bears Ears and Grand Staircase-Escalante were originally proclaimed between 1906 and 1939, it is no wonder that Presidents repeatedly revised national monument proclamations to reflect new information.<sup>237</sup> In that period, public land surveys were completed for previously unsurveyed regions that included national monuments, poor quality monument boundary surveys were updated, and better information became available regarding both the location of the objects to be protected by national monuments and the landscapes containing those resources. This is not to suggest that revisions made by prior Presidents were necessarily lawful, only that such revisions were needed.

While the need for prior revisions that address mapping issues appears compelling, that justification does little to illuminate President Trump’s revisions to either Bears Ears, which was proclaimed in 2016, or Grand Staircase-Escalante, which was proclaimed in 1996. Neither of the proclamations reducing those monuments mentions survey errors. Reductions of over 1.1 million acres at Bears Ears and over 870,000 acres at Grand Staircase-Escalante, moreover, can hardly be attributed to mapping error correction. While Congress may have acquiesced in the President’s legal authority to revise monument proclamations to correct errors in the original proclamation, prior error correction creates little precedent for recent actions.

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234. PUB. LAND LAW REVIEW COMM’N, ONE THIRD OF THE NATION’S LANDS: A REPORT TO THE PRESIDENT & TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION 260 (1970).

235. *Id.*

236. See BUREAU OF LAND MGMT., PUBLIC LAND STATISTICS 2016, at 35 (2017).

237. See NAT’L PARKS CONSERVATION ASS’N, *supra* note 25.

2. *Problems Describing the Objects to be Protected and the Landscape Containing Them*

The problems resulting from bad mapping are anything but theoretical. Several early national monuments were set aside in haste, before the specific locations of the objects to be protected were well known. Absent a careful description of the locations of these objects, early proclamations sometimes cast a wide net, protecting a larger geographic area than was intended in order to ensure that objects of historic or scientific interest were not left unprotected. At least twice, Presidents set aside monuments with the express intent of going back and reducing the size of the monument once the precise location of the objects warranting protection had been better identified.

*Navajo National Monument, Arizona*

Navajo National Monument, which was set aside by President Taft on March 20, 1909,<sup>238</sup> and revised by him in 1912,<sup>239</sup> is a case in point. The monument was created to protect large Native American cliff dwellings which were thought to rival those of Mesa Verde.<sup>240</sup> William Douglass from the General Land Office had been touring the Four Corners region and heard rumor of large untouched ruins near Tsegi Canyon, within the Navajo Nation.<sup>241</sup> Douglass also feared that a professor of classics, untrained in the field of archaeology, was fielding a “pseudo-scientific” expedition that would:

[M]ake a large collection from the ruins, using untried and poorly trained students. [Douglass] expected the ruins of Tsegi Canyon to be among the last undisturbed ruins discoveries, and in his view, their value to archaeological science was too great to leave to a group interested mainly in collecting artifacts.<sup>242</sup>

Douglass turned to President Taft and the recently passed Antiquities Act to protect these sites. But Douglass had not yet visited the area and there were no reliable maps locating the ruins.<sup>243</sup> The best information regarding their location came from the approximation of a Paiute Indian guide.<sup>244</sup>

As a result, [Douglass] arbitrarily requested the reservation of an area even he recognized was far larger than necessary to protect the ruins.

238. Proclamation No. 873, 36 Stat. 2491 (Mar. 20, 1909) [hereinafter Navajo Proc.].

239. Proclamation No. 1186, 37 Stat. 1733 (Mar. 14, 1912) [hereinafter Navajo Revision Proc.].

240. See HAL K. ROTHMAN, NAT'L PARK SERV., NAVAJO NATIONAL MONUMENT: A PLACE AND ITS PEOPLE, AN ADMINISTRATIVE HISTORY 15 (1991).

241. See *id.* at 18–20.

242. *Id.* at 20–21.

243. See *id.*

244. See *id.* at 19–20.

Douglass knew that the government had no real way to protect remote places without formal reservation. The large quantity of land was necessary because he had not yet been to the Tsegi Canyon area. But he could not afford to wait, for the party of excavators was on the way. . . . The general reservation would suffice as a protective measure until he could visit the area and determine what ought to be in the monument and what could be released to the public domain.<sup>245</sup>

The general reservation that Douglass requested, and that President Taft made, is unlike any other national monument reservation. Not knowing where the cliff dwellings were located, President Taft first defined a general geographic area believed to contain the cliff dwellings. He then reserved as part of the national monument forty acres around every ruin within that larger area. Because the number and location of ruins were unknown, this resulted in an unidentified number of forty-acre monument sites containing each individual but unidentified cliff dwelling.<sup>246</sup> Both Douglass and Taft expected to revise the boundary based upon improved surveys, which were published in 1911,<sup>247</sup> and the next year President Taft rewrote the proclamation to protect three isolated sites that total just 360 acres.<sup>248</sup>

#### *Petrified Forest, Arizona*

Petrified Forest National Monument, now Petrified Forest National Park, had a similar history. As explained in a hearing on a bill to create the National Park Service:

The Petrified Forest National Monument, Arizona, was originally set aside on December 8, 1906, with an area of 60,776 acres. The definite location of the principal deposits of silicified wood was not known, the intention being to reduce the area after the lands could be examined and the location of the valuable deposits determined. During the year Dr. George P. Merrill, head curator of geology, National Museum, visited the reservation at the insistence of this department, and submitted a report thereon recommending the reduction. . . . This report met with the approval of the department, and accordingly, on July 31, 1911, a new proclamation was issued reducing the area of the Petrified Forest National Monument to 25,625 acres.<sup>249</sup>

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245. *Id.* at 21.

246. Navajo Proc., *supra* note 238.

247. ROTHMAN, *supra* note 240, at 27.

248. Navajo Revision Proc., *supra* note 239. The physical distance between the three isolated monument sites and failure to provide for visitor access or services posed problems for monument administration that continue to this day. ROTHMAN, *supra* note 240, at 29.

249. *Establishment of a National Park Service: Hearing on H.R. 22995 Before the H. Comm. On the Pub. Lands*, 62d Cong. 32 (1912); *see also* Proclamation No. 697, 34 Stat. 3266 (Dec. 8,

The Monument was set aside before accurate surveys could be completed because, as the Arizona House of Representatives explained: “Ruthless curiosity seekers are destroying these huge [petrified] trees and logs by blasting them in pieces in search of crystals, which are found in the center of many of them, while carloads of the limbs and smaller pieces are being shipped away to be ground up for various purposes.”<sup>250</sup> An investigation by the Department of the Interior confirmed the threat to the petrified trees. The Department concluded that “visitors to this region usually carry away with them as much as their means of transportation will permit. . . . They usually carry with them some concealed tools or instruments, and with these they are perpetually breaking off pieces of objects of which they wish to carry away as souvenirs.”<sup>251</sup> As the Department noted, it was Arizona’s wish that “this wonderful deposit should be kept inviolate, that future generations may enjoy its beauties and study one of the most curious and interesting effects of nature’s forces.”<sup>252</sup>

While the Merrill survey helped in identifying the objects to be protected, it was imperfect, and the subsequently reduced monument failed to adequately protect objects identified in the monument proclamation. President Hoover enlarged the Petrified Forest National Monument in 1930 to include an “approach highway and additional features of scenic and scientific interest.”<sup>253</sup> In 1931, he enlarged it again to include additional “features of scenic and scientific interest” as well as lands to be used for access and administrative purposes.<sup>254</sup> In 1932, he enlarged it a third time to include “certain adjoining lands for administrative purposes and the protection of a certain approach highway and additional features of scenic and scientific interest.”<sup>255</sup> In 1958, Congress upgraded the monument to national park status.<sup>256</sup>

In the case of both Navajo and Petrified Forest National Monuments, the President and his administration had to revise the monument because the original designation had been too broad. This seems to suggest that Presidents *do*—as the Trump administration claims—have the authority to revisit the question of what the “smallest area” is. However, in the case of both Navajo and Petrified Forest, revision was made necessary by the fact that the administration that made the original proclamation did not initially make a meaningful determina-

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1906) (establishing the monument); Proclamation No. 1167, 37 Stat. 1716 (July 31, 1911) (revising the monument).

250. H. Memorial No. 4, 18th Territorial Leg. (Ariz. 1895), as reproduced in LESTER F. WARD, U.S. DEP’T OF THE INTERIOR, REPORT ON THE PETRIFIED FORESTS OF ARIZONA 5 (1900).

251. WARD, *supra* note 250, at 17–18.

252. *Id.* at 5.

253. Proclamation No. 1927, 46 Stat. 3040, 3040 (Nov. 14, 1930).

254. Proclamation No. 1975, 47 Stat. 2486, 2486 (Nov. 30, 1931).

255. Proclamation No. 2011, 47 Stat. 2532, 2532 (Sept. 23, 1932).

256. See Act of Mar. 28, 1958, Pub. L. No. 85-358, 72 Stat. 69 (1958).

tion of the “smallest area,” simply because it was not possible to make that determination at the time. In other words, it was not feasible for the original administration to satisfy the statute to the letter, and the revising administration merely closed that gap. By contrast, it was possible for the Clinton and Obama administrations to make the determination and they did in fact make it. The events surrounding Navajo and Petrified Forest National Monuments therefore do not provide any legal basis for the Trump administration to revisit the question.

### 3. *Inaccurate and Incomplete Surveys*

Poor quality surveys of both the objects of scientific or historic interest and the landscape in which those resources existed were a pervasive problem. Presidents revised monument proclamations at least six times to address survey errors.

#### *Great Sand Dunes, Colorado*

In 1946, President Truman redrew the boundary for Great Sand Dunes National Monument, reducing it slightly to correct survey errors.<sup>257</sup> As explained in the proclamation reducing the monument, the boundary to the then fourteen-year-old monument needed correction because:

[T]he lands included within the Great Sand Dunes National Monument . . . were described therein in conformity with plats then on file in the General Land Office and other maps of the locality; . . . *resurveys by the General Land Office disclose that [certain lands] . . . described in the said Proclamation, do not exist*; and . . . it appears necessary and desirable in the public interest to redefine the area included within the Monument in accordance with the latest plats of survey.<sup>258</sup>

Complicating matters, multiple public land surveys converge in the monument, undoubtedly contributing to survey errors and the need to revise the proclamation. The monument also included unsurveyed lands that were identified in the original proclamation by their “probabl[e]” legal description.<sup>259</sup>

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257. See Proclamation No. 2681, 11 Fed. Reg. 2623 (Mar. 14, 1946).

258. *Id.* at 2623, 2625 (emphasis added).

259. See Great Sand Dunes Proc., *supra* note 232.

Like Petrified Forest, Great Sand Dunes was upgraded to a National Park and Preserve.<sup>260</sup> Today, the Park and Preserve together cover 149,028 acres, more than four times the area set aside in 1932.<sup>261</sup>

*Hovenweep, Colorado and Utah*

Hovenweep National Monument, which straddles Utah's eastern border with Colorado, was designated in 1923<sup>262</sup> and provides another example of revision prompted by legal error. Notably, the net effect of the revision was to increase, rather than reduce, resource protection. In 1956, President Eisenhower revised the monument boundary, eliminating lands that were "erroneously included" in the monument because of a typographical error, and that "contain[ed] no objects of historic or scientific interest."<sup>263</sup> The lands removed were misidentified in the legal description as the *SW*1/4, *NE*1/4 of section 20, and were replaced by the corrected *SE*1/4, *NE*1/4 of section 20.<sup>264</sup> Additional lands containing Cutthroat Castle were added to the monument at that time, reflecting the third enlargement to the monument since its creation.<sup>265</sup>

*Timpanogos Cave, Utah*

The 150-acre Timpanogos Cave National Monument provides yet another example. Originally proclaimed in 1922, the location of the cave system proved difficult to describe accurately, in part because the caves were located "upon unsurveyed lands within the Wasatch National Forest."<sup>266</sup> As President Kennedy explained in the proclamation modifying the boundaries:

[A] subsequent survey, accepted by the General Land Office on May 17, 1945, disclosed that that diagram does not accurately depict the

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260. Great Sand Dunes National Park and Preserve Act of 2000, Pub. L. No. 106-530, 114 Stat. 2527 (2000) (codified as amended in 16 U.S.C. §§ 410hhh through 410hhh-9, 668dd (2012)).

261. Original acreage taken from NAT'L PARKS CONSERVATION ASS'N, *supra* note 25. Current acreage taken from LISTING OF ACREAGE, *supra* note 25.

262. See Proclamation No. 1654, 42 Stat. 2299 (Mar. 2, 1923).

263. See Proclamation No. 3132, 21 Fed. Reg. 2369, 2369 (Apr. 12, 1956).

264. *Id.* A similar correction was made by proclamation in the case of Buck Island National Monument. Buck Island was originally established by President Kennedy in 1961, Proclamation No. 3443, 76 Stat. 1441 (Dec. 28, 1961), and expanded by President Ford in 1975 by approximately 30 acres, Proclamation No. 4346, 89 Stat. 1237 (Feb. 1, 1975). Soon after, President Ford issued a new proclamation correcting a typographical error in the expansion proclamation. See Proclamation No. 4359, 89 Stat. 1254 (Mar. 28, 1975). No change in acreage occurred.

265. The monument had previously been enlarged in 1951 and again in 1952. See Proclamation No. 2924, 16 Fed. Reg. 3687 (May 1, 1951); Proclamation No. 2998, 17 Fed. Reg. 10,715 (Nov. 26, 1952).

266. Timpanogos Proc., *supra* note 232.

boundaries of the monument as those boundaries are marked on the ground; and . . . it appears that it would be in the public interest to redefine the external boundaries of the monument in conformity with the survey.<sup>267</sup>

*Mount Olympus, Washington*

Survey errors at Mount Olympus National Monument created similar confusion, complicating management efforts. As the Secretary of Agriculture explained, “[t]he original diagram accompanying the proclamation dated March 2, 1909, it appears was not drawn with strict regard for the correct assemblage of the unsurveyed townships, regarding which there was little evidence at that date.”<sup>268</sup> These problems were resolved in 1915 as part of a broader boundary revision that is discussed in more detail in Part III.C of this Article.

*Arches, Utah*

Updated land and resource surveys also prompted revisions to Arches National Monument. On April 12, 1929, President Hoover proclaimed two areas totaling 4,520 acres that were “located in unsurveyed townships” as Arches National Monument.<sup>269</sup> On November 25, 1938, President Franklin Roosevelt expanded the monument by 29,160 acres to include lands containing “geologic and prehistoric structures of historic and scientific interest,” and “other public lands contiguous to the said monument which are necessary for the proper care, management, and protection of the objects of scientific interest situated on the lands included in the monument and on the other lands referred to above.”<sup>270</sup> The expansion also included unsurveyed land and it soon became clear that the boundaries of the enlarged monument would need further adjustment:

[A] considerable portion of the public lands in the western section of the monument was unsurveyed [when the 1938 proclamation expanding Arches National Monument was drafted]. . . . Accordingly, the boundary could not be established on the ground with any degree of certainty, and surveys completed in 1945 revealed that several objects of outstanding scientific and scenic value which were intended to be included in the monument, such as the noted Fiery Furnace area, had been omitted. It was also revealed that adequate provisions had not been made for road access to scenic and scientific features.<sup>271</sup>

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267. Proclamation No. 345, 76 Stat. 1457 (Mar. 27, 1962).

268. Letter from D.F. Houston, Sec’y of Agriculture, to the Sec’y of the Interior (Mar. 22, 1915) (on file with author).

269. See *Arches Proc.*, *supra* note 232.

270. Proclamation No. 2312, 53 Stat. 2504, 2504 (Nov. 25, 1938).

271. Letter from Julius A. Krugg, Sec’y of the Interior, to President Harry S. Truman 1 (Nov. 17, 1949) (on file with author).

The 1945 survey also identified “certain lands lying along the east boundary of the monument that are not of monument significance and could be better utilized for grazing and other purposes.”<sup>272</sup> The federal government began efforts to adjust the monument’s boundaries, but efforts to redraw the boundaries stalled as the State of Utah and the federal government attempted to concurrently negotiate an agreement to exchange state lands within the monument expansion area for federal lands outside of the monument.<sup>273</sup> It was not until 1960, after negotiations were concluded and the matter was resolved, that President Eisenhower trimmed 720 acres from the monument in conjunction with a 480-acre expansion.<sup>274</sup>

### *Natural Bridges, Utah*

Natural Bridges National Monument provides yet another example of error correction that improved monument management. The monument was proclaimed by President Roosevelt on April 16, 1908, during the final year of his presidency,<sup>275</sup> and expanded a year later by President Taft because:

[A]t the time this monument was created nothing was known of the location and character of the prehistoric ruins in the vicinity of the bridges, nor of the location of the bridges and the prehistoric cave springs, also hereby reserved, with reference to the public surveys, the same being many miles from surveyed land.<sup>276</sup>

Seven years later, President Wilson revised the boundary again because “the three several [*sic*] tracts embraced within this monument reservation have been resurveyed and relocated with reference to the recently established corner of the public land surveys, to the end that their location has been definitely fixed.”<sup>277</sup> But President Wilson recognized that challenges describing the monument continued, as portions of the monument remained in “unsurveyed townships.”<sup>278</sup>

President Kennedy became the fourth President to revise the monument’s boundaries based on improved survey data when, in 1962, he added 5,236 acres<sup>279</sup> to the monument to:

272. *Id.*

273. Memorandum from the Director, Bureau of Land Mgmt., to the Director, Nat’l Park Serv. (Dec. 9, 1949) (on file with author).

274. *See* Proclamation No. 3360, 25 Fed. Reg. 7145 (July 26, 1960).

275. Natural Bridges Proc., *supra* note 232.

276. Proclamation No. 881, 36 Stat. 2502, 2502 (Sept. 25, 1909).

277. Proclamation No. 1323, 39 Stat. 1764, 1764 (Feb. 11, 1916).

278. *Id.* at 1765.

279. Proclamation No. 3486, 76 Stat. 1495, 1495–96 (Aug. 14, 1962) [hereinafter 1962 Natural Bridges Revision Proc.].

Provide a protective strip on the south and west sides of the present monument lands; preserve several cliff-type prehistoric Indian ruins adjacent to the monument on the north; and make available sufficient lands to the east for a headquarters and road network. The existing monument lands are inadequate, not only for planned development, but for protection of the area's prime scientific and scenic values.<sup>280</sup>

He simultaneously trimmed 320 acres from the monument.<sup>281</sup> According to President Kennedy's 1962 proclamation, the excluded lands "no longer contain features of archeological value and are not needed for the proper care, management, protection, interpretation, and preservation of the monument."<sup>282</sup>

The lands removed involved two 160-acre "remote detached sections"<sup>283</sup> approximately twenty miles from the monument, each of which contained a cave and spring. When the monument was initially designated, "these caves were considered significant primarily because springs in the caves provided the only available water along the route traveled by visitors to the area."<sup>284</sup> However, after about 1925, the springs were no longer critical for visitors because "[p]rogressive road construction . . . eliminated the need for this old trail approach and the watering locations."<sup>285</sup> While one of the caves that was removed from the monument had at one time contained a small Pueblo ruin, that ruin had "been completely destroyed by stock watering and seeking shelter at the cave. Archaeologists feel that any archaeological values in these caves have been destroyed."<sup>286</sup>

The boundary change was also done in conjunction with a transition from the "natural metes and boundaries" description in the proclamation to the rectangular survey system utilized by the BLM's cadastral engineers.<sup>287</sup> As explained by the Department of the Interior employees who worked to redefine the monument boundary:

[W]e bowed to modern survey techniques and stayed with breakdowns of the one square mile section system. Bates was the conservative here, and I was somewhat greedy about taking land away from the BLM for the expansion of Natural Bridges. The final boundaries,

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280. Letter from John A. Carver, Jr., Acting Asst. Sec'y of the Interior, to David E. Bell, Director, Bureau of Budget (June 5, 1962) (on file with author).

281. *Id.*

282. 1962 Natural Bridges Revision Proc., *supra* note 279, at 1496.

283. Memorandum from Nusbaum, Archaeologist, to the Regional Director, Region Three, Nat'l Park Serv., 1 (Oct. 25, 1949) (on file with author).

284. Memorandum from Conrad Wirth, Director, Nat'l Park Serv. 2 (Jan. 23, 1961) (on file with author); *see also* Memorandum from Nusbaum, *supra* note 283, at 1.

285. Memorandum from Nusbaum, *supra* note 283, at 1.

286. Memorandum from Wirth, *supra* note 284, at 2.

287. Lloyd M. Pierson, *I Remember Bates*, 63 UTAH HIST. Q. 135, 143-44 (1995).

after several reviews by the Department of the Interior, NPS, BLM, and state agencies in the early 1960s, came out to a fairly respectable size and protected the monument much better. The new boundaries avoided the possibility of a large hotel dominating the scene overlooking any of the natural bridges by being far enough back from the bridges to provide a good buffer zone.<sup>288</sup>

Maps that failed to accurately represent the landscape containing newly minted national monuments were a major and recurring problem throughout the rural West. These challenges were exacerbated by the limitations inherent in the surveying and mapping technology that was in use a century ago. Reasonable people can disagree on whether Congress' failure to object to these revisions signaled acquiescence in the President's power to revise national monuments to correct mapping and survey errors. A court ruling on the reductions to Bears Ears or Grand Staircase-Escalante National Monuments, however, need not define the outer boundary of that power, or even affirm its existence. Carving Grand Staircase-Escalante in half and shrinking Bears Ears by eighty-five percent were not, and cannot be, described as error correction.

#### 4. *Inadvertent Inclusion of Non-Federal Land and Infrastructure*

Updated surveys revealed new information not only about the objects to be protected and the landscape containing them, but also about non-federal lands and facilities that had inadvertently been included within monument boundaries. The Antiquities Act only authorizes Presidents to designate national monuments "on land owned or controlled by the Federal Government."<sup>289</sup> Presidents therefore lack authority to designate non-federal lands, including non-federal inholdings, as part of a national monument. Nevertheless, in many instances, updated surveys revealed that non-federal lands and facilities had in fact been included in monuments. Modern proclamations clarify that non-federal lands are not part of the monument, but most early proclamations did not. To remove a potential cloud on the title of private land and improve monument management, early Presidents issued new proclamations excluding these lands from the monument. These proclamations should not be thought of as monument reductions, as they merely clarify what the Antiquities Act had already settled—state and private lands, even if surrounded by a monument, are not part of the monument.

In the modern era, boundary adjustments such as these became a system-wide goal of the National Park Service, which administered all national monuments until 1996, when the Grand Staircase-Escalante National Monument

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288. *Id.*

289. 54 U.S.C. § 320301(a) (2014).

was created. In 1954, the Chief of Cooperative Activities wrote to the Director of the National Park Service recommending that the Service:

[R]e-examine the boundaries of all areas to see if recommendations for modified boundaries might be made to contract present areas and thereby reduce the problem of acquiring inholdings, or to reduce problem management. An active program for the acquisition of inholdings should be adopted with adequate budgetary support where the inholdings materially detract from the full development and enjoyment of the park or monument area.<sup>290</sup>

The Chief then directed that “[r]ecommendations shall be made periodically as to boundary readjustments and inholding acquisitions.”<sup>291</sup>

Boundary adjustments also became a tool to help the Park Service improve site management and visitor services through its decade-long and congressionally authorized “Mission 66” program, which was launched in 1956<sup>292</sup> and led up to the Park Service’s fiftieth anniversary in 1966.<sup>293</sup> Park Service priorities motivated some reductions while others were done to remove clouds on title.

#### *Mount Olympus, Washington*

Mount Olympus National Monument provides an early example of efforts to exclude non-federal inholdings. Mount Olympus, now Olympic National Park, was first protected in 1909.<sup>294</sup> According to Congressman Humphrey of Washington, President Theodore Roosevelt was in favor of protecting the area, but congressional efforts to create a national park had stalled. Congressman Humphrey and Gifford Pinchot<sup>295</sup> went to the President two days before he left office and reported this account of their interaction:

Without waiting for any formal greeting, as soon as he entered he called to me across the room, “Tell me what you want, Mr. Humphrey, and I will give it to you. Do not take time to give me details, simply tell me what you wish me to do.” I said, “Mr. President, I want you to set aside as a National Monument, 750,000 acres in the heart of the Olympic mountains, the main purpose of this is to

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290. Memorandum from Chief of Cooperative Activities to the Director, Nat’l Park Serv. (Mar. 12, 1954) (on file with author).

291. *Id.*

292. See NAT’L PARK SERV., MISSION 66 FOR THE NATIONAL PARK SYSTEM 10 (1956), <https://perma.cc/F7FR-RHQY>.

293. *Id.*

294. Mount Olympus Proc., *supra* note 232.

295. Gifford Pinchot was the first Chief of the U.S. Forest Service and went on to serve as the Governor of Pennsylvania. See *Gifford Pinchot*, NAT’L PARK SERV., <https://perma.cc/7ZCL-V7NH>.

preserve the elk in the Olympics.” He replied, “I will do it. Prepare your order and I will sign it.” That was the whole transaction. I shook hands with him, wished him success in Africa, and told him goodbye.<sup>296</sup>

In their haste to create the Mount Olympus National Monument, the proclamation neglected to mention that the monument was limited to federal lands, but it did recognize “prior valid adverse claims” like homesteads.<sup>297</sup>

This recognition formed the basis for subsequent minor reductions to exclude non-federal land from the monument. Understanding that some homestead claims in Mount Olympus had arisen before the monument was proclaimed only to ripen into legal claims of land title some years later, President Taft trimmed 160 acres from the 639,200-acre monument in 1912,<sup>298</sup> removing a homestead and “permit[ting] certain claimants to land therein to secure title to the land.”<sup>299</sup> In 1929, President Coolidge also removed a 640-acre section from the monument<sup>300</sup> to exclude another homestead.<sup>301</sup> It would later come to light that this second homestead was filed to obtain ownership of “Goblin’s Gate,” a proposed hydroelectric dam site.<sup>302</sup>

#### *Glacier Bay, Alaska*

Revisions to Glacier Bay National Monument also reflect efforts to expressly exclude homesteads and private land claims by recognizing “all prior valid claims.”<sup>303</sup> Glacier Bay was almost 1.4 million acres when originally designated by Calvin Coolidge in 1925.<sup>304</sup> President Franklin Roosevelt further ex-

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296. Clifford Edwin Roloff, *The Mount Olympus National Monument*, 25 WASH. HIST. Q. 214, 226 (1934); CARSTEN LIEN, OLYMPIC BATTLEGROUND 38 (1991).

297. Mount Olympus Proc., *supra* note 232, at 2247; *see also* MEREDITH B. INGHAM, JR., OLYMPIC NATIONAL PARK: A STUDY OF CONSERVATION OBJECTIVES RELATING TO ITS ESTABLISHMENT AND BOUNDARY ADJUSTMENTS 10 (1955). Homestead laws allowed pioneering individuals and families to settle on the land, make improvements to the land, and to secure title to the land once they had demonstrated their occupation and use. Numerous homestead laws existed and are summarized in GATES, *supra* note 56, at chs. XV and XVIII.

298. Proclamation No. 1191, 37 Stat. 1737 (Apr. 17, 1912).

299. U.S. DEP’T OF THE INTERIOR, REPORTS OF THE DEPARTMENT OF THE INTERIOR FOR THE FISCAL YEAR ENDING JUNE 30, 1915, at 1103 (1916).

300. Proclamation No. 1862, 45 Stat. 2984 (Jan. 7, 1929).

301. The section removed from the monument contained a homestead. *See* U.S. Surveyor General’s Office Field Notes, Homestead Entry Survey No. 52 (received Oct. 2, 1911) (on file with author).

302. *See* Carsten Lien, *The Olympic Boundary Struggle*, 52 MOUNTAINEER 18, 22 (1959) (explaining that the purpose of the reduction was “to permit the construction of a dam on the Elwha River”). The dam at Goblin’s Gate was never built.

303. Glacier Bay Proc., *supra* note 232, at 1989.

304. *See id.* at 1989–90.

panded the monument by 904,960 acres in 1939.<sup>305</sup> This enlargement was based in part on an erroneous understanding that “no private lands would be included within the proposed boundaries.”<sup>306</sup> In reality, the monument contained a former saw mill site,<sup>307</sup> four or five homesteads,<sup>308</sup> a small salmon cannery,<sup>309</sup> a fur farm,<sup>310</sup> and a stand of Sitka spruce that had been withdrawn by the Navy for use in airplane construction.<sup>311</sup> To address the multiple conflicts arising from this error, President Eisenhower reduced the monument by 24,925 acres in 1955.<sup>312</sup> The conflicts included “several homesteads which were patented prior to the enlargement of the monument by the proclamation of April 18, 1939.”<sup>313</sup>

As discussed in more detail later in this Article, Glacier Bay also contained a secret military airfield that had been constructed to protect the West Coast from possible invasion during World War II. Glacier Bay, like many other monuments discussed in this article, also became a National Park and Preserve,<sup>314</sup> and today encompasses over 3.2 million acres.

#### *Katmai, Alaska*

A similar series of events played out at Katmai National Monument. Much like homesteaders, miners could stake a claim to mineral-rich federal

305. Proclamation No. 2330, 53 Stat. 2534, 2534 (Apr. 18, 1939).

306. JOHN M. KAUFFMAN, *GLACIER BAY NATIONAL MONUMENT, ALASKA: A HISTORY OF ITS BOUNDARIES* 31 (1954) (on file with author).

307. *Id.*

308. *Id.* at 17.

309. *Id.* at 18.

310. *Id.*

311. *Id.*

312. Proclamation No. 3089, 20 Fed. Reg. 2103, 2104–05 (Apr. 5, 1955) [hereinafter *Glacier Bay Revision Proc.*]. President Eisenhower purported to act under authority granted to him by the Antiquities Act as well as by the Timber Culture Act, ch. 561, § 24, 26 Stat. 1095, 1103 (1891) and the Appropriations Act of 1898, 30 Stat. 11, 34, 36 (1897). The former authorized the President to create forest reserves while the latter authorized the President to designate or modify such reserves. While these statutes allowed the President to include lands removed from the monument in the Tongass National Forest (they had previously been removed from the forest reserve when the monument was expanded in 1939, *see* *Glacier Bay Expansion Proc.*, *supra* note 305, at 2534–35), neither statute authorized national monument reductions.

313. *Glacier Bay Revision Proc.*, *supra* note 312, at 2103. The excluded area included open water and the “small homesteader community of Gustavus.” Memorandum in Support of Motion of the U.S. for Partial Summary Judgment on Count IV of the Amended Complaint at 21, *Alaska v. United States*, 546 U.S. 413 (2006) (No. 128, Original).

314. *See* *Alaska National Interests Land Conservation Act*, Pub. L. 96-487, tit. II, § 202(1), 94 Stat. 2371, 2382 (1980) (codified as amended in 16 U.S.C. § 410hh-1(1) (2012)).

lands, develop their claim, and secure title to the land.<sup>315</sup> Also like claims filed under homestead laws, mining claims were often staked many years before they were perfected and the claimant secured legal title to the land.<sup>316</sup> In a rare reduction consummated through an Executive Order rather than a Presidential Proclamation, President Coolidge in 1929 trimmed approximately ten acres from the 1,088,000-acre Katmai National Monument to exclude a mining claim.<sup>317</sup> The Monument had been proclaimed in 1918,<sup>318</sup> and as the Executive Order explains and congressional documents confirm, John J. Folstad had filed to mine coal near Takhli Bay in 1907, in an area that would come to be protected as part of the monument eleven years later.<sup>319</sup> Mr. Folstad operated the mine for years, and in 1923, he petitioned the General Land Office for a mine permit.<sup>320</sup> Rather than issue a permit to accommodate this valid existing use, President Coolidge decided to remove the mine area from the monument and eliminate the conflict.<sup>321</sup> Katmai, like so many other monuments, was also elevated to national park and preserve status and today encompasses over 4 million acres.<sup>322</sup>

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315. See, e.g., General Mining Act of 1872, 17 Stat. 91 (1872) (codified as amended at 30 U.S.C. §§ 21–47 (2012)); see also Robert W. Swenson, *Legal Aspects of Mineral Resources Exploitation*, in GATES, *supra* note 56, at 772 (discussing acquisition of rights to minerals on federal lands).
316. See Swenson, *supra* note 315, at 772.
317. See Exec. Order No. 3897 (Sept. 5, 1923) (eliminating land from the Katmai National Monument “[i]n view of the prior occupation and development of the tract by John J. Folstad as a coal mine for supplying fuel for local use”).
318. Katmai Proc., *supra* note 232.
319. See Letter from H.K. Love, Special Agent, General Land Office, to L.R. Glavis (Jan. 17, 1908) in COMPILATION OF LETTERS, TELEGRAMS, REPORTS & OTHER DOCUMENTS OFFERED IN EVIDENCE BEFORE THE JOINT COMM. OF CONG. TO INVESTIGATE THE DEPARTMENT OF THE INTERIOR AND THE BUREAU OF FORESTRY IN THE COURSE OF THE HEARINGS HELD BY THE COMM. JAN. 26 – MAY 28, 1910, at 212–13 (1910). See generally JON M. KAUFMAN, NAT’L PARK SERV., KATMAI NATIONAL MONUMENT, ALASKA: A HISTORY OF ITS ESTABLISHMENT AND REVISION OF ITS BOUNDARIES 1 (1954) (on file with author) (discussing mining claims that predated monument creation).
320. Frank B. Norris, *An Era of Neglect: Monument Administration Before 1950*, in NAT’L PARK SERV., ISOLATED PARADISE: AN ADMINISTRATIVE HISTORY OF THE KATMAI AND ANIKCHAK NATIONAL PARK UNITS, ALASKA (1996), available at <https://perma.cc/MZM6-8T5F>.
321. NAT’L PARK SERV., REPORT OF THE DIRECTOR OF THE NATIONAL PARK SERVICE TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDING JUNE 30, 1923 AND THE TRAVEL SEASON, 1923, at 84 (1923).
322. See Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, tit. II, § 202(2), 94 Stat. 2371, 2382 (1980) (codified as amended at 16 U.S.C. § 410hh-1(2) (2012)); LISTING OF ACREAGE, *supra* note 25.

*Great Sand Dunes, Colorado*

The 1956 revision to Great Sand Dunes National Monument<sup>323</sup> also falls in this category.<sup>324</sup> Like other monument proclamations of that era, the original Great Sand Dunes proclamation recognized valid existing rights but did not mention non-federal land.<sup>325</sup> In 1956, President Eisenhower added land along the eastern border to the monument, while deleting certain lands unnecessary for preservation of the dunes and exchanging them for state and private holdings within the monument.<sup>326</sup> These modifications “accomplished the elimination of several tracts of privately-owned land and ma[de] it possible to accomplish exchanges which will place 4,386 acres of state-owned lands outside of monument boundaries.”<sup>327</sup> As the National Park Service Advisory Board explained, “[m]uch of the land to be deleted [was] State and privately-owned, some ha[d] potential mining claims, or mineral leases, and none contain[ed] important dunes.”<sup>328</sup> The sand dunes, which were unaffected by the revision, were the only objects of historic or scientific importance specifically identified in the proclamation.<sup>329</sup> The revised boundary, moreover, “retain[ed] about a 2-mile buffer zone for protection of the major dune area.”<sup>330</sup> The boundary modifications followed earnest pleas for infrastructure upgrades<sup>331</sup> and were apparently part of the broader Mission 66 program that resulted in the “most

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323. Proclamation No. 3138, 21 Fed. Reg. 4035 (June 7, 1956). As with the reduction to the Glacier Bay National Monument, *see* Glacier Bay Revision Proc., *supra* note 312, President Eisenhower claimed to be acting under authority granted to him under both the Antiquities Act and the Appropriations Act of 1898, 30 Stat. 11, 34, 36 (1897). But the latter act authorized only creation and modification of forest reserves and therefore allowed for changes to the national forest without providing additional authority for monument reductions.
324. Most early records regarding the monument were destroyed in a fire, leaving little information about the modification. Telephone Interview with Khaleel Saba, Assistant Archivist, Nat'l Park Serv. Intermountain Region Museum Services Program (May 14, 2018).
325. *See* Great Sand Dunes Proc., *supra* note 232, at 2506.
326. *See* Nat'l Park Sys. Advisory Bd., Minutes from the 33rd Meeting Held on Sept. 7–9, 1955, at 15 (1955) (on file with author) [hereinafter National Park System Advisory Board Meeting Minutes]; NAT'L PARK SERV., MISSION 66 PROSPECTUS, GREAT SAND DUNES NATIONAL MONUMENT 16 (1955) (on file with author). Acreages of the monument as well as the reductions at this time are unreliable and inconsistent, likely reflecting the poor quality of existing surveys.
327. HARTON L. BILL, NAT'L PARK SERV., AREA MANAGEMENT STUDY GREAT SAND DUNES NATIONAL MONUMENT 4 (1956) (on file with author).
328. National Park System Advisory Board Meeting Minutes, *supra* note 326, at 15.
329. *See* Great Sand Dunes Proc., *supra* note 232, at 2506.
330. National Park System Advisory Board Meeting Minutes, *supra* note 326, at 15.
331. *See* NAT'L PARK SERV., MISSION 66 PROSPECTUS, GREAT SAND DUNES NATIONAL MONUMENT 16 (1955) (on file with author).

profound period of transformation since Herbert Hoover first authorized the monument in 1932.”<sup>332</sup>

*Black Canyon of the Gunnison, Colorado*

Black Canyon of the Gunnison National Monument tells a similar story involving a land exchange. President Hoover set aside the 13,148-acre monument on March 2, 1933,<sup>333</sup> just two days before leaving office. As with other monuments, “one of the most persistent problems confronting Black Canyon of the Gunnison National Monument involved its boundaries—poorly defined, encompassing in some spots too little land for adequate monument development and protection, in other spots including too many in-holdings.”<sup>334</sup>

Access to the monument also posed a significant problem. The number of visitors more than tripled between 1946 and 1956,<sup>335</sup> and was expected to double again after the state of Colorado paved the “Black Canyon Highway” (Colorado Highway 347) in 1958 to improve access to the monument.<sup>336</sup> Within the monument, however, tourists continued to encounter gravel roads, and the Park Service sought to make rapid improvements in response.<sup>337</sup> The Park Service also sought to develop the monument headquarters area as well as picnic and campground facilities.<sup>338</sup> The monument superintendent and Park Service staff were under pressure to address Mission 66 objectives before the Park Service’s anniversary in 1966. Having little money for the land acquisition needed to improve access and enhance visitor facilities within the monument, they worked to address the needs of the monument through a congressionally authorized land exchange,<sup>339</sup> trading public lands within monument boundaries for private land needed to complete the South Rim road. Exchanges such as these “clear[ed] the way for necessary boundary adjustments and development

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332. MICHAEL M. GEARY, *SEA OF SAND: A HISTORY OF GREAT SAND DUNES NATIONAL PARK AND PRESERVE* 129 (2016).

333. Proclamation No. 2033, 47 Stat. 2558 (Mar. 2, 1933).

334. RICHARD G. BEIDLEMAN, *ADMINISTRATIVE HISTORY OF THE BLACK CANYON OF THE GUNNISON NATIONAL MONUMENT* 139 (1965) (on file with author) (internal citation omitted).

335. See NAT’L PARK SERV., *MISSION 66 FOR BLACK CANYON OF THE GUNNISON NATIONAL MONUMENT* 2 (on file with author) (no date).

336. See Bill Sparks, *New Black Canyon Highway Will Help Attract Visitors to Area*, MONTROSE DAILY PRESS, Apr. 23, 1958, at 1 (reporting the monument superintendent’s prediction that construction of the highway would increase visitors from 43,148 the previous year to over 100,000 during the coming summer months).

337. See NAT’L PARK SERV., *supra* note 292, at 2; Bill Sparks, *Tourists from 13 States Join Local Residents at Dedication*, MONTROSE DAILY PRESS, May 26, 1958, at 1.

338. See RUSSELL L. MAHAN, U.S. DEP’T OF THE INTERIOR, *SUPERINTENDENT’S ANNUAL REPORT BLACK CANYON OF THE GUNNISON NATIONAL MONUMENT 1956 FISCAL YEAR 3* (1956) (on file with author).

339. Act of May 1, 1958, Pub. L. No. 85-391, 72 Stat. 102 (1958).

of the area under the Mission 66 program.”<sup>340</sup> The Park Service further negotiated with private landowners in the aftermath of the exchange,<sup>341</sup> and on April 8, 1960, President Eisenhower issued a proclamation removing, from the 13,148-acre monument, 470 acres that were “no longer required for the proper care, protection, and management of the objects of scientific interest.”<sup>342</sup>

*Colorado, Colorado*

The 1959 reduction to Colorado National Monument provides yet another example of the exclusion of private property. Designated on May 24, 1911, the proclamation for the 13,833-acre monument recognized “prior, valid, adverse claims” but did not expressly address non-federal lands.<sup>343</sup> When problems involving non-federal inholdings arose, President Eisenhower, in 1959, trimmed 211 acres from the monument and added 120 acres to it.<sup>344</sup> The boundary revision addressed what the National Park Service described as a “complicated land situation” involving undeveloped mining claims, donations to the Park Service that had not been recorded, and six tracts of private land that were all at least partially within the monument.<sup>345</sup> Together, non-federal inholdings were believed to total 190.36 acres.<sup>346</sup> Of the 211 acres that were removed, approximately 131 acres reflected lands that had been transferred out of federal ownership in 1911 and 1912,<sup>347</sup> shortly after the monument was created.<sup>348</sup> Both land sales occurred years before the monument was designated, but a land patent was not issued until after the monument had been designated.<sup>349</sup> The excluded parcels were therefore not federal land at the time the monument was designated and could not have been part of the monument. National Park Service correspondence also indicates that at least a portion of

340. Memorandum from Superintendent of Colorado-Black Canyon of the Gunnison National Monuments, Nat'l Park Serv., to the Director, Nat'l Park Serv. (May 22, 1957) (on file with author) (emphasis in original omitted).

341. See Memorandum from Supervisory Park Ranger of Black Canyon National Monument, Nat'l Park Serv., to the Superintendent of Colorado and Black Canyon National Monuments, Nat'l Park Serv. 2 (Aug. 2, 1958) (on file with author).

342. Proclamation No. 3344, 25 Fed. Reg. 3153, 3153 (Apr. 8, 1960).

343. Proclamation No. 1126, 37 Stat. 1681, 1681 (May 26, 1911) [hereinafter *Colorado Proc.*].

344. See Proclamation No. 3307, 24 Fed. Reg. 6471, 6471, 6473 (Aug. 7, 1959).

345. Memorandum from P. P. Patraw, Acting Regional Director, to Superintendent, Mesa Verde (Mar. 12, 1953) (on file with author).

346. *Id.*

347. U.S. Patent No. 210,775 (filed June 22, 1911); U.S. Patent No. 292,293 (filed Sept. 16, 1912) (both on file with author). Patented lands did not follow monument boundaries. Patented acreage therefore exceeds acreage removed from the monument.

348. See *Colorado Proc.*, *supra* note 343.

349. E-mail from Chris Haviland, Bureau of Land Mgmt., to author (Mar. 12, 2018, 14:46 MST) (on file with author).

the excluded lands may have been difficult to manage because, while part of the monument, these lands were outside of the fenced monument area.<sup>350</sup>

*Scotts Bluff, Nebraska*

Scotts Bluff National Monument, which lies less than twenty miles east of the Wyoming-Nebraska border, provides yet another example of a monument that was reduced to accommodate existing infrastructure and private land, neither of which were expressly discussed in the original proclamation. Designated in 1919 because of its important role in the history of westward settlement, Scotts Bluff originally included approximately 2,053 acres.<sup>351</sup> President Coolidge trimmed a quarter-section (160 acres) from the monument in 1924.<sup>352</sup> The lands eliminated from the monument were “classed as irrigable land under the North Platte Federal Irrigation Project and [were] eliminated for that reason.”<sup>353</sup>

The excluded lands were also subject to a homestead that included “residence, cultivation, and improvements.”<sup>354</sup> While the General Land Office accepted proof of homestead development six years after the monument had been reduced, it appears that homestead development predated the reduction by at least a decade. The Gering Irrigation District was created in 1895, and by 1900 had completed a series of canals that connected it with the existing Mitchell Canal and Irrigation District. Newly constructed canals included “25 miles of new canal . . . through a very rough stretch of country, locally called ‘Bad Lands,’” that are the Scotts Bluff National Monument.<sup>355</sup> The Gering Lateral to the Gering Canal cuts the eliminated section roughly in half and connects into the Mitchell and Gering Canal.<sup>356</sup> While the lands eliminated from the monument were under federal control at the time of the designation, their subsequent transfer out of federal ownership left the federal government without the ownership or control required by the Antiquities Act.

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350. Letter from Homer W. Robinson, Superintendent, Colorado National Monument, to Mr. Ples E. Watson (Apr. 6, 1956) (on file with author).

351. See Proclamation No. 1547, 41 Stat. 1779 (Dec. 12, 1919).

352. Exec. Order No. 4008 (May 9, 1924).

353. U.S. DEP’T OF THE INTERIOR, REPORT OF THE DIRECTOR OF THE NATIONAL PARK SERVICE TO THE SECRETARY OF THE INTERIOR FOR THE FISCAL YEAR ENDED JUNE 30, 1924, AND THE TRAVEL SEASON 1924, at 16 (1924).

354. Letter from D. K. Parrott, Acting Ass’t Comm’r of the Gen. Land Office, to Charles E. Gering (Apr. 2, 1930) (on file with author).

355. NEB. BD. OF IRRIGATION & DRAINAGE, TENTH BIENNIAL REPORT OF THE STATE BOARD OF IRRIGATION AND DRAINAGE TO THE GOVERNOR OF NEBRASKA 68–69 (1914).

356. See U.S. GEOLOGICAL SURVEY, TOPOGRAPHIC MAP: SCOTTS BLUFF SOUTH QUADRANGLE, NEBRASKA, SCOTTS BLUFF CO. 7.5 MINUTE SERIES (1963) (on file with author).

*White Sands, New Mexico*

A similar problem arises with respect to infrastructure, and two revisions to national monuments clarified that highways bisecting the landscape before national monuments were designated were, much like homesteads and mines, not intended to be part of the monument. In 1933, President Hoover proclaimed the 134,487-acre White Sands National Monument in New Mexico.<sup>357</sup> Barely a year later, President Franklin Roosevelt reduced the monument by 158.91 acres<sup>358</sup> because “certain sections of the right-of-way for United States Highway Route 70 are included within the White Sands National Monument.”<sup>359</sup> The road that would become Highway 70 predated the monument, and the proclamation that reduced the monument merely allowed for improvements to existing infrastructure along the monument’s southeast border.<sup>360</sup>

*Craters of the Moon, Idaho*

Craters of the Moon National Monument was similarly revised to facilitate improvements to an existing highway that ran through the monument. At the time of the initial proclamation in 1924,<sup>361</sup> access to the monument was from the Idaho Central Highway, which, according to the map appended to the original proclamation, came very close to the northwest border of the monument. The highway was rerouted through the monument some time prior to 1928, and the 1928 monument expansion roughly tripled the length of the highway through the monument.<sup>362</sup> Idaho sought to improve that highway, which was graded earth outside the monument and a semi-surfaced road through the monument.<sup>363</sup> To accommodate highway improvements, President Franklin Roosevelt excluded the highway route from the monument.<sup>364</sup> His 1941 proclamation removing the highway states that the excluded lands are “not necessary for the proper care and management of the objects of scientific

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357. Proclamation No. 2025, 47 Stat. 2551 (Jan. 18, 1933); NAT’L PARKS CONSERVATION ASS’N, *supra* note 25.

358. *See* MONUMENTS LIST, *supra* note 25.

359. Proclamation No. 2295, 53 Stat. 2465, 2465 (Aug. 29, 1938).

360. *Compare* NEW MEXICO HIGHWAY DEP’T, MAP: OFFICIAL ROAD MAP OF NEW MEXICO (1932), at <https://perma.cc/MY25-Y2XB>, *with* NEW MEXICO HIGHWAY DEP’T, MAP: OFFICIAL ROAD MAP OF NEW MEXICO (1935), <https://perma.cc/55HX-ZLMJ>.

361. Craters of the Moon Proc., *supra* note 232.

362. *Id.*; Proclamation No. 1843, 45 Stat. 2959 (July 23, 1928). Both proclamations contain maps depicting the highway in relation to the monument’s changing boundaries. *See* THOMAS A. SULLIVAN, NAT’L PARK SERV., PROCLAMATIONS AND ORDERS RELATING TO THE NATIONAL PARK SERVICE UP TO JANUARY 1, 1945, at 162–63 (1947).

363. TEXACO TOURING SERVICE, TEXACO ROAD MAP: IDAHO, MONTANA, WYOMING (1937) (on file with author).

364. *See* Proclamation No. 2499, 55 Stat. 1660, 1660 (July 18, 1941). Idaho Central Highway was once Highway 22 and is now Highway 20.

interest situated on the lands within the said monument,” implying that the revision did not undermine resource protection.<sup>365</sup>

Revisions such as these highlight an important problem with claims of authority based on congressional acquiescence. *Midwest Oil* makes clear that the presidential action must be known to Congress.<sup>366</sup> Minor revisions that corrected typographical errors in a proclamation, such as at Hovenweep; that resolved technical errors in monument boundary descriptions, like at Timpanogos Cave and Great Sand Dunes; or that corrected errors and better described a previously unsurveyed landscape, like those at Arches, Natural Bridges, Navajo, and Petrified Forest, may have escaped congressional attention. The burden of demonstrating congressional knowledge falls on the President, and a lack of demonstrable congressional knowledge may limit the number of prior reductions that can be relied upon to demonstrate the requisite pattern of informed congressional acquiescence. Furthermore, when considering congressional acquiescence, the relevant question is whether there is “a systematic, *unbroken*, executive practice, long pursued to the knowledge of the Congress and never before questioned.”<sup>367</sup> Here, the chain was broken by enactment of FLPMA and the intervening Attorney General opinions discussed above.

And even if Congress was aware of monument reductions, most prior reductions have little in common with the combined 2-million-plus-acre reductions to Bears Ears and Grand Staircase-Escalante National Monuments. The Trump administration does not claim that its reductions follow in the footsteps of Mt. Olympus, Katmai, or any of the other monuments that carefully eliminated non-federal inholdings. Indeed, both the original Bears Ears and Grand Staircase-Escalante National Monument proclamations specifically exclude non-federal lands.<sup>368</sup> Similarly, while revisions to Great Sand Dunes and Black Canyon of the Gunnison effectuated land exchanges that removed non-federal inholdings, the State of Utah had already traded away all of its lands within the Grand Staircase-Escalante and similar exchanges were proposed for Bears Ears as part of the Obama proclamation. And the administration cannot claim that its reductions, like those at Scotts Bluff, White Sands, or Craters of the Moon narrowly accommodate existing infrastructure. Finally, despite the superficial similarities between the Katmai reduction and President Trump’s reductions, Katmai was reduced to move already ongoing mining activity off of monument lands so as to maintain the integrity of the monument designation, whereas the

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365. *Id.*

366. See *United States v. Midwest Oil*, 236 U.S. 459, 474–75 (1915).

367. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (emphasis added) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952)).

368. *Bears Ears Proc.*, *supra* note 3, at 1143; *Grand Staircase-Escalante Proc.*, *supra* note 40, at 50,225.

Trump reductions reduce monuments in order to *allow* mining on unencumbered monument land.

### 5. *Improving Management*

The need to revise monument boundaries in light of improved information is not surprising given the limitations of early maps and surveys. Over the years, Presidents revised monument boundaries to reflect new information and changed conditions at individual monuments and surrounding landscapes. These revisions generally improved monument access and management, and better protected the objects identified in the original monument proclamations.

#### *Grand Canyon II, Arizona*

One of the largest and most complicated presidential revisions to a national monument involved the Grand Canyon. On January 11, 1908, Theodore Roosevelt set aside the largest monument to that date, the 808,000-acre Grand Canyon National Monument.<sup>369</sup> Despite its large size, many believed that the designation neither included all the lands necessary to protect the landscape, nor provided sufficient substantive protections for the area's sensitive resources.<sup>370</sup> Controversy regarding how much of the Grand Canyon landscape to protect, and how to balance protection with logging and grazing, continued for years afterwards.

In 1916, Congress created the National Park Service,<sup>371</sup> and three years later, Congress converted most of the Grand Canyon National Monument into our country's seventeenth national park.<sup>372</sup> The congressionally directed change in status came with a reduction in size that contributed to concerns from the Park Service and others that the park boundaries "had been drawn too close to the rim of the canyon; did not follow natural features; were difficult to administer as far as wildlife was concerned, [and] did not offer adequate [wildlife] range."<sup>373</sup> As the Park Service subsequently explained, a "park designed to protect a superlative canyon cannot protect it when only one wall of the canyon is

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369. Grand Canyon Proc., *supra* note 31; *see also* NAT'L PARKS CONSERVATION ASS'N, *supra* note 25.

370. BARBARA J. MOREHOUSE, A PLACE CALLED GRAND CANYON 39–40 (1996). The Supreme Court upheld the monument designation on the basis that the Grand Canyon "is an object of unusual scientific interest" within the meaning of the Antiquities Act, thus effectively resolving whether landscape-scale features could be protected as monuments. *Cameron v. United States*, 252 U.S. 450, 455 (1920) (internal citations omitted).

371. National Park Service Organic Act, Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified as amended at 54 U.S.C. §§ 100101, 100301–100303, 100751–100753, 102101 (2014)).

372. *See* MOREHOUSE, *supra* note 370, at 44.

373. JOHN M. KAUFFMAN, CONSERVATION OBJECTIVES AT THE GRAND CANYON: A HISTORY OF THE BOUNDARIES OF GRAND CANYON NATIONAL PARK AND GRAND CANYON NATIONAL MONUMENT 4 (1954); *see also* MOREHOUSE, *supra* note 370, at 53.

within the park.”<sup>374</sup> The Park Service also had concerns regarding wildlife habitat:

As with most of our great National parks the Grand Canyon was set aside as a rare physiographic and geological feature of unusual interest and beauty, but with little appreciation of its value as a native wildlife refuge, and zoological laboratory of surpassing interest. . . . Still here are to be found some of the most thrilling wild animal exhibits on the Continent and there is every reason to believe that several others of our most important large game mammals and birds of the region can be brought up to an abundance limited only by the carrying capacity of the range.<sup>375</sup>

Others expressed concern that important scenic areas and geologic wonders had been left out of the park.<sup>376</sup>

Although Congress responded by approving a 32,000-acre park expansion in 1927,<sup>377</sup> the move did not entirely allay these concerns.<sup>378</sup> Debate continued, with multiple proposals to change the park boundary.<sup>379</sup> According to the Park Service, time was of the essence in resolving the boundary controversy and the area protected needed to be expanded “as soon as possible—before railroad indemnity selection rights in the area could be taken up.”<sup>380</sup> Consequently, in December of 1932, during the waning days of his presidency, Herbert Hoover expanded the protected landscape by proclaiming the 273,145-acre Grand Canyon II National Monument.<sup>381</sup>

But the boundaries of Grand Canyon II were again based on an imperfect compromise. Incomplete and inaccurate land surveys of the area further com-

374. Memorandum from H.C. Bryant, Grand Canyon Nat'l Park Superintendent, to the Regional Director, Region Three, at 3 (Oct. 1944) (on file with author) (day illegible in copy).

375. KAUFFMAN, *supra* note 373, at 14–15 (quoting Report of Dr. Vernon Bailey, Chief Field Naturalist, Biological Survey, to Paul G. Redington, Chief of the Biological Survey). Wildlife and the habitat it occupies are objects of scientific interest under the Antiquities Act and therefore appropriate for protection as a national monument. *See* Cappaert v. U.S., 426 U.S. 128, 142 (1976) (holding “[t]he pool in Devil’s Hole [National Monument] and its rare inhabitants are ‘objects of historic or scientific interest,’” and that monument designation to protect them was an appropriate exercise of the Antiquities Act) (quoting Antiquities Act 54 U.S.C. § 320301(a) (2014)).

376. MOREHOUSE, *supra* note 370, at 56.

377. Act of Feb. 25, 1927, Pub. L. No. 69-645, 44 Stat. 1238 (1926).

378. *See* MOREHOUSE, *supra* note 370, at 62.

379. *Id.* at 68.

380. KAUFFMAN, *supra* note 373, at 19. Railroads received certain enumerated sections of land as compensation for construction of public railroads. Where these sections of lands were subject to homestead or mining claims, or the land had already been conveyed into private ownership, railroads had the right to select replacement lands, which were known as “indemnity” lands.

381. Proclamation No. 2022, 47 Stat. 2547 (Dec. 22, 1932).

plicated matters.<sup>382</sup> For the next seven and a half years, Congress and the President worked to revise the monument boundaries, and no fewer than nine bills were introduced as part of that effort.<sup>383</sup> The last of these bills, Senate Bill 6, proposed to cut 148,159 acres from the monument<sup>384</sup> and reached the President's desk on August 7, 1939. President Roosevelt vetoed Senate Bill 6, explaining that "insufficient consideration ha[d] been given to the matter," and that "[b]efore approving any measure that would eliminate lands from any national monument, I would want to receive a report from representatives of the National Park Service based on a thorough investigation of the land proposed for elimination from the monument."<sup>385</sup>

A preliminary report, prepared in compliance with the President's directive by park naturalist Edwin McKee, recommended keeping the southern portion of the monument intact while straightening the western boundary to include more antelope habitat, and remarked that the boundaries proposed under Senate Bill 6 were "entirely inadequate and eliminated from the monument areas many features which logically belong to it and are of both scientific and scenic importance."<sup>386</sup> McKee went on to note that "a wildlife problem would soon arise" under the congressionally defined boundaries<sup>387</sup> and that "no Government representatives connected with drafting of the proposed boundaries of Grand Canyon National Monument has yet visited or studied on the ground [all of] the area in question."<sup>388</sup>

A subsequent "full scale study of the boundary question" largely concurred with McKee's recommendations.<sup>389</sup> In December of 1939, Ben M. Thompson, Chief of the National Park Service Planning Division, transmitted the investigating team's final report to Secretary of the Interior Harold Ickes, recommending the boundaries that would eventually be codified in a 1940 proclamation.<sup>390</sup> Secretary Ickes concurred in these boundaries and forwarded to

382. S. REP. NO. 76-744, at 3 (1939).

383. H.R. 12,081, 74th Cong. (1936); S. 4503, 74th Cong. (1936); H.R. 7264, 75th Cong. (1937); H.R. 9314, 75th Cong. (1938); S. 3362, 75th Cong. (1938); S. 4047, 75th Cong. (1938); S. 6, 76th Cong. (1939); H.R. 7570, 76th Cong. (1939); S. 2981, 76th Cong. (1939).

384. S. REP. NO. 76-744, at 2 (1939).

385. Memorandum of Disapproval from President Franklin Roosevelt (Aug. 7, 1939) (on file with author); *see also* KAUFFMAN, *supra* note 373, at *i*.

386. KAUFFMAN, HISTORY OF THE BOUNDARIES OF GRAND CANYON, *supra* note 373, at 23.

387. *Id.* Park Service biologists similarly concluded that "boundary changes should be adjusted for the benefit of antelope and bighorns," W.B. MCDUGAL, NAT'L PARK SERV., SPECIAL REPORT: PROPOSED BOUNDARY CHANGES AT GRAND CANYON NATIONAL PARK 3 (on file with author) (no date), and that "the remainder of the animal life will [also] be adequately provided for" by such a change. *Id.*

388. KAUFFMAN, *supra* note 373, at 23.

389. *Id.* at 24.

390. *Id.* at 25.

President Roosevelt a proposed proclamation reducing the size of the monument.<sup>391</sup> As Secretary Ickes explained, “this recommended boundary is drawn to retain the heads of side canyons; to retain the principal volcanic exhibits on the western boundary; to exclude the privately-owned lands for which there is little hope of acquisition and to exclude grazing land that is not essential for monument purposes.”<sup>392</sup>

Following these recommendations, President Roosevelt reduced Grand Canyon II on April 4, 1940, trimming the monument by 71,854 acres, or twenty-six percent.<sup>393</sup> Two pending congressional bills<sup>394</sup> to reduce the Monument were allowed to die,<sup>395</sup> likely reflecting congressional assent to the new boundary. “The only surprises, perhaps, are the length of time to reduce the size of the monument and the relatively small amount of territory that opponents won back.”<sup>396</sup> All told, in the lead-up to the 1940 revision, Congress and the President worked together to forge a workable compromise, with Congress considering nine separate bills to remake the boundary, and the President convening a commission on boundary adjustments. A giant of a President, at the zenith of presidential power, President Franklin Roosevelt finalized what Congress failed to do—and he did so with the knowledge, sustained involvement, and informed consent of Congress.

The exclusion of lands under the 1940 revision turned out not to be permanent, as protections for the Grand Canyon were strengthened many times in the years to come. On January 20, 1969, President Johnson designated the 32,547-acre Marble Canyon National Monument.<sup>397</sup> Then, in 1975, both the Grand Canyon II and Marble Canyon National Monuments were incorporated into Grand Canyon National Park, protecting approximately 1.2 million additional acres.<sup>398</sup> President Clinton further expanded protections for the Grand Canyon landscape in 2000, when he designated the 1,014,000-acre Grand Canyon-Parashant National Monument.<sup>399</sup> Today, all the lands that were removed by the 1940 proclamation, and then some, are protected.

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391. MOREHOUSE, *supra* note 370, at 78.

392. Barbara J. Morehouse, *Power Relationships in the Spatial Partitioning and Natural Resource Management of the Grand Canyon* 190 (1993) (unpublished Ph.D. dissertation, University of Arizona) (on file with author) [hereinafter Morehouse Dissertation]. *See also* KAUFFMAN, *supra* note 373, at 25.

393. Proclamation No. 2393, 54 Stat. 2692 (Apr. 4, 1940).

394. S. 2981, 76th Cong. (1939); H.R. 7570, 76th Cong. (1939). Both were companion bills reflecting the same boundary contained in the earlier S. 6, 76th Cong. (1939).

395. KAUFFMAN, *supra* note 373, at 25.

396. MOREHOUSE, *supra* note 370, at 68; *see also* Morehouse Dissertation, *supra* note 392, at 178.

397. Proclamation No. 3889, 34 Fed. Reg. 909 (Jan. 22, 1969).

398. Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, § 3, 88 Stat. 2089, 2090 (1975) (codified in 16 U.S.C. § 228b (2012)).

399. Proclamation No. 7265, 65 Fed. Reg. 2825 (Jan. 11, 2000) (Grand Canyon-Parashant proclamation).

*Bandelier, New Mexico*

Prior to President Trump's recent actions, the most recent national monument reduction by a President occurred on May 27, 1963—fifty-five years earlier—when President Kennedy redrew the boundaries of Bandelier National Monument.<sup>400</sup> First proclaimed in 1916<sup>401</sup> and later expanded in 1932<sup>402</sup> and again in 1961,<sup>403</sup> President Kennedy's 1963 revision effected an exchange of 2,882 acres of land<sup>404</sup> owned by Los Alamos Scientific Laboratory<sup>405</sup> for 3,925 acres of monument land that “had been fully researched and [was] not needed to complete the interpretive story of the Bandelier National Monument.”<sup>406</sup>

The land exchange was the culmination of four years of negotiations, which added high-value wilderness-quality lands to the monument, creating an important protective buffer between the growing Los Alamos community and archaeological ruins.<sup>407</sup> In return, monument managers relinquished an area that had been severely impacted by unmanaged visitation and that had lost much of its scientific integrity and value.<sup>408</sup> Notably, the National Park Service was concerned about the lack of resources to manage the sensitive and over-visited archaeologically rich lands that would eventually be excluded from the monument.<sup>409</sup> By transferring these lands to the lab, which was closed to public entry,<sup>410</sup> the federal government limited public access to sensitive sites and increased protection for the objects of historic and scientific interest identified in the original proclamation.<sup>411</sup>

400. 1963 Bandelier Revision Proc., *supra* note 6.

401. Bandelier Proc., *supra* note 232.

402. Proclamation No. 1991, 47 Stat. 2503 (Feb. 25, 1932).

403. Proclamation No. 3388, 26 Fed. Reg. 247 (Jan. 11, 1961).

404. 1963 Bandelier Revision Proc., *supra* note 6, at 5407.

405. Los Alamos Scientific Laboratory is now the Los Alamos National Laboratory.

406. 1963 Bandelier Revision Proc., *supra* note 6, at 5407; *see also* Michael Kelleher, *Changing Approaches to Management at the Tsankawi Mesa of Bandelier National Monument*, 20 THE GEORGE WRIGHT FORUM 58, 62 (2003) (discussing the land exchange).

407. *See* Hal K. Rothman, *Bandelier National Monument: An Administrative History*, S.W. CULTURAL RESOURCES CTR. PROFESSIONAL PAPERS No. 14, 48–52 (1988).

408. *See id.* at 48.

409. *See id.* at 51–52.

410. *See* U.S. DEP'T OF ENERGY, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE CONVEYANCE AND TRANSFER OF CERTAIN LAND TRACTS ADMINISTERED BY THE DEPARTMENT OF ENERGY AND LOCATED AT LOS ALAMOS NATIONAL LABORATORY, LOS ALAMOS AND SANTA FE COUNTIES, NEW MEXICO 13-1 (1999) (explaining that Technical Area 74, which includes most of the land transferred to the lab, is gated and “access to the tract is currently limited to Federal, State, and local government personnel on official business”).

411. *See id.*

*Wupatki, Arizona*

Revisions to the Wupatki National Monument do not fit neatly into any category but, like other revisions discussed in this section, appear intended to advance the public interest without minimizing protection of the objects identified in the original monument proclamation. President Franklin Roosevelt trimmed 52.27 acres from the 35,865-acre Wupatki National Monument on January 22, 1941, to enable construction and operation of a water diversion on the Little Colorado River and to facilitate the irrigation of lands on the Navajo Indian Reservation.<sup>412</sup>

Notably, the proposal to reduce the Monument was originally made by the Navajo Service and approved by the Commissioner of Indian Affairs<sup>413</sup> before being routed to the Park Service for its approval, and eventually sent on to the President. The National Park Service, which administered the monument, did not object to the project because:

The weir seems to be proposed for diversion purposes only [and] would not be expected to impound and thus back up any appreciable quantity of water. The diversion canal is entirely on reservation lands. We would be affected only in that one abutment of the weir would be against that bank of the river which constitutes our boundary.<sup>414</sup>

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412. Proclamation No. 3454, 55 Stat. 1608 (Jan. 22, 1941). The monument had been proclaimed sixteen years earlier. *See* Proclamation No. 1721, 43 Stat. 1977 (Dec. 9, 1924). President Roosevelt's proclamation modifying the monument reads, in relevant part, as follows: "under and by virtue of the authority vested in me by [the Antiquities Act] and by [the Pickett Act], [I] do proclaim that [certain lands] comprising 52.27 acres, *are hereby excluded from the Wupatki National Monument, and temporarily withdrawn from settlement, location, sale, or entry and reserved for use in connection with the construction and operation of a diversion dam in Little Colorado River for irrigating Navajo Indian lands.*" 55 Stat. at 1608 (emphases added). Although it may appear as if President Roosevelt is invoking authority under the Pickett Act, Pub. L. No. 61-303, 36 Stat. 847 (1910) (repealed 1976), to reduce the monument, it is more likely that references to the Antiquities Act and Pickett Act allude, respectively, to the first and second italicized clauses. The Pickett Act, passed in 1910, authorized a President to temporarily reserve public lands for "water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals," and provided that "such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." *Id.* at 847. This grant includes the power to temporarily reserve from disposal the water project site once it is removed from the Wupatki Monument, but does not authorize the monument reduction itself since the monument was originally set aside under the Antiquities Act only. *See* 43 Stat. at 1977.

413. *See* Letter from E.R. Fryer, General Superintendent, Navajo Service, to the Commissioner of Indian Affairs (July 12, 1940) (on file with author).

414. Letter from Hugh M. Miller, Superintendent of Southwest Monuments, Nat'l Park Serv., to David J. Jones, Custodian of Wupatki National Monument, Nat'l Park Serv. (Aug. 21, 1940) (on file with author).

The monument's custodian also carefully surveyed the area and concluded that no major archaeological sites would be impacted.<sup>415</sup>

President Trump's recent actions are distinguishable from the revisions to the Grand Canyon, Bandelier, and Wupatki National Monuments because his reductions do not appear to reflect new information about either the objects to be protected or the landscapes containing those resources. Each revision discussed in this Section was undertaken after specific determinations that the revised boundaries were adequate to protect the objects the original monument designation sought to protect. While President Trump's proclamations make that claim, the tens of thousands of sites that were excluded from the monuments and the strong influence energy companies had in drawing the revised boundaries leave that assertion on the shakiest of grounds.

The Bandelier revision is notable because, while occurring fifty-five years earlier and before enactment of FLPMA, it is the closest in time to President Trump's revisions. It also produced the opposite result—it brought sensitive resources into the monument and the lands excluded from the monument were made inaccessible to looters by placing them inside Los Alamos National Laboratory—resource protection increased rather than decreased. Finally, the Grand Canyon revision represents the outer limit of large reductions that Congress could conceivably have acquiesced to—and then acquiescence was the result of seven and a half years of back-and-forth negotiation with the President.

#### 6. *National Monument Boundary Revisions Under the President's Article II Power*

The scope of the President's powers are set forth in Article II of the Constitution. These powers include that of Commander-in-Chief of the military “when called into the actual Service of the United States.”<sup>416</sup> While no President has formally claimed to reduce a national monument based on his power as Commander-in-Chief, the facts show that the existential threats to the United States posed by World War I and World War II were front-and-center in three decisions to revise national monument boundaries. There also appears to be little doubt that the President's wartime powers were recognized as potentially authorizing monument reductions. Writing on the eve of World War II, the Secretary of the Interior opined that:

Should national defense exigencies arise requiring the use of any specific areas within the national park system [which, at that time, in-

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415. See Letter from David J. Jones, Custodian of Wupatki National Monument, Nat'l Park Serv., to Hugh M. Miller, Superintendent of Southwest Monuments, Nat'l Park Serv. (Sept. 13, 1940) (on file with author).

416. U.S. CONST. art. II, § 2, cl. 1.

cluded all national monuments] which are nowhere else available, the President of the United States, as Commander in Chief of the armed forces of the United States, would have plenary power to take all steps necessary for national defense.<sup>417</sup>

Presidents reduced national monuments under the shadow of the World Wars on at least three occasions. These reductions, implicating the President's wartime powers and made necessary by extraordinary circumstances, bear no connection with the reductions undertaken by the Trump Administration.

*Santa Rosa Island, Florida*

The short-lived Santa Rosa Island National Monument was established by President Roosevelt on May 17, 1939.<sup>418</sup> Shortly after the United States joined World War II in 1941, the War Department took over management of part of the monument, as well as about 384,000 acres of the neighboring Choctawhatchee National Forest land on Santa Rosa island.<sup>419</sup> The land was used to expand Eglin Field, an Air Force base that went on to become a cornerstone of our nation's armament development and defense training system.<sup>420</sup>

On August 13, 1945—four days after the Nagasaki bombing and on the eve of the Japanese surrender—President Truman cut 4,700 acres from the monument, permanently reserving the land for use by the “War Department for military purposes” and explaining that the “elimination of such lands from the national monument would not seriously interfere with its administration.”<sup>421</sup> In 1946, Congress abolished what was left of the original monument, turning the land over to the State of Florida.<sup>422</sup>

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417. Letter from Sec'y of the Interior to Hon. Alva B. Adams, Chairman, S. Comm. on Pub. Lands & Surveys, in *Nat'l Park Serv., Minutes of the Thirteenth Meeting of the Advisory Board of National Parks, Historic Sites, Buildings, & Monuments*, Oct. 28-30, 1940 (on file with author).

418. Proclamation No. 2337, 53 Stat. 2542 (May 17, 1939).

419. See *Eglin Air Force Base History*, U.S. AIR FORCE, <https://perma.cc/CPQ8-A42U>.

420. See *Eglin Field Historic District*, NAT'L PARK SERV., <https://perma.cc/6NBL-QW7J>. The Air Force recounts that “Eglin became the site for gunnery training for Army Air Force fighter pilots, as well as a major testing center for aircraft, equipment, and tactics,” and that “in March 1942, the base served as one of the sites for Lieutenant Colonel Jimmy Doolittle to prepare his B-25 crews for their raid against Tokyo.” *Eglin Air Force Base History*, *supra* note 419.

421. Proclamation No. 2659, 59 Stat. 877, 877 (Aug. 13, 1945).

422. An Act to Abolish the Santa Rosa Island National Monument and to Provide for the Conveyance to Escambia County, State of Florida, of That Portion of Santa Rosa Island Which is Under the Jurisdiction of the Department of the Interior, Pub. L. No. 79-564, 60 Stat. 712 (1946).

*Glacier Bay, Alaska*

The reduction of Glacier Bay National Monument can also be traced to its use as a military base in World War II. On April 24, 1943, President Franklin Roosevelt issued an Executive Order delegating the President's authority to "withdraw or reserve" public lands to the Secretary of the Interior.<sup>423</sup> Pursuant to that authority, Abe Fortas, who was then the Acting Secretary of the Interior and who would later go on to become a Supreme Court Justice, issued a secret order<sup>424</sup> allowing the War Department to temporarily use lands within Glacier Bay National Monument for national defense purposes so long as those lands and facilities were needed to prosecute World War II.<sup>425</sup> With war raging in the Pacific and growing fear of a possible Japanese attack,<sup>426</sup> the War Department constructed an airfield and installed associated infrastructure within the monument. Following the conclusion of World War II, President Eisenhower removed from the monument those lands that were "now being used as an airfield for national-defense purposes and are no longer suitable for national-monument purposes."<sup>427</sup> While President Eisenhower's reduction was not responding to an immediate threat to the nation, the reduction was a recognition of changes made in response to wartime needs.

*Mount Olympus, Washington*

Mount Olympus National Monument in Washington State was modified partly to correct errors in the original proclamation and partly to accommodate national security interests. The case of Mount Olympus is peculiar because the original proclamation contained ambiguous language that seemed to accommodate the interests of the timber industry, and because military involvement in the monument was inextricably bound up with its potential for timber extraction. President Theodore Roosevelt's original proclamation establishing the monument<sup>428</sup> stated, on the one hand, that the area identified was "hereby reserved from all forms of appropriation under the public land laws, subject to all prior valid adverse claims, and set apart as a National Monument."<sup>429</sup> In contrast, a later provision in the same proclamation stated that:

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423. Exec. Order No. 9337, 8 Fed. Reg. 5516, 5516 (Apr. 24, 1943).

424. Public Land Order 177, 11 Fed. Reg. 8367 (Aug. 2, 1946).

425. See *id.* at 8367-68.

426. These fears appear to have been well-founded. The Japanese bombed Unalaska and Amaknak Islands on June 3, 1942, and occupied Kiska and Attu islands until they were repelled by the U.S. Army in 1943. See *Aleutian World War II*, NAT'L PARK SERV., <https://perma.cc/W764-ZHUH>.

427. Proclamation No. 3089, 20 Fed. Reg. 2103, 2103 (Mar. 31, 1955). As discussed in *supra* notes 303-14 and accompanying text, reductions also removed non-federal inholdings from the monument.

428. Olympus Proc., *supra* at note 232.

429. *Id.* at 2247.

The reservation made by this proclamation is not intended to prevent the use of the lands for forest purposes under the proclamations establishing the Olympic National Forest, but the two reservations shall both be effective on the land withdrawn, but the National Monument hereby established shall be the dominant reservation and any use of the land which interferes with its preservation or protection as a National Monument is hereby forbidden.<sup>430</sup>

Loggers, arguing that the term “forest purposes” should be interpreted to include logging, sought to harvest the old growth forests within the monument. Mineral prospectors also sought to stake claim to copper and other precious metals they believed were locked up inside the monument.<sup>431</sup> However, they were thwarted by the Secretary of the Interior who interpreted the national monument reservation as controlling over the national forest reservation and determined that there could be no logging and “no ‘prospecting for or working of mineral deposits’ in the monument.”<sup>432</sup> Conflict erupted, and commodity producers sought to return as much of the monument as possible to the National Forest System, where it could be logged and mined with relative impunity. Other lands would be included in a new National Park.<sup>433</sup>

World War I, which began in 1914, quickly brought the conflict over timber and minerals to a head. Fighting severely reduced timber harvests in Europe, and the need for Douglas fir for ships and Sitka spruce for airplanes became particularly acute.<sup>434</sup> Sitka spruce was critical to airplane construction because it was light, strong, and did not splinter when struck by a bullet.<sup>435</sup>

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430. *Id.* at 2248.

431. *See, e.g.,* ASAHEL CURTIS ET AL., CONCERNING LEGISLATION, WITH A VIEW OF CHANGING THE CHARACTER OF THE MT. OLYMPUS NATIONAL MONUMENT AND THE CREATION OF THE OLYMPUS NATIONAL PARK (1912) (on file with author) (describing resolution, adopted by several local chambers of commerce, advocating that mining be permitted within the Mount Olympus National Monument and Olympus National Park). It appears that these claims were likely a ruse to secure title to valuable timber lands and that little, if any, valuable minerals were actually present. *See* Memorandum from H.S. Graves, Chief, U.S. Forest Serv., to Francis G. Caffey, Solicitor, Dep’t of Agric. 3 (Nov. 12, 1914) (on file with author) (“It is certain that many prospectors will be disappointed in the mining values [and] I am deeply concerned at the prospect[ ] of . . . fake mining claims on our heaviest and most valuable bodies of timber.”).

432. LIEN, *supra* note 296, at 39.

433. *See* Letter from H.S. Graves, Chief, U.S. Forest Serv., to David F. Houston, Sec’y of Agric. 2 (Dec. 10, 1914) (on file with author).

434. *See* Notes of Henry S. Graves, Chief, U.S. Forest Serv., 3, 11 (on file with Yale University Library Archives) (no date) (“10. French and British were both short. Our first need had to be at a sacrifice to their convenience and comfort of troops. . . . 37. One of the difficult problems was the production of materials for aircraft. 38. Best species Sitka Spruce. Allies had been taking our chief output.”).

435. *See* Gerald W. Williams, *The Spruce Production Division*, FOREST HIST. TODAY 3 (1999); *see also* GAIL E.H. EVANS & GERALD W. WILLIAMS, OVER HERE, OVER HERE: THE

Spruce, however, was available only in temperate rainforests like those found along the Pacific Northwest coast, and the monument was home to “the largest stands of Sitka spruce in the Northwest.”<sup>436</sup>

On May 11, 1915, less than a year after the assassination of Archduke Ferdinand and the beginning of World War I and “on the basis of military needs for timber and minerals,”<sup>437</sup> President Wilson cut 299,370 acres from the monument’s original 608,640 acres.<sup>438</sup> The lands eliminated thereby were returned to the Olympic National Forest in order to “permit their development,”<sup>439</sup> making much-needed lumber available to support the war effort.<sup>440</sup> In its bid to increase the supply of lumber, the United States went so far as to mobilize the Army’s “Spruce Production Division” to the Olympic Peninsula to put down labor unrest and to construct railroads for transporting logs to mills.<sup>441</sup> This construction is considered to be “among the greatest World War I engineering and labor efforts engaged in by the United States.”<sup>442</sup>

Critically, as a 1935 solicitor’s opinion explains, even in the midst of World War I President Wilson acted only after the Department of Agriculture investigated the boundary change and concluded that the reduction would not impact elk summer range or glaciers—the resources that the monument was set aside to protect.<sup>443</sup> Glaciers and elk summer range were located at higher elevations that were less desirable for timber production, and these areas would remain protected by the reduced monument. The Chief of the Forest Service was also concerned that reductions could open important elk breeding areas to mining and homesteading, and that even small homesteads “might seriously affect

ARMY’S SPRUCE PRODUCTION DIVISION DURING “THE WAR TO END ALL WARS” 4 (1984).

436. GAIL E.H. EVANS, *HISTORIC RESOURCE STUDY: OLYMPIC NATIONAL PARK WASHINGTON*, ch. III (1983), <https://perma.cc/LPS3-GBD9>.

437. INGHAM, *supra* note 297, at 4; *see also* EVANS, *supra* note 436, at ch. III; Elmo R. Richardson, *Olympic National Park: 20 Years of Controversy*, 12 *FOREST HIST. NEWSL.* 6, 7 (1968).

438. Proclamation No. 1293, 39 Stat. 1726, 1726 (May 11, 1915); *MONUMENTS LIST*, *supra* note 25. While the proclamation preceded a formal declaration of war, it occurred on the heels of two attacks on American-flagged ships and just four days after the German navy sank the British passenger ship the *Lusitania*, killing more than 1,100 passengers and crew, including 124 Americans. Telegram from President Woodrow Wilson to Ambassador James Gerard (May 13, 1915), <https://perma.cc/QA2S-JFER>.

439. U.S. DEP’T OF THE INTERIOR, *REPORTS OF THE DEPARTMENT OF THE INTERIOR FOR THE FISCAL YEAR ENDING JUNE 30, 1915*, at 1103 (1916).

440. *See* EVANS & WILLIAMS, *supra* note 435, at 4 (“[T]he Pacific Northwest was the primary supplier of aircraft-quality wood to Great Britain, France and Italy.”); LIEN, *supra* note 296, at 219; Williams, *supra* note 435, at 9.

441. *See* Williams, *supra* note 435, at 6–7; EVANS & WILLIAMS, *supra* note 435, at 6.

442. EVANS, *supra* note 436, at ch. III.

443. Dep’t of the Interior, M. Opp. 27,657, at 6 (Jan. 30, 1935).

the perpetuation of the animals.”<sup>444</sup> Although the original monument proclamation also referred to the elk’s “breeding grounds,”<sup>445</sup> the solicitor’s opinion did not address possible impacts to the breeding habitat. The Chief of the Forest Service therefore followed up with the solicitor who assured the chief that the Secretary of Agriculture would have the authority to refuse to make agricultural land within the proposed elimination area available for homesteading where, in his judgement, “they were chiefly valuable as a breeding ground for elk.”<sup>446</sup> Based on this assessment, the chief concluded that elk breeding areas could be adequately protected without the monument designation and that the reduced monument “will, in my judgement, provide the essential protection to the elk, substantially as well as under the present arrangement.”<sup>447</sup> The state of Washington, moreover, had imposed a ban on all elk hunting in the region through 1925, and all involved appeared to believe that the state would continue to act in ways that would protect the elk.<sup>448</sup>

As in the case of the Grand Canyon and other monuments, the protections that Mount Olympus lost were subsequently restored and strengthened. Twenty years after victory in World War I, Mount Olympus National Monument was re-designated as Olympic National Park, and management was transferred from the U.S. Forest Service to the National Park Service.<sup>449</sup> With the onset of World War II, interest in commercial access to timber within the newly created park increased again, but the heightened protections afforded to national parks<sup>450</sup> and increasing use of aluminum for aircraft construction were enough to foreclose further intrusions into the park.<sup>451</sup> Today, Olympic National Park spans 922,560 acres, including most, if not all, of the areas previously removed from the park.

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444. Letter from Henry S. Graves, Chief, U.S. Forest Serv., to Francis G. Caffey, Solicitor, Dep’t of Agric. 2 (Nov. 12, 1914) (on file with author).

445. Mount Olympus Proc., *supra* note 232, at 2247.

446. Letter from Francis G. Caffey, Solicitor, Dep’t of Agric., to Henry S. Graves, Chief, U.S. Forest Serv. 5–6 (Nov. 30, 1914) (on file with author). This issue arose because the Act of June 11, 1906, Pub. L. No. 59-220, 34 Stat. 233 (1906), empowered the Secretary of Agriculture to open national forest lands to homesteading.

447. Letter from Henry S. Graves, Chief, U.S. Forest Serv., to David F. Houston, Sec’y of Agric. 3 (Dec. 10, 1914) (on file with author).

448. Letter from R.L. Fromme, Forest Supervisor, to the District Forester 3 (Aug. 7, 1914) (on file with author). Protection of elk populations was an important issue because, “[i]n an operation as ruthless as the slaughter of the buffalo of the Great Plains, [elk] hide and teeth hunters moved into the area and killed most of the herd.” LIEN, *supra* note 296, at 32–34.

449. See Act of June 29, 1938, Pub. L. No. 75-778, 52 Stat. 1241 (1938).

450. See National Park Service Organic Act, Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified as amended at 54 U.S.C. §§ 100101, 100301–100303, 100751–100753, 102101 (2014)).

451. See Janet A. McDonnell, *World War II: Defending Park Values and Resources*, 29 PUBLIC HISTORIAN 15, 30–31 (2007).

Notably, the reductions to both Santa Rosa Island and Glacier Bay were made following a congressional declaration of war,<sup>452</sup> when the President's claim to constitutionally granted power as Commander-in-Chief was at its strongest.<sup>453</sup> And, as noted above, the 1915 reduction to Mount Olympus National Monument was made after hostilities had already begun.

Actions intended to advance our national defense and taken following either a declaration of war or direct and repeated attacks on our nation may have relied on the President's Article II power as Commander-in-Chief. Even if the actions were formally taken under Antiquities Act authority, given that these actions were taken in the context of clear congressional knowledge of the President's broader efforts to protect national security, Congress could be understood to have deferred to the President's wartime powers under Article II. Revisions related to the two World Wars obviously have little relevance to President Trump's reductions to the Bears Ears or Grand Staircase-Escalante National Monuments.

#### CONCLUSION

The Property Clause of the U.S. Constitution grants Congress the power to create, revise, or even eliminate national monuments. The President, however, has no such power under the Constitution: he must rely instead on the authority delegated to him by Congress. The Antiquities Act empowers the President to create national monuments, but it does not expressly grant the President the power to revise or eliminate them, and there is little to suggest that Congress intended to grant the President such powers. First, there was no functional need for swift action to reduce national monuments, so Congress had no reason to grant that power to the President. Second, Congress granted Presidents the power to revise other public land reservations when they believed a two-way power was necessary and appropriate, but they chose not to do so in the Antiquities Act. Third, where Congress authorized the President to revise monument boundaries, as it did at Colonial National Monument, it did so narrowly, in response to monument-specific needs that did not leave thousands of resources without the protections properly afforded to national monuments. Congress also repeatedly rejected legislation granting the President broad revisionary powers, indicating both that Congress understood the President to lack such powers and that Congress intended to retain the power to reduce for itself.

A case can be made that in the past, Congress may have acquiesced in a President's actions to update national monument boundaries that corrected er-

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452. See Joint Resolution Declaring that a State of War Exists Between the Government of Germany and the Government of the People of the United States and Making Provision to Prosecute the Same, Pub. L. No. 77-331, 55 Stat. 796 (1941).

453. See U.S. CONST. art. II, § 2.

rors and omissions resulting from incomplete or inaccurate boundary surveys, to improve protection of the resources identified in monument proclamations based on new information, to clarify that private lands or infrastructure were not part of the monument, or in response to the existential threat posed by two World Wars. But this has limited precedential value for the contemporary actions of President Trump's administration. The handful of prior monument revisions made by prior Presidents falls far short of the 252 actions identified in *Midwest Oil*—and whether Congress was aware of many of those revisions, and thereby able to give its assent, is unclear.

Implied authority to shrink national monuments, if it exists at all, appears to create little cover for President Trump's massive monument reductions. Where other Presidents revised monuments to protect resources or address existential threats to national security, President Trump baldly substituted his "energy first" policy agenda for the preservation objectives underpinning the Antiquities Act and prior monument designations.

Although Presidents have reduced national monuments before, the legality of these reductions was never tested in court and therefore cannot be assumed. The passing of more than a half-century since the last reduction also implies that such powers, if they existed at all, may have withered on the vine. Congress, moreover, forcefully reasserted its authority over the public domain when it enacted FLPMA, repealing the President's implied power to reserve land and limiting the executive branch's power to modify national monuments. FLPMA also fundamentally changed public land policy to increase the emphasis on conservation. Congress could not have intended to affirm an implied presidential power in direct conflict with FLPMA.

But if any power to revise national monuments somehow survived, it must be limited by the scope of prior congressional acquiescence. That acquiescence—at monuments like Navajo, Petrified Forest, Great Sand Dunes, Arches, Hovenweep, Timpanogos, Mount Olympus, and Natural Bridges—was limited to correcting errors in the description of the objects being protected and their surrounding landscape. At the Grand Canyon, Bandelier, and Wupatki, changes responded to new information in ways that enhance protection for the objects identified in the original monument proclamation. At Black Canyon of the Gunnison, Mount Olympus, Glacier Bay, Katmai, Colorado, Scotts Bluff, White Sands, and Craters of the Moon, revisions excluded from a monument private land and infrastructure that predated the monument's designation. And at Santa Rosa Island, Mt. Olympus, and Glacier Bay, revisions responded to existential threats to national security posed by two World Wars. These reductions have little in common with President Trump's reductions.

Only two prior reductions appear to have any similarity to President Trump's reductions to the Bears Ears and Grand Staircase-Escalante National Monuments: the reductions to Mount Olympus and the Grand Canyon II National Monuments. While the creation of both of those monuments was con-

troversial due in part to their size and the extractive uses they displaced, both are distinguishable. Both early monuments suffered from poor quality mapping that compromised both resource protection and management efficiency. Mount Olympus was reduced during a time of war and only after an evaluation that the reductions would not impair the objects for which the monuments were protected. Reductions at Grand Canyon II proceeded only after years of effort, sustained congressional involvement, numerous studies, and a careful drawing of a boundary that at least appears to have improved resource protection and monument management. And both monuments are now national parks that include most, if not all, of the previously removed lands.

Mount Olympus' change in status was precipitated by World War I and the unique role that its forests played in the war effort. Santa Rosa monument was reduced and abolished because of World War II. Bears Ears was eviscerated within a year of its establishment for no reason except that a new President had different policy priorities. Lands released from Bears Ears were opened to mining and drilling and denied the protections afforded them under the original proclamation and as part of the National Landscape Conservation System. Tens of thousands of objects of historic and scientific importance on over 1.1 million acres—more than twice the area of all prior presidential monument reductions combined—lost crucial protections, and they lost those protections without a searching analysis. No credible claim can be made that the reduction advanced the Antiquities Act's goal of protecting lands and objects that are valuable to culture, history, and science; and the proclamation reducing the monument does not even purport to base the decision on national security concerns.

While the Grand Staircase-Escalante National Monument survived longer, it too fell to reductions less than a year into the Trump Administration. That hardly seems like enough time to conduct the searching analysis necessary to justify reducing a national monument, or to ensure that the objects for which the monument was designated were protected. And no such care was taken. President Trump simply decided that energy development was more important than resource protection.

Reasonable people can disagree about the wisdom of individual monument designations or whether the Antiquities Act, which is more than a century old, adequately reflects contemporary values. Those seeking redress for perceived injury are not without a remedy, but that remedy resides in the halls of Congress, which unquestionably has the power to create, modify, or even revoke national monument designations. There is no reason to expand the power of the President by creating implied powers that are supported neither by history nor by law.