July 7, 2017

Review, [MS – 1530]
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

[Docket No. DOI 2017-0002]
Review of Certain National Monuments Established Since 1996

Public Comment Re: Katahdin Woods and Waters National Monument

Dear Secretary Zinke:

The National Parks Conservation Association ("NPCA") has been the leading voice of the American people in protecting and enhancing our National Park System since 1919, the Natural Resources Council of Maine ("NRCM") is the state's leading nonprofit membership organization protecting, restoring, and conserving Maine's environment, now and for future generations, and Elliotsville Plantation, Inc. ("EPI"), is a private operating foundation whose mission is the acquisition and conservation of land and the preservation of open space for the benefit of the public and the conduct of educational and stewardship programs. On behalf of our more than 1.2 million collective members and supporters nationwide, including our 28,000 members and supporters in the State of Maine, we write to ask that you uphold the current monument designation for Katahdin Woods and Waters National Monument ("Katahdin Woods", or the "monument"), maintaining the boundaries and protections as established in the proclamation from President Obama on August 24, 2016 (the "Proclamation").

NPCA and NRCM, along with our supporters in Maine and beyond, worked closely with the Quimby family via EPI, the donors of the land designated as Katahdin Woods, and the National Park Foundation ("NPF") in order to create the monument. NPCA, NRCM and EPI worked with various Maine-based civic, recreation and conservation organizations, business owners, and citizens to ensure that Katahdin Woods is publicly accessible and managed in order to protect the unique and important natural and historical resources within its borders while also allowing for diverse uses, including, but not limited to snowmobiling and limited hunting (two uses which are unique for a National Park Service-managed national monument).

In the comments below, we outline the legal and policy reasons why the Department of the Interior ("DOI") should not recommend any changes to Katahdin Woods, and why changes to Katahdin Woods are beyond the authority of the president. In summary:

- As described in the attached memorandum from the law firm of Arnold & Porter Kaye Scholer, the United States acquired this land under a contractual agreement with the donors. Any change in the national monument status of Katahdin Woods or any reduction in the boundaries or any change in administrating agency or permitted uses of that land would require the consent of the donors. Not only would such an act be a

violation of that contract but such a breach of trust would have a significant chilling effect on future donations to NPF and to the National Park Service ("NPS").

- Apart from any agreement reached with the donors, the president does not have the legal authority to rescind Katahdin Woods' designation as a national monument or otherwise change Katahdin Woods' established boundaries or permitted uses. Only Congress, and not the president, has the authority to make such modifications to monument designations.
- You have asked about the public input received in connection with the creation of this monument. Conserving lands at Katahdin Woods began in 2000 when the Quimby family first began acquiring land in the Maine North Woods from logging companies looking to sell their land adjacent to Baxter State Park. Over the course of the following sixteen years, thousands of local residents, business owners, members of the Maine legislature and local municipal leaders have been involved in on-going discussions around NPS management for this land in the North Woods. Outreach included discussions with the Katahdin Area Chamber of Commerce, Bangor Regional Chamber of Commerce, the Maine Innkeeper's Association, the Penobscot Indian Nation, the New England Forestry Foundation, Maine Forest Products Council, the Maine chapter of the Sierra Club, the office of the Governor of Maine and his Staff and countless other local groups and organizations. The time and energy expended by our organizations demonstrate the commitment to addressing the concerns of groups and communities for the future management, boundaries and uses of the monument.
- Mainers, including the Honorable Senator Angus King, Maine State Attorney General Janet T. Mills, Maine State Representative Steve Stanley, 13,500 Mainers from 371 towns, all 50 states and 53 countries,[1] and officials in bordering counties, support Katahdin Woods.
- Katahdin Woods provides a much-needed economic benefit to the surrounding communities which have been suffering negative impact of the loss of forestry, paper mills and other logging related industries for the past two decades.
- Katahdin Woods meets the requirements of the Antiquities Act (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." Further, Katahdin Woods is of great scientific and historical interest. Among other things, Katahdin Woods encompasses not less than three significant watersheds in the Maine North Woods and is home to countless indigenous Maine species such as moose, lynx, and the American three-toed woodpecker.

I. Any of the Changes Under Review at Katahdin Woods Would Require the Consent of the Donors.

Katahdin Woods was established with 87,500 acres of land donated by EPI under agreements with NPF and NPS. The Roxanne Quimby Foundation, Inc. established a $20,000,000 endowment to support that monument under other parts of such agreements. As explained in the attached memorandum from the law firm of Arnold & Porter Kaye Scholer (the "APKS Contract Memo"), Appendix A, the donors have contractual rights. That memorandum is attached as Appendix A. If President Trump were to revoke the monument designation, reduce the size of the monument, change the agency administering the unit or make other material modifications, such an act would violate those rights unless the donors had consented to the changes. We assume the Department and the Administration would not wish to violate such a contract with a significant donor to NPF and

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[1] As noted in a NRCM press release, dated November 10, 2015 "Widespread Support in Maine, Across U.S. for New National Park", citing a petition provided to Maine's congressional delegation in support of the establishment of Katahdin Woods. https://www.nrcm.org/news/widespread-support-in-maine-across-u-s-for-new-national-park/

NPS, and particularly the covenant of good faith and fair dealing implicit in that contract, as explained in that memorandum.

Such an action would likely chill future gifts to NPF and NPS. The NPF was created by Act of Congress in order to encourage private support for the National Park System.[2] Donors gave approximately $73.5 million in cash, services and property to NPF in 2015 alone.[3] Rescinding or modifying the creation of the Katahdin Woods could damage NPF's credibility as a source of support for the National Park System and damage its fundraising abilities. What might future donors think when they see how these donors were treated?

II. Even with the Donors' Consent, the President Does Not Have the Legal Authority to Rescind, Reduce the Size of or Materially Modify a Monument Under the Antiquities Act.

The current review of 27 national monuments, including Katahdin Woods, does not provide any legal avenue for the president to rescind or reduce in size any national monument. No president has the legal authority to rescind or materially modify any national monument proclaimed under the Antiquities Act. That would be true even if the donors were to consent to such changes.

President Trump's Executive Order on the Review of Designations Under the Antiquities Act signed on April 26, 2017 directs the DOI Secretary to provide the Office of Management and Budget and President Trump with potential recommendations "for such Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out the policy set forth in section 1 of this order." Section 1 of the Order broadly talks about public input, economic growth, the "original objectives" of the Antiquities Act and "appropriately balanc[ing] the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities." At the time of President Trump's Executive Order, you explained that you will consider whether monuments should be "rescinded, resized, [or] modified." When asked if the president has the power to do so unilaterally, you suggested that it is "untested" whether the president has the unilateral power to rescind a monument, but that "it's undisputed the president has the authority to modify a monument."[4]

We urge you, Secretary Zinke, to re-examine your understanding of this issue. The president has no power unilaterally to rescind a national monument designation and no power to modify or "resize" a monument, particularly one that is part of the National Park System, as is Katahdin Woods. We attach a memorandum from the law firm of Arnold & Porter Kaye Scholer ("APKS Authority Memo") (Appendix B) and a law review article by four professors (the "Squillace Article") (Appendix C) who collectively conclude that no such power of rescission exists and no such power to make material changes exists. The only result of the current review ordered by President Trump, therefore, would be to make recommendations to Congress, asking that Congress draft legislation to make whatever revocations or modifications your office and the president believe justified. And as discussed above, the consent of the donors would also be required.

In summary, whether or not the president may make a rescission or modification of a monument designation does not turn on any power granted the president by the U.S. Constitution. This issue instead concerns administration of federally owned land, and the Constitution gives that power exclusively to Congress. U.S. Const., Property Clause, Art. IV, § 3. Whether or not the president has the power unilaterally to revoke a national monument designation therefore depends on whether

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[2] See 54 U.S.C. § 101111 ("Purpose and Establishment of Foundation"). NPF's enabling act only permits it to accept gifts to support the National Park Service. 54 U.S.C. § 101113 ("Gifts, devises or bequests").

[3] National Park Foundation, *Annual Report for 2015*, at 25-26.

[4] "Press Briefing by Secretary of Interior Ryan Zinke to Review the Designations Under the Antiquities Act," Office of the Press Secretary, White House, April 25, 2017.

that power is expressly or by implication delegated to the president by an Act of Congress. The Antiquities Act of 1906 authorizes the president to create national monuments on land owned or controlled by the federal government.[5] The act says nothing about a president having the power to abolish a national monument or to reduce the size of a monument. And no such power may be implied. This is so for several reasons:

First, the U.S. Attorney General opined long ago that the Antiquities Act could not be interpreted to imply that a president has the power to revoke a national monument's designation. No president has attempted to revoke such a designation since that Opinion was issued in 1938.[6]

Second, in the more than 100 years since the adoption of the Antiquities Act, Congress has adopted a comprehensive legislative portfolio to govern federally owned land, into which the Antiquities Act was folded and in conjunction with which it must be interpreted. One of those statutes was the Federal Land Policy and Management Act ("FLPMA"), adopted in 1976.[7]

- One of Congress's purposes in FLPMA was to reassert its own authority over federal land withdrawals and to limit to express delegations the authority of the Executive Branch in this regard.[8] Accordingly, Congress there repealed a number of prior statutes that had authorized Executive Branch withdrawals and revocations, and Congress also repealed a Supreme Court decision that had found an implied power in the presidency to withdraw land from oil exploration.[9] The Supreme Court has made clear that, to harmonize different statutes, "a specific policy embodied in a later federal statute should control our construction of [a prior one], even though it had not been expressly amended."[10] This is particularly so when the later statute is a comprehensive legislative scheme.[11] FLPMA was the very sort of "comprehensive legislative scheme" that requires interpreting the Antiquities Act to harmonize with FLPMA, and it would not be harmonious to read into the Antiquities Act an implied authorization for a president to revoke or materially modify a prior monument's designation. *See* APKS Authority Memo at pages 8-14; Squillace Article at pages 56-69

- Consistent with this, Congress in effect adopted the Attorney General's interpretation that no revocation power should be read into the Antiquities Act by implication. When Congress legislates on a subject, "[C]ongress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning."[12] Yet in FLPMA, Congress did not "affirmatively act to change the meaning" of the Antiquities Act as interpreted by the Cummings Opinion. Congress therefore in effect adopted that interpretation, consistent with its purpose of reasserting its authority over federal lands.

The conclusion that only Congress may revoke a national monument designation is even clearer when the monument, like Katahdin Woods, is part of the National Park System. Ten years after

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[5] 54 U.S.C. § 320301(a).
[6] "Proposed Abolishment of Castle Pinckney Nat'l Monument," 39 Op. Atty. Gen. 185 (1938).
[7] 43 U.S.C. 1704 *et seq.*
[8] 43 U.S.C. 1704 (a)(4).
[9] *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).
[10] *See United States v. Romani,* 523 U.S. 517 (1998).
[11] *See Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981); *see also Hi-Lex Controls Inc. v. Blue Cross*, 2013 WL 228097 (E.D. Mich. Jan. 22, 2013) at *3.
[12] *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 822 (11th Cir. 1998) (addressing legislative action after earlier Attorney General interpretation); *see also, to the same effect, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 381-82 and n.66 (1982) (considering whether rights should be implied under a statute); *Souter v. Jones,* 395 F.3d 577, 598 (6th Cir. 2005).

adoption of the Antiquities Act, Congress adopted the Organic Act of 1916 creating the National Park System.[13] Congress there mandated that the fundamental purpose of the System is to "conserve the scenery, natural and historic objects, and the wild life in the System units ... [and] leave them unimpaired for the enjoyment of future generations."[14] In 1970, Congress adopted amendments to that Organic Act which made clear that national monuments administered by NPS are part of that System and are to be protected as such.[15] And Congress provided that the entire National Park System is a "cumulative expression[] of a single national heritage."[16]

In 1978, not satisfied that the Executive Branch had gotten the message, Congress returned to this subject and added the mandate that:

> the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, *except as directly and specifically provided by Congress*.[17]

Congress clearly did not intend that a president could unilaterally revoke the designation of a national monument that is part of the National Park System without Congress' directly and specifically so providing. Such an act would certainly be in derogation of the values and purposes for which the monument had previously been established. It would be doubly problematic for a monument, such as Katahdin Woods, where the land for establishment of the unit had been specifically donated for that purpose in consultation with NPF for the benefit of NPS.

Moreover, while you have stated that the power to modify a monument is supposedly uncontested, that is not the case. A president does not have the power to do in part what he cannot do in full. In 1935, the Office of the Solicitor of the DOI was asked to opine about the president's power to reduce in size monuments created under the Antiquities Act. The Solicitor concluded that that power did exist based on the Supreme Court's decision in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).[18] When Congress expressly repealed *Midwest Oil*, however, the basis for the Solicitor's decision was removed. *See* Squillace at 67.

Again, that conclusion is doubly true for monuments administered by NPS, such as Katahdin Woods. That is so because Congress adopted provisions governing the National Park System expressly addressing the change in boundaries for any unit of that System, such as Katahdin Woods. While Congress in 1977 gave the Secretary of the Interior the power to make minor boundary adjustments, Congress made clear in 1990 amendments (Pub. Law No. 101-628) that any other changes in boundaries would require a proposal to Congress and legislative action.[19] Congress also made clear that any such proposal would need to be accompanied by, among other things, an analysis of

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13 Now codified at 54 U.S.C. § 100101(a).

14 *Id.*

15 *See* Pub. L. No. 91-383 (National Park System General Authorities Act), codified in this regard at 54 U.S.C. §§ 100102(2), 100501 (defining "National Park System" to include any area administered by the Director of NPS, including for "monument" purposes). Those monuments are as fully covered by general regulations protecting the entire System as are any national parks created by Congress. *See* 36 C.F.R. §1.2 (NPS regulations apply to federally owned land administered by NPS).

16 54 U.S.C. § 100101(b)(1)(B).

17 *Id.*, § 100101(b)(2) (*emphasis added*).

18 Opinion of the Solicitor M27657 (Jan. 30, 1935).

19 *See* 54 U.S.C. §§ 100505, 100506 (a), (c). *See also* H.R. Rep. No. 101-695 (Sept. 13, 1990) at 6 ("The Committee believes it is important to keep in mind that this is a study process and no decisions on these matters will be made unless there is subsequent Congressional action.").

whether or not an existing boundary provides for the adequate protection and preservation of the natural, historic, cultural, scenic and recreational resources integral to the System unit.[20]

Indeed, Congress provided that even "minor boundary changes involving only deletions of acreage owned by the Federal Government and administered by the [NPS] may be made only by an Act of Congress."[21] It would be untenable for the Administration to claim that a reduction in the size of a monument *greater* than a "minor" adjustment could be made unilaterally by the president.

In the Executive Order of April 26, 2017, President Trump asked for a review of whether the designations "appropriately balance the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities." In the unlikely event that a court might find that a president does have the power to rescind or modify a monument designation, however, such a power can be no broader that the Antiquities Act into which the power is implied. No such balancing test is found in the Antiquities Act. The balancing standard laid out in President Trump's Executive Order on April 26, 2017 is therefore inapplicable and must not be relied on by your office in making any recommendations.

III. Responses to The Questions Asked in Your Order.

In the Department's May 5, 2017 press release, comments were sought on a number of specific criteria being considered as part of the current review. We address those criteria below.

A. There Was Substantial Public Outreach and Coordination with Relevant Stakeholders

In the Department's press release, Katahdin was singled out for review based on "Whether the Designation was Made Without Adequate Public Outreach and Coordination with Relevant Stakeholders." We understand this issue was raised particularly as to this monument because some have argued that President Obama proclaimed this monument without an adequate public input or consultation with local elected officials.

But that is not correct. The provisions in the deeds to the federal government and in the Proclamation that allow hunting and snowmobiling within the monument in and of themselves reflect public input. Snowmobiling and hunting are generally prohibited on National Monument grounds managed by NPS. The fact that they are permitted in Katahdin Woods was the result of lengthy and comprehensive discussions with the community. We have highlighted significant aspects of the consultations involved with the creation of the monument below.

Before Katahdin was established, Secretary Jewell adhered to a process of public input laid out by President Obama and her predecessor, Ken Salazar, in the 2011 DOI Report "*America's Great Outdoors: A Promise to Future Generations.*"[22] While there is clearly no legal obligation under the Antiquities Act to consider public input, this Report stated:

> Action Item 8.4a: Implement a transparent and open approach to new national monument designations tailored to engaging local, state, and national interests.

Any recommendations should focus on historic and natural features and cultural sites on federal lands that deserve protection under the 1906 Antiquities Act. In the process of making recommendations, the following should be considered:

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[20] *Id.* at 100506 (a)(1).
[21] *Id.* at 100506(c)(6); *see also* 2006 Management Policies 3.5.
[22] February 2011.

- public input from local, state, and national interests;
- transparency in development and execution of the designation;
- valid existing rights on federal lands; and
- criteria enumerated in law. [23]

This process was established and followed for the Obama Administration's consideration of any and all national monument proposals, including Katahdin Woods. NPCA participated in numerous public meetings held by the Obama Administration of various national monument proposals.

Approximately 90% of the State of Maine is owned by private citizens.[24] The 87,500 acres that comprise Katahdin Woods make up less than 0.4% of the land in Maine, and less than 1% of the mostly undeveloped 10 million-acre area known as the "North Woods". Over the past twenty years, residents of Maine's North Woods have seen an economic shift as the forestry, paper and logging industries have moved out of the area, leaving behind economic uncertainty and causing population shifts to the south.

Beginning in 2011, Lucas St. Clair, President of EPI, began a regional campaign to design a proposal for donating the land east of Baxter to the National Park Service, meeting with local residents, including business owners, politicians, timber industry executives, snowmobilers, anglers, hikers, skiers, river guides, teachers, mill workers and other residents concerned with the future of their communities and the North Woods.

In reaction to his meetings with local residents, Mr. St. Clair drafted a donation proposal for establishing a national park, designed to address the desires of the community including specifically providing access to the land for purposes of hiking, hunting, snowmobiling and skiing. He listened to the concerns of residents and addressed the needs for any park established to include amenities such as campgrounds and improved infrastructure. Because of those conversations, it was an essential element of any park proposal to provide for public access for hunting and snowmobiling – two activities for which access on private land can be uncertain from year to year.

Over five years, the proposal to establish Katahdin Woods as a national park gained local support through such groups as the Katahdin Area Chamber of Commerce, the Katahdin Rotary Club, the Greater Houlton Chamber of Commerce, the Bangor City Council and the Maine Innkeepers Association. Endorsements for the proposal were received by more than 200 local businesses throughout the following Maine regions: Katahdin, Houlton, Presque Isle, Bangor and Acadia.[25]

In April 2015, a Critical Insights poll showed that 67% of residents of Maine's 2nd Congressional district (northern, western and eastern Maine) supported the proposed national park unit. In November 2015, advocates delivered more than 13,000 signatures in support of the proposed park unit from residents of 371 Maine towns and 50 states to Maine's congressional delegation.

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[23] *America's Great Outdoors: A Promise to Future Generations*, at 63-64.

[24] "Public Access to Privately Owned Lands in Maine," by James M. Acheson, Maine Policy Review, Volume 15, Issue 1 at 19 (2006).

[25] http://www.wlbz2.com/news/local/national-park-service-director-hears-public-comments-on-proposed-national-monument/197011505
http://www.pressherald.com/2016/05/16/mainers-express-misgivings-about-north-woods-national-monument/
http://bangordailynews.com/2016/05/16/news/state/maine-people-weigh-in-on-proposed-national-monument-at-packed-forums-in-orono-east-millinocket/
http://wabi.tv/2016/05/16/hundreds-attend-orono-meeting-with-national-park-service-director-to-discuss-possible-national-monument-designation/

After the proposal gained momentum in northern Maine, a national monument designation was pursued. Senator Angus King invited the NPS Director to meet with and answer questions from local citizens in the region.[26] There were several meetings and some impromptu gatherings. The culmination was a well-publicized public meeting in Orono, Maine with over 1,400 Mainers from all over the state, where the vast majority supported the proposal for a national monument managed by NPS. In a state where the population of 60% of towns have fewer than 2,000 residents, this was an impressive turnout. In addition, of the roughly 400 handwritten comments collected at the meeting, approximately 95% supported a national monument. In response to the strong community support for the park proposal, the EPI offered to donate their North Woods land to NPS, with such donation to be handled in accordance with protocols established by the NPF.

On July 11, 2016, as a further show of support by the people of Maine for the designation of the EPI lands as a national monument, thirty-five State Representatives from Maine, seven State Senators and numerous municipal leaders proffered a letter of support to President Obama. The letter specifically asked the president to utilize his authority to designate a new national monument in Maine on the land to be donated. The group indicated that more than 60% of Maine voters support the idea of creating new public lands within Maine.

Once the donation was complete and the title transfers occurred, the land was declared Katahdin Woods in August of 2016. The surrounding towns began to see signs of economic improvement. Real estate sales have picked up, multi-season visitation is increasing and business investments are on the rise.

B. Katahdin Woods Meets the Requirements and "Original" Objectives of the Antiquities Act and Properly Protects Qualifying Objects (Criteria (i) and (ii)).

Your press release asks for comment on, as President Trump's Executive Order specified, whether the designation meets the "original objectives" and requirements of the Antiquities Act, including the requirement that the monument be the "smallest area compatible with the proper care and management of the objects to be protected." It also seeks comment on whether the designated lands are appropriately classified as those eligible for protection under that Act.

The assumption behind the use of the term "original objectives" suggests that there has been some change in the objectives over time, but that is not true. Nor is it true that the "original objectives" were limited to protecting small areas, as some have argued, and as the review of all monuments of more than 100,000 acres suggests. Secretary Zinke stated on April 25, 2017 that the average size of monuments designated in the early years of the Act was 442 acres, but that is also incorrect.

In fact, the Act from its inception was intended by Congress to include large areas having historic or scientific interest as well as small areas around archeological ruins. President Theodore Roosevelt, who you lauded at your press conference, designated monuments of 818,000 acres (1908, Grand Canyon) and 640,000 acres (1909, Mount Olympus). The Supreme Court upheld the Grand Canyon designation in 1920.[27] Indeed, every court to have considered the issue since then has agreed that the Act was intended to protect, not just archeological "objects," but large natural areas having historic or scientific interest, as the Act provides.[28] For example, in 1976, the Supreme Court found that a pool of water and the fish that live there are such objects.[29] Additionally, the Court of Appeals for the

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[26] Letter from the Hon. Angus King, Jr. to Jonathan Jarvis, dated March 25, 2016; NPS Press Release, *National Park Service Director Hears Views on Proposed Monument* (May 17, 2016) (https://www.nps.gov/orgs/1207/05-17-2016b.htm).

[27] *Cameron v. United States*, 252 U.S. 459 (1920).

[28] *See, e.g., Caeppert v United States*, 426 U.S. 128 (1976); *Mountain States Legal Foundation v Bush*, 306 F. 3d 1132 (D.C. Cir. 2002).

[29] *Caeppert,* 426 U.S. at 141-42.

District of Columbia rejected an argument that Giant Sequoia National Monument was a violation of the Antiquities Act because it included supposedly non-qualifying objects, explaining that "such items as ecosystems and scenic vistas … did not contravene the terms of the statute."[30]

Given that the Act may be used to protect objects as large as the Grand Canyon and objects of natural rather than archeological interest that are of historic or scientific interest, size alone does not make a national monument illegal under the Act, nor must the "object" be as constrained as opponents of national monuments argue. We would further argue that the three major watersheds located within the confines of Katahdin Woods qualify as "objects" based on the Grand Canyon decision.

As the proclamation establishing the monument demonstrates, this very special natural and cultural landscape meets these criteria under the Antiquities Act. The objects of historic and scientific interest occur throughout the landscape, in all the 13 deeded parcels donated to NPS. They include remarkable geology, undeveloped watersheds and stunning hydrological features, significant biodiversity and connectivity for plants and animals, and extraordinary opportunities to observe and study all this natural wonder. The objects also include the history of human activity in this landscape, include its significance to the Wabanaki people, loggers and timber companies, recreationists including hunters, anglers, and hikers, artists including John James Audubon and Frederic Edwin Church, and historic figures including Henry David Thoreau and Theodore Roosevelt whose lives were changed by the North Woods. All the land included in the national monument encompasses, and is essential to the proper care and management of, these objects.

Whether it's the wild rivers, critical wildlife habitat, historical significance, awe-inspiring scenery, or night skies and northern lights -- the area is a natural and cultural wonder that Americans should visit and embrace, much like Acadia National Park on Maine's coast. Like Katahdin Woods, Acadia started as a national monument proclaimed by President Wilson after private land had been donated for it. Without the Antiquities Act, neither of these places that are quintessentially Maine would have had a fighting chance to be preserved for all Americans.

Thus, the boundaries of Katahdin Woods meet the Act's requirements that reservations of land: (i) address "historic landmark[s], historic and prehistoric structure[s], [or] other object[s] of historic or scientific interest" and (ii) not exceed "the smallest area compatible with the proper care and management of the objects to be protected". Katahdin Woods clearly contains both scientific and historic value.

Further, the notion that the Antiquities Act should only be used in the face of an imminent threat is not stated in the law. However, the Act is a very important tool when there is some urgency for protection. Not only was there urgency to protect the Katahdin Woods from a conservation standpoint, but also from an economic standpoint. The Maine North Woods had been experiencing an economic shift as the logging and forestry industries were leaving the area. Redevelopment of the woodlands around Baxter State Park not only serves the purpose of preserving land, history and nature but also provides local communities with opportunities created by establishing a nationally recognized recreation destination.

C. Because the Land Here Was Privately Owned before the Designation, The Designation Had No Negative Effects On Permitted Uses (Criteria (iii) and (iv)).

The press release asks for comments on "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, ("FLPMA") (43 U.S.C. 1701(a)(7)), as well as the effects on the available uses of Federal lands beyond the monument boundaries." Criteria (iv) asks about the effect of the designation on non-federal land within or beyond the boundaries. But those

[30] *Tulare County v. Bush*, 306 F. 3d 1138, 1141-42 (D.C. Cir. 2002).

criteria have no application here. First, FLPMA does not apply to a National Park System unit like Katahdin Woods. Second, this was land privately owned before the designation, so those lands were not "Federal lands." Uses of such private land were instead a function of EPI's decisions, subject to local law. And the designation will have only a positive impact on non-federal owners within or beyond the boundaries.

Katahdin Woods is somewhat unique among federal lands within the national monument system due to certain designated public uses specified in the conveyancing deeds from the donors. Specifically, snowmobiling and limited hunting being permissible within the boundaries of the national monument is not something which is typically the case. Usually, for hunting activities to be permitted on NPS land, such an act would require congressional consent. Here, by utilizing the donation process through NPF, EPI was able to address the local community desires and specify within the conveyancing documents that activities such as snowmobiling and hunting (activities not always guaranteed on private land without consent of the owner) were to be permissible for the general public to enjoy on several parcels where EPI previously allowed them.

Now that Katahdin Woods is managed by NPS, it is open and available for the public to enjoy. It is managed per the proclamation, deeds, and national park laws and policies which promote general public access, from the vehicle access to the loop road to mountain biking on trails to hiking and canoeing. Baxter State Park, which is adjacent to Katahdin Woods, is managed by the State under a different set of rules. Its rules are slightly more restrictive than those of Katahdin Woods. For instance, permits are required for vehicle use and hunting is generally prohibited.[31] Therefore, Katahdin Woods provides the public guaranteed access to many activities in the area.

The proclamation declaring Katahdin Woods requires NPS to prepare a management plan in three years. The management plan will outline 1) natural and cultural resources protection requirements; 2) infrastructure issues and needs; 3) activities and recreational uses; and 4) issues that will require further planning. NPS has already held four public outreach meetings (listening sessions) for the management plan. All took place last fall. Approximately 550 people attended those sessions. The agency is well on its way to begin drafting a plan with the community.

D. Concerns of State, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected States, tribes, and localities (Criterion (v)).

Many tribal, regional and local officials have issued their support for the monument designation in the last several years. They believe the monument plays an important role in the protection of natural and cultural resources as well as the health of the economy in the region.

The Chief of the Penobscot Nation supported the designation before the area was declared a national monument because of the protection it provides for the resources. Chief Francis stated in a letter to President Obama:

> *…The Penobscot River in central and northern Maine is the heart of the cultural identity of the Penobscot Nation. We have been the caretakers of this great watershed since time immemorial, and we consider that responsibility a very serious priority for our tribe.*
>
> *…Designation of the land surrounding these rivers as a national monument would ensure that these lands and waters are protected permanently. Tribal members, as well as all residents and visitors to Maine, would be able to paddle and fish the entire area forever.*

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[31] Baxter State Park Authority, Rules and Regulations, Ch. 1 § § 3, 5 (http://baxterstatepark.org/wp-content/uploads/2017/03/RulesRegsBSP2017.pdf).

Residents of the Katahdin region and tribal members alike would benefit, not only from long-term protection of the lands surrounding the rivers but from the economic activity that a new national monument would bring to the greater Bangor and Katahdin regions… (see Appendix D)

On May 3, 2017, local elected officials from the Katahdin region wrote you a letter requesting support for the monument. They effectively asked you to reject any rescission of the monument. The 19 elected officials said:

All of the signers of this letter are elected officials in the Katahdin region surrounding the Katahdin and Waters National Monument that was designated on Aug. 24, 2016.

Some of us opposed the National Monument before it was created. Some of us supported it. And some of us took no public position before it was created.

However, now that the Monument has been created, all of us are united in our desire to see it continue and succeed. Although the Monument is less than a year old, already some businesses in the region have experienced an uptick in activity. Real estate sales have picked up. The communities have begun to heal from the divisiveness that existed during the debate about the Monument. Our communities now have hope again.

We understand that there are some who have talked of rescinding the designation of this Monument. We encourage you to reject that idea.

Instead we encourage you to do everything in your power to ensure that this Monument is a success. Our communities will thank you for that. (see Appendix D)

Furthermore, the Bangor Region Chamber of Commerce wrote Maine's congressional delegation on May 21, 20017, to address the issue of rescinding the monument's designation. The City of Bangor is major transportation hub in the region including the Bangor International Airport that is the initial starting point for many visitors traveling to Katahdin Woods and Acadia National Park. It stated:

…The national monument represents only one element of a larger economic development strategy for the Katahdin region, but it is an important element. Real estate sales, outdoor recreation investments, and tourism promotion in the region all depend on certainty. And, investment in business that rely on the outdoors and use of outdoor resources will not occur without certainty. Any effort now to rescind the national monument would only reignite instability, rancor, and uncertainty for communities that strongly need forward momentum on economic progress.

For these reasons, the Board of Directors of the Bangor Region Chamber of Commerce opposes efforts to overturn the proclamation that established the national monument as that would undermine the expectations that have become settled in the region, and offer to assist our elected officials as well as the business community in the Katahdin Region as they incorporate the Katahdin Woods and Waters National Monument into a larger economic development strategy. (see Appendix D)

Recently, 36 businesses surrounding Katahdin Woods wrote to Maine's congressional delegation echoing the previous comments about economic rebound in the region. You met with many of these business owners during a breakfast meeting on June 16th, 2017 at the Twin Pines Camps. (see http://www.pressherald.com/2017/06/15/zinke-leaves-door-open-to-katahdin-national-park-calls-federal-ownership-settled/). They said:

…A number of business owners in the region have already noted an increase in business as a result of the establishment of the new Monument. In addition, it appears that real estate sales have picked up measurably as a result of the National Monument.

For these reasons, we urge you to strongly support the National Monument and the many residents, businesses, and their employees who will benefit from it. We hope that you will work with us to help our communities take advantage of the opportunities the National Monument provides. Now is the time for all of us to pull together to ensure that we derive the maximum benefits possible from the Katahdin Woods and Waters National Monument.

These comments and others from around the state and region echo a similar theme of supporting the monument and moving toward strong natural and cultural resource protection, greater public access, and robust economic health for the area.

E. Katahdin Woods Is Unique Because it is Privately Endowed (Criterion vi)).

The press release asks about the availability of federal resources to properly manage the designated area. But the Quimby Family Foundation provided for an endowment of $20,000,000 in order to support operations of Katahdin Woods. As set forth in the Memorandum, dated July 25, 2016, from Will Shafroth, President of the National Park Foundation, hours were spent with the Quimby family discussing the structure and requirements needed for appropriate development and management of the monument. For Katahdin Woods, the Quimby family via EPI not only wanted to donate the 87,500 acres which were to be designated as a national monument but also provide funding such that the national monument could succeed in its intended purpose of preserving and conserving the land of the North Woods while also providing for access, enjoyment and recreation for the citizens both locally and globally.

F. Practical and Economic Impact of the National Monument Designation (Criteria vii):

National parks protect America's heritage and are some of the most popular destinations in the world with 417 park units, 23 national scenic and national historic trails, and 60 wild and scenic rivers. Last year, visitation to the National Park System reached a peak of over 330 million visitors. As a result, they deliver robust economic returns of $10 in economic benefits nationally for every dollar invested in the NPS. The economic value of parks has grown along with visitation so that last year, national parks supported nearly $35 billion in economic activity and 318,000 jobs. NPCA and other polling indicates the vast popularity of national parks and strong bipartisan support for adequately funding them.

The NPS budget is roughly $3.4 billion, which includes $2.85 billion appropriated by Congress plus expected fee revenue. NPS roads also benefit from Highway Trust Fund dollars for maintenance totaling $268 million per year. NPS has roughly 20,000 employees. Each NPS unit is allocated a budget including Katahdin Woods.

Katahdin Woods is already receiving visitors and we believe will see growth as more Americans and international visitors learn of the monument's existence. The evidence of this visitation growth is already happening. Following the monument designation last August, over 1200 vehicles entered the Katahdin Woods and Waters Loop Road before it was closed for the winter season. Those numbers reflect an approximately threefold increase in visitor traffic from prior to park opening. Based on recordkeeping by EPI, in prior years, the Loop Road averaged about six hundred vehicles per year. Katahdin Woods doubled visitor traffic in less than 2 months in the fall of 2016. While NPS does not have a firm number of actual guests, a reasonable assumption would be two individuals per vehicle, which would suggest that almost 2500 people visited Katahdin Woods in 2016 following the monument's opening. Further, it is estimated that last winter approximately five hundred skiers

utilized the north entrance trails and approximately 150 park visitors stayed overnight in on-site huts. So far, for 2017, Katahdin Woods has employed traffic counters on the Loop Road and North Entrance since opening day and the most recent readings (approximately four weeks old) reflect approximately 600 vehicles (estimated as 1,200 people) on the Loop Road and 240 vehicles (approximately 480 people) utilizing the North Entrance. With respect to the Grondin Road entrance, as of [three weeks ago] the National Park Service counters reflected approximately 80 vehicles (160 visitors) at that location.

Funding from the NPS budget and endowment will help toward making improvements and investments in facilities and infrastructure to enhance visitors' experiences at Katahdin Woods. This will undoubtedly bring more visitors and visitor-spending to the area.

G. Even if the President had the Unilateral Authority to Rescind the Designation of Katahdin Woods, Doing So Would Present the Federal Government with Significant Questions about the Disposition of the Land (Criterion (vii)).

The press release finally asks for comments on "such other factors" as the Secretary deems appropriate." Apart from the other factors discussed above, we urge the Secretary to consider what disposition of this land could be made in the event the monument designation was revoked.

In the case other monuments under review, we assume you are thinking that revoking a designation or reducing the size of the monument would mean the land would return to its status before the designation. But, even if that is so for other units, it is not so in the case of Katahdin Woods because the land was not previously owned by the Federal Government. In this case, therefore, a revocation or reduction in size would present you with significant issues about the disposition of the land.

First, while some have advocated that the land be turned over to the State, such an act or any other attempt to sell or convey this land would require an act of Congress, apart from the need for the consent of the donors. That is so because the land would still be administered by NPS so it would be subject to the laws applicable to the National Park System. *See* 54 U.S.C. § 100501 (the "System shall include any area of land or water administered by the Secretary, acting through the Director [of the NPS], for … other purposes."). The Secretary could not sell, deed, gift or otherwise transfer the land to any other party, including the State of Maine. The Secretary may not convey or lease "property within national parks or within national monuments of scientific significance."[32] Department regulations define a "national monument of scientific significance" to mean "a unit of the National Park System designated as a national monument by statute or proclamation for the purpose of preserving landmarks, structures, or objects of scientific interest."[33] The Katahdin Woods proclamation expressly states that it is based on the presence of objects of scientific interest, and it identifies multiple features of scientific interest (such as rare wildlife, its large and distinctive watershed, and geological formations dating to the Devonian period). Moreover, Congress has excepted "land reserved or dedicated for national forest or national park purposes" from provisions of law that permit sales and disposal of excess property.[34]

Nor could these lands be assigned to the management of the State of Maine, as some have suggested.[35] The statutes governing the National Park System authorize the Secretary to enter into cooperative management agreements with State authorities where a Park System unit is adjacent to a State Park. However, the statutes also provide that "[t]he Secretary may not transfer administration

[32] 54 U.S.C. § 102901.
[33] 36 C.F.R. § 17.2.
[34] See 40 U.S.C. § 102.
[35] *See* Letter from the Hon. Paul R. LePage, Governor of the State of Maine, to the Hon. Ryan Zinke, Secretary of the Interior, dated May 24, 2017, at 2.

responsibilities for any System unit under this paragraph."[36] And in authorizing some other acts, Congress made clear that "in no case is this limited relinquishment authority to be construed as permission to cede management control of any National Park System area to any other managing agency."[37]

In addition, the Organic Act's mandates would continue to apply to this land after a revocation, assuming it were lawful. That would mean, for example, that the Secretary could not permit commercial logging there. The Organic Act requires NPS to "conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[38] Consistent with this mandate, the statute severely limits the sale of "services, resources, or water" within a unit, and among other things only permits such transactions so long as the activities do not "jeopardize or unduly interfere with the primary natural or historic resources of the System unit."[39] Logging, moreover, would obviously be inconsistent with the Organic Act's conservation directive. As stated by the Sixth Circuit Court of Appeals, "unlike national forests, Congress did not regard the National Park System to be compatible with consumptive uses."[40]

Finally, the Executive could not avoid these statutory requirements by simply transferring the administration of these lands from NPS to another agency: the law does not permit one to do indirectly what one cannot do directly. As explained in the APKS Authority Memo attached, the Executive Branch is not permitted to modify the proclamation declaring a national monument under the Antiquities Act. Thus, the president could not avoid the above statutory requirements by simply "crossing out" "NPS" as the responsible administrator for the monument and inserting the name of a different agency. In addition, once federally-owned lands have been reserved for some purpose by lawful action of the Executive Branch, in the absence of specific statutory authority, only the Congress may place those lands in the public domain. As the Solicitor General of the Department of the Interior found long ago:

> The authority of the Executive to establish national monuments under the provisions of the act of 1906 [the Antiquities Act] has not been curtailed by subsequent legislation but it has frequently been ruled by the Attorney General that in the absence of authority from Congress the president may not restore to the public domain lands which have been reserved for a particular purpose ....[41]

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[36] 54 U.S.C.S § 101703(a).
[37] H. R. Rep. No. 94-1569, at 7 (1976).
[38] 54 U.SC. § 100101(a) (Promotion and regulation).
[39] 54 U.S.C. § 100901.
[40] *Michigan United Conservation Clubs v. Lujan*, 949 F.2d 202, 207 (6th Cir. 1991) citing the Organic Act, 54 U.S.C. 100101, as previously codified at 16 U.S.C. § 1.
[41] *Opinion of May 16, 1932*, M-27025, at 4 (citing 10 U.S. Op. Atty. Gen 359; 16 Op. 121, 123 17 Op. 168; 21 Op. 120). Other opinions are to the same effect. *See Opinion of Jan. 30, 1935*, M-27657 (stating that an interdepartmental transfer would be invalid); *Opinion of Apr. 20, 1915*, M-27657 (lands underlying a monument administered by the Department of Agriculture remained under that Department's administration following reduction in size of monument); *Opinion by Attorney General Edward Bates to the Secretary of the Interior*, 10 U.S. Op. Atty. Gen. 359 (1862) "([T]he President derived his authority to appropriate this land to military purposes, not from any power over the public lands inherent in his office, but from an express grant of power from Congress to erect fortifications ... . But, in my opinion, he had no power to take them out of the class of reserved lands, and restore them to the general body of public lands.").

And transferring the management of a unit of the National Park System outside of NPS would certainly be "in derogation of the values and purposes for which the System units have been established." Such an act could only be effected "as directly and specifically provided by Congress."[42]

IV. Conclusion.

NPCA, NRCM and EPI urge the administration to maintain the current protections of the Katahdin Woods and Waters National Monument. We strongly recommend that your office not make any recommendations to rescind the national monument status or alter the boundaries of the land from that which was donated, or make any significant changes that would allow illegal or inappropriate uses not currently allowed in the monument. Instead, we ask that your office and NPS continue to provide the leadership necessary to move forward with the collaborative resource management plans that properly protect this treasured landscape. Katahdin Woods is a unique segment of the Maine North Woods with significant educational, scientific and recreational value worthy of its current designation and wholly in keeping with the intention and written purpose of the Antiquities Act and consistent with the Gift Agreements entered into between EPI, the Quimby Family and NPF, on behalf of NPS.

Since its enactment over a hundred years ago, the Antiquities Act has been one of our nation's most critical conservation tools for preserving our nation's most important public lands and waters. Our national parks and monuments and other protected public lands and waters unite all Americans by protecting our shared American heritage for future generations to enjoy. The sheer diversity of historic, cultural, and natural treasures that have been protected by the Antiquities Act is the reason why hundreds of groups representing sportsmen, cultural heritage organizations, evangelicals, conservation, recreation businesses, historic preservation, social justice, and many others all oppose efforts to undermine our national monuments and view an attack on any one national monument as an attack on them all.

To call into question whether our national heritage is worth protecting will have lasting repercussions on the preservation of our public lands for generations to come. Eight Republican and eight Democratic presidents have designated 157 national monuments under the authority of the Antiquities Act. As noted above, this includes nationally significant cultural, historical, and natural sites such as, the Grand Canyon and Acadia National Parks, Statue of Liberty and Muir Woods National Monuments, and the Chesapeake and Ohio Canal National Historical Park. In fact, many of our nation's most popular and iconic national parks were first protected using the Antiquities Act. More recently, the Antiquities Act has help safeguard and honor more diverse stories in the National Park System through the designations of Stonewall, Belmont-Paul Women's Equality, and César E. Chávez National Monuments. We urge you to imagine what our country would be like without these incredible places, protected just as they should be.

Further, as addressed in the APKS Contract Memo, a contractual relationship was established between the donors and NPF and NPS under which the donated land would be made a national monument administered by NPS. If the president were permitted to redesignate or modify the scope or use of Katahdin Woods without consent of the donors, such action would undoubtedly negatively impact NPF's future ability to secure donations, both of land and of monetary endowments.

Thank you for your consideration of these comments and those of our members and supporters. We call on your administration to maintain and support all of our country's national monuments, including Katahdin Woods in order to protect these important lands, while leaving a lasting legacy for all Americans.

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[42] 54 U.S.C. § 100101(b)(2).

Sincerely,

Theresa Pierno
President and CEO
National Park Conservation Association

Lisa Pohlmann
Executive Director
Natural Resources Council of Maine

Lucas St. Clair
President
Elliotsville Plantation, Inc.

Enclosures

Appendix A Arnold & Porter Kaye Scholer Memo: Any Material Change in the Proclamation Designating Katahdin Woods and Waters a National Monument without the Consent of the Donors would Likely Constitute a Violation of the Contract Between Them and the United States

Appendix B Arnold & Porter Kaye Scholer Memo: The President Has No Power Unilaterally to Abolish or Materially Change a National Monument Designation Under the Antiquities Act of 1906

Appendix C "Presidents Lack the Authority to Abolish or Diminish National Monuments" by Mark Squillace, Eric Biber, Nicholas S. Bryner, Sean B. Hecht. Virginia Law Review Online, Vol. 103, 55-71, June 2017.

Appendix D Informational Packet on Katahdin Woods and Waters Proposed National Park and National Recreation Area

Appendix A

Arnold & Porter Kaye Scholer Memo: Any Material Change in the Proclamation Designating Katahdin Woods and Waters a National Monument without the Consent of the Donors would Likely Constitute a Violation of the Contract Between Them and the United States

Any Material Change in the Proclamation Designating Katahdin Woods and Waters National Monument without the Consent of the Donors would Likely Constitute a Violation of the Contract Between Them and the United States

President Trump's Executive Order on the Review of Designations Under the Antiquities Act signed on April 26, 2017 directs the Secretary of the Department of Interior to provide the Office of Management and Budget and President Trump with recommendations "for such Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out the policy set forth in section 1 of this order." [1] Section 1 of the order broadly talks about public input, economic growth, the "original objectives" of the Antiquities Act and "appropriately balanc[ing] the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities."[2] At the time of President Trump's Executive Order, Secretary Zinke explained that he would consider whether monuments should be "rescinded, resized, [or] modified."[3] When asked if the president has the power to do so unilaterally, the Secretary suggested that it is "untested" whether the president has the unilateral power to rescind a monument, but that "it's undisputed the president has the authority to modify a monument."[4]

We have been asked by our client, National Parks Conservation Association, to evaluate whether a binding contract was formed when Katahdin Woods and Waters National Monument ("Katahdin W&W") was established by Presidential Proclamation No. 9476 on August 24, 2016. In summary, while we do not represent the donors of the land that became Katahdin W&W and do not have access to all of the facts relating to that transaction, it appears that a binding contract was entered into between the donors and the United States under which any changes in the status of that land as a national monument managed by the National Park System ("NPS") or any change in the monument's boundaries or the uses of the land could not be made without the consent of the donors.

DISCUSSION

The land that became Katahdin W&W was the subject of a gift from certain entities related to the family of Roxanne Quimby. The documents reflecting that transaction make clear that a contract was made between those entities and the United States under which the land would be made a national monument administered by NPS for the purposes and uses set forth in

[1] Exec. Order No. 13792, 82 Fed. Reg. 20,429 (May 1, 2017).

[2] *Id*.

[3] "Press Briefing by Secretary of Interior Ryan Zinke to Review the Designations Under the Antiquities Act," Office of the Press Secretary, White House, April 25, 2017.

[4] *Id.*

President Obama's Proclamation 9476. No material change in the status of the land or the purposes and uses under which it is administered, or the administration of the land by NPS, could therefore be made without the agreement of the donors. Accordingly, Secretary Zinke should not make any recommendation for the President to take any action as to Katahdin W&W without obtaining the approval of the donors. Otherwise, the United States would be violating that contractual arrangement. Even worse from a public appearance perspective would be any breach of the implied covenant undertaken by the United States in this regard to act in good faith and not deprive the donors of their reasonable expectations in the performance of the contract.

We have reviewed certain documents relating to the gifts of this land. Those include (i) an agreement between the Roxanne Quimby Foundation, Inc. (the "Foundation") and the National Park Foundation ("NPF") entitled "Gift Agreement Relating to the Proposed Katahdin Woods and Waters National Monument" (the "Foundation Agreement"), under which the Foundation agreed to make certain contributions to NPF; (ii) a Gift Agreement between Elliotsville Plantation, Inc. ("EPI") and NPF, dated September 30, 2014 (the "EPI Agreement"), under which EPI agreed to transfer the land; (iii) an Addendum to the EPI Agreement dated August 19, 2016 (the "EPI Agreement Addendum"); and (iv) an Agreement Concerning Affirmative Obligations and Indemnification between EPI and the Department of the Interior and NPS dated August 17, 2016 (the "EPI Indemnity Agreement") (together, the "Gift Agreements"). We have also reviewed Proclamation 9476, the deeds by which EPI effectuated the transfer of the land to the Federal Government and certain other documents relating to that transaction.

There does not appear to be any doubt that a contractual agreement was reached between the Foundation and EPI, on one hand, both vehicles of the Roxanne Quimby family, and the Department of the Interior, acting through NPS and NPF, on the other. Under that agreement:

- EPI agreed to transfer 87,500 acres of land to NPS. The EPI Agreement Addendum, signed by the president of NPF and Roxanne Quimby, states that "EPI intends to donate [that land] to the United States in 2016 for the purpose of establishing a National Monument to be managed as a unit of the National Park System,…".[5] That Agreement references a map entitled "Proposed National Monument Designation of EPI Lands." NPF agreed that the gift would be counted as a gift to NPF's "Centennial Campaign for America's National Parks".[6]
- The Foundation agreed to donate $20,000,000 over time to NPF and has made the first contribution of such funds. The Foundation Agreement also refers to EPI's intent as described above and states that the Foundation agrees to provide an endowment "to further the purposes of the Monument".[7]

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[5] EPI Agreement Addendum, at 1.

[6] *Id.*

[7] Foundation Agreement, at 1.

- On August 17, 2016, EPI transferred the land.
- On August 24, 2016, President Obama issued Proclamation 9476, establishing Katahdin W&W with the land transferred by EPI.

Contract formation with the federal government is governed by the "ordinary principles for contract construction and breach that would be applicable to any contract between private parties."[8] In order to be valid and enforceable, agreements with the federal government must satisfy two elements: (1) a mutual intent to contract including offer, acceptance, and consideration; and (2) authority of the federal government representative to enter into or ratify the agreement.[9] The agreement must also be sufficiently definite as to its material terms, so that "the parties can be reasonably certain as to how they are to perform."[10]

In *McClare v. Rocha*, the Supreme Judicial Court of Maine laid out the requirements for the creation of a contact to transfer land. "[T]he essential material terms" for a contract to sell land, said the court, were "identification of the parties, the property, and the purchase price."[11] These terms, as well as the mutual assent to be bound by them, may be established over several documents.[12] The facts here meet these requirements for creation of such a contact. Moreover, the transfer and acceptance of the land, the payment of the first installment of the funding to the endowment and the designation of the land promptly thereafter as a national monument by President Obama reflect at least initial performance. This performance on each side further evidences the existence of a contract and mutual assent, and that the parties agreed that the land should be used solely for the creation of the Monument under the care of NPS.[13]

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[8] *United States v. Winstar Corp.*, 518 U.S. 839, 871 (1996).

[9] *Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 885 F. Supp. 2d 156, 182-83 (D.D.C. 2012).

[10] *LanQuest Corp. v. McManus & Darden LLP*, 796 F.Supp.2d 98, 102 (D.D.C.2011).

[11] 2014 ME 4, ¶ 19, 86 A.3d 22, 28.

[12] *Id.* (finding contract may exist where terms and parties identified in separate emails); *see also* Restatement (Second) of Contracts § 132 (1981) ("The memorandum may consist of several writings if one of the writings is signed and the writings in the circumstances clearly indicate that they relate to the same transaction.").

[13] *See* Restatement (Second) of Contracts § 5 (Am. Law. Inst. 1981) ("The terms of a promise or agreement are those expressed in the language of the parties or implied in fact from other conduct. Both language and conduct are to be understood in the light of the circumstances, including . . . course of performance."); *Brooks Bros. v. Harris*, 432 A.2d 750, 752 (Me. 1981) ("It is a black-letter principle of contract law that 'any conduct of one party, from which the other might reasonably draw the inference of a promise, is effective in law as such.'").

The fact that various agreements were entered into with different governmental entities is of no consequence in concluding that a contract was formed. NPF was acting for the benefit of the Department of the Interior and NPS in entering into the agreements. Not only do the Gift Agreements make that clear,[14] but NPF itself is an entity established for that very purpose.[15] NPF was of course chartered by Congress in 1967 in order to "encourage private gifts of real and personal property… for the benefit of [the National Park Service]… to further the conservation of natural, scenic, historic, scientific, educational, inspirational or recreational resources for future generations of Americans . . . ."[16] Accordingly, Will Shafroth, President of NPF, explained to Ms. Quimby in a July 25, 2016 memorandum, among other things relevant here, that NPF had been working with NPS to better understand the start-up costs for the monument and NPS endowment needs for the "long-term success of the Monument . . . ."

There does not appear to be any doubt, moreover, that the intention of the parties to these agreements was that the land would be used as a national monument to be administered by NPS. Both the EPI Agreement Addendum and the Foundation Agreement, as noted above, reflect that EPI intended to donate the "land gift to the United States in 2016 for the purpose of establishing a National Monument to be managed as a unit of the National Park System."[17] The Foundation Agreement specifies that the funds are to be used for "Monument purposes," including for the "[o]perational needs of the NPS," "[p]ark planning," capital improvements "such as trails, signage, camping, boating, parking, visitor contact facilities and other public facilities," and the acquisition of property and easements "to improve public access to or management of the Monument."[18] The deeds that transferred the land to federal ownership were accepted by the United States on August 17, 2016, and the acceptance for each deed states that the grant is accepted "by and through" an officer of the "Department of the Interior, National Park Service, Northeast Region Land Resources."[19] On the same day, the EPI Indemnity Agreement was

[14] Among other things noted in the next paragraph of the text, Paragraph III of the EPI Agreement indicates it is the Donor's intent that the land will be acceptable to the National Park Service in keeping with its mission and strategic objectives. Paragraph I of the EPI Agreement indicates the Donor will be consulted if there is a change in use.

[15] *See* 54 U.S.C. § 101111 ("Purpose and Establishment of Foundation"). NPF's enabling act only permits it to accept gifts that are for the benefit of NPS. *Id.* at § 101113 ("Gifts, devises or bequests").

[16] 54 U.S.C. § 101111.

[17] EPI Agreement Addendum at 1. When the Board of Directors of EPI approved the transfer, moreover, they expressly stated their understanding that the gift was being made "to facilitate having such Property declared a National Monument." Unanimous Written Consent To Action Without Meeting of the Board of Directors of EPI, dated August 15, 2106.

[18] Foundation Agreement at 1-2.

[19] Deeds dated August 12, 2016.

signed between the donor "and the United States of America, Department of the Interior, National Park Service," and was signed by the Northeast Regional Director of National Park Service, acting on behalf of the Department of the Interior. That Agreement provides that, except with the written consent of EPI, the United States may not "seek to amend any of the Agreements ... where the results would be to increase EPI's risk," making clear that the land may only be used as set forth in the Proclamation and deeds unless the donor's consent is obtained.[20]

Moreover, the Proclamation itself, dated one week after the land transfer, states that EPI has donated the land to NPS "for the purpose of establishing a national monument to be administered by the National Park Service" and that EPI "established a substantial endowment with the National Park Foundation to support the administration of a national monument."[21] The Proclamation states that the "Secretary of the Interior … shall manage these lands through the National Park Service . . . ."[22]

Furthermore, it is well-established that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."[23] This obligation requires "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."[24] "[E]vasion of the spirit of the bargain" and "willful rendering of imperfect performance" both violate this obligation.[25] As discussed above, the agreed common purpose of the Quimby family's grant of these lands and funds - and NPS's and the NPF's acceptance thereof - was the creation of Katahdin W&W.

CONCLUSION

Accordingly, apart from other reasons why the President may not do so, which we have addressed elsewhere, if the President were to revoke the Katahdin W&W national monument designation, reduce its size or make any other material changes in its management or permitted uses of the land, without the consent of the donors, such an act would constitute a violation of the agreement made between the United States and the donors, including the United States' duty and obligation of good faith and fair dealing.

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[20] EPI Indemnity Agreement at 2.

[21] Proclamation No. 9476, 81 Fed. Reg. 59,121 (Aug. 26, 2016) (Establishment of the Katahdin Woods and Waters National Monument).

[22] *Id.*

[23] Restatement (Second) of Contracts § 205.

[24] *Id.* at cmt. a.

[25] *Id.* at cmt. d.

ARNOLD & PORTER KAYE SCHOLER

June 29, 2017

Robert D. Rosenbaum
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Appendix B

Arnold & Porter Kaye Scholer Memo: The President Has No Power Unilaterally to Abolish or Materially Change a National Monument Designation Under the Antiquities Act of 1906

The President Has No Power Unilaterally to Abolish or Materially Change a National Monument Designation Under the Antiquities Act of 1906

We have been asked by our client, National Parks Conservation Association, whether a sitting President may unilaterally abolish or materially change a national monument that was established by an earlier President under the authority of the Antiquities Act of 1906. The question arises in the context of President Trump's Executive Order of April 26, 2017 directing the Secretary of the Interior to conduct a review of all national monuments designated since 1996 which are at least 100,000 acres or which the Secretary determines were designated without adequate public input.[1] The Executive Order directs the Secretary to report back to the President and make recommendations "for such Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out the policy set forth in section 1 of this order." Section 1 broadly talks about public input, economic growth, the "original objectives" of the Antiquities Act and "appropriately balance[ing] the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities."

President Trump stated when he issued the Order that "the Antiquities Act does not give the federal government unlimited power to lock up millions of acres of land and water, and it's time that we ended this abusive practice."[2] That review will cover some 25 national monuments designated or expanded since 1996.

President Trump said he was particularly eager to change the boundary of Bears Ears National Monument in Utah.[3] President Obama designated that monument primarily at the request of Native American tribes, declaring that the "paleontological resources [there] are among the richest and most significant in the United States" and that the area's "petroglyphs and pictographs capture the imagination with images dating back at least 5,000 years."[4] President Trump, however, referred to this monument designation as a "massive federal land grab,"[5] which suggests that the federal government did not already own the land before that event. However, the federal government has owned that land since long before Utah became a state in 1896. While the federal government made land grants to the new State for various purposes,[6] the new State's constitution, as Congress required, "forever disclaim[ed] all right and title" to federal

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[1] *Review of Designations Under the Antiquities Act,* Exec. Order 13792, 82 Fed. Reg. 20429 (May 1, 2017).

[2] Juliet Eilperin, "Trump orders a review of newer national monuments," Washington Post, April 27, 2017, at A3.

[3] *Id.*

[4] *Establishment of the Bears Ears National Monument*, Proclamation No. 9558, 82 Fed. Reg. 1139 (Jan. 5, 2017).

[5] Eilperin, at A3.

[6] *See* Utah Enabling Act, ch 138, § § 6-12, 28 Stat. 107 (1894), https://archives.utah.gov/research/exhibits/Statehood/1894text.htm.

lands within the State's boundaries."[7] Under these circumstances, it is unclear from whom the federal government supposedly "grabbed" this land.

Secretary Ryan Zinke explained at the time of President Trump's Executive Order that he will be considering whether monuments should be "rescinded, resized, [or] modified." When asked if the President has the power to do so unilaterally, he said it is "untested" whether the President has the unilateral power to rescind a monument but that "it's undisputed the President has the authority to modify a monument."[8]

It is apparent, in part from the President's terminology (e.g., that Bears Ears was a federal "land grab") and the Secretary's description of the law, that they have been influenced by a March 2017 report written for the American Enterprise Institute by John Yoo and Todd Gaziano entitled "Presidential Authority to Revoke or Reduce National Monument Designations." Those authors argue there that President Trump has the authority to rescind or revoke the creation of national monuments by President Obama and that the President also has the authority to reduce the size of national monuments. They also argue that the Antiquities Act only authorized, or at least that Congress only intended that it be used to designate, relatively small areas as monuments around human archeological sites.

It is beyond the scope of this memorandum to discuss the merits of particular national monument designations or the fact that President Obama established procedures to assure there was significant public outreach and input before each of his monument designations. The purpose of this memorandum is instead to address the Yoo and Gaziano arguments about the scope and nature of the monuments Congress authorized to be designated in the Antiquities Act and their arguments that a President may unilaterally rescind or materially reduce the size of a monument previously established. After evaluating the U.S. Constitution, relevant statutes and other relevant authorities, we have concluded that Yoo and Gaziano are wrong about these matters.

Executive Summary

The authority granted by the Antiquities Act is not limited to small areas around human archeological sites.

President Trump's Executive Order and accompanying Administration statements suggest that the "original" objective of the Antiquities Act was limited to permitting the President to set aside small areas of land around human archeological sites. Monument designations outside this constrained scope are called "abuses." This is the view for which Yoo and Gaziano argue and this ("abuses") is how they describe large monuments protecting natural sites. However, they base their argument - - not on the final language of the statute - - but on early bills rejected by Congress. This is a novel way to understand a statute.

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[7] *Id.,* § 3.

[8] "Press Briefing by Secretary of Interior Ryan Zinke to Review the Designations Under the Antiquities Act," Office of the Press Secretary, White House, April 25, 2017.

In fact, in the five or six years before the Antiquities Act was adopted, there were two camps seeking such a statute, but they had different concepts of what it should authorize. Archeologists wanted a narrow statute to protect archeological sites. The Department of the Interior wanted a statute authorizing the protection of large scenic areas, this being before creation of the National Park System. In the end, all sides agreed upon compromise language that became the Antiquities Act. The compromise added a clause authorizing protection of areas having "historic or scientific interest" and provided that the monument "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[9]

Almost immediately after the Act's adoption, President Theodore Roosevelt established the Grand Canyon National Monument, protecting 818,000 acres, and almost immediately someone challenged the legality of that monument's designation under the Act. But the U.S. Supreme Court rejected the challenge in *Cameron v. United States*.[10] Referring to the clause which formed the basis of the compromise, the Court explained that the Grand Canyon "is an object of unusual scientific interest" and went on to explain its scientific importance and natural wonders.

Every court thereafter has reached the same conclusion as to other monuments challenged as natural rather than archeological. It is not surprising that larger areas are required to protect natural wonders than the areas required to protect archeological sites. Congress provided flexibility concerning the size of each monument in order to allow for differences based on what is being protected. Referring to larger monuments as "abuses" ignores the text of the statute and the history behind its adoption.

The President has no authority to revoke or materially reduce previously designated monuments.

In our system of Government, Presidents have no power other than that granted to them by the U.S. Constitution or by an Act of Congress. The issue here does not invoke any power granted the President by the U.S. Constitution. The issue instead concerns administration of federally owned land, and the Constitution gives that power exclusively to Congress. U.S. Const., Property Clause, Art. IV, § 3. Whether or not the President has the power unilaterally to revoke a national monument designation therefore depends on whether that power is expressly or by implication delegated to the President by an Act of Congress. The Antiquities Act of 1906 authorizes the President to create national monuments on land owned or controlled by the federal government.[11] The Act says nothing about a President's having the power to abolish a national monument or to reduce the size of a monument. The question is therefore whether such a power may be implied.

Contrary to the arguments of Yoo and Gaziano, reading a revocation power into that statute by implication would be improper. This is so for several reasons.

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[9] 54 U.S.C. § 320301(a) and (b).

[10] 252 U.S. 459 (1920).

[11] 54 U.S.C. § 320301(a).

First, the U.S. Attorney General opined long ago that the Antiquities Act could not be interpreted to imply that a President has the power to revoke a national monument's designation. No President has attempted to revoke such a designation since that Opinion was issued in 1938.

Second, Yoo and Gaziano fail to recognize that in the more than 100 years since the adoption of the Antiquities Act, Congress has adopted a comprehensive legislative scheme to govern federally owned land, into which the Antiquities Act was folded and in relation with which it must be interpreted. One of those statutes was the Federal Land Policy and Management Act ("FLPMA"), adopted in 1976.[12] Congress there in effect adopted the Attorney General's interpretation that no revocation power should be read into the Antiquities Act by implication. Thereafter, it would be particularly improper to interpret the Antiquities Act as implying that the President has the power to revoke a monument designation.

Third, as to those national monuments which were made part of the National Park System, Congress has mandated that the power to manage those special places "shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress."[13] Revoking the designation of such a national monument and pulling it out of the National Park System would certainly be in derogation of the reasons such special places were added to that System.

Secretary Zinke, however, stated that a President has the authority to modify a monument, and President Trump stated he is eager to modify the boundaries of Bears Ears National Monument. If they are thinking that the President would have the power to modify that monument in a material way that would undermine the protection of the resources for which it was created, they are wrong. A President does not have the power to do in part what he may not do in full. While there were some instances before 1976 of Presidents changing the boundaries of monuments, no President has attempted to do so after FLPMA was adopted.

The revocation of the designation of a national monument or the material reduction in its size, and particularly a monument that is part of the National Park System, is therefore beyond the power of a President acting without Congress. The interpretation proffered by Yoo and Gaziano would therefore, if acted upon, result in a usurpation of congressional powers by the Executive Branch.

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I. The Antiquities Act of 1906.

The Nineteen Century saw substantial western expansion of the United States, and it was the federal government that acquired the land making that expansion possible. While that government had acquired land since its founding, the government substantially increased its holdings by such events as the Louisiana Purchase of 1803, the Oregon Compromise with

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[12] 43 U.S.C. 1704 *et seq.*

[13] 54 U.S.C. § 100101(b)(2).

England in 1846 and the treaty resolving the Mexican-American War in 1848.[14] No sooner had the public land domain been established in the Eighteenth Century than a policy of disposing of the land had been initiated.[15] The federal government transferred nearly 816 million acres of public domain land to private ownership and 328 million acres to the States as they became established.[16]

By late in the Nineteenth Century, however, demands grew to "withdraw" some public lands from that available for sale, grant or other disposition so it could be retained by the federal government for conservation and similar purposes. The first permanent federal land reservation was Yellowstone National Park, created in 1872, and in 1891 the President was given power to withdraw forest lands and prevent their disposal.[17] The federal government retained for the benefit of all Americans a large part of the land that government had acquired, totaling approximately 600 million acres.[18]

In recognition of the slow process of enacting federal legislation, Congress adopted the Antiquities Act in 1906 to empower the President to protect some of that federal land promptly. That Act, as now codified, provides:

> (a) The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.
>
> (b) The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[19]

President Theodore Roosevelt was the first to use that Act, establishing 18 national monuments, including Devil's Tower, Muir Woods, Mount Olympus (the predecessor to Olympic National Park) and the Grand Canyon. Almost every President thereafter has designated additional national monuments. These monuments were created to provide for the enjoyment and use of the federal lands by the American people.

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[14] *See generally* "Natural Resources Land Management Act," S. Rep. No. 94-583 (hereafter the "Senate Report") at 27-32; Carol Hardy Vincent et al., Cong. Research Serv., *Federal Land Ownership: Overview and Data* 5 (2014), *available at* https://fas.org/sgp/crs/misc/R42346.pdf.

[15] *See* Senate Report, at 28.

[16] Kristina Alexander and Ross W. Gorte, Cong. Research Serv. RL34267, *Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention* 5 (2007), *available at* https://fas.org/sgp/crs/misc/RL34267.pdf.

[17] 17 Stat. 326; 26 Stat. 1095.

[18] Alexander and Gorte, at 9.

[19] 54 U.S.C. § 320301(a) and (b).

II. The President's Authority under the 1906 Act is not Limited to Protecting Small Areas Around Archeological Sites, As Yoo and Gaziano Argue and the Administration Claims.

Yoo and Gaziano argue that Congress only intended in the Antiquities Act to authorize the President to create monuments to protect small areas around human archeological sites. They concede that the Act's "final language covered more than antiquities" and that "small scenic areas" were contemplated. But they argue that "the statute's title, drafting history and historical context" should convince Presidents "to follow the text and spirit of the original law."[20] And they repeatedly call Presidential proclamations that did not do so "abuses." This is a novel way of understanding a statute passed by Congress, i.e., by looking to earlier versions of a bill not adopted rather than to the "final language" of the act. Contrary to these arguments, the Act by its terms and as understood by Congress at the time authorizes protection of large areas containing natural resources, and the size of the protected area depends on the resources being protected.

It is true that the national monument authority is generally referred to as the "Antiquities Act," but that is so because parts of the statute did in fact address only antiquities, such as by prohibiting their looting.[21] But the legislative history of the portion of the Act relating to monuments, as well as its text, makes clear that that authority was not limited to protecting antiquities. There was considerable disagreement about what became this part of the Act in the years before its adoption. There were two views: archeologists and the Smithsonian Institution wanted a law providing for the protection only of archeological sites in order to address Western legislators' concerns over the size and scope of protected areas, as Yoo and Gaziano say.[22] The Department of the Interior and some members of Congress, on the other hand, wanted a law that would provide protection as well for large "scenic beauties and natural wonders and curiosities".[23] While Yoo and Gaziano say Congress had rejected bills the Department supported, they omit the fact that bills limited as the archeologists wanted had also failed.[24] This process went on for 5 years. Finally, Professor Edgar Hewett drafted a compromise bill that was adopted without much further ado and became the relevant part of the Antiquities Act of 1906.[25]

Yoo and Gaziano rely largely on a work by Ronald Lee for their recital of the history of the Act.[26] Here is what he says about the final bill:

> Senator Lodge's bill, in its earlier versions, had been limited to historic and prehistoric antiquities and made no provision for protecting natural areas. At some point in his

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[20] Yoo and Gaziano, at 3.

[21] *See* 54 U.S.C. § 32032.

[22] *See* Ronald F Lee, "The Antiquities Act, 1900-1906," in *The Story of the Antiquities Act* (National Park Service, March 15, 2016), www.nps.gov/archeology/pubs/lee/Lee_CH6.htm at 2-3.

[23] *Id.*, at 3.

[24] *Id.,* at 4-6.

[25] *Id.,* at 7.

[26] Yoo and Gaziano, at nn. 3, 5, 6 and 8.

> discussions with government departments, Hewett was persuaded, probably by officials of the Interior Department, to broaden his draft to include the phrase "other objects of historic or scientific interest." … As it later turned out, the single word "scientific" in the Antiquities Act proved sufficient basis to establish … national monuments preserving many kinds of natural areas, …[27]

One of the first monuments to be designated under that Act was President Theodore Roosevelt's 1908 creation of Grand Canyon National Monument, which covered 818,000 acres.[28] The holder of a mining claim to land on the south rim of the Canyon challenged the legality of the monument designation because it supposedly exceeded the President's power under the Antiquities Act. In *Cameron v. United States*, the Court rejected that argument.[29] The mining claim, the Court explained, included the trailhead of the famous Bright Angel Trail "over which visitors descend to and ascend from the bottom of the canyon."[30]

> The act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors. [31]

In 1976, the Supreme Court again was called on to address this issue and again explained that the Antiquities Act is not limited to archeological areas. In *Caeppert v. United States*, the Court upheld President Truman's creation of a national monument at Devil's Hole, Nevada, as a habitat for a species of fish found only there. The fish, said the Court, were "objects of historic or scientific interest" within the meaning of that clause in the Antiquities Act.[32] Similarly, when President Carter designated several national monuments in Alaska based in part on their natural resources, opponents challenged the designations in court, making the same arguments about the supposedly constrained nature of places that could be so designated. The district court resoundingly rejected those arguments, based in part on *Cameron* and *Caeppert* as well as on the court's analysis of the Act's legislative history.[33] Reciting the same legislative history discussed above, the court found that Mr. Hewett's compromise bill, which contained the clause "other objects of historic or scientific interest" and which had become law, "was indeed intended to enlarge the authority of the President." Moreover, the court concluded that "matters of scientific

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[27] Lee, at 9.

[28] *Establishment of Grand Canyon National Monument,* Proclamation No. 794, 35 Stat. 2175 (1908).

[29] 252 U.S. 459 (1920). President Roosevelt also designated the 60,000 acre Petrified Forest National Monument in 1906, the 10,000 Chaco Canyon National Monument in 1907 and the almost 640,000 acre Mount Olympus National Monument in 1909. *See* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. Rev. 473, 490 n. 92 (2003).

[30] 252 U.S. at 455 and n.1.

[31] *Id.,* at 455-56.

[32] 426 U.S. 128, 141-42 (1976).

[33] *Anaconda Copper Co. v. Andrus*, No. A79-161, civil, 14 ERC 1853 (D, Alaska July 1, 1980).

interest which involve geological formations or which may involve plant, animal or fish life are within this reach of the presidential authority under the Antiquities Act."[34]

The Administration's claims that large monuments are "abuses" of the Antiquities Act and that it was only intended to apply to small areas are simply wrong. In setting limits on the size of areas to be protected, the Act merely imposed the requirement that the president designate the "smallest area compatible with the proper care and management of the objects to be protected." From the very beginning, that Act was used to protect large areas such as the Grand Canyon and Mount Olympus, which later became Olympic National Park. It is obvious that more land is needed to protect natural resources such as these areas than to protect isolated archeological sites. It is therefore simply not true that the areas protected under the Act in its early years were limited to small areas of a few hundred acres.

III. The President Has No Implied Power to Revoke a National Monument Created under the Antiquities Act.

Because the Antiquities Act does not expressly empower or prohibit Presidents to revoke national monuments, proponents of such a power argue that that power may be read into the Act by implication. Gaziano and Yoo and some members of Congress argue that the President has many implied powers and that this is merely one such power. They are wrong.

Yoo and Gaziano argue for a general proposition that "the authority to execute a discretionary government power usually includes the power to revoke it -- unless the original grant expressly limits the power of revocation."[35] They argue that this supposedly follows from the principle that each "branch of government can reverse its earlier actions using the same process originally used."[36] They point to the President's power to fire Executive Branch officials even after the Senate has confirmed the appointment and to the President's power over foreign treaties. The problem with that argument is that it ignores the source of the original power. There is no government-wide general rule on this subject; each source of power must be examined to assess whether a power to revoke previous actions should be implied. As former President and Supreme Court Chief Justice Taft stated:

> The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to *some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise.* Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof.[37]

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[34] *Id.*

[35] Yoo and Gaziano, at 7.

[36] *Id.,* at 8.

[37] William Howard Taft, OUR CHIEF MAGISTRATE AND HIS POWERS 139-40 (1916), *available at* https://archive.org/stream/ourchiefmagistra00taftuoft#page/n5/mode/2up) (*emphasis added*).

Accordingly, when Yoo and Gaziano point to the power of the President to fire Executive Branch officers and to revoke treaties with foreign governments, they are pointing to powers found in the Constitution's grant of executive authority to the President. The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const., Art. II, § 1. It is reasonable to conclude that that broad grant includes the power to revoke what has been done. As Justice Taft explained:

> The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist.[38]

The same may be said of specific powers granted the President, including that to make treaties with foreign countries. *See* U.S. Const., Art. II, § 2.

But here we are not dealing with the scope of the powers granted the Executive Branch under the Constitution. Here, we are dealing instead with the power over federal lands, and the Constitution grants that power, not to the President, but exclusively to the Congress. The Property Clause of the Constitution provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States …." *Id.*, Art. IV, § 3, Cl. 2.

For the President to have the power to revoke a monument designation under the Antiquities Act, therefore, the issue is whether that Act of Congress, not the Constitution's grant of the executive power to the President, may be interpreted to imply the unstated power to revoke a monument designation thereunder.[39]

This is a question on which the Attorney General of the United States, Homer S. Cummings, ruled in the negative.[40] In 1938, President Franklin Roosevelt asked Attorney General Cummings for a formal Legal Opinion as to whether the President could rescind former President Coolidge's designation of the Castle Pinckney National Monument under the Antiquities Act. After careful study, Attorney General Cummings explained that the answer was "no."

> A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative

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[38] *Id.*

[39] Yoo and Gaziano also argue as an analogy that the Executive Branch has the power to repeal regulations adopted under discretionary statutory authority. But that authority is recognized, in the words of Justice Taft, as "included within such express grant as proper and necessary to its exercise." *Id.* That says nothing about whether such implied power should also be implied in the Antiquities Act.

[40] Attorney General Cummings held a PhD and law degree from Yale University. He served from 1933 until 1939. (*See* U.S. Department of Justice, *Attorneys General of the United States,* at https://www.justice.gov/ag/bio/cummings-homer-still)

> 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.[41]

The Attorney General's Opinion explained that under long-standing precedent "if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation."[42] Since the Cummings Opinion, no President has attempted unilaterally to rescind a national monument.[43] Rather, as contemplated by the Cummings Opinion, when some monuments have been abolished, it has been Congress that has done so by legislation.[44]

Yoo and Gaziano argue that the Cummings Opinion was "poorly reasoned" and "erroneous as a matter of law."[45] But their description of that opinion is not a fair characterization of Attorney General Cumming's reasoning. For example, they claim he found binding an 1862 opinion when he merely relied on its reasoning and they then describe that earlier opinion unfairly. But what Cummings found significant about that earlier case is that, as in the case of the Antiquities Act, the statute in question had authorized the President to reserve lands but had said nothing about his power to undo the reservation made. And the earlier Attorney General had concluded that such power could not be implied. In reaching the same conclusion as to the Antiquities Act, Attorney General Cummings distinguished statutes that expressly authorize the President to revoke reservations.

The gaping hole in the Yoo and Gaziano arguments, however, is that they ignore or minimize the importance of the fact that, since 1906, Congress has adopted a comprehensive system of laws to govern federally-owned lands, and that the Antiquities Act must be understood and interpreted as part of that legal structure. Statutes covering the same subject matter are interpreted together. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000). Two particular later statutes are relevant here. First, in 1976, Congress adopted the Federal Land Policy and Management Act ("FLPMA").[46] Second, in 1916,

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[41] "Proposed Abolishment of Castle Pinckney Nat'l Monument," 39 Op. Atty. Gen. 185, 185 (1938), *citing* Opinion by Attorney General Edward Bates to the Secretary of the Interior, 10 U.S. Op. Atty. Gen. 359 (1862). As a general matter, opinions of the Attorney General are binding on the Executive Branch offices that request them until they are overruled or withdrawn. *See Pub. Citizen v. Burke*, 655 F. Supp. 318, 321–22 (D.D.C. 1987) ("As interpreted by the courts, an Attorney General's opinion is binding as a matter of law on those who request it until withdrawn by the Attorney General or overruled by the courts." (citation and internal quotations omitted)), *aff'd*, 843 F.2d 1473 (D.C. Cir. 1988); *cf.* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel,* 110 Colum. L. Rev. 1448, 1472, 1482–84 (2010).

[42] 39 Op. Atty. Gen. at 186–87.

[43] Squillace, at 553.

[44] Congress has abolished a number of National Monuments by legislation. *See, e.g.*, Wheeler National Monument in 1950 (64 Stat. 405); Shoshone Cavern in 1954 (68 Stat. 98); Papago Saguaro in 1930 (46 Stat. 142); Old Kasaan in 1955 (69 Stat. 380); Fossil Cyad in 1956 (70 Stat. 898); Castle Pinkney in 1956 (70 Stat 61); Father Millet Cross in 1949 (63 Stat. 691); Holy Cross in 1950 (64 Stat. 404); Verendrye in 1956 (70 Stat. 730), and Santa Rosa Island in 1946 (60 Stat. 712).

[45] Yoo and Gaziano, at 5.

[46] 43 U.S.C. 1704 *et seq*.

Congress adopted the National Park System Organic Act, to which Congress added significant provisions in 1970 and 1978.

When FLPMA was adopted in 1976, Congress legislated against the backdrop of the Antiquities Act providing that the President could create national monuments and the Cummings Opinion that the President could not revoke national monuments. There is evidence that Congress was aware of the Cummins Opinion, which was reported in one of the studies leading to FLPMA's passage.[47] But in any event, when Congress legislates on a subject, "[C]ongress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning."[48] Yet in FLPMA, Congress did not "affirmatively act[] to change the meaning" of the Antiquities Act as interpreted by the Cummings Opinion. Congress therefore in effect adopted that interpretation.

Moreover, the Supreme Court has made clear that, to harmonize different statutes, "a specific policy embodied in a later federal statute should control our construction of [a prior one], even though it had not been expressly amended."[49] This is particularly so when the later statute is a comprehensive legislative scheme.[50] FLPMA was the very sort of "comprehensive legislative scheme" that requires interpreting the Antiquities Act to harmonize with FLPMA. It would not be harmonious with FLPMA to read into the Antiquities Act an implied authorization for a President to revoke a prior monument's designation because in FLPMA, one of Congress' purposes was to reassert its own authority over federal land withdrawals and to limit to express delegations the authority of the Executive Branch in this regard.

FLPMA was the result of a years-long re-examination and reorganization of laws governing management of federal lands, including the creation of reservations or "withdrawals" of land for particular purposes.[51] In 1964, Congress had created The Public Land Law Review Commission to undertake that reexamination, finding in part that there were many statutes governing federal lands "which are not fully correlated with each other."[52] The Commission obtained extensive studies and finally issued its report in 1970.[53] One of its recommendations was that "[d]elegation of the congressional authority should be specific, not implied, …."

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[47] *See* Charles F. Wheatley, Jr., "Study of Withdrawals and Reservations of Public Domain Lands" (Public Land Law Review Commission 1969), at 17, 264.

[48] *Bledsoe v. Palm Beach County Soil & Water Conservation Dist*., 133 F.3d 816, 822 (11th Cir. 1998) (addressing legislative action after earlier Attorney General interpretation); *see also, to the same effect, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 and n.66 (1982) (considering whether rights should be implied under a statute); *Souter v. Jones,* 395 F.3d 577, 598 (6th Cir. 2005).

[49] *See United States v. Romani,* 523 U.S. 517 (1998).

[50] *See Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981); *see also Hi-Lex Controls Inc. v. Blue Cross*, 2013 WL 228097 (E.D. Mich. Jan. 22, 2013) at *3.

[51] Pub. Law No. 94-579, codified at 43 U.S.C. § 43 U.S.C. § 1701 *et seq.* As the Senate Report accompanying the bill that became FLPMA explained, Congress had long recognized "a need to review and reassess the entire body of law governing Federal lands." Senate Report, at 34.

[52] *See* 78 Stat. 982 (Sept. 19, 1964).

[53] Public Land Law Review Commission, "One Third of the Nation's Land: A Report to the President and the Congress" (1970); *see also* Senate Report, at 32-36.

Congress followed that recommendation, declaring in FLPMA that "it is the policy of the United States that … the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action."[54] Accordingly, Congress expressly repealed a large number of statutes previously authorizing the Executive Branch to make withdrawals of federal land and overturned a court decision implying such power.[55] But FLPMA did not repeal the Antiquities Act. This was no oversight; the decision to leave that Act in effect was noted in the House Report.[56] And while Congress gave the Secretary of the Interior some powers to make, modify or revoke withdrawals, FLPMA provided that the Secretary did not have power to "revoke or modify" any Antiquities Act monument designation.[57]

The House Report made clear that there were to be no more implied powers to withdraw lands or to revoke previous withdrawals; only Congress was to have those powers except as expressly delegated.

> With certain exceptions [including under the Antiquities Act], H.R. 13777 will repeal all existing law relating to executive authority to create, modify, and terminate withdrawal and reservations. It would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, ... *It would also specially 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."[58]

Specifically as to national monuments, therefore, just as Attorney General Cummings concluded, while the President would continue to have the power to establish national monuments under that Act, only Congress would be empowered to revoke a monuments designation. Any other understanding of the Antiquities Act would be contrary to Congress'

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[54] *Id.*, codified at 43 U.S.C. § 1704(a)(4).

[55] *See* Pub. Law No. 74-597, § 704 ("Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (*U.S. v. Midwest Oil Co.*, 236 U.S. 459) and the following statutes and parts of statutes are repealed: …").

[56] "The exceptions, which are not repealed, are contained in the Antiquities Act (national monuments), ..." House Report, at 29.

[57] 43 U.S.C. §1714 and § 1714(j). Those sections speak in terms of the authority of the Secretary of the Interior to make, modify or revoke withdrawals, but it is relevant to note in understanding that section that at the time of FLPMA's adoption, the President had delegated to the Secretary of the Interior all of the President's "authority … vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." *Delegating to the Secretary of the Interior the Authority of the President to Withdraw or Reserve Lands of the United States for Public Purposes*, Exec. Order 10355, 17 Fed. Reg. 4831 (May 28, 1952); Wheatley, at 379 (that Executive Order, as of 1969, "is now the controlling authority").

[58] House Report, at 9 (*emphasis added*).

purpose and comprehensive legislative scheme in FLPMA to eliminate all implied delegations of authority to the Executive Branch to withdraw or revoke withdrawals.

Yoo and Gaziano nevertheless suggest that a President could revoke a prior designation if the later President determines it was based on a factual error, is no longer a valid designation due to changed circumstances, or is "illegally or inappropriately large."[59] But there already exists a remedy under such circumstances; those same arguments can be made to Congress.[60]

The conclusion that only Congress may revoke a national monument designation applies doubly to those national monuments created under the Antiquities Act and administered by the National Park Service ("NPS").[61] Ten years after adoption of the Antiquities Act, Congress adopted the Organic Act of 1916 creating the National Park System.[62] Congress there mandated that the fundamental purpose of the System is to "conserve the scenery, natural and historic objects, and the wild life in the System units … [and] leave them unimpaired for the enjoyment of future generations."[63] In 1970, Congress adopted amendments to that Organic Act which made clear that national monuments administered by NPS are part of that System and are to be protected as such.[64] And Congress provided that the entire National Park System is a "cumulative expression[] of a single national heritage."[65] In 1978, not satisfied that the Executive Branch had gotten the message, Congress returned to this subject and added the mandate that

> the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, *except as directly and specifically provided by Congress*.[66]

Congress clearly did not intend that a President could unilaterally revoke the designation of a national monument that is part of the National Park System without Congress' directly and

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[59] Yoo and Gaziano, at 9, 10.

[60] As described in noted 4 above, on several occasions Congress has abolished national monuments by legislation.

[61] For example, recent Proclamations establishing national monuments as part of the National Park System have provided "The Secretary of the Interior (Secretary) shall manage the monument through the National Park Service, pursuant to applicable legal authorities, consistent with the purposes and provisions of this proclamation." *Establishment of the Belmont-Paul Women's Equality National Monument,* Proclamation No. 9423, 81 Fed. Reg. 22505 (Apr. 15, 2016).

[62] Now codified at 54 U.S.C. §100101(a).

[63] *Id.*

[64] *See* Pub. L. No. 91-383 (National Park System General Authorities Act), codified in this regard at 54 U.S.C. §§ 100102(2), 100501 (defining "National Park System" to include any area administered by the Director of NPS, including for "monument" purposes). Those monuments are as fully covered by general regulations protecting the entire System as are any national parks created by Congress. *See* 36 C.F.R. §1.2 (NPS regulations apply to federally owned land administered by NPS).

[65] 54 U.S.C. § 100101(b)(1)(B).

[66] *Id.,* § 100101(b)(2) (*emphasis added*).

specifically so providing. Such an act would certainly be in derogation of the values and purposes for which the monument had previously been established.[67]

All of this simply goes further to establish that in the 1970s Congress adopted the Cummins Opinion's conclusion that no President may unilaterally revoke the establishment of any national monument. Such a revocation would require an act of Congress.

IV. For the Same Reasons, No President May Unilaterally Materially Reduce the Size of a National Monument.

President Trump's Executive Order of April 26, 2017 and Secretary Zinke's comments also raise the issue whether a President may unilaterally reduce the size of a national monument. Yoo and Gaziano argue that that power is to be implied into the Antiquities Act even if the President does not have the power to revoke a monument's designation.[68] But there is no merit to this claim, which is simply an alternative formulation of the baseless argument that a President may unilaterally abolish a national monument. Any attempts by the President to remove land or features that would undermine the purposes and values for which the monument was originally created would be a partial revocation of the monument. The President does not have the power to do in part what he cannot do in full.

Yoo and Gaziano rely on the fact that Presidents have issued a handful of proclamations that reduced the size of some national monuments. Whatever the understanding of this power might have been before the 1970s legislation discussed above, however, they cite not one example of any such reduction after FLPMA was adopted in 1976. The last time such a thing happened was in 1963, when President Kennedy issued a Proclamation to remove certain lands from Bandelier National Monument in New Mexico.[69] In FLPMA, Congress reasserted its authority over such matters. As discussed above, Congress made clear that it was "specially reserv[ing] to the Congress *the authority to modify* and revoke withdrawals for national monuments created under the Antiquities Act."[70]

It is unclear whether a President could make non-material adjustments to monument boundaries without congressional authorization. But President Trump does not appear to be planning to test that question when he says he is eager to change the boundaries of Bears Ears National Monument. It is at least clear that any reduction in the size of the monument or other modification that undermines the purpose and values for which it was created could be made only by Congress.

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[67] For example, the Presidential Proclamation designating Bears Ears National Monument explains that it is intended to preserve features of the lands that are sacred to Native Americans, paleontological resources, and a wide variety of vegetation. *Establishment of the Bears Ears National Monument*, Proclamation No. 9558, 83 Fed. Reg. 1139 (Jan. 5, 2017).

[68] Yoo and Gaziano, at 14-17.

[69] *Revising the Boundaries of the Bandelier National Monument*, Proclamation No. 3539, 28 Fed. Reg. 5407 (May 27, 1963).

[70] House Report, at 9 (*emphasis added*).

V. Conclusion.

For over one hundred years, the Antiquities Act has allowed Presidents to create national monuments and preserve worthy lands for the enjoyment of all Americans and future generations. There are today national monuments in 31 states. For all Americans, they offer recreational opportunities and preserve a heritage of beauty, scientific marvels, and human achievement. But the Antiquities Act and subsequent legislation reserved to Congress, which has Constitutional authority over public lands, the sole power to revoke such a designation or materially to reduce the monument's size.

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May 3, 2017

Appendix C

"Presidents Lack the Authority to Abolish or Diminish National Monuments" by Mark Squillace, Eric Biber, Nicholas S. Bryner, Sean B. Hecht. Virginia Law Review Online, Vol. 103, 55-71, June 2017.

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ESSAY

PRESIDENTS LACK THE AUTHORITY TO ABOLISH OR DIMINISH NATIONAL MONUMENTS*

INTRODUCTION

BY any measure, the Antiquities Act of 1906 has a remarkable legacy. Under the Antiquities Act, 16 presidents have proclaimed 157 national monuments, protecting a diverse range of historic, archaeological, cultural, and geologic resources.[1] Many of these monuments, including such iconic places as the Grand Canyon, Zion, Olympic, and Acadia, have been expanded and redesignated by Congress as national parks.

While the designation of national monuments is often celebrated, it has on occasion sparked local opposition, and led to calls for a President to abolish or shrink a national monument that a predecessor proclaimed.[2]

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[1] See Nat'l Parks Conservation Association, Monuments Protected Under the Antiquities Act (Jan. 13, 2017), https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act.

[2] On April 26, 2017, President Trump issued an Executive Order calling for the Secretary of the Interior to review certain national monument designations made since 1996. Exec. Order No. 13,792, Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20,429 (2017), https://perma.cc/CA3A-QEEQ. The Order encompasses Antiquities Act designations since 1996 over 100,000 acres in size or "where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders[.]" Id. at § 2(a). The Order asks the Secretary to make "recommendations for . . . Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out the policy" described in the Order. Id. at

This article examines the Antiquities Act and other statutes, concluding that the President lacks the legal authority to abolish or diminish national monuments. Instead, these powers are reserved to Congress.

I. THE AUTHORITY TO ABOLISH NATIONAL MONUMENTS

The Property Clause of the Constitution vests in Congress the "[p]ower to dispose of and make all needful Rules and Regulations respecting [public property]."[3] The U.S. Supreme Court has frequently reviewed this power in the context of public lands management and found it to be "without limitations."[4] Congress can, however, delegate power to the President or other members of the executive branch so long as it sets out an intelligible principle to guide the exercise of executive discretion.[5]

Congress did exactly this when it enacted the Antiquities Act and delegated to the President the power to "declare by public proclamation" national monuments.[6] At the same time, Congress did not, in the Antiquities Act or otherwise, delegate to the President the authority to modify or revoke the designation of monuments. Further, the Federal Land Policy and Management Act of 1976 ("FLPMA") makes it clear that the President does not have any implied authority to do so, but rather that Congress reserved for itself the power to modify or revoke monument designations.[7]

§ 2(d)-(e). The limits of presidential authority to abolish or diminish monuments has been the subject of prior analysis, including a report published by the Congressional Research Service in November 2016 and an analysis by the law firm Arnold & Porter Kaye Scholer. Alexandra M. Wyatt, Cong. Research Serv., R44687, Antiquities Act: Scope of Authority for Modification of National Monuments (2016), https://perma.cc/RCT9-UJ8N; Robert Rosenbaum et al., Arnold & Porter Kaye Scholer, The President Has No Power Unilaterally to Abolish or Materially Change a National Monument Designation Under the Antiquities Act of 1906 (May 3, 2017), https://www.npca.org/resources/3197-legal-analysis-of-presidential-ability-to-revoke-national-monuments.

[3] U.S. Const. art. IV, § 3, cl. 2.

[4] See Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)). See also Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 294–295 (1958).

[5] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). The Supreme Court has also made clear that any delegation of legislative power must be construed narrowly to avoid constitutional problems. Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).

[6] 54 U.S.C. § 320301(a) (2012).

[7] See infra Section I.A.

A. The Antiquities Act does not grant authority to revoke a monument designation

The United States owns about one third of our nation's lands.[8] These lands, which exist throughout the country but are concentrated in the western United States, are managed by federal agencies for a wide range of purposes such as preservation, outdoor recreation, mineral and timber extraction, and ranching. Homestead, mining, and other laws transferred ownership rights over large areas of federal lands to private parties. At the same time, vast tracts of land remain in public ownership, and these lands contain a rich assortment of natural, historical, and cultural resources.

Over its long history, Congress has "withdrawn," or exempted, some federal public lands from statutes that allow for resource extraction and development, and "reserved" them for particular uses, including for preservation and resource conservation.[9] Congress has also, in several instances, delegated to the executive branch the authority to set aside lands for particular types of protection. The Antiquities Act of 1906 is one such delegation.

The core of the Antiquities Act is both simple and narrow. It reads, in part:

> [T]he President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected . . . .[10]

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[8] See Public Land Law Review Commission, One Third of the Nation's Land 19 (1970).

[9] See, e.g., The Wilderness Act, 16 U.S.C. § 1133(d)(3) (2012) ("[E]ffective January 1, 1984, the minerals in lands designated. . . as wilderness are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing. . . ."); The Wild and Scenic Rivers Act, 16 U.S.C. § 1280(b) (2012) ("The minerals in any Federal lands which constitute the bed or bank or are situated within one-quarter mile of the bank of any river which is listed [for study as wild and scenic] are hereby withdrawn from all forms of appropriation under the mining laws. . . .").

[10] Antiquities Act of 1906, 34 Stat. 225 (1906) (prior to 2014 amendment). The language of the Antiquities Act was edited and re-codified in 2014 at 54 U.S.C. § 320301(a)-(b) with the stated intent of "conform[ing] to the understood policy, intent, and purpose of Congress

The narrow authority granted to the President to *reserve* land[11] under the Antiquities Act stands in marked contrast to contemporaneous laws that delegated much broader executive authority to designate, repeal, or modify other types of federal reservations of public lands. For example, the Pickett Act of 1910 allowed the President to withdraw public lands from "settlement, location, sale, or entry" and reserve these lands for a wide range of specified purposes "*until revoked by him or an Act of Congress*."[12] Likewise, the Forest Service Organic Act of 1897 authorized the President "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*."[13]

Unlike the Pickett Act and the Forest Service Organic Administration Act, the Antiquities Act withholds authority from the President to change or revoke a national monument designation. That authority remains with Congress under the Property Clause.

This interpretation of the President's authority finds support in the single authoritative executive branch source interpreting the scope of Presidential power to revoke monuments designated under the Antiquities Act: a 1938 opinion by Attorney General Homer Cummings.[14] President Franklin D. Roosevelt had specifically asked Cummings through the Secretary of the Interior whether the Antiquities Act authorized the President to revoke the Castle Pinckney National Monument. In his opinion, Cummings compared the language noted above from the Pickett Act and the Forest Service Organic Act with the language in the Antiquities Act, and concluded unequivocally that the Antiquities Act

in the original enactments[.]" Pub. L. No. 113-287, §§ 2-3, 128 Stat. 3094, 3259 (2014) (codified at 54 U.S.C. § 320301(a)-(b)).

[11] In an opinion dated September 15, 2000, the Office of Legal Counsel in the Department of Justice found that the authority to reserve federal land under the Antiquities Act encompassed the authority to proclaim a national monument in the territorial sea—3-12 nautical miles from the shore—or the exclusive economic zone—12-200 nautical miles from the shore. Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 183–85 (Sept. 15, 2000), https://perma.cc/E8J8-EDL3.

[12] Pickett Act, Pub. L. No. 303, 36 Stat. 847 (1910) (repealed 1976) (emphasis added).

[13] Forest Service Organic Act of 1897, ch. 2, 30 Stat. 34 (1897) (codified as amended at 16 U.S.C. § 475 (2006)) (emphasis added).

[14] Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185 (1938).

"does not authorize [the President] to abolish [national monuments] after they have been established."[15]

B. FLPMA clarifies that only Congress can revoke or downsize a national monument

In 1976, Congress enacted FLPMA.[16] FLPMA governs the management of federal public lands lacking any specific designation as a national park, national forest, national wildlife refuge, or other specialized unit. The text, structure, and legislative history of FLPMA confirm the conclusion of Attorney General Cummings that the President does not possess the authority to revoke or downsize a monument designation.

FLPMA codified federal policy to retain—rather than dispose of—the remaining federal public lands,[17] provided for specific procedures for land-use planning on those lands, and consolidated the wide-ranging legal authorities relating to the uses of those lands.[18] Prior to FLPMA's enactment, delegations of executive authority to withdraw public lands from development or resource extraction were dispersed among federal statutes, including the Pickett Act and the Forest Service Organic Act. Moreover, in *United States v. Midwest Oil Co.,* the Supreme Court held that the President enjoyed an implied power to withdraw public lands as might be necessary to protect the public interest, at least in the absence of direct statutory authority or prohibition.[19]

FLPMA consolidated and streamlined the President's withdrawal power. It repealed the Pickett Act, along with most other executive au-

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[15] Id. at 185–86 (1938).

[16] Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified primarily at 43 U.S.C. §§ 1701–1782 (2012)) [hereinafter "FLPMA"].

[17] See 43 U.S.C. § 1701 (2012).

[18] Land use planning is specifically provided for under § 202 of FLPMA. Id. at § 1712. Additional public land use management authority is found at § 302 of FLPMA, which, among other things, requires the Secretary of the Interior to "take any action necessary to prevent the unnecessary or undue degradation of the lands." Id. at § 1732(b).

[19] 236 U.S. 459, 491 (1915). *Midwest Oil* involved withdrawals by President Taft of certain public lands from the operation of federal laws that allowed private parties to locate mining claims on public lands and thereby acquire vested rights to the minerals found there. The Secretary of the Interior recommended the withdrawals after receiving a report from the Director of the Geological Survey describing the alarming rate at which federal oil lands were being claimed by private parties. Noting the government's own need for petroleum resources to support its military, the report lamented that "the Government will be obliged to repurchase the very oil that it has practically given away . . . ." Id. at 466–67 (quotation marks omitted).

thority for withdrawing lands—with the notable exception of the Antiquities Act.[20] In place of these prior withdrawal authorities, FLPMA included a new provision—section 204—that authorizes the Secretary of the Interior "*to make, modify, extend, or revoke withdrawals* but only in accordance with the provisions and limitations of this section."[21]

FLPMA left unchanged the President's authority to create national monuments under the Antiquities Act, and included language confirming that Congress alone may modify or abolish monuments. Subsection 204(j) of FLPMA somewhat curiously states that "[t]he Secretary [of Interior] shall not . . . modify or revoke any withdrawal creating national monuments under [the Antiquities Act]. . . ."[22] Because only the *President*, and not the Secretary of the Interior, has authority to proclaim national monuments, Congress's reference to the *Secretary*'s authority under the Antiquities Act is anomalous and, as explained further below, may be the result of a drafting error. Nonetheless, this language reinforces the most plausible reading of the text of the Antiquities Act: that it deliberately provides for one-way designation authority. The President may act to create a national monument, but only Congress can modify or revoke that action.

An examination of FLPMA's legislative history removes any doubt that section 204(j) was intended to reserve to Congress the exclusive au-

[20] FLPMA, § 704(a), 90 Stat. 2792 (1976). The authority to create or modify forest reserves was repealed in 1907 for six specific states before its repeal was extended to all states in FLPMA Section 704(a). 34 Stat. 1269, 1271 (1907).

[21] 43 U.S.C. § 1714(a) (2012) (emphasis added).

[22] Id. at § 1714(j). The provision reads in its entirety as follows, with emphasis on the part relating to the Antiquities Act:

> The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; *modify or revoke any withdrawal creating national monuments under [the Antiquities Act]*; or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. Nothing in this Act is intended to modify or change any provision of the Act of February 27, 1976 (90 Stat. 199; 16 U.S.C. 668dd(a)).

Id. The reference in the first clause prohibiting the Secretary from "mak[ing]" a withdrawal "created by [an] Act of Congress" does not make sense because the Secretary cannot logically "make" a withdrawal already created by Congress. But it also is not relevant to the Antiquities Act since national monuments are created by the President, not Congress. Id. The second clause likewise addresses withdrawals made by Congress. The third clause is the only one that specifically addresses the Antiquities Act; it makes clear that the Secretary cannot modify or revoke national monuments. The final operative clause likewise prohibits the Secretary from revoking or modifying withdrawals, in that case involving National Wildlife Refuges.

thority to modify or revoke national monuments. FLPMA's restriction of executive withdrawal powers originated in the House version of the legislation.[23] Skepticism in the House towards executive withdrawal authority dated back to the 1970 report of the Public Lands Law Review Commission (PLLRC), a Congressionally-created special committee tasked with recommending a complete overhaul of the public land laws. The PLLRC report called on Congress to repeal all existing withdrawal powers, including the power to create national monuments under the Antiquities Act.[24] The Commission suggested replacing this authority with a comprehensive withdrawal process run by the Secretary of the Interior and closely supervised by Congress.[25]

The House Committee on Interior and Insular Affairs' Subcommittee on Public Lands largely followed this recommendation by including Section 204 in its draft of FLPMA.[26] Complementing this section, the bill presented to and passed by the House included a provision—ultimately enacted as Section 704(a) of FLPMA—that repealed the Pickett Act and other extant laws allowing executive withdrawals, as well as the implied executive authority to withdraw public lands that the Supreme Court had recognized in *Midwest Oil*.[27]

Consistent with this approach, the Subcommittee on Public Lands drafted Section 204(j) in order to constrain executive branch discretion in the context of national monuments. The Subcommittee frequently discussed the issue during its detailed markup sessions in 1975 and early 1976 on its version of the bill that would eventually become FLPMA.[28]

At an early markup session in May 1975, some subcommittee members, under the mistaken impression that the Secretary of the Interior created national monuments, expressed concerns that some future Secretary might modify or revoke them.[29] The Subcommittee therefore began

[23] See H.R. 13777, 94th Cong. § 604(b) (1976). The Senate bill contained no restrictions on executive withdrawal power. See S. 577, 94th Cong. (1975).

[24] See Public Land Law Review Commission, supra note 8, at 2, 54–57.

[25] Id. at 56–57.

[26] H.R. 13777, 94th Cong. § 204 (1976).

[27] See id. at § 604(b) (1976). See also *Midwest Oil*, 236 U.S. at 491.

[28] The subcommittee's hearings and markups focused on H.R. 5224, which eventually passed the full Committee in April 1976. An amended version was reintroduced as a clean bill, H.R. 13777, which was approved by the House and sent to the conference committee. See H.R. Rep. No. 94-1163, at 33 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6207 (1976) (describing replacement of H.R. 5224 with H.R. 13777 by committee).

[29] See H.R. 5224, et al., Public Land Policy and Management Act of 1975: Hearing Before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs, 94th Cong.

shaping the bill to eliminate any possibility of unilateral executive power to modify or revoke monuments, while maintaining the existing power to create monuments.[30]

Once the Subcommittee's misunderstanding about Secretarial authority to designate monuments became apparent, the Subcommittee also proposed shifting the authority to create national monuments from the President to the Secretary, in the pattern of consolidating withdrawal authority in Section 204.[31] The first version of what later became Section 204(j) of FLPMA was drafted after this discussion, as was a provision that would have amended the Antiquities Act to transfer designation authority from the President to the Secretary of the Interior.[32] The Ford Administration appeared to object generally to constraining executive power to withdraw public lands.[33] As part of the subsequent changes to the draft legislation, the Subcommittee dropped the provision that would

88–93 (May 6, 1975) [hereinafter May 6 Hearing]. Later statements by subcommittee members indicate that their understanding was that the Secretary had delegated authority to propose the creation of monuments, but that they were ultimately proclaimed by the President. H.R. 5224 & H.R. 5622: Hearing before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs, 94th Cong. 184 (June 6, 1975) [hereinafter June 6 Hearing].

[30] May 6 Hearing, supra note 29, at 91 (statement of Rep. Melcher):

> I would say that it would be better for us if, in presenting this bill to the House, for that matter in full committee, if we made it clear that the Secretary and perhaps also make it part of the bill somewhere, that he can not revoke a national monument.

See also id. at 93 (statement of committee staff member Irving Senzel: "So we could put in here that—we can put in the statement that he cannot revoke national monuments once created."); H.R. 5224 & H.R. 5622: Hearing Before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs, 94th Cong. 176 (June 6, 1975) (statement of committee staff member Irving Senzel: "In accordance with the decision made the last time, there is a section added in there that provides that no modification or revocation of national monuments can be made except by act of Congress.").

[31] See June 6 Hearing, supra note 29, at 183–85.

[32] See Public Land Policy and Management Act of 1975 Print No. 2: Hearing Before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs, 94th Cong. 23–24 (Sept. 8, 1975) (prohibiting the Secretary from modifying or revoking a national monument). Id. at 92 (amending the Antiquities Act by substituting "Secretary of the Interior" for "President of the United States").

[33] See H.R. Rep. No. 94-1163, at 41–42, 52 (May 15, 1976). The comments from the Assistant Secretary of the Interior from November 21, 1975, on Subcommittee Print No. 2 listed the proposed changes to withdrawal authority as one of the reasons for the Administration's opposition to that version of the bill, noting that under it, "the proposed . . . Act would be the only basis for withdrawal authority." Id. at 52.

have transferred monument designation authority from the President to the Secretary.[34]

Nonetheless, the Subcommittee retained Section 204(j). Pairing Section 204(j) with the proposed transfer of monument designation power strongly suggests that the language of Section 204(j) was not an effort to constrain (non-existent) Secretarial authority to modify or revoke national monuments while retaining Presidential authority to do so. Instead, it was part of an overall plan to constrain and systematize all executive branch withdrawal power, and reserve to Congress the powers to modify or rescind monument designations.[35] The House Committee's Report on the bill makes clear that this provision was designed to prevent *any* unilateral executive modification or revocation of national monuments. In describing Section 204 of the bill as it was presented for debate on the House floor, the Report explains:

> With certain exceptions, [the bill] will repeal all existing law relating to executive authority to create, modify, and terminate withdrawals and reservations. It would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, Indian reservations, certain defense withdrawals, and withdrawals for National Wild and Scenic Rivers, National Trails, and for other "national" recreation units, such as National Recreation Areas and National Seashores. *It would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act* and for modification and revocation of withdrawals adding lands to the National Wildlife Refuge System. These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.[36]

Thus, notwithstanding the anomalous reference to the Secretary in Section 204(j), Congress explicitly stated its intention to reserve for it-

[34] See See Public Land Policy and Management Act of 1975 Print No. 4: Hearing Before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs 94th Cong. (March 16, 1976).

[35] See id. at 30.

[36] H.R. Rep. No. 94-1163, at 9 (May 15, 1976) (emphasis added). Floor debates in the House do not contain any record of discussing this particular issue, and the Conference Report on FLPMA, later in 1976, did not specifically address it.

self the authority to modify or revoke national monuments.[37] The plain language of this report, combined with other statements in the legislative history and the process by which Congress created Section 204(j), make clear that Congress' intent was to constrain all executive branch power to modify or revoke national monuments, not just Secretarial authority.

In light of the text of the Antiquities Act, the contrasting language in other statutes at the turn of the 20th century, and the changes to federal land management law in FLPMA, the Antiquities Act must be construed to limit the President's authority to proclaiming national monuments on federal lands. Only Congress can modify or revoke such proclamations.

II. AUTHORITY FOR SHRINKING NATIONAL MONUMENTS OR REMOVING RESTRICTIVE TERMS

If the President cannot abolish a national monument because Congress did not delegate that authority to the President, it follows that the President also lacks the power to downsize or loosen the protections afforded to a monument. This conclusion is reinforced by the use of the phrase "modify and revoke" in Section 204(j) of FLPMA to describe prohibited actions.[38] Moreover, while the Antiquities Act limits national monuments to "the smallest area compatible with the proper care and management of the objects to be protected,"[39] that language does not grant the President the authority to second-guess the judgments made by previous Presidents regarding the area or level of protection needed to protect the objects identified in an Antiquities Act proclamation.

[37] The most plausible interpretation of the reference to the Secretary in the text is that there was a drafting error on the part of the Subcommittee in failing to update the reference in Section 204(j) when it dropped the parallel language transferring monument designation authority from the President to the Secretary. The only other plausible interpretation of Section 204(j) is that the provision was designed to make clear that Section 204(a), which authorizes the Secretary to modify or revoke withdrawals, was not intended to grant new authority to the Secretary over national monuments. Under this reading, the reference to the Secretary in Section 204(j) would not be anomalous but would serve the specific purpose of restricting the scope of Section 204(a). But whether the reference to the Secretary in Section 204(j) was a drafting error, or simply a clarification about the limits of the Secretary's power under Section 204(a) does not really matter because either interpretation is consistent with the conclusion that Congress intended to reserve for itself the power to modify or revoke national monuments. FLPMA's legislative history strongly reinforces this point. See supra notes 29–36.

[38] FLPMA, § 204(j), 90 Stat. 2743, 2754 (1976).

[39] 54 U.S.C. § 320301(b).

A. Presidents lack legal authority to shrink national monuments

Over the first several decades of the Antiquities Act's existence, various Presidents reduced the size of various monuments that their predecessors had designated. Most of these actions were relatively minor, although the decision by President Woodrow Wilson to dramatically reduce the size of the Mount Olympus National Monument, which is described briefly below, was both significant and controversial.[40] Importantly though, no Presidential decision to reduce the size of a national monument has ever been tested in court, and so no court has ever ruled on the legality of such an action. Moreover, all such actions occurred before 1976 when FLPMA became law. As the language and legislative history of FLPMA make clear, Congress has quite intentionally reserved to itself "the authority to *modify* and revoke withdrawals for national monuments created under the Antiquities Act."[41]

In his 1938 opinion, Attorney General Cummings acknowledged the history of modifications to national monuments, noting that "the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom."[42] The opinion, however, does not directly address whether these actions were legal, and does not analyze this issue, other than to reference the language from the Antiquities Act that limits monuments to "the smallest area compatible with the proper care and management of the objects to be protected."[43]

The Interior Department's Solicitors did review several presidential attempts to shrink monuments, but reached inconsistent conclusions. In

[40] See Mark Squillace, The Monumental Legacy of the Antiquities Act of 1906, 37 Ga. L. Rev. 473, 561–64 (2003).

[41] H.R. Rep. 94-1163, at 9 (emphasis added). 43 U.S.C. 1714(j) ("The Secretary shall not. . . *modify* or revoke any withdrawal creating national monuments under [the Antiquities Act].") (emphasis added).

[42] Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188 (1938).

[43] Id. at 188 (quoting 54 U.S.C. § 320301(b)). See also Wyatt, supra note 2, at 5. Much like the Attorney General's 1938 Opinion, the CRS report acknowledges that "there is precedent for Presidents to reduce the size of national monuments. . .", and that "[s]uch actions are presumably based on the determination that the areas to be excluded represent the President's judgment as to 'the smallest area compatible with the proper care and management of the objects to be protected.'" Id. But also like the Attorney General's Opinion, the report never actually analyzes the legal issue in depth and it does not address the particular question as to whether FLPMA might have resolved or clarified the issue against allowing presidential modifications. Id.

1915, the Solicitor examined President Woodrow Wilson's proposal to shrink the Mount Olympus National Monument, which President Theodore Roosevelt had designated in 1909.[44] Without addressing the core legal issue of whether the President had authority to change the monument status of lands designated by a prior President, the Solicitor expressed the opinion that lands removed from the monument would revert to national forest (rather than unreserved public domain) because they had previously been national forest lands.[45]

In the end, President Wilson did downsize the Mount Olympus National Monument by more than 313,000 acres, nearly cutting it in half.[46] Despite an outcry from the conservation community, Wilson's decision went unchallenged in court.[47]

In 1924, for the first time, the Solicitor squarely confronted the issue of whether a President has the authority to reduce the size of a national monument, concluding that the President lacked this authority. The Solicitor considered whether the President could reduce the size of the Gran Quivira[48] and Chaco Canyon National Monuments.[49] Relying on a 1921 Attorney General's opinion involving "public land reserved for lighthouse purposes," the Solicitor concluded that the President was not authorized to restore lands to the public domain that had been previously set aside as part of a national monument.[50] The Solicitor confirmed this position in a subsequent decision issued in 1932.[51]

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[44] Proclamation No. 869, 35 Stat. 2247 (1909) (creating Mount Olympus National Monument); see also Squillace, supra note 40, at 562–63 (discussing the review of President Wilson's proposal).

[45] U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of April 20, 1915, at 4–6. The University of Colorado Law Library has established a permanent, online database that includes the four unpublished Solicitor's Opinions cited in this article. That database is available at http://scholar.law.colorado.edu/research-data/4/.

[46] Proclamation No. 1293, 39 Stat. 1726 (1915); Squillace, supra note 40, at 562.

[47] See Squillace, supra note 40, at 563–64.

[48] Proclamation No. 959, 36 Stat. 2503 (1909) (creating Gran Quivira National Monument).

[49] Proclamation No. 740, 35 Stat. 2119 (1907) (creating Chaco Canyon National Monument).

[50] U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of June 3, 1924, M-12501 (citing 32 Op. Att'y Gen 438 (1921)). In language that anticipated the later 1938 opinion, this 1921 Attorney General's opinion concluded that "[t]he power to thus reserve public lands and appropriate them . . . does not necessarily include the power to either restore them to the general public domain or transfer them to another department." Disposition of Abandoned Lighthouse Sites, 32 Op. Att'y Gen. 488, 488–91 (1921) (quoting Camp Hancock–Transfer to Dept. of Agriculture, 28 Op. Att'y Gen. 143, 144 (1921)). The Solicitor's 1924 opinion on Gran Quivara and Chaco Canyon might be distinguished from the 1915

Subsequently, in 1935, the Interior Solicitor reversed the agency's position, but this time on somewhat narrow grounds.[52] This opinion relied heavily on the implied authority of the President to make and modify withdrawals that the U.S. Supreme Court upheld in *United States v. Midwest Oil Co*.[53] The argument that *Midwest Oil* imbues the President with implied authority to modify or abolish national monuments is problematic, however, for at least three reasons. First, as described previously, Congress enjoys plenary authority over our public lands under the Constitution, and the President's authority to proclaim a national monument derives solely from the delegation of that power to the President under the Antiquities Act.[54] But the Antiquities Act grants the President only the power to reserve land, not to modify or revoke such reservations. Such actions, therefore, are beyond the scope of Congress' delegation. Second, the *Midwest Oil* decision relied heavily on the perception that Presidential action was necessary to protect the public interest by preventing public lands from exploitation for private gain. Construing the law to allow a President to open lands to private exploitation protects no such interest. Finally, and as noted previously, Congress expressly overruled *Midwest Oil* when it enacted FLPMA in 1976.[55] Thus, even if those earlier, pre-FLPMA monument modifications might arguably have been supported by implied presidential authority, that implied authority

opinion on Mount Olympus National Monument, on the grounds that the earlier opinion had specifically supported the modification of the monument because the lands would not be restored to the public domain, but would rather be reclassified as national forests. Solicitor's Opinion of April 20, 1915, supra note 45, at 6. The legal argument against the modification of monument proclamations, however, has never rested on whether the lands would be restored to the public domain or revert to another reservation or designation.

[51] U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of May 16, 1932, M-27025 (opinion regarding Death Valley National Monument).

[52] U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of January 30, 1935, M-27657 (upholding the validity of the reduction of Mount Olympus National Monument since no interdepartmental transfer). See also National Monuments, 60 Interior Dec. 9, 9–10 (July 21, 1947) (solicitor opinion reaffirming the 1935 opinion).

[53] U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of January 30, 1935, M-27657; United States v. Midwest Oil Co., 236 U.S. 459, 483 (1915).

[54] See , supra Part I.

[55] FLPMA, § 704(a), 90 Stat. 2792 (1976). While the text of Section 704(a) specifically mentions the power of the President "to make withdrawals," given the clear intent of Congress in FLPMA to reduce executive withdrawal power, the section is best understood as also repealing any inherent Presidential power recognized in *Midwest Oil* to modify or revoke withdrawals as well.

is no longer available to justify the shrinking of national monuments following the passage of FLPMA.[56]

Some critics of national monument designations have argued that a President can downsize a national monument by demonstrating that the area reserved does not represent the "smallest area compatible" with the protection of the resources and sites identified in the monument proclamation.[57] But allowing a President to second-guess the judgment of a predecessor as to the amount of land needed to protect the objects identified in a proclamation is fraught with peril because it essentially denies the first President the power that Congress granted to proclaim monuments. If that were the law, then nothing would stop a President from deciding that the objects identified by a prior President were themselves not worthy of protection. Congress clearly intended the one-way power to reserve lands as national monuments to avoid this danger. Moreover, the fact that national monuments often encompass large landscapes, which are themselves denoted as the objects warranting protection, is not a cause for concern because the courts, including the U.S. Supreme Court, have consistently upheld the use of the Antiquities Act to protect such landscapes as "objects of historic or scientific interest."[58] Courts

[56] This repeal removes any presumption of inherent Presidential authority to withdraw public lands or modify past withdrawals. As noted above, such authority, if any, must derive from an express delegation from the Congress. In this way, the power of the President or any executive branch agency over public lands is unlike the inherent power of the President to issue, amend, or repeal executive orders or the inherent power of the Congress to promulgate, amend or repeal laws. It is arguably akin to the power of administrative agencies to issue, amend, or repeal rules but, unlike the Antiquities Act, each of these powers has been expressly delegated to agencies by the Administrative Procedure Act. See 5 U.S.C. § 551(5) (2012) (definition of "rulemaking").

[57] See, e.g., John Yoo & Todd Gaziano, Am. Enter. Inst., Presidential Authority to Revoke or Reduce National Monument Designations 14–18 (2017), https://perma.cc/PX7W-UD3E. The Interior Solicitor's 1935 opinion, and a subsequent one in 1947, addressed this issue in reviewing and supporting the validity of the decision by Woodrow Wilson to shrink the Mt. Olympus National Monument. Squillace, supra note 40, at 560–64. According to that opinion, both the Interior and Agriculture Departments thought the area was "larger than necessary." U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of Jan. 30, 1935, M-27657 (http://scholar.law.colorado.edu/research-data/4/.). However, there is no legal basis for concluding that the opinions of cabinet officials should overturn a prior presidential determination as to the scope and management requirements of a protected monument. Squillace, supra note 40, at 560–64.

[58] See Cameron v. United States, 252 U.S. 450, 455–56 (1920). The Court dismissed the plaintiff's objection to the establishment of the 808,120 acre Grand Canyon National Monument with these words:

> The Grand Canyon, as stated in [President Roosevelt's] proclamation, "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not

have upheld two prominent examples of landscape level monuments under these broad interpretations: the Grand Canyon,[59] designated less than two years after the Antiquities Act's passage; and the Giant Sequoia National Monument, created in 2000.[60]

It is conceivable, of course, that a revised proclamation might be needed to correct a mistake or to clarify a legal description in the original proclamation, as occurred very early on when President Taft proclaimed the Navajo National Monument and subsequently issued a second proclamation clarifying what had been an extremely ambiguous legal description.[61] But the clear restriction on modifying or revoking a national monument designation—cemented by FLPMA—indicates that a President cannot simply revisit a predecessor's decision about how much public land should be protected.

> in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.

Id. at 455–56. See also, Tulare Cty. v. Bush, 306 F.3d 1138, 1140–41 (D.C. Cir. 2002) (discussing Giant Sequoia National Monument). Additional Supreme Court cases that address Antiquities Act designations support this broad interpretation of what may constitute an "object of historic or scientific interest." See United States v. California, 436 U.S. 32, 34 (1978) (Channel Islands); Cappaert v. United States, 426 U.S. 128, 131–32, 142 (1976) (Devil's Hole).

[59] Cameron, 252 U.S. at 455–56.

[60] Tulare Cty., 306 F.3d at 1140–41.

[61] Taft's original proclamation for the Navajo National Monument in Arizona protected:

> [A]ll prehistoric cliff dwellings, pueblo and other ruins and relics of prehistoric peoples, situated upon the Navajo Indian Reservation, Arizona between the parallels of latitude thirty-six degrees thirty minutes North, and thirty-seven degrees North, and between longitude one hundred and ten degrees West and one hundred and ten degrees forty-five minutes West . . . together with forty acres of land upon which each ruin is located, in square form, the side lines running north and south and east and west, equidistant from the respective centers of said ruins.

Proclamation No. 873, 36 Stat. 2491, 2491–92 (1909). The map accompanying the proclamation states that Navajo National Monument is "[e]mbracing all cliff-dwelling and pueblo ruins between the parallel of latitude 36°30' North and 37 North and longitude 110° West and 110° 45' West. . . with 40 acres of land in square form around each of said ruins." Id. at 493 Thus, the original proclamation was ambiguous. It plainly was not intended to include all of the lands within the latitude and longitude description but only 40 acres around the ruins in that area. The map specifically identified at least 7 sites as "ruins" and appeared to denote a handful of other sites that might have been intended for protection under the original proclamation, although the map is a little unclear on this point. The revised proclamation issued three years later, also by Taft, clarified the ambiguous references in the original proclamation. It included a survey done after the original proclamation and protects two, 160-acre tracts of land and one, 40 acre tract. Proclamation No. 1186, 37 Stat. 1733, 1733–34, 1738 (1912).

B. Removing protections that apply on national monuments would be an unlawful modification

A related issue is whether a President can modify a national monument proclamation by removing some or all of the protections applied to the monument area, such as limitations on livestock grazing, mineral leasing, or mining claims location. Plainly, these are types of "modifications." As discussed above, Congress's use of the phrase "modify and revoke" to describe prohibited actions demonstrates that the same legal principles apply here as would apply to an attempt to abolish a monument.[62] More generally, if a President lacks the authority to abolish or downsize a monument, it would also suggest a lack of presidential authority to remove any restrictions imposed by a predecessor. Moreover, to the extent that a claim of presidential authority rests on an argument that the President can shrink a monument to conform to the "smallest area compatible" language of the Antiquities Act, that argument would be inapplicable to an effort to remove restrictive language from a predecessor's national monument proclamation.[63]

Aside from these legal arguments, construing the Antiquities Act as providing one-way Presidential designation authority is consistent with the fundamental goal of the statute. Faced with a concern that historical, archaeological, and natural or scenic resources could be damaged or lost, Congress purposefully devised a delegation to the President to act quickly to ensure the preservation of objects of historic and scientific interest on public lands before they are looted or compromised by incompatible land uses, such as the location of mining claims. Once the President has determined that these objects are worthy of protection, no future President should be able to undermine that choice. That is a decision that Congress lawfully reserved for itself under the terms of the Antiquities Act, a point that Congress reinforced in the text and legislative history of FLPMA.

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[62] See supra Section II.A.

[63] In National Monuments, supra note 52, at 10, the Solicitor acknowledged that the Mineral Leasing Act does not apply to national monuments. Nonetheless, he held that "in the event of actual or threatened drainage of oil or gas under lands within the Jackson Hole National Monument by wells on non-federally-owned lands, the authority to take the necessary protective action, including the issuance of oil and gas leases, would impliedly exist." Id. at 10–11. To be clear, however, the Solicitor was not sanctioning surface occupancy of national monument lands but only the issuance of leases that would allow the federal government and the lessee to share in the oil and gas production that was being extracted from a well on non-federal lands. For further discussion of this issue, see Squillace, supra note 40, at 566–68.

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CONCLUSION

Our conclusion, based on analysis of the text of the Antiquities Act and other statutes, legislative history, and prior legal opinions, is that the President lacks the authority to abolish or downsize a monument, or otherwise weaken the protections afforded by a national monument proclamation declared by a predecessor. Moreover, while we believe this to be the correct reading of the law from the time of enactment of the Antiquities Act in 1906, the enactment of FLPMA in 1976 removes any doubt as to whether Congress intended to reserve for itself the power to revoke or modify national monument proclamations, because Congress stated so explicitly.

Presidents may retain some authority to clarify a proclamation that contains an ambiguous legal description or a mistake of fact.[64] Where expert opinions differ, however, courts should defer to the choices made by the President proclaiming the monument and the relevant objects designated for protection. Otherwise, a future President could undermine the one-way conservation authority afforded the President under the Antiquities Act and the congressional decision to reserve for itself the authority to abolish or modify national monuments.

The remarkable success of the Antiquities Act in preserving many of our nation's most iconic places is perhaps best captured by the fact that Congress has never repealed any significant monument designation.[65] Instead, in many instances, Congress has expanded national monuments and redesignated them as national parks.[66] For more than 100 years, Presidents from Teddy Roosevelt to Barack Obama have used the Antiquities Act to protect our historical, scientific, and cultural heritage, often at the very moment when these resources were at risk of exploitation. That is the enduring legacy of this extraordinary law. And it remains our best hope for preserving our public land resources well into the future.

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[64] See supra note 61 and accompanying text.

[65] About a dozen monuments have been abolished by the Congress. None of these were larger than 10,000 acres, and no monument established by a president has been de-designated by Congress without redesignating the land as part of another national monument or other protected area since 1956. See Squillace, supra note 40, at 550, 585–610 (appendix). See also National Park Service, Archeology Program: Frequently Asked Questions (May 31, 2017), https://perma.cc/BW3C-X52Z (noting no parks as "abolished" since 1956 except for Misty Fjords, which was subsequently made part of Tongass National Park).

[66] See e.g., Proclamation No. 277, 40 Stat. 1175 (1919)(expanding size of Grand Canyon park).

Appendix D

Informational Packet on Katahdin Woods and Waters Proposed National Park and National Recreation Area