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Intersectional Management: An Analysis of Cooperation and Competition on American Public Lands

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The United States government holds public lands in trust for the whole of the American people. This article focuses on National Monuments under the Antiquities Act. It argues that the federal government should renew its approach to the management of these lands by incorporating principles of environmental justice and long-term environmental viability. The article begins by examining the historical and legal foundations of federal lands in the United States, with a focus on the Antiquities Act. It then reflects on recent litigation and political controversy surrounding Bears Ears National Monument and Grand Staircase–Escalante National Monument, to illustrate how the current ad-hoc approach to management leaves valuable public lands subject to cyclical presidential administrations and without necessary, durable management policies. The article offers three recommendations. First, that the Antiquities Act be amended to reserve the right to diminish existing monuments solely to Congress. Second, that any amendment also requires minimum management standards for all new national monuments. Finally, the article calls for executive branch agencies to develop more robust means for incorporating stakeholder input in the management planning of national monuments, including through advisory boards. We argue that, due to the history of Native American land dispossession in the United States, there ought to be specific policies for fostering greater collaboration and co-stewardship agreements with Native American tribes and organizations.

This land is your land, this land is my land.
This land was made for you and me.

- Woody Guthrie

I. INTRODUCTION

Many Americans are familiar with the popular Woody Guthrie song from 1940, "This Land Is Your Land." It is a song which celebrates the great diversity of landscapes which define the geography of the United States. The nation's lands are heralded all the way from its ancient green Appalachian Mountains in the east to the mighty Pacific Coast in the west. The nation holds spring-fed turquoise rivers, unique and vast deserts, awe-inspiring mountain precipices, and prairies that hold countless ecosystems and mythologies. America's approach to public lands offers all kinds of people an opportunity to engage with these wondrous spaces—in addition to stewarding and protecting their beauty for generations to come. In this way, public lands are an important part of the American

identity, as was captured in the famous tune. But behind the lyrics of the chorus lies a question . . .

If this land is *our* land, how do we properly protect it, enjoy it, and manage it for the greatest benefit to all? This article seeks to respond to that question, focusing on one category of public lands: national monuments in particular. With lands so varied and vast as this nation's, an intense competition over use and management exists within them. This is true with respect to national monuments, where the goals of resource preservation, public education and recreation, and ecological restoration exist in tension and pose challenges for effective management. Further, public lands exist in the backdrop of a painful and tumultuous history of Native American genocide and land dispossession. Many of the most celebrated American public lands, including certain national monuments, are also sacred, historic, and culturally significant Native American lands.

If these American public lands are to be considered *our* lands, especially in this time of rapid environmental change, land managers must find ways to mediate effectively between the wide variety of interests for their use. All the while, managers must also balance the necessity of now with the urgency of tomorrow and the interests of all those hikers, loggers, campers, and oil drillers to come. In America, *we* is a complicated term, but the beauty of public lands is that they belong to *we* all. Ultimately, the question becomes: if this land is *our* land, how may we best include *all*?

The federal government holds public lands in trust for the whole of the American people. Throughout American history, different presidential administrations and congresses have dealt with federal lands in a variety of ways—reflecting the complexities implicit in land being both *yours* and *mine*. There have been periods that focus on land conservation—famously, during the Teddy Roosevelt administration—and others on resource extraction—most recently, during the Donald Trump administration. Many of the most famous (and controversial) actions of both administrations regarding federal lands center on their use of the Antiquities Act of 1906, which enables the President to establish, modify, and possibly disestablish national monuments. This executive branch authority exists in tension with Congress's ability to pass legislation creating, modifying, and disestablishing national monuments.

This article begins, in Section 2, by examining the historical and legal foundations of federal lands in the United States, with a focus on the Antiquities Act. Then, in Section 3, it reflects on recent litigation and political controversy surrounding Bears Ears National

Monument and Grand Staircase–Escalante National Monument, to illustrate how the current ad-hoc approach to management leaves valuable public lands subject to cyclical presidential administrations and without necessary, durable management policies. The article offers three recommendations in Section 4. First, the Antiquities Act should be amended to reserve the right to diminish existing monuments solely to Congress. Second, any amendment should also require minimum management standards for all new national monuments. Finally, the article calls for executive branch agencies to develop more robust means for incorporating stakeholder input in the management planning of national monuments, including through advisory boards. A fundamental principle of environmental justice is the ability for all people to participate in the environmental decision-making process and the pursuit of this justice is imperative with respect to national monuments. We argue that, due to the history of Native American land dispossession, there ought to be specific policies for fostering greater collaboration and co-stewardship agreements with Native American tribes and organizations.[1] Where agencies lack authority to create such forums and advisory bodies, Congress should codify requirements to do so.

II. OVERVIEW OF NATIONAL MONUMENTS AND OTHER FEDERAL PUBLIC LANDS

A. *Federal Public Lands*

1. *Federal land acquisition and disposition.*

The United States contains 2.27 billion acres of land.[2] Of that, 28% (610 million acres) is federally owned, and these federal lands are valuable assets.[3] They provide ecosystem services, are used in commodity production, provide support to the defense industry, support wildlife and biodiversity, and attract people and businesses. Tourism to national parks brings significant amounts of revenue to the local economies; in fact, the 2018 National Park Visitor Spending

1. For more on tribal involvement in resource development and tribal capacity building, see Sam J. Carter and Robin M. Rotman, *Resurfacing Sovereignty: Who Regulates Surface Mining in Indian Country After* McGirt*?*, 83 MONT. L. REV. 266 (2022).

2. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 2018, at 3 (2019), https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2018.pdf [https://perma.cc/7MKE-W54B].

3. CAROL HARDY VINCENT ET AL., CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020) https://fas.org/sgp/crs/misc/R42346.pdf [https://perma.cc/DM8V-PDBR].

Effect reported $40.1 billion in visitor spending to the benefit of communities near national parks—supporting 329,000 jobs.[4]

However, despite their obvious benefits, public lands have been subject to controversy—both with respect to their existence and their management— since the founding of the U.S. In the present day, to some individuals, businesses, and state and local governments, the federal government's ownership of land is seen as an infringement of their property rights and economic freedoms.

Throughout the late 1700s and early to mid-1800s, the United States acquired large amounts of land through forced removal of Native Americans, cessions from war with Mexico, and purchases from European countries.[5] The federal policies of this period reflected popular ideas that the American west was an unlimited frontier for economic gain—despite water scarcity and the Indigenous populations living there.[6] Through the Homestead Act of 1862,[7] the General Mining Law of 1872,[8] and the Desert Lands Act of 1877,[9] the federal government further emphasized private property ownership and resource extraction.[10] The Homestead Act of 1862 aligned with the sentiment of Manifest Destiny.[11] Under the Act, the federal government provided settlers with land if they journeyed west to populate the newly gained territories.[12] To encourage individual settlement, the federal government deployed the military

4. *National Park Visitor Spending Contributed $40 Billion to U.S. Economy*, NAT'L PARK SERV. (May 23, 2019), https://www.nps.gov/orgs/1207/national-park-visitor-spending-contributed-40-billion-to-u-s-economy.htm [https://perma.cc/ARB3-7BDJ].

5. BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, *supra* note 2, at 3-5 [https://perma.cc/7MKE-W54B].

6. *See generally* Lee Ann Potter & Wynell Schamel, *The Homestead Act of 1862*, 61 SOC. EDUC. 359 (1997).

7. Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976).

8. General Mining Law of 1872, ch. 152, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 22–24, 26–30, 33–43, 46-48, 50-52, 71-76 (1993)).

9. Desert Lands Act of 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321–23, 325, 327–29 (1976)).

10. *See* Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 4 UTAH L. REV. 1127, 1132–1133 (2005).

11. Signed into law by President Abraham Lincoln on May 20, 1862, the Homestead Act encouraged Western migration by providing settlers 160 acres of public land. In exchange, homesteaders paid a small filing fee and were required to complete five years of continuous residence before receiving ownership of the land. After six months of residency, homesteaders also had the option of purchasing the land from the government for $1.25 per acre. The Homestead Act led to the distribution of 80 million acres of public land by 1900.

12. *See generally* Potter & Schamel, *supra* note 6.

to forcibly move Native Americans off prospective homesteads and onto reservations.[13]

By the turn of the twentieth century, widespread disposition and unfettered development culminated in corporate abuse of the nearly-free land and mineral rights,[14] depleted timber resources, diminished wildlife populations, and scarred landscapes through boom-and-bust mining cycles.[15] In response, the federal government began to withdraw certain lands from public sale.[16] By 1890, the western frontier was nearly closed and the sale of public lands decreased significantly.[17] However, the emphasis on land disposition guided federal policy into the twentieth century,[18] culminating in the repeal of the Homestead Act in 1976.[19]

2. *Management and use of federal public lands.*

The way public lands should be managed and used is also a contentious topic, particularly in the American West, where much land is federally owned.[20] The management of public lands is subject to varied perspectives and goals. Two land ethics predominate this debate: conservation and preservation, which can be traced back to John Muir and Gifford Pinchot at the turn of the twentieth century.[21]

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13. Keiter, *supra* note 10, at 1132. The legacy of dispossession, assimilation, and allotment continues to shape the sociocultural fabric and economy in Indian country today. *See* Sam J. Carter and & Robin M. Rotman, *It's None of Your Business: State Regulation of Tribal Businesses Undermines Sovereignty and Justice*, 18 N. Y. U. J. L. & BUS. 1 (2021).

14. For example, after gaining land rights in Montana, the Anaconda Copper Company grew to massive proportions, effectively controlling all Butte politics and media. Today in Butte, where 1.5 billion tons of ore were extracted, lies the infamous Berkeley Pit. Its water is laden with heavy metals and various toxins and has twice killed migrating flocks of snow geese that landed there. S*ee* Kathleen McLaughlin, *A Once-powerful Montana Mining Town Warily Awaits Final Cleanup of its Toxic Past*, WASH. POST, Feb. 10, 2020, https://www.washingtonpost.com/climate-environment/a-once-powerful-montana-mining-town-warily-awaits-final-cleanup-of-its-toxic-past/2020/02/09/514c4220-4943-11ea-bdbf-1dfb23249293_story.html [https://perma.cc/H5RP-BVDZ].

15. Keiter, *supra* note 10, at 1133.

16. For example, the government protected hot springs in Arkansas, scenic waterways in the Yosemite Valley, and regions of land in Yellowstone—all of which eventually became designated as National Parks, Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship,* 18 HARV. ENV'T L. REV. 345, 352–53 (1994).

17. Keiter, *supra* note 10, at 1132–33.

18. Hardt, *supra* note 16, at 352-54.

19. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701–85 (2012)). The Homestead Act was repealed with the passage of the Federal Land Policy and Management Act.

20. VINCENT, *supra* note 3, at 7-8 (2020), https://sgp.fas.org/crs/misc/R42346.pdf [https://perma.cc/P8NK-BCYG].

21. Robert Hudson Westover, *Conservation Versus Preservation?*, U.S. DEP'T AGRIC. (Feb.

Muir believed in preservation: the idea that land ought to be kept as close to its natural state as possible, and that exposure to nature offers spiritual benefits to people and society.[22] Preservationists believe that land serves the people best when undeveloped and unfettered; thus, preservationists generally oppose logging, mining and other extractive uses on federal land.[23] Alternatively, conservation stems from Pinchot, who argued that lands ought to be managed to provide the highest possible return to society. Conservationists believe that one can attach monetary value to resources and attributes of the land; the way these lands are managed ought to best value the ecological and scientific evaluation of the land for both the present day and for generations to come.[24] Conservationist principles have largely guided the American approach to managing federal lands.[25]

Beyond the question of *how* federal lands should be managed, there is also the question of *who* within federal government should manage them. Congress and the Executive Branch are in something of a tug-of-war regarding authority over public lands. Article IV, Clause 3 of the U.S. Constitution states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property of the United States."[26] The first case to significantly interpret this power was *United States v. Gratiot*. This case, from the 1840s, gave a broad reading to the Clause, holding that Congress's power on federal land is "without limitation."[27]

21, 2017), https://www.usda.gov/media/blog/2016/03/22/conservation-versus-preservation [https://perma.cc/4Z5J-W6Z3].

22. Keiter, *supra* note 10, at 1165.

23. Hardt, *supra* note 16, at 357 (citing Stephen Fox, *John Muir and His Legacy: The American Conservation Movement*, 9 HUMBOLDT J. SOC. REL. 172 (1981)). *See also* Keiter, *supra* note 10, at 1167.

24. *See* Hardt, *supra* note 16, at 357 n. 68 (first citing HAROLD T. PINKETT, GIFFORD PINCHOT, PRIVATE AND PUBLIC FORESTER, 59 (1970); then quoting GIFFORD PINCHOT, THE FIGHT FOR CONSERVATION, 42–43 (1911) ("The first principle of conservation is development, the use of the natural resources now existing on this continent for the benefit of the people who live here now. There may be just as much waste in neglecting the development and use of certain natural resources as there is in their destruction.")).

25. *See* Keiter, *supra* note 10, at 1159.

26. U.S. CONST. art. IV, § 3.

27. United States v. Gratiot, 39 U.S. 526, 537 (1840); *see also id.* at 534) ("The words 'dispose of' the public lands, used in the Constitution of the United States, cannot, under the decisions of the Supreme Court, receive any other construction than that Congress has the power, in its discretion, to authorize the leasing of the lead mines on the public lands in the territories of the United States. There can be no apprehensions of any encroachments upon state rights by the creation of a numerous tenantry within the borders of the states from the adoption of such measures." *Id.* at 534.

The broad authority of Congress over federal lands articulated in *Gratiot* was upheld by a 1976 U.S Supreme Court case, *Kleppe v. New Mexico,* which adopted a broad interpretation of "without limitation" under Article IV, Clause 3.[28] *Kleppe* addressed the question of whether the federal government can regulate and protect wildlife on federal land. Specifically, the case dealt with the Wild Free-Roaming Horses and Burros Act, which provides that if protected horses or burros that live on land administered by the Secretary of the Interior or Secretary of Agriculture wander onto private land, they are protected from "capture, branding, harassment, or death," as they are considered components of public land.[29] The State of New Mexico argued that the Act was an infringement upon New Mexico's sovereignty, as it conflicted with state law.[30] In *Kleppe v. New Mexico*, the U.S. Supreme Court held that "the Clause must be given an expansive reading," and that Congress has "complete authority over the public lands [and the wildlife living there]."[31]

Despite its "complete authority" over public lands, Congress delegates most of its land management authority to executive branch agencies due to the scientific complexity of many land management decisions. These agencies each manage their lands according to individual statutory mandates. The agency that manages a parcel of federal land and the type of designation assigned to the parcel significantly impacts how it is managed and which uses are allowed upon it. There are three federal departments that collectively administer approximately 96% of the federal lands: the Department of Agriculture (USDA), the Department of the Interior (DOI), and the Department of Defense (DOD).[32] Within the DOI are the National Park Service (NPS), the U.S. Fish and Wildlife Service (FWS), and the Bureau of Land Management (BLM). The NPS manages 79.9 million acres.[33] Its controlling statute, the National Park Organic Act, sets forth a two-pronged mission: to conserve the land and to promote recreation.[34] The FWS manages 89.2 million acres of land,

28. Kleppe v. New Mexico, 426 U.S. 529, 538 (1976).

29. The Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1970).

30. *Kleppe*, 426 U.S. at 541.

31. *Id.* at 530.

32. VINCENT, *supra* note 3, at 3. Because lands managed by the Department of Defense are not at issue in this article, we will not focus on the Department's approach to management. *See id.* at 15.

33. *See id.* at 5.

34. National Park Service Organic Act of 1916, ch. 408, 39 Stat. 535 (codified as amended at 16 U.S.C. §§ 1–4) (stating the NPS shall act "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the

predominantly National Wildlife Refuges.[35] It is mandated by the Fish and Wildlife Act primarily to administer regulations and conservation assistance to fish and wildlife populations, but also to educate the public on these resources.[36] The BLM manages 244.4 million acres.[37] It is responsible for many different types of land designations but the most common is simply called BLM lands. The BLM has a multiple-use mandate; the Federal Land Policy and Management Act (FLPMA) directs it to balance recreation, grazing, timber, energy and minerals, watershed, wildlife and fish habitat, and conservation.[38] Under the USDA is the Forest Service (FS), which manages 192.9 million acres.[39] The Forest Service has a multiple-use mandate for natural resource management, research, education, and recreation; it is primarily responsible for the management of National Forests and Grasslands.[40]

In addition to the types of lands primarily administered by specific agencies, some land designations, such as Wilderness Areas, Wild and Scenic Rivers, National Monuments and National Scenic and Historic Trails, can be "overlaid" on federal lands managed by any of the agencies described above. When Congress or the executive branch makes such an overlay, the federal agency that previously managed the land typically continues to do so, but it does so pursuant to the purposes of the overlay, rather than in accordance with the agency's organic statute. For example, BLM lands are managed for multiple uses in accordance with FLPMA, but when a Wilderness Area overlay is created for a parcel of land managed by BLM, the agency henceforth manages the property according to the strict guidelines

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same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations").

35. *See* VINCENT, *supra* note 3, at 5.

36. *See* Fish and Wildlife Act of 1956, ch. 1039 70 Stat. 1119, P.L. 1024.

37. *See* VINCENT ET AL., *supra* note 3, at 4.

38. *See Multiple Surface Uses of the Public Domain*, *Hearing on H.R. 5891 Before the H. Comm. on Interior and Insular Affairs*, 84th Cong. (1955); *What We Manage*, BUREAU OF LAND MGMT., https://www.blm.gov/about/what-we-manage/national [https://perma.cc/5FHV-577S] (archived Apr. 5, 2023). Pinchot's ideas of conservation are paramount in the BLM's "multiple use" mandate. Public Law 84-167 enabled disposal of and claims to certain federal lands and resources (notably, not to national parks, monuments, or Native lands). Private groups typically cannot obtain the property rights to federal lands, but they can acquire a contract, lease, or permit to extract and produce oil and gas, coal, strategic minerals, and renewable energy resources. *See* Surface Resources and Multiple Use Act of 1955 (Multiple Use Act), Public Law No. 84-167, 69 Stat. 367.

39. *See* VINCENT ET AL., *supra* note 3, at 4.

40. National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended at 16 U.S.C. §§ 1600–14 (1994)).

set forth in the Wilderness Act.[41] Similarly, some National Parks contain Wilderness Areas which are managed by NPS specifically for the preservation of wilderness and contain some of the strictest management rules.

There are also some federal lands and waters that are managed jointly by two or more federal agencies or by the federal government and tribal, state, or local governments. For instance, several marine national monuments are managed jointly by the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. In the case of national monuments, the Antiquities Act—which gives the President power to establish monuments, and will be further discussed in the next section—enables the president to outline specific conservation goals for the monument. These goals then mitigate discrepancies between agency mandate policies to guide a consistent management plan for the monument.

While these charters mitigate many agency conflicts, in the present day, the wide array of stakeholder views and different agencies has culminated in enduring debate over what uses should be allowed on public lands.[42] While federal lands are technically held in trust for the American people, they are not always open to public access, and certainly not all uses.[43] On public lands, people of all interests and backgrounds compete to use the land as they wish. Anglers argue for open stream access, ranchers want open grazing, hikers and cyclists seek quiet trails, and ATV riders covet the ability to ride in wild spaces. All the while, energy companies want to extract resources and environmentalists want to preserve the land that these resources are found on; hunters want to shoot game, and birdwatchers want wildlife protected. While America's public lands appeal to many they certainly are not conducive to all uses simultaneously.

Thus, to help mitigate this competition, some federal lands charters may designate an advisory board of relevant groups and people to shape the specific management plan for the land. The

41. Wilderness Act of 1964, Pub. L. No. 88–577, § 1(B), 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131–36 (2006)) ("the area shall continue to be managed by the Department and agency having jurisdiction thereover immediately before…").

42. Charles S. Lucero, *Public Access to Federal Lands: Dilemma*, 3 PUB. LAND L. REV. 194, 201 (1982).

43. *Id.* at 195 ("This inaccessibility results from four problems: 1) a lack of public awareness concerning which lands are public; 2) the physical remoteness of public lands from established roads and trails; 3) government lessees and permittees who prohibit public use on federal lands; and 4) private landowners who block access to public lands by controlling key tracts of land.").

Federal Land Recreation Enhancement Act[44] requires the Secretaries of Interior and Agriculture establish Recreation Resource Advisory Committees[45] when fees are collected on their agencies' lands—as the Act permits. Such advisory committees have served a significant role in the federal government since its advent.[46] The various land management agencies often rely on the input of advisory committees to guide management plans for specific parcels of land. These committees are a key way that agencies engage with a wide array of perspectives and land interests. For example, the BLM advisory councils include statewide and regional committees affiliated with specific sites on the BLM's National Conservation Lands, and the National Wild Horse and Burro Advisory Board. These committees are "sounding boards for BLM initiatives, regulatory proposals, and policy changes."[47] Each group is comprised of 10-15 members of diverse interests such as ranchers, environmentalists, tribes, state and local government officials, recreationists, and more.[48]

However, advisory committees are not a sure-fire way to prevent dispute and controversy on federal lands. Rather, despite dedicated advisory councils for the Bears Ears and Grand-Staircase Escalante National Monuments, the two parcels have been engulfed in legal battles and back-and-forth executive action for years. In many ways, the nation's national monuments—created at the intersection of executive and congressional power—are a prime example of the management tug-o-war that exists broadly on federal lands. The following sections of this article discuss how national monuments are created by the President under the Antiquities Act of 1906[49] or by Congress through their own enabling status.[50] They also examine several issues arising from these designations.

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44. Federal Lands Recreation Enhancement Act, Pub. L. No. 108-447, 118 Stat. 3377 (codified as amended at 16 U.S.C. 87, §§ 6801–6814 (2004)).

45. *See Recreation Advisory Committees*, U.S. DEP'T AGRIC., https://www.fs.usda.gov/working-with-us/committees/recreation-advisory-committees [https://perma.cc/H5CZ-Y7SY] (archived Apr. 5, 2023).

46. "President George Washington sought the advice of such a committee during the Whiskey Rebellion of 1794, the contributions made by these groups have been impressive and diverse." *Finding Information on FACA Committees*, U.S. GEN. SERVICES ADMIN., https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-management/finding-information-on-faca-committees/faca-101 [https://perma.cc/N4DJ-DMT6] (archived Apr. 5, 2023).

47. *About Advisory Councils*, BUREAU OF LAND MGMT., https://www.blm.gov/get-involved/resource-advisory-council/about-rac [https://perma.cc/32LY-W3EM] (archived Apr. 5, 2023).

48. *Id.*

49. 54 U.S.C. §§ 320301–320303.

50. United States v. Gratiot, 39 U.S. 526 (1840).

B. *National Monuments and the Antiquities Act*

National monuments are present throughout the nation and feature several prominent landscapes—beloved by many Americans. So too, though, the Antiquities Act has been prominent in the nation's courts.[51] Litigation regarding the presidential ability to create and modify monuments, the allowable size of monuments, the types of resources that can be protected, the management of national monuments, and the potential inclusion of nonfederal land in designations have all been litigated in recent years.[52] Many challenges to national monument designations have been brought by the states in which the monuments are located.[53] However, few of these issues have been judicially resolved.[54] Before many cases can reach a decision, the management decisions that sparked the litigation often change with changes in administrations—thus rendering the litigation moot and leaving the Act largely without judicial clarification. In this section we will discuss the history of the Act and some considerations relevant to creating, modifying, and managing national monuments.

1. *Legislative history.*

The Antiquities Act—with its ambiguous wording and broad legislative history—has been a source of contention since its passage. The Antiquities Act was established in 1906 and authorizes the President to designate federal land as a national monument to protect and preserve "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest."[55] Under the Act,

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51. The U.S. Supreme Court has held that review is available for challenges of a president's use of the Antiquities Act to "ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority," *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002), citing *United States v. California,* 436 U.S. 32 (1978), at 35–36; *Cappaert,* 426 U.S. at 141–42; *Cameron,* 252 U.S. at 455–56.

52. *See, e.g.*, *Massachusetts Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019) (holding that submerged canyons and seamounts in the Atlantic Ocean were "lands" the President was able to reserve as a national monument under the Antiquities Act; *Tulare Cnty. v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002) (holding that the authority under the Act is not limited to only archeological sites).

53. *See* Maureen A. McCotter, *A Presidential Power of Monumental Proportions: Does the Antiquities Act Permit the Review and Revision of National Monuments or Can the President Steal Your Land?*, 30 VILL. ENV'T L.J. 173, 177 (2019).

54. Laura Pousson, *The Battle Has Just Begun: Monumental Issues of Implied Powers Within the Antiquities Act of 1906*, 7 LSU J. ENERGY L. & RESOURCES 193, 210–11 (2019).

55. *See* 54 U.S.C. §§ 320301(a), (b).

the President is to reserve the "smallest area compatible with the proper care and management of the objects to be protected."[56]

The Act was initially created in response to theft and looting concerns at significant historical sites, mainly in the southwestern United Sates.[57] To address the issue, the House Committee of Public Lands saw many proposals that ranged from narrow to expansive. Ultimately, they took the expansive route. The committee, chaired by Iowa Congressman John Lacey, was presented with three different bills. The broadest of the three, H.R.8066,[58] allowed presidential designation of lands for scenic beauty and natural uniqueness; another, H.R. 8195,[59] simply prohibited individuals from harming antiquities on federal public lands, and the third, H.R. 9245,[60] gave the Secretary of the Interior the ability to designate areas of land smaller than 320 acres for protection.[61] Chairman Lacey sent all three bills to the Department of the Interior (DOI) for review. At the DOI, Binger Hermann, Commissioner of the General Land Office (GLO), argued for an even more expansive bill[62]—one that would allow the President to designate National Parks.[63] In 1900, Congressman Lacey proposed H.R. 11021, a bill most similar to the broadest of the three initially debated, but that also included language for protecting the "scenic beauties, natural wonders or curiosities" of potential land designations.[64] This bill was met with resistance—particularly from Western congressmen—in committee.[65]

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56. *See id.*

57. Jesse Knowlden, *The Presidential Authority to Reserve and Modify National Monuments Under the Antiquities Act*, 87 U. CIN. L. REV. 593, 595 (2018).

58. H.R. 8066, 56th Cong. (1900).

59. H.R. 8195, 56th Cong. (1900).

60. H.R. 9245, 56th Cong. (1900).

61. *See generally* Mark Squillace, *The Looming Battle over the Antiquities Act*, HARV. L. REV. BLOG (Jan. 6, 2018), https://blog.harvardlawreview.org/the-looming-battle-over-the-antiquities-act/ [https://perma.cc/A9RQ-3T6T].

62. Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 476–78 (2003).

63. *Birth of a National Park*, NAT'L PARK SERV., https://www.nps.gov/yell/learn/historyculture/yellowstoneestablishment.htm [https://perma.cc/89CK-FVR5] (archived Apr. 5, 2023). The first national park was Yellowstone National Park, created in 1872 by the Yellowstone National Park Protection Act. The National Park Service was created later in 1916 due to an apparent need for organized management in National Parks.

64. Squillace, *supra* note 62, at 480 (citing Ronald F. Lee, *The Antiquities Act of 1906*, NAT'L PARK SERV., ARCHEOLOGY PROGRAM (1970), https://www.nps.gov/archeology/pubs/lee/index.htm [https://perma.cc/R9V6-2KKQ], *reprinted in* Raymond Harris Thompson, *An Old and Reliable Authority*, 42 J. SW., at 198 (2000)).

65. *Id.* at 482 (citing SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE

Several years and debates later, a final bill was authored by Dr. Edgar Lee Hewett, a prominent expert on Indian ruins in the southwestern United States.[66] The bill had unanimous support from the American Anthropological Association and the Archaeological Institute.[67] It reflected a compromise between the DOI's preferred expansive scope and the trepidations of the western Congressional delegations. The bill did not include specific acre-limits on designations, but claimed much more generally that, "The President is to reserve 'the smallest area compatible with the proper care and management of the objects to be protected.'"[68] The final proposal did not include the DOI's favored scope to include "scenic" protections, but instead allowed designations that protect land for its "scientific and historic" value.

On January 9, 1906, Representative Lacey introduced Hewett's bill in the House as H.R. 13349. Senator Thomas Patterson of Colorado introduced an identical companion bill to the Senate on February 26, 1906.[69] There was little floor debate over the bill, so context for understanding the bill's intent is largely limited to committee history. Generally speaking, the legislative history supports a narrow interpretation of the President's power, but Hewett's actual wording shows no evidence of restricting designations to small sites.[70] Ultimately, President Theodore Roosevelt signed the bill into law on June 8, 1906, enabling the presidential power that gave birth to many renowned national

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PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920, at 47 (1959)).

66. H.R. 11016, 59th Cong. (1906).

67. Lee, *supra* note 64, at ch. 6.

68. CAROL HARDY VINCENT, CONG. RSCH SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 1 (2022), https://sgp.fas.org/crs/misc/R41330.pdf [https://perma.cc/QH2D-5G33] (quoting 54 U.S.C. § 320301(b)).

69. S. 4698, 59th Cong. (1906).

70. *See* 40 Cong. Rec. 7888 (1906). This conversation between Rep. Lacey and Tex. Congressman, John H. Stephens, is often referenced to support a legislative intent for small-sized designations:

MR. STEPHENS: How much land will be taken off the market in the Western States [] by the passage of the bill?

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

MR. STEPHENS: Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States ha[s] been tied up?

MR. LACEY: Certainly not. The object is entirely different. It is to preserve those old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst the other [bill] reserves the forests and the water courses.

MR. STEPHENS: I will say that that bill was abused . . . I hope . . . this bill will not result in locking up other lands.

monuments.[71] That law, codified at 54 U.S. Code § 320301, reads that the president may declare historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest on federal lands (or private lands appropriately relinquished to the federal government) so long as the designation is confined to the smallest area compatible with the proper care and management of the objects to be protected.[72]

2. *Establishing national monuments.*

There are two mechanisms for creating a national monument. First, the President can issue a Presidential Proclamation creating a national monument pursuant to his Antiquities Act authority. In total, 18 of the 21 presidents since 1906 have created 161 national monuments.[73] Separately, Congress can create a national monument by passing an Act. In total, Congress has created 45 national monuments.[74] When Congress has opted to designate lands as national monuments, they are often relatively small in size (most are under 1000 acres) and many are significant historical sites such as battlefields or forts. This is likely because Congress also can create National Parks, so their larger designations tend to receive this more protected status instead.

National monuments can be found across the United States and its territories.[75] Monuments vary widely, ranging in scope from individual buildings in urban areas to large swaths of remote land and ocean. Some of the most well-known national monuments include the Statue of Liberty, Devils Tower, and Muir Woods. And, as discussed above, many of the United States' national parks began as national monuments—for example, the Grand Canyon, Great Sand Dunes, Olympic, Joshua Tree, Grand Teton, and the St. Louis Arch all began as National Monuments.[76]

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71. 54 U.S.C. §§ 320301–320303.

72. 54 U.S.C. § 320301.

73. VINCENT, *supra* note 68, at 2.

74. *See generally Antiquities Act of 1906*, *Frequently Asked Questions*, NAT'L PARK SERV., ARCHEOLOGY PROGRAM, https://www.nps.gov/archeology/sites/antiquities/FAQs.doc [https://perma.cc/3PNE-RW2X] (archived Apr. 5, 2023).

75. *See Antiquities Act – Maps, Facts & Figures*, NAT'L PARK SERV., ARCHEOLOGY PROGRAM, https://www.nps.gov/archeology/sites/antiquities/fullMap.htm [https://perma.cc/MV8U-DFZJ] (last updated Apr. 20, 2022).

76. *National Monument Facts and Figures*, NAT'L PARK SERV., ARCHEOLOGY PROGRAM, https://www.nps.gov/archeology/sites/Antiquities/MonumentsList.htm [https://perma.cc/MU4G-HFAT] (last updated Mar. 15, 2022).

The Antiquities Act was first used in the year of its passage, 1906, when President Theodore Roosevelt declared Devils Tower National Monument the nation's first national monument, encompassing 1,347 acres in Wyoming.[77] He established 17 more national monuments within the next three years; perhaps most notable of these was Grand Canyon, which was created in 1908 and encompassed 800,000 acres. This designation prompted a suit that was eventually heard by the U.S. Supreme Court in *Cameron v. United States*.

In this case, plaintiff Ralph Henry Cameron had developed a prosperous copper mine on the South Rim of the canyon and held mining claims at certain points along the Bright Angel Trail (a significant hiking trail still maintained today as part of Grand Canyon National Park). Cameron's claims were likely bogus and staked just so that he could charge tourists an entrance fee to the trail.[78] Before the Supreme Court, Cameron argued that the President did not have the power to designate the Grand Canyon as a national monument. The Supreme Court upheld the 800,000-acre designation, citing the Grand Canyon's scientific significance.[79] *Cameron* set the precedent that Presidents can establish monuments that are large in size, if the objects to be protected conform to the criteria established in the Antiquities Act.

Fifty-six years later, in 1976, another case reached the U.S. Supreme Court: this time, Devil's Hole National Monument—a detached, 40-acre unit of the former Death Valley National Monument (now Death Valley National Park).[80] Devil's Hole contains the only naturally-occurring population of the endangered Pupfish,

77. Proclamation No. 658, 34 Stat. 3236 (Sept. 24, 1906).

78. Bright Angel trail is a popular day hike located in what is now Grand Canyon National Park.

79. *See Cameron*, 252 U.S. at 456 (1920) ("[The Grand Canyon] is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.").

80. Cappaert v. United States, 426 U.S. 128 (1976). Death Valley was designated by President Hoover in 1933 to include two million acres. Greg Lucas, *Death Valley Becomes a National Monument*, CAL@170, https://cal170.library.ca.gov/february-11-1933-death-valley-becomes-a-national-monument-2/ [https://perma.cc/M9NM-CVJA]. In 1952, it was enlarged to include the Devil's Hole tract. Proclamation No. 2961, 66 Stat. 320301 (Jan. 17, 1952). Death Valley was redesignated as a National Park in 1994. *Death Valley National Park Celebrates 25th Anniversary*, NAT'L PARK SERV., https://www.nps.gov/deva/learn/news/25th-anniversary.htm#:~:text=On%20October%2031%2C%201994%2C%20President,and%20established%20Mojave%20National%20Preserve [https://perma.cc/QT2R-8YFY] (last updated Nov. 7, 2019).

and thus has great scientific value.[81] In 1968, nearby ranchers, the Cappaerts, began pumping groundwater from the same source that feeds Devil's Hole, thereby lowering the water level in Devil's Hole and harming the endangered fish that live there. The U.S. Supreme Court unanimously held that "when the United States reserved Devil's Hole, it acquired by reservation water rights in unappropriated appurtenant water sufficient to maintain the level of the pool to preserve its scientific value."[82] Section 2 of the Antiquities Act specifies that when "[significant] objects are situated upon a tract…held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government."[83] In *Cappaert v. United States*, the Supreme Court interpreted this statutory provision broadly, holding that groundwater on privately-owned land can be enjoined if it interferes with the federal government's ability to properly care for Devil's Hole. Thus, *Cappaert* held that the designation of a national monument can affect the rights and actions of private property owners holding land outside of the monument boundaries.

Section 2 of the Act also raises questions about the extent to which nonfederal land can be included in national monuments. It specifies that national monument lands must be "owned or controlled by the government of the United States," but it does not directly speak to private landowners selling or donating their property to the federal government for designation, as has occurred from time to time.[84] The Act also does not speak to whether the federal government can use eminent domain to seize private lands for inclusion in national monuments. To date, the federal government has never attempted to do so, but the theoretical possibility remains.

Presidents Clinton, Bush, and Obama all declared numerous and vast monuments during their respective times in office. President Clinton led off by designating 1.7 million acres in Utah as Grand Staircase–Escalante National Monument.[85] The move generated swift criticism as some called it unlawful and locals complained of foregone natural resource extraction jobs in the area.[86] In creating the

81. *Devils Hole*, NAT'L PARK SERV., https://www.nps.gov/deva/learn/nature/devils-hole.htm [https://perma.cc/6XB8-EUEL] (last updated Sept. 29, 2021).

82. *Cappaert*, 426 U.S. at 138.

83. 54 U.S.C. § 320301(a).

84. This most recently occurred with the César E. Chávez National Monument established by President Obama in 2012 with lands donated by the National Chávez Center. Proclamation No. 8884, 77 Fed. Reg. 62,413 (Oct. 8, 2012).

85. Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 18, 1996).

86. David Negri, *Grand Staircase–Escalante National Monument: Presidential Discretion*

Monument, President Clinton cited concerns over a large coal mining operation in the vicinity and plans for its expansion.[87] Locals have argued that although tourism did increase after the designation, those jobs do not compare to the full-time, benefit-paying jobs in the mining industry.[88] In addition to Grand Staircase–Escalante, President Clinton created eighteen other monuments.[89]

In 2006, President Bush created the largest-ever Monument: Papahānaumokuākea National Monument, the nation's first marine monument, which encompasses 140,000 square miles of ocean in the Hawaiian Archipelago.[90] Following Papahānaumokuākea's designation, President Bush created four other large marine monuments, each of which are managed jointly by the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration.[91] Critics of these marine designations argue that the Antiquities Act does not expressly give the President power to designate monuments in an Exclusive Economic Zone (such as the Outer Continental Shelf), and therefore such designations are unconstitutional.[92] However, proponents argue that swift executive action is necessary to protect eminently threatened fisheries and coral reefs.[93]

President Obama continued his predecessors' trend towards expansive designations. In total, he created twenty-nine new national monuments ranging in size from 0.12 acres to 1.6 million acres.[94] Perhaps the most controversial of these designations was the Bears Ears National Monument in Utah, encompassing 1.35 million acres.[95] The area is known for its beautiful and unique geologic features, its cultural significance to Native people, and for the presence of

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Plus Congressional Acquiescence Equals a New National Monument, 10 UTAH B.J. 20, 20 (1997).

87. *See* Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENV'T L. REV. 535, 557–558 (2001).

88. Hannah Nordhaus, *What Trump's Shrinking of National Monuments Actually Means*, NAT'L GEOGRAPHIC (Feb. 2, 2018), https://www.nationalgeographic.com/news/2017/12/trump-shrinks-bears-ears-grand-Staircase–Escalante-national-monuments/#close [https://perma.cc/8GF9-SZXF].

89. Proclamation No. 7399, 3 C.F.R. 7399 (Jan. 17, 2001).

90. Proclamation No. 8031, 71 Fed. Reg. 36,441 (June 15, 2006).

91. Joseph Briggett, *An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power to Designate Monuments in the Outer Continental Shelf*, 22 TUL. ENV'T. L.J. 403, 407 (2008).

92. *Id.* at 422.

93. *See id.* at 404.

94. *See* VINCENT, *supra* note 68, at 11.

95. *National Monument Facts and Figures*, *supra* note 76. For context, about 42% of land in Utah is publicly owned. BUREAU OF LAND MANAGEMENT, https://www.blm.gov/maps/frequently-requested/utah [https://perma.cc/2U2W-M4GU].

historical sites. Bears Ears was established under the joint management of the BLM and the U.S. Forest Service. This monument, along with the Grand Staircase–Escalante National Monument created under President Clinton, is discussed further in Section 3.

3. *Diminishing and abolishing national monuments.*

Just as monuments can be created, they can also be diminished, abolished, or redesignated. Congress explicitly has this power pursuant to the 1976 Federal Land Policy and Management Act (FLPMA).[96] Most often, Congress has redesignated national monuments as national parks,[97] national preserves,[98] or wilderness areas.[99] Congress has abolished eleven monuments in total—usually because the resources, artifacts, or structures they were protecting were reevaluated or removed. Some monuments have also been abolished because of budget restrictions in the managing agency, mismanagement, or because they were publicly inaccessible.[100]

The Antiquities Act does not explicitly give the President the ability to diminish or abolish national monuments, and FLPMA is silent on the issue. Some commentators argue that although the Antiquities Act grants the President a broad power to create monuments, diminishment is not allowed because the Act is silent on the ability to revoke or diminish previous designations.[101]

Others claim that the Act's silence is actually evidence of an implied power of the President to review former administrations' designations.[102] This issue of presidential diminishment has never

96. See *id.* for complete list of monument designations and congressional action.

97. *Id.*

98. *A National Preserve*, NAT'L PARK SERV., https://www.nps.gov/bicy/learn/the-first-national-preserve.htm [https://perma.cc/H7AF-SFWS] (last updated May 24, 2022). National preserves are a type of land management concept that is a compromise between the restrictive uses associated with National Parks and protecting critical and beautiful land. Preserves are areas "that [are] protected, but also allow for specific activities that [are] described by Congress within the legislation that [creates] the preserve." *Id.*

99. 54 U.S.C. §§ 320301. Those monuments are Mount of the Holy Cross, Mistry Fjords, and Wheeler.

100. *Abolished National Monuments*, NAT'L PARK SERV., https://www.nps.gov/articles/000/abolished-national-monuments.htm [https://perma.cc/HX43-FNWR] (last updated Feb. 17, 2021). Eight of the nine transferred monuments were less than 350 acres; except Papago Saguaro, which is now a Phoenix city park, is approximately 2050 acres. *Papago Saguaro National Monument*, NATL PARK SERV., https://www.nps.gov/archeology/sites/antiquities/profilepapagosaguaro.htm [https://perma.cc/KG75-NUPW] (last updated Apr. 20, 2022).

101. Squillace, *supra* note 62, at 554–58.

102. John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. ON REG. 617, 647–48 (2018). Those who argue that the

been dealt with formally by Congress or the courts. Yet, seven Presidents have diminished a total of fourteen national monuments.[103] Many of these diminishments were relatively small (less than 1000 acres), though Mount Olympus National Monument, a notable exception, was significantly diminishment by President Wilson allegedly for the purpose of providing timber for the World War effort in 1915. Fortunately, the 608,640-acre original area was later included in the nearly one-million-acre Olympic National Park created by Congress in 1938.[104]

The case of Olympic National Park foreshadowed the path of other prized federal lands throughout the 20th century and into the present day. For example, in 2017, President Trump made headlines by issuing proclamations to significantly reduce the size of Bears Ears National Monument and Grand Staircase–Escalante National Monument. He is the first President to attempt diminishment since FLMPA was passed. Several lawsuits were filed in relation to these diminishments, and as they are still pending, are discussed in the following section, together with an analysis of the collaborative management approach the Biden administration is taking towards them.

4. *Managing national monuments.*

In addition to these issues regarding the existence and size of national monuments, another subject of attention is the question of how national monuments should be managed. When a monument is created, it is assigned a managing agency (or agencies).[105] Usually, the

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Antiquities Act allows subsequent presidents to diminish or revoke a national monument tend to also argue that the President's designating powers as more limited, for example that monuments should be relatively small in size. *Id.*

103. These reductions generally fit into three categories: "(1) reductions that were intended to correct mapping errors, or errors and omissions in the initial proclamation; (2) reductions responding to new information; or (3) reductions that were made based on authority other than the Antiquities Act, such as the President's Article II power as Commander in Chief." John C. Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications*, 43 HARV. ENV'T. L. REV. 1,40 (2019).

104. Mount Olympus National Monument was created just two days before President Roosevelt left office. It encompassed 608,640 acres of temperate rainforest and Pacific shoreline. In 1915, President Wilson diminished the Monument by nearly half of its acreage. President Wilson purported that the diminishment was needed to timber resources for military operations in WWI, but some commentators have stated this likely done to please the timber industry. *See* Emily Bergeron, *Bridging the Nature-Culture Gap: Using Cultural Resource Laws for Environmental Protection*, NAT. RES. & ENV'T, Winter 2020, at 18 (citing Carten Lien, OLYMPIC BATTLEGROUND: CREATING AND DEFENDING OLYMPIC NATIONAL PARK, 51–52 (2d ed. 2000)).

105. *See* VINCENT, *supra* note 68 at 7.

managing agency is the same one that previously owned the land, though they manage the monument in accordance with the terms of the relevant Proclamation or Act, and not in accordance with their organic act.[106] In some cases, a Proclamation or Act has directed a national monument to be managed jointly by multiple agencies, in which case they co-operate to manage the monument according to its designating Proclamation or Act. Each designation, whether by Congress or the President, directs agencies to manage the area in the spirit of a monument—in other words, for "the care and management of objects of scientific and historic interest identified by the proclamations."[107] As discussed in section 2.1.2, monument designation acts as an overlay designation and can limit or prohibit land uses, such as development or recreational uses, pursuant to its designating document.

Yet, despite the specific management directives for National Monuments, they are not immune from the management challenges facing all other public lands. The agency responsible for management usually faces some difficulty in deciding which uses are appropriate for the land—even within the established guidelines—as not all possible uses are conducive to one another. Perhaps the most well-known dispute regarding uses of a national monument is over Devils Tower National Monument in Wyoming. Devils Tower is managed by the NPS and, as noted above, is the nation's first national monument. In 1995, the NPS issued a Final Climbing Management Plan (FCMP) for the Monument.[108] Among other restrictions, the FCMP asked rock climbers to "voluntarily refrain from climbing on Devils Tower during the culturally significant month of June" out of respect to Native American reverence for "Devils Tower as a sacred site." The

106. *See id.* Although presidents have, in fact, selected agencies other than the NPS to manage national monuments—most commonly, the agency that managed the parcel before the monument designation—the legal authority for the president to do so has been called into question. Prior to 1933, presidents designated a variety of federal land management agencies to manage various monuments. The Franklin Roosevelt administration, however, consolidated all management under the NPS. This persisted until 1978, when President Carter selected the FWS to manage two national monuments and the FS to manage two others. *Id.* at 8. In response, the Supreme Court held that the Antiquities Act means "no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another." United States v. California, 436 U.S. 32, 41 (1978).

107. Antiquities Act of 1906, 54 U.S.C. §§ 320301–320303 (previously Pub. L. No. 59-209, 34 Stat. 225 (1906)
(codified at 16 U.S.C. § 431–33) (recodified by Pub. L. No. 113-287, 128 Stat. 3259 (2014))).

108. *Final Climbing Management Plan/Finding of No Significant Impact*, *Devils Tower National Monument*, NAT'L PARK SERV. (Feb. 1995), https://www.nps.gov/deto/planyourvisit/upload/DETO-FCMP-1995-accessible.pdf [https://perma.cc/6KEV-CYXL].

FCMP had also initially included a commercial climbing ban in June, but that was removed in 1996. The FCMP sparked a lawsuit led by a climbing guiding group, Bear Lodge Multiple Use Association, in which the plaintiffs contended that the plan violated the Establishment Clause of the First Amendment by promoting Native religious practice, and that the plan conflicted with the NPS's own recreation mandate and policies.[109] Ultimately, the federal district court disagreed and found that the FCMP was lawful and it was upheld. This case exemplifies how important management plans can be to navigating conflicting land uses and the ultimate purpose of the Antiquities Act: preservation of threatened objects and landscapes.

To partially mitigate these types of conflicts, in recent years the role of advisory boards have been bolstered for some monuments. Ideally, if effectively implemented, advisory boards can be useful for preempting the type of conflict that sparked litigation over Devils Tower, however, as will be discussed in the following section, this goal is not always achieved.

The following sections illustrate the conflicts that can arise regarding the existence and management of national monuments, using case studies and recommendations.

III. MODERN UTAH MONUMENTS–A CASE STUDY

To illustrate the complexities of establishing, diminishing, and managing national monuments, we now turn to two contemporary cases playing out in the southwestern state of Utah. Both the Bears Ears National Monument and Grand Staircase–Escalante National Monument made headlines when President Trump diminished them in 2017. Both Monuments contain significant Indigenous sites and history and therefore offer a unique lens through which to view equitable management principles. The conflict over these Monuments, and the cases that followed Trump's proclamations, have captured the attention of many local residents, Native American tribes, state and local governments, conservation groups, recreation groups, certain scientific groups, and outdoor retailers alike. These cases could be pivotal for interpreting the Antiquities Act in the future, but they are currently pending in a state of inactivity after the Biden administration restored the monuments in Fall 2021 (though the state of Utah recently filed suit over the restoration).[110] The

109. Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448 (D. Wyo. 1998).

110. Proclamation No. 10,285, 86 Fed. Reg. 57,321 (Oct. 8, 2021).

following subsections will discuss the history and status of both Monuments along with the litigation ensuing over each.

A. *Background and Introduction to Utah National Monuments*

The controversy over the creation, subsequent diminishment, and eventual restoration of both Bears Ears and Grand Staircase–Escalante National Monuments has sparked protests and political action on both sides of the aisle. Some who live near these Monuments in Utah felt that the Presidential designations stole land that was rightfully theirs and limited their economic opportunities. Many Native Americans, however, have expressed that the real theft occurred long ago when they were forced off their land and into reservations by settlers. They feel, among other things, that designation of the sites as national monuments supports their exercise of religious freedom on culturally significant lands. In this section we will discuss the monuments' creation, diminishment, ongoing litigation, and recent developments within the Biden administration that may indicate how the President will address the issue.

1. *Bears Ears National Monument*.

The Indigenous 5-Tribe Coalition led the call for the establishment of the Bears Ears National Monument.[111] Originally, the group sought 1.9 million acres to be designated as a national monument. The coalition and numerous non-Native Utahans in San Juan County, where the monument would be located, campaigned Congress to create the monument. When it became clear that their efforts would fail at the congressional level, the Coalition and local groups turned to the President and his powers under the Antiquities Act.[112] Ultimately, President Obama signed the designation of 1.35 million acres to become the Bears Ears National Monument pursuant to Presidential Proclamation 9558 in December 2016.[113] Many celebrated the Monument as the first Native American Monument in the United States and praised the designation decision for the strong role of Native voices included in the Monument's management.[114]

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111. *See About the Monument*, BEARS EARS INTER-TRIBAL COAL., https://bearsearscoalition.org/about-the-monument/ [https://perma.cc/AE6V-J9YB] (archived Apr. 5, 2023). The collation included the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe, and Pueblo of Zuni. *Id.*

112. *See* PUBLIC TRUST (Patagonia 2020).

113. *See* Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

114. *See* PUBLIC TRUST, *supra* note 112.

The Proclamation which created the monument stated that the designation was based on Bears Ears' "extraordinary archaeological and cultural record," "sacredness to many Native American tribes," and historical, paleontological, geologic, and ecological significance.[115] According to the Bears Ears Intertribal Coalition, the Monument contained "more than 100,000 cultural and archaeological sites" when originally designated, making it one of the most significant archaeological regions in the United States.[116] The area is known for its striking natural landscape, artifacts of Paleoindian habitation dating back to 11,000 B.C., intricate cliff dwellings, and numerous mesa-top houses. Additionally, the Bears Ears National Monument contains internationally renowned rock climbing, trail running, mountain biking, hiking, and wildlife-viewing opportunities.[117]

To guide the management of these numerous features, the Bears Ears Proclamation created two separate advisory bodies. First, pursuant to the Federal Advisory Committee Act,[118] the Proclamation called for the creation of an advisory board, named by its charter as the Bears Ears Monument Advisory Committee (MAC), to consist of "a fair and balanced representation of interested stakeholders."[119] As outlined in its charter, the MAC's objectives are to provide consensus-based input on the management of the Bears Ears National Monument.[120] MAC members are volunteers and citizens representing a variety of interests and expertise including tribal interests, paleontology, livestock permittees and private landowners,

115. *See* Proclamation No. 9558, 82 Fed. Reg. at 1139–43.

116. *See Cultural and Archaeological Significance*, BEARS EARS INTER-TRIBAL COAL., https://www.bearsears coalition.org/archaeological-significance/#:~:text=The%20Bears%20Ears%20cultural%20landscape%20is%20known%20to,such%20a%20striking%20and%20relatively%20undeveloped%20natural%20landscape [https://perma.cc/Z5GU-RZTN] (archived Apr. 5, 2023).

117. *See* THIS IS BEARS EARS (Patagonia 2017), http://bearsears.patagonia.com/ [https://perma.cc/G6AJ-DE7E] (click "Skip" in the bottom right corner; then select the "02 Sport" panel on the next page to view the video content on recreation in Bears Ears National Monument).

118. 5 U.S.C. App.

119. *See* Proclamation No. 9558, 82 Fed. Reg. at 1144 ("The Secretaries, through the BLM and USFS, shall establish an advisory committee under the Federal Advisory Committee Act (5 U.S.C. App.) to provide information and advice regarding the development of the management plan and, as appropriate, management of the monument."); USDA & DEP'T OF THE INTERIOR, BEARS EARS NATIONAL MONUMENT ADVISORY COMMITTEE CHARTER (2020), https://www.blm.gov/sites/blm.gov/files/2020%20SIGNED%20Charter_%20Bears%20Ears_%2009%2011%202020.pdf [https://perma.cc/CQ88-TC68].

120. *Id.*

local businesses, state and local government, recreation, conservation, and hunting.[121] Second, the proclamation established the Bears Ears Commission to "ensure that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge."[122] The proclamation enabled the Commission to guide the "development and implementation" of the Bears Ears Monument management plan.[123] The Proclamation prescribed that the Commission would consist of one elected officer each from the Hopi Nation, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah Ouray, and Zuni Tribe.[124]

Despite its widespread celebration, the monument was characterized by many locals and their elected representatives as a government overreach. Following the designation, Utah Congressman Rob Bishop—who has frequently made headlines over his attempts to shrink tribal sovereignty and federal treaty responsibilities[125]—called the Antiquities Act "the most evil Act ever invented," and stated that anyone who supported it should "die."[126] For all of the attention it generated, one might have thought that Bears Ears was the largest monument ever created under the Antiquities Act.[127] However, it is far from the largest, and it is only President Obama's second largest designation.[128]

However, Congressman Bishop's sentiment about the monument was echoed by others, and in 2017, President Trump issued a Proclamation reducing the size of the Monument by 85% on the basis that the un-designated lands were not significant, unique, or threatened.[129] After the diminishment, just two noncontiguous units

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121. *Id.*

122. *See* Proclamation No. 9558, 82 Fed. Reg. at 1144.

123. *Id.*

124. *Id.*

125. Rob Capriccioso, *Rep. Rob Bishop Angers House Colleagues Over His Handling of Indian Affairs*, ICT (Sept. 13, 2018), https://indiancountrytoday.com/archive/rep-rob-bishop-angers-house-colleagues-handling-indian-affairs [https://perma.cc/EL8Y-W8HN]; *see also* Nat'l Cong. of Am. Indians Res. PHX-16-018, Gen. Assemb., Ann. Convention (2016).

126. McCotter, *supra* note 53, at 186 (citing Robinson Meyer, *Obama's Environmental Legacy,* THE ATLANTIC (Dec. 30, 2016), https://www.theatlantic.com/science/archive/2016/12/obamas-environmental-legacy-in-two-buttes/511889/ [https://perma.cc/7ZPZ-BPAJ]).

127. The Bears Ears National Monument, when designated, was just the 22nd largest monument created under the Antiquities Act.

128. *See* Proclamation No. 9395, 81 Fed. Reg. 8371, 8374 (Feb. 12, 2016). In February of 2016, President Obama designated 1,600,000 acres to be the Mojave Trails National Monument. This was his most expansive use of the Antiquities Act, although it was relatively uncontroversial compared to his designation of the Bears Ears National Monument.

129. *See* Proclamation No. 9681, 82 Fed. Reg. 58081 (Dec. 4, 2017); Julie Turkewitz,

(Shash Jaa and Indian Creek) remained. Further, the Proclamation significantly altered the management plan for the Monument to allow motorized and nonmotorized vehicle access, to open mining claims and geothermal leases, and to decrease the role of the Bears Ears Commission.[130] By removing the tribe's role from the management process, the Trump administration largely paved the way toward opening the remaining lands to uses not likely to be supported by the Indigenous community.

Considering this and other concerns about the constitutionality of the diminishment, several lawsuits were filed, which were subsequently consolidated into one action. Plaintiffs represent different perspectives, but each advance a similar argument—that the Monument should be restored to its original boundaries. Native American tribes argue that the Trump Administration lacked authority to diminish the Monument in the first place, and that the land does in fact have spiritual significance and cultural artifacts in need of protection.[131] A coalition of groups with interests in conservation, historic preservation, and outdoor recreation argues that the area's unique scientific, aesthetic, and recreational values should be protected.[132] Additionally, a number of conservation organizations seek injunctive relief to block mining and drilling activities on the un-designated land, arguing that those activities would threaten the two remaining units (Shash Jaa and Indian Creek).[133]

Much to the relief of proponents of the Monument, in January 2021, on his first day in office, President Biden signed an Executive Order to "conduct a review of the monument boundaries" of the Bears Ears and Grand Staircase – Escalante National Monuments.[134] Also, following the DOI's review, section 3(c) of Biden's Order allows the Attorney General to request "the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent

Trump Slashes Size of Bears Ears and Grand Staircase Monuments, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html [https://perma.cc/ET5G-A7V3].

130. *See* Ethel Branch & Daniel Cordalis, *The Unlawful Reduction of Bears Ears National Monument: An Executive Overreach*, 49 TRENDS 4 (2018).

131. *See* Tribal Plaintiffs' Response to Federal Defendants' Motion to Dismiss, Hopi Tribe v. Trump, No. 1:17-cv-02590-TSC (D.D.C. Nov. 15, 2018), 2018 WL 6037688.

132. Complaint for Declaratory and Injunctive Relief, Utah Dine Bikeyah v. Trump, No. 1:17-cv-02605 (D.D.C. Dec. 6, 2017).

133. Complaint for Declaratory and Injunctive Relief, Nat. Res. Def. Council, Inc. v. Trump, No. 1:1 7-cv-02606 (D.D.C. Dec. 7, 2017).

134. Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

with this order, pending the completion of the actions described in subsection (a) of this section."[135] In response, the newly-appointed Secretary of the Interior, Deb Haaland, the first Native American to head the Department, visited the monuments in April 2021 as part of a three-day trip to Utah to review the monuments' boundaries and management.[136] On June 4, 2021, she submitted her recommendation to the President regarding the monuments, and on October 8, 2021, President Biden issued a presidential action, announcing that the monuments had been restored.[137] The Order affirmed the unique and historic nature of the monument and stated that, "despite millennia of human habitation, the Bears Ears landscape remains one of the most ecologically intact and least-roaded regions in the contiguous United States."[138]

Further, in June 2022, the five tribes (Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah and Ouray Reservation, and the Pueblo of Zuni), the Bureau of Land Management, and the Forest Service entered into a cooperative management agreement and unveiled a new sign for the monument.[139] The sign—which includes both agencies' logos and each tribal government's logo—signals a new era of inclusive and constructive management for the monument. The restoration of the monument, and the subsequent co-management decisions made for it (discussed in Section 4) were considered a win by the tribal governments and environmental groups who had advocated for restoration.[140]

2. *Grand Staircase–Escalante National Monument.*

There are many parallels to the Bears Ears story in the status of the Grand Staircase–Escalante National Monument. The Monument was established by President Bill Clinton in 1996. The land was designated for its "vast and austere landscape" that includes a

135. *Id.*

136. *Secretary Haaland Wraps Three-Day Visit to Utah*, DEPT. OF THE INTERIOR (Apr. 9, 2021), https://www.doi.gov/news/secretary-haaland-wraps-three-day-visit-utah.

137. Proclamation No. 10,285, 86 Fed. Reg. 57,321 (Oct. 15, 2021).

138. *Id.*

139. *Bears Ears National Monument Inter-Governmental Agreement 2022,* BUREAU OF LAND MGMT. (Jun. 18, 2022), https://www.blm.gov/sites/blm.gov/files/docs/2022-06/BearsEarsNationalMonumentInter-GovernmentalAgreement2022.pdf [https://perma.cc/GCQ8-S66Y].

140. *BLM, Forest Service and Five Tribe Bears Ears Commission Commit to Historic Co-Management,* DEPT. OF THE INTERIOR (Jun. 20 2022), https://www.doi.gov/pressreleases/blm-forest-service-and-five-tribes-bears-ears-commission-commit-historic-co-management.

"spectacular array of scientific and historic resources" and its significance as "the last place in the continental United States to be mapped."[141]

In 2017, President Trump diminished Grand Staircase to approximately one-half of its original size. Similar to the diminishment of Bears Ears, President Trump asserted that Grand Staircase was not unique, special, or adequately threatened.[142] Also similar to Bears Ears, the move swiftly generated litigation, resulting in multiple lawsuits that have since been consolidated.[143] Opponents of the diminishment lamented that it puts sensitive resources at risk of being developed for mineral extraction under the General Mining Law of 1872.[144] According to a New York Times investigation and a related lawsuit brought by the Information Access Clinic, pressure to open the area for oil, gas and coal leasing was a motivation for the diminishment of both Bears Ears and Grand Staircase–Escalante National Monuments.[145]

The suits over Bears Ears and Grand Staircase–Escalante have been consolidated into one case, which the Trump administration attempted to have moved to Utah courts and then thrown out.[146] Judge Tanya Chuktan instead ordered the case proceed in the US District Court of D.C.[147] The outcome of this litigation could have a significant impact not only on the monuments in question but on all future national monuments created under the Antiquities Act. However, now that President Biden has restored these monuments,

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141. Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 18, 1996).

142. Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 8, 2017).

143. Complaint for Injunctive and Declaratory Relief, Wilderness Soc'y v. Trump, No. 1:17-cv-02587 (D.D.C. Dec. 4, 2017); Complaint for Declaratory and Injunctive Relief, Grand Staircase Escalante Partners v. Trump, No. 1:17-02591 (D.D.C. Dec. 4, 2017).

144. 30 U.S.C. § 21 et seq.

145. Eric Lipton and Lisa Freidman, *Oil was Central in Decision to Shrink Bears Ears Monument, Emails Show*, N.Y. TIMES (Mar. 2, 2018), https://www.nytimes.com/2018/03/02/climate/bears-ears-national-monument.html [https://perma.cc/4GBH-RPZX] ("The lawsuit cited the agency's failure to respond to an open records request in August asking for internal records related to the deliberations.").

146. *See* Proposed Order on Federal Defendants' Motion to Transfer, Grand Staircase Escalante Partners v. Trump, No. 1:17-cv-02591 (D.D.C. Jan. 18, 2018).

147. Tribal Plaintiffs' Response to Federal Defendants' Motion to Dismiss, Hopi Tribe v. Trump, No. 1:17-cv-02590-TSC (D.D.C. Nov. 15, 2018). In September 2018, the administration filed to have the case transferred to Utah state courts. Following US District Court Judge Tanya Chutkan's decision to block the Trump administrations attempt at transfer, the administration tried again to affect the case by requesting it be dismissed altogether. The Trump administration and its lawyers argued that the groups filing the suits do not have proper standing and that the President did nothing illegal. Judge Chutkan ruled against this a year later on September 9, 2019, allowing the case to proceed. *See* Consolidated Cases Order, Hopi Tribe v. Trump, No. 1:17-cv-02590-TSC Document 141 (D.D.C. Sep. 30, 2019).

the litigation might be rendered moot. It currently hangs in an extended period of inactivity. Despite the stayed litigation, the tribal commission, Forest Service, and Bureau of Land Management have entered into a cooperative management plan—reflecting the original spirit of the Bears Ears National Monument Proclamation.[148]

As the following section will discuss, the tales of the Bears Ears and Grand Staircase -Escalante National Monuments exemplify the dangers of ad-hoc management authority. With lands as special as those included in the monuments—with such cultural and spiritual histories—durable management policies are needed to protect the long-term health of ecosystems included in the monuments. Further, in the era of climate change and its heightened effects on the American West, management mistakes risk increasingly high consequences. For these reasons, it is apparent that federal land management must be re-evaluated to better protect such special places of American heritage.

IV. ANALYSIS AND RECOMMENDATIONS

The time for more durable management is now. Public lands face an increasing threat from climate change. With raging wildfires, water scarcity, increasingly severe weather, rising seas, and warming temperatures—American public lands are in a dangerous state.[149] But with the ever-present turmoil of the American political system and starkly diverging views of public lands, the question of how to create responsive management in the face of all these threats is a challenging one.

In the case of national monuments in particular, there appear to be three different paths for moving forward. One potential avenue is to amend the Antiquities Act to specifically prohibit diminishment, or to amend the Act—and potentially other similar authorities—to prescribe minimum management standards that must be strictly adhered to. Another, and likely more attainable, option would be to prescribe advisory boards and bolster their authority to make decisions that ensure inclusive and cooperative management. These boards are all the more appropriate when they enable Native Americans to share traditional knowledge and have input on the management of national monuments that comprise their traditional

148. *Bears Ears National Monument Inter-Governmental Agreement* 2022, *supra* note 139.

149. For in-depth reading on how climate change is affecting national parks and monuments across the country, see MICHAEL J. YOCHIM, REQUIEM FOR AMERICA'S BEST IDEA: NATIONAL PARKS IN THE ERA OF CLIMATE CHANGE (2022).

homeland. Further, while threatened by climate change, public lands, such as national monuments, have emerged as an increasingly valuable resource for *fighting* climate change through carbon sequestration and by supporting biodiversity. Traditional approaches to environmental stewardship that are led and informed by Indigenous groups are emerging as a critical way to address these challenges. On national monuments and other public lands, American leadership has the opportunity to confront the climate crisis while prioritizing justice for communities who have been historically marginalized and harmed by US federal land policy.

A. *National Monuments and Climate Change*

The stakes for finding a solution are only growing. The federal government, understandably, faces a difficult challenge in deciding how best to mediate between energy demands, agriculture, ranching, recreation, and community interests while also being mindful of environmental realities that will affect future generations. Thus, a fundamental problem in both the Utah controversy and other federal land dramas is finding the appropriate balance between these demands. While the recreation industry grows at exponential rates, the economics of the question is changing.[150] And, as climate change becomes an increasingly imperative component of US and international policy, the role of oil and gas industries in global warming has come into the scope of the federal lands discussion.[151] The oil and gas industries are major contributors to climate change,[152] and thus the natural disasters ravaging American lands.[153]

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150. In Utah, there were an estimated 10,682,894 national park visits. In 2019, visitor spending in the state brought in $10,064,000,000 and tourism related tax revenue brought in $1,340,000,000 (even amidst the COVID-19 pandemic).

UTAH ECONOMIC COUNCIL, UTAH ECONOMIC REPORT TO THE GOVERNOR 137 (2021), https://treasurer.utah.gov/wp-content/uploads/ERG2021-1.pdf [https://perma.cc/ZE2W-X89G].

151. These industries have risks which extend beyond the global warming context as well. *See* Hannah J. Wiseman, *Taxing Local Energy Externalities*, 96 NOTRE DAME L. REV. 563, 577–78 (2020) ("Construction of pipelines [. . .] leads to soil erosion, which can pollute local streams and other waterbodies. [And once] the pipeline has been constructed and buried, the open corridor remains—thus impacting the local landscape and fragmenting wildlife habitat. Further, safety issues, including methane leaks and explosions, are somewhat rare, yet potentially deadly when they occur. Over the past twenty years (through 2019), there have been 1,404 'significant' gas pipeline incidents that killed 49 people, injured 175 people, and caused more than $2 billion in damage.").

152. *See* J. Lelieveld et al., *Effects Of Fossil Fuel And Total Anthropogenic Emission Removal On Public Health And Climate,* 116 PNAS 7192, (2019).

153. Oil and gas projects can also directly impact federally owned public land, including

Further, conserving federal lands is critical for maintaining biodiversity and carbon sinks, which are both essential for mitigating the effects of global warming.[154] It is also important to remember that these issues are not isolated to the American West, where most public lands are located. Climate change, biodiversity loss, and oil and gas and mining projects have significant impacts on lands throughout America—both public and privately owned.[155]

Understanding the high stakes of inaction, the Biden administration has indicated a focus on climate. In addition to restoring the Bears Ears and Grand Staircase monuments, President Biden pledged to protect 30% of US lands and ocean territories by 2030 though the "America the Beautiful" Pledge.[156] This pledge is particularly ambitious but is informed by the scientific understanding that in order to preserve 75% of Earth's species and slow climate change through carbon storage in natural landscapes, 30% of the planet's land and 30% of its water must be conserved.[157] At the time of the proclamation, just 12% of American lands (and 26% of seas) were protected.[158]

With so far to go in achieving the pledge, the Antiquities Act appears a particularly attractive tool for forging ahead—despite the controversy that often engulfs it.[159] The executive branch does not

national parks. In 1989, the infamous Exxon Valdez oil spill caused "black waves" of oil to wash up along the shorelines of Kenai Fjords National Park. ALASKA REGION NATIONAL PARK SERVICE, THE EXXON VALDEZ OIL SPILL AND THE NATIONAL PARKS SERVICE: A REPORT ON THE INITIAL RESPONSE 24-25 (1990), https://www.nps.gov/parkhistory/online_books/alaska/exxon_valdez_hanable.pdf [https://perma.cc/JNL7-ZZYN].

154. This need goes two ways as well. Biodiversity and carbon sinks are increasingly threated by climate change. *See* Inara Scott et al., *Environmental Law. Disrupted.*, 49 ENVTL. L. REP. NEWS & ANALYSIS 10038, 10041 (2019). ("While cultivation (agriculture, ranching, and forestry) and direct exploitation remain the gravest harms to biodiversity, climate change increasingly threatens biodiversity as species are unable to adapt to a rapidly and chaotically changing world: our current, static methods of conserving species become increasingly inadequate if we do not preserve or restore habitats that species will need in a climate-addled future.")

155. For a discussion of how coal mining has affected many southeastern landowners, *see* Sam Evans, *Voices from the Desecrated Places: A Journey to End Mountaintop Removal Mining*, 34 HARV. ENVTL. L. REV. 522 (2010).

156. DEPT. OF THE INTERIOR ET AL., CONSERVING AND RESTORING AMERICA THE BEAUTIFUL 10 (2021).

157. E. Dinerstein et al., *A Global Deal For Nature: Guiding Principles, Milestones, and Targets*, 5 SCI. ADVANCES, Apr. 2019, at 2, 4.

158. Lindsay Rosa & Jacob Malcom, *Getting to 30x30*, DEFS. WILDLIFE (2020), https://defenders.org/sites/default/files/2020-07/getting-to-30x30-guidelines-for-decision-makers.pdf [https://perma.cc/3CM8-6A9V].

159. President Biden appears to be receptive to this idea. At the White House Summit on Conservation Action in March 21, 2023, as this article was going to press, President Biden

need to look far to find inspiration in other significant environmental acts that have been interpreted to enact major climate policy beyond their initial intended breadth. For example, the Clean Air Act was originally passed to address specific pollutants that did not include greenhouse gasses.[160] After the landmark Supreme Court ruling *Massachusetts v. EPA*, though, the Act's reach was amplified to include regulations on carbon dioxide and other major contributors to climate change due to their effect on the atmosphere and global warming.[161] This interpretation enabled the executive branch to enact necessary regulations to help prevent the worst effects of global warming.[162]

The Antiquities Act's ability to be used for such bold climate action will likely depend on which reading of the Act's text and legislative history will win out. It could be possible for the Antiquities Act to shift from a focused land preservation Act to a broader tool for confronting climate change (like the Clean Air Act). In the absence of clear judicial interpretation in the Bears Ears and Grand Staircase cases, many fundamental questions about the Act still remain. For example: Is the purpose of the Act to protect small historical sites from looting or damage? Or may the Act be used broadly to support conservation, environmental, and cultural efforts on large swathes of land? Or is that an end-run on Congress's authority to designate National Parks and other federal protected lands? Regardless of how one answers these questions, the seemingly endless pendulum between different administration's interpretations makes it exceedingly difficult to effectively manage monuments since land takes so long to implement decisions on it. Given the stakes of climate change, American lands can't afford such a lack of consistent

created two new monuments: Castner Range National Monument and Avi Kwa Ame National Monument. Establishment of the Castner Range National Monument, Proclamation No. 10534, 88 Fed. Reg. 17999 (Mar. 27, 2023); Establishment of the Avi Kwa Ame National Monument, Proclamation No. 10533, 88 Fed. Reg. 17987 (Mar. 27, 2023). The monuments are not included in the discussion herein though they serve as an example of the ways in which the executive can utilize the Antiquities Act to protect strategic and culturally significant places. The Avi Kwa Ame Proclamation included provisions that call for tribal co-stewardship. *Id.* at 17995.

160. The Clean Air Act, 42 U.S.C. §§ 7401-7671q.

161. Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

162. Different administrations exercise this authority in different ways. For example, the Bush administration did little to regulate greenhouse gas emissions under the Act while the Obama administration EPA issued an endangerment finding soon after taking office. *See* Michael Gerrard, *Overview of Climate Change Litigation,* 113 AM. SOC'Y INT'L L. PROC. 194, 194 (2019).

management. Thus, one way or another, the Antiquities Act must see some kind of clarification.

This could occur through a few different avenues. First, Congress could specifically amend the Act to allow for broader and larger designations under its authority. [163] However, his appears unlikely to occur in the current gridlocked political climate. Second, the Biden administration could issue increasingly ambitious national monument designations under the Act. In that situation, the monuments could become test pieces for judicial interpretation of the Act. The Court could then either affirm the monuments—thus, implicitly affirming that the Act retained such significant authority all along. If this were the case, agencies and stakeholders might find greater traction. encouraging Congress to modify the Act in accordance with the Court's interpretation. Alternatively, the Court could reject the monuments as an executive branch overreach and thereby limit the scope of the Act. This outcome appears increasingly likely as the Court appears poised to strike down situations where the president and his agencies act beyond explicit Congressional authorization. This is particularly apparent in the wake of the recent *West Virginia v. EPA* decision.

In that case, the Court held that the EPA was without authority to propose rules that affect existing power plants' abilities to produce electricity from particular sources on a grid wide scale.[164] The court applied the emerging major questions doctrine to say that the EPA lacked authority under the Clean Air Act to promulgate regulations that set emissions limits for existing power plants in a process known as "generation shifting." The major questions doctrine essentially says that there are some legal issues so significant, an Executive Branch agency must have clear and specific direction from Congress to act on them. The Court's rationale relied on the fact that Congress had specifically rejected legislation that would institute a cap-and-trade program similar to what the EPA proposed. The Court found this to be evidence that Congress did not intend to allow an agency to create rules that they expressly refused.[165] Also, the Court relied on evidence that the EPA had rarely used Section 111(d) before its attempt to do so under the Clean Power Plan and thus, it was unlikely

163. For an in-depth discussion of what these amendments might look like, *see* Andrew Diaz*, The Transformation of the Antiquities Act: A Call for Amending the President's Power Regarding National Monument Designations,* 49 GOLDEN GATE U. L. REV. 117, 128-38 (2019).

164. West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

165. *Id.*

for such broad authority to be delegated under an ancillary Clause such as Section 111(d).[166]

Fortunately for the Antiquities Act though, those two fundamental pieces of the Court's rationale do not apply to it. First, unlike Section 111(d) of the Clean Air Act, the Antiquities Act has been used widely and often since its passage. The Court's reasoning that such power is often not granted under an ancillary clause does not apply; the Antiquities Act is a deliberate grant of executive power.[167] Second, as discussed above, Congress has frequently supported presidential designations—often enlarging them or granting them even greater protection.[168] This is quite opposite from the explicit Congressional rejection of cap-and-trade discussed in *West Virginia*.[169] Being mindful of the breadth of the major questions doctrine, it will be essential to demonstrate that future broad designations under the Antiquities Act are within the President's authority delegated by Congress. Generally, the path towards favorable judicial interpretation of the Antiquities Act still appears possible—albeit muddied by the potential of the major questions doctrine.

B. *Developing Minimum Management Standards*

Given the potential hurdles posed by *West Virginia v. EPA* and the current gridlocked political climate in Congress, it is important to consider other, more attainable options. One of these options would be the development of minimum management standards that accompany a national monument designation—either by Congressional legislation or through wording in the proclamations used to create future monuments. Developing these standards would create a more focused set of possible management decisions for agencies to make—and more importantly, these standards would endure beyond individual administrations and their agencies'

166. David Freeman Engstrom & John E. Priddy, *West Virginia v. EPA and the Future of the Administrative State*, STAN. L. SCH. BLOG (July 6, 2022), https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/ [https://perma.cc/GS49-9673] ("Going forward, all federal agencies (not just the EPA), will need to show that their actions are supported by clear, express statutory authority, at least when their actions might be adjudged to have 'vast economic and political significance.' Agency attempts to use 'long-extant' statutory language that the agency never wielded will be intensely scrutinized. Regulatory changes that affect an entire industry at a fundamental level will be highly suspect.").

167. Antiquities Act of 1906, 54 U.S.C. §§ 320301–320303.

168. VINCENT, *supra* note 68, at 2.

169. *West Virginia*, 142 S. Ct. at 2615.

respective interpretations of proper management. Thus, the deployment of minimum management standards could effectively reduce the number of pendulum swings currently inflicting monuments and other public lands.

As discussed above, national monuments are overlay designations. In this way, another type of overlay designation—that of a wilderness area—can be useful in imagining what minimum management standards can look like. The Wilderness Act specifically prohibits uses that would interfere with the untouched nature of wilderness. Section 4(c) of the Act states that "there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and except as necessary to meet minimum requirements for the administration of the area."[170] 4(c) even outlines a list of specific uses that are prohibited. This type of prohibition on development, mechanical transport, and roads serves obvious purposes in ensuring wilderness areas stay *wild* and can be seen as a model for developing broad standards that align with the Antiquities Act's fundamental goal.

Creating a one size-fits-all list of standards like the one offered by the Wilderness Act would be challenging, though. Since national monuments are so varied in size and purpose, broad standards are likely to be necessary. While banning offshore drilling makes sense for the Mariana Trench National Monument, it does little to ensure healthy management of the Little Bighorn National Monument. Rather, battlefield monuments like Little Big Horn might be better served by requiring signs and reading material that contains historical context and information for guests. To combat this dilemma of variation, it would be most beneficial for minimum standards to be especially tailored to the spirit of the Antiquities Act and the reason for preserving a particular parcel under it. Since the Antiquities Act is designed to preserve "objects of historic or scientific interest," proclamations or acts which establish monuments ought to specifically list those objects and the extent they must be protected to their historic or scientific qualities. In doing so, monuments would be increasingly aligned with the Antiquities Act's core purpose. This requirement should do much to address concerns of overly expansive monuments by ensuring that each designation is acutely related to the Antiquities Act's core purpose.

170. Specifically, the Act states that "there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area." The Wilderness Act of 1964, 16 U.S.C. § 1131 4(c).

C. *Creation of National Monument Advisory Boards*

Minimum management standards will act as safeguards to ensure valuable lands are not subjected to mining claims, as happened during the Trump era of Bears Ears. However, they will not solve the problem of Presidential diminishment, which is likely only fixable through the judicial or Congressional amendment paths discussed above, or conflicting recreation uses and community demands. Here, advisory boards appear an attractive choice to mediate between such interests by ensuring more responsive management plans. Though the Antiquities Act does not require that a monument has an advisory board, there are agencies, as discussed above, which do have direction to include public comment on lands managed under certain circumstances Monuments managed by these agencies are no exception. Through these directives, monument-establishing documents, and management plans, several national monuments have their own advisory boards and even more accept public input through various less formal advisory bodies. For example, the Mariana Trench National Monument has an advisory board that includes local government officials and U.S. government officials from the Department of Defense and the U.S. Coast Guard. The Papahānaumokuākea Marine National Monument features a similar advisory board, and as discussed above, both the Bears Ears and Grand Staircase–Escalante National Monuments feature advisory boards. Advisory boards such as these can be useful for structuring management plans that support the wide range of stakeholder interests on public lands. This is especially true when other governmental sectors, local communities, and tribes are immediately affected by the management plan—which can, as seen with *Cappaert v. United States,* affect even private land.

Despite these benefits, many national monuments do not have advisory bodies at all, e.g., the Devils Tower National Monument discussed in section 2. We can recall the controversy and subsequent Supreme Court case, *Bear Lodge v. Babbit,* that resulted from the management plan enacted there. As with many national monuments, management plans at Devils Tower are created by the monument supervisor or similarly positioned individual.[171] Plans are developed with guidance from the designating Proclamation or Act of Congress,

171. NAT'L PARK SERV., BLACK-TAILED PRAIRIE DOG MANAGEMENT PLAN/ENVIRONMENTAL ASSESSMENT 69 (Aug. 2013), https://parkplanning.nps.gov/document.cfm?parkID=49&projectID=39180&documentID=54818 [https://perma.cc/63TL-69XM].

the managing agency, and feedback from the Federal Register, but can lack core input from groups most affected by the plan. When these groups feel aggrieved by the resulting plan, they often file suit. From a perspective of efficiency, bolstering management's reliance on advisory board input is a productive way to bring in a diverse array of perspectives to hopefully preempt the type of conflict that occurred in *Bear Lodge*, thus avoiding litigation for the agency.

This reliance could be modeled off management of other federal lands which already have advisory bodies. For example, the Black Hills Resources Advisory Community (FS) reviews and recommends resource projects. Notice of committee meetings are posted in the Federal Register, and community members can submit proposals for how to use Committee money (in October 2020, it was around $300,000).[172] The money allows direct community engagement on untaxed forest service land to "improve the environment, help wildlife, or maintain roads, trails and other infrastructure."[173] This type of direct engagement allows those most impacted by land management decisions to advocate for federal land near them.

Additionally, establishing strong advisory boards is likely the best option for creating durable and cooperative monument management that goes beyond the minimum standards prescribed above. Agencies should be required to develop an advisory board to guide the development and implementation of a monument's management (while following or going beyond the minimum standards). Additionally, there ought to be processes in place that allow public comment when an agency fails to adequately consider advisory board input, similar to a NEPA analysis conducted in the environmental review stage of federal projects. An ideal board would reflect the full range of stakeholder perspectives, including industry, scientific, conservation, Native American tribes, community groups, outdoor recreation, and state and local government interests. However, with many of these interests unlikely to ever reach an agreement, it is important for each stakeholder group to have clearly outlined authorities.

The managing agency will decide who gets a seat at the table and how much influence they receive upon creation of the board, and these decisions should be informed by the spirit of the designating

172. Funding comes from the Secure Rural Schools and Community Self-Determination Act, 16 USC Ch. 90.

173. Seth Tupper, *Group has $30,0000 to Spend in Black Hills, Wants Proposals*, S.D. PUB. BROAD. (October 2020), https://www.sdpb.org/blogs/news-and-information/group-has-300000-to-spend-in-black-hills-wants-proposals/ [https://perma.cc/NAW6-D73R].

Proclamation or Act for the monument. In this way, the board can have clearly established priorities that best reflect the character of the national monument and the communities who surround it. For example, the Birmingham Civil Rights Monument in Alabama memorializes tragic and vivid examples of segregation and racial injustice in America.[174] This monument's advisory board ought to especially emphasize input from Black community members and social justice leaders in the region. Similarly, management of monuments designated for their unique paleontological deposits should rely on the guidance of advisory boards where paleontologists and local scientists have a large voice. Monuments that commemorate significant battlefields ought to have boards largely influenced by historians. By tailoring advisory boards to meet the specific needs and fundamental purposes of national monuments (often stated in their charters), management can be administered in a precise and effective way.

1. *The importance of collaboration.*

Of course, agency decisions on delegating authority become increasingly complicated when the monuments comprise large swaths of land and feature a variety of significant features. Here, again, we return to the case of Bears Ears. In this case, the model set forth by President Obama when he established the Bears Ears National Monument appears to be a promising one for ensuring that all stakeholder perspectives are included in management decision making. However, as is obvious by the significant controversy that endures over the monument—despite the advisory board's and the Intertribal Commission's roles—all perspectives were not adequately satisfied or balanced. This raises a new question: When there are so many desired land uses that, in many cases, are exclusive of others, can a balance ever be achieved, and if not, whose voice should carry the most weight?

Answering this, of course, involves considering countless communities and their respective histories and ties to the land. In attempting a balance, agencies will be forced to make difficult decisions. And to effectively manage the land—and avoid the ad hoc approach that has plagued monuments for so long, it is important that there is guidance on whose voice should take priority. In the case of

174. *History & Culture*, NAT'L PARK SERV., https://www.nps.gov/bicr/learn/historyculture.htm [https://perma.cc/XH5H-JSP6] (last updated June 7, 2022).

Bears Ears and similar monuments, the voices that are prioritized ought to be the long-ignored ones—those of Native American tribes and marginalized communities. When considering a monument celebrated for its cultural and spiritual significance to populations that have been systemically oppressed by American land policy for centuries, it is necessary that Native American voices take a central role in management. There are many reasons for this.

Tribes hold significant historical and ecological knowledge of their traditional homelands.[175] Thus, beyond the equitable considerations of including Indigenous voices in stewardship decisions, advisory boards and tribal participation can offer critical support on developing sustainable management.[176] In the era of climate change, such sustainability is critical.[177] In the area of climate change research, studies have shown that "traditional knowledge can expand the range and richness of the information available, in both space and time scale."[178] To support this type of involvement, Congress should consider an amendment to the Antiquities Act that requires the establishment of an advisory board––as well as request a tribal commission when appropriate––for all new National Monuments created by the Act. As discussed above, the political appetite for these legislative interventions may not exist. If so, Congress could instead delegate greater authority for agencies to

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175. *Our Common Future*, Report of the World Commission on Environment and Development, p. 12 (1987) ("Tribal and indigenous peoples' . . . lifestyles can offer modern societies many lessons in the management of resources in complex forest, mountain and dryland ecosystems."). Specifically, "in north-western New Mexico, traditional Indigenous farming methods are being passed down to protect against the effects of climate crisis[.]" Samuel Gilbert, *Blue corn and melons: meet the seed keepers reviving ancient, resilient crops*, THE GUARDIAN (Apr. 18, 2022), https://www.theguardian.com/environment/2022/apr/18/seed-keeper-indigenous-farming-acoma [https://perma.cc/7WB8-CD6K].

176. *See* Lake et al., *Returning Fire to the Land: Celebrating Traditional Knowledge and Fire*, 115 J. FORESTRY, 343, 343-53 (2017).

177. Sarah Krakoff, *Public Lands and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. 213, 255 (2018)

("Science, with its methods of data collection, measurement, assessment, and falsification can tell us what has happened. It can also make predictions about the future. But traditional knowledge comprises an intimate and detailed cultural connection between humans and place, which accrues slowly and deeply over time. This kind of knowledge will be crucial for maintaining the human-land connection as we move into an era of constant change.").

178. Firket Berkes, Sacred Ecology 164 (4th ed. 1999) (citing Riedlinger, D. & F. Berkes, *Contributions of traditional knowledge to understanding climate change in the Canadian Arctic*, 37 POLAR RECORD 315, 315–28 (2001)). In discussing the value of incorporating Indigenous knowledge into climate change science, Berkes noted that climate models do not often address the full picture. However, "projects involving multiple communities and examining indigenous observations at regional as well as local scales are very significant in this regard because they provide cross-scale insights." *Id.* at 175.

partner with stakeholders without considering something as significant as an amendment to the Antiquities Act itself. This type of action would create greater ability within the executive branch to utilize the knowledge and input of tribes and other stakeholder groups for creating effective monument management.

2. *Collaboration and co-stewardship today.*

Until congressional action occurs, it is up to the president and managing agencies to include a wide range of stakeholder views in management decisions pursuant to their existing authority.[179] Soliciting broader input could support a number of existing administrative initiatives, such as the 30 by 30 pledge.[180] The Biden administration has made several moves to foster this type of collaboration—even going further than calling for advisory boards at times. Where advisory boards are insufficient to address the nuanced management decisions and historical context of certain lands, there are several opportunities for fostering other kinds of tribal inclusion: namely, through co-stewardship agreements. The term "co-stewardship" encompasses the various federal approaches to incorporating tribal traditional and ecological knowledge, treaty rights, and tribal input into land management decisions.[181] This means that in certain circumstances, where congressional authority allows for an agency to enter into such agreements, Tribes can gain substantial authority over management decisions for lands owned by the federal government that goes beyond the ability to merely give input.

The Biden administration has encouraged tribal cooperation through various executive orders and agency agreements. Executive Order 13985 is emblematic of this shift towards cooperative management.[182] In the order, President Biden called for greater efforts throughout the federal government to foster racial justice and support for underserved communities. This Executive Order speaks

179. *See* Krakoff, *supra* note 177, at 237. Some agencies have already begun to engage with Tribes in meaningful ways: "In the public lands context, several statutes and executive orders require or encourage federal agencies to cooperate and consult with Tribes on a range of matters. And at Yellowstone and [Grand Canyon National Park], the Park Service regularly consults with the many Tribes that once called those vast landscapes home." *Id.*

180. Michael C. Blumm & Gregory A. Allen, *The 30 by 30 Proposal, Areas of Critical Environmental Concern, and Tribal Cultural Lands*, 52 ENV'T. L. REP. 10366, 10367 (2022).

181. *See* Monte Mills & Martin Nie, *Bridges to A New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 52 ENV'T. L. REP. 10661, 10661 (2022).

182. Exec. Order No. 13985, 86 FR 7009 (2021).

broadly to eliminating systemic barriers to opportunities and benefits for people of color and other underserved groups. It emphasizes the importance of 'embedding fairness in decision-making processes' of all executive departments and agencies, which would include those agencies managing public lands. In furtherance of this direction, President Biden also issued a "Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships," which strengthened earlier efforts to spur consultation with Tribes.[183] The memorandum reaffirmed the policy announced in Executive Order 13175 of November 6, 2000 (Consultation and Coordination with Indian Tribal Governments), which required all executive departments and agencies to "engag[e] in regular, meaningful, and robust consultation with Tribal officials in the development of Federal policies that have Tribal implications."[184] In his memo, President Biden directed the heads of each agency to submit a detailed plan to the Office of Management and Budget within 90 days detailing how they would implement Executive Order 13175.[185] Moreover, the plans must be developed after first consulting with Tribal Nations and officials.[186] Additionally, under the Biden administration, agencies have recently placed a renewed emphasis on Executive Order 13007, from the Clinton-era, which directed agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sacred sites.[187]

The DOI and USDA have worked towards implementing President Biden's guidance. Together, in November 2021, Secretaries Haaland (DOI) and Vilsack (USDA) issued a Joint Secretarial Order on "managing Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes."[188] The Order included several directives for identifying opportunities to foster greater tribal collaboration. Specifically, in Section 5, the Secretaries outlined their commitment to fostering co-stewardship of federal lands and to "give consideration and deference to Tribal proposals, recommendations, and knowledge that affect management decisions" where co-

183. Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 FR 7491 (2021).

184. *Id.*

185. *Id.*

186. *Id.*

187. Exec. Order No. 13007, 61 FR 26771 (1996).

188. Joint Secretarial Order 3403, 63 FR 26571 (1998).

stewardship is not permitted by law.[189] In this endeavor, the two departments have slightly different capabilities under the law and have thus taken slightly different approaches.[190]

In March 2022, the director of the National Parks Service (the first Tribally enrolled member to lead NPS) testified in front of the House Committee on Natural Resources to express the agency's commitment to further foster co-stewardship where possible on NPS lands.[191] Though formal co-stewardship legislation is minimal, there are several Acts of Congress that permit various forms of collaboration on public lands. Currently, a major source of authority for both the DOI and the USDA is the Tribal Forest Protection Act (TFPA).[192] The TFPA authorizes the Secretaries of Agriculture and Interior to give special consideration to projects proposed by Tribes that meet certain criteria on FS or BLM land to protect Indian trust lands and resources from threats such as fire, insects and disease.[193] Additionally, the Indian Self-Determination and Education Assistance Act (which initially only applied to the DOI but was partially extended to the USDA through Section 8703 of the 2018 Farm Bill) authorizes the agencies to carry out demonstration projects by which federally recognized Indian Tribes or Tribal organizations contract to perform the projects proposed under the TFPA.[194]

As discussed above, in June 2022, the BLM, FS, and the Five Tribe Coalition entered into an Intergovernmental Cooperative Agreement to establish co-management principles for the Bears Ears National Monument. This arrangement is similar to a memorandum of understanding commonly used by both agencies to enter into agreements with partners (such as Tribes) for the management or administration of a land parcel. Here, the cooperative agreement explicitly recognized the "importance of Tribal knowledge about the lands and objects" within Bears Ears and sought to "ensure that management decisions affecting the monument reflect the expertise and traditional and historical knowledge of interested Tribal Nations

189. *Id.*

190. The DOI has greater authority to enter into co-stewardship agreements and has even delegated some lands back to Tribes in trust, though most DOI relationships with Tribes are cooperative opportunities supported through official agreements, often with accompanying Tribal Council resolutions.

191. *Examining the History of Federal Lands and the Development of Tribal Co-Management: Hearing Before the H Comm. on Natural Resources*, 117th Cong. 215–17 (1998) (statement of Charles F. Sams III, Director, National Parks Service, U.S. Dept. of Interior).

192. Tribal Forest Protection Act (TFPA), 25 U.S.C. § 3115a.

193. *Id.* § 3115a(c).

194. 25 U.S.C. § 3115b.

and people."[195] The agreement formally allowed for cooperation, consultation, and discussion between the various managing parties and serves as a strong example of tribal co-management.[196]

The Bears Ears Agreement was entered into under authority granted in Section 307(b) of the Federal Land Policy and Management Act of 1976. [197] This provision provides that the DOI may undertake programs of resource management through Cooperative Agreements and under the Wyden Amendment of Public Law 105-277.[198] The amendment authorizes the Forest Service to enter into Cooperative Agreements with willing tribal governments for the protection, restoration, and enhancement of fish and wildlife habitat, and other resources on public or private land meeting certain requirements. [199]

These laws are critical for achieving President Biden's goals of greater collaboration with Tribes. However, it would be beneficial to expand the executive branch's power under the statutes to create more long-term and durable agreements. That way, agencies would have enough appropriate tools to adequately involve Tribes and protect the decisions they make throughout changing administrations. In addition to Cooperative Agreements, there may be other means for delegating management authority to Tribes. Specifically, management service contracts could potentially be a useful tool. The need for this type of durable shared governance of resources is all too clear in the case of Bears Ears. Though the Cooperative Agreement appears poised to allow land managers to strike a meaningful balance in administering the land for multiple interests and uses, this arrangement for the monument's management potentially remains in jeopardy. In fact, in August 2022, the state of Utah and two Utah counties filed suit in the U.S. District Court for the District of Utah to stop the restoration of the boundaries of Bears Ears and Grand Staircase–Escalante, alleging that President Biden abused his Antiquities Act authority.[200]

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195. *Bears Ears National Monument Inter-Governmental Agreement* 2022, *supra* note 139.

196. Blumm, *supra* note 180 at 10368.

197. 43 U.S.C. § 1737.

198. Wyden Amendment, § 323 of Public Law 105-277 as amended by Public Law 107-63, § 330; Public Law 111-11, § 3001.

199. *Id.*

200. *Utah Challenges Unlawful Designation of National Monuments,* UTAH GOV. SPENCER J. COX (Aug. 24, 2022), https://governor.utah.gov/2022/08/24/utah-challenges-unlawful-designation-of-national-monuments/ [https://perma.cc/AC2J-CZKK].

Cooperative agreements could be grounds for challenging an attempt to reduce the monument's boundaries, but they might complicate one by allowing tribal governments a meaningful opportunity to intervene in the litigation. It is increasingly clear though, that greater congressional clarification is needed on either (1) the executive branch's ability to delegate durable and meaningful power to Tribes for management (and perhaps even the land itself), or (2) the president's ability to designate adequately threatened and unique places—such as Bears Ears—as national monuments despite their relatively large size.[201] The former need dovetails with many related calls from Indigenous voices for heightened respect of tribal sovereignty, particularly when it comes to the ability to control lands significant to tribal wellbeing.[202] The significance of this control (or lack thereof) has been evident throughout public lands history, and was particularly evident in the 1988 case, *Lyng v. Northwest Indian Cemetery Protective Association*.[203] There, the Supreme Court held that agencies are not bound by the Free Exercise Clause to accommodate tribal religious needs into management decisions.[204] This allowed the Forest Service to construct a road which would interfere with the Tribes' religious practices and damaged sacred areas of the Six Rivers National Forest.[205] By bolstering agencies' consideration of tribal input and giving administrative legitimacy to tribal needs, such effects can be avoided, and the Bears Ears National Monument appears poised to serve as a strong example of this.

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201. It is important to note that allowing agencies to retain control over public lands is likely the most desirable outcome from a broad perspective. Agencies, as opposed to Tribal governments are best poised to incorporate the variety of interests included in an advisory board. While in some cases, full Tribal management may be the best option for a given parcel, it should not be treated as a widespread solution. Delegating extensive management authority away from agencies is likely to create a tidal wave of litigation from aggrieved parties. And although litigation is, in some cases, inevitable (as is evident from the new Utah suit over Bears Ears), there is much promise in the kind of co-stewardship agreement established for Bears Ears. This approach allows for agencies and tribes cooperate to ensure multiple uses can co-exist while proper deference is given to tribal ecological, cultural, and spiritual knowledge on sites with tribal significance. *See* Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Lands*, 113 YALE L.J. 1623, 1660 (2004).

202. For scholarship on this topic, *see* Emma Blake, *Tribal Co-Management: A Monumental Undertaking?*, 48 ECOLOGY L.Q. 249, 274 (2021). ("President Biden should break away from the legacy frameworks that govern public lands management and, instead, identify opportunities to implement the trust doctrine as an affirmative duty on federal officials in making decisions about the public lands.")

203. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

204. *Id.* at 441-42.

205. *Id.* at 442.

Though we appear to conclude with a happy ending for Bears Ears, it should still serve as a cautionary tale. The monument has experienced significant turmoil over the past several years and without codified protection to ensure the longevity of the current co-managed arrangement, the Monument could risk diminishment and mismanagement again. Bears Ears deserves protection and consistency for the sake of the ecosystems, stories and cultural significance it holds, and all those who cherish it. It is important to adopt legislation that requires monuments to be administered in a way that is compatible with their charter and gives deference to those with the highest stakes for protecting the land. It would be most desirable for the Antiquities Act to be amended to clarify that Congress alone retains the power to diminish existing monuments. Finally, where possible, Congress should take steps to bolster executive branch agencies' abilities to meaningfully collaborate with Tribes and other significant groups in developing management plans for national monuments. This collaboration should be long-term, formalized, and potentially, should even include the ability to delegate lands back to Tribes where appropriate. These changes would allow for a balanced revision to the way America administers its many beloved national monuments. It is a revision that is critically needed.

V. CONCLUSION

The modern distribution of administrative powers on public lands reflects the need to create effective policy for such wild and ecologically diverse places. However, as we have seen in Bears Ears and Grand Staircase, the lack of a consistent policy to definitively protect federal lands from development and leasing has left them cyclically threatened with the changing of presidential administrations. In the case of public lands, even one administration acting illegally—and too rapidly for the courts to perform a check on the abuse—could leave large swaths of land irrevocably damaged. When a species becomes extinct—whether polar bears in Alaska or whooping cranes in the southeast—it can *never* return. While judicial review may provide remedy to poor policy, it cannot regrow 2000-year-old redwoods lost to unsustainable logging. No number of appeals can undo an oil spill in a once-protected marine monument diminished by a future administration and opened to offshore drilling that causes billions of dollars in damage and claims countless marine lives.

Amending the Antiquities Act to give the executive branch a more permanent ability to create national monuments would enable opportunities to create durable land conservation practices and protect many acres of American land from the ravages of extraction. However, a more manageable solution might be for each land management agency to collectively agree to minimum management standards for all national monuments—in accordance with their establishing document. These minimum standards should be augmented by the creation of advisory boards for all national monuments to guide their implementation and more nuanced management decisions. Congressional activity to codify requirements for the creation of these advisory boards would be greatly beneficial for ensuring more informed management. Further, agency efforts to specifically foster tribal co-management, where appropriate, should be heightened and greater authority ought to be congressionally given to such agencies to enter into co-management agreements. These approaches would lead to better informed, more inclusive, and more durable land management. As recent years have exposed just how vulnerable many lands are under the current approach, developing new management tools is imperative.