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**The Antiquities Act of 1906
and
Theodore Roosevelt's
“Interpretation of Executive Power”**

From the Grand Canyon Through the Grand Staircase

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Daniel Chapin, September 2008)*

The Antiquities Act of 1906 is a short and simple law of three sections drafted by archeologist Edgar Hewitt to protect objects of antiquity on public land. Through a long process before the Act was passed by Congress and signed by President Theodore Roosevelt on June 8, the Act became much more important as a measure, and to some in an improper manner. The issue of contention was the authority contained within Section 2 allowing the president to declare national monuments for qualified public lands. This power delegation was a tool of the progressive politics of the time to promote efficiency and resource protection from the government, but has since been a contentious political issue involving separation of powers, improper use and motive, federalism, and regional political differences. Politics, politicians, political battles, and their context, is essential in any study of monument declarations.

Though the Act as written contains the seed, it was not expanded into the power that it has become until Theodore Roosevelt grasped the authority. And because he was the first president to use the authority, he established nearly all of the precedents, including monument qualification, size, and declaration frequency. Roosevelt formed the law not just because of his great interest in conservation and the natural world, but also in the use and implementation of executive authority for the public good. His “interpretation of executive authority” was expansionary and progressive. The president, elected by the people, must act and do whatever is necessary to defend and promote the national aggregate interest. Successful action will automatically develop a legacy for future people to use and update. Though the law must not be broken in the process, it must be read to allow maximum flexibility and responsible political action for the present and the future.

In reading the Antiquities Act, Roosevelt quickly demolished the idea the bill was a small and restricted measure to protect objects of antiquity at archeological ruins in the southwestern United States. In so doing he did not read into the Act anything more than what was there on paper. It is the language that enabled him and future like-minded presidents to do it, but it was his style of leadership that transformed the Act into one of the greatest tools of land protection in the United States in the past one hundred years. This paper will outline how Theodore Roosevelt and his interpretation of the Antiquities Act changed the face of American public lands in the twentieth century with the general support of the American people, the federal courts, and the Congress.

There will be seven chapters:

The first chapter is a biography of Theodore Roosevelt, emphasizing how he became the man and the president capable of producing the expansive interpretation of the Act. The second is an examination of the Act's political and philosophical background. The third is a discussion of President Roosevelt in action creating the interpretation of the act. The next three chapters will detail the development of the Roosevelt interpretation over the course of the twentieth century with particular interest to its most controversial subsequent users: Franklin Roosevelt, Jimmy Carter, and Bill Clinton. The last will be a concluding chapter about the Act and its future.

A copy of the Antiquities Act is featured after this introduction. With footnotes appearing throughout, a bibliographic compilation follows the conclusion of the paper.

List of Abbreviations or Definitions:

The Act: *Antiquities Act of 1906, unless otherwise specified.*

Alaskan parkland: *national interest lands to be entered into National Park, National Forest, National Wildlife Refuge, or National Wild and Scenic River Systems.*

ANCSA: *Alaskan Native Claims Settlement Act of 1971.*

ANILCA: *Alaska National Interest Lands Conservation Act of 1980.*

ANWR: *Arctic National Wildlife Refuge, Alaska.*

BLM: *Bureau of Land Management.*

FLPMA: *Federal Land Policy and Management Act of 1976.*

GLO: *General Land Office.*

MSLF: *Mountain States Legal Foundation.*

NEPA: *National Environmental Policy Act of 1969.*

NLCS: *National Landscape Conservation System.*

NPS: *National Park Service.*

Public Domain: *unreserved land owned by the federal government that is open to disposition under the various general land laws in effect.*

The Secretary: *the Secretary of the Interior, unless otherwise specified.*

Theodore [Roosevelt]: *Father of President Theodore Roosevelt.*

TR: *Theodore Roosevelt, 26th President of the United States.*

American Antiquities Act of 1906

16 USC 431-433

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

Sec. 2. That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with proper care and management of the objects to be protected: Provided, That when such objects are situated upon a tract covered by a bona fied unperfected claim or 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, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

Sec. 3. That permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulation as they may prescribe: Provided, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

Sec. 4. That the Secretaries of the Departments aforesaid shall make and publish from time to time uniform rules and regulations for the purpose of carrying out the provisions of this Act.

Approved, June 8, 1906

The Interpreter of the Antiquities Act

Chapter 1

On June 8, 1906, Theodore Roosevelt signed a short simple piece of conservation legislation into law. There is much to the fact that a president would favor conservation measures at a time in the nation's history when previous presidents had been generally supportive of letting the public land be dispersed to homesteaders, railroads, mining firms, livestock ranchers, and other connected interests to spur as much economic development and growth in the West as possible. There is no doubt that TR was a prominent guardian of development and increasing the nation's share in the world geopolitical and economic system; he was capitalist through and through and had a great disdain for those who did not believe in it. However, he felt that unrestrained capitalism, and government that allowed such an economic situation to occur, was destructive. Capitalism must have a democratic aspect to it much like the government; the people must never be ignored. His father was a great example of reasoned civic life, and he always believed that the top in society must never ignore the bottom. Roosevelt was a progressive reformer from his early days in politics and never looked back.

From this progressivism Roosevelt became a defender of the natural resources and land that provided the might he wished the country to hold. It would be of no use if the country rapidly expanded to great heights and then fell because it had exhausted all of its energy. Because of his frenetic activity passing legislation, organizing bureaucratic agencies, and using the Antiquities Act, Roosevelt left conservation as a policy matter for all of his successors. His manner of engaging executive power up to a clear point of limitation set the stage for his own use of the Act and has since been held as the example for action by later presidents. His capacity to do battle with his opposition on his issues and beliefs paved the path for eventual battles between the president and his foes. The battles extended into other realms besides conservation; Roosevelt was consistent in style. His position on conservation and his code of political operation greatly resulted from his own life and experience, and it is worthwhile to examine it in detail. Perhaps only the character of Roosevelt could have produced the expansive use of the Antiquities Act and make it a common feature in the public lands debate of the twentieth century.

Manhattan

When recalling elements of Roosevelt's personality and visual image, most Americans consider him a Rough Rider, a rugged hunter, or outdoorsman. He was all of that, and he was extraordinarily proud of it. However, what perhaps is more fascinating is that Theodore Roosevelt was originally a man of the city. Over the course of his life his urban roots and his frontier adventures gave him a dynamism not seen in many leaders of his day. That he had such energy to draw upon, such conviction to act, and such comparable experience made him one of the greatest drivers of American life at the start of the twentieth century. His multifaceted background and interests also heavily contributed to his emergence as the nation's conservationist president and the interpreter of the Antiquities Act.

He was born on October 27, 1858 in a fashionable Manhattan brownstone on East 20th Street. The house had been given to his father, also Theodore Roosevelt, upon his wedding day by grandfather Cornelius Van Schaack Roosevelt, one of New York's wealthiest and most respectable men. Cornelius had made it a ritual to present a house to

each of his sons when the vows of marriage signified the start of a new family.¹ In many ways for the Roosevelts, New York still had the trappings of the Dutch colonial trading port of New Amsterdam that ancestor Klaes Martenszen van Rosenvelt arrived at in the late 1640s. Thenceforth, all six generations before TR were born in Manhattan and had succeeded in farming, manufacturing, trading, engineering, and financing.² Commercial success, as often is the case, flowed from the family's Dutch blood.

Theodore was prominent in society, and excelled in the philanthropic duties that his position offered and generally required. His accomplishments in 1869 provide superb examples of his civic character. Tending to the estimated 20,000 homeless children in New York City, he helped begin the Children's Aid Society.³ At another point the charter of the American Museum of Natural History was signed in Theodore's front parlor.⁴

The Civil War provided ample opportunity to extend his abilities for fellow New Yorkers and Northerners. With an eye on the war's social repercussions at the front and at home, he lobbied government officials in Washington to establish a commission to ensure that at least a portion of a soldier's monthly pay made it back home to his family. Often times the money would be lost through gambling or drunk away rather than benefiting the soldier or his family likely to be suffering from the removal of the income earning husband, son, or brother.

Though Theodore contributed to the war effort in an important and influential way, he did not fight in it. He was of age to be in the Union Army and had the status to start with an officer's position in a New York regiment. However, Theodore avoided military service by hiring a substitute, a common solution for many of wealthy stature.⁵

The Civil War meant two important things to TR. First, for a young child who pretended to be a Union soldier at nearly every playtime, it would grow upon him that his father's lack of service on the Northern side was unsatisfactory and unfortunate, though he would never say or write it publicly. Theodore's use of a legal loophole in hiring a substitute may have brought a sense of shame or embarrassment, despite his other more thoughtful and less dramatic contributions. One biographer speculated that it may have been the cause of his "almost hysterical desire to wage war" later in life, whether actual or political.⁶

Second, with Theodore often away in Washington or on commission duty, the Roosevelt home became a closeted shelter for Southern sympathies. His mother, grandmother, and aunt ran the household, and they all hailed from Southern plantations. His mother, Martha Bulloch, or Mittie, was raised in Georgia, and according to TR, was "entirely unreconstructed until the day of her death." Avoiding Yankee society and confined to the house, his older relatives opened up to tell stories of the South, and TR's interest of history and information in general abounded from then on.

¹ McCullough, David, Mornings on Horseback, Simon and Shuster, New York, 1981, pages 19-20; Official Map and Guide, Theodore Roosevelt Birthplace NHS, New York, National Park Service, 2002.

² Morris, Edmund, The Rise of Theodore Roosevelt, The Modern Library, New York, 2001, pages 6-7.

³ In other actions for the poor and newly arrived immigrants, Theodore also participated in starting medical and educational institutions.

⁴ McCullough, pages 28-29.

⁵ Morris, pages 8-9.

⁶ Putnam, Carleton, Theodore Roosevelt: The Formative Years, 1858-1886, Charles Scribner's Sons, New York, 1958, pages 25-26

As turmoil raged everywhere, the Roosevelt household was not spared much internal solitude or health. TR's childhood was racked with chronic sickness and asthma that "approached invalidism." The family letters constantly discussed his health, or lack of it.⁷ His attacks could "profound[ly]" disturb the family schedule as "summer plans, sudden cancellations of dinner engagements, changes in plans of all kinds [were] determined time and again by the status of his health." Particularly awful were the frequent nighttime asthma attacks. When the sickness was at its worst, Theodore would alert the servants to prepare the carriage and "the father and child would drive off in the dark in the hope that the sudden change of air might bring relief."⁸ It is quite astonishing to compare this sickly child with his future as cowboy riding alone in the Dakota Badlands after a long day's work and as president losing sight in his left eye after "a sparring match" at the White House.⁹

As TR grew older his health began to improve, though rather slowly. When inside for long periods of time, he served as curator a scientific collection that grew into a self-fashioned Roosevelt Museum of Natural History, no doubt around the same time his father helped start one for the rest of New York. His scientific talents were widespread; for example, he wrote an essay about insects at age nine, amazing his parents. However, the interests frequently shocked those who came in contact with him. Once while riding a streetcar, frogs jumped out of TR's hat, "much to the dismay of fellow passengers." The servants, who from time to time still had to help manage his attacks, were occasionally confronted with requests to boil woodchuck carcasses for twenty-four hours. He also made some of their duties more difficult by tying a menacing snapping turtle to the sink where the laundry was done.¹⁰

In the spring of 1869, the family undertook a ten-month long Grand Tour of Europe. Though they often clashed with his health, ventures into the countryside proved to be the best experiences. For example, a Sunday spent with his father after church services on the English seashore walking for miles along the cliffs and beaches was recorded in the young lad's diary as "the happiest day I have ever spent."¹¹ The six weeks that the family spent in Switzerland were filled with rigorous hikes through the mountains at high elevations; TR hiked nineteen miles once and then twenty miles several days later.¹² In northern Italy he wrote, "I strayed from the rest and now, in the wood around the villa Colata which is on Lake Como, with no sound save the waterfall and the Italian breeze on my cheek, I all alone am writing my journal."¹³ Though Europe in some ways was a tonic buoying his spirits, his health still remained quite bothersome.¹⁴

TR's ability to deal with his frail health came from both himself and his father. In the child's mind (probably influenced by the Union victory in the Civil War) the sickness

⁷ Putnam, pages 25-26.

⁸ McCullough, page 36.

⁹ McCullough, page 367.

¹⁰ Morris, pages 18-19.

¹¹ McCullough, pages 81-82.

¹² McCullough, page 84.

¹³ Putnam, page 63.

¹⁴ With the crowded schedule that included the sights of London, Antwerp, Amsterdam, Heidelberg, the Swiss, French, and Italian Alps, Milan, Venice, Vienna, Berlin, Paris, Nice, Rome, Naples, and everything in between, it was inevitable that his health would deteriorate after time.

was an enemy to be opposed with strenuous activity. Sometimes he was so motivated by these pursuits that they reached the point of reaggravating the asthma and constant colds and pains. But as the months passed, he slowly overcame the difficulties or at least better suited himself to their existence, and it drove him to pursue other interests. Biographer Carleton Putnam wrote:

*A battle of this sort necessarily had a profound effect on the character of the sufferer. A handicap in the young produces either resignation or defiance. In [TR's] case it produced defiance. And in the process it caused a powerful secondary reaction. He gasped for air, and symbolically he gasped for the outdoors. Steadily, from his first consciousness, the outdoors became for him a need and a refuge... Finally, in his teens, the need merged into what was to be a lifelong obsession with exercise and outdoor life. The outdoors was to become no longer a hope or a crutch, but a habitual and essential part of normal living, embraced for its own sake. The source of the consecration - the infant's gasp for air - would then be all but forgotten.*¹⁵

Theodore was as much behind TR's revitalization as he was the battle to keep his son's tottering health from falling off the brink. Theodore always encouraged action and dedication. "He hated idleness. Every hour must be accounted for and one must also enjoy everything one did. Get action, he said. Seize the moment." He was always of optimistic spirits, for his son, family, city, and country, a feeling that spread to all of his social and public commitments.¹⁶ After the summer following the trip to Europe, Theodore had a discussion with his twelve-year-old son. TR had not improved after relocating to several different places in the Hudson Valley to find better air. "Theodore," he said, "you have the mind, but you do not have the body, and without the help of the body the mind cannot go as far as it should. You must make your body. It is hard drudgery to make one's body, but I know you will do it."¹⁷

TR responded to the challenge immediately and "adhered to [it] with bulldog tenacity." He worked out at a local gymnasium as well as on the family's backyard piazza that Theodore had stocked with athletic equipment. Soon thereafter the youngster began to box with his "father's hearty approval." From that fall of 1870 onward the childhood health problems began to loosen from the bodybuilding campaign; TR reported a sick free month in August 1871.¹⁸ Though sickness would return from time to time dampening TR's spirits, he would not waver, especially as he geared to enter Harvard by the middle of the decade.¹⁹

Before entering Harvard there was another long family trip to Europe and the Middle East in 1872-1873. TR excitedly found each new destination an opportunity to examine nature, particularly the wildlife. In Egypt he wrote in his journal about the birds of the Nile valley. It also was the scene of his first hunt, where he bagged a warbler along the riverbank. Though most of his hunting was for the benefit of his museum collection back in New York, the killing eventually meandered over to sport, which TR found just

¹⁵ Putnam, pages 26-27.

¹⁶ McCullough, page 31.

¹⁷ McCullough, pages 111-112.

¹⁸ Morris, pages 32-35.

¹⁹ Morris, page 51.

as enjoyable. Besides the wildlife, TR wrote about the historic monuments that he saw. Sickness only caught up to him during the winter in Lebanon, and it remained throughout the spring in Greece and Austria.²⁰

The next four years in Cambridge were supposed to cement and professionalize TR's interest in natural science and introduce him the best of Boston's society and youth. Finding success in the latter, by graduation day he was engaged to marry Alice Lee of Chestnut Hill and of established Brahmin background. However, the professional interest in science did not last, despite several published works on wildlife. Alice was never fond of the idea of TR requiring more technical education and of the odors and carcasses produced by such work.²¹ His father also played a role in the shift in his professional outlook. He was pleased by his son's energy in study, but emphasized that he must always do his best, enter the subject completely, and mind his financial responsibilities. This last comment hinted that science held much less income than commerce and that he may not always be able to live with maximum comfort.²²

But perhaps the greatest influence that Theodore had on his son's decision to stop training in the sciences were the circumstances of his death in February 1878 at the age of forty-six. In the fall of 1877, President Rutherford B. Hayes had nominated the incorruptible Theodore to the corruptible post of customs collector for the Port of New York. The nomination was a political move not to reward Theodore or to clean up the customs office, but to spite state Republican boss, Senator Roscoe Conkling. Conkling blocked the appointment, and Theodore did not respond well to the disillusioning position of political pawn. His health deteriorated rapidly, except for a brief recovery during the Christmas holiday. Rectal-colon cancer was the real cause, but the politics most certainly accelerated death.²³ Theodore in life and death must have been a great draw to politics for TR. He had represented all that was good about civic life and duty, and his death revealed its dark unseemly side that he had not mastered. Though it is hard to know, because TR did not write about loss in his writings, perhaps the inability to survive the mud of politics and lack of military service to defend the Union were the only two disappointments TR ever held about his father.

The death convulsed TR for a long time. In a diary he wrote, "he was the most wise and loving father that ever lived: I owe everything to him." Back at Harvard in May, he reported to the same diary, "Am working away pretty hard, but I do not care so much for my marks now; what I most valued them for was *his* pride in them." His father had supported his scientific endeavors, showed him the sights of Europe and the Middle East, provided a gleaming example of living and giving, urged him to invigorate and save himself with physical activity to build strength, and eased the pain of his constant childhood sicknesses.²⁴ When a Harvard doctor told him after a physical examination near graduation that unless he lived a quiet life without fierce vigorous exercise his heart was going to give out, TR, showing the influence of his father, responded, "I'm going to

²⁰ Morris, pages 38-42.

²¹ Morris, pages 65-66; 87-88.

²² Morris, page 67.

²³ Morris, pages 68-70.

²⁴ McCullough, pages 186-188. In June 1878 TR wrote about his father's compassion when ill as a child: "He did everything for me, and I nothing for him. I remember so well how, years ago, when I was a weak, asthmatic child, he used to walk up and down with me in his arms...an oh, how my heart pains me when I think I was never able to do anything during his last illness."

do all the things you tell me not to do.”²⁵ TR’s sister Corinne recalled years later that, “when the college boy of 1878 was entering upon his duties as President of the United States, he told me frequently that he never took any serious step or made any vital decision for his country without thinking first what position his father would have taken on the question.”²⁶ The civic legacy of his father was monumental, and Theodore Roosevelt began the long effort to try and surpass it in politics, as is the American way.

Dakota Badlands

The decision to switch professions from science to politics had an immediate effect after graduating from Harvard in 1880. He was elected state assemblyman soon afterward and quickly made a name for himself in Albany. Rising in the Republican ranks provided satisfaction. Roosevelt found that politics was about taking risks and seizing opportunities; it complemented his father’s advice for activity. Gaining influence in Albany was a great boon to TR’s confidence.

But the most momentous decisions and experiences of his life in the 1880s came not in Albany, but in the Badlands of western Dakota Territory. In the east the decade saw two of his worst political defeats, the 1884 Republican national convention and presidential campaign and the 1886 mayoral race in New York City. However on the plains and badlands of northern Dakota, Roosevelt reached a new plateau of confidence and respect that helped obliterate these bad political memories as well as the quick and horrible aftershocks of death in the family.

Roosevelt likely heard of adventure in Dakota in May 1883 at a New York party from naval Commander H.H. Gorringer. He had recently purchased a cantonment along the tracks of the Northern Pacific Railroad where it crossed the Little Missouri River. Gorringer advertised excellent hunting possibilities including the magnificent bison.²⁷ Roosevelt agreed to go in the fall with a party, but when the time came in early September, he found himself the only group member boarding a westbound train. It took four days to travel to western Dakota, and he arrived in the middle of the night.

Along the banks of the Little Missouri River, a steadily flowing river except during the hottest summer droughts, stood two new developments dependant on the Northern Pacific Railroad. On the west bank was Little Missouri, “Little Misery” to the several residents, consisting of a few shacks, a hotel, and a saloon named “Big-Mouthed Bob’s Bug Juice Dispensary.”²⁸ On the east bank was Medora, the new western dream of a wealthy French aristocrat, the Marquis de Mores. The name was derived from his wife, Medora, the source of much of his funding for the variety of projects that crossed his mind. Both were excellent with the gun and trigger and that skill, along with his supply of money, brought instant respect.²⁹

The Marquis wished his settlement to be the headquarters of a ranching and meatpacking empire. He would ranch the cattle on his land, slaughter them in his town, pack them in his refrigerated railroad cars, and ship the meat directly to the market of any

²⁵ Morris, page 109.

²⁶ Morris, page 72.

²⁷ Morris, pages 181-183. Bison numbers were massively dwindling partly as a result of these types of railroad hunting journeys from the east.

²⁸ Morris, page 189.

²⁹ The Marquis had killed an unfriendly cowboy that, earlier in the year, plotted to ambush him for placing fences on the plains to denote lines of property.

city, east or west. He would also start a newspaper named the *Badlands Cowboy*, build a small Catholic church for the benefit of his wife, construct a home that he christened a *chateau*, and employ dozens of people on the range and in town at the meatpacking plant and other company owned businesses.³⁰ Setting the stage for his business and fiefdom, the Marquis once announced, “I pride myself on having a natural intuition. It takes me only a few seconds to understand a situation that other men have to puzzle over for hours.”³¹ It sounded brilliant and profitable, but the scheme was doomed to fail within four years. Overconfidence was a factor.³²

TR, the only person to step from the train on September 7, 1883, began a great period of individual growth and accomplishment. Though he was personally responsible for most of it, the surrounding mysterious Badlands participated by being the scorching, rocky, dusty, rugged, and beautiful terrain that it was and is. Decades later he reflected to an audience after his presidency, “If it were not for my years in Dakota, I never would have become President of the United States.”³³

After two weeks, which included a hunting trip that scored a bison and several late nights talking with new friend and rancher Gregor Lang, Roosevelt made a substantial decision on the spot. Discussing ranching with Lang and his two friends, Sylvane Ferris and Joe Merrifield, so interested and excited TR that he wrote a check for \$14,000, hiring Ferris and Merrifield to buy cattle and start an operation centered at their Chimney Butte Ranch and Maltese Cross cabin. Trusting the pair he waived the right to a receipt, and Roosevelt returned east to his duties in New York by the end of September.³⁴

Five months later in February 1884, Roosevelt received a double shock from his home in Manhattan. Alice had given birth to a daughter, but was dying from Bright’s disease, and his mother was ill in bed with typhoid fever. When he arrived from Albany, late in the evening on February 13, only hours remained for both lives. His mother died around three in the morning and Alice slipped away around two in the afternoon.³⁵ Roosevelt spent a couple of days “in a dazed, stunned state,” according to his old tutor. Afterwards he resolved, “I shall come back to my work at once; there is nothing left for me except to try to so live as not to dishonor the memory of those I loved who have gone before me.”³⁶ The failure of fellow Republican reformers at the June convention in Chicago to get their candidate nominated sent him further into a depression. It got worse in November when Democrat Grover Cleveland was elected president, the first from that party, subtracting Andrew Johnson, since before the Civil War.

Only the comfort and isolation of the Badlands and the Great Plains could restore his spirits. Roosevelt claimed the Dakota Badlands as his retreat from the East, politics, pain, and any lingering doubts about his confidence and health. “There was, in this

³⁰ Both the Chateau de Mores and the remaining foundations of the meatpacking plant are contained within a state historical park administered by the North Dakota State Historical Society. These two sites and the St. Mary’s Catholic Church are also listed on the National Register of Historic Places.

³¹ McCullough, pages 323-325; Hagedorn, Hermann, *Roosevelt in the Badlands*, Theodore Roosevelt Nature and History Association, Medora, North Dakota, 1921, 1987, page 61.

³² In addition to the weather, overgrazing of the land, change in his interests, and the anger of beef industry competitors, especially from the slaughterhouses of Chicago contributed to his demise.

³³ Morris, page 378.

³⁴ Morris, page 209.

³⁵ Morris, pages 229-230.

³⁶ Putnam, page 390.

beautiful country, something which thrilled Roosevelt, body and soul.” Likely it was the land itself; the rugged, dusty dry labyrinth of juniper covered buttes and coulees eroded by intermittent streams that first caused the roaming Lakota tribes to describe the territory as *makoshika* or badlands. The fantastic landscape differed so greatly from the crowded streets of the burgeoning island of Manhattan, the smoky Albany hotels crammed with caucusing and card-playing politicians, or the cavernous hall of the New York State Assembly chamber. “Here he had only to saunter up a butte” to view spectacular panoramas, or “gallop in any direction, for as long as he liked, and not see a single human being.”³⁷ Natural sounds or silence heard from the environs of his cabin impressed his somber ears:

*In the hot, lifeless air all objects that are not near by seem to sway and waver. There are few sounds to break the stillness. From the upper branches of the cottonwood trees overhead, whose shimmering, tremulous leaves are hardly ever quiet, but if the wind stirs at all, rustle and quiver and sigh all day long, comes every now and then the soft, melancholy cooing of the mourning dove, whose voice always seems far away and expresses more than any other sound in nature the sadness of gentle, hopeless, never-ending grief. The other birds are still; and very few animals move about.*³⁸

The fourteen thousand dollar ranching investment “was a small price to pay for so much freedom.” Though he understood the necessity of urban life, the open land had its own important power on life and individual character.³⁹

Arriving in Medora on June 9, 1884, Roosevelt solidified his presence in Dakota within the rest of the month. After a few days he wrote another check to Ferris and Merrifield for \$26,000 to finance the purchase of additional cattle. Roosevelt had now invested almost twenty percent of his fortune, clearly putting himself at risk with this cash advance for a sizable loss should any disaster come.⁴⁰ He also moved to a new ranch thirty miles north of Medora along the Little Missouri. To help him with the operation he asked two friends from college-age trips to the northern woods of Maine to take the long trip west. They responded favorably to the challenge as well as the guarantee of pay and arrived by the end of the summer. With these friends he christened the Elkhorn cabin, his retreat and ranching headquarters for the next two years.

He wrote back east to his sister Bamie that, “The country is growing on me, more and more; it has a curious, fantastic beauty of its own.”⁴¹ He went alone on a hunting trip, and he wrote of the solitary surroundings, “nowhere, not even at sea, does a man feel more lonely than when riding over the far-reaching, seemingly never ending plains...nowhere else does one seem so far off from all mankind.”⁴² Reporting the trip to Bamie in another letter, he wrote, “I felt absolutely free as a man could feel; as you know, I do not feel loneliness.”⁴³

³⁷ Morris, page 211.

³⁸ Roosevelt, Theodore, Ranch Life and the Hunting Trail, University of Nebraska Press, Lincoln, Nebraska, 1888, 1983, pages 39-40.

³⁹ Morris, page 211.

⁴⁰ McCullough, pages 322, 328.

⁴¹ Hagedorn, page 105.

⁴² Putnam, pages 456-457.

⁴³ Hagedorn, pages 104-106.

In his autobiography, written after leaving the White House, TR commented again on the nature of his labors and relaxations and its lifelong benefits:

I do not believe there ever was any life more attractive to a vigorous young fellow than life on a cattle ranch in those days. It was a fine, healthy life, too; it taught a man self-reliance, hardihood, and the value of instant decision - in short, the virtues that ought to come from life in the open country. I enjoyed the life to the full. After the first year I built on the Elkhorn ranch a long, low ranch house of hewn logs, with a veranda, and with, in addition to the other rooms, a bedroom for myself, and a sitting-room with a big fireplace. I got out a rocking chair - I am very fond of rocking chairs - and enough books to fill two or three shelves, and a rubber bathtub so that I could get a bath. And then I do not see how any one could have lived more comfortably.⁴⁴

Besides the wealth of experience, the improved health and strength, and the retreat from the sadness of family deaths and the failures of the presidential campaign of 1884, Roosevelt's time in Dakota was the birth of perhaps his greatest contribution to American politics. From the mysterious ruggedness of the Badlands, he infused conservation into the national debate and provided it with a solid legal foundation. He theorized that the United States will be great not because of what it has to start with, but in the manner that it protects and wisely uses its natural and national attributes.

The most public evidence of his new conservation ethic appears in his speech on the Fourth of July in 1886 in Dickinson, then a town of seven hundred about thirty-five miles to the east of Medora by train. It was an extraordinary glimpse into the mind of a growing young politician. Appropriate for a Yankee gentleman, the speech was of moral and "solemn" background. He began by alluding to the gift of the Revolution and Union granted by the nation's founders. "Much has been given to us," he said, "and so, much is expected of us; and we must take heed to use aright the gifts entrusted to our care." In Dakota the land is the greatest resource providing property for homes, fields to cultivate and for animals to graze, and a future for the nation and its people. "So it is peculiarly incumbent on us today so to act throughout our lives as to leave our children a heritage, for which we will receive their blessing and not their curse." Wrongful behavior or "vice" diminishes the patrimony to bestow to the future:

It is not what we have that will make us a great nation; it is the way in which we use it. I do not undervalue for a moment our material prosperity; like all Americans, I like big things; big prairies, big forests and mountains, big wheat-fields, railroads - and herds of cattle, too - big factories, steamboats, and everything else. But we must keep steadily in mind that no people were ever yet benefited by riches if their prosperity corrupted their virtue... We have fallen heirs to the most glorious heritage a people ever received, and each one must do his part if we wish to show that the nation is worthy of its good fortune.

Finishing with more words reflecting the American Union and the sovereignty of its citizens, Roosevelt reiterated the idea of "responsibility" to the future, in both East and West. Knowing his prowess in the brown canyons of Dakota and the brownstones of Manhattan, the audience had a special intuition he could bring that latitudinal unity to the

⁴⁴ Roosevelt, Theodore, An Autobiography, Charles Scribner's Sons, New York, 1925, pages 95-96.

nation. On the train ride back to Medora the editor of *The Badlands Cowboy* told Roosevelt that he “could do better work in a public and political way than in any other,” and that he would rise all the way to the Presidency. Roosevelt agreed; it was not the first time he had heard that said of him, in the East or the West.⁴⁵

The speech was a general address on the state of the agrarian plains and the history of the Union on the national holiday to joyous citizens on the one hundred and tenth anniversary of independence. Unsurprisingly therefore, it was packed with the muscular patriotism that many in the audience were expecting and that Roosevelt would become known for.⁴⁶ However, it is a perfect verbalization of his growing wish to see land as a responsibility to protect and to leave a part of it, whether scenic, scientific, or historic, for the future. As our lives are great opportunities to benefit today and tomorrow’s society with dignified action, respectful use of national resources, are just as vital to extending the nation into the future. With farsighted vision and “virtue,” the nation can produce with what it was naturally given much longer into the future and can benefit the lives of its children. The nation is its parts, the land, creativity, diversity, and the people. The people are one in the same as the nation as they are with the land and the characteristics it inspires. Improper use of the nation would result in disaster.

The speech no doubt would have made father Theodore more impressed with his son than ever before. His message was direct, thoughtful, and well-presented. He identified a growing problem for the future, that of wise growth, and made a public attempt to remedy it in the best and most judicious manner. His ability to connect his lofty words to the audience of cowboys and other simple folk was quite apparent to those in attendance, not just the editor of the Medora newspaper. In the opinion of the master of ceremonies, Dr. Stickney, Roosevelt easily surpassed the previous speakers in eloquence and meaning.⁴⁷

In what would have been highly satisfying personally for Theodore, the speech was made by a vigorous healthy man of twenty-seven years. The ranching venture and associated adventures, requiring courage, strength, and great physical capacity, had garnered a lasting respected public image among people who did not regularly grant such a courtesy and keep it.⁴⁸ Roosevelt was before an audience that he had firmly grasped with his articulation and respected image. For TR as a politician and a conservationist, it was one of his greatest moments.

Roosevelt had yet one more eastern disappointment to go. In November he lost in the New York City mayoral election. Even worse, he finished third. But it would be all right. He would come back and win again in New York. It was the same result in Dakota where the harsh winter of 1886-1887 wiped out his cattle operation, just as Roosevelt was planning to leave the business. When the financial count arrived, Roosevelt had lost roughly \$80,000.⁴⁹ What he had gained in ranching, though, was not money, but wisdom about the manner of other people and the world around them. And in politics Roosevelt

⁴⁵ McCullough, pages 358-360; Hagedorn pages 405-411.

⁴⁶ Collins, Michael, *That Damned Cowboy*, Peter Lang Publishing, Inc., New York, 1989, page 80.

⁴⁷ Hagedorn, page 409.

⁴⁸ A rumor persisted that Roosevelt would inevitably become a representative or senator for the soon-to-be state of North Dakota. Collins, page 80.

⁴⁹ Morris, pages 363-376

learned, as many other politicians have found, that perhaps it is best to lose once or twice before truly embarking on the route to ascendancy.

The Roosevelt legacy was growing before the nation's eyes, and TR knew it. His father's commitment and optimism began to serve him fantastically well in public life. In assuming a full time career of politics, leaving ranching behind, he never left this sense of duty behind. As his father gave so much to him, TR was now bequeathing to his growing national constituency. Once assuming the presidency he could finally claim the entire nation and its people as his beneficiary.

Onward to the Presidency

In the fifteen years between 1886 and 1901, TR built the political foundation for his presidency. With a number of positions and tactics, Roosevelt developed his famous persona that never ceased to create largely favorable attention. However his agitation for conservation, a strong navy, or worker and consumer protections turned heads in his own party. He constantly battled the latest foe to threaten the public. Some were intrigued and thrilled; others fumed at his quick rise to the heights of American executive authority and what it would mean for their own position.

After leaving the ranching business in 1887, he helped start a new organization to inform the public about wildlife, forests, and wilderness.⁵⁰ The group called itself the Boone and Crockett Club, and Roosevelt was elected the first president.⁵¹ This organization was largely successful in its operations and saw several victories during the decade.⁵² In 1891 it helped kill a congressional bill to allow railroad companies to infiltrate Yellowstone and secured passage of the forest reserve provision empowering the president to declare forest reserves on public lands. In 1894 member John Lacey passed a landmark bill in Congress to protect wildlife in Yellowstone, serving as the foundation for all wildlife preservation in national parks.⁵³

In his later positions as a U.S. Civil Service Commissioner, New York City Police Chief, and Assistant Secretary of the Navy, many political colleagues did not appreciate his message, energy, and tactics. Yet he seemed to grow stronger by every attempt to thwart his will. On the Police Commission he fought Tammany Democrats over corruption in the force with constant favorable publicity. With his pronouncements and investigations, Roosevelt garnered headlines spreading his name and message, and the New York newspapers, happily selling their copy to an interested public, responded with even more coverage.⁵⁴ With President McKinley and national Republican boss Senator Mark Hanna of Ohio nervous about him in power at the Navy Department in 1897, it was telling that TR jokingly told a *New York Tribune* reporter, "I am sedate now." The fact that his superior Secretary John Long was a grandfatherly, "plump," laissez-faire, white-

⁵⁰ Collins, page 99.

⁵¹ Cutright, Paul Russell, Theodore Roosevelt: The Naturalist, Harper and Brothers, New York, 1956, pages 69-70.

⁵² It helped that membership included influential conservationists and important congressmen including Henry Cabot Lodge of Massachusetts, John Lacey of Iowa, and House Speaker Thomas Reed of Maine.

⁵³ Collins, pages 98, 123-126; Morris, page 390. The club advocated for the creation and public funding of zoos in eastern cities and successfully lobbied for the National Zoological Park in Washington in 1890 and the New York Zoological Society in the Bronx in 1895. Cutright, Paul Russell, Theodore Roosevelt: The Making of a Conservationist, University of Illinois Press, Urbana, Illinois, 1985, pages 178-179

⁵⁴ Morris, pages 502-505.

haired man who equally rested and worked only spread suspicions that TR would be uncontrollable.⁵⁵

With the enormous fanfare surrounding his colonelcy of the Rough Riders during the Spanish-American War in 1898, Roosevelt won the New York Governorship later that year in November. One of the most important governmental positions outside of Washington was in his hands, and he would neither take the responsibility nor the opportunity lightly. The New York Republican machine, lead by Senator Thomas Platt, tried to keep a close eye on him and his actions, having decided to risk a potentially hostile reformist Republican in control rather than any Democrat. Very quickly they found that he was not going to take orders the way many other predecessors had.⁵⁶

The gubernatorial powers that he held in Albany confirmed TR's belief in benevolent executive authority as the best way to achieve progress for the public. A single elected official operating for the general good, was entirely more efficient, productive, and beneficial for the society's main interests than a committee, board, congress, or party machine organization. Those political pathways are prone to pervasive corruption, petty in-fighting, and unbearable delay. So is a single official, but full responsibility would fall uniquely on him. But most importantly, speed and effectiveness comes from strong leadership.

The reforms rewarded "common sense" politics, derived from "the right law, and the right public opinion back of the law."⁵⁷ It would be all the better if men similar to Roosevelt were elected to these high offices. To ensure election and public trust, progressive politicians learned the art of public relations. A politician trusted and respected by the public would earn thousands of new votes and with some hard and well-placed effort could even sway the public to views and policies to which it may not at first subscribe. Roosevelt completely mastered this modern executive style, if he did not largely invent it himself.

A passage from his autobiography well describes his executive tactics developed in previous years and well-honed in the period as Governor:

If after repeated and persistent effort I failed to get them [the Legislature] to support me, then I made a fair fight in the open, and in a majority of cases I carried my point and succeeded in getting through the legislation which I wished. In theory the Executive has nothing to do with legislation. In practice, as things now are, the Executive is or ought to be peculiarly representative of the people as a whole. As often as not the action of the Executive offers the only means by which the people can get the legislation they demand and ought to have. Therefore a good executive under the present conditions of American political life must take a very active interest in getting the right kind of legislation, in addition to performing his executive duties with an eye single to the public welfare. More than half of my work as Governor was in the direction of getting needed and

⁵⁵ Morris, pages 590-591.

⁵⁶ For instance, Roosevelt rejected Platt's first choice for the position of state Superintendent for Public Works, one of the largest distribution points of the political patronage that greased the party's machine. Instead the Governor offered Platt a choice of four more suitable candidates, a process he continued for the rest of his two-year term. Platt chose the person, but Roosevelt chose the level of quality. Morris, pages 727-728.

⁵⁷ Roosevelt, Autobiography, page 186.

*important legislation. I accomplished this only by arousing the people, and riveting their attention on what was done.*⁵⁸

When it came time to choose a nominee for vice president to complement incumbent William McKinley for the Republican national ticket in 1900,⁵⁹ Roosevelt was selected by popular acclamation. But there were mixed reasons for accepting him. TR's friends, notably Senator Henry Cabot Lodge, thought it would energize the party nationally and serve as Roosevelt's advance ticket to the White House in 1904. However, behind the scenes, many Republicans had alternative motives or reactions. Senator Platt's New York machine hoped to promote the renegade Governor to political oblivion, otherwise known as the vice-presidency, in order to ruin his career and save the state's economy and the way it was ruled. Platt envisioned with sarcastic pleasure that Inauguration Day, 1901 would be the time for "Teddy to take the veil."⁶⁰ Others were outright horrified at any prospect of him on the ticket. Senator Hanna, McKinley's distributor of power, blurted out in frustration during the Philadelphia convention, "Don't any of you realize that there's only one life between this madman and the Presidency?"⁶¹

In rising to the forefront of the national political stage, Roosevelt merged the traditional eastern politics of position, bosses, and patronage, from which Roosevelt was produced and to an extent felt at home, with the western badlands politics of personal image, charisma, and delivery. In the 1900 campaign, McKinley decided to remain at home in Canton, Ohio to receive reporters and visitors on his front porch, believing the rough and tumble of campaigning was below his presidential dignity. Meanwhile, Roosevelt was instructed to travel around the country and publicly battle with the Democratic candidate, William Jennings Bryan. It was an assignment in which he reveled.⁶² Using his natural communication skills and those earned in his previous travels and tours, Roosevelt began building "phenomenal national appeal" that may have been as strong in western states as it was in his home ground of the Northeast.⁶³ It was as if the aristocratic wealthy Marquis de Mores, the status quo, was once again losing the plains and the people to the young energetic grounded rancher from Manhattan. Indeed after the assassination of President McKinley at the hand of anarchist Leon Czolgosz in Buffalo, propelling Theodore Roosevelt, at age forty-two, to the highest office in the land, Senator Hanna fumed on the train back to Washington, "Now look - that damned cowboy is the President of the United States."⁶⁴

The Active Conservationist in the White House

Theodore Roosevelt's style as President did not differ from much of the political record that he had built up leading to the moment he assumed the office. What tactics

⁵⁸ Roosevelt, Autobiography, page 282.

⁵⁹ The Vice Presidency stood vacant as the 1900 election season unfolded. The last holder of the position, Garret A. Hobart, had died in 1899. Morris, pages 746-747.

⁶⁰ Morris, pages 749, 773.

⁶¹ Morris, page 763.

⁶² Morris, page 769. In between the June convention and Election Day in November, the vice-presidential candidate traveled over 21,000 miles to give 673 speeches in 567 towns in twenty-four states to about three million people. Bryan was just as good as Roosevelt in whistle stop campaigning.

⁶³ McCullough, David, Path Between the Seas, Simon and Shuster, New York, 1977, page 247.

⁶⁴ Morris, Edmund, Theodore Rex, The Modern Library, New York, 2002, page 30. Referred to from hereafter as "Morris TR."

Roosevelt employed in Albany, he used in Washington. That was not unexpected or unnatural; it was the strategy of a winner. For TR strong forceful executive leadership was not just his way of leading, but also the best way. With a fascination in conservation and the natural world that had steadily developed since childhood, time would only tell what Roosevelt would produce for conserving the nation's natural treasures. In just two years in Albany, Roosevelt had brought much to the public's attention on a favored subject of his. The people would then want to know more about it and eventually demand action. "Never before," one historian wrote, "had a governor of New York State or a governor of any state spoken out so fully, and so forthrightly, about the related topics of forest preservation, forest fires, flooding, stream pollution, soil erosion, reservoirs, illegal hunting, wildlife controls, and watersheds."⁶⁵

The Antiquities Act was just one important piece of conservation legislation he shepherded through Congress. His broad interpretation of the Act's language and the frequency of declarations subsequent to passage were not particular to this singular authority. Therefore, in the context of his presidency, the interpretation might be quite expected and is characteristic of the Rooseveltian approach to the executive branch.

Discussing his position as Governor of New York, Roosevelt wrote his executive authority was a special opportunity to be "representative of the people as whole." Now as the President, the official elected by all of the people, Roosevelt looked to the electoral majority that had elected McKinley in 1900 and himself in 1904 as the foundation of his support. He saw himself as a representative and a trustee of the people and their interests. "My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people." In order to perform such a vast function rather than act as a typical vehicle for political gain of a small set of special interests, Roosevelt judged himself to be honest, incorruptible, judicious, and sensible. One of his top priorities upon entering the presidency was, "an insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people." To connect to the people and move them in the "right" direction courage, depth, and persistence were required. A successful politician cannot "content himself with the negative merit of keeping his talents undamaged in a napkin."⁶⁶

This positive self-judgment, perhaps presumptive, but undertaken nonetheless, followed the tradition of his father's public concern and generous philanthropy and the growing progressive political reform movement active in certain circles around the country, especially on the Great Plains to which TR had a special connection. In the atmosphere of massive corporate trusts, railroad and robber barons, party machines and political fiefdoms,⁶⁷ all usually obstacles to the march of improvement and reform, the progressives believed only a willing leader dedicated to the general interest of the public could advance society to the greater place where it deserved to reside. "I did not care a rap for the mere form and show of power," wrote Roosevelt, using language very similar

⁶⁵ Cutright, *Theodore Roosevelt: The Making of a Conservationist*, page 205.

⁶⁶ Roosevelt, *Autobiography*, page 357.

⁶⁷ The fact that members of the United States Senate were not yet elected by the people contributed to the number of party bosses and patronage kings like Hanna of Ohio, Platt of New York, Matthew Quay of Pennsylvania, and John Spooner of Wisconsin. In TR's father's time the list included Roscoe Conkling of New York, Leland Stanford of California, and Zachariah Chandler of Michigan. Until the ratification of the 17th Amendment in 1913, state legislatures had such elective authority and often gave it to the head of the party organization. Caro, Robert A., *Master of the Senate*, Vintage Books, New York, 2002, page 29.

to his speech on July 4, 1886 in Dickinson, “I cared immensely for the use that could be made of the substance.”⁶⁸ Given this directional emphasis, the progressive spirit placed the interests of the future right behind, if not next to, the interests of the present.

In his autobiography, TR clearly articulated his approach to the presidency that impacted much of his decision-making and in this context the Antiquities Act:

The most important factor in getting the right spirit in my Administration...was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its constitutional powers... I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition.⁶⁹

That there were many opponents of reserving public land who wished to see it used as it always had been, in the pursuit of economic benefit, profit, and income, only made Roosevelt’s fashion of employing executive authority all the more welcoming in the eyes of conservationists and preservationists. However, to Roosevelt’s detractors and enemies, Democrats and some conservatives, it was an imperial, autocratic, and dangerous style not seen since the Civil War and Reconstruction. Their philosophical and political objections are substantive, and the idea of limited government had been sacrosanct throughout the nineteenth century.⁷⁰ It was clear to many that with the advent of combative Theodore Roosevelt after the assassination of friendly William McKinley, American politics was going to get a lot more interesting and the stakes were going to rise dramatically.

There were several notable occasions in his seven and one half years in the White House when Theodore Roosevelt brought his “interpretation of executive power” to the table using the Presidency in ways many then living had not seen before. Roosevelt used the existing generative or delegated powers of the 1891 Forest Reserve Act, for instance, with such great frequency, energy, and vigor that Congress returned the authority to itself. With powers newly granted to him like the Antiquities Act, the President set an example unlikely to be produced by any other chief executive of the period. On other occasions TR acted in just the manner in which he said in his autobiography he tried to operate. He famously gave himself the authority to create what would become the first national wildlife refuge. Lastly, in describing the impressive saga of arranging, starting,

⁶⁸ Roosevelt, *Autobiography*, page 357; the most famous line from that speech was, “It is not what we have that will make us a great nation; it is the way in which we use it.”

⁶⁹ Roosevelt, *Autobiography*, page 357.

⁷⁰ In a measure of American foreign policy and legislative activity in the late nineteenth century, the Senate did not ratify a major treaty between 1871 and 1898. Caro, page 34.

and building the canal across the Isthmus of Panama, Roosevelt later claimed in a 1911 speech that, “I took the isthmus.”⁷¹ It was no wonder why Senator Hanna, entrenched in the deliberations of the Senate and the patronage system, called TR a “madman.”

National Forest Reserves

On March 3, 1891 President Benjamin Harrison signed an omnibus public land bill that had been drifting between the two chambers of Congress for a number of years. What attracted the eyes of lobbyists favoring the bill, including the Boone and Crockett Club, chaired by TR, as well as congressional opponents, was the provision of Section 24. This article gave the President virtually unlimited authority to “set apart and reserve,” by proclamation, forests on federal land as “public reservations.”⁷² Attached to the large bill during the House and Senate conference committee as a rider and not referred back to the committees of origination, it is possible that the amendment remained because no one wished to block the entire bill because of one section after so many years of debate. Also, it was impossible to know how much the president would actually use the power once granted to him.⁷³ In the measure Congress offered no instructions on special management of the forest reservations, and it was assumed by the Harrison administration the land would remain in the government department currently in control of it.

President Harrison declared the first forest reserve of 1.2 million acres in March 1891 in Wyoming southeast of Yellowstone National Park, pleasing those who wished wider protection for the area.⁷⁴ Over the next two years Harrison reserved thirteen million acres. President Cleveland proclaimed 5 million acres, and then stopped to protest the lack of protection and management mandates. Hoping to restart the process in Congress to pass a forest regulation bill, Cleveland issued an order on Washington’s Birthday, 1897 creating reserves on twenty-one million acres. With less than two weeks left in his term, Cleveland surprised observers and irritated many more. After debates, battles, amendments, vetoes, and an inauguration of a new president, a suitable bill finally passed with President McKinley’s signature.⁷⁵ By the time TR assumed the presidency in 1901, the size of the nation’s forest reserves stood at roughly fifty million acres.⁷⁶

⁷¹ McCullough, *Path*, page 384.

⁷² An Act to Repeal Timber-Culture Laws, United States Statutes at Large, Vol. 26, Chap. 561, pp. 1095-1103.

⁷³ Steen, Harold K., *The U.S. Forest Service, A History*, University of Washington Press, Seattle, 1976, pages 26-27. The argument has been made that many congressmen let the amendment stand because of lack of knowledge and awareness. However Representative Mark Dunnell, Republican from Minnesota and sponsor of many previous land bills in the past two decades, raised serious questions on the floor of the House and engaged the general bill’s sponsor, Lewis Payson of Illinois, the Republican chairman of the Public Lands Committee, in a lively debate, making it unlikely that some members were caught unaware. *Congressional Record*, House of Representatives, February 28, 1891, pages 3613-3616.

⁷⁴ Steen, Harold K., editor, *Origins of the National Forests*, Forest History Society, Durham, North Carolina, 1992; Reiger, John F., “Wildlife, Conservation, and the First Forest Reserve, page 116.

⁷⁵ Steen, *The U.S. Forest Service*, pages 33-35.

⁷⁶ Cutright, *TR, The Making of a Conservationist*, page 216.

In his years in the White House, Roosevelt expanded the forest system by one hundred and fifty million acres, a three hundred percent increase.⁷⁷ In 1905, TR asked for and received from Congress a bill establishing the Forest Service to manage the growing forest system. Gifford Pinchot was named chief of the new agency. Pinchot, a proponent of multiple use theories of land and a good friend of the president, wrote in formulating the principles of the Forest Service that controversial matters would “always be decided from the standpoint of the greatest good of the greatest number in the long run.”⁷⁸ Both the reservation of the forestland and the careful and reasoned use of it would benefit the people the most. Roosevelt gave valuable support to his forest chief and his policies.

The rate at which Roosevelt and Pinchot worked to increase the Forest Service’s land holdings and bureaucratic reach alarmed many western interests and politicians. Among the western states, Colorado was a particular hotbed of resentment and anger.⁷⁹ By 1907 western leaders had coalesced to thwart Pinchot during consideration of the annual agriculture appropriations act. A Senate debate over Pinchot’s salary - westerners wanted to punish him by allocating a salary less than that of his fellow bureau chiefs in the department - spilled over into a long discussion over the benefits of the current forest reserve policy. After stating his disagreement with all of the policies concerning forest reserve management and calling the Forest Service “unbusinesslike” and “the worst organized Department of the Government,” Republican Senator Charles Fulton of Oregon introduced an amendment to prohibit the president from declaring forests reserves in Washington, Oregon, Idaho, Montana, Wyoming, and Colorado.⁸⁰ Angered by the removal of so many acres of timberlands from possible agricultural improvement, Fulton wished to return the designation power to Congress. Support flowed from western colleagues, excited by the opportunity to thwart TR.

At the other end of Pennsylvania Avenue, Roosevelt only momentarily found himself in a bind by the rider. He could not afford to veto the bill, even if he loathed the amendment. Politically, a veto would have brought unnecessary uproar and potentially divided western Republicans from the easterners. Furthermore, a veto would have denied the Forest Service all of its money for operations and jeopardized future funding. However, there were still ways of returning fire to Senator Fulton and his allies.

Plans had been circulating for months in the Forest Service about potential proclamations to make before the administration’s departure in March 1909, and the president asked for them to be formalized immediately. A few days before signing the bill, Roosevelt proudly declared sixteen million acres of forests after round-the-clock last minute preparations by Pinchot and the Forest Service.⁸¹ Later TR wrote about “retaining some sixteen million of acres to be exploited by land grabbers and by the representatives of the great special interests, at the expense of the public interest,” in his autobiography:

⁷⁷ Cutright, *TR, The Making of a Conservationist*, page 220. In two different restatements of this acreage, it is equal to the size of all the states from Maine to the Virginias and is larger than France, Belgium, Luxembourg, and the Netherlands combined.

⁷⁸ Steen, *USFS*, page 75.

⁷⁹ In Steen collection, McCarthy, Michael, “The First Sagebrush Rebellion: Forest Reserves and States Rights in Colorado and the West, 1891-1907,” pages 188-190.

⁸⁰ *Congressional Record*, US Senate: February 14, 1907, page 2959, February 18, page 3184,

⁸¹ Steen, *USFS*, pages 99-100.

When the friends of the special interests in the Senate got their amendment through and woke up, they discovered that sixteen million acres of timberland had been saved for the people by putting them in the National Forests before the land grabbers could get at them. The opponents of the Forest Service turned handsprings in their wrath; and dire were their threats against the Executive; but the threats could not be carried out, and were really only a tribute to the efficiency of our action.⁸²

The delegations of power in the 1891 forest reserve act and the Antiquities Act have often been compared. In 1906 Congress was beginning to reach its last straw with large forests declarations and activists in charge in the White House and executive departments and agencies. Indeed much of the delay in passing the Antiquities Act was wrangling over how strict congressional language ought to be about monument size. The language in the 1906 act was largely seen as more restraining and satisfied western legislators not inclined to support the bill.⁸³ Indeed, one of the main Forest Service detractors, Thomas Patterson, a Colorado Democrat, was the lead Senate sponsor of the Antiquities Act.

Pelican Island National Bird Refuge

Roosevelt relished the chance to use constitutionally and congressionally delegated authorities, but from time to time he took matters into his own hands. Probably the most famous instance was the creation of the first federal wildlife refuge in 1903. Birds and ornithology had always been a fascinating and refreshing activity and subject in his letters and other writings, whether in the Hudson or Nile valleys or the Dakota Badlands.⁸⁴

Roosevelt found a perfect opportunity to help protect the birds and other animals that he loved to study and hunt. Congress had acted importantly to name Yellowstone a game and wildlife sanctuary in 1894, but had not done enough since then in the president's mind. In 1903 ornithologists were worried about a small island owned by the federal government on the central east coast of Florida. Many species of birds on Pelican Island, a mere four acres in size, were being hunted at such a rate for plumes and other luxuries that scientists monitoring the birds feared their extermination. The birders asked Frank Chapman, a respected ornithologist, to appeal to the president for some action. Upon hearing Chapman's request, Roosevelt asked famously, "Is there any law that will prevent me from declaring Pelican Island a Federal Bird Reservation?" When the

⁸² Roosevelt, Autobiography, pages 404-405.

⁸³ Indeed during debate in the House, Representative Stephens of Texas asked bill sponsor John Lacey, "would it be anything like the forest reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?" Lacey responded "certainly not." However, the authority granted greatly expanded executive conservation activity in Roosevelt's time and during the rest of the twentieth century. Congressional Record, House of Representatives, June 5, 1906, page 7888.

⁸⁴ In a story that the president loved to tell, he claimed he heard a Bullock's oriole one morning on a hunting trip in Colorado during the spring of 1905. His host, a known expert of birds, replied, "Oh, no, Mr. President, those birds do not come for a month yet; it is not possible; I think you are mistaken." Positively sure of the sound he heard, TR reiterated which bird it had to be. As reported by the president's physician, "suddenly Roosevelt's face beamed with pleasure as looking out the window...[he saw] swinging on a branch of a flowering bush...a gorgeous Bullock's oriole, which as he swung sounded the disputed note." Cutright, TR: The Naturalist, page 47.

returned answer was no, the President stated to the great satisfaction of Chapman, “Very well, then I so declare it.”⁸⁵

This miniscule four-acre island became the first national wildlife refuge, and the first of fifty-one across the country TR would name during his presidency. It was another example of small situations or requests bringing substantial responsibility to the government over time under the leadership of President Roosevelt. One century later there are 542 refuges on over 95 million acres of public land.⁸⁶

Roosevelt knew that the most important step in politics and policy was not the fifth, the twentieth, or the last, but the first. Much of progressive politics was centered on taking those first steps in the right direction for the future to build on. The manner in which Roosevelt created the Pelican Island refuge is one of the most frequently told episodes of his administrations. It is perhaps the best example of his “interpretation of executive power” bringing innovation and change to federal policy. His deep and vast interest in ornithology, conservation, and protection and his continual political promise to promote and defend the general public interest of the present and the future merged placing the federal government in a new realm of responsibility and delighting the president able to accomplish the action.

The Panama Canal

Among his wide range of interest and expertise, Theodore Roosevelt was particularly concerned with naval matters.⁸⁷ As Assistant Secretary of the Navy he urged a naval buildup to compete with the Europeans and the Japanese and participated in the positioning of ships prior to the Spanish-American War in 1898.⁸⁸ Another international naval development was the possibility of a canal somewhere in Central America. Inter-ocean transit through the canal would greatly expedite the creation and deployment of a two-ocean navy that would transform the United States into a formidable world power. Nicaragua began as the leading location. However a group, lead by French investor Philippe Bunau-Varilla, quietly lobbied the administration to place the canal in Panama where the remnants of a failed French attempt at a canal lay unused, potentially worth millions of dollars or francs.

Roosevelt wanted a canal built; it did not matter much where. He later called the canal, “by far the most important action I took in foreign affairs during the time I was President.”⁸⁹ He was receptive to Bunau-Varilla’s hints about the possibility of Panama, and Roosevelt kept his options open.

In November 1901 a presidential commission investigating the location of a canal recommended Nicaragua, as most observers expected. The commission rejected Panama because of the high acquisition price expected to pay for the dormant French holdings. The House moved quickly to pass a Nicaragua canal bill, and Roosevelt remained quiet

⁸⁵ Cutright, *TR, The Making of a Conservationist*, page 223.

⁸⁶ Mitchell, John B., “Our Great Estate,” *Sierra* magazine, Sierra Club, Vol. 89, No. 2, Mar/Apr 2004, p 33.

⁸⁷ Morris, *The Rise of TR*, pages 135-136. In 1881, just graduated from Harvard, he published a history entitled *The Naval War of 1812* that was widely praised as definitive and was used by both the United States Navy and the British Royal Navy. At Harvard he once wrote after daydreaming, “when the professor thought I ought to be on mathematics and the languages, my mind was running to ships that were fighting each other. Morris, page 588.

⁸⁸ Morris, *The Rise of TR*, pages 593, 602.

⁸⁹ Roosevelt, *Autobiography*, page 512.

as if approving. However, when word came from Paris that the price was to be slashed by sixty percent, the situation changed rapidly. The commission reported to Roosevelt that it would now recommend Panama, and powerful Senators Hanna and Spooner put the brakes on the Nicaragua bill in the Senate. Roosevelt announced his support for the Panama version, angering the Nicaragua backers lead by Democratic Senator John Morgan of Alabama, and the bill became law.⁹⁰

Unfortunately for canal enthusiasts, Panama at the time was governed by Colombia, and Bogotá was reluctant to see Americans arrive in numbers, demand a self-policed canal zone, deploy military forces, install fortifications, and profit from the expected canal business. Unwilling to see his holdings not be sold to his American friends, Bunau-Varilla plotted a revolution in Panama removing the Colombians and enabling a new government to immediately sign a canal treaty with Washington with the stipulation that the Americans buy out the French property, equipment, and value of work previously undertaken.⁹¹ Meeting in Washington with State Department officials and the President on October 10, 1903, the Frenchman informed TR of the planned revolution and the order of subsequent events. Six days later he met with Secretary of State John Hay and received a cryptic message thought to be an approval of the plan.⁹² Secrecy was especially important in this case, because participation in a Panamanian revolution verged on breaking or outright violating an 1846 treaty signed between Washington and Bogotá allowing for American involvement in and development of cross-isthmus transportation by railroad or canal in exchange for American guarantees of Colombian sovereignty.⁹³

When the revolution occurred in Panama in early November, American gunboats patrolled both Pacific and Atlantic coasts. With this aid, the revolutionaries were successful and were able to solidify control in the region. A satisfied Roosevelt went on to deny any participation in the revolution and belittled the Colombians when they complained. When some argued the unconstitutionality of the action, generally relating to perceived violation of the existing treaty with Colombia, Roosevelt returned fire saying it was unconstitutional “only if Jefferson’s action in acquiring Louisiana be also treated as unconstitutional.” He continued the attacks writing, “at different stages of the affair believers in a do-nothing policy denounced me as having ‘usurped authority’ – which meant, that when nobody else could or would exercise efficient authority, I exercised it.”⁹⁴ His critics received a harsh treatment in his autobiography:

From the beginning to the end our course was straightforward and in absolute accord with the highest of standards of international morality. Criticism of it can come only from misinformation, or else from a sentimentality which represents both mental weakness and a moral twist. To have acted otherwise than I did would have been on my part betrayal of the interests of the United States,

⁹⁰ McCullough, *Paths*, pages 264-269.

⁹¹ In justifying his “moral right to take part in a revolution,” he wrote, “yes, because Colombia was obviously prosecuting a policy of privacy aiming at the destruction of the precious work of Frenchmen.” McCullough, *Path*, page 350.

⁹² McCullough, *Path*, pages 350-355.

⁹³ McCullough, *Path*, page 377.

⁹⁴ Roosevelt, *Autobiography*, page 512.

*indifference to the interests of Panama, and recreancy to the interests of the world at large.*⁹⁵

Though Roosevelt was clearly posting in his memoirs the best possible side of his Panama involvement, he was well aware of the risks and the perceptions. Many disagreed with this use of authority in foreign affairs.⁹⁶

In a speech at the University of California at Berkeley several years after leaving the Presidency, Roosevelt spoke some of his most remembered and revealing lines that made supporters proud and opponents angry.

*The Panama Canal I naturally take special interest in because I started it. There are plenty of other things I started merely because the time had come that whoever was in power would have started them. But the Panama Canal would not have started if I had not taken hold of it, because if I had followed the traditional or conservative method I should have submitted an admirable state paper occupying a couple of hundred pages detailing all of the facts to Congress and asking Congress' consideration of it. In that case there would have been a number of excellent speeches made on the subject in Congress; the debate would be proceeding at this moment with great spirit and the beginning of work on the canal would be fifty years in the future. Fortunately the crisis came at a period when I could act unhampered. Accordingly I took the Isthmus, started the canal and then left Congress not to debate the canal, but to debate me.*⁹⁷

Roosevelt could obviously be cruel to his opponents, reserving bitter attacks due to their disbelief or lack of confidence in his policies, actions, or style. His fighting spirit overflows with masculine toughness and fortitude earned from his past; his attacks are laced with charges of effeminate or demented behavior and cowardice.⁹⁸

Roosevelt wanted to be a fighter from early childhood. During the Civil War he always pretended to be a Union soldier vanquishing the rebellion. He may or may have not been aware that such play affronted his mother, grandmother, and aunt, all sympathetic to the South and their home state of Georgia. Growing up with emotional battles against the constant diseases of his first twenty years and the deaths of his parents and first wife at an early age also mentally prepared him for fights and for obliterating memories that were too painful to carry. His western experiences on the Dakota range with gunslingers either as poor or hopeless as the badlands dirt or as rich as the Marquis de Mores obviously built an unshakeable confidence and physical respect and presence. In one Montana saloon a tough cowboy loaded with booze and bullets made one too

⁹⁵ Roosevelt, Autobiography, page 524.

⁹⁶ Reportedly Attorney General Philander Know remarked, after the president asked for a formulation of the government's defense, "Oh, Mr. President, do not let so great an achievement suffer from any taint of legality." On another occasion Roosevelt gave the Cabinet his own defense, turned to Secretary of War Elihu Root, and asked, "Well, have I answered the charges? Have I defended myself?" Root returned, "You certainly have, Mr. President. You have shown that you were accused of seduction and you have conclusively proved that you were guilty of rape." These men were entirely behind TR, but reveal some of the sentiment of the opposition. McCullough, Path, pages 383-384.

⁹⁷ McCullough, Path, pages 383-384.

⁹⁸ Can be seen in Root's joke, Roosevelt's comments on "sentimentality" and "mental weakness," or in another comment where he rejected "the clamor of those Americans who have made a fetish of disloyalty to their country." Roosevelt, Autobiography, page 524.

many insulting comments about TR's spectacles, and it took one punch to knock him out. He accomplished a great dream leading the Rough Riders to victory at San Juan Hill, fighting the enemy gloriously in battle.

There is clearly a dangerous side to Roosevelt's leadership style. His self-assured spirit was similar to that of many powerful and confident men before the vast spilling of youthful blood that began in 1914. He may have declared his prime motive to be the benefit of the people and their interests, but he often ran roughshod over an interest if he did not agree with it. When the Colombians were not acceding to his wishes, he "took" their isthmus. When the Columbians complained and Americans expressed dismay at the meddling, he delivered an excuse about Thomas Jefferson. By declaring a national forest or a national monument, he sometimes deprived the ability to homestead, hunt, log, or mine that land.⁹⁹ His Pelican Island question is humorous to an extent, but also partly revolting for those who cherish strict interpretation of the Constitution. Though his rural ranching and Rough Rider history gave him a great Jeffersonian appearance, he certainly was Hamiltonian in governance.

Theodore Roosevelt was a story of aggrandizement and legacy. The world must be made better and a person's descendants shall control a greater part of it than he did. That person in authority should do everything necessary and proper to achieve these goals. The attitude matches conservation perfectly. He therefore delighted in leaving and making for Americans their country a better place by reserving forests to prevent floods and refuges to provide habitats for wildlife, declaring national monuments to preserve the nation's cultural and scientific history and record, and institutionalizing within the government bureaus and laws to describe, administer, and enforce these important political philosophies.

However in a republic founded on constitutional demands, a rigorous system of checks and balances among the three government branches, and the restrictions enumerated in the Bill of Rights that ordain a general standard of limited government, Roosevelt was potentially a fearsome force. When reading his writings and statements on the people's interests and what methods must be employed to satisfy them, it sometimes seems as if Roosevelt had read the Preamble of the Constitution and maybe a section or two of Article II about the Executive Branch and then stopped.

Removing discussion of individual policies, Roosevelt's energetic appearance and force could have resembled a train wreck if you were not squarely in his corner of opinion. Roosevelt behaved rashly and seemed to refuse to deliberate. At least a president like McKinley, passively campaigning from his front porch in Ohio, appeared to do so. His active nature was threatening and his statements read like presumptive and arrogant bravado to stir up believing simpleton audiences.

At the time many raised questions about the style. In opposition to the 1891 forest reserve provision, Thomas McRae, an Arkansas Democrat and a senior member of the House Public Lands Committee, feared "that the power granted to the President...is an extraordinary and dangerous to grant."¹⁰⁰ The fact that Congress did not know what the

⁹⁹ The multiple use practices of Pinchot's Forest Service allowed continued hunting, logging, and grazing on the lands, keeping the large logging and grazing interests satisfied while irritating the smaller groups or individuals who, through lack of knowledge or deliberate misrepresentation by another politician, believed it was prohibited or found it difficult to receive permits. The national monuments restricted all four.

¹⁰⁰ Congressional Record, House of Representatives, February 28, 1891, page 3614.

president would do with the authority is unacceptable, rather than entering into faith that it would be used seldomly or appropriately.

After events in Panama and Washington rendered his Nicaragua Canal plans obsolete, Democratic Senator John Morgan of Alabama said on the Senate floor, "I fear that we have got too large to be just and the people of the country fear it."¹⁰¹ He could have been referring to Roosevelt himself, his expansionist foreign policy, the extent of the activity of the federal government in general, or all three. It all would have been true to the southerner who had served in the Senate since 1877 and was born in 1824, the year another feared populist and military hero, Andrew Jackson, first ran for President.

Roosevelt's style begot opposition naturally, but he excelled at dealing with rather than succumbing to it. More often dealing meant belittling it and railing against it, ignoring potentially helpful or compromising advice. If Roosevelt ever heard Senator Hanna's "madman" or "damned cowboy" remarks, he would have laughed at them. Roosevelt gambled that despite these substantive challenges to his style and interpretation of presidential authority, the people would solidly stand behind him, thankful for his action and ability to communicate with them his rationale for it. Even if not, he believed he would still be right in the end.

In many ways Roosevelt turned out to be right. His calls for conservation were on the mark and started a century of federal effort and responsibility. In military planning, his demands for a flexible two-ocean fleet permitted the United States to gain naval strength in the period between the two World Wars. His headstrong confidence and inability to accept doubt double as some of his greatest strengths and weaknesses. It is fortunate he was often right, but it is genuinely dreadful to imagine what might happen if a Rooseveltian leader turns out to be frequently wrong.

Politically, the gamble paid off immeasurably; the country and the people were for TR. After a campaign that "represented a personal referendum on Theodore Roosevelt rather than a contest between opposing political parties," it gave him a complete four-year term in office in 1904. He garnered 7,628,875 votes, 56.4 percent, compared to Democrat Alton Parker's 5,084,442 votes, or 37.6 percent.¹⁰² Impressively, he won 336 electoral votes, the most won by any candidate to that point, and thirty-three of forty-five states. Parker, as everyone expected, performed best in the Solid South, but lost the state of Missouri, a sure sign of Roosevelt's national strength.¹⁰³ Given this sizeable mandate and continuing lease on presidential authority, Roosevelt embarked to fully stamp his imprint on the political landscape of United States. The Antiquities Act of 1906 was a major piece of that process and legacy.

¹⁰¹ McCullough, *Path*, page 386.

¹⁰² The rest of the vote was split among third parties. Socialist Eugene V. Debs earned 3% and the Prohibitionists received 2%, leaving 1% for others.

¹⁰³ Gould, Lewis L., *The Presidency of Theodore Roosevelt*, University of Kansas Press, Lawrence, Kansas, 1991, page 144. That same night, Roosevelt's greatest personal electoral moment, he made perhaps his worst electoral decision. He declared to reporters that in 1908, "under no circumstances will I be a candidate for or accept another nomination." He regretted the remark fast, especially when March 4, 1809 seemed to be right around the corner or too soon to see a plan enacted or administered.

The Processes behind the Enactment of the Antiquities Act of 1906

Chapter 2

Two processes were hard at work in the first decade of the twentieth century to create and draft the idea and to muster and pass the Antiquities Act of 1906. Appropriately, they are reflected in the three sections of the legislation. First, the act was a goal of the American archeological community that wished to see historic and cultural ruins and remnants on public lands conserved and protected as well as open to their organizations and the interested public for research, inspection, and study. Sections 1 and 3 relate to this effort. Second, the bill was another step in the fight for preserving, designating, and administering special parts of federal lands for the benefit of the public, the contents and components of the land, and the future. Section 2 expresses this interest. Though the second intent, and thus the second section of the act, are most remembered and discussed, both were essential to the passage in Congress and signage of President Theodore Roosevelt of the bill into law.

It is important to note that the two processes are not necessarily exclusive of each other, at least in the context of the Antiquities Act. Though conservation and preservation have philosophical differences about what should be done with public lands, natural resources, and wildlife, in the context of the Antiquities Act they are variations on the same theme. The unity of the two camps fused with the backing of sympathetic progressive politicians provided the political energy to pass the legislation after a formulation period of over five years. The opponents of the measure could only hope the act would not usher in a new wave of federal action contrary to their interests. With Roosevelt in the White House, their hopes would be dashed. “Distilled to its essence, the fundamental problem [or benefit] of the Antiquities Act may be that it incorporates both conservationist and preservationist impulses. That is, the Act contains both narrow language conserving objects of antiquity for human use, and broad language preserving areas in their natural condition.”¹⁰⁴ They readily agreed that something must be done to insure that “objects of historic and scientific interest” are kept so that future generations can enjoy, learn from, and experience them and then leave them for the future. The Antiquities Act provides a definitive statement of this unification of the philosophies and made it a policy of the federal government.

The most defining common strand among conservationists and preservationists and the political and philosophical foundation of the Antiquities Act was the necessity of the involvement of the federal government in providing those guarantees to the people it serves. Speaking of Major John Wesley Powell, a notable nineteenth century explorer of the American West, conservationist, and government administrator, author Wallace Stegner wrote, “He would have said the future has a claim on us. He would have said that on the evidence of several generations of exploitative freedom no one could guarantee the future its share of the American earth except the American government.”¹⁰⁵ When

¹⁰⁴ Klein, Christine A., “Preserving Monumental Landscapes Under the Antiquities Act,” *Cornell Law Review*, Vol. 87, September 2002, page 1382.

¹⁰⁵ Stegner, *Beyond the Hundredth Meridian*, page 362.

properly run with rational experts and concerned citizens in the progressive spirit, the federal government could be the best promoter of the public interest, even when the public may have been split or partially hostile. Indeed when invested with the power to protect the natural resources and other special and scientific qualities of the public lands, the president, the personification of efficient administration and national leadership, could make the greatest and widest positive impact. Under Theodore Roosevelt and other presidents of the era, the government made a significant impact.¹⁰⁶

To its proponents the Antiquities Act was a great step forward towards protecting particular archeological and “other” scientific resources. Nearly one hundred years after the bill was signed into law on June 8, 1906, they continue to argue that the Antiquities Act is an important part of protecting the public lands and its treasures for the people. To its opponents it would become yet another bill in an ominous development of land legislation preventing traditional uses and distribution to the public or business entities. And every time the president has made a declaration and reservation using the law found to be egregious, arbitrary, or excessive use of granted authority as written in the law, they have mounted substantial campaigns to amend or repeal the act in Congress or to have it overturned in federal court. Many of the western concerns are valid and should be examined in such a light. However, in regard to the Antiquities Act, the opposition has had only minimal success in trying to restrict its use and its authority.

The development and drafting of the Act has largely contributed to the battle between these forces that still rages today and has heated up since President Bill Clinton utilized the powers of Section 2 in a highly Rooseveltian manner. Therefore it is imperative to discuss the unification of the two forces, the arguments of the opponents, largely from the west, and how these forces formed the eventual law.

Archeology and Conservation

As the nineteenth century concluded and the frontier of the United States disappeared, outstanding opportunities arose to understand the enclosed vastness of the American West. As most of the native tribes had been pacified and placed on reservations, many began to inquire into the history of the tribal cultures in decline as a result of manifest destiny. Various expeditions paid for by the federal government or private eastern sources revealed a great collection of archeological and anthropological resources on recent and Pre-Columbian Native American tribes. The Civil War brought a new interest in historic preservation, especially to sites related to the Revolution, a time and period of personalities that both North and South could agree on was important.¹⁰⁷ With professionalization of these branches of science emerging at both North American and European universities, more attention grew to the safety of the archeological finds largely in the Southwest.

Archeology

Easterners concerned with historical sites in their own states usually “became critical advocates” of southwestern archeological and anthropological research and

¹⁰⁶ Leshy, John D., “Shaping the Modern West: The Role of the Executive Branch,” *University of Colorado Law Review*, Vol. 72, Num. 2, 2001.

¹⁰⁷ Rothman, Hal, *Preserving Different Pasts*, University of Illinois Press, Urbana, Illinois, 1989, page 7.

conservation.¹⁰⁸ In 1879 two organizations were founded in eastern cities to advance and promote the interests of the scientific field. The Anthropological Society was founded in Washington and began publishing the *American Anthropologist* magazine, and in Boston a number of Harvard professors and other intellectual luminaries founded the Archeological Institute of America. Three years later a group of New Englanders persuaded Senator George Hoar of Massachusetts to introduce a petition to the floor calling for western archeological lands “to be withheld from public sale and their antiquities and ruins be preserved, as they furnish invaluable data for the ethnological studies now engaging the attention of our most learned scientific, antiquarian, and historical students.” The bill went nowhere, but Hoar continued to be a significant ally in Congress.¹⁰⁹

Allowing “the most learned...students” to identify and examine southwestern antiquities was important not only for the preciousness of the objects to be discovered at the archeological sites, but also for the prestige of the institution or association providing financial and organizational assistance to the expedition and the archeologists.¹¹⁰ Just as the cities in which the institutions were located were finally reaching a similar level in the field of competition with the great European capitals in population, wealth, commerce, and cosmopolitan importance, the universities, museums, and supporting members of the public wanted to rival their institutional counterparts across the Atlantic. Writing in 1906 the *New York Times* declared that “the American people desire a National Museum which shall be comparable without apology, with the National Museums of England, Germany, and France.”¹¹¹ Unfortunately, the best educational training was still to be found at British, German, or French universities, not in the United States, but the situation was improving.¹¹² The geographic proximity of Native American and Pre-Columbian archeology gave Americans a significant advantage in a growing field when not many others existed.

However, the Native American resource was rapidly declining, something of which the archeological and anthropological communities were well aware. The manifest destiny that sent pioneers and enterprising youths like Theodore Roosevelt, continually westward, had by the turn of the century placed the continent completely under the realm of the American government. The drive and thirst for land had nearly destroyed the cultures of the plains and mountain tribes and the animal most representative of them, the

¹⁰⁸ Rothman, page 11.

¹⁰⁹ Lee, Ronald, *The Story of the Antiquities Act*, National Park Service, 1970, www.cr.nps.gov, chapter 1.

¹¹⁰ McLaughlin, Robert H., “The Antiquities Act of 1906: Politics and the Framing of American Anthropology and Archeology,” *Oklahoma City University Law Review*, Vol. 23, 1998, pages 72 and 73.

¹¹¹ “The Smithsonian Institution,” *The New York Times*, November 25, 1906.

¹¹² Many of the influential specialists at this time were trained in part outside of the United States. Edgar Hewitt received a doctorate from the University of Geneva, Switzerland and Gifford Pinchot went to the L’Ecole Nationale Forestiere in Nancy, France. Adolphe Bandelier, born in Switzerland, but lived most of his life in the United States, studied at the University of Bern. Thompson writes, “During the late nineteenth century many Americans, especially in the scientific fields, went to German universities for their doctorates” (page 288). Showing the gathering strength of the American branch of anthropology it was reported to the American Association for the Advancement of Science in 1899 that 37 European institutions and 58 instructors taught the subject while in the United States 11 institutions and 17 instructors offered anthropology. Lee, chapter 3.

buffalo.¹¹³ As the thirst for land slowly dissipated, the hunger for authentic study and research on the vanishing culture and way of life quickly developed. In any event the situation was becoming critical. Appearing before a congressional committee, the chief of the Smithsonian Bureau of Ethnology, John Wesley Powell emphatically stated the Native American “is among us, and we must either protect him or destroy him.”¹¹⁴

It also mattered that transcontinental railroads made southwestern antiquities newly accessible for the eastern archeologists. Travel to and from the west was greatly facilitated, as was the transportation of the antiquities themselves. The size of expeditions could be expanded and supplies could arrive continuously. Also of interest to the archeologists, the railroads unfortunately brought an increasing number of settlers to the region that had little understanding of the historical significance of the antiquities, showed little concern for their well-being or intactness, and sold them to the first bidder, often finding it either a nice profit or the only source of income in the arid region.¹¹⁵ These railroads also fostered the growth of western national parks in Wyoming, California, and Washington and shuttled the first eastern tourists to the natural splendor contained within them.

Since governmental responsibility for archeological sites and objects was just developing in the 1880s, it was significant that many of the same New Englanders active in 1882 were able to pass a limited antiquities bill in 1889.¹¹⁶ This bill was not a broad effort to protect sites as was requested in 1882, but a reservation of the singular Casa Grande site in Arizona. The shift was strategic; it was a small step forward for one site out of hundreds, but importantly “at least such action would establish the principle that the government has a responsibility toward the ruins on the land it controls.”¹¹⁷ Congress found this petition sponsored by Senator Hoar to be highly reasonable and appropriated two thousand dollars for protection and repair of the site and authorized the president to reserve the land from settlement. This was the first federal archeological reserve.¹¹⁸

As the 1890s progressed, the limited means of protecting archeological sites exposed the need for additional legislation and a campaign to achieve it. After 1891 laws allowed the president to reserve forestlands, the General Land Office could temporarily reserve tracts,¹¹⁹ or Congress could designate individual sites in the manner of Casa Grande. Increasingly the first two methods were employed to a degree of success. However, government agencies had little legal authority, unclear jurisdiction, and insufficient funding to effectively administer the sites and the antiquities.

The continuous problem of looting, “indiscriminate digging,” and sale of objects displayed the limits of the government’s ability in the matter and for concerned

¹¹³ Estimates of the buffalo population at the time of Lewis and Clark place the number at sixty million; by the 1890s the number hovered in the hundreds. Kaye, Bruce and Schoch, Henry, Theodore Roosevelt National Park: The Story Behind the Scenery, KC Publications, Las Vegas, Nevada, 1993, 1999, pp 20-22.

¹¹⁴ McLaughlin, page 76. Powell lost an arm at the Battle of Shiloh in 1862 and led an exploratory expedition down the Colorado River through Utah and Arizona, including the Grand Canyon, before the river’s famous rapids were partly tamed by Glen Canyon and Hoover Dams.

¹¹⁵ McLaughlin, page 72.

¹¹⁶ The petitioners included Massachusetts Governor Oliver Ames, Anna Cabot Lodge, wife of Representative Henry Cabot Lodge, Oliver Wendell Holmes, Harvard historian Francis Parkman, and John Greenleaf Whittier.

¹¹⁷ Thompson, page 275.

¹¹⁸ Lee, chapter 2.

¹¹⁹ Lee, chapter 5.

archeologists, anthropologists, and others showed the necessity for broad federal action and regulation. The spreading of antiquities to foreign museums or to random purchasers and the destruction of some objects through carelessness not only was a disservice to the antiquities themselves and the cultures, extant and historical, they represented and documented, but made complete professional research impossible. The archeological record could never be fully substantiated if all sites were incomplete of their original holdings. Therefore, the rush was on to protect the remaining archeology of setting cultures as the twentieth century dawned.¹²⁰

For most of the time that the archeologists pushed for antiquities bills in Congress there was a split between an individual park method and a general subject approach. The first called for a site-by-site protection of ruins, the order of which being determined by the importance of the site and the level of threat from vandalism. Casa Grande was a successful example, as was the eventual creation of Mesa Verde National Park in southwestern Colorado in June 1906, the same month the Antiquities Act was signed into law. However many sites did not achieve any status greater than forest reservation including Pajarito Park, west of Santa Fe, New Mexico and Montezuma Castle, Arizona until after the Antiquities Act was passed.¹²¹

The second called for a general act to protect all archeological sites around the country putting off the organization of administration until a later time. However Congress, and western members in particular, were reluctant, if not opposed, to pass such a bill with the potential to place thousands of acres under executive authority.

The differences between these two camps in the scientific community prevented a solid unified campaign for any significant antiquities legislation for a number of years.¹²²

Conservation

One of the chief components of the Progressive movement was the reform of a century's worth of "unrestrained exploitation of natural resources spurred by" westward expansion and economic growth from the industrial revolution.¹²³ The misuse of the resources across the country had contributed to the great gap in society between those at the top, who were afforded the ability to manipulate, corrupt, and mismanage, and everyone else that was contrary to the idea of the national public good. A common strain among the archeologists and anthropologists and many of their allies was conservation of the natural, historical, and cultural resources present on the American landscape.

Conservation of these resources meant the protection of the land and resources from destructive practices harmful to the greater good. It did not mean the land and its contents should be left alone to be ruled by nature. Forest policy was a particular area where conservationist beliefs entered federal law. In a speech in March 1903 to the Society of American Foresters, Gifford Pinchot said, "The object of our forest policy is not to preserve the forests because they are beautiful or wild or the habitat of wild animals; it is to ensure a steady supply of timber for human prosperity. Every other

¹²⁰ Lee, chapter 4.

¹²¹ Pajarito Park became Bandelier National Monument, named for the famous archeologist, in 1916 and Montezuma Castle was named a national monument in December 1906 by Theodore Roosevelt. Edgar Hewitt, the main archeological advocate for the Antiquities Act, had previously spent much of his time in Pajarito Park working for it to become a national park with Representative Lacey.

¹²² Thompson, page 274.

¹²³ Klein, page 1371.

consideration becomes secondary.”¹²⁴ Conservation expectedly found its way into the organic act that created the Forest Service, providing that “no national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.”¹²⁵

Archeologists largely followed the conservationist protection philosophy to their study. Though the various antiquities bills introduced into Congress all established various penalty structures for vandals, it was always clear and understood by the archeological community that the ruins would be open for research, study, and even removal of objects to public museums and institutions. Collection of wanted data and artifacts required using the site and its remnants. The experts, through a permit process, would have access to the sites and have proper professional contact with the government department in control of the land.

In the progressive spirit, science and government would work hand in hand to protect, understand, and interpret the remnants of Native American cultures and the past of civilization on the continent. Behind the push for conservation as has been shown was urgency about the limit of opportunity to study the cultures that were in serious decline or long past and represented only with a shrinking record of oral history and artifacts. Frank Boas, seen by some as “the most eminent anthropologist in America at the turn of the century,”¹²⁶ wrote prior to the Antiquities Act becoming law that “the general breakdown of native culture, the fewness of members of certain tribes, the necessity of rapidly accumulating vanishing material, may sometimes compel the student, much against his will, to adopt methods of collecting which he recognizes as inadequate.”¹²⁷

Emerging scientific data about the benefits of forests played a significant roll in conservationist successes. In the debate in the House concerning the forest reserve provision of 1891, two congressmen noted the general and scientific benefits of the forest reserves to be created. Protected forests would reduce flooding and more water absorbed in the ground meant better soil for agriculture. They had likely been briefed by foresters and used the information to defend the policy.¹²⁸

The conservation program urged by Roosevelt and other progressives consistently included the latest scientific research to bolster their arguments. It neatly coincided with their campaign to produce efficient government and administration composed of experts eager to defend the general public interest.

Viewing the government as the only vehicle to promote their goals, organization to lobby Congress and the administration became more important. And when progressive politicians looked to archeologists for expertise, a fractious community would only cause delay. Professional unity made passage of the Antiquities Act of 1906 possible.

Parks and Preservation

The second great emphasis of the Antiquities Act was the protection of special lands on federal property that for various reasons and interests deserved or qualified for

¹²⁴ Turner, Frederick, John Muir: From Scotland to the Sierra, Canongate Books Ltd., Edinburgh, Scotland, 1985, 1997, page 323.

¹²⁵ Klein, page 1372; 16 USC 475.

¹²⁶ Rothman, Preserving Different Pasts, page 14.

¹²⁷ McLaughlin, page 76.

¹²⁸ *Congressional Record*, House of Representatives, February 28, 1891, pages 3614, 3616.

reservation from the public domain and preservation for the people. As with the archeologists who generally operated under a professionalized conservationist approach to the nation's natural and historical resources, the supporters of the bill who wanted land reserved and protected followed the ideals of the preservationists. The preservationists, lead by John Muir, argued for the land and its wildlife, vegetation, and other characteristics to be left alone for its natural wonder and beauty to be enjoyed by all those who ventured to the area. The Antiquities Act was a major bill in the line of other pieces of legislation relating to park creation. There was a limited diversity of parks created by Congress before 1906, between several remarkable parks preserved in western states and the great battlefields of the Civil War. The Antiquities Act would serve to greatly expand the breadth of parks and preserved land, subjects, and objects.

National Parks

In the nineteenth century the reserving of parks and open space for the enjoyment of the people became a major motivation for concerned citizens and governments around the country. In the West scientific expeditions uncovered great natural wonders and influential railroads sought to promote them. In the growing cities, there was increased pressure to save some space near the city or even some faraway place for leisure, recreation, and nature instead of continuing the construction of the workings of the metropolis. The national parks of the United States had a rough beginning. Many were created for the benefit of a profit hungry transcontinental railroad as were for the scenic or natural benefit. Nevertheless, the parks were created, and the system has been expanding in size and number of visitors ever since.

It is a tricky business trying to rate what was the first national park in the United States. Some point to April 20, 1832 when Congress and Andrew Jackson “reserved for the future disposal of the United States” the hot springs of central Arkansas.¹²⁹ The next action did not occur until more than three decades later. After the brutal weeks of May and early June 1864 in which General Ulysses S. Grant lost nearly fifty thousand soldiers at the fearsome battles of the Wilderness, Spotsylvania, and Cold Harbor, Congress turned its eyes briefly to more pleasing policies. With several reports of the magnificence of the Yosemite Valley reaching Washington, Congress granted a tract of land surrounding the valley and the nearby Mariposa tree grove to the state of California to be managed by the governor and a commission with the stipulation that “the premises shall be held for public use, resort, and recreation...inalienable for all time.”¹³⁰ Though a state park was created from formerly federal land, the park's stipulations nonetheless are similar to what would eventually be instituted in the Park Service Organic Act of 1916.¹³¹

The act that is most frequently cited as the first creation of a national park was the Yellowstone legislation of 1872. Several expeditions into northwestern Wyoming had

¹²⁹ Act of April 20, 1832, United States Statutes at Large, 22nd Congress, 1st Session, Chapter 70. This eventually became Hot Springs National Park.

¹³⁰ Act of June 30, 1864, United States Statutes at Large, 38th Congress, 1st Session, Chapter 184.

¹³¹ The most famous sentence of that bill reads: “The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations” (16 USC Sec. 1).

revealed to many the geological, scientific, and scenic wonder of the region. The Hayden expedition included a photographer and painter Thomas Moran to help record what many have found as indescribable. These images, Hayden's written reports, and the positive input from the Northern Pacific Railroad, gave Congress a feast of information. After a bill was passed, Congress showed its enthusiasm for the project by purchasing Moran's painting "The Grand Canon of the Yellowstone," the first American landscape it had acquired to decorate the Capitol interior.¹³² Yellowstone was "dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people."¹³³

However after the great step taken in 1872, very little was done for nearly twenty years for Yellowstone and in any other place that may have qualified for a federal public park. A small group of highly placed individuals including General Philip Sheridan and his allies in Congress were able to defend the park from railroad infiltration and efforts to return it to the public domain. They also provided more protection with an army contingent to enforce the few regulations. However they were not able to enlarge the park to the south and to the east to include the eastern front of the Absaroka Range. Sheridan sponsored a trip to Yellowstone by President Chester A. Arthur in 1883, but it did not result in conclusive action.¹³⁴

A significant cause of the inaction lies in the creating story of the park. Though Congress may have been greatly intrigued by the wonders at the headwaters of the Yellowstone River,¹³⁵ the most likely reason behind the creation of Yellowstone was the support of the Northern Pacific Railroad. In the first great railroad building boom after the Civil War that saw the Union Pacific and Central Pacific railroads meet in Utah forming a ribbon of rails from Nebraska to California, financier Jay Cooke wished to complete his railroad from Minnesota to Washington. With the mounting debt and bonds to pay, a well-publicized Yellowstone, accessible by a branch line, could develop into quite a favorable asset.¹³⁶ His agent, Nathaniel Langford, participated in expeditions and in lobbying Congress. Writing in *Scribner's* magazine in June 1871, Langford advertised that the Northern Pacific would soon transport eastern visitors to Montana in the amazing time of three days "in order to behold with their own eyes the wonders here described."¹³⁷ Indeed, much of the naturalistic promotion of the region was actually

¹³² Wallace, David Rains, Yellowstone, Official National Park Handbook, National Park Service, Division of Publications, Washington, DC, 1999, pages 54-55. Hocking, Bree, "Legislation, Art, and the Wild West," *Roll Call*, August 1, 2005, page 19.

¹³³ Act of March 1, 1872, United States Statutes at Large, 42nd Congress, 2nd Session, Chapter 24, Section 1. The House Report accompanying the bill further labeled Yellowstone as "a great national park" that "in a few years will be a place of resort for all classes of people from all portions of the world." *The Yellowstone Park*, Report 26, House of Representatives, 42nd Congress, 2nd Session, February 27, 1872.

¹³⁴ Hutton Paul Andrew, Phil Sheridan and His Army, University of Nebraska Press, Lincoln, Nebraska, 1985, pages 354-361

¹³⁵ An exhibit featuring specimens, photographs, sketches, and paintings was prominently shown in the Capitol Rotunda and articles and reports from expeditions and park supporters were widely distributed to senators and representatives. Haines, Aubrey L., The Yellowstone Story, Volume I, Yellowstone Library and Museum Association and Colorado University Press, Yellowstone National Park, Wyoming, 1977, pages 166-169.

¹³⁶ Magoc, Chris, Yellowstone, University of New Mexico Press, Albuquerque, 1999, page 17. An influential Philadelphia judge and investor suggested the park idea to Cooke.

¹³⁷ Langford, Nathaniel, "The Wonders of the Yellowstone: Second Article," *Scribner's Monthly*, June 1871, page 128; Magoc, Yellowstone, page 11.

tourist promotion for the Northern Pacific. After describing the “magnificent” park, the *Helena Herald*, revealed the business interest in the park noting, “without a doubt the Northern Pacific will have a branch track penetrating this plutonian region and few seasons will pass before excursion trains will daily be sweeping into this great park.”¹³⁸ The Panic of 1873 prevented the railroad from making Yellowstone more accessible for more than ten years, but its influence was lasting.¹³⁹

However important at the time, the reasons for the establishment of Yellowstone and other national parks, the subsequent change of protective laws has rendered them secondary considerations. Yellowstone’s creation would serve as important precedent, just as the Yosemite grant had before it.¹⁴⁰ In 1890, when Congress was interested in forest policy, it created three national reserves in California. Most of the lands surrounding the 1864 Yosemite grant became a forest reservation, as did the lands that eventually becoming Sequoia National Park. The Sequoia legislation contained the exact phrase as the Yellowstone bill, “dedicated and set apart as a public park, or pleasure ground, for the benefit and enjoyment of the people.”¹⁴¹ The same language was again used nine years later to create Mount Rainier National Park in Washington.¹⁴² The similarities show the importance of the acts, though they were spaced apart by many years. The statutory links in these parks bills, the collection of Civil War battlefields, and the requirements of the Antiquities Act national monuments started the framing of a public national park system that was slowly coming into being with each addition.

Civil War Battlefields

Besides creating several western national parks, Congress made significant steps in the 1890s by preserving eastern historical lands. The battlefields of the Civil War lay largely dormant after the armies left, the wounded treated, and the dead buried. As the nation slowly healed, many Union and Confederate veterans rose to powerful ranks in society and government. As they aged they realized the importance of the soil on which they bravely fought and where many of their friends fell. Between 1865 and 1900, four Union veterans became president, and a much larger number became senators, congressmen, governors, and mayors.¹⁴³ Many of them in and out of power lobbied for monuments, markers, and statues at the battles in which they fought.

¹³⁸ *Helena Herald*, “A National Park,” January 31, 1872; Haines, Vol. I, pages 170-171. The railroad was extended to Gardiner, Montana, at the northern entrance, but never penetrated the boundaries.

¹³⁹ Railroads influenced the creation of other early parks. In 1890 the Southern Pacific lobbied for the creation of Yosemite National Park as a mechanism for unrealized profit or positive public relations (Fox, page 106. Later in 1899, Congress specifically gave permission to build within the newly authorized Mount Rainier National Park to the Northern Pacific Railroad and established a program to trade railroad lands within the park for other lands outside of it (Act of March 2, 1899, United States Statutes at Large, 55th Congress, 3rd Session, Chapter 377, Sections 2-3).

¹⁴⁰ Yellowstone Park supporters in both the House and Senate refer to the precedent of the Yosemite grant. *Congressional Globe*, Senate, January 23, 1872, page 520; Senate, January 30, 1872, page 697; House, February 27, 1872, page 1243.

¹⁴¹ Act of September 25, 1890, United States Statutes at Large, 51st Congress, 1st Session, Chapter 926. Act of October 1, 1890, United States Statute at Large, 51st Congress, 1st Session, Chapter 1263.

¹⁴² Act of March 2, 1899, United States Statutes at Large, 55th Congress, 3rd Session, Chapter 377.

¹⁴³ The four presidents are Grant, Hayes, Garfield, and McKinley. The later three were also postwar congressmen from Ohio. Famous Union examples include General Ben Butler: congressman and governor of Massachusetts; Little Round Top hero Joshua Lawrence Chamberlain: governor of Maine; and General

The occasion for Lincoln's Gettysburg Address was the dedication of a national cemetery for the honored dead of the battle.¹⁴⁴ Cemeteries, naturally created after the carnage, were the first steps in reserving some battlefield land. However for the living, the battle had to be remembered and memorialized for themselves and the future. Therefore veterans organizations launched campaigns to erect monuments at important battlefield locations. By Gettysburg's 25th anniversary, eight northern states had contributed funds for over 200 monuments at the battlefield. The building of roads along the battle lines at several battlefields opened new sections to the growing number of visitors and induced more monument building.¹⁴⁵

Increasingly in the 1880s veterans returned to the battlefields as a part of reunions and veteran organization meetings. The lack of monuments and historical recounting of their heroic efforts disturbed many of the Union veterans returning to Chickamauga and Chattanooga.¹⁴⁶ Union veterans visiting Shiloh in 1893 were shocked when the superintendent of the national cemetery reported to them that the remains of bodies were constantly being unearthed when farmers plowed their fields or road crews started digging.¹⁴⁷

Leaders of the organizations and former generals came together to lobby for the battlefields, and interested newspapers joined the cause. Cincinnati journalist Henry Boynton, who won the Medal of Honor for bravery at Missionary Ridge, wrote:

*The survivors of the Army of the Cumberland should awake to great pride in this notable field of Chickamauga. Why should it not, as well as eastern fields, be marked by monuments, and its lines be accurately preserved for history? There was no more magnificent fighting during the war than both armies did there. Both sides might well unite in preserving the field where both, in a military sense, won such renown.*¹⁴⁸

Quickly the effort moved into high gear. Boynton and the other organizations wrote a bill and submitted it to Congress for approval to create a national military park for the two battlefields. In both chambers veterans voiced support of the bill, with seven veterans of Chickamauga speaking in the Senate alone. Representative Charles Grovner of Ohio, a colonel at Chickamauga, said in May 1890 that the battlefield, "has an importance to the nation as an object lesson of what is possible in American fighting; and the national value of the preservation of such lines for historical and professional study

John Logan: congressman and senator from Illinois. On the Confederate side General John Gordon became a Georgia senator and General Joseph Wheeler a congressman from Alabama.

¹⁴⁴ Lincoln purposely never mentioned Gettysburg by name. Instead he used the word "here," and did so eight times. By pointing to a place, but not referring to any specific one, he could have given the Address at any other battlefield. Thus wherever soldiers died, the nation received "a new birth of freedom."

¹⁴⁵ Harrison, Kathleen Georg, "A Fitting and Expressive Memorial: The Development of Gettysburg National Military Park," January 1988, from www.gdg.org/kgfhitin.html.

¹⁴⁶ Govan, Gilbert E. and Livingood, James W., The Chattanooga Country, 1540-1976: From Tomahawks to TVA, University of Tennessee Press, Knoxville, 1977, p. 367. One veteran said. "When we got there, there wasn't a man in the whole crowd that could tell a thing about it."

¹⁴⁷ Shedd, Jr., Charles E., A History of Shiloh National Military Park, Tennessee, National Park Service, 1954, <http://www.nps.gov/shil/adminhist.htm>.

¹⁴⁸ Paige, John and Greene, Jerome, Administrative History of Chickamauga and Chattanooga National Military Park, National Park Service, Denver, 1983, chapter 1, <http://www.nps.gov/chch/adhi/adhi.htm>.

must be apparent to all reflecting minds.”¹⁴⁹ With the park signed into law by President Benjamin Harrison on August 19, 1890, Boynton and the veterans began the process of planning and placing what ended up being 1,400 monuments and markers to describe the battle and remember the gallantry of the soldiers of both sides.¹⁵⁰

Congress attended to other major battlefields of the Civil War during the decade. Antietam was reserved in 1890, Shiloh in 1894, Gettysburg in 1895, and Vicksburg in 1899; all were placed under the control of the Secretary of War. Like the western national parks created at the time, issues of land use were inevitably factored into the political equation. The actions of veterans created these parks, but threats to the integrity of the historical lands themselves lead to further interest in their preservation.

In 1893 a streetcar company began building and operating a track from the town of Gettysburg south to the rocky outcroppings called Devil’s Den. Both veterans groups and government officials were disturbed by this development and began to plan the removal of the streetcar tracks and government purchase of the lands. The streetcar company refused the land arrangement, and the case went to court. Reaching the Supreme Court, the case provided significant legal sanction for the efforts to preserve battlefields around the country.

The Court found two important characteristics making the action of the government to take over the trolley land constitutional. First, the momentous events and personal sacrifice of the soldiers at Gettysburg merit the action. Second, the Republic was greatly in threat and was saved during those three days. As the land is of primary importance to the people and to the government, there exists a legitimate constitutional interest to protect and maintain responsibility over the battlefields:

*Valuable lessons in the art of war can now be learned from an examination of this great battlefield in connection with the history of the events which there took place. Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period.*¹⁵¹

These battlefields remained under control of the War Department until Franklin Roosevelt transferred them to the National Park Service in 1933. The military parks became the foundation of the nation’s historical parks that includes battlefields, homes, forts, campsites, presidential sites, and archeological and historical Antiquities Act

¹⁴⁹ Paige and Greene, chapter 1.

¹⁵⁰ *Official Map and Guide*, Chickamauga and Chattanooga National Military Park, National Park Service, 1994.

¹⁵¹ *United States v. Gettysburg Electric Railway Company*, 160 U.S. 668 (1896).

national monuments. The importance of the battlefield preservation movement comes in its concurrence with the creation of western nature parks in the 1890s and later decades and the congressionally popular and Supreme Court sanctioned activism of the federal government in purchasing and maintaining the land. Though strict preservationist management of the battlefield was not often used by the War Department,¹⁵² the battlefields have largely remained intact from the horrible days of the 1860s that transformed the fields into hallowed ground.

Preservation

Behind the more numerous and more powerful conservationists in the progressive movement at the turn of the century stood the band of preservationists. Just as appalled with the worsening condition and health of American lands as the conservationists, the preservationists wanted to take the response one step further. Instead of reserving land for utilitarian use and management, as was done by Gifford Pinchot's Forest Service, the preservationists wished to see the land untouched by human intervention. They stressed the wildness of the land, the restorative beauty and serenity of the scenery, the necessity of bountiful wild- and plant-life, and study of the land and its natural features through exploration and scientific research.

Preservationists lived best surrounded by nature and often wrote profusely about it. They branched from the European romantics writing after the Enlightenment including Wordsworth, Shelley, Rousseau, and many others.¹⁵³ Nature was always worthy of investigation; it varies and changes in so many ways that only close observation can detect. It could be brutal or beautiful, but always amazing in its sheer majesty and power. Henry David Thoreau was a prominent early preservationist in the mid-nineteenth century and for months lived peacefully beside the tranquil waters of Walden Pond south of Concord, Massachusetts. While exploring deep in the woods of Maine near Mount Katahdin, Thoreau wrote:

*Nature was here something savage and awful, though beautiful. I looked with awe at the ground I trod on, to see what the Powers had made there, the form and fashion and material of their work. This was that Earth of which we have heard, made out of Chaos and Old Night. Here was no man's garden, but the unhand-selled globe. It was not lawn, nor pasture, nor mead, nor woodland, nor lea, nor arable, nor wasteland. It was the fresh and natural surface of the planet Earth, as it was made for ever and ever.*¹⁵⁴

Nearly two thousand miles away from Concord, the vastness of the northern plains and its herds of buffalo particularly impressed artist George Catlin, one of the passengers on the steamboat *Yellowstone* on a trip up the Missouri River in 1832. He wrote rather fancifully that "some great protecting policy of government" should create "a nation's park," with Native American and bison populations intact and thriving stretching from the Rio Grande to the border with Canada, "in all the wild freshness of their nature's beauty." Though he apparently did not realize or anticipate that the

¹⁵² For example, the Gettysburg military park was used as a training ground during the First World War.

¹⁵³ Haines, Vol. 1, page 159.

¹⁵⁴ Thoreau, Henry David, The Maine Woods, Arranged by Dudley C. Lunt, W. W. Norton and Company, Inc., New York, 1950, page 277-278.

covetous eyes with which most of his fellow countrymen would soon regard the Great Plains in the coming decades would make such a dream impossible, the idea of national parks for the land and its wildlife maintained by the federal government remained.¹⁵⁵

The American spirit of freedom was often reflected in the writings of Ralph Waldo Emerson. Passages in his essay *Self-Reliance* caught the eye of a budding preservationist in California by the name of John Muir, who spent many months exploring the peaks of the Sierra Nevada.¹⁵⁶ Though he found Thoreau and Emerson “insufficiently wild,” their philosophical independence kept him reading.¹⁵⁷ Born near Edinburgh, Scotland in 1838, John Muir left for North America with his father and some of his siblings at age eleven and did not reach Yosemite in the Sierras of California until the age of thirty. Like the boy born on East 20th Street in Manhattan twenty years later, nature was present from the start of life as Muir’s grandfather took him on walks along the North Sea and around the surrounding countryside. Give a child nature, he wrote later, “and nature does the rest. It is like simply pressing a button.”¹⁵⁸

Muir would spend the rest of his life communicating with nature in whatever medium it presented itself. Rejecting theology, he settled for a spiritual existence on and amongst the earth. “It all came down to a private communion between Muir and nature. Under its spell he reached his conclusions by intuitive leaps and flashes. He literally read the face of the land, treating it as a vast book that – given patience and close study – would yield a truer sense of the cosmos.”¹⁵⁹ Muir started like Roosevelt, taking specimens and studying them with precious detail, but he never developed into the voracious hunter that Roosevelt became. The growing industrializing of the nation after the Civil War, its insatiable appetite for natural resources, and the notion of human supremacy over nature that it further enhanced greatly worried Muir as he saw the impact on the beloved high forests of the Sierras. By the mid-1870s, he stopped collecting specimens preferring to keep them growing in their natural state and habitat.¹⁶⁰ In 1890 one of his great goals was reached after Congress created Yosemite National Park, amazingly with the assistance of the Southern Pacific Railroad, a creature of industry that he had labeled “soulless” and “never counted on for anything good.”¹⁶¹ Following the victory, Muir formed the Sierra Club in San Francisco two years later.¹⁶²

Theodore Roosevelt as Conservationist and Preservationist

In 1903 Muir had an opportunity to show the Sierras to Theodore Roosevelt. He was excited by the chance to talk personally with the president about his concerns and those of other preservationists. In order to be in California at the same time as the

¹⁵⁵ Haines, Vol. 1, page 161. Catlin may have anticipated being in history books, however. He wrote: “I would ask no other monument to my memory, not another enrolment of my name amongst the famous dead, than the reputation of having been the founder of such an institution.”

¹⁵⁶ One of Muir’s favorite lines was “And truly it demands something godlike in him who has cast off the common motives of humanity and has ventured to trust himself for taskmaster.” Turner, page 217; Emerson, Ralph Waldo, *Essays: Self-Reliance*, Houghton, Mifflin and Company, Boston, 1865, pp 74-75.

¹⁵⁷ Fox, Stephen, *John Muir and His Legacy*, Little, Brown and Company, Boston, 1981, page 83.

¹⁵⁸ Fox, pages 27-28.

¹⁵⁹ Fox, page 50.

¹⁶⁰ Fox, pages 59-60.

¹⁶¹ Fox, page 106.

¹⁶² Cohen, Michael P., *The History of the Sierra Club, 1892-1970*, Sierra Club Books, San Francisco, 1988, pages 8-9.

President, who had requested the opportunity, Muir postponed a trip to Europe and Asia writing to one of his friends who had organized the trip, “an influential man from Washington wants to make a trip into the Sierra with me.”¹⁶³ Roosevelt was on an extended tour of the west and he repeatedly spoke to his audiences about the importance of conservation and preservation.

Snaking across the country allowed the president to see more people in more states who in less than two years time would vote on whether he should receive a full four year term in the White House, but it also allowed him to visit some of the scenic wonders of the western half of the country. Ever since the ranching days in Dakota, twenty years previously, Roosevelt had felt a connection to the land and the people of the west. They felt his energy and sentiment and returned the favor with massive political support. While on his way to a short but joyous celebration of his return to Medora, Roosevelt, “in the early evening twilight,” according to accompanying naturalist John Burroughs, “stood on the rear platform of his car, gazing wistfully upon the scene” as the westbound train crossed the rolling North Dakota prairie as it abruptly breaks into the Badlands. “I know all of this country like a book” he said. “I have ridden over it, and hunted over it, and tramped over it in all seasons and weather, and it looks like home to me. My old ranch is not far off.”¹⁶⁴

Burroughs was in the presidential party because Roosevelt wanted to spend a couple of weeks touring Yellowstone with him. TR had ventured though the area before, but never before in such a position to change the land, its bounty, or its management. In a proud achievement in 1902 for instance, Roosevelt had approved an appropriation to protect the Yellowstone’s dwindling bison population.¹⁶⁵ He wanted to see the land, its wildlife, and its natural wonders and then tell the people about its importance to the future and to the country. And the people wanted to hear him. He was given the opportunity on April 24, 1903 in a speech at the dedication of the arch at the northern entrance to the park in Gardiner, Montana.

Roosevelt took from the democratic theme of the creating legislation, and it was very appropriate. Upon the arch in letters large enough to read from the Northern Pacific Railroad depot was the inscription “For the Enjoyment and Benefit of the People,”¹⁶⁶ Calling Yellowstone “absolutely unique” TR told the audience “nowhere else in any civilized country is there to be found such a tract of veritable wonderland made accessible to all visitors, while at the same time not only the scenery of the wilderness, but the wild creatures of the wilderness are scrupulously preserved as they were.” The parks creation and preservation is a “credit to the nation” and the people of Montana, Wyoming, and Idaho who have a greater responsibility to the park’s health and livelihood. Foremost Yellowstone “has been preserved with wise foresight. The scheme of its preservation is noteworthy for its essential democracy.” The people must continue the foresight of the park’s creation with wise foresight in management to keep it in the majestic shape that it is found today. “The only way for the people as a whole can secure to themselves and their children the enjoyment in perpetuity of what the Yellowstone

¹⁶³ Turner, page 325.

¹⁶⁴ Burroughs, John, Camping and Tramping with Roosevelt, Houghton Mifflin, Boston, 1907, page 15.

¹⁶⁵ Morris, TR, page 220.

¹⁶⁶ Haines, Vol. 2, page 229.

Park has to give is by assuming the ownership in the name of the Nation, and by jealously safe guarding and preserving the scenery, the forests, and the wild creatures.”¹⁶⁷

Roosevelt would once again outline these ideas at the Grand Canyon in Arizona two weeks later. Best protected as current law could provide at the time in a forest reserve, Roosevelt would return to the Grand Canyon in his most famous expression of his interpretation of executive authority in the Antiquities Act in 1908. Astounded by the magnificence of the gorge carved by the Colorado River, Roosevelt once again told his audience to strive to cherish and protect the nation’s natural wonders and resources from ruinous policies and enterprise:

*We have gotten past the stage, my fellow citizens, when we are to be pardoned if we simply treat any part of our country as something to be skinned for two or three years for the use of the present generation, whether it is the forest, the water, the scenery; whatever it is. Handle it so that your children’s children will get the benefit of it.*¹⁶⁸

Therefore, by the time Roosevelt reached Muir in the Sierras he was well on the record for preservation on top of being the most prominent conservationist in the country. Muir was definitely appreciative of Roosevelt’s ability to see more into a forest than potential timber resources as Pinchot and other foresters often saw it. Excited by Roosevelt’s personal note reading “I do not want anyone with me but you, and I want to drop politics absolutely for four days, and just be out in the open with you,” Muir gave the President a tour of the Yosemite region.¹⁶⁹ Politics was briefly discussed as Roosevelt agreed to support legislation to return the Yosemite Valley to the federal government and to extend forest reserves northward towards Mount Shasta,¹⁷⁰ but the importance of the moment was the growing unity between the forces of conservation and preservation under the hopeful auspices of Theodore Roosevelt. The coalition would fragment over the thorny issue of use,¹⁷¹ but it was able to produce the Antiquities Act and fight the significant forces opposed to new controls on public land.

Western Response

In the thirty-year period before Roosevelt entered office when the conservation and preservation movements were coalescing and obtaining important but sporadic victories, the traditional mentality towards western lands reigned supreme. The idea that man could settle on, cultivate, and become successful on any piece of land was as old as the manifest destiny that brought the homesteader west across the Mississippi. Illinois, a state that would benefit tremendously from growth on the Plains, pleasantly saw its two most notable politicians of the 1850s and 1860s, Stephen Douglas and Abraham Lincoln, respectively, hold great power in Washington promoting railroads, agriculture, and

¹⁶⁷ Speech of the President on April 24, 1903 in Gardiner, Montana. Presidential Papers of Theodore Roosevelt, Library of Congress collection, speeches, series 5A.

¹⁶⁸ Speech of the President on May 6, 1903 at Grand Canyon, Arizona. Presidential Papers of Theodore Roosevelt, Library of Congress collection, speeches, Series 5B.

¹⁶⁹ Turner, pages 325-326.

¹⁷⁰ Morris, TR, page 231.

¹⁷¹ The Hetch Hetchy Dam debate in California during the Taft administration would put the Muirist preservationists against the proponents who felt a dam to bring water to San Francisco was a beneficial use of public land. Hetch Hetchy was built despite being inside Yosemite Park.

settlement. The significant economic development during and after the Civil War only accelerated the westward movement of people and philosophy.

Many westerners in the late nineteenth century, despite all the apparent hardships they faced living in the middle of an arid mountainous continental landmass, felt the land was there to be tamed and controlled. The attitude came from the near supreme confidence of the pioneers. They had just prevented the nation from breaking apart in civil war. They had arrived in the west from hundreds or over a thousand miles away using a transcontinental railroad traveling at speeds thought unimaginable by their fathers and grandfathers, who likely were to have been reared across the Atlantic in one of the kingdoms or empires of the Old World. It came from the biblical tradition that allocated to man in Genesis the “dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.”¹⁷² It came from leaders who told them that the land was theirs and that it was pliable to their wants and expectations. In the words of William Gilpin, a political notable in his day and proponent of westward destiny, on July 4, 1868 in Denver, “North America is known to our own people. Its concave form and homogeneous structure are revealed. Our continental mission is set to its perennial frame.”¹⁷³ Reserving land for non-use, perceived non-use, or for greater public purposes, rather than for homesteading, logging, mine prospecting, farming, and ranching, seemed an affront to a century’s worth of growth from the Appalachians and Alleghenies to the Cascades and Coastal Ranges.

Westerners and their elected officials usually resented the clamoring of easterners for federal land reserves, whether for forest or archeological purposes and resources. The withdrawal of land from the public domain, removed the possibility of homesteading, grazing, prospecting, and farming unless federal permission was granted, not necessarily an easy process. Whenever a significant political action was undertaken from the faraway east coast, such as the large withdrawal of forestlands by President Cleveland in February 1897, westerners responded with shock and anger.¹⁷⁴

Most of the settlers were not aware of the archeological significance of the sites and did not understand what the purpose of the scientists was. Furthermore many individuals probably had an antipathy for subjects and objects relating to Native American cultures; it had taken much time, effort, expense, and lives to remove the plains and mountain tribes from the desired lands and often westerners had a personal role in the undertaking. They were veterans of the various military campaigns, knew someone in one of them, or confronted Native Americans at one time or another whether the situation was friendly or hostile. The antipathy stretched to many who never had to specifically deal with the issue; rather the negative word of mouth had caught hold on their perception, valid or not. The tribes were seen as the enemy, and not an emerging and fascinating source of American anthropologic study.

Beyond dislike of Native Americans, Westerners disliked federal intervention or delay on the dispersal of the public land. For decades it had been the job of the federal government to open up to settlement land in new territories and states as the United States expanded westward from the Appalachian Mountains. Next to military service, participation in elections, and sending and receiving mail, land dispersal was one of the

¹⁷² Genesis, 1:26 (King James Bible).

¹⁷³ Stegner, *Beyond the Hundredth Meridian*, page 2.

¹⁷⁴ Rothman, *Preserving Different Pasts*, pages 16-17.

few things where people had a need to communicate with or use the federal government. The idea that the government would not permit settlement, agriculture, or other activity made little sense. What people were expecting during the century was the type of law like the preemption act. This measure allowed squatters to cultivate unsurveyed land up to 160 acres and pay the government an inexpensive price. The law was first passed in 1830. A number of acts followed to open the west including two bills to Abraham Lincoln's liking during the Civil War, the Homestead Act and the Pacific Railroad Act.¹⁷⁵ The second bill gave wide corridors of land to railroads that wished to link the Mississippi Valley with the Pacific Coast.¹⁷⁶

With the Civil War complete, the west became America's national destiny, or so it seemed. Living on the plains or the mountains was another matter with frequent problems from the climate, lack of labor, unavailability of many materials, and dependency on the government, railroads, or other monopolies for transportation, services, and the land itself. These monopolies tended to be the only source of non-agricultural employment and they ruled to maximize profit, and usually from boardrooms in Manhattan. They lived a remarkable rugged tough life of independence and isolation on the plains, but dependence was not far away at all. That was the lot of the land.

The idea of reserving a park in Yellowstone struck many westerners as an odd development. Why should the government just reserve one area, and why such a large one? The idea was an aberration from tradition and practice, and seemed to take some off guard. Voicing his "grave doubts" on the bill, Senator Cornelius Cole of California disputed the need for preservation. In a confident belief that probably surpassed the fanciful, Cole argued, "The natural curiosities there cannot be interfered with by anything that man can do." However he felt that barring settlement from the region estimated by him to be forty miles square was a drastic action:

*I do not see the reason or propriety of setting apart a large tract of land of that kind in the Territories of the United States for a public park. There is an abundance of public park ground in the Rocky Mountains that will never be occupied. It is all one great park, and never can be anything else; large portions of it at all events. There are some places, perhaps this is one, where persons can and would go and settle and improve and cultivate the grounds, if there be ground fit for cultivation.*¹⁷⁷

Cole's argument that the land should not be reserved was not accepted by any of his colleagues on the Senate floor. However, Cole did receive an odd reassurance that "we can repeal this law if it is in anybody's way."¹⁷⁸

The forest reserve provision of 1891 sparked a vigorous response from western politicians. Because the law did not establish administration over and procedures

¹⁷⁵ Watkins, T.H., Righteous Pilgrim, Henry Holt and Company, New York, 1990, pages 306-308.

¹⁷⁶ Though thirty miles away from Medora, the Northern Pacific Railroad owned all of the land surrounding Theodore Roosevelt's Elkhorn Ranch. The corridors were granted to allow the railroads proper discretion in surveying their paths across the mountains, river valleys, and other natural features and to allow the railroad to profit from their sale or usage.

¹⁷⁷ Congressional Globe, Senate, January 30, 1872, page 697; Ise, John, Our National Park Policy, the Johns Hopkins Press, Baltimore, 1961, page 16.

¹⁷⁸ Congressional Globe, Senate, January 30, 1872, page 697; House Report 26, The Yellowstone Park, February 27, 1872.

describing what would happen to the forest reserves once declared, the operative word immediately became “reserve.” Why should the government reserve timberland? Should it not be used for its resources by a private enterprise that makes profits and provides economic benefit? What does a reserve mean for the land, its neighbors, and potential claimants? In terms of providing for the forests it was not much of a provision. However if the amendment had included more language on management and protection it may never have made it into law in the first place. Once reserves were created management could come later; the important thing was to reserve the land to prevent claims. That fact disturbed westerners immensely. They could not receive an answer to their questions because no one knew what the response was other than the fact that Congress would eventually decide what to do. That seemed to be a plan of deception and it would only be a matter of time before western politicians could coordinate in Congress to amend or repeal the forest reserve powers. The experience of 1891 was well in the minds of those responsible for drafting what eventually became the Antiquities Act.

The Road to the Antiquities Act

The first draft of an antiquities bill submitted to Congress featured the forest reserve powers in its wording. Written by members of the American Association for the Advancement of Science and the Archeological Institute of America, the bill announced:

*The President of the United States may from time to time set apart and reserve for use as public parks or reservations, in the same manner as now provided by law for forestry reservations, any public lands upon which are monuments, cliff-dwellings, cemeteries, graves, forts, or any other work of prehistoric, primitive, or aboriginal man, and also any natural formation of scientific or scenic value of interest, or natural wonder or curiosity together with such additional area of land surrounding or adjoining or adjoining the same, as he may deem necessary for the proper preservation and subsequent investigation of said prehistoric work or remains.*¹⁷⁹

The bill was polished by Representative Jonathan Dolliver of Iowa and introduced to the House on February 5, 1900.¹⁸⁰ Within a number of months three more bills to regulate and protect antiquities were introduced into the House.¹⁸¹ When given a chance to review the bills, the General Land Office suggested that they were insufficient in giving the Executive broad power to name reservations. The last bill, originating from public lands chairman Lacey, integrated these comments and called for the president to reserve into “national parks” land with “scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest.” However Lacey’s committee, many of whose members were from western states, demurred at handing away their public lands power to the president.¹⁸²

The first and last bills, despite differently worded phrases and specifications, have a remarkable similarity in content, power delegation, purpose, and design for

¹⁷⁹ Lee, chapter 6; *Journal of the Southwest*, pages 223-224.

¹⁸⁰ Lee chapter 6; page 226.

¹⁸¹ Two came from Colorado congressman John Shafroth, a top westerner on the Public Lands Committee. His two bills limited the qualifications to be used by the president and limited size to 320 acres. Rothman, *Preserving Different Pasts*, page 21.

¹⁸² Lee, chap. 6; pages 227-228.

national monument creation. Though the Antiquities Act powers as we know them would not necessarily be determined until Theodore Roosevelt used and shaped them during the last two and one half years of his presidency, Congress from the start was considering three basic principles for any final antiquities legislative action. First, the President would be delegated reservation powers that had previously been in the sole hands of Congress.¹⁸³ Second, the size of the reservation would have a correlation to both the objects to be protected and the breadth of the object qualifications covered in the legislation.¹⁸⁴ Finally, the president would have a certain amount of discretion concerning frequency and nature of declarations.¹⁸⁵

These three standards remained under consideration during the entirety of the six years of congressional deliberation for a number of important reasons. The archeological and scientific communities after more than a dozen years of piecemeal attempts were united for general legislation. Congress, through its deliberative processes, seemed ready to accommodate their request. Lastly, Theodore Roosevelt in the White House, with the support of his Department of the Interior, was quite willing to sign the legislation and key people in the Congress and in the scientific community wished to give it to him.¹⁸⁶

Realizing that small steps like Casa Grande in 1889 were not the way to protect threatened antiquities, the archeologists and scientists shifted gears. The approach did not take into consideration the political process in Washington, for Congress had little time to respond to individual specialists asking for action on a small bit of the vast southwestern federal land domain. Realizing that Congress would only be moved by broad proposals, the scientists began to push for “national goals” in their subject. That required a different technique of reaching Congress. “Archeologists stopped petitioning and memorializing Congress and started submitting bills...that presented solutions as well as problems and couched them in modern and implementable language.” If the professionals were united and knowledgeable, Congress would have a hard time not giving them appropriate aid to their field at a time when public and presidential interest was high. They took notice and coordination steadily increased, to the point where one man, Edgar Hewitt, who had an early idea that politics needed to be understood before anything could be accomplished, generally spoke for the scientific community.¹⁸⁷

In Congress the scientists quickly realized who would become their greatest ally in passing legislation: John Lacey of Iowa. He was an old ally of President Roosevelt and had engineered the bill to bring the first firm wildlife protections to Yellowstone. He would be involved with this bill, but also other bills to create national parks at Mesa Verde, Colorado (successful), Pajarito Plateau, New Mexico (unsuccessful), and Petrified Forest, Arizona (successful only with the Antiquities Act). Important for the upcoming political process for passage of legislation, Lacey, as chairman of the House Public Lands

¹⁸³ The delegation for land power had been done before with the forest reserve provision of 1891, but this power was for new reasons and qualifications.

¹⁸⁴ For example if scenic or scientific interests qualified monuments would likely be larger as a whole than if they were not and the bill was purely limited to archeology and human history.

¹⁸⁵ The Dolliver bill says the president “may from time to time set apart” reservations and set the size “as he may deem necessary” for protection, while the Act expressly mentions “discretion.”

¹⁸⁶ Thompson, pages 284-285.

¹⁸⁷ Thompson, pages 274-286. The American Anthropological Association soon joined the American Association for the Advancement of Science and the Archeological Institute of America, the two groups responsible for the Dolliver bill.

Committee, had a firm understanding of western congressmen and their concerns, and he knew what they could or would not support. Lacey and Hewitt formed an early friendship when he visited Washington in 1900 while serving as President of the New Mexico Normal University at Las Vegas. That comradeship would be extended immeasurably when Lacey visited New Mexico in the summer of 1902 at Hewitt's request. With Hewitt at his best in the territory he loved, Lacey became convinced that action for antiquities was needed.¹⁸⁸

The last component in the drafting of the Antiquities Act was the influence of the executive branch. The two chiefs of the General Land Office (GLO) during the period, Binger Hermann (1897-1903) and W.A. Richards (1903-1907), were proponents of temporary withdrawals of important historic and scientific sites on the public domain to prevent them from falling into uncaring hands.¹⁸⁹ Though the withdrawals were one of the few things a commissioner could do to retain public land, did not provide much protection, and were only temporary in nature, they reflected an important aspect of possible legislation. If the president, through the interior secretary and the GLO, were currently in charge of maintaining the public domain and will be after some of it is reserved, they should have an input on the reservation process. The Interior Department, if operating properly and efficiently, something progressives like President Roosevelt expected from all agencies, should have the best available information on the locations under consideration. The executive branch is also much more capable than the legislative branch in making quick decisions and implementing them. Therefore, the GLO chiefs argued, should not the executive continue with these protective withdrawals? It was a progressive argument made to similarly thinking scientific professionals and congressmen and was sure to be a part of any eventual legislation. Not to be ignored, of course, was the politics of the proposed delegation of power arrangement: the Department of the Interior wanted to keep, have confirmed, and expand the executive's withdrawal powers.¹⁹⁰

After these inputs, and a lengthy campaign by Reverend Henry Mason Baum,¹⁹¹ Representative William Rodenberg of Illinois introduced a new bill in March of 1904. Rodenberg circulated the copies of the bill to his colleagues as well as leading college and university scientists and presidents around the country. They responded with terrific enthusiasm, as did Senator Henry Cabot Lodge of Massachusetts, who introduced a companion bill in the Senate. The measure called for the interior secretary to take control of the archeological sites on public lands and to establish a permit process for institutions in order for them to be able to excavate.¹⁹² However a second bill was introduced giving the Smithsonian Institution substantial access to antiquities and influence in the permit

¹⁸⁸ Thompson, pages 282-286.

¹⁸⁹ Hewitt, pleased and well aware of their interest, published several letters from GLO and other Department officials in *Science* in 1904. "The policy," undertaken by the Department of the Interior, Hewitt wrote, "if vigorously pursued, practically accomplishes the ends to be desired and renders legislation of secondary importance." Hewitt, Edgar L., "Government Supervision of Historic and Prehistoric Ruins," *Science*, New Series, Vol. 20, No. 517, November 25, 1904, page 723.

¹⁹⁰ Thompson, pages 290-293.

¹⁹¹ Baum was the leader of the Records of the Past Exploration Society, an organization devoted to history, archeology, and preservation, headquartered in Washington, DC. Baum edited the society's journal which frequently argued for legislation.

¹⁹² Lee, chap. 6; page 231-232.

process.¹⁹³ Lodge's bill passed the Senate, but the weight of the Smithsonian, interested in the other bill, blocked it in the House and the session ended without action.¹⁹⁴

Not only was a rift developing between archeological institutions that stopped consideration of one bill and potentially eroded support for future measures, but also the bills were mired in details. The Rodenberg bill contained ten sections and included an interesting clause that required excavation teams to deposit duplicate photographs of recovered objects in the U.S. National Museum in Washington. This would have been quite a burdensome and potentially expensive task as expeditions sometimes investigate thousands of objects. The Smithsonian bill meanwhile contained fourteen sections and included provisions requiring foreign expeditions to present their findings in Washington at the Smithsonian for inspection and permits were to be for periods of two years, renewable, and distributed to allow only one party per site.¹⁹⁵ These provisions were serious forms of micromanagement that Congress may not have found palatable and certainly help explain the outbreak of professional rivalry when specific institutions appear in the language of the bills.

As Hewitt had been in Europe expanding his archeological education at a Swiss university,¹⁹⁶ he became the perfect candidate to draft a compromise between Lodge-Rodenberg and Smithsonian bills. He did not participate in those discussions and "had no emotional, political, or institutional commitments to any of the pending bills, except in his overall desire to see some form of legislation passed."¹⁹⁷ Hewitt drafted new language and versions appeared in *American Anthropologist*¹⁹⁸ and *Science*¹⁹⁹ to solicit comment and feedback. The later version in *Science* featured amendments allowing the secretary to withdraw land and containing such withdraws to a spatial limit of 640 acres. Lacey's committee examined the amended version, and it was reported. However the 1905 session ended before any further action.²⁰⁰

After five years of trying, the archeological and scientific community had not achieved its goal; however they were not defeated. The bills they drafted were overloaded with sections and details, and Congress was not interested in sorting through a number of competing versions. This was an easily solvable problem. At this point Lacey and Hewitt worked to simplify matters and language even more than had already been done. They received some help by the passage of the Forest Service Act in 1905. With the Forest Service in the Department of the Agriculture, not Interior, Hewitt told an audience of the American Anthropological Association and Archeological Institute of America in Ithaca, New York on December 28, 1905, that it "would lead to great confusion and conflict of interest" if lands under the jurisdiction of one department, Agriculture, were taken and

¹⁹³ Introducing this bill in 1904 was Senator Shelby Cullom and Representative Robert Hitt, both of Illinois and both on the Board of Regents of the Smithsonian. Lee chap. 6; page 232.

¹⁹⁴ Lee, chap. 6; page 234.

¹⁹⁵ McGuire, Joseph, "Preservation of Antiquities" within Anthropologic Miscellanea, *American Anthropologist*, New Series, Vol. 6, No. 1, January-March 1904, pages 181-185.

¹⁹⁶ Thompson, page 288-289.

¹⁹⁷ Thompson, page 297.

¹⁹⁸ Hewitt, Edgar, "Preservation of Antiquities," within Anthropologic Miscellanea, *American Anthropologist*, New Series, Vol. 7, No. 3, January-March 1905, pages 164-166.

¹⁹⁹ Hewitt, Edgar, "The Preservation of American Antiquities," *Science*, New Series, Vol. 21, No. 532, March 10, 1905, pages 397-398.

²⁰⁰ Lee, chap. 6; page 235.

placed in another, Interior. With lands of three departments, Interior, Agriculture, and War, under consideration for protection, any jurisdictional squabbles would be a substantial obstacle.²⁰¹ In other words, Hewitt was telling the scientific organizations and institutions that they should no longer fight for favoritisms. He produced a bill for the speech that was simple and appropriate.

Since the goal was now very broad, Hewitt made the legal language reflect the situation. Instead of describing in detail the latest bill, in the summer of 1905 Hewitt wrote in *American Anthropologist*:

*The Commissioner of the General Land office should be empowered to withhold from any homestead entry small parcels of land on which antiquities are situated which in his judgment are of sufficient importance to warrant preservation. At present there is no law permitting him to do this. Congress must be looked to for such an authority.*²⁰²

Hewitt believed the antiquities bill should not regulate the length a permit is applicable to a particular site among other small items. It should not even necessarily announce that it is policy to protect archeological, historical, or scientific interests. Instead the bill should try and solve the three problems confronting the archeologists, and nothing else: vandals, protection, and proper scientific investigation. If need be in the future, Congress could return to the matter and make new laws or the executive could promulgate regulations from the advice of the scientists involved.²⁰³ Getting the law on the books is most important, fixing irregularities or difficulties can come later.

The Antiquities Act

What followed in 1906 was the passage of the bill Hewitt had proposed in Ithaca in December 1905. Following the rules of simplicity Hewitt kept the bill to three substantive sections, each addressing a concern for the scientists. Clarity of the language and flexibility of procedure were stressed.

Section 1 called for criminal penalties of a fine no more than five hundred dollars or imprisonment for no longer than ninety days for those “who shall appropriate, excavate, injure, or destroy” archeological or historical objects on all lands owned by the federal government. Here “Hewitt developed a simple and non-threatening way to establish indirectly the principle that the federal government must safeguard the archeological sites on its lands.”²⁰⁴ The Antiquities Act remains a principle law against the disruption of protected objects. For instance, signs at Pu’ukohola Heiau National Historic Site in Hawaii warn visitors that the temple built by King Kamehameha in 1790-91 is protected by the Antiquities Act and by a 1979 archeological protection act.

Section 2 gave to the President the authority “to declare by public proclamation... national monuments.” The new category of monument would join the national parks and battlefields as protected locations; the title suggests the site contains historic or scientific

²⁰¹ Lee, chap. 6; page 238; Hewitt, Edgar, “Preservation of American Antiquities; Progress during the Last Year; Needed Legislation,” *American Anthropologist*, New Series, Vol. 8, No. 1., January-March 1906, page 113.

²⁰² Hewitt, Edgar, “Preservation of Antiquities” within Anthropologic Miscellanea, *American Anthropologist*, New Series, Vol. 7, No. 3, July-September 1905, page 569.

²⁰³ Thompson, pages 301-302.

²⁰⁴ Thompson, page 302.

relics or objects from another time or era. The monuments must be on government lands containing “historic land marks, historic and prehistoric structures, and other objects of historic and scientific interest.” If the objects were on private property, the landowner could “relinquish” the tract to the government. The size of the monuments would “in all cases...be confined to the smallest area compatible with proper care and management of the objects to be protected.” Lastly the president could use “his discretion” in making decisions concerning the provisions in the section.

The third section outlines the permit process. The permits for access to sites may be granted by the Secretaries of Interior, Agriculture, or War, depending upon the jurisdiction of the land, and they are open to “properly qualified” groups from “reputable” organizations or institutions. A fourth section allowed for the secretaries to write uniform rules and regulations for carrying out the Act.²⁰⁵

These provisions satisfied both conservationist and preservationist principles and could be later used to protect broader environmental goals. For the conservationists land and objects were protected, but they were still open to “properly qualified” archeologists and other scientists. They could excavate and learn about previous cultures and then put them in “public museums.” Sections 1 and 3 gave them satisfaction. For the preservationists the bill not only offered protection to qualified objects, but also the potential for objects and sites to be protected within their landscape. Any president with an interest in protection would likely surround the interests with a certain amount of land “compatible with proper care and management of the objects to be protected.” Section 2 was to their great interest.

In general the bill was engrained with the progressive attitude that so typified Roosevelt and many like-minded reformers around the country. Conservationism itself, and to an extent preservationism, was a trait of progressivism made into national policy largely with the passage of this bill. Progressives called for centralizing power in the hands of benevolent experts named by an elected executive exercising their authority for the good of the people at that time and in the future. The examples of progressive legislation include the Pure Food and Drug Act, the Meat Inspection Act, antitrust suits against the Northern Securities Company, the Forest Service Act, and the Reclamation Act. These bills protected the people from corrupt private management of their interests. They established administrations and/or legal standards that future people and legislators would likely be more than willing to keep, if not make stronger.²⁰⁶ Government responsibility was extended into a number of new areas, bringing the rule of law to unregulated and unrestrained industries and activities. Therefore, the antiquities bill would be good if it protected southwestern antiquities, but would be better if it could protect other important scientific interests. In this mindset Roosevelt and his agencies kept watch on the bill’s progression.

In the course of simplifying previous bills, Hewitt had made several interesting and important shifts in the bill’s language that would have massive impact once the President started using the Act’s authority to declare national monuments. At the likely suggestion of the Department of the Interior, the historic and prehistoric structures

²⁰⁵ Lee, chap. 6; page 241. Some believed that when it came time for the rules to be drafted, the Smithsonian would have a special place in them.

²⁰⁶ Rothman, Hal, Saving the Planet The American Response to the Environment in the Twentieth Century, Ivan R. Dee, Chicago, 2000, pages 36-55.

qualifications clause was added to include the “other objects of historic and scientific interest” phrasing. This language probably came from earlier bills introduced by friends of the Department. The GLO, already rewarded with the permanent presidential powers of declaration and reservation, had also sought to widen the qualifications for possible sites.²⁰⁷ Second, though previous bills featured a set limitation in acreage, either 320 or 640 acres, this bill had no limitation beyond the presidential discretion that the monument size be no larger than what is needed to protect the objects and interests.

These two revisions of the bill became the centerpiece of western complaints. As in the forest reserve bill the Congress seemed to be handing over too much power over the public lands to the president. In the House, Lacey received objection from Representative John Stephens, Democrat of Texas. Stephens said “I think the bill would be preferable if it covered a particular spot and did [not] cover the entire domain.”

“There has been an effort made to have national parks in some of these regions,” responded Lacey, “but this will merely make small reservations where the objects are of sufficient interest to preserve them.”²⁰⁸

Stephens then asked, “Would it be anything like the forest reserve bill, by which seventy to eighty million acres of land in the United States have been tied up?”

“Certainly not,” Lacey replied. “The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst the other reserves the forests and the water courses.”

By this time Lacey must have thought that Stephens was not going to allow the bill to pass. As chairman, he made it known that the next bill to be considered would be a measure to open up certain tracts of agricultural lands within forest reserves. Stephens was pleased by this next bill and withdrew any objection to the Antiquities Act.²⁰⁹ Stephens could very well have sidelined the Act for a longer period of time, maybe until an explicit acreage limitation was added, but he liked the prospect of opening lands from forest reserves. Such was the voracity of those wanting the federal domain open for settlement. That was the majority opinion in the West.

With the Senate’s approval already obtained, the bill went to the White House for President Roosevelt’s approval. He readily signed it on June 8, 1906. Regarding the powers of Section 2, it would only be a number of months before Roosevelt dramatically expanded the meaning of the powers of reservation. Instead of the Antiquities Act becoming, in the words of Lacey’s own committee report, a way “to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times,”²¹⁰ it became one of the most important land protection measures of the twentieth century.²¹¹ Theodore Roosevelt made it that way.

²⁰⁷ Lee, chap. 6; page 241.

²⁰⁸ He later referred to “cave dwellers and the cliff dwellers” as possible objects.

²⁰⁹ *Congressional Record*, House, June 5, 1906, page 7888.

²¹⁰ Report 2224, Preservation of American Antiquities, House of Representatives, 59th Congress, 1st Session, March 12, 1906.

²¹¹ Rothman, Saving the Planet, page 53.

Roosevelt Sets a Monumental Standard

Chapter 3

Considering his excitement to declare forest reserves under law and wildlife refuges without the law, Theodore Roosevelt was certainly pleased by the chance to use yet another method of protecting other types of public land. In just two and one half years Roosevelt would name eighteen national monuments. This frequency of use was only one standard that Roosevelt would set. His example redefined the Act, and made it into an executive tool to be used, rather than be considered.

In general Roosevelt's interpretation centered on making the most of the law in the form that it rested on his desk. He would certainly follow the law, but he would not follow a narrow construction of it. Yet, it was a literal reading of the language; indeed it went line-by-line, phrase-by-phrase. In whatever form the law came to his desk, it would be used for maximum public benefit.

In preparing his declarations, and his overall interpretation of the Act, TR focused on the clause giving the President "discretion." This discretion gave him the sole responsibility, as well a political credit, for deciding and making the announcements. It also gave him legal flexibility in implementing the other qualifications of the second section, notably the regulations on monument size and description. What was not specifically mentioned in the language, he took it upon himself to decide as an executive given the discretion to do so.

The discretion won in the Act, to Roosevelt, was final. In other words, only another act of Congress would change his mind or his decision. Second-guessing was inappropriate, unless concentrated on changing the law; it was against the privileges of the executive and was contrary to the letter of the law. Therefore the time to influence a decision was before it was made. Presidents have had difficulty living up to this discretionary standard, but they would survive the associated ordeal.

Enlisting his views on maximum benefit and presidential discretion, Roosevelt greatly broadened the legal extent and capacity of the Antiquities Act. Nearly everyone expected at a minimum that the second section of the Act would be used by the President from time to time to protect small sites of important archeological ruins and antiquities with impending or existing threats of vandalism and disrepair in southwestern states and territories. Many, especially people from those southwestern states expected that to be the maximum application of the law. Roosevelt did not see it that way, and he made it known with his first declaration just four months after signing the Act into law.

His accomplishments are obviously important, but so are his methods and his procedures. In total Roosevelt provided enormous precedent for his successors: an interpretational legacy.

Devils Tower

Once given the authority to declare national monuments in the beginning of June, Theodore Roosevelt rested on his new presidential authority for the rest of the summer, likely waiting for an appropriate site to reach his desk. By September, Roosevelt began to learn about the possibility of a site in the Black Hills in the northeastern corner of

Wyoming. The state's congressman, Frank Mondell, informed Roosevelt of Devils Tower, a fantastic geologic formation already located in a federal forest reserve.

Upon a four hundred foot pine and sagebrush covered bluff overlooking the Belle Fourche River towers a rocky monolith of cooled molten magma and sedimentary rock. Geologists today believe that it began to form some 60 million years ago as the earth around the core eroded. The top of the tower is 867 feet above its base, making Devils Tower a prominent sight for miles.

Extraordinary in its surroundings, the site, as are many peaks, buttes, and other eroded curiosities in the Black Hills, was held to be sacred by the Kiowas, Cheyennes, and other tribes. In their mythology a large bear chased seven children onto a small rock by the Belle Fourche. Hoping to be spared, the children prayed to the spirits, and the rock suddenly began to rise from the ground, getting larger and larger. The angry bear still persisted in the hunt and with the sharp claws of his front paws carved fluted columns on all sides of the new tower. Many Kiowas and Cheyennes called the monolith Bear Lodge, but Colonel Richard Dodge named it Devils Tower on his Black Hills gold expedition in 1875.²¹² His name stuck on maps and in other written recollections.

Representative Mondell lived in the town of Newcastle, about sixty miles to the south of Devils Tower along the Chicago, Burlington, and Quincy Railroad. He was likely aware that passengers could see the tower from the tracks near Moorcroft,²¹³ and that local settlers had several large dramatic events at the tower, including a well publicized climb to raise an American flag to the summit July 4, 1893.²¹⁴ Monument status for Devils Tower would distinguish its substantial scientific quality and also recognize and increase its economic impact in the northeastern Wyoming region.²¹⁵ Compact in size, the monument would be small and would not extend across much territory. Mondell also came from a strong position of advocacy in the Congress. By 1906 the Republican congressman had served five terms and was a member of the House Committee on Public Lands.²¹⁶

Pleased with Mondell's recommendation of the site, Roosevelt proclaimed Devils Tower National Monument on September 24, 1906. In the announcement Roosevelt wrote the "lofty and isolated rock...is such an extraordinary example of the effect of erosion in the higher mountains as to be a natural wonder and an object of historic and great scientific interest." The monument covered just over 1150 acres.²¹⁷ It may be a coincidence or a statement on the high quality of public lands in Wyoming, but the state could then claim to be the home of the first national park, national forest, and national monument.

²¹² National Park Service, Devils Tower National Monument Official Map and Guide, United States Government Printing Office, Washington, DC, 2002.

²¹³ Mattison, Ray, Our First Fifty Years, National Park Service, 1955, www.nps.gov/deto/first50.htm.

²¹⁴ National Park Service, Devils Tower National Monument Official Map and Guide,.

²¹⁵ Mondell was not the first Wyoming politician to see the potential. In February 1892 Senator Francis Warren wrote to the GLO to preserve the site, and a temporary forest reserve was created. Warren went to the Senate floor in July to enact national park status for Devils Tower, but the bill was referred to committee and never heard from again. Mattison, Our First Fifty Years.

²¹⁶ Biographical Directory of the United States Congress, <http://bioguide.congress.gov>.

²¹⁷ Presidential Proclamation, Devils Tower National Monument, U.S. Statutes at Large, Vol. 34, pp3236-3237.

Referring again to the benchmark expectation of the Act's reservation powers covering the naming and protecting sites relating to Native American ruins or the archeology of the Southwest, Devils Tower did not pass the test. The most notable points of failure, if it could be called that, relate to the geographic location and the nature of object. Devils Tower was not in the Southwest, rather in the intermediate zone between the Great Plains and the Rocky Mountains in Wyoming. Secondly, and most controversially when applied to other sites, Devils Tower is exclusively a scientific monument. It is not a relic or antiquity of a past culture. It is not a living or working site of a people, though it is a sacred site to many. It is, in the language of the Act and Roosevelt's declaration, an "other object of...scientific interest."

In his first declaration Roosevelt was already extending the boundaries of expectations. Without much attention paid to it at the time or in later controversies, Devils Tower nationalized the Antiquities Act and widened the potential sites for selection for future presidents. Like the Act itself, Roosevelt was subtle and simple in making this policy extension. Devils Tower was a small site in Wyoming that nearly everyone who had heard a description or had seen the site in person or in a drawing found it to be an acceptable curiosity worthy of the designation. The visual clarity of Devils Tower as a landmark geologic oddity sealed the deal. It was not a shocking announcement to anyone. It even had congressional support in Representative Mondell.

In many ways Roosevelt deftly won what has turned out to be a century long series of skirmishes over the meaning of the Antiquities Act in his first declaration with universal support behind him. The war was over before anyone, perhaps including Roosevelt, knew it had even started. The longterm victory came not with Devils Tower's obvious geologic or visual appeal, but with its small size.

By remaining faithful to the supposed expectations on monument size of Congress, Roosevelt buried the possibility of disagreement. As seen in the discussion on the House floor between congressmen Lacey and Stephens and in the House report that accompanied the Antiquities Act from committee that stated the bill was intended "to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times," reservation size was the main sticking point for opponents of executive control of public lands and of conservationist ideals being applied to them.²¹⁸ It was so then and largely is so today. However by expanding the geographic and "historic and scientific interest," Roosevelt made it possible to fight and win later the battle over monument size. He would have obvious and accepted precedent on his side. And that was before he even walked on stage to ascend to the Bully Pulpit of the presidency to convince the public in speech and mannerisms that he was right and that the future would look kindly on such action with thanks.

The Devils Tower monument was shrewd for other reasons, as well. It showed the Act to be flexible. Not just in its status qualifications or in the discretion afforded to the President, but in the new opportunity for various parks to be created that may not have been for years. Devils Tower would not have been satisfactory as a national park or national forest, the only two relevant designations then existing. "Devils Tower remained in limbo, neither large nor important enough to become a national park" and before 1906

²¹⁸ Report 2224, "Preservation of American Antiquities," House of Representatives, 59th Congress, 1st Session, March 12, 1906.

it “was an anomaly...in the federal system.” The 1891 forest reserve provisions were the only way to keep the site off of the public domain during the fourteen-year period. The additional category of monument served the site very well; “there was no other category for it.”²¹⁹

Further aiding Roosevelt in his first use of the Antiquities Act powers was the support and consultation of a home-state congressman. Representative Mondell could defend the site in Congress and Wyoming and funnel necessary appropriations to it. The latter point is especially significant. The Act does not say anything about the monuments receiving congressional appropriations. As the National Park Service (NPS) did not yet exist in 1906, the Act gives administrative authority to whichever department owned the land. Such dispersal within the government could only hinder the monuments from getting their share of appropriations. Indeed before the NPS was created parks only received appropriations when Congress got around to providing it or when sufficient and well-placed pressure was applied. There was hardly any guarantee of yearly funding, as it exists today. Therefore this situation made having a congressional sponsor all the more important for the president and the site. It ensured a chance of life for the monument within the contemporary administrative and appropriations system.

By accepting Devils Tower as a scientific monument outside of the southwest, opponent then and later lost the battle. If they can accept this as an object solely of scientific interest, then they must accept all other scientific monuments. By accepting the president’s ability and discretion to name scientific monuments, then it should follow that the president has the discretion to name the monument as large or as small as may be necessary. In other words if the president has discretion on interest, under the Act he must have discretion on the size. All within four months of passage.

Other Monuments

Roosevelt did not complete his use of the act in 1906 with Devils Tower. On December 8, the TR named three monuments in the southwestern territories of Arizona and New Mexico. Two, El Morro and Montezuma Castle, covered Native American sites and the third, Petrified Forest, reserved land with an abundant collection of petrified wood in Arizona. The sites again were unarguable uses of the Act’s powers.

El Morro in New Mexico preserved a two hundred foot tall rock with petroglyphs from Pre-Columbian people, inscriptions from Spanish explorers dating to 1605, and names of nineteenth century American explorers to the region. By the 1890s El Morro sparked the interest of the Smithsonian Institution, whose acting secretary wrote the interior secretary in 1899 that, “I recommend immediate attention in this matter for many of the early inscriptions have been despoiled by vandal bands.” The GLO responded and placed it in a temporary forest reserve.²²⁰

Montezuma Castle was a defensive outpost built on a cliffside by Pre-Columbians in central Arizona. The site had come to the attention of the Interior Department as well as the territorial Governor by 1904; however like Devils Tower, it was not large or considerable enough to become a national park.²²¹ Only the Antiquities Act could provide a sufficient federal category for future protection.

²¹⁹ Rothman, Hal, Preserving Different Pasts, University of Illinois Press, Urbana, Illinois, 1989, pp 55-56.

²²⁰ Rothman, pages 56-57.

²²¹ Rothman, page 58.

Petrified Forest serves as an interesting example of the expanded potential of the Antiquities Act. The area is home to one of the largest collections of petrified wood in North America. Turned into stone by a long, complicated, and exact fossilization process, the petrified wood is an amazing natural artifact. The site had been looted for a long time, concerning many scientists as well as powerful and conservation minded Representative Lacey.²²² It did not help that the Atchison, Topeka, and Santa Fe Railroad ran right by the monument. Much of the land in the area was railroad owned, creating a problem of private land within the declaration, and the large number of railroad users provided a nearly constant source of vandals and thieves of petrified wood.

Petrified Forest is notable because it was the first proclaimed national monument to eventually become a national park upon a later act of Congress. A sizable number of the national parks in existence today began as monuments. On May 6, 1907, Roosevelt declared two more monuments in northern California, Cinder Cone and Lassen Peak, comprising a total of over six thousand acres that have since been combined to form Lassen Volcanic National Park. He would lay the foundations for two more by the end of his presidency.²²³

Monuments that eventually become national parks are tacit approvals by Congress of the short-term and long-term benefits of the Antiquities Act. In the immediate time frame when mining claims, rampant looters, vandals, encroachment, and deterioration might threaten a site, the president can move much faster than Congress. Bypassed are the cumbersome legislative processes of committees, schedules, and the needs of individual leaders and members. And if the site is particularly extraordinary, Congress may decide to give it what has become the top park designation: national park.

Muir Woods

In his first monument proclamation of 1908, Roosevelt again defined his interpretation of the act. In the case of Muir Woods National Monument in California, Roosevelt employed for the first time the clause in Section 2 allowing the secretary of the interior “to accept the relinquishment” of lands of historic or scientific interest held in private hands. The clause extends the Antiquities Act powers considerably, given that monuments can only be declared on lands “owned or controlled by the Government of the United States.” Yet, with the standard of voluntary relinquishment, the clause is a sizable protection of private property rights and the requirement that the monument cover as “much thereof as may be necessary for the proper care and management of the object” still explicitly applies. Furthermore, the process allows for direct, though voluntary, public participation in preserving historic and scientific objects not on public land.

Muir Woods National Monument, one of the great triumphs for American preservationists, was a direct result of the burgeoning growth of San Francisco.²²⁴ As the San Francisco peninsula was not a bountiful source of water, the construction of new reservoirs at greater distances became necessary. To prevent the potential construction of a reservoir on a tract of ancient redwood forest on the Marin Peninsula some ten miles northwest of the Golden Gate, William Kent and his wife Elizabeth purchased it outright

²²² Ise, *Our National Park Policy*, page 156.

²²³ They are Grand Canyon and Olympic National Parks in Arizona and Washington, respectively.

²²⁴ It would also cause a great defeat, the construction of Hetch Hetchy dam within Yosemite in the 1910s.

from the Tamalpais Land and Water Company in 1905. The active preservationist and future California congressman bought the land for \$45,000.²²⁵

Within a year he was besieged with requests to buy the forest for its timber or potential as a reservoir along Redwood Creek. The 1906 earthquake increased the demand for water, and soon enough Kent was facing a lawsuit to seek condemnation of a section of the property to build a reservoir for the city. Leading the way for a reservoir was James Newlands, chief of the North Coast Water Company and nephew to powerful Senator Francis Newlands of Nevada, the author of the 1902 Reclamation Act. The lawsuit was a significant threat to Kent; public opinion was largely supportive of private and public water projects for the city, which could have very well influenced the final outcome in the courtroom. But he would not relinquish control of the precious redwoods without a fight unless a more permanent protective status was found.²²⁶

Knowing the abilities of a landowner under the Antiquities Act, Kent acted immediately to save his redwoods. Stating the urgency of the matter, Kent wrote to the secretary of the interior on December 26, 1907 to ask acceptance of the land for the government and have the president proclaim it a monument with the stipulation that it be named for John Muir. The Secretary checked with the Forest Service and the Justice Department before sending the request to the President. Roosevelt was delighted with the prospect and declared a monument on January 9, 1908, within two weeks of the receipt of Kent's letter.²²⁷

Roosevelt constructed the proclamation differently to reflect the new use of the Antiquities Act. Showing compliance of the relevant clause in the act's second section, Roosevelt noted the letter of December 22, a "certain deed of relinquishment and conveyance, properly executed in writing and acknowledged," the Kents' intention therein to "relinquish, remise, convey and forever quit claim to the United States of America the...lands at that time held by them in private ownership."²²⁸ In accepting the land and designating it as a monument TR found that "an extensive growth of redwood trees (*Sequoia sempervirens*) embraced in said land is of extraordinary scientific interest and importance because of the primeval character of the forest in which it is located, and of the character, age and size of the trees."²²⁹

Roosevelt wrote a letter two weeks later from the White House to thank Kent for his "gift of Redwood Canyon to the National Government to be kept as a perpetual park for the preservation of the giant redwoods therein." The personal note accurately reflects his public policies and positions on conservation and its benefit to the American people, present and future:

I thank you most heartily for this singularly generous and public spirited action on your part. All Americans who prize the undamaged and especially those who realize the literally unique value of the groves of giant trees, must feel that you have conferred a great and lasting benefit upon the whole country.

²²⁵ Official Map and Guide, Muir Woods National Monument, California, National Park Service, 2003.

²²⁶ Rothman, Preserving Different Pasts, page 61-62.

²²⁷ Rothman, page 62.

²²⁸ In case there was any doubt of the Kents' ownership of the redwood forest within the boundaries Roosevelt recorded the date of the purchase, the seller, and the page in the Marin County recorder of deeds.

²²⁹ Presidential Proclamation of January 9, 1908, Muir Woods National Monument, California, TR.

Lastly he offered Kent the possibility of changing his request to name the monument for John Muir and replace it with his own name.²³⁰ Kent, writing on January 30th refused the offer reasoning that acceptance would tarnish the “benefaction” by rendering immortality “as being something purchasable.” As for spreading the Kent name, he would leave it up to his five sons that he was “trying to bring up to a knowledge of democracy and to a realizing sense of the rights of the ‘other fellow’...If these boys cannot keep the name of Kent alive, I am willing it should be forgotten.” He thanked the President for his kind words proclaiming, I “hope and believe it will strengthen me to go on in an attempt to save more of the precious and vanishing glories of nature for a people too slow of perception.” In conclusion Kent offered Roosevelt several photographs of the forests “and trust that you will believe...that our nation has acquired something worthwhile.”²³¹

In a short reply on February 5th, Roosevelt responded in characteristic fashion to each of Kent’s points:

By George! You are right. It is enough to do the deed and not to desire, as you say, to ‘stencil one’s own name on the benefaction.’ Good for you, and for the five boys who are to keep the name of Kent alive! I have four who I hope will do the same thing by the name of Roosevelt. Those are awfully good photos.

*Sincerely yours,
Theodore Roosevelt²³²*

There are few expressions of the overall essence of Theodore Roosevelt than this letter. The expression of “By George!” (often it was “By Godfrey!”), the emphasis on the deed, the importance of the future and familial legacy, and the thanks for the photographs of the redwoods. There was little need to thank Roosevelt for the declaration of the redwoods; he knew their biological importance and the value to the people of such a park close to a major growing city. What he wanted was the experience of being at a place and communicating with it and leaving behind the burdens of life’s lows in the mysterious wonder of nature’s grandeur. His life was a constant search for new Badlands, a place to drop weakness or poor health and retool anew with vigor, vitality, and vivacity. Each declaration of a national monument or national forest or wildlife refuge, or the signing of a bill creating a national park,²³³ allowed him to vision himself there taking in and restoring himself and the rest of the nation with human and natural history.

As for John Muir, he wrote to thank William Kent for the honor. Muir did not often see so many clear-cut victories for the forests and wildernesses that he so dearly loved, and he had to savor each one. Earlier in 1900 when asked to defend the redwood trees, he responded:

I would gladly go to Tamalpais and a thousand times farther to stay the ruthless destruction of the forests you refer to. But, alas, all the land thereabouts is private

²³⁰ Letter of President Theodore Roosevelt to William Kent, January 22, 1908. Letters in this series are found in: Oakes, John B., “Conservation: TR’s National Monuments,” *New York Times*, November 9, 1958 and Correspondence Regarding the Naming of Muir Woods National Monument,” National Park Service, www.nps.gov/muwo/history/letters.htm.

²³¹ Letter of William Kent to President Theodore Roosevelt, January 30, 1908.

²³² Letter of Theodore Roosevelt to William Kent, February 5, 1908.

²³³ Roosevelt signed bills creating national parks at Crater Lake, Oregon; Wind Cave, South Dakota; Sullys Hill, North Dakota; Platt, Oklahoma; and Mesa Verde, Colorado.

*property, and what more can I do in the way of protest and efforts to make public opinion for the defense of the trees than I am doing?*²³⁴

Eight years later the provisions of the Antiquities Act and Kent's donation provided Muir the answer concerning the precious and privately owned redwoods. "Saving these woods from the axe and saw," thanked Muir, "from money-changers and water-changers and giving them to our country and the world is in many ways the most notable service to God and man I have heard of since my forest wanderings began." As for the trees in the park of Redwood Canyon, "This is the best tree-lover's monument that could possibly be found in all the forests of the world. You have done me great honor and I am proud of it."²³⁵

Though the tract of redwoods was only 295 acres, the achievement came not only in the prevention of the destruction of the redwood forest but also in the protection of scientifically notable parklands near a large center of population. Normally urban or suburban parks were created and administered by municipal or state governments including Central Park in Manhattan, Palisades Park on the west bank of the Hudson in New York and New Jersey, Fairmount Park in Philadelphia, the system of parks in Chicago, or the Emerald Necklace in Boston. However, Californians used Muir Woods, a federal facility, like a local park arriving for day walks or picnics.²³⁶ Though it would take six and a half decades from 1908 for the National Park Service to ambitiously enter the arena of urban parks in addition to all of the historical sites, battlefields, and western nature parks, the early existence of Muir Woods is responsible for making San Francisco home to a renowned and incredibly popular system of federal parks perhaps only rivaled by the national capital of Washington, DC.²³⁷

The Grand Canyon

Two days after the small, but important designation in California, Theodore Roosevelt made a massive and precedent-setting proclamation in Arizona. Carving out of an existing forest reserve created by Benjamin Harrison in 1893,²³⁸ Roosevelt declared the Grand Canyon a national monument and included within the boundaries over eight hundred thousand acres.

The President was concerned with growing development along the South Rim spurred by the construction of a railroad branch line by the Atchison, Topeka, and Santa Fe Railroad to facilitate the profitable and growing tourism industry.²³⁹ The development of the land around the canyon, in particular a mining claim of Ralph Cameron, instigated a case in court threatening the Antiquities Act that reached all the way to the Supreme Court.

²³⁴ Fox, page 134.

²³⁵ Letter from John Muir to William Kent, February 6, 1908.

²³⁶ Rothman, page 64.

²³⁷ The Golden Gate National Recreation Area administers most of the federal parks in the San Francisco area, including Muir Woods. Created in 1972, this system receives nearly fourteen million visitors each year. The same year saw the creation of Gateway National Recreation Area in New York and New Jersey accommodating nine million annual visitors. www.nps.gov.

²³⁸ As a senator Harrison had unsuccessfully proposed to make the Grand Canyon a national park in 1882. That he could declare it a forest reserve as president must have been very satisfactory. Rothman, p 64.

²³⁹ Rothman, pages 64-65.

The Grand Canyon was Roosevelt's greatest use of the Antiquities Act authority, in size of land reserved, the national and natural significance of the object to be protected, and the precedent that it created for future presidents, especially once reviewed and approved by the Supreme Court.

The Grand Canyon is certainly well known to Americans and the world today as one of the greatest natural treasures of North America. Carved by the relentless and powerful Colorado River over millennia in the red rock deserts of northwestern Arizona for over 275 miles, the Canyon is over a mile deep at certain points and up to fifteen miles across from north to south. The rugged canyon and gorge walls left by the powerful forces of wind and water erosion reveal a multitude of colors layer by layer varying upon the time of day and position of the sunlight capable of turning the sandstone rock a rich red. Since the river was definitively explored by an expedition lead by Major John Wesley Powell, for the first time in the summer of 1869, the Colorado and the Canyon have provoked profound wonderment upon those that behold it. When his small crew neared the Grand Canyon, Powell wrote apprehensively in his journal:

*We are now ready to start on our way down the Great Unknown...We are three quarters of a mile in the depths of the earth, and the great river shrinks into insignificance, as it dashes its angry waves against the walls and cliffs, that rise to the world above; they are but puny ripples, and we but pigmies, running up and down the sands, or lost among the boulders. We have an unknown distance yet to run; an unknown river yet to explore. What falls there are, we know not; what rocks beset the channel, we know not; what walls rise over the river, we know not. Ah well! we may conjecture things. The men talk as cheerfully as ever; jests are bandied about freely this morning; but to me the cheer is somber and the jests are ghastly.*²⁴⁰

When Theodore Roosevelt gazed upon the great Arizona chasm for the first time in 1903, the only apprehension he felt was the thought that the Canyon might not be passed to future generations untarnished by unfortunate human intervention. On the same train trip that brought him back to Medora and to Yellowstone, Roosevelt was eager to visit a section of the country that was firmly in his and the Republican column.²⁴¹ The president reached Arizona by the first week of May. It was his first visit to the territory, and he was awestruck by what he saw. In a letter sent back to Washington later in the summer about the details of the trip, Roosevelt wrote, "the Grand Canyon of the Colorado to me [is] the most impressive piece of scenery I have ever looked at. I don't exactly know what words to use in describing it. It is beautiful and terrible and unearthly. It made me feel as if I were gazing at a sunset of strange and awful splendor."²⁴²

Awaiting his speech at the edge of the canyon on May 6 was a growing crowd, many of them fellow Rough Riders from the Spanish American War. The President appreciated their appearance and exhorted them to protect the greatest natural resource in the territory:

²⁴⁰ Stegner, pages 95-96.

²⁴¹ Morris, *Theodore Rex*, page 214.

²⁴² Morris, *TR*, page 225; *The Letters of Theodore Roosevelt*, edited by Elting E. Morison, Harvard University Press, Cambridge, Massachusetts, 1951, Volume 3, page 557.

I have come here to see the Grand Canyon of Arizona, because in that canyon, Arizona has a natural wonder which, so far as I know, is in kind absolutely unparalleled throughout the world. I shall not attempt to describe it because I cannot. I could not choose words that would convey to any outsider what that Canyon is. I want to ask you to do one thing in connection with it in your own interest and in the interest of the country – to keep this great wonder of nature as it now is.

The plea was not just for the preservation of the magnificence of the Grand Canyon but the conservation of the natural settings of the territory of Arizona and the nation as a whole. A decade later in his autobiography, TR mentioned the need to educate the nation and the people about the fallacy of “inexhaustible” natural resources. “The relation of the conservation of natural resources to the problems of National welfare and National efficiency had not yet dawned on the public mind.”²⁴³ It was the president’s job to move the public and as a progressive it was his job to see the nation move forward for the benefit of all present and future.

Though preservationist with respect to the Grand Canyon, Roosevelt remained conservationist with the national forests. “Leave [the canyon] as it is,” but responsibly and efficiently use the forests.

Preserve the forests by use; preserve them for the ranchman and the stockman, for the people of the territory, for the people of the region round about, preserve them for that use, but use them so that they will not be squandered, that they will not be wasted; so that they will be of benefit to the Arizona of 1953 as well as the Arizona of 1903.

Roosevelt finished with a firm statement of reformist progressive political philosophy. Much of it was what his father had taught him.

*Never forget that you have to have two sets of qualities; the sets of qualities that we include under the names of decency, honesty, [and] morality, that make a man a decent husband, a good father, a good neighbor, square and fair in his dealings with all men, and in his dealings with the state; and then furthermore the qualities that have to be shown by every man who is to do his work well in the world. Virtue is good, but the virtue that sits at home in its own parlor and talks about how bad the world is never did anything yet and never will. I want to see the qualities that the men of '61 to '65 had, my comrade. You had to have a man patriotic in those days, but it did not make any difference how patriotic he was if he did not fight. He was no good. So it is with citizenship. I want to see decency, and then I want to see the virile, hardy virtues; the virtues we speak of when we describe any one as not only a good man, but emphatically a man. I believe in you, I am glad to see you. I wish you well with all my heart, and I know that your future will justify all the hopes we have.*²⁴⁴

Five years later the situation at the South Rim began to concern the President. With the completion of the railroad it was natural for the next step to be the construction

²⁴³ Roosevelt, *Autobiography*, page 395.

²⁴⁴ Speech of President Theodore Roosevelt at Grand Canyon, Arizona on May 6, 1903, Presidential Papers of Theodore Roosevelt, Library of Congress, Series 5B.

of a hotel. The El Tovar Lodge had opened by 1905 and tourists able to afford the train trip to the canyon flocked to the outstanding amenities offered, notably an excellent view of the Grand Canyon from its rim. Tourism and commercial development threatened the basic serenity of the canyon, the vast silence except for a gust of wind or cry of a visible but faraway bird, and the integrity of the forest reserve. The current buildings could not be removed, but future commercial encroachment could be stopped or sufficiently restrained if the powers of the Antiquities Act could be employed. Of particular concern was the presence of a mining claim held by Arizona political personality Ralph Cameron within the boundaries of the forest reserve (and eventually the national monument). The land claimed by Cameron was held at a prominent spot. It was “immediately adjacent” to the Santa Fe railroad depot and the hotel complex and included the head of one of the trails leading down into the canyon.²⁴⁵ Just the threat of a mine or a distracting private claim was ample reason to act further for the future of the Grand Canyon.

Apparently Roosevelt never thought twice about using the authority on such a large scale. To TR the Grand Canyon was a clear object of “scientific interest,” something that was not very difficult for him to explain to the public in his proclamation. “The Grand Canyon of the Colorado River...is an object of unusual scientific interest, being the greatest eroded canyon within the United States, and it appears that the public interests would be promoted by reserving it as a National Monument, with such other land as is necessary for its proper protection.”²⁴⁶

In declaring the Grand Canyon National Monument, Theodore Roosevelt took a giant leap forward with a delegated executive authority that in some ways seemed only capable of affording the president with small quick steps. He surpassed these principles in a grand fashion on a grand scale. The average acreage of Roosevelt’s first eleven monument declarations was roughly 7,000 acres. The largest was Petrified Forest, Arizona at 60,776 acres and the second largest, Chaco Canyon, New Mexico, was 10,643 acres. Removing these two monuments from consideration, the average then drops to just above 1,000 acres. The Grand Canyon was declared to be an astounding and clearly unprecedented 808,120 acres. It would take ten sets of the combined previous eleven declarations to equal the size of Roosevelt’s latest withdrawal.

The Grand Canyon proclamation firmly cemented Theodore Roosevelt’s place in the history of conservation. It also created for the future the combined interpretation that as long as the President soundly establishes a strong “historic or scientific” rationale for declaring a monument and announces his estimation and judgment that the reserved land area is “the smallest area compatible with the proper care and management of the objects to be protected” in the proclamation, it should follow the letter of the law. If the “interests” or the “objects” were large themselves, it would therefore be appropriate, legitimate, and legal to expect the national monument covering those interests or objects to be large in acreage.

From the Roosevelt angle, a small monument covering a large scientific interest, or even historic interest, would have been highly contrary to the policy firmly stated in the law to “protect” the determined object. For instance, using the Grand Canyon and its scientific interest as an example, it would be irresponsible for a president to name only the Colorado River a national monument, leaving the rest of the canyon with its rugged

²⁴⁵ *Cameron v. United States*, 252 U.S. 450 (1920).

²⁴⁶ Presidential Proclamation, Grand Canyon National Monument, Arizona, January 11, 1908, TR.

gorges, eroded pinnacles, and layers of colored rock revealing a geologic record spanning nearly two billion years, because the river was responsible for all of the erosion necessary for the creation of the canyon. In another example, it would be equally irresponsible to name only the petroglyphs on the Inscription Rock at El Morro in New Mexico, rather than the entire rock and some additional surrounding land. If the president was inclined to use the powers of the second section of the Antiquities Act to designate a monument, which is a voluntary and optional congressionally delegated authority to be used with “his discretion,” it would be expected, appropriate, and legal to name land in the monument covering the entire object, not a just a parcel or section of it.

Without additional explicit regulations or a specified maximum acreage in the law for monument size, as was proposed in some versions of the bill prior to passage but not in the final law, no size problem existed in the eyes of Roosevelt. Monument size therefore did not matter when historic or scientific objects were present, and there were innumerable scientific spots from which to choose. This interpretation was groundbreaking and extraordinary, much like the newly protected scenery at the Grand Canyon. Roosevelt knew the consequences of the action. If Congress felt the president had acted inappropriately or against the congressional interpretation of its own law, it could simply pass legislation eliminating the monument. If it was particularly incensed with one declaration or a series of declarations, Congress could repeal the Antiquities Act outright and return the power over the national public lands to the legislative branch. Within the past year of 1907, Congress had restricted the presidential authority in declaring forest reserves in six northwestern states. In the normal battles between the Congress and the Executive, Roosevelt was taking the fight to the next level daring Congress to respond negatively.

Roosevelt could feel very secure about the future of his monuments and his use and interpretation of the Antiquities Act. Taking his actions together, it was a good bet that Congress would refrain from touching the delegated powers. As has been shown, several monuments, including Devils Tower and Muir Woods,²⁴⁷ had been proposed with the assistance of a congressman or senator, not by solely unannounced executive fiat. It is likely that those individual members during their service in the Congress would have seriously worried about the safety and existence of their monument, if the act or the powers were to be eliminated. Lastly and most importantly any attempt by the Congress to overturn the monuments would have required presidential approval. So as long as Theodore Roosevelt was in the White House, that chance was almost non-existent.²⁴⁸ Roosevelt also assumed that his handpicked Republican successor for the presidency in 1908, William Howard Taft, would not allow such a bill to become law either. The chance was therefore very low that Congress would react negatively for many years.

²⁴⁷ Frank Mondell, the main congressional sponsor of Devils Tower, was Chairman of the House Public Lands Committee from 1907 to 1911 and served until 1922 reaching the position of Majority Leader. William Kent was elected to the House in 1910 and served three terms. *Congressional Biographical Directory*.

²⁴⁸ The clever 1907 rider to the appropriations bill prohibiting forest declarations in six states provides evidence that Congress could respond to Roosevelt. However forest reserves and national monuments are two very different parts of the federal land spectrum and it would have been very difficult for the Congress to muster another such revolt. Roosevelt’s sixteen million acres of new forests largely negated their effort, leaving Congress smarting, but defeated.

Ever since 1908 presidents have taken this Roosevelt gamble in the course of many of their declarations. They went ahead and named monuments that were very large or were sure to be controversial in the state and with that state's congressional delegation. Franklin Roosevelt went ahead with the Jackson Hole National Monument in Wyoming in 1943 in the face of substantial and nearly effective resistance; Jimmy Carter confronted a deadline concerning potential parklands in Alaska by declaring more than a dozen monuments covering tens of millions of acres on the first day of December 1978; and Bill Clinton proclaimed several large monuments in a number of western states sparking controversy and several congressional plans to severely restrict the Antiquities Act as it neared its one hundredth anniversary. Though Congress has put some restraint on the Antiquities Act, prohibiting its use in Wyoming in 1950 and restricting use in Alaska in 1980, it is completely intact in the other forty-eight states.

As Congress has generally refused to take back the Antiquities Act powers in the decades after Theodore Roosevelt defined its use, federal courts have also refrained from overturning declarations or the act itself. These cases have followed the controversial declarations mentioned of the Roosevelts, Carter, and Clinton.²⁴⁹ One case reaching the Supreme Court resolved a matter of what could be defined as objects within a national monument in Nevada and the Court ruled in favor of an expansionary interpretation.²⁵⁰ However the case law is currently limited to these rulings. Each controversial declaration brings its own new battle, despite the previous history of defeat for challenges to the Antiquities Act. "A certain judicial discomfort" has formed around the Antiquities Act and its delegated presidential powers, prompting "the courts to tread lightly" on the historically rare occasions when it comes before them. Judges have preferred to issue rulings upon the particular case before them rather than delivering a broad approval or rejection of the Act. This situation indicates the importance of each individual case providing ample opportunity for bill and designation supporters and detractors to argue their positions before the law and the public in court.²⁵¹

As the first controversial national monument declaration, it was probably inevitable that the Grand Canyon designation would end up being reviewed by either the Congress or the federal judiciary. Congress debated the measure and eleven years later named the Grand Canyon a national park to be administered by the National Park Service.²⁵² Therefore the final result in Congress was an implicit approval of the monument. However a mining claimant, Ralph Cameron, filed a case in federal court arguing the president exceeded his authority with the national monument and that the ruling by the secretary of the interior, negating his mining claim because of insufficient evidence of any mining capability, was invalid. The case worked its way to the Supreme Court after Cameron appealed for the lower court's decisions to be overturned. Going

²⁴⁹ The cases are *Cameron v. United States*, 252 U.S. 450 (1920) Grand Canyon National Monument; *Wyoming v. Franke*, 58 F. Supp. 890 (1945), Jackson Hole National Monument; *Alaska v. Carter*, 462 F. Supp. 1155 (1978), Alaska national monuments of 1978; *Tulare County, California v. Bush*, 185 F. Supp. 2d 18 (2001), Grand Sequoia National Monument; *Mountain States Legal Foundation v. Bush* 353 F.3d 1132 (2002), six Clinton monuments.

²⁵⁰ *Cappaert v. United States*, 426 U.S. 128 (1976)

²⁵¹ Klein, Christine A., "Preserving Monumental Landscapes Under the Antiquities Act," *Cornell Law Review*, Vol. 87, September 2002, page 1346.

²⁵² Grand Canyon National Park Act, United States Statutes at Large, 65th Congress, 3rd Session, Chapter 44, February 26, 1919.

against the natural mystique of the Grand Canyon as presented by TR, countless nature and scientific writers, and nearly everyone who had visited the site, “the lawsuit...seemed destined from the start to secure the expansive interpretation of the Antiquities Act.”²⁵³

Before resolving that the secretary of the interior’s ruling was valid and within his authority, the Court handled Cameron’s charges that the designation of the Grand Canyon was excessive and unconstitutional. In one paragraph the Supreme Court outlined for the first time its interpretation of the Act and its use by Roosevelt in 1908:

*The defendants insist that the monument reserve should be disregarded on the ground that there was no authority for its creation. To this we cannot assent. The act under which the President proceeded empowered him to establish reserves embracing ‘objects of historic or scientific interest.’ The Grand Canyon, as stated in his proclamation, ‘is an object of unusual scientific interest.’ It is the greatest eroded canyon in the United States, if not the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.*²⁵⁴

The Court dispatched Cameron’s argument without much elaboration making significant precedent for future presidents and later courts. First the Justices affirmed the ability of the president to use the delegated powers or declaration and reservation of public land contained within the Antiquities Act. The authority is present, constitutional, and not subject to further review by a court. Second they found the president’s determination of the Grand Canyon to be “an object” of “scientific interest,” to be correct use of his discretion, repeating some of the words from the presidential proclamation.

Though the wording is very succinct in expressing this ruling several components can be inferred from it. The Court readily agreed that the Canyon was of scientific interest as “the greatest eroded canyon,” a scientific attraction, and “an unexampled field of geologic study.” This equated scientists to the “properly qualified” archeologists, anthropologists, and other agents of “reputable museums, universities, colleges, or other recognized educational institutions” as specified in the act who are granted permits of access by the secretary of the relevant government department. There is significant importance to this determination. Though the word “scientific” appears just once in the four sections of the act, its rationale and all of the scientific monuments created are as legitimate as the more elaborated “historical” reasons and monuments.

The matter of monument size does not receive specific mention, important in this case with the unprecedented area of over 806,000 acres. However, by confirming the Grand Canyon declaration, the Supreme Court was in part saying monument size does not matter, just as Roosevelt had. Adding, “it is the greatest eroded canyon in the United States, if not the world,” the Court confirmed Roosevelt’s interpretation that the size of the object(s) determines the size of the monument. Therefore the Supreme Court left the matter to the executive and legislative branches.

It could be argued that the court did not need to state anything on monuments. The Court eventually ruled Cameron’s mining claim to be invalid, just as the interior

²⁵³ Squillace, Mark, “The Monumental Legacy of the Antiquities Act of 1906,” *University of Georgia Law Review*, Vol. 37, Winter 2003, page 490.

²⁵⁴ *Cameron v. United States*.

secretary had ruled in 1909.²⁵⁵ They agreed that the secretary was the best arbiter of deciding the validity of the mining claim and the mineral character of the land in question. Because, Cameron did not have a valid claim, the Court could have reasonably ignored the charge against the monument decision. Furthermore, the Congress, one year before the issuing of the Cameron ruling, had eliminated the monument in favor of a national park for the Grand Canyon.

However, writing for the Court, Justice Van Devanter felt it necessary to refute that additional claim. The Antiquities Act would stand unchallenged in the federal courts until 1943 when the State of Wyoming filed suit in district court against the designation of Jackson Hole National Monument adjacent to Grand Teton National Park.²⁵⁶ Therefore, “as a result of its unwillingness to find that the President had exceeded his authority, the Supreme Court legitimized over a decade of executive practice protecting large landscapes under the Antiquities Act”²⁵⁷ and another twenty-three years of monument declarations during the Harding, Coolidge, Hoover, and Franklin Roosevelt administrations went ahead with judicial sanction under the auspices of the ruling.

Before and after the Cameron ruling, presidents utilized the expansive Roosevelt interpretation of the Antiquities Act. Large or purely scientific monuments continued to roll off the presidents’ desks. In naming Jewel Cave a national monument in South Dakota in 1908, Roosevelt only stated, “the natural formation...is of scientific interest.”²⁵⁸ Though it is hard to argue that what is thought to be the third longest cave in the world is not a scientific interest and that a monument of 1,275 acres is too large, Roosevelt felt little need to elaborate on the proclamation’s merits.²⁵⁹

One of Theodore Roosevelt’s last actions as President in March 1909 was the creation of Mount Olympus National Monument in Washington. This monument contained over 600,000 acres within the Olympic National Forest. Appealed to make the designation by Representative William Humphrey of Washington before leaving office,²⁶⁰ Roosevelt noted “numerous glaciers” and the habitat of Olympic Elk (*cervus roosevelti*) as the scientific interest.²⁶¹ The monument left existing logging rights or other claims untouched, but the accomplishment was clear. It was one of three out of eighteen monuments mentioned in TR’s autobiography,²⁶² and one historian called Mount Olympus a “going-away present to himself.”²⁶³

Roosevelt’s successors

Roosevelt’s successors utilized the Antiquities Act with regularity and on several occasions followed TR’s expansionary interpretation, practice, and precedent. President Taft declared Colorado National Monument in 1911 after John Otto, a man many deemed

²⁵⁵ Squillace, page 491.

²⁵⁶ *Wyoming v. Franke*, 58 F. Supp. 890 (1945) United States District Court of Wyoming.

²⁵⁷ Klein, page 1349.

²⁵⁸ Presidential Proclamation of February 7, 1908, Jewel Cave National Monument, South Dakota, TR.

²⁵⁹ *Official Map and Guide: Jewel Cave National Monument*, South Dakota, National Park Service, 2002.

²⁶⁰ Rothman, page 68.

²⁶¹ Presidential Proclamation of March 2, 1909, Mount Olympus National Monument, Washington, TR.

²⁶² Roosevelt, *Autobiography*, page 421. The other two are Muir Woods and Pinnacles of California.

²⁶³ Rothman, page 69.

insane for supposed threats against two different governors of Colorado,²⁶⁴ successfully peppered the newspapers of Grand Junction, several local officials, and Colorado Representative Edward Taylor in Washington with long letters praising the arid canyon areas south of the town of Fruita where the northern edge of the Uncompahgre Plateau meets the Grand Valley of the Colorado River. Taft's reasoning for the proclamation was extraordinarily succinct, finding that "the extraordinary examples of erosion are of great scientific interest."²⁶⁵ If that explanation was attached to the public lands of the west, untold tens of millions of acres could qualify for national monument protection!

On July 8, 1916, Woodrow Wilson accepted lands relinquished from the Hancock County Trustees of Public Reservations on Mount Desert Island in Maine to be included into Sieur de Monts National Monument. Using the historical interest of Samuel de Champlain's exploration in the area in 1604 as the historical interest and "the topographic configuration, the geology, the fauna, and the flora of the island" as the scientific interest,²⁶⁶ Wilson started the federal process that eventually created Acadia National Park, the first east of the Mississippi River.

Many notable national monuments were created between the two world wars. They are notable for their fame and for the fact that many eventually became national parks under later acts of Congress. During this period Bryce Canyon, Carlsbad Caverns, Arches, Great Sand Dunes, Death Valley, Saguaro, Black Canyon of the Gunnison, Joshua Tree, and Capitol Reef were declared monuments. These have since become national parks and are some of the most well known sites within the national park system. Several of these designations, Death Valley and Joshua Tree, as well as Arizona's Organ Pipe Cactus, numbered in the hundreds of thousands of acres. Calvin Coolidge declared one of the most famous landmarks and monuments in the country, the Statue of Liberty, in 1924. Another development was expansion of the Act to Alaska. Presidents Wilson and Coolidge named monuments of over one million acres in the territory.²⁶⁷

Another development began during the 1930s that would have a serious impact during later years. Though the New Deal saw a great expansion of executive power as the president now oversaw large agencies to build roads, bridges, dams, electrical infrastructure, and other public works, promote conservation, and manage old and new government functions, all of this needed congressional approval. As the authorizer and appropriator of federal projects the Congress played an essential role in the New Deal, even as Franklin Roosevelt as executive took a majority of the credit.²⁶⁸ In the atmosphere Congress began to take back some of its monument creating authority. It created a large number of eastern national monuments, largely forts, secondary

²⁶⁴ In 1903 he threatened one governor by sending a letter seemingly calling for a duel and in 1907 he was overheard saying he would "celebrate" the visit of the governor to Grand Junction with dynamite. Kania, Alan J., John Otto of Colorado National Monument, Roberts Rinehart, Inc. Publishers, Boulder, Colorado, 1984, pages 14-15, 25.

²⁶⁵ Presidential Proclamation of May 24, 1911, Colorado National Monument, Colorado, William H. Taft.

²⁶⁶ Presidential Proclamation of July 8, 1916, Sieur de Monts National Monument, Maine, W Wilson.

²⁶⁷ Wilson named Katmai (1 million acres) and Coolidge Glacier Bay (1.4 million acres). Both are now national parks.

²⁶⁸ Most Democrats in the Congress were more than pleased to ride on Roosevelt's coattails.

battlefields not yet protected, and other historical sites.²⁶⁹ One congressionally created monument of note was Badlands in South Dakota, now a national park.

As the decade progressed, Congress became increasingly more involved in western land matters. On top of that FDR became more isolated from Congress. Many felt that his powers were expanding too rapidly without enough checks and balances from Congress. For most of the first administration it was the Supreme Court that was checking Roosevelt's New Deal designs.²⁷⁰ When the Court stopped rejecting new government authorities around 1936, Congress took on much of the responsibility. Interestingly its first shot was Roosevelt's plan to add several positions to the Supreme Court to counterbalance conservative votes and many in Congress began believing Roosevelt "had acquired a lust for power that had to be stopped."²⁷¹

In terms of the Antiquities Act the battle between Franklin Roosevelt and Congress would not heat up until 1943 when the President declared more than 220,000 acres in Jackson Hole, the broad Snake River flats underneath the towering Grand Teton mountains. Though Roosevelt's monument stuck and eventually was added into the Teton national park, it was perhaps the costliest declaration in the history of the Act. Though a federal district court ruled it could not intervene, a victory for Roosevelt and the Act, it sent the expansive interpretation of the Act, as developed by Theodore Roosevelt, into a long hibernation not to be revived for thirty-five years thereafter.

²⁶⁹ The forts included Fort Stanwix, New York, Fort Frederica, Georgia, and Fort McHenry, Maryland. The battlefields included Appomattox, Virginia, Harpers Ferry, West Virginia, and Perry's Victory, Ohio. The historical sites included Ocmulgee, Georgia, Andrew Johnson, Tennessee, Homestead, Nebraska, Whitman, Washington, Pipestone, Minnesota, and George Washington Carver, Missouri. Most of these sites easily qualified for the Antiquities Act, but it is possible that many of these sites were not on federal land and that Congress needed to authorize and appropriate their purchase into the federal holdings.

²⁷⁰ Some of the greater rejections were *Schechter v. United States*, where the Court invalidated the first title of the National Industrial Recovery Act and *United States v. Butler*, which invalidated the Agricultural Adjustment Act. Watkins pages 416, 421.

²⁷¹ Watkins, page 621.

Controversy in Wyoming

Chapter 4

There are fewer places in the contiguous United States with the geologic diversity and wonder of northwestern Wyoming. “The combination of geologic processes in the Yellowstone – Teton region is seen nowhere on Earth on such a large scale and with such vivid manifestations.”²⁷² Though the geysers and hot springs of Yellowstone intrigued congressmen in the 1870s, they had little knowledge of the mystery behind them. Scientists now state that the park sits above a massive hot spot in the earth’s crust where magma chambers rest perhaps only one to three miles below the surface. The North American Plate moves in a southwestward direction and scientists have traced eruptions of this hotspot hundreds of miles away near where Oregon, Idaho, and Nevada join. Three enormous blasts have occurred within the past two million years.²⁷³

To the south of Yellowstone is the astounding Grand Teton range and the Jackson Hole valley. Though most of the rest of the Rocky Mountains from Canada to New Mexico were created over 60 million years ago, the Grand Tetons are relatively young geologically.²⁷⁴ Roughly in the past 13 million years a fault, running north to south at the base of the Tetons for forty miles and causing an untold number of earthquakes, has formed the valley, the mountains, and the remarkable contrast between them. The tallest mountain in the range, Grand Teton at 13,770 above sea level, stands more than 7,000 feet above the floor of Jackson Hole. Geologists have estimated that the true floor of Jackson Hole, meaning everything above has been deposited there in one way or another, is actually 16,000 feet below the elevation of the Snake River.²⁷⁵ The age of granite rock at the top of the Tetons, found by scientists to be over three billion years old and “some of hardest and least porous rocks known,”²⁷⁶ suggests that the Tetons were probably taller than they are today with erosion carrying away the lost material. Therefore, it is believed that a vertical distance of roughly 23,000 feet separates identical levels of rock, with one section high in the mountains and the other buried deep below Jackson Hole.

The earthquakes have other profound effects on the region. The vertical magnificence of the Tetons is not duplicated on the western slope of the range because there are no vertical forces at work in that area. Instead the range slowly ascends from west to east from the Idaho border for ten miles until the line of summits. Similarly to the

²⁷² Smith, Robert B. and Siegel, Lee J., Windows into the Earth, Oxford University Press, New York, 2000, page 9.

²⁷³ Anderson, Roger and Anderson, Carol Shively, Yellowstone: The Story Behind the Scenery, KC Publications, Las Vegas, Nevada, 2000, page 8. As the continental plate moves southwestward, the hotspot moves in the opposite direction, to the northeast. These catastrophic eruptions are responsible for the wide and level Snake River Plain in Idaho, as each explosion is believed to have sent hundreds of cubic miles of material into the atmosphere. The most recent Yellowstone eruption, 640,000 years ago, is thought to have ejected 240 cubic miles of debris. Official Park Handbook: Craters of the Moon National Monument, Idaho, National Park Service, 2000, pages 24-25; Official Map and Guide: Yellowstone National Park, Wyoming, Idaho, Montana, National Park Service, 2002.

²⁷⁴ Smith and Siegel, pages 33-35.

²⁷⁵ Two explanations for the deposited material include erosion from wind, rain, and the Snake River and the leftovers from the three Yellowstone eruptions.

²⁷⁶ Official Park Handbook: Grand Teton National Park, Wyoming, National Park Service, 2002.

east of the fault line, Jackson Hole slowly ascends to the east before the Absaroka Range. The evidence of vertical motion along the fault is quite evident in the various scarps, or geologic embankments, near the base of the mountains. One visible scarp above String Lake shows uplift of 125 feet.²⁷⁷ The earthquakes along the Teton fault are thought to have measured above seven on the Richter scale and occur between every two to four thousand years. Scientists believe that last earthquake was over five thousand years ago and there is disagreement over why the average has not been adhered to recently. Some argue that a major earthquake is brewing and long overdue, while others believe the fault has fallen into a period of slumber.²⁷⁸ The confusion over predictions concerning the next earthquake are likely related to the destruction of evidence by advancing and retreating glaciers and the three Yellowstone eruptions piling layers of material on the area.²⁷⁹

Protecting this masterpiece of nature would cause a fractious debate from Wyoming to Capitol Hill about use of public lands. After years of debate in Congress over the Tetons, Franklin Roosevelt used the Antiquities Act powers to extend protection to the valley in 1943. Though most of the previous declarations of the Act were met with public and political acceptance, Roosevelt did not find it easy at all. The Jackson Hole controversy resulted in the significant decline of use in the Act's powers and the prohibition of further usage in Wyoming. It was the first real test of the Theodore Roosevelt interpretation and the results for decades were mixed.

Creating a Second Park

The Tetons and Jackson Hole were renowned for their scenic splendor, but were consistently overshadowed by the existence and economic possibilities of Yellowstone to the north. As settlement reached Jackson Hole late in the nineteenth century, cattle grazing quickly took hold in the valley and solidified itself into a powerful political interest. Unlike Yellowstone, where the federal government and Northern Pacific had long allocated or controlled the economic conditions, ranching allowed for individuals and families to make a traditional agricultural living. Presidents Harrison and Cleveland declared forest reserves in the absence of congressional approval of expanding Yellowstone, including most of what became Grand Teton National Park, however administration of these lands was non-existent, lacking, or favorable to the ranchers. The transfer of these reserves to Pinchot's user-friendly Forest Service in 1905 gave another advantage to the local grazers in northern Jackson Hole.²⁸⁰

The Jackson grazing interest continued to resist the incorporation of the valley into any national park. A Yellowstone expansion proposal in 1918 that included the Teton Range and the string of glacial lakes just below but excluded much of the valley was rejected by an Idaho senator with an ear close to area grazing interests, despite approval by the entire Wyoming congressional delegation and local people because of the exclusion.²⁸¹ As a result of the failure and the new prominence of the opposed group of

²⁷⁷ Smith and Siegel, page 98.

²⁷⁸ Smith and Siegel, pages 89-93.

²⁷⁹ Smith and Siegel, pages 108-110.

²⁸⁰ Haines, Vol. 2, pages 95-97.

²⁸¹ Righter, Robert, *Crucible for Conservation: The Struggle for Grand Teton National Park*, Grand Teton Natural History Association, Moose, Wyoming, 1982, page 28. The Jackson Hole Courier of April 24, 1918 reported that opposition has dwindled as "the extension will not interfere with the grazing of Jackson Hole cattle. The united effort should be made here to have this bill introduced." Haines, Vol. 2, page 322.

nearby ranchers, the grazers and ranchers of Jackson Hole developed a fear of the more restrictive and recently created National Park Service that was enhanced by rangers of the older, settled, and less limiting Forest Service.²⁸² With this development it became difficult just to include the Teton Range into a protective park. It took eleven years for Congress to declare a national park for the mountains and the lakes, but the valley was left open.²⁸³ The battle was not finished in the least.

In the 1920s the battle lines over Jackson Hole developed along the same rifts of earlier battles. Always present and notable was the group opposed to any strengthening of protections in federal land law. These people had a strong sense of independence and resented the intervention of federal law or employees into their affairs, whether over land, occupation, or recreation. Conservationist interests, represented by the Forest Service, were opposed to any shift from the policy that allowed a laissez-faire maintenance over public land. Preservationists meanwhile argued for full incorporation of northern Jackson Hole into the park to preserve the scenic unity of mountain and valley.

These lines were not necessarily clear-cut. The strict oppositionists often sided with the Forest Service and vice versa to prevent park expansion. The availability of permits and the openness of the bureau to agricultural use frequently formed the basis of the partnership. Government officials in Wyoming and Washington necessarily stayed connected to this faction, if they did not lead it, in order to stay in office.

On the other hand, the preservationist Park Service and its allies received useful local assistance from local ranchers including Struthers Burt.²⁸⁴ Writing in the *Nation* in 1926, Burt explained much of the rancher position. Sympathetic to, but opposed to the exaggeration of, the traditional Western “inherent dislike of the federal control and an inherent hatred of any interference with individual action,” it is nevertheless important to reserve special lands and administer the “scenery that is just as nature meant it to be” in a manner to satisfy the growing “recreational urge, this desire and need for solitude, space, and fresh air.” The ranchers were also concerned that unregulated visitation via automobile would destroy their way of life and the beauty of their scenic surroundings. Only the NPS could prevent massive development of Jackson Hole, anathema to everyone except those in position to profit from business expansion.²⁸⁵

The Rockefellers

Noticing the potential of the alliance with friendly ranchers, the NPS continually sought their advice and searched for methods to purchase lands to eventually include into the park without having to ask and likely fail to receive congressional appropriations. The Deputy Director of the NPS and Superintendent of Yellowstone, Horace M. Albright, was aware of one possible method to purchase lands. Since 1924 he had worked with

²⁸² The Park Service was created in 1916 with a more protective legal mandate than the Forest Service. Righter, page 29.

²⁸³ Righter, pages 40-42.

²⁸⁴ Machlis, Gary E. and Field, Donald R., editors of National Parks and Rural Development: Practice and Policy in the United States, Island Press, Washington, DC, 2000, page 59.

²⁸⁵ Burt wrote I came to the conclusion that [the Park Service]...was the wisest, most far-seeing, fairest, most courteous, and unselfish branch of the Government...;it was the only [agency], dealing with natural resources, that could take into account the wishes and necessities of every man.” Burt, Struthers, “The Battle of Jackson’s Hole,” *The Nation*, Vol. 122, March 3, 1925, pages 225-227.

John D. Rockefeller, Jr. to clean up the roads in Yellowstone.²⁸⁶ If Rockefeller, a noted philanthropist for national parks,²⁸⁷ could be persuaded to buy Jackson Hole properties, a nearly endless pool of financial resources would be at their disposal.

Rockefeller visited northwestern Wyoming in 1926 and had a picnic lunch with Albright at a prominent bluff overlooking the Snake River that afforded a stunning view of the Grand Tetons to the west. Albright mentioned the idea of a purchasing campaign, but did not receive a complete answer until January 1927 when he met with Rockefeller in New York. There Albright's wish for Rockefeller's assistance was surpassed as he rejected a plan to buy lands only west of the Snake River in favor of a plan to cover all of Jackson Hole. Rockefeller further announced money was not an issue, even after warnings that it would cost over one million dollars, because he was convinced only a complete preservation effort would make the campaign worthwhile.²⁸⁸ Rockefeller stated two reasons for the project: "The marvelous scenic beauty of the Teton Mountains and the Lakes at their feet, which are seen at their best from the Jackson Hole Valley, and the fact that this Valley is the natural and necessary sanctuary and feeding place for the game which inhabits Yellowstone Park and the surrounding region."²⁸⁹

Proceeding very quickly and with secrecy as to the source of the funding, the Rockefeller project purchased thousands of acres in northern Jackson Hole. By 1933 more than 35,000 acres had been purchased and \$1.4 million had been spent.²⁹⁰ However once the project was revealed in that same year, controversy immediately surfaced. Grazers feared loss of public land privileges and permits. Forest Service officials, upset at the loss of territory, were pleased to describe the details of that loss to their grazing friends. County officials worried about the removal of the Rockefeller lands from the local property tax base.²⁹¹ For ten years settlement was delayed and as time passed the anti-park forces increased their foothold over the Wyoming congressional delegation.²⁹²

By the start of 1943, Rockefeller and the preservationists within Franklin D. Roosevelt's administration had had enough of waiting for Congress. In a letter to Roosevelt's Secretary of the Interior Harold Ickes, Rockefeller, frustrated with waiting, warned in November 1943:

that I should make permanent disposition of this property before another year is passed. If the federal government is not interested in its acquisition, or, being interested, is still unable to arrange to accept it...it will be my thought to make

²⁸⁶ Fosdick, Raymond B., John D. Rockefeller, Jr.: A Portrait, Harper, New York, 1956, page 309; Ernst, Joseph, editor of Worthwhile Places: Correspondence of John D. Rockefeller, Jr. and Horace M. Albright, Rockefeller Archive Center and Fordham University Press, 1991, pages 24-26.

²⁸⁷ Besides Yellowstone and Grand Teton, Rockefeller and his son Laurance would donate money for projects at Acadia, Mesa Verde, Yosemite, Great Smoky Mountains, Shenandoah, Redwood, and Virgin Islands National Parks. Newhall, Nancy W., A Contribution to the Heritage of Every American: The Conservation Activities of John D. Rockefeller, Jr., Knopf, New York, 1957; *New York Times*, "The Rockefeller Philosophy of Giving," May 15, 1960, page E6.

²⁸⁸ Righter, pages 46-48, Fosdick, pages 310-311.

²⁸⁹ Rockefeller letter of February 28, 1927 in Ernst, pages 76-78.

²⁹⁰ Watkins, T.H., Righteous Pilgrim, Henry Holt and Company, Inc., New York, 1990, page 767.

²⁹¹ The federal government does not pay state or local taxes on its land. There were pledges to offer compensation, but the county was skeptical and the federal Bureau of the Budget would not consent to the stipulation on fear of precedent. Watkins, page 768.

²⁹² Righter, pages 96-97, 101.

*some other disposition of it, or failing in that, to sell it in the market to any satisfactory buyers.*²⁹³

Considering the fifteen-year investment and the relatively inconsequential (to a Rockefeller) annual local property tax payment of roughly thirteen thousand dollars, the letter was not likely an actual threat. Rockefeller's patience may have been waning, as suggested by Horace Albright and others,²⁹⁴ but it would have been a major betrayal of his long-term goal as defined back in 1927 of preserving Jackson Hole's "marvelous scenic beauty." Therefore the letter "was probably a good way of putting a little pressure on the people in Washington" in the words of son Laurance Rockefeller.²⁹⁵

Ickes understood the motion and sought to get FDR's approval to use the powers of the Antiquities Act in the absence of favorable congressional activity.²⁹⁶ Over the winter, Ickes was, in his own words, "anxious to move." He received the approval of the Budget director and requested that the White House keep the matter quiet so as not to create early alarm that would dissuade the President from signing the proclamation.²⁹⁷ However Ickes also had received objections and warnings about the monument proposal from Wyoming Senator Joseph O'Mahoney, a Democrat.²⁹⁸ As Roosevelt was largely concerned with the upcoming war meetings with Winston Churchill at Casablanca in Morocco, Ickes received a preliminary meeting only in February 1943 and final approval in an appointment on March 12.

Roosevelt signed the proclamation creating Jackson Hole National Monument on March 15, 1943. In it FDR very vaguely referred to "historic landmarks and other objects of historic and scientific interest that are situated on lands owned or controlled by the United States"²⁹⁹ and reserved for the National Park Service a total of 221,610 acres in Jackson Hole. Of note, the proclamation, as had many before it, was "subject to all valid existing rights." The announcement thrilled the Rockefellers, Ickes, the NPS, and supportive locals.³⁰⁰

However the battle was not over, not by any means. As had been shown in past decades, a victory for one side meant an invigoration of the opposition. Surprise was the first offense. Not only were officials and residents of Wyoming surprised by the action, some in Roosevelt's administration expressed regret at the handling.³⁰¹ The firestorm of earlier fights returned with a vengeance, perhaps because the opponents felt the monument and its protections were permanent. Wyoming politicians and others expressed "vituperative outrage."³⁰² Back in Jackson Hole there was an amusing or

²⁹³ Letter of November 27, 1942 from Rockefeller to Ickes in Watkins, page 768.

²⁹⁴ Righter, page 107; Watkins, page 768.

²⁹⁵ Righter, page 108.

²⁹⁶ Righter, page 107.

²⁹⁷ Watkins, pages 768-769.

²⁹⁸ Righter, pages 109-110.

²⁹⁹ Presidential Proclamation 2578 of March 15, 1943, Jackson Hole National Monument, Wyoming, FDR.

³⁰⁰ Righter, page 110.

³⁰¹ Park Service Director Newton Drury said that it "came like a bolt out of the blue" and "ideally, we could have used more time for preparation." Watkins, page 769.

³⁰² Righter, page 110. Republican Senator Edward Robertson said the declaration was "a foul, sneaking Pearl Harbor blow," and columnist Westbrook Pegler compared the monument to "an act of annexation which follows the general lines of Adolf Hitler's seizure of Austria" and Harold Ickes to a "Nazi governor of Poland. Watkins, page 772

serious scene, depending on point of view, when grazers staged a raid in early May on monument land protesting the supposed loss of permits. They were lead by fully armed Westerns film actor Wallace Beery.³⁰³ The grazers received the press coverage such a stunt usually gets, including a photo and story in *Time* magazine. As a star in westerns he was the epitome of the popular cowboy image to which they wanted to be linked. However some humorous accounts have surfaced about his appearance. One story says he needed the assistance of a ladder to mount his horse because of his age. The promoters of the event portrayed Beery as a resident of Jackson Hole. That was true to an extent; Beery held a Forest Service permit for one half acre on Jackson Lake that was large enough only for a cabin and one milk cow that had recently died.³⁰⁴

Jackson Hole and Executive Power

In Wyoming monument opponents could stage cowboy protest events, throw reckless charges into the press, or hold resentment on local land matters and feud with disagreeing neighbors,³⁰⁵ but on the national stage none of these tactics would create the broad motivated sustained campaign necessary to eliminate through legislation the offending national monument. Therefore, Wyoming politicians changed gears from the initial uproar over the surprise and hit upon a theme that they could legitimately use in Congress, the national political arena, and the federal courts against Franklin Roosevelt and his latest use of the Antiquities Act.

Through the course of the New Deal, FDR had expanded the federal government into areas it had never before ventured. The Great Depression necessitated a vigorous multi-faceted approach to combat unprecedented economic and social hardship, and the country supported him in droves with two smashing electoral victories in 1932 and 1936. Voters did not believe Herbert Hoover or Alf Landon were capable of action and were pleased with Roosevelt's resume as Governor of New York and President. They also consistently gave him substantial majorities in both chambers of Congress, electing Democrats from all regions of the country.

However, with the massive expansion of federal priorities and other actions, including his court-packing scheme of 1937, Roosevelt began to irritate members of the legislative branch, notably conservative Democrats. Roosevelt's decision to break tradition and run for a third term in 1940 was not popular in some circles regardless of political party. Lastly the effort to bring victory in the Second World War required an expansion in executive branch power and activity that frequently dwarfed the measures of the New Deal.³⁰⁶

³⁰³ Righter, page 115.

³⁰⁴ Associated Press, "Ho for Jackson's Hole!," *New York Times*, May 3, 1943, page 19; "Western Drama: Armed Cowboys Again Ride the Range," *New York Times*, May 5, 1943, page 29; "Gun Play," *Time Magazine*, May 17, 1943, page 21.

³⁰⁵ Olaus Murie, a resident of Moose, a U.S. Biological Survey scientist at the National Elk Refuge, just north of Jackson, and a future president of The Wilderness Society reported "embarrassments" at parties when members of opposing sides ran into each other. Watkins, pages 767-768.

³⁰⁶ The greatest symbol of wartime government expansion was the construction of the Pentagon, the world's largest office building, across the Potomac in Virginia. The total government workforce in Washington nearly doubled from 139,000 in 1940 to 265,000 in 1945. Jobs were so aplenty that for some time in 1942 and 1943 the population of the District of Columbia was growing at the average rate of 5,000 per month. Watkins, pages 727-729.

The threat of rapidly increasing executive power weighed on Congress as a whole, and quickly became the surest method of Wyoming politicians to oppose Roosevelt over Jackson Hole. The offensive began on Capitol Hill on March 19, 1943 when all three members of the Wyoming delegation gave speeches denouncing the declaration. The harshest attack came from Senator Robertson who charged the proclamation “is a subterfuge to thwart the will of Congress by Executive action.” Continuing he said, “The proclamation creating this monument will not contribute in any way to the war effort. As a matter of fact, there is room for considerable argument to show that it will be against the war effort.”³⁰⁷ His Democratic colleague, Senator O’Mahoney, also made the war claim, and clearly stated the powers argument, saying the proclamation was “a rather extraordinary instance of the indirect use of Executive power to accomplish an objective which could not be accomplished by legislative action.”

Senator O’Mahoney also entered into the *Record* letters exchanged between himself and Secretary Ickes over Jackson Hole. In his letter from February, O’Mahoney told Ickes that he found “it would be contrary to sound public policy as well as the to law to attempt by executive action to procure the extension of the boundaries of a national park, particularly when Congress in the case of Teton National Park has been requested to make an extension and has not acted.”³⁰⁸ Ickes responded, though written after the proclamation was issued, arguing that national monuments are separate from national parks, even if they may border,³⁰⁹ and that the Antiquities Act was followed to the letter of the law.³¹⁰ O’Mahoney joked on the Senate floor that he considered Ickes’ reply to be “a marvel of special pleading.”³¹¹

It would take considerable time for the senators and Representative Barrett to pass the bill introduced in the House on their day of speeches to eliminate the monument. However, support among western colleagues seemed reassuringly available.³¹² In the meantime Senator O’Mahoney expressed his anger by inserting an amendment to the Interior Appropriations Bill for 1944 prohibiting funding from reaching Jackson Hole National Monument and preventing any NPS operations on the land unless borrowed from Grand Teton National Park. In another sign of support from his colleagues, the amendment survived a conference committee with the House.³¹³ He would successfully insert this amendment every year until Congress and President Truman combined the national park and national monument in 1950.³¹⁴

The Wyoming politicians had several reasonable claims to being angry at the action. President Roosevelt, Secretary Ickes, and others in the Interior Department made

³⁰⁷ *Congressional Record*, Senate, March 19, 1943, page 2236.

³⁰⁸ Letter to Harold Ickes from Joseph O’Mahoney, February 23, 1943, printed in *Congressional Record*, Senate, March 19, 1943, page 2234.

³⁰⁹ Ickes cited two previous cases where presidentially declared national monuments were adjacent to congressionally national parks, Zion and Grand Canyon, in which both had the same name. Interestingly both parks were originally claimed as national monuments under the Antiquities Act.

³¹⁰ Letter to Joseph O’Mahoney from Harold Ickes, March 18, 1943, printed in *Congressional Record*, Senate, March 19, 1943, page 2235.

³¹¹ *Congressional Record*, Senate, March 19, 1943, page 2235.

³¹² Democratic Senator Carl Hayden of Arizona was on the floor during O’Mahoney’s speech and expressed his support for the Wyoming senator’s statements.

³¹³ Special to The New York Times, “Bill Bars Funds for Wyoming Park,” *New York Times*, July 4, 1943, page 12.

³¹⁴ United Press, “Jackson Hole Bill Urged,” *New York Times*, April 16, 1949, page 10.

a significant mistake by not explaining themselves in the executive order creating the monument. They gave no indication of why the monument should be created under the conditions of the Antiquities Act beyond tersely declaring that historic and scientific interests existed on the land to be reserved. They had ample availability of relevant historic and scientific interests to use, including historic ranching structures, various geologic features, and the Jackson elk herd. In not specifying their reasoning, the administration officials left themselves open to serious political and legal charges or actions, for example the O'Mahoney appropriations amendment, that would likely be damaging and linger for a lengthy period of time. With justifiable enumeration of clear historic and scientific interests, the administration would have stood on much better ground to defend itself and may have been able to save some of its valuable political capital in the process.

Many of the attacks, as the Roosevelt New Dealers had come to expect, were debatable in their validity and honesty and were considered by some to be "false propaganda."³¹⁵ One charge frequently circulated that the monument designation would remove people from their homes and property.³¹⁶ The rumor received authenticity by appearing in the *Jackson Hole Courier* newspaper on April 8.³¹⁷ However that was not true, was not going to happen, and would have been illegal under the Antiquities Act. Furthermore, as the proclamation says that the monument is "subject to all valid existing rights," Secretary Ickes pledged to Wyoming leaders and the House Committee on Public Lands that grazing privileges "will be honored by the National Park Service during the lifetime of the holder" and that existing property rights, as demanded by the Antiquities Act, are not and cannot be infringed upon.³¹⁸

Lastly Wyoming Governor Lester Hunt, in "one of the most flagrant threats of nullification since the Civil War," declared to a meeting of western governors in Salt Lake City, "I shall utilize all police authority at my disposal to exit from the proposed Jackson Hole National Monument any federal official who attempts to assume authority." That this pronouncement was emblazoned on the front page of the *Jackson Hole Courier* for four months did not make matters any easier for either side.³¹⁹

There were also legitimate complaints from the opposition. When the Rockefellers turned their land over to the federal government it would cease to be on the local tax rolls. Teton County officials were obviously not pleased by the loss of revenues. It would have an effect on their ability to provide public services like roads and schools. Also many did not like the transfer of power from the Forest Service to Park Service. Forest rangers had operated in the region for a long time, and they were familiar to the public. Park rangers would probably come from elsewhere and have a totally different outlook on the land under their jurisdiction. The agencies were different and competing and many in Jackson Hole always supported the Forest Service.

³¹⁵ Brant, Irving, "The Fight Over Jackson Hole," *The Nation*, Vol. 161, July 7, 1945, pages 13-14.

³¹⁶ Though nearly 18,000 acres was held privately, outside of the Rockefeller holdings numbering nearly 34,000 acres, a total of 170,300 acres in the monument was federal land. Therefore of the 221,610 acres in the monument, only 8% was private land. The claims of massive federal interference were clearly exaggerated, as was the perceived "right" to the federal grazing permits on public land. Righter, page 110.

³¹⁷ Righter, page 111; Special to The New York Times, "Wyoming Combats Scenic Spot Plan," *New York Times*, August 20, 1944, page 26.

³¹⁸ Watkins, pages 770-771.

³¹⁹ Righter, page 113.

The element of surprise of the announcement was necessary for the proclamation to be signed by President Roosevelt. However, it was a source of dismay to Congress and others concerned with the balance of power and openness and democracy in the operation of government. Representative Barrett attacked the notion the executive should “accomplish by indirection, the very thing Congress refused to do directly.”³²⁰ Senator Robertson called it a “bureaucratic stranglehold” on information.³²¹ Senator O’Mahoney remarked, “I believe that it is of primary importance...that a common understanding between the [Congress] and the Executive shall be built up. I say...that by action such as that which has been taken it is impossible to build upon a basis of confidence and understanding which is so essential to democratic government.”³²² A year later Republican presidential candidate Thomas E. Dewey, looking for votes in Sheridan, Wyoming and other western localities, charged that the monument was “characteristic of the New Deal and its lack of responsibility for the rights and opinions of the people affected.”³²³ They received sympathy when the *Saturday Evening Post* editorialized about “the ease with which Franklin D. Roosevelt can pluck just the right rabbit out of the federal statutes” and that the proclamation, “would serve to warn millions of Americans of the power available to the determined bureaucracy.”³²⁴

These are substantive questions about the democracy of the designation raised by the politicians and sympathetic press. Congress had deliberated on the Jackson Hole matter for decades and had not yet reached a decision that could muster passage. The legislative branch may move at a snail’s pace and that may be an irritation to those who want fast action. However, formatting the congressional schedule is its prerogative and non-action is an indication that a democratic majority had not appeared to make appropriate policy. The charge that Roosevelt undercut the legislative process therefore may seem difficult to refute. Also, that Roosevelt could declare from two thousand miles away in Washington a seemingly permanent solution to a decades old problem in Wyoming would naturally be seen as unfair to the opponents who had worked hard for many years to fight the Park Service.

But under the existing law, Roosevelt did nothing illegal. Roosevelt, Ickes, and monument supporters argued in the proclamation, the veto message of the Barrett bill, various letters, and the press that the monument was a credible and legitimate use of presidential authority with regard to the Antiquities Act and a substantial number of precedents. In response to Dewey’s campaign attack on the monument, Ickes reminded reporters that Republican Presidents Coolidge and Hoover frequently used the Antiquities Act, and their administrations supported the Rockefeller land-purchasing project. The New Dealer also could not refuse the chance at some anti-Hoover humor and labeled him as “Mr. Dewey’s political godfather.”³²⁵

In a credit to the system and the spirit of the monument opponents, they counteracted perceived undemocratic action with more democracy. Representative Barrett introduced a bill to eliminate the monument and proceeded to win votes for his

³²⁰ *Congressional Record*, House of Representatives, March 19, 1943, page 2240.

³²¹ *Congressional Record*, Senate, March 19, 1943, page 2236.

³²² *Congressional Record*, Senate, March 19, 1943, pages 2233-2235.

³²³ Associated Press, “Ickes Credits GOP for Jackson Hole,” *New York Times*, September 16, 1944, p 8. In response, Ickes derided Dewey’s Wyoming campaign tactics as “beagle-like snuffing about for votes.”

³²⁴ Righter, page 116. *Saturday Evening Post*, August 28, 1943.

³²⁵ AP, “Ickes Credits GOP for Jackson Hole.”

legislation. Senators O'Mahoney and Pat McCarran of Nevada and Representatives Barrett and James O'Connor of Montana eventually introduced companion bills to repeal the Antiquities Act.³²⁶ Congress could certainly amend or abolish the law with its obvious constitutional power, but until it did so, and it would inevitably take time, the federal court was the only path to revocation of the executive order. The State of Wyoming did not hesitate to file a lawsuit against the NPS over the monument introducing the second major judicial challenge to the expansive interpretation of the Antiquities Act.

Wyoming v. Franke

Before Federal District Judge T. Blake Kennedy, the State of Wyoming presented a coherent case that President Roosevelt had exceeded the bounds of the statute and that the monument should be overturned because of its illegality and undue burden on the interests of Wyoming and its citizens.³²⁷ Before arguing in court, Wyoming's attorney, Corporal John McIntyre, outlined his method of attack to the press saying, "the presidential proclamation was insufficient on its face" and that Roosevelt had "acted outside his authority" because "no objects of monumental nature" as described by the Antiquities Act were in the monument.³²⁸

The case offered by Wyoming had several notable arguments, and McIntyre smartly relayed them to the press for public consumption. First, McIntyre contended that the President misused the Antiquities Act by declaring a national monument on an area that "contains no objects of an historic or scientific interest." With none of these interests present, as the land is "barren of any of these features," Roosevelt's executive action was "outside the scope and purpose of the Antiquities Act."³²⁹ McIntyre relied on the testimony of state officials and professors at the University of Wyoming to buttress the argument.³³⁰ This same charge was made by *Cameron* concerning Theodore Roosevelt's Grand Canyon designation and would eventually be used in several later cases concerning declarations by Presidents Carter and Clinton.

Second, Wyoming reasoned that the declaration was an improper use of authority because of its size. Even if there were legitimate historic and scientific interests in Jackson Hole in which the Antiquities Act could be used to protect, the monument as declared at 221,000 acres was excessively large. In not restricting the monument "to the smallest area compatible with proper care and management of the objects to be protected," as required by Section 2 of the Antiquities Act, the proclamation and the monument must be rendered "void and of no effect."³³¹ This assertion was made earlier in *Cameron*, but the Supreme Court did not feel it warranted a response. As a result of no previous explicit judicial review of the size question, Wyoming had much hope that this claim would be a significant cause for victory.

³²⁶ Righter, page 117; Associated Press, "New Fight Over Jackson Hole," *New York Times*, January 7, 1945, page 15.

³²⁷ Wyoming filed against Paul R. Franke, superintendent of Grand Teton National Park, representing the National Park Service and the Department of the Interior. Watkins, page 771.

³²⁸ Associated Press, "Corporal Argues Jackson Hole Case," *New York Times*, August 22, 1944, page 19.

³²⁹ *Wyoming v. Franke*, 58 F. Supp. 890 (1945), United States District Court of Wyoming, pages 892, 895.

³³⁰ Righter, page 120. The government responded with its own panel of experts from historians, biologists, and geologists to assert the historic and scientific interest located within the monument.

³³¹ *Franke*, page 892.

However, some of the points, as can be expected, were relatively weak and laden with political rather than legal significance. For example, Wyoming insisted that the history of the Rockefeller interest and the NPS acceptance and participation in the program, and the lack of action or rejection in Congress of expansion proposals, showed that the Jackson Hole National Monument was a “substitute” maneuver to enlarge the existing Grand Teton National Park. Thus the proclamation entered into a realm of congressional affairs not legally open to the executive, “thereby becoming an evasion of the law.”³³² It was the same charge made earlier by Senator O’Mahoney to Secretary Ickes. The charge had substance politically, but was relatively unpersuasive concerning the law. Other reasons to overturn the declaration centered on the loss of tax payments to local jurisdictions once private land was transferred to the federal government and the loss of state regulatory power in resources and transportation. Though this political issue of contention remained unresolved, it was unlikely that the court would find this issue a primary reason to overturn an executive action otherwise legal and acceptable.

When announced on February 10, 1945,³³³ Judge Kennedy’s decision was a major victory for the government and the integrity of the Antiquities Act and TR’s interpretation. “In short,” ruled Judge Kennedy in the core phrase of his opinion, “this seems to be a controversy between the Legislative and Executive Branches of the Government in which, under the evidence presented here, the Court cannot interfere.”³³⁴ His “lenient standard of review” would have significant ramifications for the future as precedent in a case with a wide discussion of the Act’s features, powers, and meaning.³³⁵

In resolving the debate over whether historic or scientific interests were evident or non-existent, Kennedy ignored it, writing, “nothing could be accomplished by a detailed discussion of it.” That was a political debate and not one for him as a judicial official to sufficiently resolve. However, it is under the law for the president to decide the nature of objects historic or scientific interest and whether or not they qualify to be protected. “If there be evidence in the case of a substantial character upon which the President may have acted in declaring that there were objects of historic or scientific interest included within the area, it is sufficient upon which he may have based a discretion.”

Precedent, as Kennedy notes, gives the President the benefit in deciding upon matters based on authorities granted and delegated by the Legislative Branch. An early Supreme Court case, *Martin v. Mott*, gave strong guidance concerning executive officers acting on delegated powers and subsequent actions taken thereof. Concerning executive discretion, Justice Story wrote, “whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.” Later Story ruled that when “the President exercises an authority confided to him by law, the presumption that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown.”³³⁶

³³² Franke, page 893.

³³³ Associated Press, “Wyoming Loses Suit Over Jackson Hole,” *New York Times*, February 11, 1945, p 32.

³³⁴ Franke, page 896.

³³⁵ Klein, page 1349.

³³⁶ *Martin v. Mott*, 25 U.S. 19, 6 L. Ed. 537 (1827). Kennedy cited more recent precedent of the Supreme Court including *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163 (1919) and *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940).

In the matter of deciding who would determine when “the contrary is shown” Kennedy left it to the Congress, the branch of the government that passed the statute delegating the declaration powers in 1906. “If the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in its legislative” power. In equal terms “the burden is on Congress” to address “the discretion of the Executive in defining the area compatible with the proper care and management of the objects to be protected.” The federal courts, operating under these principles could not be the place to overturn the actions of the executive relating to the Antiquities Act.³³⁷

Judge Kennedy made a few more interesting and important points on executive discretion. Tossing aside Wyoming’s more “technical” arguments about the national monuments relationship to the national park, he rejected the notion that the court can “take any judicial interest in the motives which may have inspired the proclamation described as an attempt to circumvent the congressional intent and authority in connection with such lands.” This not only confirms the clause in the second section of the Antiquities Act allowing private owners to “relinquish” some of their land to the government to protect objects of historic and scientific interest to be used by the Rockefellers with their 34,000 acres, but also debunks certain theories and “propaganda which has been circulated in forums and through the press of the Nation” concerning the “encroachment upon the State’s sovereignty over lands within its boundaries.” Though of “public interest,” these motives are inherently political questions, “only applicable as an appeal for Congressional action.”³³⁸

In leaving the matter to Congress, Kennedy, however, did show multiple signs of sympathy to the monument opponents.³³⁹ The most significant outreach to the opposed citizenry was the claim that “undoubtedly great hardship and a substantial amount of injustice will be done to the State and her citizens if the Executive Department carries out its threatened program.” Kennedy unfortunately left to the reader’s imagination what that “threatened program” entitled, though hinted that it included “acquisitive proclivities” and perceived “injustice” by the administration.³⁴⁰ In another section, despite his declaration that “the Court cannot interfere,” Kennedy asserted that a monument “created on a bare stretch of sage-brush prairie in regard to which there was no substantial evidence that it contained objects of historic interest...would undoubtedly be arbitrary and capricious and clearly outside the scope and purpose” of the Antiquities Act.³⁴¹ Of course this was the exact case that McIntyre had presented to him! Kennedy was writing extraneously. Perhaps he was trying to send some comfort to the state’s supporters or planting a seed that such rulings could at least have a chance to be overruled in the future.

Though these are contradictory to his other binding statements, it clearly does not subtract from the ruling that Jackson Hole National Monument was valid and legal as

³³⁷ Franke, page 896.

³³⁸ Franke, pages 896-897.

³³⁹ According to Irving Brant in *The Nation*, Kennedy, “a politically hostile federal judge” was once secretary to former Wyoming Senator Francis Warren, a Republican.

³⁴⁰ Franke, page 896.

³⁴¹ Franke, page 895.

long as Congress did not abolish it. The “discretion” of the president, which was written into the Antiquities Act, was safe until Congress had decided otherwise. That discretion covers both the historic and scientific interests and the size of the monument. Theodore Roosevelt’s interpretation of the Antiquities Act received a massive victory from the state where it was first used, though it was certainly not as popular anymore.

Barrett and Teton Park Bills in Congress

More than a year before Judge Kennedy left it to Congress to debate Jackson Hole, a bill was introduced by Representative Barrett to rescind the proclamation. The bill, popular with some western Democrats and Republicans, was considered by the House Public Lands Committee and sent to the floor in 1944.³⁴² Thenceforth opponents resumed denouncing the monument and President Roosevelt, with Republican Representative James Mott of Oregon calling it “one of the greatest usurpations of legislative authority by the Executive.” Congressman George Outland, Democrat of California, however, defended the monument telling his colleagues the bill was “against the best interests of the people and against the national park system.”³⁴³ Though Barrett could claim a victory with passage in December, the vote totals were quite lackluster. In favor of the bill were 178 congressmen, but 107 were against and 142 did not vote.³⁴⁴ With a veto guaranteed from FDR, the victory was more symbolic than anything else.³⁴⁵

Once sent to the White House, Roosevelt did not disappoint and pocket vetoed the measure on December 29, 1944. Perhaps in an effort to rectify the mistake in the drafting of the proclamation, Roosevelt went out of his way in the veto message to explain the designation to the people and to future sessions of Congress. Claiming the bill would “deprive the people of the United States of the benefits of an area of national significance from the standpoint of naturalistic, historic, scientific, and recreational values,” Roosevelt described the geologic formation of the valley from the Teton fault and glaciers, the geologic relationship between mountain and valley, the wildlife of the region, and the historic representation of early life on the frontier.³⁴⁶ If any of these reasons had been included in the original proclamation Roosevelt might have saved much hassle and would have made Wyoming’s case much harder in court, for they are all valid and justifiable specific reasons for employing the Antiquities Act.

Roosevelt also defended the Jackson Hole monument and the Antiquities Act. He reiterated that ample executive precedent existed with eighty-two monuments already declared by presidents of both parties and seven monuments larger than Jackson Hole. FDR also emphasized offers of compromise referring to Secretary Ickes’ policy of keeping existing and valid grazing permits on the monument during the lifetime of current holders and members of their immediate families and his support of finding a

³⁴² The Committee took testimony in Jackson on August 17, 1943 and over 650 people showed up to attack the monument. Of course that is not to say local supporters did not exist and indeed many of the committee members “were impressed with the potential of Jackson Hole as an extraordinary national park.” Righter, pages 118-119.

³⁴³ Associated Press, “Rebuffs President on Jackson Hole,” *New York Times*, December 12, 1943, page 18.

³⁴⁴ Righter, page 119.

³⁴⁵ The bill received unanimous consent in the Senate several days later.

³⁴⁶ Veto Message for HR 2241 as reproduced in Trussell, C.P., “President Vetoes Jackson Hole Bill,” *New York Times*, December 30, 1944, page 1.

method to offset the loss of local taxes with federal money from one source or another.³⁴⁷ The *New York Times* praised the veto message as “a statement of policy which might serve as a model for future controversies of this sort.”³⁴⁸

The resentment over Jackson Hole dwindled as time passed. In the immediate period, Franklin Roosevelt’s death would shift public attention to mourning. As a result Harold Ickes would no longer rail against Republicans and fight for policies to protect the nation’s natural resources as Secretary. FDR’s successor, Harry Truman of Missouri, was seen to be more favorable to western interests when it came time to compromise.³⁴⁹ The climate calmed, but the resolving of Jackson Hole would take five more years.

Though Barrett continued unsuccessfully with his rescission bill and O’Mahoney successfully with his funding prohibition amendment to the annual Interior Appropriations Bill,³⁵⁰ Thomas Dewey’s 1948 presidential campaign was the final hurrah for the monument opponents. Dewey made a lot of friends on a two-day visit to Wyoming on a self-described “non-political vacation” in July 1947 with his interest in learning about the monument.³⁵¹ However, Dewey did not defeat Truman, and another four years of a Democrat in the White House signaled that compromise was necessary as soon as possible. After holding out for six additional years after the 1943 proclamation to make sure their land would be properly included into a national monument or national park, a decision that raised their total investment to over two million dollars, the Rockefeller family finally handed the property deeds to their 33,500 acres of Jackson Hole in December 1949.³⁵² Once the Rockefellers felt safe about their investment, the park was almost certainly guaranteed. Interestingly, Senator O’Mahoney was now asking President Truman if he wished to create a presidential retreat in the “gorgeous area.”³⁵³

A compromise bill incorporating the national monument into the national park began to work its way through Capitol Hill in 1950. With Senator O’Mahoney, now chairman of the Senate Committee on Interior and Insular Affairs, on board the bill had bright prospects.³⁵⁴ Passage in both chambers was achieved and Truman signed the bill on September 14. The provisions satisfied many of the problems previously held with the monument. Some six thousand acres were transferred to the Forest Service or the National Elk Refuge, between the national park and the town of Jackson, the State of Wyoming was given significant input into management of the elk herd allowing limited hunting, Ickes’ grazing proposal was made law, and a program was inaugurated to compensate Teton County for losses against the tax base for the next twenty five years.³⁵⁵ However, there was one important amendment from the Wyoming congressional

³⁴⁷ Veto Message.

³⁴⁸ *New York Times*, “Jackson Hole,” December 30, 1944, page 10.

³⁴⁹ Righter, page 123.

³⁵⁰ United Press, “Jackson Hole Bill Urged,” *New York Times*, April 16, 1949, page 10.

³⁵¹ Egan, Leo, “Dewey Turns Home After 3-Week Trip,” *New York Times*, July 26, 1947, page 2.

³⁵² Associated Press, “33,562 Acres at Jackson Hole Given to U.S. by Rockefellers,” *New York Times*, December 17, 1949, page 19.

³⁵³ Associated Press, “33,562 Acres,” December 17, 1949.

³⁵⁴ Associated Press, “Jackson Hole Bill Voted,” *New York Times*, July 4, 1950, page 10.

³⁵⁵ Special to The *New York Times*, “Truman Signs Bill on New Teton Park,” *New York Times*, September 15, 1950, page 20.

delegation stating, “no further extension or establishment of national parks or monuments in Wyoming may be undertaken except by express authorization of the Congress.”³⁵⁶

After years of battles, a complete national park was now law. After a short period of time, the benefits of a full park became evident to almost all. For preservationists the park was expanded, conservationists kept grazing and hunting rights, and the people of northwestern Wyoming had a hot economic commodity. By 1959 visitation was expected to reach 1.5 million, providing a customer base for all sorts of business ventures based in Jackson.³⁵⁷ Though grazing is important in the region, business from park visitation trumped it almost immediately. Grand Teton and Yellowstone are international symbols of Wyoming, from which it has benefited tremendously.

For the Antiquities Act, the victory was measured. FDR’s proclamation had been upheld in federal court, and he had quelled the anger in Congress after vetoing their expression of anger. However, the loss of the state of Wyoming for the Antiquities Act was sizable and symbolic. The public lands of an entire state, vast and lightly populated, was removed from its protections. Furthermore, Wyoming, home of the first national monument and first use of Theodore Roosevelt’s expansive interpretation, became the first state that wanted to have no part of the authority after forty-six years.

Decline of Antiquities Act and Prelude to 1978

Over time a block of Republicans and western Democrats threatened retaliation if a president used the Act against their wishes. And presidents, newly aware of the political problems created with the Antiquities Act thanks to the Jackson Hole controversy, dramatically slowed the pace of declarations to a crawl. Presidents Truman, Eisenhower, Kennedy, Johnson, Nixon, and Ford, rarely used the power and in doing so created generally small monuments. Yet they still sometimes found themselves in controversy.

Twice in the last days and hours of their administrations, presidents of this period used the Antiquities Act resulting in unpleasant situations for the monuments. On January 18, 1961 President Eisenhower declared Chesapeake and Ohio Canal National Monument along the Potomac River in Maryland pleasing a grassroots campaign lead by Supreme Court Justice William O. Douglas. However, the monument angered Democratic Representative Wayne Aspinall of Colorado, the powerful chairman of the House Interior and Insular Affairs Committee, and he prevented any appropriations for the park for the rest of the decade.³⁵⁸ Eight years later Secretary of the Interior Stewart Udall recommended that President Johnson declare nearly 7.5 million acres of monuments in Arizona, Utah, and Alaska. With congressional pressure, again from Aspinall, and the concurrent confirmation of Alaska Governor Walter Hickel to be the new Nixon Interior Secretary, Johnson greatly angered Udall and only declared 384,500 acres of monuments, or just five percent of the proposal, in the three states.³⁵⁹

³⁵⁶ Act of September 14, 1950, Grand Teton National Park, Wyoming, Public Law 81-787; Righter, p 140.

³⁵⁷ Goodman, Jack, “Teton Park’s Anniversary,” *New York Times*, June 14, 1959.

³⁵⁸ Rothman, pages 224-225.

³⁵⁹ Johnson created Marble Canyon National Monument (NM) in Arizona between Glen Canyon Dam and Grand Canyon National Park (26,000 acres) and added to Arches (49,000 acres) and Capitol Reef (215,000 acres) NMs in Utah and Katmai NM in Alaska (94,500 acres). Udall wished him to declare Gates of the Arctic NM (4.1 million acres) and Mount McKinley NM (2.2 million acres) adjacent to the existing national park, and a Sonoran Desert NM (911,700 acres) in southern Arizona long the Mexican border. Reportedly Udall was so furious that he told Johnson “You have my resignation right now.” Special to The New York

As a statute the Antiquities Act seemed old, tired, and obsolete. The political frustration for the presidents became greater than the benefit of protected objects on public land. Public policy and attention had shifted to environmental concerns about the state of the entire American landscape and its air and water. Impressive federal steps were taken including the Wilderness Act, the Land and Water Conservation Fund Act, the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, and the Endangered Species Act during the 1960s and early 1970s. However the Antiquities Act received two somewhat surprising explicit measures of approval from the Supreme Court and the Congress in 1976 that paved the way for new expansive use in the TR tradition by Presidents Carter and Clinton.

In 1952 President Truman added a small section of land called Devils Hole in Nevada to Death Valley National Monument where a rare species of desert fish lived in a subterranean pool, a remnant of a system of prehistoric lakes.³⁶⁰ The nearby landowners, the Cappaerts, began to pump groundwater for their 12,000-acre ranch from the vicinity in 1968. As the underground aquifers were related, when the Cappaerts pumped water from wells outside of the monument boundary, it had an adverse effect on the water level of the pool and the reproductive ability of the species of fish, both mentioned in the proclamation. The Park Service grew concerned and protested the extension of the Cappaerts' water permit by the state. The government lost the protest and filed a suit in federal court that made its way on appeal of the Cappaerts to the Supreme Court.³⁶¹

In the unanimous decision, Chief Justice Warren Burger upheld NPS's victory in the lower courts. Heavily using Truman's proclamation, a statement of deference to executive discretion and authority, Burger ruled that because the proclamation specifically stated the pool as a scientific interest to be protected, the water right connected to the pool and reserved by the government in the action "was thus explicit, not implied." Therefore the government has a significant right to the water in the Devils Hole pool to protect the scientific interests on the land under the Antiquities Act and the National Park Service Act of 1916.³⁶² The government water right is not complete, but shall be determining in that it "curtail[s] pumping" to the Cappaerts "only to the extent necessary to preserve an adequate water level at Devils Hole."³⁶³

As Cameron and Wyoming had before them, the Cappaerts attacked the legitimacy of Truman's proclamation in regard to the provisions of the Antiquities Act. They claimed the pool did not qualify under the law because the law only allows the President to "reserve federal lands only to protect archeological sites." In a manner similar to the way the Court handled the charge in *Cameron*, Burger ruled, "the language of the Act which authorizes the President to proclaim as national monuments 'historic landmarks, historic and prehistoric structures, and other objects of historic and scientific

Times, "Johnson Delays Assigning 7.5 Million Acres to Parks," *New York Times*, January 19, 1969, p 1; Blair, William M., "Johnson Rebuffs Udall on Plan To Set Aside Vast park Acreage," *New York Times*, January 21, 1969, p 1.

³⁶⁰ Presidential Proclamation 2961, Devils Hole National Monument, January 17, 1952, Harry Truman.

³⁶¹ *Cappaert v. United States*, 426 U.S. 128 (1976), pages 134-136.

³⁶² National Park Service Organic Act, August 25, 1916, 16 U.S.C. 1. This act instructs that "the fundamental purpose of the said parks, monuments, and reservations...is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

³⁶³ *Cappaert*, page 142.

interest...’ is not so limited. The pool in Devils Hole and its rare inhabitants are ‘objects of historic and scientific interest.’”³⁶⁴

The importance of the opinion is similar to that of *Cameron*. The Supreme Court held that the President had the discretion to protect objects of historic and scientific interest on federal land as national monuments. His judgment on that discretion should be upheld by courts, especially when the president explains the nature of the interest in the proclamation. The Court also readily accepted significant parts of the broad interpretation of the act as begun by Theodore Roosevelt. The scientific interest clause is individual in its nature, and is not necessarily connected to or a part of the other archeological and historical clauses. By clarifying and declaring that an important pool of water and rare species of fish inhabitant within, are scientific interests, the Supreme Court widely extended the legal basis and possibility of the Antiquities Act and the public land authority of the president apart from the Congress. Resting near Sagamore Hill, TR must have been thoroughly pleased with the ruling, its confirmation of his interpretation, and the ramifications it had for future presidents.

At the same time of the *Cappaert* ruling, Congress had an ample opportunity to repeal, amend, or reform the Antiquities Act. However it did not. It left the statute in place when it passed the Federal Land Policy and Management Act of 1976 (FLPMA).³⁶⁵ One of the stated policies of this extensive legislation was that “the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action.”³⁶⁶ Congress clearly intended to return delegated public land management to its jurisdiction as specified in the Constitution.³⁶⁷

However, FLPMA left the Antiquities Act untouched. When the legislation listed laws and authorities to be repealed,³⁶⁸ Congress, in the words of one disappointed commentator, “mysteriously failed to restrict” the Act’s monument powers.³⁶⁹ Most rationales are speculative. Perhaps Congress felt that the law was still valid because of its important archeological protections.³⁷⁰ Maybe Congress found it harmless because the powers were hardly used anymore.³⁷¹ Lastly, it may have survived because its most important congressional opponent, Wayne Aspinall, was not reelected in 1972.³⁷²

In any event Congress did not take the opportunity to repeal or amend the act as was suggested it could do in *Wyoming v. Franke*. In resolving the matter of parklands and other lands in Alaska by the end of the decade, the Antiquities Act would play an enormous and controversial role, one not possible if the Supreme Court or Congress had ruled or acted differently in 1976.

³⁶⁴ *Cappaert*, page 143.

³⁶⁵ Federal Land Policy and Management Act of 1976, Public Law 94-579, October 21, 1976.

³⁶⁶ FLPMA Section 102 (a4); 43 U.S.C. 1701.

³⁶⁷ Johanssen, Richard, “Public Land Withdrawal Policy and the Antiquities Act,” *Washington Law Review*, Vol. 56, 1980-1981, page 442. U.S. Constitution, Art. IV, Sec. 3.

³⁶⁸ In total parts or all of twenty-nine statutes were repealed as well as the implied powers the Supreme Court had articulated in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). FLPMA Section 704 (a).

³⁶⁹ Johanssen, page 457.

³⁷⁰ Three years later in 1979 Congress passed the Archeological Resources Protection Act “with an itemized definition of archeological resources.” 16 U.S.C. 470aa-470mm; McLaughlin, page 91.

³⁷¹ As stated above President Johnson only declared 5% of the Udall monument proposal in 1969, and President Nixon never used the authority during his administration.

³⁷² Biographical Directory of the United States Congress: <http://bioguide.congress.gov>.

Alaskan Deadline Revives Roosevelt's Interpretation

Chapter 5

At the end of November 1978, President Jimmy Carter faced a major decision over the future of federal lands in Alaska. Section 17 (d)(2) of the Alaska Native Claims Settlement Act of 1971 (ANCSA) had established a seven-year timetable for Congress and the President to complete legislation to reserve millions acres of parkland for the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems.³⁷³ That deadline would pass on December 18, and if no action was taken, the land would revert to the public domain for transmittal to the State of Alaska or sale to or development by private interests. Several attempts during the last two years to complete legislation had stalled in the Senate thanks to filibusters from Senator Mike Gravel, a fellow Democrat from Alaska. A little over two weeks had passed since Interior Secretary Cecil Andrus had reserved 110 million acres, or thirty percent of the state, from development for three years as allowed under the provisions of the Federal Land Policy and Management Act of 1976 (FLPMA).³⁷⁴ Could he and the nation afford to not have the Alaska parkland protected permanently, and what could he do to fully reserve it if Congress had not acted by the deadline?

Carter believed he could not lose the chance to protect the parkland. As a result, he set out on the most ambitious use of the Antiquities Act in history. On December 1, 1978 the President declared fifteen national monuments in Alaska totaling roughly 56 million acres, obviously unprecedented by any measure.³⁷⁵ Remembering Theodore Roosevelt's influence on the Act, one author wrote, "it is doubtful that even he of the bully pulpit could have imagined this sweeping an exercise of presidential power."³⁷⁶ The assessment is likely true. Carter's action returned the Antiquities Act to the forefront of national conservation policy and had an enormous effect on protection of federal lands.

To further understand the circumstances and the importance of Carter's use of the Act, it is worth examining the political history of Alaskan public lands. This is necessary because it is highly doubtful that President Carter would have used the Antiquities Act at all anywhere in the nation if it were not for the situation in Alaska. Carter forced the issue on Congress, and made the historic passage of the Alaska National Interest Lands Conservation Act (ANILCA) in 1980.

Alaskan Statehood and ANCSA

When Secretary of State William Seward negotiated the purchase of the Alaskan territory from Czarist Russia in 1867, he had little idea what was there, except that it was strategically important in the Pacific. Making light of what little was known about Alaska, or "great land" in Aleut, Horace Greeley lampooned in the *New York Tribune*

³⁷³ 43 U.S.C. 1601-1642. Public Law 92-203.

³⁷⁴ Battaile, Janet, "Acreage in Alaska Is Set Aside by U.S.," *New York Times*, November 17, 1978, p A16.

³⁷⁵ The national monuments are Admiralty Island, Aniakchak, Bering Land Bridge, Cape Krusenstern, Denali, Gates of the Arctic, Kenai Fjords, Kobuk Valley, Lake Clark, Misty Fjords, Noatak, Wrangell-St. Elias, and Yukon-Charley Rivers.

³⁷⁶ Borneman, Walter R., Alaska: Saga of a Bold Land, Harper Collins Publishers, New York, 2003, p 504.

that the territory ought to be called “Seward’s Icebox,” “Icebergia,” or “Walrussia.” The final price was seven million dollars, a hefty sum. However, when spread out the cost was only two cents per acre. Once investigations of Alaska were completed, it was clear that this treaty was no folly indeed.³⁷⁷

Despite a few gold rushes, it was not until the Second World War that it seemed Alaska could become a state. With the Japanese attacking the Aleutians, as well as Hawaii, the threat of a greater invasion of North America grew. The federal government began spending significant amounts of money to take full advantage of Alaska’s strategic location and plentiful natural resources.

With the influx of soldiers, followed by their families, and those hopeful to gain profit, the territory’s population exploded. By 1950 the population was about 130,000. Fairbanks’ population had doubled in the 1940s, and Anchorage’s had risen sixfold.³⁷⁸

The growing Soviet threat only accelerated defense, transportation, and other spending in Alaska. Soon one out of six residents was in the military. Population continued to grow; by 1960 there were about 226,000 people in Alaska. Such growth made the possibility of statehood a reality.³⁷⁹

When Alaska became the 49th state in 1959, the accession bill mandated that roughly 103,000,000 acres of land, more than a quarter of the state’s area, would be distributed from the federal government to the state. However, Alaska would select its portion over the next twenty-five years, rather than see it divided in the traditional part per township formula. State leaders in Juneau could then dispose of or keep the land as they saw fit.³⁸⁰

Amidst this process remained the claims of Alaska’s native population. From the start of American involvement in Alaska, there had been confusion as to the status of land on which Alaska Natives lived. After the 1930s several reservations were declared, but there was no clear definition of other claims or procedure for resolving competing claims between the State and the Natives.³⁸¹

Controversy was inevitable. To the Alaska Natives their way of life was a harmonious “interrelated web of people, land, water, wildlife, and the spirit.” However, to the state and those for whom it selected the land, the issue was development, profit, and private property. As had happened in the past century on the Great Plains, these ways of life could not peacefully coexist for a long period of time. Though Alaskan Natives formed organizations to make their cause known, Alaskan politicians had little sympathy. Senator Ernest Gruening, one of the architects of statehood, labeled the claims as based upon “dubious grounds of aboriginal rights.” Alaska’s sole congressman, Ralph Rivers, asked, “What would they do with it?” and answered, “They wouldn’t use it. It would just lie there.” However the Alaskan Natives found sympathy with Interior Secretary Stewart Udall, who imposed a freeze on transmitting federal land to Alaska in 1966.³⁸²

The freeze lasted into the Nixon administration. Though Nixon chose Alaska Governor Walter Hickel, who was not necessarily favorable to the Native claims, for

³⁷⁷ Borneman, pages 106-112.

³⁷⁸ Borneman, page 402

³⁷⁹ Borneman, pages 393, 402.

³⁸⁰ Borneman, page 403.

³⁸¹ Borneman, page 461.

³⁸² Borneman, pages 462-466.

Interior, he had to bargain away revoking the freeze in order to get him confirmed by the Democratic-controlled Senate. Realizing that with the claims unsettled, Alaska would neither receive its choice of federal land as allowed by the Statehood Act nor federal permission to build the Trans-Alaska Pipeline,³⁸³ Alaskan politicians sat down to work out a deal. The result, ANCSA, made its way through Congress and was signed by President Nixon on December 18, 1971.³⁸⁴

In return for ending all claims for land in the state, the Alaskan Natives were given title to 40 million acres and a settlement of over \$960 million. Not everyone was satisfied with the provisions, but as with any compromise, it was the best that could be done. With the native claims settled, Alaska could move forward in construction of the pipeline from Prudhoe Bay to Valdez, and the state could proceed again with selecting its share of federal land. But it was not yet over in the least.

The Road to 1978

As Congress neared completion of ANCSA, environmentalists feared the worst. If the bill became the final resolution of Alaskan land matters, there would be no chance of a detailed process for preserving the state's abundant scenic land. In a quick act of coordination, environmentalist groups launched a last-minute campaign to amend the bill allowing for land separate from the 40 million acres for the Alaskan Natives and the remaining allotment of the 103 million acres to be chosen by Alaska to be protected in federal parklands. In a letter to President Nixon, twelve conservation groups called on the administration to protect these so-called national interest lands in ANSCA. Nowhere in the bill, they wrote, was "the public interest accommodated – the interest of the 200 million Americans who own most of Alaska."³⁸⁵

When the House passed its version of ANSCA on October 20, 1971 no conservation provision was included. In fact, it rejected a bipartisan conservation amendment offered by Representatives Morris Udall, Democrat of Arizona, and John Saylor, Republican of Pennsylvania.³⁸⁶ Environmentalists and their allies were not pleased; the *New York Times* called the vote "irresponsible" and "reckless," and said it showed the "dismal proof of the power within both parties of the oil lobbyists."³⁸⁷

Fortunately for the conservationists, they had a friend in Senator Henry Jackson, Democrat of Washington. Jackson, the chairman of the Senate Interior Committee inserted the conservation language and forced its approval at conference to reconcile the

³⁸³ Special to the *New York Times*, "Morton, in Alaska, Studies Land Claims and Pipeline," *New York Times*, June 27, 1971, page 12.

³⁸⁴ One of the major proponents of the bill was Representative Nick Begich, a freshman Democrat. Begich was well liked by his peers and the Democratic leadership, and to help him win reelection in 1972 House Majority Leader Hale Boggs of Louisiana flew to Alaska with him to campaign. Tragedy struck when the small plane carrying the two congressmen went down in bad weather in mountains near the Prince William Sound coastline southeast on Anchorage. Borneman, page 470; Farrell, John A., Tip O'Neill and the Democratic Century, Little, Brown and Company, Boston, 2001, pages 308-311.

³⁸⁵ Blair, William M., "Conservationists See Alaska 'Raid,'" *New York Times*, October 3, 1971.

³⁸⁶ Blair, William M., "House Vote Aids Alaskan Natives," *New York Times*, October 21, 1971, page 1.

³⁸⁷ *New York Times*, "Test for the Senate," October 25, 1971, page 32.

House and Senate versions.³⁸⁸ In time this amendment would create as much controversy as ANCSA had tried to solve.³⁸⁹

The environmentalists received ANCSA Section 17, D-2 from Jackson and House ally Udall. This amendment established a process for the Secretary of the Interior to withdraw land from which to eventually include up to eighty million acres into various parklands. The Secretary had nine months from passage, December 18, 1971, to order the withdrawal. At the end of two years from the date of passage, the secretary would recommend to Congress which land should become parkland. After receiving the recommendation, Congress would have five years to pass legislation creating and designating national parks, national forests, wildlife refuges, and other protected areas. If the secretary withdrew land that was desired by either the State of Alaska, the Alaska Natives, or both, the Secretary would have priority and the claimant(s) would be offered unreserved land elsewhere. These deadlines would be enforced by a provision that all land unreserved by the Secretary within two years of passage and all land unreserved by Congress after seven years of passage would revert back to the public domain to be claimed by Alaska, the Alaskan Natives, or others.³⁹⁰

Meanwhile clause D-1 gave the Secretary ninety days to study and “review the public lands in Alaska and determine whether any portion of these lands should be withdrawn...to insure that the public interest in these lands is properly protected.” The Secretary shall then reserve and classify these “public interest” lands as to how they would be distributed or protected before the time expires.³⁹¹ On March 15, 1972, just before the deadline, Interior Secretary Rogers Morton reserved and classified 274 million acres of land, with the maximum of eighty million acres going to future parklands. Though this move ended the 1966 land freeze, and reserved 1.2 million acres for the Trans-Alaska Pipeline, Alaska’s Governor was still upset at the slowness of the turnover of federal land to the state, saying Alaska had “been grievously damaged through this ill-advised action.”³⁹² A few days before the nine-month deadline to withdraw D-2 lands, Morton reserved 78,500,000 acres for consideration as parkland.³⁹³ He would have one year and three months to make a recommendation to Congress on what should be done to that land. By that deadline the Secretary announced he recommended the addition of over 83 million acres to the park system.³⁹⁴

Congressional debate over Alaskan parklands did not heat up until after the election of 1976, ushering in a new session and a new Democratic president. It would be the last session to produce a bill over Alaska lands under the deadline system.

³⁸⁸ Blair, William M., “Senate Sends Alaska Native Land Bill to Conference,” *New York Times*, November 2, 1971, page 26.

³⁸⁹ Borneman, page 470-472.

³⁹⁰ ANCSA, Section 17 (d)(2), 43 U.S.C. 1616.

³⁹¹ ANCSA, Section 17 (d)(1), 43 U.S.C. 1616.

³⁹² Blair, William M., “Morton Releases Land in Alaska,” *New York Times*, March 16, 1972, page 33.

³⁹³ Special to the *New York Times*, “Alaska Land-Use Panel Studies Disposition of 190 Million Acres,” *New York Times*, September 17, 1972.

³⁹⁴ Rensberger, Boyce, “Protection of Alaska’s Wilderness New Priority of Conservationists,” *New York Times*, October 31, 1976, page 1. As soon as the ANCSA deadlines were kept one by one, it was realized that the eighty million acre limit only counted for the nine-month withdraw deadline. The Secretary could recommend and the Congress could enact any amount of Alaska parklands, assuming it was all completed within seven years of ANCSA’s passage, December 18, 1978.

Conservationists believed their chances for a bill more to their liking improved with Jimmy Carter in the White House.

Eventually three lines of legislation were drafted. House Interior chairman Udall drafted a conservationist bill totaling 114 million acres. The Alaskan delegation led by Senator Ted Stevens and Representative Don Young, both Republicans, announced a limited bill that did not reserve any land from the possibility of development until the year 2000, twenty-two years into the future. These plans were introduced upon the opening of the session in the early 1977.³⁹⁵ Interior Secretary Cecil Andrus staked out a moderate position while the two sides aligned in on Capitol Hill and released his recommendation in September that included nearly 93 million acres.³⁹⁶ With this proposal now becoming the minimum “bottom line” level of parkland to be acceptable to the White House and congressional Democrats,³⁹⁷ the Alaska delegation had little chance of their bill becoming law. Obstruction appeared to be the only way to prevent the enactment of either the Andrus or Udall measures.³⁹⁸

Everyone expected confrontation. For any bill to reach President Carter’s desk, it would have to survive ordeals of hearings, amendments, debate delays, and obstruction in two congressional Interior committees and on the floors of both chambers. Adding to the pressure, all work on the matter had to be completed by December 18, 1978 in order for national interest lands to be permanently reserved as parklands under ANCSA.³⁹⁹ Compromise became the name of the game. Udall trimmed his bill down to 100 million acres in his House committee before sending it with approval to the House floor.⁴⁰⁰ On the floor, Udall defeated all key weakening amendments.⁴⁰¹ In the larger picture, conservationists seemed to be winning more of the battles than the Alaskan interests.

To many in Alaska, the Alaska Coalition, the alliance of 17 prominent national conservation organizations, and their allies in Congress, were attempting a massive land program hostile to them as citizens and property owners and as dutiful claimants to the 103 million acres promised to them in the 1959 statehood act. With every discovery of oil, natural gas, gold, or other minerals, calls for development understandably went out.

³⁹⁵ Rensberger, Boyce, “Alaska Land Battle to Open in Congress,” *New York Times*, April 13, 1977, page 14; King, Seth S., “House Panel Weighs Alaska Parks Plan,” *New York Times*, September 16, 1977, page 15. The Alaska proposal did place 25 million acres in a federal-state management trust that could permit hunting, logging, mining, and other development.

³⁹⁶ Associated Press, “U.S. to Seek 92 Million Alaska Acres,” *New York Times*, September 8, 1977, page 20. Besides the size difference from the Udall proposal, the recommendation had several different designations in particular areas more favorable to hunters, loggers, and developers in the 18-million-acre Tongass National Forest in southeastern Alaska.

³⁹⁷ Hill, Gladwin, “Andrus, in Alaska Visit, Rules Out Trims in Land Bill,” *New York Times*, July 19, 1978, p A8.

³⁹⁸ Mohr, Charles, “Struggle Over Alaska Lands Bill Opens With Skirmishes on Panel,” *New York Times*, March 14, 1978, page 18.

³⁹⁹ Mohr, “Struggle Over Alaska Lands Bill.”

⁴⁰⁰ Mohr, Charles, “Bill Protecting Vast Alaska Areas Is Completed by House Committee,” *New York Times*, March 16, 1978, page A18; Mohr, Charles, “Environment Demography: Congress Is Pondering the Future of Wild Alaska,” *New York Times*, March 26, 1978, page E18. Udall had originally wanted to make 147 million acres, more than 38 percent of the state, of “instant wilderness,” that would include his 115 million acres and the rest coming from the 48.2 million acres of existing Alaska parkland. However, the committee halved the wilderness acreage to just over 74 million acres.

⁴⁰¹ Russell, Mary, “House Refuses to Weaken Alaska Wilderness Bill,” *Washington Post*, May 19, 1978, page A26.

From time to time the federal government obliged as in the case of the Trans-Alaska Pipeline and many other public land management decisions.

When the dispersing of land stopped in 1966, Alaskans and their politicians felt like an unequal member of the Union. By stopping the State's land selection process for the Alaskan Native claims and then for the national interest lands, it seemed as everyone except themselves were getting their first choice of the enormous holding of federal land. It was not the fair process they expected. Tom Snapp, an Alaskan magazine editor, said in an interview, "We were supposed to be taken in as a state on an equal basis, but we're not going to be allowed to develop the way other states develop their resources...it's renegeing on the promises of statehood." Former Republican Governor and Interior Secretary Walter Hickel explained his take on the anger in the state saying, "You (federal government outsiders and conservationists) come up here two weeks a year and tell us how to live but you won't come up here and live and make it work."⁴⁰² Besides the climate, parts of Alaska were facing significant economic hardship. In Fairbanks the completion of construction on the pipeline and the end of the flow of federal funding caused despair.⁴⁰³

The Alaskan geographical and public land situation had much to do with the anger of its citizens towards the D-2 process. In a state of 365 million acres, sixteen percent of the entire land area of the United States, less than one third of one percent was privately owned as of 1978.⁴⁰⁴ As D-2 legislation stalled in Congress, a leader of a citizens group stated why Alaskans were upset and what Alaskans wanted: "Land, a piece of the good earth, a stake in the country, real property."⁴⁰⁵ Before the 1966 freeze on federal to state land transfers was lifted in March 1972, Alaska had claimed 19 million acres, only two-fifths of its allotment.⁴⁰⁶ Alaskan Natives, meanwhile, were having difficulty establishing the corporations required under ANCSA to manage their lands.⁴⁰⁷ The federal government was having a terrible time matching these claims to actual public lands.⁴⁰⁸ It is no wonder that Alaskans were upset that the public land in their state was not being allotted at the rate or in the manner that they wished or expected after statehood in 1959. There is a truthful undercurrent to the perhaps exaggerated charge by 1978 Democratic gubernatorial primary candidate Ed Mendes that the D-2 debate is "the most colonialistic attitude about a sovereign state I have ever seen."⁴⁰⁹

⁴⁰² Kovach, Bill, "Bill on Future of Federal Lands in Alaska Generates Bitter and Emotional Controversy," *New York Times*, June 19, 1978, page B4.

⁴⁰³ Richards, Bill, "A Rough Ride on an Economic Roller Coaster," *Washington Post*, May 1, 1978, p A1.

⁴⁰⁴ Kovach, "Bill on Future of Federal Lands in Alaska." That figure, 1.2 million acres, equates to about the size of Delaware.

⁴⁰⁵ Special to The New York Times, "Alaskans Rally in Campaign for Private Land Ownership," *New York Times*, November 27, 1978, page A16.

⁴⁰⁶ Blair, "Senate Sends Alaska Native Land Bill to Conference." Among the areas that the state had selected before 1966 was land around Prudhoe Bay on the North Slope. This oil-rich area produced 900 million dollars in state revenue by the passage of ANCSA in December 1971. This acreage corresponds roughly to the size of Maine.

⁴⁰⁷ Special to The New York Times, "Land Selection Problems Confront Alaskan Natives," *New York Times*, December 24, 1972, page 22.

⁴⁰⁸ Kovach, "Bill on Future." The Alaskan Native areas roughly correspond to the size of Pennsylvania, New Jersey, and Maryland or the two Virginias.

⁴⁰⁹ Kovach, "Bill on Future."

The fact that nobody really had a firm grasp over what was actually in Alaska or how it was geographically configured. Even in the debate twenty years later over allowing drilling in the Arctic National Wildlife Refuge (ANWR), there are few firm conclusions about what resources are actually present below the surface and how accessible they are, about how damaging drilling would be to the environment and wildlife protected within ANWR. The development figures and possibilities, or lack thereof, depending on viewpoint, were just as unknown. Former Governor Hickel, though attacking the perceived overstated claims of environmentalists, also was including development possibilities, when he said, “we don’t even know what’s there.”⁴¹⁰ However, when they were known the determined dollar values were substantial; one company for example valued one mineral deposit in the billions of dollars.⁴¹¹

Providing an accurate cartographic picture of the state was very difficult. A BLM official in charge of deciding Alaskan Native claims settlement estimated in 1978 that it would take another ten years to have an accurate picture of the state’s townships.⁴¹² When the search was undertaken by the military for the missing plane of campaigning Democratic Representatives Nicholas Begich of Alaska and Majority Leader Hale Boggs of Louisiana in 1972, the imaging methods used were so advanced that maps were redrawn to reflect the new information.⁴¹³

However the Alaskans, under the contemporary political arrangement in Washington and under federal law, were destined to lose their fight. When they perceived the rest of the people and representatives of the other forty-nine states to have envious eyes on Alaskan lands, they were correct. The conservationist alliance was strongly positioned politically and legally to save what the *New York Times* called the American people’s “precious inheritance in Alaska, the largest undisturbed wilderness left on earth.”⁴¹⁴ The House passed a strongly conservationist bill in the spring and the Carter administration was well on the record in support of the bill or of using various executive authorities to ensure broad conservation in Alaska. What many in Alaska did not understand was that the decision was going to be made in Washington and it was going to be for conservation. It was up to the federal government to decide the future of Alaskan parkland, because it owned the land and made the laws governing them, and had done so since it had purchased the land from Russia. Alaska was second in line beside the Alaskan Natives because that was the way Washington had decided it. It was a federal decision to be made at the federal level.

Republican Senator Ted Stevens understood the situation. Stevens was a Senate “insider” who “did his homework” and “won the respect” of his fellow Senators, and had risen to the post of Minority Whip in 1977. During the summer of 1978 as the Senate debated the bill passed by the House, Stevens changed positions from filibustering to engaging the process and his colleagues for the best available compromise. On the other hand, Senator Mike Gravel did not seem to understand. While Stevens worked hard with Interior Committee chairman Henry Jackson, Secretary Andrus, and other members of

⁴¹⁰ Kovach, “Bill on Future.”

⁴¹¹ Hill, Gladwin, “The High Stakes in Alaska’s Land Dispute,” *New York Times*, August 5, 1978, page 22.

⁴¹² Kovach, “Bill on Future”

⁴¹³ Farrell, *Tip O’Neill and the Democratic Century*, page 310.

⁴¹⁴ *New York Times*, “Protecting Alaska’s Crown Jewels,” November 23, 1978, page A22.

both chambers, Gravel missed meetings and continued to filibuster.⁴¹⁵ He irritated almost everyone except constituents and developers back home in Alaska, certainly good for himself, but nobody else.⁴¹⁶ However, Gravel, decided to end his filibuster on October 11, just two days before the end of the session. Gravel responded after a meeting with Senators Jackson, Stevens, and John Durkin, a New Hampshire Democrat, and Representatives Udall and John Sieberling of Ohio.⁴¹⁷

However, on the next day, October 12, Gravel introduced a new set of demands to end his filibuster, surprising Stevens, Jackson, Udall, and the others. Working late into the night, a compromise was handed to Gravel, but he rejected on the afternoon of the 13th. Udall raced back to the House and passed a one-year D-2 extension. That night and into the morning of the 14th, Stevens, Jackson, and Durkin tried to pass the extension. Gravel filibustered the attempt. To the great consternation of the senators, Gravel would not stop and Majority Leader Robert Byrd of West Virginia removed the extension from consideration. The Alaska land bill was dead for 1978.⁴¹⁸

In Steps Carter

With the bill's failure in the Senate, everyone looked to what President Carter would do next. Even on the floor of the Senate, in the early hours of October 14, John Durkin predicted that Carter would use the Antiquities Act.⁴¹⁹ Carter had three land reservation options: use FLPMA powers good for three years, the provisions of the Wilderness Act to study all roadless areas in the United States over 5,000 acres, or the Antiquities Act.⁴²⁰ Secretary Andrus took the first step to combat the December 18 deadline on November 16 by reserving for three years one hundred million acres of land, roughly the size of the state of California. Making the move Andrus announced "this action is aimed at protecting the integrity of Alaska land because it assures that there will be no questionable mining claims or other complications until final decisions are made."⁴²¹

Immediately afterward, Carter was urged to make a move to permanently protect the Alaska lands. On November 21 Senator William Proxmire, a Wisconsin Democrat, called on the president to "invoke the strongest possible existing authorities to preserve America's last frontier in Alaska until Congress determines the future disposition of this vast land and wildlife resource."⁴²² Two days later the *New York Times* editorialized, "President Carter can use his power to create national monuments to protect at least that

⁴¹⁵ Lemann, Nicholas, "The Great Alaska Feud: How the massive lands bill is caught between two senator's hatred for each other," *Washington Post*, September 30, 1979, page B1.

⁴¹⁶ Dewar, Helen, "Gravel's Stand Against a Land Bill Could Help Him," *Washington Post*, August 3, 1980, page A5. Nicholas Lemann presents several reasons for Gravel's obstruction including "tormenting" Stevens, local pressure from oil and mining interests, and his (unsuccessful) 1980 reelection campaign.

⁴¹⁷ Lemann, "The Great Alaska Feud."

⁴¹⁸ Lemann, "The Great Alaska Feud;" Bonner, Alice, "Gravel Accused of Sabotaging the Alaska Lands Bill," *Washington Post*, October 19, 1978, page A13.

⁴¹⁹ Lemann, "The Great Alaska Feud."

⁴²⁰ Bonner, Alice, "Andrus Pledges to Protect Alaska Land," *Washington Post*, October 26, 1978, p A14.

⁴²¹ Hornblower, Margot, "U.S. Moves to Protect Alaska Land," *Washington Post*, November 17, 1978, p A1; Battaile, Janet, "Acreage in Alaska is Set Aside by US," *New York Times*, November 17, 1978, p A16.

⁴²² *Washington Post*, "Proxmire Urges Carter to Preserve Alaska Lands," November 21, 1978, page C4.

acreage which would have become national parkland under the House bill. He should use it before the December 18 deadline.”⁴²³

After discussing with Andrus these possibilities,⁴²⁴ and receiving the support of Udall and 145 other congressmen, Carter signed Antiquities Act proclamations on December 1, 1978 to reserve 56 million acres in fifteen national monuments.⁴²⁵ Carter also ordered Secretary Andrus to declare an additional 39 million acres of national wildlife refuges, which was completed on February 12, 1979.⁴²⁶ Therefore a total of 95 million acres were reserved.⁴²⁷

It is worth noting the size of the monuments created individually and in sum to understand the magnitude of the action and the acreages that were being tossed around Washington. One glacier in Wrangell-St. Elias National Monument was listed as the size of Rhode Island, nearly 670,000 acres. The monument itself, largely snow capped mountainous terrain, was a total of nearly 11 million acres, almost as large as the states of Vermont and New Hampshire combined. Another monument, Yukon Flats, an enormous wildlife sanctuary and wetlands north of Fairbanks was estimated to contain 36,000 ponds, lakes, and pools and exceeded 10.5 million acres.⁴²⁸ By declaring a monument of four million acres surrounding Mount McKinley and Denali National Park, Carter tripled the size of parkland in the area. The Noatak National Monument, north of the Arctic Circle, preserving “the nation’s largest pristine river valley,” was 5.6 million acres, roughly the size of Massachusetts and Rhode Island combined.⁴²⁹ The 56 million acres of all the monuments combined equated to the area of Georgia, the largest state east of the Mississippi River, and South Carolina.⁴³⁰ Including the additional national wildlife refuge acreage, 39 million acres, would add the state of Alabama, and a portion of the Florida panhandle equal to the size of Maryland, to the previous amount.

The monuments obviously extended over a fantastic amount of land, but also a number of scientific interests, as required, including canyons, mountain ranges, fjords, glaciers, volcanoes, and wildlife ecosystems. Though opponents saw his selected objects of scientific interest to be highly “vague,” fitting a pattern begun by earlier presidents who had in their views misused the Antiquities Act,⁴³¹ Carter was certain of his actions’ legality and their importance to the nation. In a statement released upon the signing of the proclamations, Carter said, “I felt it was imperative to protect all of these lands. These

⁴²³ *New York Times*, editorial, “Protecting Alaska’s Crown Jewels,” November 23, 1978, page A22.

⁴²⁴ Carter, Jimmy, “Why We Need An Arctic Refuge National Monument,” *Defenders of Wildlife Magazine*, Fall 2000.

⁴²⁵ King, Seth, “Carter Designates U.S. Land in Alaska for National Parks,” *New York Times*, December 2, 1978, page 1; Hornblower, Margot, “Carter Sets Aside 56 Million Acres of Alaska Lands,” *Washington Post*, December 2, 1978, page A1.

⁴²⁶ King, Seth S., “Andrus Orders 40 Million Acres in Alaska Designated as Refuges,” *New York Times*, February 13, 1980, page A16.

⁴²⁷ Oakes, John B., opinion piece, “Rescuing Alaska’s Land,” *New York Times*, December 8, 1978, p A29.

⁴²⁸ Borneman, pages 421-422. This monument must have been particularly pleasing to environmentalists because only a little over a decade ago it was seriously proposed to dam the Yukon River at a site called Rampart and create a reservoir larger than Lake Erie or two percent of Alaska’s land area.

⁴²⁹ Hornblower, “Carter Sets Aside 56 Million Acres.”

⁴³⁰ Or in keeping with the previous geographical comparison with northeastern states, the 56 million acres is larger than New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, and New Jersey combined.

⁴³¹ Johanssen, *Washington Law Review*, page 456.

areas contain resources of unequaled scientific, historic, and cultural value, and include some of the most spectacular scenery and wildlife in the world.”⁴³² It was a firm statement of his discretion in the matter, and according to the interpretations of federal courts in three cases, twice coming from the Supreme Court, it was a legal, legitimate, and in effect immediately. Furthermore, Carter was telling Congress, though most particularly Senator Gravel, to get its act together and pass an Alaskan parklands bill to finally complete the matter that had taken nearly twenty years since Alaskan statehood and had caused so much controversy. At the very least Congress would start the debate with 56 million acres entered into national park system, and Representative Udall, Senator Durkin, and others would push mightily for twice as much land to be included in the final total.

Once Secretary Andrus had reserved over 100 million acres under FLPMA and before President Carter withdrew 56 million acres under the Antiquities Act, the State of Alaska took the federal government to court. Alaska claimed that the withdraw was illegal because the Secretary, and potentially the President, did not undertake the regulatory process of drafting an environmental impact statement as required by the National Environmental Policy Act (NEPA). Alaska also quickly filed land selections under the Statehood Act on over 40 million acres including 9 million acres that Secretary Andrus had proposed to reserve. The court could not rule on that matter because Secretary Andrus eventually solved it with his three-year designations.⁴³³

The Federal District Court in Alaska ruled consistently with Antiquities Act precedent. First, the NEPA provisions explicitly stated that federal “agencies” are bound by NEPA. The court found the government’s argument that the President is not an “agency” to be “persuasive.” As the Antiquities Act explicitly specifies the President as the office-holder with the power to “reserve” and “declare” national monuments on federal land, the president in using the powers does not have to follow the NEPA requirements. Furthermore “the doctrine of separation of powers prevents this court from lightly inferring a congressional intent to impose such a duty on the President.” The court rejected as “approach[ing] the absurd,” Alaska’s argument that presidential conferring with the secretary of the interior somehow changed the dynamics of the president’s independence in existence to an “agency.”⁴³⁴

Secondly, on the general D-2 and “public interest” land issue, the court deferred to the Congress “to make the ultimate decision” as the constitutional manager of the public land. As “the public interest lies in allowing the Congress to formulate the land policy, the court found that “that interest will be hindered if the status quo of the concerned lands is not maintained until the Congress can render that decision.” The FLPMA action by the Secretary permitted the status quo to remain on the potential Alaskan parklands. Therefore, Andrus’ three-year withdraws and any presidential declarations were not a usurpation of congressional will by the Executive Branch, but a

⁴³² Hornblower, “Carter Sets Aside 56 Million Acres.”

⁴³³ *Alaska v. Carter*, 462 L. Supp. 1155 (1978).

⁴³⁴ *Alaska v. Carter*. The court referred to Art. II, Section 2 of the Constitution where the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective offices.” Considering the language of the “emergency” FLPMA authority that Secretary Andrus used the court ruled NEPA did not apply to that authority because it would inherently “frustrate” the law’s call for “immediate” withdrawal. During the three year withdrawal the Congress would have ample time to devise a solution.

proper and appropriate gift from the Executive to the Legislative Branch allowing it more time to determine what the conservation land law in Alaska should be.⁴³⁵

A second case entered the federal courts after the Carter monument declarations involving Anaconda Copper mining company. Anaconda sued the government over three of the national monuments created, Admiralty Island (1.1 million acres), Gates of the Arctic (8.2 million acres), and Yukon Flats (10.6 million acres), claiming their establishment was contrary to the requirement for “objects of historic and scientific interest” and that their “limits” were not “confined to the smallest area compatible with proper care and management of the objects to be protected.” In an unpublished opinion, the court largely upheld the government’s argument that there were scientific interests on the lands, writing, “obviously, matters of scientific interest which involve geological formations or which may involve plant, animal, or fish life are within this reach of the presidential authority under the Antiquities Act.” However, though Judge James Fitzgerald wrote that “I do not agree and reject the view that the only limitation upon the exercise of presidential authority under [the Antiquities Act] is the paramount power of Congress in its undoubted authority to provide for the disposition and use of public lands,” he did not take action to unfavorably review the monument declarations. The court thereby minimized any threat to change in precedent, and it was further rendered moot as a decision by the passage of ANILCA in 1980, where Congress declared the three monuments federal parklands.⁴³⁶

Of course Congress had still yet to hammer out a final conservation bill. It would spend nearly more two years on that legislation. The battles in both chambers were consistently tough with occasionally fierce language and conflicts over rival bills and amendments.⁴³⁷ Secretary Andrus, speaking before the House, reopened consideration of the matter and called on the chamber to pass the Udall version and not allow “the rape, ruin, and run boys” to win the day with legislation beneficial to mining and drilling interests.⁴³⁸ The Udall version was eventually successful by a surprising margin in the middle of May 1979.⁴³⁹ As had happened before December 1978, the measure stalled in the Senate. Both the Alaskan senators wanted concessions, with Senator Stevens more participatory than Senator Gravel. Meanwhile Democratic Senators Paul Tsongas of Massachusetts and Gary Hart of Colorado pushed for a stronger bill to equal the House-

⁴³⁵ The court seems to implicitly deny the argument that congressional inaction in this particular matter could serve as action. The D-2 clause was installed into ANCSA and then carried out by the Nixon administration so that action could eventually take place, rather than inaction. The deadline is a method to force Congress to act in a timely manner and is not a way for inaction in itself even if the law’s language specifies what will happen after the deadline without action.

⁴³⁶ Klein, page 1355; *Anaconda Copper Co. v. Andrus*, 14 Env’t Rep. Cas. (BNA) 1853. District Court of Alaska, 1980; Special to The New York Times, “Judge Upholds Carter on Creation of National Monuments in Alaska,” *New York Times*, June 27, 1980, page A18.

⁴³⁷ Hornblower, Margot, “House May Debate Alaska Bill Today,” *Washington Post*, May 15, 1979, page A8; Hornblower, Margot, “Party Colleagues Berate Each Other As House Seeks Alaska Compromise,” *Washington Post*, May 16, 1979, page A4; Shabecoff, Philip, “Alaska Lands: Slow Progress,” *New York Times*, July 25, 1979, page A10.

⁴³⁸ Sinclair, Ward, “Carter Aides Hit Alaska Land Bills As ‘Unacceptable,’” *Washington Post*, April 26, 1979, page A15.

⁴³⁹ Hornblower, Margot, “House Votes Bill to Save Alaska Land,” *Washington Post*, May 17, 1979, p A1.

passed Udall version.⁴⁴⁰ The debate lasted nearly a year and a half in the Senate and a bill was finally hammered out between Senators Stevens, Jackson, and Tsongas. The Senate bill allowed 104 million acres to enter the federal parklands systems, 56.4 million acres to be classified as wilderness, with 300 million acres open to drilling, 250 million open to mining, and 350 million open to hunting.⁴⁴¹ Though some environmentalists wanted more stringent protections, lambasted giveaways to mining firms like United States Borax, and told Udall to resist the urge to further compromise,⁴⁴² many welcomed a completed bill.

Presidential politics determined the outcome of the reconciliation of the House and Senate versions. In October 1980, a month before the election, Udall proposed a series of conservationist amendments to the Senate version and promised that the House would pass the bill. However, Senator Stevens refused to allow the additional compromise.⁴⁴³ When Republican Ronald Reagan defeated Jimmy Carter in November, Udall knew that time was running out for his bill and with dissatisfaction ushered the Senate bill through the House. Calling ANILCA the “greatest land conservation legislation of the century” Carter accepted the House vote about a week after the election⁴⁴⁴ and signed ANILCA on December 2, 1980, two years and one day after his unprecedented and unsurpassed declaration of national monuments.⁴⁴⁵

ANILCA contained an important provision relating to the Antiquities Act. Seeking to prevent such a large scale of presidential authority within Alaska, Congress attached to the bill a clause still allowing the President to declare national monuments of any size within the state, but that all monuments over five thousand acres must receive the approval of Congress within one year through a vote on a joint resolution in both chambers. If no congressional approval was given, the monument declaration would lose its effect after that one year. Monuments under five thousand acres in Alaska have no restrictions on them. The limitation did not prohibit use in the state as to what the State

⁴⁴⁰ Shabecoff, Philip, “Alaska Lands: Slow Progress.” Other Senators favoring stronger conservation measures included Republican John Chafee of Rhode Island and Democrat Alan Cranston of California. The opening framework bill was drafted by Senator Henry Jackson, Democrat of Washington and chairman of the Senate Energy and Natural Resources Committee, and favored by Senator Stevens and Republican Mark Hatfield of Oregon. It included 95 million acres of parkland, larger than Virginia, West Virginia, North Carolina, and South Carolina combined, but was smaller and less restrictive than the Tsongas bill and was 25 percent smaller than the Udall version. Omang, Joanne and Dewar, Helen, “Alaska Land Bill Is Talked Over in Senate Offices,” *Washington Post*, July 25, 1980, page A8; *Washington Post*, editorial, “Alaskan Battle Continues,” November 1, 1979, page A18.

⁴⁴¹ Omang, Janet, “Historic Alaska Lands Bill Nears Senate Passage,” *Washington Post*, August 19, 1980, Page A1; Omang, Janet, “Senate Approves Alaska Bill; House Is Urged to Accept It,” *Washington Post*, August 20, 1980, page A2; United Press, “Alaska Lands Bill Is Approved by the Senate, 78 to 14,” *New York Times*, August 20, 1980, page A17.

⁴⁴² Oakes, John B., opinion piece, “Periling Alaska’s Lands,” *New York Times*, September 23, 1980, page A23. US Borax received 150,000 acres surrounded by Misty Fjords Wilderness in the Tongass National Forest to mine molybdenum.

⁴⁴³ Omang, Janet, “Udall Renews Attempts to Thaw Frozen Alaska Land Measure,” *Washington Post*, October 3, 1980, page A2.

⁴⁴⁴ Omang, Janet, “Hill Clears Monumental Alaska Lands Bill,” *Washington Post*, November 13, 1980, A5; King, Seth S., “Compromise Bill to Preserve Alaskan Lands Approved,” *New York Times*, November 13, 1980, A1.

⁴⁴⁵ King, Seth S., “Carter Signs a Bill to Protect 104 Million Acres in Alaska,” *New York Times*, December 3, 1980, A20.

was lobbying for and what Wyoming was granted in 1950, but it was significant considering the size of nearly everything in Alaska.⁴⁴⁶

President Carter's Achievement

The Carter monument declarations stand as a massive achievement for environmental protection of federal lands. Like certain records in the sports world, it is more than unlikely that another president will or could declare anywhere near 56 million acres of federal land. The acreage was four and one half times the amount of all previous withdrawals under the Antiquities Act in its seventy-two year existence.⁴⁴⁷ It took considerable courage to go above and beyond the temporary withdrawals made by Secretary Andrus to extend the “status quo” on the land and create a benchmark minimum for Congress concerning the acreage to be fully protected in the future. Carter and Andrus were not about to let developers and others have their hands on every parcel of Alaskan territory.

The phrase of Andrus, frequently cited by environmentalists and their sponsors in Congress, “the rape, ruin, and run boys,” was a perfectly Rooseveltian attack on the opposition in the midst of a political battle. It was humorous, it was alliterative, it was applauded and repeated by supporters, and it was a partial exaggeration of the truth. The deadline faced by Carter was much like the one Roosevelt faced in 1907 concerning the national forest rider in the Interior appropriations bill of that year. Both presidents went ahead for conservation and protection, and did so dramatically. Roosevelt had more thwarting of congressional intent in mind than Carter, but neither leader was about to let such an opportunity pass without permanently reserving millions of acres of important and valuable American public lands for the future. As Jimmy Carter said on December 1, 1978, much like what Theodore Roosevelt said about the Grand Canyon as he stood before it on May 6, 1903:

*In Alaska we have a unique opportunity to balance the development of our vital resources required for continued economic growth with protection of our natural environment. We have the imagination and the will as a people to both develop our last great natural frontier and also preserve its priceless beauty for our children and grandchildren.*⁴⁴⁸

The action also gave new meaning to the Antiquities Act and Theodore Roosevelt's interpretation of it. Instead of protecting a single main or small number of objects, Carter used multiple objects and scientific interests to withdraw very large monuments. These lands, as in Yukon Flats for example, were reserved for the protection of the caribou herd and other wildlife over a wide range of their territory and natural habitat. Protecting the caribou as a scientific interest now meant protecting lands where they graze and find food, give birth, and migrate, as well as protecting other species or scientific interests connected to their health and well-being. Carter was reserving entire or large sections of ecosystems as national monuments for the first time on a grand scale. Franklin Roosevelt had used the Teton elk herd as a scientific reason to explain Jackson

⁴⁴⁶ Johannsen, page 463.

⁴⁴⁷ Ranchod, Sanjay, “The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act,” *Harvard Environmental Law Review*, Vol. 25, 2001, page 546.

⁴⁴⁸ Hornblower, Margot, “Carter Sets Aside 56 Million Acres of Alaska Lands”

Hole National Monument, but there were other and likely greater considerations for creating the monument below the magnificent Grand Tetons. The same is true for Theodore Roosevelt's Mount Olympus National Monument in Washington in 1909. Many of President Clinton's monuments followed this same pattern, though on a smaller scale within the lower forty-eight states. Carter created, and Clinton enhanced, a new trend for the Antiquities Act that will last well into the future as long as presidents use the powers and Congress allows them the privilege by not amending the Act.

However in the process, Carter's action highlighted the new political realities between the national political parties concerning protection of natural resources on federal land. Though light use had partly determined this reality, Carter's proclamations removed the last strains of bipartisanship towards the Antiquities Act.

The Alaskan issue aroused substantial approval for and opposition to the Antiquities Act and the objectives of the environmentalist movement. Environmentalists groups were able to join together to form the Alaska Coalition and have powerful influence in the Congress with "a massive mail and lobbying campaign nationwide" sending thousands of letters to senators to support increased protection. Meanwhile industry organizations, the National Rifle Association, and Alaskan state officials had their own lobbying operation running.⁴⁴⁹ In the midst of the debate in the 1960s and 1970s in Alaska and elsewhere in the United States, the old meaning of the word conservation was mostly obliterated. The calls for environmental protection were now entirely preservationist and those that called for multiple uses were sided with the developers and industry interests. The middle ground where Theodore Roosevelt once stood as a conservationist and the founder of the expansive interpretation of the Antiquities Act had visibly disappeared from the political landscape.

The increased divide between environmentalists and developers and multiple users, began to be reflected in the political parties. The beginning of the 1970s saw Republican Richard Nixon sign some of the most important environmental legislation in the nation's history including NEPA, the Clean Air and Water Acts, and the Endangered Species Act. However, by the end of the decade, with the election of Ronald Reagan, the split in the political parties concerning the environment was real and seemingly a permanent fixture of the continuous debate between them. Though Representative Udall received sixty-six votes from Republicans on passage of his bill in May 1979, one year later he had to give up several provisions just to see any bill get to President Carter, before President-elect Reagan entered the White House.⁴⁵⁰ The 1980 election saw the defeat of Senator Durkin and eleven other Senate Democrats, as the chamber was lost to the Republicans. The new class of conservative Republicans was not favorable to environmental policy.⁴⁵¹ Under the leadership of Reagan in the 1980s and Speaker Newt Gingrich in the 1990s, the partisan divide on the environment, and in this case the Antiquities Act, would sharply increase.

The Alaskan land matter clearly defined the federalism question raised so much by Alaskan political leaders. They frequently declared the D-2 process a "lock-up" of land deserved to be owned by Alaskans or their state government for their benefit as a way to raise revenue. Though it is true that the federal government was locking-up land

⁴⁴⁹ Omang, Joanne, "Governor, Senators Shun Alaska Bill," *Washington Post*, July 30, 1980, page A2.

⁴⁵⁰ Hornblower, "House Votes Bill to Save Alaska Land."

⁴⁵¹ Dewar, Helen, "GOP, With 53 Seats, Claims the Senate," *Washington Post*, November 6, 1980, A1.

in terms of protectionary measures ranging from hunting and logging to drilling and mining, it was in no way locking-up lands that Alaska deserved. The state of Alaska never owned the land and would never own it until the federal government dispersed it under the 1959 statehood act or in other voted measures. If Congress and the President decided to create parkland on tracts desirable for mineral exploitation, Alaska could not do anything about it, because they themselves did not own it. Everyone in the United States owns it, and the nation's elected representatives, whether the President, speaking for the nation as a whole, or in Congress, speaking for states and districts, have the right to make law and policy concerning its management. There simply was no taking away of any land anywhere, and that was a fact that was not understood by many on the side opposing ANILCA or later declarations by President Clinton.

However the federalist argument would still be made and would receive authentication in many political corners. It could be resurrected immediately and be used to wage political battles. The fights over the Antiquities Act would rage after President Carter's bold move for a time, but it quieted down during the Reagan, Bush, and early Clinton years. The powers were not used for more than seventeen years, thus providing little reason to talk about them. As shall be seen the Antiquities Act debate would heat up tremendously as President Clinton decided to use the Antiquities Act in a heavily Rooseveltian fashion beginning in 1996.

Updating the Roosevelt Interpretation for the 21st Century

Chapter 6

President Clinton's use of the Antiquities Act was almost always broiled in political conflict between himself and Congress. That conflict is inevitable under the Act, and is one of its prime checks on presidential power. Much of the conflict arose from the manner in which he declared his first monument, Grand Staircase-Escalante in southern Utah in 1996 that exceeded 1.7 million acres.⁴⁵² This was a massive protectionist move, but the announcement was too surprising to the likes of the Utah congressional delegation. The partisanship of the period, best reflected by the Clinton-Gingrich rivalry, never left the stage.

Clinton updated the legacy of saving open public lands for the future to provide for the problems of the 21st century. As the country's population grew in the 1900s, the nation's used space will grow in the 2000s. Clinton wished to reserve land across the west to protect them from land use encroachment, whether suburban sprawl or mining. Clinton's revival of the Act's executive powers produced a legacy that has endeared him to most environmentalists and to an extent the general public. One commentator wrote he "may ultimately be recognized as one of the greatest conservationists of our time."⁴⁵³ However as could be expected, he severely irritated many local people, organizations, and western politicians.

Clinton versus Gingrich

When President Clinton entered office in 1993 with fellow Democrats in control of both houses of Congress and leading environmentalist Al Gore of Tennessee as Vice President, many environmentalists had expected a great deal of attention to the issue and they were disappointed when little came. Though Clinton passed some laws including the California Desert Protection Act, he failed to reform grazing, mining, and timber laws and rules when westerners of both parties blocked his efforts.⁴⁵⁴ Thereafter, it appeared that the environment had been sent back from the front burner. Jay Hair, the executive director of the National Wildlife Foundation in 1993, said, "What started as a love affair is now looking like it may turn out to be date rape."⁴⁵⁵ With this defeat in land issues, Clinton moved on to devote his time, political capital, and attention to economic recovery and health care legislation, the second a sizable failure.

When given a chance to respond to Clinton's agenda in the 1994 election, Republicans were sent to Congress in large numbers, giving them both chambers.⁴⁵⁶

⁴⁵² This was the largest national monument declaration in the contiguous United States and the eleventh largest in the history of the legislation.

⁴⁵³ Ranchod, Sanjay, "The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act," *Harvard Environmental Law Review*, 2001, page 535.

⁴⁵⁴ Democratic Senator Max Baucus of Montana was a particular foe of this plan. *Time Magazine*, "How Green Was Bill?," December 18, 2000, page 64; Clinton, Bill, *My Life*, Alfred A. Knopf, New York, 2004, pp 628-629.

⁴⁵⁵ Egan, Timothy, "Putting Some Space Between His Presidency and History," *New York Times*, January 16, 2000.

⁴⁵⁶ The Republicans had not been in the majority in the House of Representatives for forty years.

Many were strong conservatives raised on Reagan and supportive of Newt Gingrich's rough-and-tumble style of politics.

Gingrich's victory was the centerpiece of a ten-year plan to achieve the heights of congressional power. He urged fellow Republicans to be highly organized in expounding a simple tight party message. His political style matched his view on government. "What I want to do," said Gingrich in the 1980s, "is replace a decaying, out-of-touch second-wave system with a 21st century, information age citizen led system." The positive message was mixed with harsh attacks on Democrats on corruption, ineptitude, and cultural permissiveness, among other issues. Partisan and often wild rhetoric was a necessary consequence of the modern instant political messaging. Gingrich once said, "One of the great problems we have in the Republican Party is that we don't encourage you to be nasty." Democratic House Speaker Tip O'Neill of Massachusetts was a special target for "nasty" slogans; at different times Gingrich said O'Neill was "one of the cheapest, meanest politicians to occupy that office in this century" and "teaching a younger generation the tactics of public thuggery."⁴⁵⁷ In offering his assessment of Gingrich in his 2004 autobiography, Clinton took the angle of a fellow campaigner saying, "At his best, Newt Gingrich was creative, flexible, and brimming over with new ideas. But that wasn't what had made him Speaker; his searing attacks on the Democrats had done that."⁴⁵⁸

For the President and Interior Secretary Bruce Babbitt, the election proved to be an embarrassing disaster, but also a wake-up call. Speaker-elect Gingrich's campaign program, the Contract with America, featured a significant portion "eager to rollback three decades of environmental gains." If played properly, Gingrich could eventually fumble the momentum, and Clinton could return to the stage once again as the "Comeback Kid" of 1992 just in time for 1996.⁴⁵⁹

Reacting to Gingrich, Clinton and Babbitt regularly repeated what the Republicans were attempting to do to environmental laws and regulations. Not surprisingly, much of the rhetoric and atmosphere was highly partisan. In the course of 1995, Clinton began to pick up on the "public's perception that the Republican-controlled Congress moved too far" against the environment.⁴⁶⁰ Such shift in tide would be a useful weapon to yield against the Republicans in upcoming legislative battles and their eventual presidential candidate in 1996. Meanwhile tactical strategy largely "was to play effective defense and damage control, fighting off unacceptable legislation...often in the form of substantive riders on appropriations bills" according to the Clinton Interior Department Solicitor.⁴⁶¹ One Republican appropriations rider in 1995 that brought a veto called for drilling in the Arctic National Wildlife Refuge (ANWR) in Alaska.⁴⁶²

⁴⁵⁷ O'Neill through a good slogan or two back at the Republicans, including calling Gingrich a "weirdo" and saying President Reagan was "cold...mean...[and] got ice water for blood." Farrell, Tip O'Neill and the Democratic Century, pages 627, 636. Clinton, My Life, page 622.

⁴⁵⁸ Clinton, My Life, page 659.

⁴⁵⁹ Leshy, John, "The Babbitt legacy at the Department of the Interior: a preliminary view," Environmental Law, Vol. 31, Issue 2, Spring 2001. Clinton earned the nickname after a second place finish in the 1992 presidential primary in New Hampshire while his campaign was surrounded by various scandals.

⁴⁶⁰ Maraniss, David, "Clinton Acts To Protect Utah Land; Vast Resource-Rich Area Is Turned Into Monument," Washington Post, September 19, 1996, page A1.

⁴⁶¹ Leshy, "The Babbitt legacy."

⁴⁶² Time Magazine, "How Green Was Bill?"

Coordinating between a hostile Republican Congress and environmental groups and other Democrats for the final six years of the Clinton administration would prove to be a very difficult task. Arizonan Bruce Babbitt proved to be a fortunate choice for the president to manage these affairs. In his first attempt at elective office in the 1970s, Babbitt won the position of state Attorney General. He became Governor under special circumstances,⁴⁶³ and served for nine years until 1987 having been elected twice. “His experience as Governor made him used to, and effective at, dealing with a conservative Republican legislature.” Babbitt could engage the opposition to listen to their arguments and find a compromise, while he also “knew when he could use the bully pulpit to move public opinion in his direction.”⁴⁶⁴

Preparing for the 1996 presidential election, Clinton and his aides accurately predicted that the Gingrich rollbacks and the president’s interest in environmental protection would be a strong campaign issue. It fit with the attack and defend strategy used in other issue areas. Clinton would attack Gingrich on spending cuts for education and school lunch programs or on proposed reforms for Social Security and Medicare, for example, and then promote his defense of the essential programs. Clearly a sizable percentage of the national vote would be receptive to this strategy, especially regular Democratic constituencies, but, perhaps more importantly, targeted campaigning towards swing voters might actually bring individual states into the Democratic electoral fold.⁴⁶⁵

Much of the White House offensive strategy for the environment was clearly a continuation of the bitter struggle over federal spending priorities. Over the winter of 1995-1996 the Clinton-Gingrich feud spilled over already extended deadlines and the federal government was shutdown twice. In the end, it was a Republican debacle. Gingrich, who had been riding high all of 1995 introducing components of his Contract with America as a prime minister would to parliament, really had one only way to go politically: down. Clinton had a unified party in Congress behind him, and did not suffer from inter-party splits on negotiation tactics and stances as the Republicans did. For his part Gingrich had to manage his more conservative crew in the House as well as the more moderate branch in the Senate under Majority Leader Bob Dole.⁴⁶⁶ One of the most publicized consequences of the shutdown was the closing of almost all of the popular national parks and monuments around the country. Making the pictures worse, the monuments on the Mall, Capitol Hill, and the rest of Washington was hit by a blizzard in early January; the quiet white emptiness draped a visible eerie feeling over the showdown. Tourists trying to visit the closed parks were angry and the public sympathized.⁴⁶⁷

⁴⁶³ He became Governor after the death of the replacement to Governor Raul Castro, who resigned to become President Carter’s ambassador to Argentina.

⁴⁶⁴ Leshy, “The Babbitt legacy.”

⁴⁶⁵ Egan, “Putting Some Space.”

⁴⁶⁶ Maraniss, David and Weisskopf, Michael, “Tell Newt to Shut Up!”, Touchstone Books, New York, 1996, page 149.

⁴⁶⁷ Witcover, Jules, Party of the People: A History of the Democrats, Random House, New York, 2003, page 677; Wren, Christopher, “The Toll of the Shutdown on Traveler’s Plans,” *New York Times*, January 14, 1996; Fletcher, Michael A. and Borgman, Anna, “U.S. Museums, Parks Open to Small Crowds; End of Shutdown Comes Too Late for Some Tourists,” *Washington Post*, January 7, 1996, page A6; Egan, “Putting Some Space.” Except for certain select parks and monuments that states or cities temporarily assumed responsibility for to keep them open, like the State of Arizona with the Grand Canyon or the City of Philadelphia with Independence Hall and the Liberty Bell, 366 sites around the country were closed

Drawing energy from the victory in the shutdown battle, Clinton effectively molded environmental and public lands protection into his 1996 campaign message.⁴⁶⁸ In what unfolded as a successful strategy for the rest of his time in the White House, Clinton avoided confrontation and inaction on Capitol Hill by taking steps via executive authority. In other words it was an agenda of proclamations rather than legislation. Using the Antiquities Act in the west would satisfy his goals to protect special public lands as well as assist his campaign. Preparations for such an action were made throughout the summer; Utah seemed to be the place to do it.

The Political Context for Grand Staircase

Years of gridlock in Congress about Utah public lands and wilderness preceded Clinton's action. Two rival bills circulated in the early 1990s about designating wilderness in various portions of the state. The Democratic bill sponsored by Representatives Wayne Owens of Utah and Maurice Hinchey of New York called for about 5.5 million acres of federal wilderness, while the Republican bill, championed by Utah Representative Jim Hansen, would designate only 1.4 million acres. Each bill sat for years; Owens and Hinchey could not obtain any more support from the Utah congressional delegation, and Hansen's bill would not move with Democrats in charge of the House of Representatives.⁴⁶⁹

The situation changed dramatically in 1994, with the influx of Republicans into Congress. Hansen and Utah Republicans appeared ready and able to send their Utah wilderness bill to the president's desk. Yet it did not happen. Democrats and environmentalists "were adamantly opposed" to Hansen's language that allowed BLM lands not designated as wilderness to be opened to "non-wilderness multiple uses." A filibuster by Senator Bill Bradley, Democrat of New Jersey, blocked the Hansen bill in the Senate, and Utah Republicans were left to plan for another day and another session.⁴⁷⁰

After the battle in Congress, Clinton and Babbitt maneuvered to prevent their wilderness goals from being defeated by Hansen's bill. Secretary Babbitt ordered the BLM to restudy the amount of lands that would qualify for wilderness status.⁴⁷¹ By the Independence Day weekend of 1996, Clinton silently considered using the Antiquities Act to reserve large tracts of Utah BLM land in the near future.⁴⁷² Adding to the consideration of thwarting Hansen, the administration learned that Andalex, a Dutch mining firm, had federal coal leases on the Kaiparowits Plateau and wanted to develop them. Wishing to stop this development, the Antiquities Act seemed to Clinton to be the last resort to protect the Utah lands.⁴⁷³

leaving the 383,000 daily visitors to the National Park System without open parks or rangers. Quoting Egan, "Democrats say one of their best issues in 1996 were efforts by a handful of Western Republicans to close down some national parks."

⁴⁶⁸ The message was more anti-Gingrich than anti-Dole and spread across the political spectrum, including most notably Social Security and Medicare.

⁴⁶⁹ Rasband, page 496.

⁴⁷⁰ Rasband, pages 497-498.

⁴⁷¹ Rasband, pages 498-499.

⁴⁷² Rasband, page 506; Leshy, "The Babbitt Legacy."

⁴⁷³ Rasband, page 504.

The last consideration before declaration was electoral politics. It was clear to all that President Clinton would not carry the state of Utah in 1996. “The most Republican state in the nation,” with only five electoral votes, placed Clinton third behind Ross Perot in 1992. However, it was still possible that other western states such as Arizona, Nevada, or Colorado could fall to the President. These states featured rapidly growing moderate suburban communities appreciative of land conservation efforts. Regional and national polls also suggested “broad political support” for reserving a large portion of southern Utah. That the Andalex mining operation would most likely be stopped only increased the favorability of action.⁴⁷⁴ At the least, Clinton would gain in the Pacific Coast states, likely Democratic territory. Once concluded that Democratic and moderate western constituencies and politicians would generally approve the creation of a large western national monument,⁴⁷⁵ the idea was put on a fast track.⁴⁷⁶

The plan worked brilliantly. The monument announcement “maintained favor with western environmental groups” and contributed to victories in November in California, Oregon, Washington, Nevada, and New Mexico. Furthermore, the designation “cullled favor with Arizona’s environmental plurality” and helped secure its eight electoral votes.”⁴⁷⁷ Clinton’s Arizona triumph was quite an upset; the last Democrat to win there was Harry Truman in 1948.⁴⁷⁸

Grand Staircase and the Grand Canyon

On September 18, 1996 President Clinton declared Grand Staircase – Escalante National Monument. He did so not in Utah, but at the rim of the Grand Canyon in Arizona, with one of the most recognizable and spectacular natural features of the world behind him, all contained within a popular national park. Appearing at the South Rim, with Vice President Al Gore and a park ranger by his side,⁴⁷⁹ Clinton could say, ending with applause, “seventy miles to the north of here in Utah lies some of the most remarkable land in the world. We will set aside 1.7 million acres of it.”⁴⁸⁰

Though his detractors made it seem that that was impossible for him,⁴⁸¹ the president’s designation was not only a result of electoral politics. Clinton felt that the

⁴⁷⁴ Egan, Timothy, “Clinton Enters Utah Battle Over Fate of Wilderness Area,” *The New York Times*, September 17, 1996, page A12; Rasband, pages 509-510.

⁴⁷⁵ Two Democratic politicians from Colorado, for example, advised and praised Clinton’s actions. Governor Roy Romer called it a “high-water mark” for the President, and Senate candidate Tom Strickland said, “there is a national constituency for this national treasure.” Kerwin, Kathy, “Coloradans welcome national monument,” *Rocky Mountain News*, September 19, 1996, page 11A.

⁴⁷⁶ Rasband, James, “Utah’s Grand Staircase: The Right Path to Wilderness Preservation?,” University of Colorado Law Review, Vol. 70, 1999, page 509.

⁴⁷⁷ Blasi, page 226.

⁴⁷⁸ Mitchell, Alison, “President Designates A Monument Across Utah,” *The New York Times*, September 19, 1996, page B11.

⁴⁷⁹ Larmer, Paul, “A Bold Stroke: Clinton takes a 1.7 million acre stand in Utah,” High Country News, September 30, 1996, www.hcn.org.

⁴⁸⁰ Remarks by President Clinton on September 18, 1996 at Grand Canyon National Park, Arizona, Office of the Press Secretary, from <http://clinton6.nara.gov/1996/09/1996-09-18-president-remarks-at-grand-canyon-az.html>.

⁴⁸¹ For example, Representative Hansen said, “Never in 36 years as an elected official have I seen anyone as blatantly political as Mr. Clinton.” This view of course purposefully obscures the political activity of the Republicans. A furious Senator Hatch threatened to block Clinton’s judicial nominations as Judiciary Committee chairman. Edwards, “Clinton’s Utah Land Proposal;” Davidson, “Utah Delegates.”

Andalex mine was a threat to the serenity of the scientifically important land and that economic growth could not be allowed to proceed without concurrent measures to promote the conservation of natural resources and the preservation of great landscapes, geologic formations, ecosystems, and historical records of the past. To show this interest the declaration was very precise about listing the historical and scientific objects in the monument. Lastly, Clinton importantly invoked the memory of another president in his speech as he proclaimed the largest monument in the contiguous United States. Of course, just his presence at the Grand Canyon was a reminder of Theodore Roosevelt, something newspapers and other press were well aware of.⁴⁸²

Knowing full well that opponents from Utah, the Republican party, and elsewhere would accuse the President of overstepping executive authority as created by the Antiquities Act, Clinton could return fire by saying his actions were well with precedent and started by a Republican. On multiple occasions since 1906 both Republican and Democratic presidents have read the bill to allow them to name very large monuments of hundreds of thousands if not millions of acres to protect “objects of scientific interest.” Courts have agreed with the designations, Congress has upgraded many monuments, including the Grand Canyon to national park status, in many ways constituting approval, and the American public as a whole has been historically supportive of parks and designations. In a move highly reminiscent of a tactic used by Harold Ickes, Clinton credited Republicans for the Antiquities Act and the broad interpretation.⁴⁸³

Explaining the move, Clinton emphasized protecting the national interest. Arguing for closing the Andalex mining interests, Clinton said, “Mining jobs are good jobs, and mining is important to our national economy and to our national security. But we can’t have mines everywhere, and we shouldn’t have mines that threaten our national resources.” Clinton remarked on TR’s foresight and progressive thought.⁴⁸⁴ “It was President Roosevelt’s wisdom and vision that launched the Progressive Era and prepared our nation for the twentieth century. Today we must do the same for the twenty-first century.” Clinton was putting the bookend on the century of not only progressivism, but also conservation.

The power of conservation that Clinton argued for in his speech was greatly similar to that of Theodore Roosevelt. He also leaned on preservationist connections to the dangerous beauty of the land. The power of the visible earth whether scientific or historic remarkably affects the lives and thoughts individuals and can be a lasting gift to future generations.

Aided by the newspaper pictures and television camera angles, Clinton made it seem that the monument in Utah was as spectacular as the Grand Canyon in Arizona. Also by being at the Grand Canyon, seventy miles to the south, Clinton could play on the untouched and untrammled isolation and mystery of the land in Utah. That fact alone made Grand Staircase a treasure worth protecting. These visual arguments were important for the politics of the event, but they would not suffice under the Antiquities

⁴⁸² The Egan article in the *New York Times* on September 17, 1996, the day before the declaration, begins with: “Following a path taken by Teddy Roosevelt in 1908, President Clinton will go to the Grand Canyon...”

⁴⁸³ Associated Press, “Ickes Credits GOP for Jackson Hole,” *New York Times*, September 16, 1944, page 8.

⁴⁸⁴ Also, by implicitly contrasting Theodore Roosevelt, “a great Republican President,” to the currently enraged Utah congressional Republicans, Clinton could once again portray his opposition as extremist followers of Newt Gingrich.

Act as a reason for a president to withdraw and declare a national monument. Clinton had plenty to say on Grand Staircase as a land of historic and scientific interest:

*On this remarkable site, God's handiwork is everywhere in the natural beauty of the Escalante Canyons and in the Kaiparowits Plateau, in the rock formations that show layer by layer billions of years of geology, in the fossil record of dinosaurs and other prehistoric life, in the remains of ancient American civilizations like the Anasazi Indians. Though the United States has changed and Utah has grown, prospered, and diversified, the land in the Utah monument remains much as it did when Mormon pioneers made their way to the Red Canyons in the high desert in the late 1800s. Its uniquely American landscape is now one of the most isolated places in the lower forty-eight states. In protecting it, we live up to our obligation to preserve our natural heritage. We are saying very simply, our parents and grandparents saved the Grand Canyon for us; today we will save the Grand Escalante Canyons and the Kaiparowits Plateaus of Utah for our children.*⁴⁸⁵

Nothing more appropriately or legally could signify for a president the century of conservation started by Theodore Roosevelt than the Antiquities Act. Just as it was in the first decade of the century, in the last decade conservation was about saving precious lands and natural and historical resources for future generations. There was little doubt as to where Clinton was getting his inspiration.

Though not as interesting or as visually stunning as his speech, Clinton's proclamation was a considerable document. It was carefully prepared to reflect the features of the land within the monument, much as he had done in his speech. The monument's "vast and austere landscape embraces a spectacular array of scientific and historic resources." In listing these interests, Clinton established a sound legal basis for the proclamation to survive any court battle in which opponents would accuse the proclamation of overextending its bounds in terms of the Antiquities Act.

Then, upon assuring that the land in the monument was owned or controlled by the federal government, the president included the most important legal statement, "the federal land and interests reserved within consist of approximately 1.7 million acres, which is the smallest area compatible with proper care and management of the objects to be protected."⁴⁸⁶ Therefore, the President had made an executive decision in accordance with the law that despite the size of the monument, unprecedented within the forty-eight states, the acreage was necessary to protect the identified objects.

Reaction in Utah: From Anger to Acceptance

Like many of Roosevelt's bold moves at the turn of the century, Clinton's moves at the end of the century brought forth uproar from those on the losing side. The loudest and most public cries of anger came from the Utah congressional delegation, which was effectively "outflanked" and "caught flatfooted."⁴⁸⁷ Though furious at the declaration, with Utah Republican Senator Orrin Hatch telling Secretary Babbitt "there would be real hell to pay," some in the Utah delegation were conceding, with cynicism, the brilliance of

⁴⁸⁵ Remarks by President Clinton on September 18, 1996 at Grand Canyon National Park, Arizona.

⁴⁸⁶ Presidential Proclamation 6920, September 18, 1996, Grand Staircase - Escalante National Monument.

⁴⁸⁷ Rasband, page 511.

Clinton's move. The other Republican Senator, Robert Bennett, said, "This will be a magnificent photo opportunity with President Clinton standing in front of the most majestic scenery in the world to declare that he has protected Utah from the plunderers. It will help Clinton in the polls, in the West and elsewhere."⁴⁸⁸

The surprise of the announcement caused the first ripple of uproar. The Clinton administration picked the date for releasing the news with secrecy to avoid having the Utah delegation receive advance in notice and try to stop the announcement with riders to the uncompleted Interior Appropriations Bill. The first public indication came when a September 7 article in the *Washington Post* stated the White House was considering declaring a national monument in Utah. There were no clear indications in the report about how long it would be before the President would name the monument, if indeed he decided to declare it, or about the size.⁴⁸⁹ Furor from Utah was quick and heavy.⁴⁹⁰

Representative James Hansen, who had fought in the pre-monument wilderness battles, now declared war over the declaration. "If this goes through," Hansen proclaimed, "I will go to the House and blast Clinton every night before national television cameras." Senator Bennett said, "This is an outrageous way to make public policy,"⁴⁹¹ and Senator Hatch impetuously declared it, "the mother of all land grabs."⁴⁹² Also "fumed" was Bill Howell, executive director of the Utah Association of Local Governments, who said, "This is the most arrogant gesture I have seen in my lifetime. The only compatible act I can think of is when a country is ruled by a king and he sweeps his hand across a map and says, 'It will be thus.'"⁴⁹³

The likely defeat of the Andalex mine deal also caused anger. The mine would have created hundreds of jobs for the region and would have pumped millions of dollars into the Utah state school system through leases on state land.

The people of Kane and Garfield counties in southern Utah also met the declaration with uproar. In Kanab, a rally was held at the town's school gym and citizens arrived wearing black armbands and holding signs reading "Shame on you, Clinton" and "Why Clinton, Why? You're our President." A group of schoolchildren then released fifty black balloons into the air hoping to warn other states about their land being grabbed.⁴⁹⁴ The worst of the protesting came when President Clinton and Secretary Babbitt were hung in effigy.⁴⁹⁵ In the November elections Utah's only Democratic congressman, Bill Orton, lost his seat.⁴⁹⁶ Earlier in October a poll in the *Deseret News* showed that 52% of interviewed Utahns were either somewhat opposed or strongly

⁴⁸⁸ Egan, "Clinton Enters Utah Battle Over Fate of Wilderness Area."

⁴⁸⁹ Kenworthy, Tom, "President Considers Carving National Monument Out of Utah Land," *Washington Post*, September 7, 1996, page A3. The likely size was 1.8 million acres though some sporadic reports indicated it could be nearly 2.5 million acres, an area larger than Yellowstone National Park.

⁴⁹⁰ Rasband, pages 510-511; Edwards, Alan, "Clinton's Utah Land Proposal Creates Monumental Uproar," *Deseret News*, September 8, 1996, page 1; Davidson, Lee, "Utah Delegates Vow to Block It - If It Happens," *Deseret News*, September 10, 1996, page 1.

⁴⁹¹ Egan, "Clinton Enters Utah Battle Over Fate of Wilderness Area."

⁴⁹² Larmer, Paul, "The Mother of all land grabs," High Country News, September 30, 1996, www.hcn.org.

⁴⁹³ Maraniss, David, "Clinton Acts To Protect Utah Land; Vast Resource-Rich Area Is Turned Into Monument," *Washington Post*, September 19, 1996, page A01.

⁴⁹⁴ Larmer, "A Bold Stroke."

⁴⁹⁵ Rasband, page 485.

⁴⁹⁶ Maddox, Laurie S., "Taking Swipes at Clinton, Utahns Vow to Fight Back," *Salt Lake City Tribune*, September 19, 1996, page A5.

opposed to the monument.⁴⁹⁷ But even right after the proclamation, there were small signs of the antagonism eventually abating among Utahns and the monument. For example, a sign outside a roadside business in Kanab read “Shame on you Clinton; Buses Welcome.”⁴⁹⁸

Though the Utah politicians would long remember the declaration, the public eventually became used to it. It is likely that the public opposition subsided in part because of the management details established in the proclamation. Clinton and his advisors planned for and allowed several important concessions at the request of the Utah Governor and members of Congress just before the monument was announced.⁴⁹⁹ Within the monument the appropriate Utah state agency would manage fish, wildlife, and hunting. Livestock grazing was permitted to continue under applicable federal law. No additional water rights were imposed. As for the coal mines, and the Andalex lease in particular the proclamation states, “the establishment of this monument is subject to valid existing rights.” Therefore the Andalex lease was not necessarily canceled or revoked.⁵⁰⁰

Furthermore the federal responsibility over the monument was given to the Bureau of Land Management (BLM) rather than the Park Service as most monuments had been since a 1933 reorganization. The BLM already had responsibility for the land, and its employees, probably known in the various communities, would stay, providing a familiar continuance for Utahns. Lastly the BLM was given three years to create a management plan for the monument following normal regulation drafting procedures.⁵⁰¹

With these favorable terms and the passage of time, Utahns lost their anger. Though not necessarily publicized to the extent of the opposition, all along a sizable percentage of the Utah population supported the monument. The October 1996 poll in the *Deseret News* showed support at 37%. In May 1997 a poll in the *Salt Lake Tribune* showed that opposition had dwindled to 32%, and that a majority in Weber and Salt Lake counties, believed the monument “was a good thing.”⁵⁰²

The availability of new opportunities relating to the monument also spurred some acceptance. Louise Liston, a Garfield County Commissioner from Escalante, once strongly opposed to the monument, told the *New York Times* in 1997 that, “People have come to terms with what happened - they now know the monument is here to stay. People are thinking about what the monument can do for them, instead of what the monument did to them.” And she appeared to be right. A local inn was completely booked some nights. A town food store posted a sign reading “*supermarche*” to cater to the European tourists who visit southern Utah’s ten national parks and monuments. A ranchette development reported its “short” distance to the monument. The only waitress at the Cowboy Blues Diner “has struggled to keep up with the crowded tables.” Scott

⁴⁹⁷ Bernick, Jr., Bob, 52% Oppose Monument,” *Deseret News*, October 20, 1996, page A1. This fairly weak majority shows the extreme position of the politicians.

⁴⁹⁸ Larmer, “A Bold Stroke.”

⁴⁹⁹ Rasband, page 512.

⁵⁰⁰ Halden, Ann E., “The Grand Staircase - Escalante National Monument and the Antiquities Act,” *Fordham Environmental Law Journal*, Vol. 8, 1996-1997, pages 731-734. However, the Andalex project would likely be denied because new restrictions on access, road building, and transportation.

⁵⁰¹ Presidential Proclamation 6920, September 18, 1996.

⁵⁰² “Time Softens Opposition to Monument,” *Salt Lake Tribune*, May 16, 1997, page C1. Weber and Salt Lake counties include the metropolitan areas of Odgen and Salt Lake City, respectively, and had a total population around one million people, half of the state’s population.

Groene, a spokesman for the Southern Utah Wilderness Alliance, an environmental group that supported the Hinchey wilderness bill and the monument, agreed with Liston's sentiment. "The really shrill rhetoric you only hear from the politicians," he said. "And that rhetoric is thirty years old."⁵⁰³

Options to reconsider Antiquities Act after 1996

As has always been the case since the Grand Canyon, the opponents of the proclamation had two available courses of action to fight the monument. The first was to bring a lawsuit to federal court. The second was to enact legislation in Congress concerning the monument in particular or the Antiquities Act in general. Within a year of the declaration both paths were taken in a concerted effort to block future use of the authority or to destroy it outright.⁵⁰⁴

In the courts the Utah Association of Counties and the Mountain States Legal Foundation (MSLF) filed suit in 1997 arguing that the monument was illegal for its size and the manner in which it was drafted. The case was delayed for several years and only in January of 2004 was the case actually argued before a federal district judge in Salt Lake City.⁵⁰⁵ Claiming that the monument was illegal, opponents argued that it was politically motivated rather than driven by protection of scientific interests, the size was exorbitant, the declaration created wilderness when only Congress can create it, and the judge has the authority to review the declaration.⁵⁰⁶ Monument defenders said historic and scientific interests existed and that the size was proper to protect them, that the wilderness management policy is not a germane matter for the court, and that the precedent does not support the overturning of the monument.⁵⁰⁷

Though this case was filed before Clinton's 2000-2001 round of monument declarations, it was decided after two other anti-monument cases were dismissed. On April 19, 2004, District Judge Dee Benson released his ruling in favor of Grand Staircase. His opinion followed the precedent of other Antiquities Act cases as well as other cases dealing with congressionally delegated powers. His language was as forceful as the two earlier Clinton rulings.⁵⁰⁸ Finding that "the record is undisputed" in the president's use of

⁵⁰³ Brooke, James, "Utah is Warming Up To Newest National Monument; Tourist Dollars Smooth Ruffled Feathers," *New York Times*, October 13, 1997, page A12.

⁵⁰⁴ Davidson, Lee, "Green Light for Proposal Has Utahns Seeing Red," *Deseret News*, Sept. 18, 1996, p1; Maddox, Laurie Sullivan, "Monument Foes Still Hope to Win in the End," *Salt Lake Tribune*, September 20, 1996, page A1.

⁵⁰⁵ The first suit was dismissed in 1997. It was filed again and the court accepted. After Congress had passed laws exchanging state land within the monument for federal lands elsewhere, appropriated funds for the monument, and fixed minor problems in the boundaries, the government thought the case should be dismissed because of implicit congressional ratification. The judge disagreed in 1999 and that ruling was upheld at appeals in 2000. In 2001 environmentalist groups sought to join in the lawsuit with the government and the district judge said they could not. However the appeals court overruled that decision. *Mountain States Legal Foundation v. Bush* information from www.mountainstateslegal.com.

⁵⁰⁶ The laws alleged to have been broken included the U.S. Constitution, the Antiquities Act, the Wilderness Act, NEPA, FLPMA, the Administrative Procedure Act (APA), and several other statutes relating to regulatory procedure.

⁵⁰⁷ Israelson, Brent, "Monument friends and foes face off," *Salt Lake Tribune*, January 16, 2004, page B2; Spangler, Donna Kemp, "Judge to rule on monument," *Deseret Morning News*, January 16, 2004.

⁵⁰⁸ These two rulings will be discussed below. In summary of one of those rulings involving California's Giant Sequoia National Monument, the district judge in declining judicial review wrote, "courts are extremely limited in their review of congressionally authorized presidential actions." Doyle, Michael and

delegated authority and correct compliance with the provision, the “facts compel a finding in favor of the President’s actions in creating the monument.”⁵⁰⁹

Agreeing with prior rulings Benson found himself limited as to what comprised judicial jurisdiction concerning the law. “When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion. To do so would impermissibly replace the President’s discretion with that of the judiciary.”⁵¹⁰ Judicial inability to review is especially apparent when the law explicitly allows for presidential “discretion” in carrying out the delegated authority. Therefore, issues of motivation, reasoning, and discretion were strictly off-limits to the courts.

Benson then outlined areas where courts had authority and jurisdiction. First, the court could review whether or not the President “acted pursuant” to the Act’s powers and guidelines. Relying upon the proclamation, Benson declared “the language...clearly indicates the President considered the principles that Congress required him to consider: he used his discretion in designating objects of scientific or historic value, and used his discretion in setting aside the smallest area necessary to protect those objects.” Second, Benson legitimized the action in relation to each of the other laws mentioned by the plaintiffs. For example, the president did not violate the Wilderness Act because “he did not designate wilderness; he designated a national monument.” The President did not violate federal agency procedural law, NEPA, and others, because he, as President, is not subject to them.⁵¹¹

Here Benson strongly and succinctly rejected a major political issue in Congress, Utah, and the press. Even if the Department of the Interior (DOI) or others drafted the proposal and submitted it to the President, “it was the President’s action, and not the action of the DOI, that had the legal effect of creating the Monument.” In other words “the ultimate decision to create the Grand Staircase Monument rested with, belonged to, and was made by, President Clinton,” and not by anyone else, as explicitly provided by the Antiquities Act.⁵¹²

Though a ruling favoring the government and the monument was likely, considering the substantial amount of precedent and the clarity of the Antiquities Act and Clinton’s proclamation, the opponents still left with resentment. MSLF attorney William Perry Pendley said, “We are definitely appealing. The judge is mistaken in his finding that he has no authority to decide if Clinton abused his authority.”⁵¹³ In a humorous return, Heidi McIntosh, an official of the Southern Utah Wilderness Alliance, comparing monument opponents to a baseball batter correctly said, “Monument challenges are batting zero.”⁵¹⁴

Meanwhile, an editorial of the *Deseret Morning News*, though still criticizing the surprise of the declaration, called for Utahns to forgive and forget, if they had not long

Mark Grossi, “Clinton Sequoia decision stands: Judge blocks effort to challenge status of national monument,” *Fresno Bee*, October 3, 2001.

⁵⁰⁹ *Utah Association of Counties v. George W. Bush*, Judge Dee Benson, April 19, 2004, page 16.

⁵¹⁰ *Bush*, page 16.

⁵¹¹ *Bush*, pages 21, 17.

⁵¹² *Bush*, pages 27, 36.

⁵¹³ Israelson, Brent, “Monument Wins in Court,” *Salt Lake Tribune*, April 20, 2004.

⁵¹⁴ Spangler, Donna Kemp and Roche, Lisa Riley, “Judge Upholds Grand Staircase,” *Deseret Morning News*, April 20, 2004.

done so already. Visitors to the monument “won’t care how it was created or what the arguments were at the time. They are likely to leave with a greater appreciation for nature and for Utah’s place in the union. Even if it masks other important issues and considerations, this isn’t such a bad outcome.”⁵¹⁵

Even Pendley’s compatriot in the lawsuit, the Utah Association of Counties, was resigned to defeat. Mark Walsh, an associate director of the organization, signaled the group would likely not appeal and instead would focus attention on pushing action in Congress.⁵¹⁶ Not only would the appeal assuredly fail, as all others have, but also Utah counties, who contributed \$185,000 of taxpayer money to fund the lawsuit, would probably not vote for further expensive legal action.⁵¹⁷ Garfield County Commissioner Dell LeFever summed it best saying, “It’s tough to overturn a federal judge.”⁵¹⁸ If the Utah counties do go to Congress to address the monument, they will have an extraordinarily tough time.

In Congress monument opposition since 1996 has had measured success, but all victories have clearly and only been symbolic in nature. The vicious attacks on the President from the Utah politicians rapidly were formulated into action on Capitol Hill.⁵¹⁹ When the 105th Congress began in 1997, Utah Republicans quickly introduced legislation to amend the Antiquities Act. The National Monument Fairness Act, sponsored by Senator Hatch and Representative Hansen, required the president to consult with the governor before declaring a monument in a state and that all monuments over five thousand acres required congressional approval.⁵²⁰ House rules favoring the Republican majority and Representative Hansen’s chairmanship of the national parks subcommittee ensured the bill some momentum. Even so, the bill was found to be too restrictive in committee, and Hansen replaced the measure with a limitation of 50,000 acres before congressional approval was required. The bill passed the House on October 7. However, the Senate took no action under the threat of Democratic filibuster. Even if a bill had passed Congress, President Clinton never would have signed it.

During the 105th Congress, the Republican controlled House Resources Committee examined the background into the Clinton designation. It studied the matter of initiation. If the President did not originate the procedure for declaring Grand Staircase a monument, the committee wanted to know if the monument would then have to go through the rigorous and open NEPA study process. If that was the case, did the proclamation constitute a violation of NEPA.⁵²¹

Like several other Republican committee investigations into the administration, it was a highly partisan affair.⁵²² The committee subpoenaed some emails and

⁵¹⁵ *Deseret Morning News*, editorial, “Living with the Monument,” April 21, 2004.

⁵¹⁶ Hummel, Debbie, “Plantiffs Plan to Fight Judge’s Ruling on Grand Staircase Monument,” Associated Press wire, April 20, 2004.

⁵¹⁷ *Salt Lake Tribune*, “Suit Costs Utahns Almost \$200,000,” April 20, 2004.

⁵¹⁸ Spangler, Donna Kemp and Roche Lisa Riley, “Judge Upholds Grand Staircase,” *Deseret Morning News*, April 20, 2004.

⁵¹⁹ Davidson, Lee, “Utahns introduce bills requiring Congress to OK monuments,” *Deseret News*, March 20, 1997, page B2. Senator Hatch compared the monument declaration to the attack on Pearl Harbor.

⁵²⁰ Israelsen, Brent, “Hatch Monument Bill Asks for ‘Fairness,’” *Salt Lake Tribune*, March 20, 1997, p A7.

⁵²¹ Woolf, Jim, “Is Monument Document From Babbitt?,” *Salt Lake Tribune*, March 14, 1997, page A7;

Woolf, Jim, “Did Clinton Take First Step on ‘Staircase?,’” *Salt Lake Tribune*, November 16, 1997, B1.

⁵²² Another 105th Congress investigation was into campaign finance abuse allegations. Representative Dan Burton of Indiana “conducted his panel’s investigation in the House as an expose of Democratic campaign

communications and placed them prominently in the committee report in order to repetitively lambaste the White House. But beyond the vague charge of “evasion” of NEPA,⁵²³ there were neither specific charges nor findings of illegal behavior by the administration nor recommendations that the Congress revoke or reduce the national monument or the Antiquities Act.⁵²⁴ The partisan report left its questions largely unanswered, while unhesitatingly heaving intense criticism at President Clinton.

In the next two Congresses, Utah legislators introduced Antiquities Act reform plans yet still had little success. In 1999 another piece of legislation passed the House amending the Antiquities Act. In a lopsided vote of 408-2, likely because the bill had no chance of success in the Senate or at the other end of Pennsylvania Avenue, the House approved soliciting public, state, and congressional comment before monument declarations, and that the monument management plans follow NEPA guidelines.⁵²⁵

President Clinton Recharges, Retools, and Reuses the Antiquities Act

The Grand Staircase monument stirred President Clinton in two ways. First, it made western, and particularly Utah, Republicans very angry and determined to fight his environmental moves. Clinton battled Congress on appropriations riders, bought sought other ways to advance his agenda, most frequently through executive action. Second, Clinton realized the extent that Americans are concerned with national parks, wildlands, and open spaces. He had used it effectively in his reelection campaign, winning Arizona and other western states, and prepared to use it during his second term. Though the Lewinsky scandal dominated headlines for nearly a year, during that time Clinton embarked on one of the greatest conservation campaigns in the history of the country.

Clinton sought to get things done when the Republican Congress was in no mood to act on his programs.⁵²⁶ The campaign began in 1998 and 1999 when Secretary Babbitt began investigating western lands that could qualify under the Act. These investigations included visits to the sites and discussions with various public officials. Babbitt had learned from Grand Staircase, and from the resultant bills introduced in Congress, that most of the concerns raised by opponents derived from the lack of wider administration warning and consultation prior to the declaration.⁵²⁷

finance transgressions with fiery speeches, much grandstanding about alleged violations of the law, and dramatic visuals on videotape and poster boards. The House proceedings were made-for-television political theater. Yet they received very little news coverage, perhaps because of the high-pitched rhetoric that characterized them.” Dwyre, Diana and Farrar-Myers, Victoria, Legislative Labyrinth: Congress and Campaign Finance Reform, Congressional Quarterly Press, Washington, DC, 2001, page 38.

⁵²³ The Report talks about “evasion” of NEPA, but never specifies or separates any illegalities from supposed wrongdoings. Though it implies it continuously, there is no statement anywhere in the document that charges that laws broken by anybody in the Clinton administration. The Democratic minority attachment correctly states, “The Majority report complains that there was ‘no effort’ by the President to comply with NEPA. But they offer not a single case or legal authority supporting a conclusion that the President’s actions under the Antiquities Act are subject to NEPA.” Report, page 211.

⁵²⁴ “Monumental Abuse: The Clinton Administration’s Campaign of Misinformation in the Establishment of Grand Staircase – Escalante National Monument,” Report of the House Resources Committee, Washington, DC, October 16, 1998.

⁵²⁵ Hudson, Audrey, “House passes bill to end ‘abuse’ of land-acquisition law,” *Washington Times*, September 25, 1999, page A2.

⁵²⁶ Janofsky, Michael, “U.S. Readies a Major a Land-Protection Initiative,” *New York Times*, November 21, 1999, page 19.

⁵²⁷ Leshy, “The Babbitt Legacy.”

Clinton returned to the Antiquities Act on the appropriate stage. On January 11, 2000 he created three new monuments, and expanded a fourth, from the Grand Canyon. It was ninety-two years from the day that Theodore Roosevelt had created the expansive monument to protect the Grand Canyon in 1908. Clinton made his mark on northern Arizona that day by declaring Grand Canyon-Parashant National Monument, a designation covering roughly a million acres on the North Rim. President Clinton said, “I am very grateful for the opportunities that Vice President Gore and I have had to build on President Roosevelt’s legacy, to take that long look ahead, to chart a new conservation vision for a new century.” In a tremendously Rooseveltian phrase, apt for the day and Clinton’s announcements, the President concluded:

*So I say to all of you, I hope you will go forth from this place today with a renewed dedication to the long look ahead; with a renewed sense of pride and gratitude; with a sense that we have reaffirmed our humanity as well as our devotion to our natural home; and a sense of humility that we are grateful, we are fortunate, and we are obligated to take the long look ahead.*⁵²⁸

The President’s logic for the monuments he declared that day was similar to that of Roosevelt, but updated to the realities of the latest century. Roosevelt wished to see the Grand Canyon preserved so that harmful encroachers could not take hold of the territory in and surrounding the canyon and fetter public access and public enjoyment of one of the nation’s greatest natural treasures. These developers, the railroads and their associated interests, and individuals like Cameron, who was charging fees for tourists to cross his mining claim on the popular Bright Angel Trail,⁵²⁹ were disturbing the quality of the site without the notice of the general public. The land and Arizona as a whole, at that time still a territory, was so isolated and unpopulated. The monument was a great scientific interest and deserved protection under the Antiquities Act.

President Clinton reached a similar conclusion. In this day one of the nation’s great problems are the effects of suburban sprawl. Not only does sprawl waste time and money with long commutes causing increased pollution and higher transportation and highway construction budgets, but also harms the land in its path. Having explained that a second Arizona monument, Agua Fria, containing over 71,000 acres,⁵³⁰ is “in the shadow of...the suburbs of Phoenix [that] creep ever closer to this space,” Clinton declared, “This is not about locking lands up; it is about freeing them up, from the pressures of development and the threat of sprawl, for all Americans for all time.” Like Roosevelt, Clinton believed that foresighted and courageous action against pressures that the nation is just coming to grip with, is one of the best services a president can provide.⁵³¹

When declaring his monuments in 2000, President Clinton attempted the first step in shifting the BLM’s role in conserving public land. By establishing them in a new National Landscape Conservation System (NLCS), Clinton, and Secretary Babbitt, hoped to encourage different practices in the agency over time. As most future large monuments

⁵²⁸ Remarks of President Clinton at Grand Canyon National Park, Arizona on January 11, 2000. Office of the Press Secretary, <http://clinton6.nara.gov>.

⁵²⁹ Harrison, Matthew W., “Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument – A Call for a New Judicial Examination,” *University of Oregon Journal of Environmental Law and Litigation*, Vol. 13, 1998, page 418.

⁵³⁰ Presidential Proclamation of January 11, 2000, Agua Fria National Monument, Bill Clinton.

⁵³¹ Remarks of President Clinton, January 11, 2000.

are likely to be on BLM land, Clinton was laying a path for future presidents to feel comfortable in naming these lands monuments while retaining the ability to compromise on hunting, fishing, and other recreational issues as he had. Multiple use would continue as would the expansive Roosevelt interpretation.

The NLCS is likely to become one of Clinton's greatest legacies if it is properly shepherded in the next few decades. Included with the monuments are a number of conservation areas, wild and scenic rivers, scenic and historic trails, wilderness areas, and wilderness study areas that total more than 26 million acres. What separates this system from the national park and national wildlife refuge systems, is that it protects natural and cultural resources within their ecosystems rather than within limited or arbitrary boundaries. As the manager of over 260 million acres in the United States, the BLM is the only agency with the ability and jurisdiction to operate these large areas determined more for their biological and cultural value than for the perpendicular lines on a map. Because the lands are in the BLM, and many are not designated with familiar titles, visitation may not be heavy at first allowing the agency important time to revamp its management to pursue its conservational goals and mandates.⁵³²

The chorus of outrage following the announcements came from usual places. Republican Senator Jon Kyl said "it's wrong and don't think the state of Arizona is going to stand by and let it happen." Arizona House Speaker Jeff Groscost called it "nothing but a federal usurpation." Conservative journal *Insight* derided Clinton for putting on shiny western boots for a day and for trying to be, "the second coming of Teddy Roosevelt."⁵³³

However, the anger from the state's politicians quickly receded, probably for one important reason: Arizonans appeared to support the new monuments in the state! In a poll conducted at the time of the declaration, 78% supported the creation of the monument, including 73% of Republicans and 77% of rural voters. In another poll question, 68% of voters supported presidential national monument creation in the absence of similar congressional action.⁵³⁴ Meanwhile, the state's largest newspaper, the *Arizona Republic*, editorialized that "Arizonans want the incredible beauty of their state protected, and they seem to be ahead of the politicians." The *Scottsdale Tribune*, echoed Clinton's land-sprawl statements, writing, "now is the time to protect some of Arizona's suitable unspoiled open places."⁵³⁵

Clinton announced a new round of monuments in June for locations in four western states.⁵³⁶ The monuments declared included Hanford Reach (195,000 acres), one of the Columbia River's last free flowing stretches in central Washington, Canyons of the Ancients (164,000 acres), tracts of substantial archeological value in Colorado, Cascade-Siskiyou (53,000 acres), a biologically diverse area surrounding Soda Mountain of southern Oregon, and Ironwood Forest (129,000 acres), a desert area in Arizona with

⁵³² Factual information from NLCS Coalition: www.discovernlcs.org.

⁵³³ Paige, Sean, "Seizing Land for Posterity," *Insight on the News*, February 7, 2000, page 7. In terms of usage of the Antiquities Act, in the continental United States at his presidential discretion he was the second coming of Theodore Roosevelt.

⁵³⁴ The poll was commissioned by a number of environmental groups. As shown by the newspaper editorials, it is not the only indication of support.

⁵³⁵ Nishimoto, page 77. Newspaper editorials from Rhode Island and Texas, as well as statements by Democratic congressmen from Michigan and Minnesota, are featured in Nishimoto's article to show national support for the policy. Clinton's action is itself a statement of national support as president.

⁵³⁶ Babington, Charles, "Clinton Creates 4 National Monuments," *Washington Post*, June 10, 2000, A3.

numerous cultural sites.⁵³⁷ In Colorado, as in other locations, the monument was met with praise from environmentalists and denounced by landowners in the vicinity.⁵³⁸

Clinton did not create any more significant monuments until after the November election. He named one in mid-November, Vermillion Cliffs in Arizona.⁵³⁹ The monument is immediately south of the Utah state line and Grand Staircase-Escalante National Monument. By declaring it, Clinton solved the charge from 1996 that the Grand Staircase boundaries, by stopping at the state border, showed political motive rather than concern for scientific interests,⁵⁴⁰ and protected almost 295,000 acres in the process.

Then it became a race for time before leaving the White House on January 20. Clinton received a list of recommendations from Babbitt for additional monuments in Arizona, Montana, New Mexico, California, and the Virgin Islands. Several, including coral reefs in the Virgin Islands,⁵⁴¹ Pompey's Pillar in Montana,⁵⁴² and Kasha-Katuwe Tent Rocks in New Mexico,⁵⁴³ were popular with local groups and politicians. However, Upper Missouri River Breaks in Montana was more controversial. Republicans in the state thought the President was trying somehow to "poke in the eye" departing Governor Marc Racicot, a top campaign and transition advisor to President-elect George W. Bush. The area along the Missouri River in the central part of the state in between Great Falls and Fort Peck Lake "is virtually unchanged in appearance from the days of Lewis and Clark" when they passed two hundred years ago.⁵⁴⁴ Clinton quoted passages from the journal of Meriwether Lewis in the proclamation and reported other historic and scientific interests relating to fish, wildlife, and Native Americans.⁵⁴⁵ Local interests groups like the Montana Stockgrowers' Association complained about the new restrictions,⁵⁴⁶ especially since monument lands surround some private lands. However, by this time vigorous contestation of Clinton's monuments had dwindled because most expected Republican George W. Bush to not declare any monuments.

Additional Challenges to Clinton in the Courts

One of the monuments to draw ire of Antiquities Act opponents was the Giant Sequoia National Monument in California. This monument of nearly 330,000 acres in the Sierras near Sequoia National Park was declared on April 15, 2000 and jurisdiction was given to the Forest Service, the agency that had previously managed the land in the Sequoia and Inyo National Forests. Clinton declared the monument to protect the sequoia trees there as well as wildlife, plantlife, "unique paleontological resources," fossils, and

⁵³⁷ Presidential Proclamation of June 9, 2000, Hanford Reach National Monument; Presidential Proclamation of June 9, 2000, Canyons of the Ancients National Monument; Presidential Proclamation of June 9, 2000, Cascade-Siskiyou National Monument; Presidential Proclamation of June 9, 2000, Ironwood Forest National Monument.

⁵³⁸ Romano, Michael, "Park in Four Corners Area Created," *Rocky Mountain News*, June 10, 2000, 5A.

⁵³⁹ Presidential Proclamation of November 9, 2000, Vermillion Cliffs National Monument.

⁵⁴⁰ Harrison, page 443.

⁵⁴¹ Levendosky, Charles, opinion, "Clinton, Babbitt face deadline on national monument protection," *Denver Post*, January 7, 2001, page H6.

⁵⁴² Janofsky, Michael, "Preservation Action, Then a Bigger Fight," *New York Times*, Nov. 30, 2000, p A32.

⁵⁴³ Biasi, page 242 has Senator Pete Domenici, Republican of New Mexico, saying "I'm pleased with today's move to provide national monument status to the beautiful Tent Rocks area."

⁵⁴⁴ Janofsky, "Preservation Action."

⁵⁴⁵ Presidential Proclamation of January 17, 2001, Upper Missouri River Breaks National Monument.

⁵⁴⁶ Janofsky, "Preservation Action."

differing, but neighboring, ecosystems from the great variance in elevation. The proclamation restricted mining, road building, and timber harvesting.

The restrictions on timber hurt local industries including two lumber mills that closed, leaving more than one hundred workers without jobs. Recreational organizations found that their abilities to use the land would be curtailed under the proclamation. Tulare County, which had land within the monument, believed that the loss of these jobs and the inability of the recreational users to use the land would adversely hurt its tax base. These groups organized a lawsuit and filed it in federal district court in October 2000.⁵⁴⁷

Judge Ricardo Urbina reached a decision in September 2001.⁵⁴⁸ In the opinion he dismissed the lawsuit on the ground that none of the plaintiffs' arguments satisfied any standard of review. Tulare County had argued historic and scientific objects were not specified, that some objects specified did not qualify for proper interests, the size of the monument was too large, and the proclamation will likely adversely impact objects within the monument. "A facial review of the Proclamation leads the court to determine that the plaintiffs can prove no set of facts in support of their claims that could entitle them to relief." The claim that the monument abused the constitutional power of the Congress over public lands was also dismissed because "the Antiquities Act represents a proper delegation of congressional authority to the president." Lastly Judge Urbina ruled, though it could review what the president actuated, namely the monument, "this court cannot review the President's determinations and factual findings...to do so would invade the legislative and executive domains because Congress has directed that the President, 'in his discretion,' make these findings."⁵⁴⁹ The plaintiffs also lost on appeals and the Supreme Court refused to grant certiorari.⁵⁵⁰

A second case was a broader challenge to the Antiquities Act in that the plaintiffs charged that six national monuments declared by President Clinton were abusive of the powers in the Antiquities Act.⁵⁵¹ The plaintiffs, the Mountain States Legal Foundation and the Blue Ribbon Coalition, an all-terrain vehicle recreation organization from Idaho, argued in the same vein as Tulare County and associated organizations that the designations exceeded presidential authority.

The District Court dismissed the claim and the Appeals Court affirmed that decision. At Appeals, Judge Judith Rogers wrote "At no point has Mountain States presented factual allegations that would occasion further review of the President's actions," and "nothing in the record before us indicates any infirmity in the challenged Proclamations." Having failed "to allege facts to support the claim that the President acted beyond his authority under the Antiquities Act...Mountain States presents the court with no occasion to decide the ultimate question of the availability or scope of review for exceeding statutory authority." In other words, the Mountain States argument was so "inadequate" that the judge could not find reason to even start a review of the designations, let alone decide the merits of a positive or negative review of them. It was a

⁵⁴⁷ Melley, Brian, "Group sues to reverse Sequoia National Monument designation," Associated Press wire, October 26, 2000.

⁵⁴⁸ Doyle, Michael and Grossi, Mark, "Clinton Sequoia decision stands," *Fresno Bee*, October 3, 2001, A1.

⁵⁴⁹ *Tulare County v. Bush*, 185 F. Supp. 18 (2001) United States District Court for the District of Columbia.

⁵⁵⁰ Berman, Dan, "Supreme Court Declines to Hear Challenges to Clinton-era National Monuments," *Land Letter*, Vol. 10, No. 9, October 9, 2003.

⁵⁵¹ The monuments under review in this case were Grand canyon-Parashant, Ironwood Forest, Sonoran Desert, Canyons of the Ancients, Cascade-Siskiyou, and Hanford Reach.

major defeat for monument opponents, as the court strongly threw out their arguments and claims.⁵⁵² Like in Tulare, the Supreme Court appeal was not granted certiorari.⁵⁵³

These cases are clear dismissals of challenges to the presidential discretion and authority and the congressional delegation of that power in the Antiquities Act. The dismissals are strongly worded and environmentalists are quite optimistic that the two rulings will “doom” any further Grand Staircase challenge.⁵⁵⁴ The courts have always been highly skeptical about what it sees as interference into the affairs of the Executive and Legislative Branches. Though the courts are open to future challenges of monuments yet declared, it is very unlikely that a federal judge will overturn the monument.⁵⁵⁵

Bill Clinton: Roosevelt Redux?

When history examines the record of conservation in the twentieth century, the names of two presidents should immediately appear: Theodore Roosevelt and Bill Clinton. These leaders framed the century with the ideal that the American government must protect and save for future generations the outstanding natural and historic resources that exist on the federal public lands. They also signed measures that expanded federal conservation authority and practices: Roosevelt created the monument and the wildlife refuge systems and Clinton instructed the BLM to manage monuments and other conservation areas. They both had strong conservation goals for the nation’s future, and they acted on a grand scale to ensure that protection was a substantial part of the contribution of the century to American existence.

By 2000, many indeed compared Bill Clinton and Theodore Roosevelt for their executive conservation actions. Clinton had earned the title for most monument acres declared in the contiguous United States by reserving over 5.5 million acres.⁵⁵⁶ He also halted new road building in over 40 million acres of national forests in 1999 effectively creating, at least until the end of his term, wilderness areas in those locations.⁵⁵⁷ Through another authority he protected 84 million acres of Hawaiian offshore coral reefs in 2000.⁵⁵⁸ His campaign in his last year in office reflected a deep interest in conserving western lands and in the powers of the executive branch to bring such an end.

Opponents frequently charged that President Clinton’s real motive in 2000 and January 2001 was constructing a “legacy.” This was a supposed shift of political objectives, for in 1996, reelection was his alleged principle rationale. The legacy charge is an obviously correct assertion about any public official, not just Bill Clinton. This purely political derision is substantively meaningless.

Within the confines of the Act, the charge is meaningless because of the unambiguous wording of the Antiquities Act. The President uses “his discretion” to

⁵⁵² *Mountain States Legal Foundation v. Bush*, 353 U.S. App. D.C. 306 (2002), United States Court of Appeals for the District of Columbia Circuit.

⁵⁵³ *Rocky Mountain News*, “Monuments Weather Attack; Court Rejects Plea to Delist 6 Parklands Set Aside by Clinton,” October 7, 2003, page 14A.

⁵⁵⁴ Associated Press wire, “Monument rulings may undercut Grand Staircase challenge,” October 19, 2002.

⁵⁵⁵ Rusnak, page 693.

⁵⁵⁶ Lacey, Marc, “Blocked by Congress, Clinton Wields a Pen,” *New York Times*, July 5, 2000, page A13; Nishimoto, Scott Y., “President Clinton’s Designation of the Grand Canyon-Parashant National Monument,” *University of Oregon Journal of Environmental Law and Litigation*, Vol. 17, Spring 2002, 68.

⁵⁵⁷ Egan, “Putting Some Space.”

⁵⁵⁸ *Time Magazine*, “How Green Was Bill?”

identify objects on federal land and to establish a monument within a certain boundary. Once the decision has been made, he has completed using the executive power. All other reasons for monument declaration are legally extraneous.⁵⁵⁹

Furthermore, in politics every politician of any party is out to create a legacy at all times so that he or she can stay in office or will be well remembered once out of office. Bill Clinton was a politician, and a good one, becoming the first Democrat since Franklin Roosevelt to be reelected president. Orrin Hatch, Robert Bennett, and James Hansen were politicians from Utah in 1996; they were good ones for their constituents and are still serving or were reelected until retirement.⁵⁶⁰ Were not these politicians creating a legacy for themselves as the three most willing politicians from Utah to take on President Clinton in Washington after Grand Staircase was declared? Of course they were; they are politicians. The same goes for all of the other politicians in Arizona or Montana, for example, who labeled the monuments in their states as a legacy project, especially when they were usually predisposed to attack the President. The charge of a legacy motive against President Clinton concerning the Antiquities Act is highly unpersuasive.

Was Theodore Roosevelt not creating a legacy in 1906 at Devils Tower? He most assuredly was. Therefore such criticism of the expansive interpretation of the Antiquities Act should begin there in 1906, not in 1908 with the Grand Canyon, 1943 with Jackson Hole, 1978 in Alaska, or 1996 with Grand Staircase. But that is impossible to do; Devils Tower was not excessive use of presidential authority, especially noting the relative small size of the monument. Indeed Roosevelt made a brilliant decision, whether he knew it or not, by naming a small politically harmless scientific interest monument as the first.

This is not to say legacies are meaningless. The Roosevelts, Carter, and Clinton left impressive land protection legacies, as has every president who has declared a national monument. And these legacies will long be remembered. History has been kind to Theodore Roosevelt for his conservation energy and for the Grand Canyon in particular. Though it was thought that a dam should be constructed there in the 1960s, no one seriously today considers threatening the land and features at the Grand Canyon.⁵⁶¹

Bruce Babbitt once told the story of his grandfather, a rancher and merchant in northern Arizona, who opposed TR's Grand Canyon monument because his ranch was nearby and it appeared to threaten his property rights. Then, "not many years went by," Babbitt said, "before my grandfather, in his mellow years, said he always was in favor of protecting the Grand Canyon. As I told the president: history is on our side."⁵⁶² For the same reasons with Grand Staircase-Escalante, Grand Canyon-Parashant, Giant Sequoia, or any other monument, Babbitt will always be proven correct.

⁵⁵⁹ Judge Kennedy in *Franke* wrote the court cannot "take any judicial interesting the motives which may have inspired the Proclamation." No later courts have adjusted this ruling.

⁵⁶⁰ Senators Hatch and Bennett are still in the Senate. Representative Hansen retired in 2002.

⁵⁶¹ Though we, as a whole, do threaten it and other national parks, monuments, and sites with air and water pollution and smaller illegal offences like littering, carving initials into rock, and taking objects like petrified wood or antiquities from within the park. The NPS and the Environmental Protection Agency reported in April 2004 that seven national parks have measured unhealthy levels of smog and other air pollutants. Watson, Traci and Kenworthy, Tom, "Seven national parks have unhealthy levels of smog," *USA Today*, April 8, 2004, page 1A. The parks, from west to east, are Yosemite, Sequoia/Kings Canyon, Joshua Tree, Great Smoky Mountains, Shenandoah, Cape Cod, and Acadia.

⁵⁶² Egan, "Putting Some Space."

Evaluating the Act and Its Future

Chapter 7

The Antiquities Act has redefined the American conception of its public land. Most Americans endorse the Act's desire to protect objects of historic and scientific interest, because they appreciate over time the gift that has been left to them to behold and enjoy. Despite attacks on the Act from various corners, the Act will continue to shape the public's perspective on conservation. It will do so as long as the monuments exist.

It is worth concluding on how the Act survives and will survive into the future. Some laws sink into oblivion due to age, non-use, incompetence, or obsolescence, but the Antiquities Act is alive and, perhaps surprisingly, rather healthy, as it nears one hundred years of existence.

In short the Act continues to play a role in American conservation because its language is a rare combination of straightforwardness, clarity, and authority. It is a bill the average citizen can read, instantly understand, and form a reasonable stance in favor or in opposition. Courts have found its terms legally sound and incontrovertible. The national monument declaration process, including the express delegation of congressional authority to the president and the possibilities of rectification, are clear and defined.

Though the Act has a strong legal and philosophical foundation in its simple comprehensible language, it needs, like any other law, to survive the various political tempests that traverse its part of the landscape of federal law. Laws and their aftermaths support winners and losers. In the Antiquities Act, the president becomes the singular holder of all the praise and vilification from a declaration. Focusing the attention, the credit, and the blame on the president, the most important and visible figure in American government, affords the Act a period in the sunlight of public scrutiny followed by the dark oblivion of regulatory drafting and bureaucratic procedure. It has its day and then it disappears until next time. What the president leaves after using the Act, a national monument, then enters the crowded, but adored national park system.

The presidential role in the Act causes much of the increasingly frequent controversies surrounding declarations. As the clearest symbol of his political party, the president is the target of bitter and emotionally charged criticism. Often truth, fact, and legality are neglected in order for the vigorously partisan attack to have greatest effect. Misconceptions, therefore swirl around presidential action, especially in the case of the Antiquities Act. These misconceptions cloud segments of popular judgment on the Act or monument and can seed congressional campaigns or court actions to repeal, amend, restrict, or invalidate the Act.

These campaigns often surge on the idea of trampled rights and dignities. The faraway president makes a decision by himself that changes how public land is managed. It can be difficult to imagine how this can be enacted without following the regular traditional procedures of formulating and passing laws following votes and committee hearings in Congress and a vetting process by the president. Removing this process, therefore, must remove the democratic and constitutional principles that country was founded upon.

Political partisanship over time removes the likelihood that both parties will use the Act's powers. Democrats have remained supportive of the Antiquities Act while

Republicans have curtailed their use. There are periods of activity and of silence. The cycle formed by partisanship based in part on misconceptions and perceived perversion of democracy actually serves as a restorative process for the Act rather than a slow suffocation of its principles. Without use, the Act loses its sting, and its powers appear safely harmless. The next president favorable to the Act then springs a seemingly dusty and century old authority back into the limelight, only enhancing the positive aspects of the announcement.

Finally, the American people support the broad goals of federal land conservation policies. They cherish their ability to visit our national park sites around the country, many of which were first created under the Antiquities Act. The legacy of the Act is tremendously apparent to the visitors who see and experience the Grand Canyon, Muir Woods, the Chesapeake and Ohio Canal, and all the other monuments or former monuments. The people's support is the Act's greatest strength.

Misconceiving the Antiquities Act

At first glance it is rather odd to suggest that the misconception of a law followed by various political maneuvers is helpful to its overall health and continuance. Usually such misunderstanding creates an environment of inaccurate information and poor judgment that culminate in mistakes and other harmful activity. But in the case of the Antiquities Act, the succinct and unimposing language and the nationally popular objective of special resource land conservation renders the misconceptions as simple political hyperbole and exaggeration that inevitably blows around centers of political control. In other words, the lifespans of the inaccuracies are short and benign over time because they are so obviously false and political.

Indeed the mischaracterizations sometimes make the Act's authority stronger and more vibrant. When the president survives the first brutal wave of emotional opposition and still can claim victory with a monument intact on the public land, he may be emboldened to do battle again. Theodore Roosevelt jubilantly repeated the punishment of his political enemies and was immensely aided by the energetic battle-ready public persona he cultivated with the American people. Other presidents have followed suit in this respect with the Act.

Much of the controversy surrounding the Antiquities Act is unjustified and generally based upon accidental or mostly purposeful misconceptions spread by the stubborn opponents of the legislation's powers or of a president's individual withdrawals. The largely groundless charges are used to score political points at home or with a particular national interest or constituency. They are frequently printed in newspapers, shown on television, or heard over the radio, misinforming the public about the actual powers and provisions specified in the Antiquities Act. The purveyors are not honest opponents of a bill that have reasonable grievances against it, but actually exploiters of political situations for their own good.

Some of the greatest misconceptions of the Act come from the qualification of the objects protected on the monument. More specifically they are formed to buttress arguments against the expansive Roosevelt interpretation. Though the act grew out of the need to protect antiquities in southwestern states, the written language of the law allows for such an interpretation. It is inaccurate to state that something other than presidential consideration of and conformation to the restrictive terms of the Antiquities Act must be present at the point of declaration to make the entire process valid and legal. Inevitably

these currents crash into the impervious wall of presidential discretion explicitly granted in the Act.

One frequently occurring example of outsiders supplying additional qualifying regulations for monument declaration involves the notion of threat. It has been argued that a threat to the objects and interests is somehow required in order for the President to properly use the authority. The House Resources Committee reported in 1998 after investigating the 1996 Grand Staircase declaration in Utah that “the Act contemplates that objects to be protected must be threatened or endangered in some way.” In a January 2000 editorial that railed against President Clinton, the *Deseret News* of Salt Lake City announced, “the Antiquities Act was designed only to allow presidents to quickly proclaim monuments to protect them from immediate danger.”⁵⁶³

The committee’s vague assertion and the editorial’s blanket pronouncement are false. While the Act establishes a penalty of fines and/or imprisonment for disturbing, vandalizing, or removing “any object of antiquity” on all federal land, it does not imply or require that threat to such objects is a necessary prerequisite for a presidential monument declaration. Instead of the using the Act as the final source of guidance, the Republican controlled committee appeared to credit the Clinton administration with developing the concept. The report cites a subpoenaed email of March 25, 1996 from the chairwoman of the White House Council of Environmental Quality, Kathleen McGinty, in which she wrote, “I’m increasingly of the view that we should just drop these Utah ideas. We do not really know how the enviros will react and I do think there is a danger of ‘abuse’ of the withdraw/antiquities authorities especially because these lands are not really endangered.” In the committee’s portrayal, “it follows that for the designation of the Utah Monument to be proper its lands had to be somehow threatened or endangered.”⁵⁶⁴

The underlying problems with the threat concept presented by the Resources Committee, other than the fact that it is legally extraneous, are that there is neither a serious determination of what actually constitutes a threat to the considered public land nor a specific delineation of who in the federal government formulates such a determination. Despite using the idea as a central piece of its argument, the committee does not describe its concept of threat and does not outline decision-making authority. It does neither because the report was investigative in nature rather than to generate positive legislation. As for the *Deseret News*, the newspaper wrote that the president’s “particular definition” was “unwise.” At least it realized existing law expressly declares the president the holder of all pre-monument discretion.

Threat was not explicitly written into the Antiquities Act when it was drafted before 1906 because the concept defies description, especially to archeologists or anthropologists. Theoretically all objects and interests are always under threat any time they are left unprotected. For example, an historical artifact lying in Montezuma Castle in Arizona, before Theodore Roosevelt declared it a national monument on December 8, 1906, that is important to the archeological, anthropological, historical, or scientific understanding of the culture that built the site and made the object, is under threat no matter if the antiquities dealer intent on finding, taking, and selling artifacts from the site is currently digging them up, is five miles away on his way to digging them up, or sitting

⁵⁶³ *Deseret News* editorial, “End Monument Foolishness,” January 10, 2000, page A8.

⁵⁶⁴ House Report 105-824, October 16, 1998, page 4.

in a restaurant in a New York hotel meeting for the first time a voracious collector five years before digging them up.

Furthermore, many different people will create many different explanations of the indescribable concept. Following the Utah example, there is a substantial difference in opinion among between Senator Hatch, Representative Hansen, President Clinton, and anyone else as to what constitutes a “threat” to the Grand Staircase.⁵⁶⁵ Clinton found the Andalex mine to be a threat to the land’s ecosystem, while the Utah congressional delegation and the Resources Committee argued the mine was a non-threatening economic opportunity for Utah.

This tussle of opinion is exactly why it took nearly six years for the Act to be enacted and why the multi-member bicameral Congress delegated monument declaration powers to the singular Executive. Edgar Hewitt and Representative Lacey removed contentious measures from the bill and gave broad discretion to the President to ensure protection of special resource public lands. The Act “contemplates” efficiency not threat.

Threat can be a superb reason for a president to declare a national monument, but it is not required or mandated. The Act deals with historical and scientific resources and its legal qualifications are centered on protecting them.

The other charges laid out in the House report also fall short of being convincing. Throughout the report President Clinton was alleged to have abused the Antiquities Act for his own political gain or for other unsavory purposes. Once again the committee members chose the administration as the source of perceived wrongdoing. In other words, if Clinton’s staff believed in or hinted at possible difficulty, the Committee found that material suitable evidence of impropriety rather than thorough investigation of actual law. Overall, the evidence collection and interpretations, whether relating to the Clinton administration, supposed NEPA requirements, or the Act in general, offered by the House Report is partisan at best and wrong at worst. If it had actually found and verified illegal behavior, it would not have served as “a waste of time and money.”⁵⁶⁶

Another misconception is the idea of a land grab concurrent with a monument declaration. In 1996 and 1997, Senator Hatch, furious at the White House, labeled Grand Staircase as the “mother of all land grabs.”⁵⁶⁷ This attack is simply legally baseless and only serves to roil hardcore supporters. There is more headline grabbing in the programmed angered response than land grabbing in a declaration. Indeed after a vote in the House on September 1999 to amend the Antiquities Act, the conservative *Washington Times* newspaper headlined “House passes bill to end ‘abuse’ of land-acquisition law.”⁵⁶⁸

The phrase assumes that a transfer of ownership occurred in an injurious and illegal manner and that the government took land that was not its own before the declaration. However nothing could be further from the truth. There are simply no powers of “land acquisition” anywhere in the Act. The President cannot buy land under the Act, the president cannot remove private property with the Act, and the president has always respected existing rights held on monument lands. The president only has generative national monument powers over “the lands owned or controlled by the

⁵⁶⁵ The January 10, 2000 *Deseret News* editorial supports Representative Hansen’s amendments to the Act.

⁵⁶⁶ House Report 105-824, Dissenting Views.

⁵⁶⁷ Davidson, Lee, “Utahns introduce bills requiring Congress to OK monuments,” *Deseret News*, March 20, 1997, page B2.

⁵⁶⁸ Hudson, “House Passes Bill.”

Government of the United States.” A private holding within a declared monument is geographically within the monument, but not legally so. The only way private property can be included into a monument is when it is “relinquished” by its owners to the government as the Kents did with Muir Woods or the Rockefellers with Jackson Hole. Perhaps Representative Nick Rahall, Democrat of West Virginia, retorted best to the land grab attack, writing, “All of our national monuments were already owned by the American people before they were designated, and critics of the designations would know this if they simply read the law.”⁵⁶⁹

As is often the case, those who make bold sensational attacks often support their claims with evidence as bogus as their own statements. There is no better example of this with the Antiquities Act than the land grab charge. It may sound like fighting words to put off constituents, but it serves little purpose other than political inflammation. Even an article in the *Deseret News*, at the time supportive of Utah congressional efforts to amend the Act, noted in 1997 that the delegation “used the occasion” of introducing amendments “to bash Clinton again.”⁵⁷⁰ In the end after the dust settles and the benefits of the monument are realized, the rhetoric is mostly forgotten. But it remains on the record, and it cannot be expunged. Like the charge of legacy building, it only appears for partisan advantage.⁵⁷¹ When that goal is so obvious, the message and the messenger are devalued and more likely to be ignored. Every overtly partisan political attack against the Antiquities Act makes it stronger and in the end more popular with the American people.

The Act’s Democratic Values

The charge that the Antiquities Act is undemocratic is one of the more provocative arguments in the stable of the Act’s critics. The question of its democratic nature is complex not just because both sides make reasonable arguments, but also because the image of democratic values is simultaneously vivid and vague. Democracy can be described, but the freedoms inherent in it make it difficult to define, especially in a political system as large and dynamic as ours. It must be measured by the context of the situation and established procedure. The context of American democracy inevitably and properly revolves around the Constitution.

The Constitution establishes for the federal government a representative system of three branches, each armed with checks and balances against the other two, which are separate of the state governments. This allows the people make decisions for themselves in a fair and effective manner, a fitting description of democracy. It is through this lens the democratic values of the Antiquities Act can be seen.

Many opponents therefore correctly start with the Constitution to argue for reforming the Act. They point to the explicit constitutional power of the Congress to

⁵⁶⁹ Rahall, Nick, “Clinton Was Compelled To Protect Public Lands,” *Roll Call*, April 23, 2001.

⁵⁷⁰ Davidson, “Utahns Introduce Bills.”

⁵⁷¹ Consider Representative Hansen commenting on a “last minute scramble to make a legacy for himself,” and Republican Senator Mike Enzi of Wyoming declaring Clinton “blatantly ignor[ed] the people closest to these areas and the democratic process in order to create his own legacy,” in comparison to former Bush speechwriter David Frum saying the president “is thinking about building of conservative government that are going to outlast him.” Hansen in *Deseret News*, editorial, “Time for Monumental Change,” June 11, 2001, page A10. Enzi in Levendosky, Charles, “Criticism over new monuments is unfair,” *Ventura County Star*, January 26, 2000, page B7. Frum in Hirschfeld Davis, Julie, “After scoring wins, Bush now turns to thorny issues, with eye to legacy,” *Baltimore Sun*, July 31, 2005, page 1A.

make decisions on the management, disposal, and retention of national public land.⁵⁷² They believe the Antiquities Act affronts this basic principle by unfortunately delegating significant land policy powers to the Executive, and that Congress should therefore revoke it completely or amend it to allow congressional and other inputs, notably from the public or state officials. The expansive Roosevelt interpretation particularly irks these opposing politicians or groups because it increases the power removed from Congress.

If the people are to make decisions as they see fit, it would seem they ought to have a legal participatory role in the executive branch's management of national land. This argument is two-fold. First, public participation is apart of many other federal procedures, and second, the Act is not designed for maximum democracy institutionally.

The National Environmental Policy Act of 1969 (NEPA) is the most relevant statutory inclusion of public participation in federal decision-making. There has been a substantial effort to transmit NEPA guidelines into the Antiquities Act. The House of Representatives in 1999⁵⁷³ and the House Resources Committee in 2002⁵⁷⁴ passed amendments of such nature to the Act. This would allow public input on this presidential power as it is on most other government authorities and would remove all inequalities between the Antiquities Act and the Federal Land Policy and Management Act of 1976 (FLPMA), its amendments, and other similar laws.⁵⁷⁵

Second, critics contend the Antiquities Act is not designed for democratic input institutionally. The Constitution originally gave land authority powers over the public lands to the Congress because it was the branch most responsible, in its nature and in frequency of elections, to the people. Two years after President Carter declared the Alaska monuments, Richard Johannsen wrote, "Policy developed by Congress is likely to be more responsive to the public interest because members of Congress are more accountable to the electorate than are officials of the executive branch."⁵⁷⁶ Another critic, Eric Rusnak, stated, "the Antiquities Act is antiquated because it only takes into account the president's interests" as opposed to the public's interest. "It is now time," he urged, "to take serious measures to restore public land management to the public's hands."⁵⁷⁷ In other words, the constitutional checks and balances of the system are out of order because the president has overwhelming legal power.

The tendency of "lame duck" presidents to use the Antiquities Act after presidential elections has also received critical attention. This presidential action flaunts the public's recent decision to elect a new leader, sometimes of a different political party or ideology. The danger of lame duck proclamation lies in the president "remain[ing] completely unaccountable to the public."⁵⁷⁸

Summarizing the collective disgust about the constitutional power arrangement and lack of public participation and representation, James Rasband wrote, "the Act is the

⁵⁷² Article IV, Section 3, Clause 2 states "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

⁵⁷³ Hudson, "House Passes Bill."

⁵⁷⁴ Bremner, Faith, "House Committee Votes to Curb Presidential Monument Powers," Gannett News Service, March 20, 2002.

⁵⁷⁵ Johannsen, "Public Land Withdrawal Policy and the Antiquities Act."

⁵⁷⁶ Johannsen, page 446.

⁵⁷⁷ Rusnak, Eric C., "The Straw the Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act," *Ohio State Law Journal*, Vol. 64, 2003, page 730.

⁵⁷⁸ Johannsen, page 458.

sort of gadget that so devalues the ennobling qualities of a fair and democratic preservation process that it must be amended or repealed.”⁵⁷⁹

Are these antidemocratic arguments correct or justifiable? The answer is no. The Act is democratic. The Constitution is not maligned, the public does participate, and the president is nationally accountable. Its democracy is visible in the simplicity of the language and procedure of the act.

It is important to begin with the constitutional context. The Congress, the constitutional public property owner, delegated some of its powers to the executive branch via legislation in 1906. The Supreme Court has repeatedly sanctioned such delegations of authority. It is within the freedom of the legislative branch to do so. Within the context of the Antiquities Act, the Congress agreed the president could expedite the creation of zones protecting objects of historic and scientific interest and manage this special area. Meanwhile it retained the power to limit the punishment for malicious actions against the protected objects.

Furthermore since 1906, Congress has had ample and continuous opportunity and authority to amend or reevaluate the Act and individual presidential actions. It has done so to a degree on several occasions concerning individual declarations.⁵⁸⁰ Congress has amended the Act, prohibiting use in Wyoming in 1950 and restricting use in Alaska in 1980. Otherwise, Congress has only supported the monuments and the Act. It named over two dozen of them national parks. It appropriates them funds. It specifically excluded the Act from the general repeal of twenty-nine executive authorities when writing FLPMA in 1976. It has tried the process of passing amending legislation since Grand Staircase in 1996, and all three serious attempts failed. And even during those attempts, efforts were not made to repeal the declaration.

Congress, as it constitutionally should be, is the ultimate check on the president’s Antiquities Act powers. If there is concern that a president exercised the Act contrary to the view of Congress or of the people, amending of the declaration or the Act should be vigorously pressed in Congress. It has been done on several occasions throughout the history of the Act.⁵⁸¹ Whether or not amendments will pass or the American public as a whole will stand for them is, of course, a different matter.

There is substantive debate in political science as to whether the elected officials in Congress are more democratically representative or accountable as the elected presidency. However it is not possible to say, as Rasband does by calling the Act a “gadget” that “devalues...the fair and democratic preservation process,” that the president is somehow not representative of the people or democratic values. By giving the authority to the elected president, and not the Senate-confirmed secretary of the interior, as does FLPMA, the writers of the Act were making sure that democratic and elective interests were taken into account. Congress expressed the protection of historic and scientific interests on public lands to be a national interest in 1906. The president is the only official in the entire government that is representative of the national interest,

⁵⁷⁹ Rasband, “Utah’s Grand Staircase,” page 553.

⁵⁸⁰ Congress has transferred several monuments, Wheeler and Holy Cross in Colorado, Fossil Cycad in South Dakota, Verendrye in North Dakota, and Lewis and Clark Cavern in Montana, to other federal, state, or local jurisdictions from the NPS. www.cr.nps.gov/history/hisnps/NPSHistory/antiq.htm.

⁵⁸¹ As has been shown declarations in Wyoming, Maryland, Alaska, and Utah have seen congressional action after the fact. C&O Canal in Maryland was denied funds for years and Utah has seen passage of a bill in the House twice.

capable of the quick action Congress intended and wanted, and “directly accountable to the majoritarian political processes” of the national electorate.⁵⁸²

In one case, in the name of democracy, procedures were undertaken before a potential monument declaration to allow local public input. The Republican Governor of Utah, Michael Leavitt, proposed in 2002 that President George W. Bush declare the San Rafael Swells of central Utah a monument and include over 600,000 acres. Trying to contrast himself from President Clinton, Leavitt organized a non-binding referendum in Emery County, where the monument would be located, to gauge public sentiment. In the vote 2,151 were against the monument and 1,883 voted in favor. Reviewing this straw poll, Leavitt scraped the monument proposal. When 53.3% of 4,034 participating voters in a single Utah county make a binding decision on hundreds of thousands of acres of valuable federal land that belong to all 285 million Americans, it is almost impossible to call it democratic.⁵⁸³ The Antiquities Act appropriately places the power in the hands of the nationally elected representative, the president, and not in the hands of a few thousand county voters.⁵⁸⁴

The additional argument that a “lame duck” president is unaccountable is very unpersuasive. Never in the entire history of the United States has a president been elected to serve in office from Election Day to Election Day. Rather the president serves from Inauguration Day to Inauguration Day. That delay is a constitutionally mandated arrangement of the executive branch. Though the president may wish to refrain from particular decisions, leaving them for the newly elected successor, full presidential authority, of course, still exists after an election. Last minute presidential actions before “retirement” are an expected, natural, and continuous feature of American politics in general and with the Antiquities Act in particular.⁵⁸⁵

The federal courts have been available to opponents of the Antiquities Act. Using the third branch of government to adjudicate disagreements over the law is one of the great democratic features of the American system. District judges rule on the matter and the loser has ability to appeal to the Appeals Court and then to the Supreme Court. Though courts have always approved of the president’s authority and use of discretion and have found it not within the courts’ ability to at least rectify any supposed or acknowledged grievances, cases still remain open for judicial inspection. Rejection by a federal court over one monument declaration does not prevent appealing the case to a higher court or shut down the opportunity to take the next monument declaration before a federal judge for review. Court cases, though only after the action, often provide a

⁵⁸² Lin, Albert C., “Clinton’s National Monuments: A Democrat’s Undemocratic Acts?,” *Ecology Law Quarterly*, Vol. 29, 2002, page 739.

⁵⁸³ Consider the autocracy of less than .002 percent of the national voting age population in 2000 (4,034 people out of 205,815,000) deciding the future of federal public land. President Clinton meanwhile received 47,402,357 votes out of 196,498,000 eligible to vote in 1996 (24.1%). In another form of measurement, .002% of the land area of the 48 states is about the size of the District of Columbia. www.fec.gov/elections.

⁵⁸⁴ Israelsen, Brent, “Leavitt Halts San Rafael Plan,” *Salt Lake Tribune*, December 5, 2002, page A1.

⁵⁸⁵ Indeed the delayed inaugural and transitional process serves as a temporary check on the electorate. The people must abide with a president they once voted into office for over two months as specified by the 20th Amendment. Either the people voted the president out (Herbert Hoover) or cannot vote for him because of 22nd Amendment term limitations (Dwight Eisenhower and Bill Clinton) or a previous decision to decline renomination (Theodore Roosevelt and Lyndon Johnson). The presidents in parentheses used the Antiquities Act under the described circumstances after an election.

detailed examination of the monument declaration in court and in the press. Indeed, many of the participants filing the lawsuits take public participation directly into account because of their inherent public existence as state and local governments or as organizations created for the purpose of representing them.⁵⁸⁶

Lastly, under the Act there are extraordinary democratic pressures for the president to use the authority as well as to not use it. When Theodore Roosevelt set the presidential precedent for using the powers, he outlined why presidents should consider the new possibilities. It is for the benefit of the nation to protect the historic and scientific past of the continent. Future generations should have the equal ability of past and present generations to learn and experience the sights and information protected within the national monuments (and other parks, for that matter). To reserve and protect the special natural and historic features contained on its land is one of the best and most public ways for the American nation to proclaim its progress, strength, and individuality. Congress agreed in principle in 1906 and presented for Roosevelt to sign an act allowing for these activities. Most presidents since his time have accepted TR's challenge and used the Act to their discretion for these and other purposes to protect objects of historic and scientific interest. The public has repeatedly shown its support of this goal.⁵⁸⁷

However, there are many reasons not to use the authority or to refrain from more extensive use. Using his "discretion" under the act, a president may choose a monument of smaller size than planned or may not name a monument at all. On several occasions presidents have refrained from completing recommendations made by the secretary of interior and other advisors because of various worries from internal doubts or external threats. Bill Clinton was not the first to propose a large monument in southern Utah; rather it was by Franklin Roosevelt in the mid-1930s.⁵⁸⁸ Lyndon Johnson only declared five percent of Secretary Udall's monument acreage.⁵⁸⁹ In the last days of his administration, Jimmy Carter refrained from naming a monument in the state of Washington to cover land around the recently erupted Mount St. Helens.⁵⁹⁰ Discretion implies balanced thought, and presidents have ruled both ways.

After Grand Staircase, President Clinton effectively shifted pre-declaration procedures to include public participation and visits by Secretary Babbitt.⁵⁹¹ On these visits Babbitt inspected the site to gain first hand knowledge of historic and scientific interest located on the land and held many meetings with local officials and the public. According to one report, over 600 people attended one meeting in Great Falls, Montana, connected to the planned Upper Missouri River Breaks National Monument nearby.⁵⁹² Political opponents still complained; some were Republicans predisposed to attacking Clinton, others were elected politicians favoring conservation but a little offended they

⁵⁸⁶ The States of Wyoming and Alaska, Tulare County of California, and the Utah Association of Counties have all filed cases at one time or another against the Antiquities Act.

⁵⁸⁷ Frequently relevant members in have Congress approved designations: Representative Mondell with Devils Tower in 1906, Representative Taylor with Colorado National Monument in 1911, and the Montana delegation and Pompey's Pillar in 2001.

⁵⁸⁸ *New York Times*, "Three New Monuments," August 2, 1936.

⁵⁸⁹ Blair, "Johnson Rebuffs Udall."

⁵⁹⁰ Johannsen, page 464.

⁵⁹¹ Leshy, "The Babbitt Legacy."

⁵⁹² Bremner, "House Committee Votes."

could not participate in the process in order to use it as a talking point on their next reelection campaign.⁵⁹³ Politics, in all its forms, is never far from the Antiquities Act.

The Antiquities Act therefore features essential democratic principles in its monument creating provisions. Indeed two of the most important features of our constitutional representative democracy are present in the text. First, the decision-maker, in this case the president, is an elected official. The president is therefore accountable and also by the nature of the election and office represents broad national as well as statewide constituencies and interests.⁵⁹⁴ Second, the president's actions are fully open to public challenge either in a federal court or in electing officials to Congress to change the declaration or the law. The courts and the Congress have at their full disposal the implements of the constitutional separation of powers, its respective checks and balances. It cannot be anymore democratic than that in our system.

Presidential Personality

The political aspects of presidential discretion under the Act have been well discussed, but it is important to also briefly outline the personal attraction the Antiquities Act has on the president as a person. Often Americans forget that their leader is still just a person who grew up, got an education, matured, entered a profession, and forged a career and family. We are free to label them as our heroes for their strengths, beliefs, and accomplishments or as our enemies for much of the same reasons, but they still are people. When confronted with the personal space and discretion afforded in the Antiquities Act and the amazing spiritual possibilities of gazing upon extraordinary landscapes or imagining historical dramas, most presidents since 1906 have found joy and relief in utilizing their prerogative in response to experiences in their own lives. In the process they greatly benefit the lives and futures of their fellow citizens.

Though each president assuredly has a tail to tell about the wonders of enjoying natural and historical resources, two instances stand out rather remarkably: that of Theodore Roosevelt and Bill Clinton. Their stories share similar strands of loss of friends or loved ones in a stage of transition in their lives. Yet they are restored by extended periods in the wilderness or by a short visit on a transcontinental journey. Somehow their freedom and ability to see the scientific wonders of the natural world and the visual splendors that result have profound effects, perhaps inexplicable at first, but personally tangible at a later date. The details or the consequences of the stories can be exaggerated

⁵⁹³ Senator Slade Gorton, Republican of Washington and running for reelection in 2000, interestingly displayed both characteristics in his reaction to the declaration of Hanford Reach National Monument in his state, saying, "The only 'emergency' is the fact that President Clinton will soon be out of office... While we all agree it should be protected, it has always seemed to me it should be done" with local participation. Babington, Charles, "Clinton Creates 4 National Monuments; Sites in Colorado, Washington, Oregon, Arizona Protected," *Washington Post*, June 10, 2000, page A3. Meanwhile, the other Washington senator, Democrat Patty Murray, said, "It's not too often in your political career that you can do something that will be here long past your lifetime. This is an amazing accomplishment." She undoubtedly pushed her environmental record in her reelection race of 2004! Cole, Michelle and Jonathan Brinckman, "NW Areas on Monument List," *The Oregonian*, June 1, 2000, page A1.

⁵⁹⁴ The intricacies of the Electoral College reflect these national and local constituencies. The President, with the Vice President, is the only officeholder in the country that runs for election in all fifty states. However it is not a national popular election, but a collection of fifty elections determining electors for a later meeting. Under a national popular election format, Democrat Al Gore would have been president after the 2000 elections rather than Republican George W. Bush.

or perhaps retold in sunniest form, but they should not be ignored. At the point of decision it is up to the president alone to choose a future. Personal experience can be a telling guide in deciding an outcome.

Much has been written about Theodore Roosevelt's early years as the source for his drive to conserve American natural resources. His summers in Europe, along the Hudson Valley, or in the Dakotas engaged his mind and spirit to overcome his volatile pediatric history. In 1884 he traveled again to the Badlands to make a go with cattle ranching. However lurking over the adventure stood the haunting specter of the Valentine's Day tragedy in which his wife and mother died from separate diseases in different rooms of his Manhattan home. While searching for game on the plains and creek beds, TR also hunted for resolution and recovery.

Writing to his sister Bamie, Roosevelt expounded the effect of his surroundings:

Every night I would lie wrapped up in my blanket looking at the stars till I fell asleep, in the cool air. The country has widely different aspects in different places; one day I could canter hour after hour over the all level green grass, or through miles of wild-rose thickets, all in bloom; on the next I would be amidst the savage desolation of the Badlands, with their dreary plateaus, fantastically shaped buttes, and deep, winding canyons. I enjoyed the trip greatly, and have never been in better health.⁵⁹⁵

Through the solitary wanderings in which he pondered the "savage desolation of the Badlands," he began to resolve the tragedy that seized from him his mother and wife. In the heated rocky corners dotted with juniper and decorated by eroded color he found continuance and purpose.

As president the Antiquities Act gave Roosevelt a personal avenue to provide the same healing freedom to other Americans trapped in the rugged deserted landscape. On his visit to the Grand Canyon in 1903, Roosevelt's message was to leave it unencumbered by human touch.

I hope you will not have a building of any kind, not a summer cottage, a hotel, or anything else, to mar the wonderful grandeur, the sublimity, the great loneliness and beauty of the Canyon. Leave it as it is. You cannot improve on it; not a bit. The ages have been at work on it, and man can only mar it. What you can do is to keep it for your children and your children's children and for all who come after you, as one of the great sights which every American, if he can travel at all, should see. Keep the Grand Canyon of Arizona as it is.

For Bill Clinton, the Grand Canyon was also a place to ponder the mysteries of maturing in troubled times. During his address at the Canyon in 1996, Clinton echoed a moment from his youth:

The first time I ever came to the Grand Canyon was...in 1971 in the summer. And one of the happiest memories of my entire life was when, for some fluke reason, even in the summertime, I found a place on a rock overlooking the Grand Canyon where I was all alone. And for two hours I sat and I lay down on that rock and I watched the sunset. And I watched the colors change layer after layer for two hours. I could have sat there for two days if the sun had just taken a little longer

⁵⁹⁵ Hagedorn, pages 104-106.

*to set. And even today, twenty-five years later, in hectic, crazy times, in lonely, painful times, my mind drifts back to those two hours that I was alone on that rock watching the sunset over this canyon. And it will be with me till the day I die. I want more of those sights to be with all Americans for all time to come.*⁵⁹⁶

What Clinton did not disclose was that this trip occurred during a period of significant change for him. Knowing that his student life was nearly over, Clinton was in the midst of the transitional period when choices over career and relationships appear to be most daunting. He had met Hillary Rodham at Yale in the last term and the cross-country trip to California was one his efforts to court her. Meanwhile as the Vietnam War convulsed the country, it had a sizable impact on Clinton's group of friends from his time as a Rhodes scholar in Oxford. One friend, Frank Aller, had decided to resist the draft and his decision to object was hailed in his circle for its courage. Yet the struggle began to completely define him and threatened to consume his spirit.

In September, after Clinton saw the canyon on the lonely journey to California to see Hillary, he learned Aller had committed suicide at his home in Spokane. Clinton wrote in his autobiography that, "after Frank's death, I lost my usual optimism and my interest in courses, politics, and people. I don't know what I would have done without Hillary." Biographer David Maraniss, remarking on the effect of the suicide, wrote, "For Bill Clinton...and the other Rhodes Scholars of the class of 1968, the sixties ended that day in September 1971 when Frank Aller shot himself in the head."⁵⁹⁷

The Grand Canyon visit was a short moment of solace and inspiration locked in memory surrounded by tumult and doubt. Everyone goes through such a period; and there are usually methods of moving on. For Bill Clinton in 1971 and for Theodore Roosevelt in 1883, wild rugged dry lands with all of their colors, shapes, and mysteries abounding across to the horizon brought the sought after relief. The puzzling questions swirling around the mind were temporarily solved in an expansive vision of jagged beauty. Feeling that the land had given them the drive to move forward, the presidents were thrilled to be able to use their executive abilities to help others.

The delegation of the declaration power to the President from the Congress not only serves to expedite the process, but to also give a personal side of the importance of permanently protecting natural, cultural, and historic sites. It enhances the bully pulpit, but also brings the president back down to earth. There are significant political rewards for using the Act, but there is also a personal attraction that is difficult to resist. As long as it cannot be resisted, presidents will continue to use their Antiquities Act powers.

Cycle of Usage

It is true that the Act was in its strongest shape in the early half of the twentieth century. From 1906 to 1969 eleven consecutive presidents, from Theodore Roosevelt to Lyndon Johnson, used the authority. Before World War II, it was normal for a president to declare more than a half dozen monuments in a term. However, with the partisan split in using the Antiquities Act, only one out of the five past Republican presidents have made declarations, it would appear that the Act was headed into troubled territory.

⁵⁹⁶ Mitchell, Alison, "President Designates A Monument Across Utah."

⁵⁹⁷ Clinton, My Life, pages 187-188. Maraniss, David, First in His Class, Simon and Schuster, New York, 1995, pages 244-245, 259-261.

It has been there before. In the late 1960s and early 1970s much of the national conservation focus had shifted to more environmental concerns pertaining to clean air and water and wilderness protection. In the 1980s, during the Reagan-Bush era, conservation fell way to the backburner. But each period saw a reinvigoration of the Act under presidents Carter and Clinton. With President George W. Bush in office, it appears the Act will enter another period of dormancy. However, it is nowhere near the legal scrap heap.

A cycle has developed in which presidents of the two parties either use or do not use the Act. The partisan cycle has turned out to be beneficial for the Act's longterm health. When a Democrat, as in 1978, 1996, or 2000-2001, fosters resentment after a significant declaration, it has been followed by a period of Republican indifference.

Any effort to repeal or amend the Act during the term of the president making the declaration would be vetoed. FDR vetoed efforts to restrict Jackson Hole in the 1940s, and President Clinton would have done the same in the late 1990s if any bill had reached his desk.

At first glance it would appear that the early months of the Reagan or George W. Bush administrations would have been ripe for significant overhaul of the Act following the Carter and Clinton announcements. In 1981 Republicans controlled the White House and the Senate and the Democrats were on the defensive in the House. In 2001 Republicans had a comfortable majority in the House, slim control of the Senate, and had retaken the White House.⁵⁹⁸

However, in both cases, there was no serious effort to amend or repeal the Act or previous declarations once viewed as hostile. Attempts were made in the House in 2001, but it never went beyond the Resources Committee. These attempts were not relaunched in 2003 or 2005. Knowing that Presidents Reagan and Bush would not make a declaration during their tenure, congressional Republicans felt no need or pressure to go on the offensive on the Act. A telling piece of admission comes from a Salt Lake City *Deseret News* editorial of January 2000. While declaring that, "it is past time for the Antiquities Act to be designated as obsolete," the newspaper also recognized that such repealing legislation "would be unnecessary" under "most presidents." It is a rather revealing acknowledgement.⁵⁹⁹ It is more than possible, if not likely, that modern conservative Republicans secretly appreciate having the Antiquities Act, in the famous phrase of Richard Nixon in 1962, "to kick around."

The dormancy of the Act during these Republican periods only makes it more enticing for Democrats to rediscover it when they return the White House. The idea of dredging out a law with a birthdate of 1906, the same year as the Great San Francisco Earthquake, and that was fondly supported by Republican Theodore Roosevelt, is rather dramatic and imaginative. Democrats act on a major piece of their overall agenda burnishing their conservation credentials and Republicans find pleasure in attacking them for doing so.

Another critical component of the cycle is the likelihood that a Republican president would not willingly create the precedent of sacrificing a piece of executive authority, even if he or she does not intend to use it. In the past five years, George W.

⁵⁹⁸ They would lose control of the Senate after Vermont Senator Jim Jeffords left the party to become an independent in the spring.

⁵⁹⁹ *Deseret News* editorial, "End monument foolishness."

Bush's Justice Department has defended the Act and Bill Clinton's designations in federal court. The continued support of government lawyers only ensures that federal judges will not overturn declarations or invalidate the Act. The conservative Mountain States Legal Foundation, a main plaintiff against Grand Staircase, reacted to Bush's "zealous" defense with "shock" and consternation.⁶⁰⁰ In this case President Bush has taken an historical rather than political approach in preserving executive authorities. In other words, retaining power is more important than actually using it.

The cycle of usage has afforded the Act more vigor as it enters its second century of existence. It is given time to heal, fall into the shadows, and then dramatically reappear. It has prevented its demise. Indeed the Act has not been in serious peril since 1976 when Congress had the opportunity to repeal it while considering FLPMA, or the 1940s, when World War II overshadowed the Jackson Hole battle and congressional Democrats battled the Roosevelt and Truman administrations.

Popular Support

The various political reasons mentioned above keep the Act from falling into disuse, but the general support of the American people keep it a vibrant part of the federal arsenal for land conservation. The people enjoy the recreational, educational, and restorative quality of their public lands and as a whole have instructed their representatives in both chambers of Congress to support the parks system and land conservation. As Roosevelt and others predicted, the people appreciate what the Act and other similar pieces of legislation have done for them in protecting a wide arrange of historic and scientific sites around the nation.

The people have seen the benefits for decades of TR's expansive conservation campaign, and Americans express their support with nearly 300 million annual trips just to the national park system. International tourists to the United States flock to visit not only our cities, but also our parks and monuments. Brochures at the USS Arizona Memorial in Pearl Harbor, Hawaii are printed in English, Spanish, French, German, Japanese, Chinese, and Korean for free mass distribution; many other parks are accommodating international tourists with foreign language interpretation.

The parks not only provide excellent destinations for family vacations, but are major components of many local economies. Parks, battlefields, and monuments bring tourist dollars to gateway communities, support local jobs, and increase tax revenues for towns, counties, and states. Several surveys provide the evidence of the significant economic contribution. The Civil War Preservation Trust reported in 2005 that tourism at thirteen state and federal Civil War battlefields annually supports over 3,800 jobs, stimulates at least \$173.6 million in business, and generates more than \$23 million in state and local government tax revenue.⁶⁰¹ A study covering visitor economic impact in 2000 at Badlands National Park in South Dakota determined that park tourism supported more than 435 jobs, \$5.2 million of wages and salaries for workers, and \$19 million in

⁶⁰⁰ Perry, William Pendley, "Escalante Ruling Gives President Carte Blanche Authority," Mountain States Legal Foundation, www.mountainstateslegal.org.

⁶⁰¹ Civil War Preservation Trust, "Blue, Gray, and Green: CWPT's Battlefield Benefits Guide for Community Leaders," May 16, 2005, www.civilwar.org.

total business. The survey did not include popular Black Hills attractions such as Mount Rushmore that generate even greater economic values for western South Dakota.⁶⁰²

An analysis of National Park Service data reveals the economic impact of all sites originally created under the Antiquities Act in the National Park System, which includes places no longer designated as monuments such as the Grand Canyon or Acadia. These parks and monuments received a total federal outlay in fiscal year 2003 of approximately \$185 million for park budgets. A significant portion of those funds eventually circulated into the surrounding communities in the form of contract payments, wages and salaries, procurement, and other expenditures. More importantly, visitation to these same parks supported nationally in 2003 over 44,000 jobs, \$810 million in personal income, and \$2.2 billion in business sales. Federal budget spending produced nearly twelve times as much business, an exceptional return for a single year's investment.⁶⁰³

Americans also support the idea of national parks and land conservation beyond the pecuniary benefits. The reservation of land, scenery, and natural, cultural, and historic resources for future generations has a tremendous appeal. It is a national legacy left in the public trust and backed by laws and guarantees. In the words of President Clinton, "We know, as President [Theodore] Roosevelt said, we cannot improve upon this landscape. So the only thing we can add to it is our protection. President Roosevelt challenged us to live up to that ideal, to see beyond today or next month or next year. He said, the one characteristic more essential than any other is foresight."⁶⁰⁴ Americans have stepped forward in approval of that "foresight" and will continue to do so with their support of conservation and the Antiquities Act.

Though level of commitment is wide ranging, it is clear that open-space protection and conservation are two important pieces of the "broad center of American public opinion."⁶⁰⁵ Senator Lamar Alexander, Republican of Tennessee, accurately depicted in April 2004 the national popularity of conservation, saying on the Senate floor there is a "huge conservation majority that exists in the United States...on both sides of every aisle and has broad support."⁶⁰⁶ The wide national support for conservation is a fact of American life that cannot be denied, resisted, toyed with for long.

Popular and congressional support for the park system will likely increase as 2016 approaches. In that year the National Park Service will mark its centennial, and there is a growing bipartisan movement in Congress to enact legislation to mark the anniversary with a campaign to improve visitor services, facilities, maintenance, infrastructure, and other components of park management. The plan is financed by the innovative technique of inserting a check-off box on annual federal income tax forms. If enacted Americans will undoubtedly respond to protect and enhance their national park system. A poll released at the time that the Park Centennial Act was introduced in April 2005 showed that 61% of respondents would utilize the check-off upon filing their tax forms. In such

⁶⁰² Propst, Dennis, Stynes, Daniel, and Sun, Ya-Yen, "Economic Impacts of Badlands National Park Visitor Spending on the Local Economy, 2000," Michigan State University Department of Park, Recreation, and Tourism Resources, January 2002, www.prr.msu.edu/mgm2/badlands.pdf.

⁶⁰³ The budget totals are obtained from individual park websites. Data for personal income and sales from from National Park Service Public Use Statistics Office. www.nps.gov.

⁶⁰⁴ Remarks of President Clinton on January 11, 2000.

⁶⁰⁵ Cronon, William, opinion, "When the GOP Was Green," *New York Times*, January 8, 2001, page A17.

⁶⁰⁶ Senator Alexander was speaking on the Get Outdoors Act of 2004. *Congressional Record*, Senate, April 1, 2004, page S3552.

an environment of positive contribution, the chances that the Antiquities Act would be repealed or amended for any reason appear to be negligible.⁶⁰⁷

Furthermore, in the last twenty years the southern and southwestern United States have seen massive and sustained population growth from people abandoning the Rust Belt in the Northeast and Midwest. These states also receive a large portion of immigration from Central and South America and Asia. These populations are overwhelmingly urban and suburban. A census report examining population growth from 2000 to 2003 showed the recent extent of the demographic shift. Sixty of the one hundred fastest growing counties in the country were in the South and twenty were in the West. Only two were in the Northeast. In the south and west hot growth spots included Atlanta, Central Florida, Dallas, Austin, Houston, Denver, Las Vegas, and Tucson.⁶⁰⁸

Another measurement of the demographic shift is the decennial reapportionment of seats in the Electoral College for presidential elections. At the expense of the Rust Belt, the eleven states west of the Rocky Mountains from the 1960 Census figures to the 2000 Census gained 29 electoral votes. Unsurprisingly, twenty-five of the electoral votes went to California, Nevada, Arizona, and Colorado. Other big winners in the forty year time span include Florida, Texas, and Georgia.

Though many of these western and southern states are traditionally or are rapidly becoming conservative, it does not mean that the people are always as against conservation as their elected officials appear to be. Bruce Babbitt was proven right about his home state of Arizona when he said “there has been a huge upsurge in public sentiment on behalf of protecting open space.” A poll by the *Arizona Republic* newspaper showed 80% of Arizonans supported President Clinton’s monuments in the state by the end of his term.⁶⁰⁹ The Grand Staircase monument did have a sizable influence on President Clinton’s victory in Arizona in 1996.

When interviewed by the *Salt Lake Tribune* in 2000, Antiquities Act expert Hal Rothman, of the University of Nevada, Las Vegas, said that almost all of the opposition to Clinton’s monuments came from longtime rural residents tied to the land through grazing, logging, and mining. However, Rothman “stressed” in the words of the reporter that “rural residents no longer control the West.”⁶¹⁰ Indeed, urban and suburban residents vastly outnumber rural voters.⁶¹¹ The 2000 Census provides massive amounts of data to support the claim.

It is no longer possible to assume that western states will fight monument declarations with credible and successful campaigns as was once waged by Wyoming and Alaska. Though they have been and will be launched, they will not succeed. The changing demographic landscape in the United States will have much to do with it.

⁶⁰⁷ National Parks Conservation Association, “Parks Group Praises Senators for their Leadership on National Park Funding,” press release, April 21, 2005, www.npca.org.

⁶⁰⁸ *Boston Globe*, “Fastest-growing counties,” April 9, 2004, page A3.

⁶⁰⁹ Egan, “Putting Some Space.”

⁶¹⁰ Woolf, Jim, “Monuments Rescindable, Says Expert; But undoing Clinton designations may not be worth Bush’s trouble,” *Salt Lake Tribune*, September 3, 2000, page B1.

⁶¹¹ The 2000 Census produced the following urban/rural statistics: California, 94.4%/4.6%; Nevada, 91.5%/8.5%; Arizona, 88.2%/11.8%; Utah 88.2%/11.8%; Colorado, 84.5%/15.5%; New Mexico 75%/25%. The national percentage is 79%/21%. www.fastfacts.census.gov

Possible Worries

The future of the Antiquities Act is sound, but it will definitely not be as powerful a tool for land conservation as it was in the early twentieth century. In that era presidents of both parties rolled proclamations off their desks protecting a variety of places across the country. But in the twenty-first century the Act will follow the usage cycle as described above. Several factors may hinder future presidential use of the Act.

First, the Act has become a partisan presidential power. This does not refer to its political inflection or implications, but to its use. Since the Eisenhower administration, not one of the five Republican presidents to serve in the White House has created a new national monument.⁶¹² In the meantime, all four Democratic presidents since 1961 have created at least one monument during their administrations, while expanding several others.⁶¹³ This partisan split in usage will remain until the Republican party returns to the proactive role in conservation that it held in the early half of the twentieth century.

The administration of George W. Bush has sent out mixed signals towards the Antiquities Act. When still a vice-presidential candidate in August 2000, Dick Cheney said that a potential administration might consider rescinding many of the Clinton monuments.⁶¹⁴ However, within two months into office Gale Norton, the new Secretary of the Interior, announced that the monuments would stand, though perhaps with some alterations to boundaries or change in management plans.⁶¹⁵ The unlikelihood of a Bush monument declaration stopped efforts in Congress to amend the Act, yet in 2002 there was a plan to proclaim a monument in central Utah at the suggestion of Governor Mike Leavitt. This plans were dropped, as has been discussed, after a county straw poll. Furthermore, the Bush Justice Department has vigorously defended the Act's presidential powers in federal court, despite the general conservative disfavor for the provision.

Second, over time the number of remaining sites qualified to be named national monuments will dwindle. Though western public lands with historical and scientific resources are vast, many of less than superb lands may not qualify for being worth the political risk in declaring them monuments. Many of these lands reside in the portfolio of the Bureau of Land Management (BLM), which is mandated, like the Forest Service, to allow multiple uses on its holdings.

Clinton's move to open the BLM to the general conservation audience was brilliant, yet is now in a critical period of infancy. The BLM is not as visible of a government agency as is the Park Service. Its mission is less understood, if known at all. Though it and the General Land Office, its predecessor, have existed for nearly two centuries, it does not have the NPS' ninety years of public exposure or operational control over the most exceptional and famous public lands. Therefore it is an agency more susceptible to behind-the-scenes maneuvers, cutbacks, or policy reforms, either by hostile congressional authorizing or appropriating committees or administration officials.

⁶¹² Gerald Ford expanded a couple of monuments, but did not create any new monuments.

⁶¹³ John Kennedy created two and Johnson one. Johnson expanded a number of monuments in his last day in office. Blair, "Johnson Rebuffs Udall."

⁶¹⁴ Woolf, "Monuments Rescindable"

⁶¹⁵ Pianin, Eric, "White House Won't Fight Monument Designations," *Washington Post*, February 21, 2001, page A7.

The BLM monuments will face two crucial tests before they become a lasting part of the Antiquities Act legacy. First, they must survive largely intact through presidential administrations, mostly Republican, that do not share the same conservation regulatory values. Their boundaries and acreages must remain substantially intact, allowing for minor land exchanges or adjustments with states and other entities. The laws and regulations for monument management, wilderness study, and multiple uses, must not be drastically altered. Lastly, congressional appropriations must provide adequate spending for their operation. Second, a president friendly to refining BLM land conservation must take additional steps forward from Clinton's first position. This can be done by declaring more monuments, ensuring honest regulatory protection, and reversing harmful decisions. When both tests are met, which they likely will, Clinton's legacy be fully recognized and appreciated.

Perhaps the most ominous trend for the Antiquities Act are the results of actual monument declaration on the public lands. Once proclaimed, national monuments appear within months on popular and widely purchased annual road atlases and map series, ensuring immediate tourism. Visitation to national parks sites drive the national public will to protect them, yet also bring millions of people to lands that may not have the natural ability to support them without losing their pristine character or suffering resource depredation and diminishment. The famous phrase is that Americans love their parks to death. It is a contradiction that has existed since 1916 when Congress provided for the Park Service "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

Increased visitation does stretch the ability of government agencies to properly manage the lands in their control. More cars bring higher pollution rates; carelessness with campfires and cigarettes start forest fires; walking off of trails pulverizes fragile cyptobiotic soils in the red rock deserts of the Colorado Plateau. In a time of shrinking availability for domestic discretionary spending, parks often compromise on visitor services and resource protection. For example a park might choose to provide sufficient funding and time allocation for either exotic species control, wildlife habitat protection, or interpretation programs and services. The addition of more parks can have unfortunate side effects on budgets and resource management. In order to prevent the danger from spinning out of control, Americans must demand full and adequate funding, staffing, and management at our parks, as well as heed the simple warning signs placed for our safety and for the protection of precious natural resources.

The Roosevelt Interpretation Lives On

What about the future of the Roosevelt interpretation? It will inseparably survive intact with the Antiquities Act. It, and its focus on presidential discretion and authority, is so imbedded into the modern understanding of the Act and executive power that is cannot be discarded without removing the Act itself from the law books. This will be so, despite the organized assault on the interpretation launched after 1996.

The Rooseveltian interpretation changed the way a president employs his powers and the manner in which the American public, if not international the observing audience as well, viewed the president. Theodore Roosevelt took the bull moose by the horns, wielding executive power from the Dakota Badlands, Albany, San Juan Hill, the White House, or wherever he took his person, for the greater good and the future, confronting

political enemies with relentless attacks demonizing their actual or supposed aggrandizing greed, entrenched selfishness, and irresponsible behavior and plans, and directly asking, imploring, and convincing the voting public through all sensory methods of persuasion to follow him on his progressive quest for national improvement and betterment. Presidents since have emulated his style and tremendously benefited from the bully pulpit of the presidency that he created. The people responded to him in his day, and have over the century since he assumed the highest office in the land. His spectacled carved face looks east over the rock-crowned hills towards the oceanic expanse of plains along with Washington, Jefferson, and Lincoln at Mount Rushmore. Roosevelt's continuing popularity keeps his bold vision and interpretational legacy enshrined in American political memory.

The Antiquities Act affords the president immediate attention in delivering his proclamation. The sense of accomplishment is also instantaneous. The grander the scale of the address, the grander the stage, size, or setting of the monument lands, the greater the announcement and effect. Roosevelt understood the Act's visual drama, and formed it into its second greatest asset, after the simplicity of its language. He made each declaration a monument to himself for the American eternity. On the whole the people approve of such action when the benefits are so tangible and lasting. They see and hear the president directly and personally working for them and their children, and become forgiving if at first the announcement was a little too much of a surprise. Thirteen of TR's successors each have found their own patch of glory in following him.

The Act's greatest asset will keep TR's interpretation legally valid. Federal courts have repeatedly found the Act and its presidential discretion clause virtually impenetrable to judicial oversight and review. Congress has shaved some power away from the president by addressing usage in Wyoming and Alaska, but it has otherwise only approved of the statute. The American people understand how the expansive interpretation works better for them and how it conforms to the letter of the law.

It is important amidst the praise to remember and comprehend that the Act and Roosevelt's executive style are not perfect and full-proof. The checks and balances of our constitutional system are just as essential, if not more critical, to the functioning civil society oriented towards "domestic tranquility." An expansive vision towards government function, operation, and service increases the presence of government in daily life. Though Americans have overwhelmingly accepted since Lincoln and the two Roosevelts that regulation is necessary for a more equal, prosperous, and secure Union, excessive presence can thwart, depending on viewpoint and timeframe, the ideals of liberty. What makes the Antiquities Act great is that it is an act, something that can possibly be changed through regular legislative or judicial procedure. Like the presidential discretion the Act affords, it itself is flexible.

In the future the open public lands of the United States will become more valuable as the country's population surpasses 300 million and beyond. A future president will assuredly act to save the land from our encroachment. Other sites, including small historical ones, abound throughout the nation and potentially created everyday, are available to be reserved. It will be used again and will survive into the future.

The lessons of Theodore Roosevelt and Antiquities Act may be learned elsewhere in other nations. One of the purposes of the Act was to align the United States with the laws of many European nations that had historic and scientific preservation as a national

goal allowing American scientists to have better, though proper, access to American sites in order to compete with more advanced and experienced foreign scientists in archeology and anthropology.⁶¹⁶ It is likely that other countries around the world that are in the midst of rapid industrial development with sizable populations may want to consider for themselves a law that allows the executive whether monarch, president, prime minister, or party leader, to reserve and protect important national natural wonders from the encroaching modern economy.

A case in China shows the importance of powers similar to the Antiquities Act. Rapid development of the Chinese and other Southeast Asian economies has spurred calls for dams along the many rivers of the region. The dams and reservoirs create construction jobs, provide plentiful water resources for urban and agricultural use, and, most importantly, increase the hydroelectric power supply needed to fuel economic growth. However, the reservoirs force tens of thousands from their homes, have adverse effects on fisheries, and threaten local economies.⁶¹⁷ Dams also concern scientists worried about irreparable harm done to habitats, ecosystems, and river valleys. One dam project on the Nu River in China, running through the “Grand Canyon of the Orient,” declared by the United Nations to be a World Heritage Site, particularly disturbed scientists and conservationists in China and around the world.⁶¹⁸

Though many presumed that the Chinese government would authorize and proceed with construction of the Nu Dam, they were pleasantly surprised when the plans were suspended in 2004. Chinese Premier Wen Jiabao had intervened to block the dam, stating “we should carefully consider and make a scientific decision about major hydroelectric projects like this that have aroused a high level of concern in society, and with which the environmental protection side disagrees.” The Chinese State Environmental Protection Agency, the Chinese Academy of Sciences, and national and international environmental groups had opposed the plan. Though the dam may proceed at a later date, and no national reserve was created, the situation shows the power of executive authority to halt destruction and protect vital and important scientific resources. China has a poor record on pollution and other environmental protections and it could be a signal of change of policy.⁶¹⁹ Just as the Grand Canyon of the United States dramatically changed our governmental and public attitude towards protection of historic and scientific interests via Theodore Roosevelt, the Grand Canyon of China may do the same for that country, taking a grand step forward into and for the future.

⁶¹⁶ McLaughlin cites the British Ancient Monuments Act of 1882 and an 1897 law passed in Mexico to protect Pre-Columbian sites. pages 69-70.

⁶¹⁷ *The Economist*, “The Sweet Serpent of Southeast Asia – The Mekong River,” January 3, 2004. The *Economist* reports one million people make a living on fishing in Cambodia and that 70% of Laotians supplement their income with fishing.

⁶¹⁸ Yardley, Jim, “Dam Building Threatens China’s ‘Grand Canyon,’” *New York Times*, March 10, 2004, page A1.

⁶¹⁹ Yardley, Jim, “China’s Premier Orders Halt to a Dam Project Threatening a Lost Eden,” *New York Times*, April 9, 2004, page A6.

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