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Antiquities Act Monuments: The Elgin Marbles of Our Public Lands?

*James R. Rasband**

Introduction

Although it often escapes notice in conversations about important environmental legislation, the Antiquities Act has been one of the most powerful conservation tools of this century.

Antiquities Act monuments have not only protected some of our nation's most spectacular landscapes but have paved the way for a number of our most treasured national parks. Grand Canyon, Zion, Bryce, Olympic, and Grand Teton were all monuments before they became parks. Looking back it may seem hard to see how anyone could question the virtue of the Antiquities Act. Yet that is what this paper intends, at least in part.

The problem with the Antiquities Act is not the results it has produced but the process—or, more accurately, the lack of process—by which those results have been achieved. Over and over in its 100-year history, the Antiquities Act has been wielded by presidents without any regard for the local rural communities and the state and county governments most impacted by the monument's designation. It does not need to be that way. Whether by using the withdrawal process provided in the Federal Land Policy Management Act (FLPMA), or, preferably, by amending the Antiquities Act to allow participation by state and local governments, or, at very least, by voluntarily adhering to a collaborative model under the existing Antiquities Act, largely the same preservation benefits could be achieved without disregarding affected public lands communities.

Presidential monument-making under the Antiquities Act has yielded a familiar pattern. Monument proclamations are met by a firestorm of protest in the affected community but the protest is followed by acquiescence and then acceptance. Thus, when President Roosevelt used

the Antiquities Act in 1943 to set aside Jackson Hole National Monument, there was outrage in Wyoming. But, seven years later Congress added the monument lands to the Grand Teton National Park, albeit with an amendment to the Antiquities Act prohibiting any additional monument designations in Wyoming. Likewise, when President Johnson in January of 1969, just ninety minutes before he was to leave office, signed Antiquities Act proclamations adding some 264,000 acres to Arches and Capitol Reef National Monuments, the reaction in Utah was outrage. Utah Senator Wallace Bennett protested that the proclamations were a “last gasp attempt to embalm a little more land in the West,” and were “unilateral . . . with no notice whatsoever, without hearing any interested group, without prior consultation with Congress and without consultation or discussion with state officials.”¹ But when the Federal Land Policy Management Act (FLPMA) was debated and passed seven years later in 1976, there was nary a word about the Antiquities Act. Indeed, although FLPMA specifically eliminated several sources of executive withdrawal authority, it left the Antiquities Act untouched. Likewise, when President Clinton, in 1996, set aside some 1.7 million acres of public land in Utah’s red rock country as Grand Staircase–Escalante National Monument, Utah’s congressional delegation cried foul over the administration’s failure to consult them or to give any public notice of the proposal, and the president and Interior Secretary Bruce Babbitt were hung in effigy in the southern Utah counties within which the monument is located. Yet now, ten years later, most criticism of the Grand Staircase proclamation has faded away and Utah travel and outdoor websites are filled with pictures and descriptions of the monument’s wonders.

Why is it that monument proclamations have so routinely brought criticism only to see that criticism fade over time? One part of the answer is clear: a vast majority like the results and thus any squeamishness about the means is rather quickly forgotten. The public preference for

preserving natural wonders is not new, but it has increased dramatically in the last forty years. Recreation visits to the national park system grew from 33 million in 1950 to over 277 million in 2002. Total visitor-days on BLM lands climbed from just over 31 million in 1972 to almost 68 million in 2002. Recreation in the national forests climbed from 27.4 million visitor-days in 1950 to 341.2 million in 1996.² As these numbers reveal, recreation and preservation are rapidly becoming the dominant uses of the public lands.

Another reason that criticism of monuments fades is that over time few remember the means by which lands were preserved. The on-the-ground fact of the monument is what drives public perception, not how it was created in an ever-receding past. In assessing the historical benefits of the Antiquities Act, it is important to avoid falling into this trap. It is not enough to point to all of the monuments and declare the Act good. Praiseworthy preservation results are not the only measure by which the Antiquities Act should be judged. Just as important is the process by which those results were achieved. In the absence of a legitimate process, Antiquities Act monuments risk becoming something like the Elgin Marbles—the sculptures taken from the Parthenon early in the nineteenth century by Lord Elgin and then sold to the British Museum. Although Elgin's preservation of the Marbles may have been wise and although they are undeniably one of the world's treasures, the means by which they were acquired tarnishes the achievement.³

Ironically enough, this basic principle about the relevance of the process by which monuments are proclaimed is confirmed in the very wilderness literature inspired by the lands which the Antiquities Act seeks to preserve. The consistent message of wilderness literature, as revealed in the writings of Henry David Thoreau, John Muir, Aldo Leopold, Joseph Sax, and other preservationists as well as in the recreational writing of anglers, mountaineers, and hunters, is that we are redeemed and ennobled by adherence to certain virtues in our interaction with

wilderness.⁴ Wilderness experiences are valuable because they teach us virtues like sportsmanship, restraint, deliberation, sensitivity to impact, and patient woodcraft. Yet, if these virtues govern our interaction with wilderness, should they not also govern our acquisition of wilderness, our monument-making? In the end, it is not enough merely to proclaim a monument any more than it is sufficient to simply bag a deer, net a fish, run a river, or scale a mountain; it is the manner by which the result was achieved that ultimately ennobles or devalues the activity. The irony of most national monument proclamations is that we claim to value the monument for its ability to develop within us the very virtues that we seem so quick to ignore in securing it.

If it is true that the process by which monuments are made matters, and if it is also true that the Antiquities Act has produced such beneficial outcomes, the critical question is whether the same or similar results could be achieved by a process that does not so thoroughly disregard the input and interests of rural communities and state and local governments. The answer is likely yes. If the Antiquities Act were amended to require notice to state and local government and consideration of impacts on communities nearby the monument, or, in the absence of a change in the law, if presidents, on their own initiative, consulted with affected states and local governments prior to proclaiming a monument, it would not mean the end of monument proclamations. Nor, of course, would it likely mean the end of local community protests. But it might alleviate some of the tensions surrounding monument designations and it would surely be more in keeping with the very virtues we hope to inculcate by setting aside the land from development.

Soliciting input from those connected to the land makes it more likely that unforeseen benefits and detriments of any monument proclamation will be taken into consideration. With public participation, those opposed to the monument are more likely to accept the result if they

have had an opportunity to participate in the development of the proposal. Consultation, of course, will not end opposition. Indeed, it may increase the political difficulty of presidential monument-making. Yet, by analogy to wilderness literature, undertaking the difficult task of comprehending and carefully navigating the cultural environment is what gives nobility to the venture of monument-making.

The suggestion that the impact on local communities should be considered and balanced against the benefits of a monument should not be understood as an argument that the public lands must be managed for the benefit of local communities. Instead, the consideration of impact should be understood as a focus on how public lands deserving of protection can be preserved with the least possible negative impact on local communities. Approaches to protecting local communities have been explored by a number of writers. But the one theme common to the approaches for easing the blow suffered by local communities from public land management decisions is that the community and its interests should at very least be included in the decision-making process.

Amending the Antiquities Act

If consultation with local communities would ennoble the monument proclamation process, why has it occurred only infrequently? The predominant reason is that the Antiquities Act does not require it. Certainly, presidents are free to seek input from state and local governments. For example, stung by the broad criticism of the process employed in the designation of Grand Staircase–Escalante National Monument,⁵ during the second term of the Clinton administration, Interior Secretary Bruce Babbitt actually did quite a bit of consulting with local communities about potential monument designations.⁶ Nevertheless, without an amendment to the Antiquities

Act, history suggests that presidents will most often ignore local concerns.

Secretary Babbitt's experience indicates that advance notice of a potential monument and consultation with local communities do not hinder monument proclamations. Following a more consultative approach, during his second term, President Clinton designated 21 additional monuments.⁷ Despite this record, the Clinton administration opposed amending the Act to include even the most tepid of participation obligations. For example, it threatened to veto House Bill 1487 which would have amended the Act to require the president to "solicit public participation and comment" but only "to the extent consistent with" achieving the protective purposes of the Antiquities Act and to "consult with the Governor and congressional delegation of the State ... in which the lands are located," but only "to the extent practicable."⁸

Why has there been such opposition to any amendment of the Antiquities Act, particularly when consultation has not proven an impediment to monument making? The first claim that is usually made for leaving the Antiquities Act untouched is a historical one. Supporters point to such important withdrawals as the Grand Canyon and Jackson Hole and argue that they could not have been accomplished without the Antiquities Act. However, it is not clear that an Antiquities Act amended to require notice and consultation would have failed to produce these monuments. Moreover, whatever merit this historical argument has with respect to the need for the Act in its early years, it is not particularly persuasive with respect to proclamations made after the passage of the Federal Land Policy Management Act (FLPMA) in 1976, which created an arguably sufficient procedure for decisive executive protection of public lands.

Recall that historically the president's authority to withdraw public lands for preservation purposes has been quite broad.⁹ The Antiquities Act was only one of a number of laws giving the president withdrawal authority, and the Supreme Court affirmed a variety of executive

withdrawals on the premise that congressional acquiescence in the withdrawal constituted an implied delegation of authority.¹⁰ With the passage of FLPMA, Congress attempted to limit the executive branch's withdrawal authority by repealing numerous statutory provisions giving executive withdrawal power¹¹ and then giving the secretary of the interior new withdrawal authority subject to congressional veto and a variety of procedural safeguards. FLPMA's withdrawal provisions require the secretary of the interior to publish notice of any proposed withdrawal, conduct public hearings, and consult with local government bodies.¹² Along with notice, the secretary must furnish Congress with a detailed report on the proposed withdrawal, a significant portion of which must address the withdrawal's impact on local communities.¹³ Thus, after the passage of FLPMA, presidents committed to preservation likely could still accomplish their objectives without using the Antiquities Act, and with the added benefit of a more participatory approach to withdrawal decisions.

In light of FLPMA's withdrawal provisions, one could conclude that the Antiquities Act is superfluous, that instead of amendment to include a participation requirement, the Act should simply be repealed. While this view is not without merit, repealing the Antiquities Act before testing the limits of FLPMA's withdrawal provisions seems unwise. Before explaining why that is the case, however, it is useful to explore more fully whether it at least makes sense to consider FLPMA, rather than an unamended Antiquities Act, as the preferred preservation tool.

Supporters of the Antiquities Act often argue that the Antiquities Act is critical because it allows the president to respond rapidly to emergency situations where public lands are threatened with irreparable harm. Yet most monument proclamations have not arisen as a result of emergencies. Moreover, FLPMA's withdrawal provisions specifically allow the secretary of the interior to make an emergency withdrawal of any amount of lands for a period not to exceed

three years.¹⁴ Thus, in a real emergency, FLPMA already allows circumvention of public participation to protect critical resources.

Supporters have also argued that the Antiquities Act is critical to accomplish preservation because it allows the president rather than Congress to decide whether particular lands should be protected. Given that the Constitution's Property Clause charges Congress with the obligation of managing the public lands,¹⁵ the Act's supporters do not often make the blunt argument that they do not want Congress to make the decision because Congress might not favor the withdrawal. They make a subtler point. They assert that the public and a majority in Congress would indeed support preservation legislation but that the majority's will is often thwarted by filibusters and sharp legislative maneuvering, particularly the ability of long-standing committee chairmen from public lands states who have the ability to bottle up protective legislation in committee.¹⁶ This frustration is legitimate and reflects historical reality. That is precisely what led President Eisenhower to declare the C&O Canal National Monument and President Roosevelt to declare the Jackson Hole National Monument.¹⁷ Moreover, given the increasing public preference for recreation and preservation of the public lands, it does indeed appear that a current and growing majority in Congress would support greater preservation.

Nevertheless, this legitimate concern is not a persuasive argument for the necessity of using the Antiquities Act because FLPMA was again designed to answer this concern. FLPMA allows the secretary to make withdrawals of any acreage for a period of up to twenty years unless Congress within ninety days rejects it by a concurrent resolution.¹⁸ Moreover, FLPMA specifically prohibits the committee to which the withdrawal is referred from bottling up the vote on the resolution if any proponent demands a discharge of the withdrawal issue.¹⁹ Thus, FLPMA

provides a mechanism to circumvent committee roadblocks and actually test Congress' support for the withdrawal.

These same veto provisions, however, present the greatest risk in relying exclusively on FLPMA and simply repealing the Antiquities Act. Given the United States Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*,²⁰ finding a similar legislative veto provision unconstitutional, there are serious questions about whether FLPMA's legislative veto provisions would survive constitutional challenge. Although the secretary's FLPMA withdrawal authority could even be strengthened if FLPMA's veto provisions were held to be unconstitutional yet severable from the rest of the withdrawal process, it is also possible that a court could strike down the secretary's entire withdrawal authority.

The *Chadha* precedent presents a threat to the FLPMA withdrawal process but not enough of one to justify wholesale rejection of FLPMA's more inclusive and deliberative withdrawal process. It would still be possible, for instance, to simultaneously withdraw a monument under both FLPMA and the Antiquities Act. If FLPMA's withdrawal provisions proved unconstitutional, the monument would still survive, and the process would have been more collaborative. If FLPMA's veto provisions survived legal challenge, the argument for using the Antiquities Act would be further diminished. Admittedly, the FLPMA approach might be a bit more arduous, time-consuming, or politically difficult but that is not a sufficient justification for completely excluding affected communities from the decision.

Even if FLPMA's veto provisions survived judicial scrutiny, some might be reluctant to use it as a substitute for the Antiquities Act. Under FLPMA, Congress can veto presidential action and a secretarial withdrawal assures only twenty years of protection, whereas under the Antiquities Act the president may act unilaterally and monuments have no expiration date. Neither of these

arguments are overwhelming. Antiquities Act withdrawals can themselves be overturned by Congress, albeit with more procedural hurdles than with the FLPMA veto process. Moreover, if Antiquities Act supporters are correct, and they surely are, that locally disputed monuments have broad public support and quickly become national treasures, it is extremely unlikely that Congress would initially veto a withdrawal, and even more unlikely that after twenty years, Congress would not finally ratify the withdrawal.

Nevertheless, it is true that FLPMA's twenty-year limit on the withdrawal and its potential for congressional veto of the withdrawal do pose some additional risks to monument making. But that conclusion is not an argument for leaving the Antiquities Act unamended. The notification, consultation, and impact study requirements contained in FLPMA could be grafted onto the Antiquities Act without significant harm to preservation efforts. On balance, for those concerned about both preservation and a more ennobling process, this appears the best course for now. Although FLPMA's withdrawal process is preferable to an unamended Antiquities Act, amending the Act to include process protections would retain the benefit of decisive presidential action while diminishing any risk of losing a monument at the end of twenty years.

The political reality, of course, is that amendment of the Antiquities Act is as unlikely now as it has been historically. Nevertheless, nothing prevents the president from voluntarily engaging in a worthier monument withdrawal process. In fact, non-compulsory adherence to a virtuous process may ultimately enhance the nobility of the preservationist project more than obligated adherence to codified virtue.

Conclusion

In his book *Fire on the Plateau*, Charles Wilkinson concludes that the history of the American West has been one of "conquest by certitude." He contends that many of the harms

suffered by the Indian peoples and the lands of the Colorado Plateau have been the result of decisions by government officials “who knew to an absolute certainty what was right for the Colorado Plateau.”²¹ Wilkinson’s “conquest by certitude” thesis seems a largely accurate characterization of public lands policy in the nineteenth century. Confident in the moral, economic, and scientific wisdom of Manifest Destiny, Americans were sure about what was the best use of the public lands and what was best for the Indian tribes who dwelled there. Means were not particularly important because the ends were so plainly correct.

The more interesting question is whether Wilkinson’s thesis remains applicable today. Specifically, is aggressive use of the Antiquities Act a repetition of this historical pattern of conquest by certitude? Should we be so certain about the altruism and correctness of our preservation preference that we eschew any obligation to consult with those rural communities that have developed real and lasting attachments to the public lands, at least in part because of their reliance on public policies that encouraged that attachment? If so, we are forgetting that our nineteenth-century predecessors believed with just as much conviction that settling and developing those lands was the right thing to do.

If our current public lands agenda runs the same risk of conquest by certitude, what is the answer? Must monument-making take a back seat to natural resource extraction? Not necessarily. The solution is not to abandon the preservation preference but to exhibit more skepticism about its achievement. At a minimum, skepticism implies a willingness constantly to question the necessary scope of our public lands aspirations and our means for achieving them. In the monument context, some of that questioning should be directed at rural communities in the form of requiring public participation and impact studies prior to a monument proclamation. The idea

of public participation and impact studies is neither novel nor earth-shattering in natural resources law, except, apparently, in the case of the Antiquities Act.

Ultimately, the test for those of us who favor the increasingly dominant public land uses of preservation and recreation is whether this time we can exhibit less certitude about our public lands preference by recognizing the interests of the communities who are a part of the fabric of those lands. Amending the Antiquities Act to include minimal notification and public participation requirements would be a good beginning.

Endnotes

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¹ *Salt Lake Tribune*, “Bennett Blasts LBJ ‘Land Grab’ to Expand 2 Monuments in Utah,” January 22, 1969, sec. 2, 17.

² James Rasband, James Salzman, and Mark Squillace, *Natural Resources Law and Policy* (New York: Foundation Press 2004), 557.

³ For a review of the dispute over whether the Elgin Marbles should be repatriated to Greece, see John H. Merryman, “Thinking About the Elgin Marbles,” *Michigan Law Review* 83 (1985), 1881.

⁴ Joseph L. Sax, *Mountains without Handrails: Reflections on the National Parks* (Ann Arbor: University of Michigan Press, 1980), 103.

⁵ See Steve DiMeglio, “Clinton Looks West in Search of a Legacy,” *Gannett News Service*, May 29, 2000, quoting Secretary Babbitt: “What I’ve said to everybody in the West after Escalante is that it won’t happen again on my watch.”

⁶ Mark Squillace, “The Monumental Legacy of the Antiquities Act,” *Georgia Law Review* 37:2 (2003), 539–540.

⁷ Squillace, “Monumental Legacy,” 473.

⁸ H.R. 1487, 106th Cong. § B (1999). *Inside Energy/with Federal Lands*, “Senate Energy Committee Approves Weaker Version of Monument Bill,” October 25, 1999, 14 (reporting the veto threat).

⁹ The Property Clause of the United States Constitution allocates primary control over the public lands to Congress, giving it the power to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” United States Constitution, article IV, § 3, cl. 2. In theory, therefore, it is Congress, and not the executive branch, that makes withdrawal decisions. Thus, Congress may exercise its constitutional power to make withdrawals by statute (for example, create a national park), or Congress may pass legislation delegating that authority to the executive branch.

¹⁰ *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). Quite a bit has been written on the withdrawal authority of the executive branch. The most comprehensive review of executive withdrawal authority is the 1970 report of the Public Land Law Review Commission (PLLRC), *One Third of the Nation’s Land* (1970). The PLLRC recommended that large scale withdrawals “be accomplished only by act of Congress, *id.* at 54 (Recommendation 8), in part because of its finding that areas set aside by executive action ... have not had adequate study and there has not been proper consultation with people affected or with the units of local government in the vicinity, particularly as to precise boundaries.” *Id.* at 1. Much of this recommendation was enacted in FLPMA six years later, although the Antiquities Act was not repealed.

¹¹ In FLPMA, Congress repealed 29 statutory provisions granting withdrawal authority to the executive branch. See P.L. 94-579, sec. 704(a), 90 Stat. 2744, 2792 (1976).

¹² 43 U.S.C. § 1714.

¹³ 43 U.S.C. § 1714(c)(2).

¹⁴ 43 U.S.C. § 1714(e).

¹⁵ United States Constitution, article IV, § 3, cl. 2.

¹⁶ John D. Leshy, “Putting the Antiquities Act into Perspective,” in *Visions of the Grand Staircase–Escalante*, edited by Robert B. Keiter, Sarah B. George, and Joro Walker (Salt Lake City: Utah Museum of Natural History and Wallace Stegner Center, 1998), 86.

¹⁷ *Ibid.*

¹⁸ 43 U.S.C. § 1714(c)(1).

¹⁹ *Ibid.*

²⁰ 462 U.S. 919 (1983).

²¹ Charles F. Wilkinson, *Fire on the Plateau: Conflict & Endurance in the American Southwest*, (Washington, D.C.: Island Press 1999), 309.