SLIDES: Second Thoughts About the Antiquities Act: Does the Process for Public Land Decisionmaking Have an Ethical Dimension?

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Second Thoughts About the Antiquities Act: Does the Process for Public Land Decisionmaking Have An Ethical Dimension?

James R. Rasband

The Past, Present and Future of Our Public Lands, Natural Resources Law Center, University of Colorado, June 4, 2010
“The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”
Paul Begala, July 1998
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Recommendation 8. Large scale, limited or single use withdrawals of a permanent or indefinite term should be accomplished only by act of Congress. All other withdrawal authority should be expressly delegated with statutory guidelines to insure proper justification for proposed withdrawals, provide for public participation in their consideration, and establish criteria for executive action.

The Commission recommends that large scale withdrawals and reservations for the purpose of establishing or enlarging any of the following should be reserved to congressional action: national parks, national monuments... PLLRC Report at 54.
Potential Monuments

San Rafael Swell, UT
Montana’s Northern Prairie, MT
Lesser Prairie Chicken Preserve, NM
Berryessa Snow Mountains, CA
Heart of the Great Basin, NV
Otero Mesa, NM
Northwest Sonoran Desert, AZ
Owyhee Desert, OR/NV
Cascade-Siskiyou National Monument, CA (expansion)
Vermillion Basin, CO
Bodie Hills, CA
The Modoc Plateau, CA
Cedar Mesa Region, UT
San Juan Islands, WA
Jeff Comstock, director of the Moffat County Natural Resources Department, letter to Secretary Salazar: “What is most offensive is an executive order telling you how to manage your land. . . . Involve your local people before you start doing a ‘top-down’ approach.” A Vermillion Basin National Monument “would mean lost jobs, lost hunting opportunities, a taking of property rights, and most importantly ignoring local planning processes, expertise and participation.”

“I’m pretty upset over this,” Moffat County commissioner Tom Mathers said. “You’ve got someone in upper government saying ‘this is what we think we need’ without consulting the people that it affects. It’s wrong and not democratic.”

Mike Milovich, Carbon County Commissioner: “There has been no public input and no inter-local interaction with the Interior Department. Since I’ve been in office in 1991 there seems to be a concerted effort of these land grabs to satisfy wilderness or environmental advocates. These groups are using whatever means necessary to accomplish this. They have the ear of the administration right now and it’s ‘damn the process, full steam ahead.’”
“[A] foul, sneaking Pearl Harbor blow.”
Senator Edward Robertson, Wyoming

“[C]ontrary to every principle of freedom and democracy.”
Representative Frank Barrett, Wyoming

“Let them bring the matter before Congress and let the people be heard on it. . . . Are they the masters of the people? Are they above the law?”
Representative Frank Barrett, Wyoming

Incorporated into Grand Teton National Park in 1950.

“It was great in hindsight.”
Senator Alan Simpson, Wyoming.

“Nowhere else in the United States, including Alaska, can the casual visitor observe such a striking diversity of wildlife as that abounding in Grand Teton National Park and Yellowstone National Park.”
Jackson Hole, Wyoming Chamber of Commerce
The proclamations were “arbitrary” and “unilateral . . . With no notice whatsoever, without hearing any interested group, without prior consultation with Congress and without consultation or discussion with state officials.”

*Senator Wallace F. Bennett of Utah*

The proclamations [of Capitol Reef and Arches National Parks] are a “last gasp attempt to embalm a little more land in the West.”

*Senator Wallace F. Bennett, UT*

“We’d rather go down fighting than lying on our backs.”

*President, Utah Cattlemen’s Association*

“Road development in the area will stop; existing roads and trails within the areas’ boundaries will be blocked; oil and gas development will stop; grazing rights will be terminated; mining operations will stop; watershed and soil conservation will stop; logging and lumbering will stop; hunting and recreational expansion will stop.”

*Garfield County Commissioner*
“This area of southern Utah has a diversity of landscape like no other area in the state - red rock formations and canyons, pristine meadows, alpine forests, as well as lush green valleys.”

Capital Reef Country Travel Council
“[T]his is the mother of all land grabs.”
Senator Hatch, Utah

“[T]he height of arrogance.”
Senator Bennett, Utah

The act of a “tyrant.”
Senator Burns, Montana

“[A] phenomenal misuse of power.”
Senator Craig, Idaho

“It was an arrogant as hell for the president to use the law to his advantage as he did.” “What I’d like to do is declare war on the White House . . . but my church and the laws don’t allow me to do that.”
Kane County Commissioner
“This is the most arrogant gesture I have seen in my lifetime. . . . The only comparable 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!’”

*Executive Director, Utah Association of Local Governments.*

“[T]he extreme environmental community, who wants to kill our timber, wants to kill our mining, wants to keep people from going into the wilderness and enjoying it and fishing, hunting, standing there and looking at God’s beauty, no, we do not get to do that, because the President of the United States, in his great, wonderful, awesome wisdom, greater than anybody . . . had the right to say this beautiful area should be reserved.”

*Representative Hansen, Utah*
“[S]trikingly beautiful and scientifically important,” “[the monument] offers an impressive array of educational, recreational, and other multiple-use opportunities for visitors.”
Kane County Visitor’s Guide

“[M]ore natural scenic attractions than anywhere in the world.”
“America’s largest national monument.”
Garfield County Tourism Office

“Geology unequaled anywhere on the Colorado Plateau; a diverse array of ecosystems; one of the best and most continuous of fossil records of late Cretaceous life in the world; evidence of three major prehistoric cultures. These are but a few of the treasures the Monument holds for scientific study.”
Kane County Office of Tourism
“The president flew in here for just a couple of hours. He has never been to the area. He issues his edict. He’s gone and then leaves somebody else, in effect, to clean up the mess.”
Senator Jon Kyi, AZ

“The President is currently engaging in the biggest land grab since the invasion of Poland.”
Representative Helen Chenoweth-Hage

“This expansive mosaic of semi-desert area, cut by ribbons of valuable riparian forest, offers one of the most significant systems of prehistoric sites in the American Southwest. In addition to the rich record of human history, the monument contains outstanding biological resources.”
Go-Arizona.com
Is the Antiquities Act nothing more than Congress tying itself to the mast?
“The procedure of administrative rulemaking is in my opinion one of the greatest inventions of modern government.”
Kenneth Culp Davis

“One might argue that correct outcomes are all that really matter and the democratic process is valuable only insofar as it contributes to correct outcomes. But surely the more widely held view is that an undemocratic regime violates an important human right, even if it legislates as well as or even better than a democratic regime.” Lawrence B. Solum

“I think the emphasis on the redemptive quality of procedural reform is about nine parts myth and one part coconut oil.”
Joseph Sax

Notice-and-comment rulemaking is to public participation as Japanese Kabuki theatre is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.” E. Donald Elliot.
“Only Losers Care About Process.”
"The preservationists are really moralists at heart, and people are very much at the center of their concerns. They encourage people to immerse themselves in natural settings and to behave there in certain ways, because they believe such behavior is redeeming."
“Fishing is most satisfying, not when it results in accomplishment of a set task, but in refining us.”

Joseph Sax, Mountains Without Handrails 28

“The secret of fishing is to be content to not-catch fish in the most skillful and refined manner.”

Albert Miller, Fishless Days, Angling Nights xiii (1971).
“In great mountaineering, the result, the reaching of a summit, is of minor importance . . . the whole merit of the climb depend[s] upon the way it was done, that is the method, behavior and mental attitude of the climbers.”

(Galen Rowell, In The Throne Room of the Mountain Gods 147 (1977) (quoting English alpinist Geoffrey Winthrop Young)).

“The purpose of setting forth rules for the ‘climbing game’ is ‘to conserve the climber’s feeling of personal (moral) accomplishment against the meaninglessness of a success which represents merely technological victory.’”

(Lito Tejada-Flores, Games People Play, Ascent 23-25 (1964)).
“The chase, not the catching, is paramount.”

*Roderick Nash, Wilderness and the American Mind 235 (1967) (describing William Falkner’s message in The Bear).*

“Voluntary adherence to an ethical code elevates the self-respect of the sportsman, but it should not be forgotten that voluntary disregard of the code degenerates and depraves him. Our tools for the pursuit of wildlife improve faster than we do, and sportsmanship is a voluntary limitation in the use of these armaments. It is aimed to augment the role of skill and shrink the role of gadgets in the pursuit of wild things.”

*Aldo Leopold, A Sand County Almanac 197 (Ballantine Books 1970) (1966).*
“The preservationists are really moralists at heart, and people are very much at the center of their concerns. They encourage people to immerse themselves in natural settings and to behave there in certain ways, because they believe such behavior is redeeming.”
“[S]ome hunters have overstepped the bounds of friendly competition and redefined deer hunting as an outright trophy quest in which nothing—not circumstances, effort, luck, or coincidence—matters more than score. If this year’s rack doesn’t rack up more points than last year’s, the hunt was a bust. That’s a frightening attitude, really, and blatantly disrespectful to the animal.”


A “peculiar virtue of wildlife ethics is that the hunter ordinarily has no gallery to applaud or disapprove his conduct. Whatever his acts, they are dictated by his own conscience rather than by a mob of onlookers.”

* 140,000 square miles of U.S. waters
* 4,500 square miles of relatively undisturbed coral reef habitat
* More than 7,000 species.
Recommendation 8. Large scale, limited or single use withdrawals of a permanent or indefinite term should be accomplished only by act of Congress. *All other withdrawal authority should be expressly delegated with statutory guidelines to insure proper justification for proposed withdrawals, provide for public participation in their consideration, and establish criteria for executive action.*
Secretary Babbitt’s “No Surprises” Policy

(1) Visit any area the Interior Department was considering for monument status

(2) Meet personally with local officials and interested members of the public about different strategies for protecting the area under review

(3) Allow local senators and congressmen the chance to develop appropriate legislation to protect the area.
Indian Creek WIA

The Utah Settlement

* Rescinds new Wilderness Inventory and Study Procedures Handbook.

* “Defendants will not establish, manage or otherwise treat public lands, other than Section 603 WSAs and Congressionally designated wilderness, as WSAs or as wilderness pursuant to the Section 202 [planning] process absent congressional authorization. . . .”
* Midnight (or end-of-term) regulations
* Appropriation riders
* Rulemakings on the heels of failed legislative initiatives
* Settling lawsuits on favorable terms
* Making policy changes by way of Solicitor opinion or changes to agency handbooks
“Only Losers Care About Process.”
Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) ... and

(4) each affected client gives informed consent, confirmed in writing.

Comment 24
Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.
“Intrinsic justifications [for the caution on positional conflicts] may also rest upon the . . . the goals of the legal system. The intrinsic justification of protecting the integrity of the legal and judicial system explains the provisions that lawyers should avoid (1) the appearance of impropriety and (2) conduct prejudicial to the administration of justice. These rules protect the legal system’s image without regard to the effect on the advancement of the individual client’s legal interests.”

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