# Monograph Series

## Project 2025: Implications for Climate and the Environment

Reducing the Size of National Monuments

Paper 3

March 2025

UC Berkeley Center for Law, Energy & the Environment

## ABOUT THE MONOGRAPH SERIES

The Heritage Foundation launched Project 2025 in 2023. Titled "Mandate for Leadership: The Conservative Promise," it presents a comprehensive collection of proposals on critical topics, many with implications for U.S. energy and environmental policy. Despite receiving significant media attention, few have read the entire 900+ page document or mapped its potential implications for climate change and environmental impacts.

Over 100 conservative organizations contributed to Project 2025, but it is not explicitly linked to the new Administration. The document calls for a significant and often radical overhaul of the federal government, with a particular focus on agencies and actions connected to climate change and environmental and energy law and policy. Many of these proposals have already been put forward and it is fair to anticipate that the underlying legal theories will be pursued.

This Monograph Series presents analyses to examine the potential implications that could result from the implementation of proposals set forth in Project 2025 and how they may affect action on climate change and the environment.

## ABOUT THE AUTHORS

James G. Moose is of counsel to Remy Moose Manley LLP in Sacramento, California, where he has practiced since 1986. He represents both public and private clients in local, regional, and state administrative proceedings and in court. His litigation work has resulted in more than 35 published, precedent-setting decisions in the California Supreme Court and the California Courts of Appeal. Between 1987 and 2007, he was the co-author of *Guide to the California Environmental Quality Act* (Solano Press), which was cited more than 40 times in published opinions by California courts. He is also the author of a law review article entitled, *The Relationship Between Water Supply and Land Use Planning: Leading Cases Under the California Environmental Quality Act* (4 Golden Gate U. Envtl. L.J. 27). For more than 30 years, he lectured for numerous organizations on environmental law topics, and especially the California Environmental Quality Act. He served for twelve years on the Board of Directors of Solar Cookers International, a Sacramento-based nonprofit promoting climate-friendly solar cooking for vulnerable populations worldwide. He is currently a member of the Emeritus Circle of former members of the Advisory Board for the UC Berkeley Center for Law, Energy and the Environment (CLEE), after having served on the CLEE Advisory Board for over 15 years.

Hannah Rider is an associate attorney Remy Moose Manley, LLP, where her work focuses on environmental, land use, and administrative law. Prior to receiving her law degree from the University of California, Davis School of Law, Hannah worked in public lands policy at the Center for Western Priorities.

## ABOUT THE CENTER FOR LAW, ENERGY & THE ENVIRONMENT

CLEE channels the expertise and creativity of the Berkeley Law community into pragmatic policy solutions to environmental and energy challenges. CLEE works with government, business, and the nonprofit sector to help solve urgent problems requiring innovative, often interdisciplinary approaches. Drawing on the combined expertise of faculty, staff, and students across the University of California, Berkeley, CLEE strives to translate empirical findings into smart public policy solutions to better environmental and energy governance systems.

# The Scope of a President's Authority to Modify National Monuments Under the Antiquities Act

## INTRODUCTION

In *Mandate for Leadership: The Conservative Promise* (2024), also known as "Project 2025," the authors state that "[a]s has every Democratic President before him beginning with Jimmy Carter, Joe Biden has abused his authority under the Antiquities Act of 1906." (Project 2025, p. 532.) The authors go on to state that "the new [Trump] Administration must vigorously defend the downward adjustments it makes to permit a ruling on a President's authority to reduce the size of national monuments by the U.S. Supreme Court. Finally, the new Administration must seek repeal of the Antiquities Act of 1906, which permitted emergency action by a President long before the statutory authority existed for the protection of special federal lands, such as those with wild and scenic rivers, endangered specials [sic], or other unique places. Moreover, in recent years, Congress has designated as national monuments those areas deserving of such congressional action."

These suggestions from Project 2025 echo issues that arose during the first Trump Administration. Of the various actions affecting environmental policy taken during that administration, one that generated substantial attention and controversy was the decision to shrink two national monuments in Utah. In 2017, President Trump issued proclamations reducing Bears Ears National Monument by 85 percent[1] and Grand Staircase-Escalante National Monument by 50 percent.[2] Although the Biden administration restored the original boundaries before legal challenges were settled, the unresolved status of a President's authority under the Antiquities Act is expected to resurface in the second Trump administration, as Project 2025 foreshadows. The analysis below assesses the power of one presidential administration to cut back on acreage put into National Monument status by a prior administration. As the above-quoted passages suggest, the new Trump Administration may be looking to test such powers before the United States Supreme Court, unless that issue can be sidestepped by changes made by Congress to the Antiquities Act itself.

National monuments are a unique classification of federal land, created by the Antiquities Act of 1906. The Antiquities Act authorizes the President to declare historical landmarks, historic and prehistoric structures, and other objects of historic or scientific interest, as well as the surrounding federal land, as national monuments. (Congressional Research Service, "The Antiquities Act: History, Current Litigation, and Considerations for the

[1] Bears Ears National Monument was reduced from 1.35 million acres to two separate tracts totaling 228,784 acres.

[2] Grand Staircase-Escalante National Monument was reduced from 1.7 million acres to 1 million acres.

116th Congress" (May 15, 2019) https://crsreports.congress.gov, p. 1.) Originally enacted in response to the destruction of prehistoric ruins and other archeological sites in the western United States, the Act has now been used over 300 times, reserving millions of acres of federal land for protection. (U.S. National Park Service, "National Monument Facts and Figures," https://www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm.)

## BACKGROUND

### The Antiquities Act

Originally enacted in 1906, the Antiquities Act was intended to permit swift executive action to protect historic resources and objects of antiquity. (54 U.S.C. § 320301 et seq.) The core of the Act authorizes the President to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments," and to "reserve parcels of land as a part of the national monument" that comprise the "smallest area compatible with the proper care and management of the objects to be protected." (54 U.S.C. § 320301(a), (b).)

In addition, the Act authorizes the Executive Branch to issue permits for the examination of ruins, excavation of archeological sites, and collection of objects of antiquity for scientific and educational purposes, and authorizes responsible executive departments to issue uniform rules and regulations to effectuate the Act's provisions. (54 U.S.C. §§ 320302, 320303.)

The Antiquities Act provides arguably the most expeditious method for protecting federal land. The designations do not need to be ratified by Congress. (54 U.S.C. § 320301.) The statute does not require the President to produce an evidentiary record or follow any specific procedures. (Klapperich, Christopher, *The New Frontier of Environmental Preservation: The Antiquities Act*, 58 Santa Clara L. Rev. 189, 193 (2018).) Further, because the proclamations are issued directly by the President and not through an executive agency, they are not subject to the procedural and judicial review provisions of the Administrative Procedure Act or the procedural and administrative record requirements of the National Environmental Policy Act. (Squillace, Mark Stephen, *The Monumental Legacy of the Antiquities Act of 1906*, Georgia Law Review, Winter 2003, footnote 15, citing *Franklin v. Massachusetts* (1992) 505 U.S. 788, 800-801.)

Monuments are generally managed by the National Park Service, but management authority can be tasked to other agencies such as the Bureau of Land Management. The land designation for a national monument is also unique because the enabling legislation does not

itself provide use restrictions and management goals. Instead, management is guided primarily by the management plans developed by the agency responsible for overseeing a particular monument. (Iraola, Roberto, *Proclamations, National Monuments, and the Scope of Judicial Review under the Antiquities Act of 1906* (2004) 29 Wm. & Mary Envtl L. & Pol'y Rev. 159, 167-168.)

Bears Ears and Grand Staircase-Escalante Litigation

In 2017, the first Trump Administration announced proclamations that modified the boundaries of these two Utah national monuments. Grand Staircase-Escalante National Monument was established by President Clinton in 1996, protecting 1.7 million acres of southern Utah. (*The Wilderness Society v. Trump*, TWS Plaintiffs' Opposition to Federal Defendants' Motion to Dismiss, Case No. 17-cv-02591, p. 9 ("Plaintiffs' Brief").) The enabling proclamation noted the "rich mosaic of historic and scientific interest," including extensive fossils, paleontological sites, and biological resources. (Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (Sept. 18, 1996).) Over the next two decades, Congress added nearly 200,000 acres of land to the monument. (Opposition to Motion to Dismiss, *supra*, at p. 1.)

Bears Ears National Monument was established by President Obama in 2016—just one year before the Trump proclamation. Bears Ears was the first protected federal land that was advocated for by, and created in consultation with, indigenous tribes. In 2015, tribal leaders from the Navajo Nation, Hopi Tribe, Ute Indian Tribe, Ute Mountain Ute Tribe, and Pueblo of Zuni collectively formed the Bears Ears Inter-Tribal Coalition. (*NRDC et al. v. Trump et al.*, "Complaint for Injunctive and Declaratory Relief," Case No. 17-cv-2606, p. 29.) Later that same year, the Coalition submitted to President Obama a comprehensive proposal for the creation and management of a Bears Ears National Monument. The President's proclamation for the new monument established the Bears Ears Commission, a unique advisory council, consisting of one elected officer from each tribe in the Bears Ears Inter-Tribal Coalition, to provide guidance and recommendations on the development and management of the monument. (*Id.* at p. 27.)

In 2017, the first Trump Administration reduced Grand Staircase-Escalante to about half of its original size, and split Bears Ears into two separate, much smaller parcels. The proclamations found that the original Obama-created monuments contained objects that were "not... of any unique or distinctive scientific or historic significance" and were not in danger of being damaged or destroyed. (82 Fed. Reg. at 58,090; 82 Fed. Reg. at 58,081.) The proclamations also noted that national monuments generally "may... create barriers to achieving energy independence ... and otherwise curtail economic growth." (Exec. Order 13,792, 82 Fed. Reg. 20,429.)

These presidential actions provoked a slew of lawsuits in opposition to the reductions. Before the cases were decided, however, the administration changed, and President Biden restored both monuments to their original boundaries. The cases were stayed, meaning that the unanswered legal questions remain open.

## ANALYSIS

These unanswered questions may well arise during a second Trump Administration, as the authors of Project 2025 anticipated. In analyzing how they might ultimately be resolved, we first consider what we do know about the delegation of authority under the Antiquities Act.

### Congress can modify and abolish national monuments.

The Constitution allocates to Congress the authority to manage federal public lands. The Property Clause gives Congress the exclusive "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." (U.S. Const. art. IV, § 3, cl. 2.) Congress has exercised this authority to alter monument designations on several occasions, including by changing monuments into national parks,[3] transferring monuments to state control, or abolishing monuments entirely. (Congressional Research Service, *supra*, at p. 9.) In two instances, Congress imposed restrictions on the President's authority to establish national monuments in Wyoming and Alaska. (Squillace, *supra*, at pp. 7-8, 9-10.)

### The President probably cannot completely abolish a national monument.

No President has attempted to completely revoke a national monument designation. Legal scholarship on the subject generally concludes that presidents do not have this authority, based on a 1938 Attorney General opinion that concluded that Presidents cannot rescind or revoke the reservation associated with a national monument. (Iraola, *supra*, at p. 164.) In the lead-up to that opinion, the Interior Department sought guidance on whether land reserved under the Antiquities Act could be transferred to the Department of War. In response, the Attorney General found that "[the President's] power so to confine that area" does not include "the power to abolish a monument entirely." (39 Op. Att'y Gen. 185, 188–89 (1938).) The opinion states that "the statute does not in terms authorize the President to

[3] Several of America's most iconic national parks were initially protected as national monuments, and later redesignated as national parks by Congress. This list includes the Grand Canyon, Zion, Olympic, and Acadia National Parks. (Squillace et al., Presidents Lack the Authority to Abolish or Diminish National Monuments, 103 Va. L. Rev. 55 (June 9, 2017).)

abolish national monuments, and no other statute containing such authority has been suggested. If the President has such authority, therefore, it exists [only] by implication." (*Ibid*.) In reaching this conclusion, the Attorney General relied on a separate but related land management scheme, under which a previous president had established a military reservation in Illinois. The court found that the president was not allowed to rescind the reservation in order to allow settlement on that land, leading the Attorney General to conclude that national monuments would be similarly protected. (*Ibid*.)

Courts are generally deferential to presidential decisionmaking regarding the creation of national monuments.

The majority of case law on the Antiquities Act stems from challenges to the creation of national monuments. In every instance, courts have upheld Presidents' discretion to determine historical and scientific resources worth protecting, and the appropriate amount of land necessary for such protection.

The first lawsuit over the Antiquities Act involved the creation of the Grand Canyon National Monument[4] in 1908. A businessman continued to conduct mining operations within the newly established monument, claiming that the monument was invalid since the Grand Canyon was not the type of object encompassed by the Act. (*Cameron v. United States* (1920) 252 U.S. 450, 455.) The United States Supreme Court held, however, that the Grand Canyon *was* an "object of unusual scientific interest" for the purposes of the Antiquities Act. (*Ibid*.)

In 1945, a district court in Wyoming first addressed the appropriate scope of judicial review. In considering a challenge to the newly established Jackson Hole National Monument, the court held that it had "limited jurisdiction to investigate and determine whether or not the Proclamation" was lawful. (*Wyoming v. Franke* (D. Wyo. 1945) 58 F. Supp. 890, 894.) The court found that its review was limited to the evidence put forward by the government in support of the proclamation. (*Id*. at 895-896.)

Later cases affirmed the broad interpretation of the President's authority to designate prehistoric ruins and other objects of antiquity, and to determine the amount of land needed for their preservation. (Congressional Research Service, *supra*, at p. 9.) In *Cappaert v. United States*, for example, the Supreme Court was deferential to the President with respect to the nature of objects that can qualify for Antiquities Act protection, holding that an underground pool containing endangered pupfish was an appropriate subject of protection. (*Cappaert v.*

[4] The Grand Canyon was initially protected as a national monument before Congress redesignated it as a national park in 1919. (National Park Service, Grand Canyon: Management, https://www.nps.gov/grca/learn/management/index.htm.)

*United States* (1976) 426 U.S. 128, 147.) In *United States v. California*, the Supreme Court held that enlarging the Channel Islands National Monument for the sole reason that the additional lands were required for "the proper care, management, and protection of the objects of geological and scientific interest" presented sufficient grounds to reserve the land under the Act. (*United States v. California* (1978) 436 U.S. 32, 36.)

## It is unsettled whether presidents have the authority to reduce the size of existing national monuments.

Until the recent Bears Ears and Grand Staircase-Escalante litigation, the question of whether Presidents could reduce the scope of existing national monuments never reached the courts. That litigation allowed arguments to be developed on both sides;[5] but as discussed above, the cases were stayed prior to their resolution. Based on the briefing from this litigation, a future court reviewing actions of a second Trump administration reducing the size of one or more national monuments will likely have to address the following three primary questions: first, whether the delegation of power in the Antiquities Act includes the authority to reduce the size of national monuments; second, whether the legislative history is relevant to this question; and third, whether the actions or inaction of past Congresses could be understood to represent presumptive acquiescence in Presidential efforts to reduce the size of national monuments.

First, it is important to establish the foundation for the President's authority regarding national monuments. "The President's power, if any … must stem either from an act of Congress or from the Constitution itself." (*Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 585; *Medellin v. Texas* (2008) 552 U.S. 491, 495.) Generally, Congress has authority over federal public lands, as established by the Property Clause. Since the Constitution gives Congress, and not the Executive Branch, the authority to manage federal lands, the President's power does not stem from the Constitution itself. Rather, the Antiquities Act represents a delegation from Congress to the President of some of its inherent authority under the Property Clause. (*Tulare County v. Bush* (2001) 306 F.3d 1138, 1143.) The Supreme Court has confirmed Congress's ability to delegate its constitutional authority to the Executive Branch, including where Congress allows the Executive Branch "ample latitude" in determining how to accomplish the stated legislative objective. (*Yakus v. U.S.* (1944) 321 U.S. 414, 424-425.) In the public lands context, the Supreme Court confirmed in *U.S. v. Grimaud* that Congress can confer specific powers to the Executive "for administering the laws which govern." (*U.S. v. Grimaud* (1911) 220 U.S. 506, 517.)

[5] The cases also include several procedural claims, including standing, failure to state a claim, and violation of the Administrative Procedure Act. This paper focuses on the substantive arguments.

a. Does Congress' delegation of power in the Antiquities Act include the authority to reduce national monuments?

On its face, the text of the Antiquities Act simply delegates to the President the power to *create* national monuments. The President may "declare by public proclamation... objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be... national monuments" and "may reserve as a part thereof parcels of land, the limits of which... shall be confined to the smallest area compatible with proper care and management of the objects to be protected." (54 U.S.C. § 320301(a), (b).) The express language only discusses the creation of national monuments; it is not explicit about whether a President can modify an existing national monument.

"The starting point for interpretation of a statute is always its language." (*Community for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 739.) Under "settled principles of statutory construction," courts "first determine whether the statutory text is plain and unambiguous." (*Carcieri v. Salazar* (2009) 555 U.S. 379. 387.) If so, courts "must apply the statute according to its terms." (*Ibid.*) As Justice Thomas opined: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." (*Connecticut Nat. Bank v. Germain* (1992) 503 U.S. 249, 254.) A decade later, Justice Thomas once again confirmed this principle of statutory construction: "Where... a statute's words are unambiguous, the judicial inquiry is complete." (*Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 91.)

Under a plain reading of the text, the Antiquities Act authorizes the President to take two actions: (1) declare national monuments and (2) reserve land for protection. The "smallest area compatible" language is subordinate to the President's reservation authority. This relationship was further clarified when Congress recodified the 1906 Antiquities Act in 2014. Although the recodification did not change the substance of the text, it adjusted the formatting and headings to emphasize its two distinct grants of authority. It now reads:

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

(54 U.S.C. § 320301.)

Looking at subdivisions (a) and (b) together, it appears that the limitations set forth in

the second sentence of subdivision (b) apply only to the power set forth in the first sentence of subdivision (b). Subdivision (a) grants Presidents the power to declare certain types of properties, structures, or objects to be national monuments. The first sentence of subdivision (b) goes on to grant Presidents the related power to "reserve parcels of land as part of the national monuments." This power to reserve parcels is limited, however. Those parcels must be confined to "the smallest area compatible" with the proper care and management of the objects to be protected."

Notably, the language here does not expressly create any kind of *ongoing* authority to *revisit* prior Presidential decisions creating national monuments or reserving parcels within such monuments. The absence of such language suggests that Congress did *not* intend to delegate modification power to the President. This interpretation is supported by the fact that Congress revisited and clarified the statutory language in 2014. The express purpose of the recodification was "to conform to the understood policy, intent, and purpose of Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections...." (159 Cong. Rec. H2171-01, H2171.)

The primary argument *in favor* of an ongoing Presidential power to revisit earlier decisions creating national monuments is that the President's power to designate such monuments *inherently* includes the power to undo those prior decisions. This argument raises several issues in light of established principles of statutory interpretation and appears to run contrary to those principles.

In the litigation during the first Trump Administration, the Defendants claimed that "Congress could not have been more plain that Presidents are to ensure that monument reservations are *and remain* 'confined' to the smallest area...." (See *The Wilderness Society v. Trump*, Memorandum in Support of Federal Defendant's Motion to Dismiss, Case No. 1:17-cv-02587, p. 26 ("Defendants' Brief").) This interpretation, however, quite literally reads extra words into the statute. As Justice Scalia stated in 2015: "The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to *add words to the law* to produce what is thought to be a desirable result. That is Congress's province. We construe [a statute's] silence as exactly that: silence." (*E.E.O.C. v. Abercrombie & Fitch Stores, Inc.* (2015) 575 U.S. 768, 774, emphasis added.)

Consistent with this principle of construction, other public lands statutes enacted around the same time explicitly included a delegation of authority to reduce or revoke earlier land reservations.) For example, the Forest Service Organic Administration Act of 1897 explicitly authorized the President to "modify any Executive order... establishing any forest reserve, and by such modification [he or she] may reduce the area or change the boundary

lines of such reserve, or may vacate altogether any order creating such reserve." (30 Stat. 11, 36 (1897) (codified at 16 U.S.C. § 473).) In addition, the Pickett Act of 1910, although now repealed, specifically authorized the modification of reservations. (Pickett Act, Pub. L. No. 61-303, 36 Stat. 847 (1910).) The Supreme Court has held that statutes should be construed narrowly in light of omitted terms that were made explicit in other contemporaneous statutes. (*Amoco Prod. Co. v. S. Ute Indian Tribe* (1999) 526 U.S. 865, 877-878.) "Where Congress has consistently made express its delegation of a particular power, its silence [in another statute] is strong evidence that it did not intend to grant the power." (*Alcoa S.S. Co. v. Fed. Mar. Comm'n*, 348 F.2d 756, 758 (D.C. Cir. 1965).)

The Defendants in the first Trump Administration litigation also posed a more generalized argument that this "one-way ratchet" is "nonsensical" and inconsistent with typical constructions of authority. (Defendants' Brief, *supra*, at pp. 27-28.) In response to such a characterization, it could be noted that, while Presidents are free to revoke executive orders issued by prior administrations, this principle does not necessarily extend to designations of national monuments, since this authority is delegated from Congress and is not an inherent Executive power. Such a one-way structure—giving designation authority to the Executive but reserving modification authority for Congress—is not unique. For example, Presidents have the authority to designate wilderness study areas but cannot return these areas to general use management without Congressional action. (U.S. Dep't of Justice, Off. of Legal Counsel, *Presidential Authority Over Wilderness Areas Under the Federal Land Policy and Management Act of 1976*, 6 Op. O.L.C. 63, 65 (1982).)

The absence of express language granting modification power suggests that, if Congress believes that the parcels reserved by a President are more extensive than needed, Congress itself must make any change it considers desirable, using the power given to it through the Property Clause. Congress can—and often does—modify or even reverse national monument designations. Therefore, there is a clear remedy available as a check on Presidents' designations that Congress finds to be excessive.

Well-established principles of constitutional law support Congress' sweeping authority over public lands, except where it has clearly and unambiguously delegated such authority; "[t]he power over the public land thus entrusted to Congress is without limitations." (*U.S. v. City and County of San Francisco* (1940) 310 U.S. 16, 29, citing *U.S. v. Gratiot* (1840) 39 U.S.529, 534; see also *Kleppe v. New Mexico* (1976) 426 U.S. 529, 539.) For example, in *U.S. v. City and County of San Francisco*, the Supreme Court found that Congress had granted to San Francisco the rights to build and operate a dam on federal land, conditioned on restrictions on San Francisco's ability to sell or lease the power generated by the dam to another entity. When San Francisco attempted to sell the power through Pacific Gas & Electric Company, a private

utility, the Supreme Court held that Congress could properly put limitations in place when delegating its authority under the Property Clause. (*U.S. v. City and County of San Francisco, supra,* 310 U.S. at p. 31 ["Congress may constitutionally limit the disposition of the public domain to a manner consistent with its view of public policy"].)

Further emphasizing this interpretation, recent Supreme Court decisions present a trend of narrow interpretation of Congressional grants of authority to the Executive Branch. In *United States Forest Service v. Cowpasture River Preservation Association*, Justice Thomas stated: "Under our precedents, when Congress wishes to 'alter the fundamental details of a regulatory scheme,' as respondents contend it did here through delegation, we would expect it to speak with the requisite clarity to place that intent beyond dispute." (*United States Forest Service v. Cowpasture River Preservation Association* (2020) 590 U.S. 604, 621.) Further, recent decisions in the administrative law context illustrate a move away from deference to the Executive Branch when Congress delegates authority. (See *Loper Bright Enterprises v. Raimondo* (2024) 630 U.S. 369, 396.) Overall, under the most straightforward reading of the Antiquities Act's provisions, Congress has not delegated such authority to the President.

b. Is the legislative history of the Antiquities Act relevant to the question of a President has the authority to modify existing national monuments?

When a statute is ambiguous, courts can look to legislative history in interpreting its terms. The Defendants in the Bears Ears and Grand Staircase-Escalante litigation pointed to sources in the legislative record that emphasized limits on reservations (the "smallest area" language). Plaintiffs, on the other hand, brought up examples in the legislative history of materials that they thought supported their own position. While the legislative record may contain materials that both sides claimed supported their arguments, it is important to remember that extra-textual evidence is only supposed to clarify ambiguity; "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it." (*Milner v. Department of Navy* (2011) 562 U.S. 562, 574.) In *Milner*, the Supreme Court held that "when presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language." (*Ibid.*)

The existence of back-and-forth discussions in the legislative history does not create textual ambiguity. As Chief Justice Roberts has emphasized, "[w]hat Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." (*N.L.R.B. v. WS General, Inc.* (2017) 580 U.S. 288, 306.) As discussed above, the text of the Antiquities Act is not inherently ambiguous. While it is likely that the legislative history will be brought forward and discussed in future litigation, it is important to remember that standard principles of statutory interpretation place primary, and in many cases sole, weight on the enacted text.

c. Does a history of Congressional acquiescence exist, and if so, does it give Presidents the authority to diminish established monuments?

The other central question that will likely arise in future litigation is whether past practice could be understood to affirm the President's ability to modify national monuments. In the prior litigation, the Defendants argued that Congress affirmed the practice by allowing past Presidents to modify monuments without taking corrective action. Presidents have reduced the size of national monuments on eighteen occasions in the past, and Defendants argued that, if this practice was contrary to the Congressional intent embodied in the Antiquities Act, Congress would have acted in response to such Presidential action. (Defendants Brief, *supra*, at p. 29.)

The Supreme Court has held that "if pervasive enough, a history of congressional acquiescence can be treated as a 'gloss on Executive Power'." (*Medellin v. Texas* (2008) 552 U.S. 491, 531, quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).)

There are two key issues associated with Defendants' argument in this context. First, the Supreme Court has held that when the text of a statute is clear, the court need not consider extra-textual evidence. (*N.L.R.B., supra,* 580 U.S. at p. 305.) Here, since the primary disagreement is over statutory interpretation, evidence of post-enactment practice is not necessarily relevant.

Second, even if extra-textual evidence were relevant, it is not clear here that the instances of Presidential modification rise to the standard of a "systematic, unbroken [] executive practice,... never before questioned," that might support a claim that Congress has silently acquiesced to an unwritten Presidential power to reduce monument boundaries. (*Medellin*, *supra*, 552 U.S. at 531.) Although there are several examples of Presidential adjustments, some involved only minor corrections or clarifications, though others did make more substantial boundary adjustments. (Plaintiffs' Brief, *supra*, at p. 28-29.) While it is true that Congress did not take corrective action, it is also true that none of these actions prompted a judicial challenge, suggesting that these were not significant or controversial actions.

Again considering, for the sake of argument, that extra-textual evidence should be examined, it is significant that there are no examples of Presidential modification monuments after 1963. This notable fact could be invoked to rebut the argument that the practice is "unbroken." This same fact is also significant for another reason, however, because Congress enacted the Federal Land Policy and Management Act (FLPMA) in 1976. There are two elements of FLPMA that suggest that Congress did *not* intend to extend the power to diminish

existing national monuments to the Executive Branch. First, Section 204(j) provides that "[t]he Secretary [of Interior] shall not... modify or revoke any withdrawal creating national monuments." Second, the Secretary of the Interior similarly lacks the power to create national monuments either. Because these aspects of FLPMA are consistent with a literal reading of the Antiquities Act, the structure and wording of FLPMA suggest that, within the Executive Branch, only the President can create monuments and that, conversely, only Congress can diminish them. (See Squillace, *supra*, at p. 16.) Further, the House Report on the final version of FLPMA states that it will "specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act." (H.R. Rep. 94-1163.)

Overall, there is a strong argument that courts should not consider extra-textual evidence, and particularly post-enactment practice, when interpreting the Antiquities Act. Even if considered, though, such evidence appears to lead to the conclusion that Presidents *cannot* modify existing national monuments.

## CONCLUSION

The Antiquities Act has been a strong and efficient conservation tool for more than a century, as numerous Presidents have used it to provide protection to federal lands considered worthy of permanent preservation and management for the benefit of future generations. To the extent that the second Trump Administration may seek to cut back on the lands currently subject to such protection, the United States Supreme Court or whatever lower court is the last word on the subject should hold that only Congress can modify existing national monuments. On its face, the Antiquities Act includes clear language delegating to Presidents only the authority to create national monuments. No language authorizes a later President to undo or modify the actions of an earlier President. This conclusion is the product of standard principles of statutory construction discussed above.

Although future court decisions of course cannot be predicted with certainty, and although the lack of direct precedent in this area of law compounds this uncertainty, the arguments in support of restricting modification power to Congress seem substantially stronger than arguments in favor of broad Presidential power to modify or reduce existing national monuments.