

## ARTICLES

### SEPARATION OF POWERS AND FEDERAL LAND MANAGEMENT: ENFORCING THE DIRECTION OF THE PRESIDENT UNDER THE ANTIQUITIES ACT

BY

KELLY Y. FANIZZO\*

*When can a third party sue to force an executive agency to take an action in compliance with the direction of the President? In 2001, President Bill Clinton designated a half million acre national monument in southeastern Arizona and ordered the United States Bureau of Land Management (BLM) to study whether cattle grazing would harm the significant historic and scientific sites he intended to protect. BLM allowed grazing to continue without doing the study. A non profit conservation group, the Western Watersheds Project, sued BLM to implement President Clinton's orders. The group asked the court to exercise its authority under the Administrative Procedure Act to compel agency action unlawfully withheld and set aside arbitrary, capricious, and unlawful agency action. BLM responded that judicial review was not available to enforce its compliance. This article argues that courts should enforce the terms of such presidential proclamations when third parties sue the noncompliant agency. The intent of Congress in delegating to the President the ability to act quickly and reserve public lands for certain uses and not others and the broad deference given by the courts to the exercise of presidential discretion at the time of the designation support the application of this judicial review. Set against the*

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\* Abraham L. Freedman Teaching Fellow, Temple University Beasley School of Law; J.D., American University, Washington College of Law; B.A., Franklin and Marshall College. The author thanks Richard Greenstein, Gregory Mandel, and Duncan Hollis, as well as Muriel Morisey who read an earlier draft, and Michael D. Smith and Alexander "Ti" Hays V for their early advice and assistance.

*backdrop of preserving our national cultural heritage, this article highlights the respective and, at times, overlapping roles of the executive, legislative, and judicial branches in federal land management.*

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## I. INTRODUCTION

The role of the President in managing federal lands is largely, and rightfully, limited—bound by constitutional doctrine and statutory

authority.<sup>1</sup> Congress has, however, provided the President with the power to protect sites of significance to the nation through the Antiquities Act of 1906 (Antiquities Act or the Act).<sup>2</sup> Allowing the President to unilaterally reserve large tracts of land for the protection of historic and scientific objects and sites by designating them as national monuments, the Antiquities Act has been the subject of much debate regarding whether and how the President's exercise of this power might violate the separation of powers.<sup>3</sup> For instance, consider the controversy that arose in response to President Bill Clinton's 1996 designation of the Grand Staircase-Escalante National Monument, a monument consisting of 1.7 million areas in southern Utah.<sup>4</sup> Today, that designation still causes many to state that, "[i]n the West, . . . [the term 'monument' is] a fighting word, bound up for years with simmering resentments against the federal government and presidential powers."<sup>5</sup> Recently, a case in the United States District Court for the District of Arizona illuminated a new chapter in this discourse: whether a third party can sue to force an executive agency to take an action in compliance with the direction of the President.

Challenging the Bureau of Land Management's (BLM) management of the Sonoran Desert National Monument in *Western Watersheds Project v. Bureau of Land Management*<sup>6</sup> as "damag[ing] the soil, plant, wildlife, and historic resources" to be protected,<sup>7</sup> the Western Watersheds Project (WWP)

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<sup>1</sup> See U.S. CONST. art. IV, § 3, cl. 2 ("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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

<sup>2</sup> 16 U.S.C. §§ 431–433 (2006).

<sup>3</sup> See Roberto Iraola, *Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 159, 172–84 (2004) (providing a synthesis of the cases challenging the designation of national monuments in the Supreme Court, circuit appellate courts, and district courts); Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?*, 29 ECOLOGY L.Q. 707, 709 (2002) (describing congressional authority for federal land management and the meaning of withdrawal of public lands).

<sup>4</sup> See Kirk Johnson, *In the West, 'Monument' is a Fighting Word*, N.Y. TIMES, Feb. 20, 2010, at A8, <http://www.nytimes.com/2010/02/20/us/politics/20utah.html> (last visited July 11, 2010) (describing the current contention over the possibility of new monument designations in nine western states and the concern about potentially "secret" discussions within the executive branch that would result in monument designations without the opportunity for consultation with the public, local stakeholders, or Congress).

<sup>5</sup> *Id.*

<sup>6</sup> No. CV 08-1472-PHX-MHM (D. Ariz. Feb. 2, 2009) (order granting BLM's motion to dismiss), *vacated and revised*, 629 F. Supp. 2d 951 (D. Ariz. 2009) (considering also the Western Watersheds Project's claims relating to the development of a grazing compatibility determination and BLM's renewal of grazing permits on the monument in the context of Section 325 of the Department of the Interior and Related Agencies Appropriations Act of 2004). This article will not discuss BLM's argument that section 325 bars Western Watersheds Project's claims or the court's consideration of or holding on this point. See 629 F. Supp. 2d at 968–71.

<sup>7</sup> Complaint at 1, *W. Watersheds Project*, 629 F. Supp. 2d 951 (No. CV 08-1472-PHX-MHM). WWP filed its First Amended Complaint (No. 9) on October 21, 2008, Plaintiff's Motion for Summary Judgment and Injunction (No. 10) six days later, and a motion for permanent injunction—Plaintiff's Motion for Injunctive Relief (No. 22)—on October 31, 2008.

asked the district court to exercise its authority under the Administrative Procedure Act (APA)<sup>8</sup> to compel agency action unlawfully withheld<sup>9</sup> and set aside arbitrary, capricious, and unlawful agency action.<sup>10</sup> WWP based its claim on BLM's lack of compliance with the President's management directives in the national monument proclamation; BLM responded that judicial review was not available to enforce its compliance.<sup>11</sup> Set against the backdrop of preserving our national cultural heritage, this case highlights the respective and, at times, overlapping roles of the executive, legislative, and judicial branch in federal land management decision making.

Questions over how best to regulate and protect historic places, sites, and property are not new.<sup>12</sup> Pieces of our national heritage are lost forever to illicit collecting and looting of archaeological sites and cultural resources.<sup>13</sup> Generally, the term "cultural resources" refers to evidence of the human past.<sup>14</sup> In the late nineteenth and early twentieth century, there was a particular concern with the destruction and loss of prehistoric sites and features, and the valuable information contained within them, in the American Southwest.<sup>15</sup> Unchecked collecting and vandalism<sup>16</sup> pushed a number of archaeologists, anthropologists, scholars, and historians to secure much needed legislation.<sup>17</sup> The Antiquities Act was established to preserve threatened resources, protect against the loss of valuable scientific data, and give the President the authority to protect those historic and scientific structures and objects by unilaterally reserving public lands as national monuments.<sup>18</sup>

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<sup>8</sup> 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (2006).

<sup>9</sup> *Id.* § 706(1).

<sup>10</sup> *Id.* § 706(2).

<sup>11</sup> Amended Complaint at 12, 15–16, *W. Watersheds Project*, 629 F. Supp. 2d 951 (No. CV 08-1472-PHX-MHM); Defendant's Response to Plaintiff's Motion for Reconsideration at 3–4, 5, *W. Watersheds Project*, 629 F. Supp. 2d 951 (No. CV 08-1472-PHX-MHM).

<sup>12</sup> See generally Sherry Hutt, *Cultural Property Law Theory: A Comparative Assessment of Contemporary Thought*, in LEGAL PERSPECTIVES ON CULTURAL RESOURCES 17, 17–34 (Jennifer R. Richman & Marion P. Forsyth eds., 2004) (describing several theories of cultural property law).

<sup>13</sup> See David Harmon, Francis P. McManamon & Dwight T. Pitcaithley, *The Antiquities Act, A Cornerstone of Archaeology, Historic Preservation, and Conservation*, in THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 267, 268 (David Harmon, Francis P. McManamon & Dwight T. Pitcaithley eds., 2006) (describing the sense of closure of the American frontier in the late nineteenth century and the "democratic" "ransacking" that occurred to archaeological sites to provide building materials, curios, and objects for museum exhibits).

<sup>14</sup> Don D. Fowler, *Foreword* to LEGAL PERSPECTIVES ON CULTURAL RESOURCES, *supra* note 12, at ix, ix.

<sup>15</sup> RONALD F. LEE, THE ANTIQUITIES ACT OF 1906, Ch. 1 (Electronic ed., National Park Service 2001) (1970), [http://www.nps.gov/archeology/pubs/Lee/Lee\\_CH1.htm](http://www.nps.gov/archeology/pubs/Lee/Lee_CH1.htm) (last visited July 11, 2010).

<sup>16</sup> See *id.* chs. 4–5 (describing the consumer demand for prehistoric objects and the rush to collect artifacts from prehistoric sites and noting that prior to the enactment of the Antiquities Act, the federal government relied upon its ability to withdraw specific tracts of public land temporarily from sale or entry to protect antiquities).

<sup>17</sup> *Id.* ch. 1.

<sup>18</sup> Antiquities Act of 1906, 16 U.S.C. § 431 (2006).

In response to multiple challenges, the courts have given broad deference to the ability of the President to designate national monuments.<sup>19</sup> Congress provided the President with considerable discretion in the statutory language of the Act.<sup>20</sup> The President, in turn, has arguably pushed the limits of that discretion, but the courts have continued to support the President's exercise of authority in determining the reservation necessary to protect significant resources.<sup>21</sup> However, as demonstrated by *Western Watersheds Project*, Antiquities Act cases can raise other separation of powers issues. In responding to WWP's challenge to its management of the Sonoran Desert National Monument, BLM argued that its actions, while not in compliance with the monument proclamation's directives, constituted presidential action that was not subject to judicial review.<sup>22</sup> Accordingly, BLM argued that it was up to the executive branch and not the judiciary to enforce the proclamation. This article argues that BLM's ability to exercise its expertise and discretion is guided by the President's direction, and that an agency's lack of compliance with the President's direction cannot constitute presidential action that is exempt from judicial review.

The proclamation designating a national monument constitutes the written directive of the President—changing the manner in which the subject property is to be treated. It presents the will of the executive, unilaterally and without need for congressional approval, directing certain actions and policies; it is thus comparable to an executive order.<sup>23</sup> Executive orders, and by extension, presidential proclamations, have been considered “an important weapon in the arsenal of presidential policymaking.”<sup>24</sup> Generally, the directives in each proclamation instruct the land managing agency to implement certain nondiscretionary use restrictions and in most cases, exercise its expertise to develop a management strategy for the monument.<sup>25</sup> The directives both direct and limit the exercise of agency discretion to achieve the protective purpose of the proclamation.<sup>26</sup> Preservationists submitted amicus briefs that argued that to find the President lacked such authority in the development of

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<sup>19</sup> See, e.g., GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 440–43 (6th ed. 2007).

<sup>20</sup> 16 U.S.C. § 431 (2006).

<sup>21</sup> See, e.g., *W. Watersheds Project*, 629 F. Supp. 2d 951, 963–64 (D. Ariz. 2009).

<sup>22</sup> Defendant's Response to Plaintiff's Motion for Reconsideration, *supra* note 11, at 3–5 (No. CV 08-1472-PHX-MHM).

<sup>23</sup> See Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 546–48 (2005) (finding no statutory definition or legal requirements guiding the types of actions that are to be directed by an executive order, but noting the use of executive orders by presidents to “initiate many of their most important policies”); *W. Watersheds Project*, 629 F. Supp. 2d at 962, n.3 (accepting WWP's assertion that proclamations and executive orders are “functionally equivalent”).

<sup>24</sup> Steven Ostrow, Note, *Enforcing Executive Orders: Judicial Review of Agency Action under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 659 (1987).

<sup>25</sup> See, e.g., Proclamation No. 7984, 3 C.F.R. 12 Comp. 100–102 (2007); Proclamation No. 7393, 3 C.F.R. 7 Comp. 100–102 (2002); Proclamation No. 7320, 3 C.F.R. 107 Comp. 100–102 (2001).

<sup>26</sup> See, e.g., Proclamation No. 7984, 3 C.F.R. 13 Comp. 100–102 (2007); Proclamation No. 7393, 3 C.F.R. 9 Comp. 100–102 (2002); Proclamation No. 7320, 3 C.F.R. 108 Comp. 100–102 (2001).

monument proclamations could undermine the protective purpose of the Antiquities Act.<sup>27</sup>

With few exceptions, each President since the passage of the Antiquities Act has exercised his authority to designate national monuments.<sup>28</sup> At the time of designation, the President in office arguably has the best ability, as seen through the intent the Act's drafters and the courts' deference to the exercise of presidential discretion in the designation of the monument, to determine the management directives necessary to ensure that the protective purpose of each proclamation is achieved. After significant deliberation, Congress gave the executive office the authority, and arguably the responsibility, to identify those sites and objects that might be threatened with destruction or misuse, to respond quickly to threats and withdraw the necessary property from the public domain, and to establish the level of protection that is required to achieve the intent of the Act.<sup>29</sup> The exercise of the President's discretion at that moment in time should be preserved and enforced through judicial review. Careful planning and consideration through the traditional legislative process should determine whether significant change or revocation of that designation is needed in those cases where the resource is no longer threatened or the reservation is no longer in the nation's best interests.<sup>30</sup>

Judicial enforcement of a monument proclamation's directives ensures that protection is maintained through subsequent administrations and political changes. In light of differing agency missions, responsibilities, and of course political will, how a proclamation's directives are enforced could significantly influence the level and consistency of the protection intended by each proclamation and tangentially, that intended by the Antiquities Act. While the Arizona district court looked to BLM's statutory authority to find the "specific statutory foundation" to allow for judicial review under the

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<sup>27</sup> Brief of Natural Resource Law Professors and Practitioners as Amici Curiae in Support of Motion for Reconsideration at 3, *W. Watersheds Project*, 629 F. Supp. 2d 951 (D. Ariz. 2009) (No. CV 08-1472-PHX-MHM); see Brief of National Trust for Historic Preservation as Amici Curiae in Support of Plaintiff's Motion for Reconsideration at 1-2, *W. Watersheds Project*, 629 F. Supp. 2d 951 (D. Ariz. 2009) (No. CV 08-1472-PHX-MHM) (asserting the court's initial order has "the dangerous potential to cast a legal cloud on all national monuments. At the very least, the Court's statements will generate enormous confusion regarding the applicable legal standards for management, and for judicial review of agency actions, within national monuments around the country, especially those monuments managed by the Bureau of Land Management").

<sup>28</sup> See National Park Service History: National Monument Proclamations Under the Antiquities Act, <http://www.nps.gov/history/history/hisnps/NPSHistory/monuments.htm> (last visited July 11, 2010) (listing the national monuments designated during each President's administration).

<sup>29</sup> See John D. Lesly, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 301-02 (2001) (describing the long waiting period that is often incurred when Congress is making decisions about the management of federal lands in contrast to the executive's ability to act more quickly, and arguing that without "bold executive actions," many of the national parks, forests, and monuments that are so valued today would not exist). Professor Lesly also argues that the President is able to act more quickly than Congress to respond to threats requiring land protection and preservation. *Id.* at 304.

<sup>30</sup> See *infra* text accompanying notes 368-74 regarding the debate as to whether a President has the authority to unilaterally revoke a national monument proclamation.

APA,<sup>31</sup> this article suggests the existence of the specific statutory foundation in the Antiquities Act itself.<sup>32</sup> In considering the enforceability of a proclamation, the court should look directly to the Antiquities Act, which provides substantive limits for the President's exercise of discretion in reserving a monument, and the management directives themselves as the law to apply in assessing the nondiscretionary aspects of the agency's actions. Additional procedural safeguards, such as whether the presidential proclamation intended to preclude judicial review and the issue of standing, can also guide the court's review of agency action under the APA to ensure the separation of powers is maintained and to stop any potential for unnecessary litigation to constrain the managing agency's ability to manage the federal property under its care.

Part II of this article describes the Sonoran Desert National Monument and WWP's challenge to BLM's management. To provide context for the questions that arise in this case, Part II develops a focused review of the Antiquities Act and its legislative history, and explains the President's ability to select each monument's managing agency as well as the controversy that stemmed from President Clinton's selection of BLM as a monument manager. Part III discusses the separation of powers principles implicated by the President's designation of a national monument and the challenges that have been raised under the non-delegation doctrine. Part IV considers the power struggle that occurs within the executive branch and the separation of powers debate that was raised by BLM's response to WWP's challenge. This section discusses the limits of presidential action and the test developed by the courts to identify a final agency action. Part V of this article reviews what makes an executive order or presidential proclamation carry the force and effect of the law and under what circumstances the terms of a monument proclamation can be enforced. Finally, Part VI considers the need for judicial review of a monument proclamation and identifies the opportunities that exist to ensure such review is effective, appropriately limited, and maintains the separation of powers.

## II. THE SONORAN DESERT NATIONAL MONUMENT

In south central Arizona lies the Sonoran Desert National Monument.<sup>33</sup> "A magnificent example of untrammeled Sonoran desert landscape," the monument consists of roughly 486,149 acres of land and "encompasses a functioning desert ecosystem with an extraordinary array of biological, scientific, and historic resources."<sup>34</sup> President Clinton established this

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<sup>31</sup> *W. Watersheds Project*, 629 F. Supp. 2d at 967–68.

<sup>32</sup> See *infra* Part VI.B.

<sup>33</sup> Bureau of Land Mgmt., Sonoran Desert National Monument Advisory Council, [http://www.blm.gov/az/st/en/prog/blm\\_special\\_areas/natmon/son\\_des/council.html](http://www.blm.gov/az/st/en/prog/blm_special_areas/natmon/son_des/council.html) (last visited July 11, 2010).

<sup>34</sup> Proclamation No. 7397, 3 C.F.R. 22 Comp. 100–102 (2002).

monument days before leaving office on January 17, 2001.<sup>35</sup> Following a string of controversial monument designations,<sup>36</sup> the Sonoran Desert National Monument, along with a number of its contemporaries, attracted attention due to its large size, its identification as a landscape or ecosystem monument, and its designation under the management of BLM rather than the National Park Service (NPS). Whether BLM is sufficiently “preservation-minded” to manage national monuments has been contested.<sup>37</sup>

### A. The Monument Proclamation

When President Clinton issued the proclamation for the Sonoran Desert National Monument, he included more detail than many of his predecessors had in earlier monument proclamations.<sup>38</sup> This was in keeping with other proclamations stemming from the Clinton Administration.<sup>39</sup> Not only describing with particularity the “historic landmarks, historic and prehistoric structures, and other objects of historic and scientific interest”<sup>40</sup> and the size of the monument to be designated as “the smallest area compatible with the proper care and management of the objects to be protected,”<sup>41</sup> Clinton also included specific use restrictions in the proclamations to direct the management of the monument.<sup>42</sup>

The proclamation describes the objects to be protected as part of the “untrammeled Sonoran desert landscape.”<sup>43</sup> Listing biological resources, plant communities and in particular, the saguaro cactus forests, packrat middens,

<sup>35</sup> *Id.* at 25; see Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 537 (2001) (noting that Clinton designated six monuments in his last week in office, including the Carrizo Plain National Monument, the Kasha-Katuwe Tent Rocks National Monument, Pompeys Pillar National Monument, Upper Missouri River Breaks National Monument, Sonoran Desert National Monument, and the Virgin Islands Coral Reef National Monuments).

<sup>36</sup> See, e.g., *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1133–34 (D.C. Cir. 2002) (hearing challenges to the Grand Canyon-Parashant National Monument, the Canyons of the Ancients National Monument, the Cascade-Siskiyou National Monument, the Hanford Reach National Monument, the Ironwood Forest National Monument, and the Sonoran Desert National Monument); Lin, *supra* note 3, at 708.

<sup>37</sup> See *infra* notes 120–121.

<sup>38</sup> See Mark Squillace, *The Antiquities Act and the Exercise of Presidential Power: The Clinton Monuments*, in *THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION*, *supra* note 13, at 106, 113 (noting the simple and brief descriptions of the objects to be protected in early proclamations under the Antiquities Act, and President Clinton’s practice of following President Carter’s example of using substantially more detail to describe the objects to be protected and why the lands designated are “the smallest area compatible with the proper care and management of the objects to be protected”).

<sup>39</sup> Compare Proclamation No. 7397, 3 C.F.R. 22 Comp. 100–102 (2002), with Proclamation No. 7398, 3 C.F.R. 27 Comp. 100–102 (2002), and Proclamation No. 7374, 3 C.F.R. 199 Comp. 100–102 (2001), and Proclamation No. 7265, 3 C.F.R. 7 Comp. 100–102 (2001).

<sup>40</sup> Antiquities Act of 1906, 16 U.S.C. § 431 (2006).

<sup>41</sup> *Id.*

<sup>42</sup> See Squillace, *supra* note 38, at 113 (noting the Clinton-era proclamations withdrawing the lands from “all forms of entry, location, selection, sale, or leasing or other disposition under the public land laws” and restricting motorized and mechanized vehicle use off road).

<sup>43</sup> Proclamation No. 7397, 3 C.F.R. 22 Comp. 100–102 (2002).



wildlife, and archaeological and historic sites, the proclamation provides specific examples and reasons why these resources are so important and deserving of protection.<sup>44</sup> Of note, the proclamation highlights the “rich diversity, density, and distribution of plants in the Sand Tank Mountains area” which it accredits in large part to the lack of livestock grazing.<sup>45</sup>

The proclamation notes the public interest in creating this monument and continues with the management directives necessary to protect the objects identified.<sup>46</sup> In addition to the standard language often used in President Clinton’s proclamations regarding the withdrawal of lands from “entry, location, selection, sale, or leasing or other disposition,”<sup>47</sup> the proclamation prohibits the use of off road motorized or mechanized vehicles, instructs the Secretary of the Interior to develop a management plan to include consideration of road closures or travel restrictions, and confines to a certain extent the issuance of grazing permits.<sup>48</sup> The proclamation allows BLM to continue operating under its standard authorities to issue and administer grazing permits on lands within its jurisdiction, however, it specifies that “grazing permits on Federal lands within the monument south of Interstate Highway 8 shall not be renewed at the end of their current term; and . . . grazing on Federal lands north of Interstate 8 shall be allowed to continue only to the extent that the Bureau of Land Management determines that grazing is compatible with the paramount purpose of protecting the objects identified in this proclamation.”<sup>49</sup> From the proclamation’s earlier language, noting the benefit to the diversity of the plant community in the Sand Tank Mountains area from the lack of livestock grazing, the continuation of such prohibition in the monument south of Interstate 8, and the charge to BLM to assess the compatibility of continued grazing with the protective intent of the monument designation, President Clinton’s use of detail emphasizes which

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<sup>44</sup> See *id.* at 23 (detailing the diverse plant communities in the monument by area, listing the various species of wildlife and identifying those that are endangered, and more briefly describing the archaeological and historic sites, such as rock art sites, lithic quarries, a prehistoric travel and trade corridor, village and habitation sites, and historic trails, including the Juan Bautista de Anza National Historic Trail, the Mormon Battalion Trail, and the Butterfield Overland State Route).

<sup>45</sup> See *id.* at 22 (stating the Sand Tank Mountains area had been withdrawn for military purposes since 1941, thus while there had been limited public access, there had not been livestock grazing for almost fifty years).

<sup>46</sup> See *id.* at 23–24.

<sup>47</sup> *Id.* at 24 (stating the lands are withdrawn “from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing, other than by exchange that furthers the protective purposes of the monument”). The proclamation also includes standard language to the extent that, “[w]arning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.” *Id.* at 25. Compare *id.*, with Proclamation No. 7374, 3 C.F.R. 199 Comp 100–102 (2001), and Proclamation No. 7393, 3 C.F.R. 7 Comp. 100–102 (2002), and Proclamation No. 7396, 3 C.F.R. 19 Comp. 100–102 (2002).

<sup>48</sup> Proclamation No. 7397, 3 C.F.R. 22 Comp 100–102 (2002) (allowing certain military activities, including low level overflights, to continue).

<sup>49</sup> *Id.* at 24–25.

management considerations are of paramount importance to protect the monument's significant resources.

*B. Western Watersheds Project v. Bureau of Land Management*

In its complaint, WWP alleged that BLM was authorizing grazing on the Sonoran Desert National Monument in violation of the proclamation, which was damaging the scientific and historic resources that were to be protected.<sup>50</sup> WWP asserted that BLM failed to undertake the required grazing compatibility study while continuing to permit grazing within the northern portion of the monument.<sup>51</sup> Specifically, WWP alleged the grazing caused "compaction and erosion of soils, destruction of biological soil crusts, reduction in vegetation cover, loss of native plant diversity, increase in non-native plants, and altered plant community structure and composition," which also damaged wildlife habitat.<sup>52</sup> WWP described the harmful competition created between grazing livestock and the protected species identified in the proclamation, as well as the damage caused to cultural and historic sites.<sup>53</sup> Supporting its claims, WWP referenced studies that were completed to evaluate the monument's ecological condition and the impacts of grazing.<sup>54</sup> WWP concluded in their complaint that the 2005 report done by

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<sup>50</sup> Complaint, *supra* note 7, at 2 (No. CV 08-1472-PHX-MHM). WWP withdrew its Motion for Summary Judgment and Permanent Injunction, which the court stated could be refiled after BLM compiled the Administrative Record as directed and subject to its ruling on BLM's Motion to Dismiss. *W. Watersheds Project v. Bureau of Land Mgmt.*, No. CV 08-1472-PHX-MHM (D. Ariz. Feb. 2, 2009) (order granting BLM's motion to dismiss), *vacated and revised*, 629 F. Supp. 2d 951 (D. Ariz. 2009); *see also* First Amended Complaint at 1, *W. Watersheds Project*, 629 F. Supp. 2d 951 (D. Ariz. 2009) (No. CV 08-1472-PHX-MHM) (describing BLM's "mismanagement of the Sonoran Desert National Monument with respect to livestock grazing").

<sup>51</sup> Complaint, *supra* note 7, at 2 (No. CV 08-1472-PHX-MHM) (stating that BLM has not determined whether livestock grazing is compatible with the protection of native habitats, vegetation, wildlife, and historic sites); *see also* First Amended Complaint, *supra* note 50, at 2 (No. CV 08-1472-PHX-MHM) (noting that seven years have passed since the proclamation's issuance without the compatibility study being completed).

<sup>52</sup> Complaint, *supra* note 7, at 9–12 (No. CV 08-1472-PHX-MHM) (describing in detail how the damaged resources and features undermine the intent of the proclamation); First Amended Complaint, *supra* note 50, at 10 (No. CV 08-1472-PHX-MHM). WWP describes the type and number of grazing allotments that occur on the monument. Complaint, *supra* note 7, at 8–9 (No. CV 08-1472-PHX-MHM); First Amended Complaint, *supra* note 50, at 8–9 (No. CV 08-1472-PHX-MHM).

<sup>53</sup> Complaint, *supra* note 7, at 12; First Amended Complaint, *supra* note 50, at 12 (No. CV 08-1472-PHX-MHM).

<sup>54</sup> Complaint, *supra* note 7, at 12–13 (No. CV 08-1472-PHX-MHM) (noting that BLM contracted for these studies with The Nature Conservancy and the Pacific Biodiversity Institute shortly after the monument was established); First Amended Complaint, *supra* note 50, at 13 (No. CV 08-1472-PHX-MHM) (same). The Pacific Biodiversity Institute conducted field work from 2002 to 2006, which identified the areas most impacted by livestock grazing as having "the most disturbance in the form of low vegetation cover, low native species diversity, high levels of non-native species-especially in herb and grass cover, and soil erosion and compaction." First Amended Complaint, *supra* note 50, at 13–15 (No. CV 08-1472-PHX-MHM) (citing a 2005 Nature Conservancy report as having "assessed existing research on impacts of livestock grazing in the Sonoran desert and its implications for grazing management on the monument"). WWP also

The Nature Conservancy found “that no known system of grazing is compatible with protecting the Sonoran Desert ecosystem and its resources.”<sup>55</sup>

WWP brought its claims under the APA, alleging first that because BLM did not complete the compatibility determination or the management plan, it violated the national monument proclamation through a failure to act,<sup>56</sup> and second that because BLM reauthorized grazing prior to completing the compatibility determination, its reauthorization was “arbitrary, capricious, an abuse of discretion, and not in accordance with law under the [APA].”<sup>57</sup> WWP sought an injunction to compel BLM to “complete a compatibility determination for [the grazing allotments north of Highway 8] within six months and approve a final management plan within one year.”<sup>58</sup> WWP also asked the court to set aside the renewed grazing permits and authorizations BLM had already issued north of Highway 8.<sup>59</sup> The court found that the President has the authority to include management directives in national monument proclamations and that judicial review pursuant to the APA is available for BLM’s inaction in violation of the monument proclamation to the extent that the proclamation’s management directives further the managing agency’s statutory authority for related agency action.<sup>60</sup>

### C. The Antiquities Act of 1906

The Antiquities Act is a rather short, but significant piece of legislation. The protective intent and scope of the Act are clear in its first section:

[A]ny 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 . . . be fined . . . or be imprisoned . . . .<sup>61</sup>

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referenced the data collection done by BLM on the grazing allotments within the monument. First Amended Complaint, *supra* note 50, at 14–15 (No. CV 08-1472-PHX-MHM).

<sup>55</sup> Complaint, *supra* note 7, at 14 (No. CV 08-1472-PHX-MHM); First Amended Complaint, *supra* note 50, at 14–15 (No. CV 08-1472-PHX-MHM).

<sup>56</sup> First Amended Complaint, *supra* note 50, at 17 (No. CV 08-1472-PHX-MHM) (describing the compatibility determination and management plan as “discrete mandatory duties”); *see* 5 U.S.C. § 706(1) (2006).

<sup>57</sup> First Amended Complaint, *supra* note 50, at 18 (No. CV 08-1472-PHX-MHM); *see* Administrative Procedure Act 5 U.S.C. § 706(2) (2006).

<sup>58</sup> First Amended Complaint, *supra* note 50, at 18 (No. CV 08-1472-PHX-MHM).

<sup>59</sup> *Id.* (requesting the court to also grant preliminary or permanent injunctive relief and award the plaintiff reasonable costs, litigation expenses, and attorney fees).

<sup>60</sup> *W. Watersheds Project*, 629 F. Supp. 2d 951, 964, 968 (D. Ariz. 2009).

<sup>61</sup> Antiquities Act of 1906, 16 U.S.C. § 433 (2006). The criminal enforcement provision of the Antiquities Act has been found to be unconstitutionally vague by the United States Court of Appeals for the Ninth Circuit. *See* *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974); *see also* SHERRY HUTT ET AL., CULTURAL PROPERTY LAW: A PRACTITIONER’S GUIDE TO THE MANAGEMENT, PROTECTION, AND PRESERVATION OF HERITAGE RESOURCES 48 (2004). Section 3 of the Act requires

The Antiquities Act was the first federal legislation to protect historic properties.<sup>62</sup> Section 2 of the Act grants the President the authority to withdraw public lands for the protection of objects of historic or scientific interest.<sup>63</sup> It states,

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.<sup>64</sup>

Few limitations have been placed on the President's authority to establish national monuments.<sup>65</sup> As will be seen, this provision of the Antiquities Act has withstood multiple challenges.

### *1. The Origins and Intent of the Antiquities Act*

In 1970, Ronald F. Lee wrote a comprehensive account of the debates and events leading up to the passage of the Antiquities Act.<sup>66</sup> Reflecting on Lee's account of the Act's history and describing early discussions of what would eventually become the Act, Secretary of the Interior Bruce Babbitt noted that,

[d]ebates between those who favored conservation or preservation and those who favored commercial uses of public lands swirled around the legislation from the beginning of its consideration. . . . Eventually, the public sentiment to remedy the increasing destruction of archeological sites in the Southwest and the wholesale removal of artifacts that was occurring, overcame these objections[, which stated the government could not protect all the archeological resources that were threatened and that were concerned with

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permits to examine ruins, excavate archaeological sites, or gather objects of antiquity on lands under the jurisdiction of the federal government. 16 U.S.C. § 432 (2006).

<sup>62</sup> See Lynne Sebastian, *Archaeology and the Law*, in LEGAL PERSPECTIVES ON CULTURAL RESOURCES 3, 4–5 (Jennifer R. Richman & Marion P. Forsyth eds., 2004) (naming the Antiquities Act as the “first federal legislation passed specifically to protect historic properties” but noting that its vagueness caused problems in the prosecution of looters and that the Archeological Resources Protection Act, 16 U.S.C. §§ 470aa–470ll (2006), was enacted in the 1970s to address the ongoing commercial looting).

<sup>63</sup> 16 U.S.C. § 431 (2006).

<sup>64</sup> *Id.*

<sup>65</sup> See *id.* § 431(a) (“No further extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.”); Leshy, *supra* note 29, at 297 (describing this 1950 amendment to the Antiquities Act as a reaction to Franklin Roosevelt's 1943 creation of the Jackson Hole National Monument); see also Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3100–3233 (2006) (enacted in 1980 to subject all future reservations in Alaska of over 5000 acres by the President under the Antiquities Act to congressional approval).

<sup>66</sup> LEE, *supra* note 15.

providing the President another means to set aside large areas of the public domain].<sup>67</sup>

Much of the legislative history of the Act focuses on the debates as to what was to be protected and how much land was necessary to accomplish that goal.<sup>68</sup> Yet, there was another big debate ongoing at that time: which federal entity would be granted the withdrawal authority and the responsibility to manage the designated property, and what, if any, protections for the significant objects and sites would be required.

Between 1899 and 1906, multiple draft bills were developed with varying, albeit often similarly structured, provisions granting the authority to withdraw and manage lands to different offices within the executive branch.<sup>69</sup> The first draft bill to be put on the table for discussion provided for the President to set apart and reserve land for use as a public park<sup>70</sup> in the same manner as provided for forestry reservations.<sup>71</sup> That bill provided for the Secretary of the Interior to permit archaeological excavations to qualified institutions.<sup>72</sup> In a subsequent version of the draft bill, H.R. 9245,<sup>73</sup>

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<sup>67</sup> Bruce Babbitt, *Introduction to LEE*, *supra* note 15.

<sup>68</sup> See generally LEE, *supra* note 15, ch. 6 (describing in great detail the development of the subsequent bills and the negotiations that occurred on each); Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 483 (2003) (discussing the development of the final language that made it into the Act including the words, “historic” and “scientific,” and “the smallest area compatible with the proper care and management of the objects to be protected”). Professor Squillace provides a very comprehensive source on the use and interpretation of the Antiquities Act. See also *Utah Ass’n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1178–79 (C.D. Utah 2004) (“Despite what may have been the intent of some members of Congress, use of the Antiquities Act has clearly expanded beyond the protection of antiquities and ‘small reservations’ of ‘interesting ruins.’”).

<sup>69</sup> LEE, *supra* note 15, ch. 6.

<sup>70</sup> See *id.* It wasn’t until House Bill, H.R. 13349 and Senate Bill, S. 4698, in 1906, that the term “national monument” was introduced by Edgar Hewett. *Id.* Lee states that, “[w]hy Hewett recommended this term is not known. To make small archaeological reservations ‘National Parks’ must have seem[ed] inappropriate and probably difficult to get through Congress. The word ‘monument’ appeared in several earlier bills and may have suggested the term finally adopted.” *Id.*

<sup>71</sup> See *id.* (quoting an undated, unsigned, printed document entitled “A Bill for the Preservation of Prehistoric Monuments, Ruins, and Objects, and to prevent their Counterfeiting, and for other Purposes,” 10 pages including explanation of bill; Files, Office of Archeology and Historic Preservation, National Park Service, Washington, DC).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (describing the movement from the first draft bill to its revised version introduced by Representative Jonathan P. Dolliver, H.R. 8066, Representative John F. Shafroth’s version, H.R. 8195, and then Representative Shafroth’s second attempt, H.R. 9245); see H.R. 8066, 56th Cong. (1st Sess. 1900) (placing the monuments, ruins, buildings, cemeteries, and other significant sites in “the care and custody of the Secretary of the Interior, with authority to permit examinations, excavations, or the gatherings of such objects” and to allow the President to “withdraw from sale and set aside for use as a public park or reservation, in the same manner and form as now provided by law and regulation for forestry reservations, any prehistory or primitive works, monuments, cliff dwellings, [etc.] . . . Any and all such reservations shall be regarded as public parks of the United States, and shall be subject to such rules and regulations as shall be formulated by the Secretary of the Interior for their preservation and maintenance”); H.R. 8195, 56th Cong. (1st Sess. 1900) (providing that no “person shall destroy, injure, or carry away, without authority from the Secretary of the Interior, any aboriginal antiquity or prehistoric

the Secretary of the Interior would have the authority to set aside lands that would be placed under the jurisdiction of the Smithsonian Institution's Bureau of American Ethnology.<sup>74</sup> Within months, another bill, A Bill to Establish and Administer National Parks, and for Other Purposes,<sup>75</sup> provided that the lands to be set apart by the President would be known as national parks and under the "exclusive control of the Secretary of the Interior."<sup>76</sup> This bill included general language to guide the Secretary's authority, stating that the Secretary "is hereby empowered to proscribe such rules and regulations and establish such services as he shall deem necessary for the care and management of the same."<sup>77</sup> The next iteration, H.R. 10451, similarly authorized the Secretary of the Interior to set apart and reserve lands as well as administer them.<sup>78</sup>

In early 1904, S. 4127 and H.R. 12447,<sup>79</sup> drafted by officials at the Smithsonian Institution,<sup>80</sup> provided the President with the authority to create public reservations and the Secretary of the Interior to control and make "such rules and regulations and to establish such service as he shall deem necessary for the care and management of [those reservations]."<sup>81</sup> These bills went on to authorize the Secretary of the Smithsonian Institution to "supervis[e], subject to the said rules and regulations of the Secretary of the

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ruin"); H.R. 9245, 56th Cong. (1st Sess. 1900) ("The Secretary of the Interior may, in his discretion, set aside the lands upon which these ruins exist to the extent not exceeding three hundred and twenty acres to each ruin . . .").

<sup>74</sup> H.R. 9245, 56th Cong. (1st Sess. 1900); *see* H.R. 10451, 56th Cong. (1st Sess. 1900) (providing that the Secretary of the Interior may "set apart and reserve from sale, entry, and settlement any public lands in the States of Colorado and Wyoming and in the Territories of Arizona and New Mexico upon which are monuments, cliff dwellings, [etc.]" and that the Secretary of the Interior would have the "authority to care for, protect, preserve, and manage the same").

<sup>75</sup> H.R. 11021, 56th Cong. (1st Sess. 1900).

<sup>76</sup> *Id.*; *see* LEE, *supra* note 15, ch. 6 (referring to H.R. 11021, and asserting that the first section of the Bill was a reaction to the vast amount of land, more than 46 million acres, already under the administration of the Department of the Interior as a result of Executive Proclamation).

<sup>77</sup> H.R. 11021; *see* LEE, *supra* note 15, ch. 6 (quoting H.R. 11021 and noting that the third section of the Bill authorized the Secretary of the Interior to grant permits for "examinations, excavations, and gathering of objects of interest within such national parks" as long as they were for "the benefit of the Smithsonian Institution or a reputable museum, university, college, or other recognized scientific or educational institution").

<sup>78</sup> *See* LEE, *supra* note 15, ch. 6 (referring to H.R. 10451 and noting again the Secretary's authority in this bill to permit excavations by qualified institutions on the reservations); *see also* H.R. 14227, 56th Cong. (2d Sess. 1901) (providing the authority to issue permits for the excavation or disturbance of ancient ruins, habitation remains, or burial places to the Bureau of American Ethnology of the Smithsonian Institution, but requiring the recommendation of the university of the relevant state or territory); H.R. 12141, 58th Cong. (2d Sess. 1904) (including the same provisions).

<sup>79</sup> S. 4127, 58th Cong. (2d Sess. 1904); H.R. 12447, 58th Cong. (2d Sess. 1904).

<sup>80</sup> LEE, *supra* note 15, ch. 6.

<sup>81</sup> S. 4127 (authorizing the Secretary of the Interior to also "make such rules and regulations governing explorations, excavations, and the collection of aboriginal implements, utensils, and other objects of antiquity on said reservations" provided, however, "[t]hat such explorations, excavations, and collections shall be made only by the Smithsonian Institution or some of its bureaus, or by some State, Territorial, municipal, or other duly incorporated museum").

Interior, . . . all aboriginal monuments, ruins, and other antiquities on any of the said reservations.”<sup>82</sup> Representative William A. Rodenberg introduced H.R. 13349, which provided that all “historic and prehistoric ruins, monuments, archaeological objects, and other antiquities are hereby placed in the care and custody of the Secretary of the Interior with authority to grant [excavation and collecting] permits to persons, whom he may deem properly qualified.”<sup>83</sup> In this draft, Congress would make the reservation, and until such time, the Secretary of the Interior would appoint “custodians” for the “protection and preservation” of the ruins.<sup>84</sup>

In the Senate Subcommittee on Public Lands hearings in April 1904, Dr. Francis W. Kelsey of the Archaeological Institute of America raised a concern about the “constant friction and a clashing of authority” that would result from allowing a “division of administration between the Secretary of the Interior and the Smithsonian Institution.”<sup>85</sup> Dr. Kelsey also recognized the first purpose of any such proposed legislation as “for the preservation of monument on general lines, without taking into account the future questions [of administration] that may arise and that are all out of sight.”<sup>86</sup> But in 1905, the issue of which office would manage the reserved lands remained in the forefront of the struggle to pass the antiquities legislation.<sup>87</sup> A prominent figure in the final push to establish the Act, Edgar L. Hewett conducted significant research on “the question of how these monuments may be permanently preserved and prehistoric relics protected at least long enough to permit of their scientific investigation.”<sup>88</sup> Hewett inquired about the measures already in place to protect significant sites and was told by the

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<sup>82</sup> *Id.*; H.R. 12447.

<sup>83</sup> See H.R. 13349, 58th Cong. (2d Sess. 1904) (authorizing the Secretary of the Interior to make recommendations to Congress as to those ruins that should be made national reservations); LEE, *supra* note 15, ch. 6 (discussing the creation of Records of the Past and the involvement of Rev. Henry Mason Baum).

<sup>84</sup> H.R. 13349. The Lodge Bill, S. 5603, was the companion measure to H.R. 13349. LEE, *supra* note 15, ch. 6.

<sup>85</sup> See *Preservation of Historic and Prehistoric Ruins, etc.: Hearing on S. 4127 Before the S. Subcomm. of the Comm. on Public Lands*, 58th Cong. 5–6 (1904) (statement of Doctor Francis W. Kelsey) (stating earlier that the Department of the Interior “has been deeply interested” in the preservation of significant sites, but “that they need special legislation to give adequate protection for matters of this kind”).

<sup>86</sup> *Id.* at 5. Dr. Kelsey later advised that the question of administration “be eliminated from any immediate legislation” and to maintain the status quo of all the public lands remaining “under the control of the Secretary of the Interior.” *Id.* at 6. Dr. Kelsey also noted the “sentiment of the country” that to allow, as was suggested in a number of the draft bills, the Smithsonian Institution to control the recovered materials from permitted excavations or collections on the reservations would give the institution “an unfair advantage.” *Id.* at 7.

<sup>87</sup> See LEE, *supra* note 15, ch. 6 (noting that prior to 1905, “all the federally owned lands on which aboriginal ruins and pueblos were likely to be found were administered by the Secretary of the Interior,” and finding the passage of the Forest Transfer Act in 1905, which provided for the forest reserves, and the prehistoric sites that may be located on them, to move under the jurisdiction of the Department of Agriculture, to add “a major jurisdictional complication to the other problems that had to be taken into account in framing antiquities legislation”).

<sup>88</sup> EDGAR L. HEWETT, *GOVERNMENT SUPERVISION OF HISTORIC AND PREHISTORIC RUINS* 3 (Library of Congress) (1904), available at <http://www.archive.org/download/governmentssuperv00hewe/governmentssuperv00hewe.pdf>.

General Land Office that, for instance, those “ruins of known importance” within forest reserves were “under the care of that forest force patrolling the reserves, and instructions have . . . been issued to the forest officers in respect to having a general care of these ruins.”<sup>89</sup> Hewett urged immediate action to authorize the various branches of the Department of the Interior to “protect all ruins on the public domain.”<sup>90</sup>

Hewett sought a compromise and “emphasized the role of land-managing agencies as custodians of the ruins on their [own] lands.”<sup>91</sup> He asserted that “[t]he purposes for which the lands of the United States are administered are so diverse that no Department could safely undertake to grant privileges of any sort upon lands under the jurisdiction of another Department.”<sup>92</sup> Hewett’s proposal also gave the President broader authority than had been included in earlier versions on the bill.<sup>93</sup> Interestingly, an earlier suggestion to create a presidentially appointed archaeological commission to report to the Secretary of the Interior regarding the preservation of significant sites and to “control . . . ancient monuments and remains on public lands” did not appear to be given much discussion.<sup>94</sup>

The tug-of-war that took place among the Secretary of the Interior, the Smithsonian Institution, and the President as to which entity would withdraw the land and which entity would administer the monument shows the competing interests and serious consideration that went into determining how best to achieve a common intent to protect resources on public lands.<sup>95</sup> It was clear that the protection to be offered to American

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<sup>89</sup> See *id.* at 3 (excerpting a letter from the Honorable W.A. Richards, Commissioner of the General Land Office, dated Oct. 5, 1904). The letter from Richards continued that a “lack of sufficient available funds . . . [made it not] practicable to place custodians in charge of the numerous and widely scattered ruins throughout the southwest, except in the case of three localities in Arizona.” *Id.* at 4.

<sup>90</sup> See H.R. REP. NO. 2224, at 2 (1906) (incorporating Hewett’s memorandum, in which he discusses certain districts containing ruins in New Mexico, Colorado, Utah, and Arizona). Hewett also urged the Forestry Department to protect the ruins in certain districts within forest reserves. *Id.* at 7.

<sup>91</sup> Raymond Harris Thompson, *Edgar Lee Hewett and the Politics of Archaeology*, in *THE ANTIQUITIES ACT, A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION*, *supra* note 13, at 35, 41.

<sup>92</sup> Edgar L. Hewett, *Preservation of American Antiquities; Progress During the Last Year; Needed Legislation*, 8 AM. ANTHROPOLOGIST, 109, 113 (1906).

<sup>93</sup> See *Anaconda Copper Co. v. Andrus*, 14 Env’t Rep. Cas. (BNA) 1853, 1854 (D. Alaska 1980) (noting the proposal offered by Hewett allowed the President to withdraw objects of historic or scientific interest as well as historic landmarks and historic and prehistoric structures).

<sup>94</sup> See *Preservation of Historic and Prehistoric Ruins, etc.: Hearing on S. 4127 Before the S. Subcomm. of the Comm. on Public Lands*, *supra* note 85, at 11 (statement of Reverend Doctor Henry Mason Baum) (quoting a letter from Benjamin I. Wheeler, President of the University of California, and F.W. Putnam, Professor of Anthropology and Director of the Museum of Anthropology). Reverend Doctor Baum urged the Senate to put the control of the antiquities and the authority to permit excavations by all the country’s institutions with the Secretary of the Interior. *Id.* at 14. In his statements, the Honorable William A. Jones, Commissioner of Indian Affairs, also stated that the reservations’ administrative responsibility should be given to the Secretary of the Interior. *Id.* at 23 (statement of Hon. William A. Jones).

<sup>95</sup> See generally H.R. 13478, 58th Cong. (2d Sess. 1904); S. 5603, 58th Cong. (2d Sess. 1904); S. 5603, 58th Cong. (2d Sess. 1904) (Amendment); H.R. 11016, 59th Cong. (1st Sess. 1906). The



antiquities must be “expeditious.”<sup>96</sup> On January 9, 1906, Representative John F. Lacey introduced Hewett’s draft bill, which would become the law.<sup>97</sup> The bill ended the debate and granted the President authority, “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.”<sup>98</sup> The new law coincided with other pieces of legislation expanding the “conservation concept” of the federal government.<sup>99</sup>

## 2. Managing the National Monument

The Antiquities Act does not specify which federal agency will or should manage any particular national monument, although the management of early monuments was generally given to the agency with existing jurisdiction over the property.<sup>100</sup> After the law’s passage, the Departments of Agriculture, War, and Interior all managed national monuments with similar

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language of most of the draft bills addressed both the control of permits for excavation and collecting of archaeological objects and the care and management of the reservation. The preservation of archaeological sites to allow for complete and comprehensive scientific investigation was of significant concern. *See Preservation of Historic and Prehistoric Ruins, etc.: Hearing on S. 4127 Before the S. Subcomm. of the Comm. on Public Lands, supra* note 85, at 12 (statement of Reverend Doctor Henry Mason Baum); *see also* H.R. REP. NO. 59-2224, at 2-3 (1906) (incorporating a memorandum from Prof. Edgar L. Hewett in which he notes the need for “the preservation of this vast treasury of information relative to our prehistoric tribes” and finding, “[u]nquestionably some of these regions are sufficiently rich in historic and scientific interest and scenic beauty to warrant their organization into permanent national parks. Many others should be temporarily withdrawn and allowed to revert to the public domain after the ruins thereon have been examined by competent authority, the collections therefrom properly cared for, and all data that can be secured made a matter of permanent record”).

<sup>96</sup> CAROL HARDY VINCENT & PAMELA BALDWIN, CONG. RESEARCH SERV., NATIONAL MONUMENTS AND THE ANTIQUITIES ACT: RECENT DESIGNATIONS AND ISSUES CRS-3 (2001); *see* H.R. REP. NO. 3704, at 2 (1905) (appending a report, dated Sept. 3, 1904, from Prof. Edgar L. Hewett in which he referenced the “necessity for speedy action looking toward the preservation of these ruins [in Arizona, New Mexico, Colorado, and Utah]”).

<sup>97</sup> H.R. 11016, 59th Cong. (1st Sess. 1906); S. 4698, 59th Cong. (1st Sess. 1906); *see* LEE, *supra* note 15, ch. 6; *see also* S. REP. NO. 3797 (1906) (urging the Senate to pass S.4698, recognizing the wide support for the bill from numerous institutions and museums, and “in view of the fact that the historic and prehistoric ruins and monuments on the public lands of the United States are rapidly being destroyed by parties who are gathering them as relics and for the use of museums and colleges, etc., your [Committee on Public Lands] . . . are of the opinion that their preservation is of great importance”).

<sup>98</sup> S. 4698 § 2.

<sup>99</sup> *See* Elena Daly & Geoffrey B. Middaugh, *The Antiquities Act Meets the Federal Land Policy and Management Act*, in *THE ANTIQUITIES ACT, A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION*, *supra* note 13, at 219, 221 (placing the passage of the Antiquities Act in context with new national parks, wildlife refuges, and forest reserve systems). The authors assert that as “[a] hallmark of Progressive-era legislation, the Antiquities Act was well suited to the aims of President Roosevelt, who was not afraid to use the law’s far-reaching power in the name of public interest.” *Id.*

<sup>100</sup> *See generally* Squillace, *supra* note 68, at 519-34 (describing in detail the issues and history surrounding the President’s selection of a managing agency for a national monument).

but minimal protection methods.<sup>101</sup> The Act explicitly granted the President the ability to “reserve” land for a particular use, and not others,<sup>102</sup> but political discussions continued as to which agencies should be managing the national monuments.<sup>103</sup> For instance, there was significant competition between NPS and the Forest Service to maintain and acquire jurisdiction over national monuments.<sup>104</sup>

In response to President Herbert Hoover’s request in 1929, the Attorney General opined that the President lacked the authority to transfer the national monuments under the Departments of War and Agriculture to NPS without legislative action because “Congress intended that jurisdiction to administer the national monuments which the President was . . . authorized to create should reside in the Departments which had jurisdiction respectively of the land within which the monuments were located.”<sup>105</sup>

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<sup>101</sup> See LEE, *supra* note 15, ch. 8 (referring to Frank Bond’s discussion of monument administration in 1911 consisting of posted warning notices and “a few local make-shift measures”; further, there were no appropriated funds for additional protections); Squillace, *supra* note 68, at 520 (noting in the first half of the twentieth century, the Department of War, the Department of Agriculture, and the National Park Service in the Department of the Interior each managed national monuments); see also Char Miller, *Landmark Decision: The Antiquities Act, Big-Stick Conservation, and the Modern State*, in THE ANTIQUITIES ACT, A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION, *supra* note 13, at 74–75 (stating that no monument had sustained supervision until the 1930s or later and federal agency budgets generally had no dedicated funds for protecting the monuments).

<sup>102</sup> Antiquities Act of 1906, 16 U.S.C. § 431 (2006); see David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 285–86 (1982) (describing the use of congressional and executive withdrawals in response to growing concerns for the protection of public lands).

<sup>103</sup> See HORACE M. ALBRIGHT, ORIGINS OF NATIONAL PARK SERVICE ADMINISTRATION OF HISTORIC SITES, [www.nps.gov/history/history/online\\_books/albright/origins.htm](http://www.nps.gov/history/history/online_books/albright/origins.htm) (last visited July 11, 2010) (explaining, in a statement of self-reflection, that “[w]e [Albright and Mather] fully appreciated the significance and importance of the Lacey Antiquities Act of June 8, 1906, . . . and we were proud of those areas that were located on public lands managed by the Interior Department”). Horace M. Albright was the first assistant director of NPS under Director Stephen T. Mather, and was later the second director of NPS. Albright noted that other monuments were under the War Department because they were situated on War Department lands, and others, as part of national forests, were administered by the Department of Agriculture. *Id.* Albright describes in clear first person detail the events and discussions leading up to the passage of the reorganization act, including his own efforts to have the War Department’s parks and monuments transferred to NPS. *Id.*

<sup>104</sup> See Squillace, *supra* note 68, at 520 (describing the Forest Service’s “utilitarian conservation” as “at odds” with NPS’s preservation mandate). For instance, Professor Squillace notes that there was an early proposal to transfer jurisdiction over all national monuments to NPS in the NPS Organic Act, but the final act did not do so. See *id.* at 521 (referencing H.R.15522, 64th Cong.(1916), reprinted in H.R. REP. NO. 64-700, at 1 (1916)).

<sup>105</sup> See Squillace, *supra* note 68, at 522 (quoting 36 Op. Att’y Gen. 75, 77 (1929), and pointing out that the statutory language does not require the monument to remain under a certain department’s jurisdiction after the monument has been created). Professor Squillace theorizes that the Act provides the President with limited authority to designate a national monument but not the authority to regulate federal lands, which remains under congressional control. *Id.*; see also NAT’L PARK SERV., EXPANSION OF THE NATIONAL PARK SERVICE IN THE 1930S ADMINISTRATIVE HISTORY, ch. 2, [www.nps.gov/history/history/online\\_books/unrau-williss/adhi2b.htm](http://www.nps.gov/history/history/online_books/unrau-williss/adhi2b.htm) (last visited Apr. 7, 2010) (specifying that such a transfer would “infringe on the constitutional prerogatives of Congress”).

Shortly following this opinion, legislation was passed in response to the depression that allowed the President to transfer the functions of any executive agency to the jurisdiction of any other executive agency.<sup>106</sup> Relying upon this authority in 1933, President Franklin Roosevelt issued Executive Order No. 6166,<sup>107</sup> which moved national monuments not previously under the Department of the Interior's jurisdiction to the jurisdiction of NPS.<sup>108</sup> NPS Director Albright described the order of June 10, 1933 as accomplishing at least three "very important things" for NPS: it made NPS the "Federal agency charged with the administration of historic and archeological sites and structures throughout the United States," it expanded NPS influence, and it made NPS "a very strong agency with such a distinctive and independent field of services as to end its possible eligibility for merger or consolidation with another bureau."<sup>109</sup> Between 1933 and 1978, no presidentially-created national monument was managed by an agency other than NPS.<sup>110</sup> Prior to President Clinton's monument designations, for example, "management of

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<sup>106</sup> See Act of Mar. 3, 1933, Pub. L. No. 428, § 16, 47 Stat. 1489, 1517 (1933). The Act states:

[t]he Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accomplished in great measure by proceeding immediately under the provisions of this title. Accordingly, the President shall investigate the present organization of all executive and administrative agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes . . . .

*Id.*

<sup>107</sup> Exec. Order No. 6166, (June 10, 1933), reprinted as amended in 5 U.S.C. § 901 (2006), available at [www.archives.gov/federal-register/codification/executive-order/06166.html](http://www.archives.gov/federal-register/codification/executive-order/06166.html) (last visited July 11, 2010).

<sup>108</sup> See *id.* § 2 ("All functions of administration of public buildings, reservations, national parks, national monuments, and national cemeteries are consolidated in an Office of National Parks, Buildings, and Reservations in the Department of the Interior."); Squillace, *supra* note 68, at 524, 525 (describing the subsequent request by the Secretary of Agriculture to exclude the 15 national monuments under Forest Service jurisdiction from Executive Order No. 6166 due to the "dual" nature of the withdrawals for national forest purposes as well as national monuments and also whether the exception clause in the executive order might apply to those monuments); see also NAT'L PARK SERV., *supra* note 105 (noting the inexplicable delay by the Forest Service to react to the issuance of the Executive Order for six weeks, and noting that Horace Albright would have expected Forest Service opposition to the order in light of the Forest Service's previous opposition to such a transfer). The Secretary of the Interior, Harold L. Ickes, could not report until Jan. 28, 1934 that the administration of the 15 monuments under the Department of Agriculture had been transferred to NPS. *Id.*

<sup>109</sup> See ALBRIGHT, *supra* note 103 (providing additional context on the efforts of Gifford Pinchot, former Chief of the Forest Service, to seek the transfer of national parks from Department of Interior to the Forest Service); see also NAT'L PARK SERV., THE NATIONAL PARK SYSTEM CARING FOR THE AMERICAN LEGACY, [www.nps.gov/legacy/mission.html](http://www.nps.gov/legacy/mission.html) (last visited July 11, 2010) (stating that 63 national monuments and military sites were transferred to NPS from the Forest Service and the War Department under Executive Order No. 6166).

<sup>110</sup> See VINCENT & BALDWIN, *supra* note 96, at 10 (noting that in 1978, President Carter designated two new monuments in Alaska to be managed by the Forest Service and two monuments to be managed by the Fish and Wildlife Service; also describing briefly the memorandum of understanding that was developed between NPS and Department of Agriculture for the management of the Forest Service monuments).

almost every large monument had been taken away from the . . . [BLM] upon its designation [as a national monument], and transferred to the . . . [NPS].”<sup>111</sup>

The President’s selection of a managing agency in the designation of a national monument is a significant decision with potential ramifications on the way in which that monument is to be administered. Perhaps it is not surprising then that President Clinton caused a stir of controversy when he selected BLM as a managing agency in a series of monument designations. In so doing, the executive sought to give the “often-maligned agency” a sense of “new direction.”<sup>112</sup>

#### *D. Multiple-Use Management*

The Sonoran Desert National Monument is one of President Clinton’s designations under BLM.<sup>113</sup> These designations were controversial because of BLM’s multiple-use mission.<sup>114</sup> Generally consisting of large landscapes and ecosystems,<sup>115</sup> Secretary of the Interior Bruce Babbitt promoted the designation of BLM as their managing agency due, in part, to its status as the existing land manager.<sup>116</sup> Secretary Babbitt explained that the previous

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<sup>111</sup> See Ranchod, *supra* note 35, at 538 (describing the Grand Staircase-Escalante National Monument as the first monument designated for BLM to manage). Whether the President can designate agencies other than NPS to manage monuments created after 1933 has been debated. Scholars have argued that the language of Executive Order No. 6166 applies to both existing and future monuments, and have pointed to the continuing practice of Presidents to transfer newly created national monuments to the jurisdiction of NPS. See Squillace, *supra* note 68, at 525–26 (describing this debate as a question “left unresolved by Executive Order No. 6166,” and pointing to the intent to transfer “all functions of administration of . . . national monuments” and not the “monuments themselves” as supporting the application of the order to future monuments).

<sup>112</sup> See Robert B. Keiter, *The Monument, the Plan, and Beyond*, 21 J. LAND RESOURCES & ENVTL. L. 521, 531 (2001) (noting the attempt to utilize BLM’s conservation mandate and establish a dedication to “resource protection”).

<sup>113</sup> Proclamation No. 7397, 3 C.F.R. 22 Comp 100–102 (2002); see also VINCENT & BALDWIN, *supra* note 96, at 9 (noting the Grand Staircase-Escalante National Monument as the first monument to be administered by BLM).

<sup>114</sup> See VINCENT & BALDWIN, *supra* note 96, at 10 (noting the multiple uses that would be allowed on lands managed by BLM such as recreation, range, minerals, watershed, fish and wildlife as well as the protection of other values, including scientific and historical values). Vincent and Baldwin discuss BLM’s “flexible management” policies, in comparison with those of NPS, whereby “under the BLM interim management policy, uses generally would be permitted unless shown to be detrimental to the monuments. In NPS units, uses are more likely to be prohibited unless shown to be beneficial.” *Id.*; see also Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 58 (2004) (describing BLM’s multiple use management under FLPMA as “a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put”). The Court noted that “not all [land] uses are compatible,” for example, areas designated as wilderness that are closed to commercial and recreational uses. *Id.*

<sup>115</sup> See Ranchod, *supra* note 35, at 537–38 (stating President Clinton’s practice of designating “entire ecosystems” as monuments constituted a shift from the previous protection given to “curiosities,” specific objects of unusual historic or scientific value that stand out from the landscape by virtue of their extraordinary beauty”).

<sup>116</sup> See Squillace, *supra* note 38, at 114 (describing Secretary Babbitt’s reasoning for placing the large new monuments under the existing land manager as attempting to win public approval and support for their designation).

practice had been to take land away from BLM to protect it “[b]ut . . . the largest land manager ought to be induced to have a sense of pride rather than simply having a bunch of inventory out in the garage that is discovered and given to someone else.”<sup>117</sup> Secretary Babbitt established the National Landscape Conservation System (NLCS), a sub-agency within BLM responsible for managing the national monuments under its jurisdiction.<sup>118</sup> The NLCS allows for a “wider range of uses” on monument lands, provided those uses are consistent with the directives of a monument’s proclamation.<sup>119</sup> Therefore, the agency has a certain amount of discretion to exercise in its management decisions.

Many have argued that by allowing “compatible uses” the protection intended for the identified resources in the national monument is not paramount.<sup>120</sup> Thus, the balancing and prioritizing of values in the management of those lands is inappropriate. Described as a “major shift in the national monument paradigm” and an “uncomfortable compromise,” scholars acknowledge the “record acreage designated as monument lands” under BLM but assert those monuments are established “with less protection.”<sup>121</sup> The root of this concern lies in BLM’s mission and its authorizing legislation for land management: the Federal Land Policy and Management Act (FLPMA).<sup>122</sup>

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<sup>117</sup> Ranchod, *supra* note 35, at 570 (quoting an address by Secretary Babbitt).

<sup>118</sup> Squillace, *supra* note 38, at 115.

<sup>119</sup> *Id.*; see also, e.g., VINCENT & BALDWIN, *supra* note 96, at 10 (discussing the different activities such as mineral development, timber, and hunting and grazing that would be permissible on monument lands managed by BLM versus those activities on lands managed by NPS). But see Daly & Middaugh, *supra* note 99, at 231 (finding BLM’s management of existing uses on monument lands to comply with a “standard of best management practices so that they do not conflict with the values for which the monument was proclaimed”).

<sup>120</sup> See, e.g., Ranchod, *supra* note 35, at 538 (noting activities such as hunting and grazing, now possibly permitted, had been prohibited in previous “smaller curiosity monuments,” but even mining, oil and gas drilling, and other commercial extractive uses are at times permitted in President Clinton’s monuments). The author asserts that “[t]hese changes in management authority and protection for monument lands may undercut the conservation legacy Clinton forged by using the national monument designations to protect ecosystems.” *Id.* at 538–39. But see Squillace, *supra* note 68, at 546 (stating that new mineral development and road construction would be generally precluded in BLM monuments, but hunting and grazing may continue, provided those activities are compatible with the protection of the identified objects in the monument proclamation).

<sup>121</sup> Ranchod, *supra* note 35, at 537, 583. But see Squillace, *supra* note 68, at 549 (noting that for some of the landscape level monuments established by President Clinton, the proclamations require the managing agency to develop a management plan for the monument to determine what actions are necessary to fulfill the intent of proclamation). While these plans are prepared in accordance with the agency’s existing land use planning authorities, the proclamations for agencies such as BLM “will clearly limit the management options that would otherwise be available.” *Id.*

<sup>122</sup> Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2006); see Lin, *supra* note 3, at 710 (“The 1976 passage of the Federal Land Policy and Management Act . . . drastically curbed and modified the executive branch’s withdrawal authority.”). FLPMA did not change the Antiquities Act. See *Utah Ass’n of Counties*, 316 F. Supp. 2d 1172, 1198 n.16 (D. Utah 2004); see also *Anaconda Copper Co.*, 14 Env’t Rep. Cas. (BNA) 1853, 1854 (D. Alaska 1980) (finding the passage of FLPMA “afforded Congress an opportunity to restrict the by then well-

FLPMA is BLM's organic act<sup>123</sup> and the primary basis for its land management.<sup>124</sup> Providing a "unified legislative mandate" for the agency, FLPMA sets forth multiple use, sustained yield, and environmental protection as the "guiding principles for public land management."<sup>125</sup> BLM's system of monument management must comply with its multiple-use mission as dictated by FLPMA.<sup>126</sup> FLPMA defines "multiple use" as:

the management of public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.<sup>127</sup>

FLPMA defines "sustained yield" as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various

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established exercise of presidential authority under the 1906 Antiquities Act, and . . . believe[d] it is significant that in the promulgation and enactment of the 1976 legislation, Congress did not curtail or restrict the exercise of presidential authority").

<sup>123</sup> See U.S. BUREAU OF LAND MGMT., DEP'T OF THE INTERIOR, THE FEDERAL LAND POLICY AND MANAGEMENT ACT (FLPMA) OF 1976: HOW THE STAGE WAS SET FOR BLM'S "ORGANIC ACT," <http://www.blm.gov/flpma/organic.htm> (last visited July 11, 2010) (stating that FLPMA "consolidated and articulated BLM's management responsibilities").

<sup>124</sup> See Martin Nie, *Statutory Detail and Administrative Discretion in Public Lands Governance: Arguments and Alternatives*, 19 J. ENVTL. L. & LITIG. 223, 238 (2004) (noting BLM also manages its lands pursuant to the Public Rangelands Improvement Act of 1978). For a list of the other applicable laws guiding BLM's land management policies, see generally Bureau of Land Mgmt., National System of Public Lands, Laws, Regulations, Policies, Court Decisions, <http://www.blm.gov/wo/st/en/info/regulations.html> (last visited July 11, 2010).

<sup>125</sup> BUREAU OF LAND MGMT., *supra* note 123; see BUREAU OF LAND MGMT., MISSION AND HISTORY, *available at* <http://www.blm.gov/natacq/BLMMissHistExc.pdf>; see also 43 U.S.C. § 1732(a) ("The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.").

<sup>126</sup> See David Williams, *Planning the BLM's First National Monument*, 21 J. LAND RESOURCES & ENVTL. L. 543, 544 (2001) (stating that BLM was to follow FLPMA to complete the planning process, rather than NPS's regulations for managing monument lands); see also Daly & Middaugh, *supra* note 99, at 219, 227 (describing the creation of the NLCS to meet the challenge of successfully protecting sensitive resources while providing for a multiple-use management system on BLM lands).

<sup>127</sup> 43 U.S.C. § 1702(c) (2006).

renewable resources of the public lands consistent with multiple use.”<sup>128</sup> The statute recognizes a need for the protection of historic, cultural, and scenic values, and natural resources.<sup>129</sup> But it provides significant discretion to the agency, requiring the Secretary to “use and observe the principles of multiple use and sustained yield set forth in this and other applicable law” and integrate consideration of physical, biological, economic, and other factors in devising land use plans.<sup>130</sup>

BLM asserts that it is its “challenge, and opportunity, to manage the Sonoran Desert National Monument, to fulfill the purpose of the monument as described in the Proclamation while accommodating to the extent practicable the increase in recreational use that is expected to occur.”<sup>131</sup> More broadly, BLM states that the American West, where most of its lands are located, constitutes the “fastest growing region of the Nation.”<sup>132</sup> As a result, “public lands are increasingly viewed from the perspective of their diverse recreational opportunities, their cultural resources, and—in an increasingly urban world—their vast open spaces. However, the more traditional land uses—grazing, timber production, and energy and mineral extraction—also remain important, especially to the economic and social well-being of many rural Western communities.”<sup>133</sup> BLM attempts to balance such traditional uses as grazing with maintaining the environmental health of its lands.<sup>134</sup> Livestock grazing may not be an issue on many national

<sup>128</sup> *Id.* § 1702(h).

<sup>129</sup> *See, e.g.*, 43 U.S.C. § 1702(a) (2006) (defining “areas of critical environmental concern” as “areas within the public lands where special management attention is required [—] when such areas are developed or used or where no development is required [—] to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards”).

<sup>130</sup> *Id.* §§ 1701(a)(12), 1712(c)(1)–(9); *see* Nie, *supra* note 124, at 240 (“Instead of providing clear unequivocal guidance in the form of prescriptive law, Congress provided an array of criteria to be incorporated or merely considered in the development and revision of land-use plans.”); Justin James Quigley, *Grand Staircase-Escalante National Monument: Preservation or Politics?*, 19 J. LAND RESOURCES & ENVTL. L. 55, 65–66 (1999) (finding the potentially conflicting principles in FLPMA’s provisions to be “somewhat reconciled” under the concept of “multiple use” as adopted from the Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528–531) (2006).

<sup>131</sup> Bureau of Land Mgmt., *supra* note 33. BLM expects that recreational visits to the monument will increase from 20,000 per year (as of 2008) to 100,000 per year by 2015 and states that citizen involvement is “essential in meeting the challenge of fulfilling the purpose of the monument.” *Id.*

<sup>132</sup> BUREAU OF LAND MGMT., *supra* note 125.

<sup>133</sup> *Id.*; *see* Andy Kerr & Mark Salvo, *Evolving Presidential Policy Toward Livestock Grazing in National Monuments*, 10 PENN. ST. ENVTL. L. REV. 1, 3–4 (2001) (finding that grazing is a traditional use in many areas and describing the debate over grazing on portions of the Jackson Hole National Monument).

<sup>134</sup> Kerr & Salvo, *supra* note 133, at 11 (arguing that “[w]here harmful grazing occurs in existing monuments, the federal government should reduce or eliminate livestock in those areas, either through administrative action pursuant to current management authority or by buying out grazing interests from graziers and retiring the associated grazing allotments”); U.S. Bureau of Land Mgmt., Fact Sheet on the BLM’s Management of Livestock Grazing: Grazing on Public Lands, [www.blm.gov/wo/st/en/prog/grazing.print.html](http://www.blm.gov/wo/st/en/prog/grazing.print.html) (last visited Apr. 7, 2010). BLM administers public land ranching pursuant to the Taylor Grazing Act of 1934. *Id.*; *see also* U.S. Bureau of Land Mgmt., About the BLM, [www.blm.gov/wo/st/en/info/About\\_BLM.print.html](http://www.blm.gov/wo/st/en/info/About_BLM.print.html)

monuments; for instance, NPS's management policy "generally disfavors grazing."<sup>135</sup> For the majority of President Clinton's monuments, however, "[g]razing appears to have been either perpetuated or restricted in each national monument based on the history of the area, the future envisioned for each reservation, and local politics."<sup>136</sup> In the Hanford Reach National Monument, President Clinton prohibited grazing altogether.<sup>137</sup> Yet President Clinton's restrictions on grazing in the Sonoran Desert National Monument have been described as his "most ardent stance against livestock grazing."<sup>138</sup>

After significant deliberation, Congress decided to place the power to reserve lands in the hands of the President. The President then uses that power to exercise his discretion, albeit not wholly unlimited, to identify the managing agency in each monument designation. What has resulted, both in the President's designation and the way in which the monument is managed, is an ongoing debate as to whether this authority constitutes a violation of the separation of powers.

### III. SEPARATION OF POWERS

The framers of the Constitution intended a government where the separation of powers would prevent the rise of tyranny and work to preserve liberty.<sup>139</sup> "The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility."<sup>140</sup> In

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(last visited Apr. 7, 2010) ("[BLM] administers more than 18,000 grazing permits and leases and nearly 13 million authorized livestock animal unit months on 160 million acres of public rangeland.").

<sup>135</sup> Kerr & Salvo, *supra* note 133, at 3 (noting early proclamations designating monuments on Forest Service lands were usually silent on the question of grazing and left the decision up to forest manager); see VINCENT & BALDWIN, *supra* note 96, at 10 (stating that grazing is typically allowed on BLM lands but not on NPS lands, although grazing is authorized by NPS statute, 16 U.S.C. § 3, unless prohibited by the statute creating the individual park unit or the Secretary finds that grazing would be detrimental to the park resources). "In practice, grazing often is not allowed." *Id.* at 10 n.18.

<sup>136</sup> Kerr & Salvo, *supra* note 133, at 7. The authors state that many monument proclamations, specifically those designations following the Grand Staircase-Escalante National Monument, do not directly address grazing and allow BLM as the land manager to regulate grazing on the monuments. *Id.* at 8.

<sup>137</sup> Proclamation No. 7319, 3 C.F.R. 102 Comp. 100-102 (2001); see Kerr & Salvo, *supra* note 133, at 8 (referring to this proclamation as "a breakthrough in presidential-livestock relations" but noting that the prohibition itself was "not very significant because livestock grazing has been banned from the Hanford Reach since 1942" and "the primary object of 'scientific interest' to be protected by the national monument designation was the pristine, ungrazed grassland").

<sup>138</sup> Kerr & Salvo, *supra* note 133, at 11.

<sup>139</sup> *Mistretta v. United States*, 488 U.S. 361, 380-81 (1989); see *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) for the proposition that this arrangement was to "diffus[e] power the better to secure liberty").

<sup>140</sup> *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983); see U.S. CONST., arts. I, II, III.



considering the powers of the executive branch, for instance, Professor Louis Sirico, Jr. describes the focus of the deputies to the Constitutional Convention on three interrelated questions: “how much power the Executive should enjoy, how strictly the separation-of-powers doctrine should apply, and how effective a variety of checks and balances might prove.”<sup>141</sup> Thus, the original purpose of the separation of powers was to “harness political competition into a system of government that would effectively organize, check, balance, and diffuse power . . . the system would be self-enforcing, relying on interbranch competition to police institutional boundaries and prevent tyrannical collusion.”<sup>142</sup>

### *A. Maintaining the Separation of Powers*

Generally, the doctrine holds that one branch of the government cannot significantly interfere with the operation of another branch’s constitutional functions.<sup>143</sup> Multiple “checks,” such as “the bicameral requirement, the Presentment clauses, the President’s veto, and Congress’ power to override a veto,” serve “to protect the people from the improvident exercise of power by mandating certain proscribed steps.”<sup>144</sup> As such, the separation of powers doctrine “helps to slow down the lawmaking process so that it can be responsive to all the various constituencies in a large democracy.”<sup>145</sup>

The extent to which the separation of powers should be maintained, whether it is enforced strictly or more flexibly, continues to be a source of

<sup>141</sup> See Louis J. Sirico, Jr., *How the Separation of Powers Doctrine Shaped the Executive*, 40 U. Tol. L. Rev. 617, 628 (2009) (stating the deputies considered the following issues: “choosing the Executive, permitting the Executive to stand for a second term, devising the executive veto, requiring legislative advice and consent on executive appointments, authorizing the Executive to grant reprieves and pardons, and making the Vice President the President of the Senate”).

<sup>142</sup> See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2313 (2006) (describing the early intent and strategy of James Madison but finding the democratic competition envisioned by the framers to be replaced by the competition between two major political parties). Professors Levinson and Pildes describe Madison’s vision that each branch of government would come to have a “will of its own,” but argue that to separate the branch from the individuals (a.k.a. the political actors) who occupy it is not possible. *Id.* at 2317. The authors persuasively assert that under this model, governmental officials are influenced by partisan and policy goals, and where there is a single party in both Congress and the executive office, it is possible to see more cooperation, as opposed to competition, between the branches. *Id.* at 2323. For instance, “[w]e should expect Congress to be considerably less willing to delegate policymaking discretion to the executive branch when the policy preferences of the two branches diverge.” *Id.* at 2341.

<sup>143</sup> *Chadha*, 462 U.S. at 963 (Powell, J., concurring).

<sup>144</sup> *Id.* at 957.

<sup>145</sup> See Patrick M. Garry, *The Unannounced Revolution: How the Court has Indirectly Effected a Shift in the Separation of Powers*, 57 Ala. L. Rev. 689, 695–96 (2006) (describing the positive goals that the doctrine brings about as “allowing a wide-ranging political representation of diverse interests, leading to a broad-based consensus across a diverse republic; promoting the distinctive qualities associated with each branch; and providing the means by which to overcome temporary legislative or political impasses”).

debate.<sup>146</sup> Some “functional overlap” is permissible between branches.<sup>147</sup> The doctrine is generally not applied too rigidly,<sup>148</sup> but rather it is considered on a case by case basis, looking to the specific facts and circumstances at issue.<sup>149</sup> Current executive branch and administrative agencies exercise to some extent both legislative and judicial powers.<sup>150</sup> In regard to the judicial branch, the Court has “expressed [its] . . . vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed ‘tasks that are more properly accomplished by [other] branches,’ . . . and second, that no provision of law ‘impermissibly threatens the institutional integrity of the Judicial Branch.’”<sup>151</sup> Professor Patrick Garry describes two approaches to considering the separation of powers: the formalist approach, whereby a clear and positive line is drawn between each branch and decision making does not include policy concerns, and the functionalist approach, which focuses on maintaining the balance of powers among the branches and not holding such a strict adherence to the branch divisions.<sup>152</sup> Despite the growing complexity of the government and current administrative state, Professor Garry still finds the doctrine to be an effective strategy in maintaining a balanced government.<sup>153</sup> The difficulty clearly lies, however, in

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<sup>146</sup> See *Chadha*, 462 U.S. at 951 (“The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desired objectives, must be resisted. Although not ‘hermetically’ sealed from one another . . . , the powers delegated to the three Branches are functionally identifiable.” (citation omitted)).

<sup>147</sup> See *Chadha*, 462 U.S. at 999 (White, J., dissenting) (“But the history of the separation of powers doctrine is also a history of accommodation and practicality. Apprehensions of an overly powerful branch have not led to undue prophylactic measures that handicap the effective working of the national government as a whole.”).

<sup>148</sup> But see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (“[T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features[—]of which the conclusiveness of judicial judgments is assuredly one[—]it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.”).

<sup>149</sup> See *Mistretta*, 488 U.S. 361, 382–83 (1988) (noting instances where the Court has upheld “statutory provisions that to some degree commingle the functions of the Branches, but pose no danger of either aggrandizement or encroachment”).

<sup>150</sup> See Garry, *supra* note 145, at 698, 701 (describing one argument that “the agency role in the law-making process has become almost unchecked, largely because current separation of powers jurisprudence is unsuited to the realities of modern administrative governance”).

<sup>151</sup> See *Mistretta*, 488 U.S. at 383 (quoting *Morrison v. Olson*, 487 U.S. 654, 680–81 (1988), and *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986)).

<sup>152</sup> See Garry, *supra* note 145, at 704–05 (“Whereas the formal approach advocates drawing clear lines between the distinct and definable powers of the three branches, the functional approach stresses the maintenance of a working government over an adherence to strict divisions between the branches.”).

<sup>153</sup> See Garry, *supra* note 145, at 706 (noting, however, that critics of a separation of powers approach point to the complexity of each branch, including multiple subparts, that make it difficult to “identify a branch’s institutional competency”). Professor Garry also notes a trend by which the Court has been “retreating” from separation of powers disputes and thus, has been allowing the executive branch to influence the direction of the doctrine. *Id.* He identifies a response to this withdrawal in explaining that “[j]udicial review not only preserves the separation of powers but is justified by it.” *Id.* at 707. Judicial review is thus dependent on, and an integral actor in, the system of checks and balances.

deciphering when one branch's actions improperly encroach upon another branch's authority.<sup>154</sup>

*B. Challenging the Authority of the President Under the Antiquities Act*

The President's exercise of authority under the Antiquities Act raises a question concerning executive involvement in federal land management.<sup>155</sup> From a formalist perspective, the President's authority has been challenged under the Property Clause of the Constitution<sup>156</sup> as being able to regulate public lands without limitation.<sup>157</sup> On the other hand, scholars have pointed to the potential overlap of executive and legislative functions and have argued, from a more functionalist perspective, that it is appropriate for the President to be able to unilaterally set aside tracts of land to better express the national public interest and to respond in a timely manner to threats to significant resources.<sup>158</sup>

<sup>154</sup> Garry, *supra* note 145, at 696; see *Mistretta*, 488 U.S. at 383, n.13 (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977), for the proposition that where the Court finds, for instance, a statutory provision that potentially interferes with the executive branch's ability to exercise its constitutional responsibilities, the Court then considers "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress").

<sup>155</sup> See, e.g., Leshy, *supra* note 29, at 288 (finding that despite criticism, President Clinton's use of the Antiquities Act in 2001 is consistent with the "long tradition of executive leadership in setting aside public lands for conservation"). Professor Leshy asserts, in the context of the executive's ability to conserve large tracts of public lands,

[t]he response to executive action tends to follow a pattern. First are complaints about interference with congressional prerogatives, often repeated by opponents of changing the status quo. Experience shows these complaints usually fade rather quickly, giving way to acceptance (albeit sometimes grudgingly in the vicinity of the federal lands affected) of the course for the future set by executive leadership. Eventually comes congressional ratification, endorsement, and even enhancement of the executive action.

*Id.* at 300.

<sup>156</sup> See U.S. CONST. art. IV, § 3, cl. 2 ("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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

<sup>157</sup> See *Iraola*, *supra* note 3, at 170–71 (quoting *Tulare County v. Bush*, 185 F. Supp. 2d 18, 26 (D.D.C. 2001) (the Antiquities Act is "a proper delegation of congressional authority to the President under the Property Clause"). The court in *Tulare County v. Bush*, 18 F.Supp. 2d 18 (D.C.C. 2001), disagreed with the argument that the Proclamation establishing the Giant Sequoia National Monument and the Act violated the Property Clause. *Id.* at 26. The court noted significantly, "[e]ven if standards and limitations are somewhat broad, 'Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors.'" *Id.* (quoting *Touby v. United States*, 500 U.S. 160, 165 (1991)); see also *Utah Ass'n of Counties*, 316 F. Supp. 2d 1172, 1190–91 (D. Utah 2004) (responding to the claim that the Act provided "virtually unfettered discretion to regulate and make rules concerning federal property" by focusing on the President's ability to designate the monuments and finding the Act has "clear standards and limitations" as to the objects to be protected and the size of the withdrawal, thus it does not violate the non-delegation doctrine or the Property Clause of the Constitution).

<sup>158</sup> Compare Lin, *supra* note 3, at 733–35 (contrasting the President's use of the Antiquities Act under an "emergency rationale" to the use of FLPMA's emergency withdrawal authority),

There remains a viable “checks and balances” system in place to ensure the executive office does not overreach in exercising its authority under the Antiquities Act.<sup>159</sup> Congress may, if needed, restrict the President’s exercise of authority and has, on occasion, considered such proposals to restrict the President’s ability to designate monuments under the Act.<sup>160</sup> Much has been said about those attempts to limit the President’s authority through amendments to the statute, but none of the attempts thus far have been successful.<sup>161</sup> In addition, the President’s ability to withdraw land has been criticized as inconsistent with the general congressional intent of FLPMA to return jurisdiction over public land withdrawals to Congress.<sup>162</sup> But the express statutory language of FLPMA leaves the President’s authority under the Antiquities Act intact.<sup>163</sup> While the debate over the role of the President and the role of Congress in withdrawing public lands has played out in many political and public arenas,<sup>164</sup> the President’s ability to designate national monuments has withstood significant pressure over the past century.<sup>165</sup>

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with Leshy, *supra* note 29, at 291 (describing briefly earlier presidential action to conserve and preserve wide tracts of public land, and ascribing the “preserv[ation of] magnificent features of America’s federal lands . . . [to] leadership by the executive, not by Congress”).

<sup>159</sup> See Lin, *supra* note 3, at 728 (arguing that the separation of powers is not disrupted by the President’s exercise of power under the Act and noting Congress’s ability to withhold funding for the management of a monument and its ability to modify or nullify a designation).

<sup>160</sup> See VINCENT & BALDWIN, *supra* note 96, at 2 (discussing legislative actions that addressed the size of the monuments and the resources to be protected, as well as the procedures for designation). The authors note in particular the proposed bills in the 106th Congress to amend the Antiquities Act, such as measures to include public participation in the designation process, to require congressional approval of designations, and to make the designation process more consistent with other federal land management and environmental laws. *Id.*; see also Quigley, *supra* note 130, at 84–85, 93–95 (discussing unsuccessful attempts in the 78th Congress and the 96th Congress, and attempts in the 104th Congress and the 105th Congress; finding “[t]he chances of amending or repealing the Antiquities Act are minimal”). The author describes the eastern delegation in contrast to the western delegation of Congress and notes that the federal lands upon which monuments are most likely to be designated—or are designated—are in eleven western states, thus the eastern delegation’s constituents are less likely to be directly impacted by a national monument designation. *Id.* at 96.

<sup>161</sup> Lin, *supra* note 3, at 715–19; see also Ranchod, *supra* note 35, at 577 (noting attempts to amend the Antiquities Act to limit the President’s power have followed “controversial monument designations by previous presidents, but [have] never become law”).

<sup>162</sup> See Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714(a) (2006) (providing for the Secretary of the Interior to “make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section”); *id.* § 1714(c) (repealing the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress); *id.* § 1714(j) (prohibiting the Secretary of the Interior from modifying or revoking any withdrawal creating national monuments under the Antiquities Act). For information on the President’s implied authority, see *United States v. Midwest Oil Co.*, 236 U.S. 459, 471–72 (1915).

<sup>163</sup> See VINCENT & BALDWIN, *supra* note 96, at 8 (noting, however, that FLPMA did not repeal or amend the Antiquities Act as it did to many other withdrawal statutes).

<sup>164</sup> On a practical and procedural level, the impetus for the President’s use of the Antiquities Act, often the timing of a designation and the steps taken, or not, in preparation for a designation have also come under fire. See VINCENT & BALDWIN, *supra* note 96, at 6 (describing the level and type of threat cited by the President to support a new monument, and noting allegations that the President’s creation of a new monument was to support an environmental

The courts have consistently upheld this exercise of presidential authority as not violating the separation of powers.<sup>166</sup> Courts generally decline to second-guess the President's decisionmaking in reserving lands to protect significant objects and structures due to the discretion granted the President by the statute.<sup>167</sup> Starting with the separation of powers analysis of Justice Robert Jackson's concurrence<sup>168</sup> in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>169</sup> in which Justice Jackson argued that the President's authority "is at its maximum" when he "acts pursuant to an express or implied authorization of Congress" and identified the "zone of twilight in which [the

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cause or for other political reasons); Lin, *supra* note 3, at 720–22, 738–39 (describing the "proceduralist" challenges to President Clinton's monument designations, such as the little advance public notice given prior to the establishment of the Grand Staircase-Escalante National Monument, and noting the "land grab" allegations and a "desire for political gain, rather than sincere concern for threatened resources" as motivation, but arguing that the lack of significant public participation in the designation process does not make the act "undemocratic"); Squillace, *supra* note 68, at 539 (noting the criticism of the Clinton Administration for not consulting with state officials). In particular, the lack of public participation in the designation process has been identified as a potential problem. *See generally* News Release, Nat'l Park Serv., Interior Secretary Makes Plans to Manage National Monuments (Apr. 24, 2002), <http://home.nps.gov/applications/release/print.cfm?id=245> (last visited July 11, 2010) (noting Secretary Gale Norton's concerns over the manner in which the monuments were established by the Clinton Administration in 2000 and 2001, and asserting that the Department of the Interior would move forward to "develop land use plans [for those monuments] in an open, inclusive, and comprehensive way," involving "maximum input" from the public). Questions about the inclusion or status of non-federal land in monument designations have been raised as well. VINCENT & BALDWIN, *supra* note 96, at 6–7. *See generally* *United States v. California*, 436 U.S. 32, 41 (1978) (deciding that the federal government could not include in the Channel Islands National Monument land it had already ceded to the state).

<sup>165</sup> *See* Daly & Middaugh, *supra* note 99, at 221 (describing the Antiquities Act as a "hallmark of Progressive-era legislation"); Harold H. Bruff, *Executive Power and the Public Lands*, 76 U. COLO. L. REV. 503, 509–12 (2005).

<sup>166</sup> *See* Leshy, *supra* note 29, at 296 (describing the Supreme Court as supporting the President's ability to "preserve federal lands from private exploitation"); *see also* *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1135 (D.C. Cir. 2002) (noting generally that there have been a small number of cases challenging national monument proclamations but each time the President's authority has been upheld).

<sup>167</sup> *See Anaconda Copper Co.*, 14 Env't Rep. Cas. (BNA) 1853, 1854 (D. Alaska 1980) (noting the recognition of presidential authority in Supreme Court cases); *see also* *Ranchod*, *supra* note 35, at 549 ("There has never been a successful legal challenge to any use of the Antiquities Act."); *Utah Ass'n of Counties*, 316 F. Supp. 2d 1172, 1179 (D. Utah 2004) ("Every challenge [to the Antiquities Act] to date has been unsuccessful.").

<sup>168</sup> *See* Bruff, *supra* note 165, at 505 ("[A]ll separation of powers analysis should be contextual. Therefore, we should consider the nature of the subject matter involved, the history of interbranch relations that it involves, and the presence or absence of individual rights as we search for answers to real problems."). Professor Bruff asserts that Presidents have operated "freely throughout the zone of twilight, and the courts have proved willing to uphold these executive adventures." *Id.*

<sup>169</sup> 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (hearing a challenge to the President's order that directed the Secretary of Commerce to take possession of and operate steel mills as "lawmaking"). In contrast to the courts' treatment of challenges to national monument proclamations, the Court found in *Youngstown Sheet & Tube Co.* that the President's action was unconstitutional because the "order [did] not direct that a congressional policy be executed in a manner prescribed by Congress—it direct[ed] that a presidential policy be executed in a manner prescribed by the President." *Id.* at 588.

President] and Congress may have concurrent authority, or in which its distribution is uncertain,”<sup>170</sup> Professor Harold H. Bruff notes the statutory language, “in his discretion,”<sup>171</sup> may mean to the United States Supreme Court that Congress intended to make the President’s actions “entirely unreviewable.”<sup>172</sup> Professor Bruff argues that the growing expansive use of the Antiquities Act by numerous Presidents, including President Clinton, given the congressional and judicial acceptance of this use within the “zone of twilight,” is not surprising, recognizing the “generous interpretation” usually given to a statute administered by the President.<sup>173</sup>

Accordingly, the courts have engaged in a very limited review of the President’s exercise of authority in designating national monuments.<sup>174</sup> While the Supreme Court has not been explicit in defining the scope of judicial review available for presidential decisions under the Antiquities Act, in the few cases that have come before it, the Court has upheld the President’s

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<sup>170</sup> *Id.* at 637 (Jackson, J., concurring) (“[c]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” (footnote omitted)). Justice Jackson cautioned that

[c]ourts [that] can sustain exclusive Presidential control . . . [where the President undertakes action incompatible with the direction of Congress will] only be disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

*Id.* at 637–638.

<sup>171</sup> Bruff, *supra* note 165, at 509 (quoting the Antiquities Act of 1906, 16 U.S.C. § 431 (2006)).

<sup>172</sup> *See id.* (noting that the Antiquities Act does however include a restriction regarding the size of the monument to be designated but referring to the holding in *Cameron v. United States*, 252 U.S. 450 (1920), which upheld the designation of the Grand Canyon as a monument, and asking, “[i]f the Canyon could qualify, what could fail?”).

<sup>173</sup> *See id.*, at 510–12 (comparing the continued issuance of executive orders to implement personal presidential policies within a certain context to the use of the Antiquities Act “from its modest textual base to its expansive modern meaning”).

<sup>174</sup> *See Wyoming v. Franke*, 58 F.Supp. 890, 892 (D. Wyo. 1945) (considering a challenge from the state of Wyoming to the proclamation establishing the Jackson Hole National Monument, wherein the state alleged, among other claims, that the monument area was “outside the scope and purpose of the Antiquities Act . . . in that such area contains no objects of an historic or scientific interest required by the Act,” and was “not confined to the smallest area compatible with the proper care and management of a National Monument.” The state argued the proclamation was an attempt to “substitute” a “National Monument for a National Park,” the creation of which rested solely with Congress). The court cited its “limited jurisdiction” to review whether the proclamation is an improper exercise of the President’s authority under the Antiquities Act and required only substantial evidence to show the monument area contains objects of historic or scientific interest. *Id.* at 895–96. According to the court, “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. 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, but 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 branch.” *Id.* at 896.

broad authority.<sup>175</sup> In the first case to come before the Court,<sup>176</sup> it considered a challenge to the President's designation of the Grand Canyon National Monument, easily finding the Act to authorize the President to establish a reserve for "objects of historic or scientific interest" and the Grand Canyon to meet the Act's standard for those types of objects to be protected.<sup>177</sup> In *Cappaert v. United States*,<sup>178</sup> the Court found the designation of Devil's Hole as a component of the Death Valley National Monument reserved federal water rights in unappropriated water to the extent needed to ensure that the purpose of the monument proclamation would be met.<sup>179</sup> While the Cappaerts argued that the President lacked authority to protect a "pool" under the Antiquities Act, with minimal discussion the Court found the President's discretion to identify "objects of historic or scientific interest" to be "not so limited."<sup>180</sup>

Separation of powers concerns also appear in several lower court decisions and justify the continued narrow scope of review for presidential decisionmaking in designations under the Antiquities Act.<sup>181</sup> While the court in *Utah Association of Counties v. Bush* acknowledged that, "[w]hether the President's designation best fulfilled the general congressional intention embodied in the Antiquities Act is not a matter for judicial inquiry,"<sup>182</sup> the

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<sup>175</sup> See *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1135 (D.C. Cir. 2002) (looking to the Court's treatment of judicial review for decisions placed within the President's discretion in other statutes and cautioning against the review of potential abuses of Presidential discretion). In another case to come before the Supreme Court involving an Antiquities Act challenge, *United States v. California*, 436 U.S. 32 (1978), the Court considered the state's ownership rights in submerged waters within the Channel Islands National Monument and whether the property was owned or controlled by the federal government at the time of the proclamation. *Id.* at 32–33. The Court found the monument proclamation did not strengthen the federal government's property interests. *Id.* at 40.

<sup>176</sup> *Cameron*, 252 U.S. at 450.

<sup>177</sup> *Id.* at 455–56. The Court went on to consider the validity and treatment of the Secretary of the Interior's decisions regarding Cameron's lode mining claim on the southern rim of the Grand Canyon. *Id.* at 455–64.

<sup>178</sup> 426 U.S. 128 (1976).

<sup>179</sup> See *id.* at 140–41 (finding the purpose of the monument proclamation to be the preservation of the Devil's Hole pool, which includes a unique type of desert fish and its natural habitat).

<sup>180</sup> *Id.* at 142. The Court also considers the application of the doctrine of implied reservation of water rights to groundwater, questions of implied water rights in accordance with state law, and the issue of res judicata in reference to the water-rights claim in federal court. *Id.* at 142–47.

<sup>181</sup> See, e.g., *Anaconda Copper Co.*, 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980) (considering allegations that certain monument designations in Alaska exceeded the scope of the President's authority as it relates to the objects to be protected). The court found that the proclamations, on their face, did not exceed the authority granted in the Act. *Id.* at 1855. While the court identified limitations on the President's authority, specifically in the definition of objects to be protected, it found the Supreme Court had not yet established the "outer parameters" of "presidential authority" under the Antiquities Act. *Id.* at 1854; see also *Utah Ass'n of Counties*, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004) (referencing the Supreme Court precedent that limits judicial review in these cases "to ascertaining that the President in fact invoked his powers under the Antiquities Act. Beyond such a facial review the Court is not permitted to go").

<sup>182</sup> See *Utah Ass'n of Counties*, 316 F. Supp. 2d at 1185–86 (relying on *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940), to find the judiciary does not have the ability to review the reasoning for those decisions which are placed within the discretionary authority of the President).

court in *Wyoming v. Franke* was more explicit in recognizing the potential problems or injuries that may result from the implementation of the proclamation that could only be remedied by Congress.<sup>183</sup> Nonetheless, referencing the discretion granted to the President in the statute, the court in *Utah Association of Counties* limited its review to determine solely whether the President acted pursuant to the authority granted to him under the statute.<sup>184</sup>

### C. Non-Delegation Doctrine

A potential violation that is discussed more frequently than it is found is the improper delegation of legislative authority from Congress to the executive.<sup>185</sup> The Supreme Court explicitly identified the non-delegation doctrine over a century ago, and has employed the “intelligible principle” requirement for sustaining congressional delegation for decades.<sup>186</sup> Where Congress delegates decision making authority, it “must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’”<sup>187</sup> The intent of this doctrine is to stop the executive branch from legislating; thus the legislative authority of Congress can be delegated only where Congress provides an “intelligible principle” that “guide[s] the agency in ‘fill[ing] up the details.’”<sup>188</sup> Scholars argue, however, that under today’s non-delegation doctrine, “virtually

<sup>183</sup> *Franke*, 58 F.Supp. 890, 896 (D. Wyo. 1945).

<sup>184</sup> See *Utah Ass’n of Counties*, 316 F. Supp. 2d at 1176–77, 1186 (reviewing whether the Antiquities Act is unconstitutional because it violates the delegation doctrine; whether the President, in his designation of the monument, violated the Property Clause and the Spending Clause of the Constitution, the Antiquities Act, the Wilderness Act, and Executive Order No. 10,355; and whether the President or other government defendants violated other statutes such as the National Environmental Policy Act and FLPMA); see also *Utah Ass’n of Counties v. Bush*, 455 F.3d 1094, 1097–98 (10th Cir. 2006) (dismissing Mountain States Legal Foundation’s appeal for lack of standing; the court did not address the merits of Mountain States’ claim that the designation violated the Antiquities Act and the Wilderness Act). In an interesting footnote, the court declined to consider the assertion made by Mountain States in oral argument that it “was relying on an implied right of action under the Antiquities Act” but noted the Supreme Court’s “strict standard” in finding such an implied right. *Id.* at 1098 n.4.

<sup>185</sup> See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 472 (2001) (finding the text of the Constitution “permits no delegation of those powers”); see also *Mistretta*, 488 U.S. 361, 373 (1989) (noting that the Court invalidated two statutes in 1935 as violating the non-delegation doctrine but otherwise has upheld, “without deviation, Congress’ ability to delegate power under broad standards”).

<sup>186</sup> See generally *Field v. Clark*, 143 U.S. 649, 692 (1892) (“[c]ongress cannot delegate legislative power to the president [as] a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *Chadha*, 462 U.S. 919, 986 (1983) (White, J., dissenting) (finding that Congress can delegate to the executive some lawmaking abilities that do not require the passage of new legislation).

<sup>187</sup> See *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409).

<sup>188</sup> See Garry, *supra* note 145, at 702 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).



anything counts as an ‘intelligible principle.’”<sup>189</sup> Professor Garry explains, “[t]he Court’s hesitancy to overrule congressional delegations, no matter how broad, results from the conclusion that a robust Non-Delegation Doctrine would make effective governance impossible in a vast, complex, and ever-changing society.”<sup>190</sup> The Court has recognized that the non-delegation doctrine does “not prevent Congress from obtaining the assistance of its coordinate Branches”<sup>191</sup> and that where Congress sets forth the “general policy, the public agency which is to apply it, and the boundaries of this delegated authority,” such delegation shall not violate the separation of powers.<sup>192</sup>

The grant of authority to the President under the Antiquities Act has withstood specific allegations that it is in violation of the non-delegation doctrine through the existence of the necessary “intelligible principle.”<sup>193</sup> In keeping with the trend noted above regarding the Court’s hesitancy to find a statutory delegation in violation of the non-delegation principle, the United States District Court for the District of Columbia in *Tulare County v. Bush*,<sup>194</sup> stated that “the Antiquities Act establishes clear standards and limitations” by describing the types of objects that can be included in monuments and

<sup>189</sup> *Id.*; see Levinson & Pildes, *supra* note 142, at 2358 (terming it the “famously underenforced nondelegation doctrine” and noting that “the Court has invalidated only two Congressional acts on nondelegation grounds, both during the New Deal” but finding the doctrine to exist in “nondelegation canons’ of statutory construction”).

<sup>190</sup> Garry, *supra* note 145, at 702. Professor Garry also finds, over the past few decades, that Congress has delegated more policy-making authority to administrative agencies, and thus to the judiciary due to its ability to review agency actions and decisions. *Id.* at 692, 709–10.

<sup>191</sup> See *Mistretta*, 488 U.S. 361, 372 (1988) (quoting *J.W. Hampton, Jr., & Co.*, 276 U.S. at 406) (“[T]he extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination.”).

<sup>192</sup> *Id.* at 373 (quoting *Am. Power & Light Co. v. Sec. & Exch. Comm’n*, 329 U.S. 90, 105 (1946)).

<sup>193</sup> See *Whitman*, 531 U.S. 457, 474–75 (2001) (providing a rather broad interpretation of the boundaries of the intelligible principle). Further, the Court found the amount of discretion constitutionally allowed may vary “according to the scope of the power congressionally conferred”, but the Court does not require Congress to say “how much . . . is too much” discretion. *Id.* at 475. It is interesting to note Justice Thomas’s concurrence, which questions whether the “intelligible principle” is the only constitutional limit on congressional delegations to executive branch agencies. *Id.* at 487 (Thomas, J., concurring). See generally *Loving v. United States*, 517 U.S. 748, 758 (1996) (“[T]he delegation doctrine . . . has developed to prevent Congress from forsaking its duties.”); *Yakus v. United States*, 321 U.S. 414, 425–26 (1944) (“Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.”).

<sup>194</sup> 185 F. Supp. 2d 18, 26 (D.D.C. 2001). Concerned with the Giant Sequoia National Monument, the plaintiff in *Tulare County* argued that the objects to be protected were not described with reasonable specificity, the objects included did not qualify for protection, the size of the monument was not the smallest area compatible, the proclamation increases the potential harm to any objects of historic or scientific interest, the proclamation violates the Property Clause of the Constitution, the proclamation violates the National Forest Management Act (NFMA) by withdrawing land from the National Forest System, the current management of the monument by the Forest Service violates the NFMA, and the National Environmental Policy Act, and the proclamation violates valid existing rights. *Id.* at 22. In considering its scope of review, the court noted that the “Antiquities Act sets forth no means for reviewing a President’s proclamation other than specifying that a President has discretion in his or her use of the Act.” *Id.* at 24.

the manner by which the President is to determine the size of a monument.<sup>195</sup> The court was cautious in its review of the President's authority.<sup>196</sup> Finding the substantive requirements in the language of the statute, that the designation identify "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" and that the designation be limited to the "smallest area compatible with proper care and management of the objects to be protected,"<sup>197</sup> judicial review is usually limited to the face of a national monument proclamation to consider simply whether the President exercised his discretion consistent with these standards.<sup>198</sup> That the President may abuse the discretion provided to him has been left open for question and, theoretically, judicial review.<sup>199</sup> However, to overcome the court's general reticence to delve into a facial inquiry of the national monument proclamation, a plaintiff would need to meet a rather stringent factual pleading requirement.<sup>200</sup> While arguments may arise that a President is pushing the outer limits of his designation authority,<sup>201</sup> the courts' treatment of the

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<sup>195</sup> See *id.* at 26 (stating that "when delegating authority, Congress must provide standards to guide the authorized action such that one reviewing the action could recognize whether the will of Congress has been obeyed" and finding further the Giant Sequoia National Monument Proclamation to include "meaningful limitations" in accordance with the Antiquities Act). On appeal, the court relied on *Mountain States* to again address its scope of review and affirmed the order of the district court. *Tulare County*, 306 F.3d 1138, 1141 (D.C. Cir. 2002) (citing *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002)). It found the complaint did not include sufficient factual allegations to support an *ultra vires* claim that would show the district court erred by not engaging in a factual inquiry to assess the President's compliance with statutory requirements. *Id.*

<sup>196</sup> See *Tulare County*, 306 F.3d at 1142–43. The appellate court was cautious to ascertain that the appropriate pleading requirements had been met to support a challenge to the President's authority under a statute granting him broad discretion. *Id.* at 1141.

<sup>197</sup> Antiquities Act of 1906, 16 U.S.C. § 431 (2006).

<sup>198</sup> See *Mountain States Legal Found.*, 306 F.3d at 1136 (finding no separation of powers issue in this limited judicial review because the statute has placed discernible limits on the President's discretion). The court declined to engage in an analysis of the President's actions in this case because Mountain States Legal Foundation failed to allege sufficient facts to support its *ultra vires* claim. *Id.*; see *Utah Ass'n of Counties*, 316 F. Supp. 2d 1172, 1183 (C.D. Utah 2004) (finding President Clinton met both of these requirements in his designation of the monument and stating "[t]hat is essentially the end of the legal analysis"); see, e.g., *Cameron*, 252 U.S. 450, 455 (1920); *Anaconda Copper Co.*, 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980).

<sup>199</sup> See *Tulare County*, 185 F. Supp. 2d at 25 (finding that the court can evaluate whether the President abused the discretion granted to him under the Antiquities Act but not his "determinations and factual findings"). The court continues that such a review of Presidential determinations and findings "would invade the legislative and executive domains because Congress has directed that the President, 'in his discretion,' make these findings." *Id.*

<sup>200</sup> See *Mountain States Legal Found.*, 306 F.3d at 1134, 1137 (considering Mountain States Legal Foundation's allegation that fact finding was required to determine whether the President complied with the standards of the Act in designating a number of national monuments and finding no "infirmity" in the proclamations to warrant such a review). The court concluded that without the required factual allegations, "Mountain States presents the court with no occasion to decide the ultimate question of the availability or scope of review for exceeding statutory authority." *Id.* at 1137.

<sup>201</sup> See VINCENT & BALDWIN, *supra* note 96, at 4–6 (discussing arguments that push to restrict monument size with reference to the legislative history of the Act and arguments in support of a broader interpretation of the President's discretion, and discussing similarly the objects that are

President's actions in establishing national monuments will most likely remain extremely limited and deferential.<sup>202</sup>

#### IV. PRESIDENTIAL VERSUS AGENCY ACTION

In *Western Watersheds Project*, BLM asserted that its actions—its lack of compliance with the Sonoran Desert National Monument proclamation—constituted presidential action and not agency action.<sup>203</sup> While an assessment of what constitutes presidential action and what constitutes agency action may appear at first glance to be an assessment of the balance of powers within the executive branch, it raises slightly different separation of powers questions. This particular balancing of power between the President and the executive agencies directly impacts the reach of the judiciary and the limits of the courts' review.

##### *A. Balancing Power Within the Executive Branch*

In addition to the separation of powers among the executive, legislative, and judicial branches, there have also been conflicts in the balance of powers within the executive branch.<sup>204</sup> Professors Daryl J. Levinson and Richard H. Pildes reference the work of Dean Elena Kagan, in describing the attempt of the Clinton Administration to achieve “greater presidential policy control over the regulatory activity of executive branch agencies,” due in part to a politically divided government.<sup>205</sup> President Clinton sought policy change through unilateral administrative action rather than legislative action.<sup>206</sup> For instance, President Clinton sought greater control over independent agencies through Executive Order 12,866, Regulatory Planning

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protected in monument designations in light of the original intent of the Act and an argument for more restrictive use of the Act's protection). The authors note the general judicial deference that has been given to presidential determinations regarding the size of a monument and what objects should be protected, but conclude that a future legal challenge may have an uncertain outcome. *Id.* at 5–6.

<sup>202</sup> See Iraola, *supra* note 3, at 184–86 (noting the conclusions that may be reached in looking to the judicial review available for the President's designation of national monuments: 1) judicial review will be limited to the question of whether the President has facially exercised his discretion in accordance with the Act's standards, and 2) in considering a challenge to a monument designation, the courts focus on the two substantive requirements of the statute: what qualifies as historic objects, finding it is clear that President's discretion not limited to solely archaeological sites, and the smallest area compatible with the purpose of protecting the identified objects or sites, finding the courts generally give the President's factual determinations “substantial judicial deference”); see also David J. Seidman, *Tulare County v. George Bush: Courts Place High Burden on Parties who Challenge the Scope of Presidential Authority*, 11 U. BALT. J. ENVTL. L. 245, 246 (2004) (referring to this analysis by the court as an “early indicator of the Court's hesitancy in accepting any matters questioning Presidential authority”).

<sup>203</sup> *W. Watersheds Project*, 629 F. Supp. 2d 951, 963 n.4 (D. Ariz. 2009).

<sup>204</sup> See Levinson & Pildes, *supra* note 142, at 2363.

<sup>205</sup> See *id.* (noting President Clinton, a Democrat, was facing a Republican Congress).

<sup>206</sup> *Id.*

and Review.<sup>207</sup> As Dean Kagan notes, while President Clinton's approach to agency oversight was seen as less "aggressive" than the approach taken by either Presidents Ronald Reagan or George H. Bush,<sup>208</sup> this executive order "intended to improve the internal management of the Federal Government"<sup>209</sup> and establish a "program to reform and make more efficient the regulatory process . . . to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory review and oversight; and to make the process more accessible and open to the public."<sup>210</sup> In this action, the President established certain limits on agency discretion and directed the exercise of agency expertise.<sup>211</sup>

Dean Kagan identifies the "conventional view . . . [, which] posits, although no court has ever decided this matter, that by virtue of this power [to structure the relationship between the President and the administration], Congress can insulate discretionary decisions of even removable (that is, executive branch) officials from presidential dictation—and, indeed, that Congress has done so whenever (as is usual) it has delegated power not to the President, but to a specified agency official."<sup>212</sup> But she finds that where Congress has delegated discretionary authority through statute to an executive branch official, "without in any way commenting on the President's role in the delegation," two questions arise: whether the statute intends the delegation to rest solely with the agency official, or alternatively, whether the delegation runs to the agency official but is subject to presidential control.<sup>213</sup> The reach of the President into agency policymaking thereby illuminates an internal separation of powers issue.

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<sup>207</sup> Exec. Order No. 12,866, 3 C.F.R. 638 Comp. 100–102 (1994).

<sup>208</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247, 2285–86 (2001) (comparing Executive Order No. 12,866 with Executive Order No. 12,291 and Executive Order No. 12,498, and finding that Clinton's executive order retained "the most important features of President Reagan's oversight system" by requiring, for instance, all major regulations of the executive branch agencies to be reviewed by the Office of Management and Budget, which was located within the Executive Office of the President, and the use of a cost-benefit analysis to assess regulatory decisions).

<sup>209</sup> Executive Order No. 12,866, 3 C.F.R. 638 Comp. 100–102 (1994). This executive order explicitly states, however, that it "does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." *Id.*

<sup>210</sup> *Id.* at 638; see Kagan, *supra* note 208, at 2248 (finding the implementation of this executive order by the Office of Management and Budget under the Clinton Administration to be "generally sympathetic to regulatory efforts").

<sup>211</sup> See Kagan, *supra* note 208, at 2249 ("Where once presidential supervision had worked to dilute or delay regulatory initiatives, it served in the Clinton years as part of a distinctly activist and pro-regulatory governing agenda.").

<sup>212</sup> *Id.* at 2250.

<sup>213</sup> See *id.* at 2251, 2326 (accepting "Congress's broad power to insulate administrative activity from the President, but argu[ing] here that Congress has left more power in presidential hands than generally recognized" and finding further that "a statutory delegation to an executive agency official—although not to an independent agency head—usually should be read as allowing the President to assert directive authority, as Clinton did, over the exercise of the delegated discretion.").

*B. The Umbrella of Presidential Action*

A different situation arises where, as in the Antiquities Act, Congress delegates power directly to the President, who then uses that authority to subsequently direct agency action.<sup>214</sup> For the purposes of judicial review, the question then becomes whether the subsequent agency action constitutes an extension of the presidential exercise of discretion and should thus be granted deference by the court. In *Tulare County*, the District Court for the District of Columbia considered allegations that the Forest Service was managing the Giant Sequoia National Monument in violation of the National Forest Management Act, its forest planning regulations, and the National Environmental Policy Act (NEPA),<sup>215</sup> and stated that presidential actions are not subject to judicial review under the APA because the President is not an agency under its terms.<sup>216</sup> Furthermore, the district court found that “because the Forest Service is merely carrying out [the] directives of the President, and the APA does not apply to presidential action,” judicial review is unavailable for the Forest Service’s management of the monument.<sup>217</sup> The court went on to find, “[a]ny argument suggesting that this action is agency action would suggest the absurd notion that all presidential actions must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action.”<sup>218</sup>

On appeal, the D.C. Circuit Court also emphasized that presidential actions are not subject to review but took its analysis in a different direction than the district court.<sup>219</sup> The appellate court identified the plaintiff’s challenge to the “non-presidential actions of the Forest Service,” an internal memorandum and an interim plan, “allegedly showing that the Service is not acting consistently with the Proclamation.”<sup>220</sup> The district court did not make the distinction between those actions that might be considered presidential

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<sup>214</sup> See *id.* at 2350–51 (distinguishing the situation in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), where the challenged action was that which Congress had delegated solely to the discretion of the President, independent of subsequent agency involvement). Dean Kagan asserts that, “[w]hen the challenge is to an action delegated to an agency head but directed by the President, a different situation obtains: then, the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency’s action should govern.” *Id.* at 2351.

<sup>215</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006).

<sup>216</sup> *Tulare County*, 185 F. Supp. 18, 27–28 (D.D.C. 2001). The plaintiffs in this case did not allege the Forest Service’s management of the monument was in violation of the monument proclamation. *Id.* at 28.

<sup>217</sup> *Id.* at 28.

<sup>218</sup> See *id.* at 28–29 (stating such an interpretation of “presidential action” would be “confusing and illogical”). The court went on to find that even if it were agency action, it did not constitute final agency action as required for review by the APA because the current management scheme was temporary pending the development of a management plan. *Id.* at 29.

<sup>219</sup> *Tulare County*, 306 F.3d 1138, 1143 (D.C. Cir. 2002).

<sup>220</sup> *Id.* at 1143. It is interesting to note that the district court, in referring to the plaintiffs’ challenge to the Forest Service’s management of the monument and the reliance on the memorandum and “background document” directing the current management, stated, “[t]he plaintiffs do not allege that any of the management changes that have been instituted are not mandated by the Proclamation.” *Tulare County*, 185 F. Supp. 2d at 28.

versus those that might be nonpresidential.<sup>221</sup> The district court referred to the current management scheme as “occurring pursuant to the Clinton Proclamation” and directed by a “memorandum from the Forest Supervisor and a ‘background document,’”<sup>222</sup> and found the Forest Service’s actions to be presidential and thus not subject to review under the APA. The appellate court named “an internal Forest Service memorandum interpreting the Proclamation and an interim plan that directs the day-to-day management of the Monument,”<sup>223</sup> and seemed to allow for those actions to be considered nonpresidential and thus subject to review.<sup>224</sup> The appellate court considered the complaint’s factual specificity and ultimately, with little further discussion, concluded that the complaint did not include the “sufficient specificity” as to the foresters’ actions to state a claim upon which relief could be granted.<sup>225</sup> Therefore, had sufficient facts been presented, the appellate court arguably would have reviewed the plaintiffs’ claims under the APA as it did not state the claim was dismissed for a lack of subject matter jurisdiction. The contrast between the reasoning of the district court and the appellate court is interesting to illuminate the consideration given to the limits of presidential action, but, because the appellate court in *Tulare County* decided the appeal on other grounds, the district court’s rationale is generally given “negligible authority.”<sup>226</sup>

### C. Final Agency Action

The Supreme Court provided guidance in *Franklin v. Massachusetts*<sup>227</sup> and *Dalton v. Specter*<sup>228</sup> on the limits of judicial review under the APA for presidential and agency action.<sup>229</sup> In *Franklin*,<sup>230</sup> the Court delineated the test

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<sup>221</sup> *Tulare County*, 185 F. Supp. 2d at 28–29.

<sup>222</sup> *Id.* at 28.

<sup>223</sup> *Tulare County*, 306 F.3d at 1143.

<sup>224</sup> See Brief of Natural Resource Law Professors and Practitioners as Amici Curiae in Support of Motion for Reconsideration, *supra* note 27, at 16 (No. CV 08-1472-PHX-MHM) (arguing that “the court cast significant doubt on the district court’s rationale” by assessing the challenge to the non-Presidential actions of the Forest Service).

<sup>225</sup> *Tulare County*, 306 F.3d at 1143.

<sup>226</sup> See *W. Watersheds Project*, 629 F. Supp. 2d 951, 961 (D. Ariz. 2009) (relying on *Zurich Ins. Co. v. Amcor Sunclipse N. Am.*, 241 F.3d 605, 608 (7th Cir. 2001)); see also Brief of Natural Resource Law Professors and Practitioners as Amicus Curiae in Support of Motion for Reconsideration, *supra* note 27, at 16 (No. CV 08-1472-PHX-MHM) (arguing the D.C. Circuit’s decision “cast significant doubt on the district court’s rationale”).

<sup>227</sup> 505 U.S. 788 (1992).

<sup>228</sup> 511 U.S. 462 (1994).

<sup>229</sup> See generally *Tulare County*, 185 F. Supp. 2d at 28 (explaining how a court can only review final agency actions under the APA); *W. Watersheds Project*, 629 F. Supp. 2d at 960; Brief of Natural Resource Law Professors and Practitioners as Amicus Curiae in Support of Motion for Reconsideration, *supra* note 27, at 14 (No. CV 08-1472-PHX-MHM); Motion for Reconsideration at 9, *W. Watersheds Project v. Bureau of Land Mgmt.*, 629 F. Supp. 2d 951; Defendant’s Response to Plaintiff’s Motion for Reconsideration, *supra* note 11, at 4 (No. CV 08-1472-PHX-MHM).

<sup>230</sup> *Franklin*, 505 U.S. at 797–98 (finding, in the context of determining the apportionment of congressional representatives, that the President could modify the report based upon information from the “decennial census” and did not have to use the data in the Secretary of

for “final agency action:” “whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties.”<sup>231</sup> Further, the Court refused to find the President constituted an “agency” from the otherwise silent statutory language of the APA without congressional action.<sup>232</sup> The Court determined it may review the constitutionality of the President’s actions, but not a potential abuse of discretion under the APA.<sup>233</sup> The district court in *Utah Association of Counties* described the reasoning of Justice Scalia’s concurrence in *Franklin*<sup>234</sup> as the “most restrictive approach possible to the question of . . . judicial review” to support the idea that “presidential action can be reviewed by seeking an injunction against those bound to enforce a President’s directive, but the possibility of direct judicial review of the President’s decision . . . is eliminated altogether as inconsistent with ‘the constitutional tradition of the separation of powers.’”<sup>235</sup>

The Court in *Dalton*<sup>236</sup> also found a lack of final agency action because the reports submitted by the Secretary and the Commission “carry no direct consequences”<sup>237</sup> for base closings, and that the President ultimately “takes the final action that affects’ the military installations.”<sup>238</sup> The Court stated that, “[w]e may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA . . . But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.”<sup>239</sup> As noted by the amici, Natural Resource Law Professors and Practitioners, in *Western Watersheds Project*, the Court

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Commerce’s report to show Congress the number of persons in each state; thus the action only occurs after the President submits the report to Congress).

<sup>231</sup> *Id.* at 797, 799 (“Because it is the President’s personal transmittal of the report to Congress that settles the apportionment, until he acts there is no determinate agency action to challenge. The President, not the Secretary, takes the final action that affects the States.”). Justice Stevens’s concurrence, joined by Justices Blackmun, Kennedy, and Souter, finds the census report prepared by the Secretary to constitute “final agency action.” *Id.* at 807 (Stevens, J., concurring). Looking to the legislative history of the Census Act and its statutory language, the concurring Justices did not see the “layer of Executive discretion between the taking of the census and the application of the reapportionment formula.” *Id.* at 810.

<sup>232</sup> *Id.* at 800–01 (relying on the separation of powers principle).

<sup>233</sup> *Id.* at 801.

<sup>234</sup> *Utah Ass’n of Counties*, 316 F. Supp. 2d 1172, 1185 n.7 (D. Utah 2004) (quoting Justice Scalia: “I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court.” *Franklin*, 505 U.S. at 827.).

<sup>235</sup> *Id.* (quoting *Franklin*, 505 U.S. at 828).

<sup>236</sup> 511 U.S. 462, 469 (1994) (considering a claim brought under the APA which alleged the Secretary of the Navy and the Defense Base Closure and Realignment Commission violated procedural requirements of the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808, in recommending closure of the naval shipyard).

<sup>237</sup> *Id.* (quoting *Franklin*, 505 U.S. at 798).

<sup>238</sup> *Id.* at 470 (finding the Act’s direction to the President to either approve or reject the Commission’s report in its entirety “immaterial” as the President still has the ability to exercise his discretion).

<sup>239</sup> *Id.* at 474 (stating that where a President goes beyond his statutory discretion, Congress should fix, not the courts).

in *Franklin* and *Dalton* heard challenges to preliminary agency actions coming before a final presidential action; thus, the Court found that because the President, not the agency, made the final decision from which actions or consequences result, the actions at issue were not “final agency actions” under the APA.<sup>240</sup> Thus, where the actions creating rights or results are committed to agency discretion and the President’s decision alone would not create those rights or results, a different result may be reached.<sup>241</sup>

In defining a direct causal relationship between presidential action and specific outcomes, the analysis to identify a “final agency action” pursuant to the APA provides a basis to distinguish between agency action and presidential action.<sup>242</sup> Logically, if an action is a presidential action, it cannot constitute a final agency action; likewise, an action that meets the definition of a “final agency action” is not a presidential action. The D.C. Circuit in *Public Citizen v. United States Trade Representative*<sup>243</sup> limited the holding of *Franklin* “to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties.”<sup>244</sup> The circuit court noted that “[w]hen the President’s role is not essential to the integrity of the process, however, APA review of otherwise final agency actions may well be available.”<sup>245</sup> The court in *Utah Association of Counties* considered whether the actions of federal agencies and officials in making recommendations to the President during the events leading up to a monument designation constituted final agency action to allow for review under the APA.<sup>246</sup> Because the Antiquities Act does not allow the federal agency to act alone in the designation process and the

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<sup>240</sup> Brief of Natural Resource Law Professors and Practitioners as Amici Curiae in Support of Motion for Reconsideration, *supra* note 27, at 14–15 (No. CV 08-1472-PHX-MHM) (arguing BLM’s reliance on these cases does not support its assertion that its actions constitute presidential actions, versus agency actions). The amici also note that lower courts have also held judicial review is available for “agency actions taken pursuant to a presidential order under the APA.” *Id.* at 15 (citing *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996); *Nation v. Dalton*, 107 F. Supp. 2d 37 (D.D.C. 2000); *California ex rel. Lockyer v. U.S. Forest Serv.*, 465 F. Supp. 2d 942 (N.D. Cal. 2006); and *Milena Ship Mgmt. Co. v. Newcomb*, 804 F. Supp. 846 (E.D. La. 1992)).

<sup>241</sup> See Brief of Natural Resource Law Professors and Practitioners as Amici Curiae in Support of Motion for Reconsideration, *supra* note 27, at 14 (No. CV 08-1472-PHX-MHM) (“The only ‘presidential actions’ immune from APA review . . . are decisions made by the President himself.”).

<sup>242</sup> See *Utah Ass’n of Counties*, 316 F. Supp. 2d 1172, 1189 (D. Utah 2004).

<sup>243</sup> 5 F.3d 549 (D.C. Cir. 1993). The court heard a suit against the Office of the United States Trade Representative, alleging that an Environmental Impact Statement, in accordance with the National Environmental Policy Act, was required for the North American Free Trade Agreement (NAFTA). *Id.* at 550. The court found the preparation of NAFTA not to constitute a final agency action under the APA, and thus is not reviewable by court. *Id.*

<sup>244</sup> *Id.* at 552.

<sup>245</sup> See *id.* (finding the President’s role in initiating trade negotiations and submitting trade agreements and implementing legislation to Congress to constitute his involvement as “essential to the integrity of international trade negotiations”).

<sup>246</sup> See *Utah Ass’n of Counties*, 316 F. Supp. 2d at 1188–89 (“In order for an agency’s action to have that degree of finality that is amenable to judicial review under the APA, it must have some immediate effect beyond that of a recommendation: the action is final agency action only when the agency’s action itself ‘has a direct effect on the day-to-day business’ of the persons or entities affected by the action.” (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967))).



President is required to act before the monument is legally created, there was no final agency action.<sup>247</sup> Rather, the court found the agencies “assist[ed] the President in the execution of his discretion.”<sup>248</sup> In reaching this conclusion, the court distinguished the actions of the federal agencies from that of the President.<sup>249</sup>

#### *D. Defining the Limits of Presidential Action*

In *Western Watersheds Project*, BLM argued its actions constituted presidential action to challenge the court’s ability to review WWP’s claim.<sup>250</sup> While BLM did not complete the management plan or issue the determination as to whether grazing on the monument north of Highway 8 was compatible with the proclamation’s protective purpose, and renewed grazing permits for at least five allotments on the monument’s northern section, it argued that judicial review was not available for the actions directed by the President in the proclamation under the APA.<sup>251</sup> Not surprisingly, the court quickly recognized that the APA does not apply to presidential action.<sup>252</sup> BLM emphasized that it did not challenge the President’s authority to issue management directives in a monument proclamation.<sup>253</sup> Rather, as was argued at the district court in *Tulare County*, BLM applied the umbrella of “presidential action,” whereby the action is committed to Presidential discretion by law, to the development of the

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<sup>247</sup> See *id.* at 1189.

<sup>248</sup> See *id.* at 1184, 1187 (considering agency actions in the context of claims that the Department of Interior, not the President, provided the “impetus” for the monument and that the process leading up to the designation was procedurally flawed).

<sup>249</sup> See *id.* at 1187–90.

<sup>250</sup> See *W. Watersheds Project*, No. CV-08-1472-PHX-MHM, at 4 (considering BLM’s Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)); Defendant’s Response to Plaintiff’s Motion for Reconsideration, *supra* note 11, at 3–5 (No. CV 08-1472-PHX-MHM) (contrasting presidential action with “final agency action,” for which review could be available under section 706 of the APA). This argument does not challenge the President’s use of the discretion granted to him by Congress to proscribe the development of a grazing compatibility determination and a management plan.

<sup>251</sup> See Defendant’s Response to Plaintiff’s Motion for Reconsideration, *supra* note 11, at 2 (No. CV 08-1472-PHX-MHM) (describing the grounds for BLM’s Motion to Dismiss). BLM also argued that section 325 of the Department of the Interior and Related Agencies Appropriations Act of 2004, Pub. L. No. 108-108 § 325, 117 Stat. 1241, effectively barred review of WWP’s claims relating to the grazing compatibility determination and the renewal of the grazing permits. *Id.* This article will not discuss the court’s analysis or opinion regarding Section 325.

<sup>252</sup> See *W. Watersheds Project*, 629 F. Supp. 2d. 951, 960 (citing *Dalton v. Specter*, 511 U.S. 462, 469 (1994)) (stating the President does not constitute an “agency” under the APA); see also *Alaska v. Carter*, 462 F. Supp. 1155, 1160 (D. Alaska 1978) (“[T]he doctrine of separation of powers prevents this court from lightly inferring a congressional intent to impose such a duty on the President. For these reasons the court holds that the President is not subject to the impact statement requirement of NEPA when exercising his power to proclaim national monuments under the Antiquities Act.”). The Arizona District Court references *Alaska v. Carter* in its discussion of the limited judicial review for presidential decisions. *W. Watersheds Project*, 629 F. Supp. 2d. at 959.

<sup>253</sup> Defendant’s Response to Plaintiff’s Motion for Reconsideration, *supra* note 11, at 3.

compatibility determination and management plan.<sup>254</sup> BLM asserted, “[t]he actions contemplated by the directives, which inform the scope of the President’s reservation under the Antiquities Act, represent a management decision made by the President, not by an agency.”<sup>255</sup> Thus, the executive branch and not the judicial branch, according to BLM, is the appropriate enforcement arm for the directives in a monument proclamation.<sup>256</sup>

In arguing its actions constitute presidential action, BLM did not focus on the difference between agency action taken in furtherance of the President’s order and those situations in which the agency does not comply with the President’s order.<sup>257</sup> BLM relied on *Zhang v. Slattery*,<sup>258</sup> in which the court refused to enforce an executive order where, “[f]or whatever reasons, the Attorney General did not adhere to this order and the Bush Administration did not follow up on it. However, it is not the role of the federal courts to administer the executive branch.”<sup>259</sup> At issue in *Zhang* was the lack of a specific statutory foundation to allow for judicial review; a principle that will be discussed further below.<sup>260</sup> According to BLM, executive enforcement for such presidential orders is proper to avoid judicial encroachment in the jurisdiction of the executive.<sup>261</sup>

WWP challenged BLM’s failure to act in accordance with the proclamation’s directives.<sup>262</sup> Following a “final agency action” analysis, WWP might have argued that BLM required no presidential action to implement its management plan or compatibility determination, i.e., once the Secretary approves the management plan, the agency is able to implement the plan, directly causing effects to the parties, without further direction or action by the President.<sup>263</sup> Thereby, WWP might have distinguished between

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<sup>254</sup> *Tulare County*, 185 F. Supp. 2d 18, 28–29; see Defendant’s Response to Plaintiff’s Motion for Reconsideration, *supra* note 11, at 5 (No. CV 08-1472-PHX-MHM) (relying on *Jensen v. Nat’l Marine Fisheries Serv.*, 512 F.2d 1189 (9th Cir. 1975); *United States v. Decker*, 600 F.2d 733 (9th Cir. 1979); and *Mountain States Legal Found. v. Bush*, 306 F.3d 1132; and arguing that “[a]ctions taken pursuant to authority committed to Presidential discretion by law [are not] . . . subjected to judicial oversight under the APA merely because the President chooses to act through subordinates”). BLM argued that “the principle that agency actions taken pursuant to discretion committed to the President by law are the legal equivalent of Presidential actions is deeply rooted.” *Id.* at 5 n.2.

<sup>255</sup> Defendant’s Response to Plaintiff’s Motion for Reconsideration, *supra* note 11, at 5 (No. CV 08-1472-PHX-MHM).

<sup>256</sup> See *id.* ([The] “President, not the courts, retains the ultimate authority over the directives.”).

<sup>257</sup> See *id.* (relying on *Zhang v. Slattery*, 55 F.3d 732, 748 (2d Cir. 1995), as sole support for the instance in which the agency has not completed the directed action and the executive branch chose not to follow up on it).

<sup>258</sup> 55 F.3d 732.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 747–748; see *infra* Part V.A.

<sup>261</sup> See Defendant’s Response to Plaintiff’s Motion for Reconsideration, *supra* note 11, at 7–8 (No. CV 08-1472-PHX-MHM) (arguing the directives are not invalid where not based upon a specific statutory foundation, but rather that those directives should be enforced by the executive branch and not the courts).

<sup>262</sup> *W. Watersheds Project*, 629 F. Supp. 2d 951, 955 (D. Ariz. 2009).

<sup>263</sup> See *Utah Ass’n of Counties*, 316 F. Supp. 2d 1172, 1189 (2004) (“When the statute does not permit the agency to act alone, but rather requires presidential action before there is any direct

presidential and agency action, and shown, by tracing the relationship between actions and effect, that BLM's actions constitute agency action.

Further, considering BLM's assertion that its actions constituted presidential action, the act committed to presidential discretion in the Sonoran Desert National Monument proclamation was the *inclusion* of management directives;<sup>264</sup> once the directives were put into the proclamation their implementation was no longer discretionary.<sup>265</sup> It is possible to distinguish the limits of the President's exercise of discretion from the agency's exercise of discretion. Both *Franklin* and *Dalton* made clear the distinctions between the President's action and the agencies' actions.<sup>266</sup> BLM could exercise its discretion in developing the compatibility determination and management plan, and the court could not specify the contents or outcome of those processes.<sup>267</sup> Yet BLM's lack of compliance with the President's order seems, by definition, to constitute an agency decision rather than a presidential action, as the decision is in direct conflict with the President's intent.

#### V. PRESIDENTIAL PROCLAMATIONS AND JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

In issuing an executive order, the President is exercising certain legislative authority.<sup>268</sup> Many scholars argue that executive orders and presidential proclamations are functionally the same.<sup>269</sup> The ability of the

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effect on the parties, 'there is no determinate agency action to challenge' until the President acts."). In cases where "presidential action is required before there will be any effect," there can be no judicial review under the APA. *Id.* (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992)); see, e.g., BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, APPROVED MANAGEMENT PLAN, RECORD OF DECISION xi (1999).

<sup>264</sup> See Motion for Reconsideration, *supra* note 228, at 9 (No. CV 08-1472-PHX-MHM) (arguing that the President used his discretion to impose management directives in the proclamation, any abuse of which should be addressed by Congress and not the courts).

<sup>265</sup> See Bruff, *supra* note 165, at 515 (noting that courts do not review actions committed to agency discretion, such as "an agency's refusal to initiate an enforcement action or its allocation of appropriations").

<sup>266</sup> See *Dalton v. Specter*, 511 U.S. 462, 464-65, 470 (1994) (describing the responsibilities of the Secretary of Defense, the Defense Base Closure and Realignment Commission, and the President); *Franklin*, 505 U.S. at 792-93, 796-97 (describing the responsibilities of the Secretary of Commerce and the Census Bureau, and those of the President).

<sup>267</sup> See *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004) ("[W]hen an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be.>").

<sup>268</sup> Ostrow, *supra* note 24, at 663; see also *Youngstown Sheet & Tube Co.*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.>").

<sup>269</sup> See *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 234 (8th Cir. 1975) (using the terms "Presidential proclamation and order" in the context of describing Executive Order No. 11,821). But see *Ranchod*, *supra* note 35, at 541 (stating that while presidential proclamations and executive orders both constitute "executive legislation," there are differences between them because executive orders direct executive agencies to take some action, whereas proclamations "address the public in general, and are used primarily when required by statute, in the field of

President to revoke an executive order may differ, however, from the ability of the President to revoke a national monument proclamation.<sup>270</sup> The District Court of Arizona accepted WWP's comparison of monument proclamations and executive orders, finding that "to the extent that a presidential proclamation is issued pursuant to the Antiquities Act, the proclamation must be given 'the force and effect of a statute.'"<sup>271</sup> Thus, to have the force and effect of law, the proclamation must have statutory authorization.<sup>272</sup> Where such authorization exists, the courts generally consider the proclamation or executive order to be the equivalent of federal statute<sup>273</sup> and assess subsequent agency action in compliance with the terms of the proclamation or executive order as it would assess agency action in compliance with a federal statute.<sup>274</sup> Despite this "fundamental similarity," some scholars argue that "courts rarely subject agency action taken pursuant to an executive order to APA review."<sup>275</sup>

#### *A. Judicial Review of Executive Order Compliance Under the APA*

There are several cases in which the court has reviewed an agency's compliance with an executive order.<sup>276</sup> As previously mentioned, the United

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foreign affairs, and for ceremonial purposes"). Ranchod describes executive orders as "short-term solutions" because a subsequent president can revise or revoke them. *Id.* at 542; *see also Utah Ass'n of Counties*, 316 F. Supp. 2d 1172, 1184 (2004) ("The use of executive orders may be employed by the President in carrying out his constitutional obligation to see that the laws are faithfully executed and to delegate certain of his duties to other executive branch officials, but an executive order cannot impose legal requirements on the executive branch that are inconsistent with the express will of Congress."); Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U.L. REV. 947, 998 (2003) (surmising that monument designations may be changed or revoked only by congressional act).

<sup>270</sup> *See* Stack, *supra* note 23, at 548 ("The president may issue or repeal prior presidential orders on his own initiative, and in almost all cases, may do so without having to satisfy any procedural requirements."). There is some debate as to whether a president can modify a monument established by one of his predecessors. *See generally* Ranchod, *supra* note 35, at 554 (calling the issue of whether a subsequent president can change an existing monument "unclear" and noting only "expansions and small reductions" have been attempted); Lin, *supra* note 3, at 711–12 (finding that once the President establishes a monument, he is without power to revoke or rescind the reservation, although he may be able to reduce its size); PAMELA BALDWIN, CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS, AUTHORITY OF A PRESIDENT TO MODIFY OR ELIMINATE A NATIONAL MONUMENT (2000) (comparing the ability of the President to modify or revoke executive orders to national monument proclamations, and finding that the President can modify an existing monument), *available at* <http://www.ncseonline.org/nle/crsreports/risk/rsk-46.cfm>.

<sup>271</sup> *W. Watersheds Project v. Bureau of Land Mgmt.*, No. CV 08-1472-PHX-MHM, at 10 (D. Ariz. Feb. 2, 2009) (quoting *City of Albuquerque v. U.S. Dept. of Interior*, 379 F.3d 901, 915 (10th Cir. 2004)); *W. Watersheds Project*, 629 F. Supp. 2d 951, 962 n.3 (D. Ariz. 2009).

<sup>272</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 585; *City of Albuquerque*, 379 F.3d at 913–14.

<sup>273</sup> *Indep. Meat Packers Ass'n*, 526 F.2d at 234; Ostrow, *supra* note 24, at 663–64.

<sup>274</sup> Ostrow, *supra* note 24, at 664.

<sup>275</sup> *Id.*

<sup>276</sup> *See* Brief of Natural Resources Law Professors and Practitioners as Amici Curiae in Support of Motion for Reconsideration, *supra* note 27, at 13 (No. CV 08-1472-PHX-MHM) (citing to Ninth Circuit cases such as *City of Carmel-By-The-Sea*, 123 F.3d 1142 (9th Cir. 1997), *Sierra*

States Court of Appeals for the Second Circuit in *Zhang* considered the enforceability of an executive order and whether it “effectively overturned” a Board of Immigration Appeals decision.<sup>277</sup> The executive order instructed the Attorney General to take certain actions, which the Attorney General did not do.<sup>278</sup> The court stated, “[g]enerally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders.”<sup>279</sup> When an executive order has a “specific foundation in Congressional action,” however, it may be enforced through a civil suit.<sup>280</sup> The court found in *Zhang* that the President’s executive order lacked specific congressional authority.<sup>281</sup> Without a “specific statutory foundation,” judicial review under the APA for compliance with the order’s terms is not available.<sup>282</sup> In a case cited by the District Court of Arizona, *Independent Meat Packers Association v. Butz*, the Eighth Circuit stated, “[p]residential proclamations and orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress.”<sup>283</sup> Similar to Second Circuit in *Zhang*, the United States Court of Appeals for the Eighth Circuit found that the executive order at issue in that case relied upon “no specific source of authority other than the ‘Constitution and laws of the United States.’”<sup>284</sup> The court viewed the executive order as “intended primarily as a managerial tool for implementing the President’s personal economic policies and not as a legal framework enforceable by private civil action.”<sup>285</sup>

Where the basis of the executive order is not a broad reference to the Constitution and laws of the United States,<sup>286</sup> but rather, a clear delegation of

*Club*, 705 F.2d 1475 (9th Cir. 1983), *Legal Aid Soc’y of Alameda County v. Brennan*, 608 F.2d 1319 (9th Cir. 1979), and *City of Albuquerque*, 379 F.3d at 901).

<sup>277</sup> See *Zhang*, 55 F.3d 732, 736, 742–43 (2d Cir. 1995) (hearing the appeal arising from Zhang’s petition for habeas corpus, which the Board of Immigration Appeals’ denial of Zhang’s request for asylum and withholding of return proceedings and a determination that he never “entered” the United States).

<sup>278</sup> See *id.* at 747 (noting the Attorney General did not complete the directed rulemaking).

<sup>279</sup> See *id.* (quoting *Facchiano Const. Co. v. U.S. Dept. of Labor*, 987 F.2d 206, 210 (3d Cir. 1993)).

<sup>280</sup> See *id.* at 747–48 (finding no specific congressional authority relied upon in Executive Order No. 12,711; instead, noting the source of authority for the executive order was the President’s general constitutional power to direct the administrative branch and the Attorney General’s exercise of authority under immigration laws).

<sup>281</sup> *Id.* at 748.

<sup>282</sup> See *W. Watersheds Project v. Bureau of Land Mgmt.*, No. CV 08-1472-PHX-MHM, at 12 (D. Ariz. Feb. 2, 2009) (citing also to *City of Carmel-By-The-Sea*, 123 F.3d 1142 (9th Cir. 1997), *City of Albuquerque*, 379 F.3d 901 (10th Cir. 2004), and *Indep. Meat Packers Ass’n*, 526 F.2d 228).

<sup>283</sup> 526 F.2d 228, 234 (8th Cir. 1975).

<sup>284</sup> See *id.* at 235 (referencing Executive Order No. 11,821). The district court found the executive order to be authorized by section 202 of the Agricultural Marketing Act of 1946 and Article II, Section 3 of the Constitution, but the circuit court disagreed, finding that section 202 provides only the Act’s policy objectives, and the provisions of the Constitution do not grant the executive order the “force and effect of law.” *Id.*

<sup>285</sup> *Id.* at 236. Beyond the specific statutory foundation, the executive order would also need to intend to create a private right of action, which the court found to be lacking. *Id.*

<sup>286</sup> See United States Army Legal Services Agency, *Environmental Law Division Note: Enforcing Executive Orders*, ARMY LAW., Sept. 1998, 51 (describing the holding of *Rio Grande Int’l Study Ctr. v. U.S. Dep’t of Def.*, No. L-9809 (S.D.Tex. Feb. 13, 1998)).

authority from Congress, the order carries the force and effect of law.<sup>287</sup> In addition to this specific statutory foundation, the court also looks to see whether there exists evidence of presidential intent to create a cause of action in the order.<sup>288</sup> Where the terms of the executive order are not explicit, the courts may also consider the order's history or intended "administrative scheme" to identify an implied right of action.<sup>289</sup> "Statutes rarely provide explicit authorization for a private right of action to remedy agency violations of an executive order"; in those cases, non-statutory review may be available.<sup>290</sup> As the court noted in *Western Watersheds Project v. Bureau of Land Management*, "[i]t is uncontested that judicial review of agency action is routinely available under the APA when the underlying statute contain [sic] no private rights of action."<sup>291</sup> Thus, if the executive order does not include an express or implied cause of action, the court can look to the APA to provide for judicial review of a violation of its terms.<sup>292</sup>

The APA allows judicial review of "final agency action for which there is no other adequate remedy in court."<sup>293</sup> It states that:

[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>294</sup>

The APA defines an "agency" as:

each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

<sup>287</sup> *City of Albuquerque*, 379 F.3d at 914.

<sup>288</sup> *Indep. Meat Packers Ass'n*, 526 F.3d at 236; see also *Zhang*, 55 F.3d 732, 748 ("Executive orders cannot be enforced privately unless they were intended by the executive to create a private right of action.").

<sup>289</sup> See Ostrow, *supra* note 24, at 665–66 (describing the reluctance of some courts to find a cause of action "based on an 'exclusivity of remedy' rationale" and finding "formidable barriers" exist for a plaintiff to bring a cause of action directly under an executive order).

<sup>290</sup> See *id.* at 673 (stating that non-statutory review is available to remedy an agency violation of an executive order where the plaintiff can show "(1) final agency action, (2) no other adequate judicial remedy provided by statute, and (3) exhaustion of administrative remedies"). The author asserts that section 704 of the APA "implicitly embodies the doctrine of exhaustion of administrative remedies." *Id.* n.94.

<sup>291</sup> *W. Watersheds Project v. Bureau of Land Mgmt.*, No. CV 08-1472-PHX-MHM, at 9 (D. Ariz. Feb. 2, 2009).

<sup>292</sup> Ostrow, *supra* note 24, at 666.

<sup>293</sup> Administrative Procedure Act, 5 U.S.C. § 704 (2006).

<sup>294</sup> *Id.* § 706(1)–(2)(A).

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia[.]<sup>295</sup>

“[A]gency action” is defined as including “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]”<sup>296</sup>

In *Norton v. Southern Utah Wilderness Alliance*,<sup>297</sup> the Supreme Court dictated, for the first time, what is required to bring a claim to “compel agency action unlawfully withheld or unreasonably delayed” pursuant to 5 U.S.C. § 706(1).<sup>298</sup> The Court found two tests that must be met in the statutory language: first, review under § 706(1) requires a “discrete agency action” and second, that action must be one the agency is “required to take.”<sup>299</sup> The Court considered whether it could review allegations that BLM failed to take required actions regarding the use of off-road vehicles (ORV) in wilderness study areas and noted that “[f]ailures to act are sometimes remediable under the APA, but not always.”<sup>300</sup> Justice Scalia limited those instances in which an agency may be compelled to act with the “discrete action” requirement<sup>301</sup> and the “legally required” action test.<sup>302</sup> Further, the Court ruled that it can compel an agency to undertake a legally required action but it cannot specify how the agency will complete that act where “the manner of its action is left to the agency’s discretion.”<sup>303</sup> Relying on the separation of powers principle, the Court emphasized the intent of the APA

<sup>295</sup> *Id.* § 551(1).

<sup>296</sup> *Id.* § 551(13).

<sup>297</sup> 542 U.S. 55 (2003). The Court considered “whether the authority of a federal court under the [APA] to ‘compel agency action unlawfully withheld or unreasonably delayed,’ extends to the review of the BLM’s stewardship of public lands under certain statutory provisions and its own planning documents.” *Id.* at 57–58 (citation omitted).

<sup>298</sup> See Justin Konrad, Comment, *The Shrinking Scope of Judicial Review in Norton v. Southern Utah Wilderness Alliance*, 77 U. COLO. L. REV. 515, 525–26 (2006) (stating that § 706(1) provides the “complementary standard of review for agency inaction or delay” to the more frequently used § 706(2)).

<sup>299</sup> *Norton*, 542 U.S. at 64.

<sup>300</sup> See *id.* at 60–61.

<sup>301</sup> See *id.* at 62–63 (describing the categories of agency actions defined by the statute as “involv[ing] circumscribed, discrete agency actions” and defining those terms left open by the statute, including the term “or the equivalent or denial thereof, or failure to act[.]” using the interpretive canon of *ejusdem generis*, as, by necessity, also meaning a “discrete listed action”).

<sup>302</sup> See *id.* at 63–64 (referencing the “traditional practice” which the APA continued, where “judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus under the All Writs Act, now codified at 28 U.S.C. § 1651(a)” and relying on the Attorney General’s Manual on the Administrative Procedure Act (1947) which instructs a court to compel a nondiscretionary agency action but not direct how the agency will complete that action).

<sup>303</sup> See *id.* at 65 (using as an example a situation in which the Court could compel the Federal Communications Commission to issue regulations in accordance with the Telecommunications Act of 1996, but the Court could not “set[] forth the content of those regulations.”).

to avoid “undue judicial interference [in an agency’s] lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.”<sup>304</sup> The Court’s opinion set forth what has been argued to be a rather narrow test.<sup>305</sup>

The Supreme Court has found that section 701(a) of the APA creates a presumption in favor of judicial review.<sup>306</sup> This section provides for review of agency action “except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”<sup>307</sup> The Court has found that “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review” under the APA.<sup>308</sup> Thus, the Court arguably applies a rather “liberal construction of the APA’s provisions.”<sup>309</sup> Further, the Court has found that the exception for actions committed to agency discretion is a “very narrow” one.<sup>310</sup> “The legislative history of the Administrative Procedure Act indicates that [the exception to judicial review] is applicable in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”<sup>311</sup> As was the case in *Western Watersheds Project*, where the proclamation includes specific management directives to guide BLM’s action, there is law to apply.<sup>312</sup>

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<sup>304</sup> See *id.*, at 65–66 (finding, in the course of considering whether BLM violated its mandate to manage wilderness areas in such a way not to impair their suitability for preservation by permitting ORV use, that FLPMA provides instruction on its objective but to leave discretion with BLM on how to achieve that objective). The Court also concluded the land use plan statements were not legally binding and thus could not be enforced by the APA. See *id.* at 72.

<sup>305</sup> See Konrad, *supra* note 297, at 516, 527 (arguing the Court’s incorporation of a “discreteness” requirement into section 706(1) “significantly and unnecessarily narrowed the scope of judicial review available” to enforce a “broad statutory mandate,” and resulting in a weakening of FLPMA’s wilderness protection provision); see also *Kane County Utah v. Salazar*, 562 F.3d 1077 (10th Cir. 2009) (applying the test in *Norton* to a challenge to BLM’s management plan for the Grand Staircase-Escalante National Monument).

<sup>306</sup> See Ostrow, *supra* note 24, at 681 (referencing *Abbott Labs.*, 387 U.S. 136, 140 (1966)).

<sup>307</sup> Administrative Procedure Act, 5 U.S.C. § 701(a) (2006).

<sup>308</sup> See *Abbott Labs.*, 387 U.S. at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379–80 (1962)).

<sup>309</sup> See Ostrow, *supra* note 24, at 682 (stating that the Court’s interpretation of the APA may help a potential litigant overcome the statutory preclusion exception).

<sup>310</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). The citizen group attempted to stop the Secretary of Transportation from releasing federal funds for a state highway project which would construct a segment of the highway through a city park in Memphis, Tennessee. The Court considered the Secretary’s compliance with section 4(f) of the Department of Transportation Act of 1966 and section 138 of the Federal-Aid Highway Act of 1968. *Id.* at 406–07.

<sup>311</sup> *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

<sup>312</sup> See Ostrow, *supra* note 24, at 681 (“The agency discretion exception usually will not apply in executive order cases because invariably either the order’s authorizing statute, the order itself, or the agency’s implementing regulations provide sufficient guidelines for courts to review an agency’s alleged violation of an order.”).



In *City of Albuquerque v. U.S. Dep't of the Interior*,<sup>313</sup> the United States Court of Appeals for the Tenth Circuit explicitly set forth the test that must be met for an executive order to be enforceable under the APA: first, the executive order must have a “specific statutory foundation;” if it has, then it is treated like a congressional statute; second, “neither the statutory foundation nor the executive order must preclude judicial review;” and third, “there must be ‘law to apply’—that is, there must be an objective standard by which a court can judge the agency’s actions.”<sup>314</sup> Therefore, to bring a cause of action under the APA challenging agency action taken pursuant to an executive order or proclamation, “a private litigant must show (1) that the challenged governmental conduct constitutes ‘agency action’ within the meaning of the APA, (2) that action is final and that there is no other adequate court remedy, and (3) that the plaintiff has standing to obtain judicial relief.”<sup>315</sup> The District Court of Arizona considered the issue of “final agency action” in regard to the challenge to BLM’s monument management; however, the court did not consider the question of the plaintiff’s standing to bring the suit.<sup>316</sup> Both issues could serve as procedural safeguards to achieve a limited scope of review and stop frivolous litigation.

### *B. Enforcing Management Restrictions in a Monument Proclamation*

Despite the many challenges to the designation process, the enforceability of management restrictions in a national monument proclamation has been largely assumed and not directly analyzed.<sup>317</sup> It is expected today that a monument designation will prohibit or restrict certain activities on the property to achieve the desired resource protection.<sup>318</sup> At times, local communities or citizens have been concerned about the potential impact that management restrictions on monument property might

<sup>313</sup> 379 F.3d 901 (10th Cir. 2004) (considering a claim that the Department of Interior violated Executive Order No. 12,072 in its selection process for office space for the Office of the Special Trustee for American Indians).

<sup>314</sup> *Id.* at 913–14 (citing *City of Carmel-by-the-Sea*, 123 F.3d 1142, 1166 (9th Cir. 1997)).

<sup>315</sup> Ostrow, *supra* note 24, at 671.

<sup>316</sup> *City of Albuquerque*, 379 F.3d 901, 905–06 (10th Cir. 2004).

<sup>317</sup> See Squillace, *supra* note 68, at 514 (“Among the quandaries posed by the terse language in the Antiquities Act is the uncertainty over the management and use restrictions that apply to national monuments.”); *see also* Motion for Reconsideration, *supra* note 288, at 2 (No. CV 08-1472-PHX-MHM) (“[N]umerous proclamations issued by various Presidents have included restrictions and directions on the use of monuments, and no case or other legal authority has questioned the President’s discretion to include these restrictions or suggested that these terms are not legal requirements.”).

<sup>318</sup> See Scott Y. Nishimoto, *President Clinton’s Designation of the Grand Canyon-Parashant National Monument: Using Statutory Interpretation Models to Determine the Proper Application of the Antiquities Act*, 17 ENVTL. L. & LITIG. 51, 53 (2002) (stating that most monuments ban or restrict vehicle use, mining, oil drilling, grazing, hunting, and logging); *see also* Squillace, *supra* note 68, at 514–15 (noting that the proclamations may include “a wide diversity of restrictions” but “virtually all monument proclamations” contain something of a standard warning: “all unauthorized persons not to appropriate, injure, destroy, or remove any feature” of the monument and “not to locate or settle upon any of the lands thereof”).

have on local economies or industry.<sup>319</sup> Yet, the President's ability to include management restrictions in the proclamation has been apparently unchallenged, provided those restrictions are in furtherance of the intent of the designation and perhaps, the third substantive requirement of the statute, "the proper care and management of the objects to be protected."<sup>320</sup> It appears that the monument proclamations to date have all included management restrictions which generally meet the requirements of the statute.<sup>321</sup>

More compelling perhaps is the fact that the Supreme Court has upheld management restrictions in a monument proclamation. In *Cappaert*, the Court enforced the terms of the Death Valley National Monument proclamation.<sup>322</sup> The Cappaerts owned a ranch near Devil's Hole and pumped groundwater, which originated in the same underground basin or aquifer that was the source of water for Devil's Hole, on the ranch at a distance of two and a half miles from the site.<sup>323</sup> According to the monument proclamation, Devil's Hole contains a "remarkable underground pool," which is "a unique subsurface remnant of the prehistoric chain of lakes which in Pleistocene times formed the Death Valley Lake System."<sup>324</sup> Requesting the Court to limit the Cappaerts' pumping from certain wells on their property, the Government alleged that the pumping of water from Cappaerts' wells caused the water level in Devil's Hole to lower and impacted the natural habitat of a "unique" species of fish, thus threatening its survival.<sup>325</sup> The lower courts reviewed whether the fish species could be preserved through other means and considered the purpose of establishing the monument, namely, to preserve the pool and the fish in it.<sup>326</sup> The Supreme Court found an intent to reserve the unappropriated water in the 1952 Proclamation because it stated the pool was to be protected, and "[s]ince a pool is a body of water, the protection contemplated is meaningful only if the water remains; the water right reserved by the 1952 Proclamation was thus explicit, not implied."<sup>327</sup> The Court referenced, in a footnote, the language in the Proclamation that "forbids unauthorized persons to

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<sup>319</sup> VINCENT & BALDWIN, *supra* note 96, at 8; *see Cappaert*, 426 U.S. 128, 133 (1976).

<sup>320</sup> Antiquities Act of 1906, 16 U.S.C. § 431 (2006); *see Lin*, *supra* note 3, at 712 (finding the President has discretion to "delineate permissible uses" as long as those uses "satisfy the Act's requirement of 'proper care and management of the objects to be protected'"). The author contrasts the President's ability to include management directives in a proclamation as "scarcely resembl[ing] the confiscation of private lands and obliteration of individual rights that critics sometimes charge." *Id.* at 728.

<sup>321</sup> *See Squillace*, *supra* note 38, at 113.

<sup>322</sup> 426 U.S. at 128.

<sup>323</sup> *Id.* at 133.

<sup>324</sup> *Id.* at 132 (quoting the 1952 Proclamation to explain why Devil's Hole was added to the monument. The court goes on to reference language in the Proclamation that states, "[w]hereas the said pool is of such outstanding scientific importance that it should be given special protection, and such protection can be best afforded by making the said forty-acre tract containing a pool a part of the said monument . . .").

<sup>325</sup> *Id.* at 135.

<sup>326</sup> *Id.* at 136–37.

<sup>327</sup> *Id.* at 139–40.

‘appropriate, injure, destroy, or remove any feature’ from the reservation.”<sup>328</sup> The pumping of water from the wells, resulting in the loss of water from Devil’s Hole, was considered to be “appropriating” or “removing” a protected feature on the monument.<sup>329</sup> The Court upheld the injunction enforcing a management directive to the extent necessary to protect the fish species, an object of scientific value identified in the Proclamation, “thus implementing the stated objectives of the Proclamation.”<sup>330</sup>

### 1. Enforcing the Sonoran Desert National Monument Proclamation

In *Western Watersheds Project*, the district court linked the Supreme Court’s enforcement of the Devil’s Hole National Monument Proclamation directives with the Proclamation being explicitly issued in furtherance of the National Park Service Act, rather than finding the specific statutory foundation in the Antiquities Act itself.<sup>331</sup> WWP questioned the court’s interpretation, distinguishing between the Proclamation being issued pursuant to, or “in furtherance of” the National Park Service Act and it directing NPS to manage the monument in accordance with the National Park Service Act.<sup>332</sup> WWP argued that “[t]he Antiquities Act did not need to state specifically that the President had authority to include directives on use and management of monuments for that discretion to exist,” and where the proclamation meets the requirements of the Antiquities Act, those directives were enforceable.<sup>333</sup> WWP pointed to the two substantive requirements of the Act identified by the Supreme Court, identifying the objects to be protected and “reserv[ing] the smallest area of land compatible with the proper care and management of those objects,” as allowing for such enforcement.<sup>334</sup>

Considering this argument, the district court emphasized this was a case of “first impression”<sup>335</sup> where a claim was brought under the APA

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<sup>328</sup> *Id.* at 140 n.6.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 141.

<sup>331</sup> *W. Watersheds Project v. Bureau of Land Mgmt.*, No. 08-CV-1472-PHX-MHM, at 12 (D. Ariz. Feb. 16, 2009). The court granted BLM’s Motion to Dismiss.

<sup>332</sup> Motion for Reconsideration, *supra* note 228, at 15 (No. CV 08-1472-PHX-MHM); Brief of Natural Resource Law Professors and Practitioners as Amici Curiae in Support of Motion for Reconsideration, *supra* note 27, at 4–5 n.3 (No. CV 08-1472-PHX-MHM) (arguing that the Antiquities Act provides the requisite “specific statutory foundation” for the President’s use of management directives in the proclamation).

<sup>333</sup> Motion for Reconsideration, *supra* note 288, at 8 (No. CV 08-1472-PHX-MHM); *see* Brief of Natural Resource Law Professors and Practitioners as Amici Curiae in Support of Motion for Reconsideration, *supra* note 27, at 6 (No. CV 08-1472-PHX-MHM) (supporting this argument that the court should not require “such an extreme specificity” by reference to the *City of Albuquerque*, 379 F.3d 901, 913 (10th Cir. 2004) and *Mountain States Legal Foundation*, 306 F.3d 1132, 1136–1137 (D.C. Cir. 2002)).

<sup>334</sup> Motion for Reconsideration, *supra* note 228, at 9 (No. CV 08-1472-PHX-MHM); Antiquities Act of 1906, 16 U.S.C. § 431 (2006).

<sup>335</sup> *See Western Watersheds Project*, 629 F. Supp. 2d at 962 n.2 (pointing to California *ex rel.* Lockyer, 465 F. Supp. 2d 917 (N.D. Cal. 2006), as “[t]he only other case in which the plaintiff

against agency inaction directed by a national monument proclamation. Acknowledging the Ninth Circuit's holding that an executive order having a "specific statutory foundation" could allow for review of agency action under the APA,<sup>336</sup> the court defined that scope of review to constitute situations either "(1) where Congress explicitly delegates authority to the President to issue directives to an agency, or (2) where the agency directives in a presidential order or proclamation 'rest upon statute,' i.e., the directives are issued in accordance with or in furtherance of agency action that is specifically authorized or required by statute."<sup>337</sup>

The court characterized WWP's argument as stating the President had explicit authority to include management directives in monument proclamations.<sup>338</sup> Although the court recognized the "broad delegation of authority" granted to the President under the Antiquities Act<sup>339</sup> and the "widespread practice" of presidents to include management restrictions in monument proclamations,<sup>340</sup> it found no "discernible limits on the President's discretion" in the Antiquities Act to include the management directives in monument proclamations that would allow for its review of agency actions taken pursuant to those directives.<sup>341</sup> The court did find, however, discernible limits on the President's discretion in other authorizing statutes regarding the management of federal land.<sup>342</sup>

The court considered WWP's claim that because the President has the properly delegated authority under the Antiquities Act to issue management directives in monument proclamations that require certain agency action, those directives have the force of "a congressional statute" and thus APA review is available for agency inaction pursuant to those directives without any additional statutory support.<sup>343</sup> While the court acknowledged this line of argument "to be sound,"<sup>344</sup> it found it "need not determine that issue as an executive order or presidential proclamation may also be subject to judicial review under the APA and treated as agency action when the order or proclamation 'rests upon statute.'"<sup>345</sup> However, the court did not simply consider its second avenue of review as supplementary to the specific delegation reasoning. It proceeded to consider whether another source provided the requisite specific statutory foundation to review BLM's actions

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asserted a claim for relief directly under a proclamation" but noting in that case the district court addressed only the plaintiff's arguments under NEPA).

<sup>336</sup> See *id.* at 962 (citing to *City of Carmel-By-The-Sea*, 123 F.3d 1142, 1166 (9th Cir. 1997)).

<sup>337</sup> *Id.*

<sup>338</sup> See *id.* at 964.

<sup>339</sup> *Id.* at 963 (identifying the statute's "limitations" on the President's authority as the size of the reservation).

<sup>340</sup> See *id.* at 964 (referencing Congress's acquiescence to this practice).

<sup>341</sup> *Id.*

<sup>342</sup> See *id.* at 964–65 (listing FLPMA, NFMA, Taylor Grazing Act of 1934, NEPA, the Endangered Species Act and the Public Rangelands Improvement Act of 1978 as providing those limits).

<sup>343</sup> *Id.* at 965.

<sup>344</sup> *Id.* ("[T]o the extent that the Antiquities Act does in fact delegate to the President the authority to issue directives to agencies in proclamations and the directives are thus given the effect of a congressional statute.").

<sup>345</sup> *Id.*

in situations where there was an “absence of an express delegation of authority to the President,” thus implying that such specific delegation to include management restrictions in a monument proclamation really did not exist in this case despite its earlier discussion.<sup>346</sup>

## 2. *Specific Statutory Foundation*

The court found that the specific statutory foundation to allow judicial review under the APA would exist where the proclamation directs the agency to take an action in furtherance of its “independent statutory obligation.”<sup>347</sup> In this case, the management restrictions directed BLM “to take action in furtherance of . . . [its] independent statutory obligation,” which the court noted would be the Taylor Grazing Act of 1934,<sup>348</sup> NEPA, the Endangered Species Act of 1973,<sup>349</sup> the Public Rangelands Improvement Act of 1978,<sup>350</sup> and in particular, FLPMA.<sup>351</sup> In addition, the court stated that the “directives must be sufficiently related to the agency’s grant of authority from Congress to have the force of law.”<sup>352</sup> Finally, the court found that the directives must reference the statutory foundation upon which they rely.<sup>353</sup> However, following the APA’s “*strong presumption in favor of reviewability* of agency action,”<sup>354</sup> the court found that where the proclamation did not explicitly reference FLPMA or other land management statutes, the reliance of the directives on “all applicable legal authorities” was sufficient to “necessarily refer[]” to BLM’s obligations under FLPMA.<sup>355</sup>

Having thus concluded that the directives had “specific statutory authority” to allow for judicial review of relevant agency action, the court noted the limits of its review to the “non-discretionary aspects of agency

<sup>346</sup> *Id.* at 962.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at 964.

<sup>349</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

<sup>350</sup> Public Rangelands Improvement Act, 43 U.S.C. §§ 1901–1908 (2006).

<sup>351</sup> See *W. Watersheds Project*, 629 F. Supp. 2d at 966 (noting these statutes authorize BLM to develop land use plans and manage grazing on federal land).

<sup>352</sup> See *W. Watersheds Project*, 629 F. Supp. 2d at 966 (“Therefore, if a monument proclamation directing certain agency action is issued in furtherance of an agency’s existing statutory obligation for related agency action[—]FLPMA for directives concerning management plans; FLPMA and the Taylor Grazing Act, among others, for grazing compatibility determinations[—]then agency action or inaction in violation of the proclamation is subject to judicial review under the APA; the directives must be sufficiently related to the agency’s grant of authority from Congress to have the force of law.”).

<sup>353</sup> *Id.* at 967.

<sup>354</sup> *Id.* at 968 (quoting *McAlpine v United States*, 112 F.3d 1429, 1432 (10th Cir. 1997)).

<sup>355</sup> *Id.* (reading the proclamation’s language “in the context [of] the BLM’s management of federal land”). The court stated that “[a]lthough there are times when a court may be unable to divine the statutory foundation relied on by an executive order or proclamation’s directives because the order or directives fail to explicitly refer to the agency’s independent statutory obligation on which the order or directives rely, [such a finding in this case would be a] technicality.” *Id.*

action.”<sup>356</sup> The court described the proclamation’s directives as the requisite “laws to apply” and found the directives, applicable provisions of FLPMA and other statutes authorizing BLM’s management of federal lands to be “sufficiently specific and objective to subject agency action or inaction taken in violation of Proclamation No. 7397 to judicial review under the APA.”<sup>357</sup>

## VI. NEED FOR JUDICIAL REVIEW

That national monument proclamations have the force of law appears rather straightforward.<sup>358</sup> Without judicial review of the proclamation’s management directives to enforce specific prohibitions or restrictions, the executive branch’s ability to exert influence over the way in which a particular monument is managed would be much greater.<sup>359</sup> National monuments constitute specific areas of designated uses.<sup>360</sup> The ability of nongovernmental organizations or individuals to bring a lawsuit in the event the managing agency is not carrying out the terms of a proclamation helps ensure that the proclamation achieves the intent of the designating president.<sup>361</sup>

### *A. Preserving the Exercise of Discretion Intended by the Antiquities Act*

The ability of the President, at the time of the designation, to gauge the threat to the resources and the needs and desires of the nation, is arguably why, after significant debate, the drafters of the Act elected to delegate the power to that office.<sup>362</sup> So that “objects might [not] be lost before they could

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<sup>356</sup> See *id.* (quoting *Legal Aid Soc’y of Alameda County v. Brennan*, 608 F.2d 1319, 1330 (9th Cir. 1979)). The court stated that, “to be subject to judicial review, a proclamation’s directives ‘must identify in clear and mandatory terms’ the agency action that must be taken.” *Id.* at 967.

<sup>357</sup> *Id.* at 968. The court allowed WWP’s claim against BLM to proceed “only to the extent WWP alleges a violation of the Sonoran Desert National Monument Proclamation for failure to issue a management plan for the Monument”; WWP may also file a motion for leave to file a Second Amended Complaint to state additional claims under FLPMA. *Id.* at 972.

<sup>358</sup> But see *Ranchod*, *supra* note 35, at 552 (“National monument designations by presidential proclamation do not carry the full weight of the law and are not permanent” in the context of assessing Congress’s ability to change the way a monument is managed, its boundaries, or revoke it; acknowledging, however, that “very few monuments have been undone by Congress.”).

<sup>359</sup> But see *Beermann*, *supra* note 269, at 975 (discussing the ability of the President to exert influence over federal lands generally, with the impact of a national monument designation being to lessen the flexibility of the executive to manipulate the use of monument lands).

<sup>360</sup> See *supra* notes 115–17 and accompanying text.

<sup>361</sup> See *Nie*, *supra* note 124, at 257 (finding judicial review to be “the most obvious form of administrative oversight” because it ensures agencies comply with their legal requirements). Professor *Nie* continues, “[t]he mere existence of the courts and the threat of litigation affects bureaucratic behavior through the law of anticipated reaction.” *Id.* Professor *Nie* also notes, however, that “the courtroom is not the most appropriate venue for resolving some political conflicts.” *Id.* at 258.

<sup>362</sup> See *Leshy*, *supra* note 29, at 302 (noting the amount of time Congress generally needs to make federal land management decisions and finding “the legislative process is designed less to lead change than it is to slow it down and ameliorate its effects”).

be protected by Congress,”<sup>363</sup> the drafters called on the President to take quick action.<sup>364</sup> In addition, the courts’ deferential treatment of the President’s exercise of discretion in designating a national monument is consistent with the congressional intent that the President, in making the designation, has the ability to gauge what is in the best interests of the nation and what is needed to protect significant historic and scientific sites and objects.<sup>365</sup> As noted by Professor John Leshy, the legislature often gets caught in the “tension between local and national interests” when it comes to the management of federal lands.<sup>366</sup> The direction of the President in the executive office at the time of the designation, “the only public official elected by all the people in the country . . . [who] has more freedom to take a longer and broader view, to be more guided by a sense of how the proposal would be regarded in the future by all the people in the country”<sup>367</sup> should thus be maintained through judicial enforcement.<sup>368</sup>

Ensuring the consistent enforcement of the President’s judgment is highly relevant in light of differing agency missions, responsibilities, and political will. As noted by the brief submitted in *Western Watersheds Project* by amici The National Trust for Historic Preservation, Society for American Archaeology, and Lawyers’ Committee for Cultural Heritage Preservation, “[i]n the absence of more stringent protection requirements, BLM ‘manage[s] the public lands under principles of multiple use and sustained yield,’ . . . which provides BLM with substantial discretion in determining how the public lands should be used, rather than placing paramount value on resource protection.”<sup>369</sup> Where the oversight of the agency is generally left with the executive branch unless an agency action violates a law or

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<sup>363</sup> Squillace, *supra* note 68, at 557.

<sup>364</sup> Leshy, *supra* note 29, at 301–02.

<sup>365</sup> See *supra* text accompanying notes 151–54.

<sup>366</sup> Leshy, *supra* note 29, at 301 (describing the necessity of executive leadership in conserving tracts of federal land); see also Nie, *supra* note 124, at 273 (finding the appropriations process to be problematic in that it is often “a case of a few powerful members of Congress sitting on key appropriations committees exerting brute political power for minority special interests”).

<sup>367</sup> See Leshy, *supra* note 29, at 302 (arguing that the President is best situated to make decisions regarding the protection of federal lands for the benefit of the American people).

<sup>368</sup> There is some debate as to whether a president can modify a monument established by one of his predecessors. See generally BALDWIN, *supra* note 270 (comparing the ability of the President to modify or revoke executive orders to national monument proclamations, and finding that the President can modify an existing monument); Lin, *supra* note 3, at 711–12 (finding that once the President establishes a monument, he is without power to revoke or rescind the reservation, although he may be able to reduce its size); Ranchod, *supra* note 35, at 554 (calling the issue of whether a subsequent president can change an existing monument “unclear” and noting only “expansions and small reductions” have been attempted).

<sup>369</sup> Brief of National Trust for Historic Preservation as Amici Curiae in Support of Plaintiff’s Motion for Reconsideration, *supra* note 27, at 13 (No. CV 08-1472-PHX-MHM) (“If this management standard were to govern the national monuments administered by BLM, which would be the result of this Court’s decision, then the management of national monuments would shift dramatically from resource protection to resource exploitation. This result fundamentally contradicts the purpose of the Antiquities Act.”).

regulation allowing some redress for a plaintiff, the impact of implementing differing agencies' missions could be substantial for land management.<sup>370</sup>

In light of the many practical issues facing Western states, such as population and urbanization growth as well as a public commitment to environmental and recreational values on public lands,<sup>371</sup> those monuments located in the West will most likely continue to include multiple-use management policies. While the controversy over "multiple-use monuments" may persist, there are several factors, such as inadequate funding, political pressure from multiple groups or organizations as to uses for limited resources, and a lack of necessary staffing levels, that can impact both NPS and BLM.<sup>372</sup> The National Trust for Historic Preservation points to a lack of funding and often, a lack of agency will as threats to the preservation of cultural resources in national parks.<sup>373</sup> In regards to BLM, the National Trust listed the National Landscape Conservation System, in its entirety, as one of the 2005 "America's 11 Most Endangered Historic Places" due to "chronic understaffing and underfunding."<sup>374</sup> As both agencies continue to struggle

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<sup>370</sup> See Nie, *supra* note 124, at 241–42 (arguing that FLPMA's "broad statutory language leaves the BLM open to 'agency capture' and provides ammunition for various interest groups" and providing, as an example, the criticism of conservationists who point to livestock grazing as the dominant use on national forest and BLM lands that should be subject to multiple uses). Professor Nie also points to FLPMA's broad discretionary language as allowing for President Clinton's focus on its "environmental, historical, and cultural [statutory] language" and his designation of national monuments on BLM land. *Id.* at 242.

<sup>371</sup> Keiter, *supra* note 112, at 530.

<sup>372</sup> See National Trust for Historic Preservation, Historic Preservation & Federal Public Lands, <http://www.preservationnation.org/issues/public-lands/federal-public-lands.html> (last visited July 11, 2010) (describing the role of the National Trust for Historic Preservation and the issues generally affecting historic and cultural resources on federal public lands). The National Trust also includes "inadequate survey information about cultural resources" and "lack of agency will" as factors that "combine to expose resources on these lands to many types of threats." *Id.*

<sup>373</sup> See National Trust for Historic Preservation, National Park Service, <http://www.preservationnation.org/issues/public-lands/national-park-service> (last visited July 11, 2010) (noting these problems are particularly relevant in parks with managers who perceive a conflict between the protection of cultural and natural resources).

<sup>374</sup> See National Trust for Historic Preservation, 11 Most Endangered, National Landscape Conservation System, <http://www.preservationnation.org/travel-and-sites/sites/nationwide/national-landscape-conservation-system.html> (last visited Apr. 7, 2010) (providing an update on Jan. 13, 2009 concerning the role the National Trust has played in working to permanently establish the National Landscape Conservation System through new legislation; the legislation was still uncertain at the start of the 111th Congress). The National Trust describes its "America's 11 Most Endangered Historic Places" list in the following way:

Whether these sites are urban districts or rural landscapes, Native American landmarks or 20th-century sports arenas, entire communities or single buildings, the list spotlights historic places across America that are threatened by neglect, insufficient funds, inappropriate development or insensitive public policy. The designation has been a powerful tool for raising awareness and rallying resources to save endangered sites from every region of the country.

National Trust for Historic Preservation, America's 11 Most Endangered Historic Places, <http://www.preservationnation.org/issues/11-most-endangered/america-s-11-most-endangered-historic-places.html> (last visited July 11, 2010).



with these challenges, the expectation of consistent enforcement of the directives included in each monument proclamation will continue to be incredibly important to ensure the intent and substantive requirements of each proclamation are met.

Where the judgment and policymaking of a previous president needs to be addressed, it is the legislature who should make that change through the lawmaking process.<sup>375</sup> Congress granted the President the unilateral authority to designate national monuments to respond in a timely manner to threats to significant resources. Such justification arguably does not exist in the consideration as to whether a particular threat has been removed or a resource is no longer vulnerable.<sup>376</sup> Congress has tools to influence monument management and, when necessary, to avoid abuses of executive power.<sup>377</sup> Congress may amend or overturn a monument designation<sup>378</sup> or amend the Antiquities Act.<sup>379</sup> Arguably the more common method of influencing monument management is through Congress' power to appropriate or withhold funds.<sup>380</sup> Utilizing its ability to control "power over the purse," Congress could significantly impact the management of a monument.<sup>381</sup> As explained by one scholar, "[f]unding for federal agencies to

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<sup>375</sup> See *supra* text accompanying notes 368–69 (discussing the debate as to whether a president may unilaterally revoke a monument proclamation of a previous president).

<sup>376</sup> See Squillace, *supra* note 68, at 557 ("Congress authorized the President to protect objects, but not to remove such protection once put in place. While this one-way policy might temporarily result in more protection than Congress ultimately deems necessary, it ensures that objects considered worthy of protection by one President do not lose that protection until Congress decides otherwise.").

<sup>377</sup> See Leshy, *supra* note 29, at 303–04 (discussing the ability of Congress to prevent executive abuse in the context of conserving federal lands).

<sup>378</sup> Iraola, *supra* note 3, at 188; see also Leshy, *supra* note 29, at 297 (stating that Congress has not "undone" many monuments and noting a handful of small exceptions to this statement that were either turned over to state or local governments, or put back into ordinary national forest status).

<sup>379</sup> See Lin, *supra* note 3, at 718 (discussing bills to amend the Antiquities Act after Clinton's controversial designation of the Grand Staircase-Escalante; identifying, for example, a "typical" bill as the 'National Monument Fairness Act of 1997,' sponsored by Senators Hatch and Bennett of Utah, which proposed that all monument proclamations greater than 5,000 acres be approved by Congress and preceded by consultation with the affected governor, referencing 143 CONG. REC. S2563–01 (daily ed. Mar. 19, 1997)). Another bill, introduced by Representative Hansen of Utah, provided that proposed monuments greater than 50,000 acres could not be designated until 30 days after the President transmitted the proposed proclamation to the affected state's governor to solicit written comments. *Id.* at 718–19. Further, while the President could designate a monument after following this process, the designation would become ineffective after two years unless approved by Congress. *Id.* (referring to H.R. 1127, 105th Cong. (1st Sess. 1997)); see also Leshy, *supra* note 29, at 304 (discussing the few limitations Congress has put on the President's ability to act under the Antiquities Act, while speaking slightly more broadly about Congress's response to executive action to conserve public lands, noting that "Congress has tended to respond by doing by what it does best, managing and shaping change at the margins, but not thwarting it").

<sup>380</sup> See Iraola, *supra* note 3, at 188–89 (noting one of several tools available to Congress to counter executive abuses of power is its ability to appropriate funds).

<sup>381</sup> Leshy, *supra* note 39, at 303–04 (providing such an example with Congress's response to President Eisenhower's 1961 designation of the Chesapeake & Ohio Canal National Monument

manage national monuments must be approved by a simple majority of Congress through annual appropriations bills. Without adequate funding, monument lands cannot be operated as national monuments, especially with regard to enforcement of restrictions on use, such as hunting and grazing.<sup>382</sup> Legislative “riders” have been suggested as a manner through which Congress might affect monument management, rather than cutting an agency’s budget.<sup>383</sup> Thus, Congress is not without the ability to change the way that a monument is managed.

An issue that is still debated is the President’s ability to unilaterally revoke or significantly modify a monument designation of a previous president.<sup>384</sup> Professor Squillace argues that the President lacks the authority to modify the proclamation, including its use restrictions, of an existing monument absent a showing that the previous president’s judgment was a mistake.<sup>385</sup> It appears the only legal authority directly on this issue is a 1938 Opinion of the Attorney General,<sup>386</sup> responding to an attempt to abolish the Castle Pinckney National Monument in Charleston, South Carolina, through a proposed proclamation presented by the Acting Secretary of the Interior, and transfer the land to the jurisdiction of the Secretary of War.<sup>387</sup> The Attorney General found that “[t]he [Antiquities Act] does not in terms authorize the President to abolish national monuments, and no other statute containing such authority has been suggested. If the President has such authority, therefore, it exists by implication.”<sup>388</sup> Other scholars have compared national monument proclamations to executive orders to support the argument that a subsequent President may unilaterally modify an existing monument.<sup>389</sup> Some scholars have sought a middle ground, finding the more likely approach as one where a President may “alter the rules governing management of monument lands” instead of trying to revoke or

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in the Washington D.C. area); *see also* Lin, *supra* note 3, at 716 (noting that Congress blocked funding for the management of President Eisenhower’s monument for 10 years).

<sup>382</sup> Ranchod, *supra* note 35, at 553.

<sup>383</sup> *See id.* (describing legislative riders as “non-germane amendments to appropriations bills that affect activities that are frequently unrelated to the subject matter of the bill” and noting this approach to affecting monuments to be more “targeted”).

<sup>384</sup> *See, e.g.*, Lin, *supra* note 3, at 711–12 (asserting that “[o]nce the President establishes a monument, he is without power to revoke or rescind the reservation, although” he may be able to reduce its size).

<sup>385</sup> *See* Squillace, *supra* note 68, at 566–68 (referring to such a mistake as the specific use restriction imposed in the proclamation would not protect the objects identified). Professor Squillace states, “[a]llowing a future President to unilaterally reverse restrictions included in a monument proclamation because of a different judgment about the need for that restriction is no different in kind from allowing a future President to abolish a national monument because of a different judgment about the need for the monument itself.” *Id.* at 568.

<sup>386</sup> Ranchod, *supra* note 35, at 554.

<sup>387</sup> Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att’y Gen. 185, 185–86 (1938).

<sup>388</sup> *Id.* at 186; *see id.* at 187 (“A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can.”).

<sup>389</sup> BALDWIN, *supra* note 270, at 2.

significantly modify the proclamation itself.<sup>390</sup> While this discussion may continue, Congress's ability to change or revoke a monument is clear.<sup>391</sup>

*B. The Specific Statutory Foundation in the Antiquities Act*

Although the Arizona District Court found the Sonoran Desert National Monument proclamation's directives to be in furtherance and sufficiently related to BLM's obligations under FLPMA to make BLM's failure to comply with the proclamation's directives subject to review under the APA, the requisite "specific statutory foundation" lies in the language of the Antiquities Act itself. WWP argued that the Antiquities Act provided the necessary authority to the President,<sup>392</sup> asserting:

the proclamation requires agency action; the proclamation was issued pursuant to the Antiquities Act which delegates to the President the authority to issue directives to agencies; the proclamation is thus given the effect of a congressional statute requiring agency action, and so final agency action or inaction pursuant to those directives are subject to judicial review under the APA.<sup>393</sup>

However, the court found no discernible limits placed upon the President's ability to issue management directives in monument proclamations from the Antiquities Act. The court stated that the Act "merely mentions the 'proper care and management of the objects to be protected' in the context of limiting the President's authority to reserve land under the Act."<sup>394</sup>

As was seen in the legislative history of the Act, the intent of the statute was to reserve the monument land for certain uses and not others.<sup>395</sup> The President is granted the authority to create national monuments, and he "reserves" the land for certain uses through the issuance of management directives in the proclamation.<sup>396</sup> While the debate may continue with each controversial designation as to whether the size and scope of the withdrawal reflects the expectations of the Act's drafters, the recognition that a monument designation would protect and preserve the identified resources within its boundaries remains consistent.<sup>397</sup> The "proper care and

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<sup>390</sup> Ranchod, *supra* note 35, at 555; *see id.* (describing a push to develop a weaker management plan, or modify or amend an existing plan as a "back door" strategy).

<sup>391</sup> James R. Rasband, *The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 619, 629–30 (2001).

<sup>392</sup> *W. Watersheds Project*, 629 F. Supp. 2d 951, 963 (D. Ariz. 2009); *see id.* at 965 (assessing WWP's statement that the court in *California ex. rel. Lockyer*, 465 F. Supp. 2d 942 (N.D. Cal 2006), could have relied solely upon the monument proclamation to review the Forest Service's management plan).

<sup>393</sup> *Id.* at 965.

<sup>394</sup> *Id.* at 964 (quoting *United States v. California*, 436 U.S. 32, 33 (1978)).

<sup>395</sup> Getches, *supra* note 102, at 301–02.

<sup>396</sup> Lin, *supra* note 3, at 711–12.

<sup>397</sup> *See* Getches, *supra* note 102, at 300 ("[the Act] gave the President the authority to withdraw lands with no limits on duration, unhindered by any procedural requirements, with no provision for congressional review, and with no fixed acreage limitation."). Professor Getches

management of the objects to be protected” clause, while applying to the geographic limits of the President’s reservation, might be read more broadly to also apply to the President’s exercise of discretion in the act of reserving, thus guiding the way in which the monument is to administered.<sup>398</sup> Other courts have found the term “smallest area compatible with proper care and management of the objects to be protected” to be sufficient in the context of the President’s designation authority to provide a discernible limit that would allow for judicial review.<sup>399</sup> Given the courts’ practice in the context of the President’s designation authority, to both recognize the President’s broad discretion in the Act and identify substantive limitations on that discretion from rather general statutory language, it is conceivable that a court could similarly find the same discretion and limitation on the President’s ability to issue management directives subject to judicial review.

The Eighth Circuit held in *Independent Meat Packers Association v. Butz* that a general reference to the Constitution was not sufficient to constitute the specific statutory foundation to allow for judicial review of an executive order.<sup>400</sup> By comparison, in *City of Carmel-By-The-Sea v. U.S. Dept. of Transportation*,<sup>401</sup> the Ninth Circuit found the Federal Highway Administration’s compliance with certain executive orders, directing agencies to minimize the adverse effects of their actions on floodplains and wetlands, to be subject to judicial review.<sup>402</sup> BLM argued that the Ninth Circuit reviewed the Federal Highway Administration’s actions that were taken pursuant to other specific statutory authority, not solely the executive orders.<sup>403</sup> The District Court of Arizona characterized this case as holding

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describes the original purpose of the Act as “to set aside minimal areas to protect the ruins of archaeological interest in the American Southwest,” and later notes, that to a certain extent, national monuments, like wilderness areas and national parks, “are classified and managed not to promote any conventional ‘use’ but rather to preserve them in a pristine state.” *Id.* at 302, 310.

<sup>398</sup> Antiques Act of 1906, 16 U.S.C. § 431 (2006).

<sup>399</sup> *Id.*; see, e.g., *Tulare County*, 185 F. Supp. 2d 18, 26 (D.D.C. 2001); see also *City of Albuquerque*, 379 F.3d 901, 914 (10th Cir. 2004) (“It is well established that Congress may delegate responsibility to the executive branch so long as Congress provides an ‘intelligible principle’ to guide the exercise of the power.” (quoting *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928))).

<sup>400</sup> *Indep. Meat Packers Ass’n*, 526 F.2d 228, 235 (8th Cir. 1975).

<sup>401</sup> 123 F.3d 1142, 1147 (9th Cir. 1997) (hearing a challenge to the adequacy of the Environmental Impact Statement/Report for proposed realignment of California State Highway 1 under NEPA, California Environmental Quality Act and Executive Order Nos. 11,988 and 11,990).

<sup>402</sup> *Id.* at 1166–67.

<sup>403</sup> Defendant’s Response to Plaintiff’s Motion for Reconsideration, *supra* note 11, at 6–7 (No. 08-CV-1472-PHX-MHM). WWP argued the Antiquities Act need not “specifically” authorize the President to issue management directives in the monument proclamation, rather those directives were “in furtherance of” and “sufficiently related to” the Act. Motion for Reconsideration, *supra* note 228, at 8 (No. 08-CV-1472-PHX-MHM). The district court, BLM, and WWP relied on a number of the same cases. See *W. Watersheds Project*, 629 F. Supp. 2d at 962 (citing *City of Carmel-By-The-Sea*, 123 F.3d at 1166, and *City of Albuquerque*, 379 F.3d 901, 913 (10th Cir. 2004)); Motion for Reconsideration, *supra* note 288, at 8 (No. 08-CV-1472-PHX-MHM) (citing *City of Carmel-By-The-Sea*, 123 F.3d at 1166, *City of Albuquerque*, 379 F.3d at 913, and *Nat’l Med. Enter., Inc. v. Sullivan*, 957 F.2d 664, 667 (9th Cir. 1992)); Defendant’s Response to

that the executive orders were enforceable under the APA because they were issued “in furtherance of” NEPA even though NEPA “does not specifically delegate to the President the authority to issue directives concerning agency action.”<sup>404</sup> The Ninth Circuit does not expressly state in its opinion that the executive orders were issued in furtherance of NEPA.<sup>405</sup> The circuit court does, however, discuss the agency’s compliance with the executive orders through the work done in preparation of its Environmental Impact Statement pursuant to NEPA.<sup>406</sup> Allowing for the concurrent application of environmental laws does not mean that the Antiquities Act lacks the specific statutory foundation to allow judicial review of management directives.<sup>407</sup> Requiring the statutory language to expressly provide the President the ability to issue management directives in monument proclamations seems to be an unnecessary step in the court’s analysis.

Further, relying on the language of the Antiquities Act, rather than looking to the language of different organic acts or other statutory authority, would not constrain the discretion granted to the individual agencies in managing the monument. Returning to Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co.*, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>408</sup> The President generally provides certain specific use restrictions in a monument proclamation as well as an order for the agency to develop a management plan or strategy in accordance with its underlying statutory authority and applicable regulations.<sup>409</sup> In this way, the President is setting forth the confines within which the managing agency may exercise its discretion.<sup>410</sup> There is still ample opportunity for the managing agency to use its expertise to develop specific management decisions.<sup>411</sup> Ensuring the limits of that discretion are maintained, however, requires judicial review.

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Plaintiff’s Motion for Reconsideration, *supra* note 11, at 6–7 (No. 08-CV-1472-PHX-MHM) (discussing those cases cited by Plaintiff).

<sup>404</sup> *W. Watersheds Project*, 629 F. Supp 2d at 963.

<sup>405</sup> *City of Carmel-By-The-Sea*, 123 F.3d at 1166–67.

<sup>406</sup> *Id.*

<sup>407</sup> *See Mountain States Legal Found.*, 306 F.3d 1132, 1138 (D.C. Cir. 2002) (rejecting the contention that the scope of power delegated to the president under the Antiquities Act does not embrace environmental values).

<sup>408</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. 579, 637 (1952).

<sup>409</sup> *See Squillace*, *supra* note 38, at 113–17 (describing recent trends in monument proclamations).

<sup>410</sup> *See id.* at 117; Bruff, *supra* note 165, at 503 (noting the need for “flexible administration” in the management of federal lands).

<sup>411</sup> *See* Harmon et al., *supra* note 13, at 278–79 (discussing the co-management of the Grand Canyon-Parashant National Monument by BLM and NPS, and stating that, “there is nothing in the Antiquities Act that prohibits flexibility in how protection is achieved, or by whom”). The authors expect that as “new monuments [under the jurisdiction of agencies other than NPS] mature, the respective managing agencies will place their own stamp on them.” *Id.* at 279.

*C. Procedural Safeguards Exist to Prevent a Violation of the Separation of Powers*

The District Court of Arizona provided, for the first time, an explicit description of what is required to allow for judicial review of an agency's compliance with management directives in a national monument proclamation.<sup>412</sup> This decision, even if it takes a step further than it needed to, clears up what may have been debatable uncertainty about how to bring a claim to secure judicial review for alleged mismanagement.<sup>413</sup> However, finding a more straightforward specific statutory foundation in the language of the Antiquities Act would not err on the side of providing the judiciary with a greater role in policymaking or land use regulation. The court would be enforcing the direction of the President, properly granted through the Antiquities Act, to direct the exercise of discretion and expertise of the managing agency.

Further, there are other procedural safeguards in place to ensure both that the separation of powers is preserved and that the managing agency remains able to manage the property under its jurisdiction without unnecessary litigation.<sup>414</sup> As described by Professor Bruff, "[i]n administrative law cases, courts . . . consider a series of threshold defenses before reaching the merits of the case. These include objections to the plaintiff's standing to sue, to the timing of the lawsuit, and to the reviewability of the subject matter."<sup>415</sup> In regard to claims brought under the APA alleging a violation of an executive order, such threshold issues would most likely be whether an intent to preclude judicial review exists<sup>416</sup> and whether the plaintiff has standing.<sup>417</sup>

There has been some question as to whether an executive order, "of its own force [could] preclude judicial review of action taken pursuant to it."<sup>418</sup> That the President could shield the action directed in an executive order from judicial review has been identified as a possible violation of the separation of powers; hence, there is an argument that the court should look beyond the executive order to its authorizing statute to determine if Congress intended to preclude judicial review for the subject action.<sup>419</sup> The Tenth Circuit in the *City of Albuquerque v. U.S. Department of Interior*

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<sup>412</sup> *W. Watersheds Project*, 629 F. Supp. 2d 951, 962–968 (D. Ariz. 2009).

<sup>413</sup> See *id.* at 962 (describing "two possible avenues of review" of failure to comply with executive orders and presidential proclamations).

<sup>414</sup> See Bruff *supra* note 165, at 514–15.

<sup>415</sup> Bruff, *supra* note 165, at 514. The court continued: "These defenses all embody separation of powers concerns, because they reflect both Article III definitions of cases and controversies that the federal courts may consider and fundamental concepts about the policy domain of the Executive Branch." *Id.*

<sup>416</sup> See *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1320, 1330 n.15 (9th Cir. 1979) (finding that Executive Order No. 11,246 does not preclude judicial review, and it "rests upon statute and other congressional authorization").

<sup>417</sup> See *generally* Ostrow, *supra* note 24, at 675–81 (discussing the requirements for standing to enforce executive orders).

<sup>418</sup> *Legal Aid Society of Alameda County*, 608 F.2d at 1330 n.15.

<sup>419</sup> Ostrow, *supra* note 24, at 684–86.

seemed to consider that issue in delineating the requirement as finding “neither the statutory foundation nor the executive order must preclude judicial review.”<sup>420</sup> Thus, it remains a necessary step in the court’s analysis to determine the availability of judicial review.<sup>421</sup>

The question of a plaintiff’s standing may also work to limit the cases that come before the court. Constitutional standing requires a plaintiff to “show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”<sup>422</sup> Further, prudential standing, which embodies “judicially self-imposed limits on the exercise of federal jurisdiction,”<sup>423</sup> provides “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”<sup>424</sup> The APA specifically states in section 702, however, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant *statute*, is entitled to judicial review thereof.”<sup>425</sup> The issue of a plaintiff’s standing may yet arise in a case where the alleged violation is of an executive order, rather than a statute, because the legislative intent of the APA “broaden[s] [its] . . . judicial review provisions so as to include invasions of interests protected not only by statutes, but by other kinds of law and grants of power such as executive orders.”<sup>426</sup> Thus, standing may be another procedural safeguard to help ensure the appropriate limits of judicial review.

## VII. CONCLUSION

After considerable deliberation, Congress provided the President with the authority to act quickly to reserve public lands to protect historic and scientific sites and objects.<sup>427</sup> The courts give deference to the President’s ability to designate a national monument, relying on the broad discretion

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<sup>420</sup> 379 F.3d 901, 913–14 (10th Cir. 2004).

<sup>421</sup> In *Western Watersheds Project*, the District Court of Arizona notes the requirement to consider whether the order precludes judicial review, but does not appear to apply that analysis to the case at hand. 629 F. Supp. 2d 951, 962–63 (D. Ariz. 2009).

<sup>422</sup> *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000).

<sup>423</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

<sup>424</sup> *Id.* at 12 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

<sup>425</sup> Administrative Procedure Act, 5 U.S.C. § 702 (2006) (emphasis added).

<sup>426</sup> Ostrow, *supra* note 24, at 678–80 (finding the “general judicial practice” to also support this interpretation in assessing standing for cases involving alleged violations of executive orders); see, e.g., *Legal Aid Society of Alameda County*, 608 F.2d 1320, 1132–37 (9th Cir. 1979).

<sup>427</sup> See *supra* Part II.C.1.

granted to the President in the Antiquities Act.<sup>428</sup> As seen in *Western Watersheds Project v. Bureau of Land Management*, a new question has surfaced as to whether a third party can sue to force an executive agency to take an action in compliance with the presidential proclamation designating the monument. This article argues that courts should enforce the terms of such presidential proclamations when third parties sue the noncompliant agency.

The implications of the District Court of Arizona's decision, while practically small in scale, raise significant theoretical questions about the reach of the President in federal land management, the need to preserve the influence of a strong executive actor in protecting historic and scientific objects and sites, and the role of the court in ensuring that the will of the executive is enforced. At the time of the designation, the President in office arguably has the best ability, as seen through the intent the Act's drafters and the courts' deference to the exercise of presidential discretion, to determine what management directives are necessary to ensure the protective purpose of each proclamation is achieved. Careful planning and consideration through the traditional legislative process should follow in those cases where significant change or revocation of that designation is needed because the resource is no longer threatened or the reservation is no longer in the nation's best interests. Judicial enforcement of a monument proclamation's directives ensures the intended protection is maintained through subsequent administrations and political changes, and is in keeping with the separation of powers.

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<sup>428</sup> See *supra* Parts III.B and .C.