Environmental Law & Property Rights

Modern Remedies for Antiquated Laws: Challenging National Monument Designations Under the 1906 Antiquities Act

*By Mark C. Rutzick**

In late 2009 rumors emerged that the Obama Administration is contemplating a fresh round of national monument designations under the Antiquities Act of 1906.[1] The Interior Department has confirmed that it has compiled a list of some fourteen "Treasured Landscapes," totaling 13.1 million acres of federal land, that are under consideration for potential designation, but otherwise has declined congressional inquiries into the details of the rumors.[2]

The venerable and controversial Antiquities Act, enacted in the presidency of Theodore Roosevelt, allows the President to proclaim areas of federal lands he determines contain "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" as a national monument, and to "reserve" parcels of land within the monument.[3] Presidents have used the Antiquities Act to create national monuments more than 120 times over the past century. In a single day President Jimmy Carter established fifteen new national monuments in Alaska and expanded two more, containing fifty-six million acres of federal land.[4] In response Congress enacted the Alaska National Interest Lands Conservation Act,[5] overturning most of the designations, altering the status of some and confirming a few, and included a congressional veto on future land withdrawals in the state.[6]

President Clinton proclaimed nineteen new national monuments and expanded three more, reserving 5.9 million acres of land.[7] All but one of these proclamations came in the last year of his presidency, and eleven occurred in the twilight period between the 2000 election and the end of the term.[8] The Clinton designations led to a series of lawsuits unsuccessfully challenging the decisions.[9]

It is easy to understand why President Obama might contemplate a national monument designation for an area of federal land:

a. There is intense daily pressure from dozens of environmental advocacy organizations throughout the country, many of whose members worked hard for President Obama's election, urging the federal government to accord special protection to literally hundreds of particular outdoor areas characterized as biologically or ecologically significant. The principal goal of the requested designations is usually to ban economically productive resource uses such as grazing, mining, oil and gas production, timber removal, and geothermal energy production in the affected area; sometimes limits on active recreation and off-road vehicle use are also demanded. Their focus is almost invariably on lands managed by the Bureau of Land Management (BLM) and the U.S. Forest Service, which between them manage more than 450 million acres of federal land—the majority of the 653 million acres of federal land located throughout the country (concentrated in 12 western states), and, most importantly, virtually all of the federal lands where resource use and development occur.[10]

b. Under the complex web of federal land management laws and associated environmental statutes, altering the management status of an area of federal land generally takes no less than five years and sometimes much longer. The procedural and substantive requirements of these laws command federal management agencies to conduct lengthy periods of environmental review, public comment, consideration and response to public comment, and careful consideration of the complex set of management objectives Congress has by statute prescribed for the BLM in the Federal Land Policy and Management Act (FLPMA),[11] for the Forest Service in the National Forest Management Act (NMFA),[12] and for federal agencies generally in the National Environmental Policy Act (NEPA),[13] the Endangered Species Act (ESA),[14] the Wilderness Act,[15] the Wild and Scenic Rivers Act,[16] and the Clean Water Act (CWA),[17] among others.

c. The principal attraction of the Antiquities Act as it has been used since the emergence of federal environmental legislation is that not a single one of the federal environmental statutes has applied to the President's exercise of his proclamation authority for national monuments. With the literal stroke of a pen on a Presidential proclamation, Presidents Carter and Clinton created a series of enormous national monuments throughout the West and Alaska, some exceeding one million acres in size,[18] and simultaneously reserved that land from any consumptive or extractive resource use.[19]

No one can claim that bypassing every known environmental law is a sound method for making a national monument designation; if it were there would be no need for environmental laws. The anti-environmental effects of the Antiquities Act arise, for better or worse, from the language of the 1906 statute itself.

d. Even more alluring to a President, the Antiquities Act provides no mechanism for a current or future President to repeal a monument designation.[20] President Clinton knew when he proclaimed over one million acres of national monuments on January 17, 2001 that his action could never be undone by a future President—a heady power indeed, especially for a departing executive.

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This article will examine the arguments presented (unsuccessfully) in recent challenges to Clinton proclamations, and will consider whether other, yet-untested legal theories may exist that could lead to a successful challenge in the future.

Language and History of the Antiquities Act

As always, it is useful to begin with the text of the statutory provision in question. The relevant section of the Antiquities Act 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.[21]

Proclamations under this statute were relatively common in the first half of the 20th century, up to President Roosevelt's controversial Jackson Hole proclamation in 1943 and Congress' legislative response.[22] The courts faced only two cases in that era involving national monument proclamations. In *Cameron v. United States*,[23] the court held that the 1908 proclamation of the Grand Canyon national monument (before it became a national park) was valid under the Antiquities Act, although the "objects" intended to be protected were natural rather than man-made.[24] In *Wyoming v. Franke*,[25] a district court upheld the controversial Jackson Hole proclamation by deferring to the President's discretion under the Antiquities Act.[26]

After Jackson Hole, Presidents used the Antiquities Act just twice[27] until President Carter's sweeping set of Alaska proclamations in 1978.[28] The State of Alaska challenged the adequacy of the NEPA compliance on the proclamations (the first since enactment of NEPA in 1969), and the court rejected the challenge on the ground NEPA only applies to "federal agencies" and therefore does not require compliance by the President.[29] The Antiquities Act then lay dormant until President Clinton's 1996 proclamation of the Grand Staircase-Escalate National Monument, which reserved 1,870,800 acres of federal land in Utah,[30] followed by his burst of late-term designations noted above.

Thus, when the first Clinton proclamation occurred, there was very little direct legal authority on the interpretation, application and judicial review under the Antiquities Act other than the determination that the statute was lawful.

Recent Judicial Challenges to National Monument Designations

The three cases challenging the Clinton proclamations presented a much wider range of claims than earlier cases, and drew more detailed opinions from the courts, but ultimately all failed, keeping intact the historical verity that no legal challenge to a national monument proclamation has ever succeeded. This record might tempt proclamation opponents to forgo judicial outlet of their grievances. Yet review of the courts' handling of the cases, along with re-examination of earlier litigation and the statute itself, suggests that some potential means of overturning an Antiquities Act proclamation may be available.

1. In *Mountain States Legal Foundation v. Bush*,[31] the plaintiff alleged that six Clinton proclamations violated the Property Clause of the Constitution[32] and the Antiquities Act itself. The district court had dismissed the case, ruling that the constitutional claim was not valid and that review of the proclamations under the Antiquities Act was limited to a "facial" determination whether the proclamations properly invoked the criteria in the law.[33]

The appellate court took a broader view of permissible judicial review of the proclamations, endorsing judicial review of discretionary presidential decisions "where the authorizing statute or another statute places discernible limits on the President's discretion."[34] In that circumstance, "[c]ourts remain obligated to determine whether statutory restrictions have been violated."[35] The Court found this doctrine applicable to claims challenging Antiquities Act proclamations: "In reviewing challenges under the Antiquities Act, the Supreme Court has indicated generally that review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority."[36] Thus, the court's language approves judicial review of claims alleging that an Antiquities Act proclamation is unconstitutional or that the proclamation violated the Antiquities Act or any other applicable federal statute.

However, the court declined to consider any statutory claim in the case before it, finding that the plaintiff had failed to allege facts sufficient to support a constitutional or statutory claim.[37] Stating that "the court is necessarily sensitive to pleading requirements where, as here, it is asked to review the President's actions under a statute that confers very broad discretion on the President and separation of powers concerns are presented,"[38] the court determined that "[t]o warrant further review of the President's actions, Mountain States would have to allege facts to support the claim that the President acted beyond his authority under the Antiquities Act,"[39] and that it had failed to do so.

2. The same court issued its decision the same day in a companion case challenging the Grand Sequoia National Monument proclamation in 2000, *Tulare County v. Bush*.[40] The plaintiffs in that case asserted four violations of the Antiquities Act, one constitutional violation, and violations of three other federal statutes and a settlement agreement. Applying the review standards discussed in *Mountain States*, the court addressed the merits of the Antiquities Act claims and the constitutional claim, but rejected all of them.[41] The court rejected one claim under the NFMA on the merits, but refused to decide the other NFMA claim or the NEPA claim on the ground that neither statute contains a private right of action, the APA only authorizes review of "agency action," the President is not considered to be an "agency," and the allegations of unlawful action by subordinates were too vague.[42] Finally, the court rejected the settlement agreement claim as a matter of law based in part on insufficient factual allegations.[43]

3. In 2004 the district court issued its decision in *Utah Ass'n of Counties v. Bush*,[44] where the plaintiffs challenged the

1996 Grand Staircase-Escalante proclamation. The plaintiffs presented two constitutional challenges to the Antiquities Act: delegation in violation of Congress' duty to dispose of public lands under the Property Clause,[45] (a two-part claim); and violation of the Spending Clause.[46] They also asserted that the Grand Staircase-Escalante proclamation violated four statutes (the Wilderness Act; NEPA; FLPMA; and the Federal Advisory Committee Act (FACA)[47]) and one executive order (Executive Order 10355,), as well as the Antiquities Act itself.

The district court determined that it had authority to rule on the constitutional claims, and rejected both claims on the merits.[48] For the NEPA, FLPMA and FACA claims, the court determined, as in *Tulare County*, that no judicial review of the claims was permissible because the statutes contain no private right of action, the APA only authorizes review of "agency action" and the President is not considered to be an "agency."[49] For the Wilderness Act claim, the court did not choose to dispose of it on the reviewability ground, but instead ruled that the Wilderness Act does not apply to the President but only to federal "agencies."[50] As to the violation of the executive order, the court examined the merits of the claim and seemingly rejected it before determining that the court had no authority to enforce an executive order.[51]

The court also rejected the claim of violation of the Antiquities Act, adopting a review standard narrower than that articulated by the D.C. Circuit in *Mountain States*. The court held that it could review an exercise of discretion by the President but could do no more than "ascertain[] that the President in fact invoked his powers under the Antiquities Act."[52] This amounted to a simple determination that the President had claimed he was acting under the Antiquities Act.[53] The court said it could go no farther to consider the wisdom of the President's action under the statute.[54]

Strategic Conclusions and Recommendations for Future National Monument Litigation

Several strategic conclusions and recommendations emerge from these decisions:

1. Constitutional claims should not be pursued. One compelling conclusion is that constitutional challenges to the Antiquities Act have little chance of succeeding, and may act as dead weight to sink more meritorious statutory claims. It clearly seems far too late to argue successfully that Congress cannot enact a statute delegating its authority to the President where, as the D.C. Circuit found in *Mountain States*, the statute "includes intelligible principles to guide the President's actions."[55]

2. The APA does not permit judicial review of actions taken by the President. "The actions of the President . . . are not reviewable under the APA. . . ."[56] Since the Antiquities Act expressly assigns national monument decisions to the President, the APA is simply not available as a source of judicial review.

3. Asserting an APA claim against an inferior officer is unlikely to serve as a stand-in for a claim against the President. One technique for skirting the APA's omission of judicial review against the President is to assert the legal challenges to the monument designation against some inferior officer at an agency that is subject to APA review. The *Tulare County* court did not reject the potential for such a claim to be asserted, but in that case turned back an effort to sue low level foresters under the APA because "the complaint does not identify these foresters' acts with sufficient specificity to state a claim."[57] In *Utah Ass'n of Counties*, the court rejected the attempt to challenge agency recommendations to the President prior to a national monument proclamation on the ground that a recommendation is not judicially reviewable final agency action.[58]

In neither case did the plaintiffs challenge any specific agency action implementing the proclamation. Yet it is not clear that such an approach would succeed. In *Department of Transportation v. Public Citizen*,[59] the Supreme Court determined that an agency implementing a presidential directive was not required to study the environmental effects of the directive because the agency was powerless to reverse the directive regardless of its environmental effects. The same logic could preclude judicial review of an agency's implementation of a presidential order, such as a national monument proclamation, that it is powerless to reverse.

Even if a court were to find that an implementing agency official had violated NEPA, NMFA, FLPMA, or some other federal statute after the proclamation, it seems doubtful that the court would be empowered to set aside the presidential proclamation itself, although an injunction might bar some implementation of the proclamation. The proclamation would remain in effect permanently, which is a far less satisfactory outcome than an order setting the proclamation aside.[60]

4. Non-statutory review of Antiquities Act violations is available. While the APA is not available, non-statutory review of claims based on a violation of the Antiquities Act appears viable. In fact, embracing the existence of "intelligible principles" within the authority delegated by Congress may strengthen the reviewability of statutory claims because, as the D.C. Circuit held in *Mountain States*, non-statutory (or "*ultra vires*") judicial review of presidential action is permitted "where the authorizing statute or another statute places discernible limits on the President's discretion."[61] It could be argued that the "intelligible principles" needed for a constitutional delegation of congressional authority necessarily constitute the "discernible limits on the President's discretion" that permit judicial review of presidential action.

The language in the Antiquities Act strengthens the argument for "discernible limits on the President's discretion." The statutory direction in 16 U.S.C. §431 has two separate components: the first is the power of the President to "designate . . . objects . . . to be national monuments." While the President is expressly allowed to exercise this power "in his discretion," his power is limited to "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," which certainly appears to be a "discernible limit" on his discretion.

The second power delegated to the President is that the President "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." Even with the word "may," this language is even

more clearly a "discernable limit" on the President's authority because this delegation does not contain permission for the President to act "in his discretion." The structure of the sentence clearly shows that "in his discretion" applies to the designation authority but not the reservation authority.

The omission of the modifying phrase "in his discretion" for the reservation authority, immediately following the use of that phrase for the designation authority, implies under standard rules of statutory interpretation that Congress did not intend the President to exercise his reservation authority "in his discretion" but rather in accordance with the statutory limit of a reservation to "the smallest area compatible with proper care and management of the objects to be protected."[62]

It would follow then that judicial review of the less discretionary reservation decision should be more exacting than review of the more discretionary action of designating a monument. In line with this reasoning, in *Tulare County* the court rejected a challenge to a reserve designation not because the decision was unreviewable but because "the complaint fails to identify the improperly designated lands with sufficient particularity to state a claim."[63] "Insofar as Tulare County alleges that the Monument includes too much land, i.e., that the President abused his discretion by designating more land than is necessary to protect the specific objects of interest, Tulare County does not make the factual allegations sufficient to support its claims."[64]

This reasoning is beneficial to proclamation opponents because the principal impact of a national monument proclamation is likely to result from the reservation of land within the monument rather than the designation itself; if the designation resulted in no change in on-the-ground management, there would be little controversy over these decisions.[65]

A court determining the presence or absence of "discernible limits" in the Antiquities Act could draw upon a well-trodden body of law distinguishing legislative standards to a federal agency that translate into reviewable action from those that are "committed to agency discretion" under the APA, U.S.C. §701(a)(2), and therefore unreviewable. There the controlling principle is that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[66] Courts have found reviewable action in statutes far less constraining than the words of the Antiquities Act.[67] The APA cases are consistent with allowing non-statutory review of the President's exercise of his Antiquities Act powers even though the reservation power uses the word "may."[68]

5. <u>There is a heightened pleading requirement for non-statutory review of the President's decision to create a national monument</u>. The pleading requirement announced by the D.C. Circuit in *Mountain States* and *Tulare County* is much more demanding that the normal pleading requirements under the Federal Rules of Civil Procedure, which even under recent Supreme Court decisions requires nothing more than "enough facts to state a claim to relief that is plausible on its face."[69]

A viable Antiquities Act claim against an overly broad designation or reserve will have to allege precisely where and why particular reserved areas do not qualify under the Antiquities Act. The complaint must "identify the improperly designated lands,"[70] must describe in detail which areas that were included in the reservation should not have been included, and where a claim is that areas within the designation "lack scientific or historical value,"[71] must support that claim with specific factual allegations. Notice pleading is not legally sufficient under the Antiquities Act, at least according to the D.C. Circuit.

6. <u>Non-statutory review is narrower than APA review—but still potent</u>. The absence of APA review of Presidential actions may or may not significantly limit non-statutory judicial scrutiny of those actions under the *ultra vires* doctrine. In *Mountain States*,[72] the D.C. Circuit described *ultra vires* judicial review as encompassing three categories of claims: constitutional claims; claims of violation of the statute under which the challenged action was taken; and claims of violation of other statutes.[73] Those three categories in fact constitute a fair proportion of all APA claims, although omitting the "arbitrary and capricious" review[74] and the suite of "failure to explain adequately" arguments permitted under *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*[75] While there is no requirement for the agency to produce an administrative record for non-statutory review, and the legal standard to be applied by the court is not clear, these factors do not clearly favor either side.

7. <u>A second alternative to APA review may be available</u>. Another way to overcome an APA bar to a claim against the President is for a proclamation opponent to violate the terms of a proclamation, force the government to file criminal charges, and invoke the illegality of the proclamation decision as a defense to the criminal charges. In fact, this is precisely the way that two of the reported Antiquities Act cases—*Cameron v. United States*[76] and *Cappaert v. United States*[77]—reached court. Challenging the validity of a statute or act underlying a criminal charge is a permissible defense for a criminal defendant.[78] No congressional authorization is required to challenge the validity of a statute or act in this manner.

8. <u>Non-reviewability is not the same as legality</u>. Even where the absence of APA review (or non-statutory review) may bar a claim, that bar should not be confused with a finding that the challenged action is lawful. From a judge's standpoint, a jurisdictional dismissal resolves a claim as well as a merits decision, but from the public's standpoint, there is (or should be) a fundamental difference between a court ruling that it cannot decide a claim and a court ruling that the claim has no legal merit. A jurisdictional dismissal may simply allow unlawful action to continue because the courts have no power to stop it.

9. <u>A claim that an Antiquities Act proclamation violates another federal statute requires a determination of what the President's duties are under that statute, an area of law that remains largely unexplored</u>. Perhaps the most profound and still unresolved question raised by Antiquities Act litigation is the relationship between presidential power and statutory authority that Congress assigned to an executive branch agency or officer. Does a statutory directive to "the Secretary" to perform or avoid

an act (a common statutory phrase) apply to the President? If the President cannot perform an act assigned to "the Secretary," or compel the Secretary to perform that act in a particular manner, how can the President perform his constitutionally-mandated duty in Art. II, Sec. 3, Cl. 4 to "take care that the laws be faithfully executed," and who is responsible for seeing that the Secretary faithfully executes the laws? Conversely, if the Secretary's duties automatically apply to the President, can the President order the Secretary to violate one federal statute in order to implement another federal statute (or for any other reason)?

The D.C. Circuit offered a partial answer in a case considered seminal in the development of law under the Freedom of Information Act (FOIA)[79]: *Soucie v. David*.[80] The court addressed the situation where the President, who by statute is not subject to FOIA, had directed an inferior official, who was subject to the law, not to release a Report that FOIA required to be released.

> [C]ourts have power to compel subordinate executive officials to disobey illegal Presidential commands. If nondisclosure of the . . . Report is not supported by a statutory exemption or a constitutional executive privilege, the Freedom of Information Act requires issuance of an injunction to compel the [Office of Science and Technology (OST)] to release the Report, whether the refusal to disclose is attributable to the OST or to the President.[81]

Under this rule, the President cannot order an agency official to violate a statute. The President is not above the law, even if the President is exempt from the law.

These questions relate specifically to the interplay of the Antiquities Act, enacted in 1906, and the various environmental laws (e.g., NEPA, FLPMA, NFMA, the Wilderness Act, Clean Water Act) that have been the source of a statutory violation claim in an Antiquities Act case. A later-enacted statute can impliedly amend an earlier statute, but only if the two laws "are in 'irreconcilable conflict,'" and Congress' intention to do so is "clear and manifest."[82] Absent such a clear conflict, the later-enacted statute should be construed to operate in harmony with the earlier law.[83] Without implied repeal, a later-enacted law cannot alter an existing statutory mandate to take an action if specified criteria are met. Yet a later-enacted law can permissibly add additional requirements to a statute that merely specifies minimum criteria for the action,[84] so that both statutes have effect.[85]

In this case, the Antiquities Act sets two minimum criteria (presence of certain "objects" and reserves established as small as possible) for the designation of a national monument, but does not require the President to create a monument if the two statutory criteria are met. Nothing prohibits the President from conducting an environmental review before making his decision. Thus, the President could comply, for example, with both NEPA and the Antiquities Act simply by preparing a legally adequate environmental impact statement before making a monument proclamation. The President could also comply with NFMA, FLPMA, and the Wilderness Act by following the procedural and substantive direction of those laws before exercising Antiquities Act authority.

It is true, as noted above, that NEPA compliance is not required before an agency complies with an order from the President because the agency has no discretion to disregard the Presidential order and the environmental review has no purpose.[86] But that doctrine does not excuse the President from complying with procedural or substantive environmental laws before making a decision or issuing an order to an agency. Where a statute imposes such a duty on the President, and performing that duty is not inconsistent with an earlier statute authorizing the decision or order, the President must comply with both laws.

So the issue becomes one of discerning what burdens a particular statute imposes on the President, and how those burdens interact with the President's Antiquities Act powers. An initial consideration of these questions for the relevant statutes yields some tentative observations:

1. NEPA. Title 42 U.S.C. §4332(1) states: "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . . ." This direction, which applies to the Antiquities Act as one of the "public laws of the United States," extends to the President. In contrast, 42 U.S.C. §4332(2) imposes specific environmental review duties on "all agencies of the Federal Government"—a formulation that has been interpreted to exclude the President. Thus, NEPA could reasonably be construed not to impose specific EIS-writing obligations on the President, but to require the President to interpret and administer the Antiquities Act in accordance with NEPA's policies.[87]

2. Wilderness Act. The Wilderness Act contains three categories of direction: to the world at large;[88] to the agencies responsible for managing the designated areas;[89] and to the President.[90] Further, the statute specifically directs that it "shall in no manner lower the standards evolved for the use and preservation of such park, monument, or other unit of the national park system" in accordance with a set of enumerated statutes including the Antiquities Act.[91]

Plainly the Wilderness Act applies to national monuments, and just as plainly the Wilderness Act is not permitted to "lower the standards" developed at the national monuments under the Antiquities Act. That duty applies to the President, which requires the President to determine and understand what the existing "standards" are at each national monument so as to assure no "lowering" of those standards. By expressly forbidding "lowering the standards" set under the Antiquities Act, the statute impliedly allows the Wilderness Act to modify any other duty under the Antiquities Act (i.e., allowing a power project that is not currently permitted if the President determines the power project will not "lower the standards" at the monument). So to some extent the President is required to follow both the Antiquities Act and the Wilderness Act, and to that extent the Wilderness Act impliedly amends the Antiquities Act. This could create a situation where a national monument is proclaimed with use conditions that conflict with the Wilderness Act, either by allowing activities barred by that Act or by barring activities allowed by that Act (e.g., a

power project previously approved by the President himself). A non-statutory claim against the President should be available to remedy a Wilderness Act violation resulting from a national monument designation.[92]

3. NFMA. The NFMA imposes its duties on the Secretary of Agriculture. However, 16 U.S.C. §1606 (a) imposes on the President the duty to submit an annual "Statement of Policy" for Forest Services lands to Congress along with its annual budget request, and thereafter to "carry out programs" under the Statement of Policy.

4. FLPMA. FLPMA imposes its duties principally on the Secretary of Interior but in some cases on the Secretary of Agriculture. The President's only duty is to submit wilderness recommendations to Congress.[93]

These two statutes can be considered together, as they have similar structures and purposes. In NFMA and FLPMA Congress has given the Secretaries of Interior and Agriculture statutory authority to implement land management programs. The relationship between a cabinet secretary and the President is not generally spelled out in any statute; rather, it seems to derive inferentially from Art. II, Sec. 1, Cl. 1's statement that: "The Executive Power shall be vested in a President of the United States of America," and from the President's duty in Art. II, Sec. 3, Cl. 4 to "take care that the laws be faithfully executed." Secretaries work for the President, who can give them orders and fire them if they fail to follow those orders, and reassign their duties to another department or official if he decides to do so.[94] The President can delegate his authority to the Secretaries, but remains responsible for their conduct.[95] It would seem natural that the President can tell the Secretaries how to perform the duties assigned to them by Congress (executive power is vested in the President, not any subordinate), or perform a duty himself if he deems it necessary. Yet to perform certain statutory duties the Secretaries must comply with procedural and substantive requirements under NFMA or FLPMA. If the President is not required to comply with those same requirements before acting, then the President could allow his Secretaries to evade the land management and environmental laws simply by taking decision-making authority from the Secretaries and making the decisions himself. Under the Antiquities Act, one court has held that the President's authority to include management restrictions in a monument proclamation arises from FLPMA, necessarily implying that FLPMA grants power to the President, although it purports to grant authority to "the Secretary."[96]

The President-is-not-covered concept appears to be an interpretation of this complex of statutes which should be avoided if possible.[97] The President should not be able to perform an act in a procedural or substantive manner proscribed for the subordinate who is assigned the statutory duty to perform the act. Another interpretation of these laws seems necessary to avoid this problem. The logical alternative interpretation is that when NMFA, FLPMA, the Wilderness Act and other statutes assign duties to a "Secretary," those duties also apply to the President to the extent the President involves himself (either by direction or "recommendation" enforced by threat of job loss) in decisions with consequences relevant to those statutes.

5. ESA. Unlike the statutes named above, the ESA contains its own authorization for citizen suits to enforce aspects of the statute,[98] and reliance on the APA for judicial review is unnecessary. The ESA imposes some duties on agencies, e.g., the consultation requirements in 16 U.S.C. §1536(a)(2), and other duties on "any person," e.g., the prohibition on taking an endangered species in 16 U.S.C. §1538. The President is undoubtedly a person under the latter provision, and a citizen suit is available to enjoin the President from unlawfully taking an endangered species.[99] Thus, should a national monument designation threaten to take an endangered species, any citizen could sue the President to enjoin the designation on that ground.[100]

6. Clean Water Act. The Clean Water Act has a citizen suit provision similar to that in the ESA, permitting any citizen to sue "any person" who is violating any standard or order issued under that law.[101] Suit against the President appears to be permitted under this statute if a national monument designation were to cause such a violation.

Conclusion

The President is not immune from judicial review of a national monument proclamation. A court can determine if the proclamation violates the Constitution, the Antiquities Act, or another federal statute that applies directly or indirectly to the President in a manner that limits his authority under the Antiquities Act. Recent judicial decisions upholding Antiquities Act proclamations can be viewed as providing a road-map to successful prosecution of such claims, although highlighting the narrowness of the path to judicial success. Proclamation opponents should not be unduly discouraged by the results of these cases, but should instead focus on the courts' consistent acknowledgement that valid claims against a national monument proclamation can be asserted.

Endnotes

1 16 U.S.C. §§ 431-433.

2 *See* U.S. House of Representatives, Natural Resources Committee Republicans, Ranking Member Hastings Urges Democrat Majority to Embrace Transparency, Bring Resolution of Inquiry on National Monument Documents for Vote in Full House (2010) (including attached document).

3 16 U.S.C. §§ 431.

4 *See* Cong. Research Serv., Grand Staircase-Escalante National Monument, Report 98-993 (December 21, 1998); Nat'l Park Serv., National Monument Proclamations under the Antiquities Act, http://www.nps.gov/history/history/hisnps/npshistory/monuments.htm.

5 Pub. L. 96-487 (1980).

6 16 U.S.C. § 3213 (1980); Cong. Research Serv., National Monuments and the Antiquities Act, Report RL30528 (2000). An earlier controversy arose in 1943 when President Roosevelt established a national monument in the area of Jackson Hole, Wyoming in order to receive a gift of land from the Rockefeller family. Congress reacted unfavorably to the controversial decision, prohibiting any future monument designations in Wyoming without congressional approval. 16 U.S.C. §431a.

7 Cong. Research Serv., National Monument Issues, at CRS-2 (2006).

8 *Id*. at CRS-5-6.

9 Mountain States Legal Found. v. Bush, 306 F.3d 1132 (D.C. Cir. 2002), *cert. denied,* 540 U.S. 812 (2003); Tulare County v. Bush, 306 F.3d 1138 (D.C. Cir. 2002), *cert. denied,* 540 U.S. 813 (2003); Utah Ass'n of Counties v. Bush, 316 F.Supp.2d 1172 (D. Ut. 2004), *appeal dismissed*, 455 F.3d 1094 (10th Cir. 2006).

10 Cong. Research Serv., Federal Land Ownership: Current Acquisition and Disposal Authorities 1, 11 (2007).

11 43 U.S.C. §§ 1701 *et seq.*

12 16 U.S.C.§§ 1600 *et seq.*

13 42 U.S.C. § 4332 *et seq.*

14 16 U.S.C. §§1531 *et seq*.

15 16 U.S.C.A. §§ 1131 *et seq*.

16 16 U.S.C. §§1271 *et seq*.

17 33 U.S.C. §§ 1251 *et seq*.

18 Cong. Research Serv., National Monument Issues, at CRS-5-6 (2006); Cong. Research Serv., National Monuments and the Antiquities Act, Report RL30528 (2000) (President Carter's Wrangell-St. Elias National Monument proclaimed in 1978 contained 10,950,000 acres.); Utah Ass'n of Counties v. Bush, 316 F.Supp.2d 1172, 1176 (D. Ut. 2004) (Grand Staircase-Escalante monument contains 1.7 million acres.); Proclamation No. 7265, 65 Fed. Reg. 2825, 2825-26 (Jan. 18, 2000) (Grand Canyon-Parashant National Monument in Arizona comprises 1,014,000 acres of land.).

19 Many of President Clinton's monument proclamations provided that "all motorized and mechanized vehicle use off road will be prohibited, except for emergency or authorized administrative purposes." *See, e.g.*, Proclamation No. 7265, 65 Fed. Reg. 2825, 2825-26 (Jan. 18, 2000) (Grand Canyon-Parashant National Monument); Proclamation No. 7397, 66 Fed. Reg. 7354 (Jan. 22, 2001) (Sonoran Desert National Monument in Arizona comprising 486,149 acres, with the same prohibition on vehicle use); Proclamation No. 7374, 65 Fed. Reg. 69,227 (November 9, 2000) (proclaiming the Vermillion Cliffs National Monument in Arizona with 293,000 acres, with the same vehicle prohibition).

20 Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 Cornell L. Rev. 1338, 1388 (2002).

21 16 U.S.C. §431.

22 *See supra* note 4.

23 252 U.S. 450 (1920).

24 *Id*. at 455-56.

25 58 F. Supp. 890 (D. Wy. 1945).

26 *Id*. at 895-96.

27 President Truman's proclamation of the Devil's Hole national monument in 1952 triggered a legal battle twenty years later over the inclusion of water rights within the monument, with the Supreme Court determining that the proclamation included appurtenant unappropriated water within the monument area. Cappaert v. United States, 426 U.S. 128 (1976).

28 National Park Service, National Monument Proclamations under the Antiquities Act, http://www.nps.gov/history/history/hisnps/npshistory/monuments.htm.

29 Alaska v. Carter, 462 F.Supp. 1155, 1159 (D. Alaska 1978).

30 *See* note 5 at CRS-5.

31 306 F.3d 1132.

32 U.S. Const. art. IV, § 3, cl. 2.

33 Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1134 (2002).

34 *Id*. at 1136.

35 *Id*.

36 *Id*.

37 *Id*.

38 *Id*. at 1137.

39 *Id*.

40 306 F.3d 1138 (2002).

41 *Id*. at 1141-43.

42 *Id*. at 1143.

43 *Id*. at 1143-44.

44 316 F.Supp.2d 1172 (D. Utah 2004).

45 U.S. Const. art. IV, § 3, cl. 2.

46 U.S. Const. art. I, § 8, cl. 1.

47 5 U.S.C. app. 2.

48 Utah Ass'n of Counties v. Bush, 316 F.Supp.2d 1172, 1184 (D. Utah 2004).

49 *Id*. at 1194-95.

50 *Id*. at 1194.

51 *Id*. at 1200.

52 *Id*. at 1183.

53 *Id*. at 1186.

54 *Id*.

55 Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1137 (2002).

56 Dalton v. Specter, 511 U.S. 462, 470 (1994) (quoting Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992)).

57 Tulare County v. Bush, 306 F.3d 1138, 1143 (2002).

58 *Utah Ass'n of Counties*, 316 F.Supp.2d at 1188-89.

59 541 U. S. 752 (2004).

60 Another way to overcome an APA bar to a claim against the President is for proclamation opponents to shift the debate from the judicial branch to the legislative branch through proceedings for impeachment and removal. Congress can predicate impeachment on its own determination that a violation of a statute or constitutional provision has occurred; no prior judicial decision is required.

61 Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1136 (2002).

62 "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Kucana v. Holder, 130 S. Ct. 827, 838 (2010) (citation omitted). This presumption is stronger when the comparison is between two subsections of the same section. Chesnut v. Montgomery, 307 F.3d 698, 702 (8th Cir. 2002).

63 Tulare County v. Bush, 306 F.3d 1138, 1142 (2002).

64 *Id*.

65 The designation itself undoubtedly would have some impact even without a reserve insofar as federal land management agencies might feel constrained to adopt land management measures to protect a designated monument even where no reserve is created. Any opposition to such land management measures could be expressed through a legal challenge to the land management measure against the managing agency, not through a challenge to the President's Antiquities Act decision.

66 Heckler v. Chaney, 470 U.S. 821, 830 (1985).

67 Cody v. Cox, 509 F.3d 606, 610 (D.C. Cir. 2007) (holding that a "high quality and cost-effective" requirement for health care is sufficient to permit judicial review); Inova Alexandria Hosp. v. Shalala, 244 F.3d 342, 348 (4th Cir. 2001) (stating that "courts routinely conclude that judicial review is available notwithstanding statutory language that seemingly allows for unlimited discretion," and citing cases allowing review over statutory decisions involving the word "may"); Bd. of Trustees of Knox County (Ind.) Hosp. v. Sullivan, 965 F.2d 558, 562, (7th Cir. 1992), *cert. denied*, 506 U.S. 1078 (1993) (finding that the phrase in Medicare statute "deem necessary or advisable in the interest of the United States" was found to be a sufficient standard to support review).

68 The court relied on the APA "committed to agency discretion by law" cases in determining that it had authority to review a claim that federal agency action violated a prescription in a monument proclamation. W. Watersheds Project v. Bureau of Land Mgmt., 629 F. Supp. 2d at 968.

69 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (extending *Twombly* to all civil claims).

70 Tulare County v. Bush, 306 F.3d 1138, 1142 (2002).

71 *Id*.

72 Mountain States Legal Found. v. Bush, 306 F.3d 1132 (2002).

73 *Id*. at 1136. But note that the district court in *Utah Ass'n of Counties* applied a much narrower "facial-only" non-statutory review of presidential action, as had the district court in *Tulare County*, the decision reversed in the D.C. Circuit case discussed in the text.

74 "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. . . . In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

75 463 U.S. 29 (1983). In *Tulare County*, the same three judges seemed to contradict their own *Mountain States* decision, ruling that two of the statutory claims (under NFMA and NEPA) were not justiciable because the APA does not permit judicial review of presidential action. *Tulare County*, 306 F.3d at 1143. The question is not so much whether the court's interpretation of the APA is correct, but why the court even bothered to address the viability of an APA claim under those statutes when under *Mountain States* equivalent *ultra vires* review of those claims was available outside the APA. The answer may simply be that the claims pleaded in the complaint were APA claims rather than *ultra vires* claims.

76 252 U.S. 450 (1920).

77 426 U.S. 128 (1976).

78 United States v. Lopez, 514 U.S. 549 (1995).

79 5 U.S.C. §552.

80 448 F.2d 1067 (D.C. Cir. 1971).

81 *Id*. at 1072 n.12; *see* Kemet Elecs. Corp. v. Barshefsky, 976 F. Supp. 1012, 1025 (C.I.T. 1997) ("[T]he court may review Presidential action to determine if it complies with a statute and the court may order the [United States Trade Representative], as the President's trade agreement negotiating agent, and the Commissioner of Customs to comply with statutory limitations.").

82 Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) (citations and quotations omitted).

83 *Id*. at 662.

84 *Id*. at 664.

85 "[S]ubsequent statutes concerning the use and management of federal land, including FLPMA, NFMA, the Taylor Grazing Act of 1934, 43 U.S.C. § 315, NEPA, the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq. , and the Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908, do appear to place discernible limits on the President's apparent discretion to issue directives in proclamations for the use and management of federal land in national monuments created pursuant to the Antiquities Act." W. Watersheds Project v. Bureau of Land Mgmt., 629 F. Supp. 2d 951, 954-65 (D. Ariz. 2009).

86 Dep't of Transp. v. Pub. Citizen, 541 U.S. 752 (2004).

87 This was the interpretation adopted in *Alaska v. Carter*, 462 F. Supp. 1155, 1159-60 (D. Alaska 1978) ("While the declaration of policy in NEPA requires the full consideration of environmental consequences in all of the federal government's activities, 42 U.S.C. §4331, the Act limits the 'action-forcing' impact statement process to 'agencies of the Federal government'), as well as *Utah Ass'n of Counties*, 316 F. Supp. 2d 1172, 1188 (D. Utah 2004). *See* Natural Res. Def. Council, Inc. v. U.S. Dep't of State, 658 F. Supp. 2d 105, 112 (D.D.C. 2009) ("Not even the EIS requirement of NEPA applies to the President.").

88 16 U.S.C. § 1133(c) and parts of (d).

89 16 U.S.C. § 1133(b).

90 16 U.S.C. § 1133(d)(4) (pertaining to approval of water and power projects).

91 16 U.S.C. § 1133(a)(3).

92 The court so held in *Utah Ass'n of Counties,* 316 F. Supp. 2d at 1192.

93 43 U.S.C. § 1782(b).

94 5 U.S.C. §§ 901 *et seq.*

95 3 U.S.C. § 301(2).

96 W. Watersheds Project v. Bureau of Land Mgmt., 629 F. Supp. 2d 951, 956 (D. Ariz. 2009) (proclamation enforceable because it is based on statutory authority (FLPMA)).

97 Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).

98 16 U.S.C. § 1540(g).

99 16 U.S.C. § 1540(g)(1)(a).

100 The idea that a federal regulatory action could cause an unlawful take of an endangered species is not far-fetched. In *Defenders of Wildlife v. Administrator, Environmental Protection Agency*, 882 F.2d 1294, 1300-01 (8th Cir. 1989), the court held that a federal action continuing registration of a pesticide could be considered the cause of take resulting from use of the pesticide. Other courts have held that state regulatory actions that start a chain of events leading to a take of an endangered species are unlawful under the ESA. Strahan v. Coxe, 127 F.3d 155, 158, 163 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998).

101 33 U.S.C. § 1365(a).