

# District Court to Decide Whether Antiquities Designations Are Final

Federal courts are awash in lawsuits arising out of President Trump's efforts to reverse almost every environmental initiative of his predecessor. Five lawsuits arise under one of the nation's oldest environmental statutes — the 1906 Antiquities Act. The cases, now consolidated in federal district court in Washington, D.C., challenge Trump's decision to reduce the size of two national monuments in Utah, one created by President Obama and one by President Clinton.

Under the act, the president may "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the federal government to be national monuments." The law provides that the president "may reserve parcels of land as part of the national monument" while adding that the land set aside must be "the smallest area compatible with the proper care and management of the objects to be protected."

For the past 100-plus years, presidents ambitiously exercised their Antiquities Act authority, seemingly undeterred by the "smallest area" caveat. Many have designated tens, even hundreds, of millions of acres of federal land as national monuments, sometimes to protect the lands while Congress considered and passed comprehensive legislation. President Carter designated 56 million acres in Alaska prior to passage of the Alaska National Interest Lands Conservation Act.

Because Congress now passes so little legislation, designations of monuments have taken on longer-term significance. Clinton designated several million acres of national monuments out West, including the 1.8 million acre Grand Staircase-Escalante National Monument in Utah. President George

W. Bush designated 372,848,597 acres, consisting of ocean waters and 10 islands and atolls of Northern Hawaii, as protected monuments — the largest area ever under the Antiquities Act.

By contrast, Obama's use of the act was fairly modest for much of his presidency. He frequently designated areas in the hundreds of acres or less. The monuments honored places affiliated with civil rights leaders, including Harriet Tubman and Cesar Chavez. During Obama's final year as president, however, he designated several million acres as national monuments, including in late December 2016 the 1.35 million acre Bears Ears monument in Utah.

The litigation now pending in federal court challenges the decision by Trump, one year later, to reduce by 85 percent the size of Bears Ears and by one half Grand Staircase-Escalante. They are the first cases ever to involve

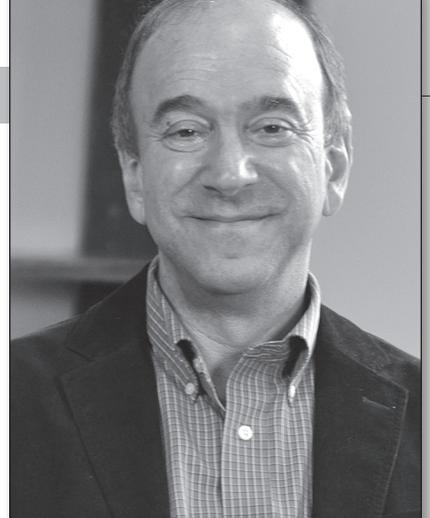
## The current office holder does not believe in irreversible presidential decisions

a presidential decision to reduce the size of a national monument.

There are nontrivial arguments on both sides. In Trump's favor, it does seem odd to suppose that one president has such unilateral, sweeping lawmaking authority that can bind all future presidents and only Congress can undo. At the very least, one is hard pressed to think of other examples of such irrevocable presidential lawmaking power binding on future White House occupants.

Nor is the current office holder someone who renders especially attractive the general notion of such irreversible presidential power. It is not hard to imagine possible designations of national monuments outside Mar-a-Lago or elsewhere that enhanced the value of the president's own holdings.

On the other hand, it is not hard to understand why Congress might have intended such a one-way ratchet favoring conservation. Conservation



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measures need such an advantage in political forums that favor short-term economic incentives. The relevant statutory language also offers meaningful support, at least by negative implication. In contrast to the Antiquities Act, which never mentions the possibility of such subsequent presidential reductions, other public land laws expressly provide for such authority.

Each side also has its not-so-persuasive makeweight argument. Those supporting Trump point out that President Woodrow Wilson reduced one monument by half, but that is of no precedential significance because it was never contested in court. Those challenging the president stress that a federal statute expressly bars the secretary of the interior from reducing a monument's size — which is bizarre because that secretary lacks power to create one — and argue the same must be true for the president. The problem of course is that the statute does not address that distinct issue.

The wild card in the avalanche of litigation triggered by this president is, of course, Trump himself. His lack of discipline, his impulsiveness, and the sustained absence of any evidence of considered judgment erode the rationale underlying the longstanding precedent that normally and appropriately supports judicial deference to exercises of presidential decisionmaking.

How to reconcile that tension is the challenge now facing judges in cases across the country. Including now in the pending Antiquities Act litigation in D.C.