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# PUBLIC LAND WITHDRAWAL POLICY AND THE ANTIQUITIES ACT

## I. INTRODUCTION

On December 1, 1978, President Carter withdrew fifty-six million acres of federal land in Alaska from the public domain.<sup>1</sup> Under the authority of section 2 of the Antiquities Act of 1906,<sup>2</sup> President Carter ordered this massive land withdrawal by presidential proclamations which created fifteen Alaska national monuments.<sup>3</sup> The unprecedented scope of this executive land withdrawal<sup>4</sup> invites an evaluation of the policy behind public land withdrawals<sup>5</sup> and the vitality of the Antiquities Act as part of that policy.

Public land withdrawal policy is of vital importance not only to Alaska, but also to the other western states containing large areas of federally owned land.<sup>6</sup> The pressures of an expanding population, an increasing

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1. See Pres. Proc. Nos. 4611-4627, 3 C.F.R. 69-104 (1979), reprinted in 92 Stat. \_\_\_\_\_ (1978).

2. 16 U.S.C. § 431 (1976).

3. President Carter's proclamations also enlarged two existing Alaska national monuments. See note 114 *infra*. It should be noted that the Alaska national monuments created by President Carter have recently been revoked by passage of the Alaska National Interest Lands Conservation Act. See note 112 *infra*.

4. Prior to President Carter's Alaska withdrawals, a total of approximately 12 million acres had been withdrawn under the Antiquities Act in 72 years. R. LEE, THE ANTIQUITIES ACT OF 1906 97 (1970).

5. "Public land" can be defined as any land or interest in land owned by the United States. See Public Land Law Review Commission Organic Act, Pub. L. No. 88-606, § 10, 78 Stat. 985 (1964) (no longer in force due to the completion of the Commission's duties). When public land is "withdrawn," its use is restricted and the land is excluded from the operation of some or all of the general land laws that authorize settlement, sale, location, or entry. See Federal Land Policy and Management Act of 1976, § 103(j), 43 U.S.C. § 1702(j) (1976).

6. The federal government owns a total of 34.1% of the United States' total land area. The heaviest concentrations of federal ownership are in the western states and Alaska as follows:

State	% of land owned by federal government
Alaska	98.5
Arizona	44.1
California	47.5
Colorado	37.3
Idaho	63.8
Montana	29.7
Nevada	87.7
New Mexico	33.2
Oregon	52.6
Utah	63.6
Washington	30.1
Wyoming	48.6

demand for land and natural resources, and a growing interest in conservation make careful land-use planning essential. Which public lands will be used to fulfill the nation's material needs and which will be withdrawn for purposes of conservation concerns not only the states that have large quantities of federal land, but all individuals who have an interest in the current debate over resource development and environmental protection. Whether the Antiquities Act is an appropriate vehicle for implementing land withdrawal policy is a question that has been of particular importance to Alaska, but it is also important to other western states that are vulnerable to executive withdrawals under the Act.<sup>7</sup>

After setting forth a brief history of public land withdrawals, this comment analyzes the current statutory public land withdrawal scheme as expressed in the Federal Land Policy and Management Act of 1976 (FLPMA)<sup>8</sup> and identifies the various policies underlying FLPMA. Next, an examination of the Antiquities Act's legislative history, judicial interpretation, and use will show that the intended scope of the Act is quite different from both its actual application by Presidents and its interpretation by courts. Evaluating the Act in light of the land withdrawal policies expressed in FLPMA, this comment will conclude that use of the Antiquities Act is so inconsistent with those policies that the Act should be repealed.

## II. PUBLIC LAND WITHDRAWAL POLICY

### A. *A History of Public Land Withdrawals*

The United States Constitution gives Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>9</sup> During the early days of the Republic, Congress delegated authority to the President to withdraw public lands for military reservations, Indian trading posts, lighthouses, and townsites.<sup>10</sup> Withdrawals of this type became so common that the validity of the President's original statutory authority was never ques-

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BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 234 (100th ed. 1979) (1978 data).

7. As recently as January 1981, land in the State of Washington was considered for withdrawal under the Antiquities Act. *Seattle Post-Intelligencer*, Jan. 6, 1981, at A1, col. 1 ("Make St. Helens a National Monument, Andrus Asks"). See notes 157 & 158 and accompanying text *infra*.

8. 43 U.S.C. §§ 1701-1782 (1976).

9. U.S. CONST. art. IV, § 3, cl. 2. See also note 14 *infra*.

10. C. WHEATLEY, *STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS* 2 (1968).

tioned.<sup>11</sup> During the later part of the nineteenth century, Congress itself began making major land withdrawals, but continued to delegate authority to the President to withdraw land for specific purposes.<sup>12</sup>

On September 27, 1909, in the absence of any statutory authority, President Taft withdrew three million acres of land in California and Wyoming from oil excavation authorized by the mining laws. In the famous case of *United States v. Midwest Oil Co.*,<sup>13</sup> the Supreme Court upheld the President's action on the basis of implied congressional acquiescence to such withdrawals.<sup>14</sup>

In 1910 Congress enacted the General Withdrawal Act (Pickett Act)<sup>15</sup> in response to continued doubt concerning the President's nonstatutory authority to make *Midwest Oil*-type withdrawals.<sup>16</sup> Under the Pickett Act, Congress delegated to the President general authority to make temporary land withdrawals that would remain in force until revoked either by the President or by Congress.<sup>17</sup> Even with passage of the Pickett Act and the Supreme Court's ruling in *Midwest Oil*, however, the scope of the President's authority to make permanent land withdrawals remained unclear. In 1942, the President delegated whatever authority he possessed to withdraw public lands to the Secretary of the Interior, who has continually made extensive land withdrawals.<sup>18</sup>

During the early 1960's, several bills designed to limit executive withdrawal authority were submitted to Congress. In response to these proposals, in 1974 Congress established the Public Land Law Review Commission (PLLRC) to study existing laws and procedures relating to the administration of public lands.<sup>19</sup> Congress accepted the PLLRC's recommendation<sup>20</sup> that legislation clarifying land withdrawal authority was nec-

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11. *Id.*

12. *Id.* at 2-3. The Antiquities Act is one of several statutes enacted during this period that delegates specific withdrawal authority to the President. Other enactments included the National Forest Act of 1891 (authorizing the President to withdraw public lands for national forests) and the Reclamation Act of 1902 (authorizing the President to make withdrawals for reclamation projects). C. WHEATLEY, *supra* note 10, at 3.

13. 236 U.S. 459 (1915).

14. *Id.* at 475. The Court expressly refused, however, to find that the President possessed power under the Constitution, independent of express or implied authorization by Congress, to withdraw public lands. *Id.* at 474.

15. Pickett Act, ch. 421, § 1, 36 Stat. 847 (1910) (repealed 1976).

16. C. WHEATLEY, *supra* note 10, at 4.

17. *Id.*

18. *Id.* at 5-6.

19. Public Land Law Review Commission Organic Act, Pub. L. No. 88-606, § 4, 78 Stat. 983 (1964) (no longer in force due to the completion of the Commission's duties).

20. Concerning land withdrawals, the PLLRC recommended that:

Congress assert its constitutional authority by enacting legislation reserving unto itself exclusive authority to withdraw or otherwise set aside public lands for specified limited-purpose uses and

essary by enacting the Federal Land Policy and Management Act of 1976 (FLPMA).<sup>21</sup>

### B. FLPMA's Public Land Withdrawal Provisions

FLPMA is a comprehensive piece of legislation aimed at modernizing the entire system of public land laws.<sup>22</sup> One of its major goals was to restore public land withdrawal authority to Congress. Section 704(a)<sup>23</sup> expressly repealed all or part of twenty-nine statutes that gave the President authority to create, modify, or terminate public land withdrawals. Furthermore, that section clearly revoked any implied executive withdrawal authority, thereby overruling *United States v. Midwest Oil Co.*<sup>24</sup>

FLPMA prohibits the executive from making any withdrawal "which

delineating specific delegation of authority to the Executive as to the types of withdrawals and set asides that may be effected without legislative action.

PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 2 (1970).

21. 43 U.S.C. §§ 1701-1782 (1976). Section 102, the congressional declaration of policy, states in part that "Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislation." *Id.* at § 1701(a)(4).

Concerning the importance of FLPMA generally, as significant public lands legislation, see *Symposium, The Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 271 (1979); *Public Land Law Symposium*, 54 DEN. L.J. 383 (1977).

22. H.R. REP. NO. 94-1163, 94th Cong., 2d Sess. 1-2 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6175, 6175-76. In recommending the enactment of FLPMA, the House committee noted:

From the beginnings of the Republic, the public lands have played a key role in the development of the economy and institutions of the United States. In directing the role that the public lands have played, the Congress has enacted thousands of public land laws. More than 3,000 remain on the books today. These laws represented and effectuated Congressional policies needed when they were passed. Many of them are still viable and applicable today under present conditions. However, in many instances they are obsolete and, in total, do not add up to a coherent expression of Congressional policies adequate for today's national goals.

*Id.*

For a complete compilation of legislative materials pertaining to FLPMA see SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, 95th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 (Comm. Print 1978).

23. FLPMA, Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976). See also H.R. REP. NO. 94-1163, 94th Cong., 2d Sess. 9 (1976), reprinted in [1976] U.S. CODE CONG. & AD NEWS 6175, 6183 ("With certain exceptions . . . [FLPMA] will repeal all existing law relating to executive authority to create, modify, and terminate withdrawals and reservations."). Four statutory provisions that delegate withdrawal authority to the executive, among which was the Antiquities Act, were intentionally deleted from § 704(a)'s list of repealed statutes. See note 71 and accompanying text *infra*. The inconsistency created by FLPMA's failure to repeal the Antiquities Act is the subject of Part IV of this comment.

24. 236 U.S. 459 (1915). Section 704(a) states: "Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (*U.S. v. Midwest Oil Co.*, 326 U.S. 459) and the following statutes and parts of statutes are repealed." FLPMA, Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976).

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can be made only by Act of Congress.”<sup>25</sup> Land withdrawals that require an act of Congress include national forests,<sup>26</sup> national parks,<sup>27</sup> national wild and scenic rivers,<sup>28</sup> national scenic trails,<sup>29</sup> national seashores,<sup>30</sup> and wilderness areas.<sup>31</sup> In addition, Congress has exclusive power to withdraw land for Indian reservations<sup>32</sup> and for certain defense purposes.<sup>33</sup> The policy underlying exclusive congressional withdrawal authority in these areas is to “insure that the integrity of the great national resource management systems will remain under the control of Congress.”<sup>34</sup>

FLPMA delegates authority to the Secretary of the Interior to make land withdrawals that do not require an act of Congress.<sup>35</sup> The delegation is limited, however, by the provisions set forth in section 204.<sup>36</sup> Under section 204(b)(1), the Secretary must give notice in the *Federal Register* within thirty days after a withdrawal is proposed by the department or

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25. FLPMA, § 204(j), 43 U.S.C. § 1714(j) (1976). The House report states that FLPMA: would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, Indian reservations, certain defense withdrawals, and withdrawals for National Wild and Scenic Rivers, National Trails, and for other “national” recreation units, such as National Recreation Areas and National Seashores. H.R. REP. NO. 94-1163, 94th Cong., 2d Sess. 9 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6175, 6183. An act of Congress is not required to withdraw land for the National Wildlife Refuge System. See 16 U.S.C. § 668dd(a)(3)(A) (1976). E.g., 45 Fed. Reg. 9,562 (1980) (public land order withdrawing land for placement in the National Wildlife Refuge System).

Section 204(j) also prohibits the Secretary from *modifying* or *revoking* (but not from *making*) any withdrawal made under the Antiquities Act or under the National Wildlife Refuge System. 43 U.S.C. § 1714(j) (1976).

26. There is no particular statutory provision requiring an act of Congress to create national forests. See 16 U.S.C. §§ 471-538 (1976). However, Congress has frequently created national forests by legislative enactment, see C. WHEATLEY, *supra* note 10, at 274, and § 704(a) of FLPMA expressly repealed the President’s statutory authority to make land withdrawals for the national forest system: See Act of June 7, 1924, ch. 348, § 9, 43 Stat. 655 (1924) (repealed in 1976 by FLPMA, Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976)). Presumably, then, it is Congress’ intention to require legislative action to withdraw any land for the national forest system. See quoted language from H.R. REP. NO. 94-1163, *supra* note 25.

27. No statutory provision clearly provides that national parks are to be created solely by act of Congress. See 16 U.S.C. §§ 1-20g (1976). However, Congress’ exclusive authority to create national parks is well established. C. WHEATLEY, *supra* note 10, at 2 & 258-59.

28. See 16 U.S.C. § 1273 (1976).

29. See 16 U.S.C. § 1244 (1976).

30. There is no statute vesting exclusive power to create national seashore recreational areas in Congress. However, all existing national seashores have been created exclusively by Congress. See 16 U.S.C. §§ 459-459(j) (1976).

31. See 16 U.S.C. § 1131 (1976).

32. See 43 U.S.C. § 150 (1976).

33. See 43 U.S.C. §§ 155-158 (1976).

34. H.R. REP. NO. 94-1163, 94th Cong., 2d Sess. 9 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6175, 6183.

35. FLPMA, §§ 204(a), (j), 43 U.S.C. §§ 1714(a), (j) (1976).

36. 43 U.S.C. § 1714 (1976).

requested by application.<sup>37</sup> This notice must specify the proposed withdrawal and the extent to which the land will be "segregated"<sup>38</sup> while the withdrawal is under consideration.<sup>39</sup> In addition, the Secretary must provide an opportunity for a public hearing before a withdrawal can become effective.<sup>40</sup>

Section 204(c)<sup>41</sup> provides for congressional review of any land withdrawal by the Secretary of 5,000 acres or more. The Secretary must notify both Houses of Congress of the withdrawal, and furnish information on the land withdrawn, no later than the withdrawal's effective date.<sup>42</sup> Congress then has ninety days to veto the Secretary's action by adopting "a concurrent resolution stating that such House does not approve the withdrawal."<sup>43</sup> Consideration of a veto can be expedited if the committee to which the resolution has been referred has not reported it out at the end of thirty days.<sup>44</sup> If Congress fails to veto the withdrawal, it remains effective for twenty years<sup>45</sup> and can be terminated sooner only by an act of Congress.

FLPMA does not provide congressional review of land withdrawals of less than 5,000 acres,<sup>46</sup> but the Secretary must still comply with the notice and hearing procedures.<sup>47</sup> If tracts of this size are withdrawn for "a

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37. 43 U.S.C. § 1714(b)(1) (1976).

38. The Secretary has the authority to segregate or exempt land from the normal operative land laws while a land withdrawal is pending. Segregation becomes effective at the time of publication and can last up to two years if not made inoperative sooner by rejection or completion of the proposed withdrawal. 43 U.S.C. § 1714(b)(1) (1976).

39. *Id.*

40. FLPMA, § 204(h), 43 U.S.C. § 1714(h) (1976).

41. 43 U.S.C. § 1714(c) (1976).

42. *Id.*

43. FLPMA, § 204(c)(1), 43 U.S.C. § 1714(c)(1) (1976). This provision is ambiguous as to whether both houses must adopt a resolution to veto the withdrawal or whether a resolution by one house is sufficient. See Wheatley, *Withdrawals Under the Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 311, 322-23 (1979). One commentator concludes that a concurrent resolution must be adopted by *both* houses of Congress to effectively veto the Secretary's withdrawal. *Id.* But see H. CONF. REP. NO. 94-1724, 94th Cong., 2d Sess. 59 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6228, 6230 (referring to the "one-House veto provision"). It should be noted that the constitutionality of such legislative veto provisions is questionable, but a full discussion of this issue is beyond the scope of this comment. See generally Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423 (1978).

44. The provision for expedition allows a motion for discharge to be made by an individual in favor of vetoing the withdrawal. If the motion to discharge is passed, the resolution comes to the floor and a motion to adopt a resolution disapproving the Secretary's withdrawal is properly before the entire house. FLPMA, § 204(c)(1), 43 U.S.C. § 1714(c)(1) (1976).

45. *Id.*

46. FLPMA, § 204(d), 43 U.S.C. § 1714(d) (1976).

47. See FLPMA, §§ 204(b)(1), (h), 43 U.S.C. §§ 1714(b)(1), (h) (1976).

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resource use,”<sup>48</sup> the Secretary has unlimited discretion in determining the duration of the withdrawal;<sup>49</sup> withdrawals for any other use are limited to twenty years.<sup>50</sup> If the withdrawal is to preserve a tract for a specific use then under consideration by Congress, the maximum duration is five years.<sup>51</sup>

Finally, section 204(e)<sup>52</sup> sets forth a separate withdrawal procedure to be followed if “an emergency situation exists and . . . extraordinary measures must be taken to preserve values that would otherwise be lost.” Emergencies can be declared either by the Secretary or the Committee on Interior and Insular Affairs of either the House or the Senate.<sup>53</sup> Emergency withdrawals are excluded from both the notice and the hearing provisions, are effective immediately, and are not reviewable by Congress.<sup>54</sup> Even though Congress has no power to veto an emergency withdrawal, within three months after the land has been withdrawn the Secretary must furnish to Congress the same information that is required in the review process for tracts exceeding 5,000 acres.<sup>55</sup> Emergency withdrawals have a limited duration of three years and may only be extended by giving the notice required by section 204(b)(1) and by becoming subject to the congressional veto provision if the withdrawal contains 5,000 acres or more.<sup>56</sup>

Section 204(f)<sup>57</sup> provides that all withdrawals having a limited duration, whether made before or after FLPMA’s effective date, must be re-

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48. A “resource use” is not defined in the Act, but seems to refer to natural resource use as well as recreational use and use through preservation of scenic value. See Wheatley, *supra* note 43, at 324.

49. FLPMA, § 204(d)(1), 43 U.S.C. § 1714(d)(1) (1976).

50. FLPMA, § 204(d)(2), 43 U.S.C. § 1714(d)(2) (1976). Examples of land withdrawals that are limited to 20 years include lands used for administrative sites, location of facilities, and other proprietary purposes. *Id.*

51. FLPMA, § 204(d)(3), 43 U.S.C. § 1714(d)(3) (1976).

52. 43 U.S.C. § 1714(e) (1976).

53. FLPMA, § 204(e), 43 U.S.C. § 1714(e) (1976). Even if the Secretary does not agree with the committee’s declaration of an emergency, he must make the withdrawal. Section 204(e) states: “When the Secretary determines, or when the Committee on Interior and Insular Affairs of either the House of Representatives or the Senate notifies the Secretary . . . the Secretary . . . shall immediately make a withdrawal . . . .” *Id.* (emphasis added).

One commentator has taken a different interpretation of § 204(e), finding that a determination of an emergency situation by either committee does not make withdrawal by the Secretary mandatory but acts only as a strong recommendation. Wheatley, *supra* note 43, at 321. See also *Alaska v. Carter*, 462 F. Supp. 1155, 1158 & n.5 (D. Alaska 1978).

54. FLPMA, § 204(e), 43 U.S.C. § 1714(e) (1976). Notice of the emergency withdrawal must, however, be filed immediately with the Committee on Interior and Insular Affairs in both houses. *Id.* It is unclear whether this notice is required when the committee itself has compelled the emergency withdrawal. See note 53 and accompanying text *supra*.

55. FLPMA, § 204(e), 43 U.S.C. § 1714(e) (1976).

56. *Id.* A public hearing, however, is not required to extend an emergency withdrawal. See *id.*

57. 43 U.S.C. § 1714(f) (1976).



viewed by the Secretary toward the end of the withdrawal period. Renewals of withdrawals of 5,000 acres or more are subject to congressional veto but do not require a repeat of the public notice and hearing procedure.<sup>58</sup> The remaining provisions of section 204 deal with the statute's retroactive effect on pending withdrawal applications<sup>59</sup> and on existing land withdrawals.<sup>60</sup>

### C. Congressional Policy Underlying FLPMA

The substantive provisions of section 204 serve five general congressional policies.<sup>61</sup>

*Policy 1: Congress shall make and implement land withdrawal policy.* By repealing twenty-nine statutes that delegated withdrawal authority to the executive and by overruling the implied delegation of *United States v. Midwest Oil Co.*, Congress clearly declared its intention to make and implement land withdrawal policy. Congressional control over land withdrawal policy was envisioned by the framers of the Constitution.<sup>62</sup> Moreover, congressional control will lead to stable and consistent national planning.<sup>63</sup> In addition, policy developed by Congress is likely to be more responsive to the public interest because members of Congress are more accountable to the electorate than are officials in the executive branch.<sup>64</sup>

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58. *Id.*

59. Section 204(g) deals with procedures for processing applications that existed at the time of the statute's enactment. 43 U.S.C. § 1714(g) (1976). Section 204(k) appropriates money to process those pending applications. 43 U.S.C. § 1714(k) (1976).

60. Section 204(1) provides for review of existing land withdrawals in certain enumerated western states. 43 U.S.C. § 1714(1) (1976).

61. Express statements by Congress on the policies behind the provisions of § 204 are lacking. However, in enacting FLPMA Congress relied heavily on the report of the Public Land Law Review Commission, which made recommendations for changes in the land withdrawal system and stated the accompanying policies. *See PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND* (1970).

62. *See* note 9 and accompanying text *supra*.

63. The House report on FLPMA states: "The Executive Branch of the Government has tended to fill in missing gaps in the law, not always in a manner consistent with a system balanced in the best interests of all the people. A major weakness which has arisen under these circumstances is instability of national policies." H.R. REP. NO. 94-1163, 94th Cong., 2d Sess. 1 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6175, 6175. *See also* Wheatley, *supra* note 43, at 327. In its report the PLLRC also noted the negative affect of executive withdrawals on stable planning: "The . . . study of withdrawals indicates that they have been used by the Executive in an uncontrolled and haphazard manner." *PUBLIC LAND LAW REVIEW COMMISSION, supra* note 61, at 43 (footnote omitted). *See generally* C. WHEATLEY, *supra* note 10, at 492-93.

64. Although the President is normally accountable to the public, it is not uncommon for lame duck Presidents to make major land withdrawals. *See* note 134 and accompanying text *infra*. Moreover, officials in unresponsive administrative positions are typically the ones who make land with-

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*Policy 2: In order to effectively make and implement land withdrawal policy, Congress shall have the exclusive authority to make, modify, or revoke land withdrawals that are part of the primary resource management systems.* Congress reserved for itself sole authority to create national forests, national parks, national wild and scenic rivers, national trails, national seashores, and wilderness areas. Withdrawals made for these management systems generally cover large areas and are restricted to a single use or to compatible multiple uses. Congressional control over these significant withdrawals is essential if Congress is to effectively make and implement its policy and planning.<sup>65</sup>

*Policy 3: Congress shall delegate authority to the executive to make land withdrawals that are not part of the primary resource management systems; however, to ensure that Congress retains control over comprehensive land withdrawal policy and its implementation, executive withdrawals over 5,000 acres shall be subject to congressional review and veto.* Land withdrawals that are not part of the primary resource management systems are generally smaller and accompanied by less restrictive use provisions. Because these withdrawals have a less significant impact on comprehensive planning, it is administratively efficient to allow the executive to study and initiate such withdrawals.<sup>66</sup> Congress' power to review and veto any non-emergency withdrawal as small as 5,000 acres<sup>67</sup>

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drawal decisions. As decision-makers, members of Congress are directly accountable to their constituents. *See also* PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 61, at 2.

65. The PLLRC recommended congressional control over all significant land withdrawals, including those listed in the text: “[L]arge scale limited or single use withdrawals of a permanent or indefinite term should be accomplished only by act of Congress.” PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 61, at 54. The PLLRC also recommended that Congress be given exclusive authority to create national monuments, national historic sites, national recreation areas, national wildlife refuges, and other areas set aside for preservation or protection of natural phenomena or wildlife. *Id.*

The House report on the National Wilderness Preservation System Act of 1964, 16 U.S.C. §§ 1131–1136 (1976), also noted the policies behind congressional control of the major land conservation systems:

A statutory framework for the preservation of wilderness would permit long-range planning and assure that no future administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or make wholesale designations of additional areas in which use would be limited.

H. R. REP. NO. 1538, 88th Cong., 2d Sess. 8 (1964), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 3615, 3616–17.

66. *See* C. WHEATLEY, *supra* note 10, at 494.

67. Several members of Congress objected to congressional review of withdrawals as small as 5,000 acres, noting that 5,000 acres is very insignificant judging by land management standards in Alaska and the western states where most of the public lands are located. *See, e.g.*, 122 CONG. REC. 23,438 (1976), (remarks of Rep. Mink). However, in spite of suggestions to increase the acreage threshold on non-reviewable withdrawals to 50,000 acres, *see id.* (amendment to the House bill offered by Rep. Mink), Congress adopted the low 5,000-acre provision.

allows it to monitor any executive decision that could possibly affect the overall congressional plan.<sup>68</sup>

*Policy 4: To ensure full consideration of competing interests in the executive decision-making process, all non-emergency executive withdrawals shall be accompanied by procedural protections.* Congress' requirement of notice and a hearing for non-emergency executive withdrawals ensures public participation in the decision-making process.<sup>69</sup> At a minimum, public participation is necessary so that citizens will feel that their views have been heard. Ordinarily, hearings will also produce information that will aid in better, more rational decisions. In addition, because land withdrawals may have a substantial impact on individuals actually using the designated land, procedural protection may be essential as a matter of constitutional right.<sup>70</sup>

*Policy 5: If emergency land withdrawals are necessary, some congressional control shall be sacrificed to allow immediate action.* Congress realized that the executive branch is better equipped to take emergency measures than the legislative. Therefore, it enacted FLPMA's emergency withdrawal provision as an escape valve through which the executive can withdraw lands that require immediate protection without compliance with cumbersome procedures. Although the executive is given broad authority in this area, Congress retained some control over emergency actions by establishing a three-year durational limit on such withdrawals. FLPMA's emergency provision thus effectively balances the need for immediate protection with the policy of congressional control over land withdrawal decisions.

Although FLPMA repealed all or part of twenty-nine statutes that delegated public land withdrawal authority to the President, section 2 of the Antiquities Act was absent from FLPMA's list of repealed statutes. In a single sentence, without any explanation, the House report states that the

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68. The provision of FLPMA requiring the Secretary to submit to Congress detailed factual information on the proposed withdrawal is especially designed to enable Congress to evaluate the proposed withdrawal in light of basic policy objectives. Wheatley, *supra* note 43, at 323.

69. The PLLRC made the following finding:

Based on our study, however, we find that, generally, areas set aside by executive action as national forests, national monuments, and for other purposes have not had adequate study and there has not been proper consultation with people affected or with the units of local government in the vicinity, particularly as to precise boundaries.

PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 61, at 1. Furthermore, the PLLRC stated:

We believe that the expression of multiple views and interests and their impact on Federal land use plans is fundamental to a democratic and meaningful planning process. It is essential to provide a direct avenue for citizen participation in the planning process, through the use of both public hearings and citizen advisory boards.

*Id.* at 57.

70. See notes 144-49 and accompanying text *infra*.

## The Antiquities Act

Antiquities Act is an exception to FLPMA's sweeping repeal of executive authority.<sup>71</sup> This exception seems unwarranted given the comprehensiveness of FLPMA's withdrawal provision and Congress' clear intent to control land withdrawal decisions. Moreover, as this comment will discuss,<sup>72</sup> the Antiquities Act conflicts badly with the five general policies underlying FLPMA. Before any comparison can be made, however, the history and interpretation of the Antiquities Act must be more closely examined.

### III. THE ANTIQUITIES ACT

#### A. *The Antiquities Act and Its Legislative History*

Section 2 of the Antiquities Act of 1906<sup>73</sup> delegates broad authority to the President to create national monuments:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.<sup>74</sup>

It is quite clear that the original purpose of the Antiquities Act, as its name suggests, was to protect objects of antiquity.<sup>75</sup> The substance of the Act was developed over a period of six and a half years in response to

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71. H.R. REP. NO. 94-1163, 94th Cong., 2d Sess. 29 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6175, 6203. The House report states:

The main authority used by the Executive to make withdrawals is the "implied" authority of the President recognized by the Supreme Court in *U.S. v. Midwest Oil Co.* (236 U.S. 459). The bill would repeal this authority and, with certain exceptions, all identified withdrawal authority granted to the President or the Secretary of the Interior. *The exceptions, which are not repealed, are contained in the Antiquities Act (national monuments), Alaska Native Claims Settlement Act (native and public-interest withdrawals), the Defense Withdrawal Act of 1958, and Taylor Grazing Act (grazing districts).*

*Id.* (emphasis added).

72. See Part IV *infra*.

73. 16 U.S.C. § 431 (1976). In referring to the Antiquities Act throughout this comment, the author is referring only to § 2 of the Act. The Antiquities Act also contains two other sections, see note 75 *infra*, but these provisions do not deal with public land withdrawal.

74. 16 U.S.C. § 431 (1976).

75. "Antiquities" are defined as "relics of monuments of ancient times." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961). See H.R. REP. NO. 2224, 59th Cong., 1st Sess. 1-8 (1906); S. REP. NO. 3797, 59th Cong., 1st Sess. 1 (1906).

Consideration of the three sections of the Antiquities Act *in pari materia* also compels the conclusion that the purpose of the Act was to protect objects of antiquity. Section 1 imposes a fine or possible imprisonment on a person who "shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity . . ." Antiquities Act of 1906, ch.

lobbying by archeological organizations.<sup>76</sup> Although the archeologists limited the scope of their proposals to preservation of aboriginal antiquities located on federal lands,<sup>77</sup> the Department of Interior repeatedly proposed adding scenic and scientific resources as objects worthy of protection.<sup>78</sup> For six years Congress rejected attempts to include this broad executive authority in any antiquities legislation.<sup>79</sup> Congress was unable to pass the more limited archeologists' proposals, however, because of bureaucratic delays and disagreements between museums and universities seeking authority to excavate ruins on public lands.<sup>80</sup>

The bill finally enacted in 1906 was drafted by Edgar Lee Hewett, a prominent archeologist.<sup>81</sup> Hewett was concerned primarily with protecting prehistoric antiquities, but, at some point, he was persuaded by government officials to broaden his draft to include the phrase "other objects of historic or scientific interest."<sup>82</sup> This clause allowed the broad delegation originally proposed by the Department of Interior, and previously rejected by Congress, to slip back into the bill. Moreover, while earlier proposals limited reservations to 320 and 640 acres,<sup>83</sup> Hewett's draft allowed the limits of national monuments to be set according to "the smallest area compatible with the proper care and management of the objects to be protected."<sup>84</sup> Despite the presence of this broad language in the Act, Congress nevertheless intended to limit the creation of national monuments to small reservations surrounding specific "objects."<sup>85</sup>

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3060, § 1, 34 Stat. 225 (1906) (current version at 16 U.S.C. § 433 (1976)). Section 3 allows for permits for "the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity . . . ." Antiquities Act of 1906, ch. 3060, § 3, 34 Stat. 225 (1906) (current version at 16 U.S.C. § 432 (1976)).

76. See generally R. LEE, THE ANTIQUITIES ACT OF 1906 47-77 (1970).

77. *Id.* at 59-62.

78. *Id.* at 52-55, 66 n.109.

79. *Id.* at 55-56, 67.

80. *Id.* at 60-64.

81. *Id.* at 70-73.

82. *Id.* at 74.

83. *Id.* at 56, 66-67, 75.

84. *Id.* at 73, 75.

85. The House report states:

There are scattered throughout the Southwest quite a large number of very interesting ruins. Many of these ruins are upon the public lands, and the most of them are upon lands of but little present value. The bill proposes to create *small* reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting *relics* of prehistoric times.

H.R. REP. NO. 2224, 59th Cong., 1st Sess. 1 (1906) (emphasis added).

Shortly after the Antiquities Act was signed into law, Congress passed a bill which created Mesa Verde National Park. Act of June 29, 1906, ch. 3607, §§ 1-2, 34 Stat. 616 (1906) (current version at 16 U.S.C. §§ 111-112 (1976)). This bill was enacted to protect spectacular cliff dwellings in Colorado and covered a land area of 216,960 acres. R. LEE, *supra* note 76, at 78-80. One commentator has speculated that Mesa Verde may have been given special treatment as a national park, instead of

## The Antiquities Act

### *B. Executive Withdrawals Made Under the Authority of the Antiquities Act*

Notwithstanding the original purpose of the Antiquities Act, the language of the statute was sufficiently broad and ambiguous to allow, and indeed to encourage, broad statutory construction by Presidents. Since 1906, Presidents have used the “other objects of historic or scientific interest” clause to expand the Act’s scope, making broad land withdrawals for scenic and general conservation purposes.

#### *1. Antiquities Act Withdrawals Prior to 1978*

Prior to President Carter’s withdrawal of Alaska lands, eleven Presidents had created eighty-eight national monuments under the authority of the Antiquities Act.<sup>86</sup> Of these, only thirty-seven can be classified as

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being scheduled for preservation as a national monument under the Antiquities Act, because the proposed area may have been thought to be too large to be made a national monument. *Id.* at 81.

Nothing in the Act authorizes the creation of national monuments for scenic purposes or for general purposes of land conservation. Indeed, at the first National Park Conference, held at Yellowstone National Park in 1911, Frank Bond, Chief Clerk of the General Land Office, made the following statement concerning national monuments:

I have at times been somewhat embarrassed by requests of patriotic and public-spirited citizens who have strongly supported applications to create national monuments out of scenery alone . . . . The terms of the monument act [the Antiquities Act] do not specify scenery, nor remotely refer to scenery as a possible *raison d’être* for a public reservation.

R. LEE, *supra* note 76, at 109, quoting F. Bond, *The Administration of National Monuments*, in *Proceedings of the National Park Conference held at Yellowstone National Park, September 11 and 12, 1911, 80–81 (1912)*.

86. Years	President	# of monuments created
1906–09	T. Roosevelt	18
1909–11	Taft	10
1913–19	Wilson	13
1922–23	Harding	8
1923–25	Coolidge	13
1929–33	Hoover	9
1933–43	F. Roosevelt	11
1943	Truman	1
1956–61	Eisenhower	2
1961	Kennedy	2
1969	Johnson	1

Data compiled from tables in R. LEE, *supra* note 76, at 94–95 with two corrections supplied by the author. See also 16 U.S.C.A. § 431 (1974). The above compilation includes only national monuments created by the President. However, Presidents have also been quite liberal in withdrawing land under the Antiquities Act for the purpose of adding to existing national monuments. See, e.g., Pres. Proc. No. 2372, 3 C.F.R. 134 (1938–1943 Compilation), reprinted in 54 Stat. 2669 (1939) (addition of 2,760 acres to Black Canyon of the Gunnison National Monument by President Franklin Roosevelt).

“historic.”<sup>87</sup> Acreage withdrawn has ranged from less than one acre to create Cabrillo National Monument<sup>88</sup> to 1,882,998 acres to create Death Valley National Monument.<sup>89</sup> Some of the presidential proclamations creating national monuments specifically described the nature of the “object” provoking the withdrawal;<sup>90</sup> other proclamations referred only generally to “unusual features of scenic, scientific, and educational interest.”<sup>91</sup>

President Theodore Roosevelt, the first President to exercise his authority under the Act, set a precedent for creating both large monuments<sup>92</sup> and purely “scientific” monuments.<sup>93</sup> Presidents Taft,<sup>94</sup> Wilson,<sup>95</sup> Harding,<sup>96</sup> Coolidge,<sup>97</sup> Hoover,<sup>98</sup> Franklin Roosevelt,<sup>99</sup> and Lyndon Johnson<sup>100</sup> followed this precedent. There is little doubt that the scope of these withdrawals is much wider than the framers of the Act originally intended.

Use of the Antiquities Act slowed measurably in 1943 after President Franklin Roosevelt created Jackson Hole National Monument.<sup>101</sup> The

87. R. LEE, *supra* note 76, at 94–95, with an addition supplied by the author. National monuments can generally be classified as “historic” if the land withdrawn contains historic landmarks or objects of antiquity, or as “scientific” if the land contains no object of historical value and appears to have been withdrawn under the Act’s “other objects of historic or scientific interest” clause. *See, e.g.*, R. Lee, *supra* note 76, at 94–95.

88. Pres. Proc. No. 1255, 38 Stat. 1965 (1913).

89. Pres. Proc. No. 2027, 47 Stat. 2554 (1933); R. LEE, *supra* note 76, at 102.

90. *See, e.g.*, Pres. Proc. No. 2860, 3 C.F.R. 34 (1949–1953 Compilation), *reprinted in* 64 Stat. A371 (1949) (Effigy Mounds National Monument, Iowa).

91. *See, e.g.*, Pres. Proc. No. 2027, 47 Stat. 2554 (1933) (Death Valley National Monument, California).

92. President Roosevelt withdrew 818,560 acres in early 1908 to create the Grand Canyon National Monument. Pres. Proc. No. [unavailable], 35 Stat. 2175 (1908); R. LEE, *supra* note 76, at 90.

93. President Roosevelt’s first Antiquities Act withdrawal contained 1,153 acres surrounding “the lofty and isolated rock” known as Devils Tower and is properly classified as a “scientific” national monument. Pres. Proc. No. 658, 34 Stat. 3236 (1906).

94. Pres. Proc. No. 1126, 37 Stat. 1681 (1911) (Colorado National Monument, Colorado) (13,883 acres).

95. Pres. Proc. No. 1487, 40 Stat. 1855 (1918) (Katmai National Monument, Alaska) (1,088,000 acres).

96. Pres. Proc. No. [unavailable], 43 Stat. 1914 (1923) (Bryce Canyon National Monument, Utah) (7,440 acres).

97. Pres. Proc. No. 1733, 43 Stat. 1988 (1925) (Glacier Bay National Monument, Alaska) (1,164,800 acres).

98. Pres. Proc. No. 2027, 47 Stat. 2554 (1933) (Death Valley National Monument, California) (1,882,998 acres). *See* R. LEE, *supra* note 76, at 102.

99. Pres. Proc. No. 2193, 3 C.F.R. 36 (1936–1938 Compilation), *reprinted in* 50 Stat. 1760 (1936) (Joshua Tree National Monument, California) (825,340 acres).

100. Pres. Proc. No. 3889, 3 C.F.R. 390 (1966–1970 Compilation), *reprinted in* 83 Stat. 924 (1969) (Marble Canyon National Monument, Arizona) (26,080 acres).

101. Pres. Proc. No. 2578, 3 C.F.R. 327 (1938–1943 Compilation), *reprinted in* 57 Stat. 731 (1943). Jackson Hole National Monument contained 221,610 acres. H.R. REP. NO. 2910, 81st Cong., 2d Sess. 2 (1950), *reprinted in* [1950] U.S. CODE CONG. & AD. NEWS 3746, 3747.

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Jackson Hole withdrawal was bitterly opposed both in Wyoming and in Congress<sup>102</sup> and was the subject of important litigation on the scope of the President's power under the Act.<sup>103</sup> Except for Effigy Mounds National Monument,<sup>104</sup> which was created from donated land, no significant additional monuments were proclaimed for the next eighteen years.<sup>105</sup>

In 1961, just two days before leaving office, President Eisenhower proclaimed the Chesapeake and Ohio Canal National Monument.<sup>106</sup> This withdrawal revived strong opposition to the Antiquities Act, but Congress took no action to restrict the President's power.<sup>107</sup> Except for two low-acreage withdrawals made by President Kennedy,<sup>108</sup> no national monuments were established by presidential proclamation until January 20, 1969, the last day of President Johnson's administration. Upon leaving office, President Johnson proclaimed the Marble Canyon National Monument in Arizona covering 26,000 acres<sup>109</sup> and added a total of 358,000 acres to three existing monuments.<sup>110</sup> President Johnson declined, however, to follow recommendations made to him to proclaim two new monuments in Alaska totalling 6,321,000 acres and one new national monument in Arizona embracing 911,700 acres.<sup>111</sup> After President Johnson's term, the Antiquities Act lay dormant until President Carter's massive Alaska withdrawals nine years later.

### 2. *President Carter's 1978 Alaska Withdrawals*<sup>112</sup>

On December 1, 1978, in response to Congress' failure to adopt com-

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102. R. LEE, *supra* note 76, at 98. See also C. WHEATLEY, *supra* note 10, at 261-62.

103. See note 126 and accompanying text *infra*.

104. Pres. Proc. No. 2860, 3 C.F.R. 34 (1949-1953 Compilation), reprinted in 64 Stat. A371 (1949).

105. In 1956 President Eisenhower did create Edison Laboratory National Monument in New Jersey, but this withdrawal encompassed less than two acres. See Pres. Proc. No. 3148, 3 C.F.R. 86 (1954-1958 Compilation), reprinted in 70 Stat. C49 (1956).

106. Pres. Proc. No. 3391, 3 C.F.R. 110 (1959-1963 Compilation), reprinted in 75 Stat. 1023 (1961).

107. R. LEE, *supra* note 76, at 98.

108. President Kennedy established two national monuments in 1961. See Pres. Proc. No. 3413, 3 C.F.R. 124 (1959-1963 Compilation), reprinted in 75 Stat. 1058 (1961) (Russell Cave National Monument, Alabama) (310 acres); Pres. Proc. No. 3443, 3 C.F.R. 152 (1959-1963 Compilation), reprinted in 76 Stat. 1441 (1961) (Buck Island Reef National Monument, Virgin Islands) (850 acres).

109. Pres. Proc. No. 3889, 3 C.F.R. 390 (1966-1970 Compilation), reprinted in 83 Stat. 924 (1969).

110. See Pres. Proc. No. 3887, 3 C.F.R. 385 (1966-1970 Compilation), reprinted in 83 Stat. 920 (1969) (addition of 48,943 acres to Arches National Monument); Pres. Proc. No. 3888, 3 C.F.R. 387 (1966-1970 Compilation), reprinted in 83 Stat. 922 (1969) (addition of 215,056 acres to Capitol Reef National Monument); Pres. Proc. No. 3890, 3 C.F.R. 392 (1966-1970 Compilation), reprinted in 83 Stat. 926 (1969) (addition of 94,547 acres to Katmai National Monument).

111. R. LEE, *supra* note 76, at 98-99.

112. An understanding of the history of Alaska public lands legislation is essential to the reader



prehensive Alaska lands legislation,<sup>113</sup> President Carter used the Antiquities Act to create fifteen new Alaska national monuments and to enlarge two existing withdrawals. The President's proclamations withdrew a total of fifty-six million acres of Alaska land.<sup>114</sup> The state government, still in the process of making its land selections as provided in the Statehood

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of this comment. The saga of Alaska lands legislation began in 1971 when Congress enacted the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601–1627 (1976). Section 17(d)(2) of ANCSA authorized the Secretary of the Interior to withdraw up to 80 million acres of federal land in Alaska for study and possible inclusion in national conservation systems. 43 U.S.C. § 1616(d)(2)(A) (1976). Under ANCSA, the Secretary was to make recommendations to Congress with respect to those lands and Congress was given up to five years to act on the Secretary's suggestions. *Id.* § 1616(d)(2)(C) & (D). Thus, under the timetable established by ANCSA, if Congress failed to act, all "d-2 withdrawals," as they came to be called, were to expire on December 18, 1978. *See id.*

In May of 1978 an Alaska lands bill finally passed the House of Representatives. *See generally* DeStefano, *The Federal Land Policy and Management Act and the State of Alaska*, 21 ARIZ. L. REV. 417, 418–19 (1979). However, largely because of the opposition of Alaska Senator Mike Gravel, in October of 1978 the Senate adjourned without passing any legislation and without extending the d-2 withdrawals beyond December 17. *See id.* at 419. In order to avoid the opening of the soon-to-expire d-2 withdrawals to mineral entry, and state selection, the Department of the Interior recommended various administrative actions to preserve the status quo until the next congressional session, which the Department hoped would produce Alaska lands legislation. *Id.*

In response to these recommendations, on November 16, 1978, Secretary of the Interior Cecil D. Andrus withdrew 110 million acres of Alaska land under the authority of FLPMA's § 204(e) emergency withdrawal provision. 43 Fed. Reg. 59,756 (1978). Then, on December 1, President Carter withdrew 56 million acres, most of which had been included in the Secretary's § 204(e) withdrawals, under the authority of the Antiquities Act.

Even before these withdrawals had been made, the State of Alaska filed suit, alleging violations of the National Environmental Policy Act (NEPA). *Alaska v. Carter*, No. A78–291 (D. Alaska, filed Oct. 30, 1978), [Pending Litigation] ENVIR. L. REP. (ELI) 65587. *See* note 142 *infra*. After the national monuments were created the State amended its complaint to challenge the legality of both President Carter's Antiquities Act withdrawals and Secretary Andrus' § 204(e) withdrawals. In a separate action, *Anaconda Copper Company* filed a similar complaint. *Anaconda Copper Co. v. Andrus*, No. A79–161 (D. Alaska, filed June 11, 1979).

For two years, citizens of Alaska were forced to comply with these massive executive withdrawals while the pending legal challenges were repeatedly stayed in the hope that Congress would soon pass comprehensive lands legislation, making legal rulings on § 204(e) and the Antiquities Act unnecessary. Finally, in November of 1980, Alaska lands legislation was sent to the President and, on December 2, 1980, the Alaska National Interest Lands Conservation Act was signed into law by President Carter. 16 WEEKLY COMP. OF PRES. DOC. 2755 (Dec. 8, 1980).

Section 1322 of the Alaska National Interest Lands Conservation Act revokes all of President Carter's Antiquities Act withdrawals and Secretary Andrus' § 204(e) withdrawals in the face of congressional designations made in the Act. *Alaska National Interest Lands Conservation Act*, Pub. L. No. 96–487, § 1322, 94 Stat. 2487 (1980) (to be codified in 16 U.S.C. § 3209). Thus, any lands withdrawn by the President or by the Secretary, which are not within a conservation unit established or expanded by the Act, are returned to the public domain for use under the general land laws, or for selection by the State under the Statehood Act. Passage of the Alaska National Interest Lands Conservation Act thus moots all litigation pertaining to use of the Antiquities Act or of FLPMA's emergency withdrawal provision in Alaska.

113. *See* note 112 *supra*.

114. *See* Pres. Proc. Nos. 4611–4627, 3 C.F.R. 69–104 (1979), *reprinted in* 92 Stat. \_\_\_\_ (1978). The Alaska national monuments created by President Carter are:

## The Antiquities Act

Act,<sup>115</sup> was outraged by President Carter's expansive use of the Antiquities Act and sought relief in federal court immediately.<sup>116</sup> In addition, public outcry against this massive land "lock-up" was significant.<sup>117</sup> There is little doubt that President Carter was acting outside the spirit of the Antiquities Act; the pattern of political events indicates that the President used the Act as a general conservation measure<sup>118</sup> rather than to protect particular "objects of historic or scientific interest" as required by the Act.

Compared to prior withdrawals under the Antiquities Act, President Carter's actions were clearly unprecedented. In one day, President Carter withdrew over four and a half times as much public land as the total land withdrawn under the Antiquities Act by all prior Presidents in seventy-two years.<sup>119</sup> President Carter's proclamations cite "objects" such as "a variety of landforms, including high mountain peaks and steep canyons,"<sup>120</sup> "extraordinarily deep and long fiords with sea cliffs,"<sup>121</sup> and

<i>Name of National Monument</i>	<i>Total Acreage Withdrawn</i>
Admiralty Island	1,100,000
Aniakchak	350,000
Becharof	1,200,000
Bering Land Bridge	2,590,000
Cape Krusenstern	560,000
Denali	3,890,000
Gates of the Arctic	8,220,000
Glacier Bay (enlargement)	550,000
Katmai (enlargement)	1,370,000
Kenai Fjords	570,000
Kobuk Valley	1,710,000
Lake Clark	2,500,000
Misty Fjords	2,285,000
Noatak	5,800,000
Wrangell-St. Elias	10,950,000
Yukon-Charley	1,720,000
Yukon Flats	10,600,000

115. When Alaska became a state in 1959, Congress gave the state 25 years to select 103,350,000 acres of land for state ownership. Alaska Statehood Act, Pub. L. No. 85-508, §§ 6(a)-6(b), 72 Stat. 339 (1958). Due to bureaucratic delays and legal problems involving conflicting land claims, as of January 1979, only 23 million acres of the state's land selections had been transferred to the state. See Fairbanks Daily News-Miner, Mar. 9, 1979, C-12 (special supplement on the Alaska lands issue).

116. See note 112 *supra*.

117. See Fairbanks Daily News-Miner, Mar. 9, 1979, at C-7 (special supplement on the Alaska lands issue). See note 156 *infra*.

118. See note 112 *supra*.

119. Prior to President Carter's withdrawals, a total of approximately 12 million acres had been withdrawn under the Antiquities Act. R. LEE, *supra* note 76, at 97.

120. Pres. Proc. No. 4625, 3 C.F.R. 98 (1979), reprinted in 92 Stat. \_\_\_\_ (1978) (Wrangell-St. Elias National Monument).

121. Pres. Proc. No. 4623, 3 C.F.R. 93 (1979), reprinted in 92 Stat. \_\_\_\_ (1978) (Misty Fjords National Monument).

“the largest and most complete example of an interior Alaskan solar basin with its associated ecosystem.”<sup>122</sup> These “objects” were, perhaps, no more vague than the “objects” withdrawn by prior presidential proclamations. Considering the President’s motive in making these withdrawals and the amount of acreage withdrawn, however, President Carter’s use of the Antiquities Act was an alarming extension of a disfavored statute already extended well beyond Congress’ original intent.

### C. *Judicial Interpretation of the Antiquities Act*

By interpreting the Antiquities Act broadly, the judiciary has invited sweeping executive application of the Act. The scope of the Antiquities Act was first addressed in *Cameron v. United States*<sup>123</sup> in 1920. In *Cameron*, the government sought to enjoin a miner from occupying his claim in the Grand Canyon National Monument, but the miner argued that the monument should be disregarded as beyond the scope of the Antiquities Act.<sup>124</sup> The Supreme Court disagreed and had little difficulty finding that the Grand Canyon was “an object of unusual scientific interest” and thus properly withdrawn.<sup>125</sup>

In *Wyoming v. Franke*,<sup>126</sup> the State of Wyoming challenged President Franklin Roosevelt’s creation of Jackson Hole National Monument. The district court, finding the withdrawal to be within the Act’s scope, engaged in only a limited review of the factual evidence and deferred to the President’s determination that the land withdrawn did contain “objects” worthy of protection.<sup>127</sup> Although the court recognized the hardship and

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122. Pres. Proc. No. 4627, 3 C.F.R. 102 (1979), *reprinted in* 92 Stat. \_\_\_\_ (1978) (Yukon Flats National Monument).

123. 252 U.S. 450 (1920).

124. *Id.* at 455–56.

125. *Id.* In *United States v. Cappaert*, 426 U.S. 128 (1976), the Court held that the Antiquities Act does not restrict the President to protecting only archeological sites. *Id.* at 141–42. Although *Cappaert* dealt primarily with the issue of rights to groundwater, the Court found that both a pool of water and the endangered species of pupfish which inhabited the pool were “objects” entitled to protection under the Act. *Id.*

126. 58 F. Supp. 890 (D. Wyo. 1945). The State of Wyoming challenged President Franklin Roosevelt’s creation of Jackson Hole National Monument on three grounds: (1) that there were no “objects” of historic or scientific interest included in the area withdrawn, (2) that the withdrawal was not confined to the smallest area compatible with the proper care and management of a national monument, and (3) that withdrawal of this land under the Antiquities Act was an attempt to “substitute . . . a National Monument for a National Park, the creation of which is within the sole province of the Congress.” 58 F. Supp. at 892.

127. *Id.* at 894–96. The court stated: “Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.” *Id.* at 896 (quoting *Martin v. Mott*, 25 U.S. (12 Wheat.) 12, 19 (1827)). The court also deferred to the executive on the issue whether the size of the withdrawal was excessive. 58 F. Supp. at 896.

## The Antiquities Act

injustice imposed on the State of Wyoming by use of the Antiquities Act, it stated that the appropriate remedy was in the legislature.<sup>128</sup>

In *Anaconda Copper Co. v. Andrus*,<sup>129</sup> one of the challenges to President Carter's Alaska withdrawals, the district court finally recognized that there are limitations on the nature of objects and the acreage that can be withdrawn under the Antiquities Act.<sup>130</sup> In addition, the court expressed its frustration with the Supreme Court's failure to define those limitations.<sup>131</sup> This suit, however, became moot before any significant decision could be made.<sup>132</sup>

Although the Antiquities Act was enacted in response to lobbying by archeological interests, its vague language has led to sweeping executive application. The judiciary, in acquiescing to broad executive use, has ignored the original intent of Congress and done little to limit the President's discretion. In enacting FLPMA, Congress purported to restore land withdrawal authority to the legislature subject to limited delegations to the executive, but Congress mysteriously failed to restrict the President's broad authority under the Antiquities Act. Whatever Congress intended by failing to repeal the Antiquities Act, the Alaska withdrawals focus renewed attention on the potential for abuse under the Act and bring into question its continued existence. When the Antiquities Act is scrutinized in light of the five policies underlying FLPMA, the inconsistencies between the Act and congressional policy are overwhelming.

### IV. THE ANTIQUITIES ACT AND CONGRESSIONAL POLICY: INCONSISTENCIES AND VIOLATIONS

#### A. *Violations of Policy 1*

The Antiquities Act violates FLPMA's basic scheme of vesting Congress with the authority to make and implement land withdrawal policy.

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128. The court stated:

[I]f 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.

58 F. Supp. at 896. Indeed, the House Interior Committee subsequently held hearings and the President was criticized for exceeding the intended scope of the Antiquities Act, and in 1950 Congress abolished the Jackson Hole National Monument and redesignated the land as part of the Grand Teton National Park. C. WHEATLEY, *supra* note 10, at 262. See 16 U.S.C. § 406d-1 (1976).

129. No. A79-161 (D. Alaska, filed June 11, 1979). See note 112 *supra*.

130. *Anaconda Copper Co. v. Andrus*, No. A79-161, at 2 (D. Alaska, June 26, 1980) (findings of the court in partial motions for summary judgment) (*dicta*).

131. *Id.* at 6-7.

132. The only issue decided by the court before passage of the Alaska National Interest Lands Conservation Act mooted the suit, see note 112 *supra*, was whether the Antiquities Act should be

As has been shown, Presidents have interpreted and applied the Antiquities Act broadly.<sup>133</sup> Congress' ability to control withdrawal policy is severely diminished by the vast land withdrawal authority potentially available to Presidents. Stability and consistency in national land-use planning is desirable, and the congressional scheme can easily be upset by ex parte presidential action under the Antiquities Act. Moreover, under the Act, lame duck Presidents have withdrawn, and will continue to withdraw, public lands at their discretion, remaining completely unaccountable to the public.<sup>134</sup> To ensure that land withdrawals reflect public choice, all major withdrawal decisions, including those made under the Antiquities Act, should be made by Congress.

### B. *Violations of Policy 2*

Continued vitality of the Antiquities Act is inconsistent with the policy of allowing only Congress to make withdrawals that are part of the pri-

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limited to "historic landmarks" and "historic and prehistoric structures." Anaconda argued that the phrase "historic landmarks, historic and prehistoric structures" qualified the enlargement of authority contained in the "other objects of historic or scientific interest" clause. *Anaconda Copper Co. v. Andrus*, No. A79-161, at 4 (D. Alaska, June 26, 1980) (findings of the court in partial motions for summary judgment). Unsurprisingly, the court found, in response to motions for partial summary judgment, that the President is not restricted to withdrawals of objects of antiquity under the Antiquities Act. *Id. passim*.

133. The Antiquities Act raises a classic delegation doctrine issue because it contains no standards and is accompanied by no procedural safeguards. Under traditional delegation doctrine theory, if Congress fixes a sufficiently meaningful standard for the executive to follow, it has not made an unconstitutional delegation of its legislative power. *See Schechter Corp. v. United States*, 295 U.S. 495, 530 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418-19 (1935). The Antiquities Act contains only a vague, standardless description of the President's power and no clear standards can be found in prior legislation, the legislative history, or in executive application of the Act.

Since *Schechter* and *Panama Refining* the Supreme Court has upheld broad delegations of legislative power even though standards were lacking, leading one scholar to conclude that procedural safeguards have replaced standards as the required element in delegations of legislative power. K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE 206-16 (1978). However, the Antiquities Act provides no procedural protection to private parties affected by executive action under the Act. *See* notes 141 & 142 and accompanying text *infra*.

Although the current vitality of the delegation doctrine is suspect, *see, e.g.*, *National Cable Television Ass'n v. United States*, 415 U.S. 336, 352-53 (1974) (Marshall, J., and Brennan, J., dissenting), the obvious frailties of the Antiquities Act present the particular kind of situation that would support the doctrine's revival. *See* Wright, Book Review, 81 YALE L.J. 575, 582-87 (1972) (suggesting that the delegation doctrine remains an important political check on the exercise of "unbounded, standardless discretion" by the executive). *See also* 1 K. DAVIS, *supra*, at 206.

Moreover, the delegation doctrine continues to be occasionally applied by state courts in natural resources and environmental cases. *See* Rodgers, *A Hard Look at Vermont Yankee*, 67 GEORGETOWN L. J. 699, 702 (1979). In addition, the policies behind the delegation doctrine are reflected in the firmly established theory that some natural resources are held in trust by government for public benefit, requiring courts to take a close look at action restricting public use. *Id.* at 702-03 & n.26.

134. Both Presidents Eisenhower and Lyndon Johnson proclaimed national monuments in the final days of their terms. *See* notes 106 & 109 and accompanying text *supra*. President Carter also

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mary resource management systems. Under the “other objects of historic or scientific interest” clause, Presidents have created large national monuments for general purposes of land conservation and scenic preservation; this was particularly obvious in the Alaska withdrawals. Although this type of withdrawal is outside the original spirit of the Act as reflected in the legislative history, courts have acquiesced in such uses of the Act.

Given the executive’s broad discretion under the Antiquities Act, any President can circumvent Congress’ exclusive authority to create national parks, national forests, and wilderness areas simply by classifying land as a national monument under the Antiquities Act.<sup>135</sup> The possibility of this type of executive action makes it impossible for Congress to make and implement land withdrawal policy by controlling large, significant withdrawals. By failing to repeal the Antiquities Act, while at the same time asserting exclusive authority over the nation’s primary resource management systems, Congress has taken an inconsistent and unmanageable position.

### C. *Violations of Policy 3*

The Antiquities Act does not fit into FLPMA’s scheme of limited executive withdrawal authority. Not only are withdrawals under the Antiquities Act usually large, but national monuments are normally administered by the National Park Service in a highly restrictive manner.<sup>136</sup> Large, restrictive Antiquities Act withdrawals are likely to have a significant impact on Congress’ comprehensive land-use planning scheme.<sup>137</sup> Because of this potential impact, the necessity of having Congress control national monument withdrawals outweighs any administrative efficiency gained in allowing the executive to make them.

The Antiquities Act is also inconsistent with Congress’ decision to review and retain veto control over all executive withdrawals over 5,000 acres. The policy behind this provision was to establish a meaningful and

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considered creating national monuments in the closing days of his administration. *See* note 157 and accompanying text *infra*.

135. President Franklin Roosevelt’s creation of Jackson Hole National Monument in the face of congressional refusal to establish a national park is exemplary. *See* C. WHEATLEY, *supra* note 10, at 261, 464–65. In *Wyoming v. Franke*, 58 F. Supp. 890, 896 (D. Wyo. 1945), the court upheld the President’s creation of the Jackson Hole monument in spite of the state’s argument that the President’s motive was to circumvent the congressional intent with respect to those lands.

136. *See* note 149 *infra*. Park Service regulations are among the most restrictive of all the departments and services which administer national conservation units.

137. One of the major concerns over President Carter’s Alaska withdrawals was that the development of valuable natural resources needed to fulfill the country’s energy needs would be blocked. *Fairbanks Daily News-Miner*, March 9, 1979, at C–8, col. 1 (special supplement on the Alaska lands issue).

expeditious procedure for information submission and congressional veto by concurrent resolution. Under the Antiquities Act, the President's power is exclusive and land withdrawals are essentially non-reviewable.<sup>138</sup> It is true that Congress may revoke or modify the status of an executive-created national monument.<sup>139</sup> It is irrational, however, that the procedure Congress must use to nullify significant withdrawals under the Antiquities Act is far more difficult than the legislative veto procedure provided by FLPMA for even small, insignificant executive withdrawals.<sup>140</sup>

#### D. *Violations of Policy 4*

The single aspect of the Antiquities Act that is most inconsistent with congressional policy is the absence of procedural protections. Under FLPMA's withdrawal provisions, the Secretary of the Interior must publish notice in the *Federal Register* of all non-emergency withdrawals, even if smaller than 5,000 acres, within thirty days after a withdrawal is proposed. Moreover, before any withdrawal can become final, a public hearing is required. In contrast, the President can proclaim a national monument under the Antiquities Act without giving notice, providing an opportunity for comment,<sup>141</sup> or even making an adequate study of the proposed withdrawal.<sup>142</sup> Presidents withdrawing land under the Antiqui-

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138. One of the chief criticisms of the Antiquities Act has been that Presidents typically withdraw an area of land far in excess of the amount that is needed to properly administer the reserved site. C. WHEATLEY, *supra* note 10, at 464-65.

139. *See, e.g.*, Act of Aug. 3, 1950, Pub. L. No. 652, 64 Stat. 405 (1950) (act of Congress abolishing Wheeler National Monument, Colorado); Act of July 11, 1956, Pub. L. No. 695, 70 Stat. 527 (1956) (act of Congress adding Zion National Monument to Zion National Park).

140. Of primary importance is the fact that the President can veto an act of Congress attempting to abolish a national monument and Congress can override the veto only by a two-thirds vote of both houses. Indeed, Congress was unsuccessful in its first attempt to abolish Jackson Hole National Monument because the bill was vetoed by the President. C. WHEATLEY, *supra* note 10, at 465. Withdrawals made under FLPMA can be revoked by either house by concurrent resolution without the President's approval. *See* note 43 *supra*. In addition, concurrent resolutions do not require three readings. F. RIDDICK, *SENATE PROCEDURE*, S. DOC. NO. 93-21, 93rd Cong., 1st Sess. 280 (1974).

141. The Antiquities Act makes no provision for procedural protection. *See* 16 U.S.C. § 431 (1976). The Act authorizes the President to make withdrawals "in his discretion" and requires only that the lands to be withdrawn be "owned or controlled" by the federal government. If this prerequisite exists, declaration by public proclamation establishes the national monument. *Id.*

142. In *Alaska v. Carter*, 462 F. Supp. 1155, 1159 (D. Alaska 1978), the court held that presidential actions under the Antiquities Act are not subject to the impact statement requirements of the National Environmental Policy Act (NEPA). The court reasoned that NEPA applies only to "federal agencies" and that because the President cannot delegate his authority to declare national monuments, the provisions of NEPA do not apply. The court rejected the State's argument that the President was advised by the Secretary of the Interior, thus creating the prerequisite agency action. *Id.* at 1160.

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ties Act may shun the public participation that is required for the well-reasoned and fair decision-making favored by congressional policy.<sup>143</sup>

Not only do the procedural inadequacies of the Antiquities Act violate public policy, but use of the Act may violate protected constitutional rights.<sup>144</sup> Under the general land laws, federal lands are usually open to a wide range of uses including livestock grazing,<sup>145</sup> mining,<sup>146</sup> and hunting and trapping.<sup>147</sup> Upon creation of a national monument under the Antiquities Act, depending on which department is given administrative responsibility, public land may be immediately withdrawn from these uses.<sup>148</sup> Arguably, a person's expectation of continued use of the land is a protected constitutional interest and the land cannot be closed to use until some kind of hearing is provided.<sup>149</sup>

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143. See note 69 *supra*. The Public Land Law Review Commission also stated: Public notice of proposed withdrawals and participation of the public and state and local governments, at least through invitation to comment and through hearings in appropriate cases, should be assured.

Effective planning requires that [sic] all citizen interests have an opportunity to be heard and considered . . . . Moreover, restriction on various kinds of uses can have a serious impact on the regional economy. Consideration of these interests, along with others, should be mandatory in the withdrawal process.

PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 61, at 55.

144. The question whether a remedy is available to one whose constitutional rights are violated by the Antiquities Act is clouded by the subject of sovereign immunity and is beyond the scope of this comment. See generally Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 Nw. U.L. Rev. 526 (1977).

145. See 43 C.F.R. § 4130.1-.7 (1979).

146. See generally 43 C.F.R. § 3810 (1979).

147. See generally 43 C.F.R. §§ 2400.0-3(j),-5(j) (1979).

148. See note 149 *infra*.

149. Consider the case of more than 1,500 commercial guides and trappers in Alaska whose occupations involve harvesting wildlife on public lands. See Fairbanks Daily News-Miner, March 9, 1979, at C-10, col. 1 (special supplement on the Alaska lands issue). Prior to President Carter's Antiquities Act withdrawals, these guides and trappers were free, under the general land laws, to hunt and trap wildlife on federal lands. With the creation of the Alaska national monuments, however, commercial (as opposed to subsistence) hunting and trapping immediately became an illegal activity on all monuments placed under the administration of the National Park Service because department regulations prohibit hunting and trapping on national monument lands. 36 C.F.R. § 2.32 (1980). See also 36 C.F.R. § 7.87(f) (1980) (interim regulations governing Alaska National Park Monuments); 44 Fed. Reg. 37,732, 37,735 (1979) (proposed rules for Alaska National Park Monuments).

It is arguable that the status of these professional outdoorsmen is deserving of constitutional protection. The same value which underlies the application of procedural guarantees when the status of the welfare recipient is altered (*Goldberg v. Kelley*, 397 U.S. 254 (1970))—*i.e.*, the protection of fundamental entitlements of livelihood from arbitrary government termination—is present when Alaska guides and trappers are deprived of their entitlement to hunt and trap on federal lands. See also Reich, *The New Property*, 73 YALE L.J. 733, 736 (1964) (discussing private use of public resources as part of the government largess).

If Alaska guides and trappers have a constitutionally protected entitlement in their continued ability to earn an income on federal land, procedural protection might be required as a matter of constitutional law, not to test disputed factual determinations, but to insure adequate consideration in the executive decision-making process before fundamental entitlements are terminated. (Note that when



### E. *Violations of Policy 5*

The Antiquities Act's continued existence may upset the balance Congress struck in FLPMA's emergency withdrawal provision. By allowing emergency executive withdrawals under section 204(e) of FLPMA,<sup>150</sup> Congress recognized that situations may arise where immediate withdrawal of land is necessary. Section 204(e) is sufficient to deal with all emergency situations and preserves some congressional control over executive action by limiting emergency withdrawals to a period of three years. However, emergency withdrawals, which should be made under FLPMA, can easily be hidden under the guise of the Antiquities Act, thus escaping the three-year limitation and circumventing the policy behind section 204(e). President Carter's use of the Antiquities Act in Alaska is a glaring example of such executive circumvention.<sup>151</sup>

## V. SUMMARY AND RECOMMENDATIONS

Not only is the Antiquities Act inconsistent with congressional policies, but its very use raises serious constitutional questions. Moreover, the Antiquities Act has been subject to increasingly broader executive application, and it is clear that its use today does not reflect the intention of

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Congress terminates government entitlements, committee hearing procedures insure consideration of differing views.)

Not only was notice and an opportunity to be heard inadequate in the initial creation of the Alaska national monuments, *cf.* *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978) (State challenge to closing of comment period on draft environmental supplement which considered several alternative administrative actions proposed for dealing with federal land in Alaska), but Alaska hunters and trappers were given no procedural protection subsequent to President Carter's proclamations. In rule-making procedures after the creation of the Alaska national monuments, the Park Service declined to consider comments on commercial hunting and trapping on the ground that "[u]nder existing law, the Service has no authority to allow sport hunting or commercial trapping within the new Alaska National Monuments." 44 Fed. Reg. 37,735 (1979). The Park Service's position is incorrect; there is no statute preventing the Park Service from modifying its own hunting and trapping prohibition so that Alaska's commercial guides and trappers could have continued their activities on national monument lands. *See* 16 U.S.C. §§ 1-18(f) (1976).

150. 43 U.S.C. § 1714(e) (1976).

151. President Carter's use of the Antiquities Act in Alaska was prompted by the emergency created by Congress' failure to pass Alaska lands legislation in late 1978. *See* note 112 *supra*.

Just two weeks prior to President Carter's use of the Antiquities Act, the Secretary of the Interior did exercise his emergency withdrawal authority under § 204(e) of FLPMA. *See* note 112 *supra*. In fact, much of the President's Antiquities Act withdrawals duplicated the Secretary's prior reservations. There are two explanations for President Carter's decision to use the Antiquities Act even though the land in question had already been protected by the Secretary. First, the President was no doubt aware that withdrawals made under the Antiquities Act may be permanent, whereas § 204(e) withdrawals are effective only for three years. Second, in an attempt to avoid obvious overstepping of his discretion under either provision, President Carter may have consciously chosen to divide his withdrawals between the Antiquities Act and § 204(e).

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Congress in 1906. President Carter's use of the Act in Alaska epitomizes the potential for executive abuse under the Act and illustrates how the Antiquities Act defeats current land withdrawal policy.

The Antiquities Act should be repealed,<sup>152</sup> and Congress should reassert its exclusive power to create national monuments.<sup>153</sup> Although the Antiquities Act currently lies dormant, three different groups have a strong interest in seeing the Act repealed before it is again used to withdraw public land.

First, the people of Alaska have a strong interest in seeking repeal to protect their state from future arbitrary executive withdrawals. In the battle for Alaska lands legislation, the State of Alaska lobbied for a provision that would allow federal withdrawals in Alaska to take place only by act of Congress and not by executive or administrative act.<sup>154</sup> The Alaska National Interest Lands Conservation Act, passed in late 1980, makes no such guarantee.<sup>155</sup> Repeal of the Antiquities Act would not only protect further valuable Alaska land from being "locked up" at the whim of fu-

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152. The author urges repeal of § 2 of the Antiquities Act. This comment does not extend to a discussion of §§ 1 and 3 of the Act. *See* note 73 *supra*. In 1943, Congress considered proposed legislation to repeal the Antiquities Act, but this legislation was unsuccessful. C. WHEATLEY, *supra* note 10, at 465. By recommending that Congress be given exclusive authority to create national monuments, the PLLRC also proposed repeal of the Antiquities Act. *See* note 65 *supra*.

153. Repeal of the Antiquities Act would take away the President's power to create national monuments. Congress would retain its power to create national monuments by specific statutory enactment. *See generally* C. WHEATLEY, *supra* note 10, at 259, 265.

154. This provision was commonly referred to as the "no more" clause" by state publications and the media. Fairbanks Daily News-Miner, Aug. 16, 1980, at 6-7 (paid advertisement by the State of Alaska, Office of the Governor, D-2 Information Office). Insertion of a "no more" clause" in Alaska lands legislation would have prevented any future use of the Antiquities Act in Alaska.

155. The Alaska National Interest Lands Conservation Act does not contain the state's proposed "no more" clause" but contains what appears to be a compromise measure. Section 1326 states:

(a) No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal shall terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress.

(b) No further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress.

Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, § 1326, 94 Stat. 2488 (1980) (to be codified in 16 U.S.C. § 3213).

Under this provision the Antiquities Act remains applicable to Alaska in a hybrid form. Because executive withdrawals under the Antiquities Act are "authorized by existing law," the President may still use the Antiquities Act to withdraw public lands in Alaska so long as the withdrawal exceeds five thousand acres. However, under § 1326, Antiquities Act withdrawals would not become effective

ture Presidents, but would be a good faith gesture toward a state that often feels politically, as well as physically, isolated from decision-makers far away in Washington.<sup>156</sup>

Second, other western states with large areas of federally owned land have a strong interest in seeing the Antiquities Act repealed to prevent its future use. In the closing days of the Carter administration, the President considered making substantial land withdrawals under the authority of the Act.<sup>157</sup> Although the President failed to create any national monuments before his term ended,<sup>158</sup> the fact that several monuments were under consideration ought to alert western states to the possibility that they too can be subject to uncontrolled, discretionary withdrawals under the Antiquities Act.<sup>159</sup>

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until notice is provided in the *Federal Register* and to both houses of Congress. Furthermore, under § 1326, Antiquities Act withdrawals in Alaska are limited in duration to one year unless Congress approves the withdrawal by joint resolution.

Thus, although the possible impact of the use of the Antiquities Act in Alaska has been lessened, the President still has exclusive, unreviewable authority to withdraw Alaska public land under the Antiquities Act for up to one year. On its face, § 1326 does not allow Congress to pass a joint resolution disapproving an Antiquities Act withdrawal.

Subsection (b) probably does not protect Alaska from one-year Antiquities Act withdrawals because it prohibits only "further studies" and Antiquities Act withdrawals are made at the complete discretion of the President. The Antiquities Act itself requires no study of proposed withdrawals, and the provisions of the National Environmental Policy Act (NEPA), which require a study in the form of an environmental impact statement (EIS), have been held not to apply to withdrawals under the Antiquities Act. *See* note 142 *supra*.

156. The entire Alaska lands issue has sparked intense resentment and public protest in Alaska. Many Alaskans feel that the federal government has broken the promises of the Alaska Statehood Act which gave Alaska the right to select 103 million acres of federal land within 25 years. *See generally* Fairbanks Daily News-Miner, March 9, 1979, § C, *passim* (special supplement on the Alaska lands issue). Although 22 years have passed since statehood was granted, only about one-third of the 103 million acres of land promised to Alaska has been transferred to the state.

In November of 1980, Alaska voters established the Alaska Statehood Commission, an 11-member commission whose executive director will earn a salary in excess of \$70,000. *Seattle Post-Intelligencer*, Jan. 13, 1981, at A4, col. 1. The Commission's purpose is to review the state's status with the federal government and recommend possible changes, among which may be secession. *Id.*

157. *Seattle Post-Intelligencer*, Dec. 31, 1980, at A3, col. 1. One of the withdrawals under consideration was a 213,000-acre or a 90,000-acre national monument in Washington state including Mount St. Helens and part of the area destroyed by the mountain's May 18, 1980 eruption. *Seattle Post-Intelligencer*, Jan. 1, 1981, at C11, col. 3.

158. President Carter's decision not to create a national monument around Mount St. Helens may have been influenced by the views of Weyerhaeuser, Burlington Northern, the U.S. Forest Service, and the Washington State Department of Natural Resources, all of whom opposed creation of a national monument. *Seattle Post-Intelligencer*, Jan. 18, 1981, at A12, col. 3 ("Plan For Volcano Preserve Attacked"); *Seattle Post-Intelligencer*, Jan. 1, 1981, at C11, col. 3.

Washington's senior member of Congress, Senator Henry M. Jackson, also opposed creation of a national monument and wanted "to see the decision made in a much more methodical fashion, one that involves the people of Washington state and the congressional delegation." *Seattle Post-Intelligencer*, Jan. 15, 1981, at C8, col. 2 ("Carter Won't OK Volcano Monument").

159. Only Wyoming is currently protected from use of the Antiquities Act. In 1950, after President Franklin Roosevelt's Jackson Hole withdrawal aroused bitter opposition to the Antiquities Act,

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Third, Congress itself has a stake in seeking repeal of the Antiquities Act. As has been shown, the Act can be used to circumvent many of the policies expressed in FLPMA. Moreover, the mere availability of this peculiar, antiquated withdrawal device makes a travesty of congressional control of land withdrawal policy and undermines the effectiveness of FLPMA. To prevent future Presidents from unilaterally creating national monuments, and to achieve consistency with the spirit and policy underlying FLPMA, the Ninety-Seventh Congress would be well-advised to repeal the Antiquities Act. The current political climate is favorable to such legislation<sup>160</sup> and the present administration would be likely to support repeal.<sup>161</sup>

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*see* note 102 and accompanying text *supra*, Congress specifically excluded Wyoming from future application of the Act. 16 U.S.C. § 431(a) (1976) (“No further extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.”). Concerning application of the Antiquities Act in Alaska after passage of the Alaska National Interest Lands Conservation Act in 1980, *see* note 155 *supra*.

160. Many western states which contain large areas of federal land are currently demanding that federal lands be turned over to the states for management. This movement has often been referred to as the “Sagebrush Rebellion.” *See* TIME, Dec. 15, 1980, at 30.

161. The Reagan administration has indicated that it favors loosening federal restrictions on public lands. *See* The Anchorage Times, March 8, 1981, at B-5, col. 1 (“Watt urges more access to parks”). Because the Antiquities Act has been used by Presidents to restrict access to and use of federal lands, the present administration could be expected to favor legislation to protect the states from future potential executive abuse under the Act.