NOTE

DISTINGUISHING THE ANTIQUITIES ACT AND OCSLA

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INTRODUCTION

On April 28, 2017, President Trump removed the protection of 115 million acres of land from the future oil and gas leasing that was previously designated under the Outer Continental Shelf Lands Act's (OCSLA) grant of presidential authority.[1] Just a few months

* J.D. 2019, NYU School of Law. I would like to thank Professor Richard Revesz for his guidance during both the brainstorming and writing process of this Note. I would also like to thank the hardworking and dedicated staff of the Environmental Law Journal for numerous rounds of tremendously helpful edits.

[1] *See* Complaint at 20, League of Conservation Voters v. Trump, 303 F. Supp. 3d 985 (D. Alaska 2017) (No. 3:17-cv-00101-SLG); Implementing an America-First Offshore Energy Strategy, Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017). For clarity's sake, a public land can be protected via a "withdrawal," whereby "the public domain is withdrawn or reserved for certain specific purposes and thereby segregated from the operation of various other public land laws authorizing the use or disposition of the lands." Christian Termyn, *No Take Backs: Presidential Authority and Public Lands Withdrawals,* 19 SUSTAINABLE DEV. L. & POL'Y 4, 4 (2019). Thus, removing the protections of land

later, on December 4, 2017, President Trump relied on the Antiquities Act to remove national monument protection from nearly half of Grand Staircase-Escalante and over 85 percent of Bears Ears National Monuments.[2] These actions have been interpreted as illegal affronts to public lands protection by many public lands scholars and environmental groups, and have resulted in ongoing litigation against the Trump administration.

Scholars who have written about President Trump's actions to date have emphasized the similarities between the Antiquities Act and OCSLA,[3] and the parties to the ongoing legal battles have mostly followed suit by using similar litigation strategies.[4] There are, however, marked differences between the two statute's statutory structure, purpose, and legislative history, as well as differences in presidential practices taken under the statutes. These differences are worthy of analysis; litigation challenging President Trump's actions under the Antiquities Act is ongoing in the U.S. District Court for the District of Columbia (District of Columbia) and under OCSLA in the U.S. District Court for the District of

could also be rephrased as "removing land withdrawals;" this article relies on such terminology throughout. *See id.*

[2] *See* Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,093 (Dec. 8, 2017); Complaint at 5, Grand Staircase Escalante Partners v. Trump, No. 17-2591 (D.D.C. Dec. 4, 2017) [hereinafter Grand Staircase Escalante Complaint]; Proclamation No. 9681, 82 Fed. Reg. 58,081, 58084–85 (Dec. 8, 2017); CAROL HARDY VINCENT, CONG. RESEARCH SERV., R41330, NATIONAL MONUMENTS & THE ANTIQUITIES ACT 11 (2018).

[3] *See* Alejandro E. Camacho & Robert Glicksman, *A Defeat on Offshore Drilling Extends the Trump Administration's Losing Streak in Court*, CONVERSATION (Apr. 9, 2019, 6:46 AM), https://theconversation.com/a-defeat-on-offshore-drilling-extends-the-trump-administrations-losing-streak-in-court-114893. *See generally infra* Part I.

[4] *Cf.* Federal Defendants' Response to Briefs of Amici Curiae at 9, Wilderness Soc'y v. Trump, No. 1:17-cv-02587, 2019 WL 2152537 (D.D.C. Apr. 17, 2019) ("Federal Defendants disagree with the *LCV* [League of Conservation Voters] court's ultimate determination—but regardless, the decision is of limited relevance to this case."). *Compare* UDB Plaintiffs' Memorandum of Points and Authorities in Opposition to Federal Defendants' Motion to Dismiss at 25, Hopi Tribe v. Trump, No. 17-cv-2590, 2019 WL 2494161 (D.D.C. Oct. 1, 2018) (arguing that the language of the Antiquities Act is unambiguous in giving the President authority to create national monuments but not revoke prior designations), *with* Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 23, League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013 (D. Alaska 2018) (No. 3:17-cv-00101-SLG) ("The straightforward wording of section 12(a) leaves no room for interpolation.").

Alaska (District of Alaska). As these cases proceed, the district courts may ultimately reach different conclusions. Scholars and parties should consider the important distinctions between OCSLA and the Antiquities Act, not merely the similarities.

This Note proceeds in three parts. Part I briefly summarizes the academic literature to date, focusing on the fact that scholars tend to discuss the Antiquities Act and OCSLA as statutory parallels to each other, and thus analyze President Trump's actions taken under them similarly. Part II discusses the main differences between the Antiquities Act and OCSLA, including the differences in statutory structure, purpose, legislative history, and presidential practices under the acts (both past presidential practices and President Trump's recent actions). This Note concludes by assessing the potential likelihood of success in the ongoing litigation surrounding the Antiquities Act and OCSLA based on the distinctions addressed in Part II. This Note does not come to any conclusions regarding the likelihood of success for the plaintiffs' challenges in either case. Instead, this Note seeks to provide a foundation for distinguishing arguments involving the Antiquities Act and OCSLA in the event that plaintiffs are handed unfavorable court decisions in either district.

I. AN EMPHASIS ON THE ANTIQUITIES ACT AND OCSLA'S SIMILARITIES IN THE ACADEMIC LITERATURE

On the campaign trail, President Trump vowed to decrease public land protection in order to open more land to oil and gas extraction.[5] So, even before the President finalized the actions at issue in the ongoing OCSLA and Antiquities Act litigation, scholars had begun to weigh in on the legality of presidential modifications under the acts. In doing so, they emphasized the similarities between a President's authority to act under OCSLA and the Antiquities Act.

The vast majority of scholars argue that President Trump's actions are illegal because both statutes function as one-way

[5] *See* Jack Healy & Kirk Johnson, *Battle Lines Over Trump's Land Policy Stretch Across 640 Million Acres*, N.Y. TIMES (Nov. 18, 2016), https://www.nytimes.com/2016/11/19/us/battle-lines-over-trumps-lands-policy-stretch-across-640-million-acres.html (noting that President Trump campaigned on the promise "to push resource extraction" on public lands and beyond).

ratchets.[6] This one-way ratchet theory begins with the fundamental principle that the Property Clause of the Constitution vests Congress with the power to make all public land management decisions.[7] Therefore, both OCSLA and the Antiquities Act, which divest Congress of its Property Clause authority in specific situations, are limited delegations of authority.[8] As such, because Congress "did not explicitly delegate the power to lift these protections once in place," it reserved "the authority to undo such protections for itself."[9]

To bolster this general proposition, scholars find support in both statutes' text, purpose, and legislative history for the one-way ratchet theory. In analyzing the Antiquities Act, scholars focus on the role of the Federal Land Policy and Management Act (FLPMA). Before Congress enacted FLPMA in 1976, Presidents had modified and revoked prior presidential monument designations, but scholars argue, by enacting FLPMA, Congress "reassert[ed] public control over executive withdrawal authority."[10] Furthermore, until President Trump's modification of Bears Ears and Grand Staircase-Escalante National Monument, "no President had attempted to modify a monument since Congress enacted [FLPMA]."[11] This reading of the Antiquities Act is further supported by an examination of other statutes passed around the same time as the Antiquities Act that delegated public land decisionmaking authority to the executive, such as the Forest Service Organic Administration Act and the Pickett Act. Both of these statutes gave Presidents withdrawal authority, but also explicitly "gave the President the additional authority to revoke

[6] *See* Jayni Foley Hein, *Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, 48 ENVT'L L. 125, 129, 132–33 (2018); *see also* Termyn, *supra* note 1, at 2, 5–6.

[7] *See* Hein, *supra* note 6, at 129.

[8] *See id.*

[9] *See id.*; *see also* Termyn, *supra* note 1, at 17 ("[T]he act of returning withdrawn land to the public domain is not simply the inverse of withdrawing land in the first place. Rather it has the characteristics of a separate legislative Act, which requires a delegation of authority and an intelligible principle to guide the exercise of that authority.").

[10] *See* Termyn, *supra* note 1, at 25–26.

[11] *See* Mark Squillace, *The Looming Battle over the Antiquities Act*, HARV. L. REV. BLOG (Jan. 6, 2018), https://blog.harvardlawreview.org/the-looming-battle-over-the-antiquities-act/.

and/or modify these withdrawals."[12] Without this explicit grant of authority, scholars allege, a President does not have the power to revoke or modify a prior monument designation.

In analyzing OCSLA, scholars look to the legislative history of the Act (a 1953 Senate Report, in particular) to argue that Congress saw OCSLA as being "a one-way lever to remove lands from disposition through mineral leasing," but which does not include the power to revoke or modify prior withdrawals.[13] Scholars compare OCSLA to other statutes such as the National Marine Sanctuary Act, which explicitly allows for the creation *and* re-designation of national marine protected areas.[14] Again, this comparison is used to emphasize the argument that explicit modification and revocation authority must be granted in order for a President to exercise that power. Finally, scholars point to the history of OCSLA, noting that "[n]o [P]resident has ever reversed a withdrawal of Outer Continental Shelf areas from oil and gas leasing, other than one with an express end date, prior to the Trump administration."[15] Here, President Trump's action modified President Obama's prior *permanent* withdrawals.[16]

Although most scholars use the one-way ratchet theory to rebuke President Trump's actions to modify public lands protections, there are a few scholars who support the President's modifications, arguing that a President has the authority to change prior withdrawals. Most of this support comes from one article authored by Professors John Yoo and Todd Gaziano, which, like the

[12] *See id.*; *see also* Termyn, *supra* note 1, at 27–28.

[13] *See* Hein, *supra* note 6, at 144; *see also* Robert T. Anderson, *Protecting Offshore Areas from Oil and Gas Leasing: Presidential Authority Under the Outer Continental Shelf Lands Act and the Antiquities Act*, 44 ECOLOGY L.Q. 727, 753 (2018).

[14] *See* Hein, *supra* note 6, at 145 ("The language of the National Marine Sanctuaries Act illustrates that when Congress sought to convey a multidirectional power to the executive branch, it did so explicitly and set forth specific procedures to guide both designations and de-designations.").

[15] *See id.* at 132.

[16] President Obama's Proclamation reserving the 115 million acres of OCS reserved the land "for a time period without specific expiration." *See id.* at 135 (quoting Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf Offshore Alaska from Leasing Disposition, 2015 DAILY COMP. PRES. DOC. 1 (Jan. 27, 2015)).

arguments by their adversaries, discusses the Antiquities Act and OCSLA in a single breath.[17]

Professors Yoo and Gaziano argue that "under traditional principles of constitutional, legislative, and administrative law, the authority to execute a discretionary power includes the authority to reverse it."[18] Professors Yoo and Gaziano support this statement by declaring that "there is no instance in American law in which a court has held that a grant of authority does not include the power of the relevant office holder to revoke prior uses of that power."[19] The authors further note that Presidents frequently revisit and revoke actions of prior Presidents and that scholars arguing otherwise do not provide a reasoned explanation for why the statutes at issue in Trump's revocation should be treated any differently.[20]

Yoo and Gaziano's article spends much time answering arguments made by their fellow academic scholars who oppose President Trump's use of executive power. For example, in response to scholars' reliance on FLPMA to support their reading of the Antiquities Act, Yoo and Gaziano state:

> The FLPMA's express limitation on the Secretary simply confirms the natural reading of the Antiquities Act, which grants authority to the President alone to specify the parcels of land withdrawn for any monument created pursuant to the Act. It should not be read to raise doubts about the President's authority to modify or revoke national monuments. The text creates no ambiguity or inference that Congress modified the President's authority in the Antiquities Act. The opposite reading of the text is much stronger, i.e., that Congress knew how to write express limitations and that it would have listed the President if its restriction on the Secretary of the Interior's power was intended to bind the President.[21]

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[17] *See* John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. REG. 617 (2018).

[18] *Id.* at 617.

[19] *Id.* at 620.

[20] *See id.* at 633 ("Presidents have a general power to reverse a designation of national landmarks by their predecessors."); *id.* at 640 ("Presidents regularly revise or revoke hundreds of executive orders and administrative regulations throughout the administrative state. If the arguments of many scholars were correct, most administrative regulations would also operate as one-way ratchets, not subject to repeal or modification by future Presidents.").

[21] *Id.* at 652–53.

Although the above is an abridged discussion of the scholarship addressing a President's authority to modify or revoke a prior withdrawal, it is evident that scholars tend to harp on the similarities between Antiquities Act and OCSLA rather than their distinctions, discussing statutory language and past practices to support their conclusions.

Some scholars do, however, acknowledge the differences between the Antiquities Act and OCSLA. For example, in her article *Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, Professor Jayni Foley Hein recognizes that "national monument status [established under the Antiquities Act] generally confers a broader set of protections than OCSLA Section 12(a), which is limited to prohibiting mineral leasing."[22] This, though, is a passing observation and not the focus of Hein's scholarship, nor the focus of other scholarship on the topic thus far. But, as will be elaborated upon below, there are significant differences between the Antiquities Act and OCSLA—differences between the statutory text and statutory structure, legislative history, underlying purpose, and presidential actions taken under the statutes—that warrant greater attention.

II. DISTINCTIONS BETWEEN THE ANTIQUITIES ACT AND OCSLA

As discussed above in Part I, many scholars have already addressed the legality of President Trump's actions taken under the Antiquities Act and OCSLA, spending much of their analyses drawing similarities between the two statutes. But, there are important distinctions between the statutes' text, structure, legislative history, purpose, along with the presidential action taken under the acts. Each of these differences will be discussed below. Ultimately, these statutory distinctions may necessitate different litigation strategies and ultimately may affect the outcome of the ongoing litigation.

A. *Statutory Text*

Much of the academic literature to date emphasizes the similarity in statutory text between the Antiquities Act and OCSLA,

[22] Hein, *supra* note 6, at 137.

namely that neither statute explicitly gives a President the authority to modify or revoke prior national monument designations or OCS withdrawal. But, several distinctions exist as well between the statutory text of the two acts. It is unclear, though, whether these distinctions make it more or less likely that, in this instance, President Trump overstepped the authority granted to him by Congress under OCSLA but not the Antiquities Act, or vice-versa.

The Antiquities Act gives a President discretionary authority to "declare" national monuments and to "reserve" land to be part of the national monuments.[23] Although a President has discretionary authority to both declare and reserve, these actions are subject to certain limitations. First, a President may declare as a monument only "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government."[24] Second, a President's ability to reserve land "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[25]

Notably, no clause in the Antiquities Act explicitly grants a President the authority to modify or revoke prior declarations of national monument designations.[26] So, a plain language reading of the actions a President may take (declaring and reserving) may be read to exclude presidential authority to take the opposite actions of revoking or abolishing national monuments.[27] This reading has led scholars and advocates alike to conclude that "President Trump's action is contrary to the Antiquities Act, which authorizes Presidents to create national monuments, but not to abolish them in whole or in part."[28]

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[23] Antiquities Act of 1906, 54 U.S.C. § 320301(a)–(b) (2012).

[24] *Id.* at § 320301(a).

[25] *Id.* at § 320301(b).

[26] *See* VINCENT, *supra* note 2, at 3.

[27] *See* Complaint at 11, Hopi Tribe v. Trump, No. 1:17-cv-02590 (D.D.C. Dec. 4, 2017) [hereinafter Hopi Complaint] (quoting Antiquities Act, § 320301(a)–(b)) (emphasis in Complaint) (internal citations omitted); *see also* Complaint at 66, Utah Dine Bikeyah v. Trump, No. 1:17-cv-02605 (D.D.C. Dec. 6, 2017) [hereinafter UDB Complaint] ("Neither § 320301(a) nor any other section of the Antiquities Act authorizes the President to revoke the national monument status of, or the protections for, objects designated under Proclamation 9558, as determined under the discretion of the establishing President.").

[28] Complaint at 3–4, Nat. Res. Def. Council, Inc. v. Trump, No. 1:17-cv-02606 (D.D.C. Dec. 7, 2017); *see also* UDB Plaintiffs' Memorandum of Points and

Yet, one could read the textual limitations written into the Antiquities Act as giving a President authority to revoke or modify a national monument's designation in certain situations. For example, perhaps a President does, in fact, have the authority to modify monuments in order to confine them "to the smallest area compatible with the proper care and management of the objects to be protected,"[29] or to ensure that the monument includes only that land that is necessary to provide "proper care and management of the objects to be protected."[30] In fact, it may be that a President not only has the authority but the *obligation* to modify monuments in this manner, as the Act specifies that these conditions "shall" be met.[31] A counter to this point is that statutory text should be read logically, assuming Congress is a reasonable entity, and it would be unreasonable, in light of the Antiquities Act purposes discussed below in Part II.D, for Congress to impose a "seesawing" of national monument status that may result from presidential modifications to or removals of national monuments.[32]

Regardless, even if one were to understand the text as allowing (or even requiring) a President to continuously monitor and limit national monuments to "the smallest area compatible with the

Authorities in Opposition to Federal Defendants' Motion to Dismiss at 26, Hopi Tribe v. Trump, No. 1:17-cv-02590-TSC (D.D.C. Nov. 15, 2018) (explaining that the plain meaning of the phrase "declare national monuments," used in Section 320301(a), is "polar opposite[]" to the phrases "revoke" or "shrink"); Termyn, *supra* note 1, at 10–11.

[29] Antiquities Act of 1906, 54 U.S.C. § 320301(b) (2012); *see also* Memorandum in Support of Federal Defendants' Motion to Dismiss, *supra* note 4, at 3.

[30] Antiquities Act, 54 U.S.C. § 320301(a)–(b).

[31] *Id.* § 320301(b); *see also* Memorandum in Support of Federal Defendants' Motion to Dismiss, *supra* note 4, at 30 ("It would be nonsensical to interpret this compulsory instruction from Congress to 'confine' monument reservations as not encompassing the authority to modify monument reservation boundaries when the President finds that 'the smallest area' compatible with protection is smaller than the area presently reserved. The President cannot fully comply with Congress's instruction to ensure that monument reservations remain 'confined' to the smallest area without the power to revisit prior reservations.").

[32] *See* NRDC Plaintiffs' Opposition to Federal Defendants' Motion to Dismiss at 2, Hopi Tribe v. Trump, No. 1:17-cv-2590-TSC (D.D.C. Nov. 15, 2018); *see also* UDB Plaintiffs' Memorandum of Points and Authorities in Opposition to Federal Defendants' Motion to Dismiss, *supra* note 28, at 31 ("If . . . the statute permits the President to reduce the size of previously-designated national monuments, it also must require him to continually revisit the boundaries of every existing monument and parcel.").

proper care and management of the objects to be protected," it is difficult to argue that President Trump did so in the instance of Bears Ears and Grand Staircase-Escalante, as his proclamations removed many "objects of scientific and historic interest" from protection in both national monuments.[33]

Section 12(a) of OCSLA, 43 U.S.C. § 1341(a) reads: "The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf."[34] So, unlike the Antiquities Act, there are no apparent limitations on the President's ability to withdraw OCS lands from oil and gas drilling. As is the case in the Antiquities Act, nothing in the text of Section 12(a) gives a President explicit authority to revoke his own or prior presidential withdrawals.[35] So, in reading the express language of Section 12(a), it seems that a President is authorized to withdraw land at his will but not to revoke those withdrawals.[36]

It is possible to argue, however, that the discretionary nature of the statute "carries with it a power to revise action previously taken under the delegated authority."[37] This can be inferred from the use of the word "may," which perhaps gives a President broad discretionary authority, and "from time to time," which could be read as allowing a President to modify prior withdrawals

[33] *See* UDB Complaint, *supra* note 27, at 64–65; Grand Staircase Escalante Complaint, *supra* note 2, at 3–5.

[34] Outer Continental Shelf Lands Act (OCSLA) of 1953 § 12(a), 43 U.S.C. § 1341(a) (2012).

[35] Termyn, *supra* note 1, at 10 (arguing that Section 12(a) "is silent as to undoing actions taken under withdraw authority").

[36] *See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 4, at 22–23 ("On its face, it does one, and only one, thing. It authorizes the President . . . to protect resources and areas from extractive activity offshore. It does not authorize the reverse—the dismantling of established protections there."); *see also id.* ("The straightforward wording of section 12(a) leaves no room for interpolation.").

[37] *See* OCSLA, 43 U.S.C. § 1341(a); *see also* Defendants' Reply Memorandum in Support of their Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment at 7–8, League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013 (D. Alaska 2019) (No. 3:17-cv-00101-SLG) (explaining that if "from time to time" does not allow a President to modify prior withdrawals, the term is rendered "superfluous"); Reply in Support of Intervenor-Defendant American Petroleum Institute's Motion to Dismiss at 16, League of Conservation Voters v. Trump, 303 F. Supp. 3d 985 (D. Alaska 2018) (No. 3:17-cv-0101-SLG).

occasionally, as he deems fit.[38] This argument seems like a stretch, however; a seemingly more persuasive interpretation of this phrasing, based on the plain meaning of the text, is that it dictates the frequency with which a President can exercise Section 12(a) authority, not the type of authority it grants.[39] So, "from time to time" allows a President to withdraw land whenever he pleases, and "may" emphasizes that this authority is discretionary rather than mandatory.

There also may be reason to give credence to the use of the word "withdraw" in Section 12(a) as opposed to the term "reservation" as used in other land management statutes. In other statutory contexts, "withdraw" indicates a desire to "preserv[e] the status quo while Congress or the executive decides on the ultimate disposition of the subject lands."[40] So, "withdraw" does not necessarily indicate permanency. "Reserve," on the other hand, "goes a step further: it not only withdraws the land from the operation of the public land laws, but also dedicates the land to a particular purpose."[41] So, if a land is given "reserve" status, it is more permanently designated. Thus, the argument goes, the fact that Congress used "withdraw" in OCSLA Section 12(a) means that it understood a President's authority to be temporary as opposed to permanent, allowing for reversals of prior withdrawals. There is a dispute, however, about whether this distinction between withdrawal and revocation authority still existed at the time that OCSLA was passed.[42] For example, in the Pickett Act of 1910, another statute that delegated public lands protection authority to the President and which was passed decades prior to OCSLA, Congress

[38] *See* OCSLA, 43 U.S.C. § 1341(a).

[39] *See* Reply in Support of Plaintiffs' Motion for Summary Judgment at 4, *League of Conservation Voters*, 363 F. Supp. 3d 1013 (No. 3:17-cv-00101-SLG); *see also id.* at 5 ("The plain congressional intent was the phrase's plainest meaning: to emphasize that the authority might be exercised with whatever frequency was thought needed.").

[40] American Petroleum Institute's Combined Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, and in Support of Cross-Motion for Summary Judgment at 13, *League of Conservation Voters*, 303 F. Supp. 3d 985 (No. 3:17-cv-00101-SLG) (quoting S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 785 (10th Cir. 2005)).

[41] *Id.*

[42] *See* Reply in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 39, at 6 ("Although the terms long ago referred to different actions, Congress ceased assuming distinct meanings decades before it enacted OCSLA in 1953.").

specified that a President's withdrawal authority should be "temporary."[43] Thus, if withdrawals were always to be temporary, the inclusion of this language in the statutory text would be surplusage.[44] Moreover, the simple fact that a President's withdraw authority is temporary does not, in and of itself, mean that the President has the authority to revoke a designation.

In sum, the above textual analysis illuminates the distinctions between the statutory text of the Antiquities Act and OCSLA. The statutory text of the Antiquities Act provides several checks on a President's ability to declare national monuments, whereas OCSLA provides a President untethered withdrawal authority. The Antiquities Act cabins a President's authority to declare and reserve monuments in a clear-cut manner, restricting a President's authority to withdraw for certain purposes ("objects of historic or scientific interest") and to certain sizes ("the smallest area compatible with the proper care and management of the objects to be protected").[45] In OCSLA, on the other hand, a President seems free to withdraw any size of land for any purpose at any time. Whether these restrictions in the Antiquities Act grant authority, or even impose a duty, on a President to modify prior national monument declarations is up for debate; but, it is obvious that these restrictions should, at the very least, have consequences on the manner in which initial presidential action occurs. In contrast, an argument could be made that because OCSLA seems to give nearly untethered authority to the President to withdraw OCS lands, he should be given more leeway to modify prior withdrawals, which may be supported by the fact that Section 12(a) uses the term "withdraw" rather than "reserve."

B. *Statutory Structure*

In engaging with the similarities between the Antiquities Act and OCSLA, many scholars have failed to take note of the fact that the statutory structures of the Antiquities Act and OCSLA differ: the Antiquities Act has a simple, straightforward statutory structure, whereas OCSLA's statutory scheme is complex and involves multiple statutory actors.

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43 *Id.*

44 *See id.*

45 *See* Antiquities Act of 1906, 54 U.S.C. § 320301(a)–(b) (2012); Hein, *supra* note 6, at 132.

The Antiquities Act is a short, simple statute with a clear purpose and statutory structure. The President is tasked with ultimate decisionmaking power to declare a national monument. Following such a designation, the Secretary of the Interior (the Secretary) is to undertake certain measures to protect lands and objects of particular historical significance.[46]

The statutory structure in OCSLA, however, is much more complex. OCSLA tasks the Secretary with managing oil and gas development of the Outer Continental Shelf (OCS).[47] Although the statute delegates to the Secretary the majority of the authority under OCSLA, some power is reserved for the President. The structure of OCSLA is complicated, but generally powers are divided into two sections: Section 8 and Section 12. Section 8 promotes leasing of the OCS, giving the Secretary the authority to approve leases, whereas Section 12 could be read as "entirely protective," giving the President the power to withdraw lands from leasing.[48]

Thus, OCSLA has a much more in-depth statutory scheme than the Antiquities Act, providing a variety of complex statutory provisions. Under OCSLA, furthermore, the vast majority of actions to be taken under the statutory scheme fall in the hands of the Secretary,[49] the President's responsibilities in Section 12 only being the right of first refusal and the right to withdraw land from leasing.[50] The Antiquities Act is simpler, providing the President with the ultimate decisionmaking power to declare a national monument or not. The Secretary does have some authority in the Antiquities Act setting as well, but only following a President's declaration.

This difference in statutory structure could lead one to conclude that OCSLA is meant to be a more limited delegation of authority to a President. The way OCSLA delegates decisionmaking authority to different actors in different sections of the statute suggests that the Secretary possesses the authority to lease while the President is

46 *See* Antiquities Act, 54 U.S.C. § 320102.

47 *See generally,* OCSLA, 43 U.S.C. § 1331 (2012).

48 League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013, 1025 (D. Alaska 2019).

49 *See, e.g.*, OCSLA, 43 U.S.C. § 1334(a) ("The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions.").

50 *See* id. § 1341(a).

given only the authority to withdraw land from leasing, with neither actor able to take on the role of the other.[51] Under this interpretation of OCSLA, a President could not do as President Trump has and revoke a withdrawal which, practically speaking, is opening up land for leasing. This same restraint does not exist on presidential action in the Antiquities Act setting, which could lead one to conclude that, at least based on a reading of the statutory structure, President Trump's actions under the Antiquities Act are more acceptable.

C. *Legislative History*

The legislative history of the Antiquities Act indicates that Congress considered but rejected presidential revocation authority, whereas no similar rejection occurred in OCSLA.

After six years of congressional debate, the Antiquities Act was passed in 1906. During this time,

> Congress considered bills that would have granted the Executive Branch creation authority but no elimination authority, as well as bills that would have granted the Executive Branch both creation authority and elimination authority. The final version of the Act, however, clearly rejected the proposals that would have delegated to the Executive Branch the authority to eliminate as well as create monument protections.[52]

In the end, nothing in the final Act "suggests that Congress recognized a . . . need for the Executive to be able to *de*-designate national monuments."[53] That being said, there were discussions leading up to the passage of the Antiquities Act that stressed the "importance of confinement" of monument size[54] which could be read as indicating that, although not expressed in the final text of the statute, some members of Congress felt the need to constrain presidential authority in some significant way.

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[51] *See League of Conservation Voters*, 363 F. Supp. 3d at 1025.

[52] Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment at 29, Grand Staircase Escalante Partners v. Trump, No. 1:17-cv-02591, 2018 WL 3820015 (D.D.C. Jan. 20, 2018) (internal citations omitted).

[53] UDB Plaintiffs' Memorandum of Points and Authorities in Opposition to Federal Defendants' Motion to Dismiss, *supra* note 28, at 27.

[54] Memorandum in Support of Federal Defendants' Motion to Dismiss, *supra* note 4, at 29; *see* Memorandum in Support of Defendant-Intervenor's Motion to Intervene at 1, Hopi Tribe v. Trump, Nos. 1-17-cv-2590-TSC, 1:17-cv-2605-TSC, 17-cv-2606-TSC, 2019 WL 2494159 (D.D.C. Jan. 11, 2019) (citing H.R. REP. NO. 59-2224, at 1 (1906)).

In OCSLA, though, the pertinent 1953 Senate Report contains no such explicit discussion.[55]

OCSLA's failure to explicitly address whether a President could revoke prior withdrawals may be a result of the fact that it was clear, from the prior public land delegations previously passed, that presidential revocation authority had to be explicitly granted from Congress.[56] The ambiguity present in OCSLA's legislative history, as a result of the explicit failure to discuss whether withdrawal authority includes the authority to reevaluate prior withdrawals, is not present in the Antiquities Act, because of the explicit

[55] *See* Hein, *supra* note 6, at 144; *League of Conservation Voters*, 363 F. Supp. 3d at 1026 n.67, 1029.

[56] Both OCSLA and the Antiquities Act were passed against a similar backdrop of prior statutes delegating public land management authority. These statutes all seem to indicate that a President's revocation and modification authority is not implicit in the statutory text, and that instead "Congress used clear language to delegate the authority to undo federal lands classifications." Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, *supra* note 52, at 30. For example, Congress amended the Sundry Civil Appropriations Act of 1897, another statute giving the President authority to reserve lands passed prior to both the Antiquities Act and OCSLA, to include language allowing the President to modify prior creations of forest reserves. *See id*. at 31. During the House debates prior to the passage of that amendment, the principal author of the Antiquities Act made statements explaining that explicit modification authority was needed, because that power was not inherent. *See id.* at 31–32. Similarly, the Newlands Reclamation Act of 1902, again another statute that granted the executive land management authority, explicitly granted the Secretary the authority to restore any previously withdrawn lands. This statutory grant creates an inference that without the explicit grant of authority to reevaluate prior land withdrawals, modification authority would not be authorized by Congress. *See id.* at 32. Finally, the Forest Service Organic Act was passed with the explicit purpose of giving a President the authority to modify mistakes in prior land designations. The initial statutory authority gave the President the power to reserve public land but did not explicitly grant the authority to revoke or modify a withdrawal. *See* Tribal Plaintiffs' Response to Federal Defendants' Motion to Dismiss at 31, *Hopi Tribe*, Nos. 1-17-cv-2590-TSC, 1:17-cv-2605-TSC, 17-cv-2606-TSC, 2019 WL 2494159. But, after President Cleveland reserved land in 1887 only to realize he had made a factual mistake in the designation, Congress passed the Forest Service Organic Act because it "shared the view that the President's authority to reserve national forests did not include a correlative power to revoke or modify them." *Id.* at 31–32. These three examples make it relatively clear that explicit statutory language is required to grant the President modification or revocation authority of prior land designations and withdrawals. *See* Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, *supra* note 52, at 30 (explaining that in prior statutes "Congress used clear language to delegate the authority to undo federal lands classifications").

congressional discussion leading up to its passage of the lack of revocation authority. Because of this specific discussion in the Antiquities Act setting, it seems clearer in the Antiquities Act setting—as compared to the OCSLA setting—that a President lacks the authority to modify or revoke land designations.

An additional complication in OCSLA's legislative history stems from the Supreme Court's 1915 decision in *United States v. Midwest Oil Co.*, holding that a President had the authority to withdraw public land from oil and gas drilling when that withdrawal served the public interest.[57] The Court in *Midwest Oil* explicitly stated that "'[t]he power of the Executive, as agent in charge, . . . need not necessarily be expressed in writing.'"[58] Thus, based in *Midwest Oil*'s holding, it could be argued that Congress enacted OCSLA with this clear statement from the Supreme Court in mind and so meant to include, via implication, authority for the President to modify or revoke prior withdrawals. But, because the Antiquities Act was promulgated prior to the *Midwest Oil* decision, no such statement indicating the Supreme Court's perspective on implicit executive power existed. So, this implicit authority should not be assumed in the Antiquities Act context.

Nevertheless, there are some ways to distinguish the situation in *Midwest Oil* from Trump's revocations at issue in the ongoing litigation. First, in *Midwest Oil*, there were 335 prior executive orders at issue, which the Court used to support its conclusion that executive practice was "longstanding," and thus congressional acquiescence could be implied.[59] Here, however, no such congressional acquiescence exists, as President Trump's actions are unprecedented: "The eighteen prior modifications are clearly distinguishable, either because they purported to rely on a separate source of executive power, or because they were meant to improve protection of monument resources by correcting survey errors or

[57] *See* Reply in Support of Intervenor-Defendant American Petroleum Institute's Motion to Dismiss at 16, *League of Conservation Voters*, 303 F. Supp. 3d 985 (No. 3:17-cv-0101-SLG).

[58] *Id.* at 18 (quoting United States v. Midwest Oil, 236 U.S. 459, 474 (1915)).

[59] *See* Reply in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 39, at 16 ("While *Midwest Oil* holds that congressional acquiescence to a longstanding executive practice of withdrawals can constitute an implicit delegation of its Proper Clause authority, nothing of the sort exists on the outer continental shelf.").

descriptions of monument resources."[60] Second, Congress expressly overruled *Midwest Oil* when it passed FLPMA in 1976.[61] Prior to FLPMA, "the Executive had claimed extensive authority in this area."[62] Congress enacted FLPMA as a reaction to this authority, and by doing so "confirmed that the President has no authority, implied or otherwise, to revoke or modify national monuments once they have been established."[63] Thus, *Midwest Oil*'s statements about congressional acquiescence could be deemed no longer relevant as they occurred prior to FLPMA. Regardless, *Midwest Oil* muddies OCSLA's legislative history in a way that does not affect the Antiquities Act's legislative history.

Because the Antiquities Act's legislative history addressed and denied presidential authority to revoke or modify prior national monument designations, parties challenging the legality of Trump's modifications to Bears Ears and Grand Staircase-Escalante will be able to make a stronger case that presidential revocations were clearly considered by Congress and rejected. On the other hand, the same strong argument does not exist in the OCSLA setting because of a lack of explicit discussion in the legislative history; this ambiguity is further magnified by the Supreme Court's holding in *Midwest Oil*.

D. *Statutory Purposes*

The Antiquities Act and OCSLA have distinct purposes. The primary purpose of the Antiquities Act is to provide speedy, permanent land protection, while OCSLA's primary purpose is to promote development.

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[60] UDB Plaintiffs' Memorandum of Points and Authorities in Opposition to Federal Defendants' Motion to Dismiss, *supra* note 28, at 41; *see also id.* at 3 ("No President has ever reduced a prior President's designation so dramatically based simply on disagreement with the prior President's judgment that the area of the monument should be 'conserve[d] . . . for the enjoyment of future generations.'") (quoting Alaska v. United States, 545 U.S. 75, 103 (2005)).

[61] *See* Reply in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 39, at 16; FLPMA, Pub. L. No. 94-579 § 704(a), 90 Stat. 2743, 2792 (1976) ("[T]he implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459) . . . [is] repealed.").

[62] UDB Plaintiffs' Memorandum of Points and Authorities in Opposition to Federal Defendants' Motion to Dismiss, *supra* note 28, at 28.

[63] *See* Hopi Complaint, *supra* note 27, at 11.

The Antiquities Act was passed in 1906 in response to concerns regarding theft and destruction of objects of particular archeological importance. The Act's purpose is to protect "specific objects, particularly objects of antiquities such as cliff dwellings, pueblos, and other archeological ruins."[64] At the time the Antiquities Act was enacted, there were "increasing concerns regarding the plundering and other destruction of sensitive sites."[65] Laws at the time were incapable of preventing this destruction, because they relied on congressional action in order to permanently protect land, and congress does not act within the quick timeframe necessary to halt imminently destructive behaviors.[66] Thus, the most logical understanding of the Antiquities Act's purpose is that it was meant "to provide the Executive branch with a speedy means to accomplish permanent protection."[67] This understanding of statutory purpose favors a reading of the Antiquities Act that would not allow a President to modify or revoke national monument designations as President Trump has attempted to do.

But, this purpose may be called into question when comparing national monument designation to national park designation. Congress may elevate national monuments to national park status, and there is no dispute that national parks ensure permanent protection of the land.[68] Thus, perhaps it could be argued that permanency can be achieved only through congressional designation of national parks, not through executive designation of national monuments.[69] And in this regard, the main purpose of the Antiquities Act—providing the President with the authority to act quickly—is still protected. Thus, upon comparing the purpose of national monuments to national parks, it is not as clear that a President should not be able to modify national monument status. That being said, there can always be more than one way of achieving a goal, and it seems more accurate to understand national monument

64 VINCENT, *supra* note 2, at 1, 6.

65 Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, *supra* note 52, at 26–27.

66 *See id.*

67 *Id.* at 27.

68 *See* Defendant-Intervenors' Reply in Support of Defendants' Motion to Dismiss at 2, Hopi Tribe v. Trump, No. 1:17-cv-02590-TSC (D.D.C. filed Dec. 12, 2018).

69 *See id.* at 2, 11.

designation as an alternative means of establishing permanent protection of lands to congressional designation of national parks.

Alternatively, OCSLA's stated purpose is to promote "expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs."[70] Initially, OCSLA's purpose was specifically focused on promoting oil and gas leasing, but in 1978, the Act was amended to add "explicit environmental protections to the leasing process"[71] and similar protections to pre-leasing exploratory activities.[72] For example, the 1978 Amendments added a four-stage leasing process, which prohibited leasing of land that would be "unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance."[73]

So, it seems clear that the broad purpose of OCSLA is to make "available its mineral resources for development" and giving the President authority to alter prior withdrawals could be interpreted to promote such purpose.[74] That being said, as distinct from the broader purpose of the Act, OCSLA Section 12(a), which gives the President the authority to withdraw land from leasing, seems to be specifically targeted at protecting and preserving lands, and the 1978 Amendment seemed to have the goal of ensuring that environmental concerns were properly considered. This should not be ignored in interpreting a President's authority to modify or revoke withdrawals under OCSLA.

The primary purposes of the Antiquities Act and OCSLA are directly opposite. The purpose of the Antiquities Act is to protect

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[70] OCSLA, 43 U.S.C. § 1332(3) (2012).

[71] Anderson, *supra* note 13, at 749, 751–52.

[72] *See id.* ("In addition, the 1978 amendments added detailed environmental protections to OCSLA. For example, exploration activity under an OCS lease may not occur if the Secretary of the Interior finds that the activity 'would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral . . . , to the national security or defense, or to the marine, coastal, or human environment.'") (quoting OCSLA, 43 U.S.C. § 1334(a)(2)(A)(i)).

[73] OCSLA, 43 U.S.C. § 1340(g)(3).

[74] Memorandum in Support of Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b) at 5, League of Conservation Voters v. Trump, 303 F. Supp. 3d 985 (D. Alaska 2018) (No. 3:17-cv-00101-SLG).

and preserve lands from, among other things, resource extraction.[75] In contrast, OCSLA is meant to make lands available to "exploration, development, and production of the minerals of the Outer Continental Shelf," albeit "subject to environmental safeguards."[76] These purposes may influence a court's interpretation of presidential statutory authority. For example, a court may determine that in order to effectuate the Antiquities Act's purpose, all prior presidential protections should be deemed to be permanent, subject only to congressional modifications as needed. In order to effectuate OCSLA's purpose, however, a President may have the authority to modify prior withdrawals as long as he is properly taking environmental concerns into account as dictated by the 1978 Amendment.

E. *Post-Statutory Enactment Executive Action*

1. *Executive Action Prior to President Trump*

Many Presidents have modified national monuments in the past by relying on the Antiquities Act, although it is possible to distinguish these actions from President Trump's modification of Bears Ears and Grand Staircase-Escalante. But, no President has modified ongoing OCS withdrawals under OCSLA.

In the Antiquities Act setting, "[p]residents have eliminated lands from existing monuments on at least eighteen occasions."[77] Thus, there is clear precedent for President Trump's actions in the Antiquities Act context. It is possible, however, to distinguish these prior presidential actions from President Trump's in several regards. First, even among other national monument alterations, President Trump's removal of land from Bears Ears and Grand Staircase-Escalante is more dramatic and gave drastically different reasons than other potentially similar presidential actions.[78] Second,

[75] Antiquities Act of 1906, 54 U.S.C. § 320101 (2012) ("It is declared that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States.").

[76] OCSLA, 43 U.S.C. § 1332.

[77] Memorandum in Support of Federal Defendants' Motion to Dismiss, *supra* note 4, at 7.

[78] UDB Plaintiffs' Memorandum of Points and Authorities in Opposition to Federal Defendants' Motion to Dismiss, *supra* note 28, at 41; *see also* Memorandum in Support of Federal Defendants' Motion to Dismiss, *supra* note

all of these prior modifications occurred before the enactment of FLPMA. As discussed previously, FLPMA established a general presumption against implied delegations of congressional public lands management authority to Presidents, which, it could be argued, was integrated into the Antiquities Act upon its enactment.[79] Thus, even if Presidents had the authority to modify prior presidential delegations before FLPMA was enacted, they no longer have the authority to do so.

This interpretation of FLPMA, however, is up for debate. First, FLPMA discusses the Secretary's public land management authority rather than the President's, so it is possible that despite FLPMA's clear purpose, the fact that Congress did not explicitly reference presidential authority might be interpreted to mean that the President's Antiquities Act authority was not impacted by FLPMA. Second, FLPMA expressly overruled many land management statutes, but did not outright overrule the Antiquities Act. This too could be interpreted to mean that Congress embraced the Antiquities Act, and its prior monument designations as well as prior monument alterations by Presidents, in enacting FLPMA. Thus, it appears that Presidents have acted in ways similar (if not identical) to President Trump in modifying national monuments status of prior land designations.

The prior actions in the Antiquities Act setting cannot alone support the legality of President Trump's modifications to Bears Ears and Grand Staircase-Escalante National Monuments—the prior modifications were never challenged in court, after all—but they do stand in stark contrast to the unprecedented nature of his actions in the OCSLA context. In the OCSLA context, "no President

4, at 3 ("No President has ever reduced a prior President's designation so dramatically based simply on disagreement with the prior President's judgment that the area of the monument should be 'conserve[d] . . . for the enjoyment of future generations.'") (quoting Alaska v. United States, 545 U.S. 75, 103 (2005)). *See also* UDB Plaintiffs' Memorandum of Points and Authorities in Opposition to Federal Defendants' Motion to Dismiss, *supra* note 28, at 41("The eighteen prior modifications are clearly distinguishable, either because they purported to rely on a separate source of Executive power, or because they were meant to improve protection of monument resources by correcting survey errors or descriptions of monument resources.").

[79] *See* Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, *supra* note 52, at 36.

until now has purported to revoke a permanent withdrawal."[80] There have been a few prior modifications, but all of these were modifications of time-limited withdrawals, whereas the OCS withdrawals that President Trump modified (President Obama's prior withdrawals) were of a permanent duration.[81] In sum, there are distinctions in the way that past Presidents have relied on the Antiquities Act and OCSLA that may be relevant in the success of a challenge to President Trump's actions taken under the statute.

2. *President Trump's Actions*

Although President Trump's actions taken under the Antiquities Act and OCSLA have been compared by most, the actions are distinguishable in notable ways. For one, President Trump's declarations modifying Bears Ears and Grand Staircase-Escalante National Monuments are accompanied by detailed explanations, whereas the declarations modifying prior withdrawals under OCSLA are not. Additionally, President Trump's modifications under the Antiquities Act have much more immediate impacts than his modifications under OCSLA.

President Clinton designated Grand Staircase-Escalante in 1996 after finding that 1.7 million acres of "geological and historic treasures, including unique paleontological resources found nowhere else in the world, and vividly beautiful landscapes" required protection due to threats from coal mining and related activities.[82] Following President Clinton's designation, Congress added 200,000 acres to the monument after the federal government acquired additional land from the state of Utah.[83] Upon designating Grand Staircase-Escalante, BLM's management of the area changed dramatically, with the agency creating a Monument Management Plan to ensure "that the protective purposes for which the Monument was designated [were] fulfilled and that all future activities on the Monument conform[ed] to the management plan."[84]

[80] Reply in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 39, at 13.

[81] *See id.* at 17. For example, although President George W. Bush did amend a prior OCS withdrawal by President Clinton, that withdraw was only temporary from the get go and Congress let the funding for the withdrawal lapse. *See id.*

[82] Complaint for Injunctive and Declaratory Relief at 4, Wilderness Soc'y v. Trump, No. 1:17-cv-02587 (D.D.C. Dec. 4, 2017) (internal citations omitted).

[83] *See* Complaint, *supra* note 2, at 25.

[84] Complaint for Injunctive and Declaratory Relief, *supra* note 82, at 28.

Then, in 2016, President Obama signed Proclamation 9558, designating 1.35 million acres of land for the creation of Bears Ears National Monument.[85] Bears Ears is "home to Native peoples since time immemorial" and "contains hundreds of thousands of objects of historic and scientific importance, many traditional cultural properties, and many sacred sites."[86] Due to its immense importance, and in a showing of unprecedented unity, five tribes (the Navajo, Hopi, Zuni, Ute Indian and Ute Mountain Ute) formed the Bears Ears Inter-Tribal Coalition in an effort to urge President Obama to designate the land.[87] Upon designation of the area, President Obama continued to honor the tribes' connections to the land by creating the Bears Ears Commission, comprised of tribal leaders, and by requiring the Secretary to include the Commission in the decisionmaking surrounding development and management plans of Bears Ears.[88] Among other protections, President Obama's designation withdrew Bears Ears from future oil and gas leasing and development.[89] But, unlike Grand Staircase-Escalante, no management plan was in place when President Trump revoked the monument's designation.[90]

Despite these well-reasoned designations, on April 26, 2017, President Trump issued Executive Order 13,792 which "directed the Secretary of the Interior to review all national monuments designated or expanded after January 1, 1996, that either included more than 100,000 acres of public land or for which the Secretary determines inadequate 'public outreach and coordination with

[85] *See* Hopi Complaint, *supra* note 27, at 1, 3; UDB Complaint, *supra* note 27, at 32.

[86] Hopi Complaint, *supra* note 27, at 2.

[87] *See id.* at 2, 16.

[88] *See* UDB Complaint, *supra* note 27, at 31; *see also id.* at 35 ("The recent designation of the Bears Ears National Monument through Proclamation 9558 is the product of years of public advocacy and engagement by Plaintiffs, tribal nations, and other groups with interests in protecting the cultural, historical, and ecological heritage of southeastern Utah.").

[89] *See id.* at 31–32.

[90] *Compare* Notice of Intent To Prepare Resource Management Plans for the Grand Staircase-Escalante National Monument, 83 Fed. Reg. 2179, 2179 (Jan. 16, 2018) (noting the proposed plans will replace existing plans), *with* Notice of Intent To Prepare Monument Management Plans for the Bears Ears National Monument, 83 Fed. Reg. 2181, 2182 (Jan. 16, 2018) (noting no such replacement).

relevant stakeholders occurred.'"[91] After a short (sixty-day) public comment period, where the Department of the Interior received nearly three million comments regarding twenty-seven monuments that it planned to review, Ryan Zinke, then-Secretary, recommended that President Trump reduce the size of four monuments and modify the allowed uses of others.[92]

Zinke recommended reductions to both Grand Staircase-Escalante and Bears Ears National Monuments. This did not come as a surprise: it is likely that the date specified in President Trump's Executive Order, "all [p]residential designations or expansions of designations under the Antiquities Act made since January 1, 1996,"[93] was deliberately selected to include Grand Staircase-Escalante;[94] and while Secretary Zinke had 120 days to review most monument designations, he was given just forty-five days to review Bears Ears.[95]

On December 4, 2017, President Trump issued Proclamation 9682 which "modified and reduced" Grand Staircase-Escalante to 1,003,863 acres, claiming that this now confined the boundary of the monument "to the smallest area compatible with the proper care and management of the objects to be protected."[96] This proclamation removed nearly half of Grand Staircase-Escalante's prior area from protection;[97] President Trump claimed that the removed land was "adequately protected under other laws, not of unique or distinctive scientific or historic significance, and/or not under threat of destruction."[98] In addition to removing land from protection—lands which "contain numerous sensitive resources, including objects specifically identified in the 1996 Proclamation"[99]—President Trump's proclamation also changed the management of the remaining lands: beginning on February 2, 2018, the remaining area of Grand Staircase-Escalante was opened

[91] Hein, *supra* note 6, at 139 (quoting Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (May 1, 2017)).

[92] *See id.* at 139–40.

[93] Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (Apr. 26, 2017).

[94] Complaint, *supra* note 2, at 41.

[95] Exec. Order No. 13,792, 82 Fed. Reg. at 20,430.

[96] Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,093 (Dec. 8, 2017).

[97] Complaint, *supra* note 2, at 5.

[98] VINCENT, *supra* note 2, at 22.

[99] Complaint, *supra* note 2, at 46.

up to mineral leasing, vehicular use on roads, ecological restoration, and active vegetation management.[100]

Similarly, on December 4, President Trump issued Proclamation 9681,[101] which reduced Bears Ears National Monument by 1.15 million acres (an eighty-five percent reduction from its original size) and established two noncontiguous units of land within the remaining monument area.[102] Despite Secretary Zinke's acknowledgement that public comments favored keeping Bears Ears' initial designation, Zinke still recommended reducing the area of the monument based on factors such as the "monuments' effect on private land and on extractive uses such as grazing, mining, and timber production"—factors that are not listed anywhere in the Antiquities Act.[103] And President Trump did just that. Similar to the Grand Staircase-Escalante reduction, President Trump claimed that the Bears Ears reduction was warranted because "objects removed from the 2016 monument [were] sufficiently protected under other authorities and/or not unique, not of significant scientific or historic interest, or not threatened so as to require protection in the monument."[104] Also, as was the case in the Grand Staircase-Escalante reduction, President Trump removed protections on the land still in the monument: along with opening Bears Ears to vehicular travel, road maintenance, livestock grazing, and vegetation management, the revocation no longer requires the federal government to consult tribal governments on land management decisions for one of the two units.[105]

In contrast to his national monument modifications, President Trump's decision to remove prior protected OCS lands was accompanied by little explanation. Relying on Section 12(a) of OCSLA, President Trump withdrew OCS lands that were

100 *See id.* at 5–6.

101 *See* Proclamation No. 9681, 82 Fed. Reg. 58,089 (Dec. 8, 2017) (modifying the Bears Ears National Monument).

102 *See* VINCENT, *supra* note 2, at 11; Complaint, Hopi Tribe, *supra* note 27, at 3; *see also* Proclamation 9681, 82 Fed. Reg. at 58,081 (President Obama establishing 1.35 million acres as Bears Ears National Monument); *id.* at 58,085 (President Trump excluding approximately 1,150,860 acres from the Monument); *id.* at 58,087 (map identifying the non-contiguous Indian Creek and Shash Jáa units).

103 *See* Antiquities Act of 1906, 54 U.S.C. §§ 320301–03 (2012); Complaint, Nat. Res. Def. Council, Inc., *supra* note 28, at 38.

104 VINCENT, *supra* note 2, at 22.

105 UDB Complaint, *supra* note 27, at 54–55.

previously permanently designated by President Obama. During his time as President, President Obama withdrew 115 million total acres of OCS in both the Arctic and the Atlantic from future oil and gas leasing "for a period without specific expiration."[106] According to President Obama, this withdrawal was warranted in order "to protect marine wildlife and habitat, and provide long-term opportunities for research, recreation, and exploration."[107]

On April 28, 2017, however, President Trump issued an Executive Order revising several of President Obama's prior protections of OCS land.[108] The Executive Order, entitled "Implementing an America-First Offshore Energy Strategy," makes it the United States' policy to "encourage energy exploration and production, including on the Outer Continental Shelf."[109] In particular, section 5 of the Trump Order changed the language in the Obama Order (withdrawing the 115 million acres) to reflect the state of protection prior to Obama's permanent withdrawal, thereby, in effect, revoking protection from future oil and gas leasing that President Obama put into place.[110] Additionally, the Trump Order mandated reconsideration of the current leasing plans in place in order to allow for annual lease sales in the Arctic and Atlantic, sought "to encourage expeditious seismic surveying" and mandated "expedited seismic permitting," and directed "a review and reconsideration of various offshore safety and pollution-control regulations and guidance documents … for consistency with the order's directive to encourage energy exploration and development."[111] Secretary Zinke promptly responded to President Trump's order, issuing his own order implementing it the following day.[112]

There are two key distinctions between President Trump's actions under the Antiquities Act and OCSLA. First, as discussed above, the President has broader discretion in his decisionmaking

106 Hein, *supra* note 6, at 135 (quoting Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf Offshore Alaska from Leasing Disposition, 2015 DAILY COMP. PRES. DOC. 1 (Jan. 27, 2015)).

107 *Id.* at 135–36.

108 *See* Termyn, *supra* note 1, at 11.

109 Exec. Order 13,795, 82 Fed. Reg. 20,815, 20,815 (Apr. 28, 2017).

110 *See* Complaint, *supra* note 1, at 20; Exec. Order No. 13,795, 82 Fed. Reg. at 20,816.

111 Complaint, *supra* note 1, at 20.

112 *See id.* at 20–21.

authority under OCSLA than under the Antiquities Act, because presidential discretion is bound in the Antiquities Act to designations of areas that (1) have historic or scientific importance and (2) are the smallest area compatible with proper management. For this reason, President Trump relied on general energy policy to change President Obama's prior proclamations under OCSLA,[113] but had to do more work to root his actions under the Antiquities Act to the statutory text, claiming that the prior designations were not the smallest compatible with management and were not needed to protect objects of scientific and historic significance.[114] By providing more detail in his national monument modifications, President Trump may be better able to ward off complaints of illegality than he will be in the OCSLA context, where his action appears to be significantly more arbitrary. Of course, the opposite conclusion could also be reached: because President Trump provides a more detailed rationale in his Antiquities Act revocations, it may be easier for a litigating party to find errors within that explanation.

Second, President Trump frames the OCSLA revocation as merely preliminary. In President Trump's Executive Order, he states the executive policy of energy dominance and reverses the language of President Obama's prior proclamations, but then mandates "reconsideration" of the current leasing policy and "encourages" expedited seismic surveying.[115] In part, President Trump is able to frame his actions this way because of the statutory structure of OCSLA: just because the President fails to fully protect an area from oil and gas drilling doesn't mean that drilling may take place, as the Secretary must first approve exploratory surveying and leasing plans, taking environmental considerations into account.[116] This is in juxtaposition to the proclamations removing protection from

[113] *See* Exec. Order No. 13,795, 82 Fed. Reg. 20,815, 20,815 (Apr. 28, 2017) (stating that the policy of the U.S. is to "encourage energy exploration and production, including on the Outer Continental Shelf").

[114] VINCENT, *supra* note 2, at 22; Proclamation No. 9681, 82 Fed. Reg. 58,081, 58,081 (Dec. 8, 2017) (modifying the area of Bears Ears by claiming that the objects removed from protection were "not of significant scientific or historic interest"); Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,093 (Dec. 8, 2017) (claiming to confine the boundary of Grand Staircase-Escalante "to the smallest area compatible with the proper care and management of objects to be protected").

[115] Complaint, *supra* note 1, at 20.

[116] *See* Anderson, *supra* note 71, at 751–52.

Bears Ears and Grand Staircase-Escalante; these proclamations not only create new boundaries, effective immediately, but also immediately open the surrounding area to oil and gas exploration.[117] The immediacy of the impact of President Trump's actions in the Antiquities Act context may make it easier to challenge in court than his actions under OCSLA for justiciability reasons.

CONCLUSION

Although the focus of scholarly work to date has emphasized the similarities between the Antiquities Act and OCSLA, there are differences, and these differences may end up resulting in distinct outcomes in the ongoing litigation surrounding President Trump's decisions to revoke prior presidential protections utilizing these statutes.

First, the statutory text of the Antiquities Act provides several checks on a President's ability to declare national monuments—national monuments are meant to protect only "objects of historic and scientific interest" and must be "confined to the smallest area compatible with the proper care and management of the objects to be protected"—whereas OCSLA provides a President untethered withdrawal authority. It is not exactly clear what the difference in statutory text means, but it could be that President Trump has the ability (or even duty) to limit Bears Ears and Grand Staircase-Escalante based on the constraints of the Antiquities Act, whereas OCSLA should be read as giving a President free reign to withdraw OCS lands from oil and gas development but not the authority, as President Trump claims, to revoke a withdrawal. Alternatively, an argument could be made that because OCSLA seems to give nearly untethered authority to a President's ability to withdraw OCS lands, he should be given more leeway to modify prior withdrawals.

Second, the statutory structure of the Antiquities Act and OCSLA differ. The Antiquities Act has a simple, straightforward statutory structure, whereas OCSLA's statutory scheme is complex and involves many statutory actors. This might lead a court to determine that OCSLA is meant to be a more limited delegation of authority to a President, giving the President authority to act in only

[117] This is so because under the Mineral Leasing Act, there is no permitting process for oil and gas exploration. *See generally* 30 U.S.C. §§ 181–236 (2012).

specific situations, and thus President Trump acted without statutory authority in revoking President Obama's protections of the OCS. Alternatively, it could be argued that because the Antiquities Act was written to give almost all decisionmaking power in the national monuments context to the President, this broad delegation also grants President Trump the ability to act as he did in modifying the boundaries of Bears Ears and Grand Staircase-Escalante.

Third, the legislative history of the Antiquities Act indicates that Congress considered and rejected presidential revocation authority, whereas no similar rejection occurred in OCSLA. The ambiguity in OCSLA may enable President Trump and the federal government to argue that OCSLA's withdrawal authority also, implicitly, granted the authority to revoke the withdrawal; that argument is a lot more difficult to make in the Antiquities Act context.

Fourth, the Antiquities Act and OCSLA have distinct purposes, the purpose of the Antiquities Act being to provide quick, permanent protection of federal land and OCSLA's purpose being to promote development. Although OCSLA's Section 12(a), which grants the President the authority at issue here, seems to be focused on protecting environmentally sensitive OCS lands, it could be argued that President Trump was acting in accord with OCSLA's overall purpose. It is not possible to make this in the Antiquities Act setting, which was passed with a goal that is clearly at odds with President Trump's actions.

Fifth, and finally, many Presidents have modified national monuments in the past, relying on the Antiquities Act, whereas none have modified ongoing OCS withdrawals under OCSLA. This could end up being a significant factor in the ongoing litigation. Although past presidential action that has not been challenged in court does not necessarily have precedential support, this fact still may end up convincing a court that President Trump's actions are legal in the Antiquities Act setting but not in the OCSLA setting.

As this Note has demonstrated, the distinctions between the two statutes do not lead to a definitive judgment that President Trump's decisions to revoke past presidential land protections are legal in one statutory regime but not in the other. In fact, it could very well be the case that his actions are illegal in both settings. But it is important to think about the distinctions between the two statutes, as these distinctions could have repercussions in the ongoing litigation.