

# ***DESIGNATION OF NATIONAL MONUMENTS USING THE ANTIQUITIES ACT***

*April 2016*

*Following the designation of the Basin and Range National Monument in Nevada in 2015, the Nevada Association of Counties (NACO) Board of Directors asked staff to write a policy paper outlining NACO's position on the use of the Antiquities Act. The following is a summary of NACO's research on this issue, which compares the Basin and Range designation with past designations and also looks towards statutory changes.*



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## **Introduction**

On July 10, 2015, President Obama signed a proclamation using the Antiquities Act to create the Basin and Range National Monument. This monument, roughly the size of Rhode Island, consists of 704,000 acres located in Lincoln and Nye Counties, in eastern Nevada. The Antiquities Act, passed in 1906, authorizes the President to designate National Monuments by proclamation - a process that lies wholly within the President's power and discretion, similar to an executive order.<sup>1</sup> The creation of National Monuments by the President does not require any Congressional approval or input, or any input from local stakeholders, even though an Antiquities Act designation immediately converts land to management analogous to National Conservation Areas (NCAs). In response to past designations, States have unsuccessfully challenged the Antiquities Act in court six times.<sup>2</sup> Alaska and Wyoming were successful in limiting the executive power to designate Monuments in those States through legislation requiring Congressional approval for future designations.<sup>3</sup> This history helps inform policy recommendations for similar aims in Nevada.

## **National Monuments Designated under the Antiquities Act**

The Antiquities Act was created in 1906 by Congress for the purpose of protecting small areas in the Southwest with prehistoric ruins and Indian artifacts from theft or destruction.<sup>4</sup> The Act grants general withdrawal authority to the President to identify and set aside acres of federal land with prehistoric ruins and Indian artifacts.<sup>5</sup> Since its passage, the Antiquities Act has been used to designate over 130 national monuments; many of which have been criticized as exceeding the original intent of the Act by designating very large areas. According to these critics, the Act clearly limits the allowable acreage - that Act says that the boundaries of any Monument should be "confined to the smallest area compatible with proper care and management of the objects to be protected".<sup>6</sup>

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<sup>1</sup> *The Antiquities Act of 1906*, P.L. 59-209, 34 Stat. 225 (1906) (codified at 16 U.S.C. § § 431-433), at <http://www.nps.gov/history/local-law/anti1906.htm>

<sup>2</sup> *United States v. California*, 436 U.S. 32 (1978); *Cameron v. United States*, 252 U.S. 450 (1920); *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945); *Cappaert v. United States*, 426 U.S. 128 (1976); *Anaconda Copper Co. v. Andrus*, 14 ERC 1853 (D. Alaska 1980) (Defs.' Ex. 3); *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978).

<sup>3</sup> *Grand Teton National Park*, 16 USCS § 406 et seq.; *Alaska National Interest Lands Conservation Act (ANCILA)*, 16 USCS § 3101 et seq.

<sup>4</sup> 2013-59 RMMLF PROC 23

<sup>5</sup> *Ibid.* at 1.

<sup>6</sup> *Id.*

A National Monument is managed like a National Conservation Area (NCA), land designated primarily for conservation and recreation with little to no other uses allowed. The President, in designating a National Monument, unilaterally decides which land should be designated, rather than engaging with the public to identify areas widely-recognized as national treasures or needing protection, as is the case with Wilderness Areas and National Parks. Wilderness Areas and National Parks are created through a process that allows all interested parties to be represented and provide input. In the case of National Monuments, land previously managed by the Bureau of Land Management (BLM) for multiple uses, including industry, ranching, and recreation, can be designated a National Monument overnight without any requirement for public input or notice. Although existing uses like mining or grazing may be grandfathered in, transportation to or rights of way needed to exercise existing uses or to access private property are likely significantly limited moving forward. All future uses except for hiking, backpacking, and some hunting and fishing are forever restricted.

### **Past Designations and Resulting Exclusions**

Only two states, Wyoming and Alaska, have managed to reduce presidential powers under the Antiquities Act. Both Wyoming and Alaska enjoy congressional approval clauses, though Alaska's is only triggered by a minimum 5,000-acre withdrawal. The creation of these exclusions can be attributed almost exclusively to political will and exchanges that were made in order to get these exclusions approved; the courts however, have been unwilling to restrict in any way the President's use of the Antiquities Act. The creation of the first exclusion followed the designation of the Jackson Hole National Monument in 1943, and the second followed the designation of fifty-six million acres in Alaska in 1978. Historic concerns and challenges regarding the use of the Antiquities Act include: the size of the areas and types of resources protected; whether an emergency exists to justify a designation; tax losses for local governments; the inclusion of nonfederal lands within monument boundaries; the lack of public participation and environmental review requirements in the act; and selection of the managing agency.

President Roosevelt was the first to designate a national monument using the Antiquities Act, and the first to be challenged for it. Roosevelt's first designation was the Devil's Tower in Wyoming, which was followed by seventeen additional proclamations. With striking resemblance to the Basin and Range Designation, the most controversial was the Jackson Hole Proclamation which spurred a series of lawsuits as well as Congressional action.<sup>7</sup> When the Jackson Hole National Monument was created it was the first time the Antiquities Act had been used for so large an area. Senator Frank A. Barret introduced a bill to abolish the monument. At the hearings of the House Committee on Public Lands, he famously stated "It does not seem reasonable to me that Congress ever intended that a national monument should extend over a

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<sup>7</sup> *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945).

body of land comprising 221,000 acres, an area nearly one-third the size of Rhode Island.”<sup>8</sup> Senator Joseph C. O’Mahoney described the designation as a “rather extraordinary instance of the indirect use of Executive power to accomplish an objective which could not be accomplished by legislative action.”<sup>9</sup> The Senator was “very much amazed yesterday afternoon, while in the meeting of the Committee on Military Affairs, to have my secretary come into the meeting with a copy of the Federal Register of March 18, 1943, in his hand... establishing the Jackson Hole National Monument in Wyoming, and containing the description of several hundred thousand acres of land within the boundaries of that State.”<sup>10</sup> Key to Senator O’Mahoney’s opposition of the Jackson Hole Monument was that “the people of Wyoming have lost no opportunity to express their extinct opposition to the extension of the boundaries of that park.”<sup>11</sup> Senator Frank A. Barrett added that legislation creating the withdrawal of the same area had not been passed because “no provision was made to offset the consequent loss of taxes to the people of Wyoming,” where the loss of revenue would be a serious blow to the people of Teton County, and that “no emergency exists justifying action of this character.”<sup>12</sup>

The second most controversial use of the Act was when President Jimmy Carter, in 1978, designated seventeen monuments covering fifty-six million acres in Alaska. This was part of an effort to protect lands that had been segregated or set aside for study as possible conservation units after the December 18, 1971 Alaska Native Claims Settlement Act (ANCSA).<sup>13</sup> Because the lands were about to be reopened before Congress was able to enact legislation, President Carter designated this land under the Antiquities Act and withdrew one-hundred sixteen million other acres using Federal Land Management Policy Act (FLPMA) withdrawal provisions. The Carter Administration seemed to be concerned that this interim period would cause “Alaska [to] become a private preserve for a handful of rape, ruin and run developers.”<sup>14</sup> However, in 1980, Congress responded by introducing and passing the Alaska National Interest Lands Conservation Act (ANILCA) designating conservation units, parklands, wildlife refuge land, wild and scenic rivers, and wilderness for a total of 153.7 million acres.<sup>15</sup> This Act included a clause requiring Congressional ratification for future Antiquities Act designations greater than 5,000 acres, “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 notice of such withdrawal has been submitted to

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<sup>8</sup> Congressional Record, Senate, 1943 HR 2241, 2240 (Legislative day of Tuesday, March 9 1943) (Friday, March 19, 1943).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2233

<sup>12</sup> *Id.* at 2240

<sup>13</sup> *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 500-502 (2003).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Congress.”<sup>16</sup> It was during this time that the State of Alaska filed a lawsuit arguing that Antiquities Act Designations should trigger National Environmental Protection Act (NEPA) requirements, but again, as in past challenges, the case was lost on constitutional grounds.

As a result of challenges to these two designations and others, courts have declined to probe the reasoning of the President, finding the use of the Antiquities Act adequate so long as some objects of historic or scientific interest exist somewhere within the area.<sup>17</sup> The only suggestion that there might be a willingness to find against the President is “[I]f a monument were to be created on a bare stretch of sage-brush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest, the action in attempting to establish it by proclamation as a monument, would undoubtedly be arbitrary and capricious and clearly outside the scope and purpose of the Monument Act.”<sup>18</sup>

### **What Basin and Range Protects**

The Basin and Range Monument in Nevada is made up of an area significantly larger than the scattered areas within it that contain the historic and scientific resources referenced in its proclamation; and many of these resources were already protected through Wilderness designations and under the National Register of Historic Places.

According to the Presidential Proclamation designating the Basin and Range National Monument, the Monument was created to protect a stark and undisturbed landscape with its resident wildlife and ecology. Some argue this describes the entire expanse of the Basin and Range, which stretches from California, and across Nevada, into Utah, and then south across Arizona and New Mexico. Specifically, the following historic and scientific resources are mentioned in the Proclamation:

- The Worthington Mountains ...contain at least three known caves, including the Leviathan Cave, which features stalactites, stalagmites, flow stones, soda straws, a cave shield, and rim pools.
- The earliest Paleo-Indian inhabitants of the Basin and Range area left important traces of their presence ... in the Coal Valley Water Gap and ... around the prehistoric Coal Valley Lake.
- The excavated Civa Shelter II in the Golden Gate Range.
- Head frames, mining cabins, and other structures associated with the region's mining history can be found in the Mount Irish area.

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<sup>16</sup> ANCILA, 16 USCS § 3101 et seq.

<sup>17</sup> Wyoming at 890; *Cappaert v. United States*, 426 U.S. 128 (1976).

<sup>18</sup> *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 500-502 (2003).

- Sitting on privately-held land in Garden Valley, City is one of the most ambitious examples of the distinctively American land art movement.
- Evidence of the Alamo bolide impact, a high-velocity impact from space about 367 million years ago.
- Numerous petroglyph sites, including rock art in the White River Narrows Historic District, Mount Irish Archaeological Area, and the Shooting Gallery rock art site.<sup>19</sup>

Of the resources mentioned above, all of them, save those in the Coal Valley and the Bolide Impact, include areas no more than a few acres in size, some of which were already protected. Though the Coal Valley area is larger, cumulatively these resources make up less than a third of the area designated in the National Monument and still may not arguably constitute, “the smallest area compatible with proper care and management of the objects to be protected.” As for the Alamo Bolide Impact, it consists of rocks containing evidence of a prehistoric impact from space, and actually spans an area far larger than the Monument.<sup>20</sup> The Alamo Bolide Impact is unidentifiable to the untrained eye and covers a vast area of southeastern Nevada. Though there is scientific interest in the impact, because of its large size, remoteness, and the anonymity of the geology to laypeople, there is no evidence that it was either threatened or in need of protection. Furthermore, depending on the management decisions governing the Monument, the designation might actually make it more difficult for scientists to easily access portions of the Impact area if roads within the Monument begin to be limited.

The most publicized resources presented in the Monument are Michael Heizer's sculpture, "City," and the petroglyphs. The "City" is already protected, as it was built on private property and not open to the public. Months before the Monument was first designated, on May 6, 2015, the Triple Aught Foundation, via the Los Angeles County Museum of Art (LACMA), granted to the BLM a conservation easement for public access.<sup>21</sup> Regarding the petroglyphs:

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<sup>19</sup> *Presidential Proclamation – Establishment of the Basin and Range National Monument*, President of the United States of America (July 10, 2015), at <https://www.whitehouse.gov/the-press-office/2015/07/10/presidential-proclamation-establishment-basin-and-range-national>.

<sup>20</sup> *The Many Faces of the Alamo Impact Breccia*, (January 2004), at [http://www.geotimes.org/jan04/feature\\_Alamo.html#](http://www.geotimes.org/jan04/feature_Alamo.html#)

<sup>21</sup> As of August of 2015, the entrance to Heizer's property was closed and marked with a “no trespassing” sign. The sign read that violators would be, “immediately reported to the Lincoln County Sheriff's Department for arrest and prosecution. *Nevada's proposed national monument full of artwork, undisturbed land* (May 23, 2015), at <http://www.reviewjournal.com/news/nevada/nevada-s-proposed-national-monument-full-artwork-undisturbed-land>. On May 6, 2015, the Triple Aught Foundation granted to the BLM a Conservation Easement “for the purpose of forever preserving the cultural, architectural, historical, natural, scenic, open space character of the subject property, while allowing certain portions of the subject property to be maintained in agricultural uses.” Easement for Conservation, Lincoln County Official Record DOC # 0147481 (May 6, 2015), at [https://eplanning.blm.gov/epl-front-office/projects/nepa/63540/76449/84906/LACMA\\_Easement.pdf](https://eplanning.blm.gov/epl-front-office/projects/nepa/63540/76449/84906/LACMA_Easement.pdf)

- Worthington Mountain and the Mount Irish Range contain many of the archeological sites and other areas of value discussed in the Proclamation but both were already designated as Wilderness Areas and similarly protected.<sup>22</sup>
- Of the three rock art sites mentioned in the Proclamation, one site is not actually inside the Monument boundaries (the Shooting Gallery is over 25 miles to the east); and another, White River Narrows Archeological/Historic District, already had significant protection under the National Register of Historic Places.

A former board member of the Nevada Rock Art Foundation (NRAF), one of the few organizations with on the ground knowledge of petroglyph resources in Lincoln and Nye Counties, confirmed NRAF has not discussed the need for protection of “any significant petroglyph finds in this gigantic ‘National Monument.’”<sup>23</sup>

Using the criteria laid out in the Antiquities Act, that National Monuments are created to preserve “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest,” and should “in all cases … be confined to the smallest area compatible with proper care and management of the objects to be protected.” The 704,000 acres of the Basin and Range National Monument arguably cover an area much greater than the “landmarks,” “structures,” and “objects of interest” detailed in the Proclamation. This concern mirrors the concerns litigated by the State of Wyoming, Alaska, and others.

### **Protecting Historic and Scientific Resources with Few Financial Resources**

According to local stakeholders, there are few threats to the resources protected by Basin and Range. There have been instances of vandalism of petroglyphs but key petroglyph sites were subsequently protected. It is important to note that when the Monument was created there was only a very limited allocation of funds given to the BLM to manage the Monument. Currently there is limited to no signage, few improved roads, and no parking, services, or even cell service in many areas. In such a remote place, threats to these resources are few; yet, now that National Monument status has been given, there is no evidence that the designation will be able to provide further protection as there was no accompanying funding provided with the designation. The BLM was recently granted emergency funding through the Southern Nevada Public Lands Management Act (SNPLMA) for planning efforts in the Monument. In their application for the funding they said that, “The remote and untouched nature of this monument creates an obstacle in terms of adequate protection … however, the monument was established without a budget or

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<sup>22</sup> *Worthington Mountains Wilderness Area Map and Fact Sheet*, Bureau of Land Management, at [http://www.blm.gov/style/medialib/blm/nv/gis/maps.Par.65323.File.dat/Worthington\\_combined.pdf](http://www.blm.gov/style/medialib/blm/nv/gis/maps.Par.65323.File.dat/Worthington_combined.pdf); *Presidential Proclamation – Establishment of the Basin and Range National Monument*.

<sup>23</sup> *Monument Designation: Simply a bureaucratic ruse to block Yucca* (August 5, 2015), at <http://nevadanewsandviews.com/monument-designation-simply-a-bureaucratic-ruse-to-block-yucca/>

staff.”<sup>24</sup> Not only does the Monument currently lack the staff, signage, or other basic amenities that the public expects at National Monuments, but potential emergency situations are created for the public now interested in the Monument who travel to Lincoln and Nye counties without knowing that there are limited to no services, or even BLM rangers to provide assistance, over a very large and remote area.

## Process and Stakeholder Input

Designation of a National Monument using the Antiquities Act does not include any process for taking input, or dealing with impacts, unintended consequences, or stakeholder concerns. In contrast, the process for creating a Wilderness Area is through Congress, and was used successfully in Lincoln County to protect some of the same resources that are mentioned in the Basin and Range Proclamation.

Basin and Range was originally proposed as a bill that requested the same area be designated as a Wilderness Area.<sup>25</sup> Though there were some preliminary conversations about the bill with Nevada stakeholders, there was no real engagement with stakeholders in either Nye or Lincoln Counties. The bill was introduced but did not receive a committee hearing in either house. Following that, prior to the Basin and Range Proclamation, there was a “stakeholder” meeting called in Las Vegas, over 100 miles away at minimum from affected Nye and Lincoln County residents, and no one from either Lincoln or Nye Counties was invited to the meeting.

Recent examples of successful lands bills passed to preserve natural resources in Lincoln County emphasize that, contrary to the approach taken with Basin and Range, a Congressional process can be an effective way to preserve valuable resources and engage and gain the support of local stakeholders. Two wilderness bills were signed into law in 2000 and 2004 to protect parts of Lincoln County.<sup>26</sup> Together, these bills designated roughly 770,000 acres as Wilderness and were crafted with rigorous local stakeholder input and buy-in, and were accompanied by funding for implementation and management.<sup>27</sup> The 2004 bill was supported by stakeholders from across the spectrum and each acre of land within Lincoln County was deliberated.<sup>28</sup> These previously

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<sup>24</sup> *Southern Nevada Public Land Management Act, Special Account Reserve Request, Conservation Initiatives Category, Basin and Range National Monument: Education, Engagement and Resource Protection* as distributed to the SNPLMA Partners Working Group, (August 18, 2015).

<sup>25</sup> S. 196 Garden Valley Withdrawal Act introduced by Sen. Harry Reid, 114<sup>th</sup> Congress (2015-2016), and H.R. 857 Garden Valley Withdrawal Act introduced by Rep. Dina Titus, 114<sup>th</sup> Congress (2015-2016)

<sup>26</sup> *The Lincoln County Land Act of 2000* (LCLA), P.L. 106-298, 114 Stat. 1046 (2000), and the more recent *Lincoln County Conservation, Recreation, and Development Act of 2004* (LCCRDA), 108 P.L. 424, 118 Stat. 2403 (2004).

<sup>27</sup> LCCRDA, P.L. 108-424

<sup>28</sup> The Bill was supported by “the Nevada Land Users Coalition, the Lincoln County Commission, The Nevada Wilderness Project, the Fraternity of Desert Bighorns, the State of Nevada, Red Rock Audubon, Friends of Nevada Wilderness, Lincoln County residents, Partners in Conservation, ranchers and miners, to name just a few” *Id.*

Congressionally approved designations can be viewed as a test case showing that, in the very same area and over some of the very same resources that Basin and Range is said to protect, local input did result in a large and comprehensive designation.

### **Local Impact of the Basin and Range Designation**

The closure of such a large area to new uses through the Basin and Range Monument designation will have an impact on Lincoln and Nye Counties. The Monument's designation restricts any future uses not already occurring in the area, thus foreclosing on the ability to develop wind and solar projects or engage in mineral exploration and development. Although ranchers may continue to exercise their grazing practices, the designation renders uncertain their futures as well, including the ability for them to access their own private land and areas upon which they hold grazing permits due to likely limitations on vehicle use in the Monument. Potential economic impacts to Lincoln County are concerning as Lincoln County has one of the lowest median incomes in the State, at only \$40,000/year for the average household.<sup>29</sup>

### **Conclusion and Policy Suggestions**

The Basin and Range National Monument withdraws a very large number of acres from multiple use, without detailed justification and a process that would allow affected land users and communities to voice concerns over impacts. There are policies that could be put in place to ensure that the Antiquities Act is used conditionally in the future. Some provisions that might make the use of the Antiquities Act more acceptable to local government and stakeholders include:

- 1) Require the engagement of local officials for any monument proposed within that jurisdiction;
- 2) Impose an acreage limitation that would trigger Congressional approval;
- 3) Require meaningful stakeholder engagement or input; and
- 4) Require that sufficient funding accompany any designation.

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<sup>29</sup> United States Census Bureau, at <http://www.census.gov/quickfacts/table/INC110213/32001,32031,32003,32023,32,32017>