

Public Land Fight in Utah: Will the President Designate Bears Ears a National Monument?

Michael Lehr*

I. INTRODUCTION

The fight over federal control of western land is on display in a large, remote area of southeastern Utah. On one side is a coalition of Native American tribes, supported by conservation groups, urging the designation of a new national monument to protect 1.9 million acres of land including the culturally important area of Bears Ears. On the other side are conservative federal, state, and county lawmakers seeking to advance a recently unveiled public lands bill titled the Public Lands Intuitive (“PLI”).¹ The proposed bill would protect 1.2 million acres of the Bears Ears area while also opening land for energy development and a wilderness area. At one time, both sides were hopeful that the PLI could serve as a grand compromise, but the proposed bill, which involved years of meetings and planning, was not what environmental and tribal groups envisioned. Instead, these groups now call the bill a “public land giveaway.”² The causes of the disagreement between the two sides are historical and structural, and after years of optimism, it seems unlikely that an agreement will be reached that will satisfy both sides. At this point, the probable outcome seems to be President Obama designating a new national monument in the Bears Ears area. If the Bears Ears area is indeed designated as a national monument, the designation is sure to ignite a firestorm of

* J.D. Candidate, Columbia Law School, Class of 2017.

1. The PLI has not been formally introduced in Congress. Rep. Rob Bishop has released a discussion draft. See ROB BISHOP, U.S. HOUSE OF REPRESENTATIVES, UTAH PUBLIC LANDS INITIATIVE ACT DISCUSSION DRAFT (Jan. 20, 2016), http://robbishop.house.gov/uploadedfiles/discussion_draft_20jan16.pdf [<http://perma.cc/7YX3-9TKX>].

2. Bishop’s “Grand Bargain” Is a Grand Bust, S. UTAH WILDERNESS ALLIANCE, <http://suwa.org/bishops-grand-bargain-grand-bust-2/> [<http://perma.cc/DAX3-UD9E>] (last visited Apr. 9, 2016).

controversy in a state that has spent the last twenty years fighting against federal control of public lands.

II. BACKGROUND

The strong opposition to the designation of a new national monument is based on what many view as a major abuse of executive power during the creation of the Grand Staircase-Escalante National Monument (“Grand Staircase”).³ In 1996, President Clinton used his authority under the Antiquities Act of 1906 to name the Grand Staircase area a national monument.⁴ President Clinton did not consult with Utah’s federal or state lawmakers in any meaningful way before making his decision. Nearly all of the state, including the Governor, learned about the plans for Grand Staircase in the newspaper a week before the designation. Although the designation of Grand Staircase upset state and local officials, it won President Clinton favor in other parts of the country: President Clinton signed the order to create the national monument at the Grand Canyon in Arizona, a state he ended up winning by just two percent in the election that year, instead of at Grand Staircase in Utah, a state he had no hope of carrying.⁵ Thus, the designation’s opponents viewed the designation as a political move during an election year.

Since Grand Staircase’s designation, problems have been present at the local level, mostly around animal grazing. Both ranchers and environmental groups say their goal is to preserve the land for future use, but there is broad disagreement about what that actually means. Ranchers claim the national monument designation at Grand Staircase has tied their hands by not allowing them to remove brush that sucks up much of the water from springs, bring in rock or gravel to slow down erosion, or repair fences and roads.⁶ Environmental groups, including the Sierra

3. See Eric C. Rusnak, *The Straw That Broke the Camel’s Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 OHIO ST. L.J. 669, 718 (2003).

4. See Lisa Raffensperger, *The Highs and Lows of the Antiquities Act*, NAT’L PUB. RADIO (May 23, 2008), <http://www.npr.org/templates/story/story.php?storyId=90631198> [http://perma.cc/9UP2-H6PL].

5. *1996 Presidential Election Results*, FED. ELECTION COMMISSION, <http://www.fec.gov/pubrec/fe1996/presge.htm> [http://perma.cc/LC6W-2LBW] (last visited Apr. 19, 2016).

6. Cami Cox Jim, *Battle Over Cattle: Controversy at Grand Staircase-Escalante National Monument*, ST. GEORGE NEWS (July 6, 2015), <http://www.stgeorgetah.com/news/archive/2015/07/06/ccj-battle-cattle-controversy-grand-staircase-escalante-national-monument/#.VwV7bceGv7Z> [http://perma.cc/X9ER-YJ3W].

Club and Wild Utah Project, say that the ranching itself is the problem and should be minimized to ensure the protection of the land.⁷ The Bureau of Land Management (“BLM”) is currently considering changes to address these issues. The proposals range from phasing out grazing entirely to opening up more grazing area while updating livestock management practices.⁸ Whatever changes are made, problems are sure to persist.

The large-scale economic effects of the creation of Grand Staircase are disputed. Supporters of the national monument cite increased revenue from tourism. Those who do not support the monument point to the loss of revenue from development including coal mining, ranching, and the inability to create infrastructure to attract more residents to the area.⁹ Since the designation in 1996, public school enrollment is down sixty-seven percent in Escalante, Utah, a small town located within the national monument area.¹⁰ The reasons for the declining population of young families in the area are not completely clear and residents tend to place blame depending on how they view the national monument. Supporters see the decline as reflective of larger trends in the national economy that is moving away from mineral extraction and ranching. Opponents say the restrictive policies that come with designation as a national monument have caused the decline.¹¹ In recent years, the Obama administration has increased federal regulation and placed a moratorium on coal mining leases on federal lands in response to climate change concerns. These recent actions bear significantly on the economic

7. *Id.*

8. *What Do the Preliminary Alternatives Include?*, GRAND STAIRCASE-ESCALANTE NAT’L MONUMENT: LIVESTOCK GRAZING PLAN AMEND. EIS (Bureau of Land Mgmt., Washington, D.C.), Dec. 2014, at 6, 6–9, [http://www.blm.gov/style/medialib/blm/ut/grand_staircase-escalante/planning/livestock_eis/eis_prelim_draft_alternatives.Par.9771.File.dat/Newsletter%203%20\(FINAL%20v.508\)%20web%20ready.pdf](http://www.blm.gov/style/medialib/blm/ut/grand_staircase-escalante/planning/livestock_eis/eis_prelim_draft_alternatives.Par.9771.File.dat/Newsletter%203%20(FINAL%20v.508)%20web%20ready.pdf) [<http://perma.cc/YL8W-JP8S>].

9. See Rusnak, *supra* note 3, at 702; Greg Moore, *Economic Studies on Monuments are Mixed*, IDAHO MOUNTAIN EXPRESS (May 13, 2014), <http://archives.mtexpress.com/index2.php?ID=2007152010#.VwIKVceGv7Y> [<http://perma.cc/VD9W-7SPM>]; Kurt Repanshek, *Is there Economic Value to That National Monument in Your Backyard?*, NAT’L PARKS TRAVELER (Mar. 17, 2010), <http://www.nationalparkstraveler.com/2010/03/there-economic-value-national-monument-your-backyard5531> [<http://perma.cc/Y36K-NB9X>].

10. See Brian Maffly, *Is Southern Utah Town Being Stifled by the Feds or by Residents’ Refusal to Roll with New Industries*, SALT LAKE TRIB. (Aug. 15, 2015), <http://www.sltrib.com/news/2798818-155/is-southern-utah-town-being-stifled?fullpage=1> [<http://perma.cc/K66T-M4AP>].

11. *Id.*

value of coal mining and other extractive activities in the West.¹² Despite the lack of clarity on the effect of the national monument on the local economy overall, there is widespread agreement that the lack of state and local input in the Grand Staircase designation negatively affected how locals view the federal government and created distrust between local residents and federal employees in the area.¹³

III. PRESIDENT OBAMA AND THE ANTIQUITIES ACT

President Obama has not been shy about using his power to create national monuments. He has used the Antiquities Act more than any other President since its passage in 1906.¹⁴ In February, the President designated three additional national monuments in California covering 1.8 million acres of federal land. The White House said that it has “big, big ambitions” in the President’s final year in office for new national monument designations.¹⁵ President Obama, possibly having learned from President Clinton’s designation at Grand Staircase, has been more inclusive and has sought input from local communities before he has made his designations. However, many state and local officials see the input as little more than lip service. It is clear that the President sees protecting federal lands as a part of his legacy and recognizes that his conservation policies have broad political support nationally.¹⁶ Utah remains a deeply red state in which President Obama has

12. See, e.g., Dan Frosch, *A Part of Utah Built on Coal Wonders What Comes Next*, N.Y. TIMES (Nov. 27, 2013), <http://www.nytimes.com/2013/11/28/us/a-part-of-utah-built-on-coal-wonders-what-comes-next.html> [<http://perma.cc/5ZJG-6G5D>]; Bobby Magill, *Obama Halts Federal Coal Leasing Citing Climate Change*, SCI. AM. (Jan. 15, 2016), <http://www.scientificamerican.com/article/obama-halts-federal-coal-leasing-citing-climate-change/> [<http://perma.cc/VJ95-HRZK>].

13. See PEGGY PETRZELKA, SANDRA MARQUART-PYATT & MICHAEL IACOLUCCI, DESIGNATION OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT AND THE IMPACT ON TRUST (2013), <http://extension.usu.edu/files/publications/factsheet/IORT031.pdf> [<http://perma.cc/9S78-NRNB>].

14. Mark Landler & Julie Turkewitz, *With 3 California Sites, Obama Nearly Doubles Public Land He’s Protected*, N.Y. TIMES (Feb. 12, 2016), <http://www.nytimes.com/2016/02/13/us/obama-california-national-monument.html> [<http://perma.cc/C9H5-RG7X>].

15. Juliet Eilperin, *Obama Designates New National Monuments in the California Desert*, WASH. POST (Feb. 12, 2016), https://www.washingtonpost.com/politics/obama-to-designate-new-national-monuments-in-the-california-desert/2016/02/11/5b77db4e-c6be-11e5-a4aa-f25866ba0dc6_story.html [<http://perma.cc/3UYA-8PT7>].

16. Carolyn Lochhead, *House Republicans Open Probe of New California National Monuments*, S.F. GATE (Mar. 29, 2016), <http://www.sfgate.com/nation/article/House-Republicans-open-probe-of-new-California-7216248.php> [<http://perma.cc/3XHT-4FE2>].

little more to gain than President Clinton did in appealing to its voters. This does not bode well for Utah, where most people are against designation.¹⁷

The problem many officials in Utah have with the Antiquities Act is that it allows the President to unilaterally designate restrictive land protection over nearly any land owned by the federal government. The federal government owns a much larger portion of the land in the western United States than in the east. Fifty percent of land west of Denver is owned by the federal government including fifty-eight percent of Utah, as opposed to just four percent of land east of Denver.¹⁸ Utah's legislative leaders claim that this makes them "second class citizens" in their own state, unable to act independently on a majority of the land within its borders.¹⁹ Attempts have been made to limit the President's authority under the Act many times, especially after perceived abuses of power,²⁰ but none have ultimately succeeded.²¹ With a possible national monument designation at Bears Ears looming later this year, Utah lawmakers passed and signed a resolution to sue the federal government over the ownership of federal land. The projected cost of the lawsuit is \$14 million.²²

IV. BEARS EARS

After years of talks and meetings between Utah's federal delegation and interested parties, the PLI was unveiled in January of this year. Utah's influential Congressmen Rob Bishop and Jason Chaffetz have called the bill a compromise. Rep. Bishop, who is chairman of the House Committee on Natural Resources, says that groups on both sides of the debate are unhappy with parts of the

17. Thomas Burr, *Poll: Utahns Oppose Obama Naming a New National Monument in the State*, SALT LAKE TRIB. (Sept. 8, 2015), <http://www.sltrib.com/home/2925104-155/poll-utahns-oppose-obama-naming-a> [<http://perma.cc/YB6P-QBGD>].

18. *The Open West, Owned by the Federal Government*, N.Y. TIMES, <http://www.nytimes.com/interactive/2012/03/23/us/western-land-owned-by-the-federal-government.html> [<http://perma.cc/BC8G-HAFZ>] (last visited Apr. 9, 2016).

19. David P. Hinkins, Keven J. Stratton, Wayne Neiderhauser & Greg Hughes, *Op-ed: Until Utah Controls Its Federal Lands, Utahns Will Be Second-Class Citizens*, SALT LAKE TRIB. (Apr. 2, 2016), <http://www.sltrib.com/opinion/3722187-155/op-ed-until-utah-controls-its-federal> [<http://perma.cc/Y5VH-WHF5>].

20. See, e.g., Raffensperger, *supra* note 4.

21. Rusnak, *supra* note 3, at 698.

22. See Robert Gehrke, *Utah Gov Signs Bills on Power Regulation, Porn and Lands Lawsuit*, SALT LAKE TRIB. (Mar. 30, 2016), <http://www.sltrib.com/news/3723755-155/utah-guv-signs-bills-on-power> [<http://perma.cc/8UZK-DNQW>].

proposed bill and that was by design, because “there needs to be some kind of trade off” between protection and economic development.²³ Utah’s political leaders have mostly applauded the proposed bill. The proposal would conserve about four times more land than it would allow for energy development. Included in the conserved area would be 1.2 million acres of Bears Ears as a “national conservation area.” The plan would also release about 80 thousand acres of federal wilderness area and give 40 thousand acres to the state for developments like an expansion of an airport and the creation of hiking trails.²⁴

Environmental groups were quick to denounce the plan as a “fossil fuel development bill” claiming the PLI would open millions of acres of protected lands to energy production. Mark Maryboy, a former County Commissioner, Navajo community leader, and board member of the inter-tribal group opposing the proposed bill, refutes Bishop’s claims that tribal and environmental groups were part of the bill process. The Southern Utah Wilderness Alliance (“SUWA”), an environmental organization, asserts the designation of land as a “national conservation area” is much flimsier than a national monument designation and in effect the bill would create a “second-class wilderness” that does not adequately protect Bears Ears from possible road development and vandalism.²⁵ The inter-tribal coalition of the five largest Native American tribes in Utah alleges that the PLI would give Native Americans a far weaker voice in land management. The environmental and native groups are now pushing for a national monument designation by the President.

There is some disagreement within the Native American community. Rebecca Benally, a County Commissioner and member of the Navajo tribe, is opposed to a national monument, stating in an interview, “True Utah grass-roots Navajo strongly oppose national monument designation.” Benally’s opposition to the monument is meaningful because she is currently the only elected Navajo at the state or county level. However, Navajo opposition is largely limited to the Aneth Chapter, one of seven

23. Jack Healy, *Remote Utah Enclave Becomes New Battleground over Reach of U.S. Control*, N.Y. TIMES (Mar. 12, 2016), <http://www.nytimes.com/2016/03/13/us/remote-utah-enclave-new-battleground-over-reach-of-us-control.html> [<http://perma.cc/E3CY-PVR8>].

24. *Here Are the Basics of Bishop and Chaffetz’s Plan for Utah’s Public Lands*, SALT LAKE TRIB. (Jan. 20, 2016), <http://www.sltrib.com/home/3440873-155/here-are-the-basics-of-bishop?page=2> [<http://perma.cc/LM6L-6U7D>].

25. Bishop’s “Grand Bargain” Is a Grand Bust, *supra* note 2.

Navajo chapters within Utah. The majority of other chapters support a national monument designation.²⁶

As recently as February the Utah delegation seemed optimistic and ready to push the PLI. A letter signed by all six members of Utah's federal delegation stated, "the most effective land-management policy is inclusive and engaging . . . We are prepared to work with the administration to get this proposal signed into law."²⁷ However, in late February, Rep. Bishop held a contentious hearing with the White House's Director of the Council on Environmental Quality Christy Goldfuss and by the end of March, Rep. Chaffetz, the Chairman of the House Oversight Committee, opened an investigation into President Obama's use of the Antiquities Act stating, "The broad and frequent application of the Antiquities Act raises questions about the lack of transparency and consultation with local stakeholders."²⁸ Many see the investigation as a warning shot to the President about the possible designation of Bears Ears.²⁹

For now, it seems that both sides have retreated to their corners. President Obama has strong incentives to create a national monument at Bears Ears. He has broad national Democratic support, as well as the support from environmental and Native American groups in the area. However, there is not a statewide elected official, member of the federal delegation, or locally elected official from the Bears Ears area that supports a national monument designation. With the PLI stalled and the Antiquities Act allowing the President to move without congressional approval, it seems increasingly likely that there will be a national monument designation at Bears Ears by the end of the year.

26. Brian Maffly, *Unhappy with 'Lip Service' from Utah Delegation, Tribes to Take Request for Bears Ears Monument Straight to Obama*, SALT LAKE TRIB. (Dec. 31, 2015)

<http://www.sltrib.com/home/3366007-155/unhappy-with-lip-service-from-utah> [<http://perma.cc/HNT7-GY8S>].

27. Thomas Burr, *Obama has 'Big Ambitions' for Protecting Land, White House Says*, SALT LAKE TRIB. (Feb. 12, 2016), <http://www.sltrib.com/home/3532645-155/obama-has-big-ambitions-for-protecting> [<http://perma.cc/ER9T-6JG8>].

28. Letter from Jason Chaffetz, Chairman, House Comm. on Oversight & Gov't Reform, to Sally Jewell, Sec'y, U.S. Dep't of the Interior (Mar. 29, 2016), <https://oversight.house.gov/wp-content/uploads/2016/03/2016-03-29-JEC-Bishop-Rogers-to-Jewell-DOI-Antiquities-Act-Monuments-duc-4-12.pdf> [<http://perma.cc/LY43-7LRZ>].

29. Lochhead, *supra* note 16.