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7 UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF ARIZONA
9

10 WESTERN WATERSHEDS PROJECT,)

11 Plaintiff,)

12 v.)

13 BUREAU OF LAND MANAGEMENT,)

14 Defendant.)
15)
16)
17)

Case No. CV 08-1472-PHX-MHM

**AMICUS CURIAE BRIEF IN
SUPPORT OF PLAINTIFF'S
MOTION FOR
RECONSIDERATION**

18 **INTRODUCTION**

19 On February 2, 2009, this Court granted the Bureau of Land Management's
20 (BLM's) Motion to Dismiss plaintiff's complaint, on the grounds that the Court lacked
21 jurisdiction under the Administrative Procedure Act (APA), 5 U.S.C. § 706, to review
22 BLM's failure to comply with specific management requirements in the 2001 Proclamation
23 establishing the Sonoran Desert National Monument. This Court's opinion granting the
24 Motion to Dismiss, however, included broad statements that extend well beyond the legal
25 issues raised by the parties in the case, calling into question both the scope of the
26 President's authority under the Antiquities Act of 1906, and the facial validity of the 2001
27 Proclamation itself. Order at 11. These statements – that the President lacks authority
28 under the Antiquities Act to include management directives in national monument
proclamations, and that the Sonoran Desert Proclamation is not a “valid exercise” of the
President's authority, *id.* – have the dangerous potential to cast a legal cloud on all national

1 monuments. At the very least, the Court’s statements will generate enormous confusion
2 regarding the applicable legal standards for management, and for judicial review of agency
3 actions, within national monuments around the country, especially those monuments
4 managed by the Bureau of Land Management (BLM).

5 The National Trust for Historic Preservation, Society for American Archaeology,
6 and Lawyers’ Committee for Cultural Heritage Preservation (collectively, Amici) believe
7 that the Court’s statements are erroneous as a matter of law and inconsistent with the
8 purposes of the Antiquities Act and Supreme Court precedent “confirming the broad power
9 delegated to the President under the Act.” Mountain States Legal Found. v. Bush, 306 F.3d
10 1132, 1135 (D.C. Cir. 2002) (citing United States v. California, 436 U.S. 32 (1978);
11 Cappaert v. United States, 426 U.S. 128 (1976); Cameron v. United States, 252 U.S. 450
12 (1920)). Accordingly, we urge the Court to reconsider and revise its decision.

13 In 1906, reports of pervasive looting and unregulated excavations of archaeological
14 sites on federal public lands moved Congress to pass the Antiquities Act. Congress’
15 primary goal in doing so is stated plainly in the text of the legislation: to ensure “the proper
16 care and management of the [historic and scientific] objects” within areas of the public
17 lands reserved as national monuments. 16 U.S.C. § 431 (emphasis added).¹ To achieve
18 this goal, the Antiquities Act approved sanctions for those convicted of appropriating,
19 excavating, or otherwise harming objects of antiquity on the public lands without prior
20 permission from the federal government. Id. § 433. Additionally, the Act authorized the
21 President to designate and “reserve” “historic landmarks, historic and prehistoric structures,
22 and other objects of historic or scientific interest” as national monuments. Id. § 431. Since
23 1906, the President has relied on this authority to establish over 100 national monuments
24 throughout the United States, including over twenty within the past fifteen years. Utah
25 Assoc. of Counties v. Bush, 316 F. Supp. 2d 1172, 1178 (D. Utah 2004).

26 Thus, the President has played – and continues to play – a consequential role in
27 protecting significant historic and scientific resources on the public lands through the use

28 ¹ See also Mark Squillace, The Monumental Legacy of the Antiquities Act, 37 Ga. L. Rev. 473, 477 (2003) (“There seems little doubt that the impetus for the law that would eventually become the Antiquities Act was the desire of archaeologists to protect aboriginal objects and artifacts.”) (emphasis added).

1 of his authority under the Act to designate national monuments.² Because this Court’s
2 decision could be construed to substantially limit that authority, Amici respectfully urge
3 this Court to grant Plaintiff’s Motion for Reconsideration.

4 **ARGUMENT**

5 **I. THE ANTIQUITIES ACT DELEGATES MANAGEMENT AUTHORITY** 6 **OVER NATIONAL MONUMENTS TO THE PRESIDENT.**

7 Ordinary principles of statutory interpretation govern this case. In order to discern
8 congressional intent, a court must first give effect to the plain meaning of a statute.
9 Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). To the extent a statute contains
10 ambiguous language, a court may turn to legislative history for interpretive guidance.
11 United States v. Davidson, 246 F.3d 1240, 1246 (9th Cir. 2001). Further, congressional
12 acquiescence may inform a court’s interpretation of ambiguous statutory provisions. Bob
13 Jones Univ. v. United States, 461 U.S. 574, 600–01 (1983). Applying these principles
14 here, Congress clearly intended for the President to have the authority under the Antiquities
15 Act to require the agency actions at issue in this case.

16 **A. The Plain Language of the Antiquities Act Authorizes the President to** 17 **Manage National Monuments.**

18 The Court’s narrow interpretation of presidential authority under the Act is not
19 supported by the plain language of the statute. When interpreting a statute, a court must
20 first “determine whether the language at issue has a plain and unambiguous meaning with
21 regard to the particular dispute in the case.” Robinson, 519 U.S. at 340. “The plainness or
22 ambiguity of statutory language is determined by reference to the language itself, the
23 specific context in which that language is used, and the broader context of the statute as a
24 whole.” Id. at 341. A court also must evaluate “the structure of the law as a whole

25 ² As recently as January 6, 2009, President George W. Bush designated a number of
26 national monuments covering hundreds of thousands of square miles, including a number
27 located in the Pacific Ocean: the Northwestern Hawaiian Islands, World War II Valor in
28 the Pacific, Marianas Trench, Pacific Remote Islands, and Rose Atoll Marine National
Monuments. Bryan Walsh, “President Bush’s Last Act of Greenness,” *TIME*, Jan. 6,
2009, available at <http://www.time.com/time/health/article/0,8599,1869917,00.html> (last
visited Mar. 13, 2009).

1 including its object and policy.” United States v. Lopez-Perera, 438 F.3d 932, 933 (9th
2 Cir. 2006).

3 In this case, the Supreme Court has already ruled that the Antiquities Act contains a
4 broad delegation of authority to the President. See, e.g., Cappaert v. United States, 426
5 U.S. at 141–42. The sole restriction on the President’s authority is that the national
6 monument must “be confined to the smallest area compatible with the proper care and
7 management of the objects to be protected.” 16 U.S.C. § 431; see also Mountain States
8 Legal Found., 306 F.3d at 1137 (“[T]he court is necessarily sensitive to pleading
9 requirements where, as here, it is asked to review the President’s actions under a statute
10 that confers very broad discretion on the President and separation of powers concerns are
11 presented”). It is thus indisputable that the plain language of the statute conveys “very
12 broad discretion” to the President in protecting monument objects. See Tulare County v.
Bush, 306 F.3d 1138, 1141 (D.C. Cir. 2002).

13 Further, the context of the Antiquities Act’s grant of authority supports the
14 interpretation that the President is empowered to provide management directives in the
15 national monument proclamations. The Antiquities Act is more than simply a mechanism
16 for the President to recognize parcels of the public lands as national monuments, as this
17 Court apparently assumed. Order at 11. The Act specifically and repeatedly refers to “the
18 proper care and management of the objects to be protected.” 16 U.S.C. § 431 (emphasis
19 added). This language directly contradicts the Court’s interpretation that the Act “does not
20 amount to a statutory mandate or delegation of authority from Congress to the President for
21 the purpose of managing the monuments established under the Act.” Order at 11.

22 To support its interpretation, the Court relies on one sentence from United States v.
California, 436 U.S. 32, 40 (1978), which was taken out of context.³ However, the Court’s

23
24 ³ United States v. California involved an underlying dispute as to whether the State of
25 California or the federal government had dominion over the submerged lands and waters
26 within the Channel Islands National Monument. In concluding that dominion lies with
27 California, the Supreme Court explained that a “reservation for a national monument
28 purpose cannot operate to escalate the underlying claim of the United States to the land in
question.” U.S. v. California, 436 U.S. at 41. It was in this context of a federal-state land
dispute that the Supreme Court commented, “A reservation under the Antiquities Act thus
means no more than that the land is shifted from one federal use, and perhaps from one
federal managing agency, to another.” Order at 11 (quoting U.S. v. California, 436 U.S. at
40) (footnote omitted). Thus, the Supreme Court’s statement simply cannot be construed
to imply that the Antiquities Act fails to delegate authority to the President to “manage”
national monuments, especially when the plain language and purpose of the Act confirm

1 interpretation ignores the plain language and purpose of the Antiquities Act. Courts should
2 be cautious in interpreting a statute in such a way that eliminates (or diminishes) the
3 express purpose for the statute’s passage. See John v. United States, 247 F.3d 1032, 1036–
4 37 (9th Cir. 2001) (per curiam) (quoting New York State Dep’t of Soc. Servs. v. Dublino,
5 413 U.S. 405, 419–20 (1973)) (The court “must not ‘interpret federal statutes to negate
6 their own stated purposes.’”).

7 In short, the Court’s overly constrained interpretation of the Antiquities Act does not
8 reflect the plain meaning of the statute or its express purpose. The logical connection
9 between the Act’s purpose – to protect objects of historic or scientific interest – and the
10 President’s use of management directives to effectuate that purpose, cannot be severed.

11 **B. The Legislative History of the Antiquities Act Shows That Congress
12 Intended the President to Manage and Protect National Monuments.**

13 Even if the plain language of the Antiquities Act was ambiguous, the legislative
14 history shows that Congress intended to delegate authority to the President to manage
15 national monuments for the purpose of protecting historic and scientific objects. “Where
16 the plain language of a statute is ambiguous, a court may go beyond the words of the
17 statute ‘to examine the textual evolution of the [contested language] and the legislative
18 history that may explain or elucidate it.’” United States v. Davidson, 246 F.3d at 1246
19 (quoting United States v. R.L.C., 503 U.S. 291, 298 (1992)). Moreover, “even the most
20 basic principles of statutory construction must yield to clear contrary evidence of
21 legislative intent.” National R.R. Passenger Corp. v. National Ass’n of R.R. Passengers,
22 414 U.S. 453, 458 (1974).

23 In the late 1870s, national and international interest in the archaeological and
24 historic sites of the American Southwest increased dramatically. Ronald F. Lee, The
25 Origins of the Antiquities Act, in THE ANTIQUITIES ACT: A CENTURY OF AMERICAN
26 ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 15 (David
27 Harmon et al. eds., 2006). Along with this interest, the demand for “authentic prehistoric
28 objects” arose among collectors, which led to an increase in looting, vandalism, and
ultimately the destruction of many sites on the public lands.⁴ Id. at 22-23. As described by

the opposite interpretation.

⁴ One notable example that generated concern among archaeologists and the general public

1 one scholar, a desire to “reach a ruin rich in valuable objects before” someone else did
2 fueled the demand, and led to a “rush on prehistoric ruins of the Southwest that went on,
3 largely unchecked, until about 1904.” Id. at 23.

4 Congress did not become aware of the looting activities being carried out in the
5 Southwest until the early 1880s. In 1881, a report prepared by archaeologist Adolph
6 Bandelier for the Archaeological Institute of America recounted the destruction of the
7 Pecos Pueblo site near Santa Fe, New Mexico. Richard W. Sellers, A Very Large Array:
8 Early Federal Historic Preservation – The Antiquities Act, Mesa Verde, and the National
9 Park Service Act, 47 NAT. RES. J. 267, 274-76 (2007). This report alarmed the members of
10 the Archaeological Institute, which included Senator George F. Hoar of Massachusetts. Id.
11 at 275. Senator Hoar responded by introducing a petition to the Senate in May 1882
12 condemning those who plundered and destroyed archaeological sites, and recommending
13 federal preservation for those sites. Id. at 275. Although Congress failed to act on the
14 petition, it marked the first formal recommendation for the preservation of archaeological
15 sites in Congress.

16 In 1889, Senator Hoar petitioned Congress again, this time to preserve Casa Grande
17 – a centuries old, multi-storied structure in Arizona built by a former civilization known as
18 the Hohokam that once occupied central and southern Arizona. Id. Senator Hoar based his
19 petition on reports of vandalism and erosion from nearby irrigation projects. Id. Congress
20 responded favorably to the petition when, on March 2, 1889, it appropriated \$2,000 for the
21 purpose of repairing and protecting Casa Grande. Lee, supra, at 20. Congress also
22 authorized the President to create the nation’s first “archaeological” reserve and to include
23 in the reservation as much of the public lands “as in his judgment may be necessary” for
24 the protection of Casa Grande. Sellers, supra, at 275.

25 was the excavation of Pueblo Bonito at Chaco Canyon in New Mexico. Ronald F. Lee,
26 The Origins of the Antiquities Act, in THE ANTIQUITIES ACT: A CENTURY OF AMERICAN
27 ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 26 (David
28 Harmon et al. eds., 2006) (citing Lloyd M. Pierson, A History of Chaco Canyon National
Monument 48–55 (1956) (unpublished manuscript, on file with the Division of
Archaeology, National Park Service, Washington, D.C.)). From 1896-99, with funding
from wealthy philanthropists and antiquities collectors, Richard Wetherill excavated 198
rooms and kivas at Pueblo Bonito, removing all the artifacts that he discovered. Id. This
outraged many archaeologists and led to an investigation by the General Land Office,
which in turn increased congressional awareness and public concern that these resources
needed protection. Id.

1 During this same period, public support grew for the preservation of Civil War
2 battlefields. In the 1890s, Congress created the first five national Civil War battlefield
3 parks. *Id.* at 288. Congressman John Lacey of Iowa, a Civil War veteran, played an active
4 role in this effort, and also developed an interest in protecting and preserving America's
5 antiquities. *Id.* at 288-90. In 1900, a six-year effort to pass the Antiquities Act began, and
6 Congressman Lacey introduced the bill that eventually passed in 1906. See generally
7 Ronald F. Lee, The Story of the Antiquities Act, Chapter 6 – The Antiquities Act 1900-06,
8 *available at* http://www.nps.gov/history/archeology/PUBS/LEE/LEE_CH6.htm (last visited
9 Mar. 12, 2009); Raymond Harris Thompson, Hewitt and the Politics of Archaeology, in
10 THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC
11 PRESERVATION, AND NATURE CONSERVATION 35, 43 (David Harmon et al. eds., 2006).

12 Thus, the twenty-five years leading up to the passage of the Antiquities Act in 1906
13 reflected the need not only to retain ownership of federal lands with significant historic and
14 scientific objects, but also to protect those objects from destructive forces.

15 Much of the literature on the Antiquities Act appropriately emphasizes the
16 importance of the authority to create national monuments, natural and scenic as well
17 as archaeological and historical, but the primary purpose of the act was to 'preserve
18 American antiquities'. . . . Protecting archaeological sites was a clearly articulated
19 purpose based on sound principles that have given structure to the development of
20 the nation's archaeological policies ever since.

21 *Id.* at 44; see also Sellers, supra. at 292-93 (quoting a June 15, 1906 letter from
22 Congressman Lacey to W.H. Holmes, Head of the Bureau of American Ethnology: "I have
23 no doubt this law can be so construed as to protect substantially all the important ruins yet
24 remaining on the public lands in the Southwest."). Although the legislative history for the
25 Antiquities Act is very modest, a brief exchange between Congressman Lacey and
26 Congressman John H. Stephens of Texas reveals that the purpose of the Antiquities Act
27 was "to preserve . . . old objects of special interest and the Indian remains in the pueblos in
28 the Southwest." 40 Cong. Rec. 7,888 (June 5, 1906). Additionally, the Senate and House
bills were presented expressly "for preservation of American antiquities. . . ." *Id.* at 7,331.
Thus, even the sparse legislative history of the Antiquities Act strongly supports the
conclusion that Congress intended for the President to have the authority to manage
national monuments.

1 **C. Congress Has Acquiesced in the President’s Authority Under the**
2 **Antiquities Act to Provide for the Management of National**
3 **Monuments.**

4 In addition to the plain language and legislative history of the Antiquities Act, the
5 President’s authority to include management directives in national monument
6 proclamations under the Antiquities Act is also supported by Congress’ acquiescence in the
7 President’s broad exercise of that authority. Courts may resolve statutory ambiguities, if
8 they exist, by relying on Congress’ express or implied acquiescence in an executive branch
9 interpretation.⁵ Bob Jones Univ., 461 U.S. at 600; Cannon v. Univ. of Chicago, 441 U.S.
10 677, 702-03 (1979); Stephenson v. Shalala, 87 F.3d 350, 355 (9th Cir. 1996). Here,
11 Congress has expressly acquiesced in the President’s assertion of authority under the Act to
12 manage national monuments by passing legislation recognizing the existence of this
13 authority. Further, Congress has repeatedly declined to enact legislation that would have
14 curtailed presidential authority under the Act, and thus has acquiesced in the President’s
15 broad authority by implication.

16 **1. Congress has expressly acquiesced in the authority of the**
17 **President to manage national monuments under the Act.**

18 Congress has recently approved legislation that demonstrates express acquiescence
19 in presidential authority under the Act to manage national monuments. For example, in
20 2000, President Clinton issued a proclamation expanding the Craters of the Moon National
21 Monument in Idaho, and directing the National Park Service (NPS) and BLM to jointly
22 manage the newly designated area.⁶ Proclamation No. 7373, 65 Fed. Reg. 69,221 (Nov. 9,

23

⁵ In Northwest Env’tl. Advocates v. EPA, 537 F.3d 1006 (9th Cir. 2008), the Ninth Circuit
24 held that “the standard for a judicial finding of congressional acquiescence is extremely
25 high.” *Id.* at 1022. That standard is satisfied here, because Congress has expressly
26 endorsed the authority over the management of national monuments claimed by the
27 president under the Antiquities Act. See Pub. L. No. 107-213, 116 Stat. 1052 (2002);
28 Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63,
29 115 Stat. 414 (2002). Conversely, in Northwest Env’tl. Advocates v. EPA, the Ninth
30 Circuit determined that Congress had merely been “aware” of the regulation supporting the
31 authority asserted by EPA, but had not actually taken steps to endorse the regulation. *Id.* at
32 1023-24.

⁶ In the proclamation, President Clinton cited only the Antiquities Act as authorizing him to
expand Craters of the Moon National Monument and include management directives in the
proclamation. Proclamation No. 7373, 65 Fed. Reg. 69,221, 69,222 (Nov. 9, 2000). In this
regard, the proclamations for Craters of the Moon and Sonoran Desert are
indistinguishable. Compare id. with Proclamation No. 7397, 66 Fed. Reg. 7354, 7355.

1 2000). Because the NPS interprets its organic act to require specific authorization from
2 Congress to allow hunting in park areas, 36 C.F.R. § 2.2.(b)(1); Nat'l Rifle Ass'n v. Potter,
3 628 F. Supp. 903, 906-07 (D.D.C. 1986), the proclamation had the effect of banning
4 hunting within the area jointly managed by the two agencies. Congress responded to this
5 situation by passing legislation directing the NPS “to permit hunting on lands within the
6 Craters of the Moon National Preserve. . . .”⁷ Pub. L. No. 107-213, 116 Stat. 1052 (2002).

7 Clearly, the fundamental premise underlying Congress’ decision to specifically
8 modify the management directives applicable to the National Monument was the explicit
9 recognition that the President had the authority in the first instance to impose management
10 directives resulting from the proclamation. Thus, in passing this legislation, Congress
11 expressed its belief that the Antiquities Act authorizes the President to do more than simply
12 create or enlarge the boundaries of a national monument, but also to include management
13 directives in the governing proclamation.⁸

14 Two years later, Congress again expressly recognized the President’s authority
15 under the Act to manage national monuments. In a 2002 appropriations bill for the
16 Department of the Interior, Congress directed that

17 [n]o funds provided in this Act may be expended to conduct preleasing, leasing and
18 related activities under either the Mineral Leasing Act (30 U.S.C. 181 et seq.) or the
19 Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) within the boundaries
20 of a National Monument established pursuant to the Act of June 8, 1906 (16 U.S.C.
21 431 et seq.) as such boundary existed on January 20, 2001, except where such
22 activities are allowed under the Presidential proclamation establishing such
23 monument.

24 Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63,
25 115 Stat. 414 (2002) (emphasis added).⁹ Like the bill directing the Secretary of the Interior
26 to permit hunting within the Craters of the Moon National Preserve, Congress again

27 ⁷ Congress renamed the area added to the national monument by President Clinton as the
28 “Craters of the Moon National Preserve.” Pub. L. No. 107-213, 116 Stat. 1052 (2002).

⁸ For example, the proclamation expanding the Craters of the Moon included a prohibition
on all off-road vehicles, and a requirement to prepare a transportation plan, for the purpose
of protecting the significant objects in the monument, Proclamation No. 7373, 65 Fed. Reg.
69,221 (Nov. 9, 2000) – requirements that are closely analogous to those included in the
proclamation for the Sonoran Desert National Monument.

⁹ Congress has continued this prohibition through subsequent appropriations bills for the
Interior Department. See, e.g., Omnibus Appropriations Bill 2009, Pub. L. No. 111-8, §
411, 123 Stat. 524 (Mar. 11, 2009).

1 expressly recognized and endorsed the President’s authority under the Act to determine
2 how national monuments should be managed.

3 **2. Congress has acquiesced by implication in the authority of**
4 **the President under the Act to manage national**
5 **monuments.**

6 In addition to these examples of express acquiescence, Congress has also acquiesced
7 by implication in the authority of the President to manage national monuments, by
8 declining to pass legislation limiting presidential authority under the Antiquities Act.
9 According to the Ninth Circuit, failed legislation is entitled to “some weight.” Wilshire
10 Westwood Assocs. v. Atlantic Richfield Corp., 881 F.2d 801, 808 (9th Cir. 1989). Here,
11 Congress has considered but declined to enact several bills in recent years that would have
12 limited presidential authority under the Act. Consequently, this Court must interpret the
13 scope of presidential authority under the Antiquities Act in light of Congress’ decision not
14 to enact those bills.

15 In 1997, Congress considered and rejected a bill to restrict presidential authority
16 under the Act, in large part due to President Clinton’s designation of the Grand Staircase-
17 Escalante National Monument.¹⁰ National Monument Fairness Act of 1997, H.R. 1127,
18 105th Cong. (1997); Christine A. Klein, Preserving Monumental Landscapes Under the
19 Antiquities Act, 87 CORNELL L. REV. 1333, 1389-91 (2002). The bill would have caused a
20 national monument proclamation to expire unless Congress approved legislation within two
21 years to make the designation permanent. Id. § 2. The bill also would have required the
22 President to engage in a consultation process with the governor of the affected state prior to
23 issuing a national monument proclamation. Id. Taken as a whole, this bill would have
24 drastically limited the President’s authority to permanently reserve areas as national
25 monuments and to act swiftly to protect threatened areas worthy of national monument
26 designation.

27 During the following session, Congress again rejected another bill designed to limit
28 presidential authority under the Antiquities Act. National Monument NEPA Compliance

¹⁰ The proclamation for the Grand Staircase-Escalante National Monument included specific management directives. Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 18, 1996). Thus, the clear result of Congress’ decision not to enact the 1997 bill implicitly recognized the President’s authority to issue those management directives.

1 Act, H.R. 1487, 106th Cong. (1999). This bill would have required the preparation of
2 environmental impact statements for national monument proposals along with a ten-month
3 period of public review and comment before a proclamation could go into effect. *Id.* § 3.
4 Once more, Congress chose not to enact a bill that would have imposed direct limitations
5 on the President’s authority under the Act.

6 The foregoing demonstrates Congress’ clear awareness of how the President has
7 interpreted his authority under the Act. Further, Congress’ decision to reject legislation
8 proposed for the specific purpose of limiting authority shows that Congress has acquiesced
9 in the Presidents’ exercise of that authority. For this reason, this Court should accord
10 considerable weight to the failed legislation discussed above.

11 **II. THE COURT’S DECISION UPSETS THE WELL-ESTABLISHED 12 MANAGEMENT SCHEME GOVERNING NATIONAL MONUMENTS.**

13 For over a century, presidents have used their authority under the Antiquities Act to
14 designate prehistoric and historic landmarks, structures, and objects as national
15 monuments. During this time, presidents have also exercised their authority under the Act
16 to ensure “the proper care and management of the objects to be protected,” 16 U.S.C. §
17 431, by including management directives in national monument proclamations.¹¹

18 Like their predecessors, contemporary presidents have continued to assert the
19 authority to manage national monuments through the terms of their proclamations. The
20 proclamation for the Sonoran Desert is consistent with prior proclamations in requiring the
21 agency with management authority over the area (in this case BLM) to take specific actions
22 to protect the objects, including preparation of a resource management plan. In fact, many
23 of the national monument proclamations issued by President Clinton contain planning
24 requirements, and also require BLM to prohibit or restrict certain uses within the

24 ¹¹ For instance, in 1918, President Woodrow Wilson issued a proclamation establishing
25 Casa Grande National Monument “in order that better provision may be made for the
26 protection, preservation and care of the ruins of the ancient buildings and other objects of
27 prehistoric interest thereon. . . .” Proclamation No. 1470, 40 Stat. 1818. Five years later,
28 President Harding declared Bryce Canyon National Monument (now National Park) to be
the “dominant reservation” and specifically prohibited “any use of the land which interferes
with its preservation or protection. . . .” Proclamation No. 1664, 43 Stat. 1914. Calvin
Coolidge and Herbert Hoover included this very same management prescription in national
monument proclamations issued during their presidencies. *See, e.g.* Proclamation No.
1692, 43 Stat. 1946 (Chiricahua National Monument, Arizona); Proclamation No. 1877, 46
Stat. 2993 (Holy Cross National Monument, Colorado).

1 designated area, such as grazing, oil and gas leasing, and off-road vehicle use.¹² See, e.g.,
2 Proclamation 7398, 66 Fed. Reg. 7359, 7361 (Jan. 17, 2001) (requiring preparation of a
3 transportation plan and prohibiting off-road vehicle use in the proclamation for Upper
4 Missouri River Breaks National Monument).

5 Where the national monument proclamations issued by President Clinton and their
6 historical antecedents differ is in the agency assigned to administer the reserved area. Prior
7 to 1996, presidents placed the vast majority of national monuments created by
8 proclamation under the care and management of the National Park Service. Squillace,
9 supra, at 524. President Clinton broke from this practice between 1996 and 2001 when he
10 assigned the management of fourteen national monuments either in whole or in part to
11 BLM. Id. at 508–09. For each national monument assigned to BLM, the president ordered
12 the agency to manage the area “to implement the purposes” of the proclamation, which
13 include protecting the objects for which the president made the reservation. See, e.g.,
14 Proclamation No. 7317, 65 Fed. Reg. 37,243, 37,244–45 (June 9, 2000) (establishing
15 Canyons of the Ancients National Monument in Colorado).

16 However, if this Court’s narrow interpretation were correct, and the delegation of
17 authority to the President under the Antiquities Act related only to the “establishment” of
18 national monuments, Order at 11, then the management requirements within each
19 proclamation where the Antiquities Act provides the sole “specific statutory foundation”
20 would be presumptively invalid. In that case, BLM would be free to disregard the
21 management directives in the presidential proclamation, and to pursue other management
22 objectives and actions for the reserved areas, including those flatly inconsistent with the
23 express purpose of the Antiquities Act – to protect significant objects of historic and
24 scientific interest designated as national monuments. Such a result would surely frustrate
25 the intent of the President in issuing the proclamations, and also that of Congress when it
26 authorized the President to designate national monuments as a means of ensuring “the

27 ¹² President George W. Bush also included detailed management requirements governing
28 the national monuments that he created during his presidency. See, e.g., Proclamation No.
8336, 74 Fed. Reg. 1565 (Jan. 6, 2009) (establishing the Pacific Remote Islands Marine
National Monument and requiring, among other actions, the preparation of a resource
management plan for the area).

1 proper care and management of the objects to be protected” on the public lands. 16 U.S.C.
2 § 431.

3 Further, this Court’s order will lead to considerable confusion concerning the legal
4 standard that governs national monuments established by presidential proclamation, in
5 particular those managed by BLM. In the absence of more stringent protection
6 requirements, BLM “manage[s] the public lands under principles of multiple use and
7 sustained yield,” 43 U.S.C. § 1732(a), which provides BLM with substantial discretion in
8 determining how the public lands should be used, rather than placing paramount value on
9 resource protection. If this management standard were to govern the national monuments
10 administered by BLM, which would be the result of this Court’s decision, then the
11 management of national monuments would shift dramatically from resource protection to
12 resource exploitation. This result fundamentally contradicts the purpose of the Antiquities
13 Act.

13 **CONCLUSION**

14 For the reasons set forth above, Amici believe that this Court should grant Plaintiff’s
15 Motion for Reconsideration and revise or rescind its order of February 2, 2009.

16
17 Dated this 13th day of March, 2009

Respectfully submitted,

18
19 /s/ Alexander Hays V
20 Alexander Hays V (OSB# 063522)

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2009, I caused a true and correct copy of the foregoing Amicus Brief to be electronically filed with the Clerk of the Court for the U.S. District Court for the District of Arizona using the CM/ECF System, which sent notification of such filing to the following counsel of record in this case:

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