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MEMORANDUM

TO: George Frampton
Dinah Bear
Council on Environmental Quality

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Sec. 3.2(C) Initials: JGP Date: 5/14/17
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FROM: Ann Bushmiller
Paul Oetken
White House Counsel's Office

RE: Sequoia National Monument

DATE: April 6, 2000

As we discussed with you, and with Randy Moss, Dan Koffsky and others at OLC today, OLC is willing to consider a compromise regarding the administration of the proposed Sequoia National Monument. OLC would be agreeable to having the USDA/National Forest Service manage the Sequoia National Monument for all purposes, subject only to a requirement that the National Forest Service consult with the DOI/National Park Service prior to issuing regulations governing the monument area. Critically, the National Forest Service does not have to concur with any recommendations it receives from the Park Service in response. OLC's position is an improvement over the 1980 MOU pertaining to the Alaskan monuments at Admiralty Island and Misty Fiords regarding the USDA/Forest Service's ability to manage the new monument lands without extensive second-guessing.

Below are two paragraphs from the 1980 MOU revised to reflect our understanding of today's discussion with OLC, so that you can get a sense of how OLC's position would play out in practice:

1. The Secretary of Agriculture's existing regulations for the National Forest System shall continue to be applicable to the national monument area identified above to the extent consistent with the purposes for which it was established as national monument. Existing regulations applicable to national monuments administered by the Department of the Interior will not apply to this area. The Secretary of Agriculture will give prior consultation to the Secretary of the Interior before issuing any new regulations applicable to the national monument area, but does not have to concur in the response.
2. The day to day management of the area by the Secretary of Agriculture shall be by and through the National Forest Service, USDA, _____ Region. The Forest Service will give prior consultation with the Regional Director of the National Park Service before authorizing any activity that has a likelihood of degrading the principal resource values of the area as set forth in the

Presidential Proclamation designating the area as a National Monument. It is the intent of the parties that Department of Interior personnel not become involved in the day to day or on the ground administration of the area, except as requested by the Department of Agriculture.

If you have any questions about this proposal, please give Paul or me a call.

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OPINION OF THE OFFICE OF LEGAL COUNSEL

79-13 DEPARTMENT OF AGRICULTURE, FOREST SERVICE -
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE -
MANAGEMENT FUNCTIONS OVER NATIONAL MONUMENTS IN ADMIRALTY
AND MISTY FIORDS, ALASKA - EXECUTIVE ORDER NO. 6166 (5
U.S.C. § 901 note) - NATIONAL FOREST MANAGEMENT ACT OF 1976
(16 U.S.C. § 1609)

1979 OLC LEXIS 13; 3 Op. O.L.C. 85

February 9, 1979

ADDRESSEE: [*1]

Memorandum Opinion for the Director, Office of Management and Budget *

* This memorandum was supplemented and, in the main, superseded by a Memorandum Opinion for the Director of the Office of Management and Budget, dated February 8, 1980, reflecting a reconsideration of this opinion requested by the General Counsel of the Department of Agriculture.

OPINIONBY: HAMMOND

OPINION:

[**85] This memorandum responds to the inquiry by your General Counsel's office whether § 2 of Executive Order No. 6166 (1933), 5 U.S.C. § 901 note (1976), creating national monuments at Admiralty and Misty Fiords, Alaska, requires the transfer of management functions over national forest lands within the monuments from the Forest Service of the Department of Agriculture to the National Park Service of the Department of the Interior; and, if so, what legal action would be necessary to secure the Forest Service's continuing administration of the lands. We conclude that the order does require the transfer of management, and that a legally effective reorganization plan, or other legislative action, is necessary in order to authorize the Forest Service to administer the two monuments.

Exercising his powers under § 2 of the [*2] Antiquities Act of 1906, 16 U.S.C. § 431 (1976), n1 the President, on December 1, 1978, created national monuments in Admiralty Island (Proc. 4611, 43 F.R. 57009 [**86] (1978)), and Misty Fiords, Alaska (Proc. 4623, 43 F.R. 57087 (1978)). Within Misty Fiords National Monument are approximately 2,285,000 acres of Federal land that had been reserved as part of Tongass National Forest in 1907, 35 Stat. (Pt. 2) 2152. Within Admiralty Island National Monument are approximately 1,100,000 acres of Federal land that were added to Tongass National Forest in 1909, 35 Stat. (Pt. 2) 2226. Because the President's powers under the Antiquities Act of 1906 extend to any "objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government," the forest system status of Admiralty Island and Misty Fiords did not bar the creation of monuments on those sites. Neither were the monuments barred because of the requirement under § 9 of the National Forest Management Act of 1976, 16 U.S.C. § 1609 (1976), that lands set aside by the President as part of the national forest system not be returned to the public domain except by act of Congress. The reservation [*3] of national forest lands as parts of national monuments did not return those lands to the public domain, but, on the contrary, further restricted their lawful use to purposes consistent with the preservation of the monuments' objects.

n1 Section 2 of that Act reads:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and

management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States. [*4]

Under § 2 of Executive Order No. 6166, issued in 1933:

All functions of administration of * * * national monuments * * * are consolidated in the National Park Service in the Department of the Interior * * *; except that where deemed desirable there may be excluded from this provision any public building or reservation which is chiefly employed as a facility in the work of a particular agency. [5 U.S.C. § 901 note (1976).]

Because the Admiralty Island and Misty Fiords National Monuments are covered by § 2 and do not fall within the single stated exception to its general provisions, one consequence of the President's creation of national monuments on national forest lands would appear to be the transfer of the management of those lands from the Forest Service to the National Park Service. Such a transfer is consistent with a 1972 agreement between the Departments of Agriculture and the Interior that the 1933 Executive order did "expunge the dual reservation status formerly existing on monuments carved out of National Forests, and vested administration of those areas in the Department of the Interior." n2

n2 Quoted in a letter of December 11, 1978 from the Acting General Counsel, USDA, to the Acting Assistant Attorney General, Office of Legal Counsel. [*5]

[**87] The Department of Agriculture (USDA) argues, however, that § 9 of the National Forest Management Act of 1976, pro tanto, superseded Executive Order No. 6166 with respect to national monuments that incorporate national forest lands. n3 Based on the legislative history, USDA interprets § 9 to require that national forests set aside by the President remain within the national forest system, except when removed from the system by act of Congress. Because Congress has vested management authority over the system in USDA and the Forest Service, it follows, according to USDA, that until Congress acts to the contrary, all lands set aside by the President as national forests must be administered by the Forest Service.

n3 In connection with this opinion, we sought the views of the Department of Agriculture and of the Department of the Interior. Agriculture furnished its views to us by letter dated December 11, 1978 (see note 2, supra). In addition, we have consulted the Assistant Attorney General, Lands and Natural Resources Division.

If § 9 requires Admiralty Island and Misty Fiords to remain within the national forest system, the statutes relevant to the management [*6] of that system further require that the monuments be managed by the Forest Service. 16 U.S.C. § 472, 551, 1600 (1976). Ordinarily, in cases where statutes n4 are inconsistent, the most recent statute controls. Under this rule, the 1976 Act -- if it does require that national forest monuments remain within the national forest system -- would impliedly limit or repeal the management provisions of the Executive order. We conclude, however that § 9 does not require Admiralty Island and Misty Fiords to remain within the national forest system and that a contrary interpretation would misconstrue the statute. Thus, unless amended, Executive Order No. 6166 remains in force.

n4 Because Exec. Order No. 6166 has the force of law and cannot be amended without the assent of Congress, see discussion, *infra*, our opinion assumes that the ordinary rules of statutory interpretation, e.g., implicit repeals are disfavored, apply to the order. However, our conclusion as to the effect of Exec. Order No. 6166 does not rest on our judgment as to the deference a court would accord its provisions, but rather on our interpretation of 16 U.S.C. § 1609(a). Pretermittting any determination of the force that the order would have if found inconsistent with a subsequent statute, we do not believe the proper construction of § 9 is inconsistent with the order. [*7]

The disputed portion of § 9 reads:

Notwithstanding the provisions of the Act of June 4, 1897, no land now or hereafter reserved or withdrawn from the public domain as national forests pursuant to the Act of March 3, 1891, or any act supplementary to and amendatory thereof, shall be returned to the public domain except by an Act of Congress.

The term "public domain" is not defined in the Act, but ordinarily it refers to unreserved lands of the United States that are subject to disposal or appropriation under the public land laws. Considering the plain meaning of its words, § 9

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seems only to require that lands, once withdrawn by the President as parts of national forests, may not again become subject to private appropriation under the public land laws without an act of Congress. Such an interpretation appears wholly consistent with the express **[**88]** purpose of the section to preserve lands reserved as national forests for the "long-term benefit" of "present and future generations."

In suggesting a narrower interpretation, namely, that "shall [not] be returned to the public domain," means "shall not leave the National Forest System," Agriculture relies on one paragraph in **[*8]** the legislative history that appears in the report of the Senate Committee on Agriculture and Forestry on the National Forest Management Act of 1976, S. Rept. 893, 94th Cong., 2d sess. (1976). The single relevant paragraph concerning § 9 reads:

Section 9 of the bill amends redesignated section 11(a) of the Forest and Rangeland Renewable Resources Planning Act of 1974 by adding a provision which, in effect, gives Congressional status to National Forest lands reserved from the public domain. Other National Forests lands already have Congressional status through specific Acts, such as the Weeks Act. The new provision states that, notwithstanding the authority conferred on the President to revoke, modify, or suspend proclamations or executive orders setting apart and reserving public domain land as National Forests, public domain lands which are now or may hereafter be reserved as National Forests are not to be returned to the public domain except by an act of Congress. This does not affect the President's authority to combine National Forests, separate a forest into two or more National Forests, or change the boundary lines of a forest, providing such changes do not remove lands **[*9]** from National Forest status. Also unaffected are existing authorities regarding exchanges of lands involving public domain National Forests. [Id. at 19.]

This paragraph is, at best, inconclusive with respect to the proper interpretation of § 9. It states that the President may still modify the size and boundaries of national forests, "providing such changes do not remove lands from National Forest status." It further states that § 9 gives congressional status to national forest lands reserved from the public domain and makes reference to an impliedly analogous provision in the Weeks Act. However, the Weeks Act, which permits the purchase of lands "necessary to the regulation of the flow of navigable streams or for the production of timber," 16 U.S.C. § 515 (1976), expressly (16 U.S.C. § 521) provides that such lands:

[S]hall be permanently reserved, held, and administered as national forest lands under the provisions of section 471 of this title and acts supplemental to and amendatory thereof.

Congress' willingness and ability to provide in the Weeks Act expressly for the permanent administration, as national forests, of lands purchased for forest use raises the question **[*10]** why Congress chose words with plainly different meanings in the Forest Management Act of 1976 if its purpose was the same.

The inference that Congress did not intend to provide in the National **[**89]** Forest Management Act the same permanent status to lands reserved from the public domain as the Weeks Act accorded to certain acquired lands is buttressed by Congress' enactment in 1958 of a statute that expressly made acquired lands not covered by the Weeks Act subject to its protective provisions, and specifically excepted lands reserved from the public domain. 16 U.S.C. § 521a (1976). Congress, when it wanted to expand the coverage of the Weeks Act, thus referred to it expressly. Congress' decision neither to adopt the Weeks Act's phrasing, nor to incorporate it by reference as it had done in 1958, strongly implies that the intended effects of the 1976 Act, 16 U.S.C. § 1609(a), and the protective provisions of the Weeks Act, 16 U.S.C. § 521, are not the same.

Further, USDA's interpretation poses a potential problem for the interpretation of § 2 of the Antiquities Act of 1906, supra. Under this section, the President is empowered to declare certain landmarks, structures, **[*11]** and objects as national monuments, and to:

[R]eserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

If it were true that lands reserved from the public domain as national forests were to continue to be national forests without regard to their subsequent incorporation in national monuments, then such lands would continue to be subject to the uses approved for national forests by the Act of June 4, 1897, 16 U.S.C. §§ 473-478 (1976), the Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §§ 523-31 (1976), the Forest and Rangeland Renewable Resources Planning Act

of 1974, 16 U.S.C. §§ 1601-10 (1976), and the National Forest Management Act of 1976. Of these approved uses, it is readily conceivable that timbering, in particular, might conflict in a given case with the protection of objects properly designated as the bases for a national monument. In such a case, the perpetual forest system status of public domain lands reserved as national forests would conflict with the President's ability to create and protect national monuments on public domain [*12] lands, a conflict clearly not provided for by any of the forest acts.

In a given case it may be that no such conflict would exist and the fulfillment of national forest objectives may be wholly consistent with the purposes of a national monument. However, Congress has anticipated the possibility of conflict between monument and national forest uses and it prohibited the President from creating national forests out of national monuments, 16 U.S.C. § 471(b) (1976). (This section was repealed by Pub. L. No. 94-579, Title VII § 704(a), 90 Stat. 2792.) This provision effectively leaves to Congress the judgment of compatibility since Congress could, if it so chose, give to any public land dual monument and forest status.

It might be argued that the forest statutes may be read as not requiring timbering on every acre of forest land, even if the forest land is ideally suited for such use. The complexity of the forest-related statutes and the unforeseen problems that would be posed, however, further support an [**90] interpretation of the National Forest Management Act of 1976 which avoids even potential conflict with the Antiquities Act. Attributing to § 9 the plain meaning of its [*13] words avoids that conflict and is consistent with the statute's purpose and with the language of the Weeks Act, 16 U.S.C. § 521a; it also preserves Congress' role in determining whether, with respect to a particular parcel of public domain land, monument and forest uses are compatible.

Because of our interpretation of § 9, the Admiralty Island and Misty Fiords National Monuments are not parts of the National Forest System but simply national monuments. Accordingly, Executive Order No. 6166 requires the transfer of management functions from the Forest Service to the National Park Service. In order to permit the Forest Service to manage these monuments, the President would have to submit to Congress a reorganization plan under § 2 of the Reorganization Act of 1977, 5 U.S.C. §§ 901-12 (1977), presumably upon finding that the return of management functions to the Forest Service would "promote the better execution of the laws," 5 U.S.C. § 901(a)(1) (1977). Under § 2, the plan would become effective "at the end of the first period of sixty calendar days of continuous session of Congress" after the transmission of the plan, unless either House of Congress voted to disapprove the plan. [*14] It is not possible to amend Executive Order No. 6166 merely by issuing an amendatory order because the original order itself became effective only with the assent of Congress. The Attorney General in 1934, concluded that the President could revoke provisions of Executive orders issued under the Act of March 3, 1933 only "in the same manner in which they were enacted into law." 37 Op. Atty. Gen. 418 (1934). The current transfer of functions under a new reorganization plan would be consistent with the Attorney General's conclusion. n5

n5 The President, of course, is not required to act by reorganization plan and may, if he so chooses, submit a legislative proposal subject to the usual constitutional processes. Under either alternative, it should be recognized that the legislative designation of the Forest Service as the managing authority for two monuments will not itself determine the standards under which the monuments must be administered. Unlike the National Park Service, whose governing statutes, 16 U.S.C. §§ 1-3 (1976), impose particular duties on the Service in connection with all lands under its administration, the Forest Service is subject to no such specific mandate concerning the administration of non-national forest system lands. In recommending appropriate congressional action, the President may wish to consider the uses to which the monument lands should be subjected and to propose to Congress a more restrictive set of uses than would ordinarily apply to national forests. [*15]

LARRY A. HAMMOND

Deputy Assistant Attorney General

Office of Legal Counsel



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GLICKMAN RECOMMENDS CREATION OF SEQUOIA NATIONAL MONUMENT

WASHINGTON, April 7, 2000 - Agriculture Secretary Dan Glickman announced today that he is recommending that President Clinton establish a 355,000 acre national monument to protect Giant Sequoia groves in the Sequoia National Forest in California.

"Ancestors of the Giant Sequoias once grew as far east as Colorado and Wyoming; now these precious trees are only found on the west slope of the Sierra Nevadas," said Glickman. "To ensure the permanent survival of these ancient giants we must provide them with permanent protection."

Glickman said that a careful review of scientific data and other information, as directed by President Clinton in February, has led him to believe strongly that the groves warrant permanent protection as a Forest Service national monument. While there are some existing protections for Giant Sequoias, no such protections exist for the surrounding sub-watersheds on which these trees depend, or in areas where the risk of fire to Sequoia groves must be controlled. As a national monument, the Forest Service will focus its land management efforts on preservation of the groves and their surrounding ecosystems.

"Despite their tremendous size, Giant Sequoias are vulnerable," Glickman said. "They are very much affected by what happens on the surrounding forest. Logging or nearby development can profoundly affect water quality in the groves and threaten the long-term survival of these rare trees."

In formulating his recommendation, Glickman said that he kept in mind the concerns and potential impacts on those within forest dependent communities near the Sequoia National Forest. To that end, the Secretary included the following specific recommendations, in the event the President chooses to designate a Giant Sequoia monument –

The Forest Service would continue to manage the monument as part of the Sequoia National Forest. A science advisory panel would be created to assist in development of a management plan for the monument. This would allow the best science to guide the appropriate choice and mix of ecological management actions, including mechanical treatment, prescribed burning, and other techniques necessary to protect the giant sequoia groves from catastrophic fire and other threats. Management prescriptions to protect the Giant Sequoia groves and other objects protected by the monument would thus be based on the best available science, thereby addressing a major concern raised by several members of Congress, the California Forestry Association, and local residents.

All land within the boundaries of the monument would be removed from the commercial timber base. Previously sold timber sales would continue, as would timber sales that have a signed decision notice prior to January 1, 2000. This provides a two and a half year transition timber supply under the new monument designation without adversely affecting the Giant Sequoias.

Current grazing and special use permits would remain valid and would likely be renewed through normal permit processes, subject to otherwise applicable laws and regulations governing land use.

All valid, pre-existing rights, including the access rights of private inholders would be preserved.

The management plan would require continued public and recreational access for hunting, fishing, camping, and certain other activities. Existing camps (for instance, the Camp Whittsett Boy Scout Camp and Pyles Boys Camp) would likely continue to operate, subject to normal permit processes. Other facilities, such as Hume Lake Christian Camp, which are located on private land within the proposed monument would be unaffected by a monument designation. Following the Secretary's recommendation, the Forest Service will immediately resume the processing of the camps' pending special use permit applications.

In addition, if the monument were created, Glickman said he would direct the Forest Service to increase and enhance educational opportunities within the monument.

The Secretary's recommendation was based on information gathered by a team of career federal employees, including members from the Sequoia National Forest, Washington Office staff, as well as U.S.G.S. Biological Resources Division, the Bureau of Land Management and National Park Service within the Department of Interior. They conducted an intensive review of available scientific and other information, such as historical texts and environmental documentation prepared for previous federal actions within the area. The team gathered extensive public comment from two public meetings held in the Visalia and Fresno, California, and in consultation with the State, members of the California congressional delegation, local governments and the Tule River Tribal Council.

The President will review the Secretary's recommendation and determine whether to utilize his authorities, under the Antiquities Act, to establish a Giant Sequoia monument.

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**American Law Division**

Congressional Research Service • The Library of Congress • Washington, D.C. 20540-7410

MEMORANDUM

December 13, 1996

SUBJECT: Legal Issues Raised by the Designation of the Grand Staircase-Escalante National Monument

AUTHOR: Pamela Baldwin

INTRODUCTION

By Proclamation 6920 dated September 18, 1996,¹ President Clinton created the Grand Staircase-Escalante National Monument in south-central Utah on lands currently managed by the Bureau of Land Management (BLM) in the Department of the Interior. The Monument is approximately 1.7 million acres in size and will continue to be managed by the BLM – the first Monument to be so managed. The creation of the Monument was controversial because of its size, the manner in which it was designated, and the fact that it is to be managed by the Bureau of Land Management. A law suit challenging the validity of the Monument has been filed.²

National monuments may be created by the Congress or by the President. The President is authorized to create national monuments by the Antiquities Act of 1906. Initially, monuments were managed by various entities, including the War Department and the Department of Agriculture. When the National Park Service (NPS) was created in 1916, one of the responsibilities it was given

¹ 61 Fed. Reg. 50223 (September 24, 1996).

² Mountain States Legal Foundation v. Clinton, 96 CV 0924G (D. Ut.). The suit challenges the validity of the Monument based on its allegedly excessive size and its stated purposes; because the Antiquities Act is an unconstitutional delegation of authority and is contrary to the Federal Land Policy and Management Act; and the designation constitutes a taking of plaintiffs "right" to locate new mining claims. Not all of these claims will be addressed in this report because the likelihood of success would appear to be small. For example, it is unlikely that a court will find the Antiquities Act of 1906 to be an unconstitutional delegation of Congress' control over the federal lands, because the Act has been in effect for so long and the court has upheld such broad delegations as the Mining Law of 1872, which allows state and local law and local customs to govern the acquisition of mining claims on federal lands. *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905).

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was managing national parks and national monuments. Although this 1916 act might have been interpreted as vesting management of all national monuments in the NPS, it was not so interpreted and monuments continued to be created that were managed by other entities. In accordance with legislated authority to reorganize the government, the President in a 1933 Executive Order vested the function of administering national monuments in the NPS. Most (and possibly all) of the monuments managed by the War Department and the Department of Agriculture were then transferred to NPS administration in that year.

This report discusses the authority under which the Grand Staircase-Escalante National Monument was created and some issues related to the validity of the designation: 1) the size of the Monument, 2) the manner of its designation; 3) whether the President's authority to create national monuments has been limited; and 4) whether designating a monument to be managed by an agency other than the NPS is a "reorganization" that needed congressional approval. It is important to note that a complete historical record on agency management of national monuments is not currently available to us.

THE SIZE OF THE MONUMENT

The Grand Staircase-Escalante National Monument was designated by the President under the Antiquities Act of 1906.³ This Act authorizes the President "in his discretion" to declare by public proclamation "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" to be national monuments. To protect these, the President may reserve "parcels of land, the limits of which in all cases shall be confined to the *smallest area compatible* with the proper care and management of the objects to be protected." (Emphasis added.)

How big this "smallest area" can be has been an issue in the past. Even in the early years, some monuments were very large. For example, Grand Canyon originally was a national monument of over 800,000 acres, located in a national forest.⁴ The Supreme Court upheld the creation of that monument because the President had stated that the Grand Canyon "is an object of unusual scientific interest" and the Court seems to have evaluated this assertion and concurred.⁵ Other monuments also have been very large.⁶ Although the issue is not free

³ Act of June 8, 1906, ch. 3060, 34 Stat. 225, codified at 16 U.S.C. §§ 431-433.

⁴ The Grand Canyon National Monument was created by unnumbered proclamation, January 11, 1908.

⁵ *Cameron v. United States*, 252 U.S. 450, 455-456 (1920).

⁶ Mount Olympus National Monument was over 600,000 acres; the 1918 Katmai National Monument was over a million acres; and the Death Valley National Monument totaled over 2 million acres.

CRS-3

from doubt, size per se does not seem to invalidate a national monument if the size is appropriate to the purposes of the withdrawal. And the courts are not likely to probe very vigorously a president's opinion either of what constitutes appropriate objects for protection or how large the smallest necessary area is.

For example, Jackson Hole Country, Wyoming was designated as the Jackson Hole National Monument by Proc. No. 2578, March 15, 1943. The Proclamation simply asserted without elaboration that the area "contains historic landmarks and other objects of historic and scientific interest." The designation was challenged on the grounds that the monument did not in fact contain "objects of an historic or scientific interest" within the meaning of the Antiquities Act; that the monument was not the smallest area compatible with the proper care and management of a national monument; that the President was using the Antiquities Act and creating a national monument as the equivalent of a national park, which would otherwise have to be created by Congress.⁷ At trial, the United States introduced evidence that there were:

trails and historic spots in connection with the early trapping and hunting of animals formulating the early fur industry of the West, structures of glacial formation and peculiar mineral deposits and plant life indigenous to the particular area, a biological field for research of wild life in its particular habitat within the area, involving a study of the origin, life, habits and perpetuation of the different species of wild animals, all of which it is claimed constitute matters of scientific interest within the scope and contemplation of the Antiquities Act.⁸

The court noted that its role was narrow because of the discretion given the President in the statute. "If there be evidence in the case of a substantial character upon which the President may have acted in declaring that there were objects of historic or scientific interest included within the area, it is sufficient upon which he may have based a discretion."⁹

⁷ Wyoming v. Franke, 58 F. Supp. 890 (D. Wy. 1945).

⁸ *Id.*, at 895.

⁹ *Id.* In *Cappaert v. United States*, 426 U.S. 128, 142 (1975), the Supreme Court upheld the Devil's Hole National Monument which protected a cave, pool, and type of fish. The Channel Islands National Monument involved in *United States v. California*, 436 U.S. 32 (1978) was established to protect fossils and examples of ancient volcanism. Note 5 at 34 states that government officials wished to enlarge the Monument to protect marine life such as birds, sea otters, elephant seals, etc., "[b]ut after a representative of the Department of Justice expressed the view that the Antiquities Act did not permit establishment or enlargement of a national monument to protect plant and animal life, all references to marine life were dropped from the Proclamation." This assertion may be open to debate; many monuments have included references to biological values.

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The court viewed the issue as a controversy between the legislative and executive branches in which, "under the evidence presented here," the court could not interfere. This reasoning would seem to argue that judicial review of the purposes of the Utah monument would be similarly circumscribed, despite other of the court's remarks on when a court might find that a President had gone too far:

For example, if 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.¹⁰

Note, however, that the Proclamation declaring the Grand Staircase-Escalante National Monument contains considerable detail as to what objects and areas the President asserts are of historic or scientific note and why and this elaboration may provide a court with the basis for concluding that the size of the monument is thereby justified.

The court reviewing the Jackson Hole National Monument further noted that its analysis with reference to the objects of historic and scientific interest included in a monument "applies equally to the discretion of the Executive in defining the area compatible with the proper care and management of the objects to be protected" and the court could not concern itself with the motives of the President.¹¹ The court noted that the concerns of the state at having such a large area subject to development restrictions or regarding any other injustice brought about by the exercise of the discretion vested in the President were more properly addressed to Congress than the courts.¹²

In 1978, President Carter created several very large national monuments in Alaska.¹³ A lawsuit was filed that challenged the creation of the monuments on the basis that the monuments did not comply with the Antiquities Act because of their size. In an unreported bench opinion, the court granted partial summary judgment for the United States, concluding that although the Act limited the authority of the President as to size and subject matter of

¹⁰ Wyoming v. Franke at 895.

¹¹ *Id.*, at 896.

¹² *Id.*, at 896-897. After the designation of Jackson Hole, Congress subsequently enacted a restriction on creation of additional national monuments in Wyoming, but the Antiquities Act itself was not modified or repealed. Act of September 14, 1950, ch. 950, 64 Stat. 849, codified at 16 U.S.C. § 431a.

¹³ Proclamations 4611 through 4627, 43 Fed. Reg. 57009 (December 5, 1978). For example, the Yukon Flats National Monument was 10,600,000 acres and Wrangell-St. Elias National Monument was 10,950,000 acres.

CRS-5

withdrawals, the outermost parameters of that authority had not been articulated and the withdrawals before the court did not exceed the authority of the President.¹⁴

Thus the courts that have considered the issue have been reluctant to second guess Presidential determinations as to the reasons for protecting areas and their size. Yet the case law is scanty and a court that considered the issue afresh might reach a different conclusion in any particular instance. However, the Antiquities Act does commit the decisions on the values of an area and the appropriate size of a monument to the discretion of the President. The breadth of that statutory discretion, combined with sensitivities to the respective roles of the judicial and executive branches indicate that a new challenge on these grounds may face legal hurdles.

DESIGNATION PROCEDURES

The Antiquities Act states the authority of the President very simply: "The President of the United States is authorized, in his discretion, to declare by public proclamation ... national monuments"¹⁵

Objections have been raised to the establishment of the Grand Staircase-Escalante National Monument based on the fact that it was established without the consultations and public input that usually pertain to other significant federal actions, especially those involving large withdrawals of lands. These objections reflect the fact that major federal actions significantly affecting the human environment usually must be analyzed under the National Environmental Policy Act (NEPA).¹⁶ This Act requires certain study and public participation measures, but these requirements apply only to actions taken by federal agencies, and do not apply to the President.¹⁷

¹⁴ *Anaconda Copper Company v. Andrus*, A79-161 CIV, (D. Al. 1980).

¹⁵ 16 U.S.C. §431.

¹⁶ Pub. L. No. 91-190, 83 Stat. 852, codified at 42 U.S.C. §§ 4321 *et seq.*

¹⁷ The NEPA regulations of the Council on Environmental Quality state that *Federal agency* means all agencies of the Federal Government. "It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office" 40 C.F.R. §1508.12." In addition, NEPA does not provide a private right of action. Plaintiffs would have to sue under the Administrative Procedure Act and there are cases holding that the President is not an agency for purposes of the judicial review available under that act. *See, Dalton v. Specter* 511 U.S. 462 (1994); *Franklin v. Massachusetts*, 505 U.S. 788 (1992). *See also, Public Citizens v. Office of the U.S. Trade Representative*, 970 F. 2d 916 (D.C.Cir. 1992).

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Clearly, Congress in recent times has taken back into its own hands most of the withdrawal authority previously allowed the President under earlier land authorities. This is especially true of the Federal Land Policy and Management Act of 1976 (FLPMA),¹⁸ which applies to the remaining lands managed by the BLM. FLPMA specifically repealed almost all of the express and implied authority of the President to withdraw lands and also imposed limits on the ability of the Secretary of the Interior to make large withdrawals without consultation with and approval by Congress. However, it is also true that FLPMA did not repeal or amend the Antiquities Act, despite extensive study and consideration of the history and range of executive withdrawals.

Although FLPMA and certain other federal land management statutes include express provisions for public participation and coordination with state and local governments, no such provisions apply to the exercise of Presidential authority under the Antiquities Act. The Antiquities Act does not specify procedures for the creation of national monuments by the President.

AUTHORITY OF THE PRESIDENT TO DESIGNATE BLM AS MANAGER OF THE MONUMENT

The question of the assignment of management of the new monument to the BLM raises the most complex questions; questions that have not been raised or answered by the courts to date.

History of Monument Management

Most, but not all national monuments are currently managed by the National Park Service (NPS). Congress has statutorily directed that some monuments be managed by the Forest Service (Department of Agriculture)¹⁹ and there is no question that Congress can specify whatever management arrangements it desires.²⁰ However, in light of the history of the management of monuments, it can be asked whether the President (as opposed to Congress) can validly designate a new national monument that is managed by an entity other than the NPS.

At the time the Antiquities Act was enacted in 1906, the NPS was not yet in existence and monuments were managed by various federal agencies, notably the War Department, which managed national cemeteries, military parks, and

¹⁸ Pub. L. No. 94-579, 90 Stat. 2744, codified at 43 U.S.C. §§ 1701 *et seq.*

¹⁹ See, e.g. Mount St. Helens National Volcanic Monument, Pub. L. No. 97-243, 96 Stat. 301 and Newberry National Volcanic Monument, Pub. L. No. 101-522, 104 Stat. 2288.

²⁰ Under Article IV, § 3, cl. 2, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;"

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other commemorative sites, and the Department of Agriculture, which managed several national monuments within national forests. Several sections of the 1906 Act refer to management actions being taken by the department having jurisdiction over the lands on which antiquities are located.²¹

The NPS was created in 1916 to "promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army"²² The Director of the NPS, under the direction of the Secretary of the Interior, was to "have the supervision, management, and control of the several national parks and national monuments *which are now under the jurisdiction of the Department of the Interior*, and of the Hot Springs Reservation in the State of Arkansas, and of such other national parks and reservations of like character *as may be hereafter created by Congress*."²³ (Emphasis added.) The Secretary of the Interior was also to make regulations for the "parks, monuments, and reservations under the jurisdiction of the National Park Service."²⁴

On its face, the 1916 NPS statute did not address national monuments not then under the jurisdiction of DOI, or future monuments that might be created by the President as opposed to Congress. As introduced,²⁵ the legislation would have placed all national monuments managed by the Department of the Interior *and the Department of Agriculture* under the NPS. The relevant Committee report noted that "there should not be any conflict of jurisdiction between the departments that might interfere with the organization and operation of the national parks ... as against those reservations specifically created for the conservation of the natural resources of timber and other national assets, and devoted strictly to utilitarian purposes, in the vastly greater areas, known as national forests."²⁶ The Secretary of Agriculture opposed the transfer at that time, while acknowledging that some of the larger national monuments in national forests, such as Grand Canyon and Mount Olympus should eventually be made into national parks (as later happened). The House Committee report noted that the time had come to incorporate the monuments managed by Agriculture.²⁷ Nonetheless, the bill as ultimately enacted dropped

²¹ See, e.g., 16 U.S.C. §§ 432 on permits and 433 on enforcement and regulations.

²² Act of August 25, 1916, ch. 408, 39 Stat. 535, codified at 16 U.S.C. §1.

²³ 16 U.S.C. §2.

²⁴ 16 U.S.C. §3.

²⁵ H.R. 15522, 64th Cong., 1st Sess. (1916).

²⁶ H.R. Rep. 64-700 (1916) at 3.

²⁷ *Id.*, at 4.

the reference to the monuments of the Department of Agriculture. Therefore, the Department of Agriculture and the War Department continued to manage monuments after 1916 and new monuments were created by Presidential action after 1916 that were not managed by the NPS.²⁸

Absent any other considerations, the fact that the statute governing the NPS does not provide exclusive jurisdiction over national monuments supports the argument that the President may validly exercise his authority under the Antiquities Act to lodge management duties in another agency. However, the entire issue of how the President may do so and whether doing so might constitute a "reorganization" must also be analyzed.

Pursuant to statutory authority to reorganize the government, President Franklin D. Roosevelt in the 1933 Executive Order 6166 consolidated the management of national monuments in a new office that included the NPS. Section 2 of the Order provided:

All functions of administration of public buildings, reservations, national parks, national monuments, and national cemeteries are consolidated in an Office of National Parks, Buildings, and Reservations in the Department of the Interior, at the head of which shall be a Director of National Parks, Buildings, and Reservations; except that where deemed desirable there may be excluded from this provision any public building or reservation which is chiefly employed as a facility in the work of a particular agency. This transfer and consolidation of functions shall include, among others, those of the National Park Service of the Department of the Interior and the National Cemeteries and Parks of the War Department which are located within the continental limits of the United States

The Order was issued on June 10th, but the above section took effect after 60 days (August 10, 1933). The 1933 Order is worded inclusively -- that "all" of the named administrative functions were consolidated in the Office of National Parks, Buildings, and Reservations. Yet, the Annual Report of the Department of the Interior for 1933 indicates that "all" might not have meant "all." Rather the report states that "certain" of the various enumerated things were transferred: e.g. certain public buildings and certain national cemeteries. It is not clear whether this was meant literally or was merely a manner of speaking. But there is a statistical discrepancy that indicates that not all of the national monuments managed by the War Department were transferred. An Attorney General's Opinion indicates that in 1929 the Secretary of War managed 14

²⁸ See, e.g. the following national monuments, all of which were managed by the Forest Service in the Department of Agriculture: Chiricahua National Monument, Proc. No. 1692, April 18, 1924, 43 Stat. 1946; Lava Beds National Monument, Proc. No. 1755, Nov. 21, 1925, 44 Stat. 2591; Lehman Caves National Monument, Proc. No. 1618, Jan. 24, 1922, 42 Stat. 2260; and Timpanogos Cave National Monument, Proc. No. 1640, Oct. 14, 1922, 42 Stat. 2285.

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national monuments and the Secretary of Agriculture managed 15.²⁹ Yet the 1933 DOI Report indicates that "the Office of National Parks, Buildings, and Reservations took over from the War Department the management of 11 national military parks, 2 national parks, 10 battlefield sites, 10 *national monuments*, 4 miscellaneous memorials, and 11 national cemeteries."³⁰ If the 1929 Attorney General's opinion was correct that the Secretary of War managed 14 national monuments and only 10 were transferred, it appears that the transfer was not total. No explanation was given for the apparent discrepancy.

Similarly, the 1933 Report refers to the transfer of "certain" national monuments formerly under the supervision of the Department of Agriculture,³¹ but the report does not contain any other information as to which Department of Agriculture monuments were or were not transferred. However, the 1934 DOI Annual Report indicates that 16 national monuments were transferred from the Department of Agriculture to the Service by November, 1933. This appears to be all of those managed by Agriculture.³²

As will be discussed further in the next section, the possible prospective application of the 1933 Order is not clear. We know of no national monuments created by the President between 1933 and 1978 that were not managed by NPS. But in 1978, President Carter created several large national monuments in Alaska to protect lands until Congress legislated to designate particular conservation areas. These Proclamations did not specify by which agency each new national monument would be managed, but did preserve whatever underlying withdrawals or reservations existed, with the national monument designation stated to be the "dominant" withdrawal. This language is similar to

²⁹ 36 Op. Atty. Gen. 75 (1929)

³⁰ 1933 DOI Annual Report at 156. (Emphasis added.)

³¹ *Id.*, at 154.

³² The 1926 DOI Annual Report lists 15 national monuments managed by Agriculture and the 16th, Saguaro National Monument, was created under Agriculture management on March 1, 1933. The list of units managed by the NPS in *The National Parks: Index 1985*, indicates that all but two of these were transferred to NPS and that most of them were transferred in accordance with the Executive Order. The other two were abolished by statute. (Wheeler National Monument was abolished by the Act of August 3, 1950, ch. 534, 64 Stat. 405 and Old Kasaan National Monument by the Act of July 26, 1955, ch. 387, 69 Stat. 380.) Well after the 1933 Order became effective, the Solicitor of the Department of the Interior opined that all the national forest monuments came under NPS administration on the effective date of the Order, since the Department of Agriculture had not acted under the terms of the Order to exempt any of the Forest Service monuments from its application. 54 Int. Dec. 314, 316 (1933). The Opinion also stated that after the effective date of the Order, "changes can be effected only through further action by the President or Congress."

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that used in earlier times to create monuments in national forests. Although the Proclamations did not specify which agency was to manage each monument, Admiralty Island and Misty Fjords National Monuments (both within the Tongass National Forest) were managed by the Forest Service, and Yukon Flats and Becharof National Monuments were managed by the Fish and Wildlife Service. The monument designations were superseded by the enactment of the Alaska National Interest Lands Conservation Act (ANILCA), December 2, 1980,³³ §503 of which statutorily vested management of Admiralty Island and Misty Fjords National Monuments in the Forest Service. Becharof and Yukon Flats were made National Wildlife Refuges managed by the FWS.³⁴

We know of no controversy or legal opinions concerning the management of the two monuments by the Fish and Wildlife Service,³⁵ but there were some analyses related to the Forest Service monuments.

A 1979 Opinion from the Office of Legal Counsel discussed the Forest Service monuments and noted that the Department of Agriculture argued that § 9 of the National Forest Management Act³⁶ – which prohibits the return to the public domain of national forest lands created from the public domain except by act of Congress – superseded E.O. No. 6166 with respect to national monuments that incorporate national forest lands. Therefore, the Forest Service not only could, but must, administer the two new monuments. However, the Office of Legal Counsel disagreed, concluding that having the monument lands remain in the National Forest System would result in conflicting management direction, that § 9 did not require the lands to remain within the national forest system, and that management of the monuments should be transferred to the NPS.³⁷

A later Opinion of the Office of Legal Counsel modified the 1979 opinion in part.³⁸ The later Opinion concluded that E.O. No. 6166 only consolidated

³³ Pub. L. No. 96-487, 94 Stat. 2374, codified at 16 U.S.C. §§ 3101 *et seq.* Section 305 of ANILCA states that executive orders and proclamations would remain in effect except to the extent they were inconsistent with the Act.

³⁴ §302(2) and (9) respectively.

³⁵ Representatives of the FWS inform us that because Congress curtailed expenditure of funds on the new monuments, very little was done except to begin reviews of the resources in them. Interim regulations were adopted, 44 Fed. Reg. 15500 (March 14, 1979); general management regulations were proposed, 44 Fed. Reg. 37754 (June 28, 1979); and mineral management regulations were proposed, 45 Fed. Reg. 2616 (January 11, 1980).

³⁶ 16 U.S.C. §§ 1601 *et seq.*

³⁷ 3 Op. Off. Legal Counsel 85 (February 9, 1979).

³⁸ 4B Op. Off. Legal Counsel 396 (February 8, 1980).

management functions in NPS, but did not affect non-monument reservations on the lands. This reasoning led to the conclusion that the NPS could manage the national monument aspects of the lands and the Forest Service could manage the national forest aspects of the lands. The Opinion further noted that on November 10, 1972, Interior and Agriculture Departments entered into an agreement that concluded that Executive Order No. 6166, as amended, expunged the dual status of monuments created on forest lands prior to 1933. In essence, the departments agreed to follow a 1933 opinion of the Solicitor of the Department of the Interior,³⁹ finding that, in the absence of a timely interdepartmental agreement to the contrary, the management of pre-1933 monuments on forest lands was transferred automatically to Interior by E. O. No. 6166. But, the Office of Legal Counsel Opinion continues, the Solicitor's Opinion and the 1972 Agreement "[do] not preclude a case-by-case administrative decision as to the proper management of post-1933 national monuments to the extent permitted by the executive order and any other applicable statutory authorities. Executive Order No. 6166 creates management authority in the National Park Service with respect to national monuments even if created on forest lands; whether that authority is exclusive, additional, delegable, or forfeitable depends on the terms of the order and other authorities that may exist with respect to the lands."⁴⁰ In the case of the two Alaskan monuments, the NPS and DOA agreed to enter into a memorandum of understanding to govern the management of the monuments. Clearly this second opinion contemplates some flexibility in the management of post 1933 monuments

Is Non-NPS Management a "Reorganization?"

The 1979 Opinion also states that in order for the President to permit the Forest Service to manage the monuments, the President would have to submit to Congress a reorganization plan under § 2 of the Reorganization Act of 1977. "It is not possible to amend Executive Order No. 6166 merely by issuing an amendatory order because the original order itself became effective only with the assent of Congress. The Attorney General in 1934, concluded that the President could revoke or modify executive orders issued under the Act of March 3, 1933 only 'in the same manner in which they were enacted under law.'"⁴¹ The

³⁹ 54 Int. Dec. 314 (1933).

⁴⁰ 4B Op. Off. Legal Counsel at 398-399.

⁴¹ 3 Op. Off. Legal Counsel at 90, citing 37 Op. Atty. Gen. 418 (1934). An earlier Attorney General Opinion had concluded that the President lacked authority to transfer management of existing reservations between departments or to restore reserved lands to the public domain. "No power has been conferred upon the President to interfere with this policy or to transfer to one department a portion of that which is by law appropriated to or for another department." 28 Op. Atty. Gen. 143, 145-146 (1910). The subject of that Opinion was a military post. This memorandum is not focused on transfers of monument

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opinion also noted that the President could also seek legislation to accomplish the same result, aside from the reorganization process. However, the 1933 Order had not required the assent of Congress and no congressional action may be necessary now for the President to create a new national monument managed by an agency other than the NPS. To understand why, the authority of the President to reorganize the government in general and in 1933 must be briefly reviewed.

Article II, § 1 of the Constitution provides that "The executive Power shall be vested in a President of the United States of America." Article I, § 1 states that "All legislative Powers herein granted shall be vested in a Congress of the United States" Article II, § 2, cl. 2 authorizes the President to nominate and appoint certain officers of the United States whose offices have been "established by Law." Exactly where the powers of the two branches intersect in terms of structuring the government is not always clear. The President has some range of inherent powers to govern and implement the laws, and to appoint officials, but Congress has the power to create the offices to which those officials are appointed. The reference to appointments "established by Law" and the authority given Congress under Article I, § 8, cl. 18 to do everything "necessary and proper" for carrying out powers vested in the federal government, provide the basis for concluding that aside from offices created by the Constitution itself, the power to create offices resides with Congress.⁴² When Congress has created offices, the President cannot change them without authority from Congress to do so.

A President may always seek enactment of a particular structural change. Congress has also authorized the reorganization of executive branch agencies in various statutes over the years, notably in the 1949 Reorganization Act, which

management or on the authority of the President to modify reservations, and we have no information on past policies regarding, or any examples of, administrative transfers of monument management. It also is not clear how a President is to make changes only in the same manner once the relevant reorganization act has expired. However, as noted above, two national forest national monuments were abolished by statute in order to return their management fully to national forest status. Jurisdiction over at least some other NPS units was changed statutorily as well: the Chattanooga National Cemetery was transferred from DOI to the War Department by the Act of December 7, 1944, ch. 524, 58 Stat. 797 and part of the Colonial National Historical Park was transferred to the Secretary of the Navy by the Act of December 23, 1944, ch. 721, 58 Stat. 923. On the other hand, the 1980 Opinion noted that the President, by proclamation, had eliminated underlying forest reserves in several instances in order to leave only the monument designation. 4B Op. Off. Legal Counsel at 398, citing Pres. Procs. Nos. 2330 and 2339, 53 Stat. 2534, 2544 (1939).

⁴² Bernard Schwartz, *A Commentary on the Constitution of the United States*, Part I, The Powers of Government 40 (1963).

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was revised in 1966, and most recently significantly amended in 1984.⁴³ It is important to note that there is no current reorganization authority in effect; actions that can be characterized as a reorganization must be done pursuant to new reorganization authority or as separate legislation. Many reorganization plans have been proposed and approved by Congress over the years. As the Reorganization Act was revised in 1966, "reorganization" is defined as: "a transfer, consolidation, coordination, authorization, or abolition, referred to in section 903 of this title" Section 903, in relevant part, speaks of reorganization plans that provide for --

(1) the transfer of the whole or a part of an agency, *or of the whole or a part of the functions thereof*, to the jurisdiction and control of another agency (Emphasis added.)

The revised definition of "Agency" is: "(A) an Executive agency or part thereof; and (B) an office or officer in the executive branch" The revisor's notes indicate that the revision was intended to be coextensive with and substituted for the previous language: "any executive department, commission, council, independent establishment, Government corporation, board, *bureau, division, service*, (Emphasis added.) Therefore, under the original language -- which was not intended to be altered by the revision process -- moving part of the function of one service to another bureau or service, whether within the same department or not, would constitute a reorganization and there is no reorganization authority currently in effect.

However, Congress has approved various reorganization plans that permitted greater movement of functions *within* particular departments. For example, Reorganization Plan No. 3 of 1950, pertaining to the Department of the Interior, transferred all functions of all other officers of the Department of the Interior to the Secretary and then authorized the Secretary from time to time to "make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan." Therefore, absent a statutory assignment of particular management duties to a particular agency (and, as discussed above, the 1916 Act did not vest exclusive responsibility for the management of national monuments in the NPS), even if placing the Grand Staircase-Escalante Monument under BLM administration can be argued to be a transfer of a part of the function of the NPS, it could be argued that the President (acting through the Secretary of the Interior) can do this without further congressional action because both the NPS and BLM are a part of the Department of the Interior. Note, however, that it may not be valid for the President to create a national monument under the management of the Forest Service in the Department of Agriculture, since there is no current congressional authority for inter-Departmental transfers of agency

⁴³ Pub. L. No. 89-554, 80 Stat. 394; Pub. L. No. 98-614, 98 Stat. 3192, codified at 5 U.S.C. §§ 901 *et seq.*

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functions. That circumstance would more clearly present a "reorganization" issue, possibly requiring congressional action.

The 1979 Legal Counsel Opinion stated that the 1933 Order had required 'the assent of Congress,' but this is not the case. The statute under which Executive Order 6166 of 1933 was issued is unlike most other reorganization acts. Most reorganization statutes contained some form of "legislative veto" provisions that were unconstitutional under the reasoning of *Immigration and Naturalization Service v. Chadha*.⁴⁴ When an appellate court retroactively struck down a Reorganization Act as unconstitutional,⁴⁵ Congress in 1984 passed a curative act that ratified and affirmed each reorganization plan implemented under earlier statutes.⁴⁶ The 1984 Act was intended to cure defective statutes,⁴⁷ but was broadly worded, stating: "Any actions taken prior to the date of enactment of this Act pursuant to a reorganization plan that is ratified and affirmed by section 1 shall be considered to have been taken pursuant to a reorganization expressly approved by Act of Congress."

E.O. 6166 was entitled "Organization of Executive Agencies" and issued in accordance with a March 3, 1933 statute authorizing reorganization activities.⁴⁸ Because of a remarkably prescient Attorney General,⁴⁹ this statute did not contain an unconstitutional legislative veto and hence the 1933 E.O. and associated reorganization were not defective and did not need to be ratified as law by Congress in the 1984 Act. The 1933 authority required only that whenever the President issues an Executive order "under the provisions of this title," the order shall be submitted to the Congress and not become effective until after the expiration of 60 days unless Congress, by law, provides an earlier effective date. Therefore, arguably, the consolidation of management of national monuments in the NPS was and is wholly an executive act, and may not need a subsequent act of Congress to change the consolidation of management in NPS.

⁴⁴ 462 U.S. 919 (1983).

⁴⁵ *Equal Employment Opportunity Commission v. Columbia Broadcasting Company*, 743 F. 2d 969 (2d Cir. 1984).

⁴⁶ Pub. L. No. 98-532, 98 Stat. 2705.

⁴⁷ H.R. Rep. 98-1104 (1984).

⁴⁸ Title IV, Act of March 3, 1933, ch. 212, Stat. 1489. This act was amended in some respects in Title III of the Act of March 20, 1933, ch. 3, 48 Stat. 8, 16.

⁴⁹ See, the opinion of Attorney General William D. Mitchell, 37 Op. Atty. Gen. 56 (1933), as a result of which the reorganization language in the 1933 Act differed from similar acts before and since.

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On the other hand, the curative 1984 Act statutorily ratified each reorganization plan that had been implemented before 1984. Therefore, regardless of whether the 1933 reorganization authority was defective, E.O. 6166 may have received statutory status in 1984, such that the 1933 Order cannot now be changed without congressional action. However, the basic issue remains: whether the creation of a new national monument managed by an entity other than NPS needs to be done under reorganization authority or independent legislation, or may be accomplished merely by action of the President under the Antiquities Act.

It can be argued that the creation by the President of a *new* monument that is not managed by the NPS does not raise "reorganization" issues at all because creation of such a monument is not a "transfer" of all or part of a function of the NPS at all, in that the President would not be transferring management of a unit currently under NPS control, nor affecting the duty of NPS to manage monuments in general. Rather, the argument would continue, the 1916 NPS statute does not provide exclusive NPS jurisdiction over monuments, the 1933 Order consolidated management of monuments at that time [and possibly not even all of the 1933 monuments], but did not preclude other management in all instances, and the President can exercise the separate authority of the Antiquities Act to create a monument without either amending the 1933 Order or otherwise seeking reorganization authority.

The argument in response is that, notwithstanding certain administrative analyses over the years, a new BLM-managed monument would be a departure from the completeness of the consolidation of monument management (if the consolidation was complete) that was accomplished by the 1933 Executive Order and therefore should be viewed as a "transfer" of part of the function of the NPS, which the President lacks authority to do. It could then be noted, however, that providing for the management of a new national monument by BLM is not an impermissible reorganization because there is no exclusive statutory jurisdiction in NPS to manage national monuments, both the BLM and the NPS are within the same department, and under the 1950 Reorganization Plan, the President (acting through the Secretary) can move part of the NPS function to the BLM.

It is also possible that Congress has ratified the President's designation. In the final hours before adjournment of the 104th Congress, several appropriations conference reports were folded into one omnibus measure. The Conference Report accompanying H.R. 3610 was approved by both Houses and appears to have become part of Pub. L. No. 104-208. The Joint Explanatory Statement of the Managers of that Report speaks to the Grand Staircase-Escalante Monument and specifically directs its management by the BLM:

The Administration recently created the Grand Staircase/Canyons of the Escalante National Monument in Utah as one of the largest national monuments in the continental United States without consultation with the Congress and without public comment. *The Secretary should comply fully with the provisions outlined in the*

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proclamation dated September 18, 1996. Pursuant to the proclamation, the Secretary of the Interior will manage the monument through the Bureau of Land Management.

Of particular concern is the lack of details on the monument beyond the information contained in the proclamation, including estimated costs to manage the monument and provide for a potential increase in visitors to the area. The Secretary should submit a report by February 1, 1997 that details the costs associated with the monument, the process for developing a management plan, and a description of how affected parties will be involved in the process for developing the management plan. The Secretary should also submit by April 1, 1997 a plan for implementing an exchange of school trust lands located within the monument.⁵⁰ (Emphasis added.)

Note, however, that this language is explanatory only and does not appear to have become law.⁵¹ If not, Congress did not ratify by law the management of the monument by BLM. However, because the BLM is to develop a management plan for the new national monument, the explanatory committee language relates in part to the funds provided to BLM for planning activities. The remainder of the language appears to be only directory language to the agency, but is at least an acknowledgment by the Congress of the President's action and apparent acquiescence in it.

CONCLUSION

Although the issues are not free from doubt, it appears likely that a court would uphold the new monument in light of the breadth of discretion given the President under the Antiquities Act to determine the size of the new monument and the objects and purposes it was created to protect. Since there are no set procedures by which a President designates monuments, a court is also likely to uphold its designation against any asserted procedural defects.

Conferring management responsibility for the new monument on the BLM raises more complex issues, the resolution of which is uncertain. The deference the courts have shown in the past to the exercise of a President's discretion as to the size and purposes of monuments created under the Antiquities Act may

⁵⁰ H.R. Rep. 104-863 at 989-990. See also, 42 CONG. REC. 11840, 11916 (daily ed. September 28, 1996). The Joint Explanatory Statement begins at H 11840.

⁵¹ No final text of Pub. L. No. 104-208, 110 Stat. 3009 is yet available. A draft text made available by U.S. Code Congressional and Administrative News sets out as the probable text of the law the report language of H.R. Rep. 104-863 on the Department of the Interior appropriations found at 142 CONG. REC. H11697 (daily ed. September 28, 1996), but does not set out as statutory text the explanatory material contained in the committee report set out above.

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not apply to the management issue because it is more technical in nature. Nevertheless, based on the information available to us, it appears that a court would have a number of bases, albeit of varying persuasiveness, on which to uphold the designation by the President of the Bureau of Land Management to manage the Grand Staircase-Escalante National Monument: the 1916 NPS Organic Act does not give the NPS exclusive management of all national monuments; the 1933 E.O. 6166 may be interpreted as failing to provide exclusive NPS management or may be a wholly executive action that can be modified without congressional action; the President's broad and independent authority under the Antiquities Act to create new national monuments may include discretion to designate management responsibilities; the creation of a new national monument managed by an agency other than the NPS may not be a "reorganization;" if such an action by the President may be characterized as a "reorganization," the President may accomplish a transfer of function from one agency to another within the same department under Reorganization Plan No. 3 of 1950 without additional authority from Congress; and Congress appears to have affirmed the BLM management of the Grand Staircase-Escalante National Monument in report language accompanying Pub. L. No. 104-208.

**U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGAL COUNSEL
WASHINGTON, D.C. 20530**

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WO

REPLY TO 2370 Other Areas

JUL 23 1980

SUBJECT: Admiralty Island and Misty Fjords
National Monuments, Alaska



TO: Regional Forester, R-10
W.O. Staff Directors L. LMF

The Department of Justice has advised us that both the USDA and USDI have authority to perform management functions for these National Monuments. It has been recommended that a Memorandum of Understanding (MOU) between the two Departments be prepared.

Enclosed is a draft MOU that has been prepared and reviewed by our Office of General Counsel and the USDI Solicitor. We ask for your review and comment by August 1. You will note that the Secretary of the Interior intends to designate the Bureau of Land Management as the responsible agency for management coordination.

Your review is appreciated.

ROY W. FENCHEL
Director, Recreation Management

Enclosure

RECEIVED

JUL 28 1980

USFS REGION 10
RECREATION

DRAFT COPY

Memorandum of Understanding
between the
Department of the Interior
and the
Department of Agriculture
Concerning

Management of Admiralty Island and Misty Fiords National
Monuments, Alaska

Whereas, the parties recognize that the Misty Fiords and Admiralty Island areas (hereinafter referred to as "areas") were added to the Tongass National Forest by Presidential Proclamations dated September 10, 1907 and February 16, 1904, respectively; and now constitute components of the National Forest System subject to all laws pertaining to the system, including the National Forest Management Act of 1976;

Whereas, the parties recognize that Admiralty Island National Monument and Misty Fiords National Monument were created by Presidential Proclamations 4611 and 4623, respectively, dated December 1, 1978;

Whereas, the parties recognize and accept certain conclusions contained in the attached February 8, 1980 Memorandum of the Office of Legal Counsel within the Department of Justice, to wit:

1. The national monument proclamations did not extinguish the National Forest System reservation applicable to both the Admiralty Island and Misty Fiords areas, thus retaining Department of Agriculture authority over such areas for national forest purposes,
2. Due to the operation of section 2 of Executive Order No. 6166, 5 U.S.C. § 901 note (1976), and Reorganization Plan No. 3 of 1950, 5 U.S.C. App. 1, the national monument proclamations created Department of the Interior authority over the Admiralty Island and Misty Fiords areas for national monument purposes,
3. Therefore, the Admiralty Island and Misty Fiords areas are subject to dual reservations encompassing Department of Agriculture statutory authorities for national forest purposes and Department of the Interior statutory authorities for national monument purposes;

whereas, the parties recognize that both the Secretary of Agriculture and the Secretary of the Interior have independent statutory authority to manage the areas in a manner consistent with national monument status;

whereas, the parties recognize the desirability of close cooperation between the Departments of Agriculture and Interior in the management of these areas;

whereas, the parties recognize the historical management of these areas by the Secretary of Agriculture; and

whereas, the parties desire that day to day administration of the areas continue to be the responsibility of the Department of Agriculture;

Now, therefore, the parties agree as follows in the allocation of management responsibility for the areas:

A. The Secretary of Agriculture's existing regulations for the National Forest System shall continue to be applicable to the areas to the extent consistent with the purposes for which they were established as national monuments. Existing regulations applicable to national monuments administered by the Department of Interior will not apply to the areas. The Secretary of Agriculture will give prior consultation to Secretary of Interior before issuing any special regulation applicable to these areas.

B. The day to day management of the areas by the Secretary of Agriculture shall be by and through the United States Forest Service, USDA, Alaska Region. The Forest Service will give prior consultation with the Alaska State Director of the Bureau of Land Management before authorizing any activity which has a likelihood of degrading the principal resource values of the areas as set forth in the Presidential proclamations designating the areas as National Monuments. It is the intent of the parties that Department of Interior personnel not become involved in day to day or on the ground administration of the areas, except as requested by the Department of Agriculture.

C. It is the intent of the parties that Department of Agriculture appropriations be the primary monetary means for administering the areas. Department of Interior appropriations, to the extent legally permissible, shall be available for the use of Department of Interior personnel as contemplated in this memorandum of understanding, and for other uses as requested by the Department of Agriculture.

D. This memorandum of understanding may be terminated by either party after sixty days' notice, or by operation of law. This memorandum of understanding shall be subject to amendments, additions or deletions upon the signed acceptance thereof by the Secretaries of Agriculture and Interior.

E. Nothing herein shall impair the authority of the Secretary of Agriculture regarding the exchange of national forest lands for native selections or selection rights on the areas pursuant to Section 22(f) of the Alaska Native Claims Settlement Act.

F. Nothing herein shall be construed as affecting valid existing rights.

G. Signatory for the Department of the Interior shall be the Assistant Secretary for Land and Water Resources, and signatory for the Department of Agriculture shall be the Assistant Secretary for Natural Resources and The Environment.

Date

Guy Martin
Assistant Secretary of The
Interior for Land and Water
Resources

Date

M. Russell Cutler
Assistant Secretary of
Agriculture for Natural
Resources and Environment

DEPARTMENT OF AGRICULTURE
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20250

February 19, 1980.

NOTE TO MAX PETERSON:

Attached is a Justice memorandum reversing its earlier opinion and concluding that the Forest Service still has jurisdiction over Admiralty Island and Misty Fiords. The next step is to negotiate a memorandum of understanding with Interior.

D.M.
DANIEL MARCUS
General Counsel

Attachment

cc: Rupert Cutler
Richard Fowler

HANDS STAFF

FEB 22 1980

Mr. Tolson	
Mr. DeLoach	
Mr. Mohr	
Mr. Bishop	
Mr. Casper	
Mr. Callahan	
Mr. Conrad	
Mr. Felt	
Mr. Gale	
Mr. Rosen	
Mr. Sullivan	
Mr. Tavel	
Mr. Trotter	
Tele. Room	
Miss Holmes	
Miss Gandy	

U.S. DEPARTMENT OF AGRICULTURE
OFFICE OF THE GENERAL COUNSEL

OFFICE OF THE GENERAL COUNSEL

AK REGION EPR

03/24/00 FRI 17:27 FAX 907 588 7852

Department of Justice

Washington, D.C. 20530

8 FEB 1980

Mr. Thomas Lambrix
Domestic Policy Staff
425 Old Executive Office Building
Washington, D.C. 20500

Dear Mr. Lambrix:

Attached is a copy of a February 8, 1980 memorandum from the Office of Legal Counsel to OMB Director McIntyre, amending our February 9, 1979 memorandum to him concerning the management of Admiralty Island and Misty Fiords National Monuments. Based on materials sent to us by USDA General Counsel Daniel Marcus, and September 20 and December 20, 1979 letters supporting Mr. Marcus' views from James D. Webb, Associate Solicitor for Conservation and Wildlife of the Department of the Interior, we have concluded, under § 2 of Executive Order No. 6166, that:

- a. both the USDA and Interior have authority to perform management functions with respect to post-1933 national monuments created on national forest lands; and
- b. so long as the President does not revoke the national forest status of such monuments, the Departments may agree to share management responsibilities under an appropriate memorandum of understanding.

Because of these conclusions, we no longer consider any contrary view expressed to you in our August 30, 1979 letter on this subject. Specifically, we no longer believe a plausible argument exists that, in continuing to manage Admiralty Island and Misty Fiords, the Forest Service might be violating 31 U.S.C. § 528, which requires the use of appropriations for authorized purposes only. */

*/ For the express terms of the Forest Service's 1979 and 1980 appropriations, see 92 Stat. 1292 and 93 Stat. 968.

SENT BY ASST. SECRETARY FWP ; 3-30-0 11:21AM ; INTERIOR DEPARTMENT-

2025140557;#23

In view of the complex questions that may still arise concerning the management of the two monuments, I would like to clarify what may be another misleading statement in the August 30, 1979 letter. In response to your oral inquiry, we indicated that, in part because the specific location within the Department of the Interior of monument management responsibilities is itself a matter of discretion, no private party would likely have standing to challenge in court the management of national monuments by any particular agency. As our letter is worded, it may be taken to imply a view that different agencies may lawfully manage national monuments under different land use standards. We have not considered this question and did not intend to express any view on this subject.

Please let us know if this office can be of further assistance.

Sincerely,

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

cc: Ronald Kienlen
Assistant General Counsel
Office of Management and Budget

John Handerson
Deputy Counsel to the
President's Reorganization Project
Office of Management and Budget

Daniel Marcus
General Counsel
Department of Agriculture

David Watts
Acting Associate Solicitor,
Conservation and Wildlife
Department of the Interior

Kay Oberly
Special Assistant to the Assistant
Attorney General
Land and Natural Resources Division

-2-

57009

presidential documents

[3195-01-M]

Title 3—President

Proclamation 4611

December 1, 1978

Admiralty Island National Monument

By the President of the United States of America

A Proclamation

Admiralty Island is outstanding for its superlative combination of scientific and historic objects. Admiralty Island contains unique resources of scientific interest which need protection to assure continued opportunities for study.

Admiralty Island has been continuously inhabited by Tlingit Indians for approximately 10,000 years. Archeological sites and objects are plentiful in the areas of Angoon, Chaik Bay, Whitewater Bay and other bays and inlets on the island. These resources provide historical documentation of continuing value for study. The continued presence of these natives on the island add to the scientific and historical value of the area.

The cultural history of the Tlingit Indians is rich in ceremony and creative arts and complex in its social, legal and political systems. Admiralty provides a unique combination of archeological and historical resources in a relatively unspoiled natural ecosystem that enhances their value for scientific study.

Subsequent to exploration and mapping by Captain George Vancouver at the end of the 18th century, Russian fur traders, Yankee whalers, and miners and prospectors have left objects and sites on Admiralty which provide valuable historical documentation of white settlement and exploitation of the island and its resources. Admiralty Island is rich in historic structures and sites, including whaling stations, canneries, old mining structures and old village sites, for example, Killisnoo Village where a whaling and herring saltery station were established in 1880.

Unusual aspects of the island ecology include its exceptional distribution of animal species, including dense populations of brown bears and eagles, but excluding entirely—because of the island's separation from the mainland—a large number of species indigenous to the general area. This peculiar distribution enhances the island's value for scientific study.

The unique island ecology includes the highest known density of nesting bald eagles (more than are found in all the other States combined); large numbers of Alaska brown bear; and the largest unspoiled coastal island ecosystem in North America. Admiralty Island was added to the Tongass National Forest in 1909, and specific portions of the island have been designated as bear and eagle management areas and numerous scientific studies of the bear and eagle habitat have been conducted by scientists from around the world. The island is an outdoor living laboratory for the study of the bald eagle and Alaska brown bear.

Protection of the entire island, exclusive of the Mansfield Peninsula, is necessary to preserve intact the unique scientific and historic objects and sites located there. Designation of a smaller area would not serve the scientific purpose of preserving intact this unique coastal island ecosystem.

57010.

THE PRESIDENT

Hunting and fishing shall continue to be regulated, permitted and controlled in accord with the statutory authorities applicable to the Monument area.

Section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the government of the United States to be National Monuments, and to reserve as part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

NOW, THEREFORE, I, JIMMY CARTER, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906, (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the Admiralty Island National Monument all lands, including submerged lands, and waters owned or controlled by the United States within the boundaries of the area described on the document entitled "Admiralty Island National Monument (Copper River, Meridian)", attached to and forming a part of this Proclamation. The area reserved consists of approximately 1,100,000 acres, and is the smallest area compatible with the proper care and management of the objects to be protected. Lands, including submerged lands, and waters within these boundaries not owned by the United States shall be reserved as a part of the Monument upon acquisition of title thereto by the United States.

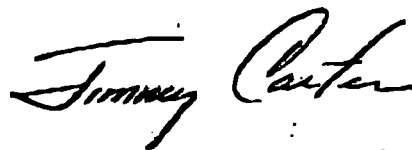
All lands, including submerged lands, and all waters within the boundaries of this Monument are hereby appropriated and withdrawn from entry, location, selection, sale or other disposition under the public land laws, other than exchange. There is also reserved all water necessary to the proper care and management of those objects protected by this Monument and for the proper administration of the Monument in accordance with applicable laws.

The establishment of this Monument is subject to valid existing rights, including, but not limited to, valid selections under the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601 *et seq.*), and under or confirmed in the Alaska Statehood Act (48 U.S.C. Note preceding Section 21).

Nothing in this Proclamation shall be deemed to revoke any existing withdrawal, reservation or appropriation, including any withdrawal under section 17(d)(1) of the Alaska Native Claims Settlement Act (43 U.S.C. 1616 (d)(1)); however, the National Monument shall be the dominant reservation. Nothing in this Proclamation is intended to modify or revoke the terms of the Memorandum of Understanding dated September 1, 1972, entered into between the State of Alaska and the United States as part of the negotiated settlement of *Alaska v. Morton*, Civil No. A-48-72 (D. Alaska, Complaint filed April 10, 1972).

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy or remove any feature of this Monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of December, in the year of our Lord nineteen hundred and seventy-eight, and of the Independence of the United States of America the two hundred and third.



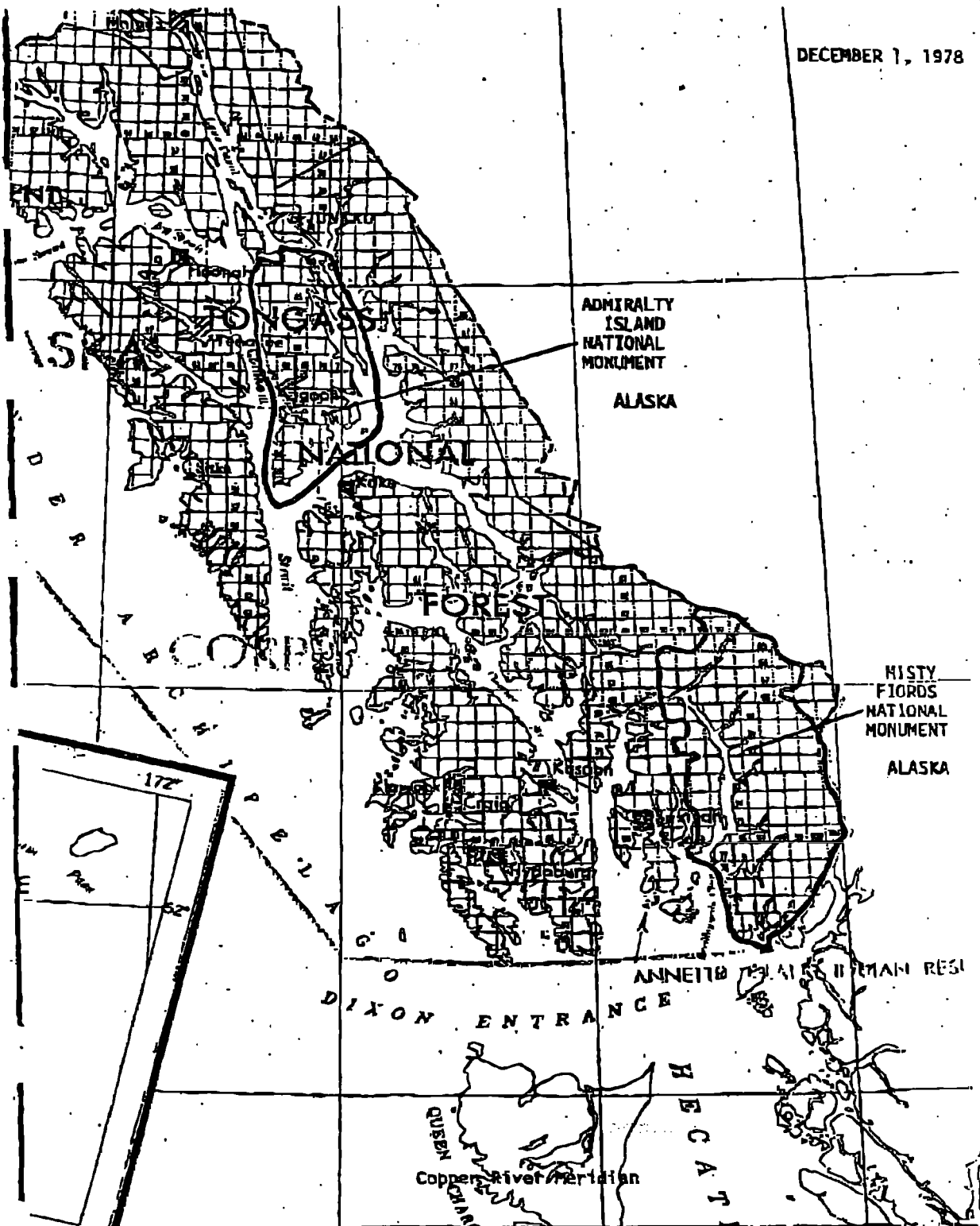
57011

THE PRESIDENT
ADMIRALTY ISLAND NATIONAL MONUMENT

COPPER RIVER MERIDIAN

- T. 42 S., R. 66 E., all land on the south side of Stevens Passage including small island adjacent to Admiralty Cove.
- T. 42 S., R. 67 E., all land on the south side of Stevens passage.
- T. 43 S., R. 65 E., all land south of the hydrographic divide between Fowler Creek and Greens Creek excluding land on the Mansfield Peninsula.
- T. 43 S., R. 66 E., all lands south of hydrographic divide between Young Bay and Greens Creek.
- T. 43 S., R. 67 E., all lands except those draining into Admiralty Creek.
- T. 43 S., R. 68 E.,
- T. 43 S., R. 69 E., all lands on the west side of Stevens passage including Grand Island.
- T. 44 S., R. 65 through 68 E.,
- T. 44 S., R. 69 E., all land on the west side of Stevens passage including Grand Island.
- T. 45 S., R. 66 through 70 E.,
- T. 46 S., R. 66 through 71 E.,
- T. 47 S., R. 66 through 71 E.,
- T. 48 S., R. 66 through 71 E.,
- T. 49 S., R. 67 through 72 E.,
- T. 50 S., R. 67 through 72 E.,
- T. 51 S., R. 67 through 72 E.,
- T. 52 S., R. 68 through 72 E.,
- T. 53 S., R. 68 through 73 E.,
- T. 54 S., R. 68 through 71 E.,
- T. 55 S., R. 68 through 70 E.,
- T. 56 S., R. 68 and 69 E., including Yasha Island.

DECEMBER 1, 1978



(PR Doc. 78-38986 Filed 12-1-78; 2:53 pm)

FEDERAL REGISTER, VOL. 42, NO. 234—TUESDAY, DECEMBER 5, 1978

THE WHITE HOUSE
WASHINGTON

February 14, 2000

The Honorable Daniel R. Glickman
Secretary of Agriculture
Washington, D.C. 20250

Dear Dan:

More than half of California's remaining giant sequoia groves, which contain the largest and many of the oldest trees in the world, lie outside Kings Canyon/Sequoia and Yosemite National Parks and within the Sequoia National Forest. I want to ensure that these majestic cathedral groves, which John Muir called "Nature's masterpiece," are protected for future generations to study and enjoy.

I would appreciate your review of this matter and your recommendation regarding whether appropriate stewardship for the sequoia groves warrants exercise of my authority under the Antiquities Act to extend permanent protection to objects of historic or scientific interest on federal land. As you know, legislative proposals have been introduced over the last decade, but not enacted, to provide permanent protection for the sequoias, and a number of others have proposed Antiquities Act protection for unprotected sequoias. Dr. Edgar Wayburn, Honorary President of the Sierra Club, mentioned this to me when I awarded him a Presidential Medal of Freedom last summer, and he also has written me about the subject.

As part of your review, please consult with appropriate members of Congress, as well as tribal, state, and local officials and other interested parties, and carefully consider their views in making your recommendation. I would also like you to draw on the scientific and management expertise of the National Park Service, the Bureau of Land Management, and the State of California regarding sequoia groves located on their lands.

Please make your recommendation on this matter within sixty days. I will carefully consider your recommendation in the context of our ongoing efforts to protect our most valuable and unique lands for future generations to enjoy.

I look forward to receiving your guidance.

Sincerely,

