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Antiquities Act: Scope of Authority for Modification of National Monuments

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Summary

The Antiquities Act of 1906 authorizes the President to declare, by proclamation, that objects of historic or scientific interest on federal lands are designated as national monuments. Over the course of more than a century, Presidents have cited the Antiquities Act as authority for protecting well over 100 land and marine areas, totaling hundreds of millions of acres, as national monuments. National monuments generally are reserved and protected from certain uses such as mineral leasing or mining, although management terms may vary by monument. Partly because of such restrictions, some presidential proclamations of national monuments—and proposals for such proclamations—have led to controversy.

Once a President has proclaimed a national monument on federal land, later Presidents or Congresses may want to abolish, diminish, or otherwise change the monument. Congress has clear authority to do so, largely under the Property Clause of the U.S. Constitution, which provides that “Congress shall have Power to ... make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” Congress has used its authority to abolish or to remove acreage from national monuments on several occasions.

It appears that presidential authority may be more constrained. No President has ever abolished or revoked a national monument proclamation, so the existence or scope of any such authority has not been tested in courts. However, some legal analyses since at least the 1930s have concluded that the Antiquities Act, by its terms, does not authorize the President to repeal proclamations, and that the President also lacks implied authority to do so. Under this view, once a President has applied the Antiquities Act to protect objects of historic or scientific interest, only Congress can undo that protection. On the other hand, Presidents have deleted acres from national monuments, proclaiming that the deleted acres do not meet the Antiquities Act’s standard that the protected area be the “smallest area compatible with the proper care and management of the objects to be protected.” Presidents also can modify the management of national monuments, although the outer boundaries of this authority, too, appear to be untested. Under the Federal Land Policy and Management Act of 1976 (FLPMA), executive branch officials other than the President are barred from modifying or revoking any withdrawal creating national monuments under the Antiquities Act.

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Introduction

Beginning with President Theodore Roosevelt, Presidents have protected well over 100 areas under the Antiquities Act of 1906.¹ These protected areas, totaling hundreds of millions of acres of land as well as large marine areas, are known as national monuments.² The Antiquities Act allows the President to declare national monuments by issuance of a public proclamation.³ While early national monument proclamations were relatively concise documents describing the objects to be protected and reserving lands from appropriation or use under public land laws,⁴ some more recent national monument proclamations have set forth more detailed management terms and use restrictions.⁵

Some presidential proclamations of national monuments have been controversial. Disputes have arisen, for example, with respect to particular areas designated, monument size, the processes by which the monuments were created, and the management terms included in the proclamations.⁶ National monument proclamations have sometimes been challenged in court, but courts generally have upheld them and construed broadly the authority granted by the Antiquities Act to establish monuments.⁷ Some national monuments have been abolished or significantly diminished by acts of Congress.⁸ However, it appears that presidential authority may be more constrained, although it remains unresolved whether a President could lawfully abolish, or the extent to which a President could significantly diminish, a previously proclaimed national monument. No court cases have directly decided the issue of the authority of a President to revoke a national monument, but various analyses have suggested that the President would lack such authority. Debate continues regarding the scope of a President's authority to take actions other than revocation, such as significantly diminishing a monument's acreage, or curtailing or expanding monument uses.

Background on National Monuments and the Antiquities Act

Both the President and Congress can create “national monuments,” a type of conservation unit created from federal lands. National monuments generally preserve resources or attractions deemed significant, such as historical or archeological artifacts, natural features, or recreational opportunities.⁹ Most national monuments are managed by the National Park Service (NPS) in the

¹ 54 U.S.C. §320301 (previously P.L. 59-209, 34 Stat. 225 (1906) (codified at 16 U.S.C. §431) (recodified by P.L. 113-287, §3, 128 Stat. 3259 (2014)).

² For additional background information on the Antiquities Act, associated issues, and legislative and administrative activity, see CRS Report R41330, *National Monuments and the Antiquities Act*, by Carol Hardy Vincent.

³ 54 U.S.C. §320301(a).

⁴ See, e.g., Proclamation No. 873, 36 Stat. 2491 (1909) (Establishment of the Navajo National Monument, Arizona).

⁵ See, e.g., Proclamation No. 9131, 79 *Federal Register* 30,431 (May 28, 2014) (Establishment of the Organ Mountains-Desert Peaks National Monument); Proclamation No. 8336, 74 *Federal Register* 1565 (January 12, 2009) (Establishment of the Pacific Remote Islands Marine National Monument).

⁶ See, e.g., CRS Report R41330, *National Monuments and the Antiquities Act*, by Carol Hardy Vincent.

⁷ See *infra*, notes 11-14 and accompanying text.

⁸ See NPS ARCHAEOLOGY PROGRAM, *Frequently Asked Questions*, <https://www.nps.gov/archaeology/sites/antiquities/FAQs.doc> (last visited November 14, 2016).

⁹ See generally CRS Report R41330, *National Monuments and the Antiquities Act*, by Carol Hardy Vincent. Note that while the Antiquities Act guides what the President can make a national monument, Congress is not bound by the Antiquities Act.

Department of the Interior (DOI), although other agencies, including the Bureau of Land Management (BLM) and the Fish and Wildlife Service (FWS) in DOI and the Forest Service in the Department of Agriculture, also manage or co-manage some monuments.

In the Antiquities Act of 1906, now codified at 54 U.S.C. §§320301-320303, Congress delegated to the President certain authority to unilaterally reserve tracts of federal land by designating them as national monuments. The act provides, in part:

(a) Presidential Declaration.—The President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.

(b) Reservation of Land.—The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.¹⁰

Courts have expansively interpreted presidential authority to declare national monuments under the Antiquities Act. Use of the Antiquities Act was challenged after President Theodore Roosevelt issued a proclamation declaring more than 800,000 acres around the Grand Canyon to be a national monument.¹¹ In *Cameron v. United States*, decided in 1920, the Supreme Court held that the Antiquities Act broadly empowered the President “to establish reserves embracing ‘objects of historic or scientific interest.’ The Grand Canyon, as stated in his proclamation, ‘is an object of unusual scientific interest.’”¹² The Court did not consider the size of the monument disqualifying.¹³ Subsequent cases also have upheld presidential proclamations designating national monuments and have affirmed the Antiquities Act’s broad application.¹⁴

The Antiquities Act is silent as to procedures to create a national monument, stating only that the President shall “declare” one by “public proclamation.”¹⁵ Because the Antiquities Act involves action by the President, presidential designation of a national monument does not trigger the procedures usually required for agency actions under the National Environmental Policy Act (NEPA);¹⁶ the President lies outside of NEPA’s definition of a “federal agency.”¹⁷

The overriding management goal for all national monuments is protection of the objects described in the proclamations. Limitations or prohibitions on certain uses may be included in the proclamations themselves, in management plans developed by the agencies to govern monument

¹⁰ 54 U.S.C. §320301. The Antiquities Act also authorizes the federal government to accept relinquishment of parcels of land held in nonfederal ownership for the protection of the objects therein as national monuments and provides that “[n]o extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.” 54 U.S.C. §320301(c)-(d).

¹¹ Proclamation No. 794, 35 Stat. 2175 (1908). The Grand Canyon was redesignated as a national park in 1919. P.L. 65-277, 40 Stat. 1175 (1919).

¹² 252 U.S. 450, 455-56 (1920).

¹³ See generally *id.*

¹⁴ See *Cappaert v. United States*, 426 U.S. 128, 141-42 (1976) (affirming federal government’s reservation of appurtenant water rights in establishing Devil’s Hole as part of Death Valley National Monument); *Mt. States Legal Found. v. Bush*, 306 F.3d 1132, 1135 (D.C. Cir. 2002) (summarizing case law, upholding dismissal of complaint challenging six national monument proclamations by President Clinton as unconstitutional and beyond the authority of the Antiquities Act).

¹⁵ 54 U.S.C. §320301(a).

¹⁶ 42 U.S.C. §§4321-4347.

¹⁷ 40 C.F.R. §1508.12 (providing that the term “federal agency” as used in NEPA does not mean Congress, the Judiciary, or the President).

lands, in agency policies, or in other sources.¹⁸ Recent proclamations under the Antiquities Act have stated, among other provisions, that federal lands reserved as national monuments are “hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws, from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing,” or similar language, “subject to valid existing rights.”¹⁹

Presidential Authority to Abolish or Modify National Monuments

The question has arisen whether a President lawfully could revoke or substantially modify a previously designated national monument. At first glance, it would appear that this question may be answered in the affirmative: there is no clear distinction between proclamations and executive orders, and Presidents generally have authority to revoke, modify, or supersede their own executive orders and proclamations or those issued by predecessors.²⁰ However, because the authority for national monument proclamations is provided by a specific statute, the authority to revoke such proclamations has been interpreted to be more limited.²¹

Abolishment of National Monuments

No President has attempted to abolish a previously established national monument by proclamation. Thus, there has been no definitive judicial interpretation whether such action would be authorized under the Antiquities Act. However, a number of legal analyses, since at least the Franklin Roosevelt Administration, have agreed that a presidential proclamation of a national monument under the Antiquities Act may be undone only by Congress.

In 1938, President Franklin Roosevelt was considering abolishment of the Castle-Pinckney National Monument in South Carolina, and the question of whether the President has authority to abolish a national monument was referred to the Attorney General at the time, Homer Cummings. The Attorney General found that the President did not have such authority, observing: “The statute does not in terms authorize the President to abolish national monuments, and no other statute containing such authority has been suggested. If the President has such authority, therefore, it exists by implication.”²² Citing earlier attorney general opinions, the Attorney General concluded that the President did not have implied authority to abolish national monuments.²³ President Franklin Roosevelt did not attempt to abolish the Castle-Pinckney National Monument, but Congress later abolished it by statute.²⁴

¹⁸ See “Effects on Land Use,” in CRS Report R41330, *National Monuments and the Antiquities Act*, by Carol Hardy Vincent.

¹⁹ See, e.g., Proclamation No. 9394, 81 *Federal Register* 8365 (February 18, 2016) (Establishment of the Castle Mountains National Monument); Proclamation No. 9476, 81 *Federal Register* 59,121 (August 29, 2016) (Establishment of the Katahdin Woods and Waters National Monument).

²⁰ See generally CRS Report RS20846, *Executive Orders: Issuance, Modification, and Revocation*, by Vivian S. Chu and Todd Garvey.

²¹ See, e.g., 39 Op. Att’y Gen. 185, 187 (1938) and discussion *infra*.

²² 39 Op. Att’y Gen. 185, 187 (1938).

²³ *Id.* (quoting 10 Op. Att’y Gen. 359 (1862)).

²⁴ P.L. 84-447, 70 Stat. 61 (1956).

Some more modern analysts also have asserted that the President lacks authority to undo a national monument proclamation under the Antiquities Act. For example, one argued in 2003 that “[t]he idea that Congress granted the President ‘one-way’ authority to create, but not revoke or modify, national monuments” was supported, in part, by what he described as “[t]he impetus to pass the law,” that is, “the concern that spectacular public land resources might be harmed before Congress could act to protect them.”²⁵

However, given the silence of the Antiquities Act on this specific question, as well as the potential analogy to other presidential executive orders and proclamations, the existence or scope of a President’s authority to abolish national monuments is still a matter of debate that has not been squarely resolved.²⁶

Enlargement or Diminishment of Monuments’ Acreage

After their establishment by a President, national monuments often have been expanded or reduced over time by subsequent Presidents, or within the same administration.²⁷ For example, Bandelier National Monument in New Mexico was established by President Woodrow Wilson in 1916 and was later expanded by Presidents Herbert Hoover and Dwight Eisenhower.²⁸ President John F. Kennedy later issued a proclamation adding 2,882 acres and removing 3,925 other acres from the monument.²⁹ President Kennedy cited the Antiquities Act as authority, declaring that “it appears that it would be in the public interest to add [the 2,882-acres] to the Bandelier National Monument because they possess unusual scenic character together with geologic and topographic features, the preservation of which would implement the purposes of such monument,” and that “it appears that it would be in the public interest to exclude from the detached Otowi section of the monument approximately 3,925 acres of land containing limited archeological values which have been fully researched and are not needed to complete the interpretive story of the Bandelier National Monument....”³⁰ As another example, the former Mount Olympus National Monument was diminished in acreage three times after its establishment—including once by nearly half—before it was ultimately redesignated by Congress as a national park in 1938.³¹

Antiquities Act authority to add new acres to national monuments appears analogous to the authority to create monuments in the first place; however, diminishment of national monuments potentially may raise distinct issues. While the Antiquities Act does not expressly address

²⁵ Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 553-54 (2003) (internal citations omitted). Professor Squillace had been a special assistant to the Interior Department Solicitor during the last year of the Clinton Administration, when a number of notable national monuments were proclaimed.

²⁶ See, e.g., Kelly Y. Fanizzo, *Separation of Powers and Federal Land Management: Enforcing the Direction of the President Under the Antiquities Act*, 40 ENVTL. L. 765, 822 (2010) (“An issue that is still debated is the President’s ability to unilaterally revoke ... a monument designation....”); Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 554-55 (2001) (“The extent to which a national monument that was created by presidential proclamation can be changed by a subsequent president is unclear....”).

²⁷ See NPS ARCHAEOLOGY PROGRAM, *Monuments List* (2016), <https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm>.

²⁸ *Id.*

²⁹ Proclamation No. 3539, 28 *Federal Register* 5407 (May 27, 1963) (Revising the Boundaries of the Bandelier National Monument, New Mexico).

³⁰ *Id.*

³¹ See NPS ARCHAEOLOGY PROGRAM, *Monuments List* (2016), <https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm>; Proclamation No. 1293, 39 Stat. 1726 (May 11, 1915).

changes in the size of national monuments, it does contain a provision governing monument size: reservations of land for monuments “shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”³² At least one analyst has contended that the same logic cited above against presidential abolishment of national monuments should also prohibit presidential modification of national monuments to diminish their size.³³ However, the 1938 Attorney General opinion discussed above contemplates reduction of monuments in size pursuant to the “smallest area” language:

While the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom, under that part of the act which provides that the limits of the monuments “in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected,” it does not follow from his power so to confine that area that he has the power to abolish a monument entirely.³⁴

Thus, despite some potential ambiguity in the phrasing of the Antiquities Act, there is precedent for Presidents to reduce the size of national monuments by proclamation.³⁵ Such actions are presumably based on the determination that the areas to be excluded represent the President’s judgment as to “the smallest area compatible with the proper care and management of the objects to be protected.” It remains undetermined whether removal of a high enough proportion of a monument’s acreage could be viewed as effectively amounting to an abolishment of the monument.

Modification of Monuments’ Management Terms and Conditions

National monuments conceivably could be modified in a variety of ways other than in size. A President could, for example, attempt to transfer management of a monument from one agency to another; expand, authorize, or prohibit uses such as mining or grazing; or allow for new rights-of-way across the lands. Again, the scope of this authority is a matter of debate, to the extent that greatly reducing a monument’s restrictions or expanding its uses can be analogized to effectively abolishing the monument.³⁶ Proclamation restrictions have been modified by subsequent proclamation in at least one instance: in 1936, President Franklin Roosevelt issued a proclamation modifying the restrictions on the Katmai National Monument in Alaska to make the reservations made in earlier proclamations “subject to valid claims under the public-land laws ... existing when the proclamations were issued and since maintained.”³⁷

The question of monument management modifications has become more pronounced over time as national monument proclamations have grown more detailed and specific. For example, President Obama’s September 15, 2016, proclamation establishing the Northeast Canyons and Seamounts Marine National Monument sets forth several paragraphs of management provisions and a

³² 54 U.S.C. §320301(b).

³³ Squillace, *supra* note 25, at 554-66.

³⁴ 39 Op. Att’y Gen. 185, 188 (1938).

³⁵ See generally See NPS ARCHAEOLOGY PROGRAM, *Monuments List* (2016), <https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm>.

³⁶ See, e.g., Squillace, *supra* note 25, at 566-68.

³⁷ Proclamation No. 2177, 35 Stat. 3523 (1936); see also National Park Service, ISOLATED PARADISE: AN ADMINISTRATIVE HISTORY OF THE KATMAI AND ANIAKCHAK NATIONAL PARK UNITS, ch. 3 (2000), available at https://www.nps.gov/parkhistory/online_books/katm/adhi/chap3.htm.

number of prohibited and regulated activities.³⁸ Where management provisions are set out in the monument's proclamation itself, diversion from such provisions could face greater legal opposition. On the other hand, not all management details are contained in a national monument proclamation. For matters not specifically addressed by the terms of a proclamation, limitation of the effects of a monument proclamation can "be accomplished by writing a management plan that does not significantly increase protection of monument lands."³⁹

Limitation on Delegation

Regardless of the scope of presidential authority to abolish or modify national monuments, any such authority cannot be delegated to other executive branch officials. One reason is found in the Federal Land Policy and Management Act of 1976 (FLPMA), which repealed a number of other withdrawal and reservation authorities, but left the Antiquities Act in place. FLPMA expressly prohibits the Secretary of the Interior from modifying or revoking any withdrawal creating national monuments under the Antiquities Act.⁴⁰ This provision came from the House bill, H.R. 13777, as introduced and as reported by the 94th Congress. The relevant committee report stated:

[The bill] would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act.... These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.⁴¹

The FLPMA language addresses only actions of the Secretary of the Interior, while the Antiquities Act is worded in terms of actions the President may take. However, the breadth of the committee report language suggests a possible interpretation of congressional intent that controlling revocations by the Secretary in this regard would operate to control the revocation or amendment of national monument withdrawals—i.e., to control the actions of the President.⁴² No court case has indicated how the FLPMA committee report language might influence, if at all, interpretation of the scope of presidential authority under the Antiquities Act.

Congressional Authority Over National Monuments

Congress can establish national monuments on federal land primarily pursuant to its authority under the Property Clause of the U.S. Constitution, which states: "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."⁴³ Congress has created several dozen specific national monuments.⁴⁴

³⁸ Proclamation No. 9496, 81 *Federal Register* 65,161 (September 21, 2016) (Northeast Canyons and Seamounts Marine National Monument).

³⁹ Ranchod, *supra* note 26, at 555.

⁴⁰ FLPMA §204(j), 43 U.S.C. §1714(j) ("The Secretary shall not ... modify or revoke any withdrawal creating national monuments under [the Antiquities Act]....")

⁴¹ H.Rept. 94-1163 at 9 (1976). The conference report did not change this provision.

⁴² *See id.*

⁴³ U.S. CONST. art. IV, §3.

⁴⁴ *See* NPS ARCHAEOLOGY PROGRAM, *Frequently Asked Questions*, <https://www.nps.gov/archeology/sites/antiquities/FAQs.doc> (last visited November 14, 2016).

Also at least in part pursuant to the Property Clause, Congress has clear constitutional authority to modify or abolish national monuments.⁴⁵ A number of national monuments originally proclaimed by Presidents have subsequently been redesignated by Congress as national historic sites, national parks, or other types of units.⁴⁶ Congress also has power to revoke national monument proclamations by statute and has done so on occasion.⁴⁷ In some instances of abolishment of national monuments, the lands in question have been transferred to states.⁴⁸ Congress also has expanded or reduced the acreage of some national monuments.⁴⁹

In addition to directly modifying or abolishing a national monument, Congress also can influence or even largely block national monument implementation through funding restrictions.⁵⁰ Congress has authority under Article I to spend money and section 9 of Article I prohibits the expenditure of money without an appropriation.⁵¹ Appropriations bills could prohibit funding for the enforcement of monument proclamations or particular usage provisions in a national monument proclamation or management plan. For instance, funding for Jackson Hole National Monument was limited for several years, until Congress abolished the monument and made it Grand Teton National Park.⁵² Some bills also have proposed to bar designation of certain areas as national monuments before any presidential proclamation has been made.⁵³

More broadly, Congress has, at times, considered or enacted legislation to amend the Antiquities Act itself. In 1950, Congress added a provision that “[n]o extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.”⁵⁴ Similar restrictions have been proposed for other states, but not enacted.⁵⁵ Other proposed modifications to the Antiquities Act have included, for example:

- imposing new procedural requirements;⁵⁶
- raising the standard for what can constitute a protected area from “the smallest area compatible with the proper care and management of the objects to be protected” to “the smallest area essential to ensure the proper care and management of the objects to be protected.”⁵⁷

⁴⁵ U.S. CONST. art. IV, §3; *see supra*, note 43 and accompanying text.

⁴⁶ *See* CRS Report R41816, *National Park System: What Do the Different Park Titles Signify?*, by Laura B. Comay.

⁴⁷ *See* NPS ARCHAEOLOGY PROGRAM, *Monuments List*, <https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm> (2016); NPS ARCHAEOLOGY PROGRAM, *Frequently Asked Questions*, <https://www.nps.gov/archeology/sites/antiquities/FAQs.doc> (last visited November 14, 2016).

⁴⁸ *See* NPS ARCHAEOLOGY PROGRAM, *Frequently Asked Questions*, <https://www.nps.gov/archeology/sites/antiquities/FAQs.doc> (last visited November 14, 2016).

⁴⁹ *See* NPS ARCHAEOLOGY PROGRAM, *Monuments List*, <https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm> (2016).

⁵⁰ *See, e.g.*, Squillace, *supra* note 25, at 500; Fanizzo, *supra* note 26, at 821-22 and notes 380-81 (discussing ability of Congress to change monument management through the appropriations process and providing examples).

⁵¹ U.S. CONST. art. I, §9.

⁵² P.L. 81-787, 64 Stat. 849 (1850) (codified at 16 U.S.C. §§406d-1 to 406d-3).

⁵³ *See, e.g.*, H.R. 193, 105th Cong. (1997) (to prohibit the designation of the Mt. Shasta area in California under the National Historic Preservation Act or the Antiquities Act).

⁵⁴ P.L. 81-787, §1, 64 Stat. 849 (1950) (recodified at 54 U.S.C. §320301(d)).

⁵⁵ *See, e.g.*, H.R. 488 and S. 232, 114th Cong. (2015) (Nevada); S. 3317, 114th Cong. (2016) (Utah).

⁵⁶ *See, e.g.*, Marine Access and State Transparency or the MAST Act, H.R. 330, 114th Cong. (2015) (requiring congressional approval of a proposed national monument and certification of compliance with the National Environmental Policy Act, along with additional requirements for marine national monuments).

⁵⁷ *See, e.g.*, National Monument Designation Transparency Act, H.R. 3389, 114th Cong. (2015).

- creating sunset provisions in which national monument proclamations would expire after six months to two years unless approved by Congress;⁵⁸
- imposing size limitations;⁵⁹ or
- narrowing the scope of “objects of historic or scientific interest.”⁶⁰

For more information on legislative activity relating to national monuments, see CRS Report R41330, *National Monuments and the Antiquities Act*, by Carol Hardy Vincent.

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Acknowledgments

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⁵⁸ See, e.g., National Monument Accountability Act, H.R. 4121, 106th Cong. (2000); H.R. 4214, 104th Cong. (1996).

⁵⁹ See, e.g., H.R. 4118, 104th Cong. (1996).

⁶⁰ See, e.g., S. 1741, 96th Cong. (1979).