

# THE WESTERN FRONTIER: THE POLITICAL BATTLE OF NATIONAL MONUMENT LANDS AND ITS EFFECTS ON PUBLIC GRAZING LANDS AND THE BEEF INDUSTRY

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## I. INTRODUCTION

The federal lands of the western United States are vast and beautiful. Many of the natural and human-made wonders of the Western Frontier have been protected and preserved since the passing of the Antiquities Act of 1906, which allowed the President of the United States to unilaterally designate national monuments.<sup>2</sup> However, over the years, many national monuments have been created through abuse of the Antiquities Act.<sup>3</sup> This can have major effects on ranchers and rural communities as the western federal lands are a major economic resource.<sup>4</sup> In December 2017, President Donald Trump took just over 1.8 million acres out of national monument status and returned those acres to federal lands for grazing and other public uses by executive order.<sup>5</sup> Some members of the public were dismayed by this move, while the beef industry and its supporters praised the change.<sup>6</sup> The western states are comprised of vast amounts of federal land.<sup>7</sup> Therefore, ranching in the western United States often requires the leasing and use of grazing permits on federal land.<sup>8</sup> Land taken out of the federal grazing program will have major effects on cattle producers, since “85 percent of the West’s federal lands are grazed by [livestock].”<sup>9</sup> Cattle producers are grateful that the actions of the Trump Administration will allow them “to resume their role as responsible stewards of the land and drivers of rural economies.”<sup>10</sup>

This Note will discuss the history of American federal lands and the history of the national monuments. It will look at the past actions of Congress and

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1. This Note will refer to federally owned lands as “federal lands,” however, federal lands managed by the Bureau of Land Management will be referred to as “public lands.”

2. CAROL HARDY VINCENT, CONG. RESEARCH SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 2 (2016) <https://perma.cc/RF4R-QLRJ>.

3. *President Donald J. Trump Stands with Local Communities Against Government Overreach on Land Management*, WHITE HOUSE (Dec. 4, 2017), <https://perma.cc/MB86-DLA6>.

4. See Brenda Richards, *Time for the Truth about Public Land Grazing*, THE HILL (Mar. 18, 2016), <https://perma.cc/XV2T-4QZ4>.

5. Travis M. Andrews, *‘The President Stole Your Land’: Patagonia REI Blast Trump on National Monument Rollbacks*, WASH. POST (Dec. 5, 2017), <https://perma.cc/R54X-FSCZ>; Jason Hayes, *How to Refocus the Antiquities Act*, WASH. EXAMINER (Jan. 17, 2018), <https://perma.cc/WYL8-RJY2>.

6. *Cattlemen Respond to National Monument Reductions: “Egregious Example of Federal Overreach Corrected in Win for Rural Communities”*, NAT’L CATTLEMEN’S BEEF ASS’N (Dec. 4, 2017), <https://perma.cc/KK5D-ZM8M> [hereinafter *Cattlemen Respond to National Monument Reductions*].

7. *The Ranching Economy*, NAT’L CATTLEMEN’S BEEF ASS’N, <https://perma.cc/P2AV-9GVJ> (archived August 24, 2018).

8. *Id.*

9. *Id.*

10. *Cattlemen Respond to National Monument Reductions*, *supra* note 6.

Presidential Administrations to understand the need to balance the protection of the federal lands with the need to promote public use and meet the needs of the surrounding communities. The current federal lands system will be examined to understand why federal lands are so vital to ranchers and rural communities alike. This Note will then discuss the changes the Trump Administration made in the federal lands, and the public backlash that followed. The public backlash will be contrasted with the national support the Executive Order received. This national support stems from the state and local demands for heightened federalism regarding the lands from which they derive their culture and lifestyle. This Note will then examine the benefits for ranchers, as well as the land—looking specifically at environmental and economic stimulation that will occur upon reduction of acres unnecessarily protected under national monument status. Next, there will be an analysis of the increased federal lands that will be opened for grazing because of President Trump’s Order. The primary issues that have been publicly discussed are effects on Native American cultural land that lost protection, as well as environmental issues that could be brought about by the change. This Note will balance these negatives against the positives of the increase in federal lands. Lastly, it will look to the future of federal lands in the United States by comparing the history of federal lands with modern uses and public views. Based upon this information, this Note will indicate several proposals for the future of federal lands.

## II. HISTORY OF AMERICAN FEDERAL LANDS

Americans have taken two views on federal lands: selling the land for national funds by encouraging settlement and, in the inverse, protecting it for the future.<sup>11</sup> These views are divided primarily by region and in generalizations.<sup>12</sup> The portion of the public that resides in the eastern United States views the land in how it would benefit them, which is through national parks, monuments, and forests.<sup>13</sup> The western United States views land according to how it benefits them, which is through the local need for land.<sup>14</sup> These conflicting views have been present throughout the existence of federal lands. The continual division has led to the current discussion of the future of federally owned lands. Throughout the development of federal land laws, we see a consistent division between the local

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11. CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 2 (2017) <https://perma.cc/TU82-6U3S>.

12. *Id.*

13. *Id.*

14. *Id.*

needs and the national concern. Therefore, it is vital to first understand the history of federal lands to understand the rise of the current issue.

America has been managing public lands since 1781 when New York surrendered unsettled, northern lands to the federal government.<sup>15</sup> Following New York's contribution, the rest of the colonies followed suit.<sup>16</sup> America gained land west to the Pacific Ocean through the Louisiana Purchase, the Mexican Cession, the Gadsden Purchase, and the Alaskan Purchase, which also became public lands.<sup>17</sup> Federal land acquisitions were important in developing a strong, centralized federal government.<sup>18</sup> Two-thirds of the original public lands have since been sold to individuals, corporations, and back to the states.<sup>19</sup>

Congress passed several laws to promote settlement and development of the West throughout the 1800s.<sup>20</sup> The General Land Office was established in 1812 to facilitate the transfers of these lands.<sup>21</sup> The majority of the land was transferred through military land bounties, land grants to states, land grants for railroads and wagon roads, and land transfers to individuals.<sup>22</sup> Flaws in these transfer programs led to federally owned tracts throughout the United States.<sup>23</sup>

The Forest Reserve Act of 1891 established the National Forest Service, which manages the national forests of the United States.<sup>24</sup> National forests are also used for livestock grazing in the western United States.

In 1916, the Stockraising Homestead Act was passed, which gave lands to ranchers to establish homesteads, but the federal government retained all mineral rights.<sup>25</sup> Today the federal government still owns the mineral rights to 70 million acres under this Act.<sup>26</sup> The Taylor Grazing Act of 1934 authorized the modern day

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15. PUB. LANDS FOUND., AMERICA'S PUBLIC LANDS: ORIGIN, HISTORY, FUTURE 3-4 (2014), <https://perma.cc/5XNS-PTD8>.

16. *Id.* at 4.

17. *Id.*

18. *See id.* at 4-5.

19. *Id.* at 4.

20. *Id.*

21. *Id.*

22. Phil Robert, *New History Chapter 6: Public Lands*, WYO. ALMANAC & HISTORY, (archived Aug. 24, 2018).

23. PUB. LANDS FOUND., *supra* note 15, at 6; Robert, *supra* note 22. The Pacific Railway Act gave the railroad companies "the odd-numbered sections on each side of the track for a distance of 20 miles "in exchange for building the transcontinental railroad. This left the government with a checkerboard of land sections.

24. PUB. LANDS FOUND., *supra* note 15, at 8; SARAH F. BATES, GETCHES WILKINSON CTR., THE WESTERN PUBLIC LANDS: AN INTRODUCTION 7 (1992), <https://perma.cc/W4LG-R9A9>.

25. PUB. LANDS FOUND., *supra* note 15, at 6.

26. *Id.*

system of issuing grazing permits, as well as setting restrictions on such use.<sup>27</sup> This is vastly different from the times in which the rancher, whose cattle began grazing the land first, had the grazing right.<sup>28</sup> The Grazing Service was formed as part of the Taylor Grazing Act and helped set up local offices to administer the program.<sup>29</sup> The enactment of the Taylor Grazing Act and the creation of the Bureau of Land Management was done to address the issues of overgrazing and rangeland sustainability.<sup>30</sup> The Act also formalized and regulated the use of public land by ranchers for grazing.<sup>31</sup> This formalization ended the public's ability to settle public lands and instead required filing applications for entry, use, and settlement.<sup>32</sup> This heavily contrasts the original public lands that were under the care of the government until they were settled. Public interest in federal lands rose in the 1960s, with many voicing protectionist and conservationist opinions.<sup>33</sup> The public's desire for greater protection of federal lands was met by President John F. Kennedy's interest in furthering conservationist efforts.<sup>34</sup> In 1964, the Classification and Multiple Use Act was passed, which categorized the public lands to be disposed for use or development and lands to remain in federal ownership for public use and protection.<sup>35</sup> This change was met with public voices fighting for the future of federal lands and ranching.<sup>36</sup> The 1960s and 1970s brought about an abundance of environmental laws such as the Clean Water Act, the Clean Air Act, the Wilderness Act, and the Endangered Species Act; all of which affected the future of federal lands.<sup>37</sup>

In 1976, the Federal Land Policy and Management Act was passed which preserved all Bureau of Land Management's public lands, unless the "disposal of particular parcel will serve the national interest."<sup>38</sup> This Act also "repealed . . . outdated public land laws."<sup>39</sup> This policy sides heavily with those geographically-

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27. *United States v. Hage*, No. 2:07-cv-01154-GMN-VCF, 2017 U.S. Dist. LEXIS 26992, at \*5 (D. Nev. Feb. 27, 2017); BATES, *supra* note 24, at 10.

28. *See* PUB. LANDS FOUND., *supra* note 15, at 9; BATES, *supra* note 24, at 7.

29. *See* PUB. LANDS FOUND., *supra* note 15, at 10.

30. VINCENT ET AL., *supra* note 11, at 21; BATES, *supra* note 24, at 10.

31. PUB. LANDS FOUND., *supra* note 15, at 10.

32. *See id.*

33. *See id.* at 10-11.

34. *See id.*

35. *See id.* at 11; BATES, *supra* note 24.

36. *See* PUB. LANDS FOUND., *supra* note 15, at 11.

37. *See id.*

38. *Id.*

39. *See id.*

-disconnected from the area, who look only at the national benefit of federal lands and fail to see the local strife that policy like this can create.<sup>40</sup>

### III. HISTORY OF THE NATIONAL MONUMENTS AND NATIONAL PARKS

The first national park was Yellowstone National Park, established in 1872.<sup>41</sup> At this time, national parks were created by Congress passing the proposed legislation and the President signing the bill into law in the same way law is created today.<sup>42</sup> However, in 1906, the Antiquities Act was passed by Congress which allowed the President to unilaterally preserve land and buildings as “national monuments.”<sup>43</sup> This Act allows for the preservation of “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon . . . [federally owned] lands.”<sup>44</sup> The Antiquities Act was passed to expedite the creation of national monuments due to the destruction that was occurring to Native American cultural sites.<sup>45</sup> The Act limits the President’s power by only allowing “the smallest area compatible with the proper care and management of the objects to be protected.”<sup>46</sup>

#### NATIONAL MONUMENT ACRES REMOVED AND ADDED BY PRESIDENTS<sup>47</sup>

President	Acres Added to National Monuments	Acres Removed from National Monuments
T. Roosevelt	1,530,934	0
W.H. Taft	34,669	26,106
W. Wilson	1,200,203	313,280
W.G. Harding	11, 772	0
C. Coolidge	1,505,104	640
H. Hoover	1,431,361	0
F.D. Roosevelt	3,015,369	71,906
H. S. Truman	28,099	4,700

40. *See id.*

41. Becky Little, *How We Got National Monuments*, HISTORY (Dec. 5, 2017), <https://perma.cc/R37N-PU3Z>.

42. *Id.*

43. *Id.*

44. Antiquities Act of 1906, 16 U.S.C. § 431 (2006).

45. Little, *supra* note 41.

46. Hayes, *supra* note 5.

47. *Antiquities Act 1906-2006: Maps, Facts, & Figures*, NAT’L PARK SERV., <https://perma.cc/7ULC-MD87> (archived Aug. 23, 2018). The above chart was compiled by calculation of the figures from this source. These figures may not be exact and were all rounded to the nearest whole number.

D.D. Eisenhower	14,073	15,439
J. F. Kennedy	30,061	4,245
L.B. Johnson	391,141	0
R. Nixon	0	0
G. Ford	87	0
J. Carter	56,045,000	0
R. Reagan	0	0
G.H.W. Bush	0	0
W. Clinton	5,717,715	0
G.W. Bush	214,629,032	0
B. H. Obama	551,876,044	0

The above chart shows that all but three presidents since the passage of the Act have unilaterally changed the acreage contained in America's national monuments.<sup>48</sup> Seven presidents have unilaterally decreased the acreage of the national monuments.<sup>49</sup> However, the biggest oddity in this chart is the increase in national monument acres during the Obama Administration.<sup>50</sup> The increase in acreage under the Obama Administration is nearly two-and-a-half times larger than the next largest administration (G.W. Bush Administration).<sup>51</sup>

#### IV. FEDERAL LANDS OF TODAY

The Federal Lands of the United States are managed by the Bureau of Land Management, the Forest Service, the Fish and Wildlife Services, and the National Park Service.<sup>52</sup> Today there are over 248 million acres of public lands managed by the Bureau of Land Management, 99.4% of which are “in the 11 western contiguous states and Alaska.”<sup>53</sup> There are around 193 million acres of federal land managed by the Forest Service; 70% is located in the eleven western contiguous states.<sup>54</sup> These two agencies play similar roles, but with different types of land.<sup>55</sup> The

48. *Id.*

49. *Id.*

50. *See id.*

51. *Id.*

52. VINCENT ET AL., *supra* note 11; Katherine Boehrer, *Intro to Federal Public Lands in the U.S.*, NOLS BLOG (Aug. 30, 2016), <https://perma.cc/Q6NX-J93V>.

53. VINCENT ET AL., *supra* note 11, at 4; BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 20 (2017), <https://perma.cc/3TZB-URJM>.

54. VINCENT ET AL., *supra* note 11, at summary; *Meet the Forest Service*, U.S. FOREST SERV., <https://perma.cc/3KTM-9N3C> (archived Aug. 23, 2018).

55. VINCENT ET AL., *supra* note 11, at 4; Boehrer, *supra* note 52.

Bureau of Land Management overseas rangeland, while the Forest Service oversees forest and timber lands.<sup>56</sup> However, the Bureau of Land Management plays a unique role in that it manages a majority of the grazing lands, as well as 700 million acres in subsurface mineral estates from the Stockraising Homestead Act.<sup>57</sup> The Fish and Wildlife Service administers over 89 million acres of federally owned land.<sup>58</sup> The National Park Service has over 79 million acres of federally owned land to manage.<sup>59</sup> Together, these four agencies manage a total of roughly 610 million acres of federal land.<sup>60</sup>

These agencies each play unique and important roles in managing Federal Lands.<sup>61</sup> Of the current American federal lands, 56% are located in 11 western states (“Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming”); 36% are located in Alaska, and 8% are located in other states.<sup>62</sup>

#### V. GRAZING LANDS OF TODAY

The Bureau of Land Management generates \$75 billion in revenue.<sup>63</sup> The Forest Service generates approximately \$680,000 in revenue from various authorized activities.<sup>64</sup> A portion of both the Bureau of Land Management and the Forest Service’s revenue is generated from grazing permits and leases.<sup>65</sup> Ranchers pay significant fees to the federal government each year to graze their livestock on public lands.<sup>66</sup>

The grazing fee varies from year to year but is based on a formula that was created in 1978.<sup>67</sup> The formula creates a fee that is charged on a per animal grazed per month of grazing basis, this is called an Animal Unit Month (AUM).<sup>68</sup> One animal unit is the equivalent of one horse, one cow and her calf, or five sheep or

56. See VINCENT ET AL., *supra* note 11, at 7; Boehrer, *supra* note 52.

57. VINCENT ET AL., *supra* note 11, at 4.

58. *Id.* at 5.

59. *Id.* at 5.

60. *Id.* at 2.

61. *Id.* at summary.

62. *Id.* at 21.

63. Press Release, Bureau of Land Mgmt., BLM and Forest Service Announce 2018 Grazing Fees (Jan. 30, 2018), <https://perma.cc/QDV9-NA3F>.

64. FOREST SERV., USDA, FISCAL YEAR 2017 BUDGET OVERVIEW D-3 (2016), <https://perma.cc/2GAE-T5GU>.

65. Press Release, *supra* note 63.; *Livestock Grazing on Public Lands*, BUREAU OF LAND MGMT., <https://perma.cc/RLG3-V8PH> (archived Aug. 23, 2018).

66. Richards, *supra* note 4.

67. Press Release, *supra* note 63.

68. *Id.*

goats.<sup>69</sup> This formula is based on the “1966 base value of \$1.23 per [Animal Unit Month]” along with the factors of “current private grazing land lease rates, beef cattle prices, and the cost of livestock production.”<sup>70</sup> This formula is combined with a maximum increase or decrease of 25%, which prevents massive fluctuations from year to year.<sup>71</sup>

#### VI. PRESIDENT TRUMP’S RECENT ROLLBACK OF NATIONAL MONUMENTS

Executive Order 13792 was signed by President Donald Trump on April 26th, 2017.<sup>72</sup> This Executive Order stated that the Secretary of the Interior would:

Conduct a review of all Presidential designations or expansions of designation under the Antiquities Act made since January 1, 1996, where the designation [or designation and later expansion] covers more than 100,000 acres . . . or where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders.<sup>73</sup>

President Trump’s Executive Order was rationalized in the name of balancing the protection of natural beauty and history with the “effects on surrounding lands and communities.”<sup>74</sup>

This Executive Order led to an investigation of 150 monument designations by Ryan Zinke, the Secretary of the Interior.<sup>75</sup> Secretary Zinke’s recommendation was for President Trump to “reduce the size of the monuments and seek congressional authorization to turn over the remaining landmarks to be co-managed by the Native American tribes.”<sup>76</sup> Based on Secretary Zinke’s investigation, President Trump reduced the size of Bears Ears National Monument and the Grand Staircase-Escalante National Monument.<sup>77</sup> Bears Ear National Monument was created by the Obama Administration with little regard to the desires of state officials, who stated that the monument was “a land grab that takes

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69. *Id.*

70. *Id.*

71. *Id.*

72. Exec. Order No. 13,792, 82 Fed. Reg. 20429 (Apr. 26, 2017).

73. *Id.*

74. *Id.*

75. Gregory Korte, *Trump Shrinks Bears Ears, Grand Staircase-Escalante Monuments in Historic Proclamations*, USA TODAY (last updated Dec. 5, 2017), <https://perma.cc/J9VU-KG7C>.

76. *Id.*

77. *Id.*

resources away from citizens.”<sup>78</sup> President Trump’s rollback reduced the 843 million acres of national monuments by 2 million acres.<sup>79</sup> While this rollback slightly reduced the acres within the National Monument System, all acres still remained in federal ownership.

## VII. PUBLIC BACKLASH

The Trump Administration’s reduction of the national monuments was followed by backlash created by marketing ploys, misunderstandings, and differing views. The following will look at this backlash to be used in forming a potential solution for the future of public lands.

### A. *The Jacket War*

Patagonia, REI, and The North Face, all retailers of outdoor clothing and jackets, spoke out against the national monument rollbacks and encouraged their customers to join them in taking a stance. After the announcement of the reduction of Bears Ears and Grand Staircase-Escalante, Patagonia led the way in taking a stance that swept the nation.<sup>80</sup> Patagonia used its website to voice their opinion in regards to the changes in the national parks.<sup>81</sup> Patagonia’s website read “The President Stole Your Land” in stark black and white.<sup>82</sup> REI also used its webpage to make a statement which reads: “REI will not retreat from our strong belief that there is common ground in the outdoors.”<sup>83</sup> The North Face followed suit by denouncing President Trump’s actions and donating funds to create a Bears Ears Education Center and asking others to do the same.<sup>84</sup> Of the three companies, Patagonia is currently the only one to have filed a lawsuit alongside other plaintiffs against the Trump Administration.<sup>85</sup>

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78. Keith Collins, *Map: Obama Established More National Monuments than Any Other President*, QUARTZ (Jan. 12, 2017), <https://perma.cc/E288-KV58>.

79. Korte, *supra* note 75.

80. Doha Madani, *Patagonia Joins Coalition Suing to Block Trump’s Federal Land Cuts*, HUFFPOST (Dec. 6, 2017), <https://perma.cc/GB9W-FEM6>.

81. *Id.*

82. Joseph Hincks, ‘*The President Stole Your Land.*’ *Patagonia to Sue Trump Over Rollback of National Monuments*, FORTUNE (Dec. 5, 2017), <https://perma.cc/9ND5-R3A5>.

83. Madani, *supra* note 80.

84. *Id.*

85. *Id.*

The outcries made by these retailers were met with opposition from some customers.<sup>86</sup> The Public Lands Council responded with the “Patagonia Shame” movement, which sold patches to cover logos on jackets.<sup>87</sup> The Public Lands Council patches sold out in less than 72 hours, showing the strong views of ranchers and rural communities, and the impact the Obama Administration’s national monument land rush had on their lives.<sup>88</sup> This movement supported ranchers and rural communities alike by giving them a voice.<sup>89</sup> The Public Lands Council movement included a short video that visualized how the Patagonia label communicated political statements that the wearer of the Patagonia product may not support.<sup>90</sup> This movement claimed the false statements made by Patagonia were a political marketing ploy.<sup>91</sup> The land the President “stole” was maintained as federal lands and was merely removed from National Monument Status, which allows for greater public access and use.<sup>92</sup>

### *B. Misconception of the National Monument Rollback*

A majority of the public has misconceptions about national monuments, and this section will discuss a few of the common misconceptions. The first misconception is that the federal lands taken out of national monuments status will be sold.<sup>93</sup> In 1976 the Federal Land Policy and Management Act was passed.<sup>94</sup> This Act ended homesteading and only allows for the sale of public lands in instances when it is in the national interest to do so.<sup>95</sup> The Act promotes the preservation and

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86. See *Public Lands Council Offers Solution to Cure Patagonia Shame*, NORTHERNAG.NET (Jan. 11, 2018), <https://perma.cc/PH8Y-EF3Y> [hereinafter *Public Lands Council*].

87. *Id.*

88. Ethan Lane, *Public Lands Council Responds to Murphy Column*, DROVERS (Jan. 17, 2018), <https://perma.cc/SE5G-HNDT>.

89. See generally *Public Lands Council*, *supra* note 86.

90. BeltwayBeef, *PLC Patagonia Shame Patch*, YOUTUBE (Jan. 11, 2018), [https://www.Youtube.com/watch?v=a\\_aDbrIBZww](https://www.Youtube.com/watch?v=a_aDbrIBZww).

91. *Id.*

92. *Id.*; Devin Henry, *Five Things to Know About Trump’s National Monument Order*, THE HILL (Dec. 4, 2017), <https://perma.cc/DZ64-CNW2>.

93. Henry, *supra* note 92.

94. *Federal Land Policy and Management Act*, LUEDERS, ROBERTSON & KONZEN LLC, <https://perma.cc/M4MR-RXM6> (archived Aug. 23, 2018).

95. *FAQs About Federal Land Sales*, BUREAU OF LAND MGMT., <https://perma.cc/HF5E-QZGH> (archived Aug. 23, 2018); *Federal Land Policy and Management Act*, *supra* note 94.

protection of public lands.<sup>96</sup> Therefore, these lands are not presently for sale and will not likely be in the foreseeable future, unless the sale is deemed appropriate.<sup>97</sup>

The second misconception is this is the first time a president has removed land from the national monument system. This in fact was the eighth time a president unilaterally decreased the national monument system.<sup>98</sup> Both Republican and Democratic Presidents have made unilateral changes to the national monuments. President W.H. Taft, President W. Wilson, President C. Coolidge, President F.D. Roosevelt, President H.S. Truman, President D.D. Eisenhower, and President J.F. Kennedy each removed acreage from the national monument system.<sup>99</sup>

The third common misconception is that the rollback of the Bears Ears Monument and the Grand Staircase-Escalante was a major percentage of public lands. The reality is that 843 million acres of national monuments were only reduced by 2 million acres.<sup>100</sup> This amounts to a mere 0.2% reduction to the national monument system.<sup>101</sup>

The final public misconception is land would be heavily mined and numerous oil drilling sites would appear across the landscape.<sup>102</sup> The reality is that even though the land was opened to permit applications for mineral and oil leases, there presently have been no applications.<sup>103</sup> The location and terrain of this land does not allow for profitable oil and mining pursuits.<sup>104</sup>

### C. Lawsuits

Native American tribes including the Hopi, Navajo, Zuni, and Ute tribes have joined in a lawsuit claiming the rollback of the federal lands was an illegal use of executive power.<sup>105</sup> In addition to the Native American tribes, ten conservation groups through the nonprofit Earthjustice have also filed suit.<sup>106</sup>

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96. *Federal Land Policy and Management Act*, *supra* note 94.

97. *Id.*

98. *Antiquities Act 1906-2006*, *supra* note 47.

99. *Id.*

100. Collins, *supra* note 78; Korte, *supra* note 75.

101. See Collins, *supra* note 78; Korte, *supra* note 75.

102. Joe Deaux, *Bears Ears' Mining Rush Falls Flat as No One Bothers to Show Up*, SALT LAKE TRIB. (last updated Feb. 7, 2018), <https://perma.cc/5LRH-SELE>.

103. *Id.*

104. *Id.*

105. Andrews, *supra* note 5.

106. *Id.*

The lawsuits claim the 1906 Antiquities Act only gave the president the right to establish and grow national monuments, not to rollback those monuments.<sup>107</sup> The Trump Administration's defense will likely be both national monuments were established beyond the "smallest area compatible with the proper care and management of the objects to be protected."<sup>108</sup> Therefore, he had a unilateral right to reduce the national parks.<sup>109</sup> Thus, due to implied congressional power, the reduction was a rightful executive proclamation to reduce the monuments to the "smallest area compatible" with the purpose of the Act.<sup>110</sup> The court's findings in this lawsuit may force the Legislature to modify the ambiguities in the Antiquities Act.

### VIII. THE CITIZENS AND LANDS OF THE UNITED STATES

Citizens of the United States have vastly different views on the future of public lands. These differing views arise from varying experience, knowledge, and connection with the land.

#### *A. Ranchers of the West*

Around 17,000 producers rely on grazing permits and leases issued throughout the United States; thus changes in federal lands can have major effects on the beef and sheep industries.<sup>111</sup> The Obama Administration's land rush essentially told ranchers "the land you or your community needs or uses is being confiscated."<sup>112</sup> Many ranchers relied upon this land, and ranching and cattle grazing are "drivers of [the] rural economies" in the Western United States.<sup>113</sup> Drastic and sudden changes to the public land where ranchers graze their cattle can have lasting effects. Therefore, President Trump's reduction of national monuments in Utah played a major role in transforming the local economy.

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107. Elizabeth Shogren, *Lawsuits Challenge Trump's Trim of Utah Monuments*, HIGH COUNTRY NEWS (Dec. 19, 2017), <https://perma.cc/6XSN-ZY6L>.

108. *Id.*

109. *Id.*

110. James R. Rasband, *Stroke of the Pen, Law of the Land?* 63 ROCKY MOUNTAIN. MIN. L. INST. 21-1, 21-17 (2017), <https://perma.cc/4QRL-MX5F>.

111. *Grazing Permits on Federal Land*, BALLOTOPEdia <https://perma.cc/2EJD-7BG4> (archived Aug. 23, 2018).

112. See Brian Maffly, *Is the Antiquities Act Broken? Utah Congressman Thinks So*, MEDIUM (Oct. 23, 2017), <https://perma.cc/9Z4T-M5JX>.

113. *Cattlemen Respond to National Monument Reductions*, *supra* note 6.

### B. Environmental Benefits of Grazing

Plants can be negatively affected if grasslands are overgrazed and overcrowded.<sup>114</sup> However, years of research has contributed to a better understanding of how to make a grazing program that benefits the land, the plants, and the cattle.<sup>115</sup> Today, grazing cattle provides a benefit to the biodiversity of the lands.<sup>116</sup> Grazing plans must take into account the plants' physiological needs and the area's precipitation.<sup>117</sup> Moreover, if a grazing plan is properly developed and implemented, it can aid in furthering plant proliferation and limiting noxious weeds.<sup>118</sup> This type of result is often a product of targeted grazing, which commonly uses high density stocking rates in short intervals, frequently targeting a specific plant species.<sup>119</sup> Grazing is also used as an alternative when prescribed burning is needed but is not feasible.<sup>120</sup>

Using grazing as fire prevention is a sustainable method to promote public safety and the environment.<sup>121</sup> Because grazing limits the density of brush and promotes fresh growth, grazing is helpful in fire-prevention planning.<sup>122</sup> Managed grazing limits the amount of fuel a fire has to feed off of.<sup>123</sup> The grazing of livestock is an environmentally beneficial practice that should be continued.

## IX. POTENTIAL NEGATIVE EFFECTS OF THE REDUCTION OF THE NATIONAL MONUMENT ACREAGE

Even though there are a plethora of positive effects of the rollback, especially for the local population of Utah, this also affects the entire Nation.<sup>124</sup> There may be legitimate concerns about these potential future effects and these concerns are important to consider when shaping future legislation.

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114. David Bradford et al., *Livestock Grazing on the National Forest: Why Continue to do it?* 24 RANGELANDS 3, 3 (2002), <https://perma.cc/A9C7-E73L>.

115. *Id.*

116. Doug Warnock, *Achieving Targeted Grazing Goals*, CAPITAL PRESS (Jan. 23, 2018), <https://perma.cc/H5S4-9YQX>.

117. Bradford et al., *supra* note 114, at 3.

118. *Id.*

119. Warnock, *supra* note 116.

120. Bradford et al., *supra* note 114, at 3.

121. Sean Paroski, *Smart Land Management Important in Fire Season*, THE ACORN (Feb. 1, 2018), <https://perma.cc/AZ8F-QS8H>.

122. *Id.*

123. *Id.*

124. Richard Gonzales et al., *Trump Orders Largest National Monument Reduction in U.S. History*, NAT'L PUB. RADIO (Dec. 4, 2017), <https://perma.cc/5LWD-3WM8>.

### *A. Native American Culture*

Many areas of the Western United States have significant sites of Native American history and culture. While each of these sites are important, the Antiquities Act was created with the intention of protecting human-made places of significance from looting and destruction.<sup>125</sup> While areas of Bears Ears fit this description, a majority of the land protected by the Bears Ears Monument is landscape rather than a specific human-made site. This was not the Legislature's intent with the Antiquities Act.<sup>126</sup>

### *B. Environmental Effects of Grazing*

The negative effects of grazing can be prevented with proper management plans in place.<sup>127</sup> Areas that are grazed at the wrong time, or for too long, can damage plant diversity and health.<sup>128</sup> Grazing effects the height of plants, variety of plants, soil health, biomass production, and seeding. Improper grazing methods can result in heightened invasive plant species.<sup>129</sup> The overstocking of rangeland can result in compacted soils and disturbed soil crust, both of which can lead to reduced soil health and plant growth.<sup>130</sup> Proper stocking rates and knowledge of the microbial soil environment can prevent these issues.<sup>131</sup>

While poorly managed grazing can damage the ecosystem, using a proper grazing plan can benefit the ecosystem. Even the Sierra Club, a typically anti-grazing organization, admits that “[science shows] that some grazing is needed to achieve ecological objectives.”<sup>132</sup> While there can be negative effects on the environment when land is overstocked, stocked at the wrong time, or stocked for too long, there are many positive effects if the grazing is properly managed.

## X. THE FUTURE OF FEDERAL LANDS

The Obama Administration's land rush and the Trump Administration's national monument rollback show how the Antiquities Act and the current system

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125. Maffly, *supra* note 112.

126. Little, *supra* note 41.

127. *Management Methods: Prescribed Grazing*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/9HX9-DQF8> (archived Aug. 23, 2018).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Grazing on Public Lands*, SIERRA CLUB (Sept. 24, 2000), <https://perma.cc/L5ZB-B5J9>.

gives a vast amount of property control to the President.<sup>133</sup> This has proven to be an unstable way to manage public lands. This approach also gives little power to local populations, many of whom derive their income from the land.<sup>134</sup> Ranchers and the local population have called for “reform [of] the Antiquities Act to ensure that those whose livelihoods and communities depend on the land have a voice in federal land management decisions.”<sup>135</sup>

#### *A. Public Understanding: Balancing the Views*

A resident of New York and a rancher of the West have polarized views and understandings regarding public lands. The vast difference in views makes it hard for them to understand. Westerners have both functional and emotional connections to the public lands that someone who has never been west of the Mississippi may struggle to understand.<sup>136</sup> Therefore, state and local input in the management of public lands is essential to balance the views of those affected with those who may not understand the importance of the role public lands play in the way of life for many in the Western United States.

#### *B. A Future of Federalism in Land*

Federalism is a view founded upon limiting federal power, due to an understanding that “the state exists to preserve freedom.”<sup>137</sup> Preserving state power is dependent upon the “separation of governmental powers.”<sup>138</sup> Property or land is often viewed in a federalist light, giving a majority of the power to local and state government. The United States has traditionally left property rights to the state legislature. According to retired Supreme Court Justice Stevens, “the needs of society have varied between different parts of the Nation.”<sup>139</sup> The Supreme Court has acknowledged that “state legislatures and state courts” should receive “great respect . . . in discerning local public needs” in property.<sup>140</sup>

133. Korte, *supra* note 75; *Antiquities Act 1906-2006*, *supra* note 47.

134. *Cattlemen Respond to National Monument Reductions*, *supra* note 6.

135. *Id.*

136. Chris Sisneros, *Understanding Westerners’ Relationship with Public Lands and Federal Land Managers through Attachment to Public Lands 1* (2015) (unpublished M.S. thesis, Utah State University) <https://perma.cc/8X4P-8KWK>.

137. *Our Background*, THE FEDERALIST SOC’Y, (last visited Feb. 12, 2018). <https://perma.cc/C94Y-EJXU> (archived Aug. 24, 2018).

138. *Id.*

139. *Kelo v. City of New London*, 545 U.S. 469, 472 (2005); *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 606-07 (1908); Ilya Somin, *Federalism and Property Rights*, U. CHI. LEGAL F. 2011 at 1 (2011), <https://perma.cc/TGJ5-XNM7>.

140. *Kelo*, 545 U.S. at 472; *Hairston*, 208 U.S. at 606-07; Somin, *supra* note 139, at 1.

Therefore, it is important that the federal lands system accounts for both the local needs and public wants. It is difficult, if not impossible, for one who has seen nothing more than the Potomac in D.C. to understand grazing needs in Utah.<sup>141</sup> Therefore, the solution is to give greater power and input regarding federal lands to state governments. It is vital to allow state government input on federal land designations, and to use state governments as arms of the Bureau of Land Management and the Forest Service.

To truly give states more power over public lands, it would be necessary to amend the Federal Land Policy and Management Act that preserved all Bureau of Land Management's public lands unless the "disposal of particular parcel will serve the national interest."<sup>142</sup> This Act would also need to be amended to allow state governments to disperse land as they see fit. However, this may result in mismanaged land due to a state's inability to fund the lands. This could result in selling off all federal lands, which many in their respected jurisdictions rely on for their livelihood.<sup>143</sup> Thus, an approach that gives states and localities more power, but not complete power, is likely the best measure to take.

### *C. Congressional Action*

Congress has already begun examining federal lands management.<sup>144</sup> With numerous proposed bills and a wide variation in views, change will likely take time. Congress will weigh the balance of protection with who should receive the benefits and control of the federal land.<sup>145</sup> While Congress may feel that they must pick between "the nation as a whole or . . . the localities and state," what Congress must truly reflect on is who is actually effected by the changing designations of federal land.<sup>146</sup> They will find that many of the local population derive their income and culture from the federal lands.<sup>147</sup> Currently, the President can "lock[] up millions of acres of land with a stroke of a pen, undermining local knowledge and decimating rural economies."<sup>148</sup> Congress must take action to prevent this in the future. This can be done through a "bottom-up" approach where the states are granted a foundational authority to designate national monuments rather than a

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141. *Finally, Rural America has a Voice Again*, U.S. DEP'T OF THE INTERIOR (Apr., 26, 2017), <https://perma.cc/MF6X-MSZF>.

142. See PUB. LANDS FOUND., *supra* note 15, at 11.

143. *Cattlemen Respond to National Monument Reductions*, *supra* note 6.

144. VINCENT ET AL., *supra* note 11, at summary.

145. *Id.*

146. *Id.* at 2.

147. JOHN FIELDER, NAT'L WILDLIFE FED'N VALUING OUR WESTERN PUBLIC LANDS, 4 (2013), <https://perma.cc/E66R-GVM9>; Maffly, *supra* note 112.

148. *Cattlemen Respond to National Monument Reductions*, *supra* note 6.

“top-down” mandate from the federal government.<sup>149</sup> In order to do such, Congress should require that: (1) national monument modifications, both increases and decreases in acreage, be limited by a specific number of acres; and (2) that local consulting must occur prior to any unilateral changes. This will reduce political land grabs.<sup>150</sup> Allowing for a return to national monument protection of only the legitimate antiquities which include “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest,” and not merely areas with no true historical significance.<sup>151</sup>

House Bill 3990, introduced by Representative Rob Bishop of Utah’s First Congressional District and Chairman of the U.S. House of Representatives Natural Resources Committee, sought to modernize the Antiquities Act. The bill limits new national monuments created by the executive branch to 640 acres and does not allow the exterior boundaries to be within 50 miles of another national monument.<sup>152</sup> The proposed bill permits monuments up to 5,000 acres, if the monument is reviewed “under the National Environmental Policy Act of 1969 by the Secretary of the Interior or the Secretary of Agriculture.”<sup>153</sup> Additionally, the bill allows monuments from 5,000 to 10,000 acres to be created subject to the preparation of an environmental assessment or environmental impact.<sup>154</sup> The bill also allows monuments from 10,000 to 85,000 acres with the approval of the Nation’s governing body, the state legislature, and the governor.<sup>155</sup> The bill seeks to diminish unilateral reduction of national monuments by up to 85,000 acres.<sup>156</sup> 85,000 acres was the average size of a national monument under the Theodore Roosevelt Administration.<sup>157</sup> While limiting acreage, it does provide a route to protect the land when an emergency occurs. Congress must approve the designation within a year or else the designation will be void.<sup>158</sup>

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149. Press Release, Cong. W. Caucus, Resources Committee Passes the National Monument Creation and Act to Modernize the 1906 Antiquities Act (Oct. 11, 2017), <https://perma.cc/AU87-VDRX> [hereinafter Cong. W. Caucus].

150. *Id.*

151. Antiquities Act of 1906, 16 U.S.C. § 431 (2006);

Cong. W. Caucus, *supra* note 149; Rebecca Worby, *In Congress, an Effort to Curtail National Monuments*, HIGH COUNTRY NEWS (Oct. 18, 2017), <https://perma.cc/RL7D-2PCL>; Maffly, *supra* note 112.

152. H.R. 3990, 115th Cong. (2017).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Maffly, *supra* note 112.

158. H.R. 3990.

While Representative Bishop's bill modifying the Antiquities Act has many outstanding aspects, there are modifications to the bill that should be considered.<sup>159</sup> The three-tier system still allows some unilateral presidential power, but prevents the abuse we saw under the Obama Administration. The elements of approval for national parks ranging from 10,000 to 85,000 acres takes away unilateral power and is a strong proposal.<sup>160</sup> Change for all three tiers would be increasing the distance between monument borders to 100 miles. This will minimize inaccessible land trapped between national monuments. Every monument, no matter the size, should require local approval. "Previous administrations abused the power of the Antiquities Act, designating" national monuments in massive tracts "without any public input or review."<sup>161</sup> Therefore, future legislation should prevent this type of federal overreach that has major lasting effects on the local population.<sup>162</sup> Local approval for all parks under 5,000 acres should require that local meetings are hosted for all to make their voice heard before the creation or modification of any monument. All monuments under 5,000 acres should also require local government approval, and the governor or legislature of the state or states affected to approve the monument. Another consideration would be to increase the first tier to 1,280 acres. This bumps the first tier from one section of land to two sections of land, which allows for protection of antiquities that may be spread-out within the area. The former Antiquities Act restriction of the "smallest area compatible" should still be used as an element so that presidents are unable to make every new national monument 1,280 acres merely because they can.

Representative Bishop's bill allows the unilateral reduction of up to 85,000 acres of national monument lands.<sup>163</sup> While this may promote reduction of more than 800 million acres locked up in national monuments, it puts no local "check" on the president. While many times national monuments take away access to lands that local populations derive their incomes from, in other cases national monument protections are beneficial for tourism and rural development. Therefore, it is important that all national monument changes have a local check. Monument reductions should be structured in a tier system similar to the proposed establishment of national monuments, but with slight variations. National monuments may be reduced by up to 10,000 acres with prior consultation of the local population with approval of local government – either from the governor or the legislature of the state or states effected. Reductions of national monuments by 10,000 to 85,000 acres should require approval of local government and the

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159. *Id.*

160. *Id.*

161. *Cattlemen Respond to National Monument Reductions*, *supra* note 6.

162. *Id.*

163. H.R. 3990.

governor and the legislature of the state or states effected. Since this route limits the unilateral presidential power to reduce national monuments, the Department of the Interior, working closely with Congress, should begin an audit of the current national monuments. While this audit may be time intensive, it would allow more land to go back to the people and prevent future land disputes. This legislative change “would ensure local ranchers and communities are not subject to the whims of an unchecked federal government.”<sup>164</sup>

In addition, legislation should allow for local management of national monuments. As proposed by U.S. Representative Chris Stewart of the Second Congressional District of Utah in House Bill 4558, the management of national monuments and public lands would rely on local input.<sup>165</sup> This is still not enough. The rancher who derives her income from the public lands, the store owner who relies on those who travel to see the monument to keep her business afloat, and the chief of the local Native American tribe whose ancestors left behind a history have far more interest in the management of the national monument lands and public lands than those in D.C. The local residents should have the power in deciding how the land is managed. Local communities and tribes should be given a valid opportunity to determine how the lands are managed with minimal oversight by the federal government. Public lands are best managed when those who rely on the land can make decisions on its use.<sup>166</sup> This change will create a balance in conservation, tourism, and grazing.<sup>167</sup>

While the western states wait for legislative change, there are measures they can take to prevent further injury to their economies and lifestyles.<sup>168</sup> Wyoming and Alaska require “congressional consent to create national monuments under the Antiquities Act.”<sup>169</sup> Utah will join Wyoming and Alaska to protect itself from future presidential abuses similar to what occurred under the Obama Administration.<sup>170</sup> This prevents sudden and vast changes in the public lands from administration to administration.<sup>171</sup> Many western states are likely to follow suit to protect against future presidential abuse of the Antiquities Act.<sup>172</sup>

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164. Worby, *supra* note 151.

165. Matthew Anderson, *How to Fix the Unintended Consequences of Grand Staircase-Escalante*, THE HILL (Feb. 16, 2018), <https://perma.cc/MF4M-UFH8>; H.R. 4558, 115th Cong. (2017).

166. Anderson, *supra* note 165.

167. *Id.*

168. Emily Means, *Resolution Exempting Utah from Antiquities Act Passes Utah House*, UTAH PUB. RADIO (Feb. 20, 2018), <https://perma.cc/E4E9-JA4A>.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

## XI. CONCLUSION

Throughout history, federally owned lands have been necessary to manage lands that are unsettled. Today, times of homesteading have ended, and federal lands are here to stay. While the American property system promotes local control of land, federal land is necessary in some areas. However, that does not mean that the local population should not have a say in the designations of that land. Changes in the federal lands affect those who derive their income and culture from the land the most.<sup>173</sup> Many are dependent upon grazing their livestock on federal lands or hunting and fishing on those lands to put food on their table and clothes on their families' backs.<sup>174</sup> The ways of the Western Frontier are more than a business or a ranch; for many, it is a way of life. This way of life requires that federal land is both stable and useable.

The Obama Administration's land rush, locking over 500 million acres, failed to make federal lands stable or useable.<sup>175</sup> This type of land frenzy was not the intent of the Antiquities Act.<sup>176</sup> While President Trump's 2-million-acre national monument reduction took away some of this sting on local economies, it was merely a band-aid on a bullet hole.<sup>177</sup> Allowing land grabs and unlimited reduction will lead to a future of land wars depending upon the president in office. This unilateral power is dangerous for the future of the United States; therefore, Congress should enact a modified Antiquities Act that gives the power back to the local population and ends federal overreach. The livelihood of many in the beef industry is at risk if no change is made.

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173. FIELDER, *supra* note 147, at 4.

174. *See id.*; Maffly, *supra* note 112.

175. *Antiquities Act 1906-2006*, *supra* note 47.

176. Maffly, *supra* note 112.

177. Collins, *supra* note 78; Korte, *supra* note 75.