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The Antiquities Act: Will it Become Just a Remnant of Environmental History?

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I. Introduction

The recent national monument Proclamations by former President Clinton ("Clinton") have been a topic of great controversy among Congress, environmentalists and industries.[1] In the year 2000 alone, Clinton designated twelve national monuments pursuant to the Antiquities Act ("Act").[2] The Giant Sequoia National Monument ("Sequoia National Monument"), and the Grand Staircase-Escalante National Monument are among them ("Escalante National Monument").[3] Even so, the former President before leaving office failed to give monument status to the Arctic National Wildlife Refuge (ANWR), an area referred to as the most pristine area within the National Wildlife Refuge System.[4] The abundance of migratory birds and mammals including polar bears, caribou, and grizzly bears brought this refuge to the top of environmental groups' lists for attaining monument status.[5] Despite pressure from environmental groups, and evidence of this Refuge's great scientific and conservation value, Clinton left office without declaring it a National Monument.[6]

This comment attempts to determine whether Clinton's controversial designations of national monuments were within the scope of the Antiquities Act. In answering this question, this comment will look at both the legislative history of the Act, as well as case law which attempts to interpret the ambiguous terms of the statute. Next, this comment will address whether the statute should be deemed unconstitutional, or contrary to statutory authority based on the fact that it gives the President unilateral authority to take lands out of the public domain without complying with APA, NEPA, or FLPMA procedures.[7] In order to examine whether Clinton's actions comply with statutory authority, this comment will focus on a case pending in the District Court of Utah concerning the declaration of the Escalante National Monument.[8] Further, this comment will analyze whether the Antiquities Act runs afoul of the nondelegation doctrine. Finally, in addition to Clinton's mysterious refusal to designate the Arctic National Wildlife Refuge a national monument, other recent developments with regards to the statute include legislative proposals to amend it in order to allow for public comment and participation.[9] This comment will show that there are both legal and policy reasons for keeping the Antiquities Act in its preserved state.

II. Background

Since the enactment of the Antiquities Act in 1906, all but three Presidents have used their authority to protect historic and scientific areas and objects on federal lands.[10] The statute provides in part:

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> 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.[11]

The Act was a legislative "response to concerns over theft from and destruction of archaeological sites and was designed to provide an expeditious means to protect federal lands and resources."[12] While the intent of the Act was aimed at preserving archeological sites, the language was broad enough to include other historic and scientific areas, including *inter alia*, paleontological and geological sites.[13]

The first President to utilize this power was Theodore Roosevelt in 1908, when he set aside 800,000 acres to create the Grand Canyon National Monument, one of his 18 designations.[14] Other presidents who used the Act extensively include Woodrow Wilson with his designation of more than 1 million acres in Alaska, which Congress eventually turned into a substantially large national park.[15] Next came Franklin Roosevelt with his declaration of the Jackson Hole National Monument, which Congress also incorporated into a national park.[16] This declaration, however, proved to be controversial. Subsequent to this proclamation, Congress passed legislation to put the designation on hold, which was then vetoed by Roosevelt.[17] Although Congress eventually incorporated this monument into a national park, it barred any further monument designations in the state of Wyoming.[18] This was the first limitation Congress put on the Act.[19] Presidents Eisenhower and Carter also used the Act in a controversial manners.[20] Eisenhower declared the Chesapeake and Ohio Canal National Monuments after Congress rejected efforts to give the Barge Canal monument status. Finally, Carter used the act to proclaim 15 new national monuments in Alaska, setting aside approximately 55,000,000 acres of land.[21] Congress agreed to these designations, but set up the second limitation on the Act: that designations in Alaska could not exceed 5,000 acres without congressional approval.[22] Clinton was the next president after Carter to make use of his authority under the Act, creating possibly the most controversial national monuments in history.

Clinton's proclamations are particularly controversial due to their size – not meeting the statutory requirement of confining the monument to "the smallest area,"[23] boundaries – which include areas of significant mineral development or other public land uses, and purpose – environmental and scenic conservation. The following monuments are examples of the more controversial designations Clinton made during his tenure. One of Clinton's most contested proclamations was that of the Grand Staircase-Escalante National Monument.[24] This monument, consisting of approximately 1.7 million acres, was described in its Proclamation as an "outstanding biological resource."[25] The Proclamation also holds the monument out as a "geologic treasure" with "major arches and natural bridges," as well as cliffs, plateaus, and diverse rock colors and formations.[26] Additionally, the Proclamation describes the region as encompassing "world class paleontological sites," archeological sites of ancient Native American cultures.[27] Further, the monument is inhabited by diverse wildlife and species including the mountain lion, bear, desert bighorn sheep, and over 200 species of birds.[28] The Escalante National Monument, however, also contains within its border, areas of great potential for oil, natural gas and mineral production.[29] The withdrawal of these potential resources and fear for Utah's economy resulted in the filing of a lawsuit against Clinton, the CEQ, and DOI.[30]

Another highly controversial declaration by Clinton was the Grand Canyon-Parashant National Monument.[31] This monument, just over one million acres, is home to a variety of rock formations uncovered by centuries of erosion by the Colorado River, canyons and buttes, volcanic remnants, fossils, archeological sites, threatened and endangered species, as well as rare plant species.[32] A significant economic affect of this proclamation, however, is that it limits timber sales to "authorized science-based ecological restoration project[s]."[33] The Giant Sequoia National Monument was one of the most recent establishments.[34] The Giant Sequoia proclamation describes the designated region as

containing "[m]agnificent groves of towering giant sequoias, the world's largest trees . . . interspersed within a great belt of coniferous forest, jeweled with mountain meadows."[35] The monument, consisting of approximately 327,769 acres, includes within its boundaries a variety of diverse, unique ecosystems within a small area, historic remnants of early Euro-american and Native American settlements, sequoia trees aged over 3,200 years, and rare bird and amphibian species.[36] The proclamation also withdraws the land from new mineral development and prohibits new timber production.[37]

A. Defining the scope of the Antiquities Act

Although there are very few cases providing legal precedent for an analysis of the present-day conflicts concerning the scope of the Antiquities Act, the cases began early on. Soon after the declaration by Theodore Roosevelt of the Grand Canyon National Monument in 1908, a lawsuit – *Cameron v. United States* – was filed claiming that the monument should be retracted based on the fact that there was "no authority for its creation."[38] The Supreme Court, however, based its decision to uphold the declaration of monument status because the canyon was one of the greatest eroded canyons in the world and was considered one of the great natural wonders.[39] Further, the court noted that the canyon was the subject of scientific study and exploration as well as a significant tourist spot, drawing thousands of visitors annually.[40] Thus, the Court appeared to approve of the president's broad interpretation of the Act.

Following *Cameron*, the next noteworthy conflict did not occur until 35 years later.[41] The lawsuit, *Wyoming v. Franke*, was a response to Franklin Roosevelt's proclamation of the Jackson Hole National Monument.[42] Plaintiffs claimed that there was no substantial evidence that the region afforded monument status encompassed objects of historical or scientific interest.[43] Therefore the proclamation was outside the scope of the Antiquities Act.[44] The Defendant brought forth evidence that the monument included:

> . . . 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.[45]

The District Court of Wyoming determined that although it may not agree that the testimony of the expert witnesses sufficiently supported the defendant's claim, there was substantial evidence upon which the President could have relied upon to make this declaration.[46] The court determined that a court could strike down a President's decision to proclaim a national monument if it were deemed to be arbitrary and capricious.[47] According to the Wyoming District Court, an example of an arbitrary and capricious proclamation would be: ". . . if a monument were to be created on a bare stretch of sagebrush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest . . ."[48] Thus, the Wyoming District Court found that great deference should be given to the President's determination that objects of historic and scientific value could be found within the monument's borders. Accordingly, only upon a finding of no substantial evidence of these valued objects within the proclaimed area should a court find that the President's actions were outside the scope of the Act.

In more recent cases, courts have attempted to define phrases and words within the Antiquities Act, and have tended to give the statute a very broad interpretation. For instance, in *Cappaert v. United States*, the Plaintiffs contended that in proclaiming Devil's Hole National Monument, the United States reserved its rights to the unappropriated waters on the land to the extent necessary to meet the purposes of the monument.[49] The water in controversy was a subterranean pool that held a "peculiar race of desert fish," which zoologists had determined to be found nowhere else in the world.[50] Apparently, these fish "evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population from the original ancestral stock that in Pleistocene times was common to the entire region[] . . ."[51] According to the plaintiffs, the defendants were using ground water which came from the same aquifer that provided the subterranean pool with its water.[52] The water level of the pool was quickly lowering, threatening the existence of these unique fish by reducing the area in which they could spawn.[53] The

Supreme Court agreed with the government's claim that by reserving Devil's Hole it also acquired water rights sufficient to preserve the pool's "scientific value."[54] In essence, the Supreme Court acknowledged in this case that a unique species of fish could have "scientific value" within the scope of the Antiquities Act.

Another case defining the scope of the Antiquities Act is *United States v. Diaz*.[55] In *Diaz*, plaintiffs claimed that face-masks found in a cave on the San Carlos Indian Reservation were objects of antiquity within the meaning of the Antiquities Act.[56] An expert witness testified that these masks, although created by a medicine man in 1969 or 1970, were objects of antiquity because the Apache Indians used the masks in religious ceremonies and then deposited them in designated places on the reservation.[57] These masks, which are considered sacred by the tribe, are not allowed off the reservation and are only to be handled by the medicine man once stored in a cave, as these were.[58] The court rejected the expert witness' testimony, because it failed to put alleged offenders of the Act on notice.[59] Specifically, there was no notice given in the statute that an antiquity referred to anything other than the age of an object.[60] To my knowledge, this is the only instance where a court has held a government's declared object of antiquity as being outside the scope of the statute.

Even more recently, the District Court of Alaska upheld three national monument declarations by the President as being within scope of the Act in *Anaconda Copper Co. v. Andrus*.[61] In *Anaconda,* Plaintiffs challenged the land withdrawals by President Carter that formed the Admiralty Island National Monument, the Gates of the Arctic National Monument and the Yukon Flats National Monument.[62] These withdrawals by President Carter exceeded in size any prior declarations under the Act. The court described the Admiralty Island Monument as including archeological sites and objects which "reflect the cultural history of the Tlingit Indians, a culture rich in the ceremony of creative arts and complex in its social, legal and political systems."[63] Further, the Monument is home to the highest population in density of nesting bald eagles, and the indigenous species of the Alaska Brown Bear.[64] The Gates of the Arctic Monument also contains objects of historic and scientific interest including remnants of glacial action and unique geological formations, as well as various plant and animal communities.[65] Finally, the Yukon Flats Monument is held to be of historic and scientific interest "[a]s a solar basin, . . ."[66]

The Alaska District Court found that while the Admiralty Island Monument proclamation was the most clear on its face as to the reasons for its designation, neither the Gates of the Arctic or Yukon Flats monuments "exceed the limits of the presidential authority as established by the controlling authorities of *Cappaert* and *Cameron*."[67] Besides looking at these precedent setting cases, the *Anaconda* court also referred to the legislative history of the statute, which did not initially, in its proposed form, contain the phrase "other objects of historic or scientific interest."[68] The court believed that the clause was intentionally added to broaden the authority of the President under the Act.[69] The court also found it significant that since President Roosevelt's first employment of his broad authority given to him by the clause "other objects of historic or scientific interest," a pattern of similar usage of the Act by Presidents has been established.[70] The court found that in addition to the case precedent and legislative history, the consistent and long established use of the Act in this broad manner was also considered in making its determination whether the President's actions exceeded the authority provided him under the Act.[71]

B. The Act in relation to the Constitution and other Federal Statutes

There have been several arguments that have been made concerning the constitutionality of the Act in its present form. One specific challenge to the Act is that it is unconstitutional for lack of due process. Presidential designations of monuments are not subject to either judicial review or public notice and comment. Thus, neither the public, nor the courts are substantially involved in the decision-making process. Although the Clinton Administration voluntarily requested input from those who would be affected by the proposed monument declarations, there is no provision within the statute requiring it.[72]

There are, however, two pending proposals: one from the House of Representatives and one from the Senate, each of which amend the

Act to allow for public participation.[73] The House bill, commonly referred to as H.R. 1487, was proposed to allow for public participation in the president's designation of national monuments pursuant to the Antiquities Act.[74] This bill would, *inter alia*, require the President to solicit participation and comment by the public and take these comments into consideration prior to a monument declaration.[75] The bill would also make any management plan for a national monument to be subject to the National Environmental Policy Act's (NEPA) procedural requirements.[76]

Similarly, the proposed Senate bill, S. 729, ensures that both Congress and the public are given the chance to participate in the declarations of national monuments.[77] Specifically, the amendment would require: public notice, hearings and comment and an environmental impact statement (EIS) prior to a declaration of a monument.[78] Further, the section states that no declaration will become final until it is met by congressional approval.[79] There are strong arguments on both sides regarding these amendments.

The arguments concerning the Antiquities Act primarily focus on the application of the Administrative Procedures Act (APA), NEPA, and Federal Land Policy and Management Act (FLPMA), as well as due process considerations and separation of powers issues.[80] This comment, however, will also discuss the reemergence of the nondelegation doctrine and its possible application with regards to the Antiquities Act.

(1) The APA: judicial review and rule making procedures

The proponents of these amendments contend that there has been a demonstrated need for more judicial and public involvement. Since there is not a provision within the Act stating otherwise, the President is given unilateral authority to declare monuments without complying with the APA's provisions, including minimum procedural requirements and a specific standard of judicial review.[81] The APA provides in part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[82] The APA requires courts to set aside agency actions that are "arbitrary, capricious, [or] an abuse of discretion."[83] Historically, courts have held that presidential action does not fall within the interpretation of "agency action."[84] There are instances, however, where courts have suggested that the President could be held to the APA's judicial review standard. In *Amalgamated Meat Cutters v. Connally*, the court upheld the Economic Stabilization Act, as the Act was found to be adequately narrow, and did not provide the President with excessive "blank check" authority.[85] In dictum, however, the court stated that it did not believe that Congress had intended "to leave the matter wholly to the discretion of the President without any possibility of judicial review."[86]

The APA further provides that the agency shall give, "general notice of proposed rule making . . . published in the Federal Register," as well as "give interested persons and opportunity to participate in the rule making through submission of written data, views, or arguments . . . ."[87] This section of the APA is a similar provision to the requirements in the proposed amendments.[88] Thus, if the proposed bills do become law, it will not be necessary to decide the question of whether the APA's rule making procedures apply to the President in the context of the Antiquities Act. However, the question of judicial reviewability will still be left open.

Proponents of limitations on the President's unilateral authority under the Act also suggest that the Department of Interior's (DOI) actions of proposing these regions to the President and filing the necessary papers constitute an "agency action" subject to APA's procedures and judicial review.[89] The APA, however, provides that only "agency action made reviewable by statute and final agency action," are subject to judicial review.[90] The Supreme Court in *Bennett v. Spear* considered the question of what constitutes a "final agency action."[91] In *Bennett,* the court held that there is a two-step test that must be applied to determine whether the agency's action was a "final agency action."[92] First, the action must mark the consummation of the agency's decision-making process.[93] Second, the action must determine rights or obligations or have legal consequences.[94] Based on this test, it would not appear that DOI's actions should be subject to APA's procedures or judicial review, however this will be more closely analyzed in the analysis section.

Alternatively, some argue that the President should be considered an agency within the context of the APA. The statute, however, specifically states that it applies to federal agencies, and the President has not been held to be an agency. The contention that the APA applied to the President was rejected in *Public Citizen v. United States Trade Representative.*[95] In *Public Citizen*, environmental groups argued that an EIS was necessary for the enactment of the North American Free Trade Agreement ("NAFTA").[96] The court however, found that the President's actions are not "agency action" and therefore are not judicially reviewable.[97]

(2) NEPA: public comment and the writing of an impact statement

NEPA is similar to the APA in that it also requires federal agencies to provide for a period of public comment, but for NEPA it is required when "major federal action" is proposed, as opposed to "final agency action." The purpose is stated in the statute, in part, as: "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation."[98] Further, the legislative history of NEPA makes it clear that the purpose of the bill is to improve the quality of the environment.[99] The background and need for legislation is stated in the legislative history as the following: "An independent review of the interrelated problems associated with environmental quality is of critical importance if we are to reverse what seems to be a clear and intensifying trend toward environmental degradation."[100] Thus, it appears that NEPA was enacted for the purpose of forcing government agencies to include environmental impacts in their decision-making process. In order to achieve this objective, NEPA provides that all federal agencies shall prepare an environmental impact statement (EIS) to be submitted with all proposals that qualify as "major Federal actions significantly affecting the quality of the human environment . . ."[101] An EIS is a detailed statement by the responsible agency head that includes, *inter alia*: environmental impacts of the proposed action, including unavoidable impacts if the proposal is implemented, and alternatives to the proposal.[102]

One of the many challenges to the Antiquities Act is that it runs afoul of NEPA. In fact, both of the proposed legislative bills include the requirement that an EIS must be written prior to monument designation.[103] Those that believe that NEPA should apply to monument designations under the Antiquities Act contend that an EIS should be required so the federal agency can address long-term environmental consequences.[104] For instance, in Utah Association of Counties v. Clinton, plaintiffs claim that the creation of the Escalante National Monument will have significant environmental impacts because the land use will be changed from light recreation, livestock grazing, and mining and mineral leasing to larger scale, and economic recreation purposes.[105]

In drafting NEPA, however, Congress did not create a separate private right of action.[106] Instead, a plaintiff's basis for judicial review must be found in the APA.[107] As discussed previously, according to present case law, presidential action is not considered an "agency action" subject to judicial review.[108] Furthermore, in *Alaska v. Carter*, the court held that NEPA's EIS requirement only applied to "federal agencies" and the President was not a "federal agency" for purposes of NEPA.[109] Thus, according to these courts, the President's action of declaring a National Monument pursuant to the Antiquities Act is not subject to judicial review or NEPA's EIS requirements.

(3) FLPMA: Is the Antiquities Act a way around FLPMA?

Another challenge raised concerning the application of the Antiquities Act is that it has been used in a manner inconsistent with and in violation of FLPMA.[110] FLPMA provides that "the public lands be managed in a manner which recognizes the nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 . . . as it pertains to the public lands."[111] Section 204(c) of FLPMA requires that proposed withdrawals of public land be published in the *Federal Register* 30 days before effecting the withdrawal, report withdrawals exceeding 5,000 acres to Congress, and limit the duration of such withdrawals to 20 years.[112] This Section also allows the DOI Secretary the ability to make emergency withdrawals of public lands for periods not exceeding 3 years.[113] Additionally, there are several procedural requirements

that the DOI must adhere to in withdrawing land, including offering opportunity for public hearings and comment.[114] In the pending case, *Utah Association of Counties v. Clinton*, the Utah Association of Counties (UAC) claims that Clinton's proclamation of the Escalante National Monument and withdrawal of these public lands, particularly from mining, failed to adhere to the procedures set forth in FLPMA.[115] The plaintiffs contends that Congress repealed the President's implied and explicit power to withdraw public lands from mining when it enacted Section 204 of FLPMA.[116] UAC argues that the Antiquities Act is just a means the DOI used to get around the procedural requirements and limitations FLPMA put on land withdrawals.[117] Thus, UAC believes that the defendants must "recognize and allow the development of existing and new mines and mineral interests within the boundaries of the national monument, including the Smoky Hollow coal mine which led the DOI Secretary to promote the national monument and the President to sign the proclamation."[118]

The outcome of this case with regards to plaintiff's NEPA and FLPMA claims will probably depend on whether the court deems the proclamation of the Escalante National Monument to be primarily an "agency action," rather than a presidential action. Further the outcome will depend on whether the court determines that the enactment of FLPMA's Section 204 repealed the President's implied and explicit authority to withdraw public lands used for mining and mineral leasing.

(4) Nondelegation doctrine: Is the Act an unconstitutional delegation of power?

The courts have rarely used the nondelegation doctrine as a means to invalidate a statute.[119] In fact, prior to 1999, it had only been used in one year – 1935.[120] The idea behind the doctrine is that a statute should be invalidated if it constitutes an unlawful delegation of legislative authority to executive officials.[121] The court in *J.W. Hampton & Co. v. United States*, set forth the principle that is adhered to today.[122] In *J.W. Hampton*, the legislature delegated to the president the authority to revise tariff duties whenever he determined that the revision was necessary to "equalize the costs of production in the United States and the principal competing country."[123] The court upheld the statute as a valid delegation of authority, finding that the statute afforded the president an "intelligible principle" with which to guide him.[124] Thus, the court found that changing tariffs for the purpose of "equaliz[ing] the costs of production," was an "intelligible principle."

A. L. A. Schechter Poultry Corp. v. United States, is a rare example of an instance where the Supreme Court used the nondelegation doctrine to invalidate a statute.[125] The case involved Section 3 of the National Industrial Recovery Act that prohibited various practices that were considered "unfair methods of competition."[126] The Court determined that Section 3 of the Recovery Act supplied "no standards for any trade, industry or activity."[127] Further, the court concluded that "[i]nstead of prescribing rules of conduct, it authorize[d] the making of codes to prescribe them."[128] Thus, the Court found that the President's authority to determine what was "unfair competition" would have no boundaries, and therefore the statute was unconstitutional.[129]

The revival of the nondelegation doctrine occurred very recently in *American Trucking Associations(ATA), Inc. v. EPA*.[130] In *ATA*, the D.C. Circuit court was asked to determine whether the Clean Air Act's (CAA) statutory criteria was a permissible delegation of authority to the Environmental Protection Agency (EPA).[131] The court found that the EPA's construction of the statute to be an unconstitutional delegation of legislative power.[132] The CAA's sections 108-09 allow the EPA to "set[s] a 'primary standard' – a concentration level 'requisite to protect the public health' with an 'adequate margin of safety' and a 'secondary standard' – a level 'requisite to protect the public welfare."[133] The EPA based its rules revising the National Ambient Air Quality Standards (NAAQS) for particulate matter and ozone on its reading of the CAA Sections 108-09.[134] The Court found that the EPA failed to articulate an "intelligible principle" by which they could determine appropriate standards for the NAAQS.[135] The Court found that the only principle that was presented was that "effects are less certain and less severe at lower levels of exposure."[136] According to the Court, the EPA did not offer an intelligible principle that would identify a point at which the levels should not be reduced any further.[137]

Thus, the Court remanded the cases for EPA to develop a permissible and constitutional construction of the CAA.[138] The case is currently being reviewed by the Supreme Court.

The nondelegation doctrine is particularly relevant because it is unclear as to whether the Antiquities Act effects an unconstitutional delegation of legislative power.

III. Analysis

The first part of the analysis will answer the question as to whether President Clinton exceeded his delegated authority in his more controversial proclamations of national monuments. Second, this comment will attempt to determine whether Clinton's actions ran afoul of the APA, NEPA, FLPMA and the nondelegation doctrine. Finally, this analysis will set forth policy reasons as to why the Act should remain in its preserved state.

A. Did Clinton exceed his delegated authority under the Act?

Clinton's more controversial designations included the Grand Canyon-Parashant National Monument, the Giant Sequoia National Monument and the Escalante National Monument. The monuments are approximately 1 million, 327,769, and 1.7 acres of reserved land, respectively. As noted previously, the Act provides that any reservation of public land "be confined to the smallest area compatible with the proper care and management of the objects to be protected."[139] Although it is impossible to tell whether these reservations are the "smallest area compatible," we can compare the acreage and objects to be preserved to a century's worth of court approved proclamations by other presidents. Theodore Roosevelt's proclamation of the Grand Canyon National Monument consisted of 800,000 acres and was upheld by the *Cameron* court based on the fact that it was the subject of scientific study, exploration and a well-visited tourist spot.[140] Another similar example is the withdrawals by President Carter, which amounted to approximately 55 million acres in Alaska.[141] The reserved land contained archaelogical sites and objects, rare and indigenous species, unique geological forms, and remnants of glacial action.[142] Furthermore, courts have upheld a "peculiar race of fish," as well as land that acts as a "solar basin" with "certain climatological phenomenon" to be within the realm of the Antiquities Act.[143] The courts have afforded great deference to the President's interpretation of the Act and have allowed reservations of a broad range of various historic and scientific objects, sizes and purposes.

The size of Clinton's proclaimed national monuments and the objects of historic or scientific value, including geological formations, archaeological sites, diverse wildlife and species, appear to be within the acceptable limits of the judiciary's interpretation of the Act. Additionally, Clinton's proclamations do not fall within the *Franke* court's example of an arbitrary and capricious declaration: one that was "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."[144] Thus, it appears that there really was not anything particularly unusual or excessive about Clinton's proclamations, even his more controversial ones. Furthermore, even if Clinton had designated the ANWR as a national monument, he probably would not have exceeded his authority under the Act. It is possible, however, that he chose not to make this declaration because of the controversial nature of the region, specifically, George W. Bush's proposal to open the region up for oil drilling. Establishing ANWR as a national monument may only have increased the likelihood that one of the proposed amendments to the Act would be enacted.

B. Does the Act run afoul of APA, NEPA, FLPMA or the nondelegation doctrine?

There is no case law holding that the President is subject to the APA, NEPA, or FLPMA. In fact, as previously noted, there is only case law to the contrary.[145] The court in *Amalgamated Meat Cutters*, however, noted in dictum that it did not believe that the interpretation of the Economic Stabilization Act was intended to be left entirely up to the President's discretion, without the possibility of judicial review.[146] Yet, there has never been a case where a court has actually reviewed a President's decision pursuant to the APA.

Additionally, the actions and recommendations by an agency that occur prior to the president's proclamation are not "final agency action," since the President can still refuse to act upon an agency's recommendation. Using the test

set forth in *Bennett v. Spear*, the action must mark the consummation of the agency's decision-making process as well as determine rights or obligations or have legal consequences for it to constitute a "final agency action" subject to APA procedures.[147] In the case of the Antiquities Act, although the recommendation to the President might be the end of the agency's decision-making process, there are no legal consequences that attach to the recommendation. The president may accept or reject the recommendation, so it is unclear whether the national monument will come into being. Thus, according to the *Bennett v. Spear* test, the agency's action would not constitute a "final agency action" subject to APA procedures.

Similarly, the action of proclaiming a national monument should not be subject to NEPA's procedures. It should be irrelevant that the Secretary of the DOI, or someone other than the President is entrusted with the duties of suggesting monument areas, filing necessary papers or drawing boundaries on maps. As the *Carter* court pointed out, "the argument that the President cannot ask for advice, and must personally draw lines on maps, file the necessary papers, and the other details that are necessary to the issuance of a Presidential Proclamation in order to escape the procedural requirements of NEPA approaches the absurd."[148] Thus, case law tends to support not holding the President subject to APA, NEPA or FLPMA procedures.

Although proponents of the proposed Senate Bill 729 and House Bill 1487 may have an argument that some form of public participation should take place, there are general policy reasons for not holding the President subject to the APA, NEPA or FLPMA procedures. First, the President is more politically accountable for his own actions, but less so for the actions of his agency heads. Thus, there is at least a political check on the President's decision-making, as opposed to that of the executive agencies. Additionally, there are instances, such as in the case of preserving endangered species, archaeological sites, and geological anomalies in which the President must be able to act quickly, before the strip miners, trespassers, hunters, or loggers deprive the area of the precious resource. Applying the APA, NEPA or FLPMA to the President makes his ability to act immediately impossible, and thus, will take the effectiveness out of the Act. These statutory-based procedures, including providing a period of public comment, and producing an EIS, which includes compiling accurate data and a detailed analysis, can take years to complete. The effectiveness and success of the Act comes with its ability to reserve land or objects prior to its degradation or disappearance, not before. Furthermore, it seems inappropriate to apply such a pro-environmental statute such as NEPA to the Act. NEPA's purpose is stated in the statute as: "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation." It would be rather disturbing to make use of a statute that was enacted to prevent environmental degradation, to slow down or halt the ability of the President to preserve natural, scientific, and historic resources.

Additionally, the argument that the enactment of Section 204 of FLPMA repealed the President's implied power to withdraw public lands from mining operations under the Antiquities Act seems incongruous with the purposes of the Act. The Act would have little meaning if it still permitted mining on the lands to be protected. The pollution and land disturbance that go along with mineral development do not seem even remotely compatible with the purposes of the Antiquities Act. Thus, it is unlikely that Section 204 of FLPMA had the effect of repealing this implied authority of the President to withdraw lands proclaimed to be national monuments from mineral development.

The only question remaining is whether the Antiquities Act constitutes an unlawful delegation of legislative authority to the President. According to the court in *J.W. Hampton & Co.*, a statute is invalid if it fails to provide an "intelligible principle" by which the agency or person implementing the statute can follow.[149] It may be argued that the Act allows the President to declare most places National Monuments, aside from bare wastelands, because there will always be some type of historic or scientific value to an area. The statute does appear to give some slight boundaries to the President's authority, including the words "confined to the smallest area compatible."[150] These words

tend to indicate that the President would be exceeding his authority if he were to set aside a million acres for one archaeological site. Yet, whether the statute actually provides an "intelligible principle" by which the President is to follow is unclear.

It is important to note, however, that although the Act is a broad delegation of power to the President, Congress always has the ability to enact legislation repealing a monument declaration.[151] Additionally, Congress may also put limits on the President's power, as it did in Wyoming and Alaska.[152] Thus, this delegation of broad power to the President is not guaranteed without some form of legislative approval.

IV. Conclusion

Based on prior designations of national monuments by earlier presidents, it does not appear that President Clinton's declarations were so extraordinary as to be considered outside the scope of the Antiquities Act. Further, since the APA, NEPA and FLPMA all apply to government agencies, and not to the President, the President should not be subject to them in using his authority provided under the Act. Additionally, the procedural requirements of the APA, NEPA and FLPMA should not apply to the president for the reason that it takes away the expediency provided in the Antiquities Act, leaving the Act ineffective in many instances. Finally, although the Act may be in violation of the nondelegation doctrine, based on its broad delegation of power to the president, there are limiting words in the statute by which the President could formulate an "intelligible principle" in determining which monument recommendations are appropriate under the Act. Additionally, there are congressional checks on the executive branch, which make the Act less of a grant of "blank check" authority. Congress has already put limits on the Act, and has the ability to repeal a designation when a monument is declared which exceeds the president's statutory authority. Thus, it is suggested that the Antiquities Act be left in its preserved state, so it can continue to be one of the most successful environmental laws in American history.

Endnotes

[1] See generally S. Rep. No. 106-372 (2000); *Clinton won't make Arctic refuge a monument*, USA Today, Jan. 13, 1990.

[2] *Clinton won't make Arctic refuge a monument*, USA Today, Jan. 11, 2001 *at* http://www.usatoday.com/news/washdc/2001-01-11-arctic.htm; The Antiquities Act, 16 U.S.C. § 431 (2000).

[3] Proclamation of the Giant Sequoia National Monument (Apr. 15, 2000) *at* http://sierraclub.org/chapters/ca/sequoia/Monument/proclamation.htm.; Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,224 (Sept. 18, 1996).

[4] *Clinton won't make Arctic refuge a monument*, USA Today, Jan. 13, 1990.

[5] *Id.*

[6] *Id.*

[7] S. Rep. No. 106-372.

[8] See Utah Association of Counties v. Clinton, No. 2:97CV0479B (D. Utah filed June 23, 1997).

[9] S. Rep. No. 106-372; H.R. Rep. No. 106-252; *Clinton won't make Arctic refuge a monument*, USA Today, Jan. 13, 1990.

[10] *Environmental Groups Fight to Prevent Attack by the Blue Ribbon Coalition on the Antiquities Act* (Oct. 31, 2000) *at* <http://www.wilderness.org/newsroom/monument_lawsuit.htm>. The only presidents who did not utilize their authority under the Antiquities Act were Presidents Nixon, Reagan, and George Bush. Gannett News Service, *The Antiquities Act in Action*, SEATTLE TIMES, May 28, 2000 *at* <http://seattletimes.nwsource.com/n...-world/htm198/hist28_20000528.html>.

[11] 16 U.S.C. § 431

[12] Carol H. Vincent and Pamela Baldwin, *RL30528: National Monuments and the Antiquities Act*, (Apr. 17, 2000) *at* http://www.cnie.org/nle/pub-15.html.

[13] H.R. Rep. No. 106-252.

[14] Gannett News Service, *The Antiquities Act in action*, SEATTLE TIMES, May 28, 2000 *at* <http://seattletimes.nwsource.com/n...-world/htm198/hist28_20000528.html>.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.;* 16 U.S.C. § 431.

[20] Gannett News Services, *The Antiquities Act in Action*, SEATTLE TIMES, May 28, 2000 *at* <http://seattletimes.nwsource.com/n...-world/htm198/hist28_20000528.html>.

[21] *Id.*

[22] *Id.*; 16 U.S.C. § 3213.

[23] 16 U.S.C. § 431.

[24] See Utah Association of Counties v. Clinton, No. 2:97CV0479B (D.Utah filed June 23, 1997).

[25] Proclamation No. 6920, 61Fed. Reg. 50,223, 50,224 (Sept. 18, 1996).

[26] *Id.* at 50,223.

[27] *Id.* at 50,224.

[28] *Id.* at 50,224-25.

[29] Complaint for Injunctive and Declaratory Relief at 8-9, Utah Association of Counties v. Clinton, No. 2:97CV0479B (D. Utah filed June 23, 1997).

[30] *See* Utah Association of Counties v. Clinton, No. 2:97CV0479B (D. Utah filed June 23, 1997).

[31] Proclamation No. 7265, 65 Fed. Reg. 2825 (Jan. 11, 2000).

[32] *Id.* at 2825-27.

[33] *Id.* at 2827.

[34] Proclamation of the Giant Sequoia National Monument (Apr. 15, 2000), *at* http://sierraclub.org/chapters/ca/sequoia/Monument/proclamation.htm.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Cameron v. United States, 252 U.S. 450, 455 (1920).

[39] *Id.* at 456.

[40] *Id.*

[41] Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945).

[42] *Id.*

[43] *Id.* at 895.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 895-96.

[47] *Id.* at 895.

[48] *Id.*

[49] Cappert v. United States, 426 U.S. 128, 135 (1976).

[50] *Id.* at 132.

[51] *Id.*

[52] *Id.* at 133.

[53] *Id.* at 133-34.

[54] *Id.* at 147.

[55] United States v. Diaz, 499 F. 2d 113 (9th Cir. 1974).

[56] *Id.* at 114.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 115.

[60] *Id.*

[61] Anaconda Copper Co. v. Andrus, 14 Envt' 1 L. Rep. 1853 (BNA) (D. Alaska 1980).

[62] *Id.* at 1855.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.* (italics added for case names).

[68] *Id.* at 1854.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 Ariz. St. L.J. 941, 948 (2000).

[73] H.R. Rep. No. 106-252 (discussing H.R. 1487); S. Rep. No. 106-372, at (discussing the purposes of S. 729).

[74] H.R. Rep. No. 106-252.

[75] *Id.*

[76] *Id.*

[77] S. Rep. No. 106-372.

[78] *Id.*

[79] *Id.*

[80] *See generally* H.R. Rep. No. 106-252; S. Rep. No. 106-372; Complaint for Injunctive and Declaratory Relief, Utah Association of Counties v. Clinton, No. 2:97CV0479B (D. Utah filed June 23, 1997).

[81] Administrative Procedure Act, 5 U.S.C. §§ 553, 702 (1996).

[82] 5 U.S.C. § 702.

[83] *Id.*

[84] 1 K. Davis, Administrative Law Treatise § 1.2, at 8 (2d ed. 1978).

[85] Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971).

[86] *Id.* at 761.

[87] 5 U.S.C. § 553 (1996).

[88] H.R. Rep. No. 106-252 (requiring the President to solicit participation and consider public comments prior to monument designation); S. Rep. No. 106-372 (requiring public notice, hearing and comments prior to monument declaration).

[89] *See*S. Rep. No. 106-372; *see also* Federal Defendants' Reply to Plaintiffs' Opposition to Defendants' Objections to Rule 56(f) Orders, Utah Association of Counties v. Clinton, No. 2:97CV0479B (D. Utah filed Dec. 17, 1998).

[90] 5 U.S.C. § 504 (1996).

[91] *See* Bennett v. Spear, 520 U.S. 154 (1997).

[92] *See id.*

[93] *Id.* at 177-78.

[94] *Id.* at 178.

[95] *See* Public Citizen v. United States Trade Representative, 5 F. 3d 549 (D.C. Cir. 1993).

[96] *Id.* at 550.

[97] *Id.* at 553.

[98] National Environmental Policy Act, 42 U.S.C. § 4321 (1994).

[99] S. Rep. No. 91-296 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2751.

[100] *Id.* at 2753.

[101] 42 U.S.C. § 4332 (1994).

[102] *Id.*

[103] H.R. Rep. No. 106-252; S. Rep. No. 106-372.

[104] *See id.*

[105] Complaint for Injunctive and Declaratory Relief, Utah

Association of Counties v. Clinton, No. 2:97CV0479B (D. Utah filed June 23, 1997).

[106]*Public Citizen*, 5 F. 3d at 551 (D.C. Cir. 1993).

[107]*Id.*

[108]*Id.*

[109]Alaska v. Carter, 462 F. Supp. 1155, 1159-60 (D. Alaska 1978).

[110]Complaint for Injunctive and Declaratory Relief, Utah Association of Counties v. Clinton, No. 2:97CV0479B, at 28 (D. Utah filed June 23, 1997).

[111]Federal Land Policy and Management Act, 43 U.S.C. § 1701(a)(12) (1976).

[112] 43 U.S.C. § 1714(a).

[113]*Id.*

[114]*Id.*

[115]Complaint for Injunctive and Declaratory Relief, Utah Association of Counties v. Clinton, No. 2:97CV0479B, at 28 (D. Utah filed June 23, 1997).

[116]*Id* at 24.

[117]*Id.*

[118]*Id.*

[119]STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & MATTHEW L. SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY 39 (Aspen Law and Business 1999).

[120]*Id.*

[121]*See id.*

[122]*See* J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928).

[123]*Id.* at 401.

[124]*Id.* at 409.

[125]*A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[126]*Id.* at 522.

[127]*Id.* at 541.

[128]*Id.*

[129]*Id.* at 542.

[130] American Trucking Associations, Inc. v. EPA, 175 F. 3d 1027 (D.C. Cir. 1999).

[131]*Id.* at 1033.

[132] *Id.* (*quoting* U.S. Const. art. I, § 1: "All legislative powers herein granted shall be vested in a Congress of the United States").

[133]*Id.* (*quoting* Clean Air Act, 42 U.S.C. §§ 7408-09).

[134]*Id.*

[135] *Id.* at 1034.

[136]*Id.*

[137]*Id.* at 1036.

[138]*Id.*

[139]16 U.S.C. § 431.

[140]*Cameron*, 252 U.S. at 456.

[141]Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 16 Va. L. Rev. 1, 37 (1982).

[142]*Anaconda Copper Co.*, 14 Envt'l L. Rep. at 1855.

[143]*Id.; Cappaert*, 426 U.S. at 114.

[144]*Franke*, 58 F. Supp. at 895.

[145]*Public Citizen*, 5 F. 3d at 553; *Carter*, 462 F. Supp. at 1159-60.

[146]*Amalgamated Meat Cutters*, 337 F. Supp. at 761.

[147]*Id.*

[148]*Carter*, 462 F. Supp. at 1160.

[149]*J.W. Hampton & Co.*, 276 U.S. at 409.

[150] 16 U.S.C. § 431.

[151]S. Rep. No. 106-372.

[152]Gannett News Service, *The Antiquities Act in action*, SEATTLE TIMES, May 28, 2000, *at* <http://seattletimes.nwsource.com/n...-world/html198/hist28_20000528.html>. As noted previously, Congress passed a bill prohibiting the President from declaring any further monuments, or expanding any monuments in Wyoming. Additionally, all declarations in Alaska exceeding 5,000 acres are subject to congressional approval.

Inside DEQ

RULEMAKING UPDATE

Hazardous Waste

HW071P - Commercial Hazardous Waste Treatment, Storage, or Disposal Facilities (LAC 33:V.Chapter 4 and LAC 33:V.517 and 5111) (La. Register vol. 27, #3, 3/20/01). Under La. R.S. 30:2178, prior to the issuance of any permit for a commercial hazardous waste treatment, storage, or disposal facility, DEQ must assess the impact of the facility on the citizens in the surrounding area, the local infrastructure, and on the environment. The statute also requires DEQ to adopt rules implementing this requirement. Although there presently exist sufficient regulations to meet this statutory requirement, in an abundance of caution and in an effort to provide additional clarity and assistance to the regulated community and the public, the Department has decided to initiate rulemaking in response to a petition for rulemaking filed in the 19th Judicial District Court. A siting fee equaling five percent of the application fee is also established, as authorized by R.S. 30:2178.

HW076 - RCRA X Package (LAC 33:V. Chapters 1, 3, 5, 9, 11, 15, 17, 22, 30, 31, 32, 38, 43, and 49) (La. Register vol. 27, #3, 3/20/01). Adopts rules in the tenth package of federally-required amendments for authorization of the state's Resource Conservation and Recovery Act ("RCRA") subtitle C program. The specific topics include the following titles: Hazardous Waste Management System; Modification of the Hazardous Waste Program; Hazardous Waste Lamps; NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (MACT Rule); NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, Final Rule, Technical Corrections; Land Disposal Restrictions, Wood Preserving Wastes, Metal Wastes, Zinc Micronutrient Fertilizer, etc., correction; Waste Water Treatment Sludges from Metal Finishing Industry; Organobromine Production Wastes; Organobromine Production Wastes, Petroleum Refining Wastes, Identification and Listing of Hazardous Waste, Land Disposal Restrictions, Final Rule and Correcting Amendments; National Pollutant Discharge Elimination System - Program Regulations Streamlining; Address Changes for USEPA Offices in Washington D.C.; Air Emission Standards; and Formula for Administrative Cost Fee.

HW075F - Small Quantity Generator Revisions - Federal Package (LAC 33:V.Chapters 1, 3, 9, 11, 13, 15, 22, 30, 38, 39, 40, 41, 43, and 49) (La. Register vol. 27 #5; 5/20/01). Revises classification and hazardous waste management requirements for small quantity generators to maintain equivalence to federal requirements. Louisiana's former classification system for small quantity generators of hazardous waste differed from the EPA small quantity generator classification system. The differences have resulted in confusion and unnecessary paperwork, with no environmental benefit.

HW075L - Small Quantity Generator Revisions - State Package (LAC 33:V.Chapters 1, 11, and 51) (La. Register vol. 27 #5; 5/20/01). Rule HW075F, which is being proposed concurrent with this rule (HW75L), changes the categories of hazardous waste generators to be equivalent to the federal regulations and also makes other revisions to the regulations to make them equivalent to the federal regulations. This rule, HW075L, reinstates the existing requirements that conditionally exempt small quantity generators (presently Louisiana small quantity generators) notify as generators of hazardous waste and pay a $50 annual fee. The Administrative Procedure Act requires that DEQ adopt federal language separately from non-federal language. This rule, HW075L, will reinstate language that would be lost if the department were to adopt the federally-equivalent language in HW075F without this companion rule. Preserving existing language will ensure that the department continues to be notified of the activity of all hazardous waste generators and

can, thus, continue to effectively ensure that wastes are being handled in a manner that is protective of human health and the environment.

Remediation

IA003 - Voluntary Remediation Regulations (LAC 33:VI Chapter 9) (La. Register vol. 27 #4, 4/20/01). Implements the Voluntary Investigation and Remedial Action Law, Act 1092 of the 1995 Regular Session of the Louisiana Legislature (La. R.S. 30:2285-2290). The rule provides a mechanism by which a person may voluntarily remediate a contaminated property and receive from the state a release from liability for past contamination in the form of a Certificate of Completion. This release would also apply to future owners of the property. Fear of pollution liability prevents many prospective purchasers, developers, etc., from undertaking cleanups at contaminated former industrial properties, effectively leaving these properties idle, unproductive, and unremediated. This rule will provide a mechanism to promote the remediation and reuse of such properties.

Underground Storage Tanks

UT007 - Requirements for Response Action Contractors (LAC 33:XI.103; 1121; and Chapter 12) (La. Register vol. 27 #4, 4/20/01). Sets the qualifications, notification, annual update requirements, and removal, suspension, and revocation procedures for Response Action Contractors (RACs), as required by R.S. 30:2195.10. RAC status allows a person or firm to carry out actions in response to a discharge or release of motor fuel from an underground storage tank and be eligible for reimbursement under the Motor Fuel Underground Storage Tank Trust Fund. The rule also corrects typographical errors and establishes new definitions. For approximately 10 years DEQ has, by policy, been approving persons or firms as RACs. This action will put into regulation many of the provisions from the previous policy and also revise and add other requirements.

Water Quality

WP036 - Poydras-Verrett Wetland and Bayou Ramos Swamp – Corrections of Typographical Errors and Numeric Criteria and Designated Uses (LAC 33:IX.1113.C.6, Table 1 and 1123.C.3, Table 3) (La. Register vol. 27, #3, 3/20/01). Site specific criteria and designated uses have been established for Poydras-Verret Marsh Wetland based on a scientific study conducted from the summer of 1995 through the summer of 1997, and for Bayou Ramos Swamp based on an 18-month characterization study conducted from the spring of 1995 through the summer of 1996. Results for each study are summarized in the Use Attainability Analysis (UAA) reports for the Poydras-Verrett Marsh Wetland and for Bayou Ramos Swamp. Two new subsegments and criteria are being proposed. Water quality management subsegment has been delineated as 041809, Poydras-Verrett Marsh Wetland, located 1.5 miles north of St. Bernard, Louisiana in St. Bernard Parish, south of Violet Canal and northeast of Forty Arpent Canal. Another subsegment is delineated as 120208 for Bayou Ramos Swamp, a forested wetland located 1.25 miles north of Amelia, Louisiana in St. Mary Parish, south of Lake Palourde. Both of these wetlands are classified as naturally dystrophic water bodies (LAC 33:IX.1109.C.3). Wetland faunal assemblages for fish and macroinvertebrates, and aboveground wetland productivity (tree, grass, and/or marsh grass productivity), are determined to be the appropriate criteria for the Poydras-Verret Marsh Wetland (041809). Faunal species diversity and abundance, naturally occurring litter fall or stem growth, and the dominance index or stem density of bald cypress are determined to be the appropriate criteria for the Bayou Ramos Swamp (120208). Designated uses are secondary contact recreation and fish and wildlife propagation. All other general and numerical criteria not specifically excepted in LAC 33:IX.1123, Table 3, shall apply. In addition, footnote numbers will be corrected for 2,3,7,8-tetrachlorodibenzo-p-dioxin (2,3,7,8-TCDD) in LAC 33:IX.1113.C.6, Table 1. A superfluous footnote will be removed from the Toxic Substance column. Also, the footnote number in the Human Health Protection for Drinking Water Supply column will be changed to reflect the appropriate footnote reference.

CASE LAW UPDATE

Storeowners Liable for LUST

In the Matter of Whitney Food Store, No. 90-003-EQ (La. Dept. of Civil Service, Div. of Admin. Law, 3/1/01). Finnegan, ALJ. DEQ inspectors found gasoline leaking from underground

storage tanks at the respondents' convenience store, into a storm drain. Emergency response contractors took interim remediation measures, and were paid with money from the Leaking Underground Storage Tank Trust Fund. DEQ then issued a compliance order to the store owners, citing an unauthorized discharge of pollutants to waters of the State, in violation of La. R.S. 30:2076, and requiring further remediation of the contamination. Respondents denied ownership of the tanks and responsibility for remediation. The ALJ found that Respondents did own the tanks, because they were component parts of the tract of land owned by Respondents. The compliance order was upheld.

Oil Well Operator Produces Brine; DEQ Produces Penalty

In the Matter of Rapiere Resources Company, No. 98-015-EQ (La. Dept. of Civil Service, Div. of Admin. Law, 3/2/01). Finnegan, ALJ. Respondent owned and operated an oil and gas production facility in Jefferson Parish. The facility discharged produced water (brine) into Bayou Dupont, as authorized by a Louisiana Water Discharge Permit System Permit. That permit required the complete termination of all produced water discharges by December 31, 1996. The ALJ found that Respondent allowed the discharge to continue, with one 7-day interruption, until at least June 3, 1997. Respondent argued that economic factors and adverse weather prevented the installation of an injection well that would have been used to dispose of the produced water. The ALJ upheld a civil penalty of $28, 456.57 for the illegal discharges.

Tank Owner Must Do the Dirty Work

In the Matter of Lester J. Gravois Unauthorized Dump Site, No. 97-064-EQ (La. Dept. of Civil Service, Div. of Admin. Law, 3/2/01). Finnegan, ALJ. The respondent, Lester J. Gravois, owned property in Thibodeaux, which was subject to a public servitude in favor of Lafourche Parish, consisting of a public road and associated drainage ditch. A parish maintenance crew was excavating a new ditch on the servitude to install culverts when they discovered an underground storage tank. The tank had been used in agriculture and was exempt from regulation. However, the soils excavated from the vicinity of the tank were found to be contaminated with diesel. The contaminated soils were covered and left on the side of the ditch, on Mr. Gravois' property.

DEQ issued a compliance order to Mr. Gravois, citing him with violating the Solid Waste Regulations by allowing the unpermitted disposal of solid waste on his property. The order required Mr. Gravois to submit a closure plan and properly dispose of the contaminated soil. Mr. Gravois contested the order, claiming that the Parish's equipment, not the underground tank, leaked the diesel that contaminated the soils.

The ALJ noted sample analysis showing that the contamination was highest in the soil closest to Mr. Gravois' tank, and decreased with the distance from the tank, until it was no longer detected. This indicated that the contamination originated at the tank, not with the Parish's equipment. The ALJ ruled that Mr. Gravois did not prove that the diesel came from the equipment. She also ruled that the fact that the soil was deposited on a servitude did not relieve Mr. Gravois of liability as landowner for removal of the soil. The order was upheld.

Case Law Update

In Albardo v. Union Pacific Railroad, 2000-2540 (La.App. 4 Cir. 4/25/01), the court granted defendants' application for supervisory review and reversed the lower court's denial of their exceptions of improper venue and improper cumulation, where fourteen railroad employees sued six separate railroads claiming damages and medical monitoring on account of the alleged failure of defendants to notify of and provide protection against exposures to hazardous and carcinogenic chemicals, which occurred at various facilities at different times in different parishes. The court found that venue was not proper as to some of the defendants, because the alleged exposures and resulting damages did not occur there, because these defendants were not domiciled there, and because there were no allegations of solidary liability.

The court indicated that plaintiffs' allegations of conspiracy might normally be enough to establish a basis for solidary liability, but in the instant case the plaintiffs had in federal court previously waived all claims except those under FELA, so each claim was limited to the direct employer of each plaintiff, and no solidarity existed. Plaintiffs' argument that mass conspiracy served as the basis for cumulation of these actions, which did not otherwise arise out of the same set of operative facts, was rejected on the same grounds.

In Bourgeois v. A.P. Green Industries, Inc., 2000-1528 (La. 4/3/01), 783 So.2d 1251, the court held that Act 989 of 1999, which amended Civil Code Article 2315 to exclude from recovery medical monitoring costs unless directly related to a manifest physical or mental injury or disease, and which contained the legislative expression that its provisions "shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date [July 9, 1999]," could not be constitutionally applied to those persons whose claim vested prior to the date of the amendment, meaning those persons who could assert that each of the seven elements in *Bourgeois I* occurred before the effective date of the Act. It appears from review of this decision that such claims will not prescribe until the symptoms become manifest or the "injury" can be medically documented. Compare Smith v. Cutter Biological below.

In Boudreaux v. State, Dept. Transp. and Dev., 2000-0050 (La.App. 1 Cir. 2/16/01) 780 So.2d 1163, the court stated, possibly in dicta, that the awareness of a claim by one or two people does not impute to the class, absent evidence that the "general members" of the class knew, or should have known, of their claim.

In Royal Street Grocery, Inc. v. Entergy New Orleans, Inc., 99-3090 (La.App. 4 Cir. 1/10/01), 778 So.2d 679, the court found that the trial court was not clearly wrong or manifestly erroneous in denying class certification in an action arising out of two power outages caused first by a fire and second by a cable failure. The court stated that the party seeking certification must establish all of the criteria found in Code of Civil Procedure Article 591(A) or the class should not be certified. The court found on review of the record that the putative representatives met their burden with respect to the numerosity and definability requirements, but agreed with the trial court that they failed to establish commonality or superiority.

In Hall v. Zen-Noh Grain Corporation, 00-1376 (La.App. 5 Cir. 12/13/00) 777 So. 2d 523, the court affirmed a decision to grant an exception of no cause of action by third party defendants. The plaintiff sued the defendant for damages allegedly sustained from emissions of grain dust caused by defendant's operations. Defendant filed a third party demand alleging in the alternative that the plaintiffs were also injured by the emissions and operations of the third party defendants. The court of appeal found that the 1996 amendments to Louisiana Civil Code Article 2324, which did away with solidary liability, eliminated the possibility that the defendant could be held liable for more than its proportionate share of the damages caused to plaintiffs and accordingly, the third parties could not be derivatively or secondarily liable on the principle demand. The court found that the third party defendants were not the warrantor or liable for any part of the principle demand. The court noted that the defendant could assert the fault of the third party defendants and that these companies are responsible in whole or in part for the damages of the plaintiffs.

In Smith v. Cutter Biological, 99-2068 (La.App. 4 Cir. 9/6/00) 770 So. 2d 392, the court, noting that ignorance or misunderstanding of the probable extent or duration of injuries materially differs from ignorance or actionable harm which delays commencement of prescription, affirmed the trial court's reversal of a $35,000,000.00 verdict on the grounds of prescription. The court found that the record supported a finding that plaintiff knew he was infected with the HIV virus and that the infection would likely lead to AIDS, even if the plaintiff thought he would not devolve to AIDS. The court stated that, if a cause of action exists for the mere fear of HIV infection without actual infection, then a cause of action accrues when one has actual knowledge of an actual infection. The court also found that the filing of a national class action more than one year after the plaintiff knew or should have known that he was infected did him no good. His parents' subsequent wrongful death claim may

have been interrupted by the filing of the national class action, but their wrongful death claim was filed more than one year after the national class was de-certified. Accordingly, their action tolled as well. The parents further opted out of another national class action and the court found that when they made that decision it was as though prescription had never been interrupted. This case also contains language against the stacking of class actions, i.e., plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely.

In Richardson v. American Cyanamid Co., 99-675 (La.App. 5 Cir. 2/29/00) 757 So. 2d 135, the plaintiffs, representing a class, appealed the trial court's de-certification of the class and dismissal of their claims with prejudice. The evidence at trial presented by defendants' air modeling expert, that no individual in the specific geographic region could have been exposed to a harmful concentration and no concentration by more than a few minutes, coupled with the fact that no member of the fire department detected any odor, was found sufficient to support the trial court's de-certification of the class, on the grounds that an insufficient number of persons were injured to maintain the matter as a class action. The trial court specifically reserved the individual actions to those persons within the locality who were so sensitive to the chemical that they would suffer symptoms or disease as a result of the concentrations as low as those presented in the case.

In Garden District Neighborhood Improvement Association v. Garden District Development Group, LLC, 2000-1923 (La.App. 4 Cir. 6/20/01), the court found that the Garden District Neighborhood Improvement Association was not required to be given notice by the Department of Safety and Permits prior to the issuance of a demolition permit to a developer. The court found that notice was required only to those whose fundamental rights or property interests were directly affected. The court stated that due process does not stand for a requirement that notice be given to all interested parties. The court also found that a local ordinance which provided "an appeal shall stay all administrative proceedings and furtherance of the action appealed from" means only that enforcement actions will be stayed during the pendency of an appeal; not that any permits issued should be enjoined or revoked.

In State v. Hair, 2000-2694 (La. 5/15/01) 784 So. 2d 1269, criminal defendants filed a motion to quash an indictment claiming that the Louisiana Air Control Law was unconstitutionally vague and overbroad on the grounds that it did not give adequate notice of the prescribed conduct or provide adequate standards for determining guilt. The trial court granted the motion and quashed the indictment. An appeal was taken directly to the Supreme Court by the district attorney. The Supreme Court first stated that the vagueness of the statute must be examined in light of the facts of the case at hand. The defendant specified the phrases "one that endangers or that could endanger human life or health" in La. .R.S. 30:2025 and "scientifically accepted data" in La. .R.S. 30:2053 were so vague that the average person cannot discern the meaning of the statutes. The court found, contrary to defendant's arguments, that the dangers of asbestos abatement have been so widely publicized that the average person should know that cutting into old pipe insulation without adequate precaution may create dangerous health risks. The court stated that this is especially true in a commercial setting such as the one before the court. The court did not consider the defendants' argument that criminal prosecution should not be allowed upon mere violation of the language without the requisite *mens rea*, i.e., that they acted willfully or knowingly, and referred same as, according to the court, it is a defense on the merits and does not provide grounds for quashing the indictment. The court noted "reasonable ignorance of fact or mistake of fact which precludes the presence of any mental element required in that crime is a defense to any prosecution for that crime." The court found that the trial court erred in declaring the Louisiana Air Control Law unconstitutional and remanded the case for further proceedings.

In Carr v. Oake Tree Apartments, 34,539 (La.App. 2 Cir. 5/9/01) 786 So. 2d 230, the trial court awarded general damages in the amount of $100,000.00 stemming from the loss of use and enjoyment of his pond which received runoff effluent from a sewage treatment plant owned and operated by the defendant apartment complex. The evidence established that the plaintiff's family ate foul smelling fish from the pond and that raw

sewage was discovered flowing into the pond from the sewage treatment plant. Inspection by the Louisiana Department of Environmental Quality showed that the plant was not properly operated. The apartment complex was issued a permit that allowed the discharge of sanitary sewage. The court noted that the permit, while retroactive, did not convey any property rights, including servitudes, and the apartment complex never obtained a servitude allowing the discharge on the plaintiff's property. The court of appeal found that while a servient estate is required to accept the natural flow of surface waters, but it is not required to accept the flow of effluent, even chlorinated effluent. The court of appeal found the determination by the trial court that the pond was contaminated supported by the record, which contained both expert testimony and sample results. The court of appeal further found that the trial court did not err in refusing to require that the defendants remediate the pond on the grounds that expert testimony taken at trial showed natural attenuation had already returned the pond to its normal state and there was no showing of permanent damages resulting from any discharge.

In Department of Environmental Quality v. Rottman, 2000-0153 (La.App. 1 Cir. 2/16/01), the Louisiana Department of Environmental Quality, eight years after it issued a compliance order, filed an ex parte petition to make compliance order executory in the 19th Judicial District Court pursuant to L.R.S. 30:2025. On motion of the defendant, the district court dismissed the ex parte motion on the grounds that it had been abandoned. The judgment of dismissal was signed and the Department filed an appeal. The Department issued a compliance order to the defendant on June 13, 1991. The defendant made an untimely request for hearing after he had been properly served and notified. The hearing officer denied his untimely request for hearing. After follow up inspection allegedly showed that the defendant was not in compliance with the compliance order, the Department decided to take steps to make its compliance order executory. A motion to dismiss was filed by the defendant on the basis of La .R.S. 30:2050.9. The court rejected the Department's argument that the enforcement action became final when the compliance order was issued and there was no request for a hearing in the time allowed by law. The court interpreted the abandonment statute to require that DEQ seek enforcement with the court within the two year period provided for in La .R.S. 30:2050.9. The court found that the filing of a petition to make the compliance order executory is the "final action" provided by the Louisiana Environmental Quality Act to accomplish enforcement of a compliance order.

In Westlake Petrochemicals Corporation Ethylene Plant Part 70, Matter of, 99 1726 (La.App. 1 Cir. 11/3/00) 769 So. 2d 1278, DEQ approved a modification of a permit to provide for expansion of a facility on January 18, 1996. Subsequently, in accordance with federal law and state regulations, the facility submitted an application for a single permit covering the entire complex under 40 CFR part 70. The Department issued the permit. On April 11, 1997, environmental groups sought judicial review of this action in the 19th Judicial District Court. The record was lodged with the district court by DEQ on September 19, 1997. On April 6, 1998, the environmental groups requested a briefing schedule and they filed their original brief on September 8, 1998. The facility filed a motion to dismiss on the grounds of abandonment which was granted by the trial judge. The basis for the dismissal was grounded on La .R.S. 30:2050.21(G) which provides "in no case shall the date for a final decision on the merits of such review or appeals extend beyond the nineteenth (19) day after receipt by the court of the record for adjudication." The trial court granted the motion for abandonment on the grounds that the environmental group did not request that the court set this matter for hearing or notify the court of the pendency of this matter as required by local rule. The court of appeals reversed, stating that La .R.S. 30:2050.21(G) provides no penalty for non-compliance. The court further noted that a local rule cannot take precedence over statutory law.

In Coalition for Good Government v. Louisiana Department of Environmental Quality, 99-2843 (La.App. 1 Cir. 10/18/00) 772 So. 2d 715, citizens' groups filed a petition for judicial review of the Department's decision to issue a hazardous waste operating permit, with attendant air and water permits for a facility, which was acquired from Marine Shell Processors. The matter was

briefed to the district court, who then remanded the matter to DEQ, requesting additional analysis on various issues. The district court did not limit DEQ's review to the issues specified by it in the remand. The citizens' groups as well as the facility owner and other environmental processors submitted additional information to DEQ for its review. DEQ supplemented the administrative record and filed a supplemental basis for decision with the district court. The district court then vacated the three permits, finding that DEQ exceeded its statutory authority in issuing a commercial waste incineration facility permit before the promulgation of the rules and regulations required by La .R.S. 30:2011.D(24)(a) and in not requiring specific buffers as required by the regulations. The court of appeals found that the district court erred and agreed with DEQ that the regulations in existence at the time La .R.S. 30:2011.D(24)(a) was enacted, were sufficient for the issuance of the permit. The court disagreed with citizens' groups that the statute required that DEQ adopt new rules. The court noted that the citizens' groups alleged no particular deficiencies in the old rules and the court found none. The court further found that the information and analysis provided in the record of decision was sufficient to satisfy the analysis required by Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 452 So. 2d 1152, 1159 (La. 1984) and Matter of Rubicon, Inc., 95-0108, (La.App. 1 Cir. 2/14/96) 670 So. 2d. 475 .

In A to Z Paper Company v. State, Department of Environmental Quality, 99-1710 (La.App. 1 Cir. 9/22/00) 770 So. 2d 445, a cement manufacturer applied to DEQ for a small source air permit for its batch plant located in New Orleans, Louisiana. Several companies by letter opposed the granting of the permit and requested a public hearing pending the permit application. DEQ conducted no hearings on the permit application and granted the permit. Notice of granting the permit was served by certified mail on the permit applicant. The opposing group attempted to appeal the issuance of the permit and again requested a hearing by letter to DEQ within thirty (30) days of the date the permit was issued. DEQ denied the request for an appeal stating that the available remedy to anyone aggrieved by a final permit action is the right to judicial review pursuant to the provisions of La. R.S. 30:2050.21. The applicants thereafter filed a petition in the 19th Judicial District Court seeking review of the issuance of the permit. DEQ filed an exception of prescription contending the petition was filed more than thirty (30) days after notice of the action and was untimely. The district judge sustained the exception. In reversing that decision, the court relied upon its prior decision Natural Resources Recovery, Inc., 98-2917 (La.App. 1 Cir. 2/18/00) 752 So. 2d 369 (see below), where it decided that the thirty (30) day time period found in La. R.S. 30:2024 pertains exclusively to the permit applicant. The court reaffirmed that the appeal delays afforded to the "aggrieved person" under La. R.S. 30:2050.21 is triggered by "notice of the action having been given." The court rejected DEQ's argument that Natural Resources Recovery was not controlling, finding no statutory basis for a distinction between a minor source permit and the major source permit. The court found that the appellants received no notice of the permit action, which the court stated was required by La. R.S. 30:2050.23 and, accordingly, the thirty (30) day time period provided for in La. R.S. 30:2050.21 did not commence to run. The court found that the appeal was therefore timely and remanded the case for further proceedings.

In BASF Corporation's Exemption Permit from Hazardous Waste Land Disposal Restrictions, Matter of, 99-0302 (La.App. 1 Cir. 7/31/00) 765 So.2d 1171, citizens' groups appealed a decision by the Louisiana Department of Environmental Quality to grant an exemption from the statutory ban on the land disposal of hazardous waste. The district court remanded the matter to DEQ to make the basic findings required by Save Ourselves. The Department thereafter issued its findings maintaining its previous decision. The citizens' groups filed a second petition for judicial review. The district court affirmed the decision and citizens' groups appealed. Citizens' groups maintained on appeal that the district court erred in affirming the decision of the Department of Environmental Quality because alternative disposal methods were available and more extensive monitoring of an injection well should have been required by the Department. The first inquiry was whether or not La. R.S. 30:2193(G), which ostensibly reduced the applicant's burden of proof in obtaining a permit, was applicable. The court found that

the change in the burden of proof was procedural in nature and applied to the instant action. The court then found that the Department's written decision conformed with the requirements of In re Rubicon, Inc., 95-0108 (La.App. 1 Cir. 2/14/96) 670 So. 2d 475. The court found that the Department fulfilled its duty in determining that alternatives were not technically or economically feasible and/or environmentally sound.

In Natural Resources Recovery, Inc., Matter of, 98-2917 (La.App. 1 Cir. 2/18/00) 752 So. 2d 369, environmental groups challenged trial court's dismissal of a petition for judicial review of a permit action taken by the Department of Environmental Quality pursuant to the Department's exception of prescription. Applicant requested solid waste permit for a landfill to be located in a heavily industrialized area. Public comment and a public hearing was held by the Department. Appellant's members testified during the public hearing and opposed the permit application. These groups also submitted written comments to DEQ. DEQ issued the permit on December 10, 1997. Notice of the permit was published in the local newspaper on December 19, 1997. The appellant filed a petition seeking judicial review on January 20, 1998 by fax with the original petition being filed on January 23, 1998. The applicant intervened in the action and filed a motion to dismiss the appeal as untimely. The court found that under La. R.S. 30:2050.21 "an aggrieved person" is given the right to appeal a final permit action to the 19th Judicial District Court. The petition for judicial review must be filed within thirty (30) days after the notice of the action or ruling being appealed has been given." Appellants admitted that they saw the advertisement in the local newspaper on December 19, 1997 but contended that DEQ was statutorily obligated to provide them notice by mail under La. R.S. 30:2050.23. They contend that DEQ did not give them a notice by mail and that their suit was timely. The court found that all challenges to the permit relating to the construction of the facility were moot at the time of the appeal because of the substantial completion of the facility, but because continued operation of the facility was also at issue in the permit and because the petition sought judicial review of the permit authorizing operations, the appeal was not moot. Despite DEQ's contentions, the court found that La. R.S. 30:2024, which makes permit actions final and not subject to further review unless the permit applicant files a request for hearing within thirty (30) days after the notice of the action is served pertains only to the permit applicant. The court found that this provision has no bearing on the commencement of the appellate delays afforded to an aggrieved person under La. R.S. 30:2050.21. The court found that La. R.S. 30:2050.23 required notice by mail. The court further found that notice by mail was required to commence the running of the thirty (30) day appeal delay in La. R.S. 30:2050.21.

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The following is a list of LEL members whose notice emails were sent back to us due to various errors. Please check to see that we have your correct email address, and inform us if it has changed.

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