



Trump signs proclamations shrinking two national monuments in Utah on December 4, 2017 (WH.gov)

On Monday, President Trump signed two proclamations, downsizing the [Bears Ears](#) and [Grand Staircase-Escalante](#) National Monuments in Utah. These two proclamations are the first official acts by Trump to implement the recommendations from Interior Secretary Ryan Zinke's national monuments review this summer. (Zinke's [final report and recommendations](#) were just made public yesterday. In a short side-by-side read-through, the public version looks almost identical to the [version leaked back in September](#), with little more than minor word changes.)

Within hours of Trump's signature, a coalition of five [Native American tribes](#), a group of [10 environmental organizations](#), and another [group of non-profit organizations](#) had already filed lawsuits alleging that the President's proclamations are unlawful; additional lawsuits are expected.

Over the past year, several of us on the blog have covered the issue of national monuments. We have described why, based on our analysis of the Constitution, the Antiquities Act, and other public lands statutes, the President does not have authority to modify or revoke a national monument designation. Consequently, Trump's actions this week [overstep the law and are likely to be overturned in court](#). I won't repeat all that analysis here, but you can find all our relevant [blog posts here](#), and a longer explanation in [this article](#) in Virginia Law Review Online co-written with Eric Biber, Sean Hecht, and Mark Squillace.

Here, I want to focus on what's in Trump's new proclamations and potential legal

implications.

## **Bears Ears**

President Obama [created](#) the Bears Ears National Monument in December 2016, covering an area of 1.35 million acres in southeastern Utah. The designation came after years of discussion among stakeholders and after various legislative proposals. Five Native American tribes—the Hopi, Navajo, Ute, Ute Mountain Ute, and Zuni tribes—advocated for and supported the creation of the monument. The area includes many sites considered sacred to these tribes, as well as a multitude of archaeological sites, scenic buttes and geologic formations, and biodiversity.

Obama's [proclamation](#) listed in great detail the variety of “objects of historic or scientific interest” intended for protection. In June, Zinke released an “interim report” from his review of Bears Ears, which recommended making boundary changes to the monument, but did not provide specifics.

The June report hinted at what would be the Trump Administration's argument as to why the boundaries would be changed ([see this blog post](#)). Zinke argued, ostensibly, that the monument was not the “smallest area compatible” for the protection of the objects identified, as required by the Antiquities Act. However, given the nature of the objects detailed in Obama's proclamation, this necessarily meant that Zinke's argument included a claim that some of these objects did not merit protection—in other words, that Trump should re-evaluate which objects should be protected in Bears Ears and amend the proclamation accordingly.

Trump's December 4 proclamation cites the phrase in the Antiquities Act indicating that national monuments should be the “smallest area compatible” with the protection of the relevant objects of historic or scientific interest identified.

Trump then introduces an apparently new standard for how to determine what the smallest area compatible is: “Determining the appropriate protective area involves examination of a number of factors, including the uniqueness and nature of the objects, the nature of the needed protection, and the protection provided by other laws.”

I am not aware of any legal source or precedent for this standard; the proclamation does not cite any. No court has ever required such an analysis for Antiquities Act protection. In [Tulare County v. Bush](#), the D.C. Circuit rejected a challenge to the Giant Sequoia National Monument, reasoning that “the Antiquities Act does not impose upon the President an

obligation to make any particular investigation” as to the appropriate size for protecting objects identified in a national monument designation. (It’s worth noting here, as well, that the historical practice of Antiquities Act designations has not always included any significant level of detail or justification with regard to what objects a monument is intended to protect. Take, for example, Herbert Hoover’s [Death Valley National Monument proclamation](#) in 1933.)

Trump’s proclamation continues by declaring that some of the objects in Bears Ears are “not unique” and that “some particular examples of these objects within the monument are not of significant scientific or historic interest.” Further, it states that many objects listed for protection are either “not under threat of damage or destruction” or are adequately protected by other existing statutes or agency management designations. The proclamation cites, in particular, roadless areas in National Forest lands, Wilderness Study Areas in BLM lands, and other classifications that place either statutory or regulatory constraints on some land uses, as well as a variety of public lands, natural resources, and archaeological resources statutes.

The result of this is a finding by Trump that Bears Ears is not the smallest area compatible with protection of objects in the area. Trump thus declares that the monument will be cut into two, much smaller monument units: The Shash Jaa area and the Indian Creek area. These total 201,876 acres—roughly 85% smaller than the original 1.35 million acre area designated by Obama. (The [Salt Lake Tribune has a detailed description](#) of what’s in and what’s out of these areas.)

The proclamation takes effect after 60 days after Trump’s signature (which should be February 2, 2018). At that point—if a court does not strike it down or issue a preliminary injunction of some sort—the remaining 1.15 million acres will be opened up to all of the relevant public lands laws for disposition, location of mining claims, mineral leasing, grazing, etc., subject to whatever other restrictions were in place before the monument was created. The proclamation immediately loosens restrictions on motorized and non-mechanized vehicle use, pending preparation of a transportation plan, and subject to the discretion of the BLM and the Forest Service. It also changes the agency-tribal commission created to inform agency management decisions by adding an official from San Juan County to the commission.

### **Grand Staircase-Escalante**

President Bill Clinton created the Grand Staircase-Escalante National Monument in southern Utah by proclamation in 1996. The Grand Staircase name refers to the steps in

geologic layers of sandstone, clearly visible in the sets of cliffs of different shades moving across the region. The proclamation covered 1.7 million acres of land; however, additional areas were included by Congress in 1998 as part of a land exchange, in which parcels owned by the State of Utah within the monument boundaries were transferred to the federal government. This distinction may be legally important, in that the 1998 acts provide congressional ratification of the monument—an additional argument as to why the President cannot unilaterally change it.

Trump's December 4 proclamation on Grand Staircase-Escalante mirrors, in many ways, the arguments and claims made with regard to Bears Ears. The proclamation asserts that many objects in the monument are not unique, not of sufficient interest, or not threatened due to adequate protection from other statutes, regulations, and agency actions. As a result, the proclamation includes a finding that the monument is not the "smallest area compatible" with the objects that merit protection.

Trump's proclamation splits Grand Staircase-Escalante into three smaller units—Grand Staircase, Kaiparowits, and Escalante Canyon—that total just over 1 million acres. The proclamation excludes 861,794 acres deemed "no longer necessary" for protection. (See the [Salt Lake Tribune's description](#) of what is now outside the monument, including coal-rich areas of the Kaiparowits Plateau.)

As with the Bears Ears proclamation, the excluded areas are set to be opened to mining, mineral leasing, and other public lands laws, subject to other existing statutes and regulations, after 60 days. Agency officials are given wider discretion to allow motorized and non-mechanized vehicle use on existing roads and trails in the monument. The proclamation also calls for agencies to prepare 3 separate management plans for the 3 monument units, and provides for one or more advisory committees for input on management.

### **Legal Issues**

Cutting Bears Ears' size by 85% and splitting it into two management units is not a mere boundary adjustment. It is essentially a complete redefinition of the monument and a reclassification of what objects the monument is intended to protect. The same goes for Grand Staircase-Escalante—cut into three parts, nearly 50% smaller than the current size.

The Trump Administration has not officially asserted that the President has the authority to entirely revoke a national monument designation. However, I think they will effectively need to make that claim for this proclamation to stand—because I think it would be difficult to

draw a line between a) complete presidential discretion to eliminate monuments and b) presidential authority to second-guess prior presidents' determinations of what objects and areas merit Antiquities Act protection. In simpler terms, if Trump doesn't have the ability to cut 100% of a monument, it's hard to argue he has the ability to gut protections by cutting 85% of it.

As a legal matter, in examining the scope of presidential authority in the context of national monuments, it's important to stress that the underlying authority to manage public lands is committed to Congress—not the President—in the Property Clause (Art. IV, Sec. 3 of the Constitution). Any power the President has must be delegated by Congress. The Antiquities Act gives presidents the authority to create national monuments, but is silent on modifying or revoking them. Other authority strongly indicates that the President does not have any implied authority to change or undo monuments. Contemporary public lands statutes, in contrast to the Antiquities Act, explicitly envisioned executive action to modify or revoke land withdrawals and reservations. And the Federal Land Policy and Management Act of 1976—as understood by the statute's drafters—leaves it to Congress to modify or revoke a monument.

As a policy matter, the one-way designation authority of the Antiquities Act makes sense. Allowing a President to second-guess what a monument protects and how to protect it would undermine the statute's purpose of providing swift protection to valuable cultural, scientific, and natural resources, free from immediate-term political challenges. The remedy for those who think the monuments are too large is in Congress. It makes sense to leave in place a higher standard for undoing protections for public lands because of the one-way nature of many land uses: even if permanent damage to resource has not yet occurred, once a valid mining claim has been located, a mineral lease sold, or a grazing permit granted, it is much harder to walk these actions back to ensure protection.

While the lawsuits on Bears Ears and Grand Staircase-Escalante are just starting, more action on national monuments is likely to come in the near future. [Secretary Zinke's report](#), now public, confirms that he has recommended more changes to more monuments—including cuts in the size of Cascade-Siskiyou and Gold Butte National Monuments, as well as modifications to 3 marine monuments and 3 other terrestrial monuments. The two proclamations from Monday lay out what are likely to be the justifications and arguments that the Trump Administration will make—so what happens in these two cases will have a significant impact beyond Utah.