Interior Secretary Ryan Zinke released his interim report yesterday on Bears Ears National Monument, recommending that President Trump re-draw the monument's boundaries. Secretary Zinke's report misreads both the Antiquities Act and President Obama's 2016 Proclamation that created Bears Ears National Monument, and any move by President Trump to downsize the monument without an act of Congress would be unlawful.

Under President Trump's Executive Order from April, Zinke has been reviewing Bears Ears and other national monuments designated by Presidents Clinton, Bush, and Obama under the Antiquities Act. Mark Squillace, Eric Biber, Sean Hecht, and I have argued previously that the President does not have the authority to unilaterally revoke or modify a national monument that has been previously designated; instead, that power is reserved for Congress. Our article on this subject, Presidents Lack the Authority to Abolish or Diminish National Monuments, has just been published in Virginia Law Review Online, and has been cited in several public comments submitted to the Department of Interior.

The Antiquities Act authorizes the President to protect "objects of historic or scientific interest" on federal lands. Zinke's memo explicitly recognizes that Bears Ears, as designated by President Obama in December 2016, "contains unique geologic features and objects of historic or scientific interest deemed culturally important to Native American tribes, including artifacts, rock art, archeological [sic] sites, dwellings, and areas used for traditional rituals, gatherings, and tribal practices."

However, Zinke has argued that the "qualifying objects within the monument can be identified and reasonably segregated," and that therefore the monument should be smaller, due to the Antiquities Act's language providing that monuments shall cover the "smallest area compatible with the proper care and management of the objects to be protected" (54 U.S.C. § 320301). Consequently, his first recommendation to the President was that the Bears Ears National Monument "boundary be revised through the use of appropriate authority, including lawful exercise of the President's authority granted by the [Antiquities] Act."

Secretary Zinke's memo does not appear to assert any power for the President to eliminate Bears Ears. Rather, it argues that the monument should be downsized, and implies that the President would have the power to do so unilaterally. This is erroneous for at least two significant reasons.

First, as detailed in our article, the full context of the Antiquities Act — taking into account contemporary public land statutes, the text and history of the Federal Land Policy and Management Act of 1976 (FLPMA), and the Constitution's provision giving federal land management authority to Congress — makes it clear that Congress intended to reserve for itself the power to abolish *or diminish* national monuments. Section 204(j) of FLPMA prohibits the Secretary of Interior from "modify[ing] or revok[ing]" national monuments designated under the Antiquities Act, and the House Committee whose members drafted the language in this section expressly noted in their report their intent to "specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act" (H.R. Rep. No. 94-1163), meaning that the President may not do so either. Although some Presidents in decades past have downsized some monuments, no court ever decided the legality of these actions, and any presidential authority that may have been claimed or implied to that effect would clearly have been eliminated by FLPMA.

Second, Zinke's recommendation is centered on the Antiquities Act's phrase about making monuments the "smallest area compatible" with protection and management. Consistent with the purpose of the Antiquities Act and with the analysis above, a President may not supplant a previous monument designation with his or her own judgment as to what constitutes the "smallest area compatible." Notwithstanding, even if the President were considered to have some authority to redefine or shrink a national monument on these specific grounds, the President could not use this provision as an end-run around the basic function of the Antiquities Act, which insulates national monuments from the unilateral decisions of subsequent Presidents. The Act creates a scheme in which Presidents may act quickly to protect an area and the objects therein; Congress may then deliberate, should it so choose, as to whether the protections or areas included in a national monument should be adjusted.

The underlying premise of Zinke's report is an argument that a smaller portion of Bears Ears would be sufficient for proper care and management of the area's resources. A careful reading of President Obama's Proclamation on Bears Ears makes this claim difficult to support. In this context, Zinke's report appears less like an assertion that Obama's monument was too large for the objects to be protected, and more like a re-evaluation as to which specific subset of the monument's objects of historic or scientific interest should have been included.

Zinke's memo acknowledges that "rock art, dwellings, ceremonial sites, granaries,

and other cultural resources" important to Native Americans "are appropriate for protection under the Act," but characterizes other "areas that may not include objects but are of importance to tribes for traditional cultural practices." This characterization ignores many of the types of "objects of historic or scientific interest" that President Obama described in his Proclamation: in addition to areas considered sacred by present-day Native American tribes, archaeological sites from Clovis people in Cedar Mesa, Ancestral Puebloan sites, petroglyphs and pictographs, and historic sites from European exploration and settlement, the Bears Ears area also containts geologic formations "from sharp pinnacles to broad mesas, labyrinthine canyons to solitary hoodoos, and verdant hanging gardens to bare stone arches and natural bridges"; paleontological resources, including sites full of fossils in places such as Arch Canyon, Indian Creek, Comb Ridge, Valley of the Gods, and the Chinle, Wingate, Kayenta, and Navajo rock formations; "green highlands," referred to by Native Americans as "Nahodishgish," that provide ecosystem services of "capturing and filtering water"; "[t]he diversity of soils and microenvironments" in the area; vegetation, with paragraphs-long descriptions of varieties according to different highland, canyon, and riparian habitat types; and fauna, ranging from large carnivores, to other mammals, reptiles, amphibians, birds, "specialized aquatic species," and even an endemic moth species.

Many early national monument designations were proclaimed without such detail as to the objects intended for protection. No court has ever struck down the creation of a monument for lack of specificity (or for any other reason). However, if President Trump determines, following Zinke's recommendation, to downsize the Bears Ears National Monument, based on an argument that a smaller size is "compatible with the proper care and management of the objects to be protected," any court reviewing such a decision would need to examine whether the President appropriately considered all of the objects mentioned in President Obama's proclamation.

Despite the criticism in Zinke's memo of "landscape" monuments, it is clear from historical practice that the Antiquities Act does reach these kinds of objects of historic or scientific interest. As early as 1908, President Teddy Roosevelt used the Act to protect the Grand Canyon, and many other areas later re-designated as national parks once began as presidentially-declared national monuments.

The rest of the recommendations in this interim review relate to requests for congressional authority or congressional action, and are therefore beyond the scope of this post, as are the report's claims with regard to the representation of tribal

interests in the designation process and management of the monument — claims that are questionable given the extent of the involvement of Utah Diné Bikéyah, a coalition of Native peoples, over the past several years.

However, it is worth noting that the Interior Department seems to have brushed aside, at least for now, the feedback it received during the brief public comment period in May. In only 15 days, the Department reported receiving some 76,500 comments on Bears Ears National Monument (the total on regulations.gov is now over 157,000 as of June 12, including comments on Bears Ears and other monuments generally; including bundled comments put together by advocacy groups, some 685,000 people weighed in). The Center for Western Priorities examined a random sample of these comments and found that 96% of them supported national monument designations, and that 97% of those commenters who specifically mentioned Bears Ears were in favor of the monument.

The Interior Department will continue its overall review of the national monuments described in Trump's Executive Order, and no specific description has been released yet as to which portions of Bears Ears are being proposed for boundary changes.