

July 9, 2017

Secretary of the Interior Ryan Zinke
Monument Review, MS-1530
U.S. Department of the Interior
1849 C Street NW., Washington, DC 20240

via regulations.gov

Re: DOI-2017-0002, Review of Certain National Monuments Established Since 1996

Dear Secretary Zinke:

One of our great American traditions is ensuring protection of federal public lands with sublime natural features, scientifically-important animals, plants, and rock formations, and Native American sacred and historical sites. National monuments, created with Presidential authority under the Antiquities Act, are a primary means of ensuring this protection. We are teachers and scholars of federal public lands law and policy; one of us is a native Californian and one is a native Utahn, so we have a particular interest in the future of national monuments, many of which are located in those states. We appreciate the opportunity to comment on the future of national monuments. We comment in our personal capacity, informed by our knowledge and background.

Presidents can establish national monuments by proclamation under the Antiquities Act. Congress enacted this law in 1906, when Teddy Roosevelt was President, to ensure protection of lands that needed it. For example, among the earliest monuments was the original, 818,000-acre Grand Canyon National Monument (later converted by Congress to a National Park), which President Roosevelt established in 1908. All national monuments are created out of land already belonging to the federal government. Typically, monuments protect land where resource exploitation for profit, vandalism, or too-intensive recreational activities are destroying the quality of the area and its resources in ways that risk forever changing them. The rules governing the management of each monument are unique, and stem from the specific provisions and requirements of the presidential proclamation establishing the monument. The federal agency in charge of each monument must establish plans, standards, and guidelines that shape the

management of the monument and limit activities incompatible with the monument proclamation and other applicable laws.

Congress has converted many of our national monuments, including the Grand Canyon, Joshua Tree, Grand Teton, Glacier Bay, and Death Valley, into National Parks, confirming the wisdom of these reservations of land. On the other hand, Congress has very rarely done the opposite and removed protections for national monuments. Contrary to false claims by Trump Administration officials and some Members of Congress, Presidents since Teddy Roosevelt have used the Antiquities Act to reserve large areas of land totaling hundreds of thousands or even millions of acres.¹ Courts have upheld these designations without exception every time they have been challenged, holding that such landscape-size monuments are within the scope of the “objects of historic or scientific interest” that may be protected under the Antiquities Act.

Over the past 20 years, Presidents Clinton, George W. Bush, and Obama created over 30 national monuments. These include Bears Ears (home to tens of thousands of Native American sites) and the majestic, geologically-significant Grand Staircase-Escalante in Utah; Carrizo Plain (home this year to the most spectacular wildflower blooms in recent memory), Giant Sequoia (preventing logging of our oldest, largest trees), and San Gabriel Mountains (providing protection to an area treasured by a largely Latino population in southern California) in California; and two important marine monuments in both the Pacific and the Atlantic that limit oil drilling and other harmful activities.

President Trump has ordered a review of these monuments. This review is based on several false premises.

First, as explained in an article we co-authored and in a previously-submitted letter signed by 121 law professors, the President lacks the authority to abolish or diminish

¹ See generally Sean B. Hecht, *Politicians and Commentators Who Criticize Recent National Monuments Are Making Up Their Own Version of History*, LEGAL PLANET, May 8, 2017, <http://legal-planet.org/2017/05/08/politicians-and-commentators-who-criticize-recent-national-monuments-are-making-up-their-own-version-of-history/>.

national monuments.² We have analyzed the issue and have explained in detail why the President doesn't possess this authority. As one of us (Nicholas Bryner) has written, the President's authority over national monuments is a "one-way ratchet."³ Congress intended for the Antiquities Act to allow the President to act quickly to preserve important sites and landscapes and ensure that they can be enjoyed by all people, rather than exploited for private gain. After that, Congress may either leave the presidential designation as-is, convert the monument into a National Park (as has been done numerous times), modify it, or revoke the status of the monument (which has been done only a handful of times). National monument designations do not, as critics say, circumvent the democratic process, and do not permanently end the discussion. They simply hold things in place—changing the status quo to conservation. If Congress studies the matter and decides to change or abolish a monument to allow for different uses of the land, it has the power to do so through the usual legislative process.

Second, the President's official statement when the review was announced contained several crucial falsehoods. Based on much commentary in media and on social media, it's apparent that many Americans believe the President's incorrect statements, and therefore misunderstand what this review can accomplish. The President said:

The previous administration used a 100-year-old law known as the Antiquities Act to unilaterally put millions of acres of land and water under strict federal control -- have you heard about that? -- eliminating the ability of the people who actually live in those states to decide how best to use that land.

Today, we are putting the states back in charge. It's a big thing.

² Mark S. Squillace, Eric Biber, Nicholas S. Bryner, and Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55 (2017), available at <http://www.virginialawreview.org/volumes/content/presidents-lack-authority-abolish-or-diminish-national-monuments>.

³ Nicholas S. Bryner, *National Monuments Under Trump*, LEGAL PLANET, Apr. 10, 2017, <http://legal-planet.org/2017/04/10/national-monuments-under-trump/>

The Antiquities Act does not give the federal government unlimited power to lock up millions of acres of land and water, and it's time we ended this abusive practice.

I've spoken with many state and local leaders -- a number of them here today -- who care very much about preserving our land, and who are gravely concerned about this massive federal land grab. And it's gotten worse and worse and worse, and now we're going to free it up, which is what should have happened in the first place. This should never have happened.

That's why today I am signing this order and directing Secretary Zinke to end these abuses and return control to the people -- the people of Utah, the people of all of the states, the people of the United States.⁴

The entire premise of this statement – that national monuments change the control of lands from local to federal – is false. In fact, every single acre of land designated as national monuments was already federal land before the designation, and for the most part has been federal land since before the states in which they are located entered the Union. (Marine monuments, which have a different history, were likewise not under the control of states or individuals prior to designation.) As the United States expanded beyond the original 13 states, the federal government obtained lands from Spain, Mexico, France, and Native American tribes. As settlers moved westward, the federal government granted parcels of land to homesteaders, miners, and railroads, to promote the development of the West. Upon statehood, the federal government granted parcels to each state, for purposes of supporting schools and public works, among other purposes. In the 19th century, the federal government's general policy was to try as much as possible to transfer land out of federal hands. However, in the West, the federal government continued to hold much of the land in many states. Since that time, U.S. policy changed, as several federal Congressional acts in the 20th century set a policy of generally retaining the remaining federal lands in federal ownership. National monuments are designated

⁴ Remarks by President Trump at Signing of Executive Order on the Antiquities Act (April 26, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/04/26/remarks-president-trump-signing-executive-order-antiquities-act>.

from existing federal lands. There has been no “federal land grab” from Western states or otherwise.

While federal land management plans include formal opportunities for input by local officials and residents, neither state or local governments nor local residents have ever been in charge of decisions regarding the use of federal land. The Constitution grants plenary authority over federal lands to Congress, in the Property Clause of Article IV.⁵ This review cannot change that. The review, whatever its result, will not “return control” to the states or put them back “in charge.” Nor will it result in allowing “people who actually live in those states to decide how best to use that land.” Rather, the lands will stay under federal control, with input from state and local governments, individuals, and other stakeholders. Any de-designation or loosening of protections of monument lands would in fact allow federal agencies greater discretion to facilitate the exploitation of federal resources like oil reserves, forests, and rangelands for private gain.

Third, the Executive Order itself calls for a review that could lead to unlawful implementation of the Antiquities Act—even if the President had the authority to shrink or eliminate monuments.⁶ The Order states that designations should reflect the Act’s “requirements and original objectives” and “appropriately balance the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities.”⁷ But there is nothing in the Antiquities Act that requires, or even allows, this type of balancing. The Order further requires the review to consider these factors:

- (i) The requirements and original objectives of the Act, including the Act’s requirement that reservations of land not exceed “the smallest area

⁵ U.S. CONST., art. IV. The U.S. Supreme Court has said that Congress’ authority over federal lands is “without limitations.” *See, e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

⁶ Exec. Order 13,792 of Apr. 26, 2017, Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20429 (May 1, 2017), *available at* <https://www.federalregister.gov/documents/2017/05/01/2017-08908/review-of-designations-under-the-antiquities-act>.

⁷ *Id.* § 1, 82 Fed. Reg. 20429.

compatible with the proper care and management of the objects to be protected”;

(ii) whether designated lands are appropriately classified under the Act as “historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest”;

(iii) the effects of a designation on the available uses of designated Federal lands, including consideration of the multiple-use policy of section 102(a)(7) of the Federal Land Policy and Management Act (43 U.S.C. 1701(a)(7)), as well as the effects on the available uses of Federal lands beyond the monument boundaries;

(iv) the effects of a designation on the use and enjoyment of non-Federal lands within or beyond monument boundaries;

(v) concerns of State, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected States, tribes, and localities;

(vi) the availability of Federal resources to properly manage designated areas; and

(vii) such other factors as the Secretary deems appropriate.⁸

This list includes criteria that were squarely within the discretion of the Presidents designating the monuments, and other criteria that are not found in the Antiquities Act or in court decisions interpreting the Act. Criteria (i) and (ii) reflect considerations that are embodied in the proclamations that created each monument, and were within the sound discretion of the Presidents who created each monument. Notably, many older national monuments from a century ago provided only very general specification of the objects to be protected and the basis for finding that those objects met the requirements of the Act. These include the original Grand Canyon National Monument, which the Supreme Court upheld against a challenge in 1920.⁹ Courts have uniformly held that

⁸ *Id.* § 2, 82 Fed. Reg. 20429-20430.

⁹ *Cameron v. United States*, 252 U.S. 450 (1920).

Presidents have very broad legal authority to determine what resources a National Monument protects, and what area of land must be designated to protect it. Moreover, it is a basic legal principle that executive branch decisionmakers may not consider factors that Congress did not authorize them to consider, when exercising authority delegated by Congress. Criteria (iii) through (viii) all appear to reflect factors that are not relevant to a determination under the Antiquities Act; therefore, it is not permissible for the Department of Interior to make recommendations based on these factors, or for any President to consider them.

Fourth, in your media statements when you initiated this review, you also made inaccurate statements when you attacked the scope of recent monument designations. You suggested that recent designations deviate from longstanding practice, claiming that *“Since the 1900s, when the Act was first used, the average size of national monuments exploded from an average of 422 acres per monument. Now it’s not uncommon for a monument to be more than a million acres.”*¹⁰ But that is wrong. In fact, Presidents have designated enormous monuments, covering sweeping areas that include natural as well as cultural sites, since the Act’s inception in 1906. We have considered and analyzed the early implementation of the Antiquities Act, and we have found no support for the idea that there was ever “an average of 422 acres per monument.” This is obvious from the fact that the fourth-ever monument designated, in December 1906, was the 60,000-acre Petrified Forest National Monument, and the eleventh monument, in 1908, was the 818,000-acre Grand Canyon National Monument. (President Roosevelt also designated the 615,000-acre Mount Olympus National Monument in 1909.) And among the Presidents in the first few decades after the Antiquities Act became law who designated large monuments – hundreds of thousands, or over a million, acres in many cases – were the archetypal Republicans of their time, representing various wings of the Republican Party in that era: Teddy Roosevelt, Calvin Coolidge, and Herbert Hoover.

¹⁰ "Finally, rural America has a voice again": Secretary Zinke Weighs In on President Trump's Executive Order Directing Interior to Review of 20 Years of Monuments (April 26, 2017), *available at* <https://www.doi.gov/pressreleases/secretary-zinke-weighs-president-trumps-executive-order-directing-interior-review>.

Before President Theodore Roosevelt signed the Antiquities Act in 1906, much of the debate that led up to the passage of the Act revolved around concern about looting of Native American sacred sites and other locations with physical manifestations of Native American culture (which were at that time often framed as archaeological sites or historical curiosities). Today, some point to language in the Act that calls for monuments to consist of the “smallest area necessary” to protect the resource, and maintain that this means larger monuments are illegitimate.

But, as demonstrated above, the idea that large monument designations are new or inappropriate is a false story based on false history. Bears Ears, for example, contains tens of thousands of culturally and archaeologically significant sites. In this case, as in others, preserving a large area of land is warranted in order to adequately protect unique ecological and cultural resources. Beyond that, the history of the Act’s application and court decisions interpreting the Act demonstrate that since its enactment, Presidents have lawfully designated large monuments to protect landscapes, ecosystems, and natural features as well as culturally important sites.

Finally, we express concern that your interim report to President Trump on Bears Ears National Monument mischaracterizes the purpose of the monument and neglects to recognize the extent of the objects designated by President Obama for protection. In your interim report, you write that “qualifying objects within the monument can be identified and reasonably segregated,” and that therefore the monument should be smaller. You further acknowledge in your interim report that “rock art, dwellings, ceremonial sites, granaries, and other cultural resources” important to Native Americans “are appropriate for protection under the Act,” but refer to other portions of Bears Ears as “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 Proclamation also

recognizes the following objects of historic or scientific interest in Bears Ears National Monument:

- 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”;
- a significant “diversity of soils and microenvironments”;
- 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.¹¹

Despite the criticism in your interim report of “landscape” monuments, it is clear from the historical practice described above, and from the Supreme Court’s decision in *Cameron v. United States* and other court decisions, that the Antiquities Act does reach these kinds of objects of historic or scientific interest. Moreover, courts afford substantial discretion to the President creating a monument to declare both what those objects are, and the acreage needed to protect them. We believe the law is clear that Presidents cannot unilaterally abolish or diminish national monuments, but even if this were not the case, any recommendation as to the size of Bears Ears National Monument must consider the “proper care and management” of all of these objects that have been designated for protection and afford deference to the prior President’s determinations.

¹¹ See Proclamation No. 9,558, Establishment of the Bears Ears National Monument (Dec. 28, 2016), available at <https://www.gpo.gov/fdsys/pkg/DCPD-201600875/pdf/DCPD-201600875.pdf>.

A century ago, this issue transcended politics. Not only was Republican President Teddy Roosevelt the driving force behind preservation of public lands through the Antiquities Act and other means, but other Presidents of quite conservative political views continued these efforts. President Calvin Coolidge, who the Heritage Foundation has called the “forefather of modern American conservatism,” designated the original Glacier Bay National Monument in Alaska in 1925. It was over a million acres in size. This was followed by the designation, by Republican President Herbert Hoover, of the original Death Valley National Monument, at 1.6 million acres. Each of these designations has left a legacy of preservation to the present day—even more so since each was followed up, eventually, by Congressional designation of the area as a national park, and each of these parks is among the jewels of our national park system.

Moreover, it was almost one hundred years ago that courts first upheld broad Presidential authority to designate large monuments. As noted above, the U.S. Supreme Court in 1920—hardly a “liberal” court—confirmed the appropriateness of the Grand Canyon monument designation in *Cameron v. United States*, and courts since then have consistently upheld Presidential authority. There is nothing novel or surprising about the practice of President Obama and other recent Presidents. These examples make clear that the views of average citizens, of Presidents, of Congress, and of federal courts about our public lands and our presidential practices in designating monuments, have not changed significantly over the century since the Antiquities Act passed. The monument designations at issue in this review are no different in scope, intention, or appropriateness from those of a hundred years ago.

While you cite Teddy Roosevelt as a model and a hero, the Trump Administration’s policy proposals, and the values they embody, are at odds with the principles Roosevelt stood for. This is evidenced by the discrepancy between Roosevelt’s expansive view 100 years ago of what was appropriate for monument designation and the very cramped view expressed recently by President Trump and by you in your statements and interim review of these matters.

We urge you to follow the law in your review of national monuments, and to recommend that the President do so as well. We further urge you to listen to the vast majority of local and national commenters, and not recommend modifying any existing monument in any way.

Sincerely,

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