May 25, 2017

Dear Secretary Zinke:

We the undersigned 71 environment and natural resources law professors submit these comments to express our serious concerns with the process initiated by Executive Order (EO) 13792, which directs the Secretary of the Interior (Secretary) to “review” the Bears Ears National Monument and provide “recommendation for such Presidential actions, legislative proposals, or other actions consistent with law.”

EO 13792 and the President’s public statements upon signing that order reflect profound misunderstandings of both the nature of national monuments and the President’s legal authority under the Antiquities Act.

Most fundamentally, EO 13792 implies that the President has the power to abolish or diminish a national monument after it has been established by a public proclamation that properly invokes authority under the Antiquities Act. This is mistaken. Under our constitutional framework, the Congress exercises plenary authority over federal lands. The Congress may delegate its authority to the President or components of the executive branch so long as it sets out an intelligible principle to guide the exercise of authority so delegated. The Antiquities Act is such a delegation. It authorizes the President to identify “objects of historic or scientific interest” and reserve federal lands necessary to protect such objects as a national monument. But the Antiquities Act is a limited delegation: it gives the President authority only to identify and reserve a monument, not to diminish or abolish one. Congress retained that power for itself.

The plain text of the Antiquities Act makes this clear. The Act vests the President with the power to create national monuments but does not authorize subsequent modification. Moreover, other contemporaneous statutes, such as the Pickett Act of 1910 and the Forest Service Organic Act of 1897, include provisions authorizing modification of certain withdrawals of federal lands. The contrast between the broader authority expressly delegated in these statutes—to withdraw or reserve land, and then subsequently, to modify or abolish such reservations or withdrawals—and the lesser authority delegated in the Antiquities Act underscores that Congress intended to give the President the power only to create a monument.

Likewise, when Congress enacted the Federal Land Policy and Management Act (FLPMA) in 1976, it included provisions governing modification of withdrawals of federal lands. Those provisions indicate that the Executive Branch may not “modify or revoke any withdrawal creating national monuments.”

2 U.S. Constitution, Art. IV, § 3, cl. 2.
3 See, e.g., J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 384 (1928).
4 54 U.S.C. § 320301. The term “reservation” relates to federal public lands law and is defined as a category of “withdrawal.” “The term ‘withdrawal’ means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program . . . .” 42 U.S.C. § 1702(j).
5 Pickett Act, 36 Stat, 847 (1910); Forest Service Organic Administration Act, 30 Stat. 36 (1897).
7 43 U.S.C. § 1714(j). The text of § 1714(j) expressly addresses the Secretary, rather than the President or the Executive Branch as a whole. The legislative history, however, makes clear that the restraint was intended to apply as a general bar to modification or abolishment of national monuments. This history is carefully documented in Mark S. Squillace, et al., Presidents Lack the Authority to Abolish or Diminish National Monuments, 103 VA L. REV. ONLINE at 3-5(forthcoming 2017) (attachment 1).
the legislative history of FLPMA demonstrates that Congress understood itself to have “specifically reserve[d] to Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act.”

Furthermore, the reasons for enacting the Antiquities Act do not support delegating to the President the power to modify a national monument. Congress passed the Antiquities Act because “private collecting of artifacts on public lands . . . threatened to rob the public of its cultural heritage.” Congress was neither nimble enough to identify all of the resources needing protection, nor to craft appropriate protections for the lands containing those resources. Recognizing these limitations, Congress endowed the President with the power to set aside national monuments, authorizing him to act with an expediency that Congress could not muster. No similar need existed for rapid revisions to national monuments, and therefore, there was no need to empower the President to take such action.

The Executive Branch has long recognized these limits on the President’s authority over established national monuments. In 1938, Attorney General Cummings concluded that the Antiquities Act “does not authorize [the President] to abolish [national monuments] after they have been established.” Indeed, no President has ever attempted to abolish a national monument, and as recently as 2004, the Solicitor General represented to the Supreme Court that “Congress intended that national monuments would be permanent; they can be abolished only by Act of Congress.”

The 1938 Attorney General Opinion noted that Presidents had, on some occasions, diminished national monuments, but the opinion did not analyze the legality of such action, and no court has considered the issue. In any case, since FLPMA’s passage, no President has claimed such authority.

In short, EO 13792 attempts to wield a power that Congress alone can wield. That is not, however, the only flaw in the Executive Order and the President’s public comments. At least four other errors are evident.

First, the EO directs the Secretary to assess a broad range of policy considerations entirely unmoored from the Antiquities Act. Such considerations, ranging from the effect of national monuments “on the available uses of Federal lands beyond the monument boundaries” to the “economic development and fiscal condition of affected States, tribes, and localities,” would be entirely appropriate in a legislative debate over monument designations. They have no relevance, however, to the circumscribed authority vested in the President.

Second, the President called national monuments a “massive federal land grab.” Yet the Antiquities Act applies only to land owned by the federal government and effects no transfer of title from any state or private landowner. The Bears Ears Proclamation itself is clear on this point, applying only to “lands owned or controlled by the Federal Government.” There has been no land grab.

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11 Reply Brief for the United States in Response to Exceptions of the State of Alaska at 32 n.20, Alaska v. United States, 545 U.S. 75 (2005). Notably, this brief was filed by Acting Solicitor General Paul Clement during the Presidency of George W. Bush.
Third, the President stated that “[t]he Antiquities Act does not give the federal government unlimited power to lock up millions of acres of land and water.” True, the President’s authority under the Antiquities Act is limited. But nothing in the Act limits the acreage of a monument. Indeed, the Act grants the President the power to reserve however many acres are necessary to protect the objects identified. This is a well-settled legal principle. In 1920, for example, the Supreme Court rejected a challenge to the authority of President Teddy Roosevelt to create the 808,120 acre Grand Canyon National Monument. In upholding the designation, the Court explained that “[t]he Grand Canyon, as stated in his proclamation, ‘is an object of unusual scientific interest.’ It is the greatest canyon in the United States, if not the world.” No court has ever held otherwise and imposed a cap on the size of a national monument.

Fourth, the President expressed an intent to give power “back to the states and to the people.” This misunderstands the nature of federal public lands law. Congress has delegated authority to manage federal lands to the executive branch, subject to specific processes and constraints. The President and federal land management agencies have no authority to abdicate those responsibilities and give states free reign over federal lands. That does not mean that states, tribes, local governments, and the public have no role to play in federal land management. Numerous opportunities for public participation exist, including with respect to the management of national monuments. But the federal government has the ultimate responsibility to carry forth the legal obligations imposed upon it by Congress, and only Congress can empower states to act in the federal government’s stead.

While we have limited our comments to the legal issues implicated in the review of national monuments, the area of our academic and scholarly expertise, we also note that existing evidence suggests that the creation of national monuments enhances, rather than impairs, local economies by attracting visitors to these unique lands. The State of Utah itself recognizes this fact, highlighting its national parks and national monuments – including Bears Ears – on the Utah Office of Tourism’s website. The State’s own website underscores the value of the Bears Ears National Monument, describing it thus:

This 1.35-million-acre national monument covers a broad expanse of red rock, juniper forests, high plateau, cultural, historic and prehistoric legacy that includes an abundance of early human and Native American historical artifacts left behind by early Clovis people, then later Ancestral Puebloans, Fremont culture and others. Just as important to the Bears Ears designation are

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14 54 U.S.C. § 320301(b).
15 Cameron v. United States, 252 U.S. 450 (1920).
16 In the absence of express congressional authorization, the executive branch may not subdelegate authority to non-federal actors. See U.S. Telecom Ass’n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004).
17 The Bears Ears Proclamation specifically mandates engagement with stakeholders. The President directed the establishment of a federal advisory committee to “consist of a fair and balanced representation of interested stakeholders, including State and local governments, tribes, recreational users, local business owners, and private landowner.” 82 Fed. Reg. at 1144. “In recognition of the importance of tribal participation to the care and management of the objects identified above, and to ensure that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge,” the Proclamation also creates a Bears Ears Commission made up of the five Tribes who have had strong connection to the lands within the Monument. Id.
19 See https://www.visitutah.com/places-to-go/state-and-federal-recreation-areas/southern/bears-ears-national-monument/ (last visited May 19, 2017). A copy of this website is included as Attachment 2. The Utah Office of Tourism is an office within the Governor’s Office of Economic Development.
the modern-day connections that the Navajo Nation, Ute Mountain Ute Tribe, Hopi Nation and other tribes have to this land.\textsuperscript{20}

It is beyond question that the proclamation creating Bears Ears National Monument identified a wealth of unique and precious resources that qualify as “objects of historic and scientific interest” throughout the reserved federal lands. President Obama, therefore, exercised lawful authority under the Antiquities Act. If the new administration believes that those objects and the lands containing them do not warrant protection, or that factors external to the Antiquities Act should be considered in evaluating national monument designations, the administration must turn to Congress for a remedy.

To amplify the comments offered here we incorporate by reference the attached forthcoming article that will appear in the \textit{Virginia Law Review Online} and a number of other recent writings by law professors on the subject.

Sincerely yours,

(All of the following are signatories in their personal capacity only. Institutional affiliations are included for identification purposes only.)

Sarah J. Adams-Schoen  
Assistant Professor of Law  
Touro College Jacob D. Fuchsberg Law Center

William L. Andreen  
Edgar L. Clarkson Professor of Law and Director, Alabama-ANU Exchange Program  
The University of Alabama School of Law

Peter A. Appel  
Alex W. Smith Professor  
University of Georgia School of Law

Hope Babcock  
Professor of Law and Director, Institute for Public Representation Environmental Law Clinic  
Georgetown University Law Center

Eric Biber  
Professor of Law  
U.C. Berkeley School of Law

Brett Birdsong  
Professor of Law  
UNLV William S. Boyd School of Law

Michael Blumm  
Jeffrey Bain Faculty Scholar & Professor of Law  
Lewis and Clark Law School

Michelle Bryan  
Professor, Natural Resources & Environmental Law Program  
Alexander Blewett III School of Law - University of Montana

Michael Burger  
Executive Director  
Sabin Center for Climate Change Law  
Research Scholar and Lecturer-in-Law  
Columbia Law School

Alejandro E. Camacho  
Professor of Law and Director, Center for Land, Environment, and Natural Resources  
University of California, Irvine School of Law

Cinnamon P. Carlarne  
Associate Dean for Faculty & Professor of Law  
Michael E. Moritz College of Law

Federico Cheever  
Professor and Co-Director of the Environmental & Natural Resources Law Program  
University of Denver Sturm College of Law

Robin Kundis Craig  
James I. Farr Presidential Endowed Chair of Law  
University of Utah S.J. Quinney College of Law

\textsuperscript{20} Id.
Myanna Dellinger  
Associate Professor of Law  
University of South Dakota School of Law

Tim Duane  
Stanley Legro Visiting Professor in Environmental Law  
University of San Diego School of Law  
Professor of Environmental Studies  
University of California, Santa Cruz

Timothy Estep  
Clinical Teaching Fellow - Environmental Law Clinic  
University of Denver, Sturm College of Law

Richard M. Frank  
Professor of Environmental Practice and Director, California Environmental Law & Policy Center  
University of California, Davis School of Law

Erika George  
Samuel D Thurman Professor of Law  
University of Utah S.J. Quinney College of Law

Robert Glicksman  
J. B. and Maurice C. Shapiro Professor of Environmental Law  
The George Washington University Law School

Emily Hammond  
Professor of Law  
The George Washington University Law School

Sean Hecht  
Co-Executive Director, Emmett Institute on Climate Change and the Environment, Evan Frankel Professor of Policy and Practice, and Co-Director, UCLA Law Environmental Law Clinic  
UCLA School of Law

Hillary Hoffman  
Professor of Law  
Vermont Law School

James R. Holbrook  
Clinical Professor of Law  
University of Utah S.J. Quinney College of Law

Bruce Huber  
Professor of Law and Robert & Marion Short Scholar  
Notre Dame Law School

Blake Hudson  
Professor, Joint Appointment  
LSU Law Center  
LSU College of the Coast & Environment  
Director, John P. Laborde Energy Law Center

David Hunter  
Professor of Law and Director, Program on International and Comparative Environmental Law  
American University Washington College of Law

Mark Hughes  
Assistant Teaching Professor  
University of Denver Sturm College of Law

Stephen M. Johnson  
Professor of Law  
Mercer University Law School

Sam Kalen  
Co-Director, Center for Law and Energy Resources in the Rockies  
Winston S. Howard Distinguished Professor of Law  
University of Wyoming College of Law

Robert B. Keiter  
Wallace Stegner Professor of Law  
University Distinguished Professor  
University of Utah S.J. Quinney College of Law

Alexandra B. Klass  
Distinguished McKnight University Professor  
University of Minnesota Law School

Christine A. Klein  
Chesterfield Smith Professor of Law  
University of Florida Levin College of Law

Jan G. Laitos  
Professor of Law and John A. Carver, Jr. Chair in Natural Resources and Environmental Law  
University of Denver Sturm College of Law
Amanda Leiter  
Professor of Law  
American University Washington College of Law  
Kevin Leske,  
Associate Professor of Law  
Barry University School of Law  

Al Lin  
Professor of Law  
University of California, Davis School of Law  

Justin Marceau  
Animal Legal Defense Fund Professor of Law  
University of Denver Sturm College of Law  

Monte Mills  
Assistant Professor and Co-Director, Margery  
Hunter Brown Indian Law Clinic  
Alexander Blewett III School of Law, The  
University of Montana  

Joel A. Mintz  
Professor of Law  
Nova Southeastern University College of Law  

Dave Owen  
Professor of Law  
University of California, Hastings College of the  
Law  

Jessica Owley  
Professor of Law  
University at Buffalo  
State University of New York (SUNY)  

Michael Pappas  
Associate Professor of Law  
University of Maryland Francis King Carey  
School of Law  

Patrick Parenteau  
Professor of Law  
Vermont Law School  

Justin R. Pidot  
Associate Professor of Law  
University of Denver Sturm College of Law  

Zygmunt J.B. Plater  
Professor of Law  
Boston College Law School  

Ann Powers  
Associate Professor Emerita of Law  
Elisabeth Haub School of Law at Pace University  

Melissa Powers  
Jeffrey Bain Faculty Scholar and Professor of Law  
Lewis & Clark Law School  

Arnold Reitze  
Professor of Law  
University of Utah S.J. Quinney College of Law  
J.B. and Maurice C. Shapiro Professor Emeritus of  
Law  
George Washington University School of Law  

Kalyani Robbins  
Associate Professor of Law and Founding  
Director, Environmental & Natural Resources Law  
Program  
Florida International University College of Law  

Jason Anthony Robison  
Associate Professor  
University of Wyoming College of Law  

Nicholas A. Robinson  
University Professor on the Environment and  
Gilbert and Sarah Kerlin Distinguished Professor  
of Environmental Law Emeritus  
Elisabeth Haub School of Law at Pace University  

Michael Robinson-Dorn  
Clinical Professor of Law  
UC Irvine School of Law  

Carol M. Rose  
Gordon Bradford Tweedy Professor of Law,  
emerita,  
Yale Law School  
Ashby Lohse Professor of Water and Natural  
Resource Law, emerita,  
University of Arizona Rogers College of Law  

Nathan Rosenberg  
Visiting Assistant Professor  
University of Arkansas School of Law
Judith Royster
Professor of Law
Co-Director, Native American Law Center
University of Tulsa College of Law

John Ruple
Associate Professor of Law (Research) and
Wallace Stegner Center Fellow
University of Utah S.J. Quinney College of Law

Erin Ryan
Elizabeth C. & Clyde W. Atkinson Professor
Florida State University, College of Law

Sarah Schindler
Professor of Law and Glassman Faculty Research Scholar
University of Maine School of Law

Daniel P. Selmi
Fritz B. Burns Professor of Real Property Law
Loyola Law School, Los Angeles

Amy Sinden
James E. Beasley Professor of Law
Temple University

Alexander Skibine
Professor of Law
University of Utah S.J. Quinney College of Law

William J. Snape, III
Assistant Dean of Adjunct Faculty Affairs & Fellow in Environmental Law
American University Washington College of Law

Mark Squillace
Professor of Law
University of Colorado Law School

Ryan B. Stoas
Associate Professor of Law
Concordia University School of Law

David Takacs
Professor of Law
University of California Hastings College of the Law

David M. Uhlmann
Jeffrey F. Liss Professor from Practice and Director, Environmental Law and Policy Program
University of Michigan Law School

Annecoos Wiersema
Professor of Law
University of Denver Sturm College of Law

David A. Westbrook
Louis A. Del Cotto Professor
University at Buffalo School of Law
State University of New York (SUNY)

Chris Wold
Professor of Law & Director
International Environmental Law Project
Lewis & Clark Law School

Sandra Zellmer
Robert B. Daugherty Professor
Nebraska College of Law (on leave 2017-18)
Distinguished Visiting Professor
University of Montana School of Law (2017-18)
ATTACHMENTS

Attachment 1: Mark Squillace, Eric Biber, Nicholas S. Bryner, & Sean B. Hecht, Presidents Lack the Authority to Abolish or Diminish National Monuments, 103 VIRGINIA LAW REVIEW ONLINE (forthcoming) (draft last revised May 19, 2017 and subject to further revisions)


Attachment 3: John Ruple, Op-Ed: Recent national monuments have protected local interests, The Salt Lake City Tribune (March 26, 2016)


Attachment 5: Bob Keiter & John Ruple, Op-Ed: Trump Officials should visit Bears Ears before making a hurried decision, The Salt Lake City Tribune (February 4, 2017)


Attachment 7: Eric Biber, Nicholas Bryner, Sean Hecht, & Mark Squillace, National monuments: Presidents can create them, but only Congress can undo them, The Conversation (April 28, 2017)

Attachment 8: Robert Glicksman, Trump’s Environmental Steamroller Bears Down on National Monuments, Center for Progressive Reform Blog (May 1, 2017)

Attachment 9: Michelle Bryan, Monte Mills, & Sandra B. Zellmer, Trump’s plan to dismantle national monuments comes with steep cultural and ecological costs, The Conversation (May 3, 2017)