

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.”¹ 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.² 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.³ 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.⁴ 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.⁵ 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.⁶ Those provisions indicate that the Executive Branch may not “modify or revoke any withdrawal creating national monuments.”⁷ And

¹ 82 Fed. Reg. 20429 (May 1, 2017). The Bears Ears National Monument was created by Proclamation 9558, 82 Fed. Reg. 1139 (Jan. 5, 2017).

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).

⁶ 43 U.S.C. § 1714(a).

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.”⁸

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.”⁹ 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.”¹⁰ 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.”¹¹

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.¹² 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.”¹³ There has been no land grab.

⁸ H.R. Rep. 94-1163, at 9 (May 15, 1976).

⁹ Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 477 (2003).

¹⁰ 39 Op. Att’y Gen. 185, 185 (1938).

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.

¹² A transcript and video recording of those comments are available at <https://www.c-span.org/video/?427579-1/president-trump-orders-national-monument-designations-review>.

¹³ 82 Fed. Reg. at 1143.

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.¹⁴ 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.”¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹ 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

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.*

¹⁸ See Headwaters Economics, *Summary: The Economic Importance of National Monuments to Local Communities Update and Overview of National Monument Series*, available at <https://headwaterseconomics.org/wp-content/uploads/monuments-summary-update-2014.pdf> (last visited May 19, 2017).

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.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 *Virginia Law Review Online* and a number of other recent writings by law professors on the subject.

Sincerely yours,

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²⁰ *Id.*

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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 2: Utah Office of Tourism, *Bears Ears National Monument*, <https://www.visitutah.com/places-to-go/state-and-federal-recreation-areas/southern/bears-ears-national-monument/> (retrieved May 19, 2017)

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

Attachment 4: Michael Blumm & Hillary Hoffman, *Why monuments aren't land grabs*, Los Angeles Times, at A11 (January 23, 2017)

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 6: John D. Leshy & Mark Squillace, *The Endangered Antiquities Act*, The New York Times (April 1, 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)

Attachment 10: Sean Hecht, *Politicians and Commentators Who Criticize Recent National Monuments Are Making Up Their Own Version of History*, Legal-Planet.org (May 8, 2017)