



National Monuments Review
Department of the Interior
1849 C St. NW
Washington, DC 20240

May 25, 2017

Submitted via: Regulations.gov portal

Comments of the Grand Canyon Trust Regarding the Review of Bears Ears National Monument per Executive Order 13792 of April 26, 2017 (82 FR 20429, May 1, 2017)

Dear Interior Secretary Ryan Zinke,

The Grand Canyon Trust is a non-profit conservation organization founded in 1985 with offices in Arizona, Utah, and Colorado whose mission is to protect and restore the Colorado Plateau - its spectacular landscapes, flowing rivers, clean air, diversity of plants and animals, and areas of beauty and solitude. Our work to permanently protect public lands in Utah in general and in the Bears Ears region in particular stretches back more than 30 years. We were deeply involved in Representative Rob Bishop's failed Utah Public Lands Initiative (H.R. 5780, 115th Congress), and played a supporting role in the Bears Ears Inter-Tribal Coalition's effort to secure protection for Bears Ears National Monument, and we strongly support both the monument's boundary integrity and permanence.

Bears Ears National Monument is among the most deserving places ever to be designated under the Antiquities Act of 1906. A broader sweep of human history is better preserved here than anywhere else on Earth. From human history dating back 13,000 years at the Lime Ridge Clovis site, through to the contemporary history of the LDS Hole-In-The-Rock Trail, the cultural record at Bears Ears is long and unbroken. Bears Ears is also home to myriad "objects of scientific interest" from fascinating geology, to largely unstudied paleontology, to rare and endemic plants that hold great medicinal and ceremonial value for Native people.

Bears Ears' designation was appropriate. It came only after Congress failed to act on a similar protective designation found in Representative Rob Bishop's failed Utah Public Lands Initiative (H.R. 5780, 115th Congress), and made numerous substantive concessions to accommodate access, grazing, uranium mining, oil and gas development, and a host of other local concerns. Bears Ears National Monument, just five months old, deserves a chance to reveal its many benefits to the world. Far from being a "land grab," this entirely federal monument offers something for everyone — locals and non-locals alike — and for the land and the Native American cultures that have been shaped there since time immemorial.



The short review mandated by executive order, and an even shorter public comment period, does this stunning and deserving place a great disservice. The object proposals for protection for more than 80 years, Bears Ears National Monument's designation was long overdue, and it deserves a thoughtful, informed, and complete review process, which if conducted fairly and honestly will reveal a national treasure that is truly deserving of national monument status. For these reasons and more, we urge that your recommendation for the future of Bears Ears be non-action – to leave Bears Ears National Monument as it is, while encouraging the Congress to appropriate funds for its proper management.

Your review mandated by Executive Order 13792 of April 26, 2017 (82 FR 20429, May 1, 2017) directs you to consider monument size and the presence of historic and prehistoric sites and other items of scientific interest; how the designation effects “available uses” of federal lands; the effect on state and private lands within and near the monument boundaries; tribal, state, and local concerns; the availability of funding to manage the monuments; and “such other factors as [you deem] appropriate.” We address each of these points below.

1. “The Secretary is directed to consider:

“(i) the requirements and original objectives of the Act, including the Act’s requirement that reservations of land not exceed ‘the smallest area compatible with the proper care and management of the objects to be protected;’ ” and

“(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.’ ”

The Antiquities Act of 1906 was originally conceived on the Colorado Plateau to protect exactly the kinds of cultural resources found at Bears Ears. Looting, grave robbing, and digging of artifacts were once popular pastimes in the West, particularly in the Bears Ears region. As countless pieces of ancient culture were dug up and shipped across the country to Chicago, New York, and to Europe, it became clear that laws were necessary to halt the plunder of history. The Antiquities Act was the result of a long, deliberative, discursive process by Congress to both protect the actual cultural resources and to provide a future mechanism — a delegation of authority from Congress to presidents to create national monuments — to protect cultural resources and objects of scientific interest.

The act has been used more than 150 times by presidents of both parties, and monuments large and small have been designated. From the first use by President Teddy Roosevelt at Devils Tower at 1,200 acres to his use of the act to designate more than 800,000 acres at the Grand Canyon, broad discretion has been given by the courts with regard to “minimum size.” The Supreme Court upheld Roosevelt’s designation of the Grand Canyon in 1920 as proper, and even the 1.8 million acre Grand Staircase-Escalante National Monument designation was found to be proper by the U.S. District Court in 2004. In that ruling, Utah Judge Dee Benson found:



“The record is undisputed that the President of the United States used his authority under the Antiquities Act to designate the Grand Staircase Monument. The record is also undisputed that **in doing so the President complied with the Antiquities Act's two requirements, 1) designating, in his discretion, objects of scientific or historic value, and 2) setting aside, in his discretion, the smallest area necessary to protect the objects...**

With little additional discussion, these facts compel a finding in favor of the President's actions in creating the monument...

When the President is given such a broad grant of discretion as in the Antiquities Act, **the courts have no authority to determine whether the President abused his discretion. To do so would impermissibly replace the President's discretion with that of the judiciary.**”¹ (Emphasis added)

Even setting aside the legal question of authority, the existing size of Bears Ears National Monument is indeed the smallest area compatible with its proper care and management because it lies in a geography that contains one of the highest densities of cultural and archaeological sites in the United States. The monument's 1.35 million acre size represents a significant compromise with state and local interests, being **half a million acres smaller** than the 1.9 million acre area the Bears Ears Inter-Tribal Coalition² proposed for protection. Bears Ears National Monument's boundary closely mirrors a National Conservation Area proposed for congressional protection in Representative Rob Bishop's failed Utah Public Lands Initiative (H.R. 5780, 115th Congress). This is noteworthy: The basic footprint of Bears Ears National Monument is one that even the monument's detractors in the Utah delegation found to be deserving of protection.

The proclamation establishing Bears Ears National Monument³ names numerous objects eligible for protection under the Antiquities Act, including cultural and historic sites, as well as objects of scientific interest including plants, animals, geology and paleontology. A careful search of the Bureau of Land Management's and Forest Service's records and the administrative record for the designation of Bears Ears will reveal a national monument replete with monument objects. You owe it to yourself to study the proclamation and these records in detail before any recommendation is made. The richness contained in Bears Ears will astound you, and the

¹ Utah Ass'n of Counties V. Bush, 316 F.Supp.2d 1172 (2004)
http://www.leagle.com/decision/20041488316FSupp2d1172_11385/UTAH%20ASS'N%20OF%20COUNTIES%20v.%20BUSH

² The Bears Ears Inter-Tribal Coalition is a formal body composed of the Navajo, Hopi, Ute, Ute Mountain Ute, and Zuni tribal governments, acting in their capacities as sovereign nations.

³ Proclamation 9558 of December 28, 2016, Establishment of the Bears Ears National Monument, Federal Register Vol. 82, No. 3, Thursday, January 5, 2017 <https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument>



administrative record represents a mere fraction of the objects yet to be discovered and studied. No comprehensive cultural resources inventory has taken place.

Cultural, historic, and objects of interest to science are present within the boundary in one of the greatest densities in the United States, and these objects are found outside the boundaries of the monument as well. The monument already leaves out many areas proposed for protection by the tribes, including significant cultural, historic, and scientific sites, rock art, historic and prehistoric structures, sites of scientific interest, areas of stunning geology, and areas rich in largely unstudied paleontology. To shrink the boundaries further would leave out tens of thousands more sites that meet the letter of the definitions found in the Antiquities Act, and would greatly compromise the ability of the tribes and land managers to care for the irreplaceable objects named in the monument's proclamation.

If any alteration to the boundary is contemplated, it must be to enlarge the boundary to include cultural sites significant to Native people, found in abundance in the Abajo Mountains, Red Canyon, and in Montezuma Canyon and Alkalai Ridge to the east. A fitting tribute to your legacy, and to President Trump's legacy, would be to issue a subsequent presidential proclamation expanding the boundary to include these deserving sites and others nearby.

2. "The Secretary is directed to consider:"

"...(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;" and

(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."

The passage of the Federal Land Policy and Management Act of 1976 (FLPMA) was a watershed moment for America's public lands. It represented a comprehensive overhaul of our nation's public land laws, and it repealed some authorities and granted others. Of note, Congress considered the Antiquities Act in the debate over FLPMA, and decided to leave it untouched, retaining the ability for presidents to designate national monuments.

While "multiple use" is a bedrock concept on public lands, it does not mean "every use on every acre." It means that multiple uses all have their place on public lands, from restrictive congressional designations like wilderness to full-scale industrial zones for the development of minerals. Each use has a place, and each use can be judged for its appropriateness in each



location. Where minerals are found, minerals are developed — such as they are in great quantities in coal country in central Utah and in the oil and gas fields of eastern Utah. Where cultural resources are present in great densities such as they are in Bears Ears, protections are more appropriate. Federal lands throughout Utah’s national parks and monuments demonstrate multiple use in action.

The availability of uses of federal lands is an important issue, and one the previous administration studied in depth before designating the monument. National monuments allow for great flexibility, and their proclamations and resultant management planning processes can help allay the (often misplaced and misstated) concerns that some anti-monument locals have over land use. The Bears Ears National Monument proclamation allows for the continuation of livestock grazing, hunting, fishing, exploring by vehicle, other forms of recreation like rock climbing, and for the gathering of firewood and plants. All of these uses are explicitly protected by the proclamation, despite what the monument’s detractors have stated, inaccurately, again and again.

That leaves us with mineral exploration and development. Bears Ears has been actively explored for oil and gas for nearly one hundred years, and the area has come up dry. As recently as 2013, the latest dry hole was drilled on the Perkins lease on Cedar Mesa just below Bears Ears. Numerous other plugged and abandoned wells are found throughout the monument, and the Obama administration took great pains to make sure that the vast majority of the lands already leased for mineral development were excluded from the monument’s current boundaries. Just the very edges of existing mineral leases, and those with the most difficult geographic conditions for development were included; they may still be developed, if the economics pencil out, under the existing proclamation.

The same is true for hard-rock minerals like gold, silver, copper, and other metals. In the Abajo Mountains, it was said that the cost of road-building, digging adits, and hauling and processing ore far exceeded the value of the minerals produced. Again, for more than one hundred years, the region was prospected with no great strike. Uranium, another mineral governed under the 1872 General Mining Law, is an exception, and areas on Elk Ridge and White Canyon did produce ore during the Cold War, but the last of the mining ceased in the 1980s as the veins played out and the market moved toward better opportunities. Efforts to clean up the toxic legacy of the Colorado Plateau’s uranium boom have occurred in the monument, and more remediation still needs to be done. Better quality and higher quantities of uranium with cheaper access exist elsewhere. But with a nod to industry, the previous administration excluded the only permitted uranium mine in the area from the monument – the Daneros Mine between the Tables of the Sun and Red Canyon. Though it is not currently in production, the monument’s designation cannot and does not affect future operations there.

As with all national monuments, the Bears Ears’ proclamation allows for the exercise of valid existing rights, and any lease in place at the time of designation may proceed with development, though no new mineral leases may be issued. In an area as stunning and rich in archaeology and



scenery as Bears Ears, the highest and best use of Bears Ears is not mineral extraction, but its permanent protection.

According to the Antiquities Act, national monument designations can only occur on federal lands — state and private and other non-federal lands are ineligible.

“The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest **that are situated upon the lands owned or controlled by the Government of the United States** to be national monuments...”⁴ (Emphasis added)

Stated plainly, the provisions set forth in national monument proclamations can have no legal effect on “the use and enjoyment of non-Federal lands within or beyond monument boundaries.”

State lands, though located inside the monument’s footprint, are not subject to monument designation, but their exchange could bring about a net benefit for both the monument and Utah’s Permanent School Trust Fund. In the case of Grand Staircase — Escalante National Monument, a congressional land exchange that occurred there resulted in both a \$50 million cash payment and more than \$340 million in resulting revenue from development of minerals on lands traded in to by the state.⁵ Such a scenario is possible at Bears Ears as well, trading largely isolated, non-revenue-generating state lands inside the monument for consolidated mineral and other development parcels elsewhere in southeast Utah. A land exchange will actually improve revenue generation for Utah’s schoolchildren, and the monument should serve as a mechanism to help that exchange occur. We support and will champion such an exchange with the right conditions that results in a true win/win for conservation, San Juan County, and the schoolchildren of Utah.

Rather than impairing enjoyment and curtailing economic prosperity, positive ancillary effects like rising private property values and other forms of sustainable economic development are often brought about by national monument designations. Bears Ears, and San Juan County, Utah are not places that are exclusively dependent on extractive uses of federal lands. The bulk of the economies there are based on a growth industry that the new monument is already nurturing. According to a report commissioned by San Juan County from Ogden, Utah-based Better City:

“San Juan County (the “County”) has a variety of natural assets that can provide a strong economic foundation. Three primary competitive advantages the County has are its natural beauty that provides a number of tourism, recreational, and lifestyle opportunities; a climate that allows for extended outdoor activity during shoulder seasons; and extractable natural resources. The County boasts an unparalleled concentration of National and State Parks, Monuments, and Recreation Areas and has abundant natural resources. The County also

⁴ 16 U.S.C. 431, Section 2

⁵ SITLA, <http://www.utah.gov/pmnm/files/232569.pdf>



provides an attractive quality of life for those looking for open space, low levels of crime, and a strong community atmosphere. Canyonlands National Park, Natural Bridges National Monument, and Glen Canyon National Recreation Area, among other attractions in the County, drive demand for tourism and seasonal housing. As a result, **sales of goods and services are 38% higher than what would be expected given existing County demographics. This indicates that visitors and seasonal residents are significant contributors to the County's economy.**⁶ (Emphasis added)

Beyond local research, Headwaters Economics, a non-partisan research firm, found that national monuments have a positive impact on local communities.⁷ Bears Ears National Monument has potential to improve the economic outlook in San Juan County, not to harm it. In fact, it is already doing so. The public profile of the area has grown with designation, triggering interest in new investment and new business. Business owners are receiving requests for visitor information on Bears Ears, and the designation is leading to increased economic opportunities for residents. Just try to book a hotel in Bluff this weekend — Bears Ears' proud gateway community — there are no rooms available.

As you are no doubt finding with the intense media coverage of the review and the high volume of public comments, national monuments, including Bears Ears, are exceedingly popular with the American public. Large majorities want to see our national monuments left alone. More than 300,000 people signed petitions urging Bears Ears' designation as a national monument, and the monument is supported by 30 regional Native American tribes, the over 200 tribes of the National Congress of American Indians, six of seven local Utah chapters of the Navajo Nation, the Bluff Special Service District, and the Utah Democratic Caucus, among many others. *A January 2017 poll found 80 percent of westerners want to keep our national monuments as they are,⁸ and nearly two thirds of Utahns polled last week support keeping Bears Ears as it is.⁹*

3. “The Secretary is directed to consider:”

“...(vi) the availability of Federal resources to properly manage designated areas.”

Base funding for land management is the sole responsibility of the United States Congress, and the prioritization of expending those resources is the responsibility of the Department of Interior. Steps should be taken to increase funding to the programs and issues that are most in need of

⁶ San Juan County Economic Development Report, Better City, Ogden, Utah, 2015

⁷ <https://headwaterseconomics.org/public-lands/protected-lands/national-monuments/>

⁸ Public Opinion Strategies and Fairbank, Maslin, Maullin, Metz & Associates - State Of the Rockies 2017 poll, conducted January 2017

https://www.coloradocollege.edu/other/stateoftherockies/conservationinthewest/2017/PublicLands_Topic_17.pdf

⁹ Public Opinion Strategies, poll conducted May 13-16, 2017 utahdinebikeyah.org/wp-content/uploads/2017/05/Utah-Statewide-Key-Findings-Final-5-22-17.pdf



attention, and national monuments including Bears Ears certainly fit the bill. There is already a need to fund additional management at Bears Ears, regardless of its status. The worst possible step to take for Bears Ears would be to remove or reduce its protected status, leading to a lower priority assigned to the serious issues that need to be addressed now. Visitors are already arriving in record numbers, and education around responsible visitation is essential to ensuring that the public can learn about how to visit the Bears Ears region and its irreplaceable cultural sites with respect. Local land managers on the ground are already taking steps to improve resource protection, and the Department of the Interior should be advocating for increased funding for Bears Ears and other national monuments from Congress.

4. “The Secretary is directed to consider:”

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

Perhaps meant to be a catch-all, we believe this is the most important category of considerations mandated by the monuments review executive order, and we urge you to prioritize the following factors in making your recommendations:

Extraordinary Significance of Bears Ears

Bears Ears National Monument is historically significant in many ways. It is the first national monument designated in direct response to a petition from sovereign Native American tribes. Bears Ears represents the next step in the evolution of the Antiquities Act, which has previously been used to protect only objects of antiquity. Bears Ears’ national monument proclamation names Native American Traditional Knowledge as a resource to be protected, and a tool to be used in its management. As such, Bears Ears honors not just objects, but the living, vibrant, and unique cultures that have evolved in this landscape.

The unity of the tribes is also historic — never before had these tribes agreed to set aside their many differences and work together to protect their ancestral public lands at Bears Ears. Their unity came about due to the powerful cultural significance of Bears Ears to the coalition tribes, and the importance of this coming together cannot be understated. The designation of Bears Ears is a powerful testament to the active government-to-government relationship between tribes and the federal government. Officials from the previous administration met with the tribes time and again to understand their vital connections to this landscape, and the monument’s designation is a result of what the tribes view as the best outcome of the government-to-government relationship. Reducing or rescinding Bears Ears in your opening months as secretary would no doubt do irreparable damage to these government-to-government relationships, a concern which should be given the most serious consideration.

The collaborative management component of Bears Ears National Monument is also an important and long-overdue step forward in American land management law. The tribes, surviving through eviction, elimination, and termination, have more than earned their seat at the



table in decisions over their ancestral lands, and their great expertise in matters related to the resources at Bears Ears will benefit all Americans. Bears Ears is the cutting edge — it is a place where western science and traditional knowledge will be joined together in a dance of reciprocity, reverence, and respect. The tribes lobbied hard, and though they did not get everything they asked for, the model found in Bears Ears’ proclamation is the strongest yet in American law. The tribes have formed their Bear Ears Tribal Commission as outlined by the proclamation, have met several times, and are already at work with local land managers on making the future for Bears Ears brighter, even as the review mandated by the executive order proceeds. Rather than snuffing out this fire just as it begins to catch, collaborative management at Bears Ears should be given a chance to reveal its great promise.

Legality of Presidential Action to Reduce or Rescind National Monuments

In making your recommendation, you have the choice to recommend executive or congressional action, and the only workable method to having your recommendations enacted is via the United States Congress. The Antiquities Act explicitly gives the president the authority to create national monument, but not to diminish or eliminate them. Though a handful of monuments have been diminished by subsequent presidential proclamation prior to the passage of FLPMA, this was most often done to small monuments where clear errors in the original proclamation were demonstrable. This is not the case with Bears Ears, whose proclamation is comprehensive, legally and factually correct, not to mention a beautiful and poetic piece of American law.

Presidential action would assuredly trigger immediate legal action. A decision to recommend presidential action will add yet another legal burden to an administration already mired deeply in the courts over legally questionable executive action. Executive action using a power not granted by Congress (modification of national monuments) will not be viewed favorably in the eyes of the law, and neither should it be by members of Congress or former members of Congress such as yourself. According to recent legal analysis:

“Congress did not, in the Antiquities Act or otherwise, delegate to the President the authority to modify or revoke the designation of monuments. Further, the Federal Land Policy and Management Act of 1976 makes it clear that the President does not have any implied authority to do so, but rather that Congress reserved for itself the power to modify or revoke monument designations. . . .the enactment of FLPMA in 1976 removes any doubt as to whether **Congress intended to reserve for itself the power to revoke or modify national monument proclamations.** Congress stated so explicitly.”¹⁰ (Emphasis added)

¹⁰ Squillace, Mark Stephen and Biber, Eric and Bryner, Nicholas S. and Hecht, Sean B., Presidents Lack the Authority to Abolish or Diminish National Monuments (May 13, 2017). 103 Va. L. Rev. Online (2017); UCLA School of Law, Public Law Research Paper No. 17-16; UC Berkeley Public Law Research Paper. Available at SSRN: <https://ssrn.com/abstract=2967807>



As such, Congress is the appropriate venue to alter national monument designations, and the only clear and viable legal path to do so. Action in Congress also gives the people a voice through their elected representatives, where executive action can often be opaque.

Popularity

As demonstrated by the polling referenced above, by the outpouring of public comments strongly in favor of leaving monuments as they are, as well as by the large number of monument supporters you encountered on your Utah visit, Bears Ears National Monument is popular and well-supported in the state, regionally, and nationally – there is no broad consensus for reducing, altering, or eliminating it.

Legacy

Please, above all, hold Teddy Roosevelt in your mind when making your decision. Roosevelt signed the Antiquities Act of 1906 into law and he used it again and again. What greater gift could you give, as secretary, to future generations than intact, protected, and treasured national monuments? Teddy Roosevelt stood up to those who would plunder our natural resources, including vocal politicians in localities where the choices he made were sometimes unpopular at the time, though widely valued today. He reserved national forests, he designated national monuments, and he left a tangible, valuable legacy that Americans will enjoy for generations to come. **Bears Ears is such a legacy whose popularity and correctness will only grow over time.** Do as Teddy said: “what you can, with what you have, where you are.” The best thing you can do for yourself, for your legacy, and for all Americans is to uphold and strengthen Bears Ears National Monument by supporting adequate funding and leaving it as it is.

Sincerely,

Tim Peterson

Utah Wildlands Program Director

Grand Canyon Trust