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

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[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.

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[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

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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.*

[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)

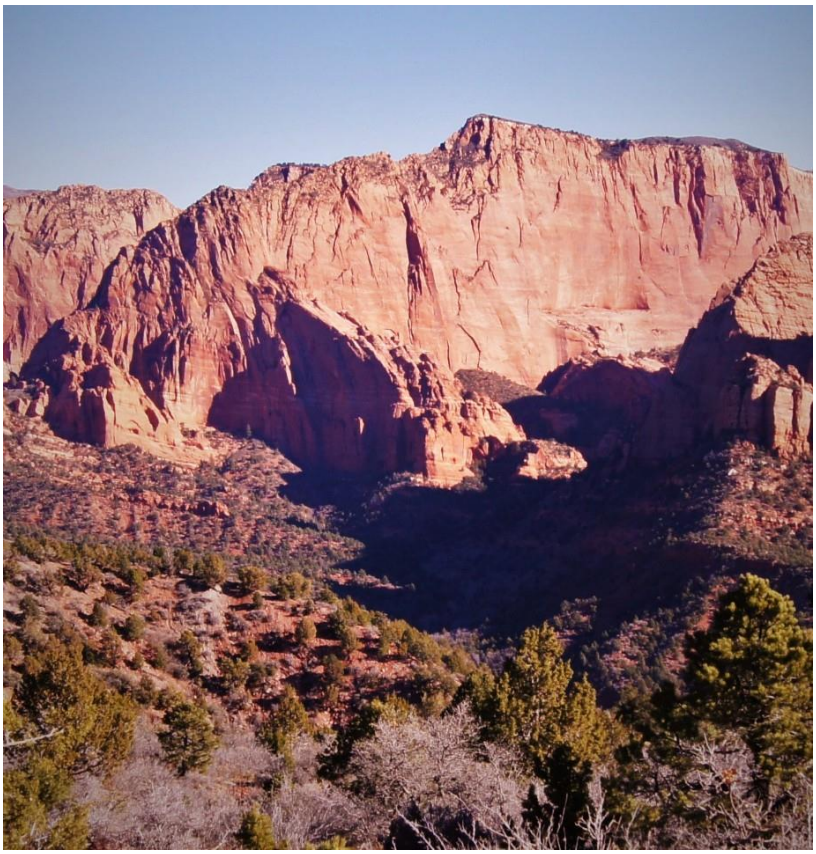
Attachment 8: Robert Glicksman, *Trump's Environmental Steamroller Bears Down on National Monuments*, Center for Progressive Reform Blog (May 1, 2017)

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)

Attachment 1

Revised May 19, 2017



PRESIDENTS LACK THE AUTHORITY TO ABOLISH OR DIMINISH NATIONAL MONUMENTS

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Presidents Lack the Authority to Abolish or Diminish National Monuments

Introduction

By any measure, the Antiquities Act of 1906 has a remarkable legacy. Under the Act, 16 presidents have proclaimed 157 national monuments, protecting a diverse range of historic, archaeological, cultural, and geologic resources.[1] Many of these monuments, including such iconic places as the Grand Canyon, Zion, Olympic, and Acadia, have been expanded and redesignated by Congress as national parks.

While the designation of national monuments is often celebrated, it has on occasion sparked local opposition, and led to calls for a President to abolish or shrink a national monument that was proclaimed by a predecessor.[2] This article examines the Antiquities Act and other statutes, concluding that the President lacks the legal authority to abolish or diminish national monuments. Instead, these powers are reserved to Congress.

The Authority to Abolish National Monuments

The Property Clause of the Constitution vests in Congress the "power to dispose of and make all needful rules and regulations respecting [public property]."[3] The U.S. Supreme Court has frequently reviewed this power in the context of public lands management and found it to be "without limitations."[4] Congress can, however, delegate power to the President or other members of the executive branch so long as it sets out an intelligible principle to guide the exercise of executive discretion.[5]

Congress did exactly this when it enacted the Antiquities Act and delegated to the President the power to "declare by public proclamation" national monuments.[6] At the same time, 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 (FLPMA) 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.

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[1] *See* National Parks Conservation Association, *Monuments Protected Under the Antiquities Act*, Jan. 13, 2017, https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act.

[2] On April 26, 2017, President Trump issued an Executive Order calling for the Secretary of the Interior to review certain national monument designations made since 1996. *Presidential Executive Order on the Review of Designations Under the Antiquities Act*, Apr. 26, 2017, *available at* https://www.whitehouse.gov/the-press-office/2017/04/26/presidential-executive-order-review-designations-under-antiquities-act. The Order encompasses Antiquities Act designations since 1996 over 100,000 acres in size or "where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders[.]" *Id*. § 2(a). The Order asks the Secretary to make "recommendations for . . . Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out" the policy described in the Order. *Id.* § 2(d)-(e).

[3] U.S. Constitution, Art. IV, § 3, cl. 2.

[4] *See Kleppe v. New Mexico*, 426 U.S. 529 (1976); *United States v. San Francisco*, 310 U.S. 16, 29 (1940).

[5] *J. W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394 (1928). The Supreme Court has also made clear that any delegation of legislative power must be construed narrowly to avoid constitutional problems. *Mistretta v. United States*, 488 U.S. 361, 373, n.7 (1989).

[6] 54 U.S.C. § 320301(a).

The Antiquities Act does not grant authority to revoke a monument designation

The United States owns about one third of our nation's lands.[7] These lands, which exist throughout the country but are concentrated in the western United States, are managed by federal agencies for a wide range of purposes such as preservation, outdoor recreation, mineral and timber extraction, and ranching. Homestead, mining, and other laws transferred ownership rights over large areas of federal lands to private parties. At the same time, vast tracts of land remain in public ownership, and these lands contain a rich assortment of natural, historical, and cultural resources.

Over its long history, Congress has "withdrawn," or exempted, some federal public lands from statutes that allow for resource extraction and development, and "reserved" them for particular uses, including for preservation and resource conservation. Congress has also, in several instances, delegated to the executive branch the authority to set aside lands for particular types of protection. The Antiquities Act of 1906 is one such delegation.

The core of the Antiquities Act is both simple and narrow. It reads, in part:

> [T]he President of the United States is hereby 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, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected . . . .[8]

This narrow authority granted to the President to *reserve* land[9] under the Antiquities Act stands in marked contrast to contemporaneous laws that delegated much broader executive authority to designate, repeal, or modify other types of federal reservations of public lands. For example, the Pickett Act of 1910 allowed the President to withdraw public lands from "settlement, location, sale, or entry" and reserve these lands for a wide range of specified purposes "*until revoked by him or an Act of Congress*."[10] Likewise, the Forest Service Organic Administration Act of 1897 authorized the President "to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification *may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve*."[11]

Unlike the Pickett Act and the Forest Service Organic Administration Act, the Antiquities Act withholds authority from the President to change or revoke a national monument designation. That authority remains with Congress under the Property Clause.

This interpretation of the President's authority finds support in the single

[7] *See* PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970).

[8] As in the original. 34 Stat. 225 (1906). The language of the Act was edited and re-codified in 2014 at 54 U.S.C. § 320301(a)-(b) with the stated intent of "conform[ing] to the understood policy, intent, and purpose of Congress in the original enactments[.]" Pub. L. 113-287, §§ 2-3, 128 Stat. 3093, 3094, 3259 (2014).

[9] In an opinion dated September 15, 2000, the Office of Legal Counsel in the Department of Justice found that the authority to reserve federal land under the Antiquities Act encompassed the authority to proclaim a national monument in the territorial sea, 3-12 nautical miles from the shore, or the exclusive economic zone, 12-200 nautical miles from the shore. *Administration of Coral Reef Resources in the Northwest Hawaiian Islands*, 24 Op. O.L.C. 183 (2000), *available at* https://www.justice.gov/sites/default/files/olc/opinions/2000/09/31/op-olc-v024-p0183_0.pdf.

[10] 36 Stat. 847 (1910) (emphasis added).

[11] 30 Stat. 36 (1897) (emphasis added).

authoritative executive branch source interpreting the scope of Presidential power to revoke monuments designated under the Act: a 1938 opinion by Attorney General Homer Cummings. President Franklin D. Roosevelt had specifically asked Cummings whether the Antiquities Act authorized the President to revoke the Castle Pinckney National Monument. In his opinion, Cummings compared the language noted above from the Pickett Act and the Forest Service Organic Act with the language in the Antiquities Act, and concluded unequivocally that the Antiquities Act "does not authorize [the President] to abolish [national monuments] after they have been established."[12]

FLPMA clarifies that only Congress can revoke or downsize a national monument

In 1976, Congress enacted the Federal Land Policy and Management Act of 1976 (FLPMA).[13] FLPMA governs the management of federal public lands lacking any specific designation as a national park, national forest, national wildlife refuge, or other specialized unit. The text, structure, and legislative history of FLPMA confirm the conclusion of Attorney General Cummings and leave no doubt that the President does not possess the authority to revoke or downsize a monument designation.

FLPMA codified federal policy to retain, rather than dispose of, the remaining federal public lands, provided for specific procedures for land-use planning on those lands, and consolidated the wide-ranging legal authorities relating to the uses of those lands. Prior to FLPMA's enactment, delegations of executive authority to withdraw public lands from development or resource extraction were dispersed among federal statutes including the Pickett Act and the Forest Service Organic Act. Moreover, in *United States v. Midwest Oil Co.*, the Supreme Court held that the President enjoyed an implied power to withdraw public lands as might be necessary to protect the public interest, at least in the absence of direct statutory authority or prohibition.[14]

FLPMA consolidated and streamlined the President's withdrawal power. It repealed the Pickett Act,[15] along with most other executive authority for withdrawing lands—with the notable exception of the Antiquities Act. In place of these prior withdrawal authorities, FLPMA included a new provision – section 204 – that authorizes the Secretary of the Interior "*to make, modify, extend, or revoke withdrawals* but only in accordance with the provisions and limitations of this section."[16]

Subsection 204(j) of FLPMA somewhat curiously states that "[t]he Secretary [of Interior] shall not . . . modify, or revoke any withdrawal creating national monuments under [the Antiquities Act] . . . ."[17] Because

[12] 39 Op. Att'y Gen. 185, 185 (1938).

[13] Federal Land Policy and Management Act of 1976 [hereinafter "FLPMA"], Pub. L. 94-579, 90 Stat. 2743 (1976).

[14] 236 U.S. 459 (1915). *Midwest Oil* involved withdrawals by President Taft of certain public lands from the operation of federal laws that allowed private parties to locate mining claims on public lands and thereby acquire vested rights to the minerals found there. The withdrawals were made on the recommendation of the Secretary of the Interior who had received a report from the Director the Geological Survey describing the alarming rate at which federal oil lands were being claimed by private parties. Noting the government's own need for petroleum resources to support its military, the report lamented that "the Government will be obliged to repurchase the very oil that it has practically given away…." *Id*. at 466-67.

[15] FLPMA, § 704(a), 90 Stat. 2792 (1976). The authority to create or modify forest reserves was repealed in 1907 for six specific states before its repeal was extended to all states in FLPMA Section 704(a). 34 Stat. 1269 (1907).

[16] 43 U.S.C. § 1714(a) (emphasis added).

[17] 43 U.S.C. § 1714(j). The provision reads in its entirety as follows, with emphasis on the part relating to the Antiquities Act:

> The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; *modify or revoke any withdrawal creating national monuments under [the Antiquities Act]*; or modify, or revoke any withdrawal which

only the *President*, and not the Secretary of the Interior, has authority to proclaim national monuments, Congress's reference to the *Secretary*'s authority under the Antiquities Act is anomalous and, as explained further below, may be the result of a drafting error. Nonetheless, this language does reinforce the most plausible reading of the text of the Antiquities Act: that it deliberately provides for one-way designation authority. The President may act to create a national monument, but only Congress can modify or revoke that action.

An examination of FLPMA's legislative history removes any doubt that section 204(j) was intended to reserve to Congress the exclusive authority to modify or revoke national monuments. FLPMA's restriction of executive withdrawal powers originated in the House version of the legislation.[18] Skepticism in the House towards executive withdrawal authority dated back to the 1970 report of the Public Lands Law Review Commission (PLLRC), a Congressionally-created special committee tasked with recommending a complete overhaul of the public land laws. The PLLRC report called on Congress to repeal all existing withdrawal powers, including the power to create national monuments under the Antiquities Act.[19] The Commission suggested replacing this authority with a comprehensive withdrawal process run by the Secretary of the Interior and closely supervised by Congress.[20]

The House Committee on Interior and Insular Affairs' Subcommittee on Public Lands largely followed this recommendation by including Section 204 in its draft of FLPMA. Complementing this section, the bill presented to and passed by the House included a provision – ultimately enacted as Section 704(a) of FLPMA – that repealed the Pickett Act and other extant laws allowing executive withdrawals, as well as the implied executive authority to withdraw public lands that the Supreme Court had recognized in *United States v. Midwest Oil Co*.[21]

Consistent with this approach, the Subcommittee on Public Lands drafted Section 204(j) in order to constrain Executive Branch discretion in the context of national monuments. The Subcommittee frequently discussed the issue during its detailed markup sessions in 1975 and early 1976 on its version of the bill that would eventually become FLPMA.[22]

At an early markup session in May 1975, some subcommittee members, under the mistaken impression that the Secretary of the Interior created national monuments, expressed concerns that some future Secretary might modify or revoke them.[23] The

> added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. Nothing in this Act is intended to modify or change any provision of the Act of February 27, 1976, 90 Stat. 199.

The reference in the first clause prohibiting the Secretary from "mak[ing]" a withdrawal "created by an Act of Congress" does not make sense because the Secretary cannot logically "make" a withdrawal already created by Congress. But it also is not relevant to the Antiquities Act since national monuments are created by the President, not Congress. The second clause likewise addresses withdrawals made by Congress. The third clause is the only one that specifically addresses the Antiquities Act and it makes clear that the Secretary cannot modify or revoke national monuments. The final operative clause likewise prohibits the Secretary from revoking or modifying withdrawals, in that case involving National Wildlife Refuges.

[18] The Senate bill, S. 507 (94th Cong.), contained no restrictions on executive withdrawal power.

[19] See PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 7, at 2, 54-57.

[20] *Id.*

[21] 236 U.S. 459 (1915).

[22] The subcommittee's hearings and markups focused on H.R. 5224, which eventually passed the full Committee in May 1976. The amended version was reintroduced as a clean bill, H.R. 13777, which was approved by the House and set to the conference committee.

[23] *See* Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U.S. House of Representatives, Executive Session, H.R. 5224, et al., Public Land Policy and Management Act of 1975, at 88-93 (May 6, 1975). Later statements by subcommittee members indicate that their understanding was that the Secretary had delegated authority to propose the creation of monuments, but that they were ultimately proclaimed by the President. Subcommittee on Public

Subcommittee therefore began shaping the bill to eliminate any possibility of unilateral executive power to modify or revoke monuments, while maintaining the existing power to create monuments.[24]

Once the Subcommittee's misunderstanding about Secretarial authority to designate monuments was corrected, the Subcommittee also proposed shifting the authority to create national monuments from the President to the Secretary, in the pattern of consolidating withdrawal authority in Section 204.[25] It was after this discussion that the first version of what later became Section 204(j) of FLPMA was drafted, paired with a provision that would have amended the Antiquities Act to transfer designation authority from the President to the Secretary of the Interior.[26] The Ford Administration objected generally to taking away the President's power to withdraw public lands.[27] As part of the subsequent changes to the draft legislation, the Subcommittee dropped the provision that would have transferred monument designation authority from the President to the Secretary.[28]

Section 204(j), however, was retained. Pairing Section 204(j) with the proposed transfer of monument designation power strongly suggests that the language of Section 204(j) was not an effort to constrain (non-existent) Secretarial authority to modify or revoke national monuments, while retaining Presidential authority to do so. Instead, it was part of an overall plan to constrain and systematize all Executive Branch withdrawal power, and reserve to Congress the powers to modify or rescind monument designations. The House Committee's Report on the bill makes clear that this provision was designed to prevent *any* unilateral executive modification or revocation of national monuments. In describing Section 204 of the bill as it was presented for debate on the House floor, the Report explains:

> With certain exceptions, [the bill] will repeal all existing law relating to executive authority to create, modify, and terminate withdrawals and reservations. It would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, Indian reservations, certain defense withdrawals, and withdrawals for National Wild and Scenic Rivers, National Trails, and for other "national" recreation units, such as National Recreation Areas and

Lands, Committee on Interior and Insular Affairs, U.S. House of Representatives, Executive Session, H.R. 5224 & H.R. 5622, at 184 (June 6, 1975).

[24] *See* Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U.S. House of Representatives, Executive Session, H.R. 5224, et al., Public Land Policy and Management Act of 1975, at 91 (May 6, 1975) (statement of Rep. Melcher) ("I would say that it would be better for us if, in presenting this bill to the House, for that matter in full committee, if we made it clear that the Secretary and perhaps also make it part of the bill somewhere, that he can not revoke a national monument."); *id.* at 93 (statement of committee staff member Irving Senzel) ("So we could put in here that—we can put in the statement that he cannot revoke national monuments once created."); *see also* Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U.S. House of Representatives, Executive Session, H.R. 5224 & H.R. 5622, at 176 (June 6, 1975) (statement of Irving Senzel) ("In accordance with the decision made the last time, there is a section added in there that provides that no modification or revocation of national monuments can be made except by act of Congress.")

[25] *Id.* at 183-85.

[26] See Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U.S. House of Representatives, Markup Public Land Policy and Management Act of 1975 Print No. 2, § 204(a), at 23-24 (Sept. 8, 1975) (prohibiting the Secretary from modifying or revoking a national monument); *id.* § 604(c), at 92 (amending the Antiquities Act by substituting "Secretary for the Interior" for "President of the United States").

[27] *See* H.R. REP. 94-1163, at 52 (May 15, 1976) (comments from Secretary of the Interior on Subcommittee Print No. 2 stating that under it, "the proposed . . . Act would be the only basis for withdrawal authority").

[28] See Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U.S. House of Representatives, Public Land Policy and Management Act of 1975 Print No. 4 (March 16, 1976).

> National Seashores. *It would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act* and for modification and revocation of withdrawals adding lands to the National Wildlife Refuge System. These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.[29]

Thus, notwithstanding the anomalous reference to the Secretary in Section 204(j), Congress explicitly stated its intention to reserve for itself the authority to modify or revoke national monuments.[30] The plain language of this report, combined with other statements in the legislative history and the process by which Section 204(j) was created, makes clear that Congress' intent was to constrain all Executive Branch power to modify or revoke national monuments, not just Secretarial authority.

In light of the text of the Antiquities Act, the contrasting language in other statutes at the turn of the 20th century, and the changes to federal land management law in FLPMA, the Antiquities Act must be construed to limit the President's authority to proclaiming national monuments on federal lands. Only Congress can modify or revoke such proclamations.

Authority for Shrinking National Monuments or Removing Restrictive Terms

If the President cannot abolish a national monument because Congress did not delegate that authority to the President, it follows that the President also lacks the power to downsize or loosen the protections afforded to a monument. This conclusion is reinforced by the use of the phrase "modify and revoke" in Section 204(j) of FLPMA to describe prohibited actions . Moreover, while the Antiquities Act limits national monuments to "the smallest area compatible with the proper care and management of the objects to be protected,"[31] that language does not grant the President the authority to second-guess the judgments made by previous Presidents regarding what area or level of protection is needed to protect the objects identified in an Antiquities Act proclamation.

Presidents lack legal authority to shrink national monuments

Over the first several decades of the law's existence, various Presidents reduced the size of various monuments that had been designated by their predecessors. Most of these actions were relatively minor, although the decision by President Woodrow Wilson to dramatically reduce the size of the Mount Olympus National Monument, which is

[29] H.R. REP. 94-1163, at 9 (emphasis added). Floor debates in the House do not contain any record of discussing this particular issue, and the Conference Report on FLPMA, later in 1976, did not specifically address it.

[30] The most plausible interpretation of the reference to the Secretary in the text is therefore a drafting error on the part of the Subcommittee in failing to update the reference in Section 204(j) when it dropped the parallel language transferring monument designation authority from the President to the Secretary. The only other plausible interpretation of Section 204(j) is that the provision was designed to make clear that Section 204(a), which authorizes the Secretary to modify or revoke withdrawals, was not intended to grant new authority to the Secretary over national monuments. Under this reading, the reference to the Secretary in Section 204(j) would not be anomalous but would serve the specific purpose of restricting the scope of Section 204(a). But whether the reference to the Secretary in Section 204(j) was a drafting error, or simply a clarification about the limits of the Secretary's power under Section 204(a) does not really matter because either interpretation is consistent with the conclusion that Congress intended to reserve for itself the power to modify or revoke national monuments. FLPMA's legislative history strongly reinforces this point.

[31] 54 U.S.C. § 320301(b).

described briefly below, was both significant and controversial.[32] Importantly though, no Presidential decision to reduce the size of a national monument has ever been tested in court, and so no court has ever passed on the legality of such an action. Moreover, all such actions occurred before 1976 when FLPMA became law. As the language and legislative history of FLPMA make clear, Congress has quite intentionally reserved to itself "the authority to *modify* and revoke withdrawals for national monuments created under the Antiquities Act."[33]

In his 1938 opinion, Attorney General Cummings acknowledged the history of modifications to national monuments, noting that "the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom[.]"[34] The opinion, however, does not directly address whether these actions were legal, and does not analyze this issue, other than to reference the language from the Act that the limits monuments to "the smallest area compatible with the proper care and management of the objects to be protected,"

The Interior Department's Solicitor did review several presidential attempts to shrink monuments, but reached inconsistent conclusions. In 1915, the Solicitor examined President Woodrow Wilson's proposal to shrink the Mt. Olympus National Monument, which President Theodore Roosevelt had designated in 1909.[35] Without addressing the core legal issue of whether the President had authority to change the monument status of lands designated by a prior President, the Solicitor expressed the opinion that lands removed from the monument would revert to national forest (rather than unreserved public domain) because they had previously been national forest lands.[36]

In the end, President Wilson did downsize the Mt. Olympus National Monument by more than 313,000 acres, nearly cutting it in half.[37] Despite an outcry from the conservation community, Wilson's decision was not challenged in court and so was allowed to stand.[38]

In 1924, for the first time, the Solicitor squarely confronted the issue of whether a President has the authority to reduce the size of a national monument, concluding that the President lacked this authority. The Solicitor considered whether the President could reduce the size of the Gran Quivira[39] and Chaco Canyon National Monuments.[40] Relying on a 1921 Attorney General's opinion involving military withdrawals, the Solicitor concluded that the President was not authorized to restore lands to the public domain that had been previously set aside as part of a national monument.[41] The Solicitor confirmed this position in a subsequent decision issued in 1932.[42]

Subsequently, in 1935, the Interior Solicitor reversed the agency's position, but this time on somewhat narrow grounds.[43]

[32] *See* Squillace, *supra* note at 561-564

[33] H.R. REP. 94-1163, at 9 (emphasis added); 43 U.S.C. 1714(j) ("The Secretary shall not . . . *modify* or revoke any withdrawal creating national monuments under [the Antiquities Act] . . . .") (emphasis added).

[34] 39 Op. Att'y Gen. 185, 188 (1938).

[35] Proclamation No. 869, 35 Stat. 2247 (1909); *see also* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 562-63 (2003).

[36] Solicitor's Opinion of April 20, 1915, at 5-6 (on file with authors).

[37] Proclamation No. 1293, 39 Stat. 1726 (1915).

[38] *See* Squillace, *supra* note 35, at 563-64.

[39] Proclamation No. 959, 36 Stat. 2503 (1909).

[40] Proclamation No. 740, 35 Stat. 2119 (1907).

[41] Solicitor's Opinion of June 3, 1924, M-12501. In language that anticipated the later 1938 opinion, this 1921 Attorney General's opinion concluded that "[t]he power to thus reserve public lands and appropriate them . . . does not necessarily include the power to either restore them to the general public domain or transfer them to another department." 32 Op. Att'y Gen. 488, 488-491 (1921). The Solicitor's 1924 opinion might be distinguished from the 1915 opinion on the grounds that the earlier opinion had specifically supported the modification of the monument because the lands would not be restored to the public domain, but would rather be reclassified as national forests. The legal argument against the modification of monument proclamations, however, has never rested on whether the lands would be restored to the public domain or revert to another reservation or designation.

[42] Solicitor's Opinion of May 16, 1932, M-27025.

[43] Solicitor's Opinion of January 30, 1935, M-27657.

This opinion relied heavily on the implied authority of the President to make and modify withdrawals that had been upheld by the U.S. Supreme Court in *United States v. Midwest Oil Co*.[44] The argument that *Midwest Oil* imbues the President with implied authority to modify or abolish national monuments is problematic, however, for at least three reasons. First, as described previously, it is Congress that enjoys plenary authority over our public lands under the constitution, and the President's authority to proclaim a national monument derives solely from the delegation of that power to the President under the Antiquities Act. But the Antiquities Act grants the President only the power to reserve land, not to modify or revoke such reservations. Such actions, therefore, are beyond the scope of Congress' delegation. Second, the *Midwest Oil* decision relied heavily on the perception that Presidential action was necessary to protect the public interest by preventing public lands from being exploited for private gain. No such interest is being protected if the law is construed to allow a President to open lands to private exploitation. Finally, and as noted previously, Congress expressly overruled *Midwest Oil* when it enacted FLPMA in 1976.[45] Thus, even if those earlier, pre-FLPMA monument modifications might arguably have been supported by implied presidential authority, that implied authority is no longer available to justify the shrinking of national monuments following the passage of FLPMA.[46]

Some critics of national monument designations have argued that a President can downsize a national monument by demonstrating that the area reserved does not represent the "smallest area compatible" with the protection of the resources and sites identified in the monument proclamation.[47] But allowing a President to second-guess the judgment of a predecessor as to the amount of land needed to protect the objects identified in a proclamation is fraught with peril because it essentially denies the first President the power that Congress granted to proclaim monuments. If that were the law, then nothing would stop a President from deciding that the objects identified by a prior President were themselves not worthy of protection. The one-way power to reserve lands as national monuments was obviously intended to avoid this danger. Moreover, the fact that national monuments often encompass large landscapes, which are themselves denoted as the objects warranting protection, is not a cause for concern because the courts, including the U.S. Supreme Court have consistently upheld the use of the Antiquities Act to protect such landscapes as "objects of historic or scientific interest." The Grand Canyon,[48] designated less than two

[44] 236 U.S. 459 (1915).

[45] FLPMA, § 704(a), 90 Stat. 2792 (1976). While the text of Section 704(a) specifically mentions the power of the President "to make withdrawals," given the clear intent of Congress in FLPMA to reduce executive withdrawal power, the section is best understood as also repealing any inherent Presidential power recognized in *Midwest Oil* to modify or revoke withdrawals as well.

[46] This repeal removes any presumption of inherent Presidential authority to withdraw public lands or modify past withdrawals. As noted above, such authority, if any, must derive from an express delegation from the Congress. In this way, the power of the President or any executive branch agency over public lands is unlike the inherent power of the President to issue, amend, or repeal executive orders or the inherent power of the Congress to promulgate, amend or repeal laws. It is arguably akin to the power of administrative agencies to issue, amend, or repeal rules but, unlike the Antiquities Act, each of these powers has been expressly delegated to agencies by the Administrative Procedure Act. See 5 U.S.C. §551(5) (definition of "rulemaking").

[47] *See, e.g.*, John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations* 14-18 (American Enterprise Institute 2017). The Interior Solicitor's 1935 opinion, and a subsequent one in 1947, addressed this issue in reviewing and supporting the validity of the decision by Woodrow Wilson to shrink the Mt. Olympus National Monument. According to that opinion, both the Interior and Agriculture Departments thought the area was "larger than necessary." However, there is no legal basis for determining that the opinions of cabinet officials should overturn a prior presidential determination as to the management requirements of a protected monument. *See* Squillace, *supra* note 35, at 561-62; *National Monuments*, 60 *Interior* Dec. 9 (July 21, 1947).

[48] Cameron v. United States, 252 U.S. 450, 455-56

years after the Act's passage, and the Giant Sequoia National Monument, created in 2000,[49] are two prominent examples of landscape level monuments that have been upheld by the courts.

It is conceivable, of course, that a revised proclamation might be needed to correct a mistake or to clarify a legal description in the original proclamation, as occurred very early on when President Taft proclaimed the Navajo National Monument and subsequently issued a second proclamation clarifying what had been an extremely ambiguous legal description.[50] But the clear restriction on modifying or revoking a national monument designation—cemented by FLPMA—indicates that a President cannot simply revisit a predecessor's decision about how much public land should be protected.

Removing protections that apply on national monuments would be an unlawful modification

A related issue is whether a President can modify a national monument proclamation by removing some or all of the protections applied to the monument area, such as limitations on livestock grazing, mineral leasing, or mining claims location. Plainly, these are types of "modifications." As discussed above, Congress's use of the phrase "modify and revoke" to describe prohibited actions demonstrates that the same legal principles apply here as would apply to an attempt to abolish a monument. More generally, if a President lacks the authority to abolish or downsize a monument, it would also suggest a lack of presidential authority to remove any restrictions imposed by a predecessor. Moreover, to the extent that presidential authority is premised on an argument that the President can shrink a monument to conform to the "smallest area compatible" language of the Antiquities Act, that argument would be inapplicable to an effort to remove restrictive language from a predecessor's national monument proclamation.[51]

Aside from these legal arguments, construing the Antiquities Act as providing one-way Presidential designation authority is consistent with the fundamental goal of the

(1920). (The Court dismissed the plaintiff's objection to the establishment of this 808,120 acre monument with these words:

> It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.)

Id. at 456.

[49] Tulare County v. Bush, 306 F.3d 1138, 1140-41 (D.C. Cir. 2002). Additional Supreme Court cases that address Antiquities Act designations support this broad interpretation of what may constitute an "object of historic or scientific interest." *See* United States v. California, 436 U.S. 32, 34 (1978); Cappaert v. United States, 426 U.S. 128, 131-32 (1976).

[50] Taft's original proclamation for the Navajo National Monument in Arizona protected "all prehistoric cliff dwellings, pueblo and other ruins and relics of prehistoric people, situated on the Navajo Indian Reservation, Arizona between the parallels of latitude 36 degrees thirty minutes North, and thirty seven degrees North, and between longitude one hundred and ten degrees West and one hundred and ten degrees forty five minutes West … together with forty acres of land upon which each ruin is located, in square form, the side lines running north and south and east and west, equidistance from the centers of said ruins." Proclamation No. 873, 36 Stat. 2491 (1909). The map accompanying the proclamation states that it is "[e]mbracing all cliff dwelling and pueblo ruins between the parallel of latitude 36o 30' North and 37 North and longitude 110o West and 110o 45' West … with 40 acres of land in square form around each of said ruins." *Id.* Thus, the original proclamation was ambiguous. It plainly was not intended to include all of the lands within the latitude and longitude description but only 40 acres around the ruins in that area. The map specifically identified at least 7 sites as "ruins" and appeared to denote a handful of other sites that might have been intended for protection under the original proclamation, although the map is a little unclear on this point. The revised proclamation issued three years later, also by Taft, clarified the ambiguous references in the original proclamation. It included a survey done after the original proclamation and protects two, 160 tracts of land and one, 40 acre tract. Proclamation No.1186, 37 Stat. 1738 (1912).

[51] For further discussion of this issue, *see* Squillace, *supra* note 35, at 566-68.

statute. Faced with a concern that historical, archaeological, and natural or scenic resources could be damaged or lost, Congress purposefully devised a delegation to the President to act quickly to ensure that objects of historic and scientific interest on public lands can be preserved before they are looted or compromised by incompatible land uses, such as the location of mining claims. Once the President has determined that these objects are worthy of protection, no future President should be able to undermine that choice. That is a decision that Congress has lawfully reserved for itself under the terms of the Antiquities Act, as reinforced by the text of FLPMA.

Conclusion

Our conclusion, based on analysis of the text, other statutes, and legal opinions, is that the President lacks the authority to rescind, downsize, or otherwise weaken the protections afforded by a national monument proclamation declared by a predecessor. Moreover, while we believe this to be the correct reading of the law from the time that the Antiquities Act was adopted in 1906, 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.

Presidents may retain some authority to clarify a proclamation that contains an ambiguous legal description or a mistake of fact.[52] Where expert opinions differ, however, courts should defer to the choices made by the President proclaiming the monument and the relevant objects designated for protection. Otherwise, a future President could undermine the one-way conservation authority afforded the President under the Antiquities Act and the congressional decision to reserve for itself the authority to abolish or modify national monuments.

The remarkable success of the Antiquities Act in preserving many of our nation's most iconic places is perhaps best captured by the fact that Congress has never repealed any significant monument designation.[53] Instead, in many instances, Congress has expanded national monuments and redesignated them as national parks. For more than 100 years, Presidents from Teddy Roosevelt to Barack Obama have used the Antiquities Act to protect our historical, scientific, and cultural heritage, often at the very moment when these resources were at risk of being exploited. That is the enduring legacy of this extraordinary law. And it remains our best hope for preserving our public land resources well into the future.

[52] *See* note 50, *supra*.

[53] About a dozen monuments have been abolished by the Congress. None of these were larger than 10,000 acres, and no monument has been abolished without redesignating the land as part of another national monument or other protected area since 1956. *See* Squillace, *supra* note 35, Appendix.

This paper may be cited freely with proper attribution prior to official publication. The authors request that, where possible, citations refer to the paper's availability at https://ssrn.com/abstract=2967807 and to its future publication in 103 Va. L. Rev. Online ___ (2017).

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Cover Photo: Kolob Canyon, Zion National Park, Utah (Nicholas Bryner)

Attachment 2

56°

- BEARS EARS NATIONAL MONUMENT -

"Rising from the center of the southeastern Utah landscape and visible from every direction are twin buttes so distinctive that in each of the native languages of the region their name is the same: Hoon'Naqvut, Shash Jáa, Kwiyagatu Nukavachi, Ansh An Lashokdiwe, or in English: Bears Ears."

Though they're the monument's namesake, the Bears Ears feature is only one part of this landscape. The pair of towering buttes stand in the center, with Dark Canyon Wilderness and Beef Basin to the west, Comb Ridge on the east, the Grand Gulch Plateau and Cedar Mesa to the south and Indian Creek/Canyonlands National Park to the north.

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 the modern-day connections that the Navajo Nation, Ute Mountain Ute Tribe, Hopi Nation and other tribes have to this land.

Travel Advisory

Visitors traveling to the area today should be aware that the recent designation of monument status has not allowed for the U.S. Forest Service and Bureau of Land Management to develop their management plan, nor create new services or facilities. Don't expect the same level of infrastructure as Arches, Canyonlands or Zion national parks. Much of the land in Bears Ears National Monument is rugged, wild and remote, requiring greater preparation, fitness and respect on the part of the visitor. Additional care needs to be taken around the numerous archaeological sites in the area. The Bureau of Land Management and Tread Lightly's "Respect and Protect" ethic should be the mindset for anyone traveling to Bears Ears.

Getting To Bears Ears

Bears Ears National Monument is located west of the towns of Blanding and Monticello and north of Mexican Hat in southeastern Utah.

The area is approximately 75 minutes south of Moab, an hour northwest of Four Corners Monument and roughly 30 minutes north of Monument Valley Navajo Tribal Park. The western border of Bears Ears, near the Hite Crossing of the Colorado River, is less than an hour south of Hanksville, or 90 minutes from Capitol Reef National Park.

Visitor Information

There is no official Bears Ears National Monument visitor center yet. The closest starting points are the Kane Gulch BLM Ranger Station 36 miles west of Blanding (season opens March 1), the BLM office in Monticello or the Blanding Visitor Center (12 North Grayson Parkway). Both will have information on visiting areas within the monument and current conditions.

BLM office in Monticello: 435-587-1500

Bears Ears Weather and Climate

The best time to go is March through mid-June and September through October. The heat of July and August can exceed 100 degrees in some areas, and there are also monsoons, which can bring flash floods. Much of Bears Ears is high desert country, often exceeding 6,000 feet above sea level on the plateau. Carry plenty of water at all times and know your limits. For more information on packing for outdoor adventure in Utah, see our Planning Ahead for Your Utah Adventure: Outdoors Tips for Three-Season Fun.

Permits, Fees and Roads

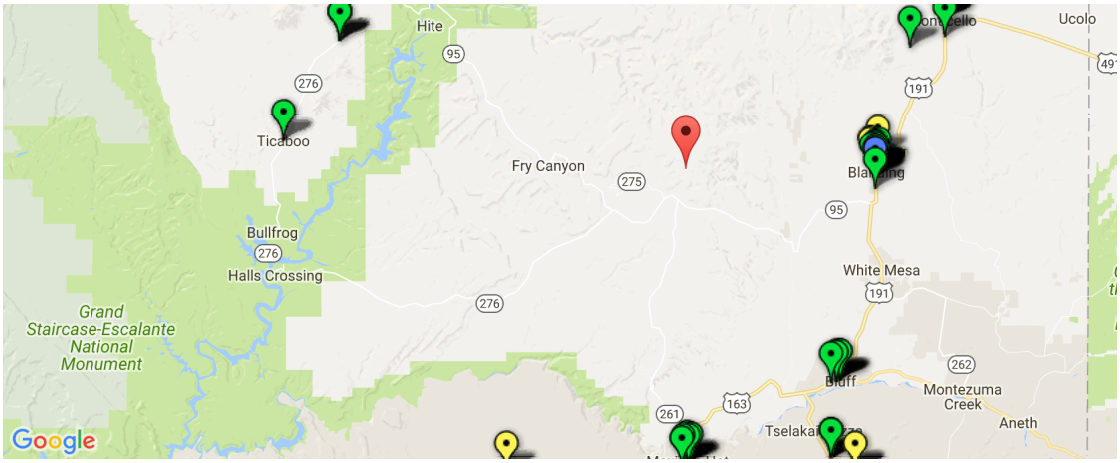
Permits and fees are currently required for several hikes in Bears Ears. Some permits are payable at the trailheads, others must be obtained from BLM field offices. Many of the dirt roads in this area are impassable when wet, snowy or muddy. Check at the visitor center or the ranger station before traveling into the backcountry. Permits are needed for both day and overnight trips, and backpackers must make advance reservations.

GPS Coordinates
Kane Gulch Ranger Station (season opens March 1)
(37.524414, -109.895755)

Respect and Protect

The law of the land is to leave what you find in the ruins and with the ancient artifacts. Enjoy it by viewing and photographing it, and note that touching these things accelerates the erosion process.

When visiting sensitive archaeological, paleontological, and other natural resources on federal, state, and tribal lands, always visit with respect. To help visitors understand the importance of these incredible sites, the Bureau of Land Management (BLM) Utah State Office and Tread Lightly! partnered to develop and implement a statewide public awareness campaign called "Respect and Protect" to engage the public in the stewardship of our nation's priceless cultural and natural heritage. The campaign also reminds public lands visitors that looting and vandalism of archaeological and paleontological resources on federal, state, and tribal lands is against state and federal law.



Bears Ears National Monument

, UT

Attachment 3

The Salt Lake Tribune
(http://www.sltrib.com)

Op-ed: Recent national monuments have protected local interests

By John Ruple
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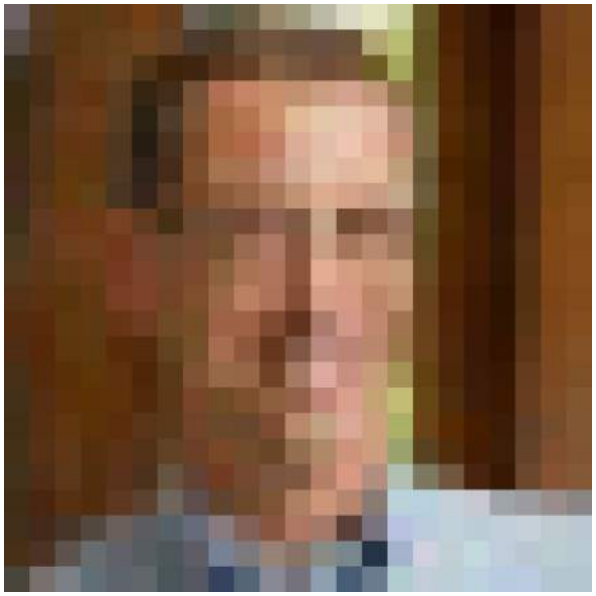

It has been said that “we are entitled to our opinions, just not our own facts.” Recent debate over the Public Lands Initiative and Bears Ears National Monument proposal makes this a good time to review the facts about national monument designations.

For 110 years, the Antiquities Act has empowered presidents to protect lands having historic or scientific interest. Indeed, 15 of the last 19 presidents, Republicans and Democrats alike, have designated national monuments. Grand Canyon, Capitol Reef and Arches national parks all began as national monuments.

Critically, the Antiquities Act affords presidents the ability to craft monument designations that are responsive to local concerns. President Obama, for example, recognized the importance of water to westerners when, in creating the Basin and Range National Monument, he stated that the monument neither created new federal water rights nor altered existing state-issued water rights. In creating the Browns Canyon National Monument, he expressly recognized state “jurisdiction and authority with respect to fish and wildlife management.” In creating the Río Grande Del Norte National Monument, he protected utility line rights-of-way within the monument. Similarly, the Basin and Range National Monument proclamation states that, “nothing in this proclamation shall be deemed to affect authorizations for livestock grazing, or administration thereof, on federal lands within the monument. Livestock grazing within the monument shall continue to be governed by laws and regulations other than this proclamation.” And of course monument proclamations apply only to federal land. As the San Gabriel Mountain National Monument proclamation and every other recent proclamation make clear, monuments are established “subject to valid existing rights.” These kinds of assurances, and more, are common in monument proclamations.

Recent national monument proclamations also universally require managers to create a management plan in consultation with state, local and tribal government because, as all six members of Utah’s congressional delegation recently noted, “the wisest land-use decisions are made with community involvement and local support, ... [and] the most effective land management policy is inclusive and engaging, not veiled or unilateral.”

That is why, in creating the Berryessa Snow Mountain National Monument, President Obama directed monument managers to “provide for public involvement in the development of the management plan including, but not limited to, consultation with tribal, state and local governments. In the development and implementation of the management plan, [federal agencies] shall maximize opportunities ... for shared resources, operational efficiency, and cooperation.”

Furthermore, monument designations do not, as some have claimed, limit American Indian access or use — to do so would violate the American Indian Religious Freedom Act, which declares that “it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions ... including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”

In fact, in designating the Chimney Rock Mountains National Monument, President Obama required the Forest Service to “protect and preserve access by tribal members for traditional cultural, spiritual, and food- and medicine-gathering purposes, consistent with the purposes of the monument, to the maximum extent permitted by law.” Virtually identical language is found in each of the six most recent monument proclamations.

If President Obama does create the Bears Ears National Monument, we should expect that he will take similar steps to protect state, local and tribal interests. Let’s set aside political rhetoric and debate the Bears Ears proposal and Public Lands Initiative with these facts in mind.

John Ruple is an associate professor of law (research) at the University of Utah’s S.J. Quinney College of Law, and a fellow with the University’s Wallace Stegner Center for Land, Resources and the Environment.

Attachment 4

Why monuments aren't land grabs

Los Angeles Times

January 23, 2017 Monday, Home Edition

Section: MAIN NEWS; Opinion Desk; Part A; Pg. 11

Length: 849 words

Byline: Michael Blumm, Hillary Hoffmann, Michael Blumm, a professor at Lewis and Clark Law School, specializes in public lands and natural resources law. Hillary Hoffmann, a professor at Vermont Law School, focuses on natural and cultural resources and tribal lands.

Body

President Obama's 2016 national monument designations have prompted Republican critics from Nevada to Maine to suggest that, under cover of the Antiquities Act of 1906, he exceeded his authority, orchestrating a federal land grab. These critics are ignoring the history and scope of the act and the positive effects of monument designations on nearby communities.

The Antiquities Act gives presidents broad authority to protect objects and surrounding public lands with historical, cultural and scientific value to the nation. Sixteen presidents have used the statute since Theodore Roosevelt signed it into law and created the first national monument at Devil's Tower in Wyoming. In the short term, their actions have frequently generated controversy.

One of the most significant battles arose in 1943. During a tug of war over the preservation of the valley at the foot of the Teton Range in Wyoming, President Franklin Roosevelt stepped in and established the Jackson Hole National Monument. It included 35,000 acres purchased secretly, for the sake of preservation, by John D. Rockefeller Jr. FDR meant to resolve the situation, but the monument designation intensified local anger over outsider interference, worries about lost tax revenue and ranchers' concerns about their future.

Numerous congressional revocation efforts by Wyoming Republicans followed, and a lawsuit challenged the use of the Antiquities Act itself, but the monument survived. In 1950, it was incorporated into Grand Teton National Park, which now welcomes around 3 million visitors annually. Roosevelt's controversial action is now credited with bolstering, rather than destroying, Teton County.

A similar story has been repeated elsewhere. In southern Utah in the late 1990s, President Clinton designated the Grand Staircase-Escalante National Monument against the wishes of many in Utah who cited fears that "locking up" these lands would depress local economies. In fact, a recent study of the region by Headwaters Economics found that after the designation, the population grew by 8%, jobs by 38% and real per capita income by 30%.

The lengthy legal history of monument designations also informs the debate over presidential overreach. No monument proclamation has ever been revoked; federal courts have dismissed all legal challenges. And the U.S. attorney general long ago concluded that presidents lack the authority to undo designations made by other presidents.

Since the Antiquities Act applies only to lands that already are federal, no private property rights are affected. Monument opponents claim that designation will curtail grazing, mining and vehicular recreation, yet existing "multiple uses" that do not

threaten the area's historic and scientific value are preserved. In Grand Staircase, pre-designation livestock grazing continues. The same will be true in Bears Ears National Monument, in Utah, which was designated by Obama in December.

Monuments are neither wilderness areas nor national parks, both of which are created under more stringent criteria. All national monuments are managed according to plans that, by law, must be revisited. Although one president creates a monument, subsequent presidents often implement the management objectives.

Opponents have labeled Obama's 2016 monuments as "midnight regulations," although most of the recent designations have been a long time in the making. Interior Secretary Harold Ickes proposed Bears Ears in 1936. Gold Butte National Monument, added in southern Nevada in December, was first proposed by local tribes in 2008. The expanded Cascade-Siskiyou Monument in Oregon and Washington was first established two decades ago, and the Papah?naumoku?kea Marine National Monument, which Obama enlarged in August, was established in 2006 by President George W. Bush.

Designations are accompanied by detailed rationales that explain the nationally significant resources the monument will protect. The rationales take months, often years, to develop. They are hardly the result of midnight whims.

Tellingly, presidents from both parties have defended prior monument designations. George W. Bush's Justice Department successfully defended monuments designated by President Clinton in court. President Wilson's lawyers won Supreme Court approval of the Grand Canyon monument in 1920, proclaimed by Wilson's predecessor, Teddy Roosevelt.

Although the Antiquities Act does not require it, the Obama administration engaged in substantial public discussions before the recent designations. Those discussions led to scaling down the size of Bears Ears monument and eliminating several areas that might be mined or used for vehicular recreation in the future.

The often ephemeral local opposition to monument status should not persuade Congress or the Trump administration to attempt to revoke the Obama designations. Today's protesting voices represent a decided minority of the wider public that benefits from public lands conservation, including future generations. Short-term political expediency has not predominated in the past and should not prevail in the future.

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Person: BILL CLINTON (59%); BARACK OBAMA (59%); JAY ROCKEFELLER (58%)

Geographic: WYOMING, USA (93%); UTAH, USA (93%); ROCKY MOUNTAINS (79%); UNITED STATES (79%)

Load-Date: January 23, 2017

Attachment 5

Op-ed: Trump officials should visit Bears Ears before making a hurried decision

The Salt Lake Tribune

February 4, 2017 Saturday

Section: NEWS; Opinion; Columnists

Length: 825 words

Byline: By Bob Keiter And John Ruple

Body

We are writing to encourage President Donald Trump and Interior Secretary-designate Ryan Zinke to proceed cautiously in determining whether to abolish or change the Bears Ears National Monument. While Utah's elected officials are imploring them to take prompt action, the recent Colorado College poll reveals that Utah voters, by a 15-point margin, favor the Bears Ears designation.

Given the depth and breadth of sentiments on all sides of the issue, we urge the administration to visit the monument and engage with its diverse stakeholders before proceeding. Postponing such a momentous decision costs only time and would de-escalate the simmering conflict, while providing the administration sufficient opportunity to weigh the implications of various courses of action.

By any objective standard, the Bears Ears National Monument designation fits the terms of the Antiquities Act. It protects "historic and prehistoric structures and other objects of historic or scientific interest" on federally owned lands. Indeed, the congressionally chartered National Trust for Historic Preservation recognizes that "perhaps nowhere in the United States are so many well-preserved cultural resources found within such a striking and relatively undeveloped natural landscape."

Moreover, the monument proclamation borrows heavily from the Utah delegation's Public Lands Initiative proposal to delineate the protected acreage, establish multi-party advisory groups and ensure Native American access for traditional purposes. Hurriedly revising the Bears Ears National Monument would put irreplaceable resources, and the Native Americans that depend upon them, at risk of irreparable injury.

A decision to abolish or alter the monument will thrust the new administration into an uncertain legal thicket. Because no president has attempted to abolish a national monument by proclamation, there is no definitive judicial interpretation whether such action would be authorized under the Antiquities Act. However, multiple legal analyses, including U.S. attorneys general opinions, agree that only Congress may undo a presidential proclamation of a national monument under the Antiquities Act. Although presidents appear to have the power to make minor revisions to a monument proclamation, no president has tried to do so to the extent or for the reasons cited by monument opponents, calling such an action into question as well.

It has been more than 50 years since a president last diminished a national monument, when John F. Kennedy redrew the boundary of Bandelier National Monument, cutting here and adding there, to enhance resource protection. No president has ever diminished a monument while the ink is still wet on the proclamation. President Taft moved swiftest, waiting three years to reduce a monument that he himself had created earlier in his own presidency. The largest reduction, trimming 311,280 acres from the Mt. Olympus National Monument, was done to increase the supply of high quality wood to produce Allied combat airplanes and lumber for ships during World War I. No similar exigencies exist today.

Moreover, abolishing or dramatically reducing the monument will not resolve the issues driving current frustrations: a landscape checkerboarded by multiple owners, competing management objectives, underfunded land managers, or polarized stakeholders. Instead, action taken in haste and without adequate public involvement will almost certainly invite protests and litigation. Litigation will, in turn, further complicate and delay good faith efforts to improve on-the-ground management. One need only consider the Dakota Access Pipeline controversy to appreciate the need for a deliberative and thoughtful approach to addressing complex legal issues and heartfelt Native American concerns.

The new administration is well positioned to chart a different and more considered course, building on the hard work that came before and addressing the specific issues that underlie the current discontent over our public lands. To help de-escalate the conflict, we urge the new administration to take the time to visit the monument and familiarize itself with its many resources, and to engage with its diverse stakeholders before moving forward.

Acrimony over public land management has reached a dangerous level. A steady hand is needed to guide us to the common ground that we believe exists. We are encouraged to have a Westerner and a sportsman poised to lead the Department of the Interior during these trying times. With mindful and respectful leadership, we believe that a peaceful and mutually beneficial path forward can be charted, and the public interest can be faithfully served. We urge President Trump and Interior Secretary-designate Zinke take that path.

Bob Keiter is the Wallace Stegner Professor of Law. John Ruple is an Associate Professor of Law and Stegner Center Fellow. Both work at the University of Utah's S.J. Quinney College of Law

Classification

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Industry: NATIONAL PARKS (92%); HISTORIC SITES (90%); HISTORIC DISTRICTS & STRUCTURES (73%)

Person: DONALD TRUMP (78%); RYAN ZINKE (73%)

Geographic: UTAH, USA (93%); UNITED STATES (93%)

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Attachment 6

The Endangered Antiquities Act

The New York Times

April 1, 2017 Saturday, Late Edition - Final

Section: Section A; Column 0; Editorial Desk; Pg. 23; OP-ED CONTRIBUTORS

Length: 982 words

Byline: By JOHN D. LESHY and MARK SQUILLACE

John D. Leshy is an emeritus professor at the University of California Hastings College of the Law in San Francisco, and Mark Squillace is a professor at the University of Colorado Law School in Boulder.

Body

The heart of the Antiquities Act of 1906 is a mere two sentences. But a good argument can be made that this brief law -- which authorizes the president to protect "objects of historic or scientific interest" on federal lands as "national monuments" -- has done more than any other to shape our nation's conservation legacy.

The act has been used more than 150 times, by nearly every president, Republican and Democrat, from Theodore Roosevelt on, to protect hundreds of millions of acres for the inspiration and enjoyment of present and future generations. Five of the nation's 10 most-visited national parks -- Grand Canyon, Zion, Olympic, Teton and Acadia, each attracting millions of people a year -- were first protected by presidents using the Antiquities Act.

Even so, this law is under attack. The 2016 Republican Party platform called for amending it to give Congress and states the right to block the president from declaring national monuments. By thwarting the president's ability to take quick action to protect wild and historic places from threats, this proposal would effectively repeal the act.

Now critics, including Representative Rob Bishop, a Republican from Utah and chairman of the House Committee on Natural Resources, are ramping up a campaign to strip away the president's authority under the Antiquities Act to designate monuments. Mr. Bishop complains that it allows the federal government to "invade" and "seize" lands. But that's not true. The act authorizes the president to protect only lands already "owned or controlled by the government of the United States," not state or private land.

Some dislike the law because presidents have tended to use it late in their terms to sidestep opposition to their designations. But would anyone today seriously question the wisdom of Theodore Roosevelt's using the act to protect what is today the core of Olympic National Park in Washington two days before he stepped down in 1909? Or Herbert Hoover's safeguarding what are now three national parks, including Death Valley in California (1.3 million visitors last year), in his last three weeks in office in 1933? Or Dwight D. Eisenhower's setting aside what is now the Chesapeake and Ohio Canal National Historical Park (five million visitors last year) two days before John F. Kennedy's inauguration in 1961?

Because these presidential actions change the status quo and prevent development, they have sometimes incited local opposition. But over time, the growing popularity of these places often led Congress to recast them as full-fledged national parks.

That's what happened after Franklin D. Roosevelt established the Jackson Hole National Monument in 1943 on land fronting the magnificent Teton mountain range in Wyoming. Outrage ensued. Senator Edward Robertson of Wyoming called the president's action a "foul, sneaking Pearl Harbor blow," and locals led a cattle drive across the new monument in protest. But by 1950, the monument's benefits to local life and the economy persuaded Congress to incorporate it into Grand Teton National Park, and President Harry S. Truman agreed. In 1967, Cliff Hansen, a leader of the cattle drive protest who became a United States senator, acknowledged he had been wrong to oppose Roosevelt's action. He called the expanded Teton Park one of his state's "great assets."

Congress can always overturn a president's monument designation, but has done so only a dozen times. Nearly all involved areas less than 2,000 acres, and the last time it happened was in 1980. But no president has ever attempted to rescind a monument established by a predecessor, and it is unclear whether a president even has the power to do so. Instead, like Congress, presidents have often used the act to expand monuments (and on occasion, to shrink them).

President Jimmy Carter made the most vigorous use of the act up to that time, protecting 56 million acres of federal land in Alaska in 1978 after the state had filed claims to pristine federal lands that Mr. Carter had asked Congress to protect.

In 2006, President George W. Bush established a huge marine national monument in the waters of the Northwestern Hawaiian Islands. He followed that up with several more marine monuments. President Barack Obama enlarged some of those and established several more.

Utah's congressional delegation is among the act's loudest critics. Yet at the same time that Representative Bishop calls it "the most evil act ever invented," the state of Utah's Office of Tourism is spending millions of dollars promoting Utah's "Mighty 5" national parks, boasting that they "draw several million visitors from around the world each year." Four of those "Mighty 5" -- Arches, Bryce Canyon, Capitol Reef and Zion -- were first protected by presidents of both parties using the Antiquities Act.

The Utah delegation is now trying to persuade President Trump to do away with or shrink the Bears Ears National Monument, established last December by President Obama on 1.35 million acres of federal land in southeastern Utah. Bears Ears contains perhaps the richest cultural, archaeological and paleontological resources of any area of comparable size in the nation.

As our population grows and our rich natural and historical heritage faces increasing threats, we should be looking to protect more places that can inspire and inform present and future generations and offer them recreational opportunities. That is the incomparable legacy of the Antiquities Act, and its necessity is as vital today as it ever was. It would be shortsighted in the extreme for Congress to change a single word of what has been, by practically every measure, one of the most fruitful and farsighted laws it has ever put on the books.

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http://www.nytimes.com/2017/03/31/opinion/the-endangered-antiquities-act.html

Graphic

DRAWING (DRAWING BY LEIGH WELLS)

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Person: JOHN F KENNEDY (79%); ROB BISHOP (55%)

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Attachment 7

National monuments: Presidents can create them, but only Congress can undo them

The Conversation

April 28, 2017

Length: 1175 words

Byline: Eric Biber, Professor of Law, University of California, Berkeley; Nicholas Bryner, Emmett/Frankel Fellow in Environmental Law and Policy, University of California, Los Angeles; Sean B. Hecht, Professor of Policy and Practice; Co-Executive Director, Emmett Institute on Climate Change and the Environment; and Co-Director, UCLA Law Environmental Law Clinic, University of California, Los Angeles; Mark Squillace, Professor of Law, University of Colorado

Body

Nicholas Bryner , University of California, Los Angeles; Eric Biber , University of California, Berkeley; Mark Squillace , University of Colorado, and Sean B. Hecht , University of California, Los Angeles

https://cdn.theconversation.com/files/167044/width496/file-20170427-15110-1luveyf.jpg

On April 26 President Trump issued an executive order calling for a review of national monuments designated under the Antiquities Act . This law authorizes presidents to set aside federal lands in order to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest."

Since the act became law in 1906, presidents of both parties have used it to preserve 157 historic sites, archaeological treasures and scenic landscapes, from the Grand Canyon to key landmarks of the civil rights movement in Birmingham, Alabama.

President Trump calls recent national monuments " a massive federal land grab ," and argues that control over some should be given to the states. In our view, this misrepresents the law. National monuments can be designated only on federal lands already owned or controlled by the United States.

The president's order also suggests that he may consider trying to rescind or shrink monuments that were previously designated. Based on our analysis of the Antiquities Act and other laws, presidents do not have the authority to undo or downsize existing national monuments. This power rests with Congress, which has reversed national monument designations only 10 times in more than a century.

Contests over land use

Trump's executive order responds to opposition from some members of Congress and local officials to national monuments created by Presidents Bill Clinton and Barack Obama. It calls for Interior Secretary Ryan Zinke to review certain national monuments created since 1996 and to recommend "Presidential actions, legislative proposals, or other actions," presumably to

shrink or eliminate these monuments. The order applies to monuments larger than 100,000 acres, as well as others to be identified by Secretary Zinke.

When a president creates a national monument, the area is "reserved" for the protection of sites and objects there, and may also be "withdrawn," or exempted, from laws that would allow for mining, logging or oil and gas development. Frequently, monument designations grandfather in existing uses of the land, but prohibit new activities such as mineral leases or mining claims.

Zinke said that he will examine whether such restrictions have led to " loss of jobs, reduced wages and reduced public access " in communities around national monuments. Following Secretary Zinke's review, the Trump administration may try either to rescind monument designations or modify them, either by reducing the size of the monument or authorizing more extractive activities within their boundaries.

https://cdn.theconversation.com/files/167051/width754/file-20170427-15121-g1fdce.jpg

Two of the most-contested monuments are in Utah. In 1996 President Clinton designated the Grand Staircase-Escalante National Monument , a region of incredible slot canyons and remote plateaus. Twenty years later, President Obama designated Bears Ears National Monument , an area of scenic rock formations and sites sacred to Native American tribes.

Utah's governor and congressional delegation oppose these monuments, arguing that they are larger than necessary and that presidents should defer to the state about whether to use the Antiquities Act. Local officials have raised similar complaints about the Gold Butte National Monument in Nevada and the Katahdin Woods and Waters National Monument in Maine, both designated by Obama in late 2016.

What the law says

The key question at issue is whether the Antiquities Act gives presidents the power to alter or revoke decisions by past administrations. The U.S. Constitution gives Congress the power to decide what happens on "territory or other property belonging to the United States." When Congress passed the Antiquities Act, it delegated a portion of that authority to the president so that administrations could act quickly to protect resources or sites that are threatened.

Critics of recent national monuments argue that if a president can create a national monument, the next one can undo it. However, the Antiquities Act speaks only of designating monuments. It says nothing about abolishing or shrinking them.

Two other land management statutes from the turn of the 20th century - the Pickett Act of 1910 and the Forest Service Organic Act of 1897 - gave the president authority to withdraw other types of land, and also specifically stated that the president could modify or revoke those actions. These laws clearly contrast with the Antiquities Act's silence on reversing past decisions.

https://cdn.theconversation.com/files/167054/width754/file-20170427-15097-u07hs2.jpg

In 1938, when President Franklin D. Roosevelt considered abolishing the Castle-Pinkney National Monument - a deteriorating fort in Charleston, South Carolina - Attorney General Homer Cummings advised that the president did not have the power to take this step. (Congress abolished the monument in 1951.)

Congress enacted a major overhaul of public lands law in 1976, the Federal Land Policy and Management Act , repealing many earlier laws. However, it did not change the Antiquities Act. The House Committee that drafted the 1976 law also made clear in legislative reports that it intended to prohibit the president from modifying or abolishing a national monument, stating that the law would "specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act."

The value of preservation

Many national monuments faced vociferous local opposition when they were declared, including Jackson Hole National Monument, which is now part of Grand Teton National Park . But over time Americans have come to appreciate them.

Indeed, Congress has converted many monuments into national parks, including Acadia , the Grand Canyon , Arches and Joshua Tree . These four parks alone attracted over 13 million visitors in 2016. The aesthetic, cultural, scientific, spiritual and economic value of preserving them has long exceeded whatever short-term benefit could have been derived without legal protection.

As Secretary Zinke begins his review of Bears Ears and other national monuments, he should heed that lesson, and also ensure that his recommendations do not overstep the president's lawful authority.

Mark Squillace served as Special Assistant to the Solicitor at the U.S. Department of the Interior in the year 2000.

Eric Biber, Nicholas Bryner, and Sean B. Hecht do not work for, consult, own shares in or receive funding from any company or organization that would benefit from this article, and has disclosed no relevant affiliations beyond the academic appointment above.

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National monuments: Presidents can create them, but only Congress can undo them

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End of Document

Attachment 8

CPRBlog
CENTER FOR PROGRESSIVE REFORM

Trump's Environmental Steamroller Bears Down on National Monuments

by Robert Glicksman

Donald Trump's antagonism toward environmental and natural resource protections seems to know no bounds, legal or otherwise. Among his latest targets are our national monuments, which include some of the most beautiful and historically, scientifically, culturally, and ecologically important tracts of federally owned lands.

During the reign of destruction the president has unleashed in his first 100 days in office, his commitment to fossil fuel resource extraction and development regardless of the impact on our nation's natural resource heritage has become clear. Trump signed a bill repealing the Interior Department's regulations restricting mountaintop removal mining practices that impair water quality and create gaping landscape wounds. He blocked long overdue revisions to the Bureau of Land Management's land use planning rules that afforded greater importance to the protection of ecological integrity and required the agency to consider the impacts of climate change on public lands. He revoked the Council on Environmental Quality's guidelines requiring agencies to factor climate-related considerations into their National Environmental Policy Act evaluations. He ordered Interior Secretary Ryan Zinke to review and "and, if appropriate, . . . as soon as practicable, suspend, revise, or rescind" regulations to ensure that hydraulic fracturing on federal lands is done in an environmentally sound manner, to prevent wasteful flaring of natural gas, and to manage oil and gas production in our national parks and wildlife refuges. Most recently, he ordered Zinke to revise the schedule of offshore oil and gas lease sales so that it includes annual sales to the maximum extent permitted by law and to limit designation of national marine sanctuaries and marine national monument designations that would otherwise restrict drilling activities in ecologically vulnerable areas that provide habitat for a host of aquatic species, including marine mammals.

Last week, the president turned his scowling visage to our national monuments. Asserting that monument designations "may . . . create barriers to achieving energy independence, restrict public access to and use of Federal lands, burden State, tribal, and local governments, and otherwise curtail economic growth," Trump issued an executive order directing Zinke to engage in a review of at least two dozen monuments. Within 120 days, Zinke must submit to the president "recommendations for such Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate."

The president's authority to designate national monuments is provided by the Antiquities Act of 1906. The law authorizes the president, "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 . . . ." This authority is unilateral. Although only Congress can create national parks, the president may designate national monuments without legislative participation. Once designated, these lands are managed under essentially the same rules and standards as those that apply to the national parks. Significantly, mineral development and other extractive uses of the kind favored by Trump and his allies in the fossil fuel industries are highly restricted, if not prohibited.

Within months of the act's passage, President Theodore Roosevelt declared the first national monument, Devil's Tower in Wyoming (which is familiar to many who have not visited it as a result of its central role in

the movie *Close Encounters of the Third Kind*). Since that auspicious beginning, 15 subsequent presidents have designated well over 100 additional monuments totaling millions of acres. This venture has been a bipartisan one. Presidents of both parties have invoked the Antiquities Act to protect America's special places. George W. Bush, for example, designated six monuments, several of which were substantial in size.

No president has ever attempted to revoke one of his predecessor's designations. Presidents have instead frequently enlarged the boundaries of existing monuments. When Congress has acted, it has affirmed the wisdom of presidential designations by converting monuments into iconic national parks, including Acadia, Badlands, Bryce Canyon, Grand Canyon, Grand Teton, Olympic, and Zion National Parks.

Because no president has seen fit to attack a predecessor's determination that a tract of federal land warranted protection as a national monument, no judicial precedents have addressed whether a president has the authority to revoke an existing monument. The text of the Antiquities Act strongly suggests a negative answer. It vests in the president the power to "declare" an area to be a national monument. It does not afford the president any power to "undeclare" an existing monument or nullify a predecessor's determination that monument status is appropriate. Moreover, in 1938, the Attorney General advised President Franklin Roosevelt that he had no such authority, express or implied (39 Op. Att'y Gen. 185, 187 (1938)). Roosevelt accordingly never attempted a monument revocation.

President Trump's executive order is designed to kick off a process that will culminate in either outright revocations or downsizing of monuments. The initiative was purportedly fueled by the antagonism by some western Republican members of Congress (such as Rep. Rob Bishop) to President Obama's designation of the Bears Ears National Monument in Utah. It may also reflect lingering resentment over President Bill Clinton's 1996 designation of the Grand Staircase Escalante National Monument, also in Utah (as described on the state's own website inviting tourism in the state). That may be why Trump's order directs Zinke to review "all Presidential designations or expansions of designations under the Antiquities Act made since January 1, 1996" where the designation initially or after expansion covers more than 100,000 acres. According to the White House, that mandate encompasses 24 monuments encompassing over 300 million acres of federal lands (for a list, see https://www.usatoday.com/story/news/politics/2017/04/26/24-national-monuments-threatened-trumps-executive-order/100925418/).

But the order has the potential to be even more far-reaching. It also directs Zinke to review any post-1996 designation "where the Secretary determines that the designation or expansion was made without adequate public outreach." That provision vests in Zinke the standardless discretion to determine whether or not the processes that preceded monument designation were "adequate." The Obama and Trump administrations have characterized the participatory opportunities afforded state and local governments and the public in the run-up to designation of Bears Ears quite differently.

Should Zinke recommend and the president decide to revoke any monuments, challenges to Trump's legal authority are certain to follow. In light of the text of the Antiquities Act and the analysis in the 1938 Attorney General's opinion, those challenges would be on firm footing. The Federal Land Policy and Management Act, which was adopted in 1976 in part to pare down implied unilateral presidential authority over the status of public lands, but which did not affect designation authority under the Antiquities Act, would constitute a further hurdle for the president to overcome. Indeed, section 204(j) of FLPMA (43 U.S.C. § 1714(j)) explicitly prohibits the Interior Secretary from "modify[ing] or revok[ing] any withdrawal creating national monuments under" the Antiquities Act.

If Trump decides instead to retain monument designations but reduce their scope, similar questions may arise. The president's authority to reduce the size of an existing monument has not been tested, either, but the Antiquities Act expressly authorizes only declaration, not reduction, of monuments. Trump's order clearly contemplates the possibility of reductions. Among other things, it directs Zinke to consider the act's requirement that reservations of land for monument designations not exceed "the smallest area compatible with the proper care and management of the objects to be protected." It is not clear that one president has the power to second-guess a predecessor's judgment on this question. Notably, courts have uniformly deferred to presidential judgments on size without independently reviewing the question of what area is the smallest

compatible. Indeed, one court upheld President Jimmy Carter's reservation of seventeen national monuments totaling 56 million acres (*Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. 1853 (D. Alaska 1980)).

Searching for as many reasons as possible to call into question the legitimacy of monument designations, Trump's order directs Zinke to consider "whether designated lands are appropriately classified under the Act as historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest." Courts reviewing challenges to monument designations, including the Supreme Court, have typically accorded the president wide latitude to determine what is suitably historic or scientific (see, e.g., *Cappaert v. United States*, 426 U.S. 128 (1976); *Cameron v. United States*, 252 U.S. 450 (1920)).

The order also requires the secretary to consider the effects of a designation on the use of private lands "within or beyond monument boundaries." The Antiquities Act's only reference to private lands authorizes federal acquisition of affected private lands. The order also mandates consideration of "the availability of Federal resources to properly manage designated areas." This self-fulfilling prophecy amounts to transparent bootstrapping given the president's budget proposal, which would slash funding for land management agencies.

If the order's review process were conducted fairly and conscientiously, the likelihood that the recommendations it generates would favor the status quo is strong. One of the president's stated goals is to alter designations that curtail economic growth. As many western communities are aware, monument designations deliver a significant boost to the recreation and tourism industries that operate near affected lands. But the process is unlikely to be even-handed. The speed with which Zinke must make preliminary (45 days) and final recommendations (120 days) suggests that the results are pre-ordained and that the justifications for the likely recommendations for revocations or downsizing will be flimsy, especially considering that the most recent monument designations were the product of extensive consultation with scientific experts, local residents, and state, local, and tribal leaders. A thorough evaluation of the two dozen targeted monuments within that timeframe is likely impossible, particularly given Zinke's repeated calls for the president to fill vacant staff positions within the Interior Department more quickly.

The fate of some of the nation's most special places is at stake. The president's desire to gut the legal regime that has protected these places for over a century is obvious. It may be up to vigilant users of our federal lands, and the federal courts in which they challenge the legality of Trump's responses to Zinke's recommendations, to thwart this latest attack on our nation's natural resource heritage.

Attachment 9

THE CONVERSATION
Academic rigor, journalistic flair

Trump's plan to dismantle national monuments comes with steep cultural and ecological costs

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The Trump administration will review the status of The Bears Ears National Monument in Utah, one of the country's most significant cultural sites. Bureau of Land Management, CC BY

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In the few days since President Trump issued his Executive Order on National Monuments, many legal scholars have questioned the legality of his actions under the Antiquities Act. Indeed, if the president attempts to revoke or downsize a monument designation, such actions would be on shaky, if any, legal ground.

But beyond President Trump's dubious reading of the Antiquities Act, his threats also implicate a suite of other cultural and ecological laws implemented within our national monuments.

By opening a Department of Interior review of all large-scale monuments designated since 1996, Trump places at risk two decades' worth of financial and human investment in areas such as endangered species protection, ecosystem health, recognition of tribal interests and historical protection.

Why size matters

Trump's order suggests that larger-scale monuments such as Bears Ears National Monument in Utah, or the Missouri River Breaks National Monument in Montana, run afoul of the Antiquities Act because of their size. Nothing is farther from the truth. The act gives presidents discretion to protect landmarks and "objects of historic or scientific interest" located within federal lands. Designations are not

limited to a particular acreage, but rather to "the smallest area compatible with proper care and management of the objects to be protected."

Thus, the size and geographic range of the protected resources dictate the scale of the designation. We would not be properly managing the Grand Canyon by preserving a foot-wide cross-section of its topography in a museum.

The U.S. Supreme Court upheld the validity of larger-scale monuments when it affirmed President Teddy Roosevelt's 1908 designation of the Grand Canyon as "the greatest eroded canyon in the United States" in Cameron v. U.S. in 1920. Cameron, an Arizona prospector-politician, had filed thousands of baseless mining claims within the canyon and on its rim, including the scenic Bright Angel Trail, where he erected a gate and exacted an entrance fee. He challenged Roosevelt's sweeping designation and lost, spectacularly, because the Grand Canyon's grandeur was precisely what made it worthy of protection.

By downsizing or dismantling a monument, Trump would be intentionally unprotecting the larger-scale resources our nation has been managing as national treasures. The loss in value would be considerable, and compounded doubly by the lost cultural and ecological progress we have made under related laws.

Cultural costs of downsizing

The Antiquities Act has long been used to protect important archaeological resources. Some of the earliest designations, like El Morro and Chaco Canyon in New Mexico, protected prehistoric rock art and ruins as part of the nation's scientific record. This protection has been particularly critical in the Southwest, where looting and pot hunting remain a significant threat. Similar interests drove the creation of several monuments subject to Trump's order, including Grand Staircase-Escalante National Monument, Canyon of the Ancients National Monument and Bears Ears National Monument. Thus, any changes to those monuments mean less protection for – and less opportunity to learn from – these archaeological wonders.

But we have learned that our past and our natural world are not merely matters for scientific inquiry to be explained by professors through lectures and field studies. Instead, scientists, archaeologists and federal land managers recognize the need to understand and foster continuing cultural connection between indigenous people and the areas where they and their ancestors have lived, worshipped, hunted and gathered since time immemorial. Many of these places are on federal lands.

While other recent designations recognized the present-day use of monument areas by tribes and their members, Bears Ears National Monument was the first to specifically protect both historic and prehistoric cultural resources and the ongoing cultural value of the area to present-day tribes. Unlike prior monuments, Bears Ears came at the initiative of tribal people, led by a unique inter-tribal coalition that brought together many area residents and garnered support from over 30 tribes nationwide. This coalition also sought collaborative tribal-federal management as a way to meaningfully invigorate cultural protection. As a result, President Obama also established the Bears

Ears Commission, an advisory group of elected tribal members with whom federal managers must meaningfully engage in managing the monument.

This national investment in cultural collaboration brings great value – a value utterly ignored by Trump's order. In fact, under that order, Bears Ears faces an expedited (45-day) review because, as Secretary Ryan Zinke noted in a recent press conference, it is "the most current one." Though the order includes opportunity for tribal input, the Bears Ears inter-tribal coalition has yet to hear from Secretary Zinke, notwithstanding numerous requests to meet.

Ecological costs of downsizing

Because they preclude development, national monuments are also critically important for ecological protection. In fact, they often serve the objectives of other federal requirements, such as the Endangered Species Act.

For example, Devils Hole National Monument provides the only known habitat for the endangered Devils Hole Pupfish (Cyprinodon diabolis). This has meant that groundwater exploitation from nearby development is restricted to protect Pupfish habitat. Similarly, the Grand Staircase-Escalante National Monument is home to an array of imperiled wildlife, including the endangered desert tortoise and the endangered California condor, along with many other native species like desert bighorn sheep and peregrine falcons.

The Grand Staircase-Escalante National Monument is among the national monuments vital to enforcing the Endangered Species Act. Bureau of Land Management

Within the protective reach of a national monument, we are also likely to find important stretches of land officially designated by federal agencies as protected land, such as scenic wilderness, wilderness study areas, the Bureau of Land Management's areas of critical environmental concern (ACEC) or the

Forest Service's research natural areas (RNAs). Each monument's care is thus interwoven with the management of these other ecologically designated areas, something plainly apparent to the communities and agency officials long working with these lands.

Zinke's backyard

These costs may hit close to home for Zinke since the Missouri River Breaks National Monument, located in his home state of Montana, is on the chopping block. President Clinton designated this 375,000-acre monument in 2001 to protect its biological, geological and historical wealth from the pressures of grazing and oil and gas extraction. Clinton noted that "[t]he area has remained largely unchanged in the nearly 200 years since Meriwether Lewis and William Clark traveled through it on their epic journey."

Interior Secretary Ryan Zinke will need to assess the cultural and ecological value of a national monument in his home state of Montana. CC BY-SA

The monument contains a National Wild and Scenic River corridor and segments of the Lewis and Clark and Nez Perce National Historic Trails, as well as the Cow Creek Island ACEC. It is the "fertile crescent" for hundreds of iconic game species and provides essential winter range for sage grouse (carefully managed to avoid listing under the ESA) and spawning habitat for the endangered pallid sturgeon. Archaeological and historical sites also abound, including teepee rings, historic trails and lookout sites of Meriwether Lewis.

The size of the Missouri River Breaks monument is thus scaled to protect an area in which lie valuable objects and geographic features, and a historic – even monumental – journey took place. And every investment we make in the monument yields a twofold return as it supports our nation's cultural and ecological obligations under related federal laws.

At the end of the day, while Trump's order trumpets the possibility that monument downsizing will usher in economic growth, it makes no mention of the extraordinary economic, scientific and cultural investments we have made in those monuments over the years. Unless these losses are considered in the calculus, our nation has not truly engaged in a meaningful assessment of the costs of second-guessing our past presidents.

Ecology National parks Indigenous land rights Endangered Species Act national monuments US land policy Trump administration Antiquities Act Trump executive order

Attachment 10

Legal Planet
Insight & Analysis: Environmental Law and Policy

Culture & Ethics | General | Politics | Public Lands

SEAN HECHT May 8, 2017

Politicians and Commentators Who Criticize Recent National Monuments Are Making Up Their Own Version of History

Republican Presidents from Teddy Roosevelt to Herbert Hoover Designated Millions of Acres Under the Antiquities Act

Valley of the Gods, Bears Ears National Monument, John Fowler, Attribution 2.0 Generic (CC BY 2.0)

As several colleagues and I noted here recently, President Trump recently issued an executive order that will result in "review" of national monuments created since 1996. (The Antiquities Act grants Presidents the authority to reserve federal lands as national monuments, protecting them from much new resource extraction and development that would otherwise potentially be available on those lands.) As we explained, the Antiquities Act doesn't give Presidents the legal authority to abolish or downsize monuments established by previous Presidents, so Trump would likely lose in court if he attempts to do so. But the policy and political dimensions of monument designation remain important, regardless of the legal issues. One ascendant issue is the legitimacy of recent designations of large monuments in Utah and other states in light of the history of monument designations. While many politicians on the political right think the recent actions are inappropriate, a careful look at the early history of our national monuments shows that they're wrong.

Some politicians and some residents of the American west believe that designation of monuments, which generally limits future rights to extract resources such as minerals and timber from our public lands, cuts against local values that elevate use of lands for economic benefit. They believe that revisiting the scope or designation of monuments is a good idea; in their view, recent Presidents have been misapplying the Antiquities Act by designating monuments outside the scope of what would generally have been accepted in prior decades. Leaders in the Republican Party and others on the political right are praising the prospect of Presidential review and attacking the scope of recent monument designations. Many of them say that monuments used to be more carefully

designated and tailored, and that recent designations deviate from longstanding practice. But these Republican leaders are either ignorant of, or selectively recalling, the history of the use of the Act. 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. And among the the Presidents who did this in the first decades after the Act became law were the archetypal Republicans of their time, representing various wings of the Republican Party in that era: Teddy Roosevelt, Calvin Coolidge, and Herbert Hoover.

Critics who attack recent monument designations as improper have included prominent political "conservatives" or libertarians, including Sen. Orrin Hatch of Utah and pundits in National Review. Their basic critique relies on the idea that recent Presidents—Obama and Clinton in particular—have gone far beyond what anyone would have imagined or intended in the early years of the Antiquities Act. Sen. Hatch's critique is representative of this view:

> *The Antiquities Act was designed to preserve our nation's rich cultural heritage by giving presidents limited authority to place small sections of land under federal control to protect archaeological sites from looting and defacement. The Antiquities Act was a well-intentioned response to a serious problem. But in the last two decades, presidents have exploited this law in the extreme, using it as pretext to enact some of the most egregious land grabs in our nation's history.*

The Trump administration evidently takes the same stance. Secretary of Interior Ryan Zinke expressed a similar opinion in a media release that cited local concern and opposition to monuments, and claimed 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.*

As Sen. Hatch noted, before President Theodore Roosevelt signed the Antiquities Act in 1906, much of the conversation 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). Hatch and others also point to language in the Act that calls for monuments to consist of the "smallest area necessary" to protect the resource. They specifically cite as inappropriate the recent designation of the 1.35-million acre Bears Ears National Monument, which National Review calls "astounding" in its scope.

But the idea that large monument designations are new or inappropriate is, much like other current right-wing narratives about the Environmental Protection Agency and other federal agencies, a false story based on false history. Bears Ears 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 the history of court decisions interpreting the Act, demonstrate that since the Act's enactment, Presidents have lawfully designated large monuments to protect landscapes, ecosystems, and natural features as well as culturally important sites.

I haven't done the math to fact-check the claim by Secretary Zinke 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." The claim is written so ambiguously that it may mean any number of things. But any cursory look at the history of monument designations reveals that this claim, and similar claims by Sen. Hatch and others, are false or extraordinarily misleading.

In fact, the Antiquities Act has been used to protect enormous areas of land since 1908, when President Roosevelt designated the 818,000-acre Grand Canyon National Monument. He also designated the 615,000-acre Mount Olympus National Monument in 1909, and the 60,000-acre Petrified Forest National Monument in 1906, within a few months of the passage of the Act.

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 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. The U.S. Supreme Court in 1920—hardly a "liberal" court—confirmed the appropriateness of the 800,000 acre 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 neither the views of progressives or of federal courts about our public lands, nor presidential practices in designating monuments, have changed dramatically over the century since the Antiquities Act passed; rather, "conservative" views have changed significantly. Right-wing pundits, lawyers, and politicians are making up a story about what "conservative" core values used to be. Teddy Roosevelt still seems to be a hero among many on the political right today, including Secretary Zinke (as noted in an astute editorial published in the New York Times today). But their policy proposals, and the values they embody, are at odds with many

of the principles he stood for, evidenced by the discrepancy between his evidently expansive view a hundred years ago of what was appropriate for monument designation and their very cramped view today.

The idea that Bears Ears, at 1.35 million acres, is "astounding" or inappropriate is absurd in light of the designation of the original, century-old Death Valley, Glacier Bay, and Yosemite national monuments, at approximately 1.6 million, one million, and 800,000 acres respectively. More broadly, the idea that recent monument designations are any different in scope, intention, or appropriateness from the norms prevalent a hundred years ago is just false. While right-wing politicians and pundits claim the mantle of conservatism regarding our public lands and decry what they characterize as the perversion of our public land laws by progressives, their rhetoric is hollow and based on fake history.

[This post has been revised slightly to add some new material about large monument designations.]

Antiquities Act, Bears Ears, Calvin Coolidge, Cameron v. United States, Death Valley, Department of Interior, executive order, false and misleading, federal public lands, Glacier Bay, Herbert Hoover, Mount Olympus, national monuments, Obama, Obama Administration, Petrified Forest, presidential power, public lands, Ryan Zinke, Teddy Roosevelt, Theodore Roosevelt, Trump, Trump Administration, Trump executive orders, Yosemite