

July 10, 2017

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

Re: Supplemental Comments Addressing The Secretary Of Interior's Interim Report On Bears Ears National Monument And Related Statements

Dear Secretary Zinke:

The Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Tribe of Indians, and Zuni Pueblo submit these comments in response to your Interim Report Pursuant to Executive Order 13792 of June 10, 2017 (“Interim Report”). Each of our Nations has historic and prehistoric ties to the land that is now protected as the Bears Ears National Monument (the “Monument”), and we have each formally selected elected or appointed officials of our respective governments to the Bears Ears Commission. Previously, through the Bears Ears Inter-Tribal Coalition (the “Coalition”), our Nations worked tirelessly with the Obama administration to identify the lands and management structure for, and eventually to establish, the Monument. Our five Nations previously submitted comments in support of the Monument (see attached) pursuant to the request for comments set forth in 82 Fed. Reg. 22016 (May 11, 2017). We stand by those comments, which call for preserving the Monument in the form described in Proclamation 9558 (the “Proclamation”). Some of us supplemented our collective comments with comments specific to our individual Nations, copies of which are also attached here. We now feel it necessary to provide additional supplemental comments because our Nations take issue with the recommendations you propose regarding the Monument in your Interim Report, and we have great concerns with several of the statements you have made to Congress about our Nations’ attitudes and interests regarding the Monument.

1. We Are Not “Happy” With The Interim Report, And Any Diminishment Will Be A Slap In The Face To Our Nations

In your June 20, 2017 testimony before the United States Senate, you stated that our Nations are “happy” with your Interim Report. None of our five Nations – the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Tribe of Indians, and Zuni Pueblo – are happy with

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your Interim Report, or any advances towards reduction or revocation of the Monument that we worked so hard to establish in its current, compromise form. Extinguishing or diminishing the Monument would indeed, as Senator Franken noted, be “a slap in the face” to our Nations as well as all Indian Nations in this country. *See National Monuments Review, Comments of the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe, and Zuni Pueblo* at 2, (May 25, 2017) (“The radical idea of breaking up Bears Ears National Monument would be a slap in the face to the members of our Tribes and an affront to Indian people all across the country.”). Our position has not changed.

2. The Monument Cannot Be Diminished Without Imperiling The Objects, Structures, and Other Objects of Historic And Scientific Interest Protected By Monument Designation

The nonprofit, grassroots Utah Navajo organization Utah Diné Bikéyah (“UDB”), which did much of the on-the-ground work for the Coalition, conducted an extensive ethnographic study documenting a vast array of “historic landmarks, historic and prehistoric structures, and other objects of historic and scientific interest” that have special significance to our Nations and our ancestors within the Monument. That study, which serves as one of the bases for the Monument boundary, showed that 1.9 million acres within southern Utah was the “smallest area compatible with the proper care and management of the objects to be protected,” and required protection under the Antiquities Act. The previous Administration utilized that study, among others, to identify the boundaries for what became the 1.35 million acre Monument. The methods used and objects inventoried are described in great detail in our May 25 comments. The current boundaries were selected specifically to encompass hundreds of thousands of cultural, historic, and spiritual sites and features. There are no unimportant areas here; in fact, Bears Ears is so rich, and the resources there so densely situated, that one cannot go more than one-eighth of a mile without encountering the next site or “object.” Our Nations contributed significant resources, time, and support to the UDB study, and continue to stand by the importance of maintaining the existing boundary of the Monument in order to protect the precious and copious resources contained therein. If you remove *any part* of Bears Ears from protection, it will necessarily damage cultural, spiritual, archaeological and/or paleontological sites of paramount significance.

3. We Are Happy With The Collaborative Management Regime Made Law By The Monument Proclamation

You indicated in both your report and subsequent testimony that our Nations are unhappy with the collaborative management approach established through the Proclamation, and

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would prefer a different model. Quite to the contrary, we are quite pleased with the deep involvement in monument management the collaborative management model provides for our Nations. Indeed, we played a significant role in advocating for and developing the collaborative management model described in the Proclamation, and our Nations are determined to engage in collaborative management of this Monument in close cooperation with the federal agencies. To that end, our five Nations have appointed Commissioners, who have now met many times, to move forward collaborative management as expeditiously as possible. The designation of the Monument has contributed to an increased volume of visitors to Monument lands, and the need to protect the resources sought to be preserved under the Proclamation has become even more urgent. Accordingly, our Commission has been working closely with our federal partners to put in place a management plan suitable to ensure that the Monument will be managed in a manner respectful of our histories and cultures, and protective of our cultural, historic, and spiritual patrimony in a manner beneficial to all citizens of this country and of the world. The Monument Proclamation is law, and we are thankful for the protections it gives us in moving forward with collaborative management. In the event Congress were to pass legislation authorizing an even more robust regime for tribal management than collaborative management, we would certainly support that, but no such model exists and no such discussions are occurring. Meanwhile, the collaborative management system established in the Proclamation is greatly needed, is excellent, and recognizes our Nations' role in Monument management.

4. The Only Officials Representative Of Indian Nations Are Those Elected Or Appointed By Our Nations And Our Enrolled Membership

Finally, in both your report and your testimony, you have criticized the Commission because it does not include any representation from Rebecca Benally or other representatives of San Juan County. The Bears Ears Commission, with representatives from each of our five Nations, was formed in order to further the government-to-government and special trust relationship that exists between the United States and our federally-recognized sovereign Nations. State and local government representatives elected by San Juan County residents at large, even in majority-Navajo or Native American districts, do not represent the sovereign Navajo Nation government, or any other Indian Nation's government. The Navajo Nation, and all of the Coalition Tribes, are pre-constitutional sovereigns with electoral systems and government processes that serve and further the sovereign activities of our Nations irrespective of State and local government processes and political boundaries. To suggest that a representative of a State or local government should have a seat on the Commission or any other entity that represents the interests of a sovereign Indian Nation is an affront to Tribal sovereignty. Only elected and appointed officials of our Nations may speak on our behalf, not just any Native person with whom you speak.

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We submit these comments with the hope that you will hear the voices of our Nations, and work to protect Bears Ears National Monument in its current form. We will continue to stand in defense of the Monument to the fullest extent, and to voice our clear opposition to any contemplated diminishment of the Monument's protections or boundaries.

spectfully.



Alfred Lomahquahu, Vice Chairman
Hopi Tribe



Russell Begaye, President
The Navajo Nation



Tony Small, Vice Chairman
Ute Business Committee, Ute Indian Tribe



Harold Cuthair, Chairman
Ute Mountain Ute Tribe



Carleton Bowekaty, Councilman
Zuni Pueblo

ATTACHMENT 1

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

**COMMENTS OF
THE HOPI TRIBE, NAVAJO NATION,
UTE MOUNTAIN UTE TRIBE,
UTE INDIAN TRIBE, AND ZUNI PUEBLO**

May 25, 2017

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Introduction

The creation of the Bears Ears National Monument represents a landmark in the long history of the American public lands system. It is also a notable event in our Tribal histories. Together, we five Tribes took the lead in making this Monument a reality. We conceived of this Monument, helped build overwhelming support for it locally and nationally, and carried the many justifications for it to Washington, DC. We earned this Monument every step of the way. It was well worth it, but it required a huge amount of work.

For us, Bears Ears is a homeland. It always has been and still is. The culture is everywhere. The canyons and forests hold many of our stories. Family gatherings, dances, and ceremonies are held at special places within Bears Ears. People go to Bears Ears to gather roots, berries, piñon nuts, weaving materials, and medicines. We go for healing. Stone cliff-dwellings and trails, testaments to the Old People, have survived thousands of years of wear and weather. Our ancestors are buried there, and we can hear their songs and prayers on every mesa and in every canyon.

Attempting to eliminate or reduce the boundaries of this Monument would be wrong on every count. Such action would be illegal, beyond the reach of presidential authority. Bears Ears enjoys overwhelming popularity nationally—and extensive and passionate support in the State of Utah as well. It would be a travesty to leave this landscape vulnerable to uranium and fossil-fuel mining, and excessive off-road vehicle use. Additionally, there has been ghastly looting and grave robbing that continues to this day. This was a major impetus for the Monument status. Citizens of America and the world would lose the opportunity to enjoy the wonders of one of the most remote and wondrous landscapes found anywhere. They would lose, as well, the opportunity for Bears Ears to become home to a world-class institute on indigenous Traditional Knowledge.

The radical idea of breaking up Bears Ears National Monument would be a slap in the face to the members of our Tribes and an affront to Indian people all across the country. We did not bring forth grievances. We brought a solution: the permanent protection of a great natural and cultural landscape. When the President of the United States created the Monument, he accepted our solution and promised that the lands within the Monument would be protected for us and the generations that come after us. Bears Ears is too precious a place, and our cultures and values too dignified and worthy, to backtrack on the promises made in the Presidential Proclamation.

The Nature and Validity of This Review of Monument Designations

On April 26, 2017, President Trump called for an unprecedented review of national monument designations made since January 1, 1996, where the designation covers more than 100,000 acres, or where the Secretary of Interior determines that the designation or expansion was made without adequate public outreach or coordination with relevant stakeholders. The review is purportedly to determine whether the designations conform to the objectives of the Antiquities Act. However, there is no statute authorizing any such review of monuments, nor statutory authority for any public comment period, and certainly no authority—statutory or otherwise—to diminish or revoke any monument. Any such presidential action would be ultra vires and unconstitutional. Therefore, although we have no choice but to respond, the public process created by this order is unauthorized and void.

Pursuant to President Trump's executive order, the Department of the Interior is reviewing monument designations and seeking comments as part of the review. 82 Fed. Reg. 22016 (May 11, 2017). The Secretary is purportedly considering several factors in his review. *See* 82 Fed. Reg. 20429-20430 (May 1, 2017). We are confused by the inclusion of factors outside of the statutory text of the Antiquities Act, as they are irrelevant to whether or not Bears Ears was properly

designated. As such, any recommendation by the Secretary to the President that is based on information outside the scope or authority of the Secretary or President under the Antiquities Act would be improper. The President has authority to designate national monuments, but does not have authority to eliminate, shrink, or move the boundaries of them.

As will be seen below, Bears Ears easily fits within the objectives of the Antiquities Act, and was the product of extensive public outreach, coordination with relevant stakeholders, and substantive research.

Bears Ears: A Tribal Homeland Since Time Immemorial

Our Tribes came to the Bears Ears landscape at different times. Some of us have been there forever, and some came later. We inhabited, hunted, gathered, prayed, and built civilizations. Our presence, much in evidence today, covered the whole region and is manifested in migration routes, ancient roads, great houses, villages, granaries, hogans, wickiups, sweat lodges, corrals, petroglyphs and pictographs, tipi rings, and shade houses. Bears Ears holds more than 100,000 Native American cultural sites and is widely recognized as one of the world's premier areas for archaeological resources.

By the mid-19th century, the United States became determined to open the American Southwest to homesteading. This meant moving Indian people off many traditional lands, including Bears Ears. Utes and Navajos were force-marched to reservations. For the Navajo, this was the Long Walk to Bosque Redondo in New Mexico. In particular, the White Canyon region of Bears Ears remains a significant historical site because of its many *Nahonidzho*, or escaping places, used by Navajos to protect themselves from the soldiers. The Zuni and Hopi were spared the violence of the forced removal because they had by this time relocated to their current pueblos to the south and southeast.

For generations, federal policy required Indian people to remain on their reservations and pueblos. The sense of homeland and the ancestors, however, was too strong. People avoided their federal overseers and found ways to return to Bears Ears for hunting, gathering, and ceremonies. In the late 19th and early 20th centuries, as federal policy relented, the non-Indian residents of San Juan County regularly forced Native Americans out of Bears Ears, sometimes violently. Yet our people continued to find ways to return.

As Tribes became more active after World War II, we began talking about Bears Ears. The looting and grave robbing had been intensifying ever since the 1890s, causing widespread destruction. In 1968, Robert Kennedy came to the Navajo reservation during his presidential campaign. He held a meeting in Bluff and Navajo people urged him to protect the Ancient Puebloan villages and other archaeological resources. Given the importance of this area to us and the nation, it is imperative that it be protected.

The Origins of the Monument: Defining the Boundaries of the Cultural Landscape

The push for Bears Ears began in earnest in 2010 with the creation of the grassroots non-profit organization, Utah Diné Bikéyah (UDB). UDB was formed with a primary objective of protecting Bears Ears. Looking back, we can see that the formation of UDB was an important step on the road to the Bears Ears National Monument.

Early on, UDB set out on a project that was ambitious in the extreme. People were already discussing the possibility of creating a wilderness area, national park, national monument, or other appropriate classification. UDB defined its goal as establishing conclusively the proper boundaries, defined scientifically, culturally, and historically, necessary to protect the Bears Ears homeland. After much deliberation, it settled upon a methodology, one which would require a prodigious amount of work. The interdisciplinary effort was based on thorough ethnographic

research featuring an intensive interviewing regime; research by academic experts in ecology, biology, anthropology, archaeology, and public policy; Traditional Knowledge; extensive data on wildlife species obtained from Utah state wildlife officials; and data analysis.

The ethnographic data resulted in sophisticated and highly reliable cultural mapping. *See* generally Bears Ears Inter-Tribal Coalition, *Protecting the Whole Bears Ears Landscape: A Call to Honor the Full Cultural and Ecological Boundaries* (2016). Seventy cultural interviews were conducted by a Navajo traditionalist fluent in English and the Diné languages and possessing ethnographic training. The resulting ethnographic data was captured and organized on a fine scale. Maps were then prepared using that information to show why 1.9 million acres should be set aside as a cultural landscape.

This ethnographic mapping process benefited from Traditional Knowledge, which is increasingly recognized by western sciences and scholarship and used by federal agencies in land management and planning. Traditional Knowledge is derived from keen observation carried out and passed down over hundreds or thousands of years. It represents another way of knowing the social and ecological landscape. It is invaluable to scientists in places where it remains intact—places such as Bears Ears. The Presidential Proclamation rightly refers to Traditional Knowledge several times and emphasizes its critical place in future land management at the Bears Ears National Monument.

This intensive work began in 2010 and continued for several years. It was a joined enterprise of Traditional Knowledge and western sciences. It reflected the careful, dedicated, and knowledgeable work of hundreds of Native people and dozens of academics. Their work shows that the Bears Ears landscape is one discrete unit, bound together in numerous ways, and it blends perfectly with other protected federal and Tribal lands.

UDB released its Bears Ears proposal in April, 2013. The Proposal called for a 1.9 million acre protected area that could be designated as a national monument, wilderness area, national recreation area, or other classification under federal law. The carefully-considered, data-driven boundaries developed by UDB quickly became accepted as a serious proposal that deserved serious attention. While Utah public officials were generally noncommittal or negative, the boundaries were praised by conservation groups and many federal officials. Our Tribes were inspired by the Proposal and the hard work that went into it, especially the cultural mapping that UDB developed that so fully represented Native American values.

For its part, UDB was disappointed and frustrated by the opposition or disinterest of Utah federal, state, and county politicians. In 2014, UDB turned to the Tribes to support and carry the Proposal. This was only logical. Federal Indian policy is based on the federal-tribal relationship and the Tribes would be the appropriate advocates to carry the Proposal forward. As a result, protecting Bears Ears increasingly became a major subject in the minds of the Tribes of the Southwest during 2014 and 2015.

The Tribal Proposal

We held many meetings, large and small, and made conference calls to discuss the alternatives. It became clear to us that there were two broad considerations. As a legal matter, what were the pros and cons of the different land classifications—wilderness, national monument, national recreation area, and others? At least as important, though, was the question of which would be the best forum—legislation controlled by the Utah delegation or a national monument proclamation developed by the administration and signed by President Obama?

In 2013, the Utah delegation was developing the so-called Public Lands Initiative (PLI). This was an initiative, led by Congressmen Bishop and Chaffetz, with the professed goal of

reaching a consensus agreement among all stakeholders over the public lands of Eastern and Southern Utah, an area of great cultural value, beauty, and mineral potential. The general idea was that an agreement would lead to congressional legislation putting some federal lands in wilderness and other protected status and allowing multiple-use development to proceed on most of the other lands. We wanted to develop an agreement through the PLI process, but also wanted to ensure that Bears Ears was properly protected. As a result, we analyzed the options of PLI and national monument status, among others.

We were very apprehensive about the PLI process. Up to that time, the Utah leaders had never taken us seriously. This was in spite of the fact that we worked tirelessly on the PLI process, putting in as much or more effort than any party involved in the process. We made at least 25 presentations at PLI meetings, complete with maps, a two-page summary of the UDB proposal (the precursor to the later and more comprehensive Coalition Proposal), and substantial oral presentations. Congressional staff were present at approximately a dozen of these meetings. We also made four separate trips to Washington DC to meet with the Utah delegation; at each of those meetings, we made extensive statements complete with maps and a summary of the Proposal. At all of these meetings, both in the field and in Washington DC, we asked for comments on our proposal. It was to no avail.

In spite of our extensive and unwavering efforts, in no instance did anyone from the Utah delegation or the PLI make a single substantive comment, positively or negatively, on our proposal. Our painful experience with attempting to make an inroad into the PLI process was epitomized by our dealings with the San Juan County Commission. Although the proponents of the PLI described the process as “open” and “ground-up,” PLI leaders said that they were relying

heavily on the county commission. Indeed, we were told to present our proposal to the San Juan County Commission.

As part of the PLI process, the San Juan County Commission conducted a public comment survey on PLI in 2014 to gauge support for various land use proposals for Bears Ears. The UDB proposal was initially identified as “Alternative D” and the County Commission staff agreed to include Alternative D in the list of alternatives on the survey. Then, the staff broke that promise and refused to include Alternative D on the list for the formal comment process.

Supporters of Alternative D (Bears Ears) waged a write-in campaign. Despite being omitted from the list, the Bears Ears proposal received 300 positive comments, 64% of the 467 total comments received in the County. The Commission then completely rejected the results of its own survey—and the wishes of the Indian people who constitute nearly 60% of the population of San Juan County—and selected the heavy-development, low conservation “Alternative B.” Alternative B had received just two comments, one half of 1% of the total.

In spite of the extraordinary unfairness of this proceeding—the kind of raw, heavy-handed political overreaching rarely seen in America today—at no time has San Juan County, the PLI, or the Utah delegation ever seen fit to acknowledge it, much less apologize and disown it.

In 2015, the Tribes decided to hold a special meeting to decide what the strategy should be. The meeting was held in Towaoc at the Ute Mountain Ute Reservation on July 15-17, 2015. The third day, Friday, was reserved for a meeting with federal officials from Washington, D.C. The day before, at the Thursday meeting in Towaoc, Tribal leaders had made a series of critical decisions that energized the already enthusiastic Bears Ears movement.

UDB and the Navajo Nation had always wanted this effort to be headed up by a multi-Tribal organization comprised of the Tribes that used the Bears Ears area the most. Thus, on that

day at Towaoc, to unite formally in furtherance of protecting the sacred Bears Ears landscape, Tribal leaders from Hopi, Navajo, the Ute Indian Tribe, Ute Mountain Ute, and the Zuni Tribe agreed to create the historic Bears Ears Inter-Tribal Coalition to protect and preserve the homeland area they all care so deeply about. All of the Tribes passed resolutions on the subject before the meeting or shortly after it. The five Tribes then adopted an MOU setting forth the mission, function, and procedures for the Coalition. (The Coalition continues to exist and is dedicated to grassroots organizing and public outreach. The Bears Ears Tribal Commission, was created by the Presidential Proclamation as a land management entity for the National Monument.)

The then newly-formed Bears Ears Inter-Tribal Coalition, recognizing the significance of the creation and management of a Bears Ears National Monument, decided to craft a comprehensive, detailed proposal, to be submitted to the President by a self-imposed deadline of October 15, 2015. Submission by this date would allow the President ample time to consider, and hopefully sign, a proclamation under the Antiquities Act, before the end of his term. This would also allow time for the Bishop-Chaffetz PLI process to review our proposal and include all or part of it in its proposed legislation, if so inclined.

During the late summer of 2015, the Tribes held four more well-attended, intensive day-long meetings, hosted at the reservations of the Coalition members, to review draft proposals in depth. These meetings, combined with UDB's work since 2010, allowed us to become well-informed in all of the issues related to achieving and carrying out a complex federal land management program.

The Proposal had many aspects to it, but two were the most fundamental to the Tribes. We strongly recommended the 1.9 million acre national monument with the boundaries developed by UDB's comprehensive, in-depth research and analysis. In addition, we discussed Collaborative

Management often and in-depth, and unanimously put forth a strong version of Collaborative Management between our Tribes and the federal agencies in which Traditional Knowledge would play an essential role.

Our Proposal reflects our intimate connection with Bears Ears, a cultural landscape densely inhabited by the stories, histories, prayers, and practices of people and place over millennia. Tucked among the canyons, folds, meadows, and promontories of Bears Ears rest an estimated 100,000 archaeological sites, regarded by researchers as world-class objects of scientific inquiry. Kivas, granaries, hogans, rock art panels, graves, and many more historic and prehistoric markers—all the work of our ancestors—are found throughout this area, preserved relatively undisturbed for centuries by the Colorado Plateau’s arid climate and rugged terrain.

The supplemental report, Bears Ears Inter-Tribal Coalition, *Protecting the Whole Bears Ears Landscape: A Call to Honor the Full Cultural and Ecological Boundaries* October 18, 2016, includes both maps and narrative descriptions of the importance and significance of the five geographic regions that comprise the whole of the Bears Ears National Monument: The Confluence, White Canyon, Indian Creek, Headwaters, and Cedar Mesa. *Id.* Each of the Bears Ears regions stand as significant historic and cultural landscapes deserving of a national monument designation in its own right. Taken as a whole, these five regions interlace to tell a compelling story of ancient cultures—even reaching into the present day with dwellings established as recently as the 1920s.

In all, our proposal represented the true voice of these Tribes and our determination to present to the United States a program that is workable in the real world of land management. We believed then and now that our proposal, as now mostly embodied in the Presidential Proclamation,

will add even more luster to the proud American system of conservation lands and, as well, bring justice to Tribes and this sacred landscape.

The Coalition submitted its comprehensive proposal to the Obama Administration on October 15, 2015, and its supplemental report on October 18, 2016. *See* Bears Ears Inter-Tribal Coalition, *Proposal to President Barack Obama for the Creation of Bears Ears National Monument* 18 (Oct. 15, 2015), <http://www.bearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf>; Bears Ears Inter-Tribal Coalition, *Protecting the Whole Bears Ears Landscape: A Call to Honor the Full Cultural and Ecological Boundaries*.

The Administration's Extensive Public Outreach and Thorough Analysis of Legal Requirements

The Obama Administration put in an inordinate amount of time and expertise in conducting comprehensive research, reaching out to the public, and developing its position on Bears Ears. It was a big issue. Opposition was small in numbers but very loud—although there was a magnificent outpouring of public support for the Monument, the Utah congressional delegation and various state officials all were extremely active in pressing their positions with administration officials. But, from top to bottom, the administration developed and analyzed a tremendous amount of scientific, historical, economic, cultural, and legal material. On our trips back to Washington, we never failed to be amazed by the number of dedicated administration people who actively responded to the public and were deeply familiar with all or some of the issues.

For our part, beginning with the presentation of our Proposal, we began a 14-month period in which we had numerous meetings and conference calls with officials in the Interior Department, Forest Service, and Council on Environmental Quality. Most of our people live in remote areas in

the Southwest, and travel to the East Coast is grueling, but we made many, many trips to Washington DC.

We established a substantial public relations program and reached out locally and nationally through public meetings, op-ed articles, and television and radio presentations. Gradually, support for Bears Ears and our proposed collaborative management regime rose across the country. The only place where there was opposition was in the state of Utah, but public opinion polls showed that the Utah citizenry supported Bears Ears. Opponents blithely stated that “the people of San Juan County” oppose Bears Ears, ignoring the fact that the Native American population in the county is nearly 60%.

Virtually every major newspaper in the country supported the national monument. Especially notable is the *Salt Lake Tribune*, with the largest circulation in Utah. The *Tribune* editorialized in favor of the Monument several times and often exposed misinformation being released by the Utah delegation.

The Obama Administration welcomed and received the views of the public. The Antiquities Act does not require any specific procedures, other than the entry of a proclamation by the President. But the President directed that this be an open process. The administration received all manner of written opinions by letters and email. Meetings were arranged with countless organizations and individuals. Utah public officials, for example, had ongoing meetings and communications with the President, high White House officials, the two secretaries, heads of agencies, and career staff. As late as December 21, 2016, just one week before the Proclamation was signed, the Governor of Utah’s office complimented the staff to the Department of the Interior on the time and attention that they devoted to this issue.

In an exceptional display of reaching out to the public, Secretary Sally Jewell, accompanied by top Interior and Agriculture officials, traveled to Bluff, Utah and held a day-long open public hearing in which more than one hundred citizens, drawn by lot, made two-minute statements. See <http://bluffutah.org/secretary-jewell-to-discuss-protection-of-bears-ears-at-public-meeting/>. Every perspective was represented. The overflow crowd was estimated at approximately 2,000; the largest gathering ever held in Bluff.

The Committee on Oversight and Government Reform documented the timeline of events that led up to the Bears Ears Proclamation. The timeline and the documentation reveal repeated contacts, meetings, coordination, and outreach by the Obama Administration with the Utah delegation, governor, and local communities prior to the Monument Proclamation. See *Documents Obtained by Oversight Committee Refute Republican Claims That Obama Administration Did Not Consult on Bears Ears Monument Designation*, Committee On Oversight and Government Reform (April 13, 2017), <https://democrats-oversight.house.gov/news/press-releases/documents-obtained-by-oversight-committee-refute-republican-claims-that-obama>. To show the extensive public outreach and coordination in the creation of the Bears Ears National Monument, we incorporate by reference the timeline and documentation of the Committee on Oversight and Government Reform.

In addition to attending to public outreach, the President and the administration gave long and careful attention to two provisions in the Antiquities Act that were especially relevant to the creation of this Monument. The statute allows presidents to create national monuments to protect “objects” of historic or scientific interest. While the legal definition of “objects” is very broad and calls for extensive discretion by presidents, the designation of such objects is critical to the creation of any monument. In this case, administration officials gave the matter continuing consideration.

The result can be seen in the Proclamation, which identifies a great many objects and places them in context.

The other provision is that, under the Antiquities Act, national monuments “shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.” While uniform case law gives very broad authority to presidents—Congress delegated authority to create national monuments to the President, “in his discretion” in the Antiquities Act—agency officials scrutinized this issue at length. State of Utah and mining company executives pressed for reducing the acreage. Finally, the Proclamation made a major reduction from the Tribes’ proposal of 1.9 million acres down to 1.35 million acres, a cut of nearly 30%. This action, which we strenuously opposed, was a compromise for extraction industries and brought the size of the Monument down nearly to the acreage allocated for protection under the Bishop-Chaffetz proposal in the PLI. While we believe that the size of the Monument should be expanded to include more precious resources, the current acreage is easily supported as “the smallest area compatible with the proper care and management of the objects to be protected.”

The Presidential Proclamation

The Presidential Proclamation of December 28, 2016 reflects the long and hard work that the administration put into it. The new Monument is tailor-made for coverage under the Antiquities Act of 1906, which Congress passed in response to the destruction of the kind of exquisite Southwestern archaeological resources that are so abundant at Bears Ears. Every part of the Monument holds “historic landmarks, historic and prehistoric structures, and other objects of historic and scientific interest,” the core requirement of the Antiquities Act and the evocative Proclamation identifies such archaeological objects in great detail. The Proclamation is equally expansive with objects that are historical, geological, anthropological, paleontological, ecological,

hydrological, botanical, and biological. Proclamation No. 9558, 82 Fed. Reg. 1139-43 (Dec. 28, 2016). *These objects exist everywhere within the Monument.*

It is also worth pointing out that the outdoor recreation economy generates \$887 billion annually in consumer spending, creates 7.6 million jobs, provides for \$65.3 billion in federal tax revenue, and provides for \$59.2 billion in state and local revenue. https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf Likewise, National parks, wildlife refuges, national monuments and other public lands and waters account for \$35 billion in economic output and 396,000 jobs in the U.S. *Id.* After Utah representatives came out against Bears Ears, the twice-yearly Outdoor Retailer gathering, which brought the state \$45 million in annual direct spending, began looking for another host city. <https://www.usatoday.com/story/money/nation-now/2017/04/25/amid-public-land-battle-outdoor-industry-boasts-887-billion-impact/100883702/>. Thus, the economic impact of Bears Ears on local, state, and federal economies should not be underestimated and supports maintaining the Monument. Indeed, fiscal responsibility demands that it be maintained.

The Proclamation recognizes the “[a]bundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts [that] provide an extraordinary archaeological and cultural record.” While the area is important to all Americans, the Proclamation recognizes that “the land is profoundly sacred to many Native American Tribes, including the Ute Mountain Ute Tribe, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation, and [Pueblo of] Zuni.”

The Proclamation notes that the earliest Native people—from the Clovis to the Ancestral Puebloans—utilized the Bears Ears region for millennia. *Id.* “The remains of single family dwellings, granaries, kivas, towers, and large villages, and roads linking them together, reveal a complex cultural history. ‘Moki steps,’ hand and toe holds carved into steep canyon walls by the

Ancestral Puebloans, illustrate the early people's ingenuity and perseverance and are still used today to access dwellings along cliff walls.”

The “petroglyphs and pictographs capture the imagination with images dating back at least 5,000 years and spanning a range of styles and traditions. From life-size ghostlike figures that defy categorization, to the more literal depictions of bighorn sheep, birds, and lizards, these drawings enable us to feel the humanity of these ancient artists.”

We were disappointed by the Obama Administration's reduction of the Monument from our proposal of 1.9 million acres down to 1.35 million acres. Virtually all of the changes were made to accommodate mining interests. We were saddened because those areas are all culturally important to us and now may well be developed in disruptive ways that detract from the values of the Monument lands themselves. While we disagree with this review process as stated above, any review of the Monument should consider its expansion to the originally proposed 1.9 million to protect these cultural resources.

Even still, the Proclamation achieved our goals and the goals of the Antiquities Act. The provisions for collaborative management vary somewhat from our proposal but the end result is truly exciting in that it calls for deep involvement—not just “consultation” or “advice”—of our tribal Commission as a “partner” in management of the Monument. The Proclamation leaves no doubt about the central importance of our Traditional Knowledge in management of this Monument: “The traditional ecological knowledge amassed by the Native Americans whose ancestors inhabited this region, passed down from generation to generation, offers critical insight into the historic and scientific significance of the area. Such knowledge is, itself, a resource to be protected and used in understanding and managing this landscape sustainably for generations to come.” 82 Fed Reg. at 1140.

As an overarching matter, the Proclamation alludes to, and honors, Native people in the in a respectful manner. It describes our cultural practices in terms that are accurate, neither demeaning nor romantic. The Proclamation is not locked in the past: it acknowledges contributions of both our ancestors and Native Americans today. Traditional Knowledge, for example, is correctly recognized as being possessed by us both historically and contemporarily. In the past, monument proclamations made only passing references to Native Americans. In this case, about one-quarter of the text is dedicated to our people and our relationship to all that is the Bears Ears landscape. In reading the Proclamation, one can see—and it means a great deal to us—that President Obama created the Bears Ears National Monument to honor Indian Tribes (both past and present), the land, and the relationship between the Tribes and the land.

Conclusion

As can be seen from these comments, there was extensive public outreach and coordination with relevant stakeholders and the Bears Ears National Monument easily conforms to the objectives of the Antiquities Act. Under the Antiquities Act, presidents have authority to create new national monuments, but not to extinguish or diminish existing monuments. An attempt to do either one would be struck down by the courts as executive overreaching. We are attaching a short, recent article in which distinguished scholars address this matter entitled *Presidents Lack the Authority to Abolish or Diminish National Monuments*. Mark Stephen Squillace, Eric Biber, Nicholas S. Bryner and Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 Va. L. Rev. Online (2017), <https://ssrn.com/abstract=2967807>.

Leaving the Monument fully intact is also the correct result as a matter of right and wrong. The wonderful Bears Ears National Monument is a gift to the citizens of the United States and the world. Once experienced, the physical beauty of the red-rock terrain and the cultural power of the

Old People stay with visitors forever. As for us, we personally have received a great gift also, but most of all we think of our ancestors. They gave us everything we have and this Monument honors them, their wisdom, and their way of life. As President Theodore Roosevelt said in proclaiming the 800,000-acre Grand Canyon National Monument under the Antiquities Act, "Leave it just as it is. You cannot improve upon it."



Alfred Lomahquahu
Vice Chairman, Hopi Tribe

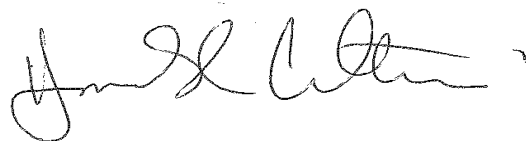
THE NAVAJO NATION



Russell Begaye, *President*



Tony Small
Vice Chairman, Ute Business Committee
Ute Indian Tribe



Harold Cuthair
Chairman
Ute Mountain Ute Tribe



Carleton Bowekaty
Councilman
Zuni Pueblo

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ATTACHMENT 2



THE NAVAJO NATION

RUSSELL BEGAYE PRESIDENT
JONATHAN NEZ VICE PRESIDENT

May 24, 2017

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

Re: Review of Certain National Monuments Established Since 1996

I. The History and significance of the Bears Ears National Monument to the Navajo Nation

The Bears Ears National Monument lies immediately adjacent to the Navajo Nation's northern boundary in San Juan County, Utah. The lands protected by the Monument hold special cultural and historical significance for the Navajo people, who believe that the towering spires in the Valley of the Gods are ancient Navajo warriors frozen in stone, and that the Bears Ears peaks are the top of the dismembered head of a bear that stands guard to culturally important Changing Bear Woman.

Additionally, the origin narratives of certain Navajo healing ceremonies make special mention of geographic sites located in present-day Bear's Ears National Monument, including the Bears Ears buttes themselves, Elk Ridge, Comb Ridge, the Abajo Mountains, and zones around crossings of the San Juan River at Cottonwood Wash, Comb Wash, and Mexican Hat. At least five types of Navajo ceremonies are associated with these places. The prominence of these sites in our ceremonies' origin narratives underscores those sites' cultural, spiritual, and historical significance to the Navajo people. Some of these sites were created when our deities first put the earth's surface in order, including what was to become a homeland for the Navajo people and our ancestors. Other sites in the Monument were where our deities and our people stopped amid travels and gained bits of knowledge that became incorporated into some of our most significant ceremonies. The influence of that knowledge continues to ordain the manner by which those ceremonies are practiced even today.

The lands that fall within the Bears Ears National Monument also have great significance to the human history of the Navajo people. By no later than 1800, specific, genealogically-identified Navajo forebears dwelt, herded, farmed, hunted, gathered, and performed ceremonial activities in the present-day Bears Ears National Monument. In 1864, U.S. troops marched several groups of Navajos—totaling over 9,000 individuals—in succession and at gunpoint 350 miles to Fort Sumner in east central New Mexico as the finale to Colonel Kit Carson's scorched earth campaign against the Navajo. Many Navajos escaped this removal by remaining in or fleeing to the stronghold of what is now the Bears Ears National Monument. The Monument is also the home of important figures in Navajo history, including Headman *K'aayéllii*, and Navajo Chief Manuelito (one of the negotiators of and signatories to the Navajo Treaty of 1868 with the United States).

The ties of the Navajo to the region extend from "pre-historic" times to the present. Ethnographic studies and oral traditions describe the Navajo ethno-genesis as an assimilation of various ethnic groups, including the Anasazi and Puebloan peoples from Canyon de Chelly and elsewhere, who the Navajo acknowledge as their relatives by referring to them as *Nihinaazázi'* (the ancestors who lived around us). Today the Navajo people continue to make offerings and prayers to these relatives in the Bears Ears region. Until recently, the Navajo people resided in areas now within the Monument's boundaries. They

lived there in hogans and wikiups, herded sheep, and hunted on the land. They also foraged, created rock art, and buried ancestors there. Many hogans remain in the region today, standing as a tribute to the deep cultural and historical ties the Navajo people retain to the Monument lands.

Indeed, Navajo people continue to make extensive use of the Monument lands. Traditional Navajo ceremonies, practiced since time immemorial, continue to take place in the Monument, and draw on plants, soils, and other items that can only be harvested from the Monument. The Navajo people have a demonstrated, enduring, and strong interest in the preservation of the Monument as designated by President Obama because this specific designation provides significant protection for the preservation of Navajo culture and traditions into the future.

II. The Establishment of Bears Ears National Monument Was Proper

The lands now protected within the Bears Ears National Monument are archaeologically rich, in part because of the strong human presence of the Navajo people and our forebears on that land. This richness did not go unnoticed. Vandalism and looting of those lands has long been an issue of concern for the region, and for the Navajo people and the Navajo Nation. In 2009 a federal raid resulted in the arrest and sentencing of 19 San Juan County residents for violations of the Archaeological Resources Protection Act. It was perhaps this recent and egregious incident that prompted a more than six years long robust public process that engaged the citizens of San Juan County and elsewhere in Utah in a discussion on how Bears Ears and other public lands in Utah might be better protected. This process was initiated by former Utah Senator Ben Bennett, and included specific outreach to the Utah Navajo Chapters.

As a people whose culture is derived from a deep connection to the Monument lands, and to the animals that share that land, the Navajo people have remained dedicated participants in this public process and ultimately in the protection of those land through designation of the Monument. As part of the larger public process underway, Utah Diné Bikéyah, a Navajo citizens group, was directed to undertake an ethnographic study. They spent two and a half years researching and analyzing the specific lands in the Bears Ears region to identify those lands with the strongest cultural ties to the Navajo and other tribes. Then-Navajo Nation President Ben Shelly officially called on the U.S. Department of Interior to designate the Bears Ears region as a National Monument in 2011. That same year, the Navajo Nation and Utah Diné Bikéyah signed an MOU with San Juan County to engage in a joint public lands planning process. Between 2011 and 2015, Navajo Nation and Utah Diné Bikéyah continued to engage in outreach to local and federal representatives and officials, publish information about the proposed monument, and host public meetings. In 2014, six out of seven Utah Navajo Chapters passed resolutions in support of the Monument, and four other tribes joined the Navajo Nation in forming the Bears Ears Inter-Tribal Coalition (“Coalition”) to advocate for the protection of the Monument lands. The other member tribes to the Coalition include the Hopi Tribe, the Zuni Tribe, the Ute Indian Tribe, and the Ute Mountain Ute Tribe.

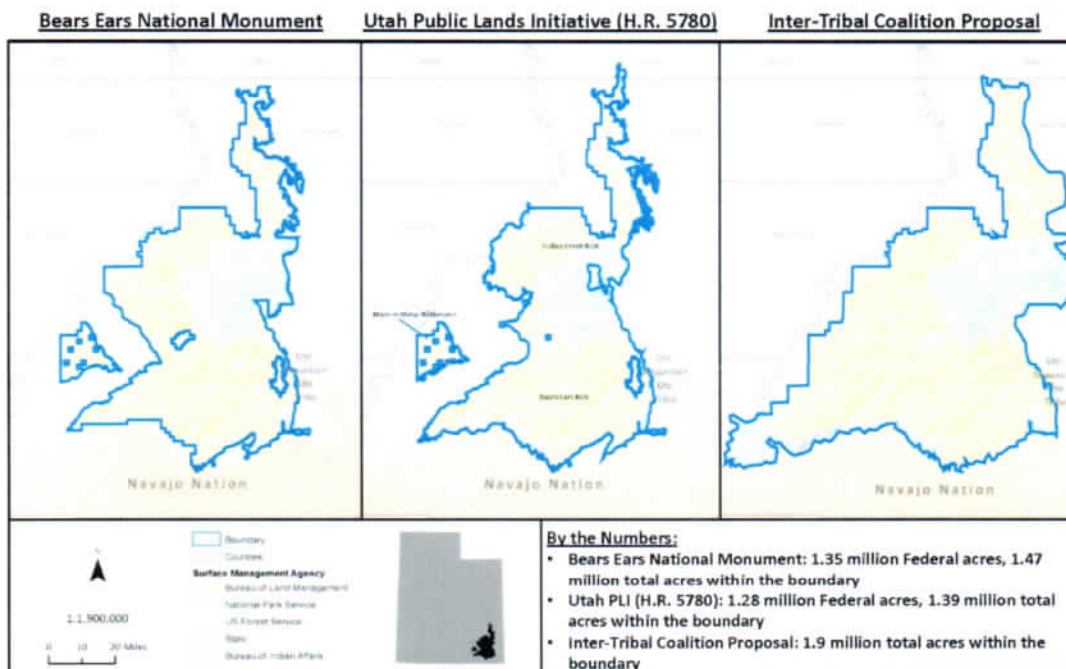
The ethnographic research and data analysis conducted by Utah Diné Bikéyah was used by the Coalition in making its recommendation for first a National Conservation Area and—when it became clear Congress would not act to adequately protect the Monument lands—then a monument designation. Utah Diné Bikéyah identified hundreds of thousands of historic landmarks, structures, and historic and scientific objects located within the boundaries of Bears Ears National Monument. These included migration routes, ancient roads, great houses, villages, granaries, hogans, wikiups, sweat lodges, corrals, tipi rings, shade houses, pueblos, kivas, rock paintings, petroglyphs, pictographs, and cliff dwellings in addition to the rich paleontological and ecological resources the Monument protects. This research demonstrates that all lands within the Monument boundary (and many thousand acres more) are necessary for the proper care and management of important cultural and historic resources. The original map the Coalition presented to the Obama administration for protection included 1.9 million acres of land defined

by the ethnographic research conducted by Utah Diné Bikéyah. This same map was presented to the people of San Juan County in December of 2014 and received the approval of 64 percent of respondents.

When the MOU between the Navajo Nation, Utah Diné Bikéyah, and San Juan County expired in 2013, the County chose not to renew it. Instead, the County collaborated with the Utah Congressional delegation to develop an alternative proposal they called the Public Lands Initiative. The Public Lands Initiative proposed protections in the form of two National Conservation Areas (NCAs): the Bears Ears NCA and the Indian Creek NCA. The Public Lands Initiative bill would have provided for management advice through two bodies: one composed of tribal members, and a second composed of citizens of San Juan County. The Bears Ears NCA section of the bill did not address mineral or land disposal withdrawals, livestock grazing, wildlife management, vehicle use, or water rights. The Indian Creek NCA section of the bill would not have provided for management advisors, but would have withdrawn the area from mineral development and disposal under applicable public lands laws, and limited vehicle use to designated routes. This proposal was also presented to the people of San Juan County in December 2014, but received the support of less than 1 percent of respondents.

The Navajo Nation and other Coalition tribes spent extensive time and resources on developing the evidence and working with the federal government on the creation of Bears Ears National Monument in order to protect ongoing use of the region by Native and non-Native people. When the Monument was designated, the Obama administration created the boundary based on a compromise between the tribes' proposed boundary (which was based on cultural resource protection), and the Utah Delegation's Public Lands Initiative bill (which was based on facilitating natural resource extraction). The map below comparing both proposals with the current Monument forcefully makes this point. While this compromise did not afford the extent of protection that the Coalition tribes sought, the Navajo Nation believes that the compromise was well-reasoned, and allows for an appropriate balance between protection of cultural and historic sites within the Monument and extraction in the most appropriate locations along the boundaries of the Monument.

Bears Ears National Monument and other proposals for protecting the Bears Ears area



Source: <https://www.blm.gov/programs/national-conservation-lands/national-monuments/utah/bears-ears/map-comparison>.

III. Threats to Monument Lands Remain Imminent and Warrant Protection

Throughout the public engagement process, vandalism and looting of the archaeologically rich Bears Ears region continued to threaten even the most remote areas of Bears Ears. The BLM Field Office in Monticello, Utah reports that it investigated 25 instances of looting, vandalism, and disturbance of grave sites in San Juan County between 2011 and 2016, and has continued to receive increasing numbers of similar reports in 2017. Other threats to the Bears Ears region and its fragile archaeological and paleontological resources prior to Monument designation included irresponsible off-road vehicle use, visitors who caused damage due to lack of knowledge about the nature and fragility of archaeological and paleontological resources, and mining and energy development. Oil, gas, and uranium can be found in and around the Monument, and in March 2015 the Utah legislature passed HB 0393, which designated the majority of the Monument lands as an “Energy Zone.” The bill aimed to streamline development and declared grazing, energy and mineral development to be the “highest and best use” of public lands. All of these uses threaten the integrity of the archaeological and cultural resources now protected by Monument status.

IV. Continued Use and Enjoyment of Bears Ears National Monument

The collaborative role the Coalition tribes will play in providing guidance and recommendations on the development and implementation of management plans and on management of the Monument, will ensure that Monument management will acknowledge and protect the living and dynamic nature of Navajo culture, as well as the resources of the Monument. Our tribal members will thus be able to continue age-old cultural practices on Monument lands—such as the harvesting of plants, firewood, and minerals, hunting, and ceremonial practices—even while we preserve invaluable cultural and historic structures that provide unparalleled scientific and recreational opportunities to the general public.

The Coalition tribes worked hard to ensure the designation of Bears Ears National Monument in a manner that would both protect the lands and their historical, archaeological, cultural, and spiritual resources and also ensure ongoing traditional use of those lands by the membership of all five tribes. The Monument has the broad and enthusiastic support of tribal members, including the majority of Navajos living in San Juan County. The Nation stands ready to support and defend the Monument alongside the other Coalition tribes for as long as necessary to ensure that the Monument remains protected for tribal people and all people who wish to visit its lands. One of the key drivers in the Coalition seeking to protect these lands was to protect their healing powers, which extend beyond Indian country and offer a benefit to all humanity. The region has already seen a marked increase in use of these lands, as visitors from around the world learn about the wonders of the Bears Ears region. This increased visitation has begun, and will continue to benefit the local economy in San Juan County, Utah.

V. Management of the Monument

The Coalition tribes have all appointed representatives to the Bears Ears Commission, which was established by the Bears Ears Monument declaration. Although a Monument Manager has not yet been appointed by the Bureau of Land Management, the Commission is currently developing governing documents and management recommendations. The Coalition tribes are deeply committed to supporting the successful management of Bears Ears National Monument, and with the help of a group of non-profits, have begun work even without federal funding. The Commission’s work is vital at this time, in light of the increased visitation to the Monument. The majority of visitors are new to the region, and many do not have the knowledge about how to responsibly visit fragile archaeological sites without causing damage to manmade objects and fragile desert ecosystems. The Navajo Nation and other Coalition tribes will continue to support and work for the successful management of the Monument, and

stand ready to assist the federal land management agencies with visitation and management planning by bringing additional personnel, knowledge, and some grant funding resources to the process.

VI. Bears Ears Was Properly Designated and Should Remain a Monument

The area protected by Bears Ears National Monument is deeply significant to the Navajo people and other Coalition tribes, and is replete with paleontological, archaeological, historic, and scientific resources. These resources extend outside of the Monument boundaries, but the dimension of Bears Ears National Monument were carefully crafted to protect the most important objects while allowing for continued natural resource extraction in other parts of San Juan County. The area protected is the “smallest area compatible with the proper care and management” of the area’s most important objects and ecosystems, while allowing for appropriate multiple uses both within and outside the Monument’s boundaries. The Navajo Nation, including a majority of its members in San Juan County, supports the Monument designation. The Nation looks forward to the economic growth through tourism that the Monument will bring to the region, as well as the protections to significant cultural and historic landmarks that it affords. The Navajo Nation stands ready to continue to provide expertise and resources in the management and protection of the Monument.

Sincerely,

THE NAVAJO NATION

A handwritten signature in black ink, appearing to read "Russell Begaye". The signature is fluid and cursive, with a large initial "R" and "B".

Russell Begaye, *President*

ATTACHMENT 3



UTE MOUNTAIN UTE TRIBE

P.O. Box 248
Towaoc, Colorado 81334-0248
(970) 565-3751

May 25, 2017

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

Re: Comment on Review of National Monuments

Department of the Interior:

The Ute Mountain Ute Tribe (UMUT) submits the following comments in connection with the Office of the Secretary's Notice of Opportunity for Public Comment concerning the Review of Certain National Monuments Established Since 1996, namely the Bears Ears National Monument (BENM). As detailed below, the UMUT has significant interests in the BENM, particularly with the historic uses and the ancestral and cultural ties to the lands.

The UMUT provides these comments to inform the Department of the Interior, as a fiduciary to tribal government interests, in evaluating and understanding the value that the BENM provides to the UMUT and to the public.

I. Introduction

The UMUT is a federally-recognized Indian tribe with reservation lands in Utah, New Mexico and Colorado. Within Utah, the White Mesa portion of the UMUT reservation is home to several hundred tribal members. Along the Allen Canyon corridor of San Juan County, Utah, the UMUT also has thousands of acres of allotted lands held in trust, for the Tribe and individual tribal members, by the federal government. Some tracts of these trust allotments are located within the exterior boundaries of the BENM. In addition, like other ranching interests, the UMUT has grazing permits on lands within the monument boundaries. Accordingly, the UMUT consistently advocated for their interests and the various rights associated with these lands in discussions leading up to the establishment of the BENM.

As a principal stakeholder to the Bears Ears cultural landscape, the UMUT advocates for the present protections that the national monument designation provides to the living landscape. With over 100,000 archeological and cultural resources sites in the area, the identity, well-being, and worldviews of the UMUT are intricately tied to these lands. For tribal members, it is not only a place to regularly harvest game, firewood, or to gather medicinal plants, food, and herbs,

but it is a spiritual place of ceremony, prayer and healing. In our view, the lands take care of us and nourishes our spiritual and physical well-being. In return, we are obligated to protect her from further desecration that looting, pot hunting, oil and gas drilling, and rampant uranium mining has brought to these sacred lands.

As a steward and protector of ancestral lands, the UMUT, along with the Hopi Tribe, Navajo Nation, Ute Indian Tribe and the Pueblo of Zuni, took part in the creation of the Bears Ears Inter-Tribal Coalition (BEITC) with the common goal of seeking permanent protections for the lands. Recognizing that tribal consultation processes, afforded by federal laws, were inadequate to provide the necessary protection the lands deserve, we rather sought a more meaningful avenue for Tribes to collaborate in land management. Over the course of several meetings, we explored different mechanisms to protect 1.9 million acres of our ancestral lands and calculated that a national monument designation, by way of the Antiquities Act of 1906, met our pressing concerns. In passing the Antiquities Act, we recognize that Congress granted the President unilateral authority to designate national monuments to respond in a timely manner to threats to archaeological sites and cultural resources. The Bears Ears cultural landscape is precisely what Congress had in mind when the law was enacted.

On December 28, 2016, our efforts to protect and collaborate in management of the land were realized in the presidential proclamation establishing the BENM. That day ushered in an indigenous perspective to land management. The BENM also offered Tribes the ability to share their story and truly convey their relationship to the lands.

However, the recent events by the Trump administration have put the BENM back into peril. As a federally-recognized Indian Tribe with a government-to-government relationship with the federal agencies, the UMUT reminds the Department of the Interior, as our trustee, that to relax protections or to reduce monument boundaries is not only tantamount to further destruction of our lifeways, but is a blatant disregard for our country's collective past, present and future generations.

II. Executive Order 13792 - the Review of Certain National Monuments

On April 26, 2017, President Trump issued Executive Order 13792 (EO). Without a citation to statutory authority, the EO called for the unprecedented review of certain national monuments designated since January 1, 1996. The EO purports to determine whether the designations conform to the objectives of the Antiquities Act of 1906.

Pursuant to the Antiquities Act, the President certainly has the authority to designate national monuments, but lacks the authority to rescind, reduce or move boundaries of a prior designation. That authority was not expressly nor implicitly delegated to the President. Unless or until clearly and unequivocally delegated, the Property Clause of the U.S. Constitution reserves that authority to reside solely with Congress. U.S. CONST. art. IV, § 3. Any action by the President to rescind or reduce the BENM would be ultra vires and in violation of separation of powers principles. U.S. CONST. art. I, § 1. Accordingly, the process created by the EO is merely commentary and inconsequential.

Despite the noted limitations, the Department of the Interior is reviewing national monument designations and seeking comments pursuant to the EO. 82 Fed. Reg. 22016 (May 11,

2017). As part of the review, the Secretary is directed to consider a number of extraneous factors that are beyond the statutory text of the Antiquities Act. For instance, the effects of a designation on the use and enjoyment of non-Federal lands outside monument boundaries, the economic and fiscal conditions of governments, and the availability of Federal resources, all of which are not criteria for a proper designation. Rather, the Antiquities Act only speaks to the size of a designation and the subject matter that is to be protected by a designation, both of which the BENM satisfies.

Any recommendations on the BENM by the Secretary of the Interior that are based on factors beyond the scope of the Antiquities Act is improper. It also follows that, without statutory authorization, any subsequent action by the President to revoke or diminish the BENM is unconstitutional.

III. The BENM Boundaries are the Smallest Area Compatible With the Proper Care and Management of the Objects to be Protected

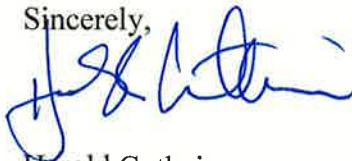
The establishment of the BENM did not occur overnight as suggested by opponents of the monument. Years of concerted effort by native-led grassroots organization, namely Utah Dine Bikeyah (UDB), provided the groundwork supplying cultural resource data, wildlife information and other analysis that enabled the UMUT and the BEITC to carefully consider national monument boundaries.

Over the course of six years, UDB conducted comprehensive ethnographic research that included opinions from experts in archaeology, anthropology, ecology, biology and public policy. UDB also conducted over seventy cultural interviews with Native American traditionalists. Using the ethnographic data and traditional knowledge from elders, cultural maps were prepared in detail, showing that a boundary of 1.9 million acres, as delineated in the BEITC's proclamation proposal, was needed to protect the cultural resources and an estimated 100,000 archaeological sites.

Although our 1.9 million acre proposal was not fully realized, we encourage you to respect the current BENM boundaries. We also urge you to consider the ethnographic data and resulting report. *See generally* Bears Ears Inter-Tribal Coalition, *Protecting the Whole Bears Ears Landscape: A Call to Honor the Full Cultural and Ecological Boundaries* (2016).

The UMUT appreciates your time and attention to these comments.

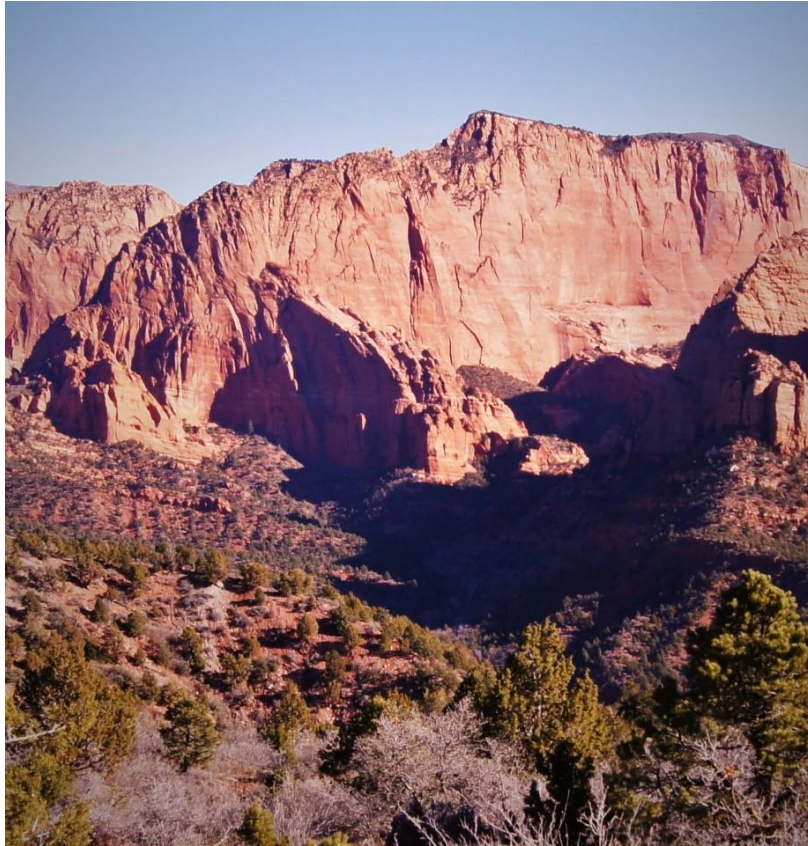
Sincerely,



Harold Cuthair
Chairman
Ute Mountain Ute Tribe

ATTACHMENT 4

Revised May 19, 2017



PRESIDENTS LACK THE AUTHORITY TO ABOLISH OR DIMINISH NATIONAL MONUMENTS

Mark Squillace, Professor of Law, University of Colorado

Eric Biber, Professor of Law, University of California, Berkeley

Nicholas S. 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, University of California, Los Angeles

ACCEPTED PAPER: VIRGINIA LAW REVIEW ONLINE

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Electronic copy available at: <https://ssrn.com/abstract=2967807>

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.

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).

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.

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 protected⁸

This narrow authority granted to the President to *reserve* land⁹ 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

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).

⁷ See PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION’S LAND (1970).

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

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

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).

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

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.

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

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.

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.

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

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 Quivira³⁹ 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

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.

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).

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

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

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

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.

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.

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⁵² *See* note 50, *supra*.