

United States of America  
United States Department of the Interior

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In the Matter of:

Review of Certain National  
Monument Designations  
Since 1996

Docket No: DOI 2017-0002

82 FR 22016

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**COMMENTS OF MAINE ATTORNEY GENERAL JANET T. MILLS**

Submitted June 12, 2017

Please accept these comments on behalf of Janet T. Mills, Attorney General of the State of Maine, in connection with the Department of the Interior's (DOI) review of the Katahdin Woods and Waters National Monument (Katahdin Woods and Waters) designation. These comments address four issues: (1) flaws in DOI's review process; (2) the lack of Executive Branch authority to abolish or reduce a national monument; (3) the adequacy of public outreach and stakeholder coordination preceding the designation; and (4) the increase in public support for Katahdin Woods and Waters since designation.

**I. DOI's review process is fundamentally flawed.**

We have several threshold concerns with the review process itself. DOI's notice invites comments on whether the Katahdin Woods and Waters designation "was made without adequate public outreach and coordination with relevant stakeholders." 82 FR 22016. This implies that a designation must comply with an identifiable standard for public outreach and stakeholder coordination when, in fact, no such standard exists. No federal statute or regulation sets forth procedural requirements to which a President must adhere before designating a national monument by proclamation.

The fact that DOI is undertaking this review also implies that a finding of inadequate public outreach and stakeholder coordination would have legal significance. We are unaware of any legal or regulatory basis for the Executive Branch to take any particular action based upon a finding that a monument designation was not accompanied by sufficient public process.

We also question whether DOI has effectively predetermined the outcome of its own inquiry. DOI's notice initiating this process makes clear that it is implementing the President's Executive Order calling for a review of designations under the Antiquities Act. 82 FR 22016;

Executive Order 13792 (April 26, 2017), 82 FR 20429. That Executive Order directs DOI to undertake review of two categories of monuments designated or expanded since January 1, 1996: those covering more than 100,000 acres (either originally or as expanded), and those “where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders.” Katahdin Woods and Waters includes 87,500 acres. Therefore, the only basis under the Executive Order for the Secretary to conduct a review of the Katahdin Woods and Waters designation is if he has *already determined* that it occurred “without adequate public outreach and coordination with relevant stakeholders.” In other words, DOI’s notice invites comments on the very same question that the Secretary was required to answer in the affirmative in order to initiate the review process. It is difficult to have confidence that public comments will receive serious and impartial consideration under these circumstances.

## **II. The Executive Branch has no authority to abolish or reduce a national monument.**

The Property Clause of the U.S. Constitution grants authority to manage federally-owned land exclusively to Congress. U.S. Constitution, Art. IV, § 3, Cl. 2 (“[T]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ...”). Therefore, any Executive Branch authority over federal lands is not constitutionally-derived, but instead exists pursuant to a delegation of Congressional authority. Congress enacted such a limited delegation of authority to the President in the Antiquities Act of 1906. 54 U.S.C. §§ 320301-320303. The Antiquities Act authorizes the President to reserve parcels of federal land as national monuments, and sets forth a complete statement of the President’s authority to act in two short paragraphs:

- (a) Presidential declaration.--The President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.
- (b) Reservation of land.--The President may reserve parcels of land as part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

54 U.S.C. §§ 320301(a)&(b). The plain language of this statute empowers the President to create national monuments; it provides no authority to abolish, reduce or otherwise undermine national monuments that already exist.

In 1938, U.S. Attorney General Homer Cummings issued a formal Opinion addressing limitations on the President’s authority under the Antiquities Act. 39 Op. Atty. Gen. 185 (1938). That Opinion concludes that the President has neither express nor implied authority to abolish a national monument, reasoning that a President’s duly authorized designation of a monument has the legal standing of a Congressional act, and therefore can be unwound only by Congress:

A duty properly performed by the Executive under statutory authority has the validity and sanctity which belongs to the statute itself, and, unless it be within the terms conferred by the statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.

*Id.* at 186-87. No subsequent Opinion of an Attorney General has superseded or modified the Cummings Opinion, which remains the leading legal authority on the issue.

The conclusion of the Cummings Opinion is consistent with the principle of statutory interpretation that courts will not find implied powers in a legislative delegation of authority unless “[t]he power to be implied ... [is] practically indispensable and essential in order to execute the power actually conferred.” 2A Sutherland Stat. Constr. § 55.03. The Antiquities Act expressly conferred upon the President the authority to *designate* national monuments. The power to *eliminate* protections for national monuments cannot be said to be “practically indispensable and essential” to the power to designate a monument in the first instance, and therefore cannot be implied. *Id.*

The unique delegation of power in the Antiquities Act was designed to authorize swift action to protect vulnerable places and things from imminent threats. *See, e.g.,* Ronald F. Lee, *The Antiquities Act of 1906*, National Park Service (discussing legislative history and historical context for the law).<sup>1</sup> The looting of archeological sites, for example, could require immediate intervention simply to preserve the status quo. The statute addresses this concern by authorizing the President to put into place essential protections by proclamation, with no attendant procedural requirements and without the delays inherent in the legislative process. In contrast, it is difficult to conceive of how the need to strip places or things of existing protections could ever present exigent circumstances that require action by Presidential proclamation. If the President concludes that an existing monument was improvidently designated or is too expansive, he could introduce legislation to address the matter. There is simply no reason to construe the Antiquities Act’s silence as implying Presidential authority to abolish or reduce national monuments when an adequate legislative remedy exists.

The enactment of Federal Lands Policy and Management Act, Pub. L. 94-579, 90 Stat. 2743 (1976) (FLPMA), reinforces the conclusion that the President lacks authority to abolish or reduce a national monument. Section 204(j) of FLPMA provides that “[t]he Secretary shall not ... modify, or revoke any withdrawal creating national monuments under [the Antiquities Act] ...” 43 U.S.C. § 1714(j). This provision refers to the Secretary of DOI (who has no authority to create national monuments) rather than the President, but the legislative history shows this was a scrivener’s error. Early versions of the bill had proposed to amend the Antiquities Act by transferring authority to designate national monuments from the President to the Secretary. A congressional subcommittee rejected that change. However, a conforming amendment was never made to Section 204(j), so the provision still reads as if the Antiquities Act delegates designation authority to the Secretary rather than the President. *See* Squillace, Biber, Bryner and Hecht, *Presidents Lack Authority to Abolish or Diminish National Monuments*, working paper,

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<sup>1</sup> Electronic version available at <https://www.nps.gov/archeology/pubs/Lee/index.htm>).

May 2017 (tracing the origins of the reference to “the Secretary” in Section 204(j) through FLPMA’s legislative history).<sup>2</sup>

The House Committee Report accompanying the bill makes clear that Section 204(j) was intended to confirm exclusive Congressional control over decisions to abolish or reduce national monuments. That report explains the Committee’s understanding that the bill “... would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act.” H.R. Rep. 94-1163 at 9. Therefore, FLPMA’s express denial of authority to the Secretary cannot be interpreted as an implied recognition of Presidential authority. Both FLPMA’s text and the underlying legislative record support the view that the Executive Branch has no power to abolish or reduce national monuments.

### **III. The public outreach and stakeholder coordination that preceded the Katahdin Woods and Waters designation was extensive.**

The stated reason for DOI’s review of the Katahdin Woods and Waters designation is to determine whether public outreach and stakeholder involvement was adequate. As noted above, the law contains no requirement for any particular public process prior to designation, so there is no legal standard that would allow for a finding of inadequacy. That aside, we have identified at least 150 different meetings with stakeholders, public meetings, public hearings and other public presentations over a period of years at which information and opinions about the monument proposal were exchanged. *See* Attachment A (Compendium of public outreach and comment opportunities). We also note that, to our knowledge, no member of Maine’s Congressional delegation has expressed the view that public comment opportunities associated with the designation decision were inadequate. Against this background, any after-the-fact DOI determination that the public process was insufficient would be arbitrary and without factual support.

### **IV. Public support for Katahdin Woods and Waters has continued to increase since designation.**

DOI’s actions should be informed by the fact that public support for Katahdin Woods and Waters has increased dramatically since the 2016 designation. The change in public sentiment is well-documented. *See, Katahdin Woods monuments’ former opponents want Trump, LePage to back off*, Portland Press Herald, May 12, 2017.<sup>3</sup> Many local business owners and elected officials from the region who once harbored concerns about the monument proposal have changed their views, *id.*, including State Representative Steve Stanley. *See* Attachment B (letter of Rep. Stanley to Secretary Zinke). Rep. Stanley worked 43 years in the East Millinocket paper mill and has represented the Katahdin region in the Maine House and Senate for many years. In 2015 he founded the Katahdin Revitalization Group, a volunteer organization devoted to strengthening and supporting the region’s communities. He had been an outspoken opponent of the idea of a national monument when it was proposed and sponsored legislation intended to

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<sup>2</sup> Available at <https://ssrn.com/abstract=2967807>.

<sup>3</sup> Available at <http://www.pressherald.com/2017/05/12/supporters-former-opponents-of-katahdin-woods-monument-want-trump-lepage-to-back-off/>.

express the Legislature's disapproval of a national monument. However, Rep. Stanley has witnessed a wave of investment activity and community excitement attributable to the designation of Katahdin Woods and Waters. He is now convinced that the Monument is the centerpiece of economic development in the region, and that losing it would be a terrible setback. *Id.* DOI should give great weight to the views of Rep. Stanley and others like him who are providing first-hand accounts of the benefits Katahdin Woods and Waters is bringing to the surrounding area today.

## V. Conclusion

We are prepared to challenge any unlawful Executive Branch action that purports to abolish or reduce the Katahdin Woods and Waters National Monument. DOI should instead terminate its review of the Katahdin Woods and Waters designation and reaffirm the agency's commitment to making the Monument work well for all people, and particularly the residents of the Katahdin region who are now counting on it for their economic future.

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