July 6, 2017

Dear Secretary Zinke and Secretary Ross:

We the undersigned 121 law professors with expertise in environmental, natural resources, and administrative law, and related fields, submit these comments to express our serious concerns with the process initiated by Executive Order (EO) 13792, which directs the Secretary of the Interior (Secretary) to "review" all national monuments designated or expanded after January 1, 1996, that either include more than 100,000 acres of public lands or for which the Secretary determines inadequate "public outreach and coordination with relevant stakeholders" occurred.[1] The Department of Commerce is conducting a separate review of five Marine Monuments.[2] EO 13792 and the President's public statements upon signing that order reflect profound misunderstandings of both the nature of national monuments and the President's legal authority under the Antiquities Act.

On May 5, 2017, the Secretary released an "initial[]" list of 22 monuments subject to review.[3] Twenty one of those monuments were included on the list due to their size, and one monument—Katahdin Woods and Waters National Monument—was included because of public input and coordination with stakeholders. The Secretary sent the President an interim report on June 12, 2017 (Bears Ears Interim Report), recommending that the size of the Bears Ears National Monument be reduced, with the details of that recommendation to follow. We submit this comment for consideration as part of the review of each of the 22 terrestrial monuments and five marine monuments currently under review.[4]

Most fundamentally, EO 13792 and the Bears Ears Interim Report imply that the President has the power to abolish or diminish a national monument after it has been established by a public proclamation that properly invokes authority under the Antiquities Act. This is mistaken. Under our constitutional framework, the Congress exercises plenary authority over federal lands.[5] The Congress may delegate its authority to the President or components of the executive branch so long as it sets out an intelligible principle to guide the exercise of authority so delegated.[6] The Antiquities Act is such a delegation. It authorizes the President to identify "objects of historic or scientific interest" and reserve federal lands necessary to protect such objects as a national monument.[7] But the Antiquities Act is a limited delegation: it gives the President

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

[2] *See* 82 Fed. Reg. at 22017.

[3] *See* Press Release, Interior Department Releases List of Monuments Under Review, Announces First-Ever Formal Public Comment Period for Antiquities Act Monuments (May 5, 2017), *available at* https://www.doi.gov/pressreleases/interior-department-releases-list-monuments-under-review-announces-first-ever-formal.

[4] Those monuments are listed in the federal register notice inviting public comment on these separate, but related, reviews. *See* 82 Fed. Reg. at 22016-17. Because this comment is filed with respect to the review of all 27 monuments, we expect that it will be included in whatever record is compiled with respect to each of those reviews.

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

[6] *See, e.g.*, *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 384 (1928).

[7] 54 U.S.C. § 320301. The term "reservation" relates to federal public lands law and is defined as a category of "withdrawal." "The term 'withdrawal' means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program . . . ." 42 U.S.C. § 1702(j).

authority only to identify and reserve a monument, not to diminish or abolish one.[8] Congress retained that power for itself.

The plain text of the Antiquities Act makes this clear. The Act vests the President with the power to create national monuments but does not authorize subsequent modification. Moreover, other contemporaneous statutes, such as the Pickett Act of 1910 and the Forest Service Organic Act of 1897, include provisions authorizing modification of certain withdrawals of federal lands.[9] The contrast between the broader authority expressly delegated in these statutes—to withdraw or reserve land, and then subsequently, to modify or abolish such reservations or withdrawals—and the lesser authority delegated in the Antiquities Act underscores that Congress intended to give the President the power only to create a monument.

Congress confirmed this understanding of the Antiquities Act when it enacted the Federal Land Policy and Management Act (FLPMA) in 1976, which included provisions governing modification of withdrawals of federal lands.[10] Those provisions indicate that the Executive Branch may not "modify or revoke any withdrawal creating national monuments."[11] And the legislative history of FLPMA demonstrates that Congress understood itself to have "specifically reserve[d] to Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act."[12]

Furthermore, the reasons for enacting the Antiquities Act do not support delegating to the President the power to modify a national monument. Congress passed the Antiquities Act because "private collecting of artifacts on public lands . . . threatened to rob the public of its cultural heritage."[13] Congress was neither nimble enough to identify all of the resources needing protection, nor to craft appropriate protections for the lands containing those resources. Recognizing these limitations, Congress endowed the President with broad authority to set aside national monuments to protect areas with scientific, cultural, or historic value to the entire nation, authorizing him to act with an expediency that Congress could not muster. No similar need existed for rapid revisions to national monuments, and therefore, there was no need to empower the President to take such action.

The Executive Branch has long recognized these limits on the President's authority over established national monuments. In 1938, Attorney General Cummings concluded that the Antiquities Act "does not authorize [the President] to abolish [national monuments] after they have been established."[14] Indeed, no President has ever attempted to abolish a national monument, and as recently as 2004, the Solicitor General

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[8] The President has authority to enlarge a national monument to protect additional objects of historic or scientific interest—and frequently this has occurred—by exercising the power delegated by the Antiquities Act.

[9] *See, e.g.*, Pickett Act, 36 Stat, 847 (1910); Forest Service Organic Administration Act, 30 Stat. 36 (1897).

[10] 43 U.S.C. § 1714(a).

[11] 43 U.S.C. § 1714(j). The text of § 1714(j) expressly addresses the Secretary, rather than the President or the Executive Branch as a whole. The legislative history, however, makes clear that the restraint was intended to apply as a general bar to modification or abolishment of national monuments. This history is carefully documented in Mark S. Squillace, et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA L. REV. ONLINE 55, 59-64 (2017) (attachment 2).

[12] H.R. Rep. 94-1163, at 9 (May 15, 1976).

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

[14] 39 Op. Att'y Gen. 185, 185 (1938).

represented to the Supreme Court that "Congress intended that national monuments would be permanent; they can be abolished only by Act of Congress."[15]

The 1938 Attorney General Opinion noted that Presidents had, on some occasions, diminished national monuments, but the opinion did not analyze the legality of such prior actions, and no court has considered the issue. In any case, since FLPMA's passage, no President has claimed such authority. Moreover, at oral argument in 2004, the United States recognized that Presidents lack authority to either revoke or diminish a national monument. In that case, the United States argued that it retained ownership of submerged lands within the boundary of Glacier Bay National Monument when Alaska became a state. The United States explained: "[U]nder the Antiquities Act, the President is given authority to create national monuments, but they cannot be disestablished except by act of Congress. Now, Congress could have disestablished this monument if it had meant to give up the land. It could have disestablished some part of it, and it chose not to do so."[16] By arguing that every acre of submerged lands were permanently part of the national monument, in the absence of Congressional action, the United States recognized that the President lacks authority to diminish a monument once lawfully created.

In short, EO 13792 represents an attempt by the Executive to wield a power that Congress alone possesses, and the Bears Ears Interim Report advocates for such illegal and unconstitutional action. That is not, however, the only flaw in the Executive Order, the President's public comments, and the Bears Ears Interim Report.[17] At least six other errors are evident.

First, the EO directs the Secretary to assess a broad range of policy considerations entirely unmoored from the Antiquities Act. Such considerations, ranging from the effect of national monuments "on the available uses of Federal lands beyond the monument boundaries" to the "economic development and fiscal condition of affected States, tribes, and localities," would be entirely appropriate in a legislative debate over monument designations. They have no relevance, however, to the circumscribed authority vested in the President.[18]

Second, the EO directs the Secretary to review monuments designated "without adequate public outreach and coordination with relevant stakeholders."[19] This directive could be premised on the incorrect assumption that the Antiquities Act requires a public comment process, and thus a prior proclamation could be legally defective for failing to engage the public. That is not so. As a factual matter, Presidents have, at times, sought significant public input on a proposed national monument. President Obama proceed in that manner before designating the Bears Ears National Monument.[20] But that approach to the process occurs as a matter of policy, not legal obligation. Alternatively, this directive could be premised on the view that the President may exercise a free-wheeling authority unmoored from any statutory grant to modify or reverse the decisions of a predecessor because, as a matter of policy, the new President believes more public

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[15] Reply Brief for the United States in Response to Exceptions of the State of Alaska at 32 n.20, *Alaska v. United States*, 545 U.S. 75 (2005). Notably, this brief was filed by Acting Solicitor General Paul Clement during the Presidency of George W. Bush.

[16] Oral Argument Transcript at 46, *Alaska v. United States*, 545 U.S. 75 (2005).

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

[18] *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007).

[19] 82 Fed. Reg. at 20429.

[20] Documents obtained by the House Committee on Oversight & Government Reform detail extensive public outreach that occurred before designation of Bears Ears National Monument. *See* https://democrats-oversight.house.gov/attachment-documents-relating-to-bears-ears-designation.

process should have occurred. There is no basis in law for the President exercising such unlimited power to second-guess the process a predecessor used to exercise delegated authority. Regardless, ample evidence exists that the national monuments under review enjoy broad public support.[21]

Third, the President called national monuments a "massive federal land grab." Yet the Antiquities Act applies only to land owned by the federal government and effects no transfer of title from any state or private landowner. The Bears Ears Proclamation itself is clear on this point, applying only to "lands owned or controlled by the Federal Government."[22] There has been no land grab.

Fourth, the President stated that "[t]he Antiquities Act does not give the federal government unlimited power to lock up millions of acres of land and water." The Bears Ears Interim Report takes a different but equally mistaken view of Presidential authority, stating that the Bears Ears National Monument includes "some objects that are appropriate for protection" and listing only archeological objects. True, the President's authority under the Antiquities Act is limited. But nothing in the Act limits the acreage of a monument or limits the "other objects of historic or scientific interest" that can be protected. Indeed, the Act grants the President the power to reserve however many acres are necessary to protect the objects identified.[23] It has long been settled that the Antiquities Act protects a broad array of objects of historical and scientific interest, including biological and geological objects. In 1920, for example, the Supreme Court rejected a challenge to the authority of President Teddy Roosevelt to create the 808,120 acre Grand Canyon National Monument. In upholding the designation, the Court explained that "[t]he Grand Canyon, as stated in his proclamation, 'is an object of unusual scientific interest.' It is the greatest canyon in the United States, if not the world."[24] Similarly, in 1976, the Supreme Court again rejected the argument that the Antiquities Act protects only archeological objects, instead holding that a subterranean pool of water and the endemic fishes that inhabited it were "objects of historic or scientific interest."[25] No court has ever held otherwise and imposed a cap on the size of a national monument or confined monuments to historical or archeological objects as the Interim Report appears to contemplate.

Fifth, the President expressed an intent to give power "back to the states and to the people." This misunderstands the nature of federal public lands law. Congress possesses plenary power over federal public lands, managing them on behalf of the American people. Congress has delegated some of its authority to the executive branch, subject to specific processes and constraints. The President and federal land management agencies have no authority to abdicate those responsibilities and give states control over

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[21] Numerous polls and other data related to the national monuments under review demonstrate broad public support. *See, e.g.*, Aaron Weiss, *New Analysis Shows National Monument Support Dominates Public Comment Period*, WESTWISE (May 25, 2017), *available at* https://medium.com/westwise/new-analysis-shows-national-monument-support-dominates-public-comment-period-7550888175e; Edward O'Brien, *Survey Finds Broad Support for Missouri Breaks National Monument Among Montanans*, MTPR.org (June 21, 2017), *available at* http://mtpr.org/post/survey-finds-broad-support-missouri-breaks-national-monument-among-montanans; Jason Gibbs, *Green Chamber poll: Residents support Organ Mountains-Desert Peaks National Monument*, LAS CRUCES SUN-NEWS, *available at* http://www.lcsun-news.com/story/news/local/2017/06/14/green-chamber-poll-residents-support-organ-mountains-desert-peaks-national-monument/394384001/. A poll released by Colorado College found that 80% of voters in seven western states support leaving national monuments intact, while only 13% support removing protections. *See The 2017 Conservation in the West Poll: Public Lands*, available at https://www.coloradocollege.edu/other/stateoftherockies/conservationinthewest/2017/PublicLands_Topic_17.pdf.

[22] 82 Fed. Reg. at 1143.

[23] 54 U.S.C. § 320301(b).

[24] *Cameron v. United States*, 252 U.S. 450 (1920).

[25] *Cappaert v. United States*, 426 U.S. 128, 142 (1976).

federal lands.[26] That does not mean that states, tribes, local governments, and the public have no role to play in federal land management. Numerous opportunities for public participation exist, including with respect to the management of national monuments.[27] But the federal government has the ultimate responsibility to carry forth the legal obligations imposed upon it by Congress, and only Congress can empower states to act in the federal government's stead.

Six, the Bears Ears Interim Report suggests that it is "unnecessary" to designate lands within a national monument that are also wilderness or wilderness study areas. There is no legal principle that prevents areas with one conservation designation from inclusion within the boundaries of another. Indeed, more than 44 million acres of wilderness area are included within fifty National Park units.[28] Moreover, managing an area as wilderness does not necessarily protect the objects protected by a national monument designation, and overlapping designations provide the relevant land management agency with more specific direction about how to manage an area. In the case of the Bears Ears National Monument, the BLM and Forest Service will manage wilderness areas to protect and conserve both wilderness attributes and also the objects of historic and scientific interest found therein. Furthermore, the Bears Ears National Monument Proclamation creates both a Monument Advisory Committee and a Tribal Commission, neither of which would have a say in wilderness area or WSA management if those areas are removed from the monument.[29]

While we have limited our comments to the legal issues implicated in the review of national monuments, the area of our academic and scholarly expertise, we also note that existing evidence suggests that the creation of national monuments enhances, rather than impairs, local economies by attracting visitors to these unique lands.[30] In some cases, this economic boon may come very swiftly. Two Maine politicians formerly opposed to Katahdin Woods and Waters National Monument have become supporters because "[a]lthough the monument is less than a year old, already some businesses in the region have experienced an uptick in activity."[31]

It is beyond question that the proclamations creating the national monuments under review—both the terrestrial monuments and the marine monuments— identify a wealth of unique and precious resources that qualify as "objects of historic and scientific interest" throughout the reserved federal lands. These proclamations are, therefore, lawful. If the new administration believes that those objects and the lands containing them do not warrant protection, or that factors external to the Antiquities Act should be

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[26] In the absence of express congressional authorization, the executive branch may not subdelegate authority to non-federal actors. *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).

[27] For example, some national monument proclamations direct the establishment of a Federal Advisory Committee to formally participate in monument planning, *see* Bears Ears Proclamation, 82 Fed. Reg. at 1144, Gold Butte Proclamation, 82 Fed. Reg. 1149, 1152 (Jan. 5, 2017). Other Federal Advisory Committees have been created to support other monument planning efforts. *See* Department of the Interior, Establishment of Advisory Committee, 68 Fed. Reg. 57,702 (Oct. 6, 2003) (creating Grand Staircase-Escalante National Monument Advisory Committee). And even in the absence of a formal advisory committee, the monument planning processes includes opportunities for public participation.

[28] *See* https://www.nps.gov/subjects/wilderness/wilderness-parks.htm.

[29] *See* 82 Fed. Reg. at 1144.

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

[31] That letter, from Stephen G. Stanley to Secretary Ryan Zinke, was included with the comments Maine Attorney General Janet T. Mills filed with the Department of Interior with respect to the review of the Katahdin Woods and Waters National Monuments, which are included as attachment 2.

considered in evaluating national monument designations, the administration must turn to Congress for a remedy.

To amplify the comments offered here we incorporate by reference the attached article recently published in the *Virginia Law Review Online* and a number of other recent writings by law professors on the subject.

Sincerely yours,

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