



**National Headquarters**

1130 17th Street, N.W. | Washington, D.C. 20036-4604 | tel 202.682.9400 | fax 202.682.1331  
[www.defenders.org](http://www.defenders.org)

*Submitted electronically via regulations.gov*

May 25, 2017

Ryan Zinke  
Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, N.W.  
Monument Review, MS-1530  
Washington, DC 20240

Re: Notice of Opportunity for Public Comment regarding a Review of Certain National  
Monuments Established Since 1996; Bears Ears National Monument

Dear Secretary of the Interior Zinke:

Defenders of Wildlife (Defenders) respectfully submits the following comments on Bears Ears National Monument pursuant to the Department of the Interior's Review of Certain National Monuments Established Since 1996.<sup>1</sup> The Notice of Opportunity for Public Comment singles out Bears Ears National Monument for public input, to be submitted by May 26, 2017. We will also submit additional comments concerning other national monuments under review prior to the July 10, 2017 deadline. We urge you to recommend the President support Bears Ears National Monument and uphold the protections afforded by the monument designation. Defenders firmly believes that none of America's national monuments should be abolished, reduced or subjected to nonconforming uses, including Bears Ears and the other national monuments identified in the notice for administrative review.

Founded in 1947, Defenders of Wildlife is a national non-profit conservation organization focused on conserving and restoring native species and the habitat upon which they depend. Based in Washington, DC, the organization also maintains six regional field offices and represents numerous members and supporters across the United States and around the world. Defenders is deeply involved in public lands management and wildlife conservation,

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<sup>1</sup> 82 Fed. Reg. 22016 (May 11, 2017).

including the protection and recovery of flora and fauna in southeastern Utah. We submit this comment on behalf of our more than 1.2 million members and supporters nationwide.

Executive Order 13792<sup>2</sup> directed the Interior Secretary to “review” national monuments designated or expanded under the Antiquities Act of 1906.<sup>3</sup> The Executive Order established criteria for reviewing monuments: 1) The Presidential designation or expansion occurred since January 1, 1996; 2) the designation exceeded 100,000 acres, or the entire monument after expansion exceeded 100,000 acres; or, 3) “where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders.” The review is to help determine whether each designation or expansion conforms to criteria included in section 1 of the order. Twenty-seven national monuments are listed within the Notice of Opportunity for Public Comment, including five marine national monuments that will also be subject to separate review under Executive Order 13795, “Implementing an America-First Offshore Energy Strategy.”

Bears Ears National Monument protects invaluable cultural, historic and scientific resources that provide immeasurable social and economic benefits to local communities and citizens across the United States. There is no question that these public lands warrant the protections provided under the Antiquities Act and that the designation is both consistent with the law as well as the policy set forth in section 1 of Executive Order 13792. The President lacks the legal authority to revoke or diminish a national monument and should additionally refrain from seeking legislative action or take any other action to undermine the designation.

#### ONLY CONGRESS HAS THE AUTHORITY TO RESCIND, REDUCE THE SIZE, OR MODIFY A NATIONAL MONUMENT

Executive Order 13792 instructs the Interior Secretary to “review” national monuments designated or expanded under the Antiquities Act, and directs the development of a report that “shall include recommendations for Presidential actions.” The Secretary has stated that the Order “directs the Department of Interior to make recommendations to the President on whether a monument should be rescinded, resized, modified.” However, such actions taken by the President would be unlawful: Only Congress has the authority to rescind, reduce the size, or substantially modify a national monument.

The President’s powers regarding management of public lands are limited to those that Congress have delegated to him. While the Antiquities Act provides the President the

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<sup>2</sup> Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20429 (May 1, 2017).

<sup>3</sup> Act of June 8, 1906, ch. 3060, 34 Stat. 225, codified at 54 U.S.C. ch. 3203. *See e.g.*, 43 C.F.R. § 2300.0-3(a)(1)(iii).

authority to “declare” and “reserve” national monuments, it does not grant him power to rescind, resize, modify, or otherwise diminish designated national monuments.<sup>4</sup>

The Property Clause of the U.S. Constitution<sup>5</sup> gives Congress “exclusive” authority over federal property,<sup>6</sup> in effect making Congress “trustee of public lands for all the people.”<sup>7</sup> “The Clause must be given an expansive reading, for ‘(t)he power over the public lands thus entrusted to Congress is without limitations.’”<sup>8</sup> Congress may, of course, delegate its authority to manage these lands to executive agencies or the President,<sup>9</sup> as it did in the Antiquities Act.

In the Antiquities Act, Congress delegated to the President the broad authority to designate as national monuments “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest,” which is only limited by the requirement that such reservations be “confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>10</sup> Conspicuously absent from the Act, however, is language authorizing any substantive changes to national monuments once they have been established.

This omission of language regarding rescinding, reducing, or modifying a national monument cannot be interpreted to mean that Congress has impliedly granted these authorities to the President.<sup>11</sup> If Congress had wanted future Presidents to rescind or make substantial changes to existing national monuments, it would have included such language in the Antiquities Act. Congress had done just that in many of the other public land reservation bills of the era.<sup>12</sup> Furthermore, Congress considered a bill that would have authorized the

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<sup>4</sup> 54 U.S.C. § 320301(a), (b).

<sup>5</sup> U.S. Const. art. IV, § 3, cl. 2.

<sup>6</sup> See, e.g., *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917).

<sup>7</sup> *United States v. City & Cty. of San Francisco*, 310 U.S. 16, 28 (1940).

<sup>8</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976) (quoting *United States v. San Francisco*, 310 U.S. at 29).

<sup>9</sup> *United States v. Grimaud*, 220 U.S. 506, 517 (1911); *Cameron v. United States*, 252 U.S. 450, 459-60 (1920); *Utah Ass’n of Cys. v. Bush*, 316 F. Supp. 2d 1172, 1191 (D. Utah 2004) (upholding designation of Grand Staircase–Escalante National Monument and delegation of the Antiquities Act) (citing *Yakus v. United States*, 321 U.S. 414 (1944)).

<sup>10</sup> 54 U.S.C. § 320301(a), (b).

<sup>11</sup> *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (refusing “once again, to presume a delegation of power merely because Congress has not expressly withheld such power.”).

<sup>12</sup> See, e.g., National Forest Organic Act of 1897, Act of June 4, 1897, 30 Stat. 1, which 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.” 30 Stat. 34, 36 (emphasis added) (repealed in part by Federal Land Policy and Management Act of 1976 (“FLPMA”), Pub. L. 94-579, Title VII, § 704(a), Oct. 21, 1976, 90 Stat. 2792; National Forest Management Act of 1976 (“NFMA”), Pub. L. 94-588, § 9, 16 U.S.C. § 1609(a)). See also, Pickett Act, Act of June 25, 1910, Pub. L. No. 61-303, 36 Stat. 847 (repealed by FLPMA, Pub. L. No. 94-579, § 704(a), 90 Stat. 2792), under which executive withdrawals were “temporary,” only to “remain in effect until revoked by him or by an Act of Congress.” *Id.* at ch. 421, § 41.

President to restore future national monuments to the public domain, which passed the House in 1925, but was never enacted.<sup>13</sup> Such an effort would have been unnecessary if this authority was already delegated to the President. The Antiquities Act thus demonstrates that Congress chose to constrain the President's authority not in his ability to designate national monuments, but by withholding the power to rescind, reduce, or modify monuments once designated.

For nearly eighty years, the federal government's position has been that the President lacks the authority to rescind, repeal, or revoke national monuments. In 1938, U.S. Attorney General Homer Cummings concluded that "[t]he Antiquities Act . . ., authorizing the President to establish national monuments, does not authorize him to abolish them after they have been established."<sup>14</sup> The Attorney General Opinion went on to state:

The grant of power to execute a trust, even discretionally, by no means implies the further power to undo it when it has been completed. A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that 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.<sup>15</sup>

Despite the apparent contradiction to this passage, and not addressing its legality or providing much discussion, this Attorney General's Opinion also recognized that "the President from time to time has diminished the area of national monuments established under the Antiquities Act."<sup>16</sup> None of these Presidential actions that reduced the size of national monuments, however, were ever challenged in court. Perhaps more importantly, there have been no attempts by the President or the Secretary to rescind, resize, modify, or otherwise diminish designated national monuments since the enactment of the Federal Land Management Policy Act of 1976 (FLPMA).<sup>17</sup>

In FLPMA, Congress not only repealed nearly all sources of executive authority to make withdrawals except for the Antiquities Act,<sup>18</sup> but overturned the implied executive authority to withdraw public lands that the Supreme Court recognized in 1915 as well.<sup>19</sup> FLPMA's treatment of the Antiquities Act were designed, moreover, to "specifically *reserve to the*

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<sup>13</sup> H.R. 11357, 68<sup>th</sup> Cong. (1925).

<sup>14</sup> 39 U.S. Op. Atty. Gen. 185.

<sup>15</sup> *Id.* at 187 (quoting 10 U.S. Op. Atty. Gen. at 364).

<sup>16</sup> *Id.* at 188. See also National Monuments, 60 Interior Dec. 9 (1947) (concluding that the President is authorized to reduce the area of national monuments by reason of the same provision of Act).

<sup>17</sup> Pub. L. 94-579 (Oct. 21, 1976), codified at 43 U.S.C. § 1701 *et seq.*

<sup>18</sup> *Id.* at Title II, § 204, Title VII, §704(a).

<sup>19</sup> *Id.*; *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

*Congress the authority to modify and revoke withdrawals* for national monuments created under the Antiquities Act.”<sup>20</sup>

Consequently, the authority Congress delegated to the President by the Antiquities Act is limited to the designation of national monuments. The reservation of Bears Ears National Monument was made by President Obama “under the discretion vested in him by the statute was in effect a reservation by the Congress itself, and ... the President thereafter [is] without power to revoke or rescind the reservation.”<sup>21</sup> Thus, as the court in *State of Wyoming v. Franke* summarized:

[I]f the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in its Legislative branch.<sup>22</sup>

THE ANTIQUITIES ACT CONTAINS LIMITED “REQUIREMENTS” FOR MONUMENT PROCLAMATION AND ITS OBJECTIVES ARE EXTENSIVE

In the Antiquities Act, Congress chose to implement the general policy of protecting “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” on federal lands by affording the President broad power to designate national monuments by proclamation.<sup>23</sup>

The President has broad authority to determine the objects to be protected when designating a national monument. If Congress had wanted to limit the type of landmarks, structures, or objects that could be included or the size an area that could be reserved under the Antiquities Act, the text of the statute would have been less unambiguous. When suits challenging designations have claimed that the original intent of the Act was to only protect small objects and sites, courts have found that it

is irrelevant to the legal questions before the Court, since the plain language of the Antiquities Act empowers the President to set aside “objects of historic or scientific interest.” The Act does not require that the objects so designated be made by man, and its strictures concerning the size of the area set aside are satisfied when the President declares that he has designated the smallest area compatible with the designated objects’ protection. There is no

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<sup>20</sup> H.R. REP. 94-1163, 9, 1976 U.S.C.C.A.N. 6175, 6183 (emphasis added).

<sup>21</sup> Proposed Abolishment of Castle Pinckney Nat’l Monument, 39 U.S. Op. Atty. Gen. 185, 187 (1938) (citing 10 U.S. Op. Atty. Gen. 359 (1862)).

<sup>22</sup> 58 F. Supp. 890, 896 (D. Wyo. 1945).

<sup>23</sup> 54 U.S.C. § 320301(a).

occasion for this Court to determine whether the plaintiffs' interpretation of the congressional debates they quote is correct, since a court generally has recourse to congressional intent in the interpretation of a statute only when the language of a statute is ambiguous.<sup>24</sup>

Congress had considered other antiquities bills, for example, that contained a clearly defined list of what would qualify as "antiquities."<sup>25</sup> An earlier version of Antiquities Act, considered immediately before the final Act, also would have made reservations larger than 640 acres only temporary.<sup>26</sup> Instead of limitations such as these, however, the final version of the Act expanded the President's discretion by adding the phrase "other objects of historic or scientific interest" to the purposes of national monuments.<sup>27</sup>

Adding this language to the Act had significant implications for how it would be implemented. Former National Park Service Chief Historian Ronald Lee recognized that "the single word 'scientific' in the Antiquities Act proved sufficient basis to establish the entire system of ... national monuments preserving many kinds of natural areas."<sup>28</sup> By the time FLPMA was enacted in 1976, 51 of the 88 national monuments that been established "were set aside by successive Presidents ... primarily though not exclusively for their scientific value."<sup>29</sup>

The designation of national monuments for scientific interests is not a recent phenomenon that started 20 years ago, but began with the designation of some of the earliest national monuments. For more than 100 years, national monuments have been established for the "scientific interests" they preserve. These values have included plants, animals, and other ecological concerns. In 1908, for instance, President Theodore Roosevelt designated Muir Woods National Monument because the "extensive growth of redwood trees (*Sequoia sempervirens*) ... is of extraordinary scientific interest and importance because of the primeval character of the forest in which it is located, and of the character, age and size of the trees."<sup>30</sup> President Roosevelt also established Mount Olympus National Monument, now part of Olympic National Park, because it "embrace[d] certain objects of unusual scientific interest, including numerous glaciers, and the region which from time immemorial has formed

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<sup>24</sup> *Utah Ass'n of Cty's. v. Bush*, 316 F. Supp. 2d 1172, 1186 (D. Utah 2004); *see also Mt. States Leg. Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002).

<sup>25</sup> H.R. 12447, 58th Cong. § 3 (1904), reprinted in NAT'L PARK SERV., HISTORY OF LEGISLATION RELATING TO THE NATIONAL PARK SYSTEM THROUGH THE 82D CONGRESS: ANTIQUITIES ACT App. A (Edmund B. Rogers, comp., 1958) (hereinafter "HISTORY OF LEGIS.")

<sup>26</sup> *See* S. 5603, 58th Cong. § 2 (1905), reprinted in HISTORY OF LEGIS.

<sup>27</sup> S. 4698, 59th Cong. § 2 (1906), reprinted in HISTORY OF LEGIS.

<sup>28</sup> Ronald F. Lee, The Antiquities Act of 1906 (1970), as reprinted in Raymond H. Thompson, *An Old and Reliable Authority*, 42 J. OF THE S.W. 197, 240 (2000).

<sup>29</sup> *Id.*

<sup>30</sup> Proclamation No. 793, 35 Stat. 2174 (1908).

summer range and breeding grounds of the Olympic Elk (*Cervus roosevelti*), a species peculiar to these mountains and rapidly decreasing in numbers.”<sup>31</sup>

President Roosevelt was not alone in utilizing the Antiquities Act’s broad authority to protect ecological marvels. Muir Woods, for example, was expanded by Presidents Harding, Franklin Roosevelt, Truman, and Eisenhower for the same reasons it was originally designated.<sup>32</sup> In 1925, President Coolidge set aside nearly 1.4 million acres as Glacier Bay National Monument because

the region [was] said by the Ecological Society of America to contain a great variety of forest covering consisting of mature areas, bodies of youthful trees which have become established since the retreat of the ice which should be preserved in absolutely natural condition, and great stretches now bare that will become forested in the course of the next century.<sup>33</sup>

In addition, President Hoover enlarged Katmai National Monument “for the purpose of including within said monument additional lands on which there are located features of historical and scientific interest and for the protection of the brown bear, moose, and other wild animals”;<sup>34</sup> Franklin D. Roosevelt set aside Channel Islands National Monument, in part, for the “ancient trees” it contained;<sup>35</sup> and President Kennedy expanded Craters of the Moon National Monument to include “an island of vegetation completely surrounded by lava, that is scientifically valuable for ecological studies because it contains a mature, native sagebrush-grassland association which has been undisturbed by man or domestic livestock.”<sup>36</sup>

The broad objectives of the Antiquities Act and significant deference to the President in specifying a monument’s purpose has resulted in courts upholding the President’s determination of what constitutes “objects” and “scientific interests” every time it has been challenged. The Supreme Court has promoted an expansive reading of the President’s discretion to determine what “scientific interests” can be protected beginning with the challenge to the designation of the Grand Canyon National Monument in 1920. There, the Court quoted from Roosevelt’s proclamation to find that the Canyon “is an object of unusual scientific interest.”<sup>37</sup>

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<sup>31</sup> Proclamation No. 896, 35 Stat. 2247 (1909).

<sup>32</sup> Proclamation No. 1608, 42 Stat. 2249 (1921); Proclamation No. 2122, 49 Stat. 3443 (1935); Proclamation No. 2932, 65 Stat. c20 (1951); Proclamation No. 3311, 73 Stat. c76 (1959).

<sup>33</sup> Proclamation No. 1733, 43 Stat. 1988 (1925).

<sup>34</sup> Proclamation No. 1950, 47 Stat. 2453 (1931).

<sup>35</sup> Proclamation No. 2281, 52 Stat. 1541 (1938).

<sup>36</sup> Proclamation No. 3506, 77 Stat. 960 (1962).

<sup>37</sup> *Cameron v. U.S.*, 252 U.S. 450, 455–56 (1920) (quoting Proclamation No. 794 34 Stat. 225 (1908)).

The President's authority to establish Devil's Hole as a national monument with the objective of preserving a "remarkable" underground pool "for the preservation of the unusual features of scenic, scientific, and educational interest.' The Proclamation notes that the pool contains 'a peculiar race of desert fish ... which is found nowhere else in the world' and that the 'pool is of ... outstanding scientific importance ...'"<sup>38</sup> In *Cappaert v. United States*, the Supreme Court found

the language of the Act which authorizes the President to proclaim as national monuments "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" is not so limited. The pool in Devil's Hole and its rare inhabitants are "objects of historic or scientific interest."<sup>39</sup>

More recently, Giant Sequoia National Monument was challenged on the grounds that the basis for Monument protects objects do not qualify under the Act.<sup>40</sup> The court in *Tulare County v. Bush* noted that " 'other objects of historic or scientific interest' may qualify, at the President's discretion, for protection as monuments. Inclusion of such items as ecosystems and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features."<sup>41</sup>

In addition, courts have found within the meaning of the Act the purposes of the

the Cascade-Siskiyou National Monument, a "biological crossroads" in southwestern Oregon where the Cascade Range intersects with adjacent ecoregions ... the Hanford Reach National Monument, a habitat in southern Washington that is the largest remnant of the shrub-steppe ecosystem that once dominated the Columbia River basin ... and ... the Sonoran Desert National Monument, a desert ecosystem containing an array of biological, scientific, and historic resources.<sup>42</sup>

*There are few requirements placed on President when designating a national monument*

Again, the only requirements restricting the President's authority to designate national monuments under Antiquities Act are: (1) the area contain "historic landmarks, historic and

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<sup>38</sup> *Cappaert v. United States*, 426 U.S. 128, 141 (1976) (quoting Proclamation No. 2961, 3 C.F.R. § 147 (1949-1953 Comp.).

<sup>39</sup> *Id.* at 142 (emphasis added) (citing *Cameron v. United States*, 252 U.S. 450, 455-456 (1920)).

<sup>40</sup> *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1140-41 (D.C. Cir. 2002)).

<sup>41</sup> *Id.* at 1142.

<sup>42</sup> *Mt. States Leg. Found. v. Bush*, 306 F.3d 1132, 1133-34 (D.C. Cir. 2002) (citations omitted).



prehistoric structures, and other objects of historic or scientific interest,” (2) the area is “situated on land owned or controlled by the Federal Government,” and (3) “[t]he limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>43</sup>

As the court in *State of Wyoming v. Franke* recognized: “What has been said with reference to the objects of historic and scientific interest applies equally to the discretion of the Executive in defining the area compatible with the proper care and management of the objects to be protected.”<sup>44</sup> In other words, the determination of what constitutes “the smallest area compatible with the proper care and management of the objects to be protected” is almost entirely within the President’s authority.

The Supreme Court recognized this principle in *Cameron v. United States* by finding the President was authorized to establish the 800,000-acre Grand Canyon National Monument.”<sup>45</sup> Since then, courts have repeatedly upheld the President’s determinations of the “smallest area” possible encompassed by a monument, including the 1.7 million acre Grand Staircase-Escalante National Monument.<sup>46</sup>

Moreover, Courts are even less likely to disturb the factual determination of a President when his proclamation contains the finding that the monument “is the smallest area compatible with the proper care and management of the objects to be protected.”<sup>47</sup> In the Proclamation establishing Bears Ears National Monument, for example, President Obama concluded that the 1.35 million acres “described on the accompanying map are confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>48</sup> In making this decision, in fact, President Obama reduced the size proposed by the Native American coalition that submitted the proposal for Bears Ears National Monument by 550,000 acres.<sup>49</sup>

THE SECRETARY MUST DETERMINE THAT THE DESIGNATION OF BEARS EARS NATIONAL MONUMENT CONFORMS TO THE POLICY SET FORTH IN THE EXECUTIVE ORDER

The designation of Bears Ears National Monument was made in lawful accordance with the requirements of the Antiquities Act and the President has no authority to revisit, rescind or reduce the designation of National Monuments. As for the political and paper exercise of the

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<sup>43</sup> 54 U.S.C. § 320301(a), (b).

<sup>44</sup> *Id.* at 896.

<sup>45</sup> 252 U.S. at 455-56.

<sup>46</sup> *Utah Ass’n of Cty. v. Bush*, 316 F. Supp. 2d at 1183 (“When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion.”)

<sup>47</sup> See, e.g., *Mt. States Leg. Found. v. Bush*, 306 F.3d at 1137; *Tulare Cnty. v. Bush*, 306 F.3d at 1142.

<sup>48</sup> Proclamation No. 9558, 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016).

<sup>49</sup> The Bears Ears Inter-Tribal Coalition, *Proposal to President Barack Obama for the Creation of Bears Ears National Monument* 1 (2015).

review, based on the facts of the monument designations under review, the Secretary must determine that the designation of Bears Ears (as well as all monuments under review for that matter) conforms to the policy set forth within the Executive Order: All of the designations were made in accordance with the requirements of the Act.

In Executive Order 13792, the Administration implies that Bears Ears National Monument inappropriately protects cultural, historic and scientific resources and that the monument perhaps includes more land than is necessary to protect such resources. There is no legal basis nor facts supporting this suggestion.

Furthermore, the facts concerning the historic value and other objects of historic or scientific interest within Bears Ears National Monument clearly demonstrate that President Obama did not abuse his discretion under the Act in designating the monument.

*Bears Ears National Monument represents a significant historic and cultural landscape within the United States*

There is no disputing the fact that the Bears Ears National Monument represents a truly significant historic and cultural landscape within the United States. As discussed with great detail within the monument's Proclamation, the archeological and historical record of the significance of the Bears Ears landscape is extremely clear. And there is no disputing the fact that the landscape within the monument is sacred to Native American tribes. The facts demonstrate that President Obama was well within his discretion in designating the land necessary to protect the unique historic and cultural values and resources found within the Bears Ears landscape. In fact, the Bears Ears National Monument represents a mere sliver of historic and cultural resources that were once present throughout a region, but have been lost; protection of these historic and cultural values is therefore of paramount importance.

In addition, Bears Ears National Monument is appropriately sized to protect natural resources and scientific objects as authorized under the Antiquities Act, including remote and intact ecosystems, watersheds, vegetation and community types, and habitat for fish and wildlife, including rare, endemic, sensitive and imperiled species.

*The designation of Bears Ears National Monument protects and provides for the proper care and management of significant and rare landscape and ecosystem values*

Bears Ears National Monument protects and provides for the proper care and management of exceptionally important and unique ecosystem and landscape conservation values. The area contained within the monument boundaries exhibits a high and increasingly rare level of ecological integrity compared to other western lands. The Antiquities Act provides the President with the authority to protect and properly management landscapes and ecosystems for their scientific and other values.

The designation of Bears Ears National Monument appropriately recognized and protected a uniquely scientifically unique landscape: A relatively intact and functional western landscape. Remote landscapes relatively unmodified by human intrusion and development are

increasingly rare within the region and nation. A recent study demonstrated that Bears Ears ranks in the 90<sup>th</sup> percentile or higher for ecological intactness and connectivity compared to other equivalently sized random samples from western lands and jurisdictions.<sup>50</sup> This means that the Bears Ears landscape demonstrates less human modification than 90 percent of other comparable western landscapes – a true measure of ecological and scientific distinction that can only be protected under the current size and configuration of the monument. A similar analysis for the same area conducted by the Bureau of Land Management (BLM) came to the same conclusion.<sup>51</sup>

The Bears Ears National Monument also provides for regionally significant landscape-level connectivity, a significant and rare ecological feature in western landscapes. Connectivity is one of the most crucial factors in the conservation of fish and wildlife populations. The recognition and protection of wildlife connectivity corridors facilitates migration, dispersal, and gene flow between Bears Ears National Monument and surrounding protected areas.<sup>52</sup>

The Bears Ears National Monument also appropriately protects a highly resilient landscape. Resilient landscapes will be better able to provide conservation values and other key ecosystem services to society into the future. The importance of Bears Ears National Monument for fish and wildlife species is not limited to its present value. According to the BLM's Rapid Ecoregional Assessment for the Colorado Plateau, much of the Bears Ears National Monument area is projected to experience low to moderate potential for impacts from climate change and other stressors.<sup>53</sup> By contrast, large areas to the east and west of Bears Ears are likely to face more severe impacts. The relative climate resilience of Bears Ears underscores the importance of protecting its habitats and species from other stressors.

Bears Ears National Monument provides for the proper care and management of a diversity of terrestrial, aquatic and riparian ecosystems, vegetation and plant community types, including an inordinate level of rare ecosystem types compared to other lands within the region. These features have incredibly high scientific value due to their diversity, intactness and rarity. Vegetation diversity is higher within the boundaries of the Bears Ears National Monument than more than 63 percent of other western lands of equivalent size.<sup>54</sup> The monument's Proclamation describes in significant factual detail the types of ecosystems, plant communities and vegetation types found within the monument. The extent of the monument is necessary to protect these appropriately recognized unique and irreplaceable scientific ecological features.

Riparian plant communities recognized and protected within Bears Ears National Monument are worth noting, given the tremendous importance of water resources in the 21<sup>st</sup>

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<sup>50</sup> Dickson, B.G., McClure, M., and C.M. Albano. 2017. A landscape-level assessment of conservation values and potential threats in the Bears Ears National Monument. (Final Report). Conservation Science Partners.

<sup>51</sup> Bureau of Land Management. 2012. Rapid Ecological Assessment for the Colorado Plateau.

<sup>52</sup> Dickson et al., 2017.

<sup>53</sup> BLM, 2012.

<sup>54</sup> Dickson et al., 2017.

century west. Regionally endemic riparian-dependent plants including the Kachina Daisy, alcove columbine and cave primrose depend on riparian and aquatic ecological features protected within Bears Ears National Monument. Riparian ecosystems support a wide number of species including the endangered Southwestern Willow Flycatcher, which requires moist riparian vegetation near saturated areas and surface water in order to breed. A large portion of their habitat has been lost and degraded across the species range due to water diversion, livestock grazing, urban development, and other human induced habitat changes.

Courts have upheld that the Act provides the President with the discretion to protect ecosystems, ecosystem features and large landscapes. In *Tulare vs. Bush* the court found that inclusion of ecosystems within the Proclamation “did not contravene the terms of the statute by relying on nonqualifying features.”<sup>55</sup> Indeed, the Bears Ears Proclamation describes in great factual detail the diversity of qualifying ecosystem types and natural and scientific features found within the monument boundaries. The facts demonstrate that President Obama designated the land necessary to protect the diversity of ecosystems found within the Bears Ears National Monument.

*The designation of Bears Ears National Monument protects and provides for the proper care and management of significant and rare fish and wildlife habitat values*

Habitat for fish and wildlife qualify for protection as scientific objects under the Antiquities Act. Bears Ears National Monument provides essential habitat for a wide variety of fish, wildlife and plant species, including rare, endemic and at-risk species, including key habitat areas for species listed under the Endangered Species Act (ESA). Altering the configuration of the monument would remove lawful protections for these objects of scientific interest.

Bears Ears National Monument provides habitat values that are significant to the region, and the configuration of the monument is necessary for the proper care and management of these habitat values. The monument supports high levels of species richness, mammal and reptile diversity compared to other western lands.<sup>56</sup> Over 15 species of bats, including at-risk Townsend’s big eared and spotted bats, can be found throughout the monument.

The monument supports the only habitat within Utah for Abert’s squirrels, which are found primarily in the monument’s Abajo Mountains. Populations in Utah are vulnerable to habitat loss and degradation, and at-risk of elimination. Alteration of the monument would remove proper protections for this species.

Bears Ears National Monument protects and provides for the proper management of a number of at-risk species, including those listed under the ESA. The U.S. Fish and Wildlife Service’s (USFWS) Information for Planning and Consultation<sup>57</sup> web tool indicates that the

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<sup>55</sup> *Tulare Cnty. v. Bush*, 306 F.3d at 1142.

<sup>56</sup> Dickson et al., 2017.

<sup>57</sup> United State Fish and Wildlife Service. Information for Planning and Consultation. <https://ecos.fws.gov/ipac/>.

following ESA-listed have the potential to occur within the Bears Ears National Monument (Table 1). In addition, 32 species listed by the U.S. Forest Service as “sensitive” are known to or may occur within the monument boundaries.

Table 1 ESA-listed species with the potential to occur within the Bears Ears National Monument

Common Name	Scientific Name	Federal ESA Status
California Condor	<i>Gymnogyps californianus</i>	experimental, non-essential
Gunnison Sage-grouse	<i>Centrocercus minimus</i>	threatened
Mexican Spotted Owl	<i>Strix occidentalis lucida</i>	threatened*
Southwestern Willow Flycatcher	<i>Empidonax traillii extimus</i>	endangered
Yellow-billed Cuckoo	<i>Coccyzus americanus</i>	threatened
Bonytail Chub	<i>Gila elegans</i>	endangered
Colorado Pikeminnow	<i>Ptychocheilus Lucius</i>	endangered*
Greenback Cutthroat Trout	<i>Oncorhynchus clarki stomias</i>	endangered
Humpback Chub	<i>Gila cypha</i>	endangered
Razorback Sucker	<i>Xyrauchen texanus</i>	endangered*
Jones Cycladenia	<i>Cycladenia humilis</i> var. <i>jonesii</i>	threatened
Navajo Sedge	<i>Carex specuicola</i>	threatened
* Designated critical habitat for these species overlaps the monument area.		

The Bears Ears National Monument provides proper protections for unique and rare plant species. For example, the Navajo Sedge was listed as threatened under the ESA in 1985. The species’ range is restricted to a small area of northeastern Arizona, a tiny sliver in northwestern New Mexico, and a small area in southeastern Utah. San Juan County Utah contains the largest portion of the species’ range, and Bears Ears contains a significant portion of the species’ recognized distribution area.<sup>58</sup> The northern extent of the species range, which overlaps the Monument, has suitable habitat<sup>59</sup> where there may be species occurrences and/or connectivity and recovery areas. Though there is a USFWS recovery plan for the species, the plan does not include recovery criteria. Utah has no state laws that protect rare plants on private or state lands. Thus, it is paramount that the species be offered all of the protections Bears Ears affords in order to recover.

Similarly, the monument also provides critical habitat for the threatened Mexican spotted owl (*Strix occidentalis lucida*) which uses the monument’s unique system of canyons, caves and cliffs for nesting. The Manti-La Sal National Forest, a large portion of which is located within the Bears Ears National Monument, is the largest contiguous habitat for the species. The Mexican spotted owl is threatened throughout its range by habitat loss, degradation, and fragmentation caused by logging, urban development, water development and agriculture. Bears Ears National Monument appropriately protects regionally significant habitat that makes an essential contribution to the recovery of the species.

<sup>58</sup> United States Fish and Wildlife Service. 2014. Navajo Sedge (*Carex specuicola*) 5-Year Review: Summary and Evaluation. Arizona Ecological Field Office. August.

<sup>59</sup> USFWS, 2014.

The Bears Ears proclamation recognizes the federally endangered Southwestern Willow Flycatcher as a monument object that must be protected. The northern extent of the Southwestern Willow Flycatcher's range occurs in southern Utah and includes the BENM area. The species depends on riparian areas with dense vegetation, with a preference for areas with willow concentrations, though the bird has adapted to non-native tamarisk encroachment into riparian habitat. A key threat to the species is the loss and degradation of riparian habitat. Protecting Southwestern Willow Flycatcher habitat along the outer edges of the species range is essential, due to climate change altering species' ranges. In fact, the ranges of many bird species are expected to move north.<sup>60</sup>

Five threatened and endangered fish species: bonytail chub (*Gila elegans*), Colorado Pikeminnow (*Ptychocheilus lucius*), Greenback Cutthroat Trout (*Oncorhynchus clarki stomias*), Humpback Chub (*Gila cypha*), Razorback Sucker (*Xyrauchen texanus*), have the potential to occur in Bears Ears National Monument, according to the USFWS.<sup>61</sup> The modification of streamflows through damming and diversions has been a major threat to these species. The monument contains designated critical habitat under the ESA for the Colorado Pikeminnow and Razorback Sucker. The Razorback Sucker population, in particular, is in trouble and experienced a rapid decline of 80 percent in the last few decades;<sup>62</sup> the International Union for Conservation of Nature considers the species to be critically endangered.

The monument designation also appropriately recognizes the scientific value of protecting rare and endemic species, such as the Kachina Daisy (*Erigeron kachinensis*) which is unique to the Colorado Plateau in southwestern Colorado and southeastern Utah and is known to occur in just four counties, including San Juan County in Utah, and occurs in Bears Ears. Nineteen of 22 occurrences have been recorded in Utah since 1983.<sup>63</sup> Mining, energy development, and water projects could threaten the species' water supply, and climate change is also a threat.<sup>64</sup> The Kachina Daisy is ranked S2 (imperiled) by NatureServe, a U.S. Forest Service Sensitive Species, a Bureau of Land Management Sensitive Species, and on the Utah Native Plant Society Rare Plant List.<sup>65</sup>

Mesas and canyon heads provide habitat for species such as mule deer, elk, and once-secure but now at-risk populations of bighorn sheep. The Desert Bighorn Sheep (*Ovis Canadensis nelsoni*) population in southeastern Utah experienced a dramatic population decline beginning

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<sup>60</sup> Hitch, A.T. and P.L. Leberg. 2007. Breeding distributions of North American bird species moving north as a result of climate change. *Conservation Biology*. 21(2): 534-539.

<sup>61</sup> United State Fish and Wildlife Service. Information for Planning and Consultation. <https://ecos.fws.gov/ipac/>.

<sup>62</sup> NatureServe. 2013. *Xyrauchen texanus*. The IUCN Red List of Threatened Species 2013: e.T23162A19032625. <http://dx.doi.org/10.2305/IUCN.UK.2013-1.RLTS.T23162A19032625.en>. (Viewed May 25, 2017).

<sup>63</sup> NatureServe. 2017. NatureServe Explorer: An online encyclopedia of life [web application]. Version 7.1. NatureServe, Arlington, Virginia. Available <http://explorer.natureserve.org>. (Viewed May 24, 2017).

<sup>64</sup> NatureServe, 2017.

<sup>65</sup> Alexander, J. 2016. The Utah Native Plant Society Rare Plant List: Version 2. Calochortiana. February.

in about 1920, before which the population was believed to be abundant.<sup>66</sup> Surveys put the total individual count at 135 sheep in 1966. Utah's wildlife department conducted translocations of the animals into the region throughout the 1970s, and the population increased to 2,700 by 2003. The species is a Forest Service Sensitive Species, and NatureServe ranks it as S3 (vulnerable).<sup>67</sup>

BEARS EARS NATIONAL MONUMENT IS CONSISTENT WITH MULTIPLE-USE POLICY AND PROVIDES SIGNIFICANT SOCIAL AND ECONOMIC BENEFITS TO THE REGION AND COMMUNITIES

The Bears Ears National Monument is consistent with the multiple-use policies of the federal land management agencies. The natural resource and management values conserved within the monument will best meet the present and future needs of the American people. Recreation, range, timber, watershed, wildlife and fish, natural scenic, scientific and historical values are all provided by the monument. The monument designation was judicious, conserving resources while allowing for the continuation of some uses. Multiple use must be viewed in a broad context with the acknowledgement that not every use must occur on every acre; while the Bears Ears National Monument protected certain values, other various values and uses can be emphasized in other areas.

In addition, Bears Ears National Monument provides significant social and economic benefits to the region and communities. For example, visitorship at the five major national parks of Southern Utah has far outpaced population growth in the past five years.<sup>68</sup> Visitorship has nearly doubled (Table 2), while the U.S. population only grew by 2.44%<sup>69</sup> over that period. This suggests that the public's desire to experience the natural wonders of southern Utah has increased markedly in recent years. It also suggests the need for additional areas in the region whose natural amenities and level of protection are sufficient to inspire an influx of visitors. National monument status appears to convey sufficient importance to inspire visitation on a level nearly equivalent to national park status. Nearby Grand Staircase-Escalante National Monument in 2014 (the only recent year for which data was available) received 878,000 visitors,<sup>70</sup> more than either Capitol Reef or Canyonlands national parks that year.

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<sup>66</sup> Bates, B. 2003. The history of desert bighorn sheep management in Utah. Desert Bighorn Council Transactions: 47: 9-15.

<sup>67</sup> NatureServe, 2017.

<sup>68</sup>[https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Recreation%20Visitation%20\(1904%20-%20Last%20Calendar%20Year\)](https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Annual%20Park%20Recreation%20Visitation%20(1904%20-%20Last%20Calendar%20Year))

<sup>69</sup> U.S. Census Bureau

<sup>70</sup> [https://www.blm.gov/sites/blm.gov/files/GSENM\\_Manager\\_Annual\\_Report\\_FY2014.pdf](https://www.blm.gov/sites/blm.gov/files/GSENM_Manager_Annual_Report_FY2014.pdf)

Table 2 Visitors to southern Utah's National Parks

Year	Zion	Bryce	Arches	Capitol Reef	Canyonlands	Total Annual Visitors
2012	2,973,607	1,385,352	1,070,577	673,345	452,952	6,555,833
2013	2,807,387	1,311,875	1,082,866	663,670	462,242	6,328,040
2014	3,189,696	1,435,741	1,284,767	786,514	542,431	7,239,149
2015	3,648,846	1,745,804	1,399,247	941,029	634,607	8,369,533
2016	4,295,127	2,365,110	1,585,718	1,064,904	776,218	10,087,077

The economic value to the state of Utah is considerable. The Outdoor Industry Association<sup>71</sup> estimates that in 2012, the last year for which data is available, outdoor recreation generated \$12 billion in consumer spending in Utah, supporting 122,000 jobs, \$3.6 billion in wages, and \$856 million in state and local tax revenue. Based on the 2012 state population of 2,856,000 people, outdoor recreation generated \$299.72 in tax revenue per Utah resident, one of the highest per capita values in the nation. In California, by comparison, outdoor recreation generated \$171.18 per resident.

#### CONCLUSION

Bears Ears National Monument protects invaluable cultural, historic and scientific resources that provide immeasurable social and economic benefits to local communities and citizens across the United States. There is no question that these public lands warrant the protections provided under the Antiquities Act and that the designation is both consistent with the law as well as the policy set forth in section 1 of Executive Order 13792. The President lacks the legal authority to revoke or diminish a national monument and should additionally refrain from seeking legislative action or take any other action to undermine the designation.

Respectfully,



Peter Nelson, Senior Policy Advisor for Federal Lands  
Defenders of Wildlife

<sup>71</sup> <https://outdoorindustry.org/advocacy/>