

**BEFORE THE UNITED STATES DEPARTMENT OF INTERIOR**

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**REVIEW OF CERTAIN  
NATIONAL MONUMENTS  
ESTABLISHED SINCE 1996  
(BEARS EARS NATIONAL  
MONUMENT)**

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**Docket No. DOI-2017-0002**

*Via regulations.gov and U.S. Mail  
May 25, 2017*

**COMMENTS OF SIERRA CLUB**

These are the official comments of the Sierra Club submitted pursuant to the U.S. Department of the Interior (DOI) notice at 82 FR 22016 (May 11, 2017): “Review of Certain National Monuments Established since 1996; Notice of Opportunity for Public Comment.” Sierra Club submits these comments to support the protection of the Bears Ears’ National Monument, as fully and properly designated by President Obama.<sup>1</sup> The Sierra Club submits these as a national organization, in addition to the comments of the Utah Chapter of the Sierra Club and our individual members’ comments on DOI’s action.

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<sup>1</sup> These comments regards the Bears Ears National Monument; and we plan to submit additional comments regarding the other monuments covered by Executive Order 13792 (April 26, 2017) by the date set for them in the notice.

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**I. INTRODUCTION: OBJECTION TO DOI PROCESS FOR REVIEW OF BEARS EARS**

President Trump’s April 26, 2017 Executive Order singled out the Bears Ears National Monument (hereafter “the Bears Ears”) for expedited treatment. Under the Order, the Secretary’s Interim Report with recommendation to the President for action on the Bears Ears is

due 45 days from the date of the Order, or by June 10, 2017. The Executive Order gives no reason for expediting the Secretary's review of the Bears Ears ahead of the other national monuments. In addition, in its May 11, 2017 notice the DOI allowed the public only 14 days for comment. Sierra Club objects to the short comment period as this hinders public participation and, because it gives the Secretary such a short amount of time to act after receiving the public comments, it is unlikely he will be able to consider them fully. This rushed process appears designed to reach a predetermined outcome, namely the reduction or elimination of the Bears Ears National Monument designation.

Recent Federal court opinions on Executive Orders by President Trump have found that his public statements are evidence of the context and intent of the orders.<sup>2</sup> In this case, his statements indicate this review process is designed to give the appearance of public participation while the decision has already been made. As reported in the press:

The president-elect has pledged to honor Theodore Roosevelt's tradition of conservation in the West, with its expansive deserts, snow-capped mountain ranges and red rock canyons. But he has also said he will "unleash" energy production there and has railed against "faceless, nameless bureaucrats" in land-management agencies. -- Associated Press, 12/14/16;<sup>3</sup>

At the signing of the executive order at the Interior Department, Trump said it would "end another egregious abuse of federal power." "I've spoken with many state and local leaders, a number of them here today, who care very much about preserving our land, and who are gravely concerned about this massive federal land grab," he said. "And it's gotten worse and worse and worse, and now we're going to free it up, which is what should have happened in the first place. This should never have happened."-- The Guardian, 4/26/17.<sup>4</sup>

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<sup>2</sup> See, e.g., *Hawai'i v. Trump*, 2017 WL 1011673 (D.Haw. 2017).

<sup>3</sup> <https://apnews.com/499a603972fd4d7fa2353989990e8db5/conservatives-seek-ally-trump-western-land-disputes>

<sup>4</sup> <https://www.theguardian.com/us-news/2017/apr/26/trump-national-monuments-review-obama-wilderness>.

Secretary Zinke has voiced similar intentions for the monument review process – specifically in regards to rescinding the Bears Ears National Monument. As reported by E&E News on May 19, 2017:

Interior Secretary Ryan Zinke told local Utah officials earlier this month that he will recommend rescinding Bears Ears National Monument and vowed to review public lands management more broadly, according to San Juan County Commissioner Phil Lyman.

President Trump ordered Zinke to review the status of dozens of monuments created since 1996, with a particular focus on the 1.35-million-acre southeastern Utah site that became the nation's newest national monument in December (E&E News PM, April 26).

Local officials as well as state and congressional Republican lawmakers have urged Trump to eliminate the Bears Ears monument located in San Juan County, arguing the Obama administration failed to sufficiently take into account opposition to the designation.

During recent weeks, Zinke held multiple meetings with San Juan County officials, including a session in his Washington office and a visit to the monument earlier this month (Greenwire, May 9).

Lyman, who serves as chairman of the San Juan County Commission and attended both meetings, told E&E News he urged Zinke to undo the monument, arguing that it is a hardship on the rural county to host such a "massive" site.

"We got a chance to visit with him in his office, and our message was that we'd like to see Bears Ears National Monument rescinded," Lyman said. "He said, 'Well, let me tell you what I'm thinking: Not only should that monument be rescinded, but we're not going to stop there. We need to discuss all the dysfunctionality of public land management over the last three decades.'"

An Interior Department spokeswoman did not respond to a request for comment for this article. But at a news conference near Monticello, Utah, earlier this month, Zinke said national monument status may not be the "right vehicle" for Bears Ears.<sup>5</sup>

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<sup>5</sup> <https://www.eenews.net/greenwire/2017/05/19/stories/1060054829>

Based on these statements, it appears this review process is not an objective evaluation of conformance of the Bears Ears designation to the Antiquities Act. In this regard, this process is similar to evaluations of Federal actions under the National Environmental Policy Act that courts have held are invalid, pre-decided, agency action.<sup>6</sup>

## **II. DISCUSSION**

### **A. Sierra Club Interest in Bears Ears National Monument**

Sierra Club is America's oldest and largest grassroots environmental organization with approximately 1.4 million members and supporters. Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Sierra Club members live, work, and recreate in the Bear Ears area; and their concerns encompass the exploration, enjoyment, and protection of the monument for themselves and future generations.

Sierra Club has a longstanding interest in protecting the Bears Ears. Since at least the 1980's the Sierra Club's Utah Chapter has proposed protections for much of the land that is now within the monument. Sierra Club has worked over the decades with numerous federal, state and local government officials, environmental organizations and the local Tribes to obtain these long overdue protections for this land. Sierra Club has taken a supportive role for the Bears Ears Inter-Tribal Coalition and other local groups dedicated to protecting Bears Ears, by providing financial

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<sup>6</sup> See, e.g., *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007)(holding USFS inappropriately used post-hoc examination of data to support a pre-determined conclusion, *i.e.* it decided to establish a categorical exclusion *before* its data call, while the agency determination that this was "the proper path" should not have been made until *after* the data call).

support, organizing meetings and letter writing campaigns, collecting public comments, and helping to organize public rallies in support of the monument designation.

**B. History of Public Participation in Establishment of Bears Ears National Monument**

One of the concerns stated in President Trump’s Executive Order is whether the designations of the national monuments were made without adequate public outreach and coordination with relevant stakeholders. This is not, however, a concern for the Bears Ears since it was the outcome of years of engagement with the stakeholders, including but not limited to the state and local governmental entities. In fact, there is great support for Bears Ears within Utah as well as the nation as a whole, and President Obama allowed ample opportunity for input from local communities. This is expressed in the April 13, 2017 Memorandum from the Democratic Members of the Committee on Oversight and Government Reform entitled “Documents Obtained by Oversight Committee Refute Republican Claims that Obama Administration Did Not Consult on Bears Ears Monument Designation.”<sup>7</sup>

The Memorandum cites several examples of federal, state and local consultations dating back at least to 2013, with the most recent example being communication from the Utah Governor’s office from December 21, 2016 complimenting staff at the DOI on the time and attention being devoted to the issue. Furthermore, the Memorandum describes a May 2016 poll released by the Bears Ears Coalition which found that 71% of Utah residents supported a national monument designation, and an August 2016 Pew Charitable Trusts poll which found that 55% of Utah residents supported a new national monument. The Memorandum goes on to

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<sup>7</sup> Available at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2017-04-13.Bears%20Ears%20Monument%20Democratic%20Memo.pdf>

list in detail the many communications between DOI staff, Utah legislators, local tribes, and conservation groups. Among these communications are several letters from the Bears Ears Inter-Tribal Coalition noting the failure of Utah legislators to seriously consider their efforts to participate in the Public Lands Initiative or their efforts to gain protections for Bears Ears. Also of note are a September 2016 letter to President Obama from 31 current and former local officials, a March 2015 resolution from the Navajo Nation Council's Committee, and a November 2016 letter from 18 national, regional, and local conservation groups, all in support of a Bears Ears National Monument designation.

### **C. Comment on Elements for DOI Review**

President Obama designated the Bears Ears National Monument in Proclamation 9558 on December 28, 2016.<sup>8</sup> As stated in the Federal Register, the Secretary of the Interior will review the Bears Ears National Monument to determine whether its designation “conforms to the policy stated in the Executive Order and to formulate recommendations for Presidential actions, legislative proposals, or other appropriate actions to carry out that policy.” The policy stated in the Executive Order is: “Designations should be made in accordance with the requirements and original objectives of the [Antiquities] Act and appropriately balance the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities.” In addition, the Executive Order lists seven elements for the Secretary’s review, which are addressed sequentially below.<sup>9</sup>

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<sup>8</sup> Available at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument>.

<sup>9</sup> For a comprehensive treatment of the history of designating national monuments, see *National Monuments and the Antiquities Act*, Congressional Research Service, 7-5700, R41330 (September 7, 2016) (hereafter the “CRS Report”).

**1. The Bears Ears National Monument is consistent with requirements and original objectives of the Act, including the Act's requirement that reservations of land not exceed "the smallest area compatible with the proper care and management of the objects to be protected."**

The Bears Ears National Monument is 1.35 million acres.<sup>10</sup> This is consistent with other large on-shore monuments, such as Katmai (1.1 million acres), Glacier Bay (1.4 million acres); and Wrangell-St. Elias (11 million acres (which was later made a National Park)).<sup>11</sup> In fact, the Antiquities Act does not cap the size of monument designations and the courts have deferred to the President's judgment as to the proper size of the monument in establishing the monument.<sup>12</sup>

As is the case with the Bears Ears, "[p]reserving objects of interest may require withdrawal of sizeable tracts of surrounding land to preserve the integrity of the objects and the interactions and relationships among them."<sup>13</sup> The proclamation establishing the Bears Ears specifically found that it was the smallest area compatible with the objects to be protected, and the description of the nature of these objects and their broad geographic array across the monument indicate that this area is necessary to protect them.

President Obama's designation of the area of the monument actually was *underinclusive*. Numerous areas were included in the inter-tribal coalition's proposal for the monument, but were left out of the final designation:

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<sup>10</sup> December 28, 2016 Presidential Proclamation.

<sup>11</sup> CRS Report at 2.

<sup>12</sup> See, e.g., *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C.Cir. 2002)(upholding Giant Sequoia National Monument).

<sup>13</sup> CRS Report at 5.



- The Abajo Mountains, *a.k.a.* Blue Mountains, which rise up just west of Monticello, the county seat, fall outside the monument boundaries. Locals use the mountains for grazing cattle, gathering firewood, recreation and as their primary source of municipal water;
- The lower reach of Allen Canyon, west of Blanding, which contains Ute Mountain Ute land and grazing allotments, is not part of the monument. (The archaeologically significant upper reaches of the canyon are within the monument);
- Black Mesa, which rises up between Cottonwood Wash and Butler Wash, was cut out of the monument;
- A large, arcing strip of land adjacent to Glen Canyon National Recreation Area and surrounding Mancos Mesa was cut out of the proposal. Wingate Mesa, Nokai Dome and the Daneros uranium mine, which is looking to expand, were not included within the national monument; and
- Raplee Anticline and most of Lime Ridge between Mexican Hat and Comb Ridge are excluded from the monument. This has been the site of some oil development and limestone quarrying.<sup>14</sup>

**2. The Bears Ears National Monument is appropriately classified under the Act as “historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest.”**

Although the Antiquities Act was a response to concerns over theft from and destruction of archaeological sites, it is not limited to such sites.<sup>15</sup> The Act states that it is not limited to archaeological ruins, since it applies to “other objects of historic or scientific interest.” The

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<sup>14</sup> This is from High Country News, December 29, 2016, available at <http://www.hcn.org/articles/obama-designates-bears-ears-national-monument>.

<sup>15</sup> CRS Report at 2.

courts have held this includes natural wonders and wilderness values.<sup>16</sup> The Grand Canyon, for example, was originally a national monument and the large area around it was designated to protect the “object” in question – the canyon.<sup>17</sup>

The Bears Ears National Monument meets the criteria of the Antiquities Act. It has historical sites such as rock art, ancient cliff dwellings, ceremonial sites, petroglyphs, pictographs, and “countless other artifacts [that] provide an extraordinary archaeological and cultural record.”<sup>18</sup> President Obama’s Proclamation stated its paleontological resources “are among the richest and most significant in the United States.”<sup>19</sup>

More than a dozen landmarks of cultural significance to Native peoples of the area are named in the Proclamation. These include the Valley of the Gods, sacred to the Navajo, and Cedar Mesa, Comb Ridge, and the San Juan River, landscape features closely tied to the ancient history, culture, and stories of native groups. Several more landmarks trace the history of the area’s tribes, their unique styles of architecture, and their daily lives, such as the Moki steps, the Moon House Ruin, and the Lime Ridge Clovis Site, one of the oldest known archaeological sites in Utah. The site dates as far back as 13,000 years ago.

The proposal from the Inter-Tribal Coalition that led to the designation of Bears Ears National Monument further details the unique significance of the area. Bears Ears includes more than 100,000 Native cultural sites that tribe members in the area regularly visit, often going with offerings and greeting ancestors by name. The Tribes’ creation stories tell of their presence on this land since the beginning of time. Protection of these sites is necessary to prevent the

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<sup>16</sup> CRS Report at 6, n. 35, citing *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132, 1138 (DC Cir. 2002).

<sup>17</sup> *Id.* at 5.

<sup>18</sup> December 28, 2016 Presidential Proclamation.

<sup>19</sup> *Id.*

desecration of graves and destruction of ancient homes and the surrounding areas of great cultural and historic significance.

The Bears Ears is also uniquely important to the history of Mormon pioneers, as described in a letter to the White House from more than 200 Mormon Church leaders.<sup>20</sup> Mormons migrated through the area in the late 19<sup>th</sup> century, seeking to establish a new settlement in what is now Bluff, Utah. Remnants from this time are still visible in the form of carved rock inscriptions, trails, corrals, and more.

In addition, the Bears Ears contains striking natural features such as “sharp pinnacles to broad mesas, labyrinthine canyons to solitary hoodoos, and verdant hanging gardens to bare stone arches and natural bridges.”<sup>21</sup> Indeed, Bears Ears’ soaring red rock structures and fossil beds have great physical and paleontological uniqueness. For example, on October 31, 2016, a group of more than 40 paleontologists wrote a letter to the White House in support of Bears Ears National Monument that describes the area as containing “some of the richest and most significant paleontological resources in the United States.”<sup>22</sup> President Obama’s Proclamation found the Bears Ears “provides vital insights to geologists”; and “protection of this area will provide important opportunities for further archaeological and paleontological study.”<sup>23</sup> Thus, the Bears Ears inarguably meets the criteria of the Act for “objects of historic or scientific interest.”

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<sup>20</sup> Available at <http://www.mesastewardship.org/bears-ears-national-monument/>

<sup>21</sup> *Id.*

<sup>22</sup> Available at [http://utahdinebikeyah.org/wp-content/uploads/2016/11/UDB\\_PaleontologistLetter\\_11-7-16.pdf](http://utahdinebikeyah.org/wp-content/uploads/2016/11/UDB_PaleontologistLetter_11-7-16.pdf)

<sup>23</sup> *Id.*

**3. The effects of designation of Bears Ears National Monument on the available uses of designated Federal lands, including consideration of the multiple-use policy of section 102(a)(7) of the Federal Land Policy and Management Act (43 U.S.C. 1701(a)(7)), as well as the effects on the available uses of Federal lands beyond the monument boundaries.**

The Secretary has requested comment on “multiple use,” which is defined in FLPMA at 43 U.S.C. § 1702(c). This states “resource values” are to be managed to “best meet the present and *future* needs of the American people.”<sup>24</sup> Under FLPMA, the land is to be managed with “consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.”<sup>25</sup> Thus, elevating protection and preservation of the natural state of the Bears Ears over other uses, such as extractive industries, oil and gas development and destructive off-road vehicles, is consistent with FLPMA’s multiple use provisions. Protection of the area preserves its natural qualities, such as its watershed values and its importance as headwaters, its biodiversity, habitat for wildlife including threatened and endangered species, and its intangible environmental qualities such as dark skies and silence that enable visitors to have a true wilderness experience.

President Obama’s Proclamation contains provisions on continuing certain existing uses in the monument, consistent with the protection of the objects of the monument. It states it shall not be construed to interfere with the operation or maintenance, or the replacement or modification within the current authorization boundary, of exiting utility pipeline, or telecommunications facilities. The USFS and BLM are directed to prepare a transportation plan

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<sup>24</sup> 43 U.S.C. §1702(c).

<sup>25</sup> *Id.*

that designates the roads and trails where motorized and non-motorized mechanized vehicle use will be allowed. And USFS and BLM will continue to apply grazing permits or leases.

**4. The effects of the designation of Bears Ears National Monument on the use and enjoyment of non-Federal lands within or beyond monument boundaries.**

There is no mention of “use and enjoyment of non-federal lands” in sections 320301 to 320303 of title 54 regarding the Antiquities Act. Nevertheless, President Obama’s proclamation protects non-federal lands in the monument. His establishment of the monument was “subject to valid existing rights, including valid existing water rights.”<sup>26</sup> And, the Proclamation called for exploration of a land exchange between the State of Utah and the Department of Interior, to enable the Federal government to acquire the State in-holding while the State would acquire land of approximately equal value outside the monument in return.<sup>27</sup> The Proclamation also states it shall not “be deemed to enlarge or diminish the jurisdiction of the State of Utah, including its jurisdiction and authority with respect to fish and wildlife management.”<sup>28</sup>

**5. Concerns of State, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected States, tribes, and localities**

There is no mention of “concerns of State, tribal, and local governments” in sections 320301 to 320303 of title 54 regarding the Antiquities Act. These concerns cannot override a monument designation, particularly in a case like the Bears Ears where the land designated was already owned by the Federal government. For example, a 1945 legal challenge to the Jackson

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<sup>26</sup> December 28, 2016 Presidential Proclamation.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Hole National Monument was premised on the state's loss of revenue from taxes and grazing fees; and the court held loss of income is not a legal basis to reject a monument designation.<sup>29</sup>

The Bears Ears will be managed by BLM and USFS in consultation with other Federal land management agencies in the local area, and a Federal Advisory Committee will be established regarding the monument's management plan. That FACA committee will include interested stakeholders, including State and local governments, tribes, recreational users, local business owners, and private landowners.<sup>30</sup> Therefore, "concerns of State, tribal, and local governments affected by a designation" have been and will be considered in the management of the area.

**6. The availability of Federal resources to properly manage Bears Ears National Monument.**

Most national monuments are managed by the National Park Service.<sup>31</sup> Based on the Presidential Proclamation, the Bears Ears is to be managed jointly by the U.S. Forest Service, which already manages the Manti-La Sal National Forest within the area, and the U.S. Bureau of Land Management, which already manages the BLM land in the area.<sup>32</sup> Thus there are adequate Federal resources to manage the areas, and no increase in resources appears necessary.

**7. Such other factors as the Secretary deems appropriate:  
Lack of Presidential Authority to Diminish or Eliminate  
Bears Ears National Monument**

In making its recommendation to the President, the Secretary should take into account that the President lacks authority to eliminate national monuments under the Antiquities Act. Presidents have expanded monuments, *e.g.* Muir Woods after its establishment in 1908; and the

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<sup>29</sup> *Wyoming v. Franke*, 58 F.Supp. 890 (D.Wyo. 1945).

<sup>30</sup> December 28, 2016 Presidential Proclamation.

<sup>31</sup> CRS Report at 10.

<sup>32</sup> December 28, 2016 Presidential Proclamation.

Mount Olympus National Monument was diminished after its establishment in 1909.<sup>33</sup> But the Antiquities Act does not authorize a President to abolish a national monument.<sup>34</sup>

More recently, Congress made it plain that the President does not have the authority to *diminish* National Monuments. In 1976 Congress passed the Federal Land Policy and Management Act, which clearly meant to deter any administrative attempts to modify national monuments. FLPMA Sec. 204(j) states "The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by an Act of Congress; modify or revoke any withdrawal creating national monuments under the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431-433)..." See also, Article IV, Sec 3 of the Constitution of the United States: "'The 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..." Congress's reservation of the power to itself to modify monuments, including those created by the President, is further indicated by its exercising its power in this field, *e.g.* by changing boundaries, abolishing monuments, and converting others to national parks.<sup>35</sup>

In sum, under the Antiquities Act, the president may "declare" national monuments and "reserve" parcels of land for those monuments, 54 U.S.C. § 320301(a), (b), but once a monument is established, nothing in the Act allows the president to take further action. When the president relies on authority delegated by Congress, as one attorney general opinion explains,<sup>36</sup> the president effectively stands in Congress's shoes and the monument proclamation carries the

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<sup>33</sup> CRS Report at 2.

<sup>34</sup> *Id.*

<sup>35</sup> CRS Report at 3.

<sup>36</sup> Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 Op. Atty. Gen. 185, 185 (1938).

force of legislation. A subsequent president, thus, cannot amend a monument, just as a president cannot amend legislation.

### **III. CONCLUSION**

Thank you for considering these comments. We look forward to working with USFS and BLM to preserve and protect the Bears Ears National Monument in the years to come. Should you have any questions about the issues addressed in these comments, Sierra Club can be reached at the contact information listed below.

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