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Environmental Protection in the Trump Era

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Reviewing, Revising, or Revoking Protection of National Monuments

Presidents have statutory authority to set aside federal lands and waters to create national monuments to protect scientific, historic, cultural, and other resources. On April 26, 2017, the President issued [Executive Order 13792](#), which directed the Secretary of the Interior to review previous monument designations made since January 1, 1996 and greater than 100,000 acres (or smaller designations where the Secretary determines there was inadequate outreach and coordination with “relevant stakeholders”), and to make recommendations for action, including revising and revoking protection, within 120 days.

Background.

Sixteen presidents, including Presidents Barack Obama and George W. Bush, have used their authority under the [Antiquities Act of 1906](#) to create national monuments by “public proclamation.” 54 U.S.C. § 320301. These proclamations set aside federally-owned lands and waters that contain “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest,” and **protect these resources from incompatible activities such as mining, leasing, logging, grazing, collecting, commercial fishing,** and other uses.

Under the Act, these monument reservations are to be the “smallest area compatible with the proper care and management of the objects to be protected,” which courts nonetheless have recognized can include huge acreages. (The Grand Canyon was initially protected by one of the earliest national monument proclamations). Many of the monument lands have later been added by Congress to legislatively-declared conservation classifications, such as National Parks.

Process.

Actions by the President. The Antiquities Act authorizes designation of monuments by presidential proclamation, **but provides no express authority for a president to revoke a monument proclamation.**² No president has ever attempted to abolish a national monument by executive action, so there is no case law addressing a revocation. A 1938 Opinion of the Attorney

Areas to Watch

Numerous national monuments may be the subject of action, including:

- Bears Ears National Monument,
- Gold Butte National Monument, and
- the marine national monuments.

On February 17, Utah’s governor signed a resolution of the Utah legislature calling on President Trump to modify the 1996 Grand Staircase-Escalante National Monument by shrinking its boundaries. On the same day, timber companies filed a federal lawsuit in Oregon contending that President Obama’s expansion of the Cascade-Siskiyou National Monument could not include certain federal lands (O&C lands) previously dedicated to sustained yield of timber; an association of Oregon counties filed a similar suit.

² Congressional Research Service (CRS), *National Monuments and the Antiquities Act* (Sept. 7, 2016).

General concluded that the president lacks legal authority to abolish a national monument, finding that the establishment of a monument in accordance with the Act is the one-way creation of a trust over the resources (“the President thereafter was without power to revoke . . . the reservation”).

On occasion, **a president has diminished the size of an existing monument or changed the regulations governing uses on a monument**, although this authority is in dispute. Unlike certain other statutes, the Antiquities Act does not expressly include a power to modify. The last diminution of an existing monument by executive action occurred in 1963 under President Kennedy.

In general, presidential authority to diminish the area protected by a previous monument proclamation has been grounded on assertions that the area is no longer, per the Act, the “smallest area” compatible with protection of the monument’s objectives. The 1938 Attorney General opinion observed that the president can diminish the area of an existing national monument; however, the rationale for this part of the opinion has been questioned in view of several changes in the laws and precedents it relied on. Recent [scholarship](#) suggests that the **Federal Land Policy and Management Act of 1976 removed any basis for subsequent diminutions by the executive.**³

Presidential proclamations frequently set out the specific incompatible activities that are prohibited or restricted within the monument area. There is no record of presidential removal or weakening of use restrictions imposed by a previous president. Presidents have *added* additional use restrictions to monument expansions. (In the Pacific Remote Islands Marine National Monument, created by President G.W. Bush in 2009 and expanded by President Obama in 2014, additional conservation restrictions were applied to the expansion area, but the original monument area remains under the prior restrictions). Thus, **the authority of a president to remove or weaken use restrictions is untested.**

Actions by Congress. Congress, acting by legislation signed by the president, can reverse or modify any of these proclamations or withdrawals under the “property clause,” its plenary constitutional power to make all necessary rules and regulations respecting the territory and property of the United States. Congress can also affect the management of national monuments through the appropriations process, specifying limitations on management activities and/or prohibiting uses of federal funds for certain management activities.

Discussion.

Following President Trump’s Executive Order, Secretary Ryan Zinke undertook review of 27 national monuments. His [interim report](#) on June 10 dealt with Bears Ears National Monument in Utah, as directed by the Order.

3 See Mark Squillace, Eric Biber, Nicholas S. Bryner, & Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 Va. L. Rev. Online 55 (2017); M. Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, Georgia L. Rev. (2003); Congressional Research Service, *Authority of a President to Modify or Eliminate a National Monument* (Aug. 3, 2000). See also Congressional Research Service, *Antiquities Act: Scope of Authority for Modification of National Monuments* (Nov. 14, 2016) (FLPMA Committee report language creates unresolved issue).

The Secretary recommended that:

- the monument cover a smaller area,
- Congress authorize tribal co-management of certain areas within the monument,
- Congress designate certain areas within the monument boundary as national recreation areas or national conservation areas, and
- Congress enact legislation clarifying management practices for wilderness and wilderness study areas within a monument.

The Secretary made some [subsequent announcements](#) removing some other monuments from further review. The Secretary's final report, due August 24, 2017, addresses all the monuments.

Possible actions by President Trump in response to the report might include the **first-ever attempt to revoke a monument designation by presidential proclamation**. This would prompt litigation by users and beneficiaries of the monument, challenging his authority to do so. Alternatively, the President might attempt to diminish the size of monuments or to change the use limitations within those monuments, based on prior presidential practice, but likewise subject to legal challenge.

Congress can modify or undo any of these designations at any time by enacting legislation, and historically has terminated some national monuments by legislation. Congress has occasionally considered legislation that would strip presidents of their unilateral authority to create national monuments (e.g., S. 33, introduced Jan. 6, 2017), but these proposals have not been enacted.



Opportunities for Public Engagement.

The public and stakeholders may advocate to the White House and Congress about possible presidential or congressional action. Such appeals might involve:

- focusing on the values being protected;
- questioning precedent for an exercise of executive authority to revoke or diminish monuments; and
- the business case for continued protection of these areas, including outdoor recreation and related economic benefits from prior designations, as well as modeling potential harm from oil and gas impacts in the marine monument areas.

Citizen groups may also have litigation options, provided they can demonstrate injury resulting from any revocations or modifications, with special attention to issues of standing and ripeness (immediacy of the injury). The National Environmental Policy Act (NEPA) does not apply to acts of the President or to Congress, and itself provides no basis for challenging these actions. However, **NEPA (and other laws) will apply to agency adoption of management plans and decisions implementing** these proclamations.

Stakeholders may also focus attention on funding for the monument areas through the Congressional appropriation process; many conservation actions that were once under attack (national parks, marine sanctuaries) eventually were supported by congressional endorsement or budget action.