

Keeping the “Public” in Public Lands

by Sharon Buccino

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The U.S. Department of the Interior (DOI) touches more lives in more ways than any other federal agency. Currently led by Secretary Ryan Zinke, the agency manages one-fifth of the land in the United States, including our national parks, wildlife refuges, and the delivery of water and power in the West.

We have entrusted Secretary Zinke and DOI with the care of wildlife, fish, waterways, and land for the benefit of us all. By the law of nature, certain things are common to all mankind. This idea has ancient roots, beginning in Greek and Roman civil law. It is embedded in the statutes the U.S. Congress has passed governing the management of public lands and waters.

As trustee, Secretary Zinke is accountable to us—the beneficiaries of the trust—to show that he has managed them for the common good. So, how is he doing? DOI’s website promotes its stewardship role. Quoting President Donald Trump, the website proclaims, “*We have to be great stewards of this land. This is magnificent land.*” Zinke’s actions, however, fail to live up to these words.

I. The Source of Zinke’s Stewardship Duty

The laws that govern management of our public lands require that they be managed in the public interest. Certain lands—like our national parks and monuments—are set aside “to conserve the scenery, natural and historic objects and the wild life.”¹ Created in 1916 as a bureau within DOI, the National Park Service must manage the lands it oversees “in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”² The National Park Service oversees 58 national parks plus 359 additional units covering more than 84 million acres.³

The National Wildlife Refuge System is also managed to conserve. As the agency responsible for the National Wildlife Refuge System, DOI’s U.S. Fish and Wildlife Service (FWS) administers “a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and

their habitats within the United States for the benefit of the present and future generations of Americans.”⁴ FWS manages refuges totaling just over 81 million acres.⁵

Much of the large estate that makes up our public lands, however, is outside of our national parks and refuges. DOI’s Bureau of Land Management (BLM) oversees three times the amount of land within the National Park System. BLM manages 247.3 million acres in 20 states, including the deserts of California, the red rock canyons of Utah, the plains of Montana, and the Iditarod Trail in Alaska. Although some lands are managed for specific purposes, BLM in general applies a “multiple-use” standard in its oversight of the public lands. The statute governing BLM’s management defines “multiple-use” as “harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment.”⁶

Congress required that BLM manage the public’s lands so they are “utilized in the combination that will best meet the present and future needs of the American people.”⁷ In the development and revision of land use plans, the Secretary of the Interior shall “weigh the long-term benefits to the public against short-term benefits.”⁸ Moreover, “in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary and undue degradation of the lands and their resources.”⁹

In sum, these three DOI agencies—the National Park Service, FWS, and BLM—oversee 65% of the acres of land owned by the federal government in the United States.¹⁰ Our national forests totaling an additional 192.9 million acres are managed by the U.S. Department of Agriculture (USDA).¹¹ Our public lands are assets intended to enrich

1. 54 U.S.C. §100101.

2. *Id.*

3. National Park Service, *Frequently Asked Questions*, <https://www.nps.gov/aboutus/faqs.htm> (last visited Feb. 9, 2018).

4. 16 U.S.C. §668dd(a)(2).

5. FWS, U.S. DOI, *STATISTICAL DATA TABLES FOR FISH AND WILDLIFE SERVICE LANDS* (as of 9/30/2017), available at https://www.fws.gov/refuges/land/PDF/2017_Annual_Report_of_Lands_Data_Tables.pdf.

6. Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §1702(c). See also 43 C.F.R. §1601.0-5(i) (2018).

7. *Id.*

8. 43 U.S.C. §1712.

9. *Id.* §1782(c).

10. CAROL HARDY VINCENT, CONGRESSIONAL RESEARCH SERVICE, *FEDERAL LAND OWNERSHIP: OWNERSHIP AND DATA 1* (2017).

11. *Id.* Like the responsibility imposed upon DOI, Congress has required that USDA manage the national forests “to serve the national interest.” 16 U.S.C. §1600(3).

each one of us, not simply a privileged few. Congress embedded in each of our nation's land management statutes a duty to future generations.¹² Even the multiple-use standard limits authorized uses to those that “will best meet the present and future needs of the American people.”¹³

II. The Meaning of Zinke's Stewardship Duty

Different standards of care apply to different categories of our public lands. The multiple-use standard is the lowest standard of care. Even this standard, however, imposes a duty to protect. Congress has authorized more uses on BLM lands than in national parks, but the Federal Land Policy and Management Act (FLPMA) nevertheless recognizes all the public's lands as assets that future generations have as much right to enjoy as the present one.¹⁴ As Secretary of the Interior, Zinke is not free to simply maximize use of the public lands today; he has a mandatory statutory duty to preserve them for tomorrow. Some drilling and mining today may meet the nation's needs. Unbridled fossil fuel extraction, however, does not.

Unlike the sum of two plus two, which is always four, the meaning of “in the public interest” is not fixed or easily determined: It changes with the times. What might have been in the public interest when the nation was young and its lands sparsely settled is different than what is in the public interest today. Two critical forces now shape management of our public lands in the public interest. First, the nation's population is three times what it was 100 years ago when the National Park System was created. Four of the nation's 10 fastest-growing cities are in the 12 western states where most of our public lands are located.¹⁵

Second, climate change is real. DOI's own Office of Inspector General has identified climate change as among the “most significant management and performance challenges” facing the department.¹⁶ Wildfires and flooding are increasing. Sea levels and temperatures are rising. Snowpacks are shrinking.¹⁷ Managing in the public interest requires consideration of the impact that burning fossil fuels extracted from the public lands has on greenhouse gas emissions and climate change.

Given the changing times and the need for flexibility, Secretary Zinke has some discretion in determining the

public interest. Such discretion, however, is not unlimited. We are a nation governed by the rule of law, not the whim of individuals. The Administrative Procedure Act (APA)¹⁸ requires federal agencies like DOI to take certain steps—including involving the public—before taking action. In addition to its procedural requirements, the APA imposes substantive standards on agency decisionmaking. Courts will set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”¹⁹

III. Zinke's Failure to Fulfill His Stewardship Duty

Secretary Zinke has lost sight of his statutory responsibilities. He has galloped forth in pursuit of “energy dominance,” opening as much of our public lands to oil, gas, and coal companies as quickly as he can. In 2017, DOI offered 12 million onshore acres for oil and gas leasing.²⁰ This number represents six times the amount offered in 2016.²¹ Zinke says he cares about protection and is inspired by the conservation legacy of President Theodore Roosevelt. Yet, his actions contradict his duty to protect.

A. Revoking Monument Protection

On December 4, 2017, President Trump signed proclamations revoking protection for more than two million acres of the public's land in Utah.²² He reduced Bears Ears National Monument by 85%, replacing it with two noncontiguous Indian Creek and Shash Jáa units.²³ He cut almost one-half of Grand Staircase-Escalante Monument, opening large amounts of federal coal to leasing.²⁴ The president acted based on Secretary Zinke's recommendations.²⁵

Secretary Zinke recommended revocation of monument protection despite overwhelming support for their preservation. In his report, Zinke himself acknowledged that “[c]omments received were overwhelming in favor of maintaining existing monuments.”²⁶ Analysis of comments submitted to the official review initiated by Secre-

12. While this Comment focuses on public lands, Congress has also required DOI to manage the offshore waters over which it has jurisdiction (the Outer Continental Shelf) “to reflect the public interest.” 43 U.S.C. §1801(7).

13. *Id.* §1702(c).

14. *Id.*

15. Samantha Sharf, *America's Fastest Growing Cities—2017*, FORBES, Feb. 10, 2017.

16. OFFICE OF INSPECTOR GENERAL, U.S. DOI, INSPECTOR GENERAL'S STATEMENT SUMMARIZING THE MAJOR MANAGEMENT AND PERFORMANCE CHALLENGES FACING THE U.S. DEPARTMENT OF THE INTERIOR (2017) (2017-ER-050).

17. Kelli M. Archie et al., *Climate Change and Western Public Lands: A Survey of U.S. Federal Land Managers on the Status of Adaptation Efforts*, 17(4) ECOLOGY & SOC'Y 20 (2012), available at <http://dx.doi.org/10.5751/ES-05187-170420>.

18. 5 U.S.C. §§500 et seq.

19. *Id.* at §706.

20. BLM, Oil and Gas Statistics, Table 11 Acreage Offered at Competitive Lease Sale Auctions Since January 1, 2009, <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/oil-and-gas-statistics> (last visited Feb. 20, 2018).

21. *Id.*

22. See James McElfish et al., *Antiquities Act: Legal Implications for Executive and Congressional Action*, 48 ELR 10187 (Mar. 2018).

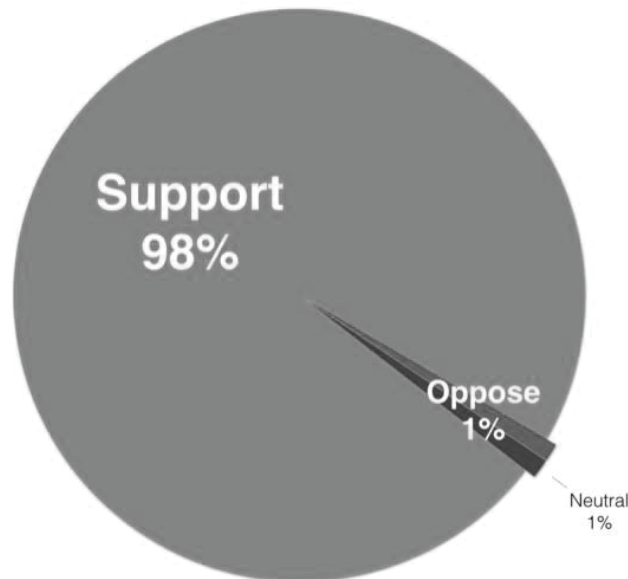
23. Modifying the Bears Ears National Monument, 82 Fed. Reg. 58081 (Dec. 8, 2017).

24. Modifying the Grand Staircase-Escalante National Monument, 82 Fed. Reg. 58089 (Dec. 8, 2017); Stephen Trimble, *When Trump Guts Two Utah National Monuments Next Week, He'll Trigger a New Conservation War*, L.A. TIMES, Dec. 1, 2017.

25. See Memorandum From Secretary Ryan Zinke, U.S. DOI, to President Donald Trump 10, 13 (2017) (Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act).

26. *Id.* at 3.

Figure 1. Public Comment Analysis of Trump/Zinke National Monument Review



Source: Aaron Weiss, Center for Western Priorities.

tary Zinke show that 98% opposed monument reduction (see Figure 1).²⁷

Recent polling reinforces widespread public support for national monuments. Two-thirds of westerners, for example, say it is a bad idea to reduce the size of Bears Ears and Grand Staircase-Escalante (see Figure 2).²⁸ A majority in seven western states believe reducing national monuments in size is a bad idea. Utah is divided. Even there, 49% of Utahans say monument reduction is a bad idea, while 41% see it as a good idea.

Given this widespread support for monument protection, it is hard to see how revoking protection is in the public interest. The federal lands within Bears Ears and Grand Staircase-Escalante National Monuments contain priceless geological, paleontological, ecological, archaeological, historic, and cultural resources. Grand Staircase-Escalante, for example, contains brilliantly colored landscapes showcasing geologic treasures of sedimentary rock formations unobscured by vegetation, and which lay bare millennia of earth's geologic history.

Bears Ears lies in the heart of the Colorado Plateau in one of the least developed areas in the contiguous United States. For thousands of years, the area has been inhabited by members of Native American tribal groups, including the Navajo Nation, Hopi Tribe, Ute Indian Tribe, Ute Mountain Ute Tribe, and Pueblo of Zuni, among others. The tribes' history is written on the landscape today: the Bears Ears area is intensely rich with petroglyphs and rock

paintings, ancient cliff dwellings, granaries, graves, ceremonial sites, and the remnants of carefully planned and constructed villages, some dating back thousands of years.

Prior to designation as national monuments, most of the land within Grand Staircase-Escalante and Bears Ears was managed under a multiple-use standard by BLM under FLPMA. This multiple-use approach to land management failed to safeguard the areas' unique landscape and the historic and cultural sites. Poorly regulated off-highway vehicle use, for example, led to environmental damage, as well as the looting and vandalism of cultural sites and fossils.

In the area that eventually became Grand Staircase-Escalante, BLM had leased large tracts of federal public land for coal mining and oil and gas drilling. In the years leading up to the area's designation as a national monument in 1996, BLM was working toward the approval of a large coal mine on the Kaiparowits Plateau. The Dutch company Andalex Resources sought to mine two to four million tons of coal a year for several decades.²⁹ After the area was proclaimed a monument, taxpayers spent \$14 million to buy out Andalex's coal leases, restore the integrity of the Kaiparowits Plateau, and ensure the preservation of this unspoiled landscape for future generations.³⁰ Why would we as a nation want to turn around and offer the leases for mining again?

In Bears Ears, uranium companies seek to profit from hundreds of claims. Energy Fuels, a Canadian uranium producer, together with other mining groups, lobbied extensively for a reduction of Bears Ears.³¹ Before the area was designated as a monument in 2016, the land was open to mining, oil and gas leasing, and off-road vehicle use. Now it is open once again. A few companies may profit, but the rest of us lose.

B. Repealing Safeguards

Secretary Zinke has also acted to repeal safeguards that limit the damage that drilling, mining, and other destructive uses have on our public lands.

I. Methane Waste Prevention Rule

In recent years, both the U.S. Environmental Protection Agency (EPA) and BLM have required oil and gas companies to capture their methane emissions. Methane is a primary constituent of natural gas. As companies produce, process, and transport natural gas, methane emissions result from both leaks and intentional venting and flaring.³² The oil and gas sector contributes almost 30% of

27. Aaron Weiss, *America to Trump and Zinke: Don't Touch National Monuments*, WESTWISE, July 10, 2017, <https://medium.com/westwise/america-to-trump-and-zinke-dont-touch-national-monuments-8f4b40c43599>.

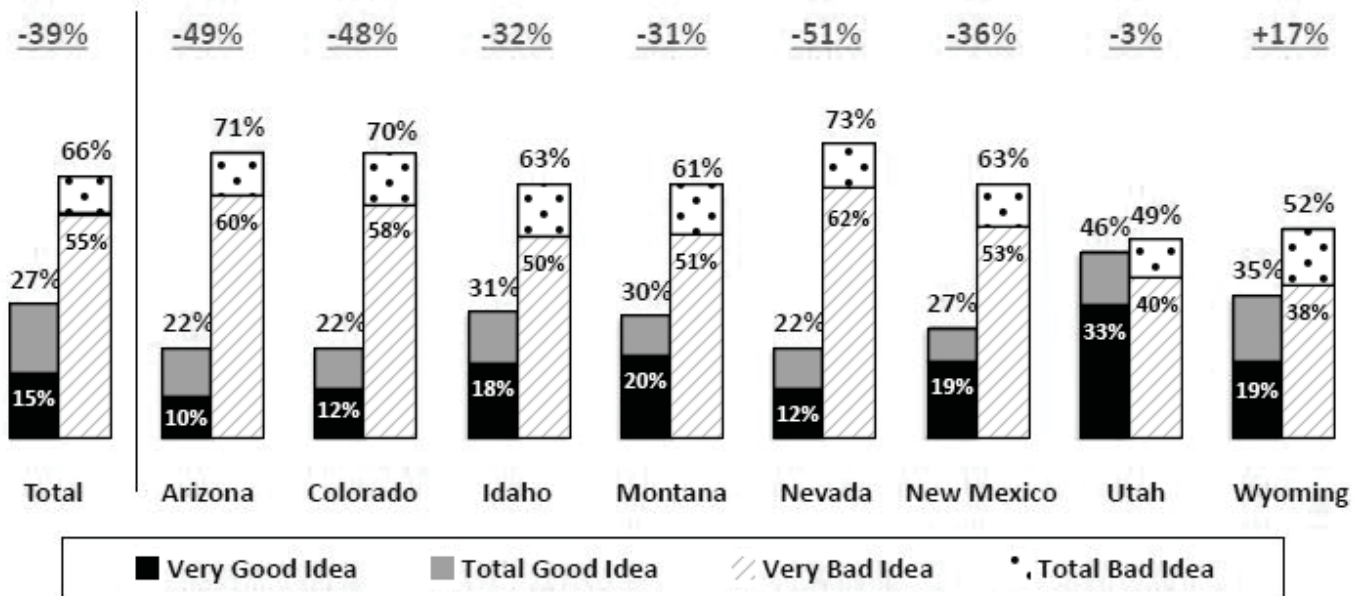
28. COLORADO COLLEGE STATE OF THE ROCKIES PROJECT ET AL., NATIONAL MONUMENTS (2018), https://www.coloradocollege.edu/other/stateoftherockies/conservationinthewest/2018/reports/National_Monuments_Report.pdf.

29. Frank Clifford, *Mine Plan for Lonely Plateau Sparks Fight*, L.A. TIMES, Sept. 3, 1996, http://articles.latimes.com/1996-09-03/news/mn-40212_1_coal-mines.

30. Rebecca Worby, *What Could Be Lost in a Push for Mining in Monuments*, HIGH COUNTRY NEWS, Nov. 3, 2017.

31. Hiroko Tabuchi, *Uranium Producers Pushed Hard for a Comeback: They Got Their Wish*, N.Y. TIMES, Jan. 13, 2018.

32. U.S. EPA, *Overview of the Oil and Natural Gas Industry*, <https://www.epa.gov/natural-gas-star-program/overview-oil-and-natural-gas-industry> (last updated July 27, 2017).

Figure 2. Evaluation of National Monuments Reduction by State

Respondents were asked: *Would you say that it is a good idea or a bad idea to reduce the size of these national monuments?*

Source: Colorado College State of the Rockies Project et al.

overall methane emissions in the United States.³³ Methane traps 86 times more heat in the atmosphere than carbon dioxide in the short term, fast-tracking the consequences of catastrophic climate change. It is often accompanied by toxic air pollutants such as benzene, formaldehyde, and ethylbenzene, threatening the health of residents living near oil and gas operations.³⁴

On December 8, 2017, BLM issued a final rule suspending its methane waste prevention rule. Previous attempts to delay compliance with the rule had failed. In May 2017, 51 senators voted to block congressional efforts to repeal the rule under the Congressional Review Act. In June 2017, BLM announced that it was indefinitely staying all the rule's provisions with future compliance dates. The agency's action, however, was invalidated by a federal district court in California for failure to follow requirements of the APA.³⁵ Following a second attempt to suspend the rule, the court issued an injunction keeping the rule's protections on the books while the court addresses whether the rule's suspension was lawful.³⁶ The judge found BLM's reasoning behind the suspension "untethered to evidence contradicting the reasons for implementing the Waste Prevention Rule."³⁷

33. U.S. EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2015 (2017) (EPA 430-P-17-001), available at https://www.epa.gov/sites/production/files/2017-02/documents/2017_complete_report.pdf.

34. Earthjustice, *Methane: A Dangerous Problem, an Easy Solution*, <https://earthjustice.org/features/everything-you-need-to-know-about-methane> (last updated Oct. 31, 2017).

35. *California v. Bureau of Land Mgmt.*, Nos. 17-cv-3804-EDL & 17-cv-3885-EDL, 2017 WL 4416409, at *14 (N.D. Cal. Oct. 4, 2017).

36. *California v. Bureau of Land Mgmt.*, Nos. 17-cv-3804-EDL & 17-cv-3885-EDL, Order Denying Motion to Transfer Venue and Granting Preliminary Injunction (Feb. 23, 2018), available at <https://www.nrdc.org/resources/court-order-granting-preliminary-injunction-blm-methane-second-stay>.

37. *Id.* at 2.

2. Hydraulic Fracturing Rule

On December 29, 2017, Secretary Zinke's BLM repealed a rule put in place in 2015 designed to modernize well construction standards and mandate disclosure of chemicals used to drill oil and gas wells. The 2015 rule replaced 30-year-old regulations following consideration of comments from numerous experts, state agencies, and Native American tribes over five years. By contrast, BLM repealed the rule after only five months from initiating notice-and-comment rulemaking.³⁸ BLM's repeal leaves more than 700 million acres of lands and minerals managed by BLM subject to outdated standards that fail to protect groundwater, lands, and wildlife.

3. Sage-Grouse Conservation Plans

On October 5, 2017, Secretary Zinke acted to reverse plans developed with various stakeholders and local elected officials to conserve sage-grouse and their habitat across 10 western states. Because of the importance of its sagebrush habitat, the health of the sage-grouse determines the survival of an entire ecosystem, including the golden eagle, elk, pronghorn, and mule deer. The plans had identified and protected the most important habitat while allowing various uses—including oil and gas drilling as well as renewable energy development—on public lands. Without the plans' protections, the sage-grouse risks listing under the Endangered Species Act (ESA).³⁹ Under Zinke's direc-

38. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61924 (Dec. 29, 2017).

39. 16 U.S.C. §§1531-1544; ELR STAT. ESA §§2-18.

tion, BLM issued a notice of intent to change the land use plans containing the sage-grouse protections.⁴⁰

C. Shutting the Public Out

Under Secretary Zinke, the public is losing its say in how our public lands are managed. On January 31 of this year, BLM scrapped policies that had provided public notice and the opportunity to comment on environmental analysis of proposed oil and gas leasing. The policies were intended to minimize conflict over proposed leasing by steering drilling to areas least valued for recreational, cultural, and other uses. They encouraged the development of master leasing plans to ensure an opportunity for local input and to provide industry some certainty about where and under what conditions drilling would be allowed. BLM had been providing the public maps of where new leases were proposed and draft environmental analysis 90 days before a sale was held. New guidance issued by Zinke's BLM eliminates the use of master leasing plans and limits the amount of environmental review required and the time for the public to protest a specific lease sale.⁴¹

Zinke has also taken aim at the public's access to information under the Freedom of Information Act (FOIA). Zinke's BLM wants new exemptions from disclosure and to limit the number of requests an individual or organization can make each year.⁴² Transparency is essential to our democracy. As citizens, we are entitled to information about what our government is doing with our taxpayer dollars. Here, there is even more at stake than taxpayer dollars. The very assets at issue—the public lands—are owned by each and every one of us. Denying the public information about assets each of us owns does not serve the public interest.

IV. Holding Zinke Accountable

Congress has not left federal agencies on their own to follow the law. Several statutes provide the public the right to go to court to hold agencies like DOI accountable to congressional mandates. Such judicial review is a fundamental piece of the checks and balances upon which American democracy is based. As explained above, the APA requires agencies to act in a reasonable manner. When they do not, citizens can challenge agency actions to stop them.

Environmental organizations have challenged in court several actions by Zinke's DOI. Environmentalists, for

example, successfully sued BLM for suspending the methane waste prevention rule without notice and comment. Attorneys general from California and New Mexico joined this effort. States, as well as federal taxpayers, lose revenue when methane is lost rather than captured and accounted for in royalty payments by oil and gas companies. The non-profits and states are now back in court challenging BLM's latest effort to block the methane controls.

In addition to procedural requirements, federal law imposes various substantive mandates upon Secretary Zinke limiting his ability to reverse public land protections. Rescinding the sage-grouse plans, for example, will require significant scientific and economic study. The plans were put in place based on years of expert input. They were designed to slow the decline of sage-grouse populations and avoid a listing as threatened or endangered under the ESA. Governors, including Republicans, support the plans. In order to reverse these plans, DOI will need to come up with evidence that the bird no longer needs protection. Failure to provide such evidence or evidence that alternative measures are effective in protecting the bird will leave Secretary Zinke vulnerable in court.

Secretary Zinke and President Trump are also defending changes to Bears Ears and Grand Staircase-Escalante National Monuments in court. Various interests, including environmental organizations and tribes, have sued Secretary Zinke in federal district court in Washington, D.C. The groups argue that the Antiquities Act provides the authority to create, but not destroy, national monuments.⁴³ In addition, the groups contend that facts fail to support Secretary Zinke's changes to the national monuments. The changes that Secretary Zinke proposed and the president adopted in his December 4 proclamations exclude objects of scientific and historic importance, leaving them vulnerable to the very damage that the original proclamations sought to avoid.

Our public lands exist today for each one of us to enjoy because of the foresight and courage of those who came before us. From the act creating the National Park Service in 1916 to the statute governing BLM, our federal laws impose a mandatory duty on public officials like Secretary Zinke to manage our public lands in the public interest. While Congress and the courts entrust such management to the discretion of agency officials, this discretion is not unlimited. We are a nation governed by rule of law, not the whim of individuals. We have entrusted Secretary Zinke with our most precious assets—our public lands and waters—and he has failed us.

40. Notice of Intent to Amend Land Use Plans Regarding Greater Sage-Grouse Conservation and Prepare Associated Environmental Impact Statements or Environmental Assessments, 82 Fed. Reg. 47248 (Oct. 11, 2017).

41. Instruction Memorandum No. 2018-034 From Brian C. Steed, Deputy Director, Policy and Programs, BLM, to All Field Officials (Jan. 31, 2018) (*Updating Oil and Gas Leasing Reform—Land Use Planning and Lease Parcel Reviews*), <https://www.blm.gov/policy/im-2018-034>.

42. BLM REPORT IN RESPONSE TO SECRETARIAL MEMORANDUM ON IMPROVING PLANNING AND NEPA PROCESSES AND SECRETARIAL ORDER 3355 (Sept. 27, 2017). See also Juliet Eilperin & Michael Laris, *Trump Administration Plan Would Roll Back Environmental Reviews Covering Use of Public Lands*, WASH. POST, Feb. 8, 2018.

43. See, e.g., *Natural Res. Def. Council v. Trump*, No. 1:17-cv-02606 (TSC) (D.D.C. filed Dec. 7, 2017), <https://www.nrdc.org/sites/default/files/complaint-bears-ears-20171207.pdf>. See also Bruce Fein & W. Bruce DelValle, *New Wine in Old Bottles: Distorting the Antiquities Act to Aggrandize Executive Power*, 48 ELR 10300 (Apr. 2018).