



President Trump Orders Review of National Monument Designations Under the Antiquities Act

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On April 26, 2017, President Trump signed Executive Order 13792, Review of Designations Under the Antiquities Act (Order), which requires the Secretary of the Interior (Secretary) to review all Presidential designations of National Monuments or expansions of such designations made since January 1, 1996 under the Antiquities Act of 1906 (Antiquities Act or Act) where the designations or expansion (i) results in a national monument exceeding 100,000 acres or (ii) where the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders. Citing massive land grab[s], carried out under the Act, President Trump stated upon signing the Order, [i]t's time to end these abuses and return control to the people, the people of Utah, the people of all of the states, the people of the United States. As described in greater detail below, although the Order covers designations made by Presidents Clinton, George W. Bush, and Obama, it contained an explicit reference to President Obama's December 28, 2016 designation of the Bear's Ears National Monument in Utah.

The Antiquities Act

The Act authorizes the President to proclaim as National Monuments historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that occur on federal lands. In designating National Monuments, the Act requires the President to limit parcels to the smallest area compatible with the proper care and management of the objects to be protected. Some have claimed that recent use of the Act by the two previous Presidents has run counter to this provision.

History of Presidential Designations under the Antiquities Act

While a number of designations have been favored by national audiences, as noted by the Congressional Research Service, some have proven to be contentious, particularly in the States where they are located. Neither Democrat nor Republican has been spared. For example, President Carter's designation of 56 million acres of land in Alaska pursuant to the Act sparked protests from Alaskans, court challenges and, ultimately, sped up approval of the Alaska National Interest Lands Conservation Act, which both expanded protected lands in Alaska (incorporating the designated lands) and prohibited Presidents from designating monuments over 5,000 acres in Alaska without Congressional approval. Similarly, President Clinton angered many Utahans when he designated the 1.7 million-acre Grand Staircase-Escalante National Monument in Utah not only because that designation effectively ended plans for a coal mine, but also because the President signed his executive proclamation to protect Utah while sitting on the Arizona side of the Grand Canyon. Local opponents also strongly criticized the designation due to the perceived lack of transparency in the designation process and perceived absence of meaningful local consultation. Aside from lawsuits, President Clinton's action also was the impetus for Congress passing the Utah Schools and Lands Exchange Act of 1998, which authorized the federal government to transfer to the State of Utah \$50 million and nearly 140,000 acres of land containing coal, natural gas, and other mineral that could be leased or developed by the State in exchange for more than 370,000 acres of Utah school trust lands, which the federal government would manage for the benefit of the Monument. While President Bush's designation of the 139,793 square-mile Papahānaumokuākea Marine National Monument (originally called the Northwestern Hawaiian Islands Marine National Monument) did not drive Congress to enact new legislation, the designation was the subject of a Federal Tort Claims Act lawsuit filed against the federal agency charged with administering the Monument. By proclamation, President Obama later expanded the designation of the Papahānaumokuākea Marine National Monument to cover 582,578 square miles.

While legal challenges to Presidential designations under the Antiquities Act have, as of the date of this writing, been unsuccessful, it is clear that these designations are fraught with controversy no matter the political affiliation of the acting President.

Controversy Surrounding Bear's Ears National Monument

Created days before President Obama left office, Bear's Ears National Monument comprises 1.3 million acres in southern Utah. While President Obama's designation of Bear's Ears was hailed by a number of Native American groups and environmental organizations, the designation has been a source of contention to communities located near the Monument. President Trump's Order, in fact, appears to be a nod to two Utah-based controversies: President Obama's designation of Bear's Ears National Monument and President Clinton's designation of the Grand Staircase-Escalante National Monument, as the Order specifically references Bear's Ears and requires the Secretary to review all national monument designations made since 1996—the year President Clinton designated Grand Staircase-Escalante.

Summary of the Executive Order

The Order requires the Secretary to review relevant National Monument designations to determine whether they were made in accordance with the requirements and original objectives of the Act. In making this determination, the Secretary is required to consider, among other things:

- the original objectives of the Act, including the Act's language that reservations of land not exceed the smallest area compatible with the proper care and management of the objects to be protected;

- whether designated lands are classified appropriately under the Act as historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest";
- the effects of the designation on the available uses of designated federal lands, including consideration of the multiple-use policy found in section 102(a)(7) of the Federal Land Policy and Management Act; and
- the effects of a designation on the use and enjoyment of non-federal lands both within or beyond the boundaries of the designated area.

The Order further requires the Secretary to provide to the President an interim report summarizing the Secretary's findings with respect to President Obama's December 28, 2016 designation of the Bears Ears National Monument, as well as any other designations the Secretary deems appropriate for inclusion in the interim report. The interim report is to be delivered to the President within 45 days of the date of the Order. The Secretary is required to provide to the President a final report summarizing his findings on all designations since January 1, 1996 within 120 days of the date of the Order. The final report must include the Secretary's recommendations for Presidential actions, legislation, or other actions that would carry out the policy set forth under the Order. In making his recommendations, the Secretary is required to consult with governors or other relevant officials of affected states, as well as the heads of executive departments and agencies concerned with the designations.

On May 11, 2017, the Department of Interior (Department) published in the Federal Register a Notice of Opportunity for Public Comment on its Review of Certain National Monuments Established Since 1996 (Notice). The Notice indicates that the public review and comment process will be used to assist the Department in determining whether the relevant National Monument designations comport with the policy set forth in the Order and to formulate recommendations for Presidential actions, legislative proposals, or other appropriate actions to carry out that policy. The Notice identifies 27 National Monuments to be reviewed by the Department and requests public comments thereon. While comments on 26 of the National Monuments may be submitted until July 10, 2017, the Department stated that comments concerning Bears Ears National Monument would have to be submitted by May 26, 2017 to ensure consideration of the same.

The Path Forward

While Secretary Ryan Zinke has indicated he would keep an open mind as he considers the various designations, President Trump has stated his eagerness to change the current boundaries of Bear's Ears and, in so doing, put the states in charge of their own destiny.

The issue of national monument designations under the Act will continue to stoke controversy among various interest groups, all of whom will anxiously await the interim and final reports required of Secretary Zinke by the Order.

Of particular interest to groups on all sides of the Act is the issue of whether a President has the authority to revoke or reduce the size of the designation of a National Monument. To date, no President ever has revoked or abolished a National Monument designation, and no federal court has directly addressed the issue of whether the President has the power to do so. While some, including former Attorney General Homer Cummings (served 1933-39), have opined that the President lacks such authority, others have suggested that the power granted to the President under the Act is broad and includes the ability to designate, revoke, and reduce the size of National Monuments.

Another issue that already has reached the courts and could, ultimately, influence Trump Administration review and handling of previous National Monuments is whether designation of National Marine Monuments

is proper under the Act, as the Act authorizes the President to designate as National Monuments lands owned or controlled by the Federal government and does not necessarily extend to bodies of water. In a complaint filed by the Massachusetts Lobstermen's Association and others, plaintiffs alleged that President Obama exceeded his authority under the Act in designating the Northeast Canyons and Seamounts National Marine Monument because [t]he ocean is not 'land owned or controlled by the Federal government' and, thus, is not within the President's monument proclaiming authority.