June 30, 2017

Review, MS – 1530
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

[Docket No. DOI 2017-0002]
Review of Certain National Monuments Established Since 1996

Public Comment Re: Craters of the Moon National Monument and Preserve

Dear Secretary Zinke,

Since 1919, the National Parks Conservation Association (NPCA) has been the leading voice of the American people in protecting and enhancing our National Park System. On behalf of our more than 1.2 million members and supporters nationwide, including our approximately 4,500 in Idaho alone, we write to ask that you uphold the current monument designation for Craters of the Moon National Monument and Preserve (Craters of the Moon), maintaining the boundaries and protections as established in the proclamation from President Clinton on November 9, 2000 and as further modified by Congress on August 21, 2002.

NPCA, along with our supporters in Idaho and beyond, has a long history of advocating for Craters of the Moon. For decades, NPCA has worked with members of the Idaho delegation to ensure that Craters of the Moon is managed to protect the unique and important natural and cultural resources within its borders while also allowing for diverse uses.

We have outlined in our comments the reasons why the Department of the Interior (DOI) should not recommend any changes to Craters of the Moon National Monument and Preserve:

- The president has no legal authority to rescind or materially modify the size of a monument under the Antiquities Act. Only Congress, and not the president, has the authority to make modifications to monument designations. This is particularly so where, as in Craters of the Moon, a portion of the monument is managed by the National Park Service.

- Congress has "ratified" the executive designation of Craters of the Moon through numerous legislative acts modifying its boundaries, designating certain areas as Wilderness, and most recently, designating certain areas as a National Monument and Preserve. Congress has therefore established that this monument is consistent with the requirements of the Antiquities Act.

- Apart from such ratification, Craters of the Moon meets the requirements and original objectives of the Antiquities 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."

- Craters of the Moon is of great scientific and educational value and is appropriately classified under the Antiquities Act as a "historic landmark[], historic and prehistoric structure[], [or] other object[] of historic or scientific interest."

- Craters of the Moon provides diverse opportunities for a wide range of uses on federal lands and meets the requirements of the multiple use policy of section 102(a)(7) of the Federal Land Policy and Management Act.

- Craters of the Moon has a long history of local and regional support. The robust public process for the 2000 expansion, as well as existing regional momentum for designating Craters of the Moon as a National Park, shows that the concerns of State and local communities and governments have been, and continue to be, accounted for in the designation process.

- Idahoans, including the Governor, U.S. Congressman Mike Simpson, and officials in bordering counties, are on the record supporting Craters of the Moon.

- Craters of the Moon provides a significant economic benefit to the surrounding communities.

- The current co-management between the National Park Service (NPS) and the Bureau of Land Management (BLM) is working and the 2007 management plan should be allowed to continue. The current management scheme shows that federal resources are available to maintain the monument.

We thank you for your consideration of these comments.

I. History of Craters of the Moon National Monument and Preserve

Craters of the Moon National Monument was established on May 2, 1924 by President Calvin Coolidge, under Presidential Proclamation 1694, in order to protect the "remarkable fissure eruption together with its associated volcanic cones, craters, rifts, lava flows, caves, natural bridges, and other phenomena characteristic of volcanic action which are of unusual scientific value and general interest" as well as "great educational value."[1] The original monument was 53,420 acres in size.

Since the 1924 creation of Craters of the Moon National Monument, five other presidential proclamations have been issued through the Antiquities Act to either expand or adjust the monument's boundaries:

- Presidential Proclamation 1843: On July 23, 1928 President Calvin Coolidge expanded the boundary of the monument to include "certain springs for water supply and additional features of scientific interest."[2]

- Presidential Proclamation 1916: On July 9, 1930 President Herbert Hoover added additional lands that contained a spring that was needed to provide the monument with an "adequate water supply."[3]

- Presidential Proclamation 2499: On July 18, 1941 President Franklin D. Roosevelt removed land from the monument so that the State of Idaho could construct State Highway No. 22

[1] Presidential Proclamation 1694.
[2] Presidential Proclamation 1843.
[3] Presidential Proclamation 1916.

deeming the land "not necessary for the proper care and management of the objects of scientific interest." [4]

- Presidential Proclamation 3506: On November 19, 1962 President John F. Kennedy expanded the monument by approximately 5,360 acres to include a 180-acre area of vegetation completely surrounded by lava, known as a "kikapu," for its ecological value "because it contains a mature, native sagebrush-grassland association which has been undisturbed by man or domestic livestock."[5] The land in between the kikapu and the monument was included in the boundary adjustment.

- Presidential Proclamation 7373: On November 9, 2000 President Bill Clinton expanded Craters of the Moon to "assure protection of the entire Great Rift volcanic zone and associated lava features, all objects of scientific interest," increasing the monument from roughly 54,000 acres to approximately 739,000 acres (or approximately 753,000 acres including state and private lands within the boundary). The features included "the Craters of the Moon, Open Crack, Kings Bowl, and Wapi crack sets and the associated Craters of the Moon, Kings Bowl, and Wapi lava fields." Proclamation 7373 directed the Secretary of the Interior to "manage the area being added to the monument through the Bureau of Land Management and the National Park Service." It provided that the two agencies "manage the monument cooperatively and [] prepare an agreement to share, consistent with applicable laws, whatever resources are necessary to manage properly the monument."[6]

In addition to decades of presidential proclamations related to Craters of the Moon, Congress has authorized at least three boundary changes to the monument since its creation:

- H.R. 15877: On February 21, 1932, Congress authorized the "exchanges of land with owners of private-land holdings within Craters of the Moon National Monument."[7]

- H.R. 7930: On June 5, 1936, Congress authorized the elimination of the "south half section 16, township 2 north range 24 east, Boise meridian" from Craters of the Moon National Monument.[8]

- H.R. 4326, Section 205 of the Omnibus Parks and Public Lands Management Act of 1996: On November 12, 1996, Congress authorized a boundary revision of Craters of the Moon National Monument "to add approximately 210 acres and to delete approximately 315 acres."[9]

Most recently, Congress authorized a name change and redesignation on a portion of the monument as a national preserve.

- H.R. 601 (Pub. L. No. 107-213): In 2002, Congress redesignated the approximately 410,000 acres added to the monument by Presidential Proclamation 7373 as "Craters of the Moon National Preserve" and authorized hunting on the preserve lands.[10]

Congress also designated lands within Craters of the Moon as a Wilderness Area under the Wilderness Act.

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[4] Presidential Proclamation 2499.
[5] Presidential Proclamation 3506.
[6] Presidential Proclamation 7373.
[7] H.R. 15877.
[8] H.R. 7930.
[9] H.R. 4326, Section 205 of the Omnibus Parks and Public Lands Management Act of 1996.
[10] H.R. 601 (Pub. L. No. 107-213).

- Pub. L. No. 91-504: On October 23, 1970, in accordance with the Wilderness Act, 16 U.S.C. 1131 *et seq.*, Congress authorized 43,243 acres of the area within the original 1924 monument area as Craters of the Moon National Wilderness Area. This area is managed by NPS.[11]

Craters of the Moon is currently co-managed by NPS and BLM. The area constitutes three administrative units: 1) the NPS National Monument, which includes the approximately 53,420 acres of the original monument, 2) the NPS National Preserve, which includes approximately 410,000 acres added in 2000, and 3) the BLM National Monument, which includes approximately 274,000 acres added in 2000. Craters of the Moon is one of two national monuments in the country jointly managed by BLM and NPS. Additionally, approximately 8,000 acres of state land and 7,000 acres of private land are within the Craters of the Moon boundary.

II. The President Lacks the Legal Authority to Rescind or Reduce the Size of or Materially Modify a Monument under the Antiquities Act

DOI's current review of 27 national monuments, including Craters of the Moon, does not provide any legal avenue for the president to rescind or reduce in size any national monument. No president has the legal authority to rescind or materially modify any national monument proclaimed under the Antiquities Act. While the President may not of course change the part of this monument that is a national preserve created by Congress, and may not change the congressionally-designated Wilderness Area, the president also lacks authority to change the other portions of the monument.

President Trump's Executive Order on the Review of Designations Under the Antiquities Act signed on April 26, 2017 directs the Secretary of the Department of Interior to provide the Office of Management and Budget and President Trump with potential recommendations "for such Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out the policy set forth in section 1 of this order." Section 1 of the order broadly talks about public input, economic growth, the "original objectives" of the Antiquities Act and "appropriately balanc[ing] the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities." At the time of President Trump's Executive Order, you explained that you will consider whether monuments should be "rescinded, resized, [or] modified." When asked if the president has the power to do so unilaterally, you suggested that it is "untested" whether the president has the unilateral power to rescind a monument, but that "it's undisputed the president has the authority to modify a monument."[12]

We urge to you, Secretary Zinke, to re-examine your understanding of this issue. The president has no power to unilaterally rescind a national monument designation and no power to modify or reduce the size of a monument. We attach a memorandum from the law firm of Arnold & Porter Kaye Scholer LLP ("APKS Memo") (Appendix A) and a law review article by four professors (the "Squillace Article") (Appendix B) who collectively conclude that no such powers of rescission or to make material changes exist. The only result of the current review ordered by President Trump, therefore, would be to make recommendations to Congress, asking that Congress draft legislation to make whatever revocations or modifications your office and the President believe justified.

In summary, whether or not the president may make a rescission or modification of a monument designation does not turn on any power granted the president by the U.S. Constitution. This issue instead concerns administration of federally owned land, and the Constitution's Property Clause

[11] Pub. L. No. 91-504.
[12] "Press Briefing by Secretary of Interior Ryan Zinke to Review the Designations Under the Antiquities Act," Office of the Press Secretary, White House, April 25, 2017.

gives that power exclusively to Congress.[13] Whether or not the president has the power to unilaterally revoke a national monument designation therefore depends on whether that power is expressly or by implication delegated to the president by an Act of Congress. The Antiquities Act of 1906 authorizes the president to create national monuments on land owned or controlled by the federal government.[14] The Act says nothing about a president having the power to abolish a national monument or to reduce the size of a monument. And no such power may be implied. This is so for several reasons:

First, the U.S. Attorney General opined long ago that the Antiquities Act could not be interpreted to imply that a president has the power to revoke a national monument's designation. No president has attempted to revoke such a designation since that Opinion was issued in 1938.[15]

Second, in the more than 100 years since the adoption of the Antiquities Act, Congress has adopted a comprehensive legislative portfolio to govern federally owned land, into which the Antiquities Act was folded and in relation with which it must be interpreted. One of those statutes was FLPMA, adopted in 1976.[16]

- Congress therein adopted the Attorney General's interpretation that no revocation power should be read into the Antiquities Act by implication. When Congress legislates on a subject, "[C]ongress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning."[17] Yet in FLPMA, Congress did not "affirmatively act to change the meaning" of the Antiquities Act as interpreted by the Cummings Opinion. Congress therefore in effect adopted that interpretation.

- To the contrary, one of Congress' purposes in FLPMA was to reassert its own authority over federal land withdrawals and to limit to express delegations the authority of the Executive Branch in this regard.[18] Accordingly, Congress there repealed a number of prior statutes that had authorized Executive Branch withdrawals and revocations, and Congress also repealed a Supreme Court decision that had found an implied power in the presidency to withdraw land from oil exploration.[19] The Supreme Court has made clear that, to harmonize different statutes, "a specific policy embodied in a later federal statute should control our construction of [a prior one], even though it had not been expressly amended."[20] This is particularly so when the later statute is a comprehensive legislative scheme.[21] FLPMA was the very sort of "comprehensive legislative scheme" that requires harmonization of the Antiquities Act with FLPMA, and it would not be harmonious to read into the Antiquities Act an implied authorization for a president to revoke or materially modify a prior monument's designation.[22]

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[13] U.S. Const., Property Clause, Art. IV, § 3.
[14] 54 U.S.C. § 320301(a).
[15] "Proposed Abolishment of Castle Pinckney Nat'l Monument," 39 Op. Atty. Gen. 185 (1938).
[16] 43 U.S.C. 1704 *et seq*.
[17] *Bledsoe v. Palm Beach County Soil & Water Conservation Dist*., 133 F.3d 816, 822 (11th Cir. 1998) (addressing legislative action after earlier Attorney General interpretation); *see also, to the same effect, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 and n.66 (1982) (considering whether rights should be implied under a statute); *Souter v. Jones,* 395 F.3d 577, 598 (6th Cir. 2005).
[18] 43 U.S.C. § 1704 (a)(4).
[19] *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).
[20] *See United States v. Romani,* 523 U.S. 517 (1998).
[21] *See Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981); *see also Hi-Lex Controls Inc. v. Blue Cross*, 2013 WL 228097, at *3 (E.D. Mich. Jan. 22, 2013).
[22] *See* APKS Memo at pages 8-14; Squillace Article at pages 3-5.

Moreover, while you have stated that the power to modify a monument is supposedly uncontested, that is not the case. A president does not have the power to do in part what he cannot do in full. It is true that some presidents did modify the size of monument designations before FLPMA, but the background of those modifications demonstrates that FLPMA withdrew the underpinnings of that authority. In 1935, the DOI Solicitor was asked to opine about the president's power to reduce in size monuments created under the Antiquities Act. The Solicitor concluded that that power did exist based on the Supreme Court's decision in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).[23] When Congress expressly repealed *Midwest Oil*, however, the basis for the Solicitor's decision was removed. *See* Squillace at 6-8. In FLPMA, Congress made clear when it adopted that statute that it was "specially reserv[ing] to the Congress *the authority to modify* and revoke withdrawals for national monuments created under the Antiquities Act."[24] Accordingly, no president has attempted to modify the size of a national monument since FLPMA any more than to revoke such a designation altogether.

In the Executive Order of April 26, 2017, President Trump asked for a review of whether the designations "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 the unlikely event that a court might find that a president does have the power to rescind or modify a monument designation, however, such a power can be no broader that the Antiquities Act into which the power is implied. No such balancing test is found in the Antiquities Act. The balancing standard laid out in President Trump's Executive Order on April 26, 2017 is therefore inapplicable and must not be relied on by your office in making any recommendations.

III. In Particular, The President Lacks the Legal Authority to Rescind or Reduce the Size of or Modify at least the Part of the Monument Administered by the National Park Service

The conclusion that only Congress may revoke a national monument designation applies doubly to those national monuments created under the Antiquities Act and administered by NPS, including part of Craters of the Moon, where management is shared by NPS and BLM. The president has no authority to revoke the NPS-managed portions of Craters of the Moon—namely, the area originally designated in 1924 and the area designated by Congress as National Preserve in 2002. In addition, the collaborative co-management scheme between NPS and BLM is crucial to the success and diverse uses of Craters of the Moon. Where, as here, NPS and BLM operate cooperatively, the same lack of Presidential authority to revoke an NPS monument should extend to the BLM-managed areas.

Ten years after adoption of the Antiquities Act, Congress adopted the Organic Act of 1916, which created the National Park System.[25] Congress therein mandated that the fundamental purpose of the System is to "conserve the scenery, natural and historic objects, and the wild life in the System units … [and] leave them unimpaired for the enjoyment of future generations."[26] In 1970, Congress adopted amendments to that Organic Act which made clear that national monuments administered

[23] Opinion of the Solicitor M27657 (Jan. 30, 1935).
[24] House Rep. No. 94-1163 (May 15, 1976), at 9 (*emphasis added*).
[25] Now codified at 54 U.S.C. § 100101(a).
[26] *Id.*

by NPS are part of that System and are to be protected as such.[27] And Congress provided that the entire National Park System is a "cumulative expression of a single national heritage."[28]

In 1978, not satisfied that the Executive Branch had gotten the message, Congress returned to this subject and added the mandate that:

> the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, *except as directly and specifically provided by Congress*.[29]

Congress clearly did not intend that a president could unilaterally revoke the designation of a national monument that is part of the National Park System without Congress' directly and specifically so providing. Such an act would certainly be in derogation of the values and purposes for which the monument had previously been established.[30]

Moreover, that a president lacks the authority to alter the size of a national monument is even more clear to the extent NPS administers the land. That is because Congress adopted provisions governing the National Park System expressly addressing the change in boundaries for any unit of the National Park System, which includes monuments administered by NPS.[31] While Congress in 1977 gave the Secretary of the Interior the power to make minor boundary adjustments, Congress made clear in 1990 amendments (Pub. Law No. 101-628) that any other changes in boundaries would require a proposal to Congress and legislative action.[32] Congress also made clear that any such proposal would need to be accompanied by, among other things,

> an analysis of whether or not an existing boundary provides for the adequate protection and preservation of the natural, historic, cultural, scenic and recreational resources integral to the System unit.[33]

Indeed, Congress provided that even "minor boundary changes involving only deletions of acreage owned by the Federal Government and administered by the [NPS] may be made only by an Act of Congress."[34] It would be untenable for the Administration to claim that a reduction in the size of a monument greater than a "minor" adjustment could be made unilaterally by the president.

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[27] *See* Pub. L. No. 91-383 (National Park System General Authorities Act), codified in this regard at 54 U.S.C. §§ 100102(2), 100501 (defining "National Park System" to include any area administered by the Director of NPS, including for "monument" purposes). Those monuments are as fully covered by general regulations protecting the entire System as are any national parks created by Congress. *See* 36 C.F.R. §1.2 (NPS regulations apply to federally owned land administered by NPS).
[28] 54 U.S.C. § 100101(b)(1)(B).
[29] *Id.* § 100101(b)(2) (emphasis added).
[30] For example, the Presidential Proclamation designating Craters of the Moon explains that it is intended to protect the "remarkable fissure eruption together with its associated volcanic cones, craters, rifts, lava flows, caves, natural bridges, and other phenomena characteristic of volcanic action which are of unusual scientific value and general interest" as well as "great educational value." Presidential Proclamation 1694.
[31] *See* 54 U.S.C. § 100102 and 100501.
[32] *See* 54 U.S.C. §§ 100505, 100506 (a), (c). *See also* H.R. Rep. No. 101-695 (Sept. 13, 1990) at 6 ("The Committee believes it is important to keep in mind that this is a study process and no decisions on these matters will be made unless there is subsequent Congressional action.").
[33] *Id.* at 100506 (a)(1).
[34] *Id.* at 100506(c)(6); *see also* 2006 Management Policies 3.5.

As in the case of FLPMA's putting an end to boundary changes made by previous presidents in non-NPS monuments, this amendment to the legislation governing the National Park System makes clear that, at least thereafter, no boundary changes may be made unilaterally by a president to any monument that is part of that System.

Thus, the President has no authority to revoke the NPS-managed portions of Craters of the Moon.

IV. Congress Has Ratified the Designation of Craters of the Moon as a National Monument by Passing Subsequent Legislation Affecting the Monument

Craters of the Moon complies with the objectives of the Antiquities Act, and congressional ratification of the monument renders the issue moot. As discussed above, the congressionally approved boundary changes to Craters of the Moon, the 1970 Wilderness designation, and the 2002 redesignation of approximately 410,000 acres of the Monument as a National Preserve constitute Congressional "ratification" of the executive branch's monument designation.

In fact, much of this legislation went beyond mere ratification--it established new boundaries, created a National Preserve, and opened certain areas up to new uses (hunting). Given this explicit Congressional activity with respect to Craters of the Moon, it is appropriate that only Congress make changes to its designation, boundaries or uses. An intrusion by the Executive branch into these areas would have the effect of amending legislation and would present significant questions as to the president's authority to act in an area that has been occupied by Congress.

A. Congressional Legislation Created a National Preserve, Adjusted Boundaries, and Designated Wilderness

The Supreme Court has explained that congressional ratification of an Executive Branch action occurs where Congress recognizes and affirms the action in subsequent legislation. When there is such ratification, the prior Executive action is made legal even if it was not so when taken. For example, in *Isbrandtsen-Moller v. United States*, the Court found that Congress had ratified an executive order transferring an agency's functions to a different department because Congress had thereafter adopted legislation recognizing the transfer.[35] That same year, the Court in *Swayne & Hoyt v. United States* explained that Congress had expressed its intent to ratify the presidential action at issue in *Isbrandtsen-Moller* "by various later acts mentioning the executive order" and recognizing its effect.[36] In addition, in *United States v. Alaska*, the Supreme Court held that Congress ratified a 1923 presidential order reserving submerged lands along the Alaskan coast (the National Petroleum Reserve) by passing the 1958 Alaska Statehood Act.[37] Although the ratification was not explicit, the Court found that the Statehood Act's description of the Reserve as territory owned by the United States was a "clear congressional statement that the United States owned and would continue to own submerged lands within the Reserve," rather than the State of Alaska.[38] By using the statute to acknowledge the federal government's ownership of the submerged lands, Congress ratified the inclusion of the lands in the Reserve, even though presidential authority to reserve the submerged lands under the 1910 Pickett Act was uncertain.[39]

As applied to Craters of the Moon, the numerous pieces of congressional legislation passed since the monument was created evince Congress's clear intent to ratify and support the monument designation made in 1924. Perhaps most significantly, in 2002 Congress redesignated approximately

[35] 300 U.S. at 147–148 (1937).
[36] 300 U.S. 297, 301 (1937).
[37] 521 U.S. 1, 42–44 (1997).
[38] *Id.* at 42 (citing Alaska Statehood Act, Pub. L. No. 85-508, § 11(b), 72 Stat. 339, 347 (1958)).
[39] *Id.* at 44–45.

410,000 acres of Craters of the Moon as a National Preserve and opened that area up to hunting.[40] Congress could have rescinded the rest of the monument designation at that time but chose not to do so. As in the relevant legislation in *United States v. Alaska*, Congress' description of the lands subject to the 2002 redesignation were explicit—the enacted legislation referenced "[t]he approximately 410,000 acres of land added to the Craters of the Moon National Monument by Presidential Proclamation 7373 of November 9, 2000, and identified on the map accompanying the Proclamation for administration by the National Park Service."[41] As discussed in more detail above, Congress has also ratified the monument's designation through legislation effecting many boundary modifications over the years, which approvingly acknowledge the existence of the Monument and the underlying designation.[42] Congressional ratification also occurred with the designation of Wilderness areas within the monument for similar reasons. [43]

B. Congress has Authorized Specific Appropriations for Craters of the Moon

Congress has also ratified the establishment of Craters of the Moon by appropriating funds for its maintenance and development as a national monument. In addition to ratification through legislation, Congressional ratification is also apparent through authorization of funding for agencies, projects, or other executive actions. The Supreme Court has acknowledged on several occasions that Congress shows intent to ratify executive action by specifically appropriating funds to support the action in question. For example, in *Isbrandtsen-Moller Co.,* the Court held that Congress ratified a presidential order transferring to the Commerce Department the duties of an agency that administered a maritime trade statute by appropriating funds to the Commerce Department earmarked for that purpose.[44] Similarly, in *Brooks v. Dewar*, it found that Congress ratified DOI's program of selling temporary licenses for grazing livestock on public lands by repeatedly and with knowledge of the license sales appropriating a portion of the revenues the program generated for improvements to grazing areas.[45] And in *Ivanhoe Irrigation District v. McCracken*, the Court held that repeated congressional reauthorization and explicit appropriations for a California water project ratified the Interior Secretary's interpretation of a statute regulating the project and noting that Congress' "subsequent and continuing action . . . constitute[d] ratification of [the] administrative construction" of the statute.[46]

At Craters of the Moon, Congress has shown its intent to ratify the monument designation through appropriations. The Senate Committee on Appropriations, for example, recommended providing $1,283,000.00 for fiscal year 2003 to upgrade the Craters of the Moon visitor center.[47] They made additional recommendations for appropriations of funds for fiscal year 2004.[48] Additionally, funds

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[40] *See* Special management requirements for federal lands recently added to Craters of the Moon National Monument, Idaho, Pub. L. No. 107-213, H.R. 601 (codified at 16 U.S.C. § 698w).
[41] *Id.*
[42] *See* Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, § 205, 110 Stat. 4093, 4106 (adjusting the boundaries of the Craters of the Moon National Monument).
[43] *See* Pub. L. No. 91-504 (designating 43,243 acres of Wilderness).
[44] 300 U.S. 139, 147–148 (1937).
[45] 313 U.S. 354, 360–61 (1941).
[46] 357 U.S. 275, 293–94 (1958), *overruled in part on other grounds by California v. United States*, 438 U.S. 645 (1978).
[47]*See* S. Rept. 107-201 - Senate Committee on Appropriations Report accompanying Department Of The Interior And Related Agencies Appropriations Bill, 2003, 107th Congress, available at https://www.congress.gov/congressional-report/107th-congress/senate-report/201/1?q=%7B%22search%22%3A%5B%22%5C%22craters+of+the+moon%5C%22%22%5D%7D&r=11.
[48] *See* S. Rept. 108-89 - Senate Committee on Appropriations Report accompanying Department Of The Interior And Related Agencies Appropriations Bill, 2004, 108th Congress, available at https://www.congress.gov/congressional-report/108th-congress/senate-

from the Land and Water Conservation Fund (LWCF)[49] have been used to support activities at Craters of the Moon.[50]

Congress has thus repeatedly indicated its intent to approve of and ratify the monument designation and subsequent executive actions taken in relation to Craters of the Moon by passing legislation and authorizing appropriations in recognition and support thereof.

V. The Factors Identified in the Request for Comments Support the Continued Designation of Craters of the Moon as a National Monument and the Maintenance of Its Existing Boundaries

Even assuming President Trump has the power to revoke some or all of the Craters of the Moon designation or otherwise modify its boundaries in light of the statutory framework of the Antiquities Act and Congress' ratification of the area as a National Monument, NPCA respectfully submits that the president should not do so. An analysis of the factors identified by Secretary Zinke in his request for comments supports Craters of the Moon's continued designation as a national monument and maintenance of its existing boundaries.

A. Factors (i) and (ii): The Craters of the Moon Designation Reflects the Antiquity Act's Requirements and Original Objectives

Secretary Zinke asks for comment on whether the designation of Craters of the Moon meets the "original objectives" and requirements of the Antiquities Act, including that the monument be the "smallest area compatible with the proper care and management of the objects to be protected," and whether the designated lands are appropriately classified as those eligible for protection under the Act for historic and scientific purposes. Both factors support the continued designation of Craters of the Moon.

1. *Congress Intended the Antiquities Act to Protect Even Large Areas Having Historic and Scientific Interest*

The assumption behind the use of the term "original objectives" suggests there has been some change in the objectives over time, but that is not true. Nor is it true that the "original objectives" were limited to protecting small areas, as some have argued and as the review of all monuments of more than 100,000 acres suggests. Secretary Zinke stated on April 25, 2017 that the average size of monuments designated in the early years of the Act was 442 acres, but that is also incorrect.

In fact, the act was, from its inception, intended by Congress to include large areas having historic or scientific interest as well as small areas around archeological ruins. President Theodore Roosevelt designated monuments of 818,000 acres (1908, Grand Canyon) and 640,000 acres (1909, Mount Olympus). The Supreme Court upheld the Grand Canyon designation in 1920.[51] Indeed, every court to have considered the issue since then has agreed that the act was intended to protect not just archeological "objects" but large natural areas having historic or scientific interest, as the act

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report/89/1?q=%7B%22search%22%3A%5B%22%5C%22craters+of+the+moon%5C%22%22%5D%7D&r=10.

[49] The LWCF was established by Congress in 1964 and uses earnings from offshore oil and gas leases to acquire lands, waters, and interests to support federal land management agencies' objectives. *See* Land & Water Conservation Fund, *at* https://www.nps.gov/subjects/lwcf/index.htm. *See also* Our Land, Our Water, Our Heritgae, LWCF in Idaho (identifying Craters of the Moon as an LWCF-funded unit).

[50] https://www.blm.gov/programs/planning-and-nepa/plans-in-development/idaho/craters-of-moon

[51] *Cameron v. United States*, 252 U.S. 459 (1920).

provides.[52] For example, in 1976, the Supreme Court found that a pool of water and the fish which live there are such objects.[53] Additionally, the Court of Appeals for the District of Columbia rejected an argument that Giant Sequoia National Monument was a violation of the Antiquities Act because it included supposedly non-qualifying objects, explaining that "such items as ecosystems and scenic vistas … did not contravene the terms of the statute."[54]

Given that the Antiquities Act may be used to protect objects as large as the Grand Canyon and objects of natural rather than archeological interest that are of historic or scientific interest, size alone does not make a national monument illegal under the act, nor must the "object" be as constrained as opponents of national monuments argue.

2. The Entirety of Craters of the Moon is Smallest Area Compatible with Proper Care and Management and is Precisely the Type of Land that Congress Intended to Protect under the Antiquities Act

The boundaries of Craters of the Moon meet the Antiquities 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 Craters of the Moon National Monument and Preserve Management Plan lays out the explanation of why the resources and values warrant its designation as a National Monument and Preserve:

- It contains a remarkable and unusual diversity of exquisitely preserved volcanic features, including nearly all of the familiar features of purely basaltic volcanism — craters, cones, lava flows, caves, and fissures.
- It contains most of the Great Rift area—the deepest known land-based open volcanic rift, and the longest volcanic rift in the continental United States.
- It contains many diverse habitats for plants and animals as a result of a long history of volcanic deposition.
- Many of the more than 500 kipukas contain representative vegetative communities that have been largely undisturbed by human activity. These communities serve as key benchmarks for scientific study of long-term ecological changes to the plants and animals of sagebrush steppe communities throughout the Snake River Plain.
- It contains the largest remaining land area within the Snake River Plain still retaining its wilderness character. The Craters of the Moon Wilderness Area and other areas within the Monument encompass more than one-half million acres of undeveloped federal lands.
- It contains abundant sagebrush steppe communities that provide some of the best remaining Greater sage-grouse habitat and healthiest rangelands on the Snake River Plain.
- It is a valued western landscape of more than 750,000 acres that are characterized by a variety of scenery, broad open vistas, pristine air quality, and a rich human history.[55]

In addition, the monument's boundaries have already been approved by Congress on numerous occasions.

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[52] *See, e.g., Caeppert v United States*, 426 U.S. 128 (1976); *Mountain States Legal Foundation v Bush*, 306 F. 3d 1132 (D.C. Cir. 2002).
[53] *Caeppert,* 426 U.S. at 141-42.
[54] *Tulare County v. Bush*, 306 F. 3d 1138, 1141-42 (D.C. Cir. 2002).
[55] Craters of the Moon National Monument and Preserve Management Plan 2007.

3. Craters of the Moon's Historic and Scientific Significance Make It Precisely the Type of Land that Congress Intended to Protect under the Antiquities Act

Because Craters of the Moon protects some of the best, youngest and most exposed examples of basaltic volcanism in the world, it has significant educational and scientific values and is undoubtedly appropriately classified under the Antiquities Act as a "historic landmark[], historic and prehistoric structure[], [or] other object[] of historic or scientific interest."[56] Craters of the Moon's educational and scientific uses are largely driven by the landscape's geological uniqueness. As noted at the time of the monument's establishment in 1924, the area contains "remarkable fissure eruption together with [] associated volcanic cones, craters, rifts, lava flows, caves, natural bridges, and other phenomena characteristic of volcanic action which are of unusual scientific value and general interest" as well as "great educational value."[57]

The monument's volcanic landscape has such similar features to the moon that in 1969 Apollo 14 astronauts were sent there to train and learn volcanic geology to prepare them for future trips to the moon. The National Aeronautics and Space Administration (NASA) knew that these astronauts would have the rare opportunity to collect rock samples from the moon and wanted to make sure they had enough geologic knowledge to choose the most scientifically valuable specimens. NASA is doing continued comparative research of Craters of the Moon to learn more about Mars, Venus, Mercury, and the moon. Research conducted at Craters of the Moon is also preparing NASA for future rover trips to Mars.

In addition to NASA researchers, Craters of the Moon provides educational opportunities to students of all levels--universities from across the country and K-12 schools continue to use the intact volcanic ecosystem at Craters of the Moon as a living laboratory.

Along with the extraordinary volcanic features, Craters of the Moon offers uniquely intact sage-steppe ecosystems and areas of undisturbed plant communities. The area supports over 700 species of plants. In addition, the "kipukas"--areas of vegetation surrounded by lava flows--have preserved unaltered plant ecosystems and are under long-term scientific study. The flora are of great educational and scientific value, and provides a recreational draw -- thousands of visitors each year journey to the monument to see the magnificent spring wildflower blooms.

B. Factor (iii): The Diverse and Abundant Resources Found in Craters of the Moon Are Available for Multiple Uses

Secretary Zinke requests comment on the effect of the designation on available uses of both Federal and non-Federal Lands within, or in proximity to, the designated lands. Craters of the Moon's designation has allowed for greater and more enjoyable access to the designated lands and has allowed surrounding communities to thrive.

1. Craters of Moon Offers a Wide Variety of Uses and Opportunities on Public Lands and Meets the Requirements of FLPMA

Congress declared in the Federal Land Policy and Management Act (FLPMA) that regarding public lands, it is a policy of the United States that "goals and objectives be established by law as guidelines for public land use planning, and that management by on the basis of multiple use and sustained yield."[58] FLPMA applies only to public lands "administered by the Secretary of the Interior through

[56] 54 U.S.C. § 320301(a).
[57] Presidential Proclamation 1694.
[58] 43 U.S.C. § 1701(a)(7).

the Bureau of Land Management," and not to NPS-administered lands.[59] "Multiple use" is defined as:

> the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment 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.[60]

"Sustained yield" is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."[61]

Craters of the Moon meets this multiple use requirement. Craters of the Moon not only provides ample prospects for economic gain, but also supports diverse scientific, educational, recreational and agricultural opportunities. The region has a long history of providing unique opportunities for a variety of users. NPS and BLM both have incorporated a wide range of uses for the monument and preserve in their resource management plans. The BLM lands are open to sheep and cattle grazing. The NPS Preserve lands and BLM monument lands are open to hunting, which is managed by the State of Idaho. In terms of recreational uses, the monument provides ample opportunities for hiking, biking, and backpacking, and has a wide range of accessibility for visitors--the monument has wheelchair-accessible trails, paved paths, and routes through more rugged open lava fields, which are open to traversing with a free permit. The visitor center provides permits for backpacking and cave exploration. In addition, the vast majority of the BLM lands are open to horseback riding as well as ATV use on designated roads and trails.

The co-management of Craters of the Moon National Monument and Preserve by NPS and BLM provides truly diverse use opportunities and takes into account several management factors specifically mentioned in FLPMA, including recreation, range, and natural scenic, scientific and historical values. Altering the size of the monument would necessarily limit the lands available to the range of users who rely on the area.

C. Factor (v): Craters of the Moon has Overwhelming Support

Secretary Zinke requests comment regarding any concerns of State, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected States, tribes, and localities. In this regard, Craters of the Moon has had wide support throughout its history and continues to garner local, state, and regional support.

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[59] 43 U.S.C. § 1702(e).

[60] *Id.* § 1702(c).

[61] *Id.* § 1702(h).

1. *A Robust Public Process and Local Support Led to the Craters of Moon 2000 Monument Expansion and Subsequent 2002 Preserve Designation*

The robust public process for the 2000 expansion, which culminated in the 2002 congressional designation of portions of the expanded area as a National Preserve, shows that the concerns of State and local communities and governments have been, and continue to be, accounted for in the designation process.

In 2000, Secretary Babbitt traveled to the Craters of Moon region on three separate occasions to solicit public input about the future management and protection of the monument. During his trip he met with leading geologists, local ranchers, local elected officials, and staff from the Idaho congressional delegation to listen to their recommendations. One of these meetings included a walking tour of Laidlow Park, where local ranchers gave Secretary Babbit their input.

Three public meetings were held between April and June 2000 in nearby communities (two in Arco, Idaho) to discuss the then-proposed expansion of the national monument. At the second meeting in Arco, both City and Butte County officials endorsed the monument expansion. Senator Craig also held a field hearing in June 2000 on the monument expansion, at which considerable local support for the expansion was voiced. Mary Ann Mix, then Chairman of Blaine County Board of Commissioners, gave testimony as to the importance of tourism in her county and testified in favor of the expansion. Blaine County holds 25% of the original Craters of the Moon National Monument and 50% of the portion added in 2000. The Mayor of Arco also gave testimony favoring the expansion. The community of Arco continues its support of Craters of the Moon to this day--the county commission passed a unanimous resolution advocating for the original monument to become a national park.

Further written testimony was given by State Representative Wendy Jaquet and State Senator Clint Stennett, both from District 25 and representing Blaine, Camas, Lincoln, and Gooding counties, in support of the 2000 expansion. Representative Jaquet and Senator Stennett stated in their written comments that "the vast majority of ranchers from our legislative district who graze in the Laidlow Park and are the stakeholders most affected by this designation are pleased with the interaction with Secretary Babbitt and his willingness to listen to their concerns."[62] Representative Jaquet and Senator Stennet also stated they supported the expansion because of the strengthened and diversified economic benefits associated with tourism, and referenced the fact that Idaho property near public lands with tourism infrastructure experienced escalating property values.

The public process and local support for Craters of the Moon National Monument continued well beyond the 2000 expansion. In 2002, Congress passed legislation authored by Representative Mike Simpson which redesignated the 410,000 acres of the expanded monument as the "Craters of the Moon National Preserve," opening that area back up to hunting. Because continued hunting was important to the surrounding communities, local and state leaders in Idaho galvanized a public process to ensure that hunting would continue.

The robust public process continued after 2002 under George W. Bush's Department of the Interior with the joint resource management plan promulgated by NPS and BLM. As with all federal resource management plans, the Craters of the Moon National Monument and Preserve plans went through the extensive public process set forth in the National Environmental Policy Act ("NEPA"). Through the NEPA process, the public had several opportunities to comment on the management plans before finalization by NPS and BLM.

2. *Idahoans, Including the Governor, Representative Simpson, and Officials in Bordering Counties, Have Expressed Support for Craters of the Moon*

[62] S. Hrg. 107-763.

The American people, including NPCA members, overwhelmingly oppose efforts to roll back protections for the parks, monuments, marine sanctuaries and other public lands and waters they love and value. According to Colorado College's 2017 Conservation in the West Poll, 80 percent of Western voters support keeping existing national monument protections in place, while only 13 percent of Western voters support removing protections for existing monuments. Results from a December 2014 Hart Research Poll show that 90 percent of Americans support the permanent protection of some public lands, monuments, wildlife refuges and wilderness.

Not only do Idahoans fall in line with Western voters' support of keeping existing national monuments, some also want Craters of the Moon elevated to National Park status. According to a recent poll conducted by Idaho Politics Weekly, 55% of Idahoans want Craters of the Moon National Monument to become Craters of the Moon National Park. The poll revealed support of the designation is not a partisan issue—58 percent of Republicans, 78 percent of Democrats, and 60 percent of Independents favor the National Park designation.[63]

The campaign to designate Craters of the Moon as a National Park is being led by a coalition of citizens in Arco, Idaho, a small gateway town to the Monument. The Arco coalition sees Craters of the Moon as essential to the community's long term financial health. Idaho Gov. Butch Otter and all five county commissions bordering Craters of the Moon are in favor of the National Park designation.

NPCA has not taken a position on the creation of a National Park at Craters of the Moon. However, regarding potential rollback of the existing monument designation, in-state polling and expression of political support for the topic makes one thing clear: the majority of Idahoans support Craters of the Moon as it exists today.

Beyond support from the Governor, Idaho Republican Representative Mike Simpson has written you, Secretary Zinke, urging you to leave Craters of the Moon with its current designations. In his letter, Representative Simpson noted that the monument "adequately suits the diverse interests of Idahoans" and that the collaborative planning process and his 2002 legislation regarding the Preserve designation and opening the area to hunting "ultimately resulted in a truly Idaho solution" for Craters of the Moon. He stated that, "[i]n Idaho, we believe that cooperative efforts produce long-term solutions and in this instance, Craters of the Moon fits that definition."

3. *The Designation of Craters of the Moon as a National Monument and Preserve Creates Economic Benefits for Local Communities*

Craters of the Moon is an economic driver for the surrounding communities as well as the state of Idaho as a whole. According to the Idaho Department of Commerce, tourism is Idaho's third largest industry. In 2015, tourists spent three billion dollars in the state and the tourism industry supported 41,600 jobs. Idaho's NPS units play an important role in the state's tourism economy. Each year tourism and related spending grows in Idaho's NPS managed units. According to NPS, Craters of the Moon has seen a 30% increase in visitation and a $2.6 million increase in visitor spending over the past four years.

A study by Headwaters Economics found that travel and tourism are significant economic drivers for communities in the Craters of the Moon region, comprising approximately 23% of total private wage and salary employment in 2015. Further, findings from that study show that the economies of the communities neighboring Craters of the Moon have grown since the 2000 boundary expansion. For

[63] http://idahopoliticsweekly.com/politics/1554-poll-idahoans-want-to-make-craters-of-the-moon-into-a-national-park.

example, per capita income of residents in the Craters of the Moon area increased 36% from 2001 to 2015, indicating growing prosperity in the region.[64]

According to NPS, over 255,000 park visitors spent an estimated $8.9 million in local gateway regions while visiting Craters of the Moon in 2016. These expenditures supported a total of 139 jobs, $3.3 million in labor income, $5.3 million in value added, and $10.2 million in economic output in local gateway economies surrounding Craters of the Moon National Monument and Preserve.

By way of comparison, total tourism to National Park Service managed lands in Idaho in 2016 attracted over 629,000 visitors, who spent an estimated $30.8 million in local gateway regions. These expenditures supported a total of 525 jobs, $13.1 million in labor income, $21 million in value added, and $39.7 million in economic output in the Idaho economy. From these statistics, it is clear that Craters of the Moon accounts for one-third of all national park tourism and spending in Idaho and for one-fourth of all national park tourism related jobs, labor income, value added and economic output in gateway economies. [65]

Any action taken to reduce the size of the monument would undo decades of collaborative efforts between local, state, and federal governments and local citizens, and would have harmful effects on neighboring communities that rely on the monument for economic support and growth.

D. Factor (vi): Available Federal Resources Supporting the Current NPS and BLM Co-Management of Craters of the Moon are Working and Should Continue

Secretary Zinke, you have requested comment on the availability of federal resources to manage Craters of the Moon. This factor also weighs in favor of maintaining the designation and the current co-management scheme.

As noted above, the public process and subsequent legislation regarding the 2000 boundary expansion led to joint management of Craters of the Moon by NPS and BLM. In 2007, NPS and BLM released their resource management plans for the expanded Craters of the Moon Monument and Preserve. Both management plans give Craters of the Moon the protection it deserves while also providing for diverse uses, including grazing and hunting. The thorough process in which these resource management plans were created and continue to be amended demonstrates that Craters of the Moon deserves to remain under the current designations for which its various components were established and that federal resources are available for management.

While BLM is continuing to modify its grazing plans to address issues raised by a lawsuit from the Western Watershed Project, it is clear that their lands should remain in monument status. The BLM has been continuing to work to strike a balance between grazing needs and sage grouse management, and should get the continued opportunity to do so under the joint Craters of the Moon National Monument and Preserve Management Plan created with NPS. As with all management plans, this plan went through the highly vetted public National Environmental Policy Act (NEPA) process and continues to undergo NEPA review, as evidenced in BLM's recently released grazing amendment plan and 2015 Greater Sage Grouse Approved Resource Management Plan Amendment.

VI. Conclusion

NPCA urges the administration to maintain the current protections of the Craters of the Moon National Monument and Preserve. We strongly recommend that your office not make any recommendations to rescind the national monument or alter the boundaries. Instead, we ask that

[64] https://headwaterseconomics.org/wp-content/uploads/Craters.pdf
[65] https://www.nps.gov/nature/customcf/NPS_Data_Visualization/docs/2016_VSE.pdf

your office and the noted land management agencies continue to provide the leadership necessary to move forward with the collaborative resource management plans that properly protect this treasured landscape. Craters of the Moon is a unique landscape with significant educational and scientific value worthy of its current designation and wholly in keeping with the intention and written purpose of the Antiquities Act.

On May 2, 2017 over 450 organizations signed a letter to your office in support of the Antiquities Act and expressed deep concerns with the April 26th Executive Order from President Trump. In this letter, the community, including NPCA, notes:

> Since its enactment over a hundred years ago, the Antiquities Act has been one of our nation's most critical conservation tools for preserving our nation's most important public lands and waters. Our national parks and monuments and other protected public lands and waters unite all Americans by protecting our shared American heritage for future generations to enjoy. The sheer diversity of historic, cultural, and natural treasures that have been protected by the Antiquities Act is the reason why hundreds of groups representing sportsmen, cultural heritage organizations, evangelicals, conservation, recreation businesses, historic preservation, social justice, and many others all oppose efforts to undermine our national monuments and view an attack on any one national monument as an attack on them all.

To call into question whether our national heritage is worth protecting will have lasting repercussions on the preservation of our public lands for generations to come. Eight Republican and eight Democratic presidents have designated 157 national monuments under the authority of the Antiquities Act. As noted above, this includes nationally significant cultural, historical, and natural sites such as, the Grand Canyon and Acadia National Parks, Statue of Liberty and Muir Woods National Monuments, and the Chesapeake and Ohio Canal National Historical Park. In fact, many of our nation's most popular and iconic national parks were first protected using the Antiquities Act. More recently, the Antiquities Act has help safeguard and honor more diverse stories in the National Park System through the designations of Stonewall, Belmont-Paul Women's Equality, and César E. Chávez National Monuments. We urge you to imagine what our country would be like without these incredible places, protected just as they should be.

Thank you for your consideration of these comments and those of our members and supporters. We call on your administration to maintain and support all of our country's national monuments, including the Craters of the Moon National Monument and Preserve in order to protect these important lands, while leaving a lasting legacy for all Americans.

Sincerely,

Theresa Pierno

Theresa Pierno
President and CEO

Enclosures

Appendix A Arnold & Porter Kaye Scholer Memo: The President Has No Power Unilaterally to Abolish or Materially Change a National Monument Designation Under the Antiquities Act of 1906

Appendix B "National monuments: Presidents can create them, but only Congress can undo them" by Nicholas Bryner, Eric Biber, Mark Squillace and Sean B. Hecht

Appendix A

Arnold & Porter Kaye Scholer Memo: The President Has No Power Unilaterally to Abolish or Materially Change a National Monument Designation Under the Antiquities Act of 1906

ARNOLD & PORTER KAYE SCHOLER

The President Has No Power Unilaterally to Abolish or Materially Change a National Monument Designation Under the Antiquities Act of 1906

We have been asked by our client, National Parks Conservation Association, whether a sitting President may unilaterally abolish or materially change a national monument that was established by an earlier President under the authority of the Antiquities Act of 1906. The question arises in the context of President Trump's Executive Order of April 26, 2017 directing the Secretary of the Interior to conduct a review of all national monuments designated since 1996 which are at least 100,000 acres or which the Secretary determines were designated without adequate public input.[1] The Executive Order directs the Secretary to report back to the President and make recommendations "for such Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out the policy set forth in section 1 of this order." Section 1 broadly talks about public input, economic growth, the "original objectives" of the Antiquities Act and "appropriately balance[ing] the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities."

President Trump stated when he issued the Order that "the Antiquities Act does not give the federal government unlimited power to lock up millions of acres of land and water, and it's time that we ended this abusive practice."[2] That review will cover some 25 national monuments designated or expanded since 1996.

President Trump said he was particularly eager to change the boundary of Bears Ears National Monument in Utah.[3] President Obama designated that monument primarily at the request of Native American tribes, declaring that the "paleontological resources [there] are among the richest and most significant in the United States" and that the area's "petroglyphs and pictographs capture the imagination with images dating back at least 5,000 years."[4] President Trump, however, referred to this monument designation as a "massive federal land grab,"[5] which suggests that the federal government did not already own the land before that event. However, the federal government has owned that land since long before Utah became a state in 1896. While the federal government made land grants to the new State for various purposes,[6] the new State's constitution, as Congress required, "forever disclaim[ed] all right and title" to federal

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[1] *Review of Designations Under the Antiquities Act*, Exec. Order 13792, 82 Fed. Reg. 20429 (May 1, 2017).

[2] Juliet Eilperin, "Trump orders a review of newer national monuments," Washington Post, April 27, 2017, at A3.

[3] *Id.*

[4] *Establishment of the Bears Ears National Monument*, Proclamation No. 9558, 82 Fed. Reg. 1139 (Jan. 5, 2017).

[5] Eilperin, at A3.

[6] *See* Utah Enabling Act, ch 138, § § 6-12, 28 Stat. 107 (1894), https://archives.utah.gov/research/exhibits/Statehood/1894text.htm.

lands within the State's boundaries."[7] Under these circumstances, it is unclear from whom the federal government supposedly "grabbed" this land.

Secretary Ryan Zinke explained at the time of President Trump's Executive Order that he will be considering whether monuments should be "rescinded, resized, [or] modified." When asked if the President has the power to do so unilaterally, he said it is "untested" whether the President has the unilateral power to rescind a monument but that "it's undisputed the President has the authority to modify a monument."[8]

It is apparent, in part from the President's terminology (e.g., that Bears Ears was a federal "land grab") and the Secretary's description of the law, that they have been influenced by a March 2017 report written for the American Enterprise Institute by John Yoo and Todd Gaziano entitled "Presidential Authority to Revoke or Reduce National Monument Designations." Those authors argue there that President Trump has the authority to rescind or revoke the creation of national monuments by President Obama and that the President also has the authority to reduce the size of national monuments. They also argue that the Antiquities Act only authorized, or at least that Congress only intended that it be used to designate, relatively small areas as monuments around human archeological sites.

It is beyond the scope of this memorandum to discuss the merits of particular national monument designations or the fact that President Obama established procedures to assure there was significant public outreach and input before each of his monument designations. The purpose of this memorandum is instead to address the Yoo and Gaziano arguments about the scope and nature of the monuments Congress authorized to be designated in the Antiquities Act and their arguments that a President may unilaterally rescind or materially reduce the size of a monument previously established. After evaluating the U.S. Constitution, relevant statutes and other relevant authorities, we have concluded that Yoo and Gaziano are wrong about these matters.

Executive Summary

The authority granted by the Antiquities Act is not limited to small areas around human archeological sites.

President Trump's Executive Order and accompanying Administration statements suggest that the "original" objective of the Antiquities Act was limited to permitting the President to set aside small areas of land around human archeological sites. Monument designations outside this constrained scope are called "abuses." This is the view for which Yoo and Gaziano argue and this ("abuses") is how they describe large monuments protecting natural sites. However, they base their argument - - not on the final language of the statute - - but on early bills rejected by Congress. This is a novel way to understand a statute.

[7] *Id.,* § 3.

[8] "Press Briefing by Secretary of Interior Ryan Zinke to Review the Designations Under the Antiquities Act," Office of the Press Secretary, White House, April 25, 2017.

In fact, in the five or six years before the Antiquities Act was adopted, there were two camps seeking such a statute, but they had different concepts of what it should authorize. Archeologists wanted a narrow statute to protect archeological sites. The Department of the Interior wanted a statute authorizing the protection of large scenic areas, this being before creation of the National Park System. In the end, all sides agreed upon compromise language that became the Antiquities Act. The compromise added a clause authorizing protection of areas having "historic or scientific interest" and provided that the monument "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[9]

Almost immediately after the Act's adoption, President Theodore Roosevelt established the Grand Canyon National Monument, protecting 818,000 acres, and almost immediately someone challenged the legality of that monument's designation under the Act. But the U.S. Supreme Court rejected the challenge in *Cameron v. United States*.[10] Referring to the clause which formed the basis of the compromise, the Court explained that the Grand Canyon "is an object of unusual scientific interest" and went on to explain its scientific importance and natural wonders.

Every court thereafter has reached the same conclusion as to other monuments challenged as natural rather than archeological. It is not surprising that larger areas are required to protect natural wonders than the areas required to protect archeological sites. Congress provided flexibility concerning the size of each monument in order to allow for differences based on what is being protected. Referring to larger monuments as "abuses" ignores the text of the statute and the history behind its adoption.

The President has no authority to revoke or materially reduce previously designated monuments.

In our system of Government, Presidents have no power other than that granted to them by the U.S. Constitution or by an Act of Congress. The issue here does not invoke any power granted the President by the U.S. Constitution. The issue instead concerns administration of federally owned land, and the Constitution gives that power exclusively to Congress. U.S. Const., Property Clause, Art. IV, § 3. Whether or not the President has the power unilaterally to revoke a national monument designation therefore depends on whether that power is expressly or by implication delegated to the President by an Act of Congress. The Antiquities Act of 1906 authorizes the President to create national monuments on land owned or controlled by the federal government.[11] The Act says nothing about a President's having the power to abolish a national monument or to reduce the size of a monument. The question is therefore whether such a power may be implied.

Contrary to the arguments of Yoo and Gaziano, reading a revocation power into that statute by implication would be improper. This is so for several reasons.

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[9] 54 U.S.C. § 320301(a) and (b).

[10] 252 U.S. 459 (1920).

[11] 54 U.S.C. § 320301(a).

First, the U.S. Attorney General opined long ago that the Antiquities Act could not be interpreted to imply that a President has the power to revoke a national monument's designation. No President has attempted to revoke such a designation since that Opinion was issued in 1938.

Second, Yoo and Gaziano fail to recognize that in the more than 100 years since the adoption of the Antiquities Act, Congress has adopted a comprehensive legislative scheme to govern federally owned land, into which the Antiquities Act was folded and in relation with which it must be interpreted. One of those statutes was the Federal Land Policy and Management Act ("FLPMA"), adopted in 1976.[12] Congress there in effect adopted the Attorney General's interpretation that no revocation power should be read into the Antiquities Act by implication. Thereafter, it would be particularly improper to interpret the Antiquities Act as implying that the President has the power to revoke a monument designation.

Third, as to those national monuments which were made part of the National Park System, Congress has mandated that the power to manage those special places "shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress."[13] Revoking the designation of such a national monument and pulling it out of the National Park System would certainly be in derogation of the reasons such special places were added to that System.

Secretary Zinke, however, stated that a President has the authority to modify a monument, and President Trump stated he is eager to modify the boundaries of Bears Ears National Monument. If they are thinking that the President would have the power to modify that monument in a material way that would undermine the protection of the resources for which it was created, they are wrong. A President does not have the power to do in part what he may not do in full. While there were some instances before 1976 of Presidents changing the boundaries of monuments, no President has attempted to do so after FLPMA was adopted.

The revocation of the designation of a national monument or the material reduction in its size, and particularly a monument that is part of the National Park System, is therefore beyond the power of a President acting without Congress. The interpretation proffered by Yoo and Gaziano would therefore, if acted upon, result in a usurpation of congressional powers by the Executive Branch.

* * * * *

I. The Antiquities Act of 1906.

The Nineteen Century saw substantial western expansion of the United States, and it was the federal government that acquired the land making that expansion possible. While that government had acquired land since its founding, the government substantially increased its holdings by such events as the Louisiana Purchase of 1803, the Oregon Compromise with

[12] 43 U.S.C. 1704 *et seq*.

[13] 54 U.S.C. § 100101(b)(2).

England in 1846 and the treaty resolving the Mexican-American War in 1848.[14] No sooner had the public land domain been established in the Eighteenth Century than a policy of disposing of the land had been initiated.[15] The federal government transferred nearly 816 million acres of public domain land to private ownership and 328 million acres to the States as they became established.[16]

By late in the Nineteenth Century, however, demands grew to "withdraw" some public lands from that available for sale, grant or other disposition so it could be retained by the federal government for conservation and similar purposes. The first permanent federal land reservation was Yellowstone National Park, created in 1872, and in 1891 the President was given power to withdraw forest lands and prevent their disposal.[17] The federal government retained for the benefit of all Americans a large part of the land that government had acquired, totaling approximately 600 million acres.[18]

In recognition of the slow process of enacting federal legislation, Congress adopted the Antiquities Act in 1906 to empower the President to protect some of that federal land promptly. That Act, as now codified, provides:

> (a) The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.
>
> (b) The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[19]

President Theodore Roosevelt was the first to use that Act, establishing 18 national monuments, including Devil's Tower, Muir Woods, Mount Olympus (the predecessor to Olympic National Park) and the Grand Canyon. Almost every President thereafter has designated additional national monuments. These monuments were created to provide for the enjoyment and use of the federal lands by the American people.

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[14] *See generally* "Natural Resources Land Management Act," S. Rep. No. 94-583 (hereafter the "Senate Report") at 27-32; Carol Hardy Vincent et al., Cong. Research Serv., *Federal Land Ownership: Overview and Data* 5 (2014), *available at* https://fas.org/sgp/crs/misc/R42346.pdf.

[15] *See* Senate Report, at 28.

[16] Kristina Alexander and Ross W. Gorte, Cong. Research Serv. RL34267, *Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention* 5 (2007), *available at* https://fas.org/sgp/crs/misc/RL34267.pdf.

[17] 17 Stat. 326; 26 Stat. 1095.

[18] Alexander and Gorte, at 9.

[19] 54 U.S.C. § 320301(a) and (b).

II. The President's Authority under the 1906 Act is not Limited to Protecting Small Areas Around Archeological Sites, As Yoo and Gaziano Argue and the Administration Claims.

Yoo and Gaziano argue that Congress only intended in the Antiquities Act to authorize the President to create monuments to protect small areas around human archeological sites. They concede that the Act's "final language covered more than antiquities" and that "small scenic areas" were contemplated. But they argue that "the statute's title, drafting history and historical context" should convince Presidents "to follow the text and spirit of the original law."[20] And they repeatedly call Presidential proclamations that did not do so "abuses." This is a novel way of understanding a statute passed by Congress, i.e., by looking to earlier versions of a bill not adopted rather than to the "final language" of the act. Contrary to these arguments, the Act by its terms and as understood by Congress at the time authorizes protection of large areas containing natural resources, and the size of the protected area depends on the resources being protected.

It is true that the national monument authority is generally referred to as the "Antiquities Act," but that is so because parts of the statute did in fact address only antiquities, such as by prohibiting their looting.[21] But the legislative history of the portion of the Act relating to monuments, as well as its text, makes clear that that authority was not limited to protecting antiquities. There was considerable disagreement about what became this part of the Act in the years before its adoption. There were two views: archeologists and the Smithsonian Institution wanted a law providing for the protection only of archeological sites in order to address Western legislators' concerns over the size and scope of protected areas, as Yoo and Gaziano say.[22] The Department of the Interior and some members of Congress, on the other hand, wanted a law that would provide protection as well for large "scenic beauties and natural wonders and curiosities".[23] While Yoo and Gaziano say Congress had rejected bills the Department supported, they omit the fact that bills limited as the archeologists wanted had also failed.[24] This process went on for 5 years. Finally, Professor Edgar Hewett drafted a compromise bill that was adopted without much further ado and became the relevant part of the Antiquities Act of 1906.[25]

Yoo and Gaziano rely largely on a work by Ronald Lee for their recital of the history of the Act.[26] Here is what he says about the final bill:

> Senator Lodge's bill, in its earlier versions, had been limited to historic and prehistoric antiquities and made no provision for protecting natural areas. At some point in his

[20] Yoo and Gaziano, at 3.

[21] *See* 54 U.S.C. § 32032.

[22] *See* Ronald F Lee, "The Antiquities Act, 1900-1906," in *The Story of the Antiquities Act* (National Park Service, March 15, 2016), www.nps.gov/archeology/pubs/lee/Lee_CH6.htm at 2-3.

[23] *Id*., at 3.

[24] *Id*., at 4-6.

[25] *Id*., at 7.

[26] Yoo and Gaziano, at nn. 3, 5, 6 and 8.

> discussions with government departments, Hewett was persuaded, probably by officials of the Interior Department, to broaden his draft to include the phrase "other objects of historic or scientific interest." … As it later turned out, the single word "scientific" in the Antiquities Act proved sufficient basis to establish … national monuments preserving many kinds of natural areas, …[27]

One of the first monuments to be designated under that Act was President Theodore Roosevelt's 1908 creation of Grand Canyon National Monument, which covered 818,000 acres.[28] The holder of a mining claim to land on the south rim of the Canyon challenged the legality of the monument designation because it supposedly exceeded the President's power under the Antiquities Act. In *Cameron v. United States*, the Court rejected that argument.[29] The mining claim, the Court explained, included the trailhead of the famous Bright Angel Trail "over which visitors descend to and ascend from the bottom of the canyon."[30]

> The act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors. [31]

In 1976, the Supreme Court again was called on to address this issue and again explained that the Antiquities Act is not limited to archeological areas. In *Caeppert v. United States*, the Court upheld President Truman's creation of a national monument at Devil's Hole, Nevada, as a habitat for a species of fish found only there. The fish, said the Court, were "objects of historic or scientific interest" within the meaning of that clause in the Antiquities Act.[32] Similarly, when President Carter designated several national monuments in Alaska based in part on their natural resources, opponents challenged the designations in court, making the same arguments about the supposedly constrained nature of places that could be so designated. The district court resoundingly rejected those arguments, based in part on *Cameron* and *Caeppert* as well as on the court's analysis of the Act's legislative history.[33] Reciting the same legislative history discussed above, the court found that Mr. Hewett's compromise bill, which contained the clause "other objects of historic or scientific interest" and which had become law, "was indeed intended to enlarge the authority of the President." Moreover, the court concluded that "matters of scientific

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[27] Lee, at 9.

[28] *Establishment of Grand Canyon National Monument*, Proclamation No. 794, 35 Stat. 2175 (1908).

[29] 252 U.S. 459 (1920). President Roosevelt also designated the 60,000 acre Petrified Forest National Monument in 1906, the 10,000 Chaco Canyon National Monument in 1907 and the almost 640,000 acre Mount Olympus National Monument in 1909. *See* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. Rev. 473, 490 n. 92 (2003).

[30] 252 U.S. at 455 and n.1.

[31] *Id.*, at 455-56.

[32] 426 U.S. 128, 141-42 (1976).

[33] *Anaconda Copper Co. v. Andrus*, No. A79-161, civil, 14 ERC 1853 (D, Alaska July 1, 1980).

interest which involve geological formations or which may involve plant, animal or fish life are within this reach of the presidential authority under the Antiquities Act."[34]

The Administration's claims that large monuments are "abuses" of the Antiquities Act and that it was only intended to apply to small areas are simply wrong. In setting limits on the size of areas to be protected, the Act merely imposed the requirement that the president designate the "smallest area compatible with the proper care and management of the objects to be protected." From the very beginning, that Act was used to protect large areas such as the Grand Canyon and Mount Olympus, which later became Olympic National Park. It is obvious that more land is needed to protect natural resources such as these areas than to protect isolated archeological sites. It is therefore simply not true that the areas protected under the Act in its early years were limited to small areas of a few hundred acres.

III. The President Has No Implied Power to Revoke a National Monument Created under the Antiquities Act.

Because the Antiquities Act does not expressly empower or prohibit Presidents to revoke national monuments, proponents of such a power argue that that power may be read into the Act by implication. Gaziano and Yoo and some members of Congress argue that the President has many implied powers and that this is merely one such power. They are wrong.

Yoo and Gaziano argue for a general proposition that "the authority to execute a discretionary government power usually includes the power to revoke it -- unless the original grant expressly limits the power of revocation."[35] They argue that this supposedly follows from the principle that each "branch of government can reverse its earlier actions using the same process originally used."[36] They point to the President's power to fire Executive Branch officials even after the Senate has confirmed the appointment and to the President's power over foreign treaties. The problem with that argument is that it ignores the source of the original power. There is no government-wide general rule on this subject; each source of power must be examined to assess whether a power to revoke previous actions should be implied. As former President and Supreme Court Chief Justice Taft stated:

> The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to *some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise.* Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof.[37]

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[34] *Id.*

[35] Yoo and Gaziano, at 7.

[36] *Id.*, at 8.

[37] William Howard Taft, OUR CHIEF MAGISTRATE AND HIS POWERS 139-40 (1916), *available at* https://archive.org/stream/ourchiefmagistra00taftuoft#page/n5/mode/2up) (*emphasis added*).

Accordingly, when Yoo and Gaziano point to the power of the President to fire Executive Branch officers and to revoke treaties with foreign governments, they are pointing to powers found in the Constitution's grant of executive authority to the President. The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const., Art. II, § 1. It is reasonable to conclude that that broad grant includes the power to revoke what has been done. As Justice Taft explained:

> The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist.[38]

The same may be said of specific powers granted the President, including that to make treaties with foreign countries. *See* U.S. Const., Art. II, § 2.

But here we are not dealing with the scope of the powers granted the Executive Branch under the Constitution. Here, we are dealing instead with the power over federal lands, and the Constitution grants that power, not to the President, but exclusively to the Congress. The Property Clause of the Constitution provides that "[t]he 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 …." *Id.*, Art. IV, § 3, Cl. 2.

For the President to have the power to revoke a monument designation under the Antiquities Act, therefore, the issue is whether that Act of Congress, not the Constitution's grant of the executive power to the President, may be interpreted to imply the unstated power to revoke a monument designation thereunder.[39]

This is a question on which the Attorney General of the United States, Homer S. Cummings, ruled in the negative.[40] In 1938, President Franklin Roosevelt asked Attorney General Cummings for a formal Legal Opinion as to whether the President could rescind former President Coolidge's designation of the Castle Pinckney National Monument under the Antiquities Act. After careful study, Attorney General Cummings explained that the answer was "no."

> 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

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[38] *Id.*

[39] Yoo and Gaziano also argue as an analogy that the Executive Branch has the power to repeal regulations adopted under discretionary statutory authority. But that authority is recognized, in the words of Justice Taft, as "included within such express grant as proper and necessary to its exercise." *Id.* That says nothing about whether such implied power should also be implied in the Antiquities Act.

[40] Attorney General Cummings held a PhD and law degree from Yale University. He served from 1933 until 1939. (*See* U.S. Department of Justice, *Attorneys General of the United States,* at https://www.justice.gov/ag/bio/cummings-homer-still)

> 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.[41]

The Attorney General's Opinion explained that under long-standing precedent "if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation."[42] Since the Cummings Opinion, no President has attempted unilaterally to rescind a national monument.[43] Rather, as contemplated by the Cummings Opinion, when some monuments have been abolished, it has been Congress that has done so by legislation.[44]

Yoo and Gaziano argue that the Cummings Opinion was "poorly reasoned" and "erroneous as a matter of law."[45] But their description of that opinion is not a fair characterization of Attorney General Cumming's reasoning. For example, they claim he found binding an 1862 opinion when he merely relied on its reasoning and they then describe that earlier opinion unfairly. But what Cummings found significant about that earlier case is that, as in the case of the Antiquities Act, the statute in question had authorized the President to reserve lands but had said nothing about his power to undo the reservation made. And the earlier Attorney General had concluded that such power could not be implied. In reaching the same conclusion as to the Antiquities Act, Attorney General Cummings distinguished statutes that expressly authorize the President to revoke reservations.

The gaping hole in the Yoo and Gaziano arguments, however, is that they ignore or minimize the importance of the fact that, since 1906, Congress has adopted a comprehensive system of laws to govern federally-owned lands, and that the Antiquities Act must be understood and interpreted as part of that legal structure. Statutes covering the same subject matter are interpreted together. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000). Two particular later statutes are relevant here. First, in 1976, Congress adopted the Federal Land Policy and Management Act ("FLPMA").[46] Second, in 1916,

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[41] "Proposed Abolishment of Castle Pinckney Nat'l Monument," 39 Op. Atty. Gen. 185, 185 (1938), *citing* Opinion by Attorney General Edward Bates to the Secretary of the Interior, 10 U.S. Op. Atty. Gen. 359 (1862). As a general matter, opinions of the Attorney General are binding on the Executive Branch offices that request them until they are overruled or withdrawn. *See Pub. Citizen v. Burke*, 655 F. Supp. 318, 321–22 (D.D.C. 1987) ("As interpreted by the courts, an Attorney General's opinion is binding as a matter of law on those who request it until withdrawn by the Attorney General or overruled by the courts." (citation and internal quotations omitted)), *aff'd*, 843 F.2d 1473 (D.C. Cir. 1988); *cf.* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1472, 1482–84 (2010).

[42] 39 Op. Atty. Gen. at 186–87.

[43] Squillace, at 553.

[44] Congress has abolished a number of National Monuments by legislation. *See, e.g.*, Wheeler National Monument in 1950 (64 Stat. 405); Shoshone Cavern in 1954 (68 Stat. 98); Papago Saguaro in 1930 (46 Stat. 142); Old Kasaan in 1955 (69 Stat. 380); Fossil Cyad in 1956 (70 Stat. 898); Castle Pinkney in 1956 (70 Stat 61); Father Millet Cross in 1949 (63 Stat. 691); Holy Cross in 1950 (64 Stat. 404); Verendrye in 1956 (70 Stat. 730), and Santa Rosa Island in 1946 (60 Stat. 712).

[45] Yoo and Gaziano, at 5.

[46] 43 U.S.C. 1704 *et seq*.

Congress adopted the National Park System Organic Act, to which Congress added significant provisions in 1970 and 1978.

When FLPMA was adopted in 1976, Congress legislated against the backdrop of the Antiquities Act providing that the President could create national monuments and the Cummings Opinion that the President could not revoke national monuments. There is evidence that Congress was aware of the Cummins Opinion, which was reported in one of the studies leading to FLPMA's passage.[47] But in any event, when Congress legislates on a subject, "[C]ongress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning."[48] Yet in FLPMA, Congress did not "affirmatively act[] to change the meaning" of the Antiquities Act as interpreted by the Cummings Opinion. Congress therefore in effect adopted that interpretation.

Moreover, the Supreme Court has made clear that, to harmonize different statutes, "a specific policy embodied in a later federal statute should control our construction of [a prior one], even though it had not been expressly amended."[49] This is particularly so when the later statute is a comprehensive legislative scheme.[50] FLPMA was the very sort of "comprehensive legislative scheme" that requires interpreting the Antiquities Act to harmonize with FLPMA. It would not be harmonious with FLPMA to read into the Antiquities Act an implied authorization for a President to revoke a prior monument's designation because in FLPMA, one of Congress' purposes was to reassert its own authority over federal land withdrawals and to limit to express delegations the authority of the Executive Branch in this regard.

FLPMA was the result of a years-long re-examination and reorganization of laws governing management of federal lands, including the creation of reservations or "withdrawals" of land for particular purposes.[51] In 1964, Congress had created The Public Land Law Review Commission to undertake that reexamination, finding in part that there were many statutes governing federal lands "which are not fully correlated with each other."[52] The Commission obtained extensive studies and finally issued its report in 1970.[53] One of its recommendations was that "[d]elegation of the congressional authority should be specific, not implied, …."

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[47] *See* Charles F. Wheatley, Jr., "Study of Withdrawals and Reservations of Public Domain Lands" (Public Land Law Review Commission 1969), at 17, 264.

[48] *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 822 (11th Cir. 1998) (addressing legislative action after earlier Attorney General interpretation); *see also, to the same effect, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 381-82 and n.66 (1982) (considering whether rights should be implied under a statute); *Souter v. Jones,* 395 F.3d 577, 598 (6th Cir. 2005).

[49] *See United States v. Romani,* 523 U.S. 517 (1998).

[50] *See Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77, 97 (1981); *see also Hi-Lex Controls Inc. v. Blue Cross,* 2013 WL 228097 (E.D. Mich. Jan. 22, 2013) at *3.

[51] Pub. Law No. 94-579, codified at 43 U.S.C. § 43 U.S.C. § 1701 *et seq.* As the Senate Report accompanying the bill that became FLPMA explained, Congress had long recognized "a need to review and reassess the entire body of law governing Federal lands." Senate Report, at 34.

[52] *See* 78 Stat. 982 (Sept. 19, 1964).

[53] Public Land Law Review Commission, "One Third of the Nation's Land: A Report to the President and the Congress" (1970); *see also* Senate Report, at 32-36.

Congress followed that recommendation, declaring in FLPMA that "it is the policy of the United States that … the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action."[54] Accordingly, Congress expressly repealed a large number of statutes previously authorizing the Executive Branch to make withdrawals of federal land and overturned a court decision implying such power.[55] But FLPMA did not repeal the Antiquities Act. This was no oversight; the decision to leave that Act in effect was noted in the House Report.[56] And while Congress gave the Secretary of the Interior some powers to make, modify or revoke withdrawals, FLPMA provided that the Secretary did not have power to "revoke or modify" any Antiquities Act monument designation.[57]

The House Report made clear that there were to be no more implied powers to withdraw lands or to revoke previous withdrawals; only Congress was to have those powers except as expressly delegated.

> With certain exceptions [including under the Antiquities Act], H.R. 13777 will repeal all existing law relating to executive authority to create, modify, and terminate withdrawal and reservations. It would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, ... *It would also specially reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act ....* These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress."[58]

Specifically as to national monuments, therefore, just as Attorney General Cummings concluded, while the President would continue to have the power to <u>establish</u> national monuments under that Act, only Congress would be empowered to <u>revoke</u> a monuments designation. Any other understanding of the Antiquities Act would be contrary to Congress'

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[54] *Id.*, codified at 43 U.S.C. § 1704(a)(4).

[55] *See* Pub. Law No. 74-597, § 704 ("Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (*U.S. v. Midwest Oil Co.*, 236 U.S. 459) and the following statutes and parts of statutes are repealed: …").

[56] "The exceptions, which are not repealed, are contained in the Antiquities Act (national monuments), ..." House Report, at 29.

[57] 43 U.S.C. §1714 and § 1714(j). Those sections speak in terms of the authority of the Secretary of the Interior to make, modify or revoke withdrawals, but it is relevant to note in understanding that section that at the time of FLPMA's adoption, the President had delegated to the Secretary of the Interior all of the President's "authority … vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." *Delegating to the Secretary of the Interior the Authority of the President to Withdraw or Reserve Lands of the United States for Public Purposes*, Exec. Order 10355, 17 Fed. Reg. 4831 (May 28, 1952); Wheatley, at 379 (that Executive Order, as of 1969, "is now the controlling authority").

[58] House Report, at 9 (*emphasis added*).

purpose and comprehensive legislative scheme in FLPMA to eliminate all implied delegations of authority to the Executive Branch to withdraw or revoke withdrawals.

Yoo and Gaziano nevertheless suggest that a President could revoke a prior designation if the later President determines it was based on a factual error, is no longer a valid designation due to changed circumstances, or is "illegally or inappropriately large."[59] But there already exists a remedy under such circumstances; those same arguments can be made to Congress.[60]

The conclusion that only Congress may revoke a national monument designation applies doubly to those national monuments created under the Antiquities Act and administered by the National Park Service ("NPS").[61] Ten years after adoption of the Antiquities Act, Congress adopted the Organic Act of 1916 creating the National Park System.[62] Congress there mandated that the fundamental purpose of the System is to "conserve the scenery, natural and historic objects, and the wild life in the System units … [and] leave them unimpaired for the enjoyment of future generations."[63] In 1970, Congress adopted amendments to that Organic Act which made clear that national monuments administered by NPS are part of that System and are to be protected as such.[64] And Congress provided that the entire National Park System is a "cumulative expression[] of a single national heritage."[65] In 1978, not satisfied that the Executive Branch had gotten the message, Congress returned to this subject and added the mandate that

> the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, *except as directly and specifically provided by Congress*.[66]

Congress clearly did not intend that a President could unilaterally revoke the designation of a national monument that is part of the National Park System without Congress' directly and

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[59] Yoo and Gaziano, at 9, 10.

[60] As described in noted 4 above, on several occasions Congress has abolished national monuments by legislation.

[61] For example, recent Proclamations establishing national monuments as part of the National Park System have provided "The Secretary of the Interior (Secretary) shall manage the monument through the National Park Service, pursuant to applicable legal authorities, consistent with the purposes and provisions of this proclamation." *Establishment of the Belmont-Paul Women's Equality National Monument,* Proclamation No. 9423, 81 Fed. Reg. 22505 (Apr. 15, 2016).

[62] Now codified at 54 U.S.C. §100101(a).

[63] *Id.*

[64] *See* Pub. L. No. 91-383 (National Park System General Authorities Act), codified in this regard at 54 U.S.C. §§ 100102(2), 100501 (defining "National Park System" to include any area administered by the Director of NPS, including for "monument" purposes). Those monuments are as fully covered by general regulations protecting the entire System as are any national parks created by Congress. *See* 36 C.F.R. §1.2 (NPS regulations apply to federally owned land administered by NPS).

[65] 54 U.S.C. § 100101(b)(1)(B).

[66] *Id.*, § 100101(b)(2) (*emphasis added*).

specifically so providing. Such an act would certainly be in derogation of the values and purposes for which the monument had previously been established.[67]

All of this simply goes further to establish that in the 1970s Congress adopted the Cummins Opinion's conclusion that no President may unilaterally revoke the establishment of any national monument. Such a revocation would require an act of Congress.

IV. For the Same Reasons, No President May Unilaterally Materially Reduce the Size of a National Monument.

President Trump's Executive Order of April 26, 2017 and Secretary Zinke's comments also raise the issue whether a President may unilaterally reduce the size of a national monument. Yoo and Gaziano argue that that power is to be implied into the Antiquities Act even if the President does not have the power to revoke a monument's designation.[68] But there is no merit to this claim, which is simply an alternative formulation of the baseless argument that a President may unilaterally abolish a national monument. Any attempts by the President to remove land or features that would undermine the purposes and values for which the monument was originally created would be a partial revocation of the monument. The President does not have the power to do in part what he cannot do in full.

Yoo and Gaziano rely on the fact that Presidents have issued a handful of proclamations that reduced the size of some national monuments. Whatever the understanding of this power might have been before the 1970s legislation discussed above, however, they cite not one example of any such reduction after FLPMA was adopted in 1976. The last time such a thing happened was in 1963, when President Kennedy issued a Proclamation to remove certain lands from Bandelier National Monument in New Mexico.[69] In FLPMA, Congress reasserted its authority over such matters. As discussed above, Congress made clear that it was "specially reserv[ing] to the Congress *the authority to modify* and revoke withdrawals for national monuments created under the Antiquities Act."[70]

It is unclear whether a President could make non-material adjustments to monument boundaries without congressional authorization. But President Trump does not appear to be planning to test that question when he says he is eager to change the boundaries of Bears Ears National Monument. It is at least clear that any reduction in the size of the monument or other modification that undermines the purpose and values for which it was created could be made only by Congress.

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[67] For example, the Presidential Proclamation designating Bears Ears National Monument explains that it is intended to preserve features of the lands that are sacred to Native Americans, paleontological resources, and a wide variety of vegetation. *Establishment of the Bears Ears National Monument*, Proclamation No. 9558, 83 Fed. Reg. 1139 (Jan. 5, 2017).

[68] Yoo and Gaziano, at 14-17.

[69] *Revising the Boundaries of the Bandelier National Monument*, Proclamation No. 3539, 28 Fed. Reg. 5407 (May 27, 1963).

[70] House Report, at 9 (*emphasis added*).

V. Conclusion.

For over one hundred years, the Antiquities Act has allowed Presidents to create national monuments and preserve worthy lands for the enjoyment of all Americans and future generations. There are today national monuments in 31 states. For all Americans, they offer recreational opportunities and preserve a heritage of beauty, scientific marvels, and human achievement. But the Antiquities Act and subsequent legislation reserved to Congress, which has Constitutional authority over public lands, the sole power to revoke such a designation or materially to reduce the monument's size.

Robert Rosenbaum, Andrew Shipe, Lindsey Beckett, Andrew Treaster, Jamen Tyler

May 3, 2017

Appendix B

"National monuments: Presidents can create them, but only Congress can undo them" by Nicholas Bryner, Eric Biber, Mark Squillace and Sean B. Hecht

THE CONVERSATION
Academic rigor, journalistic flair

National monuments: Presidents can create them, but only Congress can undo them

April 27, 2017 9.49pm EDT

Bears Ears National Monument, Utah. Bob Wick, BLM/Flickr, CC BY

On April 26 President Trump issued an executive order calling for a review of national monuments designated under the Antiquities Act. This law authorizes presidents to set aside federal lands in order to protect "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest."

Since the act became law in 1906, presidents of both parties have used it to preserve 157 historic sites, archaeological treasures and scenic landscapes, from the Grand Canyon to key landmarks of the civil rights movement in Birmingham, Alabama.

President Trump calls recent national monuments "a massive federal land grab," and argues that control over some should be given to the states. In our view, this misrepresents the law. National monuments can be designated only on federal lands already owned or controlled by the United States.

The president's order also suggests that he may consider trying to rescind or shrink monuments that were previously designated. Based on our analysis of the Antiquities Act and other laws, presidents do not have the authority to undo or downsize existing national monuments. This power rests with Congress, which has reversed national monument designations only 10 times in more than a century.

Contests over land use

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Trump's executive order responds to opposition from some members of Congress and local officials to national monuments created by Presidents Bill Clinton and Barack Obama. It calls for Interior Secretary Ryan Zinke to review certain national monuments created since 1996 and to recommend "Presidential actions, legislative proposals, or other actions," presumably to shrink or eliminate these monuments. The order applies to monuments larger than 100,000 acres, as well as others to be identified by Secretary Zinke.

When a president creates a national monument, the area is "reserved" for the protection of sites and objects there, and may also be "withdrawn," or exempted, from laws that would allow for mining, logging or oil and gas development. Frequently, monument designations grandfather in existing uses of the land, but prohibit new activities such as mineral leases or mining claims.

Zinke said that he will examine whether such restrictions have led to "loss of jobs, reduced wages and reduced public access" in communities around national monuments. Following Secretary Zinke's review, the Trump administration may try either to rescind monument designations or modify them, either by reducing the size of the monument or authorizing more extractive activities within their boundaries.

Opponents of the proposed Bears Ears National Monument in Monticello, Utah during a visit by then-Interior Secretary Sally Jewell, July 14, 2016. AP Photo/Rick Bowmer

Two of the most-contested monuments are in Utah. In 1996 President Clinton designated the Grand Staircase-Escalante National Monument, a region of incredible slot canyons and remote plateaus. Twenty years later, President Obama designated Bears Ears National Monument, an area of scenic rock formations and sites sacred to Native American tribes.

Utah's governor and congressional delegation oppose these monuments, arguing that they are larger than necessary and that presidents should defer to the state about whether to use the Antiquities Act. Local officials have raised similar complaints about the Gold Butte National Monument in Nevada and the Katahdin Woods and Waters National Monument in Maine, both designated by Obama in late 2016.

What the law says

The key question at issue is whether the Antiquities Act gives presidents the power to alter or revoke decisions by past administrations. The U.S. Constitution gives Congress the power to decide what happens on "territory or other property belonging to the United States." When Congress passed the Antiquities Act, it delegated a portion of that authority to the president so that administrations could act quickly to protect resources or sites that are threatened.

Critics of recent national monuments argue that if a president can create a national monument, the next one can undo it. However, the Antiquities Act speaks only of designating monuments. It says nothing about abolishing or shrinking them.

Two other land management statutes from the turn of the 20th century – the Pickett Act of 1910 and the Forest Service Organic Act of 1897 – gave the president authority to withdraw other types of land, and also specifically stated that the president could modify or revoke those actions. These laws clearly contrast with the Antiquities Act's silence on reversing past decisions.

Ruins at Chaco Culture National Historic Park, New Mexico, originally protected under the Antiquities Act by President Theodore Roosevelt in 1907 to prevent looting of archaeological sites. Steven C. Price/Wikipedia, CC BY-SA

In 1938, when President Franklin D. Roosevelt considered abolishing the Castle-Pinkney National Monument – a deteriorating fort in Charleston, South Carolina – Attorney General Homer Cummings

advised that the president did not have the power to take this step. (Congress abolished the monument in 1951.)

Congress enacted a major overhaul of public lands law in 1976, the Federal Land Policy and Management Act, repealing many earlier laws. However, it did not change the Antiquities Act. The House Committee that drafted the 1976 law also made clear in legislative reports that it intended to prohibit the president from modifying or abolishing a national monument, stating that the law would "specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act."

The value of preservation

Many national monuments faced vociferous local opposition when they were declared, including Jackson Hole National Monument, which is now part of Grand Teton National Park. But over time Americans have come to appreciate them.

Indeed, Congress has converted many monuments into national parks, including Acadia, the Grand Canyon, Arches and Joshua Tree. These four parks alone attracted over 13 million visitors in 2016. The aesthetic, cultural, scientific, spiritual and economic value of preserving them has long exceeded whatever short-term benefit could have been derived without legal protection.

As Secretary Zinke begins his review of Bears Ears and other national monuments, he should heed that lesson, and also ensure that his recommendations do not overstep the president's lawful authority.

Federalism national monuments Trump administration Antiquities Act public lands