July 25, 2017

The Honorable Wilbur Ross
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

[Docket No. NOAA-NOS-2017-0066]
Review of national marine sanctuaries and marine national monuments designated or expanded since April 28, 2007 under Executive Order 13795 Section 4(b)

Public Comment Re: Marianas Trench Marine National Monument

Dear Secretary Ross,

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 1.3 million members and supporters nationwide, I ask that you preserve the current monument designation and protections for Marianas Trench Marine National Monument ("MTMNM" or "the monument"), as established through President Bush's Proclamation 8335 on January 6, 2009.[1]

As set forth, President Bush's use of the Antiquities Act of 1906 (the "Antiquities Act" or the "Act") to protect MTMNM, which is one of the few relatively undisturbed areas in the world and one of the last remaining refuges for rare marine species in the Pacific, was wholly appropriate and justified to ensure protection of this unique ocean ecosystem that provides a home to a diverse assemblage of terrestrial and marine species. The Department of Commerce should not recommend any changes to MTMNM for the following reasons, as detailed in the letter following:

- The president does not have the legal authority to rescind MTMNM's designation as a marine national monument, decrease its boundaries, or modify permitted uses;
- Regardless, MTMNM's designation meets all the requirements of the Antiquities Act by having (i) a geographic scope that is the "smallest area compatible" with preservation and care of the protected objects in the monument, (ii) a designation of areas that are under the "control" of the United States as required by the Act, and (iii) an "object" scope that properly includes submarine lands, waters, an ecosystem, wildlife, and geological features with immense "historic and scientific interest," including extremely rare geologic objects and important marine and terrestrial species such as sea turtles, distinct coral reefs, and seabirds;
- Preserving these unique objects and advancing scientific research requires maintaining MTMNM as an extremely remote landscape and, thus, the designation is an appropriate area

[1] *See* Proclamation No. 8335, 74 Fed. Reg. 1557 (Jan. 6, 2009).

"compatible with the proper care and management of the objects to be protected" and require minimum impact to the federal budget;

- The designation of MTMNM was, and continues to be, widely supported by numerous stakeholders; and
- The value of the protections provided by the monument designation outweighs the speculative value of energy production.

MTMNM is located in the Western Pacific in the Mariana Archipelago, which encompasses the fourteen islands of the U.S. Commonwealth of the Northern Mariana Islands (CNMI) and the U.S. Territory of Guam, which form the land boundaries of the ocean waters and submerged lands under U.S. control that are in the monument.[2] MTMNM is one of the most geologically and biologically unique places on the planet; it is also one of the least explored. More people have explored the surface of the moon than reached the depths of the Mariana Trench.[3] The monument covers an area of 95,216 square miles of submerged lands and waters and protects a number of diverse habitats and thriving marine ecosystems, including the waters and submerged lands of the three northernmost Mariana Islands (the "Islands Unit"), the submerged lands of the known volcanic areas of the Mariana Ridge (the "Volcanic Unit"), and the Mariana Trench (the "Trench Unit"), which is approximately 940 nautical miles long and 38 nautical miles wide and contains the deepest known points in the global ocean. Recognizing the outstanding geologic, biological, and cultural values of the MTMNM, the U.S. Department of the Interior ("DOI") submitted an application for MTMNM to be designated as a UNESCO World Heritage Site in April 2017.[4]

MTMNM is managed in coordination with the Secretary of Commerce, through the National Oceanic and Atmospheric Administration ("NOAA"), and the Secretary of the Interior, through the U.S. Fish & Wildlife Service ("FWS"). NOAA has management authority over fisheries in the waters of the Islands Unit. FWS manages the Volcanic and Trench Units as part of the Marianas Arc of Fire and Marianas Trench National Wildlife Refuges, which are part of the National Wildlife Refuge System.[5] The Government of the CNMI manages the three islands of the Islands Unit above the mean low water line.[6]

Healthy coastal national parks depend on healthy aquatic ecosystems, which are protected by national parks, marine national monuments, and other types of marine protected areas ("MPAs"). While the National Park Service ("NPS") does not manage MTMNM, NPS works across federal agencies, including NOAA and FWS, to increase capacity and advance scientific understanding about issues related to oceans and coasts, such as energy development, fishing, invasive species, sea-level rise, and other threats to natural and cultural resources. There are 88 coastal parks in the National Park System that cover more than 11,000 miles of shoreline and 2.5 million acres of oceans and Great Lakes' waters. That represents about 10 percent of all U.S. shorelines, which are as diverse as lakeshores, kelp forests, glaciers, wetlands, beaches, estuaries, and coral reef areas. In 2016, these parks attracted more than 96 million visitors and generated nearly $7 billion in economic benefits to local economies.[7]

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[2] *Id.* at 1557.
[3] U.S. Dep't of the Interior Submission for Inclusion of Marianas Trench Marine National Monument as World Heritage Site, Ref. No. 6238 (Apr. 12, 2017), http://whc.unesco.org/en/tentativelists/6238/.
[4] *Id.*
[5] NOAA & U.S. Fish & Wildlife Serv., Marianas Trench Marine National Monument Planning Update Number 1 (May 2011), http://www.fpir.noaa.gov/Library/MNM/MTPlanningUpdate1.pdf.
[6] *Id.*
[7] *Annual Visitation Highlights*, Nat'l Park Serv., https://www.nps.gov/subjects/socialscience/annual-visitation-highlights.htm (last updated May 16, 2017).

MTMNM is one of four Pacific marine national monuments and is remote, making it hard to access. Fortunately, the eight national parks in the Pacific help connect people to the Pacific ecosystem's natural, cultural, and historical contributions that the marine national monuments preserve. These national parks range from historical sites like War in the Pacific National Historical Park in Guam in the Southern Mariana Archipelago that commemorates battles during World War II, such as the Battle of Midway at Papahānaumokuākea Marine National Monument, to parks that preserve modern and ancient cultural and native island ecosystems like Haleakalā National Park in Hawaii and National Park of American Samoa. At these parks, visitors can learn about the scientific values of the Pacific, the struggles during World War II, and the unique survival skills, dances, and art of the indigenous groups and early Polynesian culture.

Similar to national parks, MTMNM and other marine national monuments serve as living laboratories and can inform the management and conservation of ocean ecosystems. Marine reserves are one of the most effective tools for improving ocean ecosystems and threatened fish stocks. In June 2017, in response to President Trump's Executive Order on the Review of Designations Under the Antiquities Act, signed on April 26, 2017 (the "EO"), 535 scientists signed a letter recognizing the "important role that strongly-protected marine reserves play in conserving marine life and benefiting fish populations."[8] Marine conservation efforts lag far beyond those on land. While protections exist for approximately 12 percent of global land area, less than four percent of our oceans receive any form of protection.[9] Scientists call for protecting 20 percent if we want healthy oceans.[10] Healthy oceans and coral reef ecosystems are incredibly important to the future of our planet. Oceans produce 50 percent of the world's oxygen. A billion people, including tens of millions of Americans, rely on viable, healthy oceans for nourishment and their livelihoods. Unfortunately, our oceans are becoming increasingly degraded due to a multitude of factors, including overfishing, pollution, warming seas, coral bleaching, and ocean acidification.

We thank you for your consideration of these comments. We begin with the issue of whether the president has the power to rescind, reduce, or weaken protections of a national monument under the Antiquities Act. We then address in turn the three factors to be considered in the Secretary of Commerce's review of national marine sanctuaries and marine national monuments.

I. The President and the Secretary of Commerce Lack the Legal Authority to Rescind, Reduce the Size of, or Weaken Protections of a National Monument under the Antiquities Act.

On April 28, 2017, President Trump issued Executive Order 13795, "Implementing an America-First Offshore Energy Strategy" (the "Marine EO"). In Section 4(b) of the Marine EO, the president directed the Secretary of Commerce, in consultation with others, to review all of the designations and expansions of marine national monuments in the 10-year period prior to April 28, 2017, including MTMNM. In preparation for that consultation, Interior Secretary Zinke invited, regarding five marine national monuments, public comments addressing the application of seven factors specified in President Trump's Executive Order 13792, "Review of Designations Under the Antiquities Act," signed on April 26, 2017 (the "EO"). It is apparent from the context that these two EOs contemplated at least some recommendations that national monument designations be rescinded, reduced in size, or weakened in the protections they provide.

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[8] Letter, *Scientists Support Marine Protected Areas*, MARINE CONSERVATION INST., https://marine-conservation.org/scientists-mpa-letter-2017/ (last visited July 7, 2017).
[9] Hope Spots, Mission Blue (2017), https://www.mission-blue.org/hope-spots/.
[10] Letter, *Scientists' Letter Supporting Marine Reserves*, MARINE CONSERVATION INST., https://marine-conservation.org/marine-reserve-statement/ (last visited July 7, 2017).

No president has the legal authority to rescind, reduce the size of, or materially modify the use of any national monument proclaimed under the Antiquities Act, in the absence of congressional action granting that authority. Additionally marine nature of the monument does not lessen the availability of an Antiquities Act designation. Because the Department of Commerce has stated that "identical or substantively similar comments submitted as a part of the Department of the Interior's public comment period should not be re-submitted to the Department of Commerce," we do not repeat here the portions of our MTMNM comments submitted to the Department of the Interior that fully substantiate and explain this presidential lack of authority; we incorporate our comments to Interior by reference.[11]

The Secretary of Commerce also lacks the legal authority to rescind, reduce the size of, or materially modify the use of any national monument proclaimed under the Antiquities Act. The Antiquities Act specifies no role for the Secretary of Commerce, let alone one that would allow the Secretary to override a prior presidential action taken pursuant to that Act. In contrast, the National Marine Sanctuaries Act (the "Sanctuaries Act") grants the Secretary of Commerce limited authority to modify marine sanctuaries established under that Act.[12] That limited authority, however, has no relevance to MTMNM, because the monument is not a marine sanctuary established under the Sanctuaries Act.

Because there is no legal authority for executive branch action to rescind, reduce the size of, or weaken protections as stated in the proclamation establishing MTMNM, any Department of Commerce recommendation should address only whether the executive branch should propose that Congress enact or authorize such changes. We explain below why, in our view, Congress should not do so, and the executive branch should not recommend that it do so.

In our view, there is no sound reason for rescinding, reducing in size, or weakening protections applicable to MTMNM as established by presidential proclamation. NPCA's letter to Interior Secretary Zinke regarding MTMNM addressed the bearing on the status of MTMNM of seven factors set forth in the EO and referenced in Interior's solicitation of public comments for its review pursuant to the EO. We concluded that these factors supported maintaining MTMNM as created by the presidential proclamations. As with our analysis of presidential legal authority under the Antiquities Act, we do not repeat our analysis of the seven factors here, but incorporate it by reference.[13]

II. The Factors Identified in the Request for Comments Support MTMNM's Continued Designation as a National Monument and Maintenance of Its Existing Boundaries and Protections.

Even assuming President Trump has the power to revoke MTMNM's designation as a marine national monument or modify its boundaries or permissible uses, NPCA respectfully submits that the president should not do so.

Executive Order 13795 specifies three factors to be considered in the Secretary of Commerce's review of national marine sanctuaries and marine national monuments. Our analysis of these factors follows. We conclude that none of the three supports departing from the existing regime established by presidential proclamation.

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[11] *See* Appendix A. NPCA Letter to Ryan Zinke (DOI), Docket No. DOI–2017–0002, Re: Executive Order 13792, *Marianas Trench Marine National Monument* (July 9, 2017).
[12] 16 U.S.C. 1431 *et seq.*
[13] *See* Appendix A. NPCA Letter to Ryan Zinke (DOI), Docket No. DOI–2017–0002, Re: Executive Order 13792, *Marianas Trench Marine National Monument* (July 9, 2017).

Factor A: Monument Acreage and Budgetary Impact

As set forth in the text of the proclamation, the area set aside for MTMNM is the "smallest area compatible with the proper care and management of the objects to be protected."[14]

The Antiquities 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 (1909, Mount Olympus). The Supreme Court upheld the Grand Canyon designation in 1920.[15] Every court to have considered the issue since has agreed that the Act was intended to protect not just archeological "objects," but large natural areas having historic or scientific interest.[16] For example, in *Cappaert v. United States*, 426 U.S. 128 (1976), the Supreme Court found that a pool of water and the fish that live there are such objects.[17] 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 "such items as ecosystems and scenic vistas . . . did not contravene the terms of the statute."[18]

The size of MTMNM is justified by the nature of the objects it protects. In issuing the proclamation, President Bush recognized the critical importance of protecting these "relatively pristine coral reef ecosystems," "active mud volcanoes," and other marine life that justified the designation, set as the "smallest area compatible with the proper care and management of the objects to be protected."[19]

MTMNM encompasses the 14 islands of CNMI and the U.S. Territory of Guam that sit atop Mariana Ridge in an area known as the Mariana Volcanic Arc. "The Mariana Volcanic Arc is part of a subjection system in which the Pacific Plate plunges beneath the Philippine Sea Plate and into the Earth's mantle, creating the Mariana Trench."[20] Approximately 940 nautical miles long and 38 nautical miles wide, the Mariana Trench is five times longer than the Grand Canyon and contains more than 50 million acres of submerged features effectively unknown to humans.[21]

Located at the intersection of two tectonic plates, MTMNM preserves extremely rare geologic objects, including submarine volcanoes, mud volcanoes, and hydrothermal vents emitting carbon dioxide.[22] The diverse habitats within the monument support vibrant marine ecosystems including a

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[14] Proclamation No. 8336, 74 Fed. Reg. at 1567; Proclamation No. 9173, 79 Fed. Reg. at 58,647.
[15] *Cameron v. United States*, 252 U.S. 459 (1920).
[16] *See, e.g.*, *Caeppert v United States*, 426 U.S. 128 (1976); *Mountain States Legal Found. v. Bush*, 306 F. 3d 1132 (D.C. Cir. 2002).
[17] *Caeppert*, 426 U.S. at 141-42.
[18] *Tulare Cty. v. Bush*, 306 F. 3d 1138, 1141-42 (D.C. Cir. 2002).
[19] Proclamation 8335, 74 Fed. Reg. at 1557-58.
[20] Proclamation 8335, 74 Fed. Reg. at 1557.
[21] NOAA & U.S. FISH & WILDLIFE SERV., Marianas Trench Marine National Monument (May 24, 2012), https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Mariana_Trench_Marine_National_Monument/Documents/MTMNM%20brief%205-24-2012.pdf.
[22] U.S. Dep't of the Interior Submission for Inclusion of Marianas Trench Marine National Monument as World Heritage Site, Ref. No. 6238 (Apr. 12, 2017), http://whc.unesco.org/en/tentativelists/6238/. Because the hydrothermal vents spit acidic water near thriving coral reefs, the Monument gives researchers the opportunity to assess how coral reefs may survive in the face of increasing ocean acidification. See NOAA & U.S. FISH & WILDLIFE SERV., Marianas Trench Marine National Monument (May 24, 2012), https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Mariana_Trench_Marine_National_Monument/Documents/MTMNM%20brief%205-24-2012.pdf.

number of newly discovered, still unknown species,[23] and species that are dependent on basalt rock formations,[24] including a variety of sharks, whales, and dolphins, along with several threatened and endangered species of sea turtles.[25] Recent scientific expeditions have uncovered hundreds of different species and dozens of possible new species, including three cladorhizid sponges, three hexactinellid sponges, a hydromedusae jellyfish, a tilefish, and a seastar.[26] In recognition of its outstanding geologic, biological, and cultural values, the DOI submitted an application for the monument to be designated as a UNESCO World Heritage Site in April 2017.[27] According to DOI, the monument would be the first World Heritage Site to contain unique and little-understood geological features such as underwater volcanic and active locations of plate tectonics.[28]

Given the high connectivity characterizing the broader ecosystem of the Mariana Archipelago, the establishment and enforcement of a well-connected system of MPAs, including that of the monument, may help sustain or improve the health of the coral reef ecosystem at War in the Pacific National Historical Park. War in the Pacific National Historical Park, in Guam, was created in 1978 to honor the sacrifice and bravery of those who contributed to the Pacific Theater in World War II. In addition to its focus on preserving and interpreting a critical part of American history, the park also preserves a plethora of biological and ecological resources, including coral reefs, tropical limestone forests, and vibrant streams. The park protects one of the highest levels of species diversity throughout all of America's national parks, including one of the most diverse coral reef ecosystems.[29] It is home to threatened and endangered sea turtles and marine mammals and approximately 1000 species of fish and 400 species of coral.[30] Although live coral cover is moderately high, sedimentation, overfishing, and other threats have led to the reef's degradation over the years.[31] The park's reefs have also suffered from low coral recruitment, or the arrival of juveniles from outside areas.[32]

The budgetary impacts for managing marine sanctuaries and MPAs is minimal, especially considering the invaluable attributes of the monument as discussed above and in Factor C. MTMNM is jointly managed by NOAA and FWS, which work together to conserve the monument's land, ocean, and wildlife. In FY 2017, NOAA received $51 million to manage marine sanctuaries and marine protected areas, which is approximately one half of one percent of the Department of Commerce's

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[23] U.S. Dep't of the Interior Submission for Inclusion of Marianas Trench Marine National Monument as World Heritage Site, Ref. No. 6238 (Apr. 12, 2017), http://whc.unesco.org/en/tentativelists/6238/.
[24] NOAA & U.S. FISH & WILDLIFE SERV., Marianas Trench Marine National Monument (May 24, 2012), https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Mariana_Trench_Marine_National_Monument/Documents/MTMNM%20brief%205-24-2012.pdf.
[25] U.S. Dep't of the Interior Submission for Inclusion of Marianas Trench Marine National Monument as World Heritage Site, Ref. No. 6238 (Apr. 12, 2017), http://whc.unesco.org/en/tentativelists/6238/
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Coral Reefs in U.S. National Parks: A Snapshot of Status and Trends in Eight Parks*, NAT'L PARK SERV. & DEP'T OF THE INT. (Apr. 2009), http://www.teachoceanscience.net/pdfs/nps_coral_reefs.pdf.
[30] Eric K. Brown et al., *Informing Coral Reef Management Decisions at Four U.S. National Parks in the Pacific Using Long-Term Monitoring Data*, ECOSPHERE (Oct. 4, 2016), http://onlinelibrary.wiley.com/doi/10.1002/ecs2.1463/full.
[31] *Coral Reefs in U.S. National Parks: A Snapshot of Status and Trends in Eight Parks*, NAT'L PARK SERV. & DEP'T OF THE INT. (Apr. 2009), http://www.teachoceanscience.net/pdfs/nps_coral_reefs.pdf.
[32] *Id.*

total budget.[33] In its FY 2017 budget, FWS set aside $2 million for Pacific Marine National Monuments.[34]

Additionally management costs are minimized by the prohibition on commercial extraction. By banning activities such as deep sea mining and commercial fishing outright, enforcement and management are more straightforward and less expensive because vessels are not allowed in these protected areas. Therefore, managers are not trying to enforce safety regulations, fishing quotas, bycatch limits, and gear type in a very remote location. The deep sea mining ban also reduces negative impacts from sound and chemical pollution and debris. The commercial fishing ban minimizes harmful longline fishing impacts to sharks, marine mammals, sea turtles, and birds. Much of industrial fishing is Illegal, Unreported, and Unregulated (IUU) fishing, which is destroying fisheries, economies, and ocean habitats around the world. Economic losses from IUU fishing worldwide are estimated to be between $10 billion and $23 billion annually.[35]

Factor B: Adequacy of Any Required Federal, State, and Tribal Consultations Conducted

Because the designation was pursuant to the Antiquities Act, no federal, state, or tribal consultations were required; the Antiquities Act provides for none. Compliance with requirements would therefore have been adequate even without any consultations.

Nevertheless, public consultation did take place, and the designation of MTMNM was, and continues to be, widely supported by numerous stakeholders. This support is evident in the proclamation itself, which includes a directive that the Secretaries of the Interior and Commerce establish the Mariana Monument Advisory Council.[36] The Advisory Council, which consists of three representatives from the Government of the CNMI and one representative each from the U.S. Department Defense and the U.S. Coast Guard, must provide advice and recommendations on the development of the Monument Management Plan ("MMP"). Representation and input from local government and other federal agencies on monument management ensures that outside voices and interests are accounted for in the decision-making process.

In 2011, FWS and NOAA initiated the development of the MMP to address management of the Islands Unit, in consultation with the Government of CNMI. The MMP addresses: public education and outreach programs; traditional access by indigenous person to the monument for religious and culturally significant subsistence units; monument-related scientific exploration and research; and programs for monitoring and enforcement.[37] In addition, as the FWS and NOAA initiated development of the MMP, federal agencies sought input from the public, interested agencies, and organizations to ensure broad public participation in monument management.[38]

There is strong bipartisan local support for maintaining the protections of the monument and indeed, strengthening them through the creation of the Marianas Trench National Marine Sanctuary.

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[33] Division B – Commerce, Justice, Science, and Related Agencies Appropriations Act, 2017 at Insert 6A. http://docs.house.gov/billsthisweek/20170501/DIVISION%20B%20-%20CJS%20SOM%20OCR%20FY17.pdf

[34] U.S. Fish and Wildlife Service, *FY 2017 Budget Justification*, NWRS-6, available at https://www.fws.gov/budget/2016/FY2017_FWS_Greenbook.pdf (last visited Jun. 28, 2017).

[35] *International Guidelines Target IUU Fishing*, U.S. NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFF. OF MARINE FISHERIES, http://www.nmfs.noaa.gov/ia/slider_stories/2013/03/fao_iuu_guidelines.html.

[36] Proclamation 8335, 74 Fed. Reg. at 1560.

[37] NOAA & U.S. Fish & Wildlife Serv., Marianas Trench Marine National Monument Planning Update Number 1 (May 2011), http://www.fpir.noaa.gov/Library/MNM/MTPlanningUpdate1.pdf.

[38] *Id.*

For instance, in 2016, the Governor of the CNMI, Ralph D.L.G Torres and CNMI Congressman Gregorio Kilili Camacho Sablan sent a letter to President Obama requesting the initiation of a process to consider designating the monument as a national marine sanctuary.[39] Friends of Marianas Trench, a local organization, also filed a petition with NOAA requesting sanctuary designation.[40] Their petition included resolutions, letters, and signatures from local mayors, legislators, and 1,500 residents of the CNMI and Guam.[41] According to Torres and Sablan, "[t]he marine areas of our monument encompass biological, chemical, and geological marvels—and provide critical habitat to an astonishing diversity of deep-sea life, corals, fish, whales, turtles, and seabirds."[42] They explained that strong local support exists for the creation of a sanctuary because "the federal government declared our unique marine resources a national treasure and we must pursue avenues for federal resources to ensure adequate conservation for future generations and the promised benefits for our people."[43]

Factor C: Opportunity Costs Associated with Potential Energy and Mineral Exploration and Production from the Outer Continental Shelf and Impact on Production in the Adjacent Region.

The primary policy concern motivating the Department of Commerce review ordered in Executive Order 13795 is energy and mineral extraction from the Outer Continental Shelf, but the value of the protections provided by the monument and sanctuary designations outweigh the entirely speculative value of energy production in this remote part of the world.

Profitability seems particularly unlikely in light of the surplus in oil and natural gas resources in the United States.[44] Oil prices are continuing to drop and are currently at the lowest price since mid-November 2016.[45] Combined with flat costs, this has produced lower profit margins for all extraction companies.[46] Rational firms will not invest in exploration and drilling expected to be unprofitable. And if rational firms would not make these investments even if there were no monument designation, that designation can involve no opportunity cost associated with this non-existent exploration and production.

But this is only half the equation. The other half is the lost benefits to Americans from changing the regulatory regime to permit exploration and production. The proclamation concluded that the benefits of monument protection were in the public interest. Nothing suggests that conclusion is invalid today. Any valid economic analysis must consider the many economic benefits that depend on healthy ocean and coastal ecosystems, including productive fisheries, coastal-dependent tourism

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[39] *Marianas Monument Added to NOAA Sanctuary List; Now Eligible for Sanctuary Designation*, MARIANAS VARIETY (Mar. 17, 2017).
[40] *Id.*
[41] *Id.*
[42] John Borja, *Mariana Trench Monument May Become Sanctuary*, PACIFIC DAILY NEWS (Mar. 19, 2017, 5:57 PM).
[43] *Id.*
[44] E. Russel Braziel, *U. S. Natural Gas Supply Expanding to Surplus Levels*, THE AMERICAN OIL & GAS REPORTER, (Dec. 2014), http://www.aogr.com/magazine/cover-story/u.s.-natural-gas-supply-expanding-to-surplus-levels-demand-growth-will-foll.
[45] Sue Goodridge, *Oil Prices Tumbled to $45: The Impact on Offshore Drilling*, MARKET REALIST, (June 26, 2017), http://marketrealist.com/2017/06/oil-prices-tumbled-to-45-the-impact-on-offshore-drilling/.
[46] Clifford Krauss, *Low Oil Prices Pinch Exxon and Chevron Earnings*, THE NEW YORK TIMES, (Apr. 29, 2016), https://www.nytimes.com/2016/04/30/business/energy-environment/exxon-and-chevron-earnings-hurt-by-low-oil-prices.html.

and related employment, recreation, real estate values, and the numerous economic and social values resulting from ecosystem services provided by marine protected areas.

Healthy coastal national parks depend on the protection of offshore waters. Opening marine protected areas to potential energy and mineral extraction could do irrevocable damage to our parks, their resources, and the economies they support. The values provided by marine protected areas, including non-market values, must be part of any valuation process when considering the "opportunity costs" associated with energy and mineral extraction.

The 88 national parks that protect approximately 10 percent of the U.S. shoreline and the marine monuments and sanctuaries that span our oceans and Great Lakes provide essential safeguards for our coastal parks, habitat for wildlife and recreation opportunities that generate billions of dollars in revenues for coastal communities. These parks attract more than 88 million visitors annually and generate more than $4.8 billion in economic benefits to local economies.[47] Millions of visitors frequent the sanctuaries each year and they generate approximately $8 billion annually to local economies.[48]

As the Trump administration contemplates opening America's marine sanctuaries and monuments to energy and mineral extraction, NPCA reminds that America's national parks have already experienced damage from offshore oil spills:

- In January 1969, a blowout on an offshore oil platform spilled 200,000 gallons of crude oil into the Santa Barbara Channel.[49] In the span of that year, a total of 4.2 million gallons of oil spilled because of an undersea fault that opened up as a result of the blowout.[50] The oil caused great damage to Channel Islands National Park, contributing to the deaths of thousands of seabirds and marine mammals, and eventually leading to the national environmental movement beginning in 1970 and passage of the National Marine Sanctuaries Act in 1972.[51]

- In March 1989, the Exxon Valdez ran aground in Prince William Sound, spilling nearly 11 million gallons of oil. Many of us will never forget the images of oil-covered wildlife and beaches in the wake of the spill. Much of the contaminated Alaskan coastline included national parks, such as Kenai Fjords National Park, Katmai National Park & Preserve, Aniakchak National Monument & Preserve, and Lake Clark National Park & Preserve.[52] Recreation and tourism declined dramatically as a result of the spill, and resource managers

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[47] *Annual Visitation Highlights*, NAT'L PARK SERV., https://www.nps.gov/subjects/socialscience/annual-visitation-highlights.htm (last updated May 16, 2017).
[48] *About National Marine Sanctuaries*, NOAA, http://sanctuaries.noaa.gov/about/ (last updated May 24, 2017).
[49] *Channel Islands National Park, Environmental Factors*, Nat'l Park Serv., https://www.nps.gov/chis/learn/nature/environmentalfactors.htm (last updated June 17, 2016).
[50] *45 Years after the Santa Barbara Oil Spill, Looking at a Historic Disaster Through Technology*, NOAA Office of Response and Restoration, http://response.restoration.noaa.gov/about/media/45-years-after-santa-barbara-oil-spill-looking-historic-disaster-through-technology.html (last updated July 21, 2017).
[51] *Channel Islands National Park, Environmental Factors*, NAT'L PARK SERV., https://www.nps.gov/chis/learn/nature/environmentalfactors.htm (last updated June 17, 2016).
[52] *20 Years Later…Exxon Valdez Oil Spill.* NAT'L PARK SERV. (March 1, 2009), https://www.nps.gov/kefj/learn/nature/upload/KEFJ_EVOS_1989-2009_qa.pdf.

were forced to limit hunting and fishing access because of the damage to the natural resources.[53] Despite cleanup efforts, oil still remains on national park beaches today.[54]

- In April 2010, the Deepwater Horizon explosion and subsequent spill of approximately 206 million gallons of oil—19 times more oil than the Exxon Valdez—brought tremendous environmental and economic damage to the national parks, natural ecosystems, and communities across America's Gulf Coast.[55] Not only did this tragedy affect coastal wetlands and the wildlife that inhabit them, it had a detrimental effect on the communities that depend on these lands and waters to support fisheries and tourism-based economies that sustain them. In the months after the oil spill, NPS deployed 600 staff from 120 national parks to assist in Gulf Coast cleanup efforts, in addition to the thousands of others from federal agencies, national and local organizations, and nearby communities.[56] Gulf Islands National Seashore, known for its blue waters, white beaches, and coastal marshes, was the most directly impacted of the 10 national parks in the Gulf of Mexico region. Volunteers removed more than 918 tons of oiled debris from Gulf Islands alone.[57] Today the park is still coping with the effects of the spill on plants, wildlife, and archeological resources.

As NPS reflected on the lessons learned 20 years after the Exxon Valdez oil spill, three lessons learned stand out as significant as weakening marine sanctuary and monument designations and protections is being contemplated for energy extraction purposes:

- "The lingering effects of such an event can be difficult to identify but are vitally important to understand."[58]
- "Prevention is inordinately cheaper than cleanup."[59]
- "Distance doesn't necessarily mean you're safe."[60]

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Marine national monuments help to conserve some of our country's most prized underwater resources of natural, cultural, and historic significance. They protect key habitat for millions of species, preserve our nation's maritime and cultural heritage, and provide countless educational and scientific research opportunities. Setting aside and strengthening protections for marine areas both within and beyond the boundaries of our national parks is critically important to the health of ocean ecosystems throughout the country. The protection of marine treasures through our national parks

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[53] *Recreation & Tourism*, Exxon Valdez Oil Spill Trustee Council, http://www.evostc.state.ak.us/index.cfm?FA=status.human_recreation (last visited July 24, 2017).
[54] Jane J. Lee, *On 25th Exxon Valdez Anniversary, Oil Still Clings to Beaches*, NAT'L GEOGRAPHIC (Mar. 26, 2014), http://news.nationalgeographic.com/news/2014/03/140324-exxon-valdez-oil-spill-25th-anniversary-alaska-ocean-science/.
[55] Jeremy Repanich, *The Deepwater Horizon Spill by the Numbers*, POPULAR MECHANICS (Aug. 10, 2010) http://www.popularmechanics.com/science/energy/a6032/bp-oil-spill-statistics/.
[56] Tom Kiernan, *Three Years Later: Gulf Coast Still Recovering from BP Oil Spill*, NPCA (Apr. 18, 2013), https://www.npca.org/articles/211-three-years-later-gulf-coast-still-recovering-from-bp-oil-spill#sm.0000105v6ty4ahf74v67ewtluyq7q.
[57] *Pacific Island Network—Coastal Inventory*. NAT'L PARK SERV. (JAN. 2011) https://science.nature.nps.gov/im/units/pacn/assets/docs/features/feature.r2010022_coastal_inventory_issue22.pdf.
[58] *20 Years Later…Exxon Valdez Oil Spill.* NAT'L PARK SERV. (March 1, 2009), https://www.nps.gov/kefj/learn/nature/upload/KEFJ_EVOS_1989-2009_qa.pdf.
[59] *Id.*
[60] *Id.*

and marine national monuments helps to preserve biodiversity, ensure the availability of educational and research opportunities, build resilience against the impacts of climate change and ocean acidification, and strengthen the deeply embedded connections between our communities and the oceans.

MTMNM is one of the most significant contributions to marine conservation in the world and complies with the requirements and objectives of the Antiquities Act. We urge you to support the designation and protections of the Marianas Trench as a Marine National Monument and leave a lasting legacy for all Americans.

Thank you for your consideration of these comments.

Sincerely,

Theresa Pierno
President and CEO

Enclosures

Appendix A

NPCA Letter to Ryan Zinke (DOI), Docket No. DOI–2017–0002, Re: Executive Order 13792, Marianas Trench Marine National Monument, July 9, 2017.

Appendix B

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 C

“Presidents Lack the Authority to Abolish or Diminish National Monuments” by Mark Squillace, Eric Biber, Nicholas S. Bryner, Sean B. Hecht. Virginia Law Review Online, Vol. 103, 55-71, June 2017.

Appendix A

NPCA Letter to Ryan Zinke (DOI), Docket No. DOI–2017–0002, Re: Executive Order 13792, Marianas Trench Marine National Monument, July 9, 2017.

July 9, 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: Marianas Trench Marine National Monument

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, I write to express our unwavering support for Marianas Trench Marine National Monument ("MTMNM" or "the monument") and ask that you uphold the current monument designation, maintaining the boundaries and protections as established in the proclamation from President George W. Bush on January 6, 2009. [1]

MTMNM is located in the Western Pacific in the Mariana Archipelago, which encompasses the fourteen islands of the U.S. Commonwealth of the Northern Mariana Islands (CNMI) and the U.S. Territory of Guam, which form the land boundaries of the ocean waters and submerged lands under U.S. control that are in the monument.[2] MTMNM is one of the most geologically and biologically unique places on the planet; it is also one of the least explored. More people have explored the surface of the moon than reached the depths of the Mariana Trench.[3] The monument covers an area of 95,216 square miles of submerged lands and waters and protects a number of diverse habitats and thriving marine ecosystems, including the waters and submerged lands of the three northernmost Mariana Islands (the "Island Unit"), the submerged lands of the known volcanic areas of the Mariana Ridge (the "Volcanic Unit"), and the Mariana Trench (the "Trench Unit"), which is approximately 940 nautical miles long and 38 nautical miles wide and contains the deepest known points in the global ocean. Recognizing the outstanding geologic, biological, and cultural values of the MTMNM, the U.S. Department of the Interior ("DOI") submitted an application for MTMNM to be designated as a UNESCO World Heritage Site in April 2017.[4]

The Secretary of the Interior, through the U.S. Fish & Wildlife Service ("FWS"), has lead responsibility for managing the monument in close coordination with the Secretary of Commerce,

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[1] *See* Proclamation No. 8335, 74 Fed. Reg. 1557 (Jan. 6, 2009).
[2] *Id.* at 1557.
[3] U.S. Dep't of the Interior Submission for Inclusion of Marianas Trench Marine National Monument as World Heritage Site, Ref. No. 6238 (Apr. 12, 2017), http://whc.unesco.org/en/tentativelists/6238/.
[4] *Id.*

who is responsible for the management of fishery-related activities. FWS manages the Volcanic and Trench Units as part of the Marianas Arc of Fire and Marianas Trench National Wildlife Refuges, which are part of the National Wildlife Refuge System.[5] The Government of the CNMI manages the three islands of the Islands Unit above the mean low water line.[6] The National Oceanic and Atmospheric Administration ("NOAA") has management authority over fisheries in the waters of the Islands Unit.

Healthy coastal national parks depend on healthy aquatic ecosystems, which are protected by national parks, marine national monuments, and other types of marine protected areas ("MPAs"). While the National Park Service ("NPS") does not manage MTMNM, NPS works across federal agencies, including FWS and NOAA, to increase capacity and advance scientific understanding about issues related to oceans and coasts, such as energy development, fishing, invasive species, sea-level rise, and other threats to natural and cultural resources. NPS also plays an important role in "understanding, monitoring, [and] protecting" the numerous species that thrive throughout the world's ocean habitats—from deep canyons to shallow tidal zones.[7] There are 88 coastal parks in the National Park System that cover more than 11,000 miles of shoreline and 2.5 million acres of oceans and Great Lakes' waters. That represents about 10 percent of all U.S. shorelines, which are as diverse as lakeshores, kelp forests, glaciers, wetlands, beaches, estuaries, and coral reef areas. In 2016, these parks attracted more than 96 million visitors and generated nearly $7 billion in economic benefits to local economies.[8]

MTMNM is one of four Pacific marine national monuments and is remote, making it hard to access. Fortunately, the eight national parks in the Pacific help connect people to the Pacific ecosystem's natural, cultural, and historical contributions that the marine national monuments preserve. These national parks range from historical sites like War in the Pacific National Historical Park in Guam in the Southern Mariana Archipelago that commemorates battles during World War II, such as the Battle of Midway at Papahānaumokuākea Marine National Monument, to parks that preserve modern and ancient cultural and native island ecosystems like Haleakalā National Park in Hawaii and National Park of American Samoa. At these parks, visitors can learn about the scientific values of the Pacific, the struggles during World War II, and the unique survival skills, dances, and art of the indigenous groups and early Polynesian culture.

Similar to national parks, MTMNM and other marine national monuments serve as living laboratories and can inform the management and conservation of ocean ecosystems. Marine reserves are one of the most effective tools for improving ocean ecosystems and threatened fish stocks. In June 2017, in response to President Trump's Executive Order on the Review of Designations Under the Antiquities Act, signed on April 26, 2017 (the "EO"), 535 scientists signed a letter recognizing the "important role that strongly-protected marine reserves play in conserving marine life and benefiting fish populations."[9] Marine conservation efforts lag far beyond those on land. While protections exist for approximately 12 percent of global land area, less than four percent of our oceans receive any form of protection.[10] Scientists call for protecting 20 percent if we want

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[5] NOAA & U.S. Fish & Wildlife Serv., Marianas Trench Marine National Monument Planning Update Number 1 (May 2011), http://www.fpir.noaa.gov/Library/MNM/MTPlanningUpdate1.pdf.
[6] *Id.*
[7] *Ocean Life*, NAT'L PARK SERV., https://www.nps.gov/subjects/oceans/ocean-life.htm (last updated May 23, 2017).
[8] *Annual Visitation Highlights*, Nat'l Park Serv., https://www.nps.gov/subjects/socialscience/annual-visitation-highlights.htm (last updated May 16, 2017).
[9] *Letter, Scientists Support Marine Protected Areas, MARINE CONSERVATION INST., https://marine-conservation.org/scientists-mpa-letter-2017/ (last visited July 7, 2017).*
[10] Hope Spots, Mission Blue (2017), https://www.mission-blue.org/hope-spots/.

healthy oceans.[11] Healthy oceans and coral reef ecosystems are incredibly important to the future of our planet. Oceans produce 50 percent of the world's oxygen. A billion people, including tens of millions of Americans, rely on viable, healthy oceans for nourishment and their livelihoods. Unfortunately, our oceans are becoming increasingly degraded due to a multitude of factors, including overfishing, pollution, warming seas, coral bleaching, and ocean acidification.

As set forth below, President Bush's the use of the Antiquities Act of 1906 (the "Antiquities Act" or the "Act") to protect MTMNM, which is one of the few relatively undisturbed areas in the world and one of the last remaining refuges for rare marine species in the Pacific, was wholly appropriate and justified to ensure protection of this unique ocean ecosystem that provides a home to a diverse assemblage of terrestrial and marine species. The DOI should not recommend any changes to MTMNM for the following reasons:

- The president does not have the legal authority to rescind MTMNM's designation as a marine national monument or decrease its boundaries or modify permitted uses;
- Regardless, MTMNM's designation meets all the requirements of the Antiquities Act by having (i) a geographic scope that is the "smallest area compatible" with preservation and care of the protected objects in the monument, (ii) a designation of areas that are under the "control" of the United States as required by the Act, and (iii) an "object" scope that properly includes submarine lands, waters, an ecosystem, wildlife, and geological features with immense "historic and scientific interest," including extremely rare geologic objects and important marine and terrestrial species such as sea turtles, distinct coral reefs, and seabirds;
- The marine nature of the monument does not lessen the availability of an Antiquities Act designation. First, the submarine lands and related water columns of the MTMNM are "controlled" by the United States as part of its territorial sea and Exclusive Economic Zone ("EEZ") under United States and international law;
- Second, courts routinely have held that the Antiquities Act applies equally to submarine lands, waters, wildlife, and ecosystems. Both the unique geological features and marine biodiversity and ecosystem of the monument qualify for protection under the Act as being of "historic and scientific value;"
- Finally, Congress ratified the designation of the monument through its appropriation of federal funds, and the president cannot override that ratification;
- Preserving these unique objects and advancing scientific research requires maintaining MTMNM as an extremely remote landscape and, thus, the designation is an appropriate area "compatible with the proper care and management of the objects to be protected;" and
- The designation of MTMNM was, and continues to be, widely supported by numerous stakeholders.

We thank you for your consideration of these comments.

I. The President Lacks the Legal Authority to Rescind, Reduce the Size of, or Modify a National Monument under the Antiquities Act.

The EO directs you 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" with respect to certain land-based national monuments. The EO states that, in making your determination, you should solicit public comment on and consider seven enumerated

[11] *Letter, Scientists' Letter Supporting Marine Reserves, MARINE CONSERVATION INST., https://marine-conservation.org/marine-reserve-statement/ (last visited July 7, 2017).*

factors. The EO also provides that "in a separate but related process, certain Marine National Monuments will also be reviewed," including MTMNM, and that that review will be led by the Department of Commerce in consultation with the DOI. In connection with the marine national monuments review, you were directed to accept comments with respect to the same seven factors.

On April 28, 2017, President Trump issued Executive Order 13795, "Implementing an America-First Offshore Energy Strategy" (the "Marine EO"). In Section 4(b) of the Marine EO, the president directed the Secretary of Commerce, in consultation with you among others, to review all of the designations and expansions of Marine National Monuments in the 10-year period prior to April 28, 2017, including MTMNM.

At the time President Trump issued the EO, you stated that you would be considering whether monuments should be "rescinded, resized, [or] modified." When asked if the president has the unilateral power to rescind a monument, you stated that it was "untested" but contended that "it's undisputed the president has the authority to modify a monument."[12] We urge to you to re-examine your understanding of this issue.

No president has the legal authority to rescind, reduce, or materially modify the use of any national monument proclaimed under the Antiquities Act. As explained in detail in Appendices A and B,[13] whether or not the president may rescind or modify a monument designation does not turn on any power granted the president by the U.S. Constitution. Rather, the issue concerns the administration of federally owned land, and whether the Constitution's Property Clause gives that power exclusively to Congress.[14] 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 authorizes the president to create national monuments on land owned or controlled by the federal government, but says nothing about a president having the power to abolish a national monument, reduce its size, or materially modify its uses.[15] No such power may be implied 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.[16]

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, including the Federal Land Policy and Management Act (the "FLPMA"). While the marine national monuments are not administered by the Bureau of Land Management, which is governed by FLPMA, that act is directly relevant to the interpretation of the Antiquities Act. That is so because Congress made clear that there are no implied powers in the Antiquities Act for the president to eliminate or modify a national monument when it passed the FLPMA in 1976.[17]

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[12] Press Briefing by Secretary of Interior Ryan Zinke to Review the Designations Under the Antiquities Act, Office of the Press Secretary (Apr. 25, 2017).
[13] We attach a memorandum from the law firm of Arnold & Porter Kaye Scholer LLP ("APKS Memo") (App. A) and a law review article by four professors (the "Squillace Article") (App. B) who collectively conclude that no such powers of rescission or to make material changes exist.
[14] U.S. CONST., art. IV, § 3 (property clause).
[15] 54 U.S.C. § 320301(a).
[16] *Proposed Abolishment of Castle Pinckney National Monument*, 39 OP. ATT'Y. GEN. 185 (1938).
[17] 43 U.S.C. § 1704 *et seq*.

- In the FLPMA, Congress adopted the Attorney General's interpretation that no revocation power should be read into the Antiquities Act by implication because, 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."[18] Yet in FLPMA, Congress did not "affirmatively act to change the meaning" of the Antiquities Act as interpreted by the Attorney General's Opinion. Congress therefore effectively adopted the Attorney General's interpretation.

- 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.[19] Accordingly, Congress 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.[20] 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."[21] This is particularly so when the later statute is a comprehensive legislative scheme.[22] FLPMA is the very sort of "comprehensive legislative scheme" that requires harmonization of the Antiquities Act with FLPMA; accordingly, 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.[23]

The president therefore has no authority to revoke the monument designation for any portion of MTMNM or to modify that designation, and the DOI's current review of 27 national monuments, including MTMNM, does not provide any legal avenue for the president to do so.

In addition, while you have stated that the power to reduce the size of a monument is supposedly "undisputed," that is not the case.[24] A president does not have the power to do in part what he cannot do in full. While certain presidents have reduced monument designations *before* FLPMA, 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 monuments created under the Antiquities Act. The Solicitor concluded that that power existed based on the Supreme Court's decision in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).[25] When Congress expressly repealed *Midwest Oil* in 1976, Congress removed the basis for the Solicitor's decision.[26] Specifically, in FLPMA, 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."[27] Notably, no president has attempted to modify or revoke a designation since

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[18] *Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist.*, 133 F.3d 816, 822 (11th Cir. 1998) (addressing legislative action after earlier Attorney General interpretation); *see also, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 & n.66 (1982) (considering whether rights should be implied under a statute); *Souter v. Jones*, 395 F.3d 577, 598 (6th Cir. 2005).
[19] 43 U.S.C. § 1704 (a)(4).
[20] *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).
[21] *See United States v. Romani,* 523 U.S. 517 (1998).
[22] *See Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 97 (1981); *see also Hi-Lex Controls Inc. v. Blue Cross*, Nos. 11-12557, 11-12565, 2013 WL 228097, at *3 (E.D. Mich. Jan. 22, 2013).
[23] *See* APKS Memo (App. A) at 8-14; Squillace Article (App. B) at 56-69.
[24] Press Briefing by Secretary of Interior Ryan Zinke to Review the Designations Under the Antiquities Act, Office of the Press Secretary, (Apr. 25, 2017).
[25] Opinion of the Solicitor, M-27657 (Jan. 30, 1935).
[26] *See* Squillace Article (App. B) at 67.
[27] H.R. REP. NO. 94-1163, at 9 (May 15, 1976) (*emphasis added*).

Congress passed FLPMA. Consequently, the current review ordered by President Trump can only result in recommendations to Congress, asking Congress to draft legislation to make whatever revocations or modifications your office and the president believe justified.

In addition, even in the unlikely event that a court were to find that a president has the unilateral power to rescind, reduce, or materially alter the use of a monument, the balancing standard laid out in Section 1 of the EO is inapplicable. While 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," the president's power can be no broader that the Antiquities Act from which that power is implied. No such balancing test is found in the Antiquities Act and, therefore, the balancing standard must not be relied on by your office in making any recommendations.

II. The Factors Identified in the Request for Comments Support MTMNM's Continued Designation as a National Monument and Maintenance of Its Existing Boundaries.

Even assuming President Trump has the power to revoke MTMNM's designation as a national monument or otherwise modify its boundaries or permissible uses, NPCA respectfully submits that the president should not do so. The factors identified for comment support MTMNM's continued designation as a national monument and its existing boundaries and uses.

A. Factors (i) and (ii): MTMNM's Designation Complies with the Antiquities Act's Requirements and Objectives.

You have asked for comment on whether the designation meets the "original objectives" and requirements of the Antiquities Act. We demonstrate below that this monument designation meets all those requirements.

1. The Smallest Area Compatible with the Proper Care and Management of Protected Objects Depends on the Nature of the Objects Being Protected

By use of the term "original objectives," the EO suggests that there has been a change in the objectives of the Act 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. On April 25, 2017, you stated that the average size of monuments designated in the early years of the Act was 442 acres, but that too is incorrect. [28]

The Antiquities 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, who you lauded at your press conference, designated monuments of 818,000 acres (1908, Grand Canyon) and 640,000 (1909, Mount Olympus). The Supreme Court upheld the Grand Canyon designation in 1920.[29] Every court to have considered the issue since has agreed that the Act was intended to protect not just archeological "objects," but large natural areas having historic or scientific interest.[30] For example, in *Cappaert v. United States*, 426 U.S. 128 (1976), the Supreme

[28] Press Briefing by Secretary of Interior Ryan Zinke to Review the Designations Under the Antiquities Act, Office of the Press Secretary, (Apr. 25, 2017).
[29] *Cameron v. United States*, 252 U.S. 459 (1920).
[30] *See, e.g.*, *Caeppert v United States*, 426 U.S. 128 (1976); *Mountain States Legal Found. v. Bush*, 306 F. 3d 1132 (D.C. Cir. 2002).

Court found that a pool of water and the fish that live there are such objects.[31] 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."[32]

Given that the 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. Instead, if the objects being protected are natural areas and objects such as in the case of MTMNM, a large area can be the smallest area needed for such protection. In issuing the proclamation, President Bush recognized the critical importance of protecting these "relatively pristine coral reef ecosystems," "active mud volcanoes," and other marine life that justified the designation, set as the "smallest area compatible with the proper care and management of the objects to be protected."[33]

2. The Designated Lands are Eligible for Protection under the Act.

MTMNM is located in the Mariana Archipelago, which encompasses the U.S.-controlled territories of the Northern Marianas Islands and Guam[34] and includes both submerged lands and associated water columns within the United States' territorial sea and EEZ. Under domestic and international law, the United States' territorial sea extends twelve nautical miles from the coastal baseline.[35] The United States' EEZ is the area beyond and adjacent to the territorial sea and extends 200 nautical miles from the coastal baselines.[36] MTMNM is located in the United States' EEZ adjacent to the U.S. Commonwealth of the Northern Mariana Islands to the north and the U.S. Territory of Guam to the south.

As set forth below, submerged lands and water columns within both the United States' territorial sea and EEZ are "lands owned or controlled by the Government of the United States" for purposes of the Antiquities Act. The conclusion that the president may designate submerged lands and water columns within the United States' territorial sea and EEZ is shared by the Office of Legal Counsel—

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[31] *Caeppert*, 426 U.S. at 141-42.
[32] *Tulare Cty. v. Bush*, 306 F. 3d 1138, 1141-42 (D.C. Cir. 2002).
[33] Proclamation 8335, 74 Fed. Reg. at 1557-58.
[34] Proclamation 8335, 74 Fed. Reg. at 1557.
[35] The Third U.N. Conference on the Law of the Sea took place from 1973 to 1982 and resulted in the United Nations Convention on the Law of the Sea ("UNCLOS"). UNCLOS is the authoritative statement of the international law of the sea and established a 12-mile territorial sea and the regime of the EEZ. U.N. Convention on the Law of the Sea (hereinafter, "UNCLOS"), art. 3 (Dec. 10, 1982) (setting forth a 12-mile territorial sea); *id*. arts. 55-57 (establishing EEZ regime). While the United States has signed but not ratified UNCLOS, the provisions of UNCLOS setting forth the scope of authority over territorial seas and EEZs are treated as customary international law, giving coastal states certain rights. *Mayagüezanos por la Salud y el Ambiente v. U.S.*, 198 F.3d 297, 304-05 (1st Cir. 1999). By proclamation in 1988, President Reagan confirmed the United States' claim to, and authority over, its territorial sea consistent with customary international law. Territorial Sea of the United States of America, Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988) (establishing 12-mile territorial sea consistent with international law).
[36] Consistent with UNCLOS and customary international law, President Reagan, by proclamation in 1983, confirmed the United States' claim of rights and authority over its EEZ. Exclusive Economic Zone of the United States of America, Proclamation 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983); UNCLOS, arts. 55-57 (setting forth a 200-mile EEZ); *Mayagüezanos*, 198 F.3d at 305 (recognizing 200-mile EEZ as customary international law).

and, indeed, marine national monuments have been designated by Republican and Democratic presidents alike, with President Bush designating MTMNM as a national monument in 2009.[37]

a) The Submerged Lands and Water Columns Are "Lands"

In Proclamation 8335, President Bush stated that he was reserving: "waters and submerged lands" of the three northernmost Mariana Islands; "only the submerged lands" of the designated volcanic sites; and the Mariana Trench.[38] The Supreme Court affirmatively recognized that a president may designate submerged lands and associated water columns for purpose of the Antiquities Act. In *United States v. California*, the Supreme Court resolved a dispute regarding whether the United States or California had dominion over areas within the Channel Islands National Monument.[39] In doing so, the Supreme Court made clear that there was "no serious question" that the president "had power under the Antiquities Act to reserve submerged lands and waters" so long as they are "controlled by the Government of the United States."[40] In 2005, the Supreme Court reaffirmed this position, finding it "clear, after all, that the Antiquities Act empowers the president to reserve submerged lands."[41]

b) The United States' Territorial Sea Is "Owned or Controlled" by the United States for Purposes of the Antiquities Act

Given the United States' "absolute and exclusive" sovereign authority over the territorial sea, there is no dispute that the federal government "owns or controls" the submerged lands and associated water columns within the territorial sea for purposes of the Antiquities Act. The Supreme Court has long held that the United States' authority over its territory, including its territorial seas, "is absolute and exclusive."[42] In *United States v. California*, the Supreme Court acknowledged that there is "no serious question" that the president has the "power under the Antiquities Act to reserve the submerged lands and waters within the one-mile belts as a national monument" because, absent a

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[37] *See* Administration of Coral Reef Resources in the Northwest Hawaiian Islands, Op. O.L.C., 2000 WL 34475732, at *1-13 (Sept. 15, 2000) (confirming the longstanding position that the President could establish a national monument in territorial seas and further concluding that "the President could establish a national monument in the EEZ to protect marine resources"). Notwithstanding this clear precedent, certain opponents of the Antiquities Act have suggested that (a) the submerged lands and associated water columns are not "lands," and (b) the submerged lands and associated water columns are not "owned or controlled" by the federal government. *See, e.g.*, John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, AM. ENTER. INST., at 12 (Mar. 2017), http://www.aei.org/wp-content/uploads/2017/03/Presidential-Authority-to-Revoke-or-Reduce-National-Monument-Designations.pdf. These arguments are inconsistent with Supreme Court precedent, public policy, and historical practice.

[38] Proclamation 8335, 74 Fed. Reg. at 1558.

[39] 436 U.S. 32, 32 (1978).

[40] *Id.* at 36.

[41] *Alaska v. United States*, 545 U.S. 75, 103 (2005); *see also Cappaert*, 426 U.S. at 142-43 (upholding Presidential monument designation of Devil's Hole—a subterranean pool of water—as proper under the Antiquities Act and further concluding that designation properly included both its surface water and groundwater).

[42] *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 234 (1804); *see also The Ann*, 1 F. Cas. 926, 927 (C.C.D. Mass. 1812) (No. 397) (Story, J.) (recognizing that the territorial waters "are considered as a part of the territory of the sovereign). Under President Reagan, the Office of Legal Counsel explained that the United States "is sovereign in its territorial sea" and, consistent with customary international law, the "only qualification . . . is that ships enjoy a right of innocent passage." Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, 12 O.L.C. 238, 240 & n.4 (1988); *see also* UNCLOS, art. 3 ("The sovereignty of a coastal State extends, beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea.").

relinquishment of authority, there is no doubt they are "'controlled by the Government of the United States.'"[43] Indeed, even opponents of marine national monuments do not seriously contest that the federal government "owns or controls" its territorial sea for purposes of the Act.[44]

c) The United States' EEZ Is "Owned or Controlled" by the United States for Purposes of the Antiquities Act

The federal government does not need to have absolute and exclusive control for the designated areas to be considered "owned or controlled by the United States" for purposes of the Act.[45] While neither the Antiquities Act nor its legislative history define the term "control," "control" was defined by dictionaries at the time of the Antiquities Act to mean the authority "to exercise restraining or directing influence."[46] Contemporary Supreme Court decisions similarly linked the concept of "control" with the authority to direct influence or regulate.[47] Thus, to assess whether the United States has sufficient "control" for purposes of the Antiquities Act, one must assess the level of restraint, regulation, and directing influence it has over an area consistent with the aims of the Act and vis-à-vis the states and other sovereigns.

Under domestic and customary international law, the United States has extensive sovereign rights and jurisdiction within its EEZ. According to Article 56 of UNCLOS, the coastal State, here the United States, has the following rights in the EEZ:

> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

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[43] 436 U.S. at 32. While the United States has conveyed to the states and territories certain title, jurisdiction, or rights to submerged lands within the first three miles of its territorial sea, that does not undermine the authority of the President to designate areas within the territorial sea over the submerged lands within the first three miles. *See, e.g.*, Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 518 & n. 287 (2003) (explaining that the Attorney General concluded that "the President may proclaim a national monument over submerged lands under the primary jurisdiction of the states in accordance with the Submerged Lands Act").

[44] *See, e.g.* Yoo & Gaziano, *Presidential Authority*, at 12 (arguing against EEZ designations while acknowledging that the "Supreme Court has upheld or discussed the application of the act to the submerged lands of two different monuments along the coast and inland waterways," and recognizing that the United States' sovereign interest in its territorial sea "justifies sovereign military and economic controls"); Joseph Briggett, *An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power to Designate Monuments in the Outer Continental Shelf*, 22 TUL. ENVTL. L.J. 403, 414 (2009) (arguing only that, at the time of enactment, "Congress would not have regarded submerged lands *beyond* the territorial seas as being under the control of the federal government").

[45] Squillace, *The Monumental Legacy*, 37 GA. L. REV. at 518 n. 287 ("Under the Antiquities Act, the retention of some 'control' over the lands is all that is required to allow designation of a national monument.")

[46] *See Control*, Webster's Collegiate Dictionary (1919 ed.); *Control*, New Webstarian Dictionary (1912 ed.) (defining control as "to restrain," to "govern," or to "regulate").

[47] *See People of State of New York ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U.S. 549, 559 (1915) (stating that the federal government's authority "to regulate commerce" gives it "control over interstate commerce"); *Standard Oil Co. v. Anderson*, 212 U.S. 215, 222 (1909) (linking, in the context of agency, the concept of control with the authority to direct).

> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; and (iii) the protection and preservation of the marine environment.

While the United States has signed but not ratified UNCLOS, the provisions of UNCLOS setting forth the scope of authority over territorial seas and EEZs are customary international law.[48] President Reagan claimed authority over the United States' EEZ in Proclamation 8030. In so doing, President Reagan confirmed that the United States has "(a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters," and "(b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes and the protection and preservation of the marine monument."[49] The United States' authority over the EEZ has also been recognized by Congress.[50]

The United States' established and accepted sovereign rights and jurisdiction in the EEZ plainly provide it with sufficient "control" to designate areas within it as a national monument for purposes of the Antiquities Act. First, the United States exercises greater authority and control over the EEZ than any other sovereign, as well as any state or territory.[51] Indeed, when President Reagan issued Proclamation 5030 asserting the United States' claims to its EEZ, the White House explained that the proclamation confirmed the United States' "sovereign rights *and control* over the living and non-living natural resources of the seabed, subsoil and superjacent waters beyond the territorial sea but within 200 nautical miles of the United States coasts."[52] Thus, the United States has paramount authority and—as President Reagan's administration acknowledged—control over areas within its EEZ.

Second, the United States exercises the precise type of control over the EEZ for which designations under the Antiquities Act are intended as a matter of international and domestic law. As set forth both in Proclamation 5030 and in UNCLOS, the United States has sovereign rights within the EEZ "for the purpose of exploring, exploiting, conserving and managing natural resources" and further has jurisdiction for "the protection and preservation of the marine environment."[53] The United States also may "promote the objective of the optimum utilization of the living resources" in the EEZ, "determine the allowable catch of the living resources" in the EEZ, and engage in "conservation and management" to prevent over-exploitation.[54] These broad powers afford the United States significant control within the EEZ for the exact purpose for which designations are to be made under the Antiquities Act, which as President Trump explained, "are a means of stewarding America's

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[48] *See, e.g.*, *Mayagüezanos*, 198 F.3d at 305; *United States v. Carvajal*, 924 F.Supp.2d 219, 234 (D.D.C. 2013) (recognizing the EEZ regime under UNCLOS as a part of customary international law); 16 U.S.C. § 1802(11) (adopting the EEZ as set forth in Proclamation 5030); UNCLOS, art. 56 (setting forth the customary international law regarding the authority of a coastal nation within its EEZ.

[49] Proclamation 5030, 48 Fed. Reg. at 10605.

[50] *See* 16 U.S.C. § 1802(11) (incorporating the EEZ set by Proclamation 5030).

[51] *See* Administration of Coral Reef Resources in the Northwest Hawaiian Islands, Op. O.L.C., 2000 WL 34475732, at *9.

[52] Fact Sheet, United States Oceans Policy, Off. Press Sec'y, (Mar. 10, 1983) (emphasis added). "Superjacent waters" means the water column above the seabed. *See* U.N. Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, at app. I (Glossary of Technical Terms), at 64, U.N. PUB. SALES NO. E.88.V.5 (1989) (defining "superjacent waters" as "[t]he waters lying immediately above the sea-bed or deep ocean floor up to the surface.")

[53] Proclamation 5030, 48 Fed. Reg. 10605 (exercising rights under international law).

[54] UNCLOS, arts. 61-62.

natural resources, protecting America's natural beauty, and preserving America's historical places."[55] Indeed, the Office of Legal Counsel has already concluded that the United States exercises sufficient "control" of the EEZ to designate monuments under the Antiquities Act.[56]

Accordingly, the United States has "control" over both the EEZ and the territorial sea for purposes of the Antiquities Act and the areas contained within the MTMNM were properly designated.

3. The Objects Protected are Objects of Historic or Scientific Interest

The protection of marine areas, such as MTMNM, under the Antiquities Act is well-accepted, with Franklin Roosevelt designating the Channel Islands National Monument as the first marine monument in 1938.[57] It is equally well-accepted that aquatic life and habitat are among the "objects of historic or scientific interest" that may be protected under the Antiquities Act.

a) Aquatic Life and Habitat Can be "Objects of Historic and Scientific Interest" Under the Antiquities Act

The phrase "other objects of historic and scientific interest" in the Antiquities Act has long been understood to encompass wildlife and habitat and, from the outset, presidents have used the Act to protect wildlife and the habitat supporting that wildlife.[58] Over 40 years ago in *Cappaert*, the Supreme Court expressly recognized that aquatic life and habitat are among "objects" that may be protected by the Act.[59]

Cappaert involved a "peculiar race of fish," whose habitat is Devil's Hole, a deep limestone canyon in Nevada. The specific question posed in *Cappaert* was whether the creation of the Devil's Hole National Monument reserved federal water rights in unappropriated water such that the Cappaerts, who owned a ranch appurtenant to Devil's Hole, could be enjoined from pumping groundwater when pumping jeopardized the fish's spawning habitat. In a unanimous decision, the Supreme Court held that because "[t]he fish are one of the features of scientific interest" protected by the proclamation establishing the monument, the district court correctly determined that the level of the pool may only be permitted to drop "to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved."[60] In so deciding, the Supreme Court expressly acknowledged that aquatic life may be protected under the Act. [61]

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[55] Exec. Order No. 13792, 82 Fed. Reg. 20,429 (Apr. 26, 2017); *see also Alaska*, 545 U.S. at 103 (explaining that the purpose of designations under the Antiquities Act is "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations").
[56] Administration of Coral Reef Resources in the Northwest Hawaiian Islands, Op. O.L.C., 2000 WL 34475732, at *8-11.
[57] Proclamation No. 2281, 52 Stat. 1541 (Apr. 26, 1938); *see also* Proclamation No. 2337, 3 C.F.R. 88 (May 17, 1939) (designating the Santa Rosa Island National Monument); Proclamation No. 3443, 3 C.F.R. 152 (Dec. 28, 1961) (designating the Buck Island Reef National Monument).
[58] *See, e.g.*, Proclamation No. 869, 35 Stat. 2247 (Mar. 2, 1909) (protecting the summer range and breeding grounds of the Olympic elk (Cervus Roosevelti)).
[59] 426 U.S. at 142.
[60] *Id.* at 141.
[61] Certain commentators have made the specious argument that "sea life" should not be considered "objects" under the Antiquities Act despite the Supreme Court's clear and unequivocal holding in *Cappaert* and an 80-year tradition of establishing marine monuments *See* Yoo & Gaziano, *Presidential Authority*, at 14. These commentators point to *Yates v. United States*, 135 S. Ct. 1074 (2015), which dealt with the interpretation of a provision relating to record destruction that was passed as part of the

(continued...)

b) MTMNM Protects "Object[s] of Historic or Scientific Interest"

MTMNM is located in the Mariana Archipelago, which encompasses the 14 islands of CNMI and the U.S. Territory of Guam that sit atop Mariana Ridge in an area known as the Mariana Volcanic Arc. "The Mariana Volcanic Arc is part of a subjection system in which the Pacific Plate plunges beneath the Philippine Sea Plate and into the Earth's mantle, creating the Mariana Trench."[62] Approximately 940 nautical miles long and 38 nautical miles wide, the Mariana Trench is five times longer than the Grand Canyon and contains more than 50 million acres of submerged features effectively unknown to humans.[63]

Located at the intersection of two tectonic plates, MTMNM preserves extremely rare geologic objects, including submarine volcanoes, mud volcanoes, and hydrothermal vents emitting carbon dioxide.[64] The diverse habitats within the monument support vibrant marine ecosystems including a number of newly discovered, still unknown species,[65] and species that are dependent on basalt rock formations,[66] including a variety of sharks, whales, and dolphins, along with several threatened and endangered species of sea turtles.[67] Recent scientific expeditions have uncovered hundreds of different species and dozens of possible new species, including three cladorhizid sponges, three hexactinellid sponges, a hydromedusae jellyfish, a tilefish, and a seastar.[68] In recognition of its outstanding geologic, biological, and cultural values, the DOI submitted an application for the monument to be designated as a UNESCO World Heritage Site in April 2017.[69] According to DOI, the monument would be the first World Heritage Site to contain unique and little-understood geological features such as underwater volcanic and active locations of plate tectonics.[70]

MTMNM is comprised of three separate units: the Trench Unit, Volcanic Unit, and Islands Unit. The Trench Unit protects the Mariana Trench, the deepest place on earth, and includes the submerged lands extending from the northern limit of the EEZ in the CNMI to the southern limit of the EEZ in

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Sarbanes Oxley Act (18 U.S.C. § 1519) and absurdly claim that *Cappaert*'s finding that "fish" are objects under the Antiquities Act did not "seem necessary to its holding" regarding water rights, ignoring that the entire case revolved around the federal government's ability to protect a fish's habitat under the Act.

[62] Proclamation 8335, 74 Fed. Reg. at 1557.

[63] NOAA & U.S. FISH & WILDLIFE SERV., Marianas Trench Marine National Monument (May 24, 2012), https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Mariana_Trench_Marine_National_Monument/Documents/MTMNM%20brief%205-24-2012.pdf.

[64] U.S. Dep't of the Interior Submission for Inclusion of Marianas Trench Marine National Monument as World Heritage Site, Ref. No. 6238 (Apr. 12, 2017), http://whc.unesco.org/en/tentativelists/6238/. Because the hydrothermal vents spit acidic water near thriving coral reefs, the Monument gives researchers the opportunity to assess how coral reefs may survive in the face of increasing ocean acidification. See NOAA & U.S. FISH & WILDLIFE SERV., Marianas Trench Marine National Monument (May 24, 2012), https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Mariana_Trench_Marine_National_Monument/Documents/MTMNM%20brief%205-24-2012.pdf.

[65] U.S. Dep't of the Interior Submission for Inclusion of Marianas Trench Marine National Monument as World Heritage Site, Ref. No. 6238 (Apr. 12, 2017), http://whc.unesco.org/en/tentativelists/6238/.

[66] NOAA & U.S. FISH & WILDLIFE SERV., Marianas Trench Marine National Monument (May 24, 2012), https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Mariana_Trench_Marine_National_Monument/Documents/MTMNM%20brief%205-24-2012.pdf.

[67] U.S. Dep't of the Interior Submission for Inclusion of Marianas Trench Marine National Monument as World Heritage Site, Ref. No. 6238 (Apr. 12, 2017), http://whc.unesco.org/en/tentativelists/6238/

[68] *Id.*

[69] *Id.*

[70] *Id.*

the Territory of Guam.[71] The Volcanic Unit, which includes the submerged lands within one nautical mile of 21 designated volcanic sites, protects an arc of underwater thermal vents and mud volcanoes, producing a plethora of bizarre life forms. The Islands Unit protects the waters and submerged lands from the shoreline to 50 nautical miles from the three northernmost Mariana Islands, Farallon de Pajaros, Asuncion, and Maug, which are in their earliest geologic phases and thus illustrate the creation phase of our planet's history.[72] Pursuant to Proclamation 8335, the "objects of scientific interest" located within the Mariana Volcanic Arc, include, among others:

- The "largest active mud volcanoes on Earth;" [73]
- The "Champagne vent," which "produces almost pure liquid carbon dioxide;" a "phenomenon" observed at only "one other site in the word;"[74]
- The "Sulphur Cauldron, a pool of liquid sulfur;" the only other known location of this phenomenon is on Io, one of Jupiter's moons;[75]
- The Northern Marianas reefs, which unlike other reefs in the Pacific, provide "unique volcanic habitats" and support marine communities requiring basalt; and
- The Maug Crater, which "represents one of only a handful of places on Earth where photosynthesis and chemosynthetic communities of life are known to come together," creating an ideal natural laboratory for ocean acidification and climate change research.[76]

The Proclamation also protects the pristine reef ecosystems in the waters of archipelago's northern islands, which are "among the most biologically diverse in the Western Pacific and include some of the greatest diversity of seamount and hydrothermal vent life yet discovered." [77] The volcanic islands within the monument are "ringed by coral ecosystems with very high numbers of apex predators, including large numbers of sharks" and contain "the most diverse assortment of stony corals in the Western Pacific."[78] In fact, the monument has more stony corals than any other coral reef ecosystem in the United States and includes a site that is characterized by the highest density of sharks in the entire Pacific.[79] In addition to the unique features of the Mariana Volcanic Arc identified above, President Bush also found "these relatively pristine coral reef ecosystems," which "support some of the largest biomass of reef fishes in the Mariana Archipelago,"[80] to be "objects of scientific interest and essential to the long-term study of tropical marine ecosystems," and singled them out for protection in Proclamation 8335. [81]

4. Congress Has Ratified the Validity of the Designation of MTMNM By Appropriating Funds to Support Its Mission.

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[71] NOAA & U.S. FISH & WILDLIFE SERV., Marianas Trench Marine National Monument (May 24, 2012), https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Mariana_Trench_Marine_National_Monument/Documents/MTMNM%20brief%205-24-2012.pdf.
[72] U.S. Dep't of the Interior Submission for Inclusion of Marianas Trench Marine National Monument as World Heritage Site, Ref. No. 6238 (Apr. 12, 2017), http://whc.unesco.org/en/tentativelists/6238/
[73] Proclamation 8335, at 1557.
[74] *Id.*
[75] *Id.*
[76] *Id.*; U.S. Dep't of the Interior Submission for Inclusion of Marianas Trench Marine National Monument as World Heritage Site, Ref. No. 6238 (Apr. 12, 2017), http://whc.unesco.org/en/tentativelists/6238/.
[77] Proclamation 8335, 74 Fed. Reg. at 1557.
[78] *Id.*
[79] NOAA & U.S. FISH & WILDLIFE SERV., Marianas Trench Marine National Monument (May 24, 2012), https://www.fws.gov/uploadedFiles/Region_1/NWRS/Zone_1/Mariana_Trench_Marine_National_Monument/Documents/MTMNM%20brief%205-24-2012.pdf.
[80] *Id.*; see also Proclamation 8335, 74 Fed. Reg. at 1557.
[81] Proclamation 8335, at 1557.

Since its designation as a national monument in 2009, Congress has ratified MTMNM's designation through its repeated and knowing appropriation of federal funds to support MTMNM's mission. For example, Congress appropriated $357,524,000 for fiscal year 2009; $367,364,000 for fiscal year 2010; $377,204,000 for fiscal year 2011; $387,044,000 for fiscal year 2012; and $396,875,000 for fiscal year 2013 to carry out the federal regulations (50 CFR 665.900) that codify certain provisions of Proclamation 8335.[82] The Supreme Court has acknowledged that Congress shows intent to ratify a presidential action through appropriations.[83] Congress has thereby put to rest any claim that the designation or area was not lawful under the Antiquities Act.

B. Factors (iii) and (iv): Effects of Designation on Use of Federal Land and the Use and Enjoyment of non-Federal Lands Within and Beyond the Monument Boundaries

Per the EO, you asked for comment on "the effects of a designation on the available uses of designated Federal lands, including consideration of the multiple-use policy of section 102(a)(7), of [FLPMA] (43 U.S.C. 1701(a)(7)), as well as the effects on the available uses of Federal lands beyond the monument boundaries." Similarly, you requested comments regarding whether the monument impacts use and enjoyment of non-federal lands or lands beyond the monument's boundaries. No recommendations to change the monument are warranted based on these factors.

First, FLPMA has no applicability to this marine national monument.

In any event, to ensure conservation of the objects recognized in the Proclamation, commercial extraction is prohibited in the monument boundary, which benefits both local and highly migratory species. Deep sea mining is similarly banned, which reduces negative impacts from sound and chemical pollution and debris. Commercial fishing is also banned to help minimize harmful longline fishing impacts to sharks, marine mammals, sea turtles, and birds.[84] However, the Proclamation permits the Secretary of Commerce to allow sustenance, recreational, and traditional fishing so long as they are sustainable activities consistent with other applicable laws after due consideration of traditional indigenous fishing determined by the Government of the CNMI.[85] In addition, the Pacific Islands Fisheries Science Center monitors and coordinates research activities within the

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[82] Congress appropriated these funds to be shared among several marine national monuments, including MTMNM, as well as other fishery management-related programs. 16 U.S.C. § 1803, amended by Pub. L. 109-479, § 7, 120 Stat. 3579 (appropriating funds to the Secretary of Commerce to carry out the provisions of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq.); see 50 C.F.R. § 665.1 et seq. (regulations governing fishing, pursuant to 16 U.S.C. § 1801, including MTMNM, at Subpart G).

[83] For example, in *Isbrandtsen-Moller Co. v. United States*, the Supreme 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. 300 U.S. 139, 147–148 (1937); *see also Brooks v. Dewar*, 313 U.S. 354, 360–61 (1941) (finding that Congress ratified the 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).

[84] Much of industrial fishing is Illegal, Unreported, and Unregulated ("IUU") fishing, which is destroying fisheries, economies, and ocean habitats around the world. Economic losses from IUU fishing worldwide are estimated to be between $10 billion and $23 billion annually. *International Guidelines Target IUU Fishing*, NOAA (Mar. 22, 2013), http://www.nmfs.noaa.gov/ia/slider_stories/2013/03/fao_iuu_guidelines.html

[85] Proclamation 8335, 74 Fed. Reg. at 1557.

monument.[86] These protections are of critical importance. While the coastal ecosystems and deep-sea features of the monument are relatively intact due to its remote location, lingering threats, such as overfishing, resource damage, and ship groundings and abandonment make long-term preservation of the area essential.[87] The impacts of climate change, such as ocean acidification and coral bleaching, are already beginning to take a toll on the health of the monument's coral reefs.[88]

In addition, the protections afforded the monument benefit the ecological health of wildlife conservation reserves on the Islands Unit as well as the entire Mariana Archipelago. The monument's proximity to three adjacent wildlife conservation reserves that protect the terrestrial portions of the three islands in the Islands Unit ensures that the health and function of the broader ecosystem. In addition, the marine protections at MTMNM ensure robust, sustainable marine populations that benefit the ecological health of both monument waters and the larger Mariana Archipelago, including the national park located there. Marine reserves, such as the MTMNM, have the capacity to address severe declines in fish populations, leading to a reduction in fishing mortality that can increase the abundance of spawning fish, providing insurance against recruitment failure and maintaining or enhancing yields in fished areas.[89]

The islands of the Mariana Archipelago are volcanic in origin, with geologically younger islands in the north and older volcanic islands, now covered in limestone, in the south of the archipelago.[90] Together, CNMI and Guam have 12 marine protected areas ("MPAs"), many of which were established to counteract the strong, negative impacts of fishing pressures in recent years on the health of its waters.[91] Overall, coral reef ecosystems in the region are relatively healthy, yet anthropogenic impacts, such as pollution and overfishing, are taking their toll on coral reefs adjacent to the populated southern islands.[92] Fisheries populations in the northern islands of the archipelago, including those of the monument are, on the whole, in better condition.[93] Many of the species populating the archipelago's coral reefs are characterized by a pelagic larval phase that can disperse

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[86] *Marianas Trench Marine National Monument*, NOAA, https://www.pifsc.noaa.gov/monuments_science/marianas_trench_marine_national_monument.php (last visited July 7, 2017).
[87] U.S. Dep't of the Interior Submission for Inclusion of Marianas Trench Marine National Monument as World Heritage Site, Ref. No. 6238 (Apr. 12, 2017), http://whc.unesco.org/en/tentativelists/6238/.
[88] *Id.*
[89] Reserves are most likely to benefit surrounding fisheries if they also act as a source of larvae to the surrounding areas. If marine reserves are properly designed and enforced, they can increase the size, density, and diversity of fish, invertebrate, and other marine species. See Written Testimony of John F. Bruno, PhD, Professor, Dep't of Biology, Univ. of N.C. at Chapel Hill, before the Subcomm. On Water, Power, and the Oceans (Mar. 15, 2017), http://democrats-naturalresources.house.gov/imo/media/doc/Bruno%20testimony_4c3.pdf. Fish biomass in marine reserves can quickly increase to be four times higher on average than in fished areas and the restoration of fished predatory species can help improve important ecological functions and species interactions benefitting lower trophic levels. *See id.* Marine reserves also provide valuable baseline information about the health of marine resources, can be valuable for the study of unaltered ecological processes, and serve as important baselines or control areas for harvested populations of fish. NAT'L PARK SERV., *National Resources Management Guidelines* (No. 77), at 34 (updated 2004).
[90] *Commonwealth of Northern Mariana Islands (CNMI) and Guam*, SCH. OCEAN & EARTH SCI. & TECH AT UNIV. OF HAW., http://www.soest.hawaii.edu/pibhmc/cms/data-by-location/cnmi-guam/ (last visited July 7, 2017).
[91] *Id.*
[92] *Commonwealth of the Northern Mariana Islands (CNMI)*, NOAA https://www.coris.noaa.gov/portals/cnmi.html (revised June 28, 2017).
[93] *Id.*

larvae tens to thousands of kilometers away.[94] Thus, the ecosystems of the region are inherently connected and conservation policies at specific locations in the archipelago impact the health of the broader ecosystem. A well-planned network of MPAs is critical to increasing ecosystem resiliency, sustaining fisheries, and mitigating negative anthropogenic impacts.[95] The protection of robust larval sources is vital to the repopulation of other areas in the event of overfishing or other ecosystem disturbances.[96]

Given the high connectivity characterizing the broader ecosystem of the Mariana Archipelago, the establishment and enforcement of a well-connected system of MPAs, including that of the monument, may help sustain or improve the health of the coral reef ecosystem at War in the Pacific National Historical Park. War in the Pacific National Historical Park, in Guam, was created in 1978 to honor the sacrifice and bravery of those who contributed to the Pacific Theater in World War II. In addition to its focus on preserving and interpreting a critical part of American history, the park also preserves a plethora of biological and ecological resources, including coral reefs, tropical limestone forests, and vibrant streams. The park protects one of the highest levels of species diversity throughout all of America's national parks, including one of the most diverse coral reef ecosystems.[97] It is home to threatened and endangered sea turtles and marine mammals and approximately 1000 species of fish and 400 species of coral.[98] Although live coral cover is moderately high, sedimentation, overfishing, and other threats have led to the reef's degradation over the years.[99] The park's reefs have also suffered from low coral recruitment, or the arrival of juveniles from outside areas.[100]

Thus, MTMNM protects and enhances the waters and ecosystem of the entire Mariana Archipelago, which includes the War in the Pacific National Historical Park in Guam.

C. Factors (v) and (vi): MTMNM Designation Was Made Through Proper Process

In the EO, you asked for comment regarding "concerns of State, tribal, and local governments affected by the designation" and "the availability of Federal resources to properly manage the designated areas."

The designation of MTMNM was, and continues to be, widely supported by numerous stakeholders. This support is evident in the Proclamation itself, which includes a directive that the Secretaries of the Interior and Commerce establish the Mariana Monument Advisory Council.[101] The Advisory Council, which consists of three representatives from the Government of the CNMI and one representative each from the U.S. Department Defense and the U.S. Coast Guard, must provide advice and recommendations on the development of the Monument Management Plan ("MMP"). Representation and input from local government and other federal agencies on monument

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[94] *Mapping Pathways of Larval Connectivity in the Mariana Islands*, CORAL REEF INITIATIVE COMMONWEALTH N. MAR. I. (Feb. 2013), https://nccospublicstor.blob.core.windows.net/projects-attachments/195/Marianas_Work_Plan_March_2013.pdf
[95] *Id.*
[96] *Id.*
[97] *Coral Reefs in U.S. National Parks: A Snapshot of Status and Trends in Eight Parks*, Nat'l Park Serv. & Dep't of the Int. (Apr. 2009), http://www.teachoceanscience.net/pdfs/nps_coral_reefs.pdf.
[98] Eric K. Brown et al., *Informing Coral Reef Management Decisions at Four U.S. National Parks in the Pacific Using Long-Term Monitoring Data*, ECOSPHERE (Oct. 4, 2016), http://onlinelibrary.wiley.com/doi/10.1002/ecs2.1463/full.
[99] *Coral Reefs in U.S. National Parks: A Snapshot of Status and Trends in Eight Parks*, Nat'l Park Serv. & Dep't of the Int. (Apr. 2009), http://www.teachoceanscience.net/pdfs/nps_coral_reefs.pdf.
[100] *Id.*
[101] Proclamation 8335, 74 Fed. Reg. at 1560.

management ensures that outside voices and interests are accounted for in the decision-making process.

In 2011, FWS and NOAA initiated the development of the MMP to address management of the Islands Unit, in consultation with the Government of CNMI. The MMP addresses: public education and outreach programs; traditional access by indigenous person to the monument for religious and culturally significant subsistence units; monument-related scientific exploration and research; and programs for monitoring and enforcement.[102] In addition, as the FWS and NOAA initiated development of the MMP, federal agencies sought input from the public, interested agencies, and organizations to ensure broad public participation in monument management.[103]

There is strong bipartisan local support for maintaining the protections of the monument and indeed, strengthening them through the creation of the Marianas Trench National Marine Sanctuary. For instance, in 2016, the Governor of the CNMI, Ralph D.L.G Torres and CNMI Congressman Gregorio Kilili Camacho Sablan sent a letter to President Obama requesting the initiation of a process to consider designating the monument as a national marine sanctuary.[104] Friends of Marianas Trench, a local organization, also filed a petition with NOAA requesting sanctuary designation.[105] Their petition included resolutions, letters, and signatures from local mayors, legislators, and 1,500 residents of the CNMI and Guam.[106] According to Torres and Sablan, "The marine areas of our monument encompass biological, chemical, and geological marvels—and provide critical habitat to an astonishing diversity of deep-sea life, corals, fish, whales, turtles, and seabirds."[107] They explained that strong local support exists for the creation of a sanctuary because "the federal government declared our unique marine resources a national treasure and we must pursue avenues for federal resources to ensure adequate conservation for future generations and the promised benefits for our people."[108]

Accordingly, while future funding of MTMNM is uncertain, the monument has received federal funding in the past and the constituents most impacted by the MTMNM not only support the designation of MTMNM as a national monument, but they have requested that protections set forth in Proclamation 8335 be strengthened through the creation of a marine sanctuary, thereby ensuring the protection and preservation of this national treasure.

* * *

Marine national monuments help to conserve some of our country's most prized underwater resources of natural, cultural, and historic significance. They protect key habitat for millions of species, preserve our nation's maritime and cultural heritage, and provide countless educational and scientific research opportunities. Setting aside and strengthening protections for marine areas both within and beyond the boundaries of our national parks is critically important to the health of ocean ecosystems throughout the country. The protection of marine treasures through our national parks and marine national monuments helps to preserve biodiversity, ensure the availability of educational

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[102] NOAA & U.S. Fish & Wildlife Serv., Marianas Trench Marine National Monument Planning Update Number 1 (May 2011), http://www.fpir.noaa.gov/Library/MNM/MTPlanningUpdate1.pdf.
[103] *Id.*
[104] *Marianas Monument Added to NOAA Sanctuary List; Now Eligible for Sanctuary Designation*, MARIANAS VARIETY (Mar. 17, 2017).
[105] *Id.*
[106] *Id.*
[107] John Borja, *Mariana Trench Monument May Become Sanctuary*, PACIFIC DAILY NEWS (Mar. 19, 2017, 5:57 PM), http://www.guampdn.com/story/news/2017/03/19/mariana-trench-monument-may-become-sanctuary/99243874/.
[108] *Id.*

and research opportunities, build resilience against the impacts of climate change and ocean acidification, and strengthen the deeply embedded connections between our communities and the oceans.

MTMNM is one of the most significant contributions to marine conservation in the world and complies with the requirements and objectives of the Antiquities Act. We urge you to support the designation of the Marianas Trench as a Marine National Monument and leave a lasting legacy for all Americans.

Thank you for your consideration of these comments.

Sincerely,

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

"Presidents Lack the Authority to Abolish or Diminish National Monuments" by Mark Squillace, Eric Biber, Nicholas S. Bryner, Sean B. Hecht. Virginia Law Review Online, Vol. 103, 55-71, June 2017.

Appendix B

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.

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[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 C

"Presidents Lack the Authority to Abolish or Diminish National Monuments" by Mark Squillace, Eric Biber, Nicholas S. Bryner, Sean B. Hecht. Virginia Law Review Online, Vol. 103, 55-71, June 2017.

VIRGINIA LAW REVIEW ONLINE

VOLUME 103 JUNE 2017 55–71

ESSAY

PRESIDENTS LACK THE AUTHORITY TO ABOLISH OR DIMINISH NATIONAL MONUMENTS*

INTRODUCTION

BY any measure, the Antiquities Act of 1906 has a remarkable legacy. Under the Antiquities Act, 16 presidents have proclaimed 157 national monuments, protecting a diverse range of historic, archaeological, cultural, and geologic resources.[1] Many of these monuments, including such iconic places as the Grand Canyon, Zion, Olympic, and Acadia, have been expanded and redesignated by Congress as national parks.

While the designation of national monuments is often celebrated, it has on occasion sparked local opposition, and led to calls for a President to abolish or shrink a national monument that a predecessor proclaimed.[2]

* Mark Squillace, Professor of Law, University of Colorado; Eric Biber, Professor of Law, University of California, Berkeley; Nicholas S. Bryner, Emmett/Frankel Fellow in Environmental Law and Policy, University of California, Los Angeles; Sean B. Hecht, Professor of Policy and Practice & Co-Executive Director, Emmett Institute on Climate Change and the Environment, University of California, Los Angeles. The authors express thanks to Emma Hamilton for research assistance.

[1] See Nat'l Parks Conservation Association, Monuments Protected Under the Antiquities Act (Jan. 13, 2017), https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act.

[2] On April 26, 2017, President Trump issued an Executive Order calling for the Secretary of the Interior to review certain national monument designations made since 1996. Exec. Order No. 13,792, Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20,429 (2017), https://perma.cc/CA3A-QEEQ. The Order encompasses Antiquities Act designations since 1996 over 100,000 acres in size or "where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders[.]" Id. at § 2(a). The Order asks the Secretary to make "recommendations for . . . Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out the policy" described in the Order. Id. at

This article examines the Antiquities Act and other statutes, concluding that the President lacks the legal authority to abolish or diminish national monuments. Instead, these powers are reserved to Congress.

I. THE AUTHORITY TO ABOLISH NATIONAL MONUMENTS

The Property Clause of the Constitution vests in Congress the "[p]ower to dispose of and make all needful Rules and Regulations respecting [public property]."[3] The U.S. Supreme Court has frequently reviewed this power in the context of public lands management and found it to be "without limitations."[4] Congress can, however, delegate power to the President or other members of the executive branch so long as it sets out an intelligible principle to guide the exercise of executive discretion.[5]

Congress did exactly this when it enacted the Antiquities Act and delegated to the President the power to "declare by public proclamation" national monuments.[6] At the same time, Congress did not, in the Antiquities Act or otherwise, delegate to the President the authority to modify or revoke the designation of monuments. Further, the Federal Land Policy and Management Act of 1976 ("FLPMA") makes it clear that the President does not have any implied authority to do so, but rather that Congress reserved for itself the power to modify or revoke monument designations.[7]

§ 2(d)-(e). The limits of presidential authority to abolish or diminish monuments has been the subject of prior analysis, including a report published by the Congressional Research Service in November 2016 and an analysis by the law firm Arnold & Porter Kaye Scholer. Alexandra M. Wyatt, Cong. Research Serv., R44687, Antiquities Act: Scope of Authority for Modification of National Monuments (2016), https://perma.cc/RCT9-UJ8N; Robert Rosenbaum et al., 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 (May 3, 2017), https://www.npca.org/resources/3197-legal-analysis-of-presidential-ability-to-revoke-national-monuments.

[3] U.S. Const. art. IV, § 3, cl. 2.

[4] See Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)). See also Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 294–295 (1958).

[5] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). The Supreme Court has also made clear that any delegation of legislative power must be construed narrowly to avoid constitutional problems. Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).

[6] 54 U.S.C. § 320301(a) (2012).

[7] See infra Section I.A.

A. The Antiquities Act does not grant authority to revoke a monument designation

The United States owns about one third of our nation's lands.[8] These lands, which exist throughout the country but are concentrated in the western United States, are managed by federal agencies for a wide range of purposes such as preservation, outdoor recreation, mineral and timber extraction, and ranching. Homestead, mining, and other laws transferred ownership rights over large areas of federal lands to private parties. At the same time, vast tracts of land remain in public ownership, and these lands contain a rich assortment of natural, historical, and cultural resources.

Over its long history, Congress has "withdrawn," or exempted, some federal public lands from statutes that allow for resource extraction and development, and "reserved" them for particular uses, including for preservation and resource conservation.[9] Congress has also, in several instances, delegated to the executive branch the authority to set aside lands for particular types of protection. The Antiquities Act of 1906 is one such delegation.

The core of the Antiquities Act is both simple and narrow. It reads, in part:

> [T]he President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected . . . .[10]

[8] See Public Land Law Review Commission, One Third of the Nation's Land 19 (1970).

[9] See, e.g., The Wilderness Act, 16 U.S.C. § 1133(d)(3) (2012) ("[E]ffective January 1, 1984, the minerals in lands designated. . . as wilderness are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing. . . ."); The Wild and Scenic Rivers Act, 16 U.S.C. § 1280(b) (2012) ("The minerals in any Federal lands which constitute the bed or bank or are situated within one-quarter mile of the bank of any river which is listed [for study as wild and scenic] are hereby withdrawn from all forms of appropriation under the mining laws. . . .").

[10] Antiquities Act of 1906, 34 Stat. 225 (1906) (prior to 2014 amendment). The language of the Antiquities Act was edited and re-codified in 2014 at 54 U.S.C. § 320301(a)-(b) with the stated intent of "conform[ing] to the understood policy, intent, and purpose of Congress

The narrow authority granted to the President to *reserve* land[11] under the Antiquities Act stands in marked contrast to contemporaneous laws that delegated much broader executive authority to designate, repeal, or modify other types of federal reservations of public lands. For example, the Pickett Act of 1910 allowed the President to withdraw public lands from "settlement, location, sale, or entry" and reserve these lands for a wide range of specified purposes "*until revoked by him or an Act of Congress*."[12] Likewise, the Forest Service Organic Act of 1897 authorized the President "to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification *may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve*."[13]

Unlike the Pickett Act and the Forest Service Organic Administration Act, the Antiquities Act withholds authority from the President to change or revoke a national monument designation. That authority remains with Congress under the Property Clause.

This interpretation of the President's authority finds support in the single authoritative executive branch source interpreting the scope of Presidential power to revoke monuments designated under the Antiquities Act: a 1938 opinion by Attorney General Homer Cummings.[14] President Franklin D. Roosevelt had specifically asked Cummings through the Secretary of the Interior whether the Antiquities Act authorized the President to revoke the Castle Pinckney National Monument. In his opinion, Cummings compared the language noted above from the Pickett Act and the Forest Service Organic Act with the language in the Antiquities Act, and concluded unequivocally that the Antiquities Act

in the original enactments[.]" Pub. L. No. 113-287, §§ 2-3, 128 Stat. 3094, 3259 (2014) (codified at 54 U.S.C. § 320301(a)-(b)).

[11] In an opinion dated September 15, 2000, the Office of Legal Counsel in the Department of Justice found that the authority to reserve federal land under the Antiquities Act encompassed the authority to proclaim a national monument in the territorial sea—3-12 nautical miles from the shore—or the exclusive economic zone—12-200 nautical miles from the shore. Administration of Coral Reef Resources in the Northwest Hawaiian Islands, 24 Op. O.L.C. 183, 183–85 (Sept. 15, 2000), https://perma.cc/E8J8-EDL3.

[12] Pickett Act, Pub. L. No. 303, 36 Stat. 847 (1910) (repealed 1976) (emphasis added).

[13] Forest Service Organic Act of 1897, ch. 2, 30 Stat. 34 (1897) (codified as amended at 16 U.S.C. § 475 (2006)) (emphasis added).

[14] Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185 (1938).

"does not authorize [the President] to abolish [national monuments] after they have been established."[15]

B. FLPMA clarifies that only Congress can revoke or downsize a national monument

In 1976, Congress enacted FLPMA.[16] FLPMA governs the management of federal public lands lacking any specific designation as a national park, national forest, national wildlife refuge, or other specialized unit. The text, structure, and legislative history of FLPMA confirm the conclusion of Attorney General Cummings that the President does not possess the authority to revoke or downsize a monument designation.

FLPMA codified federal policy to retain—rather than dispose of—the remaining federal public lands,[17] provided for specific procedures for land-use planning on those lands, and consolidated the wide-ranging legal authorities relating to the uses of those lands.[18] Prior to FLPMA's enactment, delegations of executive authority to withdraw public lands from development or resource extraction were dispersed among federal statutes, including the Pickett Act and the Forest Service Organic Act. Moreover, in *United States v. Midwest Oil Co.*, the Supreme Court held that the President enjoyed an implied power to withdraw public lands as might be necessary to protect the public interest, at least in the absence of direct statutory authority or prohibition.[19]

FLPMA consolidated and streamlined the President's withdrawal power. It repealed the Pickett Act, along with most other executive au-

[15] Id. at 185–86 (1938).

[16] Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified primarily at 43 U.S.C. §§ 1701–1782 (2012)) [hereinafter "FLPMA"].

[17] See 43 U.S.C. § 1701 (2012).

[18] Land use planning is specifically provided for under § 202 of FLPMA. Id. at § 1712. Additional public land use management authority is found at § 302 of FLPMA, which, among other things, requires the Secretary of the Interior to "take any action necessary to prevent the unnecessary or undue degradation of the lands." Id. at § 1732(b).

[19] 236 U.S. 459, 491 (1915). *Midwest Oil* involved withdrawals by President Taft of certain public lands from the operation of federal laws that allowed private parties to locate mining claims on public lands and thereby acquire vested rights to the minerals found there. The Secretary of the Interior recommended the withdrawals after receiving a report from the Director of the Geological Survey describing the alarming rate at which federal oil lands were being claimed by private parties. Noting the government's own need for petroleum resources to support its military, the report lamented that "the Government will be obliged to repurchase the very oil that it has practically given away . . . ." Id. at 466–67 (quotation marks omitted).

thority for withdrawing lands—with the notable exception of the Antiquities Act.[20] In place of these prior withdrawal authorities, FLPMA included a new provision—section 204—that authorizes the Secretary of the Interior "*to make, modify, extend, or revoke withdrawals* but only in accordance with the provisions and limitations of this section."[21]

FLPMA left unchanged the President's authority to create national monuments under the Antiquities Act, and included language confirming that Congress alone may modify or abolish monuments. Subsection 204(j) of FLPMA somewhat curiously states that "[t]he Secretary [of Interior] shall not . . . modify or revoke any withdrawal creating national monuments under [the Antiquities Act]. . . ."[22] Because only the *President*, and not the Secretary of the Interior, has authority to proclaim national monuments, Congress's reference to the *Secretary*'s authority under the Antiquities Act is anomalous and, as explained further below, may be the result of a drafting error. Nonetheless, this language reinforces the most plausible reading of the text of the Antiquities Act: that it deliberately provides for one-way designation authority. The President may act to create a national monument, but only Congress can modify or revoke that action.

An examination of FLPMA's legislative history removes any doubt that section 204(j) was intended to reserve to Congress the exclusive au-

[20] FLPMA, § 704(a), 90 Stat. 2792 (1976). The authority to create or modify forest reserves was repealed in 1907 for six specific states before its repeal was extended to all states in FLPMA Section 704(a). 34 Stat. 1269, 1271 (1907).

[21] 43 U.S.C. § 1714(a) (2012) (emphasis added).

[22] Id. at § 1714(j). The provision reads in its entirety as follows, with emphasis on the part relating to the Antiquities Act:

> The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; *modify or revoke any withdrawal creating national monuments under [the Antiquities Act]*; or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. Nothing in this Act is intended to modify or change any provision of the Act of February 27, 1976 (90 Stat. 199; 16 U.S.C. 668dd(a)).

Id. The reference in the first clause prohibiting the Secretary from "mak[ing]" a withdrawal "created by [an] Act of Congress" does not make sense because the Secretary cannot logically "make" a withdrawal already created by Congress. But it also is not relevant to the Antiquities Act since national monuments are created by the President, not Congress. Id. The second clause likewise addresses withdrawals made by Congress. The third clause is the only one that specifically addresses the Antiquities Act; it makes clear that the Secretary cannot modify or revoke national monuments. The final operative clause likewise prohibits the Secretary from revoking or modifying withdrawals, in that case involving National Wildlife Refuges.

thority to modify or revoke national monuments. FLPMA's restriction of executive withdrawal powers originated in the House version of the legislation.[23] Skepticism in the House towards executive withdrawal authority dated back to the 1970 report of the Public Lands Law Review Commission (PLLRC), a Congressionally-created special committee tasked with recommending a complete overhaul of the public land laws. The PLLRC report called on Congress to repeal all existing withdrawal powers, including the power to create national monuments under the Antiquities Act.[24] The Commission suggested replacing this authority with a comprehensive withdrawal process run by the Secretary of the Interior and closely supervised by Congress.[25]

The House Committee on Interior and Insular Affairs' Subcommittee on Public Lands largely followed this recommendation by including Section 204 in its draft of FLPMA.[26] Complementing this section, the bill presented to and passed by the House included a provision—ultimately enacted as Section 704(a) of FLPMA—that repealed the Pickett Act and other extant laws allowing executive withdrawals, as well as the implied executive authority to withdraw public lands that the Supreme Court had recognized in *Midwest Oil*.[27]

Consistent with this approach, the Subcommittee on Public Lands drafted Section 204(j) in order to constrain executive branch discretion in the context of national monuments. The Subcommittee frequently discussed the issue during its detailed markup sessions in 1975 and early 1976 on its version of the bill that would eventually become FLPMA.[28]

At an early markup session in May 1975, some subcommittee members, under the mistaken impression that the Secretary of the Interior created national monuments, expressed concerns that some future Secretary might modify or revoke them.[29] The Subcommittee therefore began

[23] See H.R. 13777, 94th Cong. § 604(b) (1976). The Senate bill contained no restrictions on executive withdrawal power. See S. 577, 94th Cong. (1975).

[24] See Public Land Law Review Commission, supra note 8, at 2, 54–57.

[25] Id. at 56–57.

[26] H.R. 13777, 94th Cong. § 204 (1976).

[27] See id. at § 604(b) (1976). See also *Midwest Oil*, 236 U.S. at 491.

[28] The subcommittee's hearings and markups focused on H.R. 5224, which eventually passed the full Committee in April 1976. An amended version was reintroduced as a clean bill, H.R. 13777, which was approved by the House and sent to the conference committee. See H.R. Rep. No. 94-1163, at 33 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6207 (1976) (describing replacement of H.R. 5224 with H.R. 13777 by committee).

[29] See H.R. 5224, et al., Public Land Policy and Management Act of 1975: Hearing Before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs, 94th Cong.

shaping the bill to eliminate any possibility of unilateral executive power to modify or revoke monuments, while maintaining the existing power to create monuments.[30]

Once the Subcommittee's misunderstanding about Secretarial authority to designate monuments became apparent, the Subcommittee also proposed shifting the authority to create national monuments from the President to the Secretary, in the pattern of consolidating withdrawal authority in Section 204.[31] The first version of what later became Section 204(j) of FLPMA was drafted after this discussion, as was a provision that would have amended the Antiquities Act to transfer designation authority from the President to the Secretary of the Interior.[32] The Ford Administration appeared to object generally to constraining executive power to withdraw public lands.[33] As part of the subsequent changes to the draft legislation, the Subcommittee dropped the provision that would

88–93 (May 6, 1975) [hereinafter May 6 Hearing]. Later statements by subcommittee members indicate that their understanding was that the Secretary had delegated authority to propose the creation of monuments, but that they were ultimately proclaimed by the President. H.R. 5224 & H.R. 5622: Hearing before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs, 94th Cong. 184 (June 6, 1975) [hereinafter June 6 Hearing].

[30] May 6 Hearing, supra note 29, at 91 (statement of Rep. Melcher):

> I would say that it would be better for us if, in presenting this bill to the House, for that matter in full committee, if we made it clear that the Secretary and perhaps also make it part of the bill somewhere, that he can not revoke a national monument.

See also id. at 93 (statement of committee staff member Irving Senzel: "So we could put in here that—we can put in the statement that he cannot revoke national monuments once created."); H.R. 5224 & H.R. 5622: Hearing Before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs, 94th Cong. 176 (June 6, 1975) (statement of committee staff member Irving Senzel: "In accordance with the decision made the last time, there is a section added in there that provides that no modification or revocation of national monuments can be made except by act of Congress.").

[31] See June 6 Hearing, supra note 29, at 183–85.

[32] See Public Land Policy and Management Act of 1975 Print No. 2: Hearing Before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs, 94th Cong. 23–24 (Sept. 8, 1975) (prohibiting the Secretary from modifying or revoking a national monument). Id. at 92 (amending the Antiquities Act by substituting "Secretary of the Interior" for "President of the United States").

[33] See H.R. Rep. No. 94-1163, at 41–42, 52 (May 15, 1976). The comments from the Assistant Secretary of the Interior from November 21, 1975, on Subcommittee Print No. 2 listed the proposed changes to withdrawal authority as one of the reasons for the Administration's opposition to that version of the bill, noting that under it, "the proposed . . . Act would be the only basis for withdrawal authority." Id. at 52.

have transferred monument designation authority from the President to the Secretary.[34]

Nonetheless, the Subcommittee retained Section 204(j). Pairing Section 204(j) with the proposed transfer of monument designation power strongly suggests that the language of Section 204(j) was not an effort to constrain (non-existent) Secretarial authority to modify or revoke national monuments while retaining Presidential authority to do so. Instead, it was part of an overall plan to constrain and systematize all executive branch withdrawal power, and reserve to Congress the powers to modify or rescind monument designations.[35] The House Committee's Report on the bill makes clear that this provision was designed to prevent *any* unilateral executive modification or revocation of national monuments. In describing Section 204 of the bill as it was presented for debate on the House floor, the Report explains:

> With certain exceptions, [the bill] will repeal all existing law relating to executive authority to create, modify, and terminate withdrawals and reservations. It would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, Indian reservations, certain defense withdrawals, and withdrawals for National Wild and Scenic Rivers, National Trails, and for other "national" recreation units, such as National Recreation Areas and National Seashores. *It would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act* and for modification and revocation of withdrawals adding lands to the National Wildlife Refuge System. These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.[36]

Thus, notwithstanding the anomalous reference to the Secretary in Section 204(j), Congress explicitly stated its intention to reserve for it-

[34] See See Public Land Policy and Management Act of 1975 Print No. 4: Hearing Before the Subcomm. on Pub. Lands of the H. Comm. on Interior and Insular Affairs 94th Cong. (March 16, 1976).

[35] See id. at 30.

[36] H.R. Rep. No. 94-1163, at 9 (May 15, 1976) (emphasis added). Floor debates in the House do not contain any record of discussing this particular issue, and the Conference Report on FLPMA, later in 1976, did not specifically address it.

self the authority to modify or revoke national monuments.[37] The plain language of this report, combined with other statements in the legislative history and the process by which Congress created Section 204(j), make clear that Congress' intent was to constrain all executive branch power to modify or revoke national monuments, not just Secretarial authority.

In light of the text of the Antiquities Act, the contrasting language in other statutes at the turn of the 20th century, and the changes to federal land management law in FLPMA, the Antiquities Act must be construed to limit the President's authority to proclaiming national monuments on federal lands. Only Congress can modify or revoke such proclamations.

II. AUTHORITY FOR SHRINKING NATIONAL MONUMENTS OR REMOVING RESTRICTIVE TERMS

If the President cannot abolish a national monument because Congress did not delegate that authority to the President, it follows that the President also lacks the power to downsize or loosen the protections afforded to a monument. This conclusion is reinforced by the use of the phrase "modify and revoke" in Section 204(j) of FLPMA to describe prohibited actions.[38] Moreover, while the Antiquities Act limits national monuments to "the smallest area compatible with the proper care and management of the objects to be protected,"[39] that language does not grant the President the authority to second-guess the judgments made by previous Presidents regarding the area or level of protection needed to protect the objects identified in an Antiquities Act proclamation.

[37] The most plausible interpretation of the reference to the Secretary in the text is that there was a drafting error on the part of the Subcommittee in failing to update the reference in Section 204(j) when it dropped the parallel language transferring monument designation authority from the President to the Secretary. The only other plausible interpretation of Section 204(j) is that the provision was designed to make clear that Section 204(a), which authorizes the Secretary to modify or revoke withdrawals, was not intended to grant new authority to the Secretary over national monuments. Under this reading, the reference to the Secretary in Section 204(j) would not be anomalous but would serve the specific purpose of restricting the scope of Section 204(a). But whether the reference to the Secretary in Section 204(j) was a drafting error, or simply a clarification about the limits of the Secretary's power under Section 204(a) does not really matter because either interpretation is consistent with the conclusion that Congress intended to reserve for itself the power to modify or revoke national monuments. FLPMA's legislative history strongly reinforces this point. See supra notes 29–36.

[38] FLPMA, § 204(j), 90 Stat. 2743, 2754 (1976).

[39] 54 U.S.C. § 320301(b).

A. Presidents lack legal authority to shrink national monuments

Over the first several decades of the Antiquities Act's existence, various Presidents reduced the size of various monuments that their predecessors had designated. Most of these actions were relatively minor, although the decision by President Woodrow Wilson to dramatically reduce the size of the Mount Olympus National Monument, which is described briefly below, was both significant and controversial.[40] Importantly though, no Presidential decision to reduce the size of a national monument has ever been tested in court, and so no court has ever ruled on the legality of such an action. Moreover, all such actions occurred before 1976 when FLPMA became law. As the language and legislative history of FLPMA make clear, Congress has quite intentionally reserved to itself "the authority to *modify* and revoke withdrawals for national monuments created under the Antiquities Act."[41]

In his 1938 opinion, Attorney General Cummings acknowledged the history of modifications to national monuments, noting that "the President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom."[42] The opinion, however, does not directly address whether these actions were legal, and does not analyze this issue, other than to reference the language from the Antiquities Act that limits monuments to "the smallest area compatible with the proper care and management of the objects to be protected."[43]

The Interior Department's Solicitors did review several presidential attempts to shrink monuments, but reached inconsistent conclusions. In

[40] See Mark Squillace, The Monumental Legacy of the Antiquities Act of 1906, 37 Ga. L. Rev. 473, 561–64 (2003).

[41] H.R. Rep. 94-1163, at 9 (emphasis added). 43 U.S.C. 1714(j) ("The Secretary shall not. . . *modify* or revoke any withdrawal creating national monuments under [the Antiquities Act].") (emphasis added).

[42] Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188 (1938).

[43] Id. at 188 (quoting 54 U.S.C. § 320301(b)). See also Wyatt, supra note 2, at 5. Much like the Attorney General's 1938 Opinion, the CRS report acknowledges that "there is precedent for Presidents to reduce the size of national monuments. . .", and that "[s]uch actions are presumably based on the determination that the areas to be excluded represent the President's judgment as to 'the smallest area compatible with the proper care and management of the objects to be protected.'" Id. But also like the Attorney General's Opinion, the report never actually analyzes the legal issue in depth and it does not address the particular question as to whether FLPMA might have resolved or clarified the issue against allowing presidential modifications. Id.

1915, the Solicitor examined President Woodrow Wilson's proposal to shrink the Mount Olympus National Monument, which President Theodore Roosevelt had designated in 1909.[44] Without addressing the core legal issue of whether the President had authority to change the monument status of lands designated by a prior President, the Solicitor expressed the opinion that lands removed from the monument would revert to national forest (rather than unreserved public domain) because they had previously been national forest lands.[45]

In the end, President Wilson did downsize the Mount Olympus National Monument by more than 313,000 acres, nearly cutting it in half.[46] Despite an outcry from the conservation community, Wilson's decision went unchallenged in court.[47]

In 1924, for the first time, the Solicitor squarely confronted the issue of whether a President has the authority to reduce the size of a national monument, concluding that the President lacked this authority. The Solicitor considered whether the President could reduce the size of the Gran Quivira[48] and Chaco Canyon National Monuments.[49] Relying on a 1921 Attorney General's opinion involving "public land reserved for lighthouse purposes," the Solicitor concluded that the President was not authorized to restore lands to the public domain that had been previously set aside as part of a national monument.[50] The Solicitor confirmed this position in a subsequent decision issued in 1932.[51]

[44] Proclamation No. 869, 35 Stat. 2247 (1909) (creating Mount Olympus National Monument); see also Squillace, supra note 40, at 562–63 (discussing the review of President Wilson's proposal).

[45] U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of April 20, 1915, at 4–6. The University of Colorado Law Library has established a permanent, online database that includes the four unpublished Solicitor's Opinions cited in this article. That database is available at http://scholar.law.colorado.edu/research-data/4/.

[46] Proclamation No. 1293, 39 Stat. 1726 (1915); Squillace, supra note 40, at 562.

[47] See Squillace, supra note 40, at 563–64.

[48] Proclamation No. 959, 36 Stat. 2503 (1909) (creating Gran Quivira National Monument).

[49] Proclamation No. 740, 35 Stat. 2119 (1907) (creating Chaco Canyon National Monument).

[50] U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of June 3, 1924, M-12501 (citing 32 Op. Att'y Gen 438 (1921)). In language that anticipated the later 1938 opinion, this 1921 Attorney General's opinion concluded that "[t]he power to thus reserve public lands and appropriate them . . . does not necessarily include the power to either restore them to the general public domain or transfer them to another department." Disposition of Abandoned Lighthouse Sites, 32 Op. Att'y Gen. 488, 488–91 (1921) (quoting Camp Hancock–Transfer to Dept. of Agriculture, 28 Op. Att'y Gen. 143, 144 (1921)). The Solicitor's 1924 opinion on Gran Quivara and Chaco Canyon might be distinguished from the 1915

Subsequently, in 1935, the Interior Solicitor reversed the agency's position, but this time on somewhat narrow grounds.[52] This opinion relied heavily on the implied authority of the President to make and modify withdrawals that the U.S. Supreme Court upheld in *United States v. Midwest Oil Co*.[53] The argument that *Midwest Oil* imbues the President with implied authority to modify or abolish national monuments is problematic, however, for at least three reasons. First, as described previously, Congress enjoys plenary authority over our public lands under the Constitution, and the President's authority to proclaim a national monument derives solely from the delegation of that power to the President under the Antiquities Act.[54] But the Antiquities Act grants the President only the power to reserve land, not to modify or revoke such reservations. Such actions, therefore, are beyond the scope of Congress' delegation. Second, the *Midwest Oil* decision relied heavily on the perception that Presidential action was necessary to protect the public interest by preventing public lands from exploitation for private gain. Construing the law to allow a President to open lands to private exploitation protects no such interest. Finally, and as noted previously, Congress expressly overruled *Midwest Oil* when it enacted FLPMA in 1976.[55] Thus, even if those earlier, pre-FLPMA monument modifications might arguably have been supported by implied presidential authority, that implied authority

opinion on Mount Olympus National Monument, on the grounds that the earlier opinion had specifically supported the modification of the monument because the lands would not be restored to the public domain, but would rather be reclassified as national forests. Solicitor's Opinion of April 20, 1915, supra note 45, at 6. The legal argument against the modification of monument proclamations, however, has never rested on whether the lands would be restored to the public domain or revert to another reservation or designation.

[51] U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of May 16, 1932, M-27025 (opinion regarding Death Valley National Monument).

[52] U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of January 30, 1935, M-27657 (upholding the validity of the reduction of Mount Olympus National Monument since no interdepartmental transfer). See also National Monuments, 60 Interior Dec. 9, 9–10 (July 21, 1947) (solicitor opinion reaffirming the 1935 opinion).

[53] U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of January 30, 1935, M-27657; United States v. Midwest Oil Co., 236 U.S. 459, 483 (1915).

[54] See , supra Part I.

[55] FLPMA, § 704(a), 90 Stat. 2792 (1976). While the text of Section 704(a) specifically mentions the power of the President "to make withdrawals," given the clear intent of Congress in FLPMA to reduce executive withdrawal power, the section is best understood as also repealing any inherent Presidential power recognized in *Midwest Oil* to modify or revoke withdrawals as well.

is no longer available to justify the shrinking of national monuments following the passage of FLPMA.[56]

Some critics of national monument designations have argued that a President can downsize a national monument by demonstrating that the area reserved does not represent the "smallest area compatible" with the protection of the resources and sites identified in the monument proclamation.[57] But allowing a President to second-guess the judgment of a predecessor as to the amount of land needed to protect the objects identified in a proclamation is fraught with peril because it essentially denies the first President the power that Congress granted to proclaim monuments. If that were the law, then nothing would stop a President from deciding that the objects identified by a prior President were themselves not worthy of protection. Congress clearly intended the one-way power to reserve lands as national monuments to avoid this danger. Moreover, the fact that national monuments often encompass large landscapes, which are themselves denoted as the objects warranting protection, is not a cause for concern because the courts, including the U.S. Supreme Court, have consistently upheld the use of the Antiquities Act to protect such landscapes as "objects of historic or scientific interest."[58] Courts

[56] This repeal removes any presumption of inherent Presidential authority to withdraw public lands or modify past withdrawals. As noted above, such authority, if any, must derive from an express delegation from the Congress. In this way, the power of the President or any executive branch agency over public lands is unlike the inherent power of the President to issue, amend, or repeal executive orders or the inherent power of the Congress to promulgate, amend or repeal laws. It is arguably akin to the power of administrative agencies to issue, amend, or repeal rules but, unlike the Antiquities Act, each of these powers has been expressly delegated to agencies by the Administrative Procedure Act. See 5 U.S.C. § 551(5) (2012) (definition of "rulemaking").

[57] See, e.g., John Yoo & Todd Gaziano, Am. Enter. Inst., Presidential Authority to Revoke or Reduce National Monument Designations 14–18 (2017), https://perma.cc/PX7W-UD3E. The Interior Solicitor's 1935 opinion, and a subsequent one in 1947, addressed this issue in reviewing and supporting the validity of the decision by Woodrow Wilson to shrink the Mt. Olympus National Monument. Squillace, supra note 40, at 560–64. According to that opinion, both the Interior and Agriculture Departments thought the area was "larger than necessary." U.S. Dep't of the Interior, Office of the Solicitor, Solicitor's Opinion of Jan. 30, 1935, M-27657 (http://scholar.law.colorado.edu/research-data/4/.). However, there is no legal basis for concluding that the opinions of cabinet officials should overturn a prior presidential determination as to the scope and management requirements of a protected monument. Squillace, supra note 40, at 560–64.

[58] See Cameron v. United States, 252 U.S. 450, 455–56 (1920). The Court dismissed the plaintiff's objection to the establishment of the 808,120 acre Grand Canyon National Monument with these words:

> The Grand Canyon, as stated in [President Roosevelt's] proclamation, "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not

have upheld two prominent examples of landscape level monuments under these broad interpretations: the Grand Canyon,[59] designated less than two years after the Antiquities Act's passage; and the Giant Sequoia National Monument, created in 2000.[60]

It is conceivable, of course, that a revised proclamation might be needed to correct a mistake or to clarify a legal description in the original proclamation, as occurred very early on when President Taft proclaimed the Navajo National Monument and subsequently issued a second proclamation clarifying what had been an extremely ambiguous legal description.[61] But the clear restriction on modifying or revoking a national monument designation—cemented by FLPMA—indicates that a President cannot simply revisit a predecessor's decision about how much public land should be protected.

> in 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.

Id. at 455–56. See also, Tulare Cty. v. Bush, 306 F.3d 1138, 1140–41 (D.C. Cir. 2002) (discussing Giant Sequoia National Monument). Additional Supreme Court cases that address Antiquities Act designations support this broad interpretation of what may constitute an "object of historic or scientific interest." See United States v. California, 436 U.S. 32, 34 (1978) (Channel Islands); Cappaert v. United States, 426 U.S. 128, 131–32, 142 (1976) (Devil's Hole).

[59] Cameron, 252 U.S. at 455–56.

[60] Tulare Cty., 306 F.3d at 1140–41.

[61] Taft's original proclamation for the Navajo National Monument in Arizona protected:

> [A]ll prehistoric cliff dwellings, pueblo and other ruins and relics of prehistoric peoples, situated upon the Navajo Indian Reservation, Arizona between the parallels of latitude thirty-six degrees thirty minutes North, and thirty-seven degrees North, and between longitude one hundred and ten degrees West and one hundred and ten degrees forty-five minutes West . . . together with forty acres of land upon which each ruin is located, in square form, the side lines running north and south and east and west, equidistant from the respective centers of said ruins.

Proclamation No. 873, 36 Stat. 2491, 2491–92 (1909). The map accompanying the proclamation states that Navajo National Monument is "[e]mbracing all cliff-dwelling and pueblo ruins between the parallel of latitude 36°30' North and 37 North and longitude 110° West and 110° 45' West. . . with 40 acres of land in square form around each of said ruins." Id. at 493 Thus, the original proclamation was ambiguous. It plainly was not intended to include all of the lands within the latitude and longitude description but only 40 acres around the ruins in that area. The map specifically identified at least 7 sites as "ruins" and appeared to denote a handful of other sites that might have been intended for protection under the original proclamation, although the map is a little unclear on this point. The revised proclamation issued three years later, also by Taft, clarified the ambiguous references in the original proclamation. It included a survey done after the original proclamation and protects two, 160-acre tracts of land and one, 40 acre tract. Proclamation No. 1186, 37 Stat. 1733, 1733–34, 1738 (1912).

B. Removing protections that apply on national monuments would be an unlawful modification

A related issue is whether a President can modify a national monument proclamation by removing some or all of the protections applied to the monument area, such as limitations on livestock grazing, mineral leasing, or mining claims location. Plainly, these are types of "modifications." As discussed above, Congress's use of the phrase "modify and revoke" to describe prohibited actions demonstrates that the same legal principles apply here as would apply to an attempt to abolish a monument.[62] More generally, if a President lacks the authority to abolish or downsize a monument, it would also suggest a lack of presidential authority to remove any restrictions imposed by a predecessor. Moreover, to the extent that a claim of presidential authority rests on an argument that the President can shrink a monument to conform to the "smallest area compatible" language of the Antiquities Act, that argument would be inapplicable to an effort to remove restrictive language from a predecessor's national monument proclamation.[63]

Aside from these legal arguments, construing the Antiquities Act as providing one-way Presidential designation authority is consistent with the fundamental goal of the statute. Faced with a concern that historical, archaeological, and natural or scenic resources could be damaged or lost, Congress purposefully devised a delegation to the President to act quickly to ensure the preservation of objects of historic and scientific interest on public lands before they are looted or compromised by incompatible land uses, such as the location of mining claims. Once the President has determined that these objects are worthy of protection, no future President should be able to undermine that choice. That is a decision that Congress lawfully reserved for itself under the terms of the Antiquities Act, a point that Congress reinforced in the text and legislative history of FLPMA.

[62] See supra Section II.A.

[63] In National Monuments, supra note 52, at 10, the Solicitor acknowledged that the Mineral Leasing Act does not apply to national monuments. Nonetheless, he held that "in the event of actual or threatened drainage of oil or gas under lands within the Jackson Hole National Monument by wells on non-federally-owned lands, the authority to take the necessary protective action, including the issuance of oil and gas leases, would impliedly exist." Id. at 10–11. To be clear, however, the Solicitor was not sanctioning surface occupancy of national monument lands but only the issuance of leases that would allow the federal government and the lessee to share in the oil and gas production that was being extracted from a well on nonfederal lands. For further discussion of this issue, see Squillace, supra note 40, at 566–68.

CONCLUSION

Our conclusion, based on analysis of the text of the Antiquities Act and other statutes, legislative history, and prior legal opinions, is that the President lacks the authority to abolish or downsize a monument, or otherwise weaken the protections afforded by a national monument proclamation declared by a predecessor. Moreover, while we believe this to be the correct reading of the law from the time of enactment of the Antiquities Act in 1906, the enactment of FLPMA in 1976 removes any doubt as to whether Congress intended to reserve for itself the power to revoke or modify national monument proclamations, because Congress stated so explicitly.

Presidents may retain some authority to clarify a proclamation that contains an ambiguous legal description or a mistake of fact.[64] Where expert opinions differ, however, courts should defer to the choices made by the President proclaiming the monument and the relevant objects designated for protection. Otherwise, a future President could undermine the one-way conservation authority afforded the President under the Antiquities Act and the congressional decision to reserve for itself the authority to abolish or modify national monuments.

The remarkable success of the Antiquities Act in preserving many of our nation's most iconic places is perhaps best captured by the fact that Congress has never repealed any significant monument designation.[65] Instead, in many instances, Congress has expanded national monuments and redesignated them as national parks.[66] For more than 100 years, Presidents from Teddy Roosevelt to Barack Obama have used the Antiquities Act to protect our historical, scientific, and cultural heritage, often at the very moment when these resources were at risk of exploitation. That is the enduring legacy of this extraordinary law. And it remains our best hope for preserving our public land resources well into the future.

[64] See supra note 61 and accompanying text.

[65] About a dozen monuments have been abolished by the Congress. None of these were larger than 10,000 acres, and no monument established by a president has been de-designated by Congress without redesignating the land as part of another national monument or other protected area since 1956. See Squillace, supra note 40, at 550, 585–610 (appendix). See also National Park Service, Archeology Program: Frequently Asked Questions (May 31, 2017), https://perma.cc/BW3C-X52Z (noting no parks as "abolished" since 1956 except for Misty Fjords, which was subsequently made part of Tongass National Park).

[66] See e.g., Proclamation No. 277, 40 Stat. 1175 (1919)(expanding size of Grand Canyon park).