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THE DEBATE OVER BEARS EARS NATIONAL MONUMENT

PUBLISHED ON *September 3, 2018* by *Emilie Johnson and Nicholas Joy*



After my first year of law school, my wife and I went on a road trip through parts of Utah and Arizona. We visited Zion National Park, and my time there reinvigorated me and reminded me that life exists beyond law school.

While I was discovering the beauty of our Nation's protected lands, President Trump was reconsidering the existence of another, [Bears Ears National Monument](https://news.nationalgeographic.com/2017/12/trump-shrinks-bears-ears-grand-staircase-escalante-national-monuments/) (<https://news.nationalgeographic.com/2017/12/trump-shrinks-bears-ears-grand-staircase-escalante-national-monuments/>). I was unaware at the time, but two weeks before my trip, on April 26, 2017, President Trump issued an Executive Order (E/O) that called for a [review of national monument](https://www.whitehouse.gov/presidential-actions/presidential-executive-order-review-designations-antiquities-act/) (<https://www.whitehouse.gov/presidential-actions/presidential-executive-order-review-designations-antiquities-act/>), designations made after 1996, which were over 100,000 acres in size. The Secretary of the Interior, Ryan Zinke, reviewed [President Obama's E/O](https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument) (<https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument>), that established Bears Ears National Monument and found the national monument to be too large. Trump subsequently signed an [E/O](https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/) (<https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/>), that decreased the total size of Bears Ears National Monument by 80%



Photo by Emilie Johnson

The Antiquities Act

The Antiquities Act of 1906, gives the President the power to designate historically or scientifically significant land, owned or controlled by the federal government, as a national monument. The designation must be kept to the “smallest area compatible with proper care and management” of the federal land upon which they are located. The Antiquities Act was designed in response to an urgent need to protect the Nation’s historic landmarks and objects of scientific importance. On September 24, 1999, Congress amended the (<https://www.congress.gov/congressional-report/106th-congress/senate-report/250/1>). Antiquities Act; the President is now required to seek feedback from government officials and citizens who reside in the state where the monument designation would be located, before moving forward with the designation.

While no phrase in the Antiquities Act allows the President to decrease or rescind a previous national monument designation, it has still been done. President Wilson (<http://www.audubon.org/news/-legal-department-interior-considers-resizing-or-rescinding-national-monuments>) decreased the size of Mount Olympus in 1915, citing a need for timber during World War I. President Wilson’s E/O was never reviewed by the courts, and Congress later restored the monument to its original size. In 1962, President Kennedy relied on the powers granted to him by the Antiquities Act, when he reduced the total size of the Natural Bridges Monument after it was determined that parts of the site had no archaeological value (<http://www.presidency.ucsb.edu/ws/?pid=24031>).

Now, Trump is arguing that Obama’s E/O did not comply with the Antiquities Act. While it is possible that Obama’s E/O did not comply with the language of the Antiquities Act, the appropriate remedy would be a preliminary review by the Secretary of the Interior, an injunction by the Supreme Court, or legislative action that increases or restricts presidential power to modify national monuments. Simply put, there is no provision in the Antiquities Act that says a President can use his or her authority to revise or rescind a prior President’s national monument designation. Obama’s E/O detailed why the total acreage of Bears Ears National Monument is necessary to protect the scientific and historical significance of the area. Obama’s E/O considered numerous factors (<https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears->

[ears-national-monument](#)) and welcomed public feedback during the drafting process; now, only a year removed from when Obama signed his E/O, do Trump's findings really justify an 80% decrease of the monument's total acreage?



Photo by Emilie Johnson

A Tale of Two Executive Orders and the Bears Ears National Monument Designation.

On December 28, 2016, President Obama signed an E/O (<https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument>) that established the Bears Ears National Monument, located in South-Eastern Utah. Before the boundaries of the monument were established, Obama considered “the uniqueness and nature of the objects, the nature of the needed protection, and [the] protection provided by other laws.” President Obama asserted that the new 1.35-million-acre monument was confined to the smallest area compatible with the proper care and management of the objects to be protected.

In keeping with the 1999 amendment to the Antiquities Act, President Obama welcomed the input and involvement of local: government officials, Native American tribes and recreational users in the construction and management of the Bears Ears National Monument. Obama created a commission (<https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument>) that would provide guidance and recommendations for how the monument should be managed. The commission was comprised of one officer from each of the Hopi Nation, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah Ouray, and Zuni Tribe; each tribe would elect its officer. The Secretary of the Interior and the Secretary of Agriculture were directed to work closely with the commission to manage the land. Obama's E/O was met with mixed reviews (<https://www.theatlantic.com/science/archive/2016/12/obamas-environmental-legacy-in-two-buttes/511889/>); environmentalist groups and local Native American tribes applauded the President's action, but Republican politicians and conservative groups in Utah chastised the President's action.

While campaigning in 2016, President Trump promised crowds in Utah that once elected he would modify the size of Bears Ears National Monument. Once Trump took office, the Utah state legislature looked to hold Trump to his campaign promises and passed H.C.R. 11 (<https://le.utah.gov/~2017/bills/static/HCR011.html>); a bill that directly asked the President to rescind

Obama's E/O that established Bears Ears National Monument. Trump did not immediately rescind the designation; instead, he signed E/O 13792 (<https://www.federalregister.gov/documents/2017/05/01/2017-08908/review-of-designations-under-the-antiquities-act>), which called for the Secretary of the Interior to review specific national monument sites, including Bears Ears. After the review, Zinke determined that (<https://www.deseretnews.com/article/865681811/Zinke-Bears-Ears-monument-boundaries-need-to-change.html>) "rather than designating an area encompassing almost 1.5 million acres . . . it would have been more appropriate to identify and separate the areas that have significant objects to be protected." Zinke also concluded that some of the areas were better suited for a different type of federal protection, and some of the sites were already adequately protected by federal statutes. Zinke recommended that the current boundary lines of the Bears Ears National Monument be modified in order to meet the requirements of the Antiquities Act. Zinke also suggested that Congress should pass legislation that would require the input of local Native American tribes to be considered.

On December 4, 2017, less than a year after President Obama signed the E/O that established Bears Ears National Monument, President Trump signed an E/O (<https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/>) that shrunk its size by 1,150,860 acres. In a speech accompanying the signing of the E/O, President Trump announced (<https://wildlifemanagement.institute/outdoor-news-bulletin/may-2017/trump-executive-order-targets-national-monuments-antiquities-act>) that he was "putting the states back in charge," adding that "the previous administration [had] bypassed the states to place over 265 million acres [of] . . . land and water under federal control through the abuse of the monuments designation." President Trump, through his own proclamation, modified the monument to better fit within the guidelines of the Antiquities Act, and removed some of the monuments protected areas because they were already "adequately protected by existing law."

Three days after Trump signed the E/O, nine-conservationist groups filed a joint lawsuit that challenged the constitutionality of Trump's action. In the complaint (https://www.biologicaldiversity.org/campaigns/save_our_national_monuments/pdfs/Bears_Ears_complaint.pdf), the plaintiffs alleged that the President exceeded the scope of his authority under the Antiquities Act. The lawsuit is still pending but given the lack of judicial involvement in E/O historically, the outcome is nearly impossible to determine based on the previous precedent.



Photo by Emilie Johnson

What Can be Done Going Forward?

Since President Trump reduced the size of Bears Ears National Monument there have been several bills proposed in the Senate. The proposed bills have been aimed at establishing lasting protections for Bears Ears. Most recently, in January 2018, proposed bill S. 2354

(<https://www.tomudall.senate.gov/imo/media/doc/Antiquities%20Act%20of%202018%20Bill%20Summary.pdf>) was put before the Senate for a vote. The proposed bill would establish that “national monuments may only be reduced, diminished or revoked by an Act of Congress,” and would establish a National Treasury fund to ensure the proper upkeep of national monuments in the future. The proposed bill would also restore the boundaries of the monument back to the original acreage laid out in Obama’s unrevised E/O, approximately 1,931,997 acres. Other proposed legislation has sought to expand the total acreage

([https://www.westlaw.com/Document/IF1309481DA6E11E789B1C5C1359D8D07/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cb1t1.0](https://www.westlaw.com/Document/IF1309481DA6E11E789B1C5C1359D8D07/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cb1t1.0)) of Bears Ears National Monument site or to establish it as the first-ever “tribally managed national monument” ([https://www.westlaw.com/Document/IAC54DE11DE5C11E7A3DAF772ADC1AD95/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cb1t1.0](https://www.westlaw.com/Document/IAC54DE11DE5C11E7A3DAF772ADC1AD95/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cb1t1.0)).”

Unfortunately, there has been little progress in getting any of the proposed legislation passed. Congress seems unwilling to implement any legislation that would supersede or contradict Trump's E/O. But going forward, Congress should try to pass legislation that would establish long-lasting protections for the Bears Ears National Monument, in a manner that cannot be modified by a subsequent E/O. A bipartisan committee should be established to weigh all the public input, and any legislative action should consider the importance of the land for all interested parties.

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