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Submitted electronically via regulations.gov

July 10, 2017

The Honorable Ryan Zinke
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Monument Review, MS-1530
Washington, DC 20240

Re: Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment (May 11, 2017)

Dear Secretary Zinke:

Defenders of Wildlife (Defenders) respectfully submits the following comments on Organ Mountains-Desert Peaks National Monument for consideration in the Department of the Interior's "Review of Certain National Monuments Established Since 1996."¹

Founded in 1947, Defenders of Wildlife is a national non-profit conservation organization focused on conserving and restoring native species and the habitat upon which they depend. Based in Washington, DC, the organization also maintains six regional field offices, including in the Southwest. Defenders is deeply involved in public lands management and wildlife conservation, including the protection and recovery of flora and fauna in New Mexico. We submit these comments on behalf of our almost 1.2 million members and supporters nationwide, including our 11,967 members in New Mexico.

President Trump's Executive Order 13792² directed you to "review" national monuments designated or expanded since January 1, 1996, pursuant to the Antiquities Act of 1906.³ Section 1 of the order, "Policy," states in pertinent part: "[d]esignations should be made in accordance with the requirements and original objectives of the Act and appropriately balance the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities."

¹ 82 Fed. Reg. 22016 (May 11, 2017).

² 82 Fed. Reg. 20429 (May 1, 2017).

³ Act of June 8, 1906, ch. 3060, 34 Stat. 225, codified at 54 U.S.C. ch. 3203.

Section 2 of Executive Order 13792 establishes seven criteria for reviewing national monument designations or expansions since January 1, 1996, either 1) where the designation or the designation after expansion exceeded 100,000 acres or 2) “where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders.” The review is to determine whether each designation or expansion “conforms to the policy set forth in section 1 of the order.” At the conclusion of this review, you are to “formulate recommendations for Presidential actions, legislative proposals, or other appropriate actions to carry out that policy.”⁴

Twenty-seven national monuments are listed in the Notice of Opportunity for Public Comment, including five marine national monuments that are also subject to separate review under Executive Order 13795, “Implementing an America-First Offshore Energy Strategy.”⁵ Defenders firmly believes that none of America’s national monuments should be revoked, reduced in size or opened to nonconforming uses, including Organ Mountains-Desert Peaks and the 26 other (marine) national monuments identified for administrative review.

Organ Mountains-Desert Peaks National Monument protects invaluable cultural, historic and scientific resources that provide immeasurable social and economic benefits to local communities and citizens across the United States. These public lands merit the protections provided as a national monument, a designation that was made fully consistent with the Antiquities Act of and the policy set forth in section 1 of Executive Order 13792.

The president lacks the legal authority to revoke or reduce the size of a national monument and should additionally refrain from seeking legislative action or taking any other action to undermine the designation. Defenders of Wildlife therefore urges that your report should not include any recommendations to alter the size or status of Organ Mountains-Desert Peaks National Monument.

Thank you for your attention to these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'RDreher', with a horizontal line extending to the right from the end of the signature.

Robert G. Dreher
Senior Vice President, Conservation Programs

⁴ 82 Fed. Reg. 22016 (May 11, 2017).

⁵ Exec. Order No. 13795, 82 Fed. Reg. 20815 (May 3, 2017).

PROCLAMATION OF ORGAN MOUNTAINS-DESERT PEAKS NATIONAL MONUMENT WAS LEGAL AND APPROPRIATE UNDER THE ANTIQUITIES ACT

The Antiquities Act Imposes Few Requirements Restricting the President's Authority to Designate National Monuments

In the Antiquities Act of 1906, Congress chose to implement the general policy of protecting “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” on federal lands by affording the president broad power to designate national monuments by proclamation.⁶

In designating national monuments under Antiquities Act, the only limits on the president's authority are that: (1) the area must contain “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest”; (2) the area must be “situated on land owned or controlled by the Federal Government”; and (3) “[t]he limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”⁷

Beyond these requirements, the president is afforded extensive discretion to protect federal lands and waters under the Antiquities Act. If Congress had sought to limit the type or size of objects that could be reserved under the Antiquities Act, the text of the statute would have reflected that limitation. Instead, as federal courts have repeatedly held, the plain language of the Antiquities Act bestows vast discretionary authority upon the president to select both the type and size of an object to be protected. For example, in rejecting a challenge to President Clinton's designation of Grand Staircase-Escalante National Monument premised on the argument that the legislative history of the Act demonstrated Congress' intent to protect only man-made objects, the reviewing court stated:

This discussion, while no doubt of interest to the historian, is irrelevant to the legal questions before the Court, since the plain language of the Antiquities Act empowers the President to set aside “objects of historic or scientific interest.” 16 U.S.C. § 431. The Act does not require that the objects so designated be made by man, and its strictures concerning the size of the area set aside are satisfied when the President declares that he has designated the smallest area compatible with the designated objects' protection. There is no occasion for this Court to determine whether the plaintiffs' interpretation of the congressional debates they quote is correct, since a

⁶ 54 U.S.C. § 320301(a) (2012).

⁷ *Id.* § 320301(a), (b).

court generally has recourse to congressional intent in the interpretation of a statute *only when the language of a statute is ambiguous*.⁸

Before passing the Antiquities Act of 1906, Congress had considered other antiquities bills that set forth a clearly defined list of qualifying “antiquities.”⁹ An earlier version of the Antiquities Act—considered immediately before the final Act—also would have made reservations larger than 640 acres only temporary.¹⁰ Rather than place limitations on the president’s authority, however, the final version of the Act expanded executive discretion by adding the phrase “other objects of historic or scientific interest” to the list of interests that may be protected as national monuments.¹¹

The addition of this language to the Act has significant implications for how it is administered. Former National Park Service Chief Historian Ronald Lee recognized that “the single word ‘scientific’ in the Antiquities Act proved sufficient basis to establish the entire system of ... national monuments preserving many kinds of natural areas.”¹² By the time the Federal Lands Policy and Management Act of 1976 (“FLPMA”) was enacted, 51 of the 88 national monuments that had been established “were set aside by successive Presidents ... primarily though not exclusively for their scientific value.”¹³

“Scientific Interests” Have Included Biological Features Since the Earliest National Monument Designations

The designation of national monuments for scientific interests is not a recent phenomenon. For more than 100 years, national monuments have been established for the “scientific interests” they preserve. These values have included plants, animals, and other ecological concerns. In 1908, for instance, President Theodore Roosevelt designated Muir Woods National Monument because the “extensive growth of redwood trees (*Sequoia sempervirens*) ... is of extraordinary scientific interest and importance because of the primeval character of the forest in which it is located, and of the character, age and size of the trees.”¹⁴ President Roosevelt also established Mount Olympus National Monument because it “embrace[d] certain objects of unusual scientific interest, including numerous glaciers, and the region which from time immemorial has formed summer range and breeding

⁸ *Utah Ass’n of Chys. v. Bush*, 316 F. Supp. 2d 1172, 1186 n.8 (D. Utah 2004) (emphasis added) (citation omitted); see also *Mt. States Leg. Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002) (affirming the president’s broad discretionary authority to designate natural, landscape-scale objects of historic or scientific interest).

⁹ H.R. 12447, 58th Cong. § 3 (1904), reprinted in National Park Service, History of Legislation Relating to The National Park System Through the 82d Congress: Antiquities Act App. A (Edmund B. Rogers, comp., 1958) [hereinafter History of Legis.].

¹⁰ See S. 5603, 58th Cong. § 2 (1905), reprinted in History of Legis.

¹¹ S. 4698, 59th Cong. § 2 (1906), reprinted in History of Legis.

¹² Ronald F. Lee, The Antiquities Act of 1906 (1970), reprinted in Raymond H. Thompson, *An Old and Reliable Authority*, 42 J. OF THE S.W. 197, 240 (2000).

¹³ *Id.*

¹⁴ Proclamation No. 793, 35 Stat. 2174 (1908).

grounds of the Olympic Elk (*Cervus roosevelti*), a species peculiar to these mountains and rapidly decreasing in numbers.”¹⁵

President Roosevelt was not alone in utilizing the Antiquities Act’s broad authority to protect ecological marvels. For example, Presidents Harding, Roosevelt, Truman, and Eisenhower all subsequently expanded Muir Woods National Monument for the same reasons it was originally designated.¹⁶ Likewise, in designating Papago Saguaro National Monument in 1914, President Wilson’s proclamation highlighted that the “splendid examples of the giant and many other species of cacti and the yucca palm, with many additional forms of characteristic desert flora [that] grow to great size and perfection . . . are of great scientific interest, and should, therefore, be preserved.”¹⁷

Further, in 1925, President Coolidge designated nearly 1.4 million acres as Glacier Bay National Monument because

the region [was] said by the Ecological Society of America to contain a great variety of forest covering consisting of mature areas, bodies of youthful trees which have become established since the retreat of the ice which should be preserved in absolutely natural condition, and great stretches now bare that will become forested in the course of the next century.¹⁸

Similarly, President Hoover enlarged Katmai National Monument “for the purpose of including within said monument additional lands on which there are located features of historical and scientific interest and for the protection of the brown bear, moose, and other wild animals.”¹⁹ President Franklin D. Roosevelt designated Channel Islands National Monument, in part, for the “ancient trees” it contained.²⁰ President Kennedy expanded Craters of the Moon National Monument to include “an island of vegetation completely surrounded by lava, that is scientifically valuable for ecological studies because it contains a mature, native sagebrush-grassland association which has been undisturbed by man or domestic livestock.”²¹

Federal Courts Have Confirmed the President’s Authority to Determine the Meaning of “Scientific Interests”

The broad objectives of the Antiquities Act, coupled with the vast deference afforded to the president in specifying a monument’s purpose, compel courts to uphold presidential determinations

¹⁵ Proclamation No. 896, 35 Stat. 2247 (1909).

¹⁶ Proclamation No. 1608, 42 Stat. 2249 (1921); Proclamation No. 2122, 49 Stat. 3443 (1935); Proclamation No. 2932, 65 Stat. c20 (1951); Proclamation No. 3311, 73 Stat. c76 (1959).

¹⁷ Proclamation No. 1262, 38 Stat. 1991 (1914).

¹⁸ Proclamation No. 1733, 43 Stat. 1988 (1925).

¹⁹ Proclamation No. 1950, 47 Stat. 2453 (1931).

²⁰ Proclamation No. 2281, 52 Stat. 1541 (1938).

²¹ Proclamation No. 3506, 77 Stat. 960 (1962).

of what constitute “objects” and “scientific interests” when those findings are challenged.²² Beginning with a challenge to the designation of the Grand Canyon National Monument in 1920, the Supreme Court has promoted an expansive reading of the president’s discretion to determine which “scientific interests” may be protected. In its analysis, the Supreme Court simply quoted from President Roosevelt’s proclamation to uphold the presidential finding that the Canyon “is an object of unusual scientific interest.”²³

In *Cappaert v. United States*, the Supreme Court upheld President Truman’s exercise of authority to add Devil’s Hole to the Death Valley National Monument by relying upon the designation’s objective of preserving a “remarkable underground pool,” which contained “unusual features of scenic, scientific, and educational interest.”²⁴ In his proclamation, President Truman’s noted “that the pool contains ‘a peculiar race of desert fish ... which is found nowhere else in the world’ and that the ‘pool is of ... outstanding scientific importance ...’”²⁵ In its analysis, the Supreme Court acknowledged that “the language of the Act . . . is not so limited” as to preclude the president from exercising his broad discretion to protect such unique “features of scientific interest.”²⁶ As a result, the Supreme Court ultimately held that “[t]he pool in Devil’s Hole and its rare inhabitants are ‘objects of historic or scientific interest.’”²⁷

Similarly, in upholding the designation of Jackson Hole National Monument, the district court of Wyoming found that

plant life indigenous to the particular area, a biological field for research of wild life in its particular habitat within the area, involving a study of the origin, life, habits and perpetuation of the different species of wild animals ... [all] constitute matters of scientific interest within the scope and contemplation of the Antiquities Act.²⁸

Likewise, when ruling on a challenge to the millions of acres that President Carter set aside as national monuments in Alaska, the district court of Alaska concluded that “[o]bviously, matters of scientific 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.”²⁹ The court also found

²² See *Utah Ass’n of Chys. v. Bush*, 316 F. Supp. 2d 1172, 1179 (D. Utah 2004) (“[T]here have been several legal challenges to presidential monument designations ... Every challenge to date has been unsuccessful.”).

²³ *Cameron v. United States*, 252 U.S. 450, 455–56 (1920) (quoting Proclamation No. 794, 34 Stat. 225 (1908)).

²⁴ *Cappaert v. United States*, 426 U.S. 128, 141 (1976) (internal quotations omitted) (quoting Proclamation No. 2961, 3 C.F.R. § 147 (1949-1953 Comp.)).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 142 (emphasis added) (citing *Cameron v. U.S.*, 252 U.S. 450, 455–56 (1920)).

²⁸ *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945).

²⁹ *Anaconda Copper Co. v. Andrus*, 14 Env’t Rep. Cas. (BNA) 1853, 1855 (D. Alaska 1980).

that the Act protected a broad range of natural features, including the ecosystems of plant and animal communities relied upon by the Western Arctic Caribou herd.³⁰

Recently, Giant Sequoia National Monument was challenged on grounds that it protects objects that do not qualify under the Act.³¹ In rejecting that argument, the circuit court noted that “other objects of historic or scientific interest may qualify, at the President’s discretion, for protection as monuments. Inclusion of *such items as ecosystems and scenic vistas* in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features.”³²

In addition, one court found that the designation of the Cascade-Siskiyou National Monument legitimately protects “scientific interests” within the meaning of the Act, because the Monument is

a “biological crossroads” in southwestern Oregon where the Cascade Range intersects with adjacent ecoregions ... the Hanford Reach National Monument, a habitat in southern Washington that is the largest remnant of the shrub-steppe ecosystem that once dominated the Columbia River basin ... and ... the Sonoran Desert National Monument, a desert ecosystem containing an array of biological, scientific, and historic resources.³³

There Are No Restrictions on the Size of the Objects That May be Designated as National Monuments

As the court in *Wyoming v. Franke* recognized: “What has been said with reference to the objects of historic and scientific interest applies equally to the discretion of the Executive in defining the area compatible with the proper care and management of the objects to be protected.”³⁴ In other words, the determination of “the smallest area compatible with the proper care and management of the objects to be protected” is almost entirely within the president’s authority.

The Supreme Court honored this principle in *Cameron v. United States* by finding that President Theodore Roosevelt was authorized to establish the 800,000-acre Grand Canyon National Monument.³⁵ Since then, courts have been exceedingly hesitant to infringe upon the president’s broad discretion in determining the “smallest area” possible encompassed by a monument—including the 1.7 million-acre Grand Staircase-Escalante National Monument.³⁶

³⁰ *Id.*

³¹ *Tulare County v. Bush*, 306 F.3d 1138, 1140–41 (D.C. Cir. 2002).

³² *Id.* at 1142 (emphasis added) (internal quotations omitted).

³³ *Mt. States Leg. Found. v. Bush*, 306 F.3d 1132, 1133–34 (D.C. Cir. 2002) (citations omitted).

³⁴ 58 F. Supp. 890, 896 (D. Wyo. 1945).

³⁵ 252 U.S. 450, 455–56 (1920).

³⁶ *Utah Ass’n of Clys. v. Bush*, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004) (“When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion.”).

Courts, moreover, are even less likely to disturb the president’s factual determinations when a proclamation contains the statement that the monument “is the smallest area compatible with the proper care and management of the objects to be protected.”³⁷ Beginning in 1978, presidents have included this declaration in all proclamations establishing or enlarging national monuments.³⁸

Congress Has Demonstrated Its Approval of Large National Monument Designations

Individual presidential proclamations reserving significant amounts of land in national monuments has received much criticism. Rather than curbing the president’s power to do so, however, Congress has embraced the presidents’ inclusive interpretation and use of the authority of the Antiquities Act with limited exceptions.³⁹ Congress has shown explicit approval for these presidential withdrawals by re-designating national monuments as national parks, preserves, historic sites, or wildlife refuges and passing legislation otherwise approving the boundaries of national monuments. This congressional approval includes at least 69 national monuments, or 44 percent of those established, which encompass more than 70 percent of the acreage that has been withdrawn by the President under the Antiquities Act.⁴⁰

Future congressional approval has been more likely, moreover, when considering designations or subsequent expansions that “more than 100,000 acres.”⁴¹ Through 1981 and excluding monuments subject to the Secretary’s current review, Congress explicitly approved of 86 percent, or 25 of the 29, reservations fitting that description.⁴²

³⁷ See, e.g., *Mt. States Leg. Found.*, 306 F.3d at 1137; *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002).

³⁸ Including the determination that each national monument is confined to “the smallest area compatible with the proper care and management of the objects to be protected” began with President Carter (Proc. Nos. 4611–4627), and was continued by Presidents Clinton (Proc. Nos. 6920, 7263–66, 7317–20, 7329, 7373–74, 7392–7401), G.W. Bush (Proc. Nos. 7647, 7984, 8031), and Obama (Proc. Nos. 8750, 8803, 8868, 8884, 8943–47, 8089, 9131, 9173, 9194, 9232–34, 9297–99, 9394–96, 9423, 9465, 9476, 9478, 9496, 9558–59, 9563–67).

³⁹ The only significant exceptions to the President’s authority conveyed by Congress has been the restriction on the extension or establishment of new national monuments in Wyoming, Act of Sept. 14, 1950, Pub. L. No. 787, § 1, 64 Stat. 849 (codified as amended at 54 U.S.C. § 320301(d), and making all Executive withdrawals of more than 5,000 acres in Alaska subject to congressional approval, 16 U.S.C. § 3213(a). In addition, Congress withheld funds from the Chesapeake & Ohio Canal National Monument after it was designated by President Eisenhower in 1961. See Les Blumenthal, *Presidents as Preservationists: Antiquities Act gives Chief Executive Free Hand in Creating National Monuments*, NEWS TRIB. (Tacoma) A1 (May 28, 2000). A decade later, however, Congress re-designated the monument as a national historical park. 16 U.S.C. § 410y.

⁴⁰ Figures established in spreadsheet created with data from NPS, ARCHEOLOGY PROGRAM, *Antiquities Act 1906-2006: Monuments List*, (updated May 8, 2017 07:53:03), <https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm> as well as presidential proclamations and acts of Congress not included in therein (hereinafter “MONUMENTS LIST DATA”).

⁴¹ Exec. Order No. 13792 § 2.

⁴² MONUMENTS LIST DATA.

On average, these Congressional actions have taken more than 34 years from the time of the original designation or expansion – a figure that jumps to nearly 47 years when excluding the 17 Alaskan monument proclamations incorporated two years later by ANILCA.⁴³ In some cases, such as Craters of the Moon, however, it has taken Congress 78 years to act.⁴⁴ The monuments currently under review, in contrast, have been in existence for only 20 years or less, which is well within the time of typical congressional action regarding national monuments.

Moreover, Congress has established 45 national monuments by statute, including several that were over 100,000 acres in size at the time of enactment: Badlands⁴⁵ (130,000 acres), Biscayne⁴⁶ (172,924 acres), Mount Saint Helens⁴⁷ (110,000 acres), El Malpais⁴⁸ (114,000 acres), and Santa Rosa and San Jacinto Mountains⁴⁹ (272,000 acres). Two of these, Badlands and Biscayne, were subsequently re-designated as national parks.

Only Congress Has the Authority to Revoke or Reduce the Size of a National Monument

Executive Order 13792 instructs the Interior Secretary to “review” national monuments designated or expanded under the Antiquities Act and “include recommendations for Presidential actions.” In a press briefing on the order, Secretary Zinke stated that it “directs the Department of Interior to make recommendations to the President on whether a monument should be rescinded, resized, [or] modified.”⁵⁰ However, any such actions taken by the president would be unlawful: only Congress has the authority to rescind, reduce, or substantially modify a national monument.

The president’s powers regarding management of public lands are limited to those delegated to him by Congress. While the Antiquities Act provides the president the power to “declare” and “reserve” national monuments, it does not grant him authority to rescind, resize, modify, or otherwise diminish designated national monuments.⁵¹

⁴³ *Id.* See Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. 96-487, Title II, § 201, Dec. 2, 1980 (codified at 16 U.S.C. § 410hh).

⁴⁴ MONUMENTS LIST DATA (Craters of the Moon is the longest time it took for Congress to act on a monument larger than 100,000 acres, but it took 105 years for Pinnacles National Monument to be re-designated as a National Park).

⁴⁵ P.L. 70-1021; 45 Stat. 1553.

⁴⁶ P.L. 90-606; 82 Stat. 1188.

⁴⁷ P.L. 97-243; 96 Stat. 301.

⁴⁸ P.L. 100-225; 101 Stat. 1539.

⁴⁹ P.L. 106-351; 114 Stat. 1362.

⁵⁰ Press Briefing on the Executive Order to Review Designations Under the Antiquities Act, Ryan Zinke, Sec’y of the Interior (Apr. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/04/25/press-briefing-secretary-interior-ryan-zinke-executive-order-review>.

⁵¹ 54 U.S.C. § 320301(a), (b).

The Property Clause of the U.S. Constitution⁵² gives Congress “exclusive” authority over federal property,⁵³ in effect making “Congress[] trustee of public lands for all the people.”⁵⁴ “The Clause must be given an expansive reading, for ‘(t)he power over the public lands thus entrusted to Congress is without limitations.’”⁵⁵ Congress may, of course, delegate its authority to manage these lands to executive agencies or the president,⁵⁶ as it did in the Antiquities Act.

In the Antiquities Act, Congress only delegated to the president the broad authority to *designate* as national monuments “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest”—an authority limited only by the requirement that such reservations be “confined to the smallest area compatible with the proper care and management of the objects to be protected.”⁵⁷ Conspicuously absent from the Act, however, is language authorizing *any* substantive changes to national monuments once they have been established.

The omission of language granting the president the authority to rescind, reduce, or modify national monuments is intentional. Without it, an implicit congressional grant of these authorities cannot be read into the Antiquities Act.⁵⁸ If Congress intended to allow future presidents to rescind or reduce existing national monument designations, it would have included express language to that effect in the Act. Congress had done just that in many of the other public land reservation bills of the era.⁵⁹

Furthermore, Congress considered a bill that would have authorized the president to restore future national monuments to the public domain, which passed the House in 1925, but was never enacted.⁶⁰ Logically, that effort would have been redundant if such authority already existed under the Act. The Antiquities Act thus demonstrates that Congress chose to constrain the president’s authority not by limiting his ability to designate or expand national monuments, but by withholding the power to rescind, reduce, or modify monuments once designated or expanded. In every case

⁵² U.S. Const. art. IV, § 3, cl. 2.

⁵³ See, e.g., *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917).

⁵⁴ *United States v. City & Cty. of San Francisco*, 310 U.S. 16, 28 (1940).

⁵⁵ *Kleppe v. New Mexico*, 426 U.S. 529, 539–40 (1976) (quoting *San Francisco*, 310 U.S. at 29).

⁵⁶ *United States v. Grimaud*, 220 U.S. 506, 517 (1911); *Cameron v. United States*, 252 U.S. 450, 459–60 (1920); *Utah Ass’n of Citys. v. Bush*, 316 F. Supp. 2d 1172, 1191 (D. Utah 2004) (upholding Grand Staircase–Escalante National Monument) (citing *Yakus v. United States*, 321 U.S. 414 (1944)).

⁵⁷ 54 U.S.C. § 320301(a)–(b) (2012).

⁵⁸ *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (refusing “once again, to presume a delegation of power merely because Congress has not expressly withheld such power.”).

⁵⁹ See National Forest Organic Act of 1897, Act of June 4, 1897, 30 Stat. 1, 34, 36 (authorizing 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.”) (emphasis added) (repealed in part by Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. 94-579, Title VII, § 704(a), Oct. 21, 1976; National Forest Management Act of 1976, 16 U.S.C. § 1609(a)); Pickett Act, Act of June 25, 1910, c. 421, § 1, 36 Stat. 847 (executive withdrawals were “temporary,” only to “remain in effect until revoked by him or by an Act of Congress.”) (repealed by FLPMA § 704(a)).

⁶⁰ H.R. 11357, 68th Cong. (1925).

where a monument has been eliminated, it has taken an act of Congress to do so, even in the case of New York's Father Millet Cross National Monument, which was only 320 square feet in size.⁶¹

For nearly eighty years, the federal government's position has been that the president lacks the authority to rescind, repeal, or revoke national monuments. Of course, if the president lacks such authority, it follows that the secretary lacks the authority to rescind, repeal, or revoke national monuments as well.⁶² In 1938, U.S. Attorney General Homer Cummings concluded that "[t]he Antiquities Act ... authorizing the President to establish national monuments, does not authorize him to abolish them after they have been established."⁶³ The Attorney General Opinion went on to state:

The grant of power to execute a trust, even discretionally, *by no means* implies the further power to undo it when it has been completed. 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 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.⁶⁴

Despite the apparent contradiction to this passage, and without addressing its legality or providing much discussion, this Attorney General's Opinion also recognized that "the President from time to time has diminished the area of national monuments established under the Antiquities Act."⁶⁵ However, none of these Presidential actions that reduced the size of national monuments has ever been challenged in court. Perhaps more importantly, President Kennedy was the last to diminish a national monument⁶⁶ (adding to Bandelier National Monument 2,882 acres formerly controlled by the Atomic Energy Agency and removing the 3,925-acre Otwi Section containing "limited archaeological values"), and there have been no attempts by the President or the Secretary to rescind, resize, modify, or otherwise diminish designated national monuments since the enactment of FLPMA.⁶⁷

⁶¹ 28 H.R. 4073, Pub. L. 81-292, 63 Stat. 691.

⁶² *Cf. Utah Ass'n of Chys. v. Bush*, 316 F. Supp. 2d 1172, 1197 (D. Utah 2004) ("Because Congress only authorized the withdrawal of land for national monuments to be done in the president's discretion, it follows that the President is the only individual who can exercise this authority because only the President can exercise his own discretion.").

⁶³ Proposed Abolishment of Castle Pickney National Monument, 39 Op. Atty. Gen. 185, 185.

⁶⁴ *Id.* at 187 (emphasis added) (quoting 10 Op. Atty. Gen. at 364).

⁶⁵ *Id.* at 188. *See also* National Monuments, 60 Interior Dec. 9 (1947) (concluding that the president is authorized to reduce the area of national monuments by virtue of the same provision of Act).

⁶⁶ Proclamation 3539, May 27, 1963.

⁶⁷ Pub. L. 94-579 (Oct. 21, 1976), codified at 43 U.S.C. § 1701 *et seq.*

In FLPMA, Congress not only repealed nearly all sources of executive authority to make withdrawals except for the Antiquities Act,⁶⁸ but also overturned the implied executive authority to withdraw public lands that the Supreme Court had recognized in 1915 as well.⁶⁹ FLPMA’s treatment of the Antiquities Act was designed, moreover, to “specifically *reserve to the Congress the authority to modify and revoke withdrawals* for national monuments created under the Antiquities Act.”⁷⁰

Consequently, the authority Congress delegated to the president in the Antiquities Act is limited to the designation or expansion of national monuments. Where a President acts in accordance with that power, the designation is “in effect a reservation by Congress itself, and . . . the President thereafter [i]s without power to revoke or rescind the reservation”⁷¹ Thus, as the district court in *Wyoming v. Franke* summarized, where “Congress presumes to delegate its inherent authority to [the president], . . . the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about [because] the power and control over and disposition of government lands inherently rests in its Legislative branch.”⁷²

ORGAN MOUNTAINS-DESERT PEAKS NATIONAL MONUMENT

President Obama established the Organ Mountains-Desert Peaks National Monument (OMDPNM or “Monument”) in 2014 with Presidential Proclamation 9131.⁷³ The Monument spans approximately 496,330 acres within Doña Ana County in southern New Mexico. It is managed by the Bureau of Land Management (BLM).

The Monument includes five mountain ranges in southern New Mexico within the Chihuahuan Desert biome—the Doña Ana, Organ, Portillo, Robledo, and Sierra de las Uvas. The volcanic and limestone mountains and an otherwise diverse geology as well as several elevation gradients provide a range of ecosystems and habitat types upon which many wildlife and plant species depend.

A recent assessment analyzed ecological values of the OMDPNM by mapping and comparing a random sample of equivalent size areas in the region.⁷⁴ This science-based analysis found the monument ranked extremely high in reptile diversity at 97 percent, bird diversity at 94 percent, and

⁶⁸ *Id.* at Title II, § 204, Title VII, §704(a).

⁶⁹ *Id.*; *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

⁷⁰ H.R. REP. 94-1163, 9, 1976 U.S.C.C.A.N. 6175, 6183 (emphasis added).

⁷¹ Proposed Abolishment of Castle Pickney National Monument, 39 Op. Atty. Gen. 185, 187 (1938) (citing 10 Op. Atty. Gen. 359, 364 (1862)).

⁷² 58 F. Supp. 890, 896 (D. Wyo. 1945).

⁷³ Proclamation No. 9193, 79 Fed. Reg. 30431 (2014).

⁷⁴ Dickson, B.G., M.L. McClure, and C.M. Albano. 2017. A Landscape-level Assessment of Ecological Values for 22 National Monuments. Final Report submitted to the Center for American Progress. Conservation Science Partners. Truckee, CA. Available at <http://www.csp-inc.org/wp-content/uploads/2017/06/NationalMonumentsAssessment.pdf>.

mammal diversity at 98 percent. Rarity-weighted species richness scored 94 percent. These results demonstrate that the Monument is incredibly important for southern New Mexico's wildlife.

The Designation of Organ Mountains-Desert Peaks National Monument Protects and Provides for the Proper Care and Management of Significant and Rare Landscape and Ecosystem Objects and Values

Courts have upheld that the Act provides the President with the discretion to protect ecosystems, ecosystem features and large landscapes. In *Tulare vs. Bush* the court found that inclusion of ecosystems within the Proclamation “did not contravene the terms of the statute by relying on nonqualifying features.”⁷⁵ Indeed, the Monument Proclamation describes in great factual detail the diversity of qualifying ecosystem types and natural and scientific features found within the monument boundaries. The facts demonstrate that President Obama designated the land necessary to protect the diversity of ecosystems found within the Monument.

The OMDPNM protects and provides for the proper care and management of exceptionally important and unique ecosystem and landscape conservation values. The area contained within the monument boundaries exhibits a high and increasingly rare level of ecological integrity compared to other western lands. The Antiquities Act provides the President with the authority to protect and properly management landscapes and ecosystems for their scientific and other values.

The President's Proclamation for the Monument made clear that ecosystems were important objects needing protection. It states, for example,

Throughout the area, the characteristic plants of the Chihuahuan desert are evident. Tobosa grasslands can be found in the desert flats, punctuated by creosote bush and mesquite, as well as sacahuista, lechuguilla, and ferns. In the Sierra de las Uvas Mountains, black grama grasslands appear on the mesas while juniper woodlands and Chihuahuan vegetation give way to higher elevation montane communities. Formed by a series of alluvial fans, bajadas extend out from the base of the area's mountains and provide purchase for oak species, Mexican buckeye, prickly pears, white fir, willow, catsclaw mimosa, sotol, agave, ocotillo, flowering cactus, barrel cactus, brickellbush, and tarbush. The Potrillo Mountains are home to desert shrub communities that also include soaptree yucca and four winged saltbush.⁷⁶

The Monument's ecosystems, some rare and at risk, are essential to supporting the diversity of wildlife referenced above.

⁷⁵ *Tulare Cnty. v. Bush*, 306 F.3d at 1142.

⁷⁶ Proclamation No. 9193, 79 Fed. Reg. 30431 (2014), 30433.

Ecosystems

Several vegetative communities named as monument objects are at risk of extirpation and inability to support the plant and animal associates that depend on them. For example, all black grama grassland communities are ranked from vulnerable to imperiled by NatureServe, and at least two types of Tobosa grassland communities are at risk.⁷⁷

In the arid southwest, riparian ecosystems are particularly important to wildlife and need protection that monument designation can provide, for example from livestock grazing. Monument status may enable managers to devote resources to restoring degraded riparian areas. Riparian communities such as Boxelder/Velvet Ash, Netleaf Hackberry/Wingleaf Soapberry, and Coyote Willow/Deergrass that occur on the Monument⁷⁸ are all at risk.⁷⁹

Large Landscape Conservation

Scientists have understood for decades that large, intact, connected landscapes protected from human development and habitat degradation are essential for maintaining viable wildlife populations.⁸⁰ Larger areas tend to include a broader diversity of habitats and habitat characteristics and can accommodate more species than smaller areas⁸¹ and better provide for wide-ranging species with extensive home ranges such as large carnivores and ungulates that move between seasonal habitats. The optimal size of a given protected area depends on the habitat needs of the species that occur there, whether residents or migrants. Different species have varied habitat requirements over their life cycle that can depend on both a diversity of habitat types and patch size.⁸² The composition and distribution of species in an area can also change over time due to periodic disturbance, such as wildfire, and ecological successional stage. Larger areas offer greater representation of habitat

⁷⁷ NatureServe. 2017. NatureServe Explorer: An Encyclopedia of Life [web application]. Version 7.1. NatureServe, Arlington, VA.

⁷⁸⁷⁸ Muldavin, E., P. Durkin, M. Bradley, M. Stuever, and P. Mehlhop. 2000. Handbook of Wetland Vegetation Communities of New Mexico: Volume I: Classification and Community Descriptions. New Mexico Natural Heritage Program, Biology Department University of New Mexico.

⁷⁹ NatureServe. 2017. NatureServe Explorer: An Encyclopedia of Life [web application]. Version 7.1. NatureServe, Arlington, VA

⁸⁰ Higgs, A.J. Island biogeography and nature reserve design. 1981. *Journal of Biogeography* 8: 117-124; Pickett, S.T.A., and J.N. Thompson. 1978. Patch dynamics and the design of nature reserves. *Biological Conservation* 13: 27-37.

⁸¹ Margules, C., A.J. Higgs, and R.W. Rafe. 1982. Modern biogeography theory: are there any lessons for nature reserve design? *Biological Conservation* 24: 115-128; Rowland, M.M. and M.J. Wisdom. 2009. Habitat networks for terrestrial wildlife: concepts and case studies. In: MODELS FOR PLANNING WILDLIFE CONSERVATION IN LARGE LANDSCAPES. J.J. Millspaugh, F.R. Thompson, III (eds). Elsevier. Ch. 19, pp. 501-531.

⁸² Margules, C.F. and R.L. Pressey. Systematic conservation planning. *Nature* 405: 243-253.

diversity, characteristics and patch size, and are therefore more resilient to disturbances and stressors and supportive of the species that depend on them.⁸³

The boundaries of many monuments subject to the current review have been demarcated with these central ecological concepts in mind. Presidents' proclamations have, for example, named wide-ranging wildlife, including mule deer, bighorn sheep, pronghorn, elk, mountain lions, and others as monument objects. The importance of sufficiently large areas to protect biological objects must be considered in the review process.

Wildlife Habitat Connectivity

Landscape connectivity is also an increasingly important factor in the conservation of fish, wildlife, and plant populations.⁸⁴ Habitat loss, degradation and fragmentation pose the most important threat to the survival of native species, contributing to the shrinking distribution of many wildlife populations in North America. Landscapes fragmented by development and roads lead to increased mortality⁸⁵ for wide-ranging wildlife, including big game and large carnivores. Local populations, especially those of at-risk species, can decline and disappear without connectivity to support immigration.

The recognition and protection of habitat connectivity and wildlife corridors facilitates migration, dispersal, plant pollination, and gene flow within and across monument boundaries. Establishing new areas and expanding existing protected areas is necessary to allow species to shift their ranges to adapt to climate change.⁸⁶ Connecting these habitat cores is also essential: wildlife corridors increase movement between isolated habitat patches by approximately fifty percent, compared to areas that are not connected by corridors.⁸⁷

The OMDPNM Greater Potrillo Mountains area is a biotic linkage for species in the southwestern U.S. and northern Mexico.⁸⁸

⁸³ Margules, C.F. and R.L. Pressey. Systematic conservation planning. *Nature* 405: 243-253.

⁸⁴ Correa Ayram C.A., M. E. Mendoza, A. Etter, and D. R. Perez Salicrup. 2016. Habitat connectivity in biodiversity conservation: A Review of Recent Studies and Applications. *Progress in Physical Geography* 40(1): 7-37.

⁸⁵ Cushman, S.A., B. McRae, F. Adriaesen, P. Beier, M. Shirley, and K. Zeller. 2013. Biological corridors and connectivity. In: KEY TOPICS IN CONSERVATION BIOLOGY 2, First Edition. D.W. MacDonald and K.J. Willis (eds). John Wiley & Sons, Ltd.

⁸⁶ Heller, N.E. and E.A. Zavaleta. 2009. Biodiversity management in the face of climate change: a review of 22 years of recommendations. *Biological Conservation* 142: 14–32.

⁸⁷ Gilbert-Norton, L., R. Wilson, J.R. Stevens, and K.H. Beard. 2010. A meta-analytic review of corridor effectiveness. *Conservation Biology* 24(3): 660-668.

⁸⁸ New Mexico Wilderness Alliance et al. 2017. Organ Mountains-Desert Peaks National Monument: Biological Resources. Available at <https://www.organmountains.org/the-lands/biological-resources/>.

The Designation of Organ Mountains-Desert Peaks National Monument Protects and Provides for the Proper Care and Management of Significant Rare and At-risk Fish, Wildlife, and Plants and Habitats

Wildlife habitat qualifies for protection as a scientific object under the Antiquities Act. The Monument provides essential habitat for a variety of wildlife, including rare and at-risk species. This includes species listed under the Endangered Species Act (ESA) (see Table below) and those identified as sensitive by the BLM. The following are proclamation statements that make this clear.

The Organ Mountains are home to alligator juniper, gray oak, and mountain mahogany, as well as the endemic Organ Mountain evening primrose, Organ Mountains giant hyssop, Organ Mountains paintbrush, Organ Mountains pincushion cactus, Organ Mountain figwort, Organ Mountains scaleseed, night-blooming cereus, Plank's Catchfly, and nodding cliff daisy, and likely the endangered Sneed's pincushion cactus.⁸⁹

The area also supports diverse wildlife. Across the Organ Mountains-Desert Peaks landscape, many large mammal species can be found, such as mountain lions, coyotes, and mule deer. The Organ Mountains were also historically home to desert bighorn sheep. Raptors such as the golden eagle, red-tailed hawk, and endangered Aplomado falcon soar above the area's grasslands and foothills, where they prey on a variety of mice, rock squirrels, and other rodents, including the Organ Mountains chipmunk.⁹⁰

The area's exceptional animal diversity also includes many migratory and grassland song birds and a stunning variety of reptiles, such as black-tailed, western diamondback, and banded rock rattlesnakes; whipsnakes and bullsnakes; and tree, earless, Madrean alligator, and checkered whiptail lizards. Birds such as Gambel's quail, black-throated sparrow, ladder-backed woodpecker, verdin, black-tailed gnatcatcher, lesser nighthawk, Scott's oriole, and cactus wren also make their homes here, along with many species of bats. Other mammals, including black-tailed jackrabbits, cactus mice, and kangaroo rats, inhabit the area. One of several species of rare terrestrial snails in the area, the Organ Mountain talussnail, is also endemic.⁹¹

Altering the configuration of the Monument would remove lawful protections for the wildlife and plant species found within the Monument, which are considered to be objects of interest. The Monument provides habitat values that are significant to the region, and the current configuration of the Monument is necessary for the proper care and management of these habitat values.

⁸⁹ Proclamation No. 9193, 79 Fed. Reg. 30431 (2014), 30433.

⁹⁰ Proclamation No. 9193, 79 Fed. Reg. 30431 (2014), 30434.

⁹¹ Proclamation No. 9193, 79 Fed. Reg. 30431 (2014), 30434.

At-risk Species

OMDPNM provides habitat values that are significant to the region, and the size and configuration of the Monument are necessary for the proper care and management of these habitat values. The BLM will be developing a management plan that is protective of species Monument’s objects first and foremost, many of which are rare, endemic, and imperiled species that are vulnerable to extinction and need the protections monument status can afford.

At least three species associated with OMDPNM are BLM sensitive species and also designated as Species of Greatest Conservation Need (SGCN) by the state of New Mexico⁹² including the: Organ Mountains chipmunk, reticulated Gila monster, Townsend’s big-eared bat, and pale Townsend’s big-eared bat. The American peregrine falcon and western red bat are designated as threatened in New Mexico; the Western narrow-mouth toad is endangered in the state.⁹³

The Monument hosts several imperiled endemic species that require special protection such as the following mollusks: Organ Mountain woodlandsnail, Organ Mountain talussnail, and Doña Ana talussnail (also a SGCN). Endemic plants that are also on New Mexico’s rare plant list⁹⁴ include: Organ Mountain giant hyssop, Organ Mountain paintbrush, Organ Mountain evening primrose, nodding cliff daisy, Smooth figwort, and also the sand prickly pear, which is endangered in New Mexico and also a BLM sensitive species.

The desert night-blooming cereus is a New Mexico endangered species. Other New Mexico rare plants include: grayish-white giant hyssop, Standley’s whitlow grass, Organ Mountain pincushion cactus, Vasey’s bitterweed, and supreme sage.

Species Listed Under the Endangered Species Act

The U.S. Fish and Wildlife Service’s (USFWS) Information for Planning and Consultation⁹⁵ web tool indicates that the following ESA-listed in the table below have the potential to occur within the OMDPNM (see Table below).

| ESA-listed Species with Potential to Occur within Organ Mountains-Desert Peaks National Monument | | |
|---|--------------------------|---------------------------|
| Common Name | Scientific Name | Federal ESA Status |
| Least Tern | <i>Sterna antillarum</i> | Endangered |

⁹² New Mexico Department of Game and Fish. 2016. State Wildlife Action Plan for New Mexico. New Mexico Department of Game and Fish, Santa Fe, New Mexico.

⁹³ New Mexico Department of Game and Fish. 2016. Threatened and Endangered Species of New Mexico: 2016 Biennial Review, under Authority of the Wildlife Conservation Act (17-2-37 through 17-2-46 NMSA 1978).

⁹⁴ New Mexico Rare Plant Technical Council. 2015. New Mexico Rare Plant List.

⁹⁵ U.S. Fish and Wildlife Service. Information for Planning and Consultation. <https://ecos.fws.gov/ipac/>.

| ESA-listed Species with Potential to Occur within Organ Mountains-Desert Peaks National Monument | | |
|--|--|--|
| Common Name | Scientific Name | Federal ESA Status |
| Mexican Spotted Owl | <i>Strix occidentalis lucida</i> | Threatened |
| Northern Aplomado Falcon | <i>Falco femoralis septentrionalis</i> | Endangered, except where listed as experimental pop. |
| Piping Plover | <i>Charadrius melodus</i> | Threatened |
| Red Knot | <i>Calidris canutus rufa</i> | Threatened |
| Southwestern Willow Flycatcher | <i>Empidonax traillii extimus</i> | Endangered |
| Yellow-billed Cuckoo | <i>Coccyzus americanus</i> | Threatened |
| Chiricahua Leopard Frog | <i>Rana chiricahuensis</i> | Threatened |
| Beautiful Shiner | <i>Cyprinella formosa</i> | Threatened |
| Sneed Pincushion Cactus | <i>Coryphantha sneedii</i> var. <i>sneedii</i> | Endangered |

The Monument is in the heart of the northern aplomado falcon range in the U.S. Along with its federal ESA listing, it is also listed as endangered by the state of New Mexico. The birds are associated primarily with open grassland habitat with mesquite and yuccas for perching scattered throughout. Secondary habitat includes scrub and woodland patches. The northern aplomado falcon is endangered for several reasons.⁹⁶ Historic causes of the bird's decline include pesticide exposure, from chemicals such as DDT, that cause egg thinning and reproductive failure and also intense livestock grazing, which caused shrub encroachment. Shrub encroachment, loss of habitat to agricultural conversion, livestock grazing, and more frequent and prolonged droughts are current threats. With the exception of drought, these threats can be mitigated through appropriate habitat restoration and protection of this object that the Monument's future management plan must provide.

The endangered Sneed pincushion cactus has a very restricted range in the U.S. to southcentral New Mexico including around Las Cruces, New Mexico, which is in the middle of the Monument complex. The U.S. Fish and Wildlife Service (USFWS) has stated that while the species' threat level is high so is its potential for recovery, because threats are understood and easily mitigated.⁹⁷ The USFWS also noted the need for improved monitoring of the species in its 2014 5-year review of the

⁹⁶ U.S. Fish and Wildlife Service. 2014. Northern Aplomado Falcon (*Falco femoralis septentrionalis*) 5-year Review: Summary Evaluation. USFWS, New Mexico Ecological Service Field Office. August 26.

⁹⁷ U.S. Fish and Wildlife Service. 2015. Lee Pincushion Cactus (*Coryphantha sneedii* var. *leez*) and Sneed Pincushion Cactus (*Coryphantha sneedii* var. *sneedii*) 5-year Review: Summary and Evaluation. USFWS, New Mexico Ecological Service Field Office. August.

species' status.⁹⁸ Alleviating threats and adequate monitoring are management actions that protection by the monument status can provide.

Wide-ranging Species

The OMDPNM supports a number of ungulates including the desert bighorn sheep, which is critically imperiled in New Mexico,⁹⁹ mule deer, and pronghorn. Wide-ranging carnivores include mountain lions, bobcats, and coyotes. The monument is also within the historic range of the American bison, jaguar, and Mexican gray wolf. These are all landscape species that rely on large, connected areas.

CONCLUSION

Organ Mountains-Desert Peaks National Monument protects invaluable cultural, historic and scientific resources that provide immeasurable social and economic benefits to local communities and citizens across the United States. There is no question that these public lands warrant the protections provided under the Antiquities Act and that the designation is both consistent with the law as well as the policy set forth in section 1 of Executive Order 13792. The President lacks the legal authority to revoke or diminish a national monument and should additionally refrain from seeking legislative action or take any other action to undermine the designation.

⁹⁸ U.S. Fish and Wildlife Service. 2015. Lee Pincushion Cactus (*Coryphantha sneedii* var. *leei*) and Sneed Pincushion Cactus (*Coryphantha sneedii* var. *sneedii*) 5-year Review: Summary and Evaluation. USFWS, New Mexico Ecological Service Field Office. August.

⁹⁹ NatureServe. 2017. *Ovis canadensis mexicana*. NatureServe Explorer: An Encyclopedia of Life [web application]. Version 7.1. NatureServe, Arlington, VA.