

BEARS EARS: NATIONAL MONUMENT OR NATIONAL CONTROVERSY?

I. THE DESIGNATION OF BEARS EARS NATIONAL MONUMENT

In 2016, a national monument designation set in motion a series of events leading to compelling legal and policy questions. It is undeniable that parts of the United States, particularly in the western states, are unparalleled in their desolate beauty, but many Americans often struggle with how much governmental actors should interfere to maintain these lands. In the twilight of his presidency, President Barack Obama designated 1.35 million acres of land in Utah as Bears Ears National Monument.¹ The Monument was designed to be run jointly by both the U.S. Forest Service and Bureau of Land Management (BLM).² Unlike national parks, which are set apart by Congress for the use of the people of the United States because of scenery or natural peculiarity, national monuments are reserved by the government because “they contain objects of historic, prehistoric or scientific interest.”³ In his signing statement, President Obama referred to extensive archeological and tribal interests as reasons to designate the monument.⁴ Bears Ears National Monument contains approximately 100,000 Native American archaeological and ancestral sites,⁵ and members of the Hopi, Navajo, Ute, and Zuni tribes petitioned the federal government to act to protect this area.⁶

While President Obama’s action was lauded by many, few governmental actions are without controversy in the current age. President

1. Presidential Signing Statement on the Designation of Bears Ears National Monument and Gold Butte National Monument, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 28, 2016); Nadja Popovich, *Bears Ears National Monument is Shrinking. Here’s What is Being Cut.*, N.Y. TIMES, Dec. 8, 2017, <https://www.nytimes.com/interactive/2017/12/08/climate/bears-ears-monument-trump.html>.

2. *Bears Ears National Monument*, BUREAU OF LAND MGMT., <https://www.blm.gov/visit/bears-ears-national-monument> (last visited Apr. 24, 2018); *Bears Ears National Monument*, U.S. FOREST SERV., <https://www.fs.fed.us/visit/bears-ears-national-monument> (last visited Apr. 24, 2018).

3. *Difference Between a National Park and a National Monument*, NAT’L PARK SERV., https://www.nps.gov/parkhistory/online_books/portfolio/portfolio0b.htm (last visited Apr. 24, 2018).

4. Presidential Signing Statement on the Designation of Bears Ears National Monument and Gold Butte National Monument, *supra* note 1, at 1.

5. *Finally: Utah’s Bears Ears is a National Monument, Safeguarding Tribes’ Cultural Sites*, WILDERNESS SOC’Y, <https://wilderness.org/finally-utahs-bears-ears-national-monument-safeguarding-tribes-cultural-sites> (last visited Apr. 24, 2018).

6. Robinson Meyer, *Obama’s Environmental Legacy, in Two Buttes*, THE ATLANTIC (Dec. 30, 2016), <https://www.theatlantic.com/science/archive/2016/12/obamas-environmental-legacy-in-two-buttles/511889>.

Obama used the Antiquities Act of 1906⁷ as authority to set aside the land for Bears Ears. Many Utah governmental officials saw this as an overreach of federal power and sought to revoke or shrink the size of the monument.⁸ Additionally, some Utah residents believed that any designation should have been enacted at the state level to preserve mining and drilling rights.⁹ In a state where two-thirds of the land is owned by the federal government, residents have become increasingly frustrated that their economic woes do not seem to be considered.¹⁰

II. THE CURRENT ADMINISTRATION'S ACTIONS

In April 2017, shortly after taking office, President Trump ordered the review of certain monument designations under the Antiquities Act, including Bears Ears.¹¹ The Department of the Interior collected more than 1.4 million comments about Bears Ears during the comment period running from April to July 2017, demonstrating the level of American interest in this monument.¹² During the comment period, U.S. Secretary of the Interior, Ryan Zinke, submitted an interim report required by the President's order.¹³ In his report, Secretary Zinke recommended the downsizing of Bears Ears and seemed concerned about the amount of land that had been set aside.¹⁴

On December 4, 2017, President Trump issued a proclamation shrinking Bears Ears by eighty-five percent under the authority of the Antiquities Act.¹⁵ Relying on language from the Act requiring the designated area to be confined to "the smallest area compatible with the proper care and management of the objects of historic or scientific interest to

7. Antiquities Act of 1906, 54 U.S.C. § 320301 (2012); *American Antiquities Act of 1906*, NAT'L PARK SERV., <https://www.nps.gov/subjects/legal/american-antiquities-act-of-1906.htm> (last visited Apr. 24, 2018).

8. H.C.R. 11, 2017 Gen. Sess. (Utah 2017); Brian Maffly, *Utah Quietly Tells Feds: Trim Bears Ears Monument by 90 Percent*, SALT LAKE TRIB. (Sept. 17, 2017), <https://www.sltrib.com/news/environment/2017/09/17/utah-quietly-tells-feds-trim-bears-ears-monument-by-90-percent>.

9. James Cook, *Bears Ears: Inside the Fight for Utah's Contested National Monuments*, BBC NEWS (Dec. 4, 2017) <http://www.bbc.com/news/world-us-canada-42222069>.

10. *Id.*

11. Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (Apr. 26, 2017). Grand Staircase Escalante and Bears Ears are discussed and cited together frequently because President Trump announced reductions to both Utah monuments, but Grand Staircase Escalante was created by President Clinton in 1996. *Grand Staircase-Escalante National Monument*, UTAH.COM, <https://utah.com/grand-staircase-escalante> (last visited Apr. 24, 2018).

12. Emily Benson, *More Than 1 Million Comments Were Submitted to Interior*, HIGH COUNTRY NEWS (July 10, 2017), <https://www.hcn.org/articles/monuments-more-than-one-million-comments-were-submitted-to-interior-ryan-zinke>.

13. Press Release, U.S. Dep't of Interior, Secretary Zinke Submits 45-Day Interim Report on Bears Ears National Monument and Extends Public Comment Period (June 12, 2017).

14. *Id.*

15. Proclamation No. 9,681, 82 Fed. Reg. 58,081 (Dec. 4, 2017); Hannah Nordhaus, *What Trump's Shrinking of National Monuments Actually Means*, NAT'L GEOGRAPHIC (Feb. 2, 2018), <https://news.nationalgeographic.com/2017/12/trump-shrinks-bears-ears-grand-staircase-escalante-national-monuments>; Popovich, *supra* note 1.

be protected,”¹⁶ President Trump found that there was a “lack of a threat of damage or destruction to many of those objects (objects identified in the original proclamation), and the protection for those objects [was] already provided by existing law and governing land-use plans,” which required him to shrink the monument to a smaller area.¹⁷ The order went into effect sixty days after the proclamation, but little immediate change was expected to the surrounding area.¹⁸ The land has returned to its previous designations of “wilderness” or “multiple use,” but environmentalists are concerned about future mining permits.¹⁹ Because the land is no longer a national monument, it is now open to “corporate mining, grazing for farm animals, logging and personal recreational use. The government will have the option to lease land and resources, such as oil and gas, to private companies, and even potentially sell the land to the state or companies.”²⁰

III. THE LEGAL BATTLE BEGINS

Immediately after the proclamation was issued the opposition filed their first lawsuit. On the same day that the administration ordered Bears Ears to be resized, the Hopi Tribe, Navajo Nation, Ute Indian Tribe, Ute Mountain Ute Tribe, and Zuni Tribe, along with other organizational plaintiffs, filed a lawsuit seeking to enjoin the proclamation.²¹ The plaintiffs argue that the Antiquities Act does not give the President the power to “revoke, replace, or diminish” monuments once they are designated. Rather, the Act only gives the President the power to designate them.²² This argument is based on the plain language of the Antiquities Act and on separations of powers arguments stemming from the U.S. Constitution.²³ The plaintiffs cited Article I of the Constitution, explaining that only Congress has the power to amend enacted law and Article III of the Constitution, detailing that the President has the power to dispose of federal property only as Congress has allowed as reasons why the President could not legally shrink a national monument.²⁴ Additionally, the plaintiffs brought a claim under the Administrative Procedure Act,²⁵ arguing that because the President had no lawful authority to shrink Bears Ears, the Secretaries of the Interior and Agriculture who run the U.S. Forest Service and the BLM were required by law to keep protecting and man-

16. Antiquities Act of 1906, 54 U.S.C. § 320301 (2012).

17. Proclamation No. 9,681, *supra* note 15.

18. Hannah Grabenstein, *What Happens Now That Trump Has Said He'll Scale Back Bears Ears and Grand Staircase-Escalante?*, PBS NEWSHOUR (Dec. 6, 2017, 6:52 PM), <https://www.pbs.org/newshour/nation/what-happens-now-that-trump-has-said-hell-scale-back-bears-ears-and-grand-staircase-escalante>.

19. *Id.*

20. *Id.*

21. Compl. of Pls. at 56–57, *Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C. Dec. 4, 2017).

22. *Id.* at 52.

23. *Id.* at 52–54.

24. *Id.*

25. Administrative Procedure Act 5 U.S.C. §§ 701-706 (2012).

aging the full 1.35 million acres of Bears Ears.²⁶ Because these Secretaries have not done so, the complaint argued that the lack of action “constitute[d] an agency action ‘unlawfully withheld’” under section 706 of the Act, giving rise to a “right of action on any person adversely affected by final agency action or failure to act.”²⁷ The Tribes further argued that the lost acreage contains significant cultural and spiritual artifacts that deserve protection from the real threat of looting, grave-robbing, vandalism, and development.²⁸

After this initial lawsuit, two more lawsuits relating to Bears Ears followed during December 2017.²⁹ In the complaints, the plaintiffs allege that a lack of federal protection would lead to destruction of the extensive archeological record and ecological systems through development and mining.³⁰ Both lawsuits sought injunctive relief against oil and gas drilling, and one sought the same relief from coal and mineral mining.³¹ On February 15, 2018, the U.S. District Court of the District of Columbia consolidated the three cases into one.³²

The consolidated lawsuit represents twenty-four plaintiffs, varied legal interests, and interesting ramifications for presidential power depending on how the case is decided. This lawsuit has pitted Native Americans, environmentalists, and outdoor enthusiast organizations against rural Utah residents seeking economic opportunity and Utah lawmakers seeking greater control of their territory. Each group has its own interests, but any decision will have important legal and social consequences that extend far past a Utah monument. The rest of this article focuses on the legal issues surrounding this case.

IV. NATIVE AMERICAN INTERESTS

The Native American interest is unique among the plaintiffs. Many tribes consider Bears Ears to be a sacred place, “a home to Native peoples since time immemorial, and [it] is cherished by Native peoples for its cultural, spiritual, and archaeological importance. . . . Bears Ears contains hundreds of thousands of objects of historic and scientific im-

26. Compl. of Pls, *supra* note 21, at 55–56.

27. *Id.*; 5 U.S.C. § 706.

28. Compl. of Pls, *supra* note 21, at 22–33.

29. Andrew M. Harris, *Patagonia Sues Trump Over Bears Ears Monument*, BLOOMBERG (Dec. 7, 2017, 9:38 AM), <https://www.bloomberg.com/news/articles/2017-12-07/apparel-maker-patagonia-sues-trump-over-bears-ears-monument>; Courtney Tanner, *Here's a Breakdown of the 5 Lawsuits Filed Against Trump That Challenge His Cuts to 2 Utah National Monuments*, SALT LAKE TRIB. (Dec. 10, 2017), <https://www.sltrib.com/news/politics/2017/12/11/heres-a-breakdown-of-the-5-lawsuits-filed-against-trump-challenging-his-cuts-to-two-utah-national-monuments>.

30. Tanner, *supra* note 29.

31. *Id.*

32. Order of Consolidation, *Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C. Feb. 15, 2018).

portance, many traditional cultural properties, and many sacred sites.”³³ The tribal leadership that supported a national monument supported it because the tribes did not believe that they were getting help from Utah lawmakers to protect the area.³⁴ At least thirty tribes with ties to the region expressed support for some measure of protections for the area.³⁵ It is important to note that there are Native Americans who did not support federal intervention to create the monument or have expressed support of the shrinking of the monument, but the tribal governments have stated that these are not the official views of tribal decision-makers.³⁶

Any decision affecting Native American interests will be a controversial one. There is not enough space in this article to discuss the broken promises and heartache that Native peoples have endured at the hands of the federal and state governments.³⁷ During the nineteenth century, Navajo leaders even hid from forced relocation in the Bears Ears area.³⁸ To many Native supporters, this is one more broken promise from the federal government, with policy shifting completely only a year after the creation of the monument.³⁹ Native Americans have few options other than this lawsuit to fight for their interests. The sacred sites are not reservation land, which falls under some measure of Native American sovereignty.⁴⁰ As important as these lands are to them and even with the possibility of Native artifacts being buried there, the federal protections that generally protect sacred or funerary objects do not apply to privately-

33. Natalie A. Landreth & Matthew L. Campbell, *Protecting Bears Ears National Monument*, NATIVE AM. RTS. FUND (Feb. 21, 2018), <https://www.narf.org/cases/protecting-bears-ears-national-monument>.

34. *Id.*

35. *Tribes Uniting to Protect Bears Ears*, BEARS EARS COAL., <http://bearscoalition.org/about-the-coalition/tribal-statements-of-support> (last visited Apr. 25, 2015).

36. Jim Mimiaga, *Ute Mountain Utes Blast House Committee Over Testimony Ploy*, THE JOURNAL (Jan. 29, 2018, 12:37 PM), <https://the-journal.com/articles/82841>; Kiley Schultz, *Tribes Say ‘No Thanks’ to Plan for Scaled-back Bears Ears*, NAVAJO-HOPI OBSERVER (Feb. 6, 2018, 9:40 AM), <https://www.nhnews.com/news/2018/feb/06/tribes-say-no-thanks-plan-scaled-back-bears-ears-m>; see also Press Release, 23rd Navajo Nation Council, Navajo Nation Council Condemns Downsizing of Bears Ears National Monument (Dec. 4, 2017).

37. See Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609, 611, 615–18 (2011) (generally discussing the nature of federal governmental actions toward Native Americans and the forced reservation system); Andrea Wallace, *Patriotic Racism: An Investigation into Judicial Rhetoric and the Continued Legal Divestiture of Native American Rights*, 8 DEPAUL J. FOR SOC. JUST. 91, 97–103 (2014) (discussing the forced removal of Native Americans in the nineteenth century and the attitudes of government official).

38. Meyer, *supra* note 6.

39. See Felicia Fonseca, *Native American Tribes Call Trump’s Revamp of Tribal Advisory Commission a ‘Slap in the Face,’* PBS NEWSHOUR (Dec. 11, 2017, 3:09 PM), <https://www.pbs.org/newshour/politics/native-american-tribes-call-trumps-revamp-of-tribal-advisory-commission-a-slap-in-the-face>.

40. See generally Robert A. Fairbanks, *Native American Sovereignty and Treat Rights: Are They Historical Illusions?*, 20 AM. INDIAN L. REV. 141, 141–49 (1996) (discussing tribal sovereignty).

owned land.⁴¹ Native people stand in the unique space of having a tangible cultural tie to this land, but as with so many of their other rights, they must, under the special trust relationship they have with the United States, rely on the federal government to act in their interests.⁴²

V. THE ANTIQUITIES ACT

The definition of the Antiquities Act will likely be central to any decision in this case. Currently, the limitations are unclear. Congress holds the power to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States...”⁴³ In the Antiquities Act, Congress has ceded some of that power to the President when it comes to designating national monuments. In his actions, President Trump broke no new ground because, although feared by many, he did not rescind the monument, but diminished it, an action that former presidents have also taken.⁴⁴ Even though the President acted as other presidents have before him, the law is not clear on whether the power to diminish a monument was given to the President by Congress.⁴⁵ Some argue the because there is an implied presidential power to expand monuments under the Antiquities Act, one could use the same reasoning to find an implied power to demolish or diminish them; however, “if monument designations are equivalent to acts of Congress the power to diminish, abolish, or otherwise undo that designation is reserved to the legislative branch.”⁴⁶ Additionally, even without the logical consideration of implied powers, proponents for presidential power to diminish or abolish a monument will need to craft arguments to combat the concept that they are “contradict[ing] the plain language of the statute, which would give Congress plenary power over the designation process and would aggregate to the President powers he does not have, thus creating separation of powers concerns.”⁴⁷

At this point, it seems unlikely that a court will rule on whether a President can abolish a monument under the Antiquities Act. Neither President Trump nor any other president have ever done so, and a court will likely not wade into the murky waters of defining executive power without a clear adversarial case. This does not detract from the possibility that the time may finally be ripe to decide whether Presidents can

41. Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND RESOURCES & ENVTL. L. 259, 274–75 (2005).

42. 41 AM. JUR. 2D *Indians; Native Americans* § 6 (2018).

43. U.S. CONST. art. IV, § 3.

44. Kathryn A. Tipple, *Bears Ears National Monument: Unprecedented Surveys of Boundary Lines and Executive Authority*, ABA TRENDS (September/October 2017).

45. Michael Margherita, *The Antiquities Act & National Monuments: Analysis of Geological, Ecological, & Archaeological Resources of the Colorado Plateau*, 30 TUL. ENVTL. L.J. 273, 291 (2017).

46. *Id.* at 291–92; see also Hope M. Babcock, *Rescission of A Previously Designated National Monument: A Bad Idea Whose Time Has Not Come*, 37 STAN. ENVTL. L.J. 3, 4–6 (2017)

47. Babcock, *supra* note 46, at 6.

diminish national monuments. As excited as legal scholars may be for this potential decision, the courts could take the easy route and find another basis to decide this case. And if the judiciary finds that a President has no power to diminish a national monument, the political ramifications could be fascinating. Natural resource uses, environmental considerations, and archeological significance will be pitted against each other more fiercely than ever before.

VI. DESTRUCTION OF IRREPLACEABLE NATURAL ARTIFACTS

While the Antiquities Act has received much attention, the plaintiffs in the lawsuits who have filed claims against the President also allege the destruction of countless archaeological artifacts and an irreplaceable fossil record. While archaeologists are devastated at the possible loss, especially with recent increases in damage and looting in the area,⁴⁸ the legal recourses are limited.⁴⁹ The now consolidated lawsuit bases its claim on the Antiquities Act but argues that even if a President has the power to diminish or demolish a national monument, the President must do so in a way that protects the “objects of scientific and historic interest.”⁵⁰ Because of the extensive records of these significant objects being located outside of the diminished area, the complaint alleges that the President abused his power by not providing the correct protections. The plaintiffs have covered all possibilities with this claim by suggesting the President has overreached in this specific case, even if there is no blanket ban against monument diminishment.

VII. ADMINISTRATIVE LAW REMEDIES

Finally, the complaints all allege a violation of administrative law with a cause of action granted by the Administrative Procedure Act. The Administrative Procedure Act argument focuses on whether administrative actions were “arbitrary” and “capricious.”⁵¹ The “arbitrary and capricious” standard requires federal agencies to have reasons for their decisions, and these reasons must be given “in technocratic, statutory, or scientifically driven terms, not political terms.”⁵² To succeed, plaintiffs must combat Secretary Zinke’s report and try to prove a political purpose in the President’s actions. If the proclamation does not pass the test then it will be deemed illegal, and the Secretaries of the Interior and BLM

48. Cally Carswell, *Archaeologists Uneasy as Trump Shrinks Bears Ears Monument Lands*, NATURE 552, 13-14 (2017).

49. For a detailed argument on how to improve protections for natural resources, see Robert B. Keiter, *Toward A National Conservation Network Act: Transforming Landscape Conservation on the Public Lands into Law*, 42 HARV. ENVTL. L. REV. 61 (2018).

50. Compl. of Pls at 58-59, Nat’l Res. Def. Council, Inc. v. Trump, No. 1:17-cv-02606 (D.D.C. Dec. 7, 2017).

51. Administrative Procedure Act 5 U.S.C. § 706 (2012).

52. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 2 (2009).

should have been working on protecting the original designated monument.

VIII. CONCLUSION

This lawsuit could go in any number of directions as noted above, but the policy implications will affect large groups of people. Elected officials in western states should note that the five tribes involved in the lawsuit initially tried to work with Utah lawmakers to find a solution before seeking federal help. Native American leaders will likely be wary as they are concerned that they are not being listened to and are watching history repeating itself.⁵³ Rural Utah citizens are facing the same economic struggles as rural Americans are across the nation. Americans are also facing serious environmental decisions with far reaching implications, and we must decide how to move forward and conserve our resources, yet keep the economy going. The struggle between state and federal powers also looms in the background of this case. While the object of this controversy is Bears Ears National Monument, the issues at play reverberate throughout the beliefs and political turmoil the nation is experiencing right now. Bears Ears is a popular issue because it involves all the problems that Americans are wrestling with: state versus federal control, environmental conservation, fossil fuels, economic gain, presidential power, and the Native American voice.

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53. *Tribes Remain Opposed to H.R. 4532 at Its Second Hearing*, BEARS EARS COAL. (Jan. 30, 2018), <http://bearscoalition.org/native-american-tribes-remain-opposed-to-h-r-4532-at-its-second-hearing>; see also Alyosha Goldstein, *By Force of Expectation: Colonization, Public Lands, and the Property Relation*, 65 UCLA L. REV. DISCOURSE 124, 126-27 (2018) (discussing a theory of colonial control over Native Americans through land control).

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