CAUSE of ACTION
INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability℠

April 27, 2017

VIA CERTIFIED MAIL

The Honorable Ryan Zinke
Secretary of the Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Presidential Executive Order on the Review of Designations Under the Antiquities Act

Dear Secretary Zinke:

We write on behalf of Cause of Action Institute ("CoA Institute"), a nonprofit oversight group pursuing economic freedom and individual opportunity.[1]

Yesterday, April 26, 2017, President Trump signed the Antiquities Act Executive Order directing you to review all national monuments created by the Antiquities Act since January 1, 1996, that measure more than 100,000 acres, or lacked appropriate public input. The Order also directs you to report any potential legislative proposals, executive or other appropriate actions within 120 days, for the purpose of restoring trust between local communities and Washington, giving voice to Governors of States and local and Tribal governments who are affected by monument designations, and putting America back on track to manage our federal lands in accordance with the traditional multiple-use philosophy. This Executive Order provides a unique opportunity to highlight for your attention CoA Institute's concerns regarding recent misuse of the Antiquities Act and the preliminary results of ongoing investigations.

Since September 2016, we have been investigating the use, misuse, and abuse of the Antiquities Act of 1906, 54 U.S.C. §§ 320301 – 320303 ("Antiquities Act" or the "Act") by recent presidential administrations. To that end, CoA Institute has submitted over ten (10) Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), requests to various agencies and executive branch offices involved with national monument declarations.[2] Among other things, we are investigating the role certain Members of Congress played in lobbying President Obama to take unilateral action under the Antiquities Act, potential collusion between outside groups and the Obama Administration to declare national monuments, lack of transparency regarding monument designations, pretextual public hearings relating to predetermined monument designations, the continued acquisition of private lands in and around existing national monuments to expand such monuments, and the legality of agency rulemakings to implement Antiquities Act designations.

[1] *See* CAUSE OF ACTION INSTITUTE, *About*, https://causeofaction.org/about/.
[2] Since October 19, 2016, CoA Institute has submitted Antiquities Act-related FOIA requests to the Council on Environmental Quality ("CEQ"), The Department of the Interior ("Interior Dept."), the Bureau of Land Management ("BLM"), and the National Oceanic and Atmospheric Administration ("NOAA").

To date, CoA Institute has received several interim releases, including over 1,000 records, but we anticipate that this represents only a small fraction of the records that are responsive to our requests. These records, along with publicly available documents and conversations we have had with local stakeholders in multiple states, preliminarily confirm several of our concerns. For example, it appears that third-party environmental groups knew about a forthcoming monument designation in the Atlantic Ocean prior to August of 2015. However, local fishermen—who would be directly and adversely impacted by the designation— were notified only twelve (12) days before the September 15 meeting that was allegedly held to provide a public forum for discussion and comment prior to a decision being made. As indicated in records received and reviewed by CoA Institute, local fishermen were given only 250 words in a press release informing them of the meeting and seeking input on a then-undefined proposal. In contrast, third-party organizations had enough in-depth information in advance of the meeting to build online petitions supporting a monument in the Atlantic Ocean that were pushed out to their members nationwide.

As you know, the Antiquities Act was intended to protect "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" by permitting the President to declare such landmarks, structures, and objects of historic or scientific interest as national monuments.[3] The Act also permits the President to "reserve" land parcels as part of the national monument so long as such parcels are "confined to the smallest area compatible with the proper care and management of the objects to be protected."[4] Alternatively, if the object is not situated on federal land, the object and the land may be relinquished to the federal government.[5]

While such statutory language should limit use of the Antiquities Act, in practice, the Act has been used by presidents to declare or expand national monuments with little more than the stroke of a pen. Since 1996, Presidents Bill Clinton, George W. Bush, and Barack Obama have declared over 55 national monuments, many with little or no publicly-available data, analyses, or impact studies to substantiate "the smallest area compatible" with "the proper care and management of the objects to be protected." Problematically, some courts have held that the Act does not require the President "to make any particular investigation" prior to a monument being designated.[6] Thus, a President may declare a national monument without any information or data supporting the declaration. Because courts have been reluctant to review monument designations absent facts establishing and identifying lands that were improperly designated,[7] public recourse to challenge designations is essentially nonexistent. Indeed, no such challenge has yet been successful.

From a government oversight and transparency perspective, Presidential use of the Antiquities Act is rife with abuse, as major decisions impacting vast public lands, natural resources, property rights, and livelihoods are left to the sole discretion of the President, who is

[3] 54 U.S.C. § 320301 (a).
[4] 54 U.S.C. § 320301 (b).
[5] 54 U.S.C. § 320301 (c).
[6] *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002).
[7] *Id.*

not required to substantiate his designation in any meaningful way beyond the use of a few magic words on the face of the declaring proclamation. Unchecked discretion and lack of recourse to remedy overbroad declarations, has resulted in misuse of the Antiquities Act. Further, as publicly reported, and evident in government records received and reviewed by CoA Institute, monument declarations have been made with little or no consideration of local stakeholders and those most adversely impacted by the designations. More recent designations, such as the Northeast Canyons and Seamounts Marine National Monument[8] and the expansion of the Cascade-Siskiyou National Monument[9] have even been made in direct contravention of longstanding statutory frameworks established by Congress and trusted by local individuals, governments, and industries.

The Northeast Canyons and Seamounts Marine National Monument is composed of two discrete units of ocean that are located approximately 130 miles southeast of Cape Cod. The Monument purports to include, not only the seabed and the below-surface water column, but also the water surface. The "Canyons Unit" includes three underwater canyons at the edge of the geological continental shelf and covers approximately 941 square miles. The "Seamounts Unit" includes four seamounts and encompasses 3,972 square miles. The Proclamation commands the Secretaries of Commerce and the Interior to develop a joint management plan and to promulgate implementing regulations within 3 years of the date of the proclamation. Prior to the Proclamation, the subject area was managed in accordance with the New England Fishery Management Plan and the Mid-Atlantic Fishery Management plan. Because the Proclamation declares the withdrawal of all "Federal lands and interests in lands" within the monument, it is unclear whether there is currently any controlling authority, as the Fishery Management Plans, which often account for years of collaborative work between the Fishery Management Councils and the fishing industry, appear to have been immediately usurped.

Originally established by President Clinton, the approximately 52,000 acre Cascade-Siskiyou National Monument has grown by some 10,000 acres since its establishment.[10] The Boundary Enlargement of the Cascade-Siskiyou National Monument purports to add approximately 48,000 acres to the existing Cascade-Siskiyou National Monument, resulting in a blanket prohibition on commercial timber harvest inside the expansion area. Of those 48,000 acres, approximately 40,000 were already set aside by Congress in the Oregon and California Railroad Grant Lands Act of 1937, 43 U.S.C. §§ 1181a-1181f ("O&C Lands Act"), thus setting up a conflict between the Congressionally-designated purpose and the Presidential Proclamation. The O&C Lands Act includes a provision that a certain amount of timber be sold off the land each year, on a sustained yield basis, with the proceeds to be paid to certain counties. These counties have relied on that income for decades. Thus, with a single proclamation, the President

[8] Proclamation No. 9496, 81 Fed. Reg. 65161 (Sept. 21, 2016).

[9] Proclamation No. 9564, 82 Fed. Reg. 6145 (Jan. 18, 2017).

[10] *See* Proclamation No. 7318, 3 C.F.R. § 13152 (May 2, 2000). Prior to its expansion in January 2017, the Cascade-Siskiyou National Monument measured 63,977 acres. *See* BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION FISCAL YEAR 2017, at IV-5. The BLM also prioritizes land acquisitions "within or adjacent to" national monuments. *Id.* at VIII-10. Including the expansion area, the Cascade-Siskiyou National Monument now measures nearly 112,000 acres.

undermined the will of Congress as expressed by statute and the needs of the local stakeholders who relied on the statutory framework.

This apparent disregard for the will of Congress and the needs of local stakeholders is not new. For example, prior to President Clinton's 1996 proclamation of the Grand Staircase-Escalante Monument in southern Utah, approximately 900,000 acres of land that became part of the monument, were included in a Wilderness Study Area and managed by the BLM.[11] After eleven years of BLM evaluation and public involvement, the BLM recommended approximately 350,000 acres of the study area for wilderness designation, but concluded that the mineral potential and actual land uses outweighed the merits of wilderness protection for the balance of the study area.[12]

Congress considered establishing a wilderness area on land that became part of the Grand Staircase Monument, but did not do so.[13] Subsequent to Congress's non-action, a mining company, which held coal leases on federal lands in the area, began the processes of securing mining permits and drafting an environmental impact statement that was scheduled to be published in the fall of 1996.[14] The estimated total federal royalty payments from the proposed mine were approximately $20 billion, of which, the State of Utah and Utah counties would have been entitled to half.[15]

On September 18, 1996, President Clinton announced the establishment of the 1.7 million acre Monument, with virtually no advance consultation with Utah's federal or state officials.[16] Although the Proclamation did not explicitly terminate the coal leases on the Monument, the ability to build roads and bring motorized vehicles onto the land was severely restricted, resulting in the ultimate withdrawal of the mining company from the Monument area and eliminating the 1,000 jobs (estimated annual payroll of $16.7 million) that were anticipated to result from the mine.[17]

Not only did southern Utah lose the well-paying jobs associated with mining, the much-touted benefits of increased tourism associated with the Monument created unpredicted strains on local communities, such as increased demand for emergency services that rely on volunteers with limited staffing and equipment, and increased burdens on sanitation services in small communities that could not afford to purchase new garbage trucks at a cost of half the community's total tax base.[18]

Recent monument designations have been even more egregious in disregarding the will of Congress and the burden placed on local stakeholders who, in some cases, have claims that arise from statutes that operate in harmony with traditional use of the areas.

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[11] *Utah Ass'n of Counties v. Bush*, 316 F. Supp.2d 1172, 1180 (D. Utah, 2004).
[12] *Utah Ass'n of Counties v. Clinton*, 1999 U.S. Dist. LEXIS 15852 at *18 n. 8 (D. Utah Aug. 11, 1999).
[13] *Bush*, 316 F. Supp.2d at 1180-81.
[14] *Clinton*, 1999 U.S. Dist. LEXIS 15852 at *18-19.
[15] *Bush*, 316 F. Supp.2d at n. 5.
[16] *Bush*, 316 F. Supp.2d at 1182.
[17] *See* Rusnak, Eric C., *The Straw that Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, Ohio State Law Journal Vol. 64:669, at 705-06 n. 177, 178.
[18] *Id*. at 713, n. 226, 227.

For example, the Proclamation of the Northeast Canyons and Seamounts Monument described above, and Proclamation of the Boundary Enlargement of the Cascade-Siskiyou National Monument, both directly contravene statutory frameworks that govern the use of the waters, natural resources, and lands. Both Proclamations are currently subject to legal challenge.[19] In both cases, existing statutory rights have been disregarded, trampling the will of Congress and the local stakeholders who rely on the law. The Northeast Canyons and Seamounts designation, moreover, suffers numerous legal infirmities that are peculiar to its location outside the territory of the United States, leading to issues of interpretation, enforceability, administration, and lack of Constitutional authority to make the designation in the first place.

It is clear from our review of monument designations made over the past two decades that the national monument designation process is not transparent, may be subject to abuse, and needs improvement to better serve all stakeholders and achieve the goal of the Antiquities Act—protection of objects of historic or scientific interest. Considering CoA Institute's conversations with local stakeholders, research of publicly available documents, and review of government records provided to us, we propose for your review the following recommendations regarding oversight of existing monuments and increased transparency in the designation process:

1. Release all records relating to national monument designations, including all communications from external entities prior to designation;

2. Produce and release reports regarding costs and benefits of monument designations that include large tracts of land, including, but not limited to:

    - The number of employees needed to staff the monument;

    - The number of visitors annually;

    - The number of incidents of looting/vandalism of antiquities at monuments (including historical information for any pre-designation events);

    - The number of search and rescues, including identification of type of personnel (federal or local) needed to respond to the event and the associated costs to local communities;

    - Budget and expenditures for each monument;

    - Economic impact report, including income from entrance (or other) fees, and cost/benefit to communities, including lost opportunity to alternative land use and any increased burdens on the local tax base, along with identification of the source of information;

[19] *See Massachusetts Lobstermen's Assoc. et al. v. Ross*, Civ. Case No. 1:17-cv-0406 (D.D.C., filed Mar. 7, 2017); *Murphy Co. v. Trump, et al.*, Civ. Case No. 1:17-cv-285 (D. Or., filed Feb. 17, 2017) *and*, *Assoc. of O&C Counties v. Trump*, Civ. Case No. 1:17-cv-0280 (D.D.C., filed Feb. 13, 2017), respectively.

- Identification of all rights that were terminated, diminished, or exchanged as a result of the monument designation.

We look forward to your implementation of the President's Executive Order and are willing to provide information, as needed.

CAUSE OF ACTION INSTITUTE

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