

CAUSE *of* ACTION

INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

May 26, 2017

VIA REGULATIONS.GOV PORTAL

Monument Review
MS-1530
ATTN: Randal Bowman
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Comment on Bears Ears National Monument, 82 Fed. Reg. 22,016 (May 11, 2017)

I. Introduction

Pursuant to the Notice of Opportunity for Public Comment, 82 Fed. Reg. 22,016 (May 11, 2017), Cause of Action Institute (“CoA Institute”) hereby comments on the review of Bears Ears National Monument, designated under the Antiquities Act of 1906, 54 U.S.C. §§ 320301 – 320303 (“Antiquities Act” or the “Act”).¹

CoA Institute is a nonprofit oversight group pursuing economic freedom and individual opportunity.² As noted in our April 27, 2017 letter to Secretary Zinke,³ since September 2016, we have been investigating the use, misuse, and abuse of the Antiquities Act by recent presidential administrations. To that end, CoA Institute has submitted over eleven (11) Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), requests to various agencies and executive branch offices involved with national monument declarations.⁴

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.⁵ 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

¹ Dep’t of the Interior, Review of Certain National Monuments Established Since 1996, 82 Fed. Reg. 22,016 (May 11, 2017).

² See CAUSE OF ACTION INSTITUTE, *About*, <https://causeofaction.org/about/>.

³ Letter from CoA Institute to the Honorable Ryan Zinke, Secretary of the Interior (Apr. 27, 2017) *available at* <http://coainst.org/ZinkeLetter>.

⁴ 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”).

⁵ 54 U.S.C. § 320301 (a).

the objects to be protected.”⁶ Alternatively, if the object is not situated on federal land, the object and the land may be relinquished to the federal government.⁷

President Trump’s April 26, 2017 Executive Order on the Review of Designations Under the Antiquities Act (“Antiquities Act E.O.”)⁸ directs the Secretary of the Interior 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. Under the Antiquities Act E.O., the Secretary is directed to consider the following: (1) whether the monument designations are limited to “the smallest area compatible with the proper care and management of the object to be protected”; (2) whether the designated lands are “historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest” within the meaning of the Act; (3) the impacts of designations on the use of Federal lands; (4) the impacts of designations on non-Federal inholdings or lands near the monument boundaries; (5) concerns of “State, tribal, and local governments affected by the designation”; and (6) whether there are sufficient Federal resources to manage the designated lands; and other factors deemed appropriate by the Secretary.

II. Comments

a. Risks Relating to the Sufficiency of Federal Resources Needed to Manage the Monument.

In relation to the sixth factor articulated above—whether there are sufficient Federal resources to manage the designated lands—CoA Institute’s conversations with stakeholders, research of publicly available documents, and review of government documents provided to us in response to our FOIA requests suggest that this issue has not been adequately addressed with respect to the Bears Ears National Monument. These apparent shortcomings have the potential to undermine the stated purpose of the monument, *i.e.*, preserving the area’s “cultural, prehistoric, and historic legacy and maintain its diverse array of natural and scientific resources, ensuring that the prehistoric, historic, and scientific values.”⁹

b. The Secretary Should Collect and Review Documents Responsive to CoA Institute’s FOIA Requests

CoA Institute has submitted two FOIA requests specifically seeking records related to the designation of Bears National Monument. On October 31, 2016, we submitted a request to the Interior Department seeking, among other things, records regarding the Department’s potential collusion with outside special interests regarding the designation of Bears Ears. That request was assigned tracking number *OS-2017-00057*. To date, although CoA Institute has been in regular communications with the Department regarding the processing of this request, no records have yet been released.

⁶ 54 U.S.C. § 320301 (b).

⁷ 54 U.S.C. § 320301 (c).

⁸ Proclamation No. 13792, 82 Fed. Reg. 20,429 (May 1, 2017).

⁹ Proclamation No. 9558, 82 Fed. Reg. 1,139 (Jan. 5 2017).

Additionally, after conversations with stakeholders who raised questions regarding BLM's ability to protect and manage Southern Utah's Federal public lands, and historical artifacts therein, CoA Institute submitted a FOIA request to BLM on November 4, 2016 seeking records related to incidents of looting, vandalism, and/or damage to antiquities within the boundary of Grand Staircase-Escalante National Monument and BLM-managed lands within San Juan County, Utah, which ultimately were reserved as part of Bears Ears National Monument. That request was assigned tracking number **127 (UT-950) FOIA 2017-08 EFTS # BLM-2017-00085**. CoA Institute anticipates the production of a first round of responsive documents by May 26, 2017.

CoA Institute submitted additional requests to the Department, BLM, and CEQ seeking records related to President Obama's use of the Antiquities Act more generally, which necessarily would include records related to Bears Ears National Monument. The request to the Department was assigned tracking number **OS-2017-00060**. To date, the Department has released some 2,700 records responsive to this request. We anticipate that this interim release represents only a small fraction of the records responsive to that request. The FOIA request to BLM was received on November 4, 2016. However, despite multiple attempts to contact BLM to identify the tracking number or anticipated release date of records, CoA Institute has received no responses as to this request. Finally, the two FOIA requests to CEQ were assigned tracking numbers **2017-09** and **2017-16**. Although CoA Institute has been in regular communications with CEQ, no records have yet been released.

We bring these requests to the Secretary's attention because the records collected in response by the Department, and other agencies and offices involved in the designation of Bears Ears, are relevant to Secretary Zinke's review.

c. Additional Steps Should be Taken to Guarantee Proper Government Oversight and Transparency Related to the Designation of Bears Ears National Monument

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 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.

As stated in our April 27, 2017 letter to Secretary Zinke, CoA Institute suggests that the following information be publicly released regarding Bears Ears National Monument:

1. Release all records relating to the designation of Bears Ears National Monument, including all communications from external entities prior to designation;
2. Produce and release reports regarding costs and benefits of designation of Bears Ears National Monument, including, but not limited to:

- The number of employees staffing and patrolling the designated land prior to December 28, 2016 and the number of employees needed to staff the monument after its designation;
- The number of annual visitors to the designated land prior to December 28, 2016 and the anticipated number of annual visitors to the monument;
- The number of incidents of looting/vandalism of antiquities occurring on the lands reserved as Bears Ears National Monument (including historical information for any events prior to December 28, 2016);
- The number of search and rescues occurring on the lands reserved as Bears Ears National Monument, including identification of type of personnel (federal or local) needed to respond to the event and the associated costs to local communities;
- Existing budget and expenditures for the lands reserved as Bears Ears National Monument prior to December 28, 2016 and the anticipated budget and expenditures for the monument (including any grants to groups conducting maintenance or research on the reserved lands);
- 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; and
- Identification of all rights that were terminated, diminished, or exchanged as a result of the designation of Bears Ears National Monument.

III. Conclusion

Thank you for your consideration on the foregoing comments. If you have any questions, please do hesitate to contact us at cynthia.crawford@causeofaction.org and kara.mckenna@causeofaction.org.

Department of the Interior

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