



National Headquarters

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Submitted to 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: Supplemental Comments regarding Bears Ears National Monument and the Interim Report
Pursuant to Executive Order 13792

Dear Secretary Zinke:

On May 25, 2017, Defenders of Wildlife (Defenders) submitted comments on Bears Ears National Monument pursuant to the Department of the Interior's Review of Certain National Monuments Established Since 1996.¹ On June 12, 2017, the Department of Interior announced that you had submitted a 45-day interim report on Bears Ears National Monument to the President on June 10th, and that the public comment period for Bears Ears would be extended through July 10th.² Although this notice stated that comments concerning Bears Ears do not need to be resubmitted, Defenders respectfully submits the following supplemental comments to address concerns raised by the 45-day interim report.³

¹ Letter from Peter Nelson, Sr. Policy Advisor for Fed. Lands, Defenders of Wildlife to Ryan Zinke, Sec'y of the Interior (May 25, 2017) (hereinafter "DEFENDERS' BENM COMMENTS").

² Department of Interior: "Secretary Zinke Submits 45-Day Interim Report on Bears Ears National Monument and Extends Public Comment Period" (June 12, 2017), (last edited June 20, 2017) <https://www.doi.gov/pressreleases/secretary-zinke-submits-45-day-interim-report-bears-ears-national-monument-and-extends/>.

³ Ryan K. Zinke, Memorandum to the President: Interim Report Pursuant to Executive Order 13792 (June 10, 2017) (hereinafter "INTERIM REPORT").

THE EXISTING BOUNDARIES ENCOMPASS THE “SMALLEST AREA” APPROPRIATE FOR THE BEARS EARS NATIONAL MONUMENT

The Interim Review states that the Secretary “[found] that the designation of the BENM does not fully conform with the policies set forth in Section 1 of [Executive Order 13792]”⁴ - which directs the Secretary to consider “the requirements and original objectives of the Act, including the Act’s requirement that reservations of land ‘... be confined to the smallest area compatible with the proper care and management of the objects to be protected.’ ”⁵

President Obama has already determined the established boundaries of Bear Ears National Monument “are confined to the smallest area compatible with the proper care and management of the objects to be protected.”⁶ The Secretary, however, appears to have a limited – and incorrect – interpretation of the “the requirements of the original objectives of the Act.” In the Interim Review, for example, the Secretary wrote: “The protection of qualifying objects within the monument can be identified and reasonably segregated to reflect the ‘smallest area compatible’ intent and to concentrate preservation resources.”⁷ The “objects to be protected” under the Antiquities Act, however, are not limited to “historic landmarks, historic and prehistoric structures” but also include “other objects of historic or scientific interest.”⁸

As detailed in Defenders original comments, Congress purposely expanded the original objects of the Antiquities Act “by adding the phrase ‘other objects of historic or scientific interest’ to the purposes of national monuments.”⁹ Furthermore, *objects of scientific interests* have included plants, wildlife, ecosystems, and natural wonders since the inception of the Act.¹⁰ The majority of national monuments designated before 1976, in fact, “were set aside ... primarily though not exclusively for their scientific value.”¹¹

The fact that objects of scientific interest have include biological and natural features, including entire landscapes, have been found by the federal courts to be consistent with the original Act every time it a national monument designated for these purposes have been challenged.¹²

⁴ INTERIM REPORT at 5.

⁵ *Id.* at 3. *Cf.* Exec. Order No. 13,792 § 2(i); Fed. Reg. 22016 (May 11, 2017).

⁶ Proclamation No. 9558, 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016).

⁷ INTERIM REPORT at 1.

⁸ 54 U.S.C. § 320301(a).

⁹ DEFENDERS’ BENM COMMENTS at 6 (quoting S. 4698, 59th Cong. § 2 (1906), reprinted in NAT’L PARK SERV., HISTORY OF LEGISLATION RELATING TO THE NATIONAL PARK SYSTEM THROUGH THE 82D CONGRESS: ANTIQUITIES ACT App. A (Edmund B. Rogers, comp., 1958).

¹⁰ *Id.* at 5-9.

¹¹ *Id.* at 6 (quoting Ronald F. Lee, The Antiquities Act of 1906 (1970), as reprinted in Raymond H. Thompson, *An Old and Reliable Authority*, 42 J. OF THE S.W. 197, 240 (2000).

¹² *Id.* at 7.

THE INTERIM REPORT IGNORES THE ACTUAL PURPOSES FOR WHICH BEARS EARS NATIONAL MONUMENT WAS DESIGNATED

President Obama established Bears Ears National Monument to protect a variety of objects, including: (1) paleontological resources; (2) cultural, prehistoric, and historic legacy; (3) star-filled nights and natural quiet; (4) watershed values; (5) wildfire-shaped ecosystems; (6) a variety of vegetation; (7) numerous seeps that provide year-round water and support delicate hanging gardens, moisture-loving plants, and relict species such as Douglas fir; (8) a variety of wildlife species; and, (9) riparian habitats.

While all of these purposes are legitimate and consistent with the original intent of the Act, the Interim Report focuses only on the first two objects listed above. The Interim Report, for example, states that “[t]he protection of qualifying objects within the monument can be identified and reasonably segregated to reflect the ‘smallest area compatible’ intent and to concentrate preservation resources.”¹³ The Secretary further concludes:

Specifically, the review shows that rather than designating an area encompassing almost 1.5 million acres as a national monument, it would have been more appropriate to identify and separate the areas that have significant objects to be protected to meet the purposes of the Act, including the area reserved be limited to the smallest area compatible with the proper care and management of the objectives.¹⁴

In his Proclamation, President Obama provided a lengthy, detailed description of the interwoven nature of the ecological and cultural objects to be protected by Bears Ears National Monument. Any attempt to segregate the cultural, prehistoric and historic objects to be protected from the ecological and natural environment would not only be impossible but would be in contempt of the legitimate purposes for which the monument was designated.

THE INTERIM REPORT MISCHARACTERIZES THE LIMITATIONS ON MULTIPLE-USES IN BEARS EARS NATIONAL MONUMENT

The Interim Report declares that “much of the land [within BENM] is compatible with multiple-use practices, including recreation; grazing; timber harvest; mining; and traditional activities such as gathering of medicinal herbs and plants, hunting, fishing and wood-gathering.”¹⁵ In addition, the Report concludes: “For those areas that should remain protected under the Act, some management prescriptions appear to be too restrictive, and tribal interests have not been granted an adequate role in management of BENM given the unique significance of the area to tribes and their traditional knowledge, expertise, and use.”¹⁶

¹³ INTERIM REPORT at 1.

¹⁴ *Id.* at 5.

¹⁵ INTERIM REPORT at 1.

¹⁶ *Id.* at 5.

These conclusions are directly refuted by Presidential Proclamation No. 9558. First, President Obama’s Proclamation specifically recognized the multiple-use practices identified in the Interim Report. For example, the Proclamation states that Bears Ears

provides world class *outdoor recreation opportunities*, including rock climbing, *hunting*, hiking, backpacking, canyoneering, whitewater rafting, mountain biking, and horseback riding. Because visitors travel from near and far, these lands support a growing travel and tourism sector that is a source of economic opportunity for the region.¹⁷

The *only* limitation placed on recreational activities is the designation of “roads and trails where motorized and non-motorized mechanized vehicle use will be allowed.”¹⁸ This policy is consistent with and represents no change from existing national forest management regulations.¹⁹

The Proclamation also recognizes that “Today, ecological restoration through the careful use of wildfire and *management of grazing and timber is working* to restore and maintain the health of these vital watersheds and grasslands.”²⁰ It further provides that the “[l]aws, regulations, and policies followed by USFS or BLM in issuing and administering *grazing permits or leases on lands under their jurisdiction shall continue* to apply with regard to the lands in the monument.”²¹

Furthermore, the Proclamation considers:

*Traditions of hunting, fishing, gathering, and wood cutting are still practiced by tribal members, as is collection of medicinal and ceremonial plants, edible herbs, and materials for crafting items like baskets and footwear. The traditional ecological knowledge amassed by the Native Americans whose ancestors inhabited this region, passed down from generation to generation, offers critical insight into the historic and scientific significance of the area. Such knowledge is, itself, a resource to be protected and used in understanding and managing this landscape sustainably for generations to come.*²²

Moreover, the Proclamation provides:

Nothing in this proclamation shall be construed *to interfere with* the operation or maintenance, or the replacement or modification within the current authorization boundary, of *existing utility, pipeline, or telecommunications facilities* located within the

¹⁷ 82 Fed. Reg. at 1143 (emphasis added).

¹⁸ *Id.* at 1145.

¹⁹ 36 C.F.R. pt. 212, subpt. B – Designation of Roads, Trails, and Areas for Motor Vehicle Use. *See also* U.S. Forest Service, Manti-La Sal National Forest, *Motor Vehicle Use Map (MVUM) for the Monticello Ranger District* (2016).

²⁰ 82 Fed. Reg. at 1141.

²¹ *Id.* at 1145.

²² *Id.* at 1140.

monument in a manner consistent with the care and management of the objects identified above.

* * *

Nothing in this proclamation *shall preclude low-level overflights of military aircraft*, the designation of new units of special use airspace, or the use or establishment of military flight training routes over the lands reserved by this proclamation consistent with the care and management of the objects identified above.²³

Thus, subject to valid existing rights, the only multi-uses prohibited within Bears Ears National Monument are “location, entry, and patent under the *mining* laws, and from disposition under all laws relating to *mineral and geothermal leasing*, other than by exchange that furthers the protective purposes of the monument.”²⁴

REQUIREMENTS PLACED ON THE BEARS EARS NATIONAL MONUMENT MANAGEMENT PLAN FULLY ADDRESS MULTI-USE AND TRIBAL CONCERNS RAISED IN THE INTERIM REPORT

Pursuant to Presidential Proclamation No. 9588, the BLM and U.S. Forest Service are to manage the monument “pursuant to their respective applicable legal authorities, to implement the purposes of this proclamation [establishing BENM].”²⁵ These agencies are to jointly develop a management plan which “shall provide for maximum public involvement in the development of that plan.”²⁶ The Proclamation also directs the BLM and USFS to establish an advisory council which “shall consist of a fair and balanced representation of interested stakeholders, including State and local governments, tribes, recreational users, local business owners, and private landowners.”²⁷

Moreover, the stated concern that “tribal interests have not been granted an adequate role in management” is completely unfounded. It is very likely that President Obama would not have designated Bears Ears National Monument without the proposal from the Bears Ears Inter-Tribal Coalition.²⁸ As such, Presidential Proclamation No. 5988 explicitly provides special participation for tribal interests in the monument’s management.

In recognition of the importance of tribal participation to the care and management of the objects identified above, and to ensure that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge, *a Bears Ears Commission (Commission) is hereby established to provide guidance and*

²³ *Id.* at 1144-45 (emphasis added).

²⁴ *Id.* at 1143.

²⁵ *Id.*

²⁶ *Id.* at 1144.

²⁷ *Id.*

²⁸ See Bears Ears Inter-Tribal Coalition, *Proposal to President Barack Obama for the Creation of Bears Ears National Monument* (2015).

recommendations on the development and implementation of management plans and on management of the monument. The Commission shall consist of one elected officer each from the Hopi Nation, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah Ouray, and Zuni Tribe, designated by the officers' respective tribes. The Commission may adopt such procedures as it deems necessary to govern its activities, so that it may effectively partner with the Federal agencies by making continuing contributions to inform decisions regarding the management of the monument.²⁹

In addition, the Secretaries of Interior and Agriculture are required to

*meaningfully engage the Commission ... in the development of the management plan and to inform subsequent management of the monument. To that end, in developing or revising the management plan, the Secretaries shall carefully and fully consider integrating the traditional and historical knowledge and special expertise of the Commission.*³⁰

And, perhaps most importantly,

if the Secretaries *decide not to incorporate specific recommendations* submitted to them in writing by the Commission ..., they *will provide* the Commission ... with *a written explanation of their reasoning.* The management plan shall also set forth parameters for continued meaningful engagement with the Commission or comparable entity in implementation of the management plan.³¹

THE PRESIDENT DOES NOT HAVE AUTHORITY TO REVISE, REVOKE, OR MODIFY THE BOUNDARIES OR MANAGEMENT OBJECTIVES OF BEARS EARS NATIONAL MONUMENT

In the Interim Report, the Secretary recommended that “the BENM boundary be revised through the use of appropriate authority, including lawful exercise of the President’s authority granted by the Act.”³² Neither the Secretary nor the President, however, have provided any legal basis for the assertion that the Antiquities Act grants the President any authority beyond the ability to “declare” national monuments.³³ Defenders provided extensive analysis explaining why only Congress has the authority to implement any of the Interim Reports’ recommendations in our original comments regarding the review of Bears Ears National Monument.³⁴

²⁹ 82 Fed. Reg. at 1145 (emphasis added).

³⁰ *Id.* (emphasis added).

³¹ *Id.* (emphasis added).

³² INTERIM REPORT at 5.

³³ See 16 U.S.C. § 320301-320303.

³⁴ DEFENDERS’ BENM COMMENTS at 2-5.

CONCLUSION

The issues raised in the Secretary's Interim Report only appear to be concerned with one single use of the lands contained within the Bears Ears National Monument, namely, restrictions on the further development of mining and energy resources. All other issues raised in the Interim Report are either adequately provided for in Presidential Proclamation No. 9558 or stem from a cramped interpretation of the Antiquities Act that does not pass legal scrutiny.

Sincerely,

A handwritten signature in black ink, appearing to read "RD", with a horizontal line extending to the right.

Robert G. Dreher
Senior Vice President, Conservation Programs