

## MEMORANDUM TO THE PRESIDENT

FROM: RYAN K. ZINKE

SUBJECT: Interim Report Pursuant to Executive Order 13792

### I. SUMMARY

In the final weeks of his second term, President Obama exercised his authority under the Antiquities Act (Act) to designate the Bears Ears National Monument (BENM) in Utah. The external boundary of BENM encompasses almost 1.5 million acres of land. The lands within BENM consist of Federal lands managed by the Bureau of Land Management (BLM) within the Department of the Interior (Department) and U.S. Forest Service (USFS) within the Department of Agriculture; the external boundary also encompasses sections of State land and smaller private parcels, one of which is owned by The Nature Conservancy. While there are designated wilderness and wilderness study areas (WSAs) within BENM, much of the land 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.

The BENM contains unique geologic features and objects of historic or scientific interest deemed culturally important to Native American tribes, including artifacts, rock art, archeological sites, dwellings, and areas used for traditional rituals, gatherings, and tribal practices. Selected Native tribes have a formal advisory role under Proclamation No. 9558, but are not authorized a formal management role under existing law.

The Act authorizes the President to designate objects of scientific or historic interest on Federal lands for protection as a monument as defined in the establishing proclamation, but the authority to reserve lands as part of a monument is limited to an area that is “the smallest area compatible” with the proper care and management of those objects. 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.

Therefore, in consultation with the Secretary of Agriculture, the Secretary of the Interior (Secretary) recommends that (1) the existing boundary of the BENM be modified to be consistent with the intent of the Act; (2) Congress authorize tribal co-management of designated cultural areas; (3) Congress designate selected areas within the existing BENM as national recreation areas or national conservation areas, as defined by law; and (4) Congress clarify the intent of the management practices of wilderness or WSAs within a monument.

## II. INTRODUCTION AND PURPOSE

Executive Order 13792, “Presidential Executive Order on the Review of Designations Under the Antiquities Act,” dated April 26, 2017 (Order), directs the Secretary to conduct a review of certain Presidential designations made under the Act, to determine if the designations conform to the policies set forth in the Order. The Order further directs the Secretary to provide two reports summarizing his review:

- (1) an Interim Report under section 2(d), due within 45 days, addressing the Bears Ears National Monument established by Proclamation No. 9558, dated December 28, 2016, and “other such designations as the Secretary determines to be appropriate for inclusion”; and
- (2) a Final Report under section 2(e), due within 120 days, summarizing the findings of the review for all other monument designations covered by the Order.

The Order directs the Secretary to include recommendations in both reports for “Presidential actions, legislative proposals, or other actions consistent with law” to conform designations to the policy set forth in the Order.

This memorandum constitutes the Interim Report under section 2(d) of the Order and addresses the findings of the Secretary’s review of BENM.

## III. BACKGROUND

### A. *The Antiquities Act*

Passed in 1906, the Act, now codified at 54 U.S.C. 320301-320303, authorizes the President to: “declare by public proclamation 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 to be national monuments.” 54 U.S.C. 320301(a). The Act also authorizes the President to reserve parcels of Federal land as part of such monuments, but limits those reservations to “*the smallest area compatible* [emphasis added] with the proper care and management of the objects to be protected.” 54 U.S.C. 320301(b).

Shortly after passage of the Act, President Theodore Roosevelt first utilized the Act’s authority to designate the 1200-acre Devils Tower National Monument in Wyoming. In addition to President Roosevelt, 15 other Presidents have exercised the authority to designate monuments more than 150 times.

Although there are many instances of the use of the Act for the proper stewardship of objects of historic or scientific interest, concerns have been raised regarding (1) the use of the Act to designate “landscape” monuments that reserve large areas of Federal lands for the purposes of restricting public access and traditional uses; (2) the use of monument designations to prevent or restrict land use rather than to “protect” and preserve objects of significance; (3) the process by which Presidents have exercised such authority, including whether it included proper public outreach and coordination with state, tribal, and local officials; and (4) the potential losses of economic opportunity and jobs as a result of a monument designation.

### *B. Executive Order 13792*

The President signed Executive Order 13792 on April 27, 2017. Echoing the concerns noted above, section 1 of the Order states:

Designations of national monuments under the [Antiquities Act], have a substantial impact on the management of Federal lands and the use and enjoyment of neighboring lands. Such designations are a means of stewarding America's natural resources, protecting America's natural beauty, and preserving America's historic places. Monument designations that result from a lack of public outreach and proper coordination with State, tribal, and local officials and other relevant stakeholders may also create barriers to achieving energy independence, restrict public access to and use of Federal lands, burden State, tribal, and local governments, and otherwise curtail economic growth. Designations 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.

The Order directs the Secretary to review all designations or expansions resulting in a designation covering more than 100,000 acres or any other designations that the Secretary determines were “made without adequate public outreach and coordination with relevant stakeholders” to determine whether it conforms to the policy set forth in section 1. The Order listed several factors for the Secretary to consider when making that determination:

- (1) 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”;
- (2) whether designated lands are appropriately classified under the Act as historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest;
- (3) the effects of a designation on the available uses of designated Federal lands, including consideration of the multiple-use policy of section 102(a)(7) of the Federal Land Policy and Management Act (43 U.S.C. 1701(a)(7)), as well as the effects on the available uses of Federal lands beyond the BENM boundaries;
- (4) the effects of a designation on the use and enjoyment of non-Federal lands within or beyond the BENM boundaries;
- (5) concerns of state, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected states, tribes, and localities;
- (6) the availability of Federal resources to properly manage designated areas; and
- (7) such other factors as the Secretary deems appropriate.

As noted above, section 2 of the Order directs the Secretary to provide, within 45 days of the date of the Order, an Interim Report regarding the BENM, including the results of the review and any resulting recommendations.

### *C. Bears Ears National Monument*

The BENM was established by Proclamation No. 9558, dated December 28, 2016. It consists of 1,351,849 acres of Federal land in San Juan County, Utah, and is jointly managed by BLM (1.063 million acres) and USFS (290,000 acres). When accounting for State land and private land within the boundaries of BENM, the total area encompassed is close to 1,500,000 acres. This is four times larger than Canyonlands—the largest national park in Utah, which is almost 340,000 acres.

Within BENM, there are areas that contain numerous cultural and archeological sites, unique geologic features, and areas important to the practicing of tribal cultural traditions and ceremonies to include the collection of medicinal and ceremonial plants. Portions of the area are also home to significant recreational opportunities, including hiking, backpacking, canyoneering, mountain biking, and rock climbing.

Also within and adjacent to the BENM boundaries, numerous management authorities and plans govern the patchwork of Federal, State, and private lands. Directly adjacent to the BENM is Glen Canyon National Recreation Area, which is managed by the National Park Service (NPS), as well as Natural Bridges National Monument. National recreation areas, which can be managed by BLM, USFS, or NPS, are generally designated by Congress with the purpose of promoting recreation potential of national significance. The BENM also overlaps 11 BLM WSAs aggregating approximately 381,000 acres, which BLM is required to manage so as not to impair their suitability for preservation as wilderness by Congress until Congress determines otherwise. The BENM also overlaps the 46,353-acre Dark Canyon Wilderness on USFS lands, which is required to manage so as to preserve its wilderness characteristics under the Wilderness Act of 1964. Further, much of the area was subject to special management to protect natural, cultural, and historic resources under BLM and USFS management plans in existence prior to designation of the BENM.

The Proclamation No. 9558 (1) retains the existing management responsibility for the lands in the respective Agencies; (2) establishes a local advisory committee consisting of interested stakeholders including State and local governments, tribes, recreational users, local business owners, and private landowners; and (3) establishes the Bears Ears Commission consisting of representatives of the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah and Ouray Reservation, and Zuni Tribe. The Commission does not include the Native American San Juan County Commissioner elected by the majority-Native American voting district in that County.

### *D. Review Process*

The Department issued a press release on May 5, 2017, announcing the impending publication of a notice in the Federal Register seeking public comment on the review. Public comments are being received by the Department both online at [Regulations.gov](https://www.regulations.gov) and by mail. Comments on BENM were due at [Regulations.gov](https://www.regulations.gov) on or before May 26, 2017, or by mail postmarked on or before May 26, 2017.

The Department received approximately 76,500 comments on BENM, the majority of which also commented on the overall review. These include comments from Members of Congress, governors, state and tribal leaders, and the public. Comments expressed a variety of views on

the BENM; however Federal and State elected officials from Utah strongly oppose the current BENM boundary.

#### **IV. RESULTS OF THE INTERIM REVIEW**

The BENM contain some objects that are appropriate for protection under the Act. This includes rock art, dwellings, ceremonial sites, granaries, and other cultural resources that reflect its long historical and cultural significance to Native Americans. There are also areas that may not include objects but are of importance to tribes for traditional cultural practices. However, having conducted the review set forth in section 2 of the Order, in consultation with the Secretary of Agriculture and based on information to date, I find that the designation of the BENM does not fully conform with the policies set forth in section 1 of the Order.

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 that the area reserved be limited to the smallest area compatible with the proper care and management of the objects. Additionally, many of the lands reserved as part of BENM are already congressionally or administratively protected – in some cases, such as designated wilderness or WSA, which may provide a higher level of protection – such that designation under the Act was unnecessary. Moreover, other lands within the BENM are more appropriately set aside under another type of special designation, such as a national recreation area. 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.

#### **V. INTERIM RECOMMENDATIONS**

As a result of the review, and in consultation with the Secretary of Agriculture, I make the following interim recommendations. I recommend that:

- the BENM boundary be revised through the use of appropriate authority, including lawful exercise of the President's authority granted by the Act;
- the President request congressional authority to enable tribal co-management of designated cultural areas within the revised BENM boundaries;
- Congress make more appropriate conservation designations within the current BENM such as national recreation areas or national conservation areas, as defined by law; and
- Congress clarify the intent of the management practices of wilderness or WSAs within a monument.

I further recommend that the Department of the Interior conclude the full review under section 2(d) of the Order before more specific recommendations are made regarding the Bears Ears National Monument.

cc: Director, Office of Management and Budget  
 Assistant to the President for Economic Policy  
 Assistant to the President for Domestic Policy  
 Chairman, Council on Environmental Quality

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