Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

July 10, 2017

Mr. James Cason
Special Assistant
Office of the Secretary
Department of Interior

VIA ELECTRONIC SUBMISSION

Re: Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment (Docket No. DOI–2017–0002)

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] respectfully submits these comments on the process initiated by Executive Order 13792, which directs the Secretary of the Interior to review all national monuments designated or expanded after January 1, 1996, that either include more than 100,000 acres of public lands or for which the Secretary determines inadequate "public outreach and coordination with relevant stakeholders" occurred.[2]

First and foremost, the Executive Order reflects a serious misunderstanding of the President's legal authority under the Antiquities Act. The President and the Secretary of the Interior do not have the authority to revoke or revise existing national monuments; Congress, alone, possesses this power. Therefore, this "review" process is improper and should cease. All existing national monuments should remain national monuments in their present form. The President and the Secretary of the Interior cannot revoke, reduce the size of, or otherwise diminish existing national monuments, which were designated for the benefit of present and future generations.

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[1] This document does not purport to present New York University School of Law's views, if any.

[2] The White House, Office of the Press Secretary, *Executive Order 13792—Review of Designations Under the Antiquities Act* (April 26, 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=123827; Dept. of the Interior, *Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment*, 82 Fed. Reg. 20429 (May 1, 2017).

Second, the Executive Order and statements made by the President and Interior Secretary Ryan Zinke imply that national monuments may have a detrimental effect on local communities near those monuments. In fact, several studies show the opposite to be true: national monuments are correlated with a significant boost in per capita income, job growth, and other tangible benefits to nearby communities. Moreover, national monuments deliver long-term benefits to these communities, as opposed to the "boom and bust" cycles historically associated with fossil fuel development. Delivery of economic benefits is not required for any national monument designations; however, these studies show that the rhetoric accompanying this administration's national monument review is misleading or misinformed.

I. The President and the Executive Branch Do Not Have Authority to Revoke or Revise Existing National Monuments

Executive Order 13792 implies that the President has the power to abolish or diminish a national monument that was previously established by a prior President acting pursuant to delegated authority under the Antiquities Act. This is mistaken. Several legal scholars have published articles explaining why the President lacks the authority to revoke or modify existing national monuments.[3] Our comments do not repeat the detailed legal analysis contained in those articles; instead, we highlight a few key points.

First, the President and Secretary of the Interior may not pursue this national monument review because they lack delegated authority to revoke or diminish existing national monuments. Under our constitutional framework, Congress exercises plenary authority over federal lands.[4] Congress may delegate its authority to the President or components of the executive branch so long as it sets out an intelligible principle to guide that exercise of authority.[5]

When it passed the Antiquities Act, Congress delegated to the President the power to create national monuments, but it did not delegate the authority to abolish or diminish them. The plain text of the Antiquities Act makes this clear. The Act authorizes the President to identify "objects of historic or scientific interest" and reserve federal lands necessary to

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[3] Mark Squillace et. al, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55-71 (2017); Arnold & Porter Kaye Scholar LLP, *The President Has No Power Unilaterally to Abolish a National Monument Under the Antiquities Act of 1906* (2017), http://democrats-naturalresources.house.gov/imo/media/doc/Arnold%20&%20Porter%20Legal%20Memo%20on%20Revocation%20of%20National%20Monuments.pdf.

[4] U.S. CONSTITUTION, Art. IV, § 3, cl. 2.

[5] *See, e.g.*, *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 384, 409 (1928)("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

protect such objects as a national monument.[6] The Act does not authorize the President to subsequently revoke, reduce the size of, or otherwise diminish national monuments. Congress retained those powers for itself. As such, the President and Interior Secretary Zinke are conducting a review of national monuments which they have no authority to revoke or amend. If they move to revoke or diminish an existing national monument, a court would very likely find such action to be *ultra vires* because it is not authorized by the Antiquities Act.[7]

Second, Congress intended for the President and executive branch to have this limited power when it passed the Antiquities Act. Other statutes passed just before and immediately after the Antiquities Act, such as the Pickett Act of 1910 and the Forest Service Organic Act of 1897, contain language authorizing modification of certain withdrawals of federal lands.[8] The contrast between the broader authority expressly delegated in these statutes—to withdraw or reserve land, and then subsequently, to modify or abolish such withdrawals or reservations—and the lesser authority delegated in the Antiquities Act lends support to the interpretation that Congress intended to give the President the power to create monuments, alone.

Third, the present administration's attempt to "review" existing national monuments is particularly vexing because the executive branch has long recognized limits on the President's authority over established national monuments. In 1938, Attorney General Cummings concluded that the Antiquities Act "does not authorize [the President] to abolish [national monuments] after they have been established."[9] And as recently as 2004, during the George W. Bush administration, the Solicitor General represented to the Supreme Court that "Congress intended that national monuments would be permanent; they can be abolished only by Act of Congress."[10]

Until now, no President has ever attempted to abolish a national monument, nor embark upon a review process like this one. The fact that such a review is unprecedented is unsurprising, because the President does not possess the power to rescind or diminish existing monuments.

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[6] 54 U.S.C. § 320301.

[7] *See, e.g., Mountain States Legal Foundation v. Bush*, 306 F.3d 1132, 1136 (2002) ("In reviewing challenges under the Antiquities Act, the Supreme Court has indicated generally that review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority.").

[8] Pickett Act, 36 Stat, 847 (1910); Forest Service Organic Administration Act, 30 Stat. 36 (1897).

[9] 39 Op. Att'y Gen. 185, 185 (1938).

[10] Reply Brief for the United States in Response to Exceptions of the State of Alaska at 32 n.20, *Alaska v. United States*, 545 U.S. 75 (2005).

II. National Monuments Are Correlated With Economic Benefits to Nearby Communities

A primary objection to some existing national monuments voiced by the current administration is that national monument designations restrict certain land uses, such as coal mining and oil and gas production, and such restrictions may "curtail economic growth."[11] However, there is evidence that creating national monuments does not hinder economic growth and instead, contributes to the economic health of nearby communities. While a finding of economic benefits is not required to support or uphold any national monument designation,[12] the current administration's rhetoric of "monuments versus jobs"—a variant of the common "environment versus jobs" red herring[13]—is misplaced and misleading. In fact, there is ample evidence that national monuments and other federally protected lands promote long-term economic vitality.

The presence of federally protected lands, like national monuments, contributes to economic growth of nearby communities.

Contrary to statements contained in President Trump's Executive Order, federally protected lands, including national monuments, are correlated with sustained economic growth in nearby communities.[14]

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[11] Section 1 of Executive Order 13792 states that national monuments 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." The White House, Office of the Press Secretary, Executive Order 13792—Review of Designations Under the Antiquities Act (April 26, 2017), http://www.presidency.ucsb.edu/ws/index.php?pid=123827. Interior Secretary Ryan Zinke said he would examine whether any monument designations had led to "loss of jobs, reduced wages and reduced public access," because "some of these areas were put off limits for traditional uses, like farming, ranching, timber harvest, mining, oil and gas exploration, fishing, and motorized recreation." Juliet Elperin, "Trump Orders Review of National Monuments, Vows to 'End These Abuses and Return Control to the People," WASH. POST (April 26, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/04/25/zinke-to-review-large-national-monuments-created-since-1996-to-make-sure-the-people-have-a-voice/?utm_term=.cd9d893dfb45.

[12] Congressional Research Service, National Monuments and the Antiquities Act at 4 (Sept. 2016), https://fas.org/sgp/crs/misc/R41330.pdf (citing *Wyoming v. Franke*, 58 F. Supp. 890, 897 (D. Wyo. 1945 (upholding the designation of Jackson Hole National Monument in Wyoming and stating, with respect to claims of economic harm made by opponents to the monument designation that "such discussions are of public interest but are only applicable as an appeal for Congressional action."); *see also Cappaert v. United States*, 426 U.S. 128 (1976) (regarding Death Valley National Monument).

[13] *See, e.g.*, Institute for Policy Integrity, *The Regulatory Red Herring: The Role of Jobs Impacts Analyses in Environmental Policy Debates* (2012), http://policyintegrity.org/files/publications/Regulatory_Red_Herring.pdf.

[14] Headwaters Economics, The Economic Importance of National Monuments to Communities (2017), available at https://headwaterseconomics.org/public-lands/protected-lands/national-

Headwaters Economics' ("Headwaters") 2017 survey of national monuments shows economic growth in communities adjacent to national monuments. The study looked at 17 national monuments in western states with more than 10,000 acres. A number of these monuments were created after 1996 and are therefore subject to the present review. Headwaters examined a number of indicators of economic health, including population growth, personal income growth, job growth, and per capita income. The study found that all of the communities surrounding national monuments designated since 1996 experienced economic growth.[15] For example, Garfield and Kane counties, which abut Grand Staircase-Escalante in Utah, designated as a national monument in 1996, witnessed 13% population growth, 32% real personal income growth, 24% job growth and 17% real per capita income growth between 2001 and 2015.[16] Similarly, Yavapai County, Arizona, adjacent to the Agua Fria national monument created in 2000, experienced 29% population growth, 54% real personal income growth, 26% job growth, and 19% real personal income growth from 2001 to 2015.[17]

In fact, per capita income, a widely accepted measure of economic health, increased for the studied counties adjacent to every national monument in the years following establishment. As the Headwaters report states, "[t]his rise in personal wealth is significant, particularly in rural areas where average earnings per job are often declining."[18] While Headwaters does not purport to show a causal link between the creation of national monuments and economic growth in nearby communities, its findings indicate that many communities enjoy economic growth following monument designations.

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monuments/; Paul Lorah and Rob Southwick, Environmental Protection, Population Change, and Economic Development in the Rural Western United States, *Population and Environment,* 24(3), 255-271 (January 2003) [hereinafter Lorah and Southwick]; Ray Rasker, An Exploration into the Economic Impact of Industrial Development Versus Conservation on Western Public Lands, *Society & Natural Resources,* 19(3), 191-207 (August 2006) [hereinafter Rasker 2006]; Ray Rasker, Patricia H. Gude, and Mark Delorey, The Effects of Protected Federal Lands on Economic Prosperity in the Non-metropolitan West, *The Journal of Regional Analysis & Policy,* 43(2), 110-122 (2013) [hereinafter "Rasker et al.]

[15] Headwaters Economics, The Economic Importance of National Monuments to Communities, *supra* note 14. Trends in important economic indicators either continued or improved in each of the regions surrounding the 17 national monuments studied.

[16] Headwaters Economics, Grand Staircase-Escalante National Monument: A Summary of Economic Performance in the Surrounding Communities. Headwaters Economics factsheet (2017). *Available at* https://headwaterseconomics.org/wp-content/uploads/Escalante.pdf

[17] Headwaters Economics, Agua Fria National Monument: A Summary of Economic Performance in the Surrounding Communities. Headwaters Economics factsheet (2017). *Available at* https://headwaterseconomics.org/wp-content/uploads/AguaFria.pdf.

[18] Headwaters Economics, Updated Summary: The Economic Importance of National Monuments to Local Communities (Spring 2017), https://headwaterseconomics.org/wp-content/uploads/monuments-summary.pdf.

Conserving public lands through national monument designations helps to protect and highlight amenities that draw new residents, tourists, and businesses to surrounding communities. Protected lands deliver benefits in the form of natural amenities like scenery, clean water, clean air, and wildlife. A number of peer-reviewed studies analyzed the shift in rural economies from dependence on stagnating or cyclical extractive industries to more diversified, service-oriented amenity economies.

Some peer-reviewed academic literature seeks to demonstrate a causal link between federally protect lands and economic growth. Lorah and Southwick (2003) examined a range of federally protected lands, including wilderness areas, national parks, national monuments, and roadless areas. They note that extractive industries, such as mining, logging, agriculture and fishing, are declining, whereas the services sectors, including tourism and recreation, have grown dramatically.[19] They find that the "correlation between protected lands and growth in population, employment, total income, and per capita income is positive and statistically significant."[20] They also note that nonmetropolitan counties that have protected lands grew 5.7 times faster than nonmetropolitan counties without protected lands.[21] The authors' findings support the claim that "protected lands act as a catalyst in the transformation of stagnating extractive economies into diversified, relatively competitive amenity economies."[22]

Rasker (2006) also finds a beneficial relationship between federally controlled lands and personal income. This study examines a range of land designations, from wilderness to resource extractive uses and finds that "the presence of public lands is positively correlated with growth in personal income from 1970 to 2000 for all types of counties in the West."[23] Furthermore, Rasker finds that "public lands in general, and protected land public lands specifically, are strongly associated with growth for the non-metropolitan counties of the West."[24]

Rasker et al (2013) look at non-metropolitan counties in the West, specifically at the relationship between acreage of protected public land per county and per capita income, growth in per capita income, and growth in per capita investment income. They find that "on average, counties with national parks, wilderness, and other forms of protected public lands benefit through increased economic performance."[25] Specifically, the study shows that, "on average, from 1990 to 2010, income grew $237 faster per person and investment income grew $175 faster per person for every 10,000 acres of protected public lands" and

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[19] Lorah and Southwick, *supra* note 14 at 258.

[20] *Id*. at 265.

[21] *Id*.

[22] *Id*. at 260.

[23] Rasker 2006, *supra* note 14 at 200.

[24] *Id*. at 205.

[25] Rasker et al., *supra* note 14 at 110.

"on average, western non-metro counties have a per capita income that is $436 higher for every 10,000 acres" of protected lands.[26] In other words, protected lands can have a positive effect on economic growth, rather than a stifling one.

Hjerpe, Holmes and White (2017) find that "amenity migration" is now embedded in the economy of the western United States. They found that "some $500 million is annually spent in communities adjacent to Wilderness, generating a direct effect of 5,700 jobs and a total output effect of over $700 million across numerous industries."[27]

Similarly, Ray Rasker, director of Headwater Economics, noted in 2011 congressional testimony concerning Grand Staircase-Escalante National Monument that, "protected natural amenities—such as pristine scenery and wildlife—help sustain property values and attract new investment."[28] Rasker referenced additional literature that backs this claim.[29] He also noted the trend away from extractive industries to the service sector in the western United States, stating, "The western economy has changed significantly in recent decades. Services industries that employ a wide range of people—from doctors and engineers to teachers and accountants—have driven economic growth and now make up the large majority of jobs, even in rural areas."[30]

Finally, a historical example sheds light on the enduring value of national monument amenities that draw tourists, taxpayers, and businesses. When President Franklin D. Roosevelt designated the Jackson Hole National Monument in 1943, many Wyoming state and local leaders voiced their opposition, predicting economic devastation:

> The formation of a national park out of the lands now proposed or any part thereof will forever debar home seekers and investors, impoverish our ranges, destroy the values of our stock raising and agricultural industries, preclude the prospecting and location of minerals, destroy all prospect of future municipal and county government and greatly retard the development of the county and state, compelling residents of communities outside of proposed park extension to lose great values of their property both real and personal….[31]

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[26] *Id*. at 118.

[27] Evan Hjerpe, Tom Holmes and Eric White. National and Community Market Contributions of Wilderness. *Society & Natural Resources.* 30(3), 265-280 (2017).

[28] Testimony of Ray Rasker. Subcommittee on National Parks, Forest and Public Lands. Legislative Hearing on H.R. 302, H.R. 758, H.R. 817, H.R. 845, H.R. 846 and H.R. 2147. Tuesday, September 13, 2011.

[29] Deller, S. C., T.-H. Tsai, et al. 2001. The Role of Amenities and Quality of Life in Rural Economic Growth. American Journal of Agricultural Economics 83(2): 352-365.

[30] Testimony of Ray Rasker, *supra* note 28.

[31] Erik Molvar, Op-ed: What Utah and Trump Can Learn from Wyoming about the Value of National Monuments (May 22, 2017), www.deseretnews.com/article/865680497/Op-ed-What-Utah-and-Trump-can-learn-from-Wyoming-about-the-value-of-national-monuments.html.

Today, Wyoming's Teton County is among the wealthiest counties per capita in the United States.[32]

In short, national monuments are strongly correlated with economic growth in nearby communities. Moreover, as discussed below, there is evidence that fossil fuel extraction can lead to detrimental "boom and bust" cycles, as opposed to the sustained economic growth associated with protected lands highlighted in this section.

Fossil Fuel Extraction "Boom and Bust" Cycles Can Negatively Affect Local Economies

There is evidence that communities that depend on natural resource extraction, especially those that experience boom and bust cycles, can be economically worse off than communities that are not extraction-dependent. A number of studies have found that the costs of natural resource busts, like the oil, coal and gas bust in the 1980s, have enduring negative effects in those communities.[33]

For instance, Black et al. (2005) found that for every mining job that was created during the boom of the 1970s in U.S. coal country,[34] 0.174 local sector jobs were created. However, for every mining job lost during the bust in the 1980s, 0.349 local sector jobs were lost.[35] They also found that the effects of the boom on population led to larger effects on employment after the bust because there had been significant migration into these communities. They found continued depression of the economies affected by the 1980s coal country bust, "suggest[ing] that labour [sic] markets were not exceptionally quick to adjust to these shocks."[36]

A later study, focusing on oil and gas boom-and-bust cycles in the western United States in the 1970s and 1980s has similar findings. Jacobsen and Parker (2013) found that, "the boom created substantial short-term economic benefits, but also longer term hardships

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[32] *See id.*; Wikipedia, List of Highest-Income Counties in the United States, https://en.wikipedia.org/wiki/List_of_highest-income_counties_in_the_United_States.

[33] Dan Black, Terra McKinnish and Seth Sanders. The Economic Impact of the Coal Boom and Bust. *The Economic Journal*. 115. 449-476. (April 2005) [hereinafter "Black et al."]; Grant D. Jacobsen and Dominic P. Parker. The Economic Aftermath of Resource Booms: Evidence from Boomtowns in the American West. *The Economic Journal*. 126. 1092-1128. (June 2013) [hereinafter "Jacobsen and Parker."]; *see also* Alex James and David Aadland. The curse of natural resources: An empirical investigation of U.S. counties. *Resource and Energy Economics*. 33. 440-453 (2011).

[34] The authors examined the impact of the coal boom in the 1970s and the subsequent coal bust in the 1980s on local economies in the four-state region of Kentucky, Ohio, Pennsylvania, and West Virginia.

[35] Black et al., *supra* note 33 at 450.

[36] *Id*. at 468.

that persisted in the form of joblessness and depressed local incomes."[37] Specifically, they note:

> In the longer run, after the full boom-and-bust cycle had concluded… local per capita income was about 6% lower than it would have been if the boom had never occurred. Local unemployment compensation payments—which proxy for job loss—increased immediately following the peak of the boom and did not contract back to pre-boom levels during the entire post-bust period.[38]

In short, economic shocks in fossil fuel extraction-dependent economies can have far-reaching negative consequences. Restricting new fossil fuel extraction within national monuments and other protected lands may actually contribute to the economic health of nearby communities, rather than impair it.

III. Conclusion

The President and the Secretary of the Interior do not have the authority to revoke or diminish existing national monuments; Congress, alone, possesses that power. This review process is improper and any actions reducing or rescinding existing national monuments should be set aside by a reviewing court as exceeding the bounds of delegated authority. Moreover, there is strong evidence that national monuments and other federally protected lands provide sustained economic benefits to nearby communities. While a finding of net benefits to local communities is not required for any new or existing national monument designation, the current administration's rhetoric of "monuments versus jobs" rings hollow.

Respectfully,

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[37] Jacobsen and Parker, *supra* note 33 at 1093.

[38] *Id*.