CAMPAIGN FOR ACCOUNTABILITY

September 7, 2017

BY EMAIL: dhinkins@le.utah.gov
Sen. David P. Hinkins
Chair
Commission for the Stewardship of Public Lands
P.O. Box 145115
Salt Lake City, UT 84114

BY EMAIL: kstratton@le.utah.gov
Rep. Kevin J. Stratton
Chair
Commission for the Stewardship of Public Lands
P.O. Box 145030
Salt Lake City, UT 84114

Re: Request for Disclosure of Documents Regarding Davillier Law Group, LLC

Dear Sen. Hinkins and Rep. Stratton:

Campaign for Accountability ("CfA") respectfully requests that you, as co-chairs of the Commission for the Stewardship of Public Lands (the "Commission"), immediately release all invoices and legal analyses submitted by Davillier Law Group, LLC. Given the Commission's proven inability to accurately monitor its $2 million budget, it is incumbent on the Commission to be transparent in its dealings with its contractors. Public documents and press reports indicate you are continuing to work with Davillier without any public oversight. In addition to this letter, please find attached a formal request for all communications and agreements with Davillier.[1]

Background

CfA is a nonpartisan, nonprofit organization that seeks to hold public officials accountable. On July 6, 2016, CfA called on the Commission to audit its finances after finding numerous prohibited expenditures and billing discrepancies included in invoices submitted by the Commission's contractors, including Davillier Law Group, LLC.[2] Following a two-month investigation, on September 21, 2016, the Commission released a memo stating that Davillier

[1] GRAMA Request from Daniel Stevens, Executive Director of Campaign for Accountability, to Utah House of Representatives and Senate, September 7, 2017, attached as Exhibit A.
[2] Letter from Anne Weismann, Executive Director of Campaign for Accountability, to Sen. David P. Hinkins, Rep. Kevin J. Stratton, et. al., Commission for the Stewardship of Public Lands, July 6, 2016, *available at* http://campaignforaccountability.org/cfa-demands-audit-of-legislative-expenditures-for-utah-land-transfer-lawsuit/.

had charged the Commission $5,551 for travel expenses not allowed by its contract, which Davillier agreed to repay.[3]

The Commission's memo summarizing the investigative findings failed to respond to many of the concerns raised in CfA's July 6 letter. For instance, the Commission did not address numerous billing inconsistencies and apparent lobbying expenditures that were prohibited by Davillier's contract.[4] Neither did the Commission explain why Davillier appeared to have charged the Commission its higher hourly rate, reserved for legal work, when it was, in fact, engaged in public relations.[5]

Since issuing the memo, the Commission's dealings with Davillier have become even more opaque. The Commission has continued to work with the law firm, yet no new invoices or legal analyses have been posted on the Commission's website.[6]

Recent Commission Actions

The most recent invoice available on the Commission's website is dated August 19, 2016, for work performed by Davillier through June 14, 2016.[7] On June 15, 2016, during a briefing for fellow Republicans, the Commission co-chairs released a "Summary of Legal and Relations Services" detailing the Commission's expenditures. The summary states:

> To fulfill its obligations under the RFP/contract, Davillier Law Group constructed a Legal Consulting Services Team (Legal Team) including respected constitutional scholars and litigation specialists. On December 9, 2015, the Legal Team issued a detailed legal analysis concluding that solid legal bases exist in support of Utah's Transfer of Public Lands Act (TPLA). The Commission then directed the Legal Team to begin drafting a potential complaint. That work, along with research on related topics, continues.[8]

Following the Commission's release of the summary document, *The Deseret News* reported, "State lawmakers have instructed consultants to prepare a draft of a potential lawsuit."[9] Additionally, *UtahPolicy.com* reported, "The Davillier group is still doing work on a possible

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[3] Memorandum from Steven Allred, Office of the Legislative Fiscal Analyst, to Sen. Hinkins and Rep. Stratton, September 21, 2016, *available at* https://le.utah.gov/interim/2016/pdf/00003715.pdf; Lindsay Whitehurst, Lawyers for Public Lands Fight Reimburse Utah for nearly $6K, *Associated Press*, September 21, 2016, *available at* https://www.ksl.com/?nid=151&sid=41568172&title=lawyers-for-public-lands-fight-reimburse-utah-for-nearly-6k.
[4] Letter from Ms. Weismann to Sen. Hinkins, Rep. Stratton, et. al., Jul. 6, 2016, at 5-7.
[5] *Id.* at 6.
[6] *See* https://le.utah.gov/asp/interim/Commit.asp?Year=2016&Com=SPESPL at "Related Links" tab.
[7] *Id*.
[8] Sen. Hinkins and Rep. Stratton, Summary of Legal and Relations Services, *Commission for the Stewardship of Public Lands*, June 15, 2016, *available at* https://le.utah.gov/interim/2016/pdf/00002777.pdf.
[9] Amy Joi O'Donoghue, Utah's Lawsuit Over Federal Lands in Crafting Stage, *Deseret News*, June 15, 2016, *available at* http://www.deseretnews.com/article/865656257/Utahs-lawsuit-over-federal-lands-in-crafting-stage.html.

legal complaint to be filed by Utah officials at a later date. Payment for some of that work is still pending."[10]

The summary noted the Commission had spent less than half of its allotted $2 million, and that Davillier would be directed to draft a legal complaint, accruing additional legal fees. Indeed, nearly a year later, on May 20, 2017, John Howard, the lead attorney for Davillier's legal team, spoke at the Range Rights and Resource Symposium in Omaha, Nebraska.[11] Mr. Howard discussed the Commission's lawsuit, stating he believed the case would "move forward relatively soon."[12]

The day before Mr. Howard's remarks, the Commission co-chairs sent a letter to the Secretary of the Department of the Interior regarding President Obama's executive order designating Bears Ears National Monument.[13] The co-chairs urged Secretary Zinke to recommend that President Trump rescind President Obama's executive order establishing the monument.

Six days later, on May 25, 2017, the co-chairs submitted additional comments to Secretary Zinke.[14] The comments, on Commission letterhead, consist of 49-pages of historical analysis and legal arguments opposing the monument designation. Notably, the first page states, "These comments were prepared on behalf of the Chairs of the Commission by Richard Seamon, George Wentz, John Howard, and Colton Boyles of the Davillier Law Group, LLC." Therefore, it appears Davillier's lawyers spent considerable time and effort preparing the comments for the co-chairs.

The Commission's Disregard for Transparency

Despite the Commission's ongoing relationship with Davillier, the co-chairs have refused to reveal the extent of the terms of engagement. CfA has repeatedly attempted to obtain invoices or other communications regarding Davillier.

On October 27, 2016, CfA submitted a Government Records Access Management Act ("GRAMA") request to the Commission's co-chairs seeking copies of documents that Davillier had provided on December 9, 2015.[15] On that date, the co-chairs had publicly released a legal analysis regarding a possible lawsuit to force the federal government to transfer federal lands to

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[10] Bob Bernick, Lawmakers Not Yet Ready to File Lawsuit Over Control of Public Lands, *UtahPolicy.com*, June 15, 2016, *available at* http://utahpolicy.com/index.php/features/today-at-utah-policy/9856-lawmakers-not-yet-ready-to-file-lawsuit-over-control-of-public-lands.
[11] http://rangerights.com/agenda/.
[12] https://mediastream.bellevue.edu/Mediasite/Play/127b84eb6f5e4d80bd0a19c794afc5f51d.
[13] Letter from Sen. Hinkins and Rep. Stratton to Ryan Zinke, Secretary of the Department of the Interior, May 19, 2017, attached as Exhibit B.
[14] Letter from Sen. Hinkins and Rep. Stratton to Sec. Zinke, May 25, 2017, attached as Exhibit C.
[15] GRAMA Request from Ms. Weismann to Sen. Hinkins and Rep. Stratton, October 27, 2016, attached as Exhibit D.

state control.[16] The co-chairs withheld, however, "anticipated defenses and counterarguments thereto" citing attorney-client privilege.[17] Other Commission members had demanded the co-chairs release the records and filed a bar complaint against Davillier when the lawyers refused to release the records.[18] On December 1, 2016, Ric Cantrell, Chief of Staff for the Utah State Senate, sent an email to CfA stating "we have not been able to locate [the analysis] in the records maintained by the senate, or in any senator's individual possession."[19] (sic)

On March 1, 2017, CfA submitted another GRAMA request to the co-chairs seeking copies of all invoices submitted by Davillier and the Commission's other contractors.[20] On March 20, 2017, Kathryn Jackson, Records Officer for the Utah House of Representatives, responded that all of the requested records were available on the Commission's website.[21] In fact, however, as noted above, the most recent invoice on the Commission's website is dated August 19, 2016.

CfA, through counsel, submitted a follow-up request on May 8, 2017, seeking Davillier's invoices. Ms. Jackson responded on June 20, 2017, reiterating that all invoices were available on the Commission's website. Ms. Jackson acknowledged that press reports indicated Davillier continued to work for the Commission, but she said she had "not been able to discover any other submitted, paid, or pending invoices or other payment records concerning state funds issued to or approved for payment to Davillier Law Group, LLC."[22]

Finally, on June 1, 2017, CfA submitted a broader request seeking all communications between the Commission co-chairs and Davillier Law Group.[23] On July 1, 2017 (corrected on July 5, 2017), Ms. Jackson denied CfA's request citing attorney-client privilege.[24] The response letter indicates the co-chairs are continuing to work with Davillier without acknowledging the relationship to the other members of the Commission, the Utah Legislature, or the public. CfA is currently seeking a list of the documents the co-chairs have refused to provide.

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[16] John W. Howard, James S. Jardine, et. al., Legal Analysis of the Legal Consulting Services Team, *Commission for the Stewardship of Public Lands*, December 9, 2016, *available at* http://le.utah.gov/interim/2016/pdf/00002619.pdf.
[17] Robert Gehrke, State Paid $640k for Public Lands Analysis; Dems Want all the Info, *The Salt Lake Tribune*, February 2, 2016, *available at* http://archive.sltrib.com/article.php?id=3487535&itype=CMSID.
[18] Robert Gehrke, Dems Want State Bar to Weigh in on Public Lands Lawsuit Dispute, *The Salt Lake Tribune*, March 1, 2016, *available at* http://archive.sltrib.com/article.php?id=3598614&itype=CMSID.
[19] Email from Ric Cantrell, Chief of Staff for the Utah State Senate, to Ms. Weismann, December 1, 2016, attached as Exhibit E.
[20] GRAMA Request from Mr. Stevens to Sen. Hinkins and Rep. Stratton, March 1, 2017, attached as Exhibit F.
[21] Letter from Kathryn Jackson, Records Officer for the Utah House of Representatives, to Mr. Stevens, March 20, 2017, attached as Exhibit G.
[22] Letter from Ms. Jackson to Mr. Stevens, June 20, 2017, attached as Exhibit H.
[23] GRAMA Request from Mr. Stevens to Utah House of Representatives and Senate, attached as Exhibit I.
[24] Letter from Ms. Jackson to Mr. Stevens, July 5, 2017, attached as Exhibit J.

Co-Chairs Violate Commission's Authorizing Legislation

The Commission, at the direction of the co-chairs, appears to be in violation of its statutory authorization. First, the legislation creating the Commission states that the Commission's purpose is to consider the transfer of federal lands to state control.[25] The comments submitted to the Department of the Interior regarding Bears Ears National Monument, however, relate to Interior's potentially changing its designation for land that is, and will continue to be, owned by the federal government. As a result, the issue is wholly outside the scope of the Commission's jurisdiction.

In addition, the Commission co-chairs continue to act as de facto executives – conducting the Commission's business without the input of other Commission members. The co-chairs deliberately withheld Davillier's legal analysis from fellow members of the Commission and submitted comments to the Department of the Interior regarding Bears Ears without any apparent input from other Commission members. The public comments regarding Bears Ears National Monument were signed only by the co-chairs, are not available on the Commission's website, and the Commission does not appear to have held a public meeting before issuing the comments.

Further, the Commission does not appear to be following the statutorily mandated requirement that it meet at least eight times per year.[26] The Commission's website lists only three meetings in 2017,[27] two meetings in 2016,[28] and seven meetings in 2015,[29] its first full year in operation.

Finally, the co-chairs have repeatedly ignored calls for transparency despite the Commission's public mission and the fact that it is taxpayer funded. CfA has filed four records requests seeking Commission documents, but the co-chairs have consistently refused to release documents voluntarily, and have refused to make them available in response to GRAMA requests. Additionally, the co-chairs submitted comments to the federal government on behalf of the Commission, but failed to post the comments on the Commission's own website or subject them to public scrutiny before submitting them.

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[25] H.B. 151, *Commission for the Stewardship of Public Lands*, Aril 1, 2014, *available at* https://le.utah.gov/interim/2014/pdf/00004030.pdf.
[26] *Id.*
[27] https://le.utah.gov/asp/interim/Commit.asp?Year=2017&Com=SPESPL.
[28] https://le.utah.gov/asp/interim/Commit.asp?Year=2016&Com=SPESPL.
[29] https://le.utah.gov/asp/interim/Commit.asp?Year=2015&Com=SPESPL.

Conclusion

CfA hereby requests that you immediately release all invoices, legal analyses, and any other documents regarding Davillier Law Group, LLC. The Commission should regularly release all invoices and other legal analyses submitted by its contractors. The Utah Legislature entrusted the Commission with the responsibility of managing a $2 million budget, and the Commission must demonstrate that it is capable of adhering to its fiduciary and ethical responsibility to taxpayers. Being transparent about its dealings and actions is the most effective way for the co-chairs to demonstrate the Commission is acting lawfully and in the best interests of the citizens of Utah.

Sincerely,

Daniel Stevens
Executive Director

EXHIBIT A

UTAH STATE LEGISLATURE

REQUEST FOR A RECORD
under the
GOVERNMENT RECORDS ACCESS AND MANAGEMENT ACT (Utah Code Title 63G, Chapter 2) and UTAH LEGISLATURE POLICIES AND PROCEDURES FOR HANDLING RECORDS REQUESTS

Date: September 7, 2017

From: Daniel Stevens
(Name)
611 Pennsylvania Ave., S.E., #337
(Mailing address)
Washington | D.C. | 20003
(City) (State) (Zip code)
(202) 780-5750
(Daytime telephone number)

FOR OFFICE USE ONLY

To:
- ☒ House of Representatives
- ☒ Senate
- ☐ Office of Legislative Auditor General
- ☐ Office of Legislative Fiscal Analyst
- ☐ Office of Legislative Research and General Counsel
- ☐ Legislative Printing

I request the following record or records (must be identified with reasonable specificity):
Campaign for Accountability requests access to and copies of all documents that evidence or relate to any communications or agreements with Davillier Law Group. This request includes all documents related to the Commission for the Stewardship of Public Lands' comments to Secretary Zinke regarding Bears Ears National Monument.

I am requesting only records[1] ☒ sent, ☒ received, or ☒ created from Jan. 1, 2016 (Date) to present (Date)

If you are requesting that we search email or other records relating to specific topics, please specify the search terms[2] you would like us to use to identify the records you are requesting:
N/A

☒ I request an expedited response because I can demonstrate that this request for records benefits the public rather than myself, based on the following:
The requested information will inform and educate the public about how taxpayer funds are being spent by the Commission. Specifically, the information will inform the public about the Commission's ongoing communications with its legal team.

(For more information relating to a record request to a legislative office, please review the back of this form.)

Revised 5/23/13

[1] Declining to limit your request to particular dates may cause your request to be out of compliance with the requirement to identify the requested records with reasonable specificity.

[2] Declining to identify search terms may increase the volume of records to be reviewed and the amount of staff time required to review them and thus may result in higher fees.

GENERAL INFORMATION

Introduction

This document is intended to provide general information relating to a request for a record directed to a governmental entity within the legislative branch. It is not intended as legal advice, nor is it a comprehensive description of Utah Code Title 63G, Chapter 2, Government Records Access and Management Act ("GRAMA") or the Utah Legislature Policies and Procedures for Handling Records Requests ("Policies") (at http://le.utah.gov/documents/2007GRAMApolicies.pdf). Please refer to GRAMA and the Policies for further information.

Time for Response

Normally, a legislative office is required to respond to a request for a record as soon as reasonably possible, but no later than 10 business days after receiving the request (Policies, Section 2.1(2)(a)). If the person submitting the request demonstrates that the record request benefits the public rather than the person, the time for responding is as soon as reasonably possible, but no later than five business days after the legislative office receives the written request (Policies, Section 2.1(2)(a)). However, a legislative office may respond to a request later than the normal or expedited response time if an extraordinary circumstance exists (Policies, Section 2.1(3)). The following constitute extraordinary circumstances under the Policies:

- another legislative office or governmental entity is using the record;
- the request is for a voluminous quantity of records;
- the legislative office is currently processing a large number of records requests;
- the request requires the legislative office to review a large number of records to locate the records requested;
- the decision to release a record involves legal issues that require the legislative office to seek legal counsel for the analysis of statutes, rules, ordinances, regulations, or case law; or
- segregating information that the requester is entitled to inspect from information that the requester is not entitled to inspect requires extensive editing or computer programming.

(Policies, Section 2.1(3)).

Additionally, if a record request is made during a general or special legislative session, the legislative office may respond as soon as reasonably possible but no later than 15 business days from the date of the request. (Policies, Section 2.1(5))

Fees

It often requires significant staff time to respond to a request for a record. This is due, in part, to the time it takes to review records to identify those that are responsive to the request, to redact information that is private, protected, or controlled, if applicable, and to seek legal advice to ensure compliance with the requirements of the law. Because staff time is paid with tax revenue, the Legislature charges fees in order to recoup some of the cost to taxpayers. The general fee provisions of GRAMA do not apply to the Legislature (see Utah Code Section 63G-2-703). Instead, the Legislature has its own fee provisions relating to a request for records, as provided in the Policies. Staff time spent responding to a request is never billed higher than $25 per hour, even if the employee is actually paid at a higher rate. Black and white copies are charged at a rate of 10 cents per copy. A list of other fees charged for records is available on the Legislature's website at: http://le.utah.gov/documents/fees.htm. A legislative office is authorized to fulfill a record request without charge under circumstances specified in the Policies (Policies, Section 2.2(2)), but fulfilling a record request without charge is rare. To request that a record request be fulfilled without charge, you must complete and submit a Request to Have a Record Request Fulfilled Without Charge form, available on the Legislature's website.

Appeals

A decision to deny access to a record, or a decision claiming extraordinary circumstances, which allows additional time to respond, may be appealed pursuant to the appeals process as provided in the Policies.

The appeals process for the legislative branch is different than the process followed by other governmental entities. A person may appeal a legislative office's access determination by filing a notice of appeal with the appropriate legislative officer within 30 calendar days after the determination. For an appeal of a legislative office's claim of extraordinary circumstances, the notice of appeal must be filed within 30 calendar days after the day on which written notification of a claim of extraordinary circumstances is issued.

A determination of the appropriate legislative officer may be appealed to the Legislative Records Committee by filing a notice of appeal with the director of the Office of Legislative Research and General Counsel within 30 calendar days after the determination by the appropriate legislative officer (for an appeal challenging the claim of extraordinary circumstances, the notice of appeal must be filed within 45 calendar days after the original request for records is submitted).

An order by the Legislative Records Committee may be appealed by petitioning the district court within 30 calendar days after the Legislative Records Committee's order.

The Legislature's appeals process is described in full in the Policies.

Revised 5/23/13

EXHIBIT B

Commission for the Stewardship of Public Lands

Utah State Capitol Complex
PO BOX 145115 • Salt Lake City, Utah 84114-5115
(801) 538-1035 • fax (801) 538-1414

http://le.utah.gov

May 19, 2017

Monument Review
MS-1530, U.S. Department of Interior
1849 C Street NW
Washington, DC 20240

Dear Secretary Zinke,

We are writing to you in our capacity as co-chairs of the Commission for the Stewardship of Public Lands, a subsection of the Utah Legislature dedicated to and charged with reviewing all issues related public lands within our state. Utah's status as a premier public lands state is near to our hearts, as it is to all Utahns. We appreciate and applaud your recent visit to our state. It was a pleasure to get acquainted with you and members of your excellent staff! Your approach in meeting with state local elected officials and residents was refreshing and helpful in building trust and goodwill. We look forward to a productive working relationship.

Our purpose in writing is to urge you to recommend to our President, Donald J. Trump, that the Bears Ears National Monument designation be rescinded, and second, that the boundaries of the Grand Staircase Escalante Monument be redrawn.

Our state is committed to keeping public lands in public ownership and management, but we believe the current monument designation is the wrong tool to protect these beautiful, precious lands. Regarding the two Utah monuments under your consideration, the original designations were blunt tools forced upon Utah against the will of the people. Going forward we believe a national monument designation is appropriate when approved by state and federal legislative bodies. As articulated in resolutions passed by the Utah State Legislature, we are asking for a more surgical, precise protection for these lands. We believe the best solution is for local, state, and federal partners to work together to create the best possible plan to protect the land for multiple purposes—historic value, environmental improvement, wilderness protection, appropriate mineral extraction, recreational purposes (including camping, rock climbing, hunting, and fishing, among others), grazing, and when appropriate, economic development for the people who have made these areas their home.

Commission for the Stewardship of Public Lands

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The Utah Legislature is committed to protecting public lands, as stated in the attached resolution. In our capacity as co-chairs of the commission, we have heard from countless constituents who have made rural Utah their home and Utah outdoors their recreational spot of choice. The people of Utah cherish the public lands and desire to protect the unique treasures that are a part of these lands, but we reject the unilateral, politically motivated method used by our two most recent Democratic presidents.

Please recommend the rescission of the Bears Ears National Monument designation and a revision of the Grand Staircase-Escalante Monument boundaries. We are confident that we can work together to find the best possible solution for the public lands in Utah.

Sincerely,

Senator David P. Hinkins, Chair
dhinkins@le.utah.gov

Representative Keven Stratton, Chair
kstratton@le.utah.gov

EXHIBIT C

Commission for the Stewardship of Public Lands

Utah State Capitol Complex
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http://le.utah.gov

May 25, 2017

To: The Honorable Ryan Zinke, Secretary of the Department of the Interior

These comments are respectfully submitted by the Chairs of the Commission for the Stewardship of Public Lands of the Utah Legislature (the "Commission")* to The Honorable Ryan Zinke, Secretary of the United States Department of the Interior, in response to Docket No. DOI-2017-0002 of May 11, 2017, inviting public comment with regard to Executive Order 13792 of April 26, 2017 entitled Review of Designations Under the Antiquities Act. These comments are specific to the Bears Ears Monument (the "Monument") established by Presidential Proclamation 9558 of December 28, 2016. These comments supplement and augment our letter of May 19, 2017.

Utah is a public lands state. The Commission supports the careful stewardship, protection, and environmentally responsible multiple use of our public lands. We treasure our public lands, and are committed to keeping our public lands available to the public consistent with the rule of law and the Constitution. We therefore urge you to recommend that President Trump rescind Presidential Proclamation 9558 (the "Proclamation") because:

1. The Proclamation is an illegal use of the Antiquities Act (the "Act") in that:
    a. it fails properly to identify the objects it purports to protect as required by the Act;
    b. the reservation of 1.35 million acres vastly exceeds the "smallest area compatible with the proper care and management of the objects to be protected" as required by the Act; and
    c. the 1.35 million acres of designated lands do not represent "historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific

* These comments were prepared on behalf of the Chairs of the Commission by Richard Seamon, George Wentz, John Howard, and Colton Boyles of the Davillier Law Group, LLC.

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interest" as required by the Act; the Proclamation's true purpose is landscape and ecosystem preservation which is not within the scope of powers delegated by Congress to the President under the Act.

2. The Proclamation process was severely flawed in that it failed to take into account the culture, desires, and well-being of the citizens of San Juan County, Utah and the State of Utah, instead catering to well-funded out of state special interest groups who are not impacted by the Proclamation in the same way the local people closest to the land will be.
3. The Monument will unreasonably restrict desirable available uses of public lands within and adjacent to the Monument under the Federal Land Policy and Management Act, which requires in §102(a)(7) that public lands be managed "on the basis of multiple use and sustained yield unless otherwise specified by law" and in §102(a)(12) that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands." The Monument will also threaten national security and energy independence due to its negative impact on the United States' uranium industry.
4. The Monument will unreasonably restrict the use and enjoyment of non-public lands within and beyond the Monument boundaries.
5. The Monument will have a negative impact on the economic development and fiscal conditions of San Juan County, Utah as well as the State of Utah and the Nation.
6. The Federal Government does not have sufficient resources available properly to manage such a vast monument.
7. The antiquities that do exist within the area designated by the Proclamation are already adequately protected through numerous existing laws.

Commission for the Stewardship of Public Lands

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8. President Trump has the legal authority to rescind the Proclamation.

As a final matter, we suggest that President Trump work with Congress to amend the Act to prevent future abuse, and propose an amendment to the Act for consideration.

We address these issues in the order presented.

Section 1:
The Proclamation is an Illegal Use of the Antiquities Act

A. The Proclamation Fails Properly to Identify the Objects it Purports to Protect.

The Antiquities Act has a sharp focus. It limits national monuments to protecting three types of objects: (1) historic landmarks, (2) historic and prehistoric structures, and (3) "other objects of historic or scientific interest."[1] By contrast, the Proclamation takes a remarkably broad view of what qualifies as objects entitled to protection under the Act.[2] The Proclamation spends four pages describing various objects on the monument land, after which it "proclaims the objects identified above . . . to be the Bears Ears National Monument."[3] The "objects identified above" include sunflowers,[4] ponderosa pine,[5] sagebrush,[6] and badgers.[7]

The "object" limitation on the authority delegated by Congress to the President under the Act is significant as, without it, the President could literally proclaim all public lands -- one third of the nation -- to be a monument. As this was clearly not Congress' intent in passing the Act, the "object" limitation must have meaning. President Obama, however, totally disregarded this statutory limitation by including as "objects" subject to protection

[1] 54 U.S.C. § 320301(a).
[2] 54 U.S.C. § 320301(b).
[3] 82 Fed. Reg. at 1143.
[4] 82 Fed. Reg. at 1142.
[5] 82 Fed. Reg. at 1141.
[6] 82 Fed. Reg. at 1141.
[7] 82 Fed. Reg. at 1142.

by the Act common every-day items found throughout the State of Utah and the West. This is a particularly significant issue to the citizens of the State of Utah, where 67% of the land is public land. If President Obama's misuse of the Act is left standing, the power of a future President to proclaim monuments would be without limitation. We therefore urge that the Secretary recommend that the President rescind the Proclamation to protect our State from future abuses of this nature.

B. The Reservation Of 1.35 Million Acres Vastly Exceeds the "Smallest Area Compatible with the Proper Care and Management of the Objects to be Protected."

To protect antiquities, the Act authorizes the President to reserve small areas of public land immediately surrounding them. The Act does not allow the President to fence off more than a million acres on the premise that widely "scattered" across that vast expanse one might find assorted but unidentified antiquities, as President Obama has done here.[8] To the contrary, the Act requires that land reserved for a monument "be confined to the smallest area compatible with the proper care and management of the objects to be protected."[9] Thus, the Antiquities Act expressly contemplates that the President will use it when he determines that a particular landmark, structure, or other antiquity has historic or scientific value; in that event, he may reserve the land immediately surrounding the object to protect it. This purpose emerges plainly from the history of the Act.

The quarter-century before enactment of the Antiquities Act in 1906 saw renewed and growing interest in American antiquities.[10] American interest in these objects rekindled

[8] 82 Fed. Reg. at 1140.

[9] 54 U.S.C. § 320301(b).

[10] Ronald Freeman Lee, The Antiquities Act of 1906 (Raymond Harris Thompson ed.), 42 J. of the Southwest 198, 198-213 (2000) Ronald Lee was the Chief Historian of the National Park Service from 1938 to 1951; Lee wrote his history of the Antiquities Act for publication in celebration of the centennial of Yellowstone National Park in 1972. Raymond Harris Thompson, *"An Old and Reliable Authority": Introduction*, 42 J. of the Southwest 191 (2000). Lee's history is reproduced, with minor edits, in volume 42 of the Journal of the Southwest; it also is available on the National Park

as the embers of the Civil War cooled.[11] The year 1879 was particularly significant, according to a leading historian of the Act. Several events occurred in that year, including this one:

> In 1879 Congress authorized establishment of the Bureau of Ethnology, later renamed the Bureau of American Ethnology, in the Smithsonian Institution to increase and diffuse knowledge of the American Indian. Major John Wesley Powell, who had lost his right arm in the Battle of Shiloh and who in 1869 had led his remarkable boat expedition through the Grand Canyon of the Colorado River, was appointed its first director. He headed the bureau until his death in 1902. During this long period, he and his colleagues became a major force for the protection of antiquities on federal lands.[12]

The Smithsonian hosted a gathering of archeologists and anthropologists who formed an organization that evolved into the American Anthropological Association. That organization, in turn, "provided crucial support for the American Antiquities Act in 1906."[13]

Interest in antiquities on public land first produced federal legislation in 1889.[14] In that year, Congress enacted a law to protect the Casa Grande structure in Arizona.[15] The law authorized the President to reserve the land on which the ruin was situated from settlement and sale.[16] In 1892, President Benjamin Harrison issued an executive order reserving the Casa Grande Ruin and 480 acres around it for protection because of its archeological value.[17]

Service's website. *See* U.S. Dep't of Interior, National Park Service, Archeology Program, The Story of the Antiquities Act, by Ronald F. Lee, https://www.nps.gov/archeology/pubs/Lee/index.htm.

[11] Hal Rothman, Preserving Different Pasts: The American National Monuments, at 6-7 (Univ. of Ill. 1989).

[12] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 198.

[13] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 199.

[14] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 209.

[15] Act of Mar. 2, 1889, Ch. 411, 25 Stat. 939.

[16] 25 Stat. 961.

[17] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 209. Casa Grande was re-designated a national monument by President Woodrow Wilson on August 3, 1918. Casa Grande National Monument, Ariz., Proclamation 1470, 40 Stat. 1818 (1918).

The growing American interest in antiquities on public land led to a greater need to protect them.[18] Both amateur and professional antiquity hunters were removing antiquities from the public lands and vandalizing the sites on which they were located.[19] A commercial market arose to meet public demand. The need for legal protection of these American antiquities became apparent.[20]

Bills to provide that protection were introduced beginning in early 1900.[21] One bill, proposed by the Department of Interior, would have given the President broad authority to withdraw unlimited amounts of public land as national parks — all to be administered exclusively by the Secretary of Interior — for a wide variety of purposes, including their scenic beauty:

> The President of the United States may, from time to time, set apart and reserve tracts of public land, which for their scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest, or springs of medicinal or other properties it is desirable to protect and utilize in the interest of the public; and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.[22]

This and the other bills were referred to the House Committee on the Public Lands, whose Chairman was Representative John F. Lacey of Iowa. As historian Ronald Lee wrote,

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[18] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 213; Hal Rothman, Preserving Different Pasts: The American National Monuments, at 6-30 (Univ. of Ill. 1989).

[19] H.R. Rep. 56-1104, at 1 (1900) (stating that "destruction of [ruins in Southwest United States] is taking place more and more each year"); *Preservation of Historic and Prehistoric Ruins, Etc.: Hearing on S.4127 Before the S. Subcomm. of Comm. on Public Lands*, 58th Cong., 2nd Sess. Doc. No. 314, at 4 (1904) (testimony of Dr. Francis W. Kelsey, Sec'y of Archeological Institute of America) (stating that public lands were being looted of valuable archeological objects and that sites from which they were being taken were "so completely disfigured in the process that the remains become valueless for scientific purposes"); John Ise, Our National Park Policy: A Critical History, at 144-146 (Res. for the Future, Inc. 1961).

[20] John Ise, Our National Park Policy: A Critical History, at 147 (Res. for the Future, Inc. 1961); Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 223-230.

[21] John Ise, Our National Park Policy: A Critical History, at 149-151 (Res. for the Future, Inc. 1961); Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 223-230.

[22] H.R. 11021, 56th Cong., 1st Sess. (introduced Apr. 26, 1900), reproduced in Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 227-228.

the Interior Department's bill met with a cool reception.[23] Representative Lacey told the Interior Secretary that the committee

> seemed to be unanimously of the opinion that it would not be wise to grant authority in the Department of the Interior to create National parks generally, but that it would be desirable to give the authority to set apart small reservations, not exceeding 320 acres each, where the same contained cliff dwellings and other prehistoric remains.[24]

Historian Lee explains that the committee opposed Interior's broad proposal because of the huge withdrawals of public lands that had been made by presidents under the Forest Reserve Act of 1891.[25] The Committee eventually reported out a much narrower bill in spring 1900 that allowed the Interior Secretary to

> set apart and reserve from sale, entry, and settlement monuments, cliff dwellings, cemeteries, graves, mounds, forts, or any other work of prehistoric, primitive, or aboriginal man, each such reservation not to exceed 320 acres.[26]

By limiting each reservation to 320 acres, the bill contemplated that its authority would be used to "creat[e] reservations of the land surrounding *each* ruin."[27]

Only four years later, beginning in 1904, did Congress again consider proposed legislation to protect antiquities. The Senate passed legislation known for its chief sponsor,

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[23] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 228; John F. Shepherd, *Up the Down Staircase: Executive Withdrawals and the Future of the Antiquities Act*, 43 Rocky Mtn. Min. L. Inst. 4-1, 4-10 (1997) (stating that House committee "was not pleased with this request for a broad grant of executive authority"); *see also* Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 Wash. L. Rev. 439, 450 (1981) (stating that in years leading up to enactment of Antiquities Act, "the Department of Interior repeatedly proposed adding scenic and scientific resources as objects worthy of protection").

[24] Ronald F. Lee, The Antiquities Act, Ch. 6 (quoting Robert Claus, Information about the background of the Antiquities Act of 1906, "prepared by Robert Claus, Division of Interior Department Archives, National Archives, Washington, D.C., at p. 5 (May 10, 1945)), https://www.nps.gov/archeology/PUBS/LEE/antNotes.htm#86; John Ise, Our National Park Policy: A Critical History, at 150 (Res. for the Future, Inc. 1961).

[25] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 228-229.

[26] H.R. 10451, 58th Cong., 2d Sess. (introduced Apr. 5, 1900).

[27] H.R. Rep. 56-1104, at 1 (1900).

Henry Cabot Lodge.[28] The Lodge Bill passed the Senate in April 1904, and, as amended, was reported favorably out on the House side, but Congress adjourned without passage in the House.[29] The Lodge bill authorized the Secretary of Interior to withdraw public lands of up to 640 acres to protect historic and prehistoric ruins, monuments, archeological objects, and antiquities.[30] The Lodge bill was not enacted.[31]

Instead, the bill that was ultimately enacted as the Antiquities Act was introduced in Congress in early 1906.[32] The bill had been drafted by Edgar Lee Hewett, an influential archeologist, with input from Representative Lacey, Chairman of the House Committee on Public Lands.[33] Lacey's role in its enactment was so important that the Antiquities Act was often called "the Lacey Act."[34] The 1906 bill drafted by Hewett, unlike some earlier bills, vested power to withdraw lands to protect antiquities in the President, rather than the

[28] S. 5603, 58th Cong., 2d Sess. (1904), reproduced in H.R. Rep. 58-3704, at 1-2 (1905); Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 232; Hal Rothman, Preserving Different Pasts: The American National Monuments at 39-41 (Univ. of Ill. 1989).

[29] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 234; Hal Rothman, Preserving Different Pasts: The American National Monuments at 45 (Univ. of Ill. 1989).

[30] H.R. Rep. 58-3704, at 1 (1905) (reproducing the Lodge bill, S.5603, 58th Cong., 2d Sess., § 2).

[31] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 235.

[32] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 238-239; *see also* Hal Rothman, Preserving Different Pasts: The American National Monuments at 46-48 (Univ. of Ill. 1989); Raymond Harris Thompson, *Edgar Lee Hewett and the Politics of Archeology*, in The Antiquities Act, at 35, 43 (D. Harmon, F. McMannon & D. Pitcaithley eds. 2006).

[33] Edgar Lee Hewett drafted the bill that was ultimately enacted as the Antiquities Act while serving as secretary of a joint committee of the American Anthropological Association and the Archeological Institute of America. Raymond Harris Thompson, *Edgar Lee Hewett and the Politics of Archeology*, in The Antiquities Act, at 35, 39 (D. Harmon, F. McMannon & D. Pitcaithley eds. 2006). In developing the draft bill, Hewett worked with William Afton Richards, Commissioner of the General Land Office in the Department of Interior and Congressman Lacey. Thompson, *supra*, at 38-39, 42. The two organizations approved Hewett's draft bill at a meeting in December 1905. Thompson, *supra*, at 43. Hewett presented the draft to Congressman Lacey, who introduced it in the House in January 1906, and it passed both houses of Congress in the spring of that year. Thompson, *supra* at 43; *see also* Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 237-238 (similar description of Hewett's role in drafting the bill enacted as the Antiquities Act.); Hal Rothman, Preserving Different Pasts: The American National Monuments, at 43-46 (Univ. of Ill. 1989) (same); *cf.* John Ise, Our National Park Policy: A Critical History, at 152 (Res. for the Future, Inc. 1961) (stating that the ultimately successful bill was "drafted in the office of Commissioner Richards with the co-operation of [Representative] Lacey and Dr. Hewett").

[34] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 238-239; Rebecca Conrad, *John F. Lacey: Conservation's Public Servant*, in The Antiquities Act, at 51 (D. Harmon, F. McMannon & D. Pitcaithley eds. 2006). Congressman Lacey also gave his name to another statute, also known as the "Lacey Act," that was enacted in 1900 and that protects certain wildlife. Act of May 25, 1900, ch. 553, 31 Stat. 187 (codified as amended at 18 U.S.C. §§ 42–43, and 16 U.S.C. §§ 3371–1378).

Secretary of Interior.[35] This change stemmed from the transfer in 1905 of much public land containing antiquities to the Department of Agriculture, largely through the efforts of Gifford Pinchot, Chief of the Agriculture Department's Bureau of Forestry.[36] The 1906 bill further differed from some of its predecessors by not containing numerical limits on the amount of land that could be reserved to protect antiquities. Instead, the bill provided, in language that was ultimately enacted, that the President could reserve only "the smallest area compatible with the proper care and management of the objects to be protected."[37] The 1906 bill included as items entitled to protection "objects of historic or scientific interest," a phrase possibly taken from the bill that had been introduced in 1900 and supported by the Department of Interior.[38] The House report accompanying the House version, however, confirmed that the bill "proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times."[39]

The Act's intended narrow focus was reaffirmed in a colloquy on the floor of the House between Representative Lacey and Congressman John H. Stephens of Texas:

> Mr. LACEY: . . . [T]his [bill] will merely make small reservations where the objects are of sufficient interest to preserve them . . .
> Mr. STEPHENS of Texas: How much land will be taken off the market in the Western States by the passage of the bill?
> Mr. LACEY: Not very much. The bill provides that it shall be the smallest area necesstry [sic] for the care and maintenance of the objects to be preserved.

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[35] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 237-239.
[36] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 236; Prehistoric Ruins on Public Lands, House Rep. No. 3704, 58th Cong, 3d Sess., pp. 1-2 (1905).
[37] Ronald F. Lee, The Antiquities Act, 42 J. of the Southwest at 240-241 (quoting bills).
[38] Ronald F. Lee, The Antiquities Act of 1906, 42 J. of the Southwest at 240 ("At some point in his discussions with government departments, [Edgar Lee] Hewett was persuaded, probably by officials of the Interior Department, to broaden his draft to include the phrase 'other objects of historic or scientific interest.' This language may have come from the old Interior Department bill, H.R.11021").
[39] H.R. Rep. 59-2224, at 1 (1906), *available at* https://coast.noaa.gov/data/Documents/OceanLawSearch/House%20Report%20No.%2059-2224.pdf?redirect=301ocm.

> Mr. STEPHENS of Texas: Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?
> Mr. LACEY: Certainly not. The objective is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos of the Southwest, whilst the other [law — i.e., the forest-reserve bill] reserves the forests and the water courses.[40]

The "forest-reserve bill" to which the colloquy refers was the Forest Reserve Act of 1891, which President Theodore Roosevelt and his predecessors had used to reserve millions of acres of public lands as national forests.[41] The colloquy shows that Congress enacted the Antiquities Act with the understanding that it would not allow million-acre reservations of the sort that occurred under the 1891 law. Instead, the 1906 Act was designed to allow the President to designate discrete objects as national monuments and, for each such object, to reserve only the smallest amount of land "absolutely necess[a]ry" to protect that object.[42]

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[40] 40 Cong. Rec. 7888 (1906). As noted above, Congressman Lacey, whose explanation of the Antiquities is quoted above in the text of this memo, played such an important role in the Act's passage that for many years the legislation was known as "the Lacey Act." Ronald F. Lee, The Antiquities Act of 1906, 42 J. of the Southwest at 242. Congressman Lacey's views therefore deserve great weight in interpreting the Act. *See, e.g.*, *FCC v. League of Women Voters*, 468 U.S. 364, 387 n.18 (1984) (citing chief sponsor's view in interpreting federal statute); *McElroy v. United States*, 455 U.S. 642, 651-652 (1982) (same); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (same).

[41] President Roosevelt had withdrawn from the public domain about 150 million acres of land as forest reserves under the Forest Reserve Act of 1891, which was also called the General Revision or Creative Act of 1891. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103, *repealed by* 90 Stat. 2792 (1976); Paul W. Gates & Robert W. Swenson, History of Public Land Law Development, at 580 (1968) (stating that Roosevelt reserved about 148 million acres of forest land); David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 Nat. Res. J. 279, 288 (1982) (stating that Roosevelt withdrew more than 150 million acres of forest land). Largely because of President Roosevelt's perceived misuse of the 1891 law, Congress amended that law in 1907 to require congressional approval for the creation of national forests in six western States. Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1269, 1271; *see* Hal Rothman, Preserving Different Pasts: The American National Monuments at 48 (Univ. of Ill. 1989); *see also* 16 U.S.C. § 1609(a) (current law requiring an Act of Congress to create a national forest). It was not until 1916 that President Roosevelt's successor, Woodrow Wilson, signed legislation creating the National Park Service to manage the national park system. Act of Aug. 25, 1916, 39 Stat. 535.

[42] 40 Cong. Rec. 7888 (1906) (statement of Rep. Lacey). As one scholar has explained, Congress's intention to allow a monument to consist only of the land immediately surrounding a specific antiquity — rather than monuments, such as Bears Ears, which encompass vast expanses of land across which various antiquities are purportedly scattered — is made clear in the House report accompanying the bill that became the Antiquities Act. Eric C. Rusnak, *The Straw that Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 Ohio St. L.J. 669, 675 (2003). The House report incorporated a memorandum by Edgar Lee Hewett, the archeologist who drafted the bill ultimately enacted, "that

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Since the Proclamation reserves vast areas with no identified objects deserving protection under the Act, instead of the smallest amount of land necessary to protect identified objects, we urge that the Secretary recommend that President Trump rescind the illegal Proclamation.

C. The Proclamation's True Purpose is Landscape and Ecosystem Preservation, Which is Not Within the Scope of Powers Delegated by Congress to the President Under the Act.

1.

As noted above, the Act has a narrow focus, as shown by its text and legislative history. It does not authorize the President to reserve vast expanses for its scenic or recreational value, or as a "cultural landscape[]."[43] Yet that is precisely what President Obama did in creating Bears Ears, as well as other monuments.

Bears Ears covers 1.35 million acres, an area twice the size of Rhode Island.[44] It is one of 34 national monuments that President Obama created or expanded under the Antiquities Act, more than any other president.[45] Collectively, President Obama's monuments total more than 553 million acres.[46] *That is an area more than three times the size of Texas*, and far more than that of all prior presidents combined.[47]

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inventoried, grouped, and described the specific Indian ruins for which Hewett sought protection by the Act." *Id*. at 676; *see* H.R. Rep. 59-2224, at 3-7 (1906).

[43] 82 Fed. Reg. at 1139.

[44] United States Census Bureau, Geography, State Area Measurements and Internal Point Coordinates (reporting land area of Rhode Island as 1034 square miles — i.e. 661,760 acres), https://www.census.gov/geo/reference/state-area.html.

[45] Juliet Eilperin & Brady Dennis, *Obama names five new national monuments, including Southern civil rights sites*, Washington Post, Jan. 12, 2017, https://www.washingtonpost.com/national/health-science/obama-names-five-new-national-monuments-including-southern-civil-rights-sites/2017/01/12/7f5ce78c-d907-11e6-9a36-1d296534b31e_story.html?utm_term=.611207ae55de.

[46] *Bears Ears and Gold Butte are the latest battlegrounds in a long-running debate about federal land in the West*, The Economist, Jan. 14, 2017, http://www.economist.com/news/united-states/21714371-conservationists-are-delighted-midnight-monuments-conservatives-less-so-bears.

[47] U.S. Dep't of Interior, National Park Service, Archeology Program, Antiquities Act: 1906-2006, Maps, Facts & Figures https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm (Dec. 8, 2016) (listing national monuments and their sizes); U.S. Census Bureau, Geography, State Area Measurements and Internal Point Coordinates (reporting size of Texas

The Proclamation does not explain why 1.35 million acres is "the smallest area compatible with the proper care and management of the objects to be protected," as the Act requires.[48] Aside from the twin buttes for which the monument is named, the Proclamation identifies only 17 specific locations in the 1.35 million acre expanse where one can find the objects identified by the Proclamation as entitled to protection under the Act.[49] Otherwise, the Proclamation is vague, stating, for example, that Native American artifacts are "scattered throughout the area."[50]

Indeed, the Proclamation makes clear that, in reality, the 1.35 million acres are being reserved for purposes unrelated to protecting objects entitled to protection under the Act. Instead, the Proclamation touts the scenic and recreational value of the reserved land. As to its scenic value, the Proclamation rhapsodizes:

> From earth to sky, the region is unsurpassed in wonders. The star-filled nights and natural quiet of the Bears Ears area transport visitors to an earlier eon.[51]

As to the monument's recreational value, the Proclamation raves:

> The area . . . provides world class outdoor recreation opportunities, including rock climbing, hunting, hiking, backpacking, canyoneering, whitewater rafting, mountain biking, and horseback riding."[52]

(including land and water area) as 268,596 square miles — i.e., 171,901,440 acres), https://www.census.gov/geo/reference/state-area.html.

[48] 54 U.S.C. § 320301(b).

[49] They are: (1) "Cedar Mesa," including "the Lime Ridge Clovis Site"; (2) the "Doll House Ruin"; (3) "the Moon House Ruin"; (4) "[t]he Indian Creek area," including "Newspaper Rock"; (5) "the Hole-in-the Rock Trail"; (6) "the Outlaw trail"; (7) "Hideout Canyon"; (8) "the Abajo Mountains tower"; (9) "Arch Canyon"; (10) "Indian Creek's Chinle Formation"; (11) "Comb Ridge"; (12) "the San Juan River"; (13) "the Valley of the Gods"; (14) – (16) "the Wingate, Kayenta, and Navajo Formations"; and (17) "the Elk Ridge area of the Manti-La Sal National Forest." 82 Fed. Reg. at 1139-1141.

[50] 82 Fed. Reg. at 1140.

[51] 82 Fed. Reg. at 1141.

[52] 82 Fed. Reg. at 1143.

The Proclamation also cites "[t]he area's cultural importance to Native American tribes."[53] The Proclamation identifies "[t]he traditional ecological knowledge" developed by the tribes as "itself, a resource to be protected," apparently as an "object[]" protectable under the Act.[54] More generally, the Proclamation refers to Bears Ears as a significant "cultural landscape[]."[55] *However, the Act provides no support for using ecological or cultural landscapes as "objects" to be protected.*

The Act has two main provisions. The first allows the President to "declare" certain objects as "national monuments":

> Section 3 *Presidential Declaration*. The President may, in the President's discretion, 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.[56]

The second provision allows the President to "reserve parcels of land as a part of the national monuments":

> (b) *Reservation of land*. The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[57]

The Act's narrow focus is required to counterbalance the unilateral nature of the power delegated. The President, should he desire, can declare monuments and reserve lands to protect them without consulting state and local officials in the monument area or

[53] 82 Fed. Reg. at 1140; *see also id*. at 1139 (stating that the land "is profoundly sacred to many Native American tribes").
[54] 54 U.S.C. § 320301(a); 82 Fed. Reg. at 1140.
[55] 82 Fed. Reg. at 1139. The Proclamation refers to the Bears Ears monument as a "landscape" at least eight times. *See, e.g.*, at 1140 (stating that traditional knowledge "is, itself, a resource to be protected and used in understanding and managing this *landscape* sustainably for generations to come") (emphasis added); *id*. at 1142 ("the alcove columbine and cave primrose, also regionally endemic, grow in seeps and hanging gardens in the Bears Ears *landscape*.") (emphasis added).
[56] 54 U.S.C. § 320301(a).
[57] 54 U.S.C. § 320301(b).

considering impacts on the people in the area.[58] Nor does the President need Congress's advice or consent.[59] Unlike other decisions affecting public land, the President's establishment of a national monument is not subject to the National Environmental Policy Act (NEPA).[60] The Antiquities Act is distinctive in giving the President such unilateral power to withdraw land from the public domain.[61]

Moreover, the use that may be made of land reserved for a monument is typically severely restricted. For example, the Proclamation, similar to other recent monument proclamations, contains the following restrictive language:

> All Federal lands and interests in lands within the boundaries of the monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws or laws applicable to the U.S. Forest Service, from 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.[62]

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[58] As one scholar has said, "Over and over in its 100-year history, the Antiquities Act has been wielded by presidents without any regard for the local rural communities and the state and county governments most impacted by the monument's designation." James R. Rasband, *Antiquities Act Monuments: The Elgin Marbles of Our Public Lands?*, in The Antiquities Act, at 136 (D. Harmon, F. McMannon & D. Pitcaithley eds. 2006); *see also*, *e.g.*, S. Rep. 106-250, at 2 (2000) ("Since the passage of the Antiquities Act in 1906 many laws have been enacted which provide for increased public participation in the management of federal lands. While the Antiquities Act confers presidential authority to designate new monuments, it contains no requirements for public participation prior to any such designation.").

[59] Ronald A. Foresta, America's National Parks and Their Keepers, at 74-75 (Resource for Future, Inc. 1984) (stating that, in period when Presidents used Antiquities Act authority expansively, "agency leadership had at their disposal a means of expansion which circumvented Congress entirely"); John F. Shepherd, *Up the Down Staircase: Executive Withdrawals and the Future of the Antiquities Act*, 43 Rocky Mtn. Min. L. Inst. 4-1, 4-9 (1997) (stating that Act does not "require the President to follow any particular procedures, such as a public hearing or consultation with Congress, before designating a national monument").

[60] *Alaska v. Carter*, 462 F. Supp. 1155, 1159 (D. Alaska 1978).

[61] Hal Rothman, Preserving Different Pasts: The American National Monuments, at xi-xii (Univ. of Ill. 1989) (stating that Antiquities Act is so significant because, as it came to be interpreted, it "created a mechanism through which federal officials, interested professionals, and other special-interest groups could achieve preservation goals without waiting on popular or congressional consensus").

[62] 82 Fed. Reg. at 1143. The Proclamation further provides that laws governing grazing permits or leases on lands under the jurisdiction of the U.S. Forest Service or the Bureau of Land Management "shall continue to apply with regard to the lands in the monument to ensure the ongoing consistency with the care and management of the objects identified above." *Id*. at 1145. The Proclamation also makes the monument's establishment "subject to valid existing rights, including valid existing water rights." *Id*. at 1143. *See generally* Congressional Research Service, *Antiquities Act: Scope of Authority for Modification of*

Through such language, the Proclamation "changes the property from being federal land available for multiple uses" to land the uses of which can be restricted to serve the "overriding management goal" of protecting the purportedly designated antiquities.[63] The Proclamation makes the Monument's establishment "subject to valid existing rights."[64] But "the extent to which [monument] designations may affect existing rights is not always clear."[65] That is because—as is true of the Bears Ears proclamation—recent proclamations direct the agencies charged with administering the monuments to adopt management plans. These management plans may impose restrictions that hinder the exercise of existing rights if the agency deems the restrictions necessary to protect the designated antiquities.[66]

Because the Act authorizes the President to unilaterally reserve public land and severely restrict its use with the stroke of a pen, the Act has a sharp focus limiting its use. Nothing in the text of the Act supports a broad power to establish monuments encompassing vast "cultural landscapes" as President Obama did with Bears Ears. Instead, the Act's plain purpose is to protect discrete, identifiable antiquities.

This purpose is reinforced by Section 1 of the original Act, which imposed criminal penalties for the unauthorized removal, damage or destruction of discrete archeological objects or sites:

National Monuments, CRS Report No. R44687, by Alexandra M. Wyatt, at 3 (Nov. 14, 2016) (quoting restrictive language, similar to that quoted in the text, found in "[r]ecent proclamations under the Antiquities Act"), *available at* http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf;

[63] Congressional Research Service, National Monuments and the Antiquities Act, CRS Report No. R41330, at 7 (Jan. 30, 2017), *available at* https://www.everycrsreport.com/files/20170130_R41330_e313e8a36511852dca4acb3687edf27c4ef3aab0.pdf.

[64] 82 Fed. Reg. at 1143.

[65] Congressional Research Service, National Monuments and the Antiquities Act, CRS Report No. R41330, at 8 (Jan. 30, 2017), *available at* https://www.everycrsreport.com/files/20170130_R41330_e313e8a36511852dca4acb3687edf27c4ef3aab0.pdf.

[66] Congressional Research Service, National Monuments and the Antiquities Act, CRS Report No. R41330, at 7-9 (Jan. 30, 2017), *available at* https://www.everycrsreport.com/files/20170130_R41330_e313e8a36511852dca4acb3687edf27c4ef3aab0.pdf.

> [A]ny person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.[67]

Section 3 of the Act authorizes the government to grant permits "for the examination of ruins, the excavation of archeological sites, and the gathering of objects of antiquity on land" within a monument.[68] These provisions confirm that the Act's purpose is to protect discrete antiquities and the specific land immediately around them, not ecosystems or cultural landscapes.[69]

Since the Proclamation by its clear language reserves a vast area for reasons not allowed by the Act, we urge the Secretary to recommend that President Trump rescind the Proclamation.

Section 2:
The Proclamation Process was Flawed, Favoring Well-Funded Special Interest Groups Over Local Residents Closest to the Land.

The Bears Ears Monument was created through a flawed process that excluded input from local residents of San Juan County and citizens of Utah who opposed the Monument. Bears Ears' creation occurred over the objection of Utah's entire congressional delegation,[70]

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[67] Antiquities Act, ch. 3060, § 1, 34 Stat. 225 (1906) (current version at 18 U.S.C. § 1866(b)).
[68] Antiquities Act, ch. 3060, § 3, 34 Stat. 225 (1906) (current version at 54 U.S.C. § 320302).
[69] *See* Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 Wash. L. Rev. 439, 449-450 n. 75 (1981) (explaining that "[c]onsideration of the three sections of the Antiquities Act *in pari materia* compels the conclusion that the purpose of the Act was to protect objects of antiquity").
[70] Joint Statement of Sen. Orrin Hatch, Sen. Mike Lee, Rep. Rob Bishop, Rep. Jason Chaffetz, Rep. Chris Stewart, and Rep. Mia Love. *Exclusive: Utah Delegation's joint response to Obama's Bears Ears monument designation*, Deseret News, Jan. 24, 2017, http://www.deseretnews.com/article/865671697/My-view-Bears-Ears-designations-false-promises.html.

the Governor of Utah,[71] the Utah Legislature,[72] and the Commissioners of San Juan County, Utah, where the monument is located.[73] We submit that the opinion of the citizens of Utah and San Juan County should carry more weight in the Secretary's decision than any other group, because we are the ones most impacted by this unilateral action. Unfortunately, the opinions of the people closest to the land, and with the most to lose, were given no weight at all by President Obama.

Instead, well-funded outside interest groups ran a slick marketing campaign pushing the monument process through Washington, D.C. while bypassing local concerns. The Sierra Club, the Grand Canyon Trust and other nationally and internationally funded groups, came together with many outdoor manufacturers and California based groups, like the Hewlett-Packard Foundation and the Leonardo DiCaprio Foundation, to funnel money behind the creation of the Monument.[74] Professional marketing campaigns, advertising, and expensive lobbying groups pushed the message that the Monument was desired by local residents, when the facts show otherwise.

Contrast this to local, grassroots opposition groups, like the Stewards of San Juan County and the local "No Monument" effort. These self-funded volunteer groups are made up of the people who really understand the impact the Monument will have on their daily lives, but had no funding, no large corporate or foundation backing, and therefore little or no voice to counteract the national pro-Monument campaign. The better part of one national park, three national monuments, and a national recreation area already exist in San Juan County, yet it has the lowest per capita income in Utah. The citizens who live there simply

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[71] *Gov. Herbert Statement on designation of Bears Ears National Monument* (Dec. 28, 2016), https://www.utah.gov/governor/news_media/article.html?article=20161228-1.

[72] Concurrent Resolution Urging the President to Rescind the Bears Ears National Monument Designation, H.C.R. 11, 2017 General Sess., State of Utah (enrolled and signed by Governor, Feb. 3, 2017).

[73] San Juan County Board of Commissioners, Resolution No. 2017-02, Requesting and Recommending the Reversal of the Designation of the Bears Ears Area as a National Monument (Mar. 8, 2017).

[74] See, e.g., http://www.deseretnews.com/article/865659464/Big-money-environmentalists-and-the-Bears-Ears-story.html?pg=all

did not have the resources to make their voices heard. Under these circumstances, the process became a one-sided, David versus Goliath affair. We were therefore overjoyed that President Trump ordered this review, and that Secretary Zinke allowed, for the first time with regard to the use of the Act, public comment.

We urge the Secretary to give appropriate weight to the comments of those most impacted by the Monument, who are almost uniformly against the Monument, and to realize that most of the pro-Monument comments result from nationally funded campaigns, and are from people who have nothing at stake. Please hear the voices of the local people.

Section 3:
The Monument Will Restrict Desirable Uses of Public Lands, and Threaten the National Security of the United States.

The Proclamation states:

> All Federal lands and interests in lands within the boundaries of the monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or other disposition under the public land laws or laws applicable to the U.S. Forest Service, from 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.

The Monument encompasses rich uranium mines, gold mines, and oil and gas. The Monument immediately borders the only uranium mill in the United States. Extraction industries have historically provided numerous jobs in Utah and San Juan County. The largest private employer in San Juan County is Energy Fuels, Inc., the owner of the White Mesa uranium mill, the last such mill in the United States.[75] The second largest private employer in San Juan County, as a group, is mining operators. The Monument threatens

[75] See Utah Department of Environmental Quality, Energy Fuels Resources (USA) Inc., http://www.deq.utah.gov/businesses/E/energyfuels/; Energy Fuels, Inc., White Mesa Mill, Utah, http://www.energyfuels.com/project/white-mesa-mill/.

the existence of the White Mesa mill, forever prevents any new mining operations within the Monument, and threatens to eliminate all existing mining operations within the Monument. Additionally, the Monument threatens existing oil and gas exploration and production activities, and prevents any new exploration and production. Thus, the Monument eliminates the valid multiple use of just under one third of San Juan County by the folks who live there. This is contrary to the edicts of the Federal Land and Policy Management Act, §102(a)(7), which requires that public lands be managed "on the basis of multiple use and sustained yield unless otherwise specified by law," as well as §102(a)(12) that mandates that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands." This violation of Congressional policy both threatens the economic viability of the County and burdens the feeble – but essential -- United States uranium industry. This unnecessary result is contrary to President Trump's agenda of American prosperity.

President Trump was elected to create jobs and energy independence for the United States. He has issued several executive orders reducing needless regulations, promoting jobs and energy independence. He has issued no less than eleven executive orders aimed at jumpstarting the economy and creating jobs.[76] He has also issued an executive order specifically aimed at ensuring that America is energy independent.[77] Taken together, these

[76] These are: EO 13766 of January 24, 2017, Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects; EO 13771 of January 30, 2017, Reducing Regulation and Controlling Regulatory Costs; EO 13777 of February 24, 2017, Enforcing the Regulatory Reform Agenda; EO 13778 of February 28, 2017, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule; EO 138783 of March 28, 2017, Promoting Energy Independence and Economic Growth; EO 18788 of April 18, 2017, Buy American and Hire American; EO 13789 of April 21, 2017, Identifying and Reducing Tax Regulatory Burdens; EO 13790 of April 25, 2017, Promoting Agriculture and Rural Prosperity in America; EO 13792 of April 26, 2017, Review of Designations Under the Antiquities Act; EO 13795 of April 28, 2017, Implementing an America-First Offshore Energy Strategy; and EO 13797 of April 26, 2017, Establishment of Office of Trade and Manufacturing Policy.

[77] EO 138783 of March 28, 2017, Promoting Energy Independence and Economic Growth.

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Executive Orders set a bold agenda for jobs, economic prosperity, environmentally responsible use of our natural resources, and the energy independence of the United States. They are the polar opposite of forever preventing environmentally responsible access to vast areas of public lands, which is the result of the Proclamation.

The monument also threatens national security as it hampers the increasingly anemic US uranium industry, which is already incapable of supplying our uranium needs for domestic energy production and national defense.

The White Mesa mill, which immediately borders the Monument, is the only production facility in the United States capable of producing yellow-cake, the raw material used to produce enriched uranium. White Mesa was built in the 1970's. Given the environmental and regulatory restrictions that have been put in place since that time, it would be extraordinarily time consuming and expensive to permit and construct a replacement mill in another location. Energy Fuels has estimated that it could take ten years and over $250,000,000 to replace the White Mesa mill. The continued operation of White Mesa mill is critical to the operation of our nuclear naval fleet[78] and our nuclear triad, and therefore vital to our national security. The Monument threatens its existence.

In 2015, U.S. uranium mines produced 3.7 million pounds of uranium.[79] In that same year, U.S. nuclear reactors bought 57 million pounds of uranium, 6% of which was U.S.-origin uranium and 94% of which came from foreign countries.[80] Twenty percent of the nation's electrical power is generated by 99 nuclear reactors. Only 5 of those reactors are

[78] Late in 2014 the US Navy had 86 nuclear-powered vessels including 75 submarines. World Nuclear Ass'n, Nuclear-Powered Ships, http://www.world-nuclear.org/information-library/non-power-nuclear-applications/transport/nuclear-powered-ships.aspx (Jan. 2017).

[79] U.S. Energy Information Administration, Domestic Uranium Production Report – Annual, 2015, https://www.eia.gov/uranium/production/annual/; U.S. Energy Information Administration, Today in Energy, U.S. uranium production lowest since 2005 (Feb. 16, 2017), https://www.eia.gov/todayinenergy/detail.php?id=29992.

[80] U.S. Energy Information Administration, Nuclear & Uranium, Uranium Marketing Annual Report: 2015, at 1 (May 2016), https://www.eia.gov/uranium/marketing/pdf/2015umar.pdf.

powered by domestically produced uranium, while the remainder are dependent on foreign countries, many of them under the influence of Russia, such as Kazakhstan.[81]

While Australia and Canada were major foreign suppliers, uranium originating in Kazakhstan, Russia, and Uzbekistan accounted for almost 40% of the imported uranium.[82] Significantly, due to the domestic uranium industry's inability to perform, the Department of Defense was forced to purchase 38% of its uranium supply from Kazakhstan in 2015. It is ironic that our military is forced at this time to secure uranium in part from mines owned by Rosatom, the Russian state agency tasked with aiming nuclear warheads at the United States.[83]

Permanently locking up a rich uranium mining area, and threatening the existence of the United States' only uranium mill capable of producing yellow-cake, is totally contrary to the President's agenda to ensure that our nation is safe, and energy independent. Valid national security grounds exist for the President to rescind the Proclamation.

If the President revisits – and abolishes – Bears Ears based on considerations of national security, his decision will command great deference from courts, assuming the decision is reviewable at all.

"[N]o governmental interest is more compelling than the security of the Nation."[84] The duty of protecting national security falls to the President, as an incident of his

[81] Harry Anthony, President of the Uranium Producers Association, http://dailycaller.com/2016/05/08/heres-what-its-like-to-have-clinton-cronies-sell-out-your-industry. *See also*, sources cited in note 83.
[82] U.S. Energy Information Administration, Nuclear & Uranium, Uranium Marketing Annual Report: 2015, at 1 (May 2016), https://www.eia.gov/uranium/marketing/pdf/2015umar.pdf.
[83] *See*, https://www.eia.gov/todayinenergy/detail.php?id=30972, for a discussion of existing nuclear reactors deployed in the US power industry. Much of this supply comes from Kazakhstan, the world's leading uranium producer and a close Russian ally. For example, Uranium One, the company allowed to purchase approximately 20% of US uranium supply during the Obama Administration, and now owned by Rosatom, the Russian state owned nuclear energy and weapons agency, owns a significant percentage of the Kazakhstan uranium production. http://www.world-nuclear.org/information-library/country-profiles/countries-g-n/kazakhstan.aspx . See also, https://www.nytimes.com/2015/04/24/us/cash-flowed-to-clinton-foundation-as-russians-pressed-for-control-of-uranium-company.html?_r=0
[84] *Haig v. Agee*, 453 U.S. 280, 307 (1981).

constitutional duties as Commander-in-Chief.[85] The President's unique responsibility for national security under the Constitution reflects pragmatic considerations. Compared to courts and even to Congress, the President has superior access to sources of information relevant to the protection of national security, and is in a superior position to take the prompt action that the national security may require.[86]

This is why, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[87] Indeed, where, as here, no statute constrains the President's judgment on what national security requires and no individual constitutional rights are at stake – inasmuch as national monuments are public lands – it is doubtful that judicial review is available at all. In fact, the U.S. Supreme Court has held in at least two cases involving national security that judicial review was unavailable.

In the early case of *Martin v. Mott* (1827), an Act of Congress authorized the President to call up the militia in such numbers "as he may judge necessary to repel" the threat of a foreign invasion.[88] Jacob Mott was fined by a court martial after he failed to report for duty pursuant to the President's orders. In challenging the fine, Mott argued that no military exigency justified the President's orders. The Court held that courts could not review the

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[85] *See Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111-112 (1948); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29-32 (1827).

[86] *Dep't of the Navy v. Egan*, 484 U.S. 518, 529-530 (1988) ("The Court … has recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.'") (quoting *Haig v. Agee*, 453 U.S. 280, 293-294 (1981)); *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) ("Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," . . . especially . . . in the areas of foreign policy and national security …") (internal quotation marks and citation omitted); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (citing the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982) (referring to national security and foreign affairs as "central" Presidential domains").

[87] *Dep't of the Navy v. Egan*, 484 U.S. 518, 529-530 (1988).

[88] *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29 (1827).

argument, because "the authority to decide whether the exigency has arisen, belongs exclusively to the President, and . . . his decision is conclusive upon all other persons."[89]

A more recent case to the same effect is *Department of the Navy v. Egan* (1988).[90] The Navy removed Thomas Egan from his job at the Trident Naval Refit Facility in Bremerton, Washington, after he was denied a security clearance.[91] A statute apparently allowed Egan to appeal his removal to the Merit Systems Protection Board.[92] The Court held, however, that the Board could not review his removal because it rested on a national-security determination that was for the Navy alone to make, under authority delegated to it by the President.[93] The Court explained that "in military and national security affairs," "the courts have traditionally shown the utmost deference to Presidential responsibilities."[94]

Under decisions such as *Martin v. Mott* and *Egan*, utmost judicial deference would be due to a decision by the President to abolish Bears Ears because of its harmful effect on national security. Similar to the statute at issue in *Martin v. Mott*, the Antiquities Act generally leaves to the President's judgment whether to designate specified objects as national monuments.[95] Past Presidents have exercised that judgment to modify previously established monuments when doing so furthered national security interests. For example, President Eisenhower reduced Glacier Bay National Park in 1955 on the ground that certain

[89] *Martin v. Mott*, 25 U.S. 19, 30 (U.S. 1827).
[90] 484 U.S. 518 (1988).
[91] *Egan*, 484 U.S. at 520.
[92] *Egan*, 484 at 525-527.
[93] *Egan*, 484 U.S. at 525-531.
[94] *Egan*, 484 U.S. at 530 (internal quotation marks and citation omitted).
[95] 54 U.S.C. § 320301(a) (providing that the President "may, in [his] discretion" designate certain objects "to be national monuments"). *Compare, United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) (interpreting statute authorizing President "in his judgment" to change duties on imported goods; rejecting challenge to Presidential Proclamation changing the duty on canned clams from Japan; citing *Martin v. Mott*, among other cases, in stating, "It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.").

lands were "now being used as an airfield for national-defense purposes."[96] President Harry Truman diminished the Santa Rosa Island National Monument finding that the land was "needed by the War Department for military purposes."[97]

This precedent powerfully supports the President's power to rely on national security considerations to remove land from a monument established under the Act. More than that, the precedent supports abolition of a monument altogether when its entire existence harms national security and it was established in violation of the Act. And the decision abolishing the Monument would command "utmost deference" from the courts in the event of a judicial challenge.[98]

Therefore, we urge the Secretary to recommend that the President take valid and pressing national security issues into consideration and rescind the Proclamation.

Section 4:
The Monument Will Restrict Desirable Uses of Non-Public Lands.

The Monument will also unreasonably restrict the use of non-public lands. For example, the State of Utah owns SITLA land within the Monument. This land is used to fund the public education of Utah's children. However, the state will be denied access to, and full use of, the SITLA land within the Monument.[99]

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[96] Proclamation No. 3089, Excluding Certain Lands from the Glacier Bay National Monument and Adding a Portion Thereof to the Tongass National Forest—Alaska, 69 Stat. 27 (1955).
[97] Proclamation No. 2659, Eliminating Certain Lands from the Santa Rosa Island National Monument and Reserving Them for the Use of the War Department for Military Purposes, 59 Stat. 877 (1945).
[98] *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988).
[99] *See, e.g.*, May 9, 2017 resolution of the San Juan County School District urging President Trump to rescind the Monument, stating in part:
WHEREAS, only 8% of the land in San Juan County is subject to property tax which goes directly to fund public education, and

WHEREAS, the Federal Government has designated 1.35 million acre Bears Ears National Monument, and

WHEREAS, the designation of 1.35 million acres by the Federal Government in San Juan County will forever remove the opportunity on these lands for mineral extraction and will impact the tax base in the county by eliminating the opportunity to grow the economy through natural resources, and

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As noted, even though the White Mesa uranium mill is not within the borders of the Monument, and is on private land, its existence is threatened due to the fact that it immediately borders the Monument. Radical environmental groups, which have long harassed Energy Fuels over the existence of the White Mesa mill, will use the Monument as legal leverage to shut it down as an inconsistent use within the viewshed of the Monument.

Section 5:
The Monument Will Suppress Economic Growth in San Juan County, the State of Utah, and the Nation.

As noted above, the Monument will eliminate solid paying jobs in the State of Utah related to extraction industries. These high paying jobs once placed San Juan County as the second richest county in Utah. One national park, three national monuments, and a national recreation area later, it is now the poorest. The extraction industries that once flourished in San Juan County will be permanently eliminated by the Monument. On the other hand, if the Monument is rescinded, San Juan County and the State of Utah can benefit from the economic renaissance the Trump Administration plans. It can once again be the center of the nation's uranium industry, which will benefit the entire nation with the domestic supply of enriched uranium to power 20% of the nation's electrical needs, as well

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WHEREAS, San Juan County was once the second wealthiest county in Utah due to multiple land use on public lands

WHEREAS, permits obtained from the Bureau of Land Management control abuse of public lands, and allow activities that produce income for educating school children, and

WHEREAS, San Juan County is currently the poorest county in Utah and one of the poorest country in the nation due to the restrictions currently in place on public lands , and

WHEREAS, the national monument designation will eliminate the ability of the State of Utah to access 109,000 acres of institutional trust land designated to produce funding for our school children, and

WHEREAS, school children in San Juan County deserve adequate funding for their educational needs, and

NOW, THEREFORE, BE IT RESOLVED that the Board of Education of the San Juan School District does hereby declare our opposition to the designation of the Bears Ears National Monument and urges the President of the United States to rescind the Bears Ears National Monument designation.

as nuclear reactors that power a large percentage of our naval fleet, and the nuclear weapons triad we use to keep our nation safe. A robust uranium industry, which suffered terribly under the Obama Administration, is vital to our country's economic recovery as well as its safety and defense.

Therefore, we urge the Secretary to recommend that the President rescind the Proclamation.

Section 6:
The Federal Government is Under-Resourced Properly to Manage the Monument.

The almost $12 billion deferred maintenance backlog on existing monuments and federal parks is well documented.[100] According to the National Park Service, as of September 30, 2014, Utah's national parks and monuments had deferred maintenance of $278,094,606.[101] During the Obama Administration, the Federal Government ran annual deficits of approximately $1 trillion. The Obama Administration doubled the national debt, running up more debt in its eight years than all prior administrations combined. President Trump came into office saddled with approximately $21 trillion in national debt, constituting approximately 104% of the nation's annual gross domestic product. Obviously, the Federal Government is not on a sustainable financial path. Needlessly proclaiming another vast national monument is not financially responsible under these circumstances. We therefore urge the Secretary to recommend to the President that the Proclamation be rescinded.

Section 7:
The Antiquities Are Adequately Protected by Other Laws.

[100] http://www.latimes.com/opinion/editorials/la-ed-national-parks-20160125-story.html.
[101] https://www.nps.gov/subjects/plandesignconstruct/upload/FY14-DM-by-State-and-Park_2015-10-20.pdf

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Numerous existing laws and policies protect historic objects, landmarks and antiquities on federal land.[102] A sampling includes The Federal Property and Administrative Services Act, 40 USC 550(b) *et seq*.; The Historic Sites Act, 54 USC 320101 *et seq*.; The National Historic Landmarks Program, 54 USC 302102 *et seq*.; The National Historic Preservation Act, 54 USC 300101 *et seq*.; The National Register of Historic Places, 54 USC 302101 *et seq*.; The National Trust for the Historic Preservation of the United States, 54 USC 312101 *et seq*.; Theft of Government Property, 18 USC 641, 18 USC 666(a)(1)(A) and 18 USC 668; and The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, Transfer and Ownership of Cultural Property, 19 USC 2601 *et seq*. Clearly, in the United States, objects of historical, cultural and scientific interest on public lands are thoroughly and completely protected by the existing tapestry of federal law. The Monument adds no value whatsoever in this regard. Therefore, we urge the Secretary to recommend to the President that the Proclamation be rescinded.

Section 8:
President Trump Can Legally Rescind the Proclamation.

The Act authorizes the President to "declare" national monuments and "reserve" land as a part of those monuments.[103] Unlike other statutes, the Act neither expressly authorizes nor expressly bars the President from rescinding a previously established monument.[104] Even so, for three reasons, the Act should be interpreted to

[102] https://www.nps.gov/subjects/historicpreservation/laws.htm
[103] 54 U.S.C. § 320301.
[104] Congress has not been consistent in addressing the President's power to rescind or revoke prior presidential withdrawals of federally claimed lands from the public domain. In contrast to the Antiquities Act, which is silent on the President's rescission power, other land-withdrawal statutes have expressly addressed the issues, some by expressly authorizing rescission, others by expressly precluding it. A prior statute expressly authorizing rescission was the National Forest Organic Act of 1897, which authorized the President
to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order.
Ch. 2, § 1, 30 Stat. 11, 36 (codified at 16 U.S.C. § 473). Another statute expressly authorizing rescission was the General Withdrawal Act, also known as the Pickett Act; it authorized the President to make temporary withdrawals of lands, and said

authorize rescission. First, that interpretation enables the President to take care that the Act is faithfully executed. An improperly established monument constitutes an ongoing violation of the Act; by rescinding that monument, the President remedies the violation. Second, interpreting the Act to confer rescission power accords with the general rule that a prior president cannot tie the hands of the current President. Third, the President's power under the Act to rescind an improperly established monument flows logically from his well-established power under the Act to *modify* a monument to exclude, for example, land that was improperly included within the original monument boundaries.

Each of these three considerations, standing alone, supports interpreting the Act to authorize the President to abolish a national monument established under the Act. Together, they provide overwhelming support for that interpretation.

1. The President's Power to Abolish a Monument Improperly Established under the Act is Supported by His Constitutional Duty to Take Care That the Act is Being Faithfully Executed.

As discussed in Section 1, President Obama violated the Act in establishing Bears Ears. That violation continues to exist as long as Bears Ears retains its current form. The Constitution's Take Care Clause gives the President a duty to ensure that federal law is

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that "such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." Pub. L. No. 61-303, § 1, 36 Stat. 847 (1910), repealed by Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, Title VII, § 704(a), 90 Stat. 2792; *see also* 39 Op. Att'y Gen. 185 (1938) (citing these two statutes in arguing that Antiquities Act's silence on the issue should be read to preclude rescission power); James R. Rasband, *The Future of the Antiquities Act*, 21 J. of Land, Res. & Envtl Law 619, 626 (2001) (citing Cummings' opinion in arguing that President cannot rescind a monument). In contrast to the National Forest Organic Act and the Pickett Act, other statutes expressly *restrict* the President or his agents from rescinding prior land withdrawals. Specifically, in the National Forest Management Act of 1976, Congress amended the National Forest Organic Act of 1897 by forbidding executive-branch action returning national forest land to the public domain. *See* 16 U.S.C. § 1609(a). In FLPMA, Congress expressly barred the Secretary of Interior from "modify[ing] or revok[ing] any withdrawal creating national monuments under [the Antiquities Act]." 43 U.S.C. 1714(j); *cf.* 16 U.S.C. § 552a (authorizing President by executive order, after providing notice through Department of Interior, "to restore any reserved national-forest lands covered by a cooperative agreement with the Secretary of Interior"). Because of Congress's lack of consistency in addressing presidential rescission power, land-withdrawal statutes other than the Antiquities Act shed no light on whether that Act impliedly authorizes the President to abolish monuments established under that Act.

being faithfully executed during his watch.[105] Consistently with that duty, the Act should be interpreted to allow the President to revise or abolish Bears Ears to stop the ongoing violation of that Act.

The Take Care Clause says that the President "shall take Care that the Laws be faithfully executed."[106] The Clause does not just require the President himself to execute the laws faithfully but also to "take care" that they "be faithfully executed" by everyone responsible for their execution.[107] Thus, the Clause makes the President responsible for ongoing violations of federal law by executive officials even if he did not cause them.[108] In this way, the Take Care Clause gives constitutional underpinning for the plaque that President Truman famously displayed on his desk and that said, "The buck stops here."[109]

U.S. Supreme Court decisions reflect this constitutional (and political) truth. The Court has relied on the Take Care Clause to strike down or narrowly interpret laws that impair the President's power to ensure the faithful execution of federal law. Specifically, in *Myers v. United States* and *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court relied on the Clause to strike down laws restricting the President's power to remove subordinates.[110] In *Printz v. United States*, the Court relied on the Take Care Clause to strike down a law that shifted responsibility for executing federal law to state and local

[105] U.S. Const. art. II, § 3.
[106] U.S. Const. art. II, § 3.
[107] *See Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492-493 (2010).
[108] *Id.*
[109] Donald R. McCoy, The Presidency of Harry S. Truman, at 315 (1984).
[110] *Free Enterprise Fund*, 561 U.S. at 484 (striking down law that gave executive official multiple layers of "good-case" protection from presidential removal, and stating that "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them"); *Myers v. United States*, 272 U.S. 52, 122 (1926) (striking down Act of Congress restricting President's power to remove a postmaster; and stating that, "when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal"); *cf. Humphrey's Executor v. United Sta*tes, 295 U.S. 602, 631 (1935) (reading *Myers* narrowly to give President constitutionally irreducible power of removal only over officials with "purely executive" duties).

law enforcement agents, whom the President could not control.[111] In *Lujan v. Defenders of Wildlife*, the Court refused to interpret a federal law in a way that would allow private plaintiffs who lacked any concrete injury to sue federal agencies for supposed violations of federal law.[112] The *Lujan* Court explained that such an interpretation would unconstitutionally "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'"[113]

These decisions require interpreting the Act to allow the President to modify or abolish a monument established by a prior president in violation of the Act.[114] The decisions show that the Take Care Clause makes the President responsible for faithful execution of federal law during his watch. The responsibility extends to ongoing violations of federal law even if they were put into motion before he took office. The Act does not expressly prevent the President from revising or abolishing a national monument. And the Act *should not* be interpreted that way, or else it would prevent the President from taking care that the Act is faithfully executed during his term in office.

2. The President's Power to Abolish a Monument Improperly Established under the Act Reflects the General Rule that a President Cannot Be Bound by the Act of His Predecessors.

2.

[111] *Printz v. United States*, 521 U.S. 898, 922 (1997) (striking down provision in federal Brady Act that required state and local law enforcement officers to conduct background checks on would-be handgun buyers, holding that law unconstitutionally sought to transfer President's responsibility for faithful execution of federal laws under Take Care Clause "to thousands of [chief law enforcement officers] in the 50 States, who are left to implement the program without meaningful Presidential control").

[112] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-577 (1992) (construing "citizen suit" provision of Endangered Species Act, 16 U.S.C. § 1540(g)).

[113] *Id.* at 577; *see also Allen v. Wright*, 468 U.S. 737, 761 (1985) ("The Constitution . . . assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' U.S. Const., Art. II, § 3. We could not recognize respondents' standing in this case without running afoul of that structural principle.").

[114] As explained in the text, *Lujan v. Defenders of Wildlife* is precedent for interpreting a federal statute to avoid an interpretation that would violate the Take Care Clause. 504 U.S. at 577. Indeed, the Court has relied on the Clause to uphold acts by the President that lack *any* express statutory support. *In re Neagle*, 135 U.S. 1, 64-64 (1890) (relying on the Take Care Clause to hold that President could have a federal marshal protect Justice Field even without express statutory authority).

If the Act were interpreted implicitly to bar the President from abolishing a previously established monument, the Act would violate the general rule that one president cannot bind a later president.[115] That rule reflects longstanding presidential practices and the President's co-equality with Congress, as well as both branches' accountability to the people who elect them.

Longstanding presidential practices show that one president generally cannot bind a later president. Specifically, presidents have always been understood to be able to revoke executive orders issued by their predecessors.[116] This understanding applies to presidential proclamations as well, because "[t]he difference between executive orders and proclamations is more one of form than of substance."[117] Likewise, Presidents have consistently asserted the power to terminate international agreements made by prior presidents.[118] Of course, a

[115] Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal Forum 295, 300 ("Article II of the Constitution vests significant discretionary authority in the President . . . By 'the President' the Constitution of course means the incumbent; the powers of the office cannot be exercised by former holders of the office.").

[116] Congressional Research Service, *Executive Orders: Issuance, Modification, and Revocation*, by Vivian S. Chu & Todd Garvey, CRS Report No. RS20846, at 7 (Apr. 16, 2014), *available at* https://fas.org/sgp/crs/misc/RS20846.pdf.

[117] Committee on Government Operations, U.S. House of Representatives, *Executive Orders and Proclamations: A Study of a Use of Presidential Powers*, 85th Cong., 1st Sess., at 1 (Dec. 1957).

[118] *See* Restatement (Third) of the Foreign Relations Law of the U.S., § 339 ("Under the law of the United States, the President has the power . . . to suspend or terminate an [international] agreement in accordance with its terms" and "to terminate or suspend the agreement on behalf of the United States" upon determining that it has been violated by another party or because of supervening events); *Goldwater v. Carter*, 444 U.S. 996, 1006-1007 (1979) (Brennan, J., dissenting from majority ruling that case was nonjusticiable and concluding, on the merits, that President had power to abrogate defense treaty with Taiwan); *see also* Louis Henkin, Foreign Affairs and the U.S. Constitution, at 211-212 (2nd ed. 1996) ("Presidents have claimed authority . . . to act for the United States to terminate treaties . . ."); *id*. at 496 n.159 (stating that President's power to terminate congressional-executive agreements "seems no weaker than in regard to treaties"); Congressional Research Service, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, Report No. R44761, at 7 ("In most cases, . . . the President has unilaterally terminated executive agreements, and the Executive's authority has not been questioned by Members of Congress, or in judicial challenges . . ."); *id*. at 10 ("In most cases," President's unilateral withdrawal from, or termination of, treaties "has not generated significant opposition in either chamber of Congress"). *But cf.* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1324 (2008) (arguing that Restatement (Third)'s view that President can withdraw from a treaty "has never been formally upheld by the courts and remains controversial").

President's action may have legal consequences — when, for example, it implicates individual rights — that a later President cannot undo.[119] But no such rights are implicated here.[120]

Moreover, the principle that the President cannot be bound by his predecessors' acts reflects his equality with Congress. The U.S. Supreme Court has recognized that Congress cannot be bound by the actions of prior Congresses.[121] If the President, in contrast, could be bound by the acts of his predecessors, he would lose the coequality with Congress that the Constitution requires.[122]

The same reason supports each branch's freedom from restrictions imposed by its predecessors: the electoral processes built into the Constitution.[123] Elections ensure that "[t]he conduct of the executive branch, no less than the legislative, is . . . politically

[119] For example, once the President grants a pardon, a future President cannot prosecute the recipient for the pardoned conduct. U.S. Const. art. II § 2, cl. 1.

[120] Recognizing that the President's actions may implicate individual rights that a later President cannot undo merely puts him on par with Congress, which likewise may take actions implicating individual rights that a later Congress cannot undo. *See, e.g.*, *Perry v. United States*, 294 U.S. 330, 350, 353 (1935) (one of the Gold Clause Cases; Court held that Congress exceeded its authority in enacting a joint resolution reneging on payment terms of a government bond issued under prior statute; Court rejected government's argument that earlier Congress could not restrict power of later Congress, but ultimately dismissed the case because plaintiff hadn't shown damages).

[121] *Dorsey v. United States*, 567 U.S. 260, 132 S. Ct. 2321, 2331 (2012) (stating that "statutes enacted by one Congress cannot bind a later Congress"); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years"); *see also* United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (referring to "the centuries-old concept that one legislature may not bind the legislative authority of its successors").

[122] *See Nixon v. Fitzgerald*, 457 U.S. 731, 751 & n.31 (1982) (relying partly on the equality and independence of the three branches of federal government to justify recognizing presidential immunity analogous to immunity that members of Congress enjoy under Speech and Debate Clause, despite absence of similarly express constitutional language conferring presidential immunity).

[123] *See* Laurence H. Tribe, American Constitutional Law, vol. 1, § 2-3, at 125 n.1 (3rd ed. 2000) ("[T]he Constitution limits trans-temporal commandeering of a branch by its current occupants through the device of generally preventing any branch from making the meta-law necessary to tie the hands of the future officeholders in that branch.").

accountable."[124] In particular, elections enable the people of today to reject the policies of the past by electing candidates who pledge to undo them.[125]

Because it would be inconsistent with the electoral process for the Antiquities Act to bar the President from abolishing a monument established by his predecessor, the Act should not be interpreted to do so. Instead, the Act's express grant of "discretion" should be interpreted to allow the current President to abolish a monument established by a prior president.[126]

3. The President's Power to Abolish a Monument Established under the Act Logically Follows from His Acknowledged Power to Modify Such a Monument, and Has Support in the Act's History.

As discussed below, the President can modify a monument previously established under the Act. This power is established by (1) presidential practice; (2) the Act's legislative history; and (3) Congress's acquiescence in presidential modifications. The firmly established existence of the President's modification power supports the President's power to rescind monuments established under the Act. After all, if the President can *reduce* a monument to exclude lands that he determines were not properly included in the first place, logic compels the conclusion that he can *abolish* a monument that he determines was not properly created in the first place—say, because it did not contain antiquities entitled to protection under the Act, or because it was created without input from, and support of, those whom it would directly affect, or because it threatens national security interests.

a. Presidents Have Repeatedly Modified Monuments Established Under the Act by Excluding Land Originally Reserved for Them, and Have Also Relaxed Original Restrictions on Their Use.

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[124] Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal Forum 295, 300.

[125] Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal Forum 295, 300 ("When voters elect a new President, they expect that he will have authority to change those policies that, under the Constitution and laws, are left to the discretion of the executive."

[126] *Cf.* Michael W. McConnell, Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change, 1987 U. Chi. Legal Forum 295, 300 (arguing that Article II vests discretionary power in the current President, not his predecessors).

3.

Presidents began modifying national monuments created by prior presidents soon after enactment of the Act, and the practice has continued into modern times. These modifications have included (1) the exclusion of land originally reserved for the monuments and (2) the relaxation of restrictions imposed in the original proclamation. In all, existing monuments have been diminished or modified forty-four times. A complete listing of instances where presidents have diminished or modified existing monuments is attached to this memorandum.

Presidents have excluded land originally included in a monument sixteen times over 50 years. The earliest exclusion occurred in 1911, when President William H. Taft reduced (by more than 40%) the Petrified Forest National Monument established by President Theodore Roosevelt five years earlier.[127] The most recent exclusion occurred in 1963, when President John F. Kennedy modified the boundaries of Bandelier National Monument.[128] The number and regularity of modifications led a Congressional Research Service Report to conclude: "That a President can modify a previous Presidentially-created monument seems clear."[129]

The proclamations excluding lands that were originally included within monument boundaries reflect the breadth of the President's modification power. Several exclusions rested on a later President's determination that the original proclamations reserved more land than necessary, and therefore violated the Act's requirement that land reserved for monuments "be confined to the smallest area compatible with the proper care and

[127] Proclamation, Petrified Forest National Monument Ariz., 37 Stat. 1716 (1911); U.S. Department of Interior, National Park Service, Archeology Program, National Monuments: Maps, Facts & Figures (Dec. 8, 2016), https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm.

[128] Proclamation No. 3539, Revising the Boundaries of the Bandelier National Monument, New Mexico, 77 Stat. 1006 (1963).

[129] Congressional Research Service, *Authority of a President to Modify or Eliminate a National Monument*, CRS Rep. No. RS20647, at 5, by Pamela Baldwin (Aug. 3, 2000), *available at* http://congressionalresearch.com/RS20647/document.php?study=Authority+of+a+President+to+Modify+or+Eliminate+a+National+Monument.

management of the objects to be protected."[130] At least two proclamations excluded lands that, a later President determined, contained no objects of historical or scientific interest and had therefore been erroneously included in the original proclamation.[131] Still other exclusions reflected changed circumstances. For example, one proclamation excluded monument land that had been included in the original proclamation but was later made into an airfield.[132] Other proclamations excluded lands that no longer contained antiquities or that were no longer needed to protect the antiquity that the monument was created to protect.[133] Others rested on a later President's determination that it was in the public

[130] 54 U.S.C. § 320301(b). For example, President William H. Taft reduced the Petrified Forest National Monument in 1911 because the original proclamation "has been found, through a careful geological survey of its deposits of mineralized forest remains, to reserve a much larger area of land than is necessary to protect the objects for which the Monument was created." Proclamation, Petrified Forest National Monument, Ariz. 37 Stat 1716 (1911). Similarly, President Taft reduced the Navajo National Monument in 1912 because, "after careful examination and survey of the prehistoric cliff dwelling pueblo ruins, [the original proclamation] has been found to reserve a much larger tract of land than is necessary for the protection of such of the ruins as should be reserved." Proclamation, Navajo National Monument, Ariz., 37 Stat. 1738 (1912). In 1940, President Franklin D. Roosevelt reduced the second Grand Canyon National Monument finding that certain lands originally reserved "are not necessary for the proper care and management of the objects of scientific interest situated on the lands within the said monument." Proclamation No. 2393, Modifying the Grand Canyon National Monument—Arizona, 54 Stat. 2692 (1940). President Dwight D. Eisenhower altered the boundaries of the Colorado National Monument in 1959 to exclude "certain lands which are not necessary for the proper care, management, and protection of the objects of scientific interest situated on the lands within the monument." Proclamation No. 3307, Excluding Certain Lands From and Adding Certain Lands to the Colorado National Monument, 73 Stat. c69 (1959).

[131] In 1956, President Eisenhower altered the boundaries of Hovenweep National Monument to exclude certain lands that, he determined, "contain no objects of historic or scientific interest [and] were erroneously included in" the original proclamation. Proclamation No. 3132, Revising the Boundaries of Hovenweep National Monument Utah and Colorado, 70 Stat. c26 (1956). Similarly, President Eisenhower modified Arches National Monument in 1960 to exclude "certain lands in the southeast section thereof, contiguous to the Salt Wash escarpment, which are used for grazing and which have no known scenic or scientific value." Proclamation No. 3360, Modifying the Arches National Monument, Utah, 83 Stat. 920 (July 22, 1960).

[132] President Eisenhower reduced Glacier Bay National Park in 1955 because certain lands were "now being used as an airfield for national-defense purposes and are no longer suitable for national-monument purposes" and that other lands were "suitable for a limited type of agricultural use and are no longer necessary for the proper care and management of the objects of scientific interest on the lands within the monument." Proclamation No. 3089, Excluding Certain Lands from the Glacier Bay National Monument and Adding a Portion Thereof to the Tongass National Forest—Alaska, 69 Stat. 27 (1955).

[133] President Eisenhower excluded certain land from the Great Sand Dunes National Monument in 1956, concluding that the land was no longer necessary for "the preservation of the great sand dunes and additional features of scenic, scientific, and educational interests" and that it was "in the public interest to exclude such lands from the monument." Proclamation No. 3138, Revising the Boundaries of Great Sand Dunes National Monument, Colorado, 70 Stat. c31 (1956). President Eisenhower modified the Black Canyon of the Gunnison National Monument in 1960 to exclude lands that, he found, were "no longer

interest to remove land from a monument so it could be put to other uses.[134] Perhaps most significantly, some proclamations reducing monuments contained no justification whatsoever.[135] Together, the many proclamations excluding lands from monuments reflect that a later president can modify a monument when the later president determines that modification is warranted under the Act.

Although one academic has argued that the President can expand monuments but not contract them, this argument ignores real-world practice: Some proclamations *excluding* lands from prior presidentially established monuments have, at the same time, *added* other lands to the monument.[136] For example, President Dwight D. Eisenhower altered the

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required for the proper care, protection, and management of the objects of scientific interest situation in lands within the monument." Proclamation No. 3344, Excluding Lands from the Black Canyon of the Gunnison National Monument—Colorado, 74 Stat. c56 (1960). President John F. Kennedy modified the Natural Bridges National Monument in 1962 to "exclude from the monument approximately three hundred and twenty acres of land, known as Snow Flat Spring Cave and Cigarette Spring Cave, which no longer contain features of archeological value and are not needed for the proper care, management, protection, interpretation, and preservation of the monument." Proclamation No. 3486, Modifying The Natural Bridges National Monument, Utah, 76 Stat. 1495 (1962). In 1963, President Kennedy diminished Bandelier National Monument in 1963 to "exclude . . . approximately 3,925 acres of land containing limited archeological values which have been fully researched." Proclamation 3539, Revising the Boundaries of The Bandelier National Monument, New Mexico, 77 Stat. 1006 (1963).

[134] In 1938, President Franklin D. Roosevelt excluded land originally reserved in the White Sands National Monument that was on the United States Highway Route 70 right of way, finding the exclusion to be "in the public interest." Proclamation No. 2295, Modifying the White Sands National Monument New Mexico, 53 Stat. 2465 (1938). President Roosevelt similarly, in 1941, reduced the Craters of the Moon National Monument finding that the excluded land was "needed for the construction of Idaho State Highway No. 22." Proclamation No. 2499, Excluding Land from the Craters of the Moon National Monument—Idaho, 55 Stat. 1660 (1941). Also in 1941, President Roosevelt reduced the Wupatki National Monument to exclude land "needed in the construction and operation of a diversion dam in Little Colorado River to facilitate the irrigation of lands on the Navajo Indian Reservation." Proclamation No. 2454, Excluding Lands from the Wupatki National Monument and Reserving them for Irrigation Purposes—Arizona 55 Stat. 1608 (1941). President Harry Truman diminished the Santa Rosa Island National Monument based on his determination that the land was "needed by the War Department for military purposes" and that "elimination of such lands from the national monument would not seriously interfere with its administration." Proclamation No. 2659, Eliminating Certain Lands from the Santa Rosa Island National Monument and Reserving Them for the Use of the War Department for Military Purposes, 59 Stat. 877 (1945).

[135] In 1915 President Woodrow Wilson reduced the Mount Olympus National Monument by about 50% of its original size, without any explanation. Proclamation No. 1293, 39 Stat. 1726 (1915). President Calvin Coolidge further reduced the monument in 1929, again without explanation. Proclamation, Mount Olympus National Monument, Wash., 45 Stat. 2984 (1929).

[136] Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 553-554 (2003).

boundaries of the Colorado National Monument in 1959 to exclude "certain lands which are not necessary for the proper care, management, and protection of the objects of scientific interest situated on the lands within the monument."[137] In the same proclamation, President Eisenhower added other lands to the monument, finding that they were "needed . . . for the proper care, management, and protection of the objects of scientific interest situated on lands now within the monument."[138] In 1963, President John F. Kennedy modified the Bandalier National Monument in New Mexico, finding that it "would be in the public interest to exclude" 3,925 acres "containing limited archeological values which have been fully researched and are not needed to complete the interpretive story of the . . . Monument."[139] At the same time, President Kennedy found that it "would be in the public interest to add" 2,882 other acres "the preservation of which would implement the purposes of such monument."[140] These examples show the need for, and the common sense of, the President's ability to adjust monument boundaries to reflect his determination of what is proper under the Act.

Presidential modifications have included not only changes to the size of monuments but also changes in their management and relaxation of restrictions in the original proclamation. In 1929, for example, President Herbert Hoover transferred responsibility for managing the Bandelier National Monument in New Mexico from the Forest Service to the Park Service.[141] Only later did Congress enact a Reorganization Act expressly authorizing such transfers.[142] In 1936 President Franklin Roosevelt relaxed restrictions on the Katmai National Monument to make the original reservation of land for the monument "subject to

[137] Proclamation No. 3307, Excluding Certain Lands From and Adding Certain Lands to the Colorado National Monument, 73 Stat. c69 (1959).
[138] *Id.*
[139] Proclamation 3539, Revising The Boundaries of The Bandelier National Monument, New Mexico, 77 Stat. 1006 (1963).
[140] *Id.*
[141] Proclamation No. 1991, Bandelier National Monument, N. Mex., 47 Stat. 2503 (1932).
[142] Act of Mar. 3, 1933, ch. 212, tit. IV, 47 Stat. 1489, 1517.

valid claims under the public-land laws."[143] Presidents have also modified prior presidentially established monuments to exclude land covered by a right of way within the monuments.[144]

In short, Presidents of both parties have added land, subtracted land, and made other changes to monuments established under the Act. Presidential practice thus establishes that the Act gives the President broad power to modify monuments established under it.

b. Congress Has Knowingly Acquiesced in the Repeated Presidential Modifications of Monuments Established Under the Act.

Because Presidents have repeatedly diminished monuments established under the Act and also relaxed original restrictions on their use, it is clear that Presidents have interpreted the Act impliedly to grant them this modification power. In this situation, it is significant that Congress has never restricted the President's modification power. To be sure, the U.S. Supreme Court has often warned against drawing inferences from mere congressional inaction.[145] But that warning does not apply here.

Here we have more than "mere congressional silence and passivity."[146] While Congress has been silent about presidential *modification* of prior presidentially established monuments, Congress has regularly addressed Presidents' *creation* of national monuments.[147] For example, Congress has abolished ten presidentially established

[143] Proclamation No. 2177, Katmai National Monument, Alaska, 49 Stat. 3523 (1936).
[144] Proclamation No. 2295, Modifying the White Sands National Monument New Mexico, 53 Stat. 2465 (1938); Proclamation No. 2499, Excluding Land from the Craters of the Moon National Monument—Idaho, 55 Stat. 1660 (1941).
[145] *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (stating that "[n]onaction by Congress is not often a useful guide" to statutory interpretation). *Compare, e.g., SEC v. Sloan*, 436 U.S. 103, 121 (1978) (rejecting congressional acquiescence argument), *with Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) (accepting congressional acquiescence argument).
[146] *Flood v. Kuhn*, 407 U.S. 258, 283 (1972).
[147] David Harmon, Francis P. MacManamon & Dwight T. Pitcaithley, *Introduction: The Importance of the Antiquities Act*, in The Antiquities Act, at 1 (D. Harmon, F. McMannon & D. Pitcaithley eds. 2006) (referring to "the controversy that has swirled around the [Antiquities] Act throughout its history: whether the scope of discretionary proclamations as exercised by various presidents has far exceeded what was intended by Congress").

monuments.[148] In addition, after Congress was unsuccessful in abolishing the Jackson Hole National Monument — because of President Franklin D. Roosevelt's veto of the bill abolishing it — Congress refused to appropriate funds for administering the monument and ultimately amended the Act to prohibit the President from designating additional monuments in Wyoming.[149] More recently, Congress rescinded massive monument designations that President Jimmy Carter made in Alaska.[150] At the same time, Congress restricted future presidential withdrawals of land in Alaska.[151] Besides such legislation, many bills have been proposed in Congress to limit the President's power to create national monuments.[152]

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[148] Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 550 n.453 (2003) (stating that Congress has abolished ten national monuments established under Antiquities Act); *see* Act of Dec. 19, 1980, Pub. L. No. 96-550, § 601, 94 Stat. 3221, 3231 (abolishing Gran Quivira National Monument and including its land in statutorily created Salinas National Monument); Act of Aug. 1, 1956, Pub. L. No. 84-891, 70 Stat. 898 (abolishing Fossil Cycad National Monument); Act of July 30, 1956, Pub. L. No. 84-846, 70 Stat. 730, § 1 (abolishing Verendrye National Monument and conveying its lands to North Dakota for state historic site); Act of July 26, 1955, Pub. L. No. 84-179, ch. 387, 69 Stat. 380 (abolishing Old Kasaan National Monument and incorporating it into Tongass National Forest); Act of May 17, 1954, Pub. L. No. 83-360, ch. 203, 68 Stat. 98 (abolishing Shoshone Cavern National Monument and conveying land to Cody, Wyoming, "for public recreational use"); Act of Aug. 3, 1950, Pub. L. No. 81-652, 64 Stat. 405 (abolishing Wheeler National Monument and providing that its lands were to be administered as part of national forest in which it was located); Act of Aug. 3, 1950, Pub. L. No. 81-648, ch. 530, 64 Stat. 404 (abolishing Holy Cross National Monument and providing that its lands were to be administered as part of national forest in which it was located); Act of Sept. 7, 1949, Pub. L. No. 81-292, ch. 542, 63 Stat. 691 (abolishing Fort Niagara National Monument and conveying it to New York State for use as state park); Act of July 30, 1946, Pub. L. No. 79-564, 60 Stat 712 (abolishing Santa Rosa Island National Monument and conveying it to Escambia County, Florida); Act of Apr. 7, 1930, ch. 107, 46 Stat. 142-144 (abolishing Papago Saguaro National Monument and reserving some of its lands for military purposes while transferring remainder to City of Tempe and State of Arizona); *see also* Act of August 24, 1937, 50 Stat. 746 (transferring land in Lewis and Clark Cavern National Monument to Montana); U.S. Dep't of Interior, National Park Service, Archeology Program, Antiquities Act: 1906-2006, Maps, Facts & Figures https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm (Dec. 8, 2016) (Item 13 on monument list);.

[149] 16 U.S.C. § 431a. *See generally* James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. Colo. L. Rev. 483, 502 n.90 (1999); Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, 20 Western Historical Q. 281, 295-296 (1989).

[150] 16 U.S.C. § 3209; *Sturgeon v. Frost*, 136 S. Ct. 1061, 1065-66 (2016). The legislation rescinding President Carter's monument designations, the Alaska National Interest Lands Conservation Act, (ANILCA) 94 Stat. 2371, 16 U.S.C. §§ 3101 et seq., statutorily reserved substantially the same land that had been covered by President Carter's designations. John D. Leshy, *Shaping The Modern West: The Role of the Executive Branch*, 72 U. Colo. L. Rev. 287, 299 (2001).

[151] 16 U.S.C. § 3213(a).

[152] *See* note __ *supra*.

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Of course, Congress has also effectively ratified some presidentially established monuments by adding to them or converting them into national parks.[153] But this is just to say that Congress has paid careful, continuing attention to the President's exercise of power under the Act. For this reason, it is significant that Congress has never restricted or proposed to restrict the President's power to modify prior presidentially established monuments.[154]

This is not a situation of congressional acquiescence in a mere "administrative practice,"[155] for it does not involve merely a federal agency's view of its statutory powers. Instead it involves the views of multiple Presidents. This matters because the President, alone in the Executive Branch, has the duty to take care that the laws be faithfully executed.[156] Moreover, the official actions of a President, unlike those of an administrative agency, cannot fly under the radar screen.[157] Finally, the President, unlike the federal agencies, is Congress's co-equal, a status that makes it appropriate to presume

[153] *E.g.*, Act of Dec. 19, 1980, Pub. L. No. 96-550, § 502(a), 94 Stat. 3221, 3227 (abolishing Chaco Canyon National Monument and creating Chaco Culture National Historical Park); Act of March 28, 1958, Pub. L. No. 85-358, 72 Stat. 69 (establishing Petrified Forest National Monument as national park); Act of Feb. 26, 1919, Pub. L. No. 65-277, §§ 1 & 9, 40 Stat. 1175, 1178 (redesignating Grand Canyon National Monument as national park).

[154] Several Congressional Research Service reports have discussed the President's modification power. Congressional Research Service, *Antiquities Act: Scope of Authority for Modification of National Monuments*, CRS Report No. R44687, by Alexandra M. Wyatt (Nov. 14, 2016), *available at* http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf; Congressional Research Service, *National Monuments and the Antiquities Act*, CRS Report No. R44687, by Carol Hardy Vincent (Sept. 7, 2016); Congressional Research Service, *National Monuments and the Antiquities Act: Recent Designations and Issues*, CRS Report No. RL30528, by Carol Hardy Vincent & Pamela Baldwin (updated June 28, 2001), *available at* http://congressionalresearch.com/RL30528/document.php.

[155] *E.g.*, *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933) ("True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful.").

[156] U.S. Const. art. II, § 3.

[157] *Nixon v. Fitzgerald*, 457 U.S. 731, 752 (1982) (relying in part on "the sheer prominence of the President's office" in holding that he has absolute immunity from civil actions based on his official actions).

congressional awareness of the President's view of his power under Acts of Congress.[158] These differences between the President and the federal bureaucracy supply strong reasons to believe that Congress is aware of, and has acquiesced in, the Presidents' repeated exercise of power to modify prior presidentially created monuments, including through the exclusion of land originally included in those monuments.

The significance of congressional acquiescence in the present situation is supported by *United States v. Jackson*.[159] In *Jackson*, the U.S. Supreme Court addressed whether a 1906 Act of Congress authorized the President, by executive order, to restrict the sale or other alienation of lands held by Native Americans under the homestead laws.[160] The 1906 Act expressly authorized the President to restrict the alienation rights of Native American "allottees" — meaning, the Chief Justice explained, Native Americans "who received [land] patents under the General Allotment Act of February 8, 1887."[161] But the 1906 Act did *not* expressly authorize alienation restrictions on Native American *homesteaders*.[162] The lower federal court had held that "since the language of the [1906 Act] refers only to Indian *allottees*, it cannot be considered as authorizing the President to continue restrictions on alienation in patents issued to Indian *homesteaders*."[163] The Court rejected that interpretation, however, based on the longstanding view of the executive branch — undisturbed by Congress — that, for purposes of the 1906 Act and similar statutes, the term "allottees" included homesteaders.[164]

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[158] *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) ("The President's unique status under the Constitution distinguishes him from other executive officials.").
[159] 280 U.S. 183 (1930).
[160] *Id.* at 186 (statement of the case by Chief Justice, preceding the opinion of the Court, describing second question presented).
[161] *Id.* at 185 (statement of the case by Chief Justice, preceding the opinion of the Court).
[162] Act of June 21, 1906, ch. 3504, 34 Stat. 325, 326 (quoted in relevant part in *Jackson*, 280 U.S. at 189 n.1).
[163] *Id.* at 191 (paraphrasing district court's holding; emphasis supplied by the Court).
[164] *Id.* at 196-197 ("If there were any doubt on the question, the silence of Congress in the face of the long continued practice of the Department of the Interior . . . must be considered as equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.") (citation and internal quotation marks omitted).

So too here, Presidents have long exercised power to modify monuments established under the Act. Congress has not disturbed that power, despite continuing close attention to presidential exercises of power under the Act. The presidential practice plus congressional acceptance of that practice powerfully supports the conclusion that the Act authorizes the President to modify monuments established under the Act.

c. Official Executive-Branch Opinions Confirm That the President Can Modify Monuments Established Under the Act.

Official opinions in the executive branch confirm that the President can modify monuments established under the Act, including by reducing them. These opinions come from the Attorney General of the United States and the Solicitor of Interior.[165]

In a 1938 opinion, Attorney General Homer Cummings recognized that "[t]he President from time to time has diminished the area of national monuments established under the Act by removing or excluding lands therefrom."[166] General Cummings tied the President's power to diminish monuments to the Act's requirement that land reserved for a national monument "be confined to the smallest area compatible with the proper care and management of the objects to be protected."[167]

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[165] *See* 28 U.S.C. § 511 ("The Attorney General shall give his advice and opinion on questions of law when required by the President."); 43 U.S.C. § 1455 ("[T]he legal work of the Department of the Interior shall be performed under the supervision and direction of the Solicitor of the Department of the Interior, who shall be appointed by the President with the advice and consent of the Senate.").

[166] 39 Op. Att'y Gen. 185, 188 (1938).

[167] *Id.*; *See* 54 U.S.C. § 320301(b). Although General Cummings concluded that the President could not abolish a monument, 39 Op. Att'y Gen. at 189, that conclusion cannot logically be squared with his acknowledgement of the President's diminution power. Assume, as General Cummings did, that the President can diminish a monument to exclude land that was erroneously thought necessary to protect objects entitled to protection under the Act. Granting that power, why cannot the President abolish a monument altogether if he finds that the monument was erroneously thought to contain objects entitled to protection under the Act? Indeed, as discussed *supra* in section II.A of this memo, the President has a duty under the Constitution's "Take Care" Clause (Art. II, § 3) to remedy ongoing violations of federal law caused by his predecessor. Just such an ongoing violation exists when a prior president has created a national monument under the Act that does not contain any objects entitled to protection under the Act.

Solicitors of the Interior have confirmed the President's power to diminish monuments established under the Act. In 1948, Solicitor Mastin White advised that the Jackson Hole National Monument "may be reduced by Executive action."[168] In so advising, he relied on a 1935 Solicitor's opinion to the same effect.[169] Like Attorney General Cummings' 1938 opinion, these Solicitors' opinions tied the President's power to reduce monuments to the Act's requirement that land reserved for a monument "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[170]

d. The President's Power to Abolish a Monument Established under the Act Logically Follows from His Acknowledged Power to Modify Such a Monument, and Has Support in the Act's History.

As described above, Presidents have regularly modified monuments previously established under the Act to exclude land originally included within monument boundaries. The well-established existence of this modification power supports the President's power to

[168] 60 Interior Dec. 9, 10 (July 24, 1947).

[169] *Id.*

[170] *Id.* (reaffirming 1935 opinion concluding that the "President was authorized to reduce the area of a national monument"); *see also* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 559-560 (2003) (discussing 1924 Solicitor opinion that concluded President could not reduce national monument but that was reversed by later Solicitor opinions of 1935 and 1947). Professor Squillace, a former Clinton-era official who has generally argued against the President's power to reduce the size of national monuments, admits that a President can correct "mistake[s]" in monument designations made by predecessors. *See* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 556 & n.453, 567 (2003); *see also* Proclamation Amending Proclamation No. 4346 Relating to the Enlargement of the Buck Island Reef National Monument, 89 Stat. 1254 (1975) (correcting typo in boundary description of monument contained in earlier proclamation); Proclamation, Natural Bridges National Monument, Utah, 39 Stat. 1764 (1916) (revising boundaries in light of resurvey); John Ise, Our National Park Policy: A Critical History, at 157 (Res. for the Future, Inc. 1961) (explaining that President Wilson issued a proclamation to replace earlier one establishing Natural Bridges National Monument because of errors in original survey). Professor Squillace does not explain, however, why the Antiquities Act should be interpreted implicitly to allow the President to correct "mistakes" of his predecessors but not to allow the President to correct other erroneous determinations made in establishing a monument under the Act. For example, Professor Squillace does not explain why a President cannot modify a prior monument designation if the President determines that the prior designation is "not confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). This would seem to be a "mistake" that the Act impliedly authorizes the President to correct.

rescind altogether a monument that he determines was improperly established in the first place. This follows as a matter of logic.

Take the instances in which Presidents have modified monuments to exclude land that they determined was improperly included in the first place—for example, because it neither contained protectable objects nor was necessary to protect them. If the President can *reduce* a monument to exclude lands that he determines were not properly included in the first place, logic compels the conclusion that he can *abolish* a monument that he determines was not properly created in the first place—say, because it did not contain antiquities entitled to protection under the Act or, for that matter, because it was created without input from, and support of, those whom it would directly affect. Whether diminishing a monument or abolishing it, the President exercises discretion to revisit — and, by his lights, *correct* — a determination made by a predecessor. It is hard to conceive of a basis for distinguishing a current President's power to make a correction that affects part of a monument from his power to make a correction affecting the monument as a whole.[171]

As discussed above, Presidents have revised the boundaries of national monuments established under the Act not only to correct errors in the original proclamations but also to reflect changed circumstances. To recall one example, President Kennedy excluded almost 4,000 acres from Bandelier National Monument in 1963 because that land's archeological values "have been fully researched."[172] If President Kennedy's action was warranted with respect to a portion of the monument, logically a President should be able to eliminate an entire monument if all of its archeological values have been exhausted.

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[171] Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 551 (2003) ("Whether a future President has the authority to abolish a national monument arguably resolves the question as to whether a President may reduce the size of a national monument or eliminate restrictions or conditions included in the proclamation, since the legal issues are essentially the same.").

[172] Proclamation No. 3539, Revising the Boundaries of the Bandelier National Monument, New Mexico, 77 Stat. 1006 (1963).

Indeed, this was the view of Edgar Lee Hewett, the archeologist who drafted the bill that Congress enacted as the Act "without changing a word."[173] In the memorandum that Hewett gave Congress cataloging specific archeological ruins in the Southwest, he wrote that while some should be incorporated into permanent national parks,

> Many others should be temporarily withdrawn and allowed to revert to the public domain after the ruins thereon have been examined by competent authority, the collections therefrom properly cared for, and all data that can be secured made a matter of permanent record.[174]

Thus, Hewett, the architect of the Act, believed that some national monuments should be abolished in their entirety, and undoubtedly drafted the Act to authorize the President to do so.

Hewett's view is eminently rational. Indeed, one commentator has said that Hewett's recognition that "once a site has given up its information, it no longer needs to be preserved" has been "of inestimable value to archeology ever since."[175] This commentator explained:

> [Hewett's view] has enabled archeologists to relate in a rational way to economic and political realities, because they do not have to insist on saving 'everything.' They can focus instead on recovering the information that makes the ruins valuable in the first place."

In short, the same considerations that support the President's power to diminish a monument established under the Act support his power to abolish it.

Section 9:

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[173] Raymond Harris Thompson, *Edgar Lee Hewett and the Politics of Archeology*, in The Antiquities Act, at 35, 43 (D. Harmon, F. McMannon & D. Pitcaithley eds. 2006).

[174] Edgar Lee Hewett, Memorandum concerning the historic and prehistoric ruins of Arizona, New Mexico, Colorado, and Utah, and their preservation, reproduced and "incorporated as a part of" H.R. Rep. 59-2224, at 2-3 (1906). Hewett prepared this memorandum in 1904, at the request of William Afton Richards, then Commissioner of the General Land Office in the Department of Interior. Hal Rothman, Preserving Different Pasts: The American National Monuments, at 43 (Univ. of Ill. 1989); Raymond Harris Thompson, *Edgar Lee Hewett and the Politics of Archeology*, in The Antiquities Act, at 35, 39 (D. Harmon, F. McMannon & D. Pitcaithley eds. 2006).

[175] Raymond Harris Thompson, *Edgar Lee Hewett and the Politics of Archeology*, in The Antiquities Act, at 35, 43 (D. Harmon, F. McMannon & D. Pitcaithley eds. 2006).

Commission for the Stewardship of Public Lands

Utah State Capitol Complex
PO BOX 145115 • Salt Lake City, Utah 84114-5115
(801) 538-1035 • fax (801) 538-1414

http://le.utah.gov

Proposed Legislation

The best answer to the abuse of the Act is legislative – Congress should amend it to prevent future abuse. We propose a simple legislative approach based on the Constitution.

The only Constitutional mechanism through which the federal government can "exercise exclusive Legislation in all Cases whatsoever" over property within a sovereign State is the Enclave Clause, Article 1, Section 8, Clause 17, which reads:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

Monuments are, for all practical purposes, areas subject to the exclusive legislation of the federal government within at state. Accordingly, they are *de facto* enclaves, and should be subject to the consent of the legislature of the state in which they are created.

Therefore, we propose a simple amendment to the Act, adding a final provision, as follows:

> (e) No presidential proclamation declaring a monument under this statute shall have any legal force or effect unless and until the monument is formally consented to and ratified by the legislature of the state in which the monument is proclaimed.

This would give all states the right to determine when the federal government can exercise exclusive legislative authority over land within their borders, as required by the Enclave Clause, and would prevent future abuses of the Act.

Conclusion

Commission for the Stewardship of Public Lands

Utah State Capitol Complex
PO BOX 145115 • Salt Lake City, Utah 84114-5115
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As chairs of the Utah Legislature's Commission for the Stewardship of Public Lands, we express our thanks to the Secretary for his recent visit to our State. We also express our thanks for his review of the Bears Ears National Monument. We hope that our comments have been of assistance in his review. We offer them in the spirit of good will and cooperation, and look forward to having a productive relationship with the Department of Interior. Please also express our gratitude to President Trump for having the fortitude to issue Executive Order 13792.

We pray that the Secretary be divinely inspired with wisdom and discernment in undertaking this task. We look forward to reviewing his recommendations to the President.

Senator David P. Hinkins, Chair
dhinkins@le.utah.gov

Representative Keven Stratton, Chair
kstratton@le.utah.gov

Commission for the Stewardship of Public Lands

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	Name of Nat. Mon.	Action	Acres Affected
1- 1908/03/03	Lincoln	Diminish	not specified
2- 1911/07/31	Petrified Forest	Diminish	25,625.60
3- 1912/03/14	Navajo	Diminish	320 (88.88% reduction)*
4- 1912/04/17	Mount Olympus	Diminish	160
5- 1915/05/11	Mount Olympus	Diminish	313,280 (49%)**
6- 1929/01/07	Mount Olympus	Diminish	640
7- 1933/06/10	Old Kasaan	Transferred to NPS	
8- 1933/06/10	Cabrillo	Transferred to NPS	
9- 1933/06/10	Devil Postpile	Transferred to NPS	
10- 1933/06/10	Oregon Caves	Transferred to NPS	
11- 1933/06/10	Wheeler	Transferred to NPS	
12- 1933/06/10	Mound City Group	Transferred to NPS	
13- 1933/06/10	Lehman Caves	Transferred to NPS	
14- 1933/06/10	Timpanogos Cave	Transferred to NPS	
15- 1933/06/10	Bryce Canyon	Transferred to NPS	
16- 1933/06/10	Chiricahua	Transferred to NPS	
17- 1933/06/10	Fort Wood	Transferred to NPS	
18- 1933/06/10	Castle Pinckney	Transferred to NPS	
19- 1933/06/10	Fort Pulaski	Transferred to NPS	
20- 1933/06/10	Fort Marion	Transferred to NPS	
21- 1933/06/10	Fort Matanzas	Transferred to NPS	
22- 1933/06/10	Meriwether Lewis	Transferred to NPS	
23- 1933/06/10	Father Millet Cross	Transferred to NPS	
24- 1933/06/10	Holy Cross	Transferred to NPS	
25- 1933/06/10	Sunset Crater	Transferred to NPS	
26- 1933/06/10	Saquaro	Transferred to NPS	
27- 1933/08/22	Colonial	Modifying Boundaries	
28- 1936/06/15	Katmai	Restrictions Modified/Reserving certain prior claims	
29- 1938/08/29	White Sands	Diminish	(“R.O.W.”)
30- 1940/04/04	Grand Canyon “II”	Diminish	71,854
31- 1941/01/22	Wupatki	Diminish	52.27
32- 1941/07/18	Craters of the Moon	Diminish	(“R.O.W.”)
33- 1945/08/13	Santa Rosa Island	Diminish	4,700 (49.47% reduction)
34- 1946/03/12	Great Sand Dunes	Resurveyed & Modified	n/a
35- 1955/03/31	Glacier Bay	Diminish	24,925(land);4,193(water)
36- 1956/04/06	Hovenweep	Diminish	40
37- 1956/06/07	Great Sand Dunes	Diminish	9,880 (25% net reduction)
38- 1959/08/07	Colorado	Diminish	211
39- 1960/04/08	Black Canyon of the Gunnison	Diminish	470
40- 1960/07/22	Arches	Diminish	720
41- 1962/03/27	Timpanogos	Boundaries confirmed	n/a
42- 1962/08/14	Natural Bridges	Diminish	320
43- 1963/05/27	Bandelier	Diminish	3,925

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44- 1975/03/28	Buck Island Reef	Amending Description	n/a

*largest reduction by percentage
**largest known reduction in acres affected

EXHIBIT D

CAMPAIGN FOR
ACCOUNTABILITY

DATE: October 27, 2016

TO: Sen. David P. Hinkins

FAX: 435-748-2089

TO: Rep. Kevin J. Stratton

FAX: 801-326-1544

FROM: Anne L. Weismann
Campaign for Accountability

RE: Open Records Request

Enclosed is a letter concerning the open records request of Campaign for Accountability.

CAMPAIGN FOR ACCOUNTABILITY

October 27, 2016

BY FACSIMILE: 435-748-2089

Sen. David P. Hinkins
Chair
Commission for the Stewardship of
Public Lands
P.O. Box 485
Orangeville, UT 84537

BY FACSIMILE: 801-326-1544

Rep. Kevin J. Stratton
Chair
Commission for the Stewardship of
Public Lands
Utah House of Representatives
390 North State, Suite 360
P.O. Box 146030
Salt Lake City, UT 84114

Re: Utah Records Request

Dear Sen. Hinkins and Rep. Stratton:

Campaign for Accountability ("CfA") makes this request for records of the Utah Commission for the Stewardship of Public Lands (the "Commission") pursuant to the Utah Government Records Access and Management Act, Title 63 G, Chapter 2. The Commission is subject to the Utah Government Records Access and Management Act as a "Governmental entity" within the meaning of 63 G 2-103(11)(a)(v) and 103(11)(b)(i), but does not have a publicly identified address or custodian of records. Therefore, as chairs of the Commission, CfA directs its request to you.

Specifically, CfA requests all analyses performed by the Davillier Law Group or anyone associated with the Davillier Law Group, including but not limited to the Legal Consulting Services Team, regarding the viability of and possible bases for a lawsuit by Utah to gain ownership or control of public lands within its borders.

These analyses were performed pursuant to a contract between the Davillier Law Group and the Commission. We are aware that a 150-page legal analysis of the merits of such a case that was prepared by Davillier Law Group – at a cost of $640,000 – already has been made public. Still undisclosed, however, is any contrary or alternative analysis that addresses any potential pitfalls, weaknesses, or counterarguments to a potential lawsuit by Utah.

CfA seeks records of any kind, regardless of format, including paper records, electronic records, audiotapes, videotapes, calendars, and photographs. Further, this request includes any attachments to paper or electronic records.

By way of background, in December 2015, the Commission voted in favor of a lawsuit against the federal government challenging its authority to retain federal lands in Utah.[1] The lawsuit is estimated to cost the State of Utah nearly $14 million. *Id.* Since the disclosure of the 150-page analysis explaining how such a lawsuit would succeed, the Public Lands Subcommittee of the Western Attorneys General Litigation Action Committee, which is comprised of attorneys general from 11 western states, has issued its own legal analysis of the legal theories for and against the continued proprietary ownership of the United States of land in the western part of the country. Strikingly, that group concluded that none of the legal theories it examined would support the kind of lawsuit Utah is contemplating.

Yet despite the weight of legal authority demonstrating the lack of merit in the contemplated suit, the significant outlays of taxpayer money to the Davillier Law Group, and a commitment to spend millions of dollars more in pursuit of a lawsuit you, as co-chairs of the Commission, have refused to share the totality of the Commission-funded legal analysis with other members of the Commission or the public.

CfA is a non-profit organization and seeks the requested information to inform and educate the public about how taxpayer funds are being spent, the wisdom of spending an additional $14 million to pursue a lawsuit that almost certainly will not succeed, and the extent to which the Commission is fulfilling its fiduciary responsibilities. Accordingly, because releasing the requested records would primarily benefit the public, CfA requests they be provided free of charge pursuant to Title 63 G, Chapter 2, § 203(4)(a). If a fee waiver is not available please inform me of the costs and I will submit payment promptly. If possible, CfA would prefer to receive this information electronically via e-mail at aweismann@campaignforaccountability.org. If you provide

[1] *See, e.g.*, Brian Maffly, Utah Commission Votes to Sue Feds for Public Lands at Cost of $14 Million, *Salt Lake Tribune*, December 9, 2015, *available at* http://saltlakecity.suntimes.com/slc-news/7/141/296631/utah-commission-votes-to-sue-feds-for-public-lands-at-cost-of-14-million.

paper copies, please mail them to: Anne L. Weismann, Campaign for Accountability, 660 Pennsylvania Ave., S.E., Suite 300, Washington, D.C. 20036.

If you have any questions about this request, please contact me at 202-780-5750 or by email at the address listed above. If CfA's request is denied in whole or part, please justify all withholdings by reference to specific exemptions of the Utah Government Records Access and Management Act.

Sincerely,

Anne L. Weismann
Executive Director

EXHIBIT E

Fw: Follow up to Records Request of 10/27/16

Anne Weismann

Thu 1/26/2017 12:16 PM

Utah

To:Daniel Stevens <dstevens@campaignforaccountability.org>;

From: Ric Cantrell <rcantrell@le.utah.gov>
Sent: Thursday, December 1, 2016 8:00 PM
To: Anne Weismann
Subject: RE: Follow up to Records Request of 10/27/16

Thank you, Anne. Yes, this is helpful insight. An analysis like the one you requested might very well exist, but we have not yet been able to locate it in the records maintained by the senate, or in any senator's individual possession. Call or Email anytime.

Best,

Ric

_____
Ric Cantrell
Chief of Staff
Utah State Senate
Office: 801-538-1407
Mobile: 801-647-8944
rcantrell@le.utah.gov
senate.utah.gov

From: Anne Weismann [mailto:aweismann@campaignforaccountability.org]
Sent: Tuesday, November 29, 2016 1:50 PM
To: Ric Cantrell <rcantrell@le.utah.gov>
Subject: Follow up to Records Request of 10/27/16

On October 27, 2016, I submitted a records request on behalf of Campaign for Accountability (CfA) for all analyses performed by the Davillier Law Group regarding the viability of and possible bases for a lawsuit by Utah to gain ownership or control of public lands within its borders. In follow-up discussions with Rick Henshaw, I was advised no materials had been located beyond the analysis already made public, which does not include any evaluation of risk or negative analysis.

A search of the public record reveals evidence that such negative analysis does, in fact, exist. For example, the publicly released report by Davillier notes its lawyers "evaluated various legal theories, taken into account strengths and weaknesses of various arguments[.]" The report continues that "in the interest of preserving attorney client privilege, this public document does not discuss all anticipated defenses and counterarguments thereto." (available at http://le.utah.gov/interim/2016/pdf/00002619.pdf) Reportedly, the withheld analysis "acknowledged there were likely hurdles that would have to be overcome." (Salt Lake Tribune, 2/1/16)

Further, the lawyers denied all requests from members of the Commission for the Stewardship of Public Lands for the analysis of the weaknesses of a possible lawsuit on the ground the material was protected by the attorney-client privilege. In response, democrats on the Commission filed a complaint with the Utah State Bar seeking an ethics review of the Commission's lawyers (Davillier) for their failure to share the analysis with the full Commission.

Finally, at a December 9, 2015 meeting of the Commission, several of the lawyers on the consulting team to Davillier acknowledged they had studied weaknesses of a possible lawsuit. (http://utahlegislature.granicus.com/MediaPlayer.phpview_id=19315.

I hope this is helpful.

Anne Weismann
Executive Director
Campaign for Accountability

EXHIBIT F

CAMPAIGN FOR
ACCOUNTABILITY

March 1, 2017

BY FACSIMILE: 435-748-2089 &
BY EMAIL: dhinkins@le.utah.gov

Sen. Daivd P. Hinkins
Chair, Commission for the Stewardship of Public Lands
Utah State Senate
320 State Capitol
P.O. Box 145115
Salt Lake City, Utah, 84114

BY FACSIMILE: 801-326-1544 &
BY EMAIL: kstratton@le.utah.gov

Rep. Kevin J. Stratton
Chair, Commission for the Stewardship of Public Lands
Utah House of Representatives
350 North State, Suite 350
P.O. Box 145030
Salt Lake City, Utah 84114

Re: GRAMA Request

Dear Sen. Hinkins and Rep. Stratton:

Campaign for Accountability ("CfA") makes this request for records of the Utah Commission for the Stewardship of Public Lands (the "Commission") pursuant to the Utah Government Records Access and Management Act, Title 63 G, Chapter 2. The Commission is subject to the Utah Government Records Access and Management Act as a "Governmental entity" within the meaning of 63 G 2-103(11)(a)(v) and 103(11)(b)(i), but does not have a publicly identified address or custodian of records. Therefore, as chairs of the Commission, CfA directs its request to you.

First, CfA requests access to and copies of receipts, invoices or other payment records concerning any state funds issued to Davillier Law Group, LLC or Strata Policy.

Second, CfA requests access to and copies of receipts, invoices or other payment records pursuant to Legal Consulting Services and Relations Services Agreement 2015-01 (the "Agreement", attached as Exhibit A).

This request is for records since January 1, 2016.

CfA seeks records of any kind, regardless of format, including payment receipts; electronic funds transfer receipts; invoices for services rendered; or any other paper records, electronic records, audiotapes, videotapes, calendars or photographs, regarding funds issued to Davillier Law Group, Strata Policy, or any entity pursuant to the Agreement.

CfA is a non-profit organization and seeks the requested information to inform and educate the public about how taxpayer funds are being spent by the Utah Commission for the Stewardship of Public Lands. In 2015, the Utah State Legislature had passed and the governor signed legislation authorizing the state attorney general to sue the federal government to obtain federal land. Last month, however, the legislature passed a resolution delaying the date by which the state must proceed with the lawsuit.[1]

The requested information will help the public determine whether the Commission's spending is in line with the Legislature's recent actions. Accordingly, because releasing the requested records would primarily benefit the public, CfA requests the records be provided free of charge pursuant to Title 63 G, Chapter 2, § 203(4)(a). If a fee waiver is not available, please inform me of the costs and I will submit payment promptly.

If possible, CfA would prefer to receive this information electronically via e-mail at dstevens@campaignforaccountability.org. If you provide physical copies of the records, please mail them to: Daniel Stevens, Campaign for Accountability, 660 Pennsylvania Ave S.E., Suite 303, Washington, D.C. 20003.

If you have any questions about this request, please contact me at 202-780-5750 or by email at the address listed above. If CfA's request is denied in whole or part, please justify all withholdings by reference to specific exemptions of the Utah Government Records Access and Management Act.

Thank you for your assistance.

Sincerely,

Daniel Stevens
Executive Director

[1]Lee Davidson, Trusting in Trump, Utah Lawmakers Back Off Suing for Public-Land Control, *Salt Lake Tribune*, February 19, 2017 (*available at* http://www.sltrib.com/news/4956555-155/trusting-in-trump-utah-lawmakers-back).

EXHIBIT G

House of Representatives *State of Utah*

UTAH STATE CAPITOL • PO BOX 145030
350 N STATE STREET, SUITE 350
SALT LAKE CITY, UTAH 84114-5030 • (801) 538-1029

March 20, 2017

Daniel Stevens
Executive Director
Campaign for Accountability

Subject: Response to your records request

Dear Mr. Stevens,

As the records officer for the Utah House of Representatives, I am writing in response to the request you submitted dated March 1, 2017, which I received March 1, 2017, requesting access to records pursuant to Title 63G, Chapter 2, Government Records Access and Management Act, and the Utah Legislature Policies and Procedures for Handling Records Requests ("Policies").

Preliminarily, in your records request you ask for a waiver of the fees normally charged for fulfilling a record request. A request to have a record request fulfilled without charge ("fee waiver request") under Section 2.2 of the Policies is a matter that is separate and distinct from a record request and cannot be considered unless it is made separately. Because your fee waiver request was included as part of your record request, I am unable to acknowledge your fee waiver request, and can neither grant nor deny your request. Because of my response below, your fee waiver request is moot. However, you should understand that for any future record request, if you want your fee waiver request to be considered, you must submit it separately from your record request. For your information, a separate form for making a fee waiver request may be found at http://le.utah.gov/documents/GRAMARequestNoChargeForm.pdf.

Your record request asks for access to the following:

> Receipts, invoices or other payment records concerning any state funds issued to Davillier Law Group, LLC or Strata Policy.
>
> Receipts, invoices or other payment records pursuant to Legal Consulting Services and Relations Services Agreement 2015-01.

All of the records you request are available online at the website of the Commission for the Stewardship of Public Lands at http://le.utah.gov/asp/interim/Commit.asp?Year=2014&Com=SPESPL.

Because of the availability of these records in a public online publication, under Utah Code Subsection 63G-2-201(8)(a)(v), the Utah House of Representatives is not required to fill your records request and declines to do so.

In addition, please submit any future records request using the form that is available for that purpose. That form may be found at http://le.utah.gov/documents/GRAMARequestForm.pdf.

If you have any questions concerning this response, please feel free to contact me.

Sincerely,

Kathryn Jackson
Records Officer
Utah House of Representatives

EXHIBIT H

House of Representatives *State of Utah*

UTAH STATE CAPITOL • PO BOX 145030
350 N STATE STREET, SUITE 350
SALT LAKE CITY, UTAH 84114-5030 • (801) 538-1029

June 20, 2017

Daniel Stevens, Executive Director
Campaign for Accountability
660 Pennsylvania Ave SE, Ste 303
Washington DC 20003

Subject: Response to your records request dated May 8, 2017

Dear Mr. Stevens:

As records officer for the Utah House of Representatives, I am writing in response to the records request that your attorney, Brent V. Manning, submitted on your behalf on May 8, 2017, asking for access to records pursuant to Title 63G, Chapter 2, Government Records Access and Management Act, and the Utah Legislature Policies and Procedures for Handling Records Requests.

Your record request asks for access to the following:

Receipts, invoices or other payment records concerning any state funds issued to or approved for payment directly or indirectly to Davillier Law Group, LLC or Strata Policy.

Receipts, invoices or other payment records pursuant to the Utah Commission for the Stewardship of Public Lands' Legal Consulting Services and Relations Services Agreement 2015-01.

As indicated in my March 20, 2017 response to your previous request, I reiterate that records responsive to your request are available online at the website of the Commission for the Stewardship of Public Lands at http://le.utah.gov/asp/interim/Commit.asp?Year=2014&Com+SPESPL.

Mr. Manning's reference to "public statements made since June 12, 2016 . . . that Davillier Law Group, LLC's legal work on behalf of the Commission 'continues'" does not change my response. I have not been able to discover any other submitted, paid, or pending invoices or other payment records concerning state funds issued to or approved for payment to Davillier Law Group, LLC or Strata Policy. The requested records are provided online, as indicated above.

Because of the availability of these records in a public online publication, under Utah Code Section 63G-2-201(8)(a)(v) the Utah House of Representatives is not required to fill your records request and declines to do so.

If you have any questions concerning this response, please feel free to contact me.

Sincerely,

Kathryn Jackson
Records Officer
Utah House of Representatives

EXHIBIT I

UTAH STATE LEGISLATURE

REQUEST FOR A RECORD
under the
GOVERNMENT RECORDS ACCESS AND MANAGEMENT ACT (Utah Code Title 63G, Chapter 2) and UTAH LEGISLATURE POLICIES AND PROCEDURES FOR HANDLING RECORDS REQUESTS

Date: June 1, 2017

From: Daniel Stevens
(Name)
660 Pennsylvania Ave., S.E. Suite 303
(Mailing address)
Washington | D.C. | 20003
(City) (State) (Zip code)
(202) 780-5750
(Daytime telephone number)

FOR OFFICE USE ONLY

To:
- ☒ House of Representatives
- ☒ Senate
- ☐ Office of Legislative Auditor General
- ☐ Office of Legislative Fiscal Analyst
- ☐ Office of Legislative Research and General Counsel
- ☐ Legislative Printing

I request the following record or records (must be identified with reasonable specificity):
Campaign for Accountability requests access to and copies of any communications to, from, or between Sen. David P. Hinkins or Rep. Kevin J. Stratton and any employee or representative of the Davillier Law Group, LLC, including, but not limited to, John Howard.

I am requesting only records[1] ☒ sent, ☒ received, or ☒ created from June 15, 2016 (Date) to present (Date)

If you are requesting that we search email or other records relating to specific topics, please specify the search terms[2] you would like us to use to identify the records you are requesting:
N/A

☒ I request an expedited response because I can demonstrate that this request for records benefits the public rather than myself, based on the following:
The requested information will inform and educate the public about the Commission's work regarding the transfer of national lands to state control. Specifically, the information will inform the public about the Commission's ongoing communications with its legal team.

(For more information relating to a record request to a legislative office, please review the back of this form.)

Revised 5/23/13

[1]Declining to limit your request to particular dates may cause your request to be out of compliance with the requirement to identify the requested records with reasonable specificity.

[2]Declining to identify search terms may increase the volume of records to be reviewed and the amount of staff time required to review them and thus may result in higher fees.

GENERAL INFORMATION

Introduction

This document is intended to provide general information relating to a request for a record directed to a governmental entity within the legislative branch. It is not intended as legal advice, nor is it a comprehensive description of Utah Code Title 63G, Chapter 2, Government Records Access and Management Act ("GRAMA") or the Utah Legislature Policies and Procedures for Handling Records Requests ("Policies") (at http://le.utah.gov/documents/2007GRAMApolicies.pdf). Please refer to GRAMA and the Policies for further information.

Time for Response

Normally, a legislative office is required to respond to a request for a record as soon as reasonably possible, but no later than 10 business days after receiving the request (Policies, Section 2.1(2)(a)). If the person submitting the request demonstrates that the record request benefits the public rather than the person, the time for responding is as soon as reasonably possible, but no later than five business days after the legislative office receives the written request (Policies, Section 2.1(2)(a)). However, a legislative office may respond to a request later than the normal or expedited response time if an extraordinary circumstance exists (Policies, Section 2.1(3)). The following constitute extraordinary circumstances under the Policies:

- another legislative office or governmental entity is using the record;
- the request is for a voluminous quantity of records;
- the legislative office is currently processing a large number of records requests;
- the request requires the legislative office to review a large number of records to locate the records requested;
- the decision to release a record involves legal issues that require the legislative office to seek legal counsel for the analysis of statutes, rules, ordinances, regulations, or case law; or
- segregating information that the requester is entitled to inspect from information that the requester is not entitled to inspect requires extensive editing or computer programming.

(Policies, Section 2.1(3)).

Additionally, if a record request is made during a general or special legislative session, the legislative office may respond as soon as reasonably possible but no later than 15 business days from the date of the request. (Policies, Section 2.1(5))

Fees

It often requires significant staff time to respond to a request for a record. This is due, in part, to the time it takes to review records to identify those that are responsive to the request, to redact information that is private, protected, or controlled, if applicable, and to seek legal advice to ensure compliance with the requirements of the law. Because staff time is paid with tax revenue, the Legislature charges fees in order to recoup some of the cost to taxpayers. The general fee provisions of GRAMA do not apply to the Legislature (see Utah Code Section 63G-2-703). Instead, the Legislature has its own fee provisions relating to a request for records, as provided in the Policies. Staff time spent responding to a request is never billed higher than $25 per hour, even if the employee is actually paid at a higher rate. Black and white copies are charged at a rate of 10 cents per copy. A list of other fees charged for records is available on the Legislature's website at: http://le.utah.gov/documents/fees.htm. A legislative office is authorized to fulfill a record request without charge under circumstances specified in the Policies (Policies, Section 2.2(2)), but fulfilling a record request without charge is rare. To request that a record request be fulfilled without charge, you must complete and submit a Request to Have a Record Request Fulfilled Without Charge form, available on the Legislature's website.

Appeals

A decision to deny access to a record, or a decision claiming extraordinary circumstances, which allows additional time to respond, may be appealed pursuant to the appeals process as provided in the Policies.

The appeals process for the legislative branch is different than the process followed by other governmental entities. A person may appeal a legislative office's access determination by filing a notice of appeal with the appropriate legislative officer within 30 calendar days after the determination. For an appeal of a legislative office's claim of extraordinary circumstances, the notice of appeal must be filed within 30 calendar days after the day on which written notification of a claim of extraordinary circumstances is issued.

A determination of the appropriate legislative officer may be appealed to the Legislative Records Committee by filing a notice of appeal with the director of the Office of Legislative Research and General Counsel within 30 calendar days after the determination by the appropriate legislative officer (for an appeal challenging the claim of extraordinary circumstances, the notice of appeal must be filed within 45 calendar days after the original request for records is submitted).

An order by the Legislative Records Committee may be appealed by petitioning the district court within 30 calendar days after the Legislative Records Committee's order.

The Legislature's appeals process is described in full in the Policies.

Revised 5/23/13

EXHIBIT J

House of Representatives *State of Utah*

UTAH STATE CAPITOL • PO BOX 145030
350 N STATE STREET, SUITE 350
SALT LAKE CITY, UTAH 84114-5030 • (801) 538-1029

July 5, 2017

Daniel Stevens
Campaign for Accountability
660 Pennsylvania Avenue, S.E., Suite 303
Washington, D.C. 20003

Subject: Response to your records request - **CORRECTION**

Dear Mr. Stevens:

This is a corrected copy. I did not give you the correct Code citation in my original letter.

I am writing in response to the records request you attached to an email you sent me on June 1, 2017, on behalf of Campaign for Accountability, requesting records under Title 63G, Chapter 2, Government Records Access and Management Act, and the Utah Legislature Policies and Procedures for Handling Records Requests ("Policies"). The request seeks records described as follows:

- "access to and copies of any communications for, from, or between Sen. David P. Hinkins or rep. Kevin J. Stratton and any employee or representative of the Davillier Law Group, LLC, including, but not limited to, John Howard."

I am writing to inform you that your request is denied. The records you requested are protected records under Subsection 63 G-2-305(17) and are not subject to disclosure.

As provided in Section 3.1(1) of the Policies, a person aggrieved by a legislative office's access determination may appeal the determination within 30 calendar days from the day on which the access determination is issued. To appeal, you must file a notice of appeal with Sandy Tenney, Chief Clerk, Utah House of Representatives, 350 North State Street, Suite 350, Salt Lake City, Utah 84114.

Sincerely,

Kathryn M. Jackson
Records Officer
Utah House of Representatives