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[AFRC Opposition to Stay \(2\).pdf](#)  
[Assn O&C Counties Opposition to Stay \(4\).pdf](#)  
[INFORMATION MEMORANDUM FOR THE DEPUTY SECRETARY re CSNM litigation 10.18.17.docx](#)

Hey Aaron- How about something like this to send to Dan and Jack?

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Dan and Jack-

Plaintiffs filed their oppositions to our motions to stay in the two cases challenging the CSNM pending in DC (the third case pending in Oregon is stayed until November 27). DOJ has specifically asked whether (1) DOI has any thoughts on a reply to these oppositions; and (2) DOI has thoughts on stipulating to no discovery in these cases.

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(b)(5) ACP, AWP



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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**ASSOCIATION OF O&C COUNTIES,**

Plaintiff,

v.

**DONALD J. TRUMP**, in his official  
capacity as President of the United States of  
America; **UNITED STATES OF  
AMERICA; KEVIN HAUGRUD**, in his  
official capacity as acting Secretary of the  
Interior; and **BUREAU OF LAND  
MANAGEMENT,**

Defendants.

Civil No. 1:17-cv-00280-RJL

**ASSOCIATION OF O&C COUNTIES' OPPOSITION TO MOTION TO STAY**

**I. INTRODUCTION**

The federal defendants' request for a second stay of this action should be denied. This case involves a single, narrow, legal issue: whether the President has the legal authority under the Antiquities Act to add approximately 40,400 acres of land to the Cascade-Siskiyou National Monument ("CSNM") even though Congress previously set aside at least 35,500 acres of such lands classified as timberlands for sustained yield timber production pursuant to the Oregon and California Railroad Grant Lands Act of 1937 ("O&C Act"), 43 U.S.C. §§ 2601-2605. This is a purely legal issue that is susceptible to summary judgment; indeed, the Solicitor of the Department of the Interior long ago issued an opinion that "the President does not have . . .

authority” under the Antiquities Act to protect lands previously set aside under the O&C Act for timber production. *See* ECF No. 1 (quoting Solicitor’s Opinion M. 30506 (Mar. 9, 1940)).

Timely resolution of this issue is also vitally important to AOCC’s member counties, who are the intended beneficiaries of the O&C Act and who have the right to 50 percent of the gross receipts from timber sales and harvests on such O&C Lands. *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1183 (9th Cir. 1990) (“[T]he O&C Act was intended to provide the counties in which O&C Act land was located with [a] stream of revenue . . .”). It should go without saying that every day this matter remains pending is one less day on which AOCC’s members will ever be able to receive such revenue. As a result, further delay should be avoided.

The fact that the Court already stayed this matter for 60 days does not alter this conclusion. The Court’s initial stay was based on President Trump’s request that the Secretary of the Interior review virtually all monument designations made during the Obama Administration, including the CSNM. The clear implication at the time was that the review could lead President Trump to exclude the O&C Lands from the CSNM. Since that time, however, the Secretary has completed his review and submitted his final report to the President and there is no clear prospect of relief. If anything, the opposite is true. Although the Secretary’s report was not publicly released when it was submitted to the President in August 2017, the *Washington Post* subsequently published a link to the report on September 17, 2017.<sup>1</sup> That copy of the report shows that while the Secretary recommended the removal of 16,591 acres

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<sup>1</sup> *See* Juliet Eilperin, *Shrink at least 4 national monuments and modify a half-dozen others, Zinke tells Trump*, Wash. Post, Sept. 17, 2017, [https://www.washingtonpost.com/national/health-science/shrink-at-least-4-national-monuments-and-modify-a-half-dozen-others-zinke-tells-trump/2017/09/17/a0df45cc-9b48-11e7-82e4-f1076f6d6152\\_story.html?utm\\_term=.b38a43228b02&wpisrc=al alert-national](https://www.washingtonpost.com/national/health-science/shrink-at-least-4-national-monuments-and-modify-a-half-dozen-others-zinke-tells-trump/2017/09/17/a0df45cc-9b48-11e7-82e4-f1076f6d6152_story.html?utm_term=.b38a43228b02&wpisrc=al alert-national). A copy of the Final Report published through the link is attached as Exhibit 1 to this Opposition for the convenience of the Court.



of O&C Lands from the CSNM, *he did not even address the remainder of the more than 35,500 acres of O&C Lands that AOCC claims were improperly added to the Monument by President Obama.*

Given these considerations, there is no reasonable basis to grant a second stay. The federal defendants' unsupported speculation that President Trump's decision *could potentially* affect the outcome of these proceedings is not enough to justify further delay. Every day that the unlawful designation of the O&C Lands in the CSNM remains in place is a day in which such lands cannot be used for their Congressionally dedicated purpose of sustained-yield timber production and a day for which AOCC's members will never be able to recover the timber revenues to which they are entitled. If President Trump ultimately elects to exclude the O&C Lands from the CSNM, the federal defendants can notify the Court and the action will be moot. Unless and until that happens, though, the case should move forward.

## II. ARGUMENT

The federal defendants note that courts consider a four-part test in deciding whether to grant a stay: (1) the likelihood that the moving party will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Hill Dermaceuticals, Inc., v. U.S. Food & Drug Admin.*, 524 F. Supp. 2d 5, 8 (D.D.C. 2007). These factors do not warrant a stay here.

Tellingly, the federal defendants do not even address the first prong of the test or argue that they are likely to prevail on the merits. And with good reason. The Office of the Solicitor long ago recognized that, because of the O&C Act, O&C Lands could not be reserved under the

Antiquities Act. ECF No. 1 at 11-12. In a written opinion from 1940, the Solicitor explained that through the O&C Act,

“Congress directed that certain of the lands (those heretofore or hereafter classified as timberlands and power-site lands valuable for timber) be managed ‘for permanent forest production and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield.’ . . . It is clear from the foregoing that Congress specifically provided a plan of utilization of the Oregon and California Railroad Company revested lands. The plan among other things involves the disposal of lands and timber and the distribution of the moneys received from such disposition. **It must be concluded that Congress has set aside the lands for the specified purposes.**”

ECF No. 1 at 11-12 (quoting Solicitor’s Opinion M. 30506). Once Congress sets aside lands for a particular purpose, the President is without authority to set them aside for a different purpose. Accordingly, the federal defendants are unlikely to prevail on the merits of this case and do not argue otherwise. The motion for stay should be denied for this reason alone. *Jewish War Veterans of U.S., Inc. v. Gates*, 522 F. Supp. 2d 73, 80 (D.D.C. 2007) (denying request for stay based solely on failure to demonstrate likelihood of success on the merits).

Likewise, the federal defendants are entirely silent on the second prong, and make no argument that they will be irreparably harmed absent a stay. In fact, they identify no harm to themselves at all if their requested stay is not granted. The requirement of “[i]rreparable harm is a high standard wherein the alleged injury must be ‘certain and great’ and ‘[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.’” *Hill Dermaceuticals*, 524 F. Supp. 2d at 11 (second brackets in original) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). The federal defendants’ complete silence on this essential prong is fatal to their motion.

Rather than arguing these critical prongs, the federal defendants essentially make a pragmatic argument that the President tasked the Secretary with a “significant undertaking” that included making recommendations that “may substantially affect or alter” the CSNM designation and that “if approved, have the potential to affect issues at the core of this action.” ECF No. 32 at 5. Such speculation, however, is insufficient to justify any further delay. The federal defendants have not offered any actual evidence to suggest that either the Secretary’s recommendations or the President’s decision will in fact resolve the core legal issue in this case or moot AOCC’s request for relief. Indeed, the only publicly available information on the Secretary’s recommendation—as published by the *Washington Post*—suggests exactly the opposite since it shows that the Secretary did not even consider most of the of O&C Lands that were included in the CSNM. While it is understandable that the federal defendants may not wish to comment on governmental decisions that have not yet been finalized, it is also unreasonable for federal defendants to expect AOCC or this Court to agree to a stay without at least some firm evidence that a delay will in fact be likely to resolve all of the issues underlying AOCC’s claims. A theoretical possibility of mootness is not grounds for delaying this case because “[s]peculative injury does not constitute irreparable injury . . . .” *Nat’l Conference on Ministry to Armed Forces v. James*, 278 F. Supp. 2d 37, 52 (D.D.C. 2003) (quoting *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)).

While failing to show that they will suffer any irreparable harm, the federal defendants are quick to claim that a stay should be imposed because AOCC “has failed to show any irreparable harm” from an additional 60-day delay. ECF No. 32 at 6. But it is not AOCC’s burden to demonstrate “irreparable harm” here. And even if it were, the ongoing harm to AOCC is obvious. There is no dispute that so long as the CSNM expansion remains in place, the O&C

Lands will not be managed in accordance with the requirements of the O&C Act, and no timber sales can or will occur (sales that are essential to AOCC's member counties). Nor is this harm insignificant. Indeed, as designated, the Monument expansion includes all of the timber harvests that were scheduled to occur in the BLM's Klamath Falls Resource Area over the next ten years, effectively halting all timber harvesting in the region.<sup>2</sup> This point is also confirmed by the Secretary's final report—as published by the *Washington Post*—which acknowledges that even the inclusion of just 16,591 acres of O&C Lands in the CSNM “would reduce timber offered by BLM for sale by 4-6 million board feet per year.” Exhibit 1 at 11. And while other actions may be necessary before BLM sales on all of the relevant O&C Lands can begin, there is no question that they cannot move forward so long as such lands remain within the CSNM.

Finally, a stay is not in the public interest. The O&C Lands have been improperly tied up by Proclamation 9564 since January 12, 2017, defeating the intended use of those lands under the O&C Act to provide for the economic stability and development of AOCC member counties. This lawsuit has been pending since February 13, 2017. AOCC reasonably accommodated the federal defendants' first request for delay, and they have had ample time to reconsider Proclamation 9564. Further delay will only continue to frustrate the purpose of the O&C Act. The public interest warrants prompt resolution of this case, not further delay.

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<sup>2</sup> More detailed information on the impacts of the Monument designation on timber harvest levels--and on the Counties--is set forth in the Declaration of Andy Geissler in Support of Plaintiff's Response to Federal Defendants' Motion to Stay Case, which was filed on October 16, 2017 in the related case of *American Forest Resource Counsel v. United States*, Civil Action No. 1:17-cv-0441 (RJL). AOCC incorporates the contents of that declaration in support of its own opposition to the federal defendants proposed stay in this matter as well.

### III. CONCLUSION

For the foregoing reasons, the federal defendants' motion to stay should be denied.

DATED: October 16, 2017.

STOEL RIVES LLP

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Attorneys for Plaintiff  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 16, 2017, a copy of the foregoing document was filed electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means as reflected on the Notice of Electronic Filing.

/s/ Per A. Ramfjord  
Per A. Ramfjord (D.C. Bar No. 392237)

**Case No. 1:17-cv-00280-RJL**

# **EXHIBIT 1**

**Case No. 1:17-cv-00280-RJL**

**MEMORANDUM FOR THE PRESIDENT****FROM: RYAN K. ZINKE****SUBJECT: Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act.****Executive Summary and Impressions of the Secretary of the Interior Ryan Zinke**

In 1906, Congress delegated to the President the power to designate a monument under the Antiquities Act (Act). The Act authorizes the President singular authority to designate national monuments without public comment, environmental review, or further consent of Congress. Given this extraordinary executive power, Congress wisely placed limits on the President by defining the objects that may be included within a monument as being "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest," by restricting the authority to Federal lands, and by limiting the size of the monument to "the smallest area compatible with proper care and management of the objects." Congress retained its authority to make land-use designations without such limitations. Even with the restrictive language, use of the Act has not always been without controversy. In fact, even Theodore Roosevelt's first proclamation of the roughly 1,200 acre Devil's Tower in Wyoming was controversial. Since that time, the use of the Act has largely been viewed as an overwhelming American success story and today includes almost 200 of America's greatest treasures.

More recently, however, the Act's executive authority is under scrutiny as Administrations have expanded both the size and scope of monument designations. Since 1996 alone, the Act has been used by the President 26 times to create monuments that are over 100,000 acres or more in size and have included private property within the identified external boundaries. While early monument designations focused more on geological formations, archaeological ruins, and areas of historical interest, a more recent and broad interpretation of what constitutes an "object of historic or scientific interest" has been extended to include landscape areas, biodiversity, and viewsheds. Moreover, features such as World War II desert bombing craters and remoteness have been included in justifying proclamations.

The responsibility of protecting America's public lands and unique antiquities should not be taken lightly; nor should the authority and the power granted to a President under the Act. No President should use the authority under the Act to restrict public access, prevent hunting and fishing, burden private land, or eliminate traditional land uses, unless such action is needed to protect the object. It is Congress, and not the President, that has the authority to make protective land designations outside of the narrow scope of the Act, and only Congress retains the authority to enact designations such as national parks, wilderness, and national conservation and recreation



areas. The Executive power under the Act is not a substitute for a lack of congressional action on protective land designations.

President Trump was correct in tasking the Secretary of the Interior (Secretary) to review and provide recommendations of all monuments that were designated from 1996 to the present that are 1) 100,000 acres or greater in size or 2) were made without adequate public consultation. This is far from the first time an examination of scope of monuments has been conducted. Existing monuments have been modified by successive Presidents in the past, including 18 reductions in the size of monuments, and there is no doubt that President Trump has the authority to review and consider recommendations to modify or add a monument.

The methodology used for the review consisted of three steps. The first step was to gather the facts which included the examination of existing proclamations, object(s) to be protected, segregation of the object(s) (if practical) to meet the "smallest area compatible" requirement, the scientific and rational basis for the boundaries, land uses within the monument, public access concerns, authorized traditional uses, and appropriate environmental and cultural protections. As directed by the President, the second step was to ensure that the local voice was heard by holding meetings with local, state, tribal, and other elected officials; non-profit groups; and other stakeholders, as well as providing an online format for public comment. The final step was to review policies on public access, hunting and fishing rights, traditional use such as timber production and grazing, economic and environmental impacts, and potential legal conflicts, and to provide a report to the President no later than August 24, 2017.

The review found that each monument was unique in terms of the object(s) used for justification, proclamation language, history, management plans, economic impact, and local support. Adherence to the Act's definition of an "object" and "smallest area compatible" clause on some monuments were either arbitrary or likely politically motivated or boundaries could not be supported by science or reasons of practical resource management. Despite the apparent lack of adherence to the purpose of the Act, some monuments reflect a long public debate process and are largely settled and strongly supported by the local community. Other monuments remain controversial and contain significant private property within the identified external boundary or overlap with other Federal land designations such as national forests, Wilderness Study Areas, and lands specifically set aside by Congress for timber production.

Public comments can be divided into two principal groups. Proponents tended to promote monument designation as a mechanism to prevent the sale or transfer of public land. This narrative is false and has no basis in fact. Public lands within a monument are federally owned and managed regardless of monument designation under the Act. Proponents also point to the economic benefits from increased tourism from monument recognition. On this point, monument status has a potential economic benefit of increased visitation, particularly to service related industries, outdoor recreation industries, and other businesses dependent or supported by tourism. Increased visitation also places an additional burden and responsibility on the Federal Government to provide additional resources and manpower to maintain these lands to better support increased visitation and recreational activities.

Comments received were overwhelmingly in favor of maintaining existing monuments and demonstrated a well-orchestrated national campaign organized by multiple organizations. Opponents of monuments primarily supported rescinding or modifying the existing monuments to protect traditional multiple use, and those most concerned were often local residents associated with industries such as grazing, timber production, mining, hunting and fishing, and motorized recreation. Opponents point to other cases where monument designation has resulted in reduced public access, road closures, hunting and fishing restrictions, multiple and confusing management plans, reduced grazing allotments and timber production, and pressure applied to private land owners to sell their land encompassed by or adjacent to a monument.

### **I. Introduction and Purpose**

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

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

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

This Memorandum constitutes the Final Report under section 2(d) of the Order and addresses the findings of the review of certain Presidential designations made under the Act.

### **II. Background**

#### **A. The Antiquities Act**

Passed in 1906, the Act, now codified at 54 U.S.C. 320301-320303, reflected a long effort by Congress, the Department of the Interior, and members of the archeological community to protect antiquities from looting and desecration. The Act authorizes the President



prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States" without permission.

The Act has been used to designate or expand national monuments on Federal lands more than 150 times. It has also been used at least 18 times by Presidents to reduce the size of 16 national monuments, including 3 reductions of Mount Olympus National Monument by Presidents Taft, Wilson, and Coolidge that cumulatively reduced the size of the 639,200-acre Monument by a total of approximately 314,080 acres, and a reduction of the Navajo National Monument by President Taft from its original 360 acres to 40 acres. President Roosevelt also modified the reservation of the Katmai National Monument to modify management of the Monument.

#### *B. Executive Order 13792*

The President issued Executive Order 13792 on April 26, 2017. Echoing the concerns noted above, section 1 of the Order states:

Designations of national monuments under the [Antiquities Act], have a substantial impact on the management of Federal lands and the use and enjoyment of neighboring lands. Such designations are a means of stewarding America's natural resources, protecting America's natural beauty, and preserving America's historic places.

Monument designations that result from a lack of public outreach and proper coordination with State, tribal, and local officials and other relevant stakeholders may also create barriers to achieving energy independence, restrict public access to and use of Federal lands, burden State, tribal, and local governments, and otherwise curtail economic growth. Designations should be made in accordance with the requirements and original objectives of the Act and appropriately balance the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities.

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

- (1) the requirements and original objectives of the Act, including the Act's requirement that reservations of land "...be confined to the smallest area compatible with the proper care and management of the objects to be protected";
- (2) whether designated lands are appropriately classified under the Act as historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest;
- (3) the effects of a designation on the available uses of designated Federal lands, including consideration of the multiple-use policy of section 102(a)(7) of the Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1701(a)(7)), as well as the effects on the available uses of Federal lands beyond monument boundaries;

- (4) the effects of a designation on the use and enjoyment of non-Federal lands within or beyond monument boundaries;
- (5) concerns of state, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected states, tribes, and localities;
- (6) the availability of Federal resources to properly manage designated areas; and
- (7) such other factors as the Secretary deems appropriate.

As noted above, section 2 of the Order directs the Secretary to provide, within 120 days of the date of the Order, a Final Report including the results of the review and any resulting recommendations on monuments.

*C. Monuments Under Review*

Monument	Location	Year	Acreage
Basin and Range	Nevada	2015	703,585.00
Bears Ears	Utah	2016	1,351,849.00
Berryessa Snow Mountain	California	2015	330,780.00
Canyons of the Ancients	Colorado	2000	175,160.00
Carrizo Plain	California	2001	204,107.00
Cascade Siskiyou	Oregon	2000/2017	100,000.00
Craters of the Moon	Idaho	1924/2000	737,658.78
Giant Sequoia	California	2000	327,769.00
Gold Butte	Nevada	2016	296,937.00
Grand Canyon-Parashant	Arizona	2000	1,014,000.00
Grand Staircase-Escalante	Utah	1996	1,700,000.00
Hanford Reach	Washington	2000	194,450.93
Ironwood Forest	Arizona	2000	128,917.00
Katahdin Woods and Waters	Maine	2016	87,564.27
Mojave Trails	California	2016	1,600,000.00
Organ Mountains-Desert Peaks	New Mexico	2014	496,330.00
Rio Grande del Norte	New Mexico	2013	242,555.00
Sand to Snow	California	2016	154,000.00
San Gabriel Mountains	California	2014	346,177.00
Sonoran Desert	Arizona	2001	486,149.00
Upper Missouri River Breaks	Montana	2001	377,346.00
Vermilion Cliffs	Arizona	2000	279,566.00

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#### *D. Marine Monuments Under Review*

The Department of Commerce (DOC) is undertaking a concurrent review process, under both Executive Order 13792 as well as Executive Order 13795, "Implementing an America-First Offshore Energy Strategy", signed April 28, 2017. The DOC review includes both National Marine Sanctuaries and the five Marine Monuments under the Department of Interior's (DOI) review. The five marine monuments jointly reviewed are below.

Monument	Location	Year	Acreage
Marianas Trench	CNMI/Pacific Ocean	2009	60,938,00.00
Northeast Canyons and Seamounts	Atlantic Ocean	2016	3,114,320.00
Pacific Remote Islands	Pacific Ocean	2009	313,941,851.32
Papahānumokuākea	Hawaii	2006/2016	372,848,797.00
Rose Atoll	American Samoa	2009	8,609,045.00

#### *I. Review Process*

In an effort to make the review process transparent and give people a voice in that process, DOI announced on May 5, 2017, a formal comment period for the review. This was the first time regulations.gov has been used for a formal comment period associated with the Act. The review period closed on July 10, 2017. The DOI received approximately 2.8 million comments both electronically and by mail.

Since May, the Secretary personally visited eight national monument sites in six states. The Secretary held dozens of meetings with people and organizations, including tribal, local, and state government officials; local stakeholders; and advocates from conservation, agriculture, tourism, and historic preservation organizations.

#### *II. Results*

##### *A. Broadly and Arbitrarily Defined "Objects"*

There are many instances of the use of the Act for the proper stewardship of objects. However, the Secretary has concerns that in modern uses of the Act, objects are not consistently and clearly defined. Lending further to this concern is that there are other areas, not a part of a monument, which contain virtually identical objects. The West was inhabited by ancient cultures, the remnants of which can be found throughout the land. These remnants are further preserved by the arid western climate. There is question why only some of these resources were chosen as objects to protect under the Act, while others were not.

Throughout the review, the Secretary has seen examples of objects not clearly defined in the proclamations. Examples of such objects are geographic areas, "viewsheds," and "ecosystems."

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Ideally, the "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest," would be specifically identified, and then the quantity of land necessary to protect each object, if any, would be determined.

However, prior Administrations appear to have, in some instances, turned to designating monuments only after congressional efforts to develop broader land-management legislation has stalled. As a result, monument boundaries mirror the previously proposed legislative boundaries that were not developed with the Act initially in mind. Congress has plenary discretion to further protect areas of public lands and make other areas available for economically productive uses. Given that these same considerations and balancing processes are not available under the Act, the copying of these boundaries for use as monuments was unfortunate.

#### *B. Landscape Area Designations*

In the case of lands administered by the Bureau of Land Management (BLM), designating geographic landscape areas as objects of historic or scientific interest is especially problematic given that the determination of land uses is normally done under the robust public balancing processes pursuant to FLPMA. When landscape areas are designated and reserved as part of a monument, objects and large tracts of land are overlain by a more restrictive management regime, which mandates protection of the objects identified. This has the effect of significantly narrowing the range of uses and BLM's multiple-use mission. As a result, absent specific assurances, traditional uses of the land such as grazing, timber production, mining, fishing, hunting, recreation, and other cultural uses are unnecessarily restricted. Such action especially harms rural communities in western states given that these towns have historically benefited from grazing, mining, and timber production on nearby public lands.

The land-management and planning challenges associated with monument designations can particularly be seen where monuments are designated over special management regimes already in place. For example, many of these monuments contain Wilderness Study Areas (WSAs). Per section 603 of FLPMA, WSAs are already managed so as not to impair the suitability of such areas for preservation as wilderness, and in some cases can have stricter management requirements than those outlined in a proclamation of a monument. As WSAs may provide a higher level of protection, this raises a question as to whether a designation under the Act is even necessary.

#### *C. Traditional Uses Limited*

It appears that certain monuments were designated to prevent economic activity such as grazing, mining, and timber production rather than to protect specific objects. In regard to grazing, while it is uncommon for proclamations to prohibit grazing outright, restrictions resulting from monument designations on activities such as vegetative management can have the indirect result of hindering livestock-grazing uses.

Restrictions on vegetative management or other maintenance activities have also led to road closures. There are cases where roads have intentionally been closed as part of management plans in order to protect objects and there is evidence that an unintended consequence of monument designation is an increased threat of damage or looting of objects due to higher

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visitation. As a result, when developing transportation plans, Federal land managers have found the most efficient way to protect objects in monuments is to limit access, whether by ceasing to maintain roads or outright closing them.

Therefore, public access is of great concern related to monument designations. Hunters, anglers, and recreationalists are at times prevented from visiting these lands. Disabled and elderly visitors who rely on motorized transportation also have limited access. Further, some tribes raised concerns from some tribes that their cultural practices such as wood and herb gathering are constrained by lack of access.

While the use of public land is of continuing concern, there is perception by private inholders that their land is also encumbered by monument designations. The Act states that the President may only designate as monuments objects that "are situated on land owned or controlled by the Federal Government." However, there is concern among private landowners that monument designations around their land has the potential to limit access and prevents expansions of economic activity outside of their private lands.

Many stakeholders reported that monument designations surrounding private land often aim for those lands' eventual acquisition by the Federal Government, which are then made part of the monument. This process is often facilitated by third parties that purchase private land and then sell that land to the Federal Government.

#### *D. Concerns of State, Tribal, and Local Governments*

Given that a significant portion of land in western states is owned by the Federal Government, the multiple-use approach to land management is one of the only available mechanisms for the host states to have economic development for employment opportunities and revenue generation. The DOI has certainly heard that monument designations bring increased tourism, and therefore revenue, to some local businesses, as well as jobs. Some of these monuments under review have resulted in this activity. However, in some instances the jobs and revenues resulting from tourism do not necessarily offset the lost or forgone revenue resulting from the limitations placed on land development.

Local governments raised issues relating to lost jobs and revenue, especially when there is a lack of meaningful consultation and public process before monuments are designated. Some of the reviewed monument designations were undertaken after public meetings. However, these meetings were not always adequately noticed to all stakeholders, and instead were filled with advocates organized by non-governmental organizations (NGO) to promote monument designations. It is worth noting that this dynamic is similarly reflected in the public comment process. The DOI received approximately 2.6 million form comments, associated with NGO-organized campaigns, which far outnumbered individual comments.

Too often, it is the local stakeholders who lack the organization, funding, and institutional support to compete with well-funded NGOs. As a result, the public consultation processes that have occurred prior to monument designations have often not adequately accounted for the local voice. This is concerning, as these are the communities and stakeholders affected the most by the land-use restrictions associated with these designations. Indeed, state legislatures in both

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Utah and Arizona have considered resolutions or legislation asking for modifications to either existing monuments or to the Antiquities Act itself, often citing a lack of proper public process.

Like state governments, tribes are also concerned about consultation, and many are interested in exploring a more meaningful role in managing designations that encompass sacred or culturally significant tribal lands. In the case of the Bears Ears National Monument (BENM), the Inter-Tribal Coalition had asked for true comanagement of BENM. However, such authority is not available to the President; it must be granted by Congress. The BENM establishing proclamation setup an advisory commission instead. The Secretary recommended in the Interim Report of June 10, 2017, that the President request congressional authority to enable tribal comanagement of designated areas within the revised BENM boundaries.

Several tribes also expressed concern about access to and protection of sacred sites. Access is particularly important to continue traditional cultural practices on these sites. For example, closed roads prevent wood gathering to be undertaken with motorized vehicles. Further, tribes have expressed concern that publicity and attention to sacred sites attracts more visitors and imperil the integrity and safety of these sites.

#### *E. Enforcement and Protection Concerns*

Monuments that are hundreds of thousands of acres and above bring significant management challenges. The requirement that an area be designated as "the smallest area compatible with the proper care and management of the objects to be protected" is as much about practicality of protection as it is about preventing reservations too large that might unnecessarily prohibit or restrict other land uses. As noted above, there is concern that monument designations can draw attention to special areas and that increased visitation can threaten the objects. In simple terms, monuments that span millions of acres are difficult to police.

The agencies charged with enforcement also do not often receive increased funding resulting from a designation. Therefore, DOI has heard that these designations provide no more protection than already applicable land management authorities can.

### **III. Recommendations**

#### *A. Monument Modifications*

It is recommended that you exercise your discretion to modify certain existing proclamations and boundaries. In doing so, each proclamation would continue to identify particular objects or sites of historic or scientific interest and recite grounds for the designation thereby comporting with the Act's policies and requirements. However, this can be done in a manner that prioritizes public access, infrastructure, traditional use, tribal cultural use, and hunting and fishing rights. These recommendations have been submitted to you with the concurrence of the Secretary of Agriculture and the Secretary of Commerce. These recommended modifications are intended to ensure that the monuments meet the purposes of the Act, including that the area reserved be limited to the smallest area compatible with the care and management of the objects to be protected.



## **Bears Ears National Monument**

- The BENM was established by Proclamation No. 9558, dated December 28, 2016. It consists of 1,351,849 acres of Federal land in San Juan County, Utah, and is jointly managed by BLM (1.063 million acres) and the U.S. Forest Service (USFS) (290,000 acres).
- The BENM contains cultural and archeological sites, unique geologic features, and areas important to the practicing of tribal cultural traditions and ceremonies.
- In the 114<sup>th</sup> Congress, legislation was introduced that designates specified Federal lands as wilderness and as components of the National Wilderness Preservation System. The total boundary encompassing these land actions largely tracks with the boundaries of BENM.
- Portions of the area are also home to significant recreational opportunities, including hiking, backpacking, canyoneering, mountain biking, and rock climbing.
- Within and adjacent to the BENM boundaries, numerous management authorities and plans govern the patchwork of Federal, State of Utah, and private lands. This includes 11 BLM WSAs aggregating approximately 381,000 acres, as well as a 46,353-acre Wilderness on USFS lands.
- When accounting for State land and private land within the boundaries of BENM, the total area encompassed is close to 1,500,000 acres.

### *Recommendations:*

- The Proclamation should be amended, through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.
- The boundary should be revised through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to continue to protect objects and ensure the size is conducive to effective protection of the objects.
- The President should request congressional authority to enable tribal comanagement of designated cultural areas within the revised BENM boundaries.
- Congress should make more appropriate conservation designations, such as national recreation areas or national conservation areas, within the current BENM.
- The management plan should be developed to continue to protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.
- The DOI should work with Congress to secure funding for adequate infrastructure and management needed to protect objects effectively.

## **Cascade-Siskiyou National Monument**

- Cascade-Siskiyou National Monument (CSNM) was established by Presidential Proclamation No. 7318 on June 9, 2000, and was originally 65,000-acres. It was

expanded by almost 48,000 acres through Presidential Proclamation 9564 on January 12, 2017.

- The CSNM is located in Jackson and Klamath Counties, Oregon, and Siskiyou County, California, and is managed by the BLM.
- The original 2000 designation was the first monument to protect biodiversity. The expansion purported to create a necessary "buffer" to support the biodiversity objects outlined in the original CSNM.
- In 2015, legislation was introduced that would have protected most of the areas in the proposed monument expansion through conservation and recreation designations.
- The CSNM contains within its borders a 24,707 acre Wilderness Area designated by Congress in the 2009 Omnibus Public Lands Management Act.
- The Wilderness Area was expanded to its current size in 2010 with the acquisition of two privately owned inholdings.
- Encompassed within the exterior boundary of the original CSNM is 19,818 acres of private land (23.2%), and within the boundary of the extension is 32,677 private acres (38.3%), for a total of 52,485 acres of privately owned lands. This is 30 percent of the total area within the external exterior boundaries of the CSNM.
- The expansion also covers 16,591 acres of harvest land base for sustained yield timber production on Oregon and California Railroad Revested Lands (O&C Lands).
- The expansion would reduce timber offered by BLM for sale by 4-6 million board feet per year.
- These are lands statutorily set aside for permanent forest production under the Oregon and California Revested Lands Sustained Yield Management Act of 1937 (O&C Act).
- The 2000 CSNM monument designation required a study to assess the compatibility of grazing with the biodiversity of the area and the subsequent study found threats to riparian objects. As a result, grazing has largely diminished in the original CSNM area. Many allotments were bought out as a result of a larger land package deal in the 2009 Omnibus Public Lands Management Act.
- Motorized transportation was prohibited in the original CSNM designation. The expansion area only allows for motorized transportation after a transportation-management plan is completed. The plan has not been initiated as of this time. Due to poor maintenance, remaining usable roads in CSNM are unpassable and unsuitable for use.

*Recommendations:*

- The Proclamation should be amended, through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.
- The boundary should be revised through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, in order to reduce impacts on private lands and remove O&C Lands to allow sustained-yield timber



production under BLM's governing Resource Management Plans, until revised regional management plan achieves sustainable timber yield;

- The management plan should be revised to continue to protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.
- The DOI should work with Congress to secure funding for adequate infrastructure and management needs to protect objects effectively.

#### **Gold Butte**

- The Gold Butte National Monument (GBNM) was established by Presidential Proclamation 9559 on December 28, 2016, and consists of 296,937 acres managed by BLM and the Bureau of Reclamation in Clark County, Nevada.
- The resources identified in the Proclamation include the biologic, archaeologic, and areas of spiritual significance to American Indian tribes.
- There have been two legislative attempts to designate this area as a National Conservation Area, first in 2008 and again in 2015. Both efforts were unsuccessful.
- Lands within GBNM were managed with some level of a protective designation, either under the existing land-use plan or as designated Wilderness (28,787 acres) or Wilderness Study Areas (28,454 acres). The GBNM is also overlapped by Areas of Critical Environmental Concern designated by BLM.
- The local water district has historic water rights for six springs and provides water for the City of Mesquite. Five of the six water district springs are located within the boundaries of GBNM.
- The GBNM Proclamation inaccurately states that livestock has not been permitted in the GBNM area since 1998 and therefore prevents issuing any new grazing permits or leases. In fact, there are four active grazing allotments administered by the Arizona Strip District, either fully or partially contained within GBNM, which have been authorized since 1998.

#### **Recommendations:**

- The Proclamation should be amended, through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.
- The boundary should be revised through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to protect historic water rights.
- The President should request congressional authority to enable tribal comanagement of designated cultural areas within the revised GBNM boundaries.

- The management plan should be revised to continue to protect objects but also prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.
- The DOI should work with Congress to secure funding for adequate infrastructure and management needs to protect objects effectively.

### **Grand Staircase-Escalante**

- Grand Staircase-Escalante National Monument (GSENM) was established by Presidential Proclamation 6920 on September 18, 1996, and was BLM's first national monument. It is located in Kane and Garfield Counties, Utah, and continues to be managed by BLM. It encompasses 1,878,465 acres.
- The resources identified in the Proclamation include geologic, paleontological, archaeological, and biological resources.
- Almost 47 percent of GSENM lands (881,9897 acres) are included in WSAs.
- While overall permitted livestock grazing within GSENM is at roughly the same level now as it was at the time of designation, the actual amount of cattle runs has decreased due to restrictions on activities that facilitate grazing, including moving water lines, vegetative management, erosion control measures, and maintenance of infrastructure such as fences and roads.
- Motorized vehicle use is limited both by the GSENM Proclamation and the Monument Plan. This has created conflict with Kane and Garfield Counties' transportation network and affected access for recreational activities. For example, the Paria River Road was closed over the objection of one of the Counties and in spite of its assertion that the road was a valid County right-of-way under Revised Statute 2477.
- Garfield and Kane Counties have filed quiet title act lawsuits against the United States claiming title to approximately 1,525 roads within GSENM, but these lawsuits remain pending.
- Areas encompassed within GSENM contain an estimated several billion tons of coal and large oil deposits.
- Each monument designation we reviewed under EO 13792 had some form of public outreach before designation, with the exception of GSENM.

### **Recommendations:**

- The Proclamation should be amended, through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.
- The boundary should be revised through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act.
- The management plan should be revised to continue to protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.



- The DOI should work with Congress to secure funding for adequate infrastructure and management needs to protect objects effectively.

#### **Katahdin National Monument**

- Katahdin Woods and Waters National Monument (KWWNW) was established by Presidential Proclamation No. 9476 on August 24, 2016. The KWWNM consists of just over 87,500 acres in Maine that were donated to the Federal Government for the purpose of inclusion in the National Park System.
- Thirteen parcels were donated and conveyed under separate deeds to the United States and recorded on August 23, the day before KWWNM was designated by the President.
- In the 113<sup>th</sup> Congress, a draft legislative proposal was circulated to create a national park within the same boundary that encompasses KWWNM. Ultimately, Members of the Maine congressional delegation declined to introduce legislation.
- This land was private before its donation, and any traditional uses such as timbering, hunting, and snowmobiling were permitted as part of custom of the local area.
- While the land is now public and open for use, there are still concerns that timber harvest and snowmobiling access will not be permitted in all parts of KWWNM.
- Use restrictions imposed by the designation of KWWNM are the result of generally applicable NPS regulations.
- Commercial timbering is not typically allowed in units of the National Park System, however 54 U.S.C. § 100753 provides limited authority for cutting of timber to "conserve . . . historic objects."
- There is a strong historical role of timbering in the region, and, and the KWWNM Proclamation gives extensive attention to this as part of the narrative for the designation.

#### *Recommendation:*

- The Proclamation should be amended, through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to promote a healthy forest through active timber management.
- The management plan should be revised to continue to protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.

#### **Northeast Canyons and Seamounts**

- The Northeast Canyons and Seamounts Marine National Monument (NCSNM) was established by Presidential Proclamation No. 9496 on September 15, 2016.
- The NCSNM spans 3,972 square miles and is located approximately 130 miles southeast of Cape Cod, Massachusetts.
- The NCSNM is managed through the DOI U.S. Fish and Wildlife Service National Wildlife Refuge System and the DOC National Oceanic and Atmospheric Administration.

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- The Proclamation stated that NCSNM was established to protect geologic features, natural resources, and species.
- Fishing commercially is also prohibited with the exception of red crab and American lobster fisheries, which can continue for up to 7 years.
- In its public comments, the New England Fisheries Council stated that 1) management in NCSNM should remain under the Magnuson-Stevens Fishery Conservation and Management Act and 2) the designation of NCSNM disrupts the Council's ability to manage species to balance protection with commercial fishing.
- The Council further noted that the pre-designation process was not consistent with the full public consultation process usually conducted under the Magnuson-Stevens Fishery Conservation and Management Act.

*Recommendation:*

- The Proclamation should be amended, through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to allow commercial fishing and ensure the practice is managed under the Magnuson-Stevens Fishery Conservation and Management Act.

**Organ Mountains-Desert Peaks (OMDPNM)**

- Organ Mountains-Desert Peaks National Monument (OMDPNM) was established by Presidential Proclamation No. 9131 on May 21, 2014. It is a BLM managed monument consisting of 496,330 acres in Dona Ana County, New Mexico.
- The resources identified in the Proclamation are visual, cultural, geologic, paleontological, and ecological.
- The OMDPNM consists of 4 unconnected areas and contains 176,310 acres of WSAs.
- The OMDPNM is in proximity to strategic national security installations, and one part of OMDPNM, the Potrillos Mountain Complex, abuts the U.S.-Mexico border.
- Border security is a concern resulting from the designation, as the Proclamation restricts motorized transportation close to the border.
- The remoteness and topography of the Potrillos Mountain Complex lends itself to a drug smuggling route and needs to be monitored.
- The Potrillos Mountain Complex also encompasses the Mesilla groundwater basin. The basin has an unknown potential to address future water needs, recharge, salinity control, and storage.
- Legislation introduced in the 116<sup>th</sup> Congress would designate parts of the current boundaries of OMDPNM as wilderness and release other areas. The legislation largely utilizes the boundaries of the current OMDPNM.
- A robust ranching community has operated in the area for decades and heavily contributes to the local economy.
- The designation could prevent access to parts of allotments. Further, vegetative management and other maintenance work could be restricted and further degrade the ability for ranchers to run cattle.



*Recommendation:*

- The Proclamation should be amended, through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.
- The DOI should work with the Department of Homeland Security to assess border safety risks associated with the Potrillo Mountain Complex.
- The DOI should work with the Department of Defense to assess risks to operational readiness of nearby military installations.
- The President should request congressional authority to enable tribal comanagement of designated cultural areas.
- The management plan should be revised to continue to protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.
- The DOI should work with Congress to secure funding for adequate infrastructure and management needs to protect objects effectively.

**Pacific Remote Islands**

- The Pacific Remote Islands Marine National Monument (PRIMNM) was established by Presidential Proclamation 8336 on January 6, 2009 and consisted of 86,888 square miles. It was expanded by Presidential Proclamation No. 9173 on September 2014, which added 495,189 square miles.
- The original PRIMNM boundary is comprised of rectangular areas that extend approximately 50 nautical miles (nm) from the mean low water lines of Howland, Baker and Jarvis Islands; Johnston, Wake and Palmyra Atolls; and Kingman Reef. The expansion extends the boundary from the 50 nm boundary to the 200 mile seaward limit of the U.S. Exclusive Economic Zone around Jarvis Island and Johnston and Wake Atolls.
- The primary purpose of the designation was to protect the coral reef and associated species surrounding these islands.
- Commercial fishing is prohibited within PRIMNM.
- Prior to monument designation, there were Hawaiian and American Samoan longliners and purse seiners vessels operating. Indirect benefits of the purse seine fishery is important to the economy of American Samoa, which is heavily dependent on these vessels. American Samoa is under the jurisdiction of DOI.

*Recommendation*

- The proclamation should be amended or the boundary be revised, through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to allow commercial fishing and ensure the practice is managed under the Magnuson-Stevens Fishery Conservation and Management Act.

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## Rio Grande Del Norte

- Rio Grande Del Norte National Monument (RGDNM) was established by Presidential Proclamation 8946 on March 25, 2013 and is located in Taos County, New Mexico.
- It consists of 242,455 acres managed by BLM and contains 7,050 acres of WSAs.
- The resources identified in the Proclamation are cultural, historic, and ecological.
- Several legislative proposals have been introduced in the past to establish a National Conservation Area in the same footprint as RGDNM, the most recent in 2010. All legislative attempts were unsuccessful.
- Grazing is a significant traditional use in RGDNM. However, road closures due to monument restrictions have left many grazing permittees choosing not to renew permits.

### Recommendations

- The proclamation should be amended, through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to protect objects and prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.
- The President should request congressional authority to enable tribal comanagement of designated cultural areas.
- The management plan should be revised to continue to protect objects and also prioritize public access; infrastructure upgrades, repair, and maintenance; traditional use; tribal cultural use; and hunting and fishing rights.
- The DOI should work with Congress to secure funding for adequate infrastructure and management needs to protect objects effectively.

## Rose Atoll

- Rose Atoll Marine National Monument (RAMNM) was established on January 6, 2009, by Presidential Proclamation No. 8337.
- The RAMNM extends out approximately 50 nm from the mean low water line of Rose Atoll and encompasses 13,451 square miles (8,609,045 acres) of emergent and submerged lands and waters of and around Rose Atoll.
- The RAMNM was established to protect the reef ecosystem, which is home to diverse terrestrial and marine species.
- Rose Atoll is also designated as a National Wildlife Refuge, established on July 5, 1973, by cooperative agreement between the Government of American Samoa and the U.S. Fish and Wildlife Service.
- Commercial fishing is prohibited in RAMNM.
- Fishing in American Samoa is a mixture of commercial, subsistence, traditional, and sport fishing. American Samoa's economy is heavily dependent on can tuna fish production, and many monument designations have contributed to ongoing threats to the viability of the industry.
- Prior to 2002, the waters that were included in RAMNM and adjoining areas closer to the main islands were important commercial fishing areas.

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*Recommendation:*

- The proclamation should be amended or the boundary be revised, through the use of appropriate authority, including lawful exercise of the President's discretion granted by the Act, to allow commercial fishing and ensure the practice is managed under the Magnuson-Stevens Fishery Conservation and Management Act.

Recommendations for specific monument modifications reflecting the above considerations will be submitted separately from this Final Report should you concur with my recommendations.

*B. Monument Additions*

There are many instances of the use of the Act for the proper stewardship of objects of cultural, historic, or scientific interest. Some stakeholders have brought to DOI's attention new sites that merit protection and designation under the Act. This would provide an opportunity to lay out a standard for public input and process for monument designations in the future.

This process should include clear criteria for designations and methodology for meeting conservation and protection goals. Both should be fully transparent so that the public may meaningfully weigh in on the need for designation and weigh the benefits of protection against economic harm to the public. Options to establish this new monument designation process include legislation, regulations, or internal guidance within the Executive Branch, such as an Executive Order or a Secretary's Order.

One such location that has come to our attention is Camp Nelson, an 1863 Union Army supply depot, training center, and hospital in Kentucky. It encompasses 4,000 acres and served as the third largest recruitment and training center for African-American regiments during the Civil War. It is recommended that DOI begin a public process to weigh designating this location as a national monument.

The Consolidated Appropriations Act of 2017 included direction to NPS to conduct several special resource studies for civil rights sites in Mississippi. While each location is of interest, one location to highlight is the Medgar Evers Home in Jackson, Mississippi. Mr. Medgar Evers was the first NAACP field secretary in Mississippi and organized protests and boycotts against segregation across Mississippi. He was assassinated outside his home in 1963 by a white supremacist. The NPS in 2017 designated his house as a National Historic Landmark. It is recommended these sites be examined for possible monument designation.

Another location that may qualify for protection under the Act is the Badger-Two Medicine area, which is approximately 130,000 acres within the Lewis and Clark National Forest in northwestern Montana. It is bounded by Glacier National Park, the Bob Marshall Wilderness, and the Blackfeet Indian Reservation. This area of the Rocky Mountain Front was designated a Traditional Cultural District in May 2014, and is considered sacred by the Blackfeet Nation. It is recommended that this area be considered for designation as a national monument and as a candidate for comanagement with the Blackfeet tribe.

*C. Management Plans*

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The DOI heard from many stakeholders that its management plans associated with monuments are restrictive and difficult to navigate. When monuments are designated, the underlying land ownership remains, typically including the applicable management authorities associated with the land-managing agency. The overriding management framework then becomes the protection of the objects of historic or scientific interest. However, there is discretion in this management "overlay," and the DOI review reveals that this requirement has at times been too strictly interpreted to impede allowable uses under management plans. The DOI plans to undertake a review of existing monument management plans and update them with those considerations in mind. We believe this can be done in a manner that is consistent with public access, infrastructure, traditional use, tribal cultural use, and hunting and fishing rights.

#### *D. Congressional Requests*

As noted above in the case of BENM, it is recommended that you ask Congress to legislate tribal comanagement authority and to examine more appropriate public land use designations. However, it is also recommended that you request that Congress clarify the limits of Executive power under the Act and the intent of Congress pertaining to land use when a monument is placed over another other Federal land-use designation.

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

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EXHIBIT 1

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*Attorney-Client Privileged/Attorney Work Product*

**INFORMATION MEMORANDUM FOR THE DEPUTY SECRETARY**

From:

Date:

Re: Challenges to the Expansion of Cascade-Siskiyou National Monument

(b)(5) ACP, AWP



*Attorney-Client Privileged/Attorney Work Product*

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(b)(5) ACP, AWP



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DRAFT



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**AMERICAN FOREST RESOURCE  
COUNCIL,**

Plaintiff,

v.

**UNITED STATES OF AMERICA, *et al.*,**

Defendants.

CIVIL ACTION NO. 1:17-cv-00441-  
RJL

**PLAINTIFF'S RESPONSE TO FEDERAL DEFENDANTS'  
MOTION TO STAY CASE**

The Federal Defendants seek a second 60-day stay in order to allow the President additional time to consider how, and if, he will modify the boundaries of the Cascade-Siskiyou National Monument (the "Monument"). Defendants have made no representation as to whether the President will make a decision, when any decision may occur, or what form that decision might take. Plaintiff ("AFRC") opposes the stay request. The threshold issue in this case, whether it was legal for the President to use the Antiquities Act of 1906 to nullify the 1937 O&C Act,<sup>1</sup> is a purely legal question. Regardless of the particular form of any Presidential action, AFRC's claim will remain largely the same so long as a single acre of O&C lands remains in the Monument expansion under Proclamation 9514. There is no purpose to staying the case because

<sup>1</sup> The full title of the "O&C Act" is The Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937. *See* 43 U.S.C § 2601 (formerly codified as 43 U.S.C. § 1181a).

there is no need for further factual development.

Furthermore, AFRC and its members are experiencing, and will continue to experience, significant harm as a result of the Monument expansion. All the timber harvests planned by the BLM in the Klamath Falls Resource Area ("KFRA") for the next ten years were included within the expansion's boundaries. As a result, all the planning and environmental review necessary to facilitate those harvests have stopped, as has all timber management in that area. Federal Defendants' claim that AFRC and its members are not suffering harm ignores the very real and immediate impacts this stoppage is having on the industry. These harms are detailed in the Declaration of Andy Geissler filed in support of this response ("Geissler Decl.")

Federal Defendants provide no valid reason for delaying the prosecution of AFRC's purely-legal claim. Their primary argument, that the President might rescind the Monument expansion and make this case moot, does not support a stay. Every case is at risk of becoming moot due to settlement or change in behavior. Furthermore, unless and until there is a complete rescission of the Monument expansion, any decision by the President will still result in the Court resolving the purely legal question at issue in this case. This inevitableness means that a stay only kicks the metaphorical can down the road, while continuing to worsen the harmful impacts the Monument expansion is having on the timber industry.

## **I. LEGAL STANDARD**

This Court has inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 880 (1998) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Generally, a court should allow litigants to prosecute their claims in a timely manner, and a party seeking a stay must "meet the heavy burden of persuading the Court that a stay is appropriate." *DSMC, Inc. v. Convera Corp.*, 273 F. Supp. 2d 14, 31 (D.D.C. 2002); *see also GFL Advantage*

*Fund, Ltd. v. Colkitt*, 216 F.R.D. 189, 193 (D.D.C. 2003) (holding that "the right to proceed in court should not be denied except under the most extreme circumstances"). In cases where a stay will negatively impact an objecting party who wishes to proceed with litigation, the requesting party must demonstrate a "clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 254.

Federal Defendants describe a four-part test for determining when a stay is appropriate. Mot. to Stay at 5. They have described the wrong test. That test is used to determine whether to stay an agency action or grant a preliminary injunction. See *Hill Dermaceuticals, Inc. v. U.S. Food & Drug Admin.*, 524 F. Supp. 2d 5, 8 (D.D.C. 2007). Federal Defendants do not request a stay of an agency action; they request a stay of litigation. Their request would deny AFRC the right to prosecute its claims in a timely fashion. The four-part test asserted by the Federal Defendants is not directly applicable. Instead, the Court weighs the parties' competing interests in a manner that maintains an even balance before exercising its authority to stay a case. *Landis*, 299 U.S. at 254.

## **II. ARGUMENT**

Federal Defendants' speculation that the President may take an action that impacts this case is not, absent other factors, a valid reason to unilaterally stay this proceeding. Not only have Federal Defendants failed to identify any other reason for staying this case, but they have also failed to provide any timeline under which the President may act or any guidance as to the scope of any action. Instead, as discussed below, Federal Defendants seek to stall the quick resolution of a purely legal question, a resolution that will require minimal judicial resources, by demanding that this Court allow an unlawful Presidential Proclamation to stay in place while the President decides whether or how to resolve the issue. AFRC should not be subjected to this unnecessary delay. The Monument expansion is causing significant harm to the timber industry

because its borders were drawn to include numerous planned timber sales. These sales and all future sales, which hang in the balance here, are critical to the survival and profitability of AFRC's members.

- A. Under *Landis*, a stay is improper because the Federal Defendants have failed to demonstrate a "clear case of hardship or inequity in being required to go forward."

As discussed above, Federal Defendants mistakenly apply the standard for when a plaintiff seeks to stay an agency action or obtain a preliminary injunction. Federal Defendants mistakenly argue that a stay is proper unless AFRC shows that it will suffer irreparable harm. This is the wrong standard, and Federal Defendants apply it backwards. The burden to demonstrate "clear" hardship or inequity falls on Federal Defendants, not AFRC. The leading Supreme Court decision holds that the party seeking the stay—here Federal Defendants—must demonstrate a "clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 254. Federal Defendants have entirely failed to meet their "heavy burden" of showing that a stay is proper. *DSMC, Inc. v. Convera Corp.*, 273 F. Supp. 2d at 31; *see also GFL Advantage Fund, Ltd. v. Colkitt*, 216 F.R.D. at 193.

- B. The President's review of National Monuments is not in and of itself a reason to deny AFRC a right to prosecute its case.

On June 14, 2017, the court stayed this matter until September 23, 2017, to allow Federal Defendants, including the President, adequate time to review the Monument designation and decide how to proceed. Federal Defendants provide no valid reason for an additional stay. Instead, they assert that the "President's decisions regarding the Secretary of the Interior's recommendations on the Monuments designation and boundaries may potentially affect this litigation." Mot. at 1 (emphasis added). Thus, while formally what they seek is an additional 60-day stay for an uncertain result, they also make clear their intention to indefinitely stay this case until the President makes a decision. But his decision is not scheduled, is not required to be

made, and will very likely not streamline or resolve this dispute. So long as a single acre of O&C Lands remains within the Monument expansion, AFRC's claims against the expansion are largely unchanged.

Mere speculation that the President's decision *may* change the course of this litigation does not justify an additional stay. Indeed, a Court in this District has recognized that when a matter is being addressed in an alternative-dispute resolution process parallel to the formal litigation process, the mere possibility that the parallel process may resolve the case is not a reason to stay the litigation absent other factors weighing in favor of a stay. *See DSMC*, 273 F. Supp. 2d at 31 (party seeking a stay based on parallel arbitration failed to meet "heavy burden" because there was no assurance of when arbitration would be complete and the opposing party had a cognizable right to timely resolution of claims).

The Monument review process that the President is conducting is not the type of parallel process that warrants a stay of judicial proceedings. First, the President is not engaged in a formal process and as a result there is no timetable upon which he must act. The President can simply decide when, if ever, he intends to resolve the conflict. Second, the review process is not specifically focused on resolving the issue in this case, *i.e.*, whether the Cascade-Siskiyou National Monument expansion was legal. Instead, it is a broad review process that is looking at dozens of national monuments across the country. None of the other monuments contains lands designated for timber harvest under the O&C Act. AFRC's O&C Act claims are specific to the Monument in question, and these claims are entirely irrelevant to all other monuments under review. Third, the review process is, as far as can be discerned, a political process. AFRC is seeking a very narrow legal ruling. Federal Defendants should not be permitted to deny AFRC access to the courts to address this legal question simply because the Administration is reviewing

the issue as a matter of policy.

- C. The threshold legal question posed by AFRC is purely legal in nature, and will not require substantial judicial resources to resolve.

The legal question before the Court is straightforward: Can the President unilaterally issue a proclamation under the Antiquities Act of 1906 directing that specific parcels of land be used for a particular purpose (a national monument in which commercial timber harvesting is prohibited) that directly contravenes, nullifies, and voids a 1937 Act of Congress that requires the same parcels of land be managed for a different purpose (timber production)? Underlying this legal question is the fundamental Constitutional principle of separation of powers that states a President cannot unilaterally override Congress.

Resolving this question will not likely require any discovery, nor creation of an administrative record. The question could be resolved quickly by the filing of motions for summary judgment. If this Court finds that the President lacks the authority to unilaterally override Congress, that determination is fully dispositive of the case. This simply is not a case where the parties are facing months of drawn out and costly discovery. Similarly, there will not be a trial or complex motions practice requiring a significant expenditure of court resources. Saving resources is not a valid reason to stay this case because the resources to be expended are relatively minor.

There is a second claim at issue in this case: Whether the expansion of the Monument satisfies the Antiquities Act's minimum necessary requirements. Resolving this second question may require the creation of a record. However, because the first question is entirely dispositive, AFRC intends to file a motion for summary judgment on the first question without the need for creating a record. AFRC has communicated to the Federal Defendants its willingness to bifurcate this case and address the threshold legal issue before addressing the more resource-

intensive secondary issue.

D. AFRC and its members are currently suffering real and irreparable harm.

Federal Defendants argue that AFRC "has failed to show any irreparable harm resulting from an additional 60 day stay." Mot. at 6. Federal Defendants ignore the timber sales that have already been cancelled or that were in various stages of planning and are now cancelled (not to mention future sales that could be planned and will not). They also rely upon the assumption that the stay will only last 60 days while simultaneously making it clear that they intend to indefinitely stay the case so that the President "may" make a decision sometime in the future.

The irreparable harm to AFRC and its members is real and easily understood. The Monument expansion was drawn to include all of the timber harvests planned to occur in the BLM's Klamath Falls Resource Area ("KFRA") in the next ten years, including a 2017 sale called "Leek Peak," 2018 sales called "Summit" and "Sweet Vidalia," a 2019 sale called "Fourth Leaf," a 2020 sale called "Stag," 2021 sales called "Mr. Clean" and "Terminus," and a 2022 sale called "LBJ." Geissler Decl. at ¶¶ 2-6. Because this decade of harvests has now been prohibited by the Monument expansion, it is estimated that the KFRA will not meet its Resource Management Plan Allowable Sale Quantity for at least the next 15 years. *Id.* The Monument expansion has shut down the timber industry in an entire BLM resource area. *Id.* This is a real and immediate harm to AFRC, and its nearly 100 members who rely on the availability of timber from public lands, including the timber that was planned for harvest in what is now the Monument. *Id.* Federal Defendants' assertion that millions of other acres of timberlands exist misses the mark. Timber on federal lands is highly regulated, and the sudden evaporation of millions of board feet of timber in one resource area is not easily absorbed in another area that is under similar sustainable management. *Id.* Furthermore, it is not economically viable for mills to purchase timber from other resource areas because very quickly the cost of log transport

erases the profit margin. There simply is not a backup option available to the mills impacted, and the cancellation of these sales is the cancellation of income, jobs, and economic prosperity.

Defendants also apparently fail to recognize that every day that the Monument expansion remains in effect, the impacts on AFRC compound—it takes at least a year (generally longer) to plan a timber harvest and perform the environmental reviews necessary to allow the harvest to occur. *Id.* at ¶ 6. Currently, those processes are stopped. If AFRC wins this case tomorrow, those processes will have to restart. Time matters and every day the Monument expansion remains in effect, it places the timber industry further behind, and jeopardizes the future existence of timber mills and the jobs they support.

### III. CONCLUSION

Federal Defendants have not identified a valid reason for preventing AFRC from proceeding in the prosecution of this case. The threshold issue involves a narrow legal question that can be resolved without the expenditure of significant resources. Continuing a stay based on an inscrutable and uncertain process is not justifiable. The ongoing stay is causing irreparable harm to AFRC and its members, particularly in Southern Oregon where a BLM resource area has essentially been taken out of production, but also across the West where ripple effects are being felt.

Respectfully submitted this 16<sup>th</sup> day of October, 2017.

By: /s/ Diane M. Meyers

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American Forest Resource Council



**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing on all parties of record via CM/ECF system transmission.

Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 16<sup>th</sup> day of October, 2017, at Seattle, Washington.

/s/ Diane M. Meyers



the RMP, those lands designated as HLB are the only lands which BLM intends to manage for sustained-yield timber production.

3. Impacts are particularly acute in the BLM's Klamath Falls Resource Area ("KFRA"), where much of the HLB was included in the monument expansion. The KFRA's annual Allowable Sale Quantity ("ASQ") of 6 million board feet ("MMBF") was calculated on the assumption that all lands designated as HLB can be managed based on the principles of sustained yield. Therefore, any reduction in acres of HLB will effectively prohibit the KFRA from offering their ASQ sustainably for the term of the RMP. This is a long-term impact that will negatively affect the timber industry now and in the future.

4. In the short term, all or most of the timber harvests planned by the BLM in KFRA for the next ten years were included within the boundaries of the expanded Monument. As a result, planning and offering of those sales have been stopped. Specific sales that have been cancelled include a 2017 sale called "Leek Peak," 2018 sales called "Summit" and "Sweet Vidalia," a 2019 sale called "Fourth Leaf," a 2020 sale called "Stag," 2021 sales called "Mr. Clean" and "Terminus," and a 2022 sale called "LBJ." Together these sales amount to over 38 MMBF of timber. Their cancellation will force the KFRA to seek timber on the HLB not included in the monument expansion for replacement volume. However, any such replacement volume will only serve as a short-term stopgap as the KFRA will not have the long-term ability to offer such volume for sale.

5. The loss resulting from the now-cancelled harvest of 38 MMBF of timber will cause substantial harm to the timber industry. Many local and regional timber companies rely on the timber volume generated from KFRA sales as a crucial component of their raw material needs. While the KFRA office appears to be searching for alternative HLB acres from which to prepare timber sales on, there simply is not enough of these acres from which to replace the sudden loss of 38 MMBF. This is true both in the KFRA, and on surrounding Resource

Areas. This sudden, and unreplenishable, drop in available timber will have significant impacts on bottom-lines of families and companies. It will also result in lower revenues for many Oregon counties who rely on these types of timber sales to pay police offices, provide afterschool programing, and keep the lights on in community centers. The KFRA's contribution to the local economy is significant. The BLM has estimated it pays \$5 million per year directly to BLM employees and to support BLM timber projects in the KFRA. The BLM funds these expenditures largely by timber sales and these infusions into the timber economy will likely be substantially reduced if KFRA sales decrease. It also estimates that sales in the KFRA directly contribute \$1.5 million annually to county governments. These numbers are in addition to the major financial contributions that timber industry jobs dependent on these cancelled sales will have on the local economy and broader timber industry. Figures from the Oregon Forest Resource Institute tie each 1 MMBF of timber harvested to at least 11 direct and indirect jobs, so the long-term loss of this timber volume likely places at least 418 jobs at risk.

6. Even if the Monument expansion is fully rescinded, the previously planned timber sales will not be able to occur immediately. Each sale of public timber requires significant planning and environmental review. It is rare for this type of review to occur in under a year, and it often takes multiple years. The longer the Monument expansion remains in place, the longer the forests within its boundaries go unmanaged. The result being not only that the timber industry is harmed, but also that the forest's health declines and it becomes more susceptible to catastrophic fires and diseases.

7. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16<sup>th</sup> day of October, 2017.

  
\_\_\_\_\_  
Andy Geissler

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing on all parties of record via CM/ECF system transmission.

EXECUTED on this 16 day of October, 2017, at Seattle, Washington.

/s/ Diane M. Meyers

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**AMERICAN FOREST RESOURCE  
COUNCIL,**

Plaintiff,

v.

**UNITED STATES OF AMERICA, *et al.*,**

Defendants.

CIVIL ACTION NO. 1:17-cv-00441-  
RJL

**[PROPOSED] ORDER DENYING  
FEDERAL DEFENDANTS' MOTION TO STAY CASE**

Upon consideration of Federal Defendants' Motion to Stay Case, Plaintiff's Opposition to Federal Defendants' Motion to Stay Case, and Federal Defendants' Reply, if any, it is hereby ORDERED that the Motion is DENIED.

SO ORDERED:

Dated:

RICHARD J. LEON

United States District Judge

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