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FYI

## PUBLIC LANDS

### Smaller Bears Ears monument could trigger legal battle

Jennifer Yachnin, E&E News reporter

*Published: Monday, March 20, 2017*

Natural Resources Chairman Rob Bishop (R-Utah) asserted President Trump could significantly reduce monuments like the Bears Ears National Monument in southeast Utah. Photos courtesy of the Bureau of Land Management (Bears Ears) and C SPAN.

While opponents of the fledgling Bears Ears National Monument in southeastern Utah would like to see its status fully rescinded, many acknowledge a secondary option: asking President Trump to trim back the boundaries of the site's 1.35 million acres.

Proponents of erasing or reducing the Utah monument point to past examples of commanders-in-chief amending protected lands — something that has occurred 20 times since the creation of the Antiquities Act of 1906, which allows presidents to designate lands for the protection of cultural, historic or scientific interests.

House Natural Resources Chairman Rob Bishop (R-Utah) has pointed in particular to President Taft's reduction of the Navajo National Monument in 1912 — from 102,400 acres to 360 acres, a more than 99 percent decrease — as an example of the president's authority.

"The area of actually shrinking the boundary of a monument has been done repeatedly," Bishop said in a recent KUER-FM interview. "It's done by precedent — what takes place in the future will be done by precedent, as well."

But supporters of the Bears Ears National Monument suggest that precedent is legally tenuous at best, and should Trump attempt a reduction of the Utah site — or of the state's Grand Staircase-Escalante National Monument — it would likely trigger a battle in federal court.

"The Antiquities Act was really a one-way designation authority that allows the president to designate monuments, but it doesn't grant the president any authority to reverse the designations of his predecessors," said Earthjustice attorney Heidi McIntosh.

McIntosh noted that the president doesn't have any power to manage public lands under Article II of the Constitution, adding that that responsibility lies exclusively with Congress.

The Antiquities Act delegated "a little bit" of Congress' power to the president to designate monuments, she added, a declaration that carries the force of law.

"When he exercises his power, he's standing in the shoes of Congress," McIntosh said. "In the same way a president can't, on his own, mend or revoke acts of Congress, he can't go back and amend or revoke monuments, either."

Nonetheless, prior changes to monuments, like a trio of reductions to the Olympic National

Monument or Grand Canyon II National Monument, have never been challenged in court. And no president has amended a monument in more than 50 years, since President Kennedy issued a declaration reducing the Bandelier National Monument in New Mexico by 4,000 acres while adding 2,900 acres to the site at the same time.

"There's no case law on that issue," McIntosh added. "It's never actually been approved and upheld, and so we think that the argument that the president lacks the authority is strong."

In addition, McIntosh noted that federal courts have previously rejected challenges to monuments like Jackson Hole National Monument (now part of Grand Teton National Park) in Wyoming and Grand Staircase-Escalante National Monument.

"No court has ever overturned a monument designation," she said. "The courts are even reluctant to question the president's discretion when it comes to the values that need to be protected."

Conservationists also argue that Bishop's comparison of a potential reduction of Bears Ears to sites like the Navajo monument are also inconsistent. Much of the original 160-square-mile Navajo site in Arizona had yet to be surveyed at the time it was designated in 1909.

President Obama created the Bears Ears monument in the final weeks of his presidency, overriding objections from Utah state and congressional Republicans who wanted the state to manage the area and retain the ability to develop nearby fossil fuel resources.

Chris Krupp, public lands guardian for WildEarth Guardians, asserted that reducing the size of the monument — if not outright eliminating it — would contradict the Trump campaign's repeated promises to support public lands.

"The move would be a blatant political favor for Utah's congressional delegation that would certainly be challenged in court," Krupp said. "The Obama administration thoroughly studied and supported the scope of the national monument designation. Trump would be violating the law by drastically reducing its size as a political favor to Bishop."

## **Zinke vows to visit Utah**

Although Interior Secretary Ryan Zinke has vowed to visit the Bears Ears site and meet with local and state officials before issuing any recommendations on its future status, Trump has not indicated whether he would wait for that meeting to occur before issuing his own declarations.

A White House spokeswoman did not respond to a request for comment for this article.

Zinke acknowledged in his confirmation hearing in January that the question of whether Trump could rescind a monument outright is "legally ... untested" — no commander-in-chief has ever sought to undo a monument created by one of his predecessors — but did not discuss the possibility of major reductions (*E&E Daily*, Jan. 17).

An Interior spokeswoman said Zinke still plans to visit the Beehive State in the near future, but he has yet to officially schedule that trip.

"Secretary Zinke is committed to responsible management of federal lands for multiple uses like recreation, energy development and conservation, and he is opposed to selling federal lands," Interior spokeswoman Heather Swift told E&E News in an email. "He has signaled his support for the creation of monuments when there is consent and input from local elected officials, the local community and tribes prior to monument designations."

She added: "While monuments often provide valuable local benefits, careful consideration is required before designating significant acreage out of reach of valuable tax revenue to fund

community facilities and improvements. The Secretary remains committed to traveling to Utah and other states as he referenced in his confirmation hearing and making recommendations to the President."

Utah legislators and Gov. Gary Herbert (R) have urged Congress to rescind the monument via a resolution approved earlier this year, while also asking Trump to rein in the Grand Staircase-Escalante boundaries ([Greenwire](#), Jan. 24).

Although Congress may abolish monuments, it has done so fewer than a dozen times; it has more often converted national monuments to national parks or preserves ([Greenwire](#), Feb. 8).

### **Tribes oppose any reduction**

Sen. Martin Heinrich (D-N.M.) echoed calls Friday from tribal officials in Utah for Zinke to meet with the newly established Bears Ears Commission.

The commission represents the five tribal nations with ancestral ties to Bears Ears and issued a letter Friday urging Zinke to confer with Native American representatives ([E&E News PM](#), March 17).

In the letter, the Bears Ears Commission said that any decisions by the Trump administration to eliminate or reduce the monument site would be "absolute tragedies."

Late Friday evening, Heinrich, who sits on the Energy and Natural Resources Committee, expressed his solidarity with the commission members.

"During his confirmation, Secretary Zinke committed to me that he would meet and work with tribes and tribal communities whose ancestral lands and sacred sites are protected by Antiquities Act national monuments before making any decisions about them," Heinrich said.

"The Bears Ears region, a spectacular landscape with its big skies and red rocks east of the Colorado River and south of Canyonlands National Park, includes thousands of historic and cultural sites with deep meaning to numerous tribes. Bears Ears is sacred ground, and the tribes must have a say in the stewardship and management of it," he added.

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