

Conversation Contents

Ute Indian Tribe Comments on Bears Ears Review

Attachments:

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Rollie Wilson <RWilson@ndnlaw.com>

From: Rollie Wilson <RWilson@ndnlaw.com>
Sent: Thu May 25 2017 15:56:51 GMT-0600 (MDT)
To: "james_cason@ios.doi.gov" <james_cason@ios.doi.gov>
CC: "Downey_Magallanes@ios.doi.gov" <Downey_Magallanes@ios.doi.gov>
Subject: Ute Indian Tribe Comments on Bears Ears Review
Attachments: Ute Cmts on Bears Ears Review with Cover Ltr 5 25 17.pdf

Hi Jim,

Thanks again for meeting with the Tribe's today. We appreciate your consideration of the issues presented.

Please find attached the Ute Indian Tribe's comments on the review of the Bears Ears National Monument. I apologize for not having a hard copy ready for our meeting today.

The Tribe asked me to send you this copy directly, in addition to filing comments through regulations.gov, as this version includes a cover letter to Secretary Zinke regarding today's meeting. Unfortunately, the Tribe could not make the meeting today, but will be in DC June 20, 21, and 22 and would like to follow up with the Secretary and you at that time.

Thanks again for your consideration,

Rollie Wilson

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UTE INDIAN TRIBE

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May 25, 2017

Michael S. Black
Acting Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Bears Ears National Monument Review Meeting

Dear Acting Assistant Secretary Black:

Thank you for your letter dated May 17, 2017 inviting the Ute Indian Tribe to a meeting at the Department of the Interior Headquarters with Acting Deputy Secretary Mr. James Cason regarding the Secretary's review of the Bears Ears National Monument. We understand that the meeting has been scheduled for the afternoon of Thursday, May 25, 2017. Members of our Business Committee are not available to travel to Washington, D.C. for this meeting and we have designated our Washington, D.C. counsel, Rollie Wilson, to attend this meeting on behalf of the Tribe.

To help emphasize the Tribe's views at this meeting, please find enclosed a copy of the comments that the Tribe is filing in response to the Secretary's review of the Bears Ears National Monument. In particular, due to the short time frame provided in Executive Order No. 13792 for the Secretary's Interim Report, we recommend that the Interim Report focus on summarizing the comments received and proposing an appropriate schedule for review of the Monument. While we appreciate the meetings over the last couple of weeks, the Secretary has only just begun to engage the Bears Ears Commission as required under the Proclamation and consult with the Tribe as required by Executive Order No. 13792, other Executive Orders and Interior's Tribal Consultation Policy regarding specifics of the Monument review and any proposals.

Finally, the Business Committee plans to be in Washington, D.C. on June 20, 21 and 22, 2017 and appreciate the opportunity to meet with Secretary Zinke or Acting Deputy Secretary Cason regarding review of the Monument. Please contact Mr. Wilson directly regarding any logistics for the meeting on May 25 and to schedule a meeting on June 20, 21 or 22, 2017. He can be reached by phone at 202-340-8232 or by email at rwilson@ndnlaw.com.

Sincerely,

for Luke Duncan, Chairman
Ute Tribal Business Committee

Enclosure



UTE INDIAN TRIBE

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May 25, 2017

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

Re: Review of Bears Ears National Monument
Docket No. DOI-2017-0002

Dear Secretary Zinke,

The Ute Indian Tribe of the Uintah & Ouray Reservation (Tribe) strongly opposes any changes to the Bears Ears National Monument (Monument) established by Presidential Proclamation No. 9558, 82 Fed. Reg. 1,139 (Dec. 28, 2016). The Tribe worked for many years alongside other tribes, local communities and stakeholders, federal, state and local politicians, and the Administration to recommend the establishment of the Monument for the protection of its sacred landscapes, waters, and natural and cultural resources. If anything, under this review the Monument should be expanded to its originally proposed size of 1.9 million acres to protect even more of the important cultural resources in the area.

Review of the Monument was announced by Executive Order No. 13792 entitled "Review of Designations under the Antiquities Act" and noticed in the Federal Register at 82 Fed. Reg. 22016 (May 11, 2017). As set out in the Federal Register Notice, comments regarding the review of the Monument are due on May 26, 2017. The Executive Order then requires that you provide an Interim Report to the President by June 10, 2017 which includes recommendations regarding the Monument.

As one of the five tribes who elects a representative to the Bears Ears Commission (Commission) created by the Proclamation establishing the Monument, the Tribe has a role in guiding the management of the Monument. The Proclamation requires that the Secretaries of Interior and Agriculture "effectively partner with" and "meaningfully engage" the Commission. The Tribe has already begun working with other tribal members of the Commission, as well as the Bureau of Land Management (BLM) and the United States Forest Service (USFS) to identify priorities for management. Under this existing law, any changes to the Monument proposed during your review must be reviewed and considered by the Bears Ears Commission.

In addition, the Ute Indian Tribe is a federally recognized Indian tribe with an interest in the resources protected by the Monument and must be consulted during any review of the Monument. Consultation with the Tribe is required under Executive Order No. 13792 establishing the review process, Executive Order No. 13175 entitled "Consultation and Coordination with Indian Tribal Governments," and the Department of the Interior's Policy on Consultation with Indian Tribes (Interior's Consultation Policy). Executive Order No. 13175 requires that the Administration "work with Indian tribes on a government-to-government basis" and "respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments." Executive Order No. 13175 at Sections 2(b) and 3(a).

The Executive Order is reaffirmed and implemented by Interior's Consultation Policy which requires "a deliberative process that aims to create effective collaboration and informed Federal decision-making" that is "built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility." Interior's Consultation Policy at 2. Interior's Consultation Policy also requires that "[c]ommunication will be open and transparent without compromising the rights of Indian Tribes or the government-to-government consultation process." *Id.* Finally, the Policy notes that "consultation conducted in a meaningful and good-faith manner further facilitates effective Department operations and governance practices." *Id.*

Under these existing laws and policies, the Ute Indian Tribe provides these comments as a starting point for a meaningful exchange of information during review of the Monument. These initial comments address many of the issues raised in the Federal Register Notice including: (1) that the lands within the Monument were properly classified as "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest;" (2) how the boundaries of the Monument are already the smallest possible; (3) if the Secretary recommends the President modify or revoke Bears Ears, he would be recommending an *ultra vires* action; and (4) that during this review, the Secretary must consult with the Commission and the Tribe.

In particular and as an initial matter, due to the short time frame provided in the Executive Order for production of your Interim Report, the Tribe recommends that your Interim Report focus on summarizing all of the comments received and proposing an appropriate schedule for review of the Monument. This schedule should include coordinating with the Secretary of Agriculture, planning meetings with the Commission, consulting with affected Indian tribes and completing any other outreach required by the Executive Order. In addition, to fulfill the Proclamation and tribal consultation requirements, your meetings with the Commission and consultation with Indian tribes must allow for the exchange of information, discussion, and resolution of any issues.

I. THE MONUMENT SATISFIES THE REQUIREMENTS OF THE ANTIQUITIES ACT

Pursuant to 54 U.S.C. § 320301(a), the President can only designate national monuments for "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." The Bears Ears area has long been recognized for its natural, scientific, and historic significance. For example in designating the Monument, the President stated that "The Bears Ears

area has been proposed for protection by members of Congress, Secretaries of the Interior, State and tribal leaders, and local conservationists for at least 80 years.” 82 Fed. Reg. 1,139.

In fact, in 1906 when Congress was drafting the Antiquities Act, Congress was aware that substantial amounts of lands within southeastern Utah, the location of the Monument, needed protection. H.R. Rep. No. 224 at 2 (1906). In H. R. Rep. No. 224, (accompanying H.R. 11016, 59th Cong., 1st Sess. 1906, the bill introduced in the House which, after modifications, became the Antiquities Act) the Public Lands Committee found that:

The importance of the large number of historic and prehistoric ruins scattered over the semiarid region of the southwestern part of the United States has gradually come to be recognized. Every cliff dwelling, every prehistoric tower, communal house, shrine, and burial mound is an object which can contribute something to the advancement of knowledge, and hence is worthy of preservation.

The Report specifically discussed several sites which are now protected within Bears Ears, namely the Cottonwood Wash, Butler Wash, Grand Gulch, and Comb Wash. *Id.* at 5. Thus, even Congress in passing the Antiquities Act in 1906 recognized the historic and scientific value of the Bears Ears lands, and the need for their protection.

Acting on this important purpose of the Antiquities Act, over more than one hundred years later, the President, with the assistance of the Bears Ears Inter-Tribal Coalition (Coalition), defined the lands of historic and scientific interest to be included within the boundaries of the Monument. Much of the information used to start this process was collected in an October 15, 2015 report of the Coalition entitled “*Proposal to President Barack Obama for the Creation of Bears Ears National Monument*” (Proposal). The 1.35 million acres of land now protected within the Monument has been inhabited and cherished by the Tribe and other tribes since time immemorial. Remnants of our ancestors who inhabited the area abound in petroglyphs, cliff dwellings, pueblos and other historic markers.

As noted in the Proposal, “Bears Ears is home to more than 100,000 Native American cultural sites.” Proposal at 9. Based on this information and other reporting and studies on the Bears Ears sacred landscape, the Monument contains numerous “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” as required by the Antiquities Act.

II. THE MONUMENT DELINEATES THE SMALLEST AREA COMPATIBLE WITH THE OBJECTS TO BE PROTECTED

The Antiquities Act limits national monument boundaries to “the smallest area compatible with the proper care and management of the objects to be protected.” 54 U.S.C. § 320301(b). Based upon strong support in the record before the President, President Obama made the determination that Bears Ears National Monument is consistent with that provision of the Antiquities Act. When the Coalition submitted its Proposal to the President, it demarcated 1.9 million acres of land to be included within the Monument. The Coalition spent over five years developing the Proposal. Proposal at 19. In determining the proposed boundaries, the Coalition “had many discussions with elders who are familiar with traditional use areas.” *Id.* at 20. The

boundaries were demarcated to “include land valued by Tribal members for gathering medicines and herbs, worshipping at sacred areas, holding ceremonies, protecting archeological sites, gathering firewood, hunting, protecting wildlife habitat for deer, elk, and bighorn sheep, and maintaining natural beauty and solitude.” *Id.*

In its Proposal, the Coalition explained that Bears Ears was a landscape that needed to be protected in its entirety. In its supplement to the Proposal, the Coalition further explained that “[e]very object in the landscape – from the pattern on a shard of Ancestral Puebloan pottery or the opening in the forest used for the Bear Dance to the morphology of desert bighorn sheep – has been shaped and influenced by the long history of people on this landscape.” *Id.* at 6. In sum, the “knowledgeable work of hundreds of Native people and dozens of academics. . . . shows that the Bears Ears landscape is one discrete unit, bound together in numerous ways.”¹ *Protecting the Whole Bears Ears Landscape: A Call to Honor the Full Cultural and Ecological Boundaries* at 2 (2016).

Although the Coalition proposed a 1.9 million acre monument, in his the discretion, President chose to establish Bears Ears as 1.35 million acres. As the Proposal and Supplement to the Proposal show, and as the President, during the prior administration, has already determined, the Monument cannot be further reduced in size.

III. REVOKING OR REDUCING THE MONUMENT WOULD BE AN ULTRA VIRES ACTION

In the Antiquities Act, Congress only delegated to the President the power to establish national monuments. The Antiquities Act plainly states that “[t]he President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government *to be national monuments.*” *Id.* § 320301(a) (emphasis added). Nothing in the Antiquities Act indicates that Congress delegated its authority to revoke or modify national monuments to the President.

This limitation on the delegation of power to the President was confirmed and further codified in the Federal Land Policy Management Act (FLPMA). Congress retained the authority to revoke or modify national monuments, as clearly shown in the text and legislative history of FLPMA. See Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE ____ (May 2017) (available at <https://ssrn.com/abstract=2967807>). In a review of the authority provided under FLPMA, it was determined that Section 204(j) of FLPMA was enacted “to constrain and systematize all Executive Branch withdrawal power, and *reserve to Congress the powers to modify or rescind monument designations.*”

The legislative history of FLPMA plainly shows that Congress believed that only Congress has the authority to revoke or modify national monuments. The House Report on the bill, provided by the Committee on Interior and Insular Affairs, states that the bill “would also specifically

¹ The Coalition stated that “[w]ondrous though the natural formations are, the most profound aspect of Bears Ears is the Native presence that has blended into every cliff and corner. This spirit is the beating heart of Bears Ears.” *Id.* at 8.

reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act.” H.R. Rep. 94-1163, at 9 (1976) (emphasis added).

Because the President lacks the authority to modify or revoke national monuments, if President Trump revokes or modifies the Monument, the action would be *ultra vires*.

IV. CONSULTATION WITH THE COMMISSION AND THE TRIBE IS REQUIRED.

Under the Proclamation, the Commission must be engaged in partnership with the BLM and USFS management of Bears Ears. The Proclamation provides that the Commission will “effectively partner with the Federal agencies by making contributions to inform decisions regarding the management of the monument.” 82 Fed. Reg. 1,139. Additionally, the Proclamation requires that “[t]he Secretaries shall meaningfully engage the Commission . . . in the development of the management plan and to inform subsequent management of the monument,” and that in developing the management plan, “the Secretaries shall carefully and fully consider integrating the traditional and historical knowledge and special expertise of the Commission.” *Id.* These requirements for consultation under existing law cannot be ignored. As noted above, the Initial Report to the President should primarily set out a schedule for effective and meaningful engagement of the Commission as a part of this review process.

A schedule is also needed to fulfill tribal consultation requirements. Setting out the review process, Executive Order No. 13792 specifically states that, “the Secretary shall, as appropriate, consult and coordinate with the Governors of States affected by monument designations or other relevant officials of affected State, tribal, and local governments.” 82 Fed. Reg. 20,429. Such consultation is also required by the Proclamation designating the Monument, Executive Order No. 13175 and the Interior Consultation Policy. For example, the Proclamation states that the “Secretaries shall, to the maximum extent permitted by law and *in consultation with Indian tribes, ensure the protection of Indian sacred sites and traditional cultural properties in the monument.*” 82 Fed. Reg. 1,139 (emphasis added).

Most important, consultation is needed to ensure protection of sacred sites and traditional cultural properties. Executive Order No. 13792 requires a determination of whether the Monument’s boundaries encompasses “the smallest area compatible with the proper care and management of the objects to be protected,” and whether the Monument’s lands are appropriately classified as lands of historic and scientific interest. These determinations cannot be made without consulting with the Tribe and other tribes because only tribes have the “expertise and traditional and historical knowledge” to make these determinations. *Id.*

In another example, the Executive Order requires review of certain aspects of the Monument, including “the availability of Federal resources to properly manage” the Monument. 82 Fed. Reg. 20,429. It would be impossible to determine if there are Federal resources available to properly manage the Monument without knowing roughly what it will cost to properly manage the Monument. A consultation schedule is needed to set out how and when this information will be exchanged and discussed.

The Tribe will be significantly affected by any review of the Monument. In particular, modification or revocation of the Monument could remove protections against looting, vandalism, mining, oil and gas development, certain off-road vehicle use, construction and other acts currently prohibited in Bears Ears. To ensure that tribal interests and resources are not adversely affected, meaningful consultation with the Tribe and other tribes according to an appropriate schedule is needed.

The significance of the Monument to the Tribe and other tribes developed over centuries, and it should not be lost in a rush to judgment or an expedited review. It took a decade to establish the Monument. There is no rational basis for concluding review within 45 days. An appropriate schedule is needed to coordinate with the Secretary of Agriculture, plan meetings with the Commission, consult with affected Indian tribes and complete any other outreach required by the Executive Order.

While we appreciate the introductory meetings over the last couple weeks and the opportunity to submit these initial comments, engagement of the Commission and tribal consultation has only just begun. Numerous requirements for consultation and coordination must be fulfilled to comply with Executive Order No. 13792 and other applicable laws.

To schedule meetings with the Commission and further tribal consultation regarding your review of the Monument please call my Washington, DC counsel, Rollie Wilson, at 202-340-8232. Thank you for your attention to these comments.

Sincerely,



for Luke Duncan, Chairman
Ute Tribal Business Committee