

Stephan C. Volker  
Alexis E. Krieg  
Stephanie L. Clarke  
Daniel P. Garrett-Steinman  
Jamey M.B. Volker (Of Counsel)

Law Offices of  
**STEPHAN C. VOLKER**  
1633 University Avenue  
Berkeley, California 94703-1424  
Tel: 510/496-0600 ♦ FAX: 510/845-1255  
e-mail: [svolker@volkerlaw.com](mailto:svolker@volkerlaw.com)

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July 7, 2017

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

(also submitted online at <http://www.regulations.gov> (DOI-2017-0002))

Re: Comments of American Whitewater supporting retention, and opposing revocation or reduction, of the 21 national monument designations under review

Dear Sir or Madam:

On behalf of American Whitewater we submit the following comments supporting retention, and opposing revocation or reduction, of the 21 national monument designations under the Antiquities Act that are now under review by the Trump Administration.<sup>1</sup> These 21 national monuments are enumerated in 82 Federal Register 22016 (May 11, 2017). Please include these comments in the public record for each of these monuments.

## SUMMARY

Since the Antiquities Act was adopted by the Congress in 1906, 16 Presidents have proclaimed 157 national monuments protecting an outstanding array of nationally-recognized historic, geologic, cultural and archaeological resources throughout the United States.<sup>2</sup> In each case, the presidential proclamation creating the monument identified the extraordinary historic, cultural and scientific resources prompting the designation. In many cases, Congress subsequently expanded the areas to be protected and/or redesignated them as national parks, including Olympic, Black Canyon of the Gunnison, Zion and Grand Canyon. All of the 21 national monuments singled out for review by President Trump must be retained, and in some cases, expanded. Each of those designations was based on careful scientific and historic research, vetted to expert agencies, reviewed through widespread public outreach and participation, and amply supported in the public record.

Notwithstanding the broad public support and indisputably remarkable historic, cultural and scientific resources each of these designations protects, on April 26, 2017 President Trump issued an Executive Order directing the Secretary of the Interior to review them. Exec. Order No. 13,792, Review

1 34 Stat. 225 (1906), recodified in 2014 at 54 U.S.C. §§ 320301-320303.

2 See National Parks Conservation Association, Monuments Protected Under the Antiquities Act (Jan. 13, 2017), <https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act>.

of Designations Under the Antiquities Act, 82 Fed. Reg. 20,429 (2017). But the premise for President Trump’s Executive Order – that the President has authority under the Antiquities Act to revoke or reduce the size of monuments designated under the Act – is incorrect. As discussed below, in adopting the Antiquities Act Congress did not delegate power to the President to later modify or revoke the designation of monuments. Lest there be any doubt, when Congress adopted the Federal Land Policy and Management Act of 1976 (“FLPMA”), it made clear that it reserved for itself the exclusive power to modify or revoke monument designations. Consequently, the President does not have any implied authority to do so. Accordingly, any attempt by the President to revoke or otherwise modify any of these monument designations would be *ultra vires*.

## **AMERICAN WHITEWATER**

American Whitewater is a conservation organization incorporated under the laws of Missouri and registered as a non-profit charity under 25 U.S.C. § 501(c)(3). Its principal place of business is 629 W. Main St., Sylva, North Carolina 28779. Since 1954, American Whitewater has been dedicated to restoring rivers to their natural condition, improving public land management of the surrounding watersheds, and protecting public floating rights for responsible recreational use. American Whitewater’s membership currently includes over 5,800 active members and 130 local affiliate paddling clubs and organizations, including members who have used and enjoyed waterways within, adjacent to and downstream from the national monuments under review. American Whitewater and its members are vitally interested in retention and expansion of these national monuments because of their extraordinary historic, cultural and scientific resources including the many outstanding opportunities for public recreational use afforded by their rivers and streams. American Whitewater and its members participated in the extensive public outreach and input that preceded the designation of many of these remarkable national monuments, and are familiar with their unique and extraordinary historic, cultural and scientific resources, particularly their opportunities for whitewater recreational uses. The recreational adventures our members enjoy provide an exceptional means of experiencing the values that led to designation of many national monuments.

## **THE NATIONAL MONUMENTS UNDER REVIEW PROTECT PRICELESS HISTORIC, CULTURAL AND SCIENTIFIC RESOURCES**

There is no question but that the previous Administrations properly invoked the Antiquities Act of 1906 when they created the 21 national monuments now under review. The Antiquities Act has been utilized by 16 Presidents of both parties for over 100 years to provide essential protection for outstanding national historic, cultural and scientific resources such as Devil’s Tower and Grand Teton in Wyoming, Grand Canyon in Arizona, Black Canyon of the Gunnison River in Colorado, Zion and Capitol Reef in Utah, Olympic in Washington and Aniakchak and Denali in Alaska. Nearly half of our nation’s national parks were first protected as national monuments, including many of the most popular such as Grand Canyon, Zion, Olympic and Acadia national parks.

The 21 national monuments under review are legally no different than the 136 other national monuments designated throughout our country. All of them protect unique and outstanding historic, cultural and natural resources including archaeological artifacts from the earliest peoples inhabiting the North American continent, essential habitat for imperiled birds and wildlife that depend on wild lands and waters and undisturbed landscapes for their survival, and geologic wonders that represent unique scientific resources that enhance our understanding of the planet's history. These 21 national monuments fall well within this nation's proud legacy of protecting its most cherished lands and cultural artifacts for future generations to behold. The presidential proclamations that established each of these national monuments provide ample documentation of the remarkable historic, cultural and scientific resources that each monument protects.

**THE PRESIDENT LACKS POWER TO REVOKE OR OTHERWISE  
MODIFY THE NATIONAL MONUMENTS UNDER REVIEW.**

Neither the Antiquities Act nor any cases thereunder expressly or implicitly invests the President with the power to revoke or modify the designation of a national monument. By contrast, other statutes by which Congress delegated the power to reserve federal lands from disposition also expressly granted the President clear authority to subsequently revoke or modify the reservation. Under settled law, any delegation of legislative power to the executive branch must be construed narrowly in recognition of our tripartite system of government. Congress' adoption of FLPMA in 1976 confirms that the President may modify or revoke reservations of public lands from disposition only in accordance with prescribed procedures that expressly *exclude* national monuments designated under the Antiquities Act. For each of these reasons, as summarized below, the President lacks authority to revoke or modify any of the national monuments designated by previous Administrations. Accordingly, any attempt by President Trump to do so would be invalid.

Congress has broad “[p]ower to dispose of and make all needful Rules and Regulations respecting [public property].” U.S. Constitution, art. IV, § 3, cl. 2. And, Congress can delegate this power to the President so long as Congress provides guidelines that limit executive discretion sufficiently to prevent usurpation of the legislative power by the executive branch. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *Mistretta v. United States*, 488 U.S. 361, 373 n. 7 (1989). Consistent with this power, when Congress enacted the Antiquities Act it delegated to the President the power to “declare by public proclamation” national monuments. 54 U.S.C. § 320301(a).

But although Congress had authority to do so, in drafting the Antiquities Act it chose *not* to delegate to the President the power to revoke or modify previous presidential designations of national monuments. The Antiquities Act reads in pertinent part:

“[T]he President of the United States is hereby 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 upon the lands owned or controlled by the Government of the United States to be national monuments, *and may*

*reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected . . . .*

34 Stat. 225 (1906) (prior to amendment of the Antiquities Act in 2014) (emphasis added). By its express language, the Antiquities Act only delegates authority to the President to “reserve” land “to be protected.” *Id.* The Act contains *no* language expressly or impliedly granting the President authority to revoke or modify previous reservations of land under the Act.

In this notable respect, the Antiquities Act differs from other contemporaneous acts of Congress that explicitly allowed the President to revoke or modify prior reservations of public land. For example, in adopting the Forest Service Organic Act of 1897, Congress expressly authorized the President “to *modify* any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may *reduce the area or change the boundary lines* of such reserve, or may *vacate altogether* any order creating such reserve.” Forest Service Organic Act of 1897, ch. 2, 30 Stat. 34 (1987) (codified as 16 U.S.C. § 475) (emphasis added). Similarly, when Congress adopted the Pickett Act of 1910, it allowed the President to withdraw public lands from “settlement, location, sale, or entry” and reserve those lands for specified purposes “*until revoked by him or an Act of Congress.*” Pickett Act, Pub. L. No. 303, 36 Stat. 847 (1910) (repealed by FLPMA in 1976) (emphasis added).

Because Congress clearly knows how to grant the President the power to revoke or modify previous reservations of public lands when it wishes to do so – but notably did *not* do so when it adopted the Antiquities Act – Attorney General Homer Cummings concluded in a 1938 opinion that the Antiquities Act “does not authorize [the President] to abolish [national monuments] after they have been established.” Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att’y Gen. 185, 185-186 (1938). Attorney General Cummings’ authoritative examination of the scope of the President’s authority to revoke or modify national monument designations under the Antiquities Act has never been challenged, let alone overruled, in any published federal court ruling or Opinion of the Attorney General.

In 1976 Congress took action that left no doubt that Attorney General Cummings’ interpretation of the Antiquities Act was correct. When it adopted FLPMA, Congress included language authorizing the Secretary of the Interior “*to make, modify, extend, or revoke withdrawals* [of public land] but *only* in accordance with the provisions and limitations of this section [section 204].” 43 U.S.C. § 1714(a) (emphasis added). Importantly, Congress then directed in section 204(j) of FLPMA that “[t]he Secretary [of Interior] shall *not . . .* modify or revoke any withdrawal creating national monuments under [the Antiquities Act] . . . .” 43 U.S.C. § 1714(j) (emphasis added). This language confirms that Congress recognized that the President lacked authority to revoke or modify the prior designation of national monuments under the Antiquities Act, and that Congress chose *not* to grant the President such authority under FLPMA. The legislative history of FLPMA confirms this interpretation. *See, e.g.*, “Presidents Lack the Authority to Abolish or Diminish National Monuments,” 103 *Virginia Law Review Online* 55 (2017) at 60-64 (summarizing and quoting from the pertinent legislative history documents).

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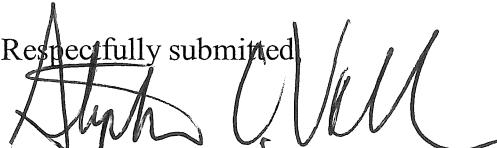
For each of the foregoing reasons, President Trump lacks the authority to revoke or otherwise modify the national monuments currently under review. Any attempt to do so would be invalid.

## CONCLUSION

The 21 national monuments under review by the Trump Administration were lawfully designated under the Antiquities Act. Each Presidential Proclamation creating these monuments was based on thorough scientific and historic research, circulated to local, state and federal agencies for careful examination, and subjected to extensive public outreach, review and comment. All are amply supported by the public record, both factually and legally.

President Trump's threatened revocation or reduction in size of the 21 national monuments under review, by contrast, exceeds his narrow authority under the Antiquities Act to proclaim – but in no case, to revoke or modify – national monuments.

Accordingly, the 21 national monument designations under review should be retained in full, as the law clearly requires.

Respectfully submitted,  
  
Stephan C. Volker  
Attorney for American Whitewater

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