CAN THE PRESIDENT LEGALLY REDUCE THE SIZE OF BEARS EARS?

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On April 17, 2019, in ongoing consolidated cases in the US District Court for the District of Columbia, the Federal defendants released responses to briefs of amici curiae. The Federal defendants continued to argue that the Antiquities Act of 1906 grants President Trump the authority to reduce the size of national monuments. The plaintiffs in two consolidated cases (Hopi Tribe, *et al.,* v. Donald J. Trump and Utah Diné Bikéyah, *et al*., v. Donald J. Trump and Stair Escalante Partners, *et al.,* v. Donald J. Trump and The Wilderness Society, *et al* ., v. Donald J. Trump) challenge President Trump's action to reduce the sizes of the Grand Stair-Escalante National Monument and the Bears Ears National Monument. The Trump administration shrank the Bears Ears National Monument by 85 percent, from 1.35 million acres to 201, 876 acres, and cut the Grand Staircase-Escalante National Monument by almost half, from 1,880,46 acres to 1,003,863 acres.

The Grand Stair-Escalante National Monument was established by Proclamation 6920 of September 18, 1996 by President William J. Clinton. The Bears Ears National Monument was established by Proclamation 9558 on December 28, 2016 by President Barack Obama. Both proclamations exercised the Presidents' authorities under the Antiquities Act of June 8th, 1906 (34 Stat. 225) (the "Antiquities Act" or the "Act").

The Antiquities Act

The Antiquities Act authorizes the President—

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 proper care and management of the objects to be protected. . . .

54 U.S.C. § 320301.

The key question in the consolidated cases is whether the Antiquities Act gives the President authority to reduce the size of national monuments. The Act does not expressly state that the President may reduce the size of existing monuments; however, President Trump is relying on the "smallest area requirement" in the Act to support the reduction in size of the two national monuments. The "smallest area requirement" states that national monuments created under the Antiquities Act "shall be confined to the smallest area compatible with proper care and management of the objects to be protected."

There are several difficult procedural issues that must be resolved by the court. One question is what standard of review is applicable. More than likely, the District Court will follow Wyoming v. Franke, 58 F. Supp. 890 (1945), which established an arbitrary and capricious standard. According to Franke, the District Court will look at whether the President's proclamation was an arbitrary and capricious exercise of power so as to be outside of the scope and purpose of the authorizing statute. The question here will be, was President

Trump's proclamation to reduce the size of Bears Ears and Grand Stair-Escalante an arbitrary and capricious exercise of power, so as to be outside the scope and purpose of the Antiquities Act? The President will need to provide the court substantial evidence of experts such that the court will be bound to uphold the proclamation, even if the court does not fully agree with it.

Another procedural question for the court will be whether it must engage in an evidentiary hearing or review the administrative record to make this determination. The Supreme Court in Franklin v. Mass., 505 U.S. 788 (1992), held that the President is not a government agency for purposes of the Administrative Procedure Act ("APA"); therefore, the President's actions are not reviewable under the APA. It is possible, then, the District Court in these consolidated cases will be forced to engage in an evidentiary hearing in order to decide if the proclamations are arbitrary and capricious.

In a November amicus brief, over two dozen Democratic Senators and over one hundred Democratic Representatives said the smallest area requirement was intended to keep the initial monuments from being overly large, *not* to "facilitate the reduction in size of [existing] monuments." On the other hand, President Trump contends that it is "in the public interest to modify the boundary of the monument[s]" to "ensure that the monument is no larger than necessary for the proper care and management of the objects."

In determining the appropriate reduction in size of both monuments, the government focused on the uniqueness and nature of the protected objects, the nature of the needed protection, and the protection already provided. Donald J. Trump asserted that many of the objects in both Proclamation 6920 and Proclamation 9558 are not unique, some are not of significant scientific or historic interest, and many are not under threat of damage or are still protected by other laws and Federal management by the Bureau of Land Management or the United States Forest Service. As such, the President reduced the boundaries of both monuments, removing lands found to be "unnecessary for the care and management of the objects to be protected within the monument."

The plaintiffs argue that the Antiquities Act does not grant explicit authority to reduce the size of existing monuments. Brian Frazelle, an attorney at the US constitutional accountability center, who represents the members of Congress, said in a statement, it is "obvious that the text of the Antiquities Act forbids what the administration is trying to do here."

The Federal defendants argued that the Act can be interpreted as "establishing authority for the president to unilaterally act, and continue to act, to ensure monument reservations were reserved to the requisite smallest area." The defense also noted that the plaintiffs allow reading into the act "an implied authority to modify the boundaries to enlarge the lands reserved for a monument - despite the absence of express textual authorization." Federal courts, including the U.S. Supreme Court, have consistently upheld presidential proclamations under the Antiquities Act, ruling each time that the president has the authority and discretion to determine the size of the area reserved.

For example, in 1920, the Supreme Court unanimously upheld President Theodore Roosevelt's 1908 designation of the Grand Canyon National Monument. In 1945, a U.S. District Court upheld the establishment of Jackson Hole National Monument in Wyoming v. Franke. In that case, the Supreme Court later upheld President Franklin D. Roosevelt's designation of Jackson Hole National Monument and found that courts have "limited jurisdiction to investigate and determine" whether a presidential proclamation under the Antiquities Act is unreasonable. In 1976, in Cappaert v. United States, the U.S. Supreme Court ruled that the Antiquities Act gives the president authority to protect species and habitat as "objects of scientific interest." In 2002, in Tulare County v. Bush, a lower federal court upheld President Clinton's designation of the Giant Sequoia National Monument. In 2004, a federal court upheld the designation of the Grand Staircase-Escalante National Monument.

Although there have been instances when a President has attempted to reduce the size of a national monument created by a previous President, to date no court has ruled on the President's authority to do so. In 1915 President Woodrow Wilson reduced the Mount Olympus National Monument, previously designated by President Theodore Roosevelt, by 313,280 acres. President Eisenhower reduced the reservation for the Great Sand Dunes National Monument from 35,528 to 26,608 acres. President Truman diminished the reservation for Santa Rosa Island National Monument by almost half from 9,500 to 4,800 acres. Importantly, however, these actions were not

challenged and the courts were never asked to rule on the authority of the then-sitting presidents to make any of these reductions. The plaintiffs have also challenged the Trump administration's revisions to the two proclamations arguing that the modifications violate the Constitution's separation of powers doctrine, the take care clause, and "the tribes right to engage with the federal government in collaborative management of all the lands."

The government's arguments are supported by the state of Utah, which owns about 109,100 acres of the original monument designation for the Bears Ears National Monument. The American Farm Bureau Federation also supports the government's arguments. The plaintiffs' arguments are supported by environmental groups, Democratic legislators, and Native American tribes including the Hopi tribe, Navajo Nation, Ute Indian Tribe Ute Mountain Ute Tribe Zuni Pueblo.

The California Environmental Attorneys at Bick Law LLP will continue to monitor this environmental litigation and provide updates as it proceeds through the judicial system.