

3223 N 1st Ave
Tucson, AZ 85719
May 19, 2017

The Honorable Ryan K. Zinke
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Re: Docket No. DOI-2017-0002 (Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment)

Dear Mr. Secretary:

America's public lands are a jewel in our nation's crown. As a fellow outdoors enthusiast, I think you will agree that, in the words of the American novelist Wallace Stegner, "they reflect us at our best". Not yet a century old, the United States brought to the world the notion that a public good existed in certain wild and scenic places whose preservation in their natural state befitted the natural and cultural inheritance of not just America, but of the whole world. Parks, nature reserves, historic sites, and similar protected places are now recognized around the world, the world's inheritance from figures such as John Muir and Theodore Roosevelt. These men and their contemporaries were possessed of a vision far exceeding the limitations of their times, foreseeing conservation values that would not be established for decades. All Americans, regardless of where they live or our politics, benefit from that vision and its practical implementation within the Department of the Interior.

The International Dark-Sky Association (IDA) shares this outlook. Founded in 1988, IDA is the world's foremost authority on the impact of artificial light at night to the natural nighttime environment. Our mission is to preserve and protect that environment and our heritage of dark skies through environmentally responsible outdoor lighting. We represent over 3,000 members in and 65 chapters in 18 countries dedicated to the proposition that natural nighttime darkness is a resource worth conserving and celebrating. IDA informs, educates and advocates for the preservation of the natural night, balancing the needs of the environment against the human need to use outdoor nighttime lighting to promote public safety, economic development, and quality of life.

Since 2001, IDA's flagship program, International Dark Sky Places¹, has made 77 designations in 14 countries and 19 U.S. states, bringing dark nighttime conditions over more than 26,000 square miles of land under rigorous conservation. The success of this program hinges on a com-

¹ <http://darksky.org/idsp/>

bination of land management best practices, public policy, and widespread public support for quality outdoor lighting, preservation of starry night skies, and the protection of vulnerable nocturnal species.

In this effort, we have partnered with 17 federally-managed land units, including seven National Monuments. While voluntary, the efforts of National Monuments seeking IDA International Dark Sky Park status are supported by agency-level policies that seek to effectively manage natural darkness alongside resources such as air and water quality. The land use restrictions attendant to National Monument designations are key to the eligibility of these lands for IDA accreditation. However, we are now concerned that recent changes in federal leadership may put these remarkable places at risk.

As you are well aware, President Trump recently issued an Executive Order² calling on your office *"to conduct a review of all Presidential designations or expansions of designations under the Antiquities Act made since January 1, 1996, where the designation covers more than 100,000 acres, where the designation after expansion covers more than 100,000 acres, or where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders, to determine whether each designation or expansion conforms to the policy set forth in section 1 of the order."* Among other provisions, Section 1 states that designations should reflect the Act's *"requirements and original objectives"* 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."*

One of the 21 National Monuments identified for review pursuant to the EO 13792, Grand Canyon-Parashant National Monument in Arizona, is currently designated as an IDA International Dark Sky Park³, recognized for its *"exceptional or distinguished quality of starry nights and a nocturnal environment that is specifically protected for its scientific, natural, educational, cultural heritage, and/or public enjoyment"*⁴. Six others National Monuments on the list in EO 13792 have either applied for IDA accreditation or have indicated their intent to apply in the future. Their protected status as National Monuments is what makes them eligible *a priori* for consideration under the terms of our program. Any lesser degree of protection would not afford this opportunity. Grand Canyon-Parashant National Monument is jointly managed by the U.S. National Park Service (NPS) and Bureau of Land Management (BLM); NPS committed to the pro-

² E.O. 13792, 82 FR 20429, May 1, 2017.

³ <http://darksky.org/idsp/parks/parashant/>

⁴ 2015 International Dark Sky Park guidelines, page 2. (http://darksky.org/wp-content/uploads/bsk-pdf-manager/IDSP_Guidelines_Oct2015_23.pdf)

tection of dark nighttime conditions in the Monument as an expression of its policies identifying natural darkness as a conservation priority^{5,6}.

The protection of nighttime darkness in National Monuments is consistent with the provisions of the Antiquities Act of 1906⁷, which contemplates the preservation of “*objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States.*” The dark night sky is certainly a feature of historic interest to the many peoples who have historically inhabited lands owned or controlled by the Government of the United States, particularly Native Americans. The night sky features in the culture and folklore of both prehistoric and historic Native Americans as well as European settlers, and archaeoastronomical evidence exists linking observing the night sky to purpose-made structures and objects on the ground. This indicates a strong cultural affinity of place between Earth and sky that is inextricable from other characteristics defining “antiquity” in the Act.

Further, natural nighttime darkness is certainly of scientific interest given its significance to wildlife ecology, and that it is an “object” in the sense that it is an aspect of a “landmark” that is definitive and sets it apart from other lands in its vicinity. Light pollution threatens the integrity of natural darkness and the visibility of the night sky over many federal lands whose history and prehistory indicate uses consistent with the historic interest of night skies, and in which natural nighttime darkness is an essential element of the lands’ scientific interest. In nearly a century of case law, the United States Supreme Court has repeatedly held⁸ that protection of lands for reasons other than the material objects of historical interest they contain is consistent with both the intent and provisions of the Antiquities Act.

The mere recognition that natural darkness and dark night skies are of “historic” and “scientific” interest, respectively, in the context of the Antiquities Act are sufficient to establish the value of National Monuments to the preservation of those resources, whether or not they were cited as motivators in creating new Monuments. Because land management agencies such as NPS have identified natural darkness as a conservation priority, and have established policies guiding their protection in National Parks and Monuments, the enhanced status of these lands is crucial for bringing their darkness resource under active management.

Rescinding Monument designations or revising downward the land area of the territory they protect presents a clear danger to the integrity of the resource already under protection. As nighttime darkness and dark night skies are fully integrated into the landscape, there is no means of pre-

⁵ Management Policies (2006), Natural Resource Management: §4.10 Lightscape Management; Green Parks Plan: Advancing Our Mission through Sustainable Operations (2012), p. 12.; NPS Interim Outdoor Lighting Guidelines (2007), p. 3.; National Park Service Director’s Call To Action Report (2015) Action 27, p. 18.

⁶ BLM is currently developing agency-level policy for protection of dark skies based on NPS guidance.

⁷ Pub. L. 59-209, 34 Stat. 225, codified as amended at 16 U.S.C. §§ 431-433 (2000).

⁸ See e.g., *Cameron v. United States* 252 U.S. 450 (1920) and *Cappaert v. United States* 426 U.S. 128 (1976)

serving the resource by shrinking or eliminating the protected area. Removing the protections and land use limitations associated with Monument status entail permitted uses that will necessarily imperil naturally dark nighttime conditions over these lands. Further, there is simply no legal precedent for a President revoking an existing National Monument designation, nor does a plain reading of the Antiquities Act imply such a power.

Further, a plain reading of the statute shows that it clearly does not require "adequate public outreach and coordination with relevant stakeholders". The Supreme Court has affirmed that the decision to designate is purely at the discretion of the President and requires no permission or even input from "relevant stakeholders". For this reason, the notion that any National Monument designation should be reviewed for unspecified purposes is facially absurd.

The public comment solicitation for actions relevant to EO 13792 request that participants consider "Whether national monuments in addition to those listed above should be reviewed because they were designated or expanded after January 1, 1996 'without adequate public outreach and coordination with relevant stakeholders;' and (2) the application of factors (i) through (vii) to the listed national monuments or to other Presidential designations or expansions of designations meeting the criteria of the Executive Order."

Several of the factors are clearly beyond the scope of review based on a plain reading of the Antiquities Act and its relevant case law. Federal courts have generally declined petitions concerning applications of the Act; when they have ruled on petitions, they have given tremendous deference to the judgment of the Presidents who made National Monument designations. The legislative history of the Act shows two significant amendments added to the original bill that both vastly expanded the scope of federal lands eligible for National Monument status and relaxed initial limits on the allowed acreage of Monuments designated under the Act⁹. As a result, the power of the Antiquities Act is not nearly as limited as its detractors claim. Review based on the factors identified in EO 13792 has no basis in either statute or case law.

In fact, Congress has repeatedly resisted calls to limit Executive power under the Act. Even while circumscribing Executive authority to temporarily withdraw land for protection of oil and gas reserves, it declined to extend the same limits to the President's establishment of national monuments in terms of acreage, duration, or purpose¹⁰. It also specifically exempted the Antiquities Act in repealing land withdrawal authorities in 29 other statutes in the enactment of the Fed-

⁹ see Christine A. Klein, "Preserving Monumental Landscapes Under the Antiquities Act," 87 Cornell L. Rev. 1333 (2002), available at <http://scholarship.law.ufl.edu/facultypub/12> and Alexandra M. Wyatt, "Antiquities Act: Scope of Authority for Modification of National Monuments," CRS report R44687 (2016), available at http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf, for historical perspectives.

¹⁰ Pickett Act, Pub. L. No. 303, 36 Stat. 847 (1910); repealed 1976.

eral Land Policy and Management Act of 1976¹¹. Presidential powers under the Act have been reduced twice, and then only by act of Congress¹².

Factor (i) calls for review of the 21 named National Monuments based on “The requirements and original objectives of the Act, including the Act’s requirement that reservations of land not exceed ‘the smallest area compatible with the proper care and management of the objects to be protected.’” Federal courts have repeatedly declined to revise the land area of National Monuments, deferring to Congress to make such decisions. Executive orders invoking Presidential authority under the Antiquities Act are not subject to the Administrative Procedures Act of 1946¹³, the courts have historically applied the its 'arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law' standard of review to Monument designations¹⁴. To date, no court has ever held that a President abused the authority of the Antiquities Act in designating a National Monument.

Factor (iii) calls for review based on “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 (43 U.S.C. 1701), as well as the effects on the available uses of Federal lands beyond the monument boundaries.” Consideration of impacts is the responsibility of the President who exercises the power granted by the Antiquities Act to name National Monuments. The Federal Land Policy and Management Act does not circumscribe the President’s authority to name or expand Monuments, with their attendant land use restrictions, as they are “otherwise specified by law,” that law being the Antiquities Act as amended.

Furthermore, the FLPMA states¹⁵ “it is the policy of the United States that . . . the public lands be managed in a manner that will protect the quality of the scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; [and] that, where appropriate, will preserve and protect certain public lands in their natural condition.” To the extent that threatened resources exist on federal lands bordering National Monuments, the Monument status should be considered specifically as it impacts the protection of those resources. In particular, the revocation of Monument status and/or size revision of an existing Monument may have specific impacts to management activities on adjacent lands. The change of status of existing National Monuments may well jeopardize not only the integrity of natural nighttime darkness on those lands, but on federal lands surrounding Monuments. This is another reason for leaving those Monument designations as-is.

¹¹ Pub. L. No. 94-579, 90 Stat. 2743, codified as amended at 43 U.S.C. §§ 1701-1782 and in various sections of the U.S. Code (1994 & Supp. V 1999).

¹² See the Alaska National Interest Lands Conservation Act of 1980 (Pub. L. No. 96-487, 94 Stat. 2371, 16 USC 410hh-3233, 43 USC 1602-1784.

¹³ Pub.L. 79-404, 60 Stat. 237.

¹⁴ 5 U.S.C. § 706(2)(A).

¹⁵ 43 U.S.C. 1701(a)(8).

Factor (iv) calls for review based on “the effects of a designation on the use and enjoyment of non-Federal lands within or beyond monument boundaries.” We see no conflict here, particularly as regards the pursuit of dark-skies conservation in National Monuments. Agency policy to protect dark skies has never been used in any way to compulsorily restrict the uses of non-federal lands on or adjacent to National Monuments, nor is it our expectation as such.

Factor (v) calls for review based on the “concerns of State, tribal, and local governments affected by a designation, including the economic development and fiscal condition of affected States, tribes, and localities”. As a matter of the management of federal lands, and the language of the Antiquities Act in particular, this is purely political in nature and the sole prerogative of Congress to correct. The courts have agreed with this interpretation.

Factor (vi) calls for review based on “the availability of Federal resources to properly manage designated areas.” This, too, is a political decision for Congress to make. It has previously withheld funds for the administration and management of National Monuments named under the Antiquities Act as a form of protest at a President’s actions¹⁶.

Separately, the comment call asks respondents to “address other factors the Secretary might consider for this review” specifically with respect to factor (vii) (“such other factors as the Secretary deems appropriate.”) To the extent that the Administration may consider ‘other factors’ in its review beyond the scope of either statute or case law, we urge consideration of the following with respect to the ongoing conservation of natural darkness and dark night skies in National Monuments:

1. We urge the Administration to consider the economic development potential of the many permitted uses of National Monuments consistent with 43 U.S.C. 1701(a)(8) (providing “for outdoor recreation and human occupancy and use”). Access to natural darkness and dark night skies provides that opportunity. On the Colorado Plateau alone, one recent estimate notes the potential for ~\$2 billion worth of tourism related to night skies in the next decade¹⁷. To the extent that any Monument designation should be reconsidered due to the regional economic impact of *restrictions* on land use accompanying the Monument status, it is only fair to weight those losses against the potential gains enabled by new forms of economic activity related to sustainable night skies tourism. Monument status

¹⁶ See Proclamation No. 2578, 3 C.F.R. 327 (1943) protecting the 221,610-acre Jackson Hole National Monument in Wyoming, which Congress later included as part of Grand Teton National Park, and Proclamation No. 2578, 3 C.F.R. 639 (1961) creating Chesapeake and Ohio Canal National Monument, upon which a hostile Congress refused to appropriate management funds for its management. In neither case did Congress act to revoke the Monument designation.

¹⁷ David Mitchell and Terrel Gallaway, “Estimating the Potential Economic Value of the Night Skies Above the Colorado Plateau”, National Park Service white paper (2016).

elevates the profile of certain federal lands; an elevated profile among the public brings attention and tourism demand; tourism demand brings jobs.

2. The protection of dark skies and natural darkness on National Monuments is consistent with the FLPMA policy statement¹⁸ that "public lands be managed in a manner that will protect the quality of the scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values." Any Administration decision to modify an existing National Monument should certainly take into account the presence of natural darkness over the site, particularly if that darkness faces acute threats from land uses that would be permitted if the Monument status were revoked or its land area decreased. Given scientific understanding of the value of nighttime darkness to various ecosystem services, and disruption of ecosystems that follows exposure to artificial light at night¹⁹, National Monuments should be maintained and managed in a way that properly supports and promotes this value.
3. The protection of public lands is integrative of *all* aspects of landscapes, including air and water quality, scenic viewsheds, and cultural resources. Nighttime darkness and dark night skies are a definitive characteristic of these landscapes, and by implication are included in the "other objects of historic or scientific interest" in the Antiquities Act and subsequent case law. Any review of National Monument status must consider this characteristic, one that is inseparable from the conservation priorities called out specifically in FLPMA as a matter of federal policy.

We appeal to you as a lifelong sportsman who, no doubt, has marveled at the dark night skies over Montana public lands like Glacier National Park -- the newest of our International Dark Sky Parks -- to pursue a review regime for recent National Monument designations that keeps in mind the value of this experience. Such night skies, largely devoid of light pollution, keep a universe full of stars available to current and future generations of Americans who, too, will see us reflected "at our best" in these protected spaces.

Sincerely,

J. Scott Feierabend
Executive Director

¹⁸ 43 U.S.C. 1701(a)(8).

¹⁹ See e.g., Travis Longcore and Catherine Rich, eds. *Ecological Consequences of Artificial Night Lighting*. Island Press: Washington (2006).