The Trump Public Land Revolution: Redefining "the Public" in Public Land Law

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Trump's Plunder of Public Lands

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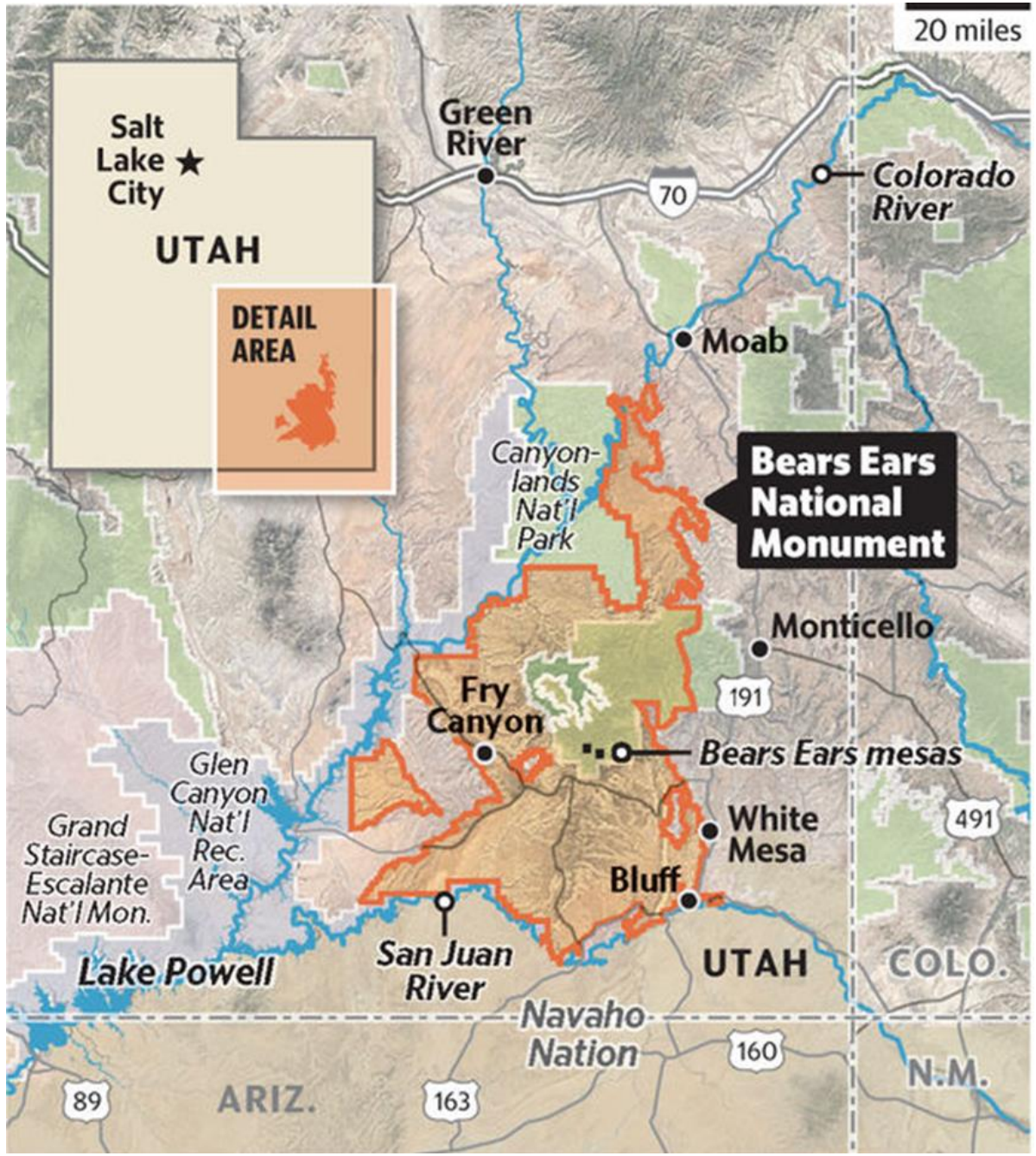
Diminishing Bears Ears and Grand Staircase-Escalante Monuments

- Grand-Staircase-Escalante designated by Pres. Clinton in 1996 for its geological, biological, and historical resources (was the largest national monument managed by BLM).
- Land exchange with Utah in 1996 seemed to give congressional approval of the monument (Utah given federal lands to compensate for state school lands in the monument, plus $50 million.)
- Reduced by nearly 1/2 by Pres. Trump on Dec. 4, 2017; broken up into 3 separate areas.
- Suits challenging the diminishment filed the day of the proclamation in the D.C. District Court.

Bears Ears National Monument

- Proposed by an inter-tribal coalition in 2015.
- Declared by Pres. Obama—1.35 million acres—for archeological and cultural resources (a sacred site for numerous tribes).
- Proclamation of Dec. 28, 2016 included an unprecedented inter-tribal advisory council to advise BLM and Forest Service management.
- Proclamation preserved existing water rights, grazing permits, public access, and oil and gas leases and pipelines (not a wilderness)
- Pres. Trump diminished the monument by 85% on Dec. 4, 2018, claiming it was based on a lack of public involvement, was not the "smallest practicable area," and would curtail energy production and economic growth (stating that the cuts were "so important for states' rights," and that distant bureaucrats "don't know your [sic] land, and don't care for it like you do").
- Suits filed by environmental groups and tribes in DC Dist Ct.; Trump Admin has sought a change of venue to D. Utah.


20 miles
Salt Lake City
UTAH
DETAIL AREA
Green River
70
Colorado River
Moab
Canyon-lands Nat'l Park
Bears Ears National Monument
Monticello
191
Fry Canyon
Bears Ears mesas
Glen Canyon Nat'l Rec. Area
Grand Staircase-Escalante Nat'l Mon.
White Mesa
491
Bluff
San Juan River
Lake Powell
UTAH
COLO.
Navaho Nation
160
N.M.
89
ARIZ.
163

Antiquities Act of 1906

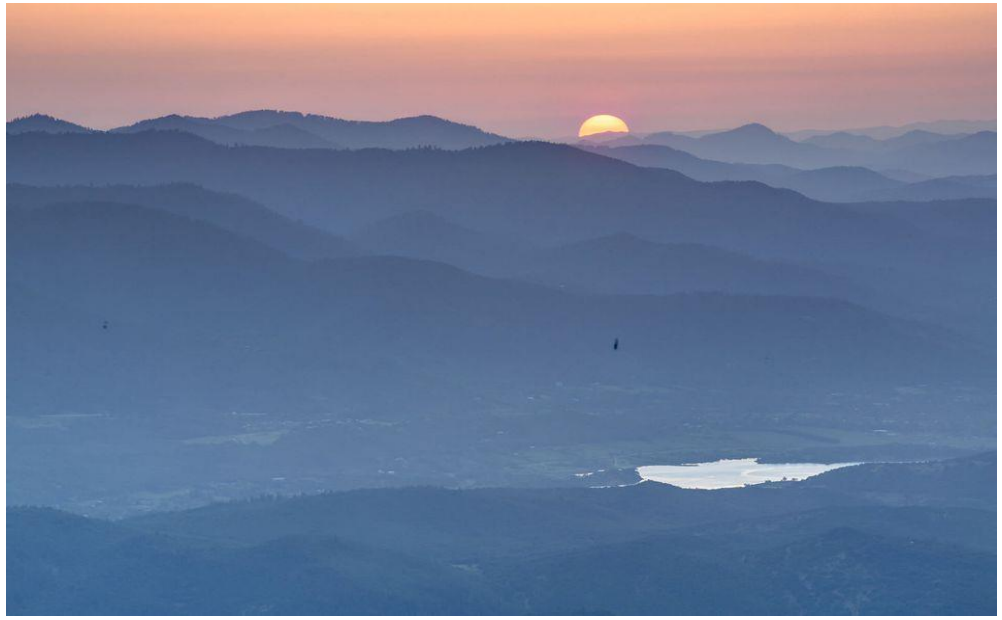
- Presidents' authority to proclaim national monuments (to protect historic and scientific objects on federal land so long as "confined to the smallest area compatible with the proper management of the objects . . .").
- Supreme Court has approved monuments as large as the Grand Canyon (*Cameron v. U.S.* (1920)).
- No express authority to revoke or modify, as in other statutes.
- 1938 opinion of the attorney general—cannot revoke a predecessor's monument (opinion didn't address diminishment).
- 1976—s. 204(j) of FLPMA (a statute that officially ended the federal land disposition era) seemed to foreclose the modification or recession of national monuments by the Executive ("*The Secretary*. . . may not modify or revoke" any national monument; legis. hist. mentions all "*executive authority*" and specifically mentions reserving Congress' power "to modify and revoke withdrawals for national monuments . . .").
- No monuments were modified or revoked in the 43 years between FLPMA and 2017.

The Property Clause

- Plenary power to the Congress under Art. IV, s. III, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States . . . ").
- Supreme Court has said at least 9 times that the power of Congress under the Property Clause is "without limitation," including *Utah Power & Light v. U.S*. (1917) (Property Clause authority is "exclusive").
- Exercise of Executive authority under the Property Clause must be by express delegation from Congress.
- Argues against implied authority to modify or revoke monuments under the Antiquities Act, especially in light of FLPMA's clear intent to restrict Executive authority.

Cascade Siskiyou National Monument

- Designated by Pres. Clinton in 2000 as the first and only monument to preserve biodiversity; an area at the “biological crossroads” linking coastal, mountain, and rangeland ecosystems as well as the Cascade, Klamath, and Siskiyou mountains.
- Comments of scientists and public that claimed the monument was not large enough to fulfill its purpose led Pres. Obama to expand it, roughly doubling its size, in 2017, extending it into California.
- Broad public support for the monument and its expansion (in state—both senators & gov. and many local gov’ts.
- Opponents include the timber industry and O & C counties—which have filed suits in the D.C. and Oregon district courts—Jackson and Klamath Counties, and a group locals calling themselves the "No Monument Tribe.“
- Zinke’s review complained about 1) private lands w/i monument, 2) O & C lands, 3) past grazing buy-outs, and 4) off-road vehicle restrictions in unroaded areas.



Timber industry claims against the expansion

- Inclusion of lands managed under the OCLA of 1938 in the expanded monument
  - 1940 Interior Solicitor's opinion suggesting that O & C lands were not suitable for inclusion in the Oregon Caves National Monument.
  - But lots of inconsistent ensuing Solicitor's opinions, including a 1981 opinion O & C lands should be managed by contemporary ecological and multiple-use principles.
  - *Headwaters v. BLM* (1990), in which the 9th Cir. upheld a decision of the BLM not to supplement an EIS on a timber sale on O & C lands on the ground that it the sale was consistent with the timber-dominant purpose of the statute.
  - But the same court subsequently ruled that the O & C lands were not exempt from NEPA, the ESA, or multiple use. *Portland Audubon Society v. Babbitt* (1993). And subject to the NW Forest Plan. *Seattle Audubon Society v. Moseley* (1996).
  - So the notion that O & C lands have been "withdrawn" for timbering hardly seems credible, especially given O & C Lands Act's purposes of watershed protection, streamflow regulation, and recreation.

NEPA: The Sleeper

- Large effects on mineral leasing, the centerpiece of Trump's policy of "energy dominance."
- 3 recent cases on the "downstream effects" of leasing:
  - *Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining* (D. Mont. Aug. 14, 2017)—invalidating an EA on expanded coal mining because of a failure to consider the costs of resulting GHG emissions.
  - *WildEarth Guardians v. BLM* (10th Cir. 2017)—an EIS on 4 Powder River coal leases could not rely on a "no action" alternative that assumed that the sales would have no effect on coal use or price or coal's share of the energy mix (rejecting the so-called "perfect substitute theory).
  - *Western Organization of Resource Councils v. BLM* (D. Mont. March 26, 2018)-rejecting EISs on BLM RMPs that would open up 15 million acres to leasing to fossil fuel extraction without considering the effects on climate change.

Trump's NEPA "Streamlining"

- Aug. 2017 Executive Order to reduce "unnecessary burdens and delays" on infrastructure projects.
- Interior Dept. imposed a limit of 150 pages on EISs and increased use of "DNAs" (determinations of NEPA applicability).
- CEQ to amend NEPA regulations to 1) establish new deadlines for reviews, 2) expand use of FONSIs; 3) narrow consideration of alternatives; 4) expand delegation to states; and 5) reduce the role of federal comment agencies.
- Loss of public involvement and agency pluralism in the NEPA process could seriously affect judicial review, as both—especially agency comments—are often influential to court interpretations of NEPA.

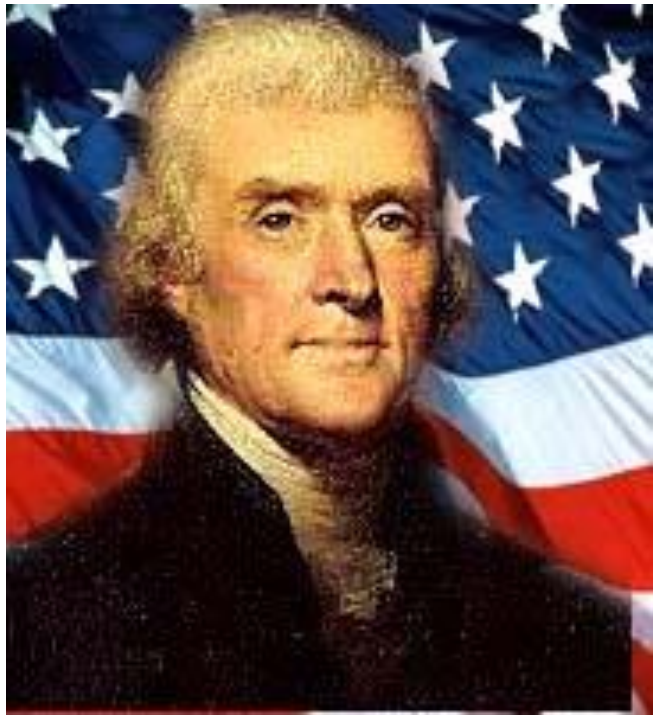
The Trump Public Lands Revolution

- No energy crisis (cf. 1970s); in fact, many existing leases are not active.
- Instead, there's a climate crisis, which the administration ignores.
- There might be a budget crisis, exacerbated by the congressional tax cuts, but no interest in ensuring fair market value through royalty rights for oil and gas leases or grazing permits.
- The Trump Revolution has been what many Western state governments have sought since the Sagebrush Rebellion of the 1970s.
- The Trump plunder was presaged by the Reagan and Bush II administrations—except then there were some congressionally imposed limits.

The “plunder” is not due to the Trump Admin. alone

- It’s been brewing for a long time, now aided by Bundy-like revolutionaries, social media, and Fox News.
- And thoroughly ensconced in state legislatures like Utah’s—and apparently widespread in Congress, evidenced by use of the CRA.
- The effect is to redefine “the public” that counts in public land law in a fundamentally undemocratic way; e.g., 98% of commentators on Bears Ears opposed changes (even half of Utahans)
- A reflection of Public Choice political theory—in which intensely focused and well-financed special interest groups—despite being a minority numerically—can overwhelm unorganized majorities.
- Calls for states’ rights in public land mgmt. are a euphemism for providing use-monopolies to local economic elites, often rural, despite the fact that the West is most urbanized region of U.S.
- The antidote is organization of the owners of public lands—the public –the into a politically effective force.
- First test is the congressional election in the fall of 2018.

The Earth as a Usufruct



- “The land belongs to the people . . . a little of it to the dead . . . some to those living [as a usufruct] . . . but most of it belongs to those yet unborn.”