STATEMENT OF ROBERT S. LYNCH,
ROBERT S. LYNCH & ASSOCIATES,
CONCERNING THE PROPOSED GRAND CANYON WATERSHED NATIONAL MONUMENT, FOR A PUBLIC LISTENING SESSION WITH CONGRESSMAN PAUL GOSAR, KINGMAN, ARIZONA, MONDAY, APRIL 11, 2016

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Congressman Gosar and interested parties, I am Bob Lynch, an attorney in Phoenix, Arizona. I am pleased to have the opportunity to present this statement to you about the proposed Grand Canyon Watershed National Monument and the problems it will create for northern Arizona.

I have viewed a map online of the environmentalists' proposal for this national monument and it is enormous. Not only does it cover extensive amounts of United States land managed by the Bureau of Land Management (BLM) but it covers essentially all of the Kaibab National Forest north of the Grand Canyon and south of the Grand Canyon as well.

The first thing that came to mind when I looked at the map was how will the Four Forest Restoration Initiative Program, the Federal/Arizona partnership for forest thinning for fire protection and watershed management, continue in a national monument? I can't imagine that the Forest Service or the State of Arizona can be particularly happy about this significant watershed on both sides of the Grand Canyon being tied up in an additional protective designation. The designation will only complicate the ability of the United States and the State of Arizona to work together to improve this forest for watershed purposes and to protect it from catastrophic wildfire.[1]

My second thought stems from my nearly 52 years as an attorney and water attorney. We know from the U.S. Supreme Court's *Cappaert* decision[2] that an implied surface water right, a Winters Doctrine right[3], is created to accompany a designation of a national monument. We also know from that case that the surface water right impliedly reserved by the designation of the

[1] I note in passing that the complexity of the area may offer an opportunity for judicial challenge not normally available. Mark C. Rutzick, *Modern Remedies For Antiquated Laws: Challenging National Monument Designations Under The 1906 Antiquities Act*, 11 Engage: J. Federalist Soc'y Prac. Groups 29 (September 2010).
[2] *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed. 523 (1976).
[3] *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908).

monument can be used to prevent the use of groundwater in the area that might adversely impact that surface water right. Add to that the fact that the Arizona Supreme Court has ruled that the Winters Doctrine applies to groundwater itself[4] and you have the perfect conundrum. Designation of the monument will tie up not only any future surface water use but any future groundwater use as well. How this goes along with intelligent land management is beyond me. We have instituted some very innovative and thoughtful land management programs in Arizona recently to help return our national forests to the healthy state they once enjoyed when nature drove the process. Since we have interfered with the process over the last century, we have much to make up for. Making a land use designation that gets in the way of that effort absolutely is counterintuitive.

Finally, I looked at the map and I wondered which agency was going to be stuck with this management nightmare. President Franklin Roosevelt consolidated monument management in the National Park Service.[5] Here, the bulk of the lands are either managed by the Bureau of Land Management or are part of the national forest system, the Kaibab National Forest. Both BLM and the Forest Service have at times been given the responsibility to manage a national monument.[6] So we are left with this additional conundrum: Who will boss whom? Which agency is best positioned to be able to manage these lands as a national monument? The Park Service? BLM? The Forest Service?

As to the Park Service, this problem is complicated by a Supreme Court decision issued on March 22, 2016 involving the State of Alaska.[7] In that case, the Supreme Court noted that the Park Service, as a matter of national policy, believes it can manage non-federal lands that end up being trapped within a federal reserve designation such as a national monument. While the Park Service was turned back in its efforts in Alaska to prevent a moose hunter from using a hover-

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[4] *In re the General Adjudication of All Rights to Use Water in the Gila River Water System and Source*, 195 Ariz. 411, 989 P.2d 739 (1999) (aka *Gila River III*); See also, *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 (2001) (*Gila River V*) for the history of the Arizona ongoing adjudication process.

[5] National Park Service Organic Act, Ch. 408, 39 Stat. 535 (1916) (codified at 43 U.S.C.A. § 1).

[6] National Monuments and the Antiquities Act, Congressional Research Service, Report No. 7-5700, pp. 9-10 (March 21, 2014); Joseph M. Feller, *Recent Developments in Public Land Law: National Monuments, National Forest Roadless Area, and BLM Rangeland Management*, SF56 ALI-ABA 179, 183 (2001).

[7] *Sturgeon v. Frost*, __ S.Ct. __, 2016 WL 1092415 (2016); Brief for the Respondents in *Sturgeon v. Frost*, pp. 21-22 and seriatim.

craft (really!), the fact remains that the Park Service believes that it has very broad powers to tell people what to do, even on their own lands if they happen to fall within a national monument or some other reserve designation that is managed by the Park Service. Does the Forest Service feel the same? I don't know. Does BLM feel the same? I don't know.

For all those private land in-holdings coming from patented mining claims or other land patent designations, I wonder how they will fair in this dictatorial climate. They won't be able to make future uses of surface water or groundwater, even if it is available, without the permission of the managing federal agency. None of these federal agencies have a particularly good track record of allowing non-federal entities to make use of water within land management areas assigned to them. And challenges to such uses are not infrequent.[8]

And of course this doesn't at all assess how the various wilderness areas and other national monuments already designated in the area will be coordinated with this. Nor does it take into account the impacts on the Kaibab Paiute Indian Reservation, which the area would border. Will this end up placing restrictions on these Indians within their reservation? Or outside? Are their hunting rights off the reservation involved? Are their fishing rights off the reservation involved? Are their sacred areas off the reservation involved? Who knows? I don't.

One of the reasons designating national monuments is better left in the hands of Congress is that its deliberative process often brings out these competing interests and seeks to deal with them in a fair and equitable fashion. Executive fiat on a one-size-fits-all basis does not.[9]

From my standpoint as a water lawyer, this is a bad idea and will continue to be a bad idea because you cannot deal with all of the incredibly varied landscape north and south of the Grand Canyon effectively in a one-size-fits-all designation. That is why the land management agencies have different parts of this area to manage. Those prior judgments by Congress need to be respected.

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[8] *Center for Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d 1101, 1121-4 (9th Cir. 2012).

[9] Joseph Briggett, *An Ocean Of Executive Authority: Courts Should Limit The President's Antiquities Act Power To Designate Monuments In The Outer Continental Shelf*, 22 Tul. Envtl. L.J. 403 (Summer 2009).

I hope this has been of some help to you in your deliberations. If there is something further I can do to help you deal with this situation, I would be pleased to contribute.