IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOPI TRIBE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case No. 1:17-cv-02590 (TSC)
UTAH DINÉ BIKÉYAH, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case No. 1:17-cv-02605 (TSC)
NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case No. 1:17-cv-02606 (TSC) **CONSOLIDATED CASES**

FEDERAL DEFENDANTS' REPLY
IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

In modifying the Bears Ears National Monument ("Monument") to reflect what he determined to be "the smallest area compatible" with the proper care and management of the Monument objects, the President properly invoked his authority under the Antiquities Act of 1906. *See* Proc. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017).[1] Plaintiffs' meritless claims challenging the Proclamation, filed within days of its issuance, fail for lack of jurisdiction and failure to state a claim, as Federal Defendants demonstrated in their opening brief. *See* Fed. Defs. Mem. Supp. Mot. Dismiss, ECF No. 49-1 ("Defs. Br.").

Plaintiffs' responses fail to show that this Court has jurisdiction to hear their claims or that they are otherwise entitled to any relief. *See* Tribal Pls.' Resp. Mot. Dismiss, ECF 70 ("Tribes Br."); UDB Pls.' Mem. of Points & Auths. Opp. Mot. Dismiss, ECF No. 71 ("UDB Br."); NRDC Pls.' Opp. Mot. Dismiss, ECF No. 72 ("NRDC Br."). By relying on post-complaint developments and transparent speculation to show injury, Plaintiffs effectively concede they did not have standing at the time they filed the complaints, and that their claims are unripe. Plaintiffs also fail to overcome Federal Defendants' showing that Proclamation 9681 was consistent with the text, purpose, and history of the Antiquities Act—and Congress' clear acquiescence to that application when it enacted the Federal Land Policy and Management Act ("FLPMA") in 1976. And, contrary to Plaintiffs' assertions, Proclamation 9681 did *not* "revok[e] the Bears Ears National Monument." Tribes Br. 10. The Monument remains, reserving over 200,000 acres of federal land encompassing thousands of objects of scientific and historic interest—but no greater than what the President has, in his discretion, deemed to be

[1]Federal Defendants will use the same abbreviations for the parties and pleadings as they did in their opening memorandum. *See* Defs. Br. 1-2 & n.1.

necessary for proper care and management of those objects. Plaintiffs barely stir themselves to defend their constitutional claims, which they acknowledge to be duplicative, and their claims under the Administrative Procedure Act ("APA") are unavoidably premature and defective. The Court should dismiss the Complaints.

ARGUMENT

I. Plaintiffs Fail to Show that the Court has Jurisdiction over their Claims.

A. Plaintiffs have not demonstrated standing.

Courts "analyze[] standing 'as of the time a suit commences.'" *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 210 F. Supp. 3d 1, 7 (D.D.C. 2016) (Chutkan, J.) (quoting *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009)), *appeal docketed* No. 16-5287 (D.C. Cir. Sept. 30, 2016). Plaintiffs failed to establish standing as of the time they filed their complaints (December 4, 6, and 7, 2017, respectively), because they did not, and could not, plausibly allege that the bare issuance of the Proclamation caused them injury that was both "actual or imminent" and "concrete and particularized" to any organization or member. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). *See* Defs. Br. 13-21. Plaintiffs' responses fail to show otherwise.

1. Post-complaint events cannot be used to establish standing.

Plaintiffs' responses discuss and attach materials concerning post-complaint activity in support of standing. *See, e.g.*, NRDC Br. 9; UDB Br. 10-12; ECF Nos. 71-7, ¶¶ 32-33; 71-13 ¶ 33. This is improper. Because "the 'existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed,' . . . a plaintiff may not supplement the record with materials that post-date the complaint in order to establish standing." *Save Jobs*, 210 F. Supp. 3d. at 6 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 n.4 (1992)); *Tracie Park v. Forest Serv.*, 205 F.3d 1034, 1037–38 (8th Cir. 2000) (holding plaintiff may not "use evidence of

what happened after the commencement of the suit" to show "a real and immediate threat" of injury). Accordingly, Plaintiffs' materials relating to post-complaint events should be stricken, and arguments for standing based upon such events should be disregarded. *See id.* at 7 (granting motion to strike post-complaint "appendix"). However, even if they were considered, the post-complaint developments do not demonstrate that injury is imminent even now.

2. The NRDC Plaintiffs have not plausibly alleged a substantial probability of injury to any member.

The NRDC Plaintiffs pursue a limited theory of standing in their response: that there is a "substantial risk" of injury to their members from "notice-level" mineral exploration ("notice-level activity"); from mineral leasing; and from motorized vehicle use. NRDC Br. 3-13. Thus, jurisdiction over NRDC's claims depends upon whether they pleaded facts demonstrating that, as of December 7, 2017, those activities threatened a particular member with imminent injury under the D.C. Circuit's "substantial risk" test. *See Food & Water Watch v. Vilsack (F&WW)*, 808 F.3d 905, 915 (D.C. Cir. 2015).[2] They did not plead those facts.

In this circuit, "the proper way to analyze" a substantial-risk claim is, first, "to consider the ultimate alleged harm" to a given member of an organization, and then "to determine whether the increased risk of such harm makes injury to [that member] sufficiently 'imminent' for standing purposes." *F&WW*, 808 F.3d at 915 (quoting *Pub. Citizen, Inc. v. NHTSA (Pub. Citizen I*), 489 F.3d 1279, 1298 (D.C. Cir. 2007)). That second determination, in turn, requires finding "at least *both* (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm

[2]To demonstrate imminence, Plaintiffs must make allegations showing that injury was "certainly impending" or showing "'a substantial risk' that the harm will occur" as of the day they filed suit. *Attias v. Carefirst, Inc.*, 865 F.3d 620, 626-27 (D.C. Cir. 2017) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 414 n.15 (2013)). The NRDC Plaintiffs depend exclusively on the "substantial risk test." *See* NRDC Br. 3-4.

with that increase taken into account." *Pub. Citizen I*, 489 F.3d at 1295. This analysis involves "a very strict understanding" of what "count[s] as 'substantial.'" *F&WW*, 808 F.3d at 915 (citation omitted).[3] Thus, the NRDC Plaintiffs cannot show standing without pleading facts showing a "*substantially*" increased risk of harm that results in a "*substantial*" probability of injury to a particular member as of the day they brought suit. *See Pub. Citizen, Inc. v. Trump (Pub. Citizen II*), 297 F. Supp. 3d 6, 18 (D.D.C. 2018). As detailed below, the NRDC Plaintiffs failed to satisfy this test for any category of potential future activity.

a. Notice-Level Activity

The NRDC Plaintiffs focus most of their discussion on notice-level activity. NRDC Br. 4-10. Although they refer to claim-staking and "casual use" as well, NRDC Br. 4-5, they do not argue that those activities cause injury, much less concrete, particularized, or imminent injury to any member. Nor would such an allegation be plausible, because Plaintiffs' asserted injuries stem from "surface-disturbing" activity, *id.* at 11, and staking and "casual use" involve at most negligible surface-disturbance. Declaration of E. Roberson, ECF No. 49-2 ("Roberson Decl.") ¶¶ 33-34; Defs. Br. 18 n.10; 43 C.F.R. § 3809.5.

With respect to notice-level activity—i.e., limited-scope exploration activities—the NRDC Plaintiffs make no serious attempt to satisfy the substantial-risk test. First, they failed to plead facts showing that the "ultimate alleged harm" from notice activity is particularized to any named member. *F&WW*, 808 F.3d at 915; *Summers*, 555 U.S. at 499 (plaintiffs asserting "probabilistic standing" must "identify members who suffer the requisite harm"). The complaint alleges no facts showing that any member faces a particularized harm from notice-level activity

[3]For example, if an action increases the risk of harm from 2% to 10%, the five-fold increase in risk may be substantial, but the 10% probability of harm to any person may not be substantial enough to demonstrate imminence.

on the excluded lands, only that notice-level activity "may" include road construction, which could in turn lead to "[t]ruck traffic and other surface developments," which would "result[ ] in new auditory and visual intrusions," which would "harm Plaintiffs' members interests and diminish their enjoyment of the natural setting in Bears Ears." NRDC Compl. ¶ 149. This allegation does not include the necessary factual links to connect notice-level activity (occurring somewhere or anywhere) to injury to any individual member, named or unnamed. Although it is true that courts must presume that a plaintiff's "general allegations embrace those specific facts necessary to support the claim," *Defs. of Wildlife*, 504 U.S. at 561, that presumption has limits: courts do not "accept inferences that are unsupported by the facts set out in the complaint," and they "may reject as overly speculative those links which are predictions of . . . future actions to be taken by third parties[.]" *F&WW*, 808 F.3d at 913 (quoting *Arpaio v. Obama*, 797 F.3d 11, 19, 21 (D.C. Cir. 2015)); *Save Jobs*, 210 F. Supp. 3d at 7. Because the NRDC Plaintiffs allege injuries based on actions of third parties, they must plead concrete facts to support the inferences they seek. They have not.

Here, it cannot be presumed that third parties will engage in notice-level activity in a specific place on the excluded lands where it will be observed or otherwise cause injury to one of Plaintiffs' members.[4] The excluded lands encompass about 1.1 *million* acres, a land area larger than Rhode Island, and mineral potential and visitor use across that area vary broadly.

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[4]In the cases cited by the NRDC Plaintiffs, NRDC Br. 4, there were concrete allegations of third-party conduct in specific areas. *See Sierra Club v. Jewell*, 764 F.3d 1, 7-8 (D.C. Cir. 2014) (plaintiffs identified two *active* mining permits, one "in use"); *NRDC v. EPA*, 755 F.3d 1010, 1017 (D.C. Cir. 2014) (petitioners identified member who lived near facility that had a pending application to burn hazardous waste prior to filing of petition); *see also, e.g.*, *In re Idaho Conservation League*, 811 F.3d 502, 509 (D.C. Cir. 2016) (plaintiff named member who lived near two mine sites, one "currently operating" and one where operator had "concrete plan" to proceed). The fact that there is a uranium mine near the excluded lands (NRDC Br. 7-8) does not demonstrate a concrete risk of injury from future uranium mining within those lands.

Moreover, mineral exploration cannot be conducted under a notice in Wilderness Study Areas ("WSAs") and Areas of Critical Environmental Concern ("ACECs")), which account for more than 395,000 acres of the excluded lands. *See* 43 C.F.R. §§ 3809.2; 3809.11; Roberson Decl. ¶¶ 12-13.[5] Thus, the Court lacks a factual basis to infer particularized injury absent allegations identifying a *particular* area where a third party is both able *and* likely to engage in notice-level activity and that one of Plaintiffs' members is likely to visit. The NRDC Plaintiffs have not made those allegations.[6] *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (holding that injury is not established by "averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory" where mining activity could occur); *see also, e.g., Elec. Privacy Info. Ctr. v. FAA (EPIC)*, 892 F.3d 1249, 1254 (D.C. Cir. 2018) (rejecting organization's "generic allegations" that drone use would increase in areas where its members live and travel).

The NRDC Plaintiffs have also failed to plead facts showing a "substantially increased risk of harm" from notice-level activity, even to some hypothetical member. *Public Citizen I*, 489 F.3d at 1295 (emphasis omitted). The vast majority of the claims currently staked on the excluded lands were staked *prior* to the establishment of the Monument in 2016. *See* Roberson Decl. ¶¶ 38, 41; Supplemental Decl. of E. Roberson ("Supp. Decl.") ¶ 8. The mere existence or staking of a claim does not demonstrate that anyone had concrete plans to engage in notice-level

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[5]In addition, 46,326 acres of lands excluded from the Monument are part of the Dark Canyon Wilderness Area, and 77,688 acres of lands excluded from of the Monument are included in seven designated inventoried roadless areas. Rasure Decl., ECF No. 49-3, ¶ 8. These lands are subject to various land use restrictions as well. *Id.* ¶¶ 9-10.

[6]In fact, each of the three areas they cite—White Canyon, Lockhart Basin, and Valley of the Gods, NRDC Br. 10—is covered in whole or in part by a WSA or ACEC designation, under which any exploration generally requires an approved plan of operations and associated environmental review that defeat any suggestion of imminence. Roberson Decl. ¶ 13; Supp. Decl. ¶¶ 6-7.

activity on them when Plaintiffs brought suit. *See* p. 9 n.10, *infra* (regarding Easy Peasy notice).[7] The NRDC Plaintiffs' "[b]are allegations about what is likely to occur are of no value." *Save Jobs*, 210 F. Supp. 3d at 7 (citation omitted).

Further, the NRDC Plaintiffs cannot show a "substantially increased risk of harm" from notice-level activity because they have not pleaded facts showing that all potential notice-level activities will cause cognizable harm. Plaintiffs' allegations assume both that third parties will seek to engage in certain *types* of notice activity *and* that BLM (or the Forest Service) will fail to carry out its legal obligations to prevent that activity from causing "unnecessary or undue degradation." *See, e.g.,* 43 C.F.R. § 3809.415 & 3809.420. *See* Defs. Br. 18 n.10. Both assumptions should be rejected. The allegations about third-party conduct are "overly speculative," *F&WW*, 808 F.3d at 913 (citation omitted), and courts "may not assume" that agency decisionmakers will exercise their discretion with respect to that conduct in any particular way. *Pub. Citizen II*, 297 F. Supp. 3d at 25 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006)). BLM's review of notice proposals is no rubber stamp. *See* Roberson Decl. ¶¶ 36-37. Thus, for example, the Court may not accept Plaintiffs' allegation that there will be "long-lasting impacts on the land" from notice-level activity, NRDC Br. 7; that would entail an impermissible assumption that BLM (or the Forest Service) would fail to enforce the reclamation commitments required under the regulation. *See* 43 C.F.R. § 3809.11; 7 C.F.R. § 228.8(g); Roberson Decl. ¶ 37.[8]

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[7]There is no direct link from maintenance of a claim to notice-level activity on that claim. Staking is not a costly exercise, and many claims are never developed. Further, notice-level activity is not a necessary step to the ultimate development of a claim. Supp. Decl. ¶ 8.

[8]*See also EPIC,* 892 F.3d at 1254 (it is the plaintiff's burden to show that agency will authorize the activities asserted to cause injury); *Attias*, 865 F.3d at 626 (explaining that *Clapper* rejected the plaintiffs' "assumption that independent decisionmakers . . . would exercise their discretion in a specific way"); *see also, e.g.*, *Turlock Irr. Dist. v. FERC*, 786 F.3d 18, 24-25 (D.C. Cir.

Finally, the NRDC Plaintiffs do not satisfy the substantial-risk test because they have not identified any member for whom injury is a "*substantial* probability." *Pub. Citizen I*, 489 F.3d at 1295. As noted, the NRDC Complaint does not link notice-level activity to any particular areas of the excluded lands that Plaintiffs' members have plans to visit. *See* p. 6-7, *supra.* Even if this Court were to infer that there is *some* chance a member could wander into an area where notice-level activity could occur, and that there is *some* risk that the activity occurring there could cause cognizable injury, Plaintiffs have not shown that those probabilities add up to a "substantial probability" of injury, and certainly not under a "strict understanding" of what "count[s] as substantial," *F&WW*, 808 F.3d at 915. *See Summers*, 555 U.S. at 499 (allegations that a member may be "roughly in the vicinity of a project site" are not sufficient).[9]

b. Other Activities

The NRDC Plaintiffs do not plausibly allege an imminent injury to any of their members from oil and gas leasing (NRDC Br. 10-11) or increased motorized vehicle use (*id.* at 11-13). They cannot show (and do not argue) that either category of activity was "certainly impending" in December 2017, and they did not make allegations to show a "substantial" and particularized

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2018) (declining to "hypothesize[ ] as to the outcome" of future agency proceedings); *Public Citizen II*, 297 F. Supp. 3d at 30 (declining to speculate how draft rule might be modified in response to executive order); *Conference of State Bank Supervisors v. OCC,* 313 F. Supp. 3d 285, 300 (D.D.C. 2018) (declining to assume regulator would charter new "fintech" companies to the exclusion of state regulation).

[9]The potential for notice-level activity at the Easy Peasy Mine site does not cure these defects—in fact it accentuates them. The notice post-dates the complaints and cannot be used to establish standing. *See Save Jobs*, 210 F. Supp. at 6. Even so, as of this filing, the operator has failed to obtain an executed reclamation contract or post a bond as required to authorize activities at the site, Supp. Decl. ¶ 9, and the NRDC Plaintiffs have not alleged that any member uses the area where Easy Peasy is located—a previously disturbed mine site that pre-dates Proclamation 9558 ("the 2016 Proclamation"), establishing the Monument. NRDC Br. 5-6; Roberson Decl. ¶ 38; Defs. Br. 16-17. Notably, the NRDC Plaintiffs did not seek injunctive relief when the Easy Peasy notice was deemed complete by BLM (on July 26, 2018), casting doubt on their conclusory allegation that notice-level activity causes injury *per se* to their members.

risk of injury to any member from those activities. *See* Defs. Br. 18-19. In fact, as of this filing, not one parcel of the excluded lands has been offered for lease, and any offer at auction that might occur someday would be many steps removed from future extractive activity. *See* Roberson Decl. ¶¶ 25-27; *see also WildEarth Guardians v. Salazar*, 859 F. Supp. 2d 83, 95-96 (D.D.C. 2012) (declining to find standing because of the "countless independent actions" of BLM and third parties that must occur between certification for leasing and coal production).[10] The interest expressed by certain third parties in making proposals for leases prior to the Proclamation (NRDC Br. 11) does not demonstrate that *BLM* had any concrete plans to lease any parcels as of the time the complaints were filed, much less *particular* parcels where future extractive activity could be observed and cause injury. The Court may not simply invoke its "common sense" to aid the Plaintiffs when they have not made allegations about particular leases where there is a non-speculative risk of activity. *See* n.4, *supra.*

Similarly, given the multiple steps that must occur before any new road is opened or trail is designated, the NRDC Plaintiffs have not made sufficient allegations to show an imminent risk of increased motorized vehicle use on the day they filed suit. *See* Defs. Br. 17-18. With respect to the Indian Creek Trail, which has minimal overlap with the excluded lands, *see* Roberson Decl. ¶ 18, Plaintiffs merely speculate that BLM will "some day" move to lift the stay. NRDC Br. 12. That is not enough. *See Kansas Corp. Comm'n v. FERC*, 881 F.3d 924, 930 (D.C. Cir. 2018) ("A petitioner that asserts a harm that may occur 'some day,' with no 'specification of

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[10]In *Fisheries Survival Fund v. Jewell*, this Court found that the plaintiffs had adequately pleaded imminent injury from the sale of *specific* leases related to a defined development proposal, and only under a relaxed standard for procedural injury. No. 16-cv-2409, 2018 WL 4705795 (D.D.C. 2018). In *League of Conservation Voters v. Trump*, 303 F. Supp. 3d 985 (D. Alaska 2018), the court applied Ninth Circuit case law on imminence, and it considered events post-dating the complaint in analyzing standing, which this Court has found to be inappropriate. *See id.* at 996-98; *but see Save Jobs*, 210 F. Supp. 3d at 6.

when the some day will be,' does not establish its standing." (citations omitted)). Nor may the Court assume that BLM will take any specific course of action with respect to Indian Creek or to any other potential road or trail "without adequate regard for the fragile . . . resources located there," NRDC Br. 13. Any assumption about how BLM (or, on lands within the Manti-La Sal Forest, the Forest Service) will exercise its discretion in any particular case is necessarily speculative. *See* p.7 & n.8, *supra*. The NRDC Plaintiffs have failed to plausibly allege any imminent risk of injury particularized to any of their members at the time they filed suit.

3. The Tribes fail to demonstrate any concrete or imminent injury as of December 4, 2017.

The Tribes advance three theories of injury. Although there is no dispute about the value the Monument lands hold for them, each of the Tribes' theories falls apart on closer inspection.

First, the Tribes contend that their standing "should be self-evident" because the Monument protected lands that are of cultural and spiritual importance to their peoples. Tribes Br. 13. But that is not the case under circuit precedent. The D.C. Circuit has found standing to be self-evident where a party is directly regulated by the challenged government action. *See Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002). It has not extended that presumption to tribal plaintiffs in cases such as this. To the contrary, in *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912 (D.C. Cir. 2003), the D.C. Circuit held that a "Tribe does not have standing merely because it has statutory rights in burial remains and cultural artifacts on [particular] lands . . . . Rather, to establish standing, the Tribe must show that the [challenged action] causes it to suffer some actual or imminent injury." *Id.* at 916. In other words, a Tribe's standing to challenge actions that affect lands it values is not self-evident.

A Tribe must demonstrate concrete and imminent injury traceable to the challenged action, just as any other plaintiff must. In *Crow Creek Sioux*, the Tribe challenged the

government's transfer of certain lands to the State of South Dakota and alleged that doing so would remove protections for cultural objects. The court held that the Tribe had failed to demonstrate imminent injury because the Archaeological Resources Protection Act ("ARPA") (and other protective statutes) continued to apply to the transferred lands, and the Tribe's allegation that "federal enforcement would diminish" was "purely speculative." *Id.* at 917. Moreover, "any lack of federal enforcement" in the future "would be traceable to the [government's] failure to fulfill [its] continuing statutory duties," not to the transfer itself. *Id.*[11]

The Tribes' theory that they will be injured by the removal or damage of cultural resources on the excluded lands fails under *Crow Creek Sioux*. The Tribes have not shown (and this Court cannot assume) that BLM and/or the Forest Service will fail to enforce the myriad protections afforded by ARPA and other statutes, which continue to apply on the excluded lands. *See* Defs. Br. 10; *Crow Creek Sioux*, 331 F.3d at 917. The Tribes also fail to show a concrete and particularized risk of injury from unspecified activities by unspecified third parties that might occur anywhere in an expanse of 1.1 million acres. To the extent they incorporate the NRDC Plaintiffs' allegations about activities such as hard-rock mining, *see* Tribes Br. 20, those arguments fail for the reasons above. *See* Part I.A.2, *supra*.

The Tribes thus primarily rely upon an allegation of injury to their governmental interests from the changes to the Bears Ears Commission, renamed the Shash Jáa Commission by Proclamation 9681. This theory is also without merit. The Tribes contend that the changes to

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[11]None of the Tribes' cited cases show they face a less "rigorous" a burden to demonstrate injury from predicted third-party actions. *Arpaio*, 797 F.3d at 21. In each case, there was a specific third-party action identified. *See Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1162 n.3 (9th Cir. 2018) (uranium mining at a specific site); *Pit River Tribe v. U.S. Forest Serv*., 469 F.3d 768, 779 (9th Cir. 2006) (leases associated with a specific geothermal power plant); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 61 (D.D.C. 2018) (Dakota Access Pipeline).

the Commission have "abrogate[d] the Tribes' right to engage, on a government-to-government basis with the United States, in collaborative management of all of the lands within the original boundaries of the [Monument.]." Tribes Br. 14. But that is simply not the case. As the Tribes acknowledge, the Department of the Interior "has one of the strongest and most detailed tribal consultation policies." *Id.* at 15. Neither the principles nor BLM's implementation of that policy have changed because of the Proclamation. It still applies and requires consultation with Tribes where proposed actions directly affect their interests, including actions on the lands excluded from the Monument.[12] Thus, the Tribes can continue to play an important role in the management of the excluded lands if they so choose.[13] But the Tribes cannot show that the changes to the Commission directly affected *the Tribes'* ability to engage in government-to-government consultation on matters involving the excluded lands.

As for the lands retained within the Monument, the Tribes allege that adding a sixth seat to the Commission for the District 3 representative from the San Juan County Commission "undermine[s] the government-to-government relationship the Tribes enjoy with the federal government" because the county "do[es] not have a relationship on par with that of federally recognized tribes." *Id.* at 17. But the Tribes have not challenged the President's legal authority to make changes to the Commission, and even if they had, the Tribes have not alleged any facts to demonstrate that the inclusion of a county commissioner has done anything to "undermine"

[12]Dep't of the Interior, Tribal Consultation Policy, *available at* https://www.doi.gov/tribes/Tribal-Consultation-Policy. Contrary to the Tribes' implication, the policy provides for consultation "directly with the United States," Tribes Br. 16.
[13]The Tribes contend that the agencies are developing the management plans for the Monument without consultation with the Commission. This allegation is not in the Complaint and concerns post-complaint developments that do not establish standing. Moreover, any injury tied to that allegation is self-inflicted: the Commission has not met because the Tribes have declined to participate. Supp. Decl. ¶¶ 12-15.

the Tribes' relationship with the United States. They only allege, without support, that "this change in the composition of the Commission poisoned the collaborative environment by bringing a fierce Monument opponent to the planning table." *Id.* Even if that allegation were true (and susceptible to proof), it does not demonstrate actual or imminent injury. Five of the six seats on the Commission are designated for representatives of the Tribes, meaning they will always hold the majority, and it cannot be a cognizable injury in fact to be asked to hear the views of a person with whom you disagree. The Tribes' fears are also greatly overstated. Indeed, after the recent elections, Navajo members will hold two of the three seats on the County Commission—and both of those members (including the new commissioner for District 3, who will sit on the Shash Jáa Commission) are board members of Plaintiff UDB.[14] This development confirms that the Tribe's allegations of injury were wholly speculative.

No one disputes that the Tribes have strong interests in protecting resources on the lands within and excluded from the Monument. But they have failed to show an imminent, concrete injury to those interests from the issuance of the Proclamation.

4. The UDB Plaintiffs have not demonstrated actual or imminent injury to any of their members as of December 4, 2017.

To make up for their failure to plead concrete and imminent injury, the UDB Plaintiffs have submitted over 150 pages of declarations, large portions of which are duplicative and irrelevant. Federal Defendants cannot address every contention in these filings in this reply, but

[14] *See* KSJD, *San Juan County Elects First Navajo-Majority Commission*, http://www.ksjd.org/post/san-juan-county-elects-first-navajo-majority-commission (last visited Dec. 12, 2018); UDB, The Utah Dine Bikeyah Board of Directors, http://utahdinebikeyah.org/mission-and-vision/board-and-staff (accessed December 9, 2018). None of this is to say that the Tribes or their members hold identical views on all issues or will vote in lockstep; only that it cannot be assumed that the addition of a member who is not "on par" with the Tribes will dilute the fundamental character of the Commission, as they allege. Tribes Br. 17.

under these reams of post-complaint material, the "hard floor" of injury in fact is still missing. *Summers*, 555 U.S. at 497.[15]

Like the other plaintiffs, the UDB Plaintiffs contend that their members are suffering actual and imminent injury because the Proclamation removes protection from cultural resources, or because there is a "substantial risk" of injury from mining and other speculative third-party activities on the excluded lands. UDB Br. 15-17. Those allegations fail to demonstrate concrete, particularized, actual or imminent injury for the reasons detailed above. *See* Parts I.A.2 & I.A.3, *supra*. Indeed, just like the NRDC Plaintiffs, the UDB Plaintiffs do not articulate and make no attempt to satisfy the elements of the "substantial risk" test. They simply contend that injury is "obvious" because the 2016 Proclamation "was designed to halt" vandalism and looting in the Monument, and now the Monument area is reduced. UDB Br. 13, 17-18. But nothing about that claim of injury is obvious. It entails conjecture about what *could* have happened under a proclamation that was never implemented beyond the early planning stages, *see* Supp. Decl. ¶¶ 17-18, *and* it entails conjecture about what will happen in the future, which depends upon the discretionary actions of BLM or the Forest Service and unspecified and unknowable actions of third parties. *See* Defs. Br. 19-20. These allegations "stack[ ] speculation upon hypothetical upon speculation," and "do[ ] not establish . . . imminent injury" to any of UDB Plaintiffs' members as of December 6, 2017. *Kansas Corp. Comm'n*, 881 F.3d at 931 (citation and internal quotation marks omitted).

The UDB Plaintiffs' one theory of actual injury also falls flat. At length, they contend

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[15]Although the standing of any one of the UDB Plaintiffs is sufficient to establish jurisdiction over their claims, standing should be addressed for each group to clarify which entities are entitled to pursue the case on appeal, and to facilitate review of any future request for attorney's fees at taxpayer expense. *See Unification Church v. INS*, 762 F.2d 1077, 1082 (D.C. Cir. 1985).

that members of the Society for Vertebrate Paleontology ("SVP") will be impeded in their research because projects on the excluded lands are no longer eligible for funding from a BLM program relating to National Landscape Conservation System ("NLCS") lands. UDB Br. 13-14. The UDB Plaintiffs' complaint did not identify any SVP members or projects that had lost that funding, however, as of the day they filed suit, and the post-complaint information they reference is not only irrelevant, *Save Jobs*, 210 F. Supp. 3d at 6, but also insufficient.[16]

5. The UDB Plaintiffs have not demonstrated organizational injury.

The UDB Plaintiffs also fail to establish jurisdiction based on organizational injury because they have not alleged facts showing that the Proclamation impedes their ability to provide services. *See* Defs. Br. 20-21. The UDB Plaintiffs imply it is sufficient merely to show that each organization has spent money on campaigns relating to the Monument. UDB Br. 10-12. That is not correct. When alleging organizational injury, "[n]ot all uses of resources count." *Ctr. for Responsible Sci. v. Gottlieb (CRS),* No. 17-cv-2198, 2018 WL 5251741, at *4 (D.D.C. Oct. 22, 2018). In particular, "resources spent educating the public or the organization's members cannot establish Article III injury unless doing so subjects the organization to 'operational costs beyond those normally expended.'" *Id.* (quoting *F&WW*, 808 F.3d at 920). That showing is necessary, because, for an organization to suffer concrete injury, "the challenged

[16]The research conducted by declarants Robert Gay and Jessica Uglesich in 2017 that BLM was able to identify as of this filing was funded in part by BLM, but not with an NLCS grant, as they apparently believe. *See* ECF No. 71-11 ¶¶ 13, 17; ECF No. 71-12, ¶ 11; *but see* Supp. Decl. ¶ 21. Thus, the declarations do not provide a factual basis from which this Court can infer that these or any other members of SVP rely on NLCS funding (or that they are categorically ineligible for such funding now, Supp. Decl. ¶ 19). Further, because there was no NLCS funding available to anyone in Fiscal Year 2018, Gay's decision not to continue research in the area after the complaints were filed is not relevant and is not traceable to the Proclamation. *See* Supp. Decl. ¶ 20.

activity must hamper the organization's ability to do what it does." *New England Anti-Vivisection Soc'y v. U.S. FWS*, 208 F. Supp. 3d 142, 166 (D.D.C. 2016).

The UDB Plaintiffs have not alleged that the Proclamation has caused them to suffer increased "operational costs" that impair their ability to "do what they do" because of the Proclamation. Although each group asserts that it has "diverted" resources to various initiatives—to advocate for Monument protection, to conserve natural or cultural resources, to educate visitors or raise awareness about those resources, e.g.— "[t]hat is not enough," *CRS*, 2018 WL 5251741, at *6. Conclusory allegations that an organization has reallocated resources to a new campaign "cannot save the day when the record reveals the . . . campaign at issue to be functionally similar to the organization's normal-course campaigns independent of the challenged conduct." *Id.* Here, the UDB Plaintiffs' use of resources to engage in activities such as advocacy, conservation, and education is "part and parcel" of their missions and does not show injury. *Id.*[17]

The UDB Plaintiffs' allegations also fail to demonstrate causation. In the circumstances, it cannot be assumed that all increases in operational costs (such as hiring additional staff) are traceable to the Proclamation—as opposed to the additional income that the plaintiff organizations have received directly or indirectly from highly publicized fundraising campaigns. *See, e.g.*, ECF No. 71-10, ¶ 33.[18] Indeed, the District Court in *Food & Water Watch* found it

[17]*See also*, *e.g. Cigar Ass'n of Am. v. FDA*, 323 F.R.D. 54, 63 (D.D.C. 2017) (repeal of tobacco labeling rules did not interfere with "daily operations" of health organizations); *Int'l Acad. of Oral Med. & Toxicology v. FDA*, 195 F. Supp. 3d 243, 258-59 (D.D.C. 2016) (no injury where plaintiff's actions in response to rule were consistent with its "standard programmatic efforts").

[18]There was no basis for such an inference in *Havens* and *Abigail Alliance*, and in those cases, the shift in resources was plausibly alleged to impair the organizations' "ability to provide . . . services." *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982); *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132-33 (D.C. Cir. 2006).

"puzzling" and "peculiar at best" for an organization to argue it is injured by spending on a "cause célèbre" where it can "marshal its resources to fight the good fight against agency action that it feels is improper and unwise." 79 F. Supp. 3d 174, 202 (D.D.C.), *aff'd*, 808 F.3d 905 (D.C. Cir. 2015). Such allegations may "prove precisely the opposite" of injury. *Id. See also, e.g., CRS*, 2018 WL 5251741, at *7 (rejecting claims of injury because "[the agency's] conduct may create a need for [the plaintiff's] program; it does not make the program more difficult").

The UDB Plaintiffs have also failed to plead facts to support their allegation that the Proclamation has caused it to lose access to tribal elders for interviews. UDB Br. 12. Gavin Noyes, UDB's declarant, asserts that "UDB has been unable to enter into [the necessary agreements] with Tribes" because of the "lack of a tribal commission to engage with, and a discomfort with collecting sensitive information that could be ignored or misused." ECF No. 71-13, ¶ 33. This theory of injury was not pleaded in the complaint, *see* UDB Compl. ¶¶ 25-27, post-dates the complaint, and cannot establish standing. Noyes' theory of causation is also implausible. There *is* a tribal commission for the Monument—the Shash Jáa Commission—and Noyes does not supply any facts to suggest that the Tribes' discomfort with the interviews is traceable to the Proclamation. Because Noyes does not speak for, and does not identify the Tribes whose motives are at issue, his assertions of causation are speculative.

That leaves the allegation that Friends of Cedar Mesa ("Friends") was "forced to construct and run its own Education Center" because the Proclamation excluded the existing visitor centers from the Monument boundaries. UDB Br. 11. That was a voluntary, discretionary decision based on Friends' subjective opinion about the extent of visitor resources serving the Monument. *See* ECF No. 71-7, ¶ 31 (Friends "has believed that visitors lack an adequate means of obtaining information about Cedar Mesa"). Friends' decision to construct the

Center in BLM's stead cannot be said to be "forced," in any sense of the term, and does not constitute cognizable injury to the organization.[19]

In sum, none of the Plaintiffs has shown that, when they filed suit, they or their members were suffering an injury in fact sufficient to establish jurisdiction in this Court.

B. Plaintiffs' claims for relief against President Trump should be dismissed.

If this Court concludes there is injury in fact to support jurisdiction over Plaintiffs' claims, all claims for relief should be dismissed to the extent they are brought against the President because Plaintiffs now acknowledge that their asserted injuries can be redressed by a declaratory judgment and potential remedies directed to the Agency Defendants. Tribes Br. 21-22; NRDC Br. 13; UDB Br. 20. *See, e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996). In this circumstance, Circuit law forecloses an order of remedies directed to the President. *See Swan v. Clinton*, 100 F.3d 973, 976-977 & n.1 (D.C. Cir. 1996).[20] Thus, the proper course of action is for the Court to dismiss the President as a defendant and dismiss Plaintiffs' claims to the extent they name the President as a defendant. Plaintiffs have not identified any circumstance where a remedy against the President would be needed to afford them adequate relief, or would afford them any relief beyond the symbolic. *See* Defs. Br. 19-20.

II. Plaintiffs' Claims are neither Constitutionally nor Prudentially Ripe.

Because Plaintiffs have not demonstrated their standing to sue at the time they commenced these actions, their claims are not constitutionally ripe. *See Chlorine Inst., Inc. v.*

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[19]Similarly, the fact that BLM has "requested" Friends to "prioritize" projects within the Monument boundaries does not mean that Friends has been "forced" to spend resources on anything it would not have normally funded. UDB Br. 11 n.1.

[20]The UDB Plaintiffs argue that declaratory relief has been entered against Presidents in the past, UDB Br. 20, but the D.C. Circuit has doubted that its earlier decisions to that effect "remain good law" after *Franklin v. Massachusetts*, 505 U.S. 788 (1992). *See Swan*, 100 F.3d at 977. The UDB Plaintiffs' arguments should also be disregarded because they did bring claims against the President.

Fed. R.R. Admin., 718 F.3d 922, 927 (D.C. Cir. 2013) (internal citation omitted)); *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 48 (D.C. Cir. 1999). But even if Plaintiffs had standing, their claims should be dismissed for lack of prudential ripeness.

Prudential ripeness requires an analysis of "the fitness of the issues for judicial decision and the extent to which withholding a decision will cause hardship to the parties." *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012) (internal quotation omitted). Arguably, Plaintiffs' claims addressing the lawfulness of Proclamation 9681 meet the first prerequisite—fitness for review—because they present primarily legal issues for the Court's consideration, and because the Proclamation is final. *See id.* But the same cannot be said for the Tribes' Fourth Count and NRDC Plaintiffs' Fifth Count, which address *implementation* of the Proclamation.[21]

Both of these counts, alleging that the Agency Defendants will in the future fail to carry out the duties supposedly mandated by the 2016 Proclamation, are indisputably unripe. The Tribes offer no argument as to why these specific counts are ripe—and the NRDC Plaintiffs argue only that there "is no uncertainty" whether the Agency Defendants will treat the Proclamation as controlling. NRDC Br. 14; *see also* Tribes Br. 22-23. But this is insufficient: Plaintiffs' allegations relying on future, unidentified decisions addressing management of the relevant lands are necessarily premature. Thus, these allegations are indisputably speculative and premature, and are based entirely upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). *See also Tulare Cty*

[21]The UDB Plaintiffs do not assert a claim focusing on implementation. Defs. Br. 25 n.16. However, they seek a remedy addressing implementation. *Id.*

v. Bush, 185 F. Supp. 2d 18, 30 (D.D.C. 2001) ("The plaintiffs cannot demonstrate ripeness . . . because the Secretary of Agriculture has not yet implemented the final management plan called for in the Proclamation."), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002).

Plaintiffs do not demonstrate cognizable hardship for *any* of their claims. As demonstrated above, Plaintiffs have not plausibly alleged imminent injury resulting from the Proclamation itself. Most injuries asserted by Plaintiffs (such as those related to certain mineral development or vehicle use) would require additional authorization by BLM and/or the Forest Service, subject to compliance with NEPA and other applicable laws—and would be subject to challenge when that process is completed. *See Wyo. Outdoor Council*, 165 F.3d at 50–51 (no hardship where Plaintiffs could seek relief via NEPA claim). And while the UDB Plaintiffs argue that delay would cause hardship by requiring them to undertake "constant burdensome monitoring," UDB Br. 23, that is not a cognizable hardship. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998) (recognizing that it might be easier "to mount one legal challenge against the [Forest] Plan now, than to pursue many challenges to each site-specific logging decision to which the Plan might eventually lead," but having to pursue the latter is not cognizable hardship); *Wyo. Outdoor Council*, 165 F.3d at 50-51.

III. Plaintiffs' *Ultra Vires* Claims Fail as a Matter of Law.

A. Plaintiffs ignore the limited review applicable to their claim.

The Supreme Court has recognized that where the President is exercising authority delegated from Congress, judicial review of presidential decisionmaking is extremely limited in scope. *See Dalton v. Specter*, 511 U.S. 462, 476 (1994) ("How the President chooses to exercise the discretion Congress has granted him is not a matter for our review."). Thus, judicial review in this case is limited to determining whether the President has clearly exceeded his authority. *Mountain States Legal Found. v. Bush (Mountain States)*, 306 F.3d 1132, 1136 (D.C. Cir. 2002).

Implicit in this limited standard of review is the principle that courts should afford some level of deference to the President's determination of the scope of the authority delegated by Congress. With respect to such determinations made by an executive *agency*, the Supreme Court has made clear that the courts are to defer to the agency's "interpretation of a statutory ambiguity that concerns the scope of [its] statutory authority." *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (rejecting argument that an "*ultra vires*" challenge was not subject to deference requirement). *See also Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984) (recognizing "that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). "[T]he question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *Safari Club Int'l v. Zinke*, 878 F.3d 316, 326 (D.C. Cir. 2017) (quoting *City of Arlington*, 569 U.S. at 301).

While the courts have not expressly addressed the issue, there is no reason why similar—or even greater—deference should not be afforded the President himself in addressing statutory delegations of authority. *See* Kevin M. Stack, The Statutory President, 90 Iowa L. Rev. 539, 590 (2005) (arguing that "the reasons for according *Chevron* deference to the president are even stronger than those for applying it to agency action").[22] Indeed, courts afford deference to

[22]An amicus brief filed in *Western Watersheds Project v. BLM*, No. 08-cv-1472, 2009 WL 5045735 (D. Ariz. Apr. 15, 2009), by Law Professors and Practitioners (including some of the same individuals who have sought permission to file amicus briefs in this litigation) cites favorably to this article, and argues that presidential interpretations of statutes should be afforded something akin to *Chevron* deference:

> While the Supreme Court has not yet definitively resolved the level of deference due a President's view of the scope of authority delegated to him by statute, lower courts have almost *uniformly granted a substantial degree of deference*. *See* Kevin M. Stack, The Statutory President, 90 Iowa L. Rev. 539, 563-568 (2005) (citing cases). This has been the case in Antiquities Act litigation. *See Mountain States Legal Foundation*, 306 F. 3d 1132; *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 813 (2003). One commentator has argued

agencies interpreting statutory authority that was directed to the President. *See Consarc Corp. v. U.S. Treas. Dep't,* 71 F.3d 909, 914 (D.C. Cir. 1995) (deferring to agency, authorized to implement relevant "Presidential authorities" under 50 U.S.C. § 1702(a), in its interpretation of that statute); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 920 (D.C. Cir. 1991) (applying deference to EPA's interpretation of statute that vested initial authority in "the President," who had delegated his authority to the EPA).

Here, the President did not exceed his authority in modifying the boundaries of the Monument to ensure that the reservation of land is confined to the smallest area compatible with the proper care and management of the monument objects, as provided in the Antiquities Act. *See* 82 Fed. Reg. at 58,081. The Act's text does not foreclose the President's assertion of this authority—it reinforces it. *See Safari Club Int'l*, 878 F.3d at 326. *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."). This circumstance is corroborated by the fact that Presidents have repeatedly exercised the authority to reduce national monuments and Congress has not taken *any* step to curtail that conduct in 110 years, despite a clear opportunity to do so in the enactment of FLPMA in 1976. Defs. Br. 35-36.

B. The Text, Purpose, and Legislative History of the Antiquities Act Authorize the President to Modify Monument Boundaries.

1. Presidential modification authority is consistent with the Act's plain language and context

The Antiquities Act's delegation of authority to the President is "broad," *Mountain States*,

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persuasively that something akin to the so-called Chevron deference accorded agency interpretations of their statutory authority should be accorded to presidential interpretations as well. Stack, at 585-601 (discussing *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

Id. (emphasis added).

306 F.3d at 1135, and expressly leaves the decisions both to declare a monument, and to reserve any particular "parcels of land," to his discretion. 54 U.S.C. § 320301. Only one instruction in the statute is mandatory—that any lands reserved "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.* § 320301(b). Plaintiffs seek to minimize this language, suggesting that it applies only to a President's initial choice to reserve lands within a monument. *E.g.*, UDB Br. 25-26. While this language does impose a limiting condition on the initial exercise of the authority to reserve lands, the mandatory and non-discretionary language used in the provision also supports Congress' intent to authorize Presidents to correct prior reservations of land that do not comport with this mandate. Defs. Br. 25-27.

Plaintiffs argue that the Act's language sustains only two narrow actions: declaring and reserving—not the "polar opposite" powers of "revok[ing] or reduc[ing] a monument." UDB Br. 25-26; Tribes Br. 25. But the Proclamation did not invoke an "opposite" power—rather, it invoked the President's ongoing authority to ensure that lands reserved for a monument are confined to the "smallest area compatible with the proper care and management" of the protected objects. Defs. Br. 26-27. The cases cited by UDB and the Tribes are inapposite. In *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013), the Court made a common-sense determination that where a provision of a statute addressing "unlawful employment practices" listed only "five of the seven prohibited discriminatory actions," the other two actions, which were addressed elsewhere in that statute, were not covered by the provision. *Id.* at 353. In *Greater Yellowstone Coalition v. Bosworth*, 209 F. Supp. 2d 156 (D.D.C. 2002), the court held that a statute requiring an agency to "establish and adhere to a schedule" for NEPA compliance did not allow modification of the schedule, once set. *See id.* at 160. But, unlike the Antiquities

Act, the statute in *Bosworth* imposed no other requirements or conditions relating to the schedule. *Bosworth* thus provides no guidance in the scenario here, where the President invoked a constituent, not an "opposite," authority under the statute.

The UDB Plaintiffs next argue that Federal Defendants' interpretation of the confinement requirement would "wrench text from context," violating the canon of statutory construction that a phrase of a statute must be read "in light of the terms surrounding it." UDB Br. 30 (quoting *FCC v. AT&T*, 562 U.S. 397, 405 (2011)). But Defendants' interpretation is consistent with this principle. The text imposing the confinement obligation was originally in the same *sentence* as the designation and reservation text.[23] And the authorization and obligation it imposes "in all cases" to confine monument reservations to the "smallest area compatible" with protection of the objects is fully consistent with the remainder of the statute—including its purpose of protecting objects, limited by obligation to ensure only those lands necessary to do so are included. *See infra* at Part III.B.

Plaintiffs claim that Federal Defendants' reading would impose a "mandatory, continuing, and indefinite duty on the President to revisit the boundaries of every national monument ever designated . . . ." UDB Br. 31 (emphasis omitted). To the contrary, a statute can authorize Executive Branch action without imposing a mandatory duty to conduct a particular review. *See, e.g.*, *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004) (statute may be "mandatory as to the object to be achieved," but leave the agency "a great deal of discretion in deciding how to achieve it"); *Anglers Conservation Network v. Pritzker*, 808 F.3d 664, 671 (D.C. Cir. 2016)

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[23]While this sentence from the original enactment has now been modified such that it is broken into multiple subsections, Congress did not intend to modify its substance, noting that the changes "conform[ed] to the understood policy, intent and purpose of Congress in the original enactments." Pub. L. No. 113-287 § 2, 128 Stat. 3094 (2014).

(distinguishing between grants of discretionary and mandatory authority). Further, the UDB Plaintiffs' reliance on *Utilities Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) is plainly unwarranted. In that case, the Court addressed a scenario where "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Id.* at 324 (internal quotation omitted). Here, Presidential modification authority was first exercised over 100 years ago (and within mere years of the Antiquities Act's enactment).[24]

Plaintiffs also attempt to distinguish cases holding that the "power to reconsider is inherent in the power to decide," *Albertson v. FCC*, 182 F.3d 397, 399 (D.C. Cir. 1950), claiming, contrary to such cases, that "[t]here is no such principle." UDB Br. 32. But they neglect to support their conclusion with any authority. In fact, numerous statutes authorize various Executive Branch officers to regulate, administer, and make decisions, without expressly saying that those decisions can be repealed or modified. But courts routinely uphold agency authority to make such changes. *E.g.*, *Pennsylvania v. Lynn*, 501 F.2d 848, 856 (D.C. Cir. 1974) ("A court is properly reluctant to conclude that Congress forbade the Secretary [to halt a program] "when he has good reason to believe that exercising his authority would be contrary to the purposes for which Congress authorized him to act."). And it is beyond cavil that presidential executive orders are routinely revised or revoked by subsequent presidents. Plaintiffs have presented no valid reason why national monument proclamations should be given a different status, effectively equivalent to legislation.

Moreover, while, as the UDB Plaintiffs note, it remains the United States' position that,

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[24]For the same reasons, the Plaintiffs' argument, addressed in more detail *infra* at Part III.E, that the President does not have the authority to modify monument boundaries such that designated objects fall outside the boundaries, fails. UDB Br. 31; Tribes Br. 23.

consistent with a 1938 Attorney General opinion, the President cannot completely *abolish* a national monument, this same opinion *supports* the Federal Defendants' position here, that the President can "diminish[] the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom, under that part of the act which provides the limits of the monuments 'in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.'" Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188 (1938).

The UDB Plaintiffs also argue that the Supreme Court has held "that Congress can authorize the removal of federal protections from public land only if it does so expressly." UDB Br. 34. But not one of the cases they cite for this remarkable proposition involves the removal of "federal protections;" each involved a *grant* of federal property or property interests. *See Coosaw Mining Co. v. South Carolina ex. rel. Tillman*, 144 U.S. 550, 562 (1892); *United States v. Holt Sate Bank*, 270 U.S. 49, 55 (1926): *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1957); *Utah Div. of State Lands v. United States,* 482 U.S. 193, 201 (1987); *United States v. Alaska*, 521 U.S. 1, 34 (1997). Although some organizations may indulge in exaggeration that the Proclamation "stole" the land from the public,[25] the Proclamation does not sell or transfer federal land to anyone.

Finally, the Tribes argue that the Court should not construe the Antiquities Act as containing modification authority in order to avoid a "constitutional question," namely whether the Antiquities Act violates the nondelegation doctrine. *See* Tribes Br. 38. But their contention that the Act fails to lay down an "intelligible principle" to govern the exercise of modification authority has no basis. *See id.* (*citing Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472

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[25] https://www.patagonia.com/protect-public-lands.html (last visited Dec. 10, 2018)

(2001)). The Antiquities Act does impose such a principle: it requires that any lands reserved "be confined to the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). This standard satisfies the intelligible principle requirement. *See Mountain States,* 306 F.3d at 1137. *Cf. Whitman*, 531 U.S. at 474 (noting that the Court has found an "intelligible principle" in statutes employing far more ambiguous standards, such as "authorizing regulation in the 'public interest'"). The President's modification followed the intelligible principle of confinement, and Plaintiffs' challenge to the Proclamation should be dismissed.

2. Contemporaneous statutes do not indicate that modification authority must be express.

Their textual arguments failing, Plaintiffs contrast the Antiquities Act with other statutes that more expressly reference modifications of reservations, implying that Congress' failure to do so in the Antiquities Act was intentional. UDB Br. 32-34; Tribes Br. 30-34. But close inspection of these statutes reveals that their argument is misplaced.

First, the statutes relied upon by Plaintiffs did not contain any language comparable to the limiting conditions on the scope of reservations that are found in the Antiquities Act. For example, the Forest Reserve Act of 1891 simply authorized the President to reserve "public land bearing forests," with no constraints on the scope of those reservations. Act of Mar. 3, 1891, Ch. 563, § 24, 26 Stat. 1103; *see also* Pickett Act of 1910, Ch. 421, 36 Stat. 847, 847 (authorizing President to "temporarily withdraw from settlement, location, sale, or entry *any* of the public lands of the United States" (emphasis added)). Moreover, the Pickett Act, contrary to Plaintiffs' contention, does not contain language expressly granting revocation authority to the President—rather it assumes that authority exists. *See* Ch. 421, 36 Stat. at 847 (providing that "such withdrawals or reservations shall remain in force until revoked by [the President] *or by an act of*

Congress" (emphasis added). The UDB Plaintiffs neglect to include this reference to Congress' revocation authority, UDB Br. 33—and for good reason. The reference was not necessary to reserve the authority to Congress, but the Act mentioned it regardless, indicating that the President's revocation authority, mentioned in the same clause, was likewise undisputed.

The Reclamation Act of 1902 is also inapposite. That statute affirmatively *required* the Secretary of the Interior to withdraw lands from entry when investigating potential reclamation projects. Pub. L. No. 57-161, § 2, 32 Stat. 388, 388. However, implicitly recognizing that Interior would determine that some projects were not feasible, Congress also required Interior to return any withdrawn lands to the public domain upon such a determination—and made this requirement to do so manifest in light of the fact that the Secretary had no discretion to forego the withdrawals initially. *See id.* The Antiquities Act, by comparison, did not need to emphasize modification authority because the initial power to declare and reserve land for monuments was discretionary, not compulsory.[26]

Plaintiffs also rely heavily on the Sundry Civil Appropriations Act of 1897,[27] addressing presidential authority to modify or revoke forest reserves created under the Forest Reserve Act of 1891. *E.g.,* UDB Br. 33. While Plaintiffs claim that Congress believed the 1897 statute was necessary because the 1891 statute did not grant the President this authority, the legislative history shows that Congress' rationale was more complex. During debates leading up to its enactment, several members of Congress thought the President already had the authority. *See* 29

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[26]The six statutes cited in by UDB Plaintiffs in a footnote are distinguishable on similar grounds. *See* UDB Br. 34 n.5. Further, some of those statutes are inapposite in that they authorized the President or Secretary to repeal withdrawals that those statutes themselves directly created. *See* 25 Stat. 505, 527 (1888); 41 Stat. 1063, 1075 (1920), 45 Stat. 1057, 1063 (1928).
[27]This is the same statute identified as the Forest Service Organic Administration Act, 30 Stat. 11, in briefs filed in *The Wilderness Society v. Trump*, No. 17-cv-2590.

Cong. Rec. 2677 (Mar. 3, 1897) (Rep. Pickler: "The President has had that power always."); 30 Cong. Rec. 917 (May 6, 1897) (Sen. Clark, noting "that it was expressly decided in the Department of the Interior . . . that the Executive always had the exact right . . . to modify an Executive proclamation"); 30 Cong. Rec. 921 (May 6, 1897) (Sens. Hawley and Pettigrew, suggesting that the Executive already has the right to modify reservations).[28] As a result, the 1897 statute expressly adopted a "belt and suspenders" approach, providing "*to remove any doubt which may exist pertaining to the authority of the President* thereon to, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all Executive orders and proclamations." Act of June 4, 1897, ch. 2, 30 Stat. 11, 34 (emphasis added).

Finally, that Rep. Lacey did not agree that the President possessed implied modification authority for forest reserves is by no means dispositive. *See Mass. Lobstermen's Assn. v. Ross*, No. 17-cv-406, 2018 WL 4853901, at *10 (D.D.C. Oct. 5, 2018) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history, . . . particularly where the record lacks evidence of an agreement among legislators on the subject." (internal quotations omitted)). Moreover, he also unequivocally maintained that the President *should* be able to correct overbroad reservations of land. 29 Cong. Rec. 2677 (Mar. 2, 1897); *see also* 30 Cong. Rec. 911 (May 6, 1897) (Rep. Gray admitting "it should have been in the power of the President to modify, repeal, or abrogate the orders already made"). It defies logic that, after the sponsor of the Antiquities Act and a majority of Congress agreed that the President either already possessed, or should possess, the power to correct overbroad reservations of land, Congress

[28] These documents and others not readily available on the internet are contained in Federal Defendants' contemporaneously filed appendix.

would then enact a statute that did not include this authority.

C. The Legislative History and Purposes of the Antiquities Act Confirm that the President Has Authority to Modify Monument Boundaries.

Plaintiffs argue that the legislative history and "essential purpose" of the Antiquities Act is incompatible with presidential authority to modify monument boundaries. *See, e.g.,* Tribes Br. 25-27. But modification of a monument to ensure that its reservation meets Congress' instruction that "[t]he limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected," is in no way contrary to the "essential purpose" of the Antiquities Act. *See* 54 U.S.C. § 320301(b).

In fact, it is consistent with Congress' overall intent. In the years leading up to the passage of the Antiquities Act, Congress was equally concerned with the Executive Branch making unnecessarily large reservations of public land. *See, e.g*., 29 Cong. Rec. 2678 (Mar. 2, 1897) (Rep. Mondell objecting that "they have reserved these vast areas" as forest reserves within Montana); *id*. (Rep. Gamble objecting to "immense area" of forest reserves in South Dakota); 30 Cong. Rec. 909-10 (May 6, 1897) (Sen. Wilson expressing concern about large reservations in Washington). When debating the Antiquities Act, numerous members of Congress expressed their concern about the potential for the President to "lock[] up" large swaths of land using this authority, and were repeatedly assured that the bill would not permit this.[29]

[29]*See, e.g*., 40 Cong. Rec. 7888 (1906) (Rep. Lacey representing that the bill would not take much land "off the market" and would, in this respect, be different from the Forest Reserve Act); Hearings Before the Committee on Public Lands for Preservation of Prehistoric Ruins on the Public Lands, 59th Cong. 11 1905) (Rep. Lacey confirming that the bill's language permitting withdrawal of "only the land necessary for such preservation" in bill would limit withdrawals to "a very small amount."); *id*. at 17 (colloquy between Rep. Rodey and Edgar Hewett that the bill would not result in an "over-reservation" of land, and noting that with respect to the timber reserves, "too much has been withdrawn; but the Department has gone to work to lop off and turn back what is not necessary"); H.R. Rep. No. 59-2224 at 1 (emphasizing that the bill "proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times").

Thus, while Congress intended to preserve objects of historic significance, it firmly intended to ensure unnecessarily large amounts of land for monuments were not reserved. The President's issuance of Proclamation 9681 falls squarely within the purpose of the statute.

D. There Is a Longstanding and Extensive History of Presidential Modification of Monument Boundaries, and Congressional Acquiescence to this Practice.

Presidents have modified monument boundaries to exclude lands at least eighteen times, with the first modification taking place only five years after the passage of the Antiquities Act. Defs. Br. 30-31. That modification was based, like Proclamation 9681, on the President's finding that the original reservation covered "a much larger area of land than is necessary to protect the objects for which the Monument was created." Proc. 1167, 37 Stat. 1716 (July 31, 1911). Certainly, eighteen modifications over many decades qualifies as the "longstanding 'practice of the government,'" which can "inform [a court's] determination of 'what the law is.'" *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (quoting *McCulloch v. Maryland*, 4 Wheat 316, 401 (1819)); *Al-Bihani v. Obama*, 619 F.3d 1, 26 (D.C. Cir. 2010).

The UDB Plaintiffs emphasize that congressional acquiescence cannot create authority for action not authorized by Congress. But this mischaracterizes Federal Defendants' argument, which is that Congress' refusal to address the longstanding practice of Presidential modification of monuments *corroborates* their statutory argument, described above.

Plaintiffs assert, based on a few contrary statements, that Executive Branch interpretation has not been sufficiently consistent to support the Federal Defendants' congressional acquiescence argument. UDB Br. 36-37. But the Supreme Court has emphasized that it has "treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute." *Noel Canning*, 134 S. Ct. at 2560. Further, those instances where the Court has not found a "particularly longstanding practice" are quite distinct. *See Medellin v.*

Texas, 552 U.S. 491, 532 (2008). For instance, in *Medellin*, the Court found congressional acquiescence not applicable when the action at issue was described by the "United States itself . . . as 'unprecedented action,'" and was unable to identify a single, parallel instance. *Id.* This stands in marked contrast to the situation here.

Moreover, the handful of data points identified by Plaintiffs, suggesting that in the mid-1920s, there was some question within the Department of the Interior about the scope of the President's authority, do not undermine the long history of Presidents *actually exercising* their modification authority. In 1924, Interior's Solicitor opined, in cursory fashion, that the President lacked statutory authority to restore lands from two specific monuments "to entry" (e.g., to claims by homesteaders, miners, and others).[30] M. 12501 and M. 12529 at 1(June 3, 1924). The 1925 request by *Interior* for legislation clarifying *presidential* authority to restore monument reservations to the public domain resulted from this cursory, unsupported opinion.

But multiple other federal officials concluded the opposite. Much closer to the Act's passage, the Interior Solicitor opined in 1915 that the President possessed authority to modify the boundaries of the Mount Olympus National Monument. Solicitor's Opinion of Apr. 20, 1915. And in 1935, the Solicitor reviewed all prior opinions, and prepared a detailed legal analysis (unlike the 1924 Opinion) concluding that the three proclamations reducing Mount Olympus National Monument were valid. Solicitor's Opinion, M. 27657 (Jan. 30, 1935). He opined that, like the withdrawal authority upheld by the Supreme Court in *United States v. Midwest Oil Co.*,

[30]Plaintiffs also cite an 1932 Interior Solicitor's Opinion, M. 27025, quoting it as noting that the Attorney General had previously opined that "in the absence of authority from Congress the President may not restore to the public domain lands which have been reserved for a particular purposes." UDB Br. 37. But the opinion was not addressing this particular question—and this statement, made in passing, directly conflicts with both a Solicitor's Opinion issued only three years later, and the Attorney General's 1938 opinion, discussed *supra*.

236 U.S. 459 (1915), the "history of Executive Order national monuments and analogous Executive order Indian reservations shows a similar long continued exercise of the power to reduce the area of these reservations by the President with the acquiescence of Congress." M. 27657 at 4. He noted that more than 23 such orders had been issued for Executive Order Indian reservations, and that eight national monument reductions had been issued between 1909 and 1929. Since "Congress has made no objection to these orders, and so far as it has been determined it has continued to appropriate money for the administration of the reduced areas," the Solicitor concluded that there was an implied power to reduce monument reservations. *Id.* at 5. Again, in 1947, the Solicitor concluded that the President is authorized to reduce the area of national monuments. M-34978, 60 Interior Dec. 9 (1947). Thus, the opinion of an Interior official in 1924 cannot overcome the more consistent contrary opinions by executive officials—and extensive evidence of actual exercise of this authority by numerous Presidents.

Plaintiffs also assert that the "eighteen prior modifications are clearly distinguishable" for a variety of reasons. UDB Br. 41. This contention is irrelevant: if the President had authority to modify monuments eighteen prior times, there is no reason why he lacks it here. Moreover, Plaintiffs are wrong that the prior modifications are materially different from Proclamation 9681. Just five years after the Act's enactment, President Taft invoked the Act to reduce the Petrified Forest National Monument from 60,776 acres to 35,250.42 acres (a 42% reduction).[31] Proc. 1167; NPS Monuments List, *supra* n.31. Similarly, President Wilson diminished Mount

[31]Similarly, President Taft reduced the Navajo National Monument from what the National Park Service has calculated as an original size of 160 *square miles*, to three parcels, comprising 380 *acres,* after finding that the original proclamation reserved "a much larger tract of land than is necessary." Proc. 1186, 37 Stat. 1733 (Mar. 14, 1912); Nat'l Park Serv., Archeology Program, Monuments List ("NPS Monuments List"), *available at* https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited Dec. 7, 2018).

Olympus National Monument in 1915 by nearly 300,000 acres, almost a 50% diminishment of the original monument. Proc. 1293; NPS Monuments List. Finally, that some prior reductions were smaller in size necessarily flows, in part, from the enormous size of the Monument when compared to the vast majority of other monuments established under the Act. *See generally* NPS Monuments List.[32] Finally, while UDB claims that some modifications purported to rely on a separate grant of power, every one of the relevant Proclamations invoked the Antiquities Act. *See* App'x at US_APP0010-45.

Plaintiffs' next argument, relying on the enactment of FLPMA (and its express prohibition of *the Secretary* modifying any withdrawal creating a national monument), ultimately is conclusive, but contrary to Plaintiffs' position. In FLPMA, Congress acted to comprehensively govern the executive branch's withdrawal and reservation authority. In Section 1714, FLPMA addresses the Secretary of the Interior's authority. Subsection 1714(j), relied upon by Plaintiffs, does not focus on monuments alone, but comprehensively establishes limits on the Secretary's withdrawal authority:

> (j) Applicability of other Federal laws withdrawing lands as limiting authority
> The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments under chapter 3203 of title 54; or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. . . .

[32]The Tribes refer to several instances where proposals purportedly providing Presidential authority to undo monument designations or restore monument lands to the public domain were not enacted. Tribes Br. 35. But "'[n]on-action by Congress is not often a useful guide" to statutory interpretation, . . . , because '[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others.'" *Citizens for Resp. & Ethics v. FEC*, 316 F. Supp. 3d 349, 410 (D.D.C. 2018) (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) & *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001)), *appeal docketed,* No. 18-5261 (D.C. Cir. Aug. 30, 2018). For instance, Congress may have not enacted such legislation because it believed the Act already provided that authority—which would be consistent with the fact that both before and after these proposals, the President did just that.

43 U.S.C. § 1714(j).

Elsewhere, FLPMA deliberately and specifically addresses (and limits) the President's authority. In Section 704(a), FLPMA expressly repealed all "implied authority of the president to make withdrawals and reservations resulting from acquiescence of the Congress"—and also repealed, in part or entirely, 30 specific statutes addressing withdrawal and reservation authority. Pub. L. No. 94-579, § 704(a), 90 Stat. 2743 (1976). FLPMA did not, however, limit the authority of the President to modify "any withdrawal creating national monuments under chapter 3203 of title 43." *Cf. id.* Under these circumstances, FLPMA must be interpreted as continuing Congress' acceptance and acquiescence to the President's authority to modify national monuments. *Nat'l Ass'n of Broadcasters v. FCC (NAB)*, 569 F.3d 416, 421 (D.C. Cir. 2009) (noting that an "omission is intentional where Congress has referred to something in one subsection but not in another").

Plaintiffs, in an about-face from their earlier argument, contend that their portrayal of the legislative history should override FLPMA's plain language and unambiguous context. Their argument completely contravenes the "first canon" of statutory construction—"that courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 818 (D.C. Cir. 2008); *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (explaining that "rebutting the presumption created by clear language is onerous" (internal quotation omitted)).

But even ignoring this canon, none of Plaintiffs' convoluted theories adequately explain why Congress chose to expressly clarify that the Secretary did not have monument modification authority—and yet, despite allegedly intending the same for the President—inexplicably failed to

make that limitation clear in the statute.[33] Plaintiffs argue that the House Report for FLPMA indicated that, under the statute, Congress alone would have authority to modify monument withdrawals. UDB Br. 29 (citing H.R. Rep. No. 94-1163 at 9). But as the Supreme Court has emphasized, "courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point." *Shannon v. United States*, 512 U.S. 573, 584 (1994) (internal quotation omitted). *See also Overseas Educ. Ass'n. v. FLRA*, 876 F.2d 960, 974 (D.C. Cir. 1989) (Buckley, J., concurring) (discounting "the reliability of legislative history," including committee reports, "as a tool of statutory construction").

Indeed, the D.C. Circuit rejected an argument similar to Plaintiffs' in *NAB*, 569 F.3d at 418–19. At issue there was the FCC's authority to regulate distance separations between four types of FM radio stations under the Radio Broadcasting Preservation Act ("Preservation Act"), which "restricted the [FCC's] authority to eliminate or reduce those separations in only one category, third-adjacent channels." *Id.* at 421. Plaintiff NAB argued that the Preservation Act should be deemed to also restrict the FCC's authority for the other categories of stations based on, inter alia, the Preservation Act's legislative history. Like Plaintiffs here, NAB referred to a statement from the legislative history indicating "the bill *maintains Congressional authority* over any future changes made to the interference protections that exist in the FM dial today." *Id.* (quoting 146 Cong. Rec. 5,611 (2000)). But the court rejected the argument—relying instead on analysis of the language and structure of the statute. *Id.* at 422 (reasoning that "an omission is intentional where Congress has referred to something in one subsection but not in another"). The court rejected NAB's "evidence that Congress had a broader purposes" because the statement

[33]Of course, to the extent Congress now thinks that FLPMA should be amended to revisit this issue, it is clearly within Congress' power to do so.

had "no statutory reference point." *Id.* (quoting *Shannon*, 512 U.S. at 583-43).

So too here. Congress' express restriction of the Secretary's authority to modify monuments, and its restriction of other withdrawal authority of the President, demonstrates that its decision not to restrict the President's monument modification authority was intentional. And the statement that Congress had a broader purpose of maintaining *all* modification authority for itself, like in *NAB*, "appears nowhere in the statute." 569 F.3d at 422.

The UDB Plaintiffs refer to isolated statements in the legislative history of the Alaska National Interest Lands Conservation Act ("ANILCA"). But ANILCA's legislative history cannot be relied upon to interpret earlier-enacted statutes. *See Consumer Prod. Safety Comm'n. v. GTE Sylvania, Inc*., 447 U.S. 102, 117–18 (1980) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (quotation omitted); *U.S. ex rel. Long v. SCS Bus. & Tech. Inst., Inc*., 173 F.3d 870, 878–79 (D.C. Cir. 1999) ("Post-enactment legislative history . . . becomes of absolutely *no significance* when the subsequent Congress (or more precisely, a committee of one House) takes on the role of a court and in its reports asserts the meaning of a prior statute.") (emphasis added). This is even more the case because ANILCA did not address modification authority for national monuments. *See* Pub. L. No. 96-487, 94 Stat. 2371 (1980).[34]

Finally, the Tribes argue that Congress' addressing of monuments created by the

[34]Furthermore, at least some of the statements cited by Plaintiffs are of limited significance, as they appear to address whether a monument is "permanent," *i.e.*, whether it could be repealed in its entirety, rather than whether it could be modified. UDB Br. 40. UDB similarly seeks to rely on briefs filed in *Alaska v. United States*, but those briefs likewise only re-stated the United States' continuing position, that monuments are "permanent" in that they cannot be completely abolished by unilateral action of the President. *See* Reply Br. Resp. Exceptions of State of Alaska, 23 n.20, *available at* https://www.justice.gov/osg/brief/original-alaska-v-united-states-opposition (last visited Dec. 10, 2018).

President shows that it "retained for itself authority" over monuments after they were established. Tribes Br. 34 (noting that Congress transformed numerous monuments into national parks, and revoked others). *Id.* But the fact that Congress found it necessary to convert certain national monuments "into some of America's most cherished national parks," *id.*, if anything, indicates Congress' recognition of the need to specifically convert such lands to permanent national parks, in light of the President's modification authority. In any case, Plaintiffs do not argue that Congress' continued exercise of authority that it delegated to the President somehow acts to revoke that delegation.

In sum, Plaintiffs cannot rebut Congress' longstanding acquiescence to the President's exercise of modification authority under the Antiquities Act, and their claims fail.

E. The President's Exercise of Discretion in Modifying the Monument Boundaries is not Reviewable.

The Plaintiffs' alternative allegation, that the Proclamation violated the President's modification authority under the Antiquities Act, also fails as a matter of law. Judicial review of presidential action under the Antiquities Act is extremely limited, and allows at most a determination of whether the President, on the face of the Proclamation, exercised his authority in accordance with that Act's standard. Defs. Br. 27-28. *See also Mountain States*, 306 F.3d at 1137; *Tulare*, 306 F.3d at 1141. The Proclamation concludes that the original boundaries of the monument do not reflect "the smallest area compatible with the proper care and management of those objects . . . ." 82 Fed. Reg. at 58,089-90, and therefore adheres to the statutory standard. *See Tulare*, 306 F.3d at 1141.

Plaintiffs claim, however, that even assuming modification authority, the degree of the modification (by approximately 85%) imposed by the Proclamation renders it an abuse of discretion. UDB Br. 44; NRDC Br. 17. But Plaintiffs cannot rely upon such broad contentions

to seek review of a Presidential action under the Antiquities Act. *See Tulare Cty*, 306 F.3d at 1142 (finding insufficient allegations that "the Monument includes too much land, i.e., that the President abused his discretion by designating more land than is necessary to protect the specific objects of interest"). Furthermore, while the D.C. Circuit left the question open, it strongly suggested that the separation of powers concerns inherent in review of discretionary presidential action may "bar review for abuse of discretion altogether." *Mountain States*, 306 F.3d at 1135; *see also Utah Ass'n of Ctys v. Bush*, 316 F. Supp. 2d 1172, 1183 (D. Utah 2004) ("When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion." (citing *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940))).

Plaintiffs also argue that the Proclamation did not just diminish the Monument, but also "excludes numerous landmarks, objects, and structures that President Obama specifically declared to be national monuments . . . ." UDB Br. 44. *See also* NRDC Br. 17-18; Tribes Br. 23. But modifying monument boundaries such that some "objects" no longer fall within it is consistent with the Antiquities Act, to the extent excluded lands are not necessary for the objects' protection. *See* 54 U.S.C. § 320301(b) (reservation must be "confined to the smallest area compatible with the proper care and management of the objects *to be protected*") (emphasis added). Indeed, Presidential modifications of monuments did so in the past. *See, e.g.,* Proc. 1191 (diminishing monument established by Proc. 1186 to protect "all prehistoric cliff dwellings, pueblo and other ruins and relics of prehistoric peoples, situated upon the Navajo Indian Reservation" to three parcels, comprising 360 acres, surrounding three specific sites); Proc. 1293 & H. Graves, Mem. Report, 8-9 (Jan. 20, 1915), cited in M. 27657 (removing over 300,000 acres from the Mt. Olympus National Monument, including portions of both the summer range and the

breeding grounds of Olympic Elk, which were initially identified for protection in Proclamation 869); Proc. 3486 (removing spring caves from Natural Bridges National Monument); Proc. 3539 (excluding "the detached Otowi section of the monument approximately 3,925 acres of land containing *limited* archeological values which have been *fully researched and are not needed* to complete the interpretive story of the Bandelier National Monument" (emphasis added)).

Plaintiffs' allegations fail to demonstrate the President's exercise of his discretion was inconsistent with this past practice or his authority under the Antiquities Act. While the Plaintiffs argue that "tens of thousands of historical objects" and "archaeological and historic sites that evidence human habitation and activity over the millennia" were improperly excluded from the Monument, Tribes Br. 11, 29, they do not identify any specific objects that were specifically identified as such in the 2016 Proclamation. For instance, while the NRDC Plaintiffs argue that "monument status was stripped" from "Farm House Ruin, Tower Ruin, and Fry Canyon Ruin," NRDC Br. 18, these sites are not mentioned in the 2016 Proclamation. *See* 82 Fed. Reg. at 1139-47. In contrast, sites that the 2016 Proclamation did identify, such as the Lime Ridge Clovis Site, Doll House Ruin, Moon House Ruin, Newspaper Rock, and most of the Moki Steps, remain within the Monument. *See id.* at 58083-85. Similarly, while Plaintiffs also characterize certain landscape features as "objects" that are now outside of the Monument, several remain within its boundaries, including portions of Cedar Mesa and the Hole-in-the-Rock trail.[35] Supp. Decl. ¶¶ 23-24.

Proclamation 9681 does exclude lands containing certain landscape features or areas that were expressly referenced in the 2016 Proclamation, including the Valley of the Gods, Hideout

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[35]Notably, only portions of the Hole-in-the-Rock trail were included in the Monument as originally established.

Canyon, "the Elk Ridge area," and the San Juan River.[36] But the 2016 Proclamation does not expressly identify some of these features as "objects."[37] And for other excluded landscape features, such as Valley of the Gods and Hideout Canyon, that were characterized as objects under the 2016 Proclamation and excluded from the Monument, Proclamation 9681 explains that these (and examples of other, more generic objects) are adequately protected by existing law or other special designations and therefore did not need to remain within the Monument. For instance, the Proclamation explains that Valley of the Gods is protected by an administratively designated "Area[] of Critical Environmental Concern." *Id.* Under this designation, BLM manages the area to preserve the scenic character of the landscape and minimal visual change from human activities is allowed. Supp. Decl. ¶ 25. It is also off-limits to mineral leasing and the disposal of mineral materials. *Id.* Similarly, the Proclamation explained that "Hideout Canyon is generally not threatened and is partially within a [WSA]." 82 Fed. Reg. at 58,084. WSAs must be managed "so as not to impair their suitability for future congressional designation as Wilderness." 43 U.S.C. § 1782(c).

Consistent with prior practice discussed above, the President's determination that "[s]ome of the existing monument's objects, or certain examples of those objects, are not within the monument's revised boundaries because they are adequately protected by existing law, designation, agency policy, or governing land-use plans" was within his discretion. *See* 82 Fed.

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[36]The UDB Plaintiffs assert that the 2016 Proclamation specifically mentioned Fry Canyon. UDB Br. 44. It did not. *See* 82 Fed. Reg. 1139-46.

[37]For instance, Elk Ridge, or the "Elk Ridge area," is described as providing examples of habitat for certain types of flora and fauna. 82 Fed. Reg. at 1141, 1142. Similarly, Cedar Mesa is described as a landscape feature providing examples of areas with paleontological and wildlife resources, but most importantly, the location of the Moon House Ruin. *Id.* at 1139. The Moon House Ruin remains a protected object under Proclamation 9681. 82 Fed. Reg. at 58,083, 58,085.

Reg. at 58,084. The Court should reject Plaintiffs' request to second-guess the President's exercise of this discretion. *See George S. Bush & Co.*, 310 U.S. at 380.

IV. Plaintiffs' Allegations that the Proclamation Violated the Constitution Fail to State a Claim.

Plaintiffs' various constitutional claims—which duplicate their *ultra vires* claims—should be dismissed. *See* Defs. Br. 39-41. Congress delegated authority to modify monument boundaries to the President in the Antiquities Act, and the President's exercise of this authority therefore cannot violate any constitutional principle. *Id.* But even if this were not the case, as demonstrated in Federal Defendants' opening brief, the claims fail on their own terms. *Id.*

Plaintiffs' opposition briefs do not show otherwise.[38] In fact, Plaintiffs admit that their constitutional claims are all founded on the same allegations as their *ultra vires* claims. *See* Tribes Br. 42 (asserting "the President simply does not have the power he asserts here"); UDB Br. 45 (asserting that President revoked "protections for public lands *without authorization*") (emphasis added). They should be dismissed for that reason alone. *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996) (declining to address constitutional claim addressing FCC order when its validity could be addressed on statutory basis); *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 40 (D.D.C. 2018) (dismissing separation of powers count because their statutory claim alleged "the same infirmities that underlie their separation of powers claim"). Recognizing this, the NRDC Plaintiffs assert that their constitutional claim need not be dismissed given the ability to pursue

[38] Indeed, UDB disavows its "Take Care clause" count, and it therefore should be dismissed. *See* UDB Br. 45 n.12.

alternative theories of liability. NRDC Br. 15-16 (citing *Scott v. District of Columbia*, 101 F.3d 748, 753 (D.C. Cir. 1996)). But *Scott* does not address this issue, and Plaintiffs provide no reason why the Court should not dismiss their indisputably duplicative constitutional claims, given the "fundamental principle that courts should avoid adjudicating constitutional questions if it is unnecessary to do so." *Colm v. Vance*, 567 F.2d 1125, 1132 n.11 (D.C. Cir. 1977).

Even if this judicial canon could be avoided, Plaintiffs fail to allege a cognizable separation of powers violation. They provide no authority supporting their contention that a separation of powers claim could exist under the facts alleged. Other than the Tribes (as addressed above), they do not, for instance, argue that the President acted under an authority that was not governed by "an intelligible principle." Defs. Br. 39 (citing *Whitman*, 531 U.S. at 472). In light of Congress' proper delegation of its authority, and the President's invocation of that authority, there is no separation of powers concern or violation of the Property Clause here. *See Mountain States*, 306 F.3d at 1136-37; *UAC*, 316 F. Supp. 2d at 1184.

Finally, with respect to their Presentment Clause claim, the Tribes fail to rebut Defendants' argument that they do not, and cannot credibly, allege that the Proclamation somehow acted to "alter the text of any statute, repeal any law, or cancel any statutory provision, in whole or in part." Defs. Br. 40 (quoting *Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 124 (D.D.C. 2007)). Their response simply confirms that their actual challenge (addressed above) is that the Proclamation was inconsistent with the Antiquities Act—not that it amended the Act. *See* Tribes Br. 42.

V. Plaintiffs' APA Counts Fail to State a Claim.

The NRDC Plaintiffs and Tribes alleged claims under the APA but do not attempt to defend any claim to compel agency action under 5 U.S.C. § 706(1) and have no basis for their claim to set aside agency action under 5 U.S.C. § 706(2). *See* NRDC Br. 19-20; Tribes Br. 43

(incorporating NRDC brief).[39] Plaintiffs provide no authority for their astonishing claim that an agency's refusal to disobey a formal directive from the President constitutes a violation of the APA. *See, e.g.*, NRDC Br. 20 (alleging that final agency action has occurred because the Agency Defendants have "decided" to "follow" the Proclamation).

Plaintiffs have also failed to allege a final agency action as a foundation for pursuing their claim. The APA defines "agency action" to mean "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). *See* 5 U.S.C. § 701(2). In *SUWA*, 542 U.S. at 62, the Supreme Court emphasized that "agency action" encompasses only "circumscribed, discrete agency actions." An agency's recognition of legal authority is not "the equivalent" of any agency action identified in the statute, let alone a "discrete" agency action. *See El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 891 (D.C. Cir. 2014) ("a general follow-the-law directive . . . flunks *SUWA*'s discreteness test").

Moreover, to accept Plaintiffs' contrary position would render the APA's "final agency action" limitation meaningless. All of an agency's operations are conducted pursuant to some grant of authority and thus all could be said to embody a "decision" to recognize that authority as valid. And it is well established that an agency's ongoing implementation of the law, including changes in the law, does not constitute a discrete agency action. *See Nat'l Wildlife Fed'n*, 497 U.S. at 890. Here, to the extent the Agency Defendants could even be said to have made a

[39]The NRDC Plaintiffs made a "failure to act" allegation and claim for relief in their complaint. *See* NRDC Compl. ¶¶ 202, 205 & Prayer for Relief ¶ 4. This aspect of their claim should be dismissed because they have abandoned it in their briefing. *See* NRDC Br. 19. The Tribes similarly sought to compel agency action, Tribes Compl. ¶¶ 221, 226, but they do not cite § 706(1), or case law applying it, and the NRDC briefing they incorporate does not address that provision. *See* Tribes Br. 43; NRDC Br. 20.

"decision" to "follow" the Proclamation, NRDC Br. 20,[40] that choice is at best "[a] preliminary, procedural, or intermediate agency action . . . subject to review on the review of the final agency action" that results, 5 U.S.C. § 704—*i.e.*, the records of decision that will issue when the Agency Defendants adopt new management plans. *See Tulare*, 185 F. Supp. 2d at 28-29 (plaintiffs failed to state APA claim based on agency memorandum, interim management plan, and unspecified acts of agency's foresters).

Unsurprisingly, Plaintiffs fail to identify any support for their position that "following the law" is reviewable agency action under the APA. The NRDC Plaintiffs have incorporated the TWS Plaintiffs' arguments from *TWS v. Trump*, No. 17-cv-2587, and Federal Defendants have addressed those arguments in their reply on that docket. *See* Defs. Reply, *TWS v. Trump*, ECF No. 81. For all the same reasons cited there, Plaintiffs' premature attempt to challenge implementation of the Proclamation should be rejected.

CONCLUSION

Plaintiffs' Complaints should be dismissed.

Respectfully submitted this 13th day of December, 2018,

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[40]The 2017 Proclamation modified the 2016 Proclamation. They do not "conflict," NRDC Br. 20. Although Plaintiffs allege that the 2017 Proclamation was *void ab initio*, that is an allegation for the Court, and not the Agency Defendants, to decide.

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2018, I electronically filed the foregoing document and its attachments with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all parties.

/s/ Romney S. Philpott
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