IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOPI TRIBE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 1:17-cv-02590 (TSC)
UTAH DINÉ BIKÉYAH, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants,	Case No. 1:17-cv-2605 (TSC)
NATURAL RESOURCE DEFENSE COUNCIL, INC., *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 1:17-cv-2606 (TSC) **CONSOLIDATED CASES**
STATE OF UTAH, *et al.*, Defendants-Intervenors.	

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Pursuant to the Court's Order dated February 10, 2020, Defendants-Intervenors State of Utah, American Farm Bureau Federation, Utah Farm Bureau Federation, Brandon Sulser, Big Game Forever, Sportsmen for Fish & Wildlife, Utah Bowmen's Association, Utah Wild Sheep Foundation, Michael Noel, and Sandy and Gail Johnson file this memorandum supporting the Federal Defendants' cross-motion for partial summary judgment. For the reasons below, there are no genuine issues of material fact and the Defendants are entitled to judgment as a matter of law.[1]

I. Plaintiffs Would Have This Court Convert National Monuments Into De Facto National Parks.

Plaintiffs' unprecedented argument that Presidents can unalterably set aside federal lands through a unilateral national-monument proclamation conflates national monuments with national parks. Their position would eliminate the symmetry between the creation and subsequent modification of these two designations.[2] It would also contradict Congress's intent in passing the Antiquities Act and Congress's extensive practice of giving national monuments permanent protections through conversion to national parks.[3] Plaintiffs now seek those permanent protections not through congressional action, but through this litigation.

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[1] Where possible, Intervenors have incorporated Federal Defendants' arguments by reference as though fully set forth herein consistent with the Court's orders granting intervention. *See*, *e.g.*, Order, ECF 105, at 8.

[2] Several other federal land designations can be established only through the legislative process, e.g., wilderness areas, and can thus be modified only through that process. To the extent national monuments are similar to those designations, Plaintiffs' arguments would similarly undermine this symmetry.

[3] *See*, *e.g.*, *An Act to establish the Grand Canyon National Park in the State of Arizona*, Pub. L. No. 65-277, ch. 44, 40 Stat. 1175 (1919); *An Act to establish the Grand Teton National Park in the State of Wyoming*, Pub. L. No. 70-817, ch. 331, 45 Stat. 1314 (1929).

Legislative history and a century of practice undermine Plaintiffs' position. When Congress enacted the Antiquities Act in 1906, this distinction between monuments and parks would have been readily apparent. The first national park, Yellowstone, was established in 1872, and five others had been established by 1906.[4]

The Department of the Interior and the President sought the authority to establish national parks unilaterally and included such authority in their precursor proposals to the Antiquities Act.[5] But Congress rejected any suggestion that this authority be transferred to the Executive Branch.[6]

Instead, Congress passed a narrower bill authorizing the President to establish national monuments rather than national parks. Congress believed that presidential authority to promptly, and unilaterally, protect antiquities was necessary to protect them from immediate threats, like looting.[7] But Congress also recognized that permanent withdrawals of public lands for this purpose were unnecessary. According to the House Report accompanying the Antiquities Act, lands within national monuments could be permanently withdrawn only if Congress converted them into a national park.[8]

Post-Antiquities Act practice follows the process described in the House Report. Several times, Congress has converted national monuments to national parks when it wished to extend

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[4] *See, e.g.*, *An Act to set apart a certain Tract of Land lying near the Head-waters of the Yellowstone River as a public Park*, ch. 24, 17 Stat. 32 (1872).

[5] *See* Ronald F. Lee, *The Antiquities Act, 1900-06*, *in* Nat'l Park Serv., *The Story of the Antiquities Act* (2001), http://www.nps.gov/archeology/pubs/lee/Lee_CH6.htm.

[6] *Id.* (discussing Congress's refusal to pass five bills that would have granted the Secretary of the Interior broad authority for designating national parks).

[7] Lee, *supra*, n.5.

[8] H.R. Rep. No. 59-2224, at 7–8 (1906) ("[T]he permanent withdrawal of tracts of land from the public domain for the purpose of protecting ruins thereon would seem to be unnecessary except where the ruins are of such character and extent as to warrant the creation of permanent national parks.").

permanent protections to federal lands.[9] The debates over such laws, and the time Congress devoted to enacting them, show that Congress was doing much more than simply affecting a name change. Moreover, Presidents have regularly altered national monuments that lack such protections without any protest from Congress.[10] Thus, Presidents and Congress have long understood that the means by which national monument areas receive permanent protection is through the legislative process. Until that happens, they remain subject to a discretionary designation that can be modified at any time.

This distinction between national monuments and national parks is not merely semantic but has significant practical consequences. National monuments are much easier to establish but equally easy for subsequent Presidents to change. National parks, by contrast, are established through the legislative process and can be changed only in the same way. Thus, the process for designating and modifying each is symmetrical.

Ending that symmetry, as Plaintiffs urge, would have significant political consequences that should concern this Court. Consider the incentives of a President pursuing land protection under the symmetrical interpretation: He may take the easy route of designating a monument, in which case he runs the risk that the protections he prefers may be changed later. Or he may urge Congress to establish a national park, in which case he may not get exactly what he wants but can be more confident that the enabling legislation will endure. This trade-off restrains the President and helps to preserve Congress's primary authority over federal lands by encouraging the President to come to the table and seek compromise. Plaintiffs' theory, by contrast,

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[9] *See, e.g.*, Pub. L. No. 65-277, ch. 44, 40 Stat. 1175 (1919); Pub. L. No. 70-817, ch. 331, 45 Stat. 1314 (1929).

[10] *See, e.g.*, Proclamation No. 1186, 37 Stat. 1733 (Mar. 14, 1912); Proclamation No. 2499, 55 Stat. 1660 (July 18, 1941); Proclamation No. 3307, 73 Stat. C69 (Aug. 7, 1959); Federal Defs.' Br., ECF 169-1, at 42-51.

undermines the incentives for legislative compromise and weakens Congress' control over federal lands, seemingly antithetical to Plaintiffs' arguments that Congress alone can diminish federal land protections.

The same incentives exist for interest groups, like Plaintiffs and amici, who wish to withdraw some areas from commercial uses. They can urge unilateral executive action, with the realization that the area will be subject to the discretion of future presidents. Or they can pursue legislation, perhaps sacrificing some short-term goals to achieve codification of greater goals. Indeed, legislation that would have established portions of the Bears Ears National Monument as a conservation area was pending in Congress when the monument was created.[11] As this case amply illustrates, interested parties may regret taking the easier path based on the results of a subsequent presidential election. But that regret is no reason to eliminate the symmetry between how a monument or park is established and how each may be modified.

II. The President's Unique Monument-Designation Authority Encompasses Subsequent Reconsideration.

A. The power to take a discretionary action includes the power to revoke or modify that action.

The symmetry between the process for establishing and modifying national monuments is not unique to federal land regulation; it reflects a broader principle of American law. Discretionary actions are generally subject to modification or reversal through the same process used in the first instance.[12] Examples of this principle are numerous but one bears emphasis: Congress routinely delegates to federal agencies the discretionary power to issue regulations without also expressly including the power to repeal or modify them. Yet no one doubts that

[11] Utah Public Lands Initiative Act, H.R. Rep. No. 114-5780 (introduced July 14, 2016).

[12] *See* John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 Yale J. on Reg. 617, 639–47 (2018).

federal agencies have the authority to repeal or modify regulations. And, as with national-monument designations, the circumstances and policy priorities underlying a regulation may change, leading to its reform by the same agencies that issued the original regulation. Regulations are frequently revised with changes in presidential administrations.[13] When changes to existing regulations have been challenged alleging the relevant statute does not expressly authorize amendment or revocation, courts have rejected such arguments.[14]

This principle has a salutary influence on the Executive Branch's incentives. Due to broad delegations and indulgent delegation doctrines, the Executive can achieve many policy goals through unilateral regulation. But taking this easy approach means that a subsequent administration may undo the regulation based on its own policy goals. Alternatively, the President or an agency can pursue congressional legislation, perhaps accepting a compromise that might depart from the executive's ideal outcome in exchange for consensus that binds future presidents.

Plaintiffs argue that the Antiquities Act lacks an explicit reference to modify past monument designations. But the power to modify past discretionary actions is the default principle in American law. The burden is on Plaintiffs to show that Congress intended to upset this principle when passing the Antiquities Act. Their arguments are unpersuasive.

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[13] 80 Fed. Reg. 56,915 (Sept. 21, 2015) (final rule amending the Cuban Assets Control Regulations to implement elements of a new policy towards Cuba); 81 Fed. Reg. 91,702 (Dec. 19, 2016) (rule requiring Social Security Administration to report to the Attorney General certain Social Security recipients for inclusion on the National Instant Criminal Background Check System).

[14] *See, e.g.*, *Pennsylvania v. Lynn*, 501 F.2d 848, 856 (D.C. Cir. 1974) ("[I]t would be unreasonable to conclude, absent a clear indication," that an official cannot reconsider an early policy choice if he believes it is not serving its purposes adequately.).

First and foremost, Plaintiffs implicitly reject this general principle, arguing for its opposite. They argue, for instance, that because the Constitution's Property Clause places the power to regulate federal lands in Congress, any executive authority over federal lands must be construed narrowly.[15] But Plaintiffs fail to identify any unique requirement of the Property Clause. Rather, all agency regulations are based on an exercise of constitutional authority that belongs in the first instance to Congress, *e.g.*, the Commerce Clause. Thus, Plaintiffs' Property Clause distinction provides no relevant difference to distinguish this case from other instances in which courts have applied the general principle.[16]

Plaintiffs also argue that the Antiquities Act is unique for a variety of reasons and, therefore, this Court should construe it to silently withhold any authority for the President to reconsider past designations. On this argument, the statute's text is of no help to Plaintiffs. The Act not only requires regulations for national monuments to be updated "from time to time . . . for the purpose of carrying out the provisions of this Act," but it also obliges Presidents to limit monuments to the "smallest area compatible" with the relevant objects' protections.[17] Plaintiffs

[15] If this argument has purchase, it must apply to *all* executive power over federal lands. Thus, the President's designation of a national monument and its size would similarly have to be narrowly construed. *See, e.g.*, 54 U.S.C. § 320301(b) (requiring monument boundaries to be the smallest area compatible with the protection of certain objects). However, courts have uniformly interpreted the *President's* authority over federal lands in these contexts broadly, giving this case a "what's good for the goose is good for the gander" quality. *See United States v. California*, 436 U.S. 32 (1978); *Cappaert v. United States*, 426 U.S. 128, 141–42 (1976); *Cameron v. United States*, 252 U.S. 450 (1920). *See* NRDC Memo, ECF 165-1, at 1, 20.

[16] Moreover, Plaintiffs' argument would undermine Congress's primacy over federal lands. As explained above, that executive actions can be reversed preserves Congress's influence by encouraging the President to seek legislative compromise where possible. Plaintiffs' argument, however, would give greater effect to unilateral executive action while undermining Congress, which cannot act without presidential cooperation thanks to the veto.

[17] Antiquities Act of 1906, Pub. L. No. 59-209, ch. 3060, 34 Stat. 225 (1906), *codified at* 54 U.S.C. §§ 320301–320303 (2018); Federal Defs.' Br., ECF 169-1, at 32-35.

argue that this latter obligation only applies at the time of designation but, contrary to Plaintiffs' position, Presidents have long construed this as an ongoing obligation, both expanding and contracting monument boundaries as circumstances require.[18] If the "smallest area compatible requirement" only applies at the time of designation, then future presidents could never reduce even a clearly illegal monument designation.[19]

The Antiquities Act's legislative history also contradicts Plaintiffs' argument, as it acknowledges that national monuments receive permanent protections only when Congress elevates them to national parks.[20] If Congress had departed from the general principle it would have said so, yet Plaintiffs have not identified anything in the text or legislative history that supports their argument. The absence of any supporting statements is especially conspicuous here since Plaintiffs' theory is that Congress silently rejected application of the general principle—an unprecedented step.

B. The statutes cited by Plaintiffs do not demonstrate that Congress must explicitly delegate the power to modify a prior land use decision.

Plaintiffs instead appeal to other statutes which they contend show that, in the federal land context, the President has authority to reconsider past decisions only if Congress grants it explicitly.[21] However, for each of the examples cited, Plaintiffs' argument misconstrues those other statutes and the implications they create.

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[18] Proclamation No. 1186, 37 Stat. 1733 (Mar. 14, 1912); Proclamation No. 2499, 55 Stat. 1660 (July 18, 1941); Proclamation No. 3307, 73 Stat. C69 (Aug. 7, 1959).

[19] Plaintiffs overstate the consequences of properly interpreting the "smallest area compatible" requirement. Nothing would require Presidents to continually review every monument in the United States. As with other discretionary decisions, reconsidering past presidential designations is also discretionary. A proper interpretation of the Antiquities Act preserves a President's authority to correct past mistakes.

[20] *See* H.R. Rep. No. 59-2224, at 7.

[21] UDB Memo, ECF 164, at 29–30.

Plaintiffs' reliance on the Pickett Act is curious because that statute directly rebuts their argument. Nothing in the Pickett Act explicitly authorized the President to modify or revoke a prior withdrawal decision.[22] Yet the existence of this power is undeniable. Indeed, the statute's text acknowledges this power by implication, thereby undermining Plaintiffs' position that Congress must explicitly grant a power to modify public lands decisions. The Pickett Act authorized "temporar[y] withdraw[als]" that would expire if "revoked by [the President] or by an Act of Congress."[23] By referring to a presidential revocation authority nowhere granted in the statute, the Pickett Act confirmed the general principle's application to federal lands. The absence of similar language in the Antiquities Act no more suggests that the President lacks power to modify existing monuments than it suggests Congress cannot modify existing monuments through new legislation.[24]

Similarly unhelpful are the statutes that expressly address revocation authority because Congress required it to be exercised in certain circumstances. The Reclamation Act of 1902 contains an explicit revocation authority because Congress *required* the executive branch to revoke past withdrawals when they no longer served the statute's purpose.[25] So too for the Federal Water Power Act, which directed the Secretary of the Interior, when certain conditions are met, to declare lands reserved by the Act itself open to location, entry, or selection.[26] That Congress expressly provides when an executive branch official *must* reverse a discretionary

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[22] *An Act to authorize the President of the United States to make withdrawals of public lands in certain cases*, Pub. L. No. 61-303, ch. 421, 36 Stat. 847 (1910).

[23] *Id*. at 847.

[24] Richard H. Seamon, *Dismantling Monuments*, 70 Fla. L. Rev. 553, 591 (2018).

[25] Pub. L. No. 57-161, ch. 1093, § 3, 32 Stat. 388, 388.

[26] Pub. L. No. 66-280, ch. 285, § 24, 41 Stat. 1063, 1075–76 (1920).

decision under other statutes implies nothing about the discretionary power to do so under the Antiquities Act.

The other acts cited by Plaintiffs are similarly unpersuasive.[27] Many of these acts involve Congress delegating to the President the power to revoke withdrawals made by other entities.[28] The remaining acts cited by Plaintiffs demonstrate the opposite of Plaintiffs' contention. Two of these acts explicitly alter the President's modification authority by placing conditions on how the President can revoke a previous withdrawal.[29] The acts thus implicitly recognize that the President has the power to revoke previous land use decisions because it places limits on the President's use of that power.[30]

The Sundry Civil Appropriations Act of 1897, commonly referred to as the Forest Service Organic Act, also recognizes the general principle that discretionary actions are generally subject to modification. As the Federal Defendants' brief explains, this act does

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[27] UDB Memo, ECF-164, at 30 n.3.

[28] *See* Act of May 14, 1898, ch. 299, § 12, 30 Stat. 409, 414 (expressly granting the authority to discontinue land districts in Alaska previously established by Acts of Congress, Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26; and Act of July 24, 1897, ch. 14, § 4, 30 Stat. 215, 215); Act of August 19, 1935, Pub. L. No. 74-286, ch. 561, § 4, 49 Stat. 660, 661 (clarifying that lands the Secretary of the Interior causes to be withdrawn may be revoked by the President); Act of July 5, 1884, ch. 214, § 1, 23 Stat. 103, 103 (conferring power to transfer jurisdiction of lands to a certain agency, rather than merely the power to revoke a reservation).

[29] Act of October 2, 1888, ch. 1069, 25 Stat. 505, 527 (delegating the power to close certain lands designated for irrigation purposes "to entry, settlement or occupation until further provided by law" and then delegating the limited authority to open those lands to homesteading only); Act of May 28, 1940, Pub. L. No. 76-532, ch. 220, § 1, 54 Stat. 224, 224 (providing the conditions for revoking withdrawal including a requirement to give "reasonable notice . . . through the Department of the Interior").

[30] The Boulder Canyon Project Act is similarly distinguishable. Boulder Canyon Project Act, Pub. L. No. 70-642, ch. 42, § 9, 45 Stat. 1057, 1063 (1928). Like the Reclamation Act of 1902, it requires the Secretary of the Interior to open certain lands under certain conditions and, like the acts cited above, it places limits on how the Secretary can open those lands, namely by opening up more than one hundred sixty acres at a time. *Id.*

authorize the President to revoke or modify past decisions, but it makes clear that this language was merely confirming authority that Congress believed the President already had.[31]

C. The 1938 Attorney General opinion is irrelevant to this case.

Finally, Plaintiffs rely on an Attorney General opinion authored 32 years after the adoption of the Antiquities Act.[32] Plaintiffs' reliance on this opinion is misplaced because the opinion concludes that Presidents have the power to reduce the size of previously established monuments, which is the authority at issue here.[33] The opinion also concludes that previously established monuments cannot be revoked but that is irrelevant to this case.

The number and percentage of acres removed from a monument does not change a reduction into a revocation. Indeed, past Presidents have significantly reduced the size of monuments. President Eisenhower reduced the reservation for the Great Sand Dunes National Monument by 25%.[34] President Truman diminished the reservation for Santa Rosa Island National Monument by almost half.[35] Presidents Taft, Wilson, and Coolidge collectively reduced the reservation for Mount Olympus by almost half, the largest by President Wilson in 1915 (cutting 313,280 acres from the original 639,200-acre monument).[36] The largest percentage reduction was the previously mentioned modification to the Navajo National Monument by President Taft in 1912, which was a 90% reduction.

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[31] Federal Defs.' Br., ECF 169-1, at 39-41.

[32] Tribal Plaintiffs Memo at 23 (citing Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185 (1938)).

[33] 39 Op. Att'y Gen. at 188.

[34] Proclamation No. 3138, 70 Stat. C31 (June 7, 1956).

[35] Proclamation No. 2659, 59 Stat. 877 (Aug. 13, 1945).

[36] Gail H. E. Evans, *Historic Resource Study: Olympic National Park, Appendix A: A Chronology of the Public Domain*, Nat'l Park Serv. (1983);[36] Proclamation No. 1186, 37 Stat. 1733 (Mar. 14, 1912).

Here, after the President's action, Bears Ears National Monument contains more than 200,000 acres—an area larger than 75% of national monuments.[37] A decision to focus protections on 200,000 acres is far different from a decision to eliminate protections entirely. The Bears Ears National Monument was not revoked, as Plaintiffs contend; it was merely reduced.

Regardless, the President *can* revoke a national monument and the 1938 opinion is simply wrong on this point.[38] Any review of the cursory and error-ridden 1938 opinion undermines its persuasiveness and leads to the opposite conclusion. Among his mistakes, Attorney General Cummings argued that revoking a single monument would be tantamount to revoking an act of Congress.[39] Just as an agency does not repeal a statute when it revokes a regulation previously issued under that statute, the President would not repeal the Antiquities Act by revoking a monument.

Additionally, the 1938 opinion misunderstood and misapplied an earlier Attorney General opinion from 1862. The 1862 opinion predated the Antiquities Act by many decades and interpreted a different set of laws relating to a transfer of title from the federal government to squatters and other settlers.[40] Even worse, the 1938 opinion misstates the relevant holding of the 1862 opinion.[41] Namely, the 1862 opinion acknowledges that the War Department could

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[37] National Park Service, Antiquities Act: 1906–2006, Maps, Facts, & Figures. *Available at* https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited Feb. 20, 2020).

[38] *See* Yoo & Gaziano, 35 Yale J. on Reg. at 660–65.

[39] 39 Op. Att'y Gen. at 187 ("The Attorney General expressed the view that the reservation made by the President under the discretion vested in him by the statute was in effect a reservation by the Congress itself . . . .").

[40] Rock Island Military Reservation, 10 Op. Att'y Gen. 359 (1862).

[41] *See* Yoo & Gaziano, 35 Yale J. on Reg. at 636.

abandon a previously established military reservation.[42] The 1862 opinion actually lends support to the argument that the President can abandon a previous monument designation. Therefore, even if it were reasonable to believe that the President revoked the Bears Ears National Monument, the 1938 opinion does not provide persuasive support that such action would be illegal.

III. FLPMA Did Not Alter The Previously Accepted Practice Of Presidents Modifying Their Predecessors' National Monuments.

Finally, Plaintiffs argue that the Federal Land Policy and Management Act (FLPMA) limits the President's authority to reduce the size of national monuments.[43] When Congress passed FLPMA, it was aware of the routine practice of presidents modifying a preceding president's national monuments. If Congress had wanted to alter that practice, as it did with other withdrawals, it would have said so. Instead, it left in place the Antiquities Act.[44] Therefore, FLPMA did not disturb the President's power—well established by 1976—to make, modify, and revoke national monuments.

FLPMA authorizes the Secretary of the Interior to withdraw federal lands for a variety of purposes and to revoke or modify past withdrawals.[45] But it authorizes the Secretary neither to establish national monuments nor to modify or revoke them.[46] In plain contravention of the

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[42] 10 Op. Att'y Gen. at 361.

[43] UDB Memo at 32–33.

[44] *See* Pub. L. No. 94-579, § 704, 90 Stat. 2743, 2792 (1976).

[45] 43 U.S.C. § 1714(j).

[46] *Id.* *See also* Federal Defs.' Br., ECF 169-1, at 49.

statute's text, Plaintiffs argue that FLPMA's prohibition on "the Secretary" modifying national monuments should be read to mean "the Secretary and the President."[47]

Not only is this bad statutory interpretation, but it creates more problems than it might solve for Plaintiffs. For instance, FLPMA also limits "the Secretary's" authority to withdraw areas exceeding five thousand acres to "a period of not more than twenty years[.]"[48] If "the Secretary" means "the Secretary and the President," as Plaintiffs contend, the original monument designation is unlawful. The original Proclamation purports to withdraw areas exceeding five thousand acres for more than twenty years.[49] Plaintiffs cannot decide that some portions of FLPMA's withdrawal section apply to the President and others do not.[50] The better reading is that FLPMA's restriction on the Secretary to modify monuments only applies to the Secretary.

Furthermore, Plaintiffs' position is at odds with the underlying purpose of FLPMA. In the Public Land Law Review Commission's report to Congress, it noted that "virtually all" of the public land had been withdrawn "under one or more of the public land laws."[51] As a result, the Commission recommended that Congress address the "problems associated with the 'withdrawal' and 'reservation' of public domain lands," because such withdrawals "have been

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[47] UDB Memo, ECF-164, at 32 (interpreting the word "Secretary" in FLPMA to mean "the Executive Branch").

[48] 43 U.S.C. § 1714(c)(1).

[49] Proclamation No. 9558, 82 Fed. Reg. 1139, 1143 (Dec. 28, 2016).

[50] *Cf. Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (A "basic canon of statutory construction [is] that identical terms within an Act bear the same meaning.").

[51] Public Land Law Review Commission, *One Third of the Nation's Land* 52 (1970), available at https://leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Meetings/September-2013/one-third-of-nation.pdf.

used by the Executive in an uncontrolled and haphazard manner."[52] Congress followed this recommendation when it passed FLPMA.[53]

Accepting Plaintiffs' argument in this case would allow a President to do what Congress sought to prevent with the passage of FLPMA. If the President can haphazardly withdraw virtually all public land through the Antiquities Act without fear of a later President fixing any mistakes, then FLPMA's restrictions on other types of land withdrawals and reservations are meaningless. Instead, the best reading of FLPMA is that it did not modify the Antiquities Act in any way. Congress was aware of the past practice of monument reductions and decided to make no modifications to that authority in FLPMA. In this manner FLPMA affirms the legality of the President's decision to reduce the Bears Ears National Monument.

As demonstrated above, the President conclusively possesses the authority under the Antiquities Act to modify existing monument boundaries. Plaintiffs dedicate hundreds of pages of legal argument and alleged factual statements suggesting that the Court should declare violations of the law and enjoin the President and two federal agencies from acting on that authority. Yet, except in a cursory manner, Plaintiffs do not present arguments that the extraordinary remedy of injunctive relief is available and appropriate. For the reasons below, the Court should deny their requested relief.

IV. Plaintiffs' Requested Relief Cannot Be Granted.

Plaintiffs are not entitled to the declaratory and injunctive relief they have requested. First, the Court cannot issue declaratory or injunctive relief against the President, which would be required for Plaintiffs' alleged harms to be remedied. Second, Plaintiffs have not, and cannot,

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[52] *Id.* at 43.

[53] 43 U.S.C. § 1701(a)(4); *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 876–77 (1990) (recognizing the important role the PLLRC Report played in the enactment of FLPMA).

satisfy each of the requirements for receiving permanent injunctive or declaratory relief. As argued above, Plaintiffs are not likely to succeed on the merits of their claims because the President has authority under the Antiquities Act to modify national monument reservations. Plaintiffs are not irreparably harmed, given that the monument objects will continue to be protected by numerous other statutory and administrative protections. The balance of harms similarly does not weigh in Plaintiffs' favor, given that the modified boundaries actually will provide greater protection for monument objects and reinstatement of the original boundaries will result in more vandalism, desecration, and damage. Finally, the public interest weighs against the requested relief because it requires the Court to substitute its judgment for that of the President.

Nor can Plaintiffs' request for injunctive and declaratory relief against the President be granted by the Court because of the constitutional separation of power issues raised by the requested relief.[54] Although in certain circumstances the Court may enjoin implementing officers from engaging in actions directed by the President,[55] Plaintiffs' requested remedy requires declaratory and injunctive relief against the President himself. It would require declaring the President's factual conclusions to be unlawful and setting aside his judgment regarding whether a prior President faithfully executed the laws.

To grant Plaintiffs' requested injunctive and declaratory relief, the Court must also determine that the original 2016 Proclamation was valid, enforceable, and complied with the Antiquities Act. No evidence is before the Court supporting that conclusion. Instead, as set forth in the modifying 2017 Proclamation, the original Proclamation reserved land in excess of

[54] *See Doe 2 v. Trump*, 319 F. Supp. 3d 539, 541 (D.D.C. 2018); *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996); Federal Defs.' Br., ECF 169-1, at 28-29.

[55] *Franklin v. Massachusetts*, 505 U.S. 788, 815 (1992) (Scalia, J., concurring opinion),

the "smallest area compatible with the proper care and management of the objects to be protected."[56] The modifying Proclamation corrected this previous abuse of Presidential authority. Requiring the Agency Defendants to comply with a presidential proclamation that the President considered to be in error is impermissible and improperly requires the Court to substitute its discretion for that of the President. As this Court has previously noted, where any agency "is merely carrying out directives of the President, . . . any argument suggesting that this action is agency action would suggest the absurd notion that all presidential actions must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action."[57] Because the Court, "whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions," the Court cannot issue the injunctive and declaratory relief requested by Plaintiffs.[58]

V. Plaintiffs Are Not Entitled To Injunctive Relief.

Plaintiffs cannot establish their entitlement to injunctive relief because they have not demonstrated (1) that they are "'likely to succeed on the merits'"; (2) that they are "'likely to suffer irreparable harm in the absence of'" relief; (3) that the "'balance of equities'" tips in their favor; or (4) that the requested injunction "'is in the public interest.'"[59] "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception

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[56] 54 U.S.C. § 320301(b); 82 Fed. Reg. 58082 (Dec. 8, 2017).

[57] *Tulare County v. Bush*, 185 F. Supp. 2d 18, 28-29 (D.D.C. 2001), *aff'd other grounds Tulare County v. Bush*, 317 F.3d 227 (D.C. Cir. 2003) (declining to find "agency action" when complaint alleged only that agencies were carrying out directives of President contained in proclamation issued under the Antiquities Act).

[58] *See Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010). *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) is inapposite because it not only predates *Franklin*, but also involved a ministerial, rather than discretionary, Presidential action.

[59] *Nat'l Parks Conservation Ass'n v. United States Forest Serv.*, Case No. 15-CV-01582 (APM), 2016 WL 420470, *6 (D.D.C. Jan. 22, 2016).

that the plaintiff must show a likelihood of success on the merits rather than actual success."[60] "An injunction should issue only if the traditional four-factor test is satisfied."[61] "It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test . . . ."[62]

A. Plaintiffs cannot succeed on the merits of their claims.

For the reasons discussed in Sections I through III of this brief and Federal Defendants' brief, Plaintiffs cannot succeed on the merits of their claims. Plaintiffs have not demonstrated that the President's authority to designate national monuments forbids the reconsideration, and correction, of improper monument designations. Instead, the power to take a discretionary action includes the power to modify that action and no congressional authorization is required to modify a declaration under the Antiquities Act.

B. Plaintiffs will not suffer irreparable harm.

Plaintiffs are not entitled to injunctive relief because they cannot establish irreparable harm. To satisfy the "considerable burden" of demonstrating irreparable injury, a movant must prove that their injury "'is *certain, great and actual*—not theoretical—and *imminent*, creating a clear and present need for extraordinary equitable relief to prevent harm.'"[63] Plaintiffs must "'provide proof that the harm has occurred in the past and is likely to occur again, or proof

[60] *Amoco Prod. Co. v. Village of Gambell, AK,* 480 U.S. 531, 546 (1987).

[61] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010).

[62] *Id.* at 158.

[63] *Nat'l Min. Ass'n v. Jackson*, 768 F. Supp. 2d 34, 50 (D.D.C. 2011) (quoting *Power Mobility Coal. v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005)) (emphasis in original). "The standard for irreparable harm is particularly high in the D.C. Circuit." *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 105 F. Supp. 3d 108, 112 (D.D.C. 2015).

indicating that the harm is certain to occur in the near future.'"[64] Injunctive relief for "a possibility of irreparable harm" is not consistent with the characterization "'of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'"[65]

Plaintiffs' requests for injunctive and declaratory relief are not substantiated by admissible evidence.[66] Allegations to demonstrate standing are necessary, but not sufficient, to establish irreparable harm and the need for injunctive relief.[67] The Tribal Plaintiffs made no showing of irreparable harm and discussed harm only in the context of establishing standing.[68] Similarly, the UDB Plaintiffs provided information only in an effort to substantiate their allegations of standing and did not analyze or substantiate any allegations of irreparable harm.[69] Finally, the NRDC Plaintiffs relied solely upon their allegations for standing in support of their cursory assertion that irreparable injury existed.[70] Plaintiffs' assertions do not satisfy their

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[64] *Save Jobs USA*, 105 F. Supp. 3d at 112 (quoting *Wisconsin Gas Co v. F.E.R.C.,* 758 F.2d 669, 674 (D.C. Cir. 1985)).

[65] *Id.* (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) does not require a different result. Although that opinion stated that "there was no separate need to show irreparable injury" for purposes of obtaining injunctive relief, decisions from the United States Supreme Court both before and after *National Mining Association* provide otherwise. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982); *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). Any suggestion in *National Mining Association* that injunctive relief may issue without satisfaction of each of the four requirements for such relief, therefore, is contrary to controlling pronouncements from the Supreme Court and should not be followed.

[66] *Wisconsin Gas Co.*, 758 F.2d at 674.

[67] *Nat'l Parks Conservation Ass'n*, 2016 WL 420470, *8; *Friends of Animals v. United States Bureau of Land Mgmt.*, 232 F. Supp. 3d 53, 65 (D.D.C. 2017). Instead, "there is a wide and apparent gap between the two standards." *Nat'l Parks Conservation Ass'n*, 2016 WL 420470 at *8.

[68] *See* ECF 163-1, at 21-33.

[69] *See* ECF 164, at 23-34.

[70] *See* ECF 165-1, at 10-26, 29.

"particularly high" burden of establishing irreparable harm because the national monument objects are still subject to protection and the Tribal Plaintiffs continue to have enforceable rights to coordinate and provide input regarding management decisions.[71]

First, the national monument objects still retain protections under numerous statutory and administrative authorities. The President expressly concluded that the original reservation was unnecessary to protect national monument objects. A finding of irreparable harm requires the conclusion that a national monument reservation inherently serves to "protect" national monument objects. Contrary to this assertion, and as discussed below, national monument reservations serve to accelerate destruction of archaeological resources by introducing dramatically increased numbers of visitors to areas that are incapable of being effectively policed for activities harming archaeological resources.[72]

Unlike the circumstances existing in 1906 when the Antiquities Act was passed, where no protections existed for archaeological resources, numerous laws, totally independent of monument status, exist to protect antiquities.[73] Since 1906, there have been numerous other environmental and resource protection laws enacted, including, among many others, the Fish and Wildlife Act of 1956; the Refuge Recreation Act; the Wilderness Act; the National Wildlife Refuge System Administration Act of 1966; the National Trails System Act; the National

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[71] *Save Jobs USA*, 105 F. Supp. 3d at 112.

[72] Defendants-Intervenors incorporate by reference the arguments set forth in their Consolidated Opening Brief of Intervenors State of Utah, San Juan County, American Farm Bureau Federation, and Utah Farm Bureau Federation Supporting Federal Defendants' Motion to Dismiss ("Intervenors' Opening Brief"), ECF 112, at 44-48.

[73] *See e.g.* the Antiquities Act, 54 U.S.C.A. §§ 320101 *et seq*. (West 2019); the Utah Antiquities Act, Utah Code Ann. §§ 9-8-301 *et seq.* (West 2019); the National Historic Preservation Act, 54 U.S.C.A. §§ 300101 *et seq.* (West 2019); the Archaeological Resources Protection Act, 16 U.S.C.A. §§ 470aa *et seq.* (West 2019); and the Native American Graves Protection and Repatriation Act, 25 U.S.C.A. § 3001, *et seq.* (West 2019).

Environmental Policy Act of 1969; the Endangered Species Act; the National Forest Management Act of 1976; the Federal Land Policy and Management Act of 1976; and the Paleontological Resources Preservation Act.[74]

There are also numerous statutory and administrative classifications protecting objects identified in the original Proclamation. These classifications include wilderness areas, wilderness study areas, areas of critical environmental concern, visual resource management units, special recreation management areas, recreation management zones, extensive recreation management areas, primitive areas, roadless areas, and natural areas. Both the BLM and Forest Service management plans for the land that was within the original monument proclamation but is outside of the modified reservations (the "Unreserved Land") provide numerous protections for the care and management of monument objects.[75] As set forth in Exhibit 1, 383,600 acres of Unreserved Land are managed as wilderness study areas, 546,500 acres are managed as visual resource management classes I or II;[76] 429,800 acres are in special recreation management areas ("SRMA"); 27,400 acres are managed as areas of critical environmental concern; 346,800 acres are managed as lands with wilderness characteristics; 123,400 acres are managed as roadless

[74] 16 U.S.C.A. §§ 742a *et seq.* (West 2019); 16 U.S.C.A §§ 460k-460k-4 (West 2019); 16 U.S.C.A. §§ 1131-1136 (West 2019); 16 U.S.C.A. §§ 668dd-668ee (West 2019); 16 U.S.C.A. §§ 1241-1251 (West 2019); 42 U.S.C.A. §§ 4321, *et seq.* (West 2019); 16 U.S.C.A. §§ 1531-1544 (West 2019); 16 U.S.C.A. §§1600-1614 (West 2019); 43 U.S.C.A. §§ 1701 *et seq.* (West 2019); 16 U.S.C. §§ 470aaa *et seq.* (West 2019).

[75] *See* Record of Decision and Approved Resource Management Plan ("BLM Management Plan"), available at https://eplanning.blm.gov/epl-front-office/projects/lup/68097/85493/102694/Monticello_Final_Plan.pdf (last visited February 24, 2020); Forest Service, Land and Resource Management Plan Manti-Lasal [sic] National Forest, ("FS Management Plan"), available at https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5383373.pdf (last visited Feb. 22, 2020).

[76] Scenic values are protected by visual resource management classes, with the vast majority of the lands that are no longer reserved being managed under the two most restrictive management classes. *See* BLM Management Plan, p.149-50, Map 16, attached as Exhibit 2.

areas; 46,600 acres are managed as wilderness; and 48,800 acres are managed as natural areas. All wilderness study areas, lands with wilderness characteristics, Valley of the Gods, and portions of suitable wild and scenic river segments are closed to leasing. Similarly, the BLM Management Plan imposes a no surface occupancy stipulation for the Cedar Mesa SRMA. Timing restrictions and controlled surface use stipulations are imposed in other areas to manage for wildlife concerns and to protect fragile soils, and visual resources. BLM Management Plan, p. 28, 40. Numerous areas are closed to surface occupancy or subject to restrictions on leasing.[77] In addition, much of the Unreserved Land is closed to OHV use or limited to designated roads and trails.[78] All areas of the Unreserved Land managed by BLM are closed to cross-country travel[79] and the Forest Service limits recreation in portions of the Unreserved Land to primitive and semi-primitive non-motorized recreation.[80]

The BLM Management Plan recognizes and protects the cultural resources in the areas that are no longer reserved.[81] These management directives are intended to "[i]dentify, preserve, and protect important cultural resources" and "[s]eek to reduce imminent threats and resolve potential conflicts."[82] The Utah State Historic Preservation Office ("SHPO") concluded that the decisions in the proposed resource management plan (which were adopted without appreciable change in the approved management plan) "will have no adverse affects [sic] on historic

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[77] *See* BLM Management Plan, Map 18, attached as Exhibit 3.

[78] *See* BLM Management Plan, Map 13, attached as Exhibit 4.

[79] *Id*. at 38, 141-45; Forest Service Land and Resource Management Plan Travel Map, attached as Exhibit 5, depicting portions of unreserved land closed to motorized travel.

[80] *See Recreation Opportunity Spectrum Map*, attached as Exhibit 6, depicting portions of unreserved land closed to motorized travel.

[81] BLM Management Plan, p.24, 59-61 ("The Approved RMP establishes goals, objectives, and management action that provide for identification, protection, preservation, and use of cultural resources.").

[82] *Id.* at 59.

properties."[83] The Forest Service management plan also protects cultural resources, directing the Forest Service to "[p]rotect and foster pub[l]ic use and enjoyment of cultural and paleontological resources."[84]

With these significant protections in place for monument objects, both under existing management plans and protective statutes, Plaintiffs cannot demonstrate irreparable harm.[85] Superimposing a monument reservation over existing protections will not serve to increase the protections afforded to monument objects. Rather, the issue is one of enforcing existing laws rather than imposing new reservations and restrictions. These significant existing protections prevent a finding of irreparable harm for the entirety of the 1.15 million acres comprising the Unreserved Land.[86]

Second, the Tribal Plaintiffs have not been irreparably harmed by any loss of coordination or consultation rights regarding the Unreserved Land or by any limitations on traditional uses. For land managed by the BLM, tribes will be consulted "to identify, protect, and maintain access for areas of traditional and religious use" and the BLM "will conduct a consultation process to identify both the resource management concerns and the strategies for addressing them through an interactive dialogue with appropriate Native American communities."[87] BLM consulted with tribes beginning in 2003 relating to the management of the Unreserved Land and addressed concerns identified by the Hopi Tribe, the Navajo Nation,

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[83] *Id*. at 42.

[84] FS Management Plan, p. III-16.

[85] *Wisconsin Gas Co.*, 758 F.2d at 674.

[86] *See* 82 Fed. Reg. 58084; *Nat'l Parks Conservation Ass'n*, 2016 WL 420470 at *7; *Wisconsin Gas Co.*, 758 F.2d at 674.

[87] BLM Management Plan, p.59, 60. The Plaintiffs did not have an enforceable right to direct management decisions over the original Bears Ears National Monument. *See Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 18-19 (D.D.C. 1999).

and the Ute Mountain Ute Tribe through clarifying or modifying the proposed resource management plan.[88] None of the tribes protested the implemented management plan.[89] The BLM Management Plan "continues consultation with Native American Tribes to address management concerns."[90] Numerous other statutes, regulations, and policies provide for consultation and coordination with Native American interests.[91] With respect to traditional uses, as discussed in Intervenors' Opening Brief[92], national monument designations often limit access to the national monument land or result in permitting requirements, that may serve to limit Native Americans' ability to engage in traditional uses. Likewise, large numbers of visitors to sacred areas used to perform ceremonies may detract from or interfere with the ability to conduct the ceremony or the sacred nature of the area.

C. The balance of equities does not favor granting Plaintiffs' requested injunctive relief.

Plaintiffs' requested injunctive relief should not be granted because the balance of equities does not favor reinstating the original Proclamation.[93] Plaintiffs cannot demonstrate that the balance of harms tips in their favor or that the requested injunctive relief will not "substantially injure other interested parties."[94] "When the issuance of a preliminary injunction,

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[88] *Id.* at 42.

[89] *Id*.

[90] BLM Management Plan, p.24

[91] *See also* 43 U.S.C. § 1712(b)(9); 36 C.F.R. 219.4(a)(2), (b); Executive Order 13175, § 3(c)(2), 65 Fed. Reg. 67249 (Nov. 6, 2000).

[92] ECF 112, at 52-53.

[93] *See Winter*, 555 U.S. at 32 ("the balance of equities and consideration of the public interest—are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent").

[94] *See Arkansas Dairy Co-op Ass'n, Inc. v. U.S. Dept. of Agric.*, 573 F.3d 815 (D.C. Cir. 2009); *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 52 (D.D.C. 2014).

while preventing harm to one party, causes injury to the other, this factor does not weigh in favor of granting preliminary injunctive relief."[95]

The balance of the equities does not weigh in Plaintiffs' favor because the creation of large national monuments, such as the Bears Ears National Monument proclaimed by President Obama, serves to increase, not limit, the destruction of cultural resources. As explained in Intervenors' Opening Brief,[96] damage to archaeological resources is especially acute in landscape level monuments such as Bears Ears and the Grand Staircase-Escalante National Monument, where existing protections for archaeological resources are not enforced and are in many instances incapable of being enforced given the topography and other practical limitations of policing remote and undeveloped areas. Archaeological studies worldwide reflect the fact that greater access to and visitation of antiquity sites lead to greater, not less, desecration.[97] Inviting innumerable visitors to areas with significant and fragile archaeological resources, without a corresponding increase in protection, is irresponsible and inimical to the interests ostensibly driving the creation of national monuments.[98]

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[95] *ConverDyn*, 68 F. Supp. 3d at 53.

[96] ECF 112, at 44-48.

[97] *See e.g.* Lavris, J.L., *A Perfect Pothunting Day*, Reference No. 059019146 (February 2007); Tipps, B., *Archeology in the Grand Staircase Escalante National Monument: Research Prospects and Management Issues*, Learning from the Land Science Symposium (November 4-5, 1997) ("Tipps 1997"); GAO, *Problems of Protecting and Preserving Federal Archeological Resources*, GAO/RCED-88-3 (December 1987), available at https://www.gao.gov/assets/150/145926.pdf (last visited December 10, 2018).

[98] Herbert, Governor Gary R., Testimony Before the U.S. Senate Committee on Energy and Natural Resources, Oversight Hearing on Potential Impacts of Large-Scale Monument Designations (July 27, 2016), available at https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=A8D9F89D-1181-4A74-B3C5-927850848E33 (last visited December 10, 2018) (noting that GSENM experienced 140 times the rate of vandalism than land later named as BENM, despite its monument protections).

The modified monument reservations, by comparison, increase protections of cultural resources and monument objects. Removing land from Bears Ears and directing visitors to smaller areas capable of physical protection and adequate enforcement will help protect the archaeological resources by reducing visitation to sites that are difficult or impossible to police.[99] Accordingly, a smaller monument with appropriately developed sites and facilities will cause visitors to avoid visiting (and damaging) other undeveloped sites.[100] Because an order of injunctive relief reinstating the original monument boundaries will serve to harm, rather than protect, monument objects, the balance of the equities weighs against Plaintiffs' requested relief and it should be denied.

D. The public interest does not favor granting injunctive or declaratory relief.

Plaintiffs' requested relief is not in the public interest because it interferes with the exercise and performance of the President's constitutional and statutory authority. In determining whether to award injunctive relief, the court "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."[101] The President has a constitutional obligation to "take Care that the Laws be faithfully executed . . . ."[102] The Antiquities Act requires that withdrawals "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[103] Whether a reservation is, in fact, "the smallest area compatible" is a discretionary conclusion by the President that may be

[99] Tipps 1997; Intervenors' Opening Brief, ECF 112, at 47-48.

[100] Tipps 1997 (important factors include "[p]roviding toilet facilities, places to rest along the path to the site, and good vantage points for photographs").

[101] *Weinberger*, 456 U.S. at 312.

[102] U.S. Const. art. II, § 3.

[103] 54 U.S.C. § 320301(b).

revised, as warranted by the situation presented.[104] The President undertook such review when issuing the modifying Proclamation.

Although "the Antiquities Act does not impose upon the President an obligation to make any particular investigation" in setting the boundaries, the President initiated an investigation regarding whether the limits set forth in the original Proclamation complied with the limitations contained in the Antiquities Act.[105] By reviewing and modifying the reservation boundaries, the President fulfilled his constitutional obligation to ensure that the laws are faithfully executed. Although the Court may review the President's actions "to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his authority,"[106] the Court does not have jurisdiction to enjoin the President's performance of official duties.[107] The public interest does not favor substituting the Court's judgment for that of the President, especially when the decision regarding the monument objects to be protected and the reservation necessary were the subject of specific review and modification by the President.[108] Plaintiffs' arguments incorrectly assume that a reservation of land equates to increased protection of national monument objects. This assumption and interpretation of the Antiquities Act is at odds with the Antiquities Act's express language, which does not require any reservation of land to protect national monument objects, and is contrary to the actual, and detrimental, effect a land reservation has on many monument objects, particularly archaeological resources. Regardless,

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[104] *See Massachusetts Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 544 (D.C. Cir. 2019); *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002).

[105] *See* Exec. Order No. 13792, 82 Fed. Reg. 20429 (April 26, 2017); *Tulare County*, 306 F.3d at 1142.

[106] *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002).

[107] *See Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996).

[108] *See* 54 U.S.C. § 320301.

the President's modifications to Grand Staircase-Escalante National Monument and Bears Ears National Monument comply with the Antiquities Act's express limitations on the President's authority to reserve only "the smallest area compatible with the proper care and management of the objects to be protected."[109] It is the protection of monument objects, not the reservation of land, that is the intent of the Antiquities Act.[110] The modifying Proclamation, by analyzing the reservations to determine whether they comply with the limitations in the Antiquities Act, "direct[s] that a congressional policy be executed in a manner prescribed by Congress,"[111] and is not an action taken in excess of the President's authority under the Antiquities Act. The public interest, therefore, does not support setting aside the modifying Proclamation or the substitution of the Court's judgment for that of the President.

VI. Conclusion

Federal Defendants have demonstrated the absence of genuine issues of material fact.[112] They and Defendants-Intervenors are entitled to judgment as a matter of law.

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[109] 54 U.S.C. § 320301(b). As explained in the Consolidated Reply Brief of Intervenors State of Utah, Garfield County, Kane County, American Farm Bureau Federation, and Utah Farm Bureau Federation Supporting Federal Defendants' Motion to Dismiss, ECF 93 in Case No. 1:17-cv-02587, at 7-8, no reservation of land is required under the Antiquities Act to protect national monument objects and such reservations can instead serve to harm monument objects such as cultural resources.

[110] *See Weinberger*, 456 U.S. at 314 (noting that "[t]he integrity of the Nation's waters . . . not the permit process" was the purpose of the statue at issue).

[111] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (in concluding that order should be set aside, noting that "[t]he President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President").

[112] Federal Defs.' Br., ECF 169-1, *passim*; Federal Defs.' Resp . . . and Statement of Material Facts, ECF 169-3, 169-4, 169-5.

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Certificate of Service

I certify that on March 5, 2020, the undersigned electronically transmitted the **DEFENDANTS-INTERVENORS' JOINT MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT** to the Clerk's Office using the CM/ECF system which will send notification of this filing to all counsel of record.

/s/ Cassie Thompson

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