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' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

The Antiquities Act of 1906 authorizes the President to designate national monuments and make reservations of land "confined to the smallest area compatible with the proper care and management of the objects to be protected [therein]." 54 U.S.C. § 320301(b). On December 4, 2017, President Trump signed Proclamation 9681, modifying the Bears Ears National Monument (the "Monument") to reflect what he, in his discretion, determined to be "the smallest area compatible" with protection of the Monument objects. *See* Proc. No. 9681, 82 Fed. Reg. 58,081, 58,085 (Dec. 4, 2017). Plaintiffs Hopi Tribe et al. (the "Tribes"), Utah Diné Bikéyah et al. (the "UDB"), and Natural Resources Defense Council et al. ("NRDC"), who disagree vociferously with the President's exercise of this discretion, filed this suit seeking to overturn the Proclamation.

Their claims fail, as an initial matter, because the UDB Plaintiffs and Tribes lack standing; they cannot show that the mere issuance of the Proclamation caused them or their members an actual or imminent, concrete, and particularized injury. Plaintiffs' claims also fail on the merits. They contend that the Proclamation is ultra vires under the Antiquities Act and that it violates the separation of powers under the United States Constitution.[1] The President, however, lawfully exercised his authority under the Antiquities Act to modify the boundaries of the Monument to what he, in his discretion, determined to be "the smallest area compatible" with protection of the Monument objects. 54 U.S.C. § 320301(b). Nothing in the Antiquities

[1] Plaintiffs also assert claims that the Proclamation was an abuse of discretion under the Antiquities Act and under the Administrative Procedure Act. However, pursuant to the Court's order adopting an agreed briefing schedule proposed by the parties, these claims are not at issue in this briefing. ECF No. 129.

Act precludes one President from modifying another's determination on this basis, and the President's interpretation of the Act's grant of authority is "entitled to great respect" in light of Congress's acquiescence to the practice over many decades. *See AFL-CIO v. Kahn*, 618 F.2d 784, 790 (D.C. Cir. 1979) (citations omitted). And, because the President was acting under the congressional authorization in the Antiquities Act, Plaintiffs can demonstrate no violation of the separation of powers doctrine.

STATUTORY AND FACTUAL BACKGROUND

I. The Antiquities Act

In 1906, Congress passed the Antiquities Act, delegating to the President power to declare landmarks, structures, and objects of historic and scientific interest to be national monuments, and to reserve federal lands for their protection. *See* Act of June 8, 1906, Pub. L. No. 59-209, ch. 3060, 34 Stat. 225 (codified at 54 U.S.C. § 320301). The legislation stemmed from proposals, primarily from archaeological organizations, to protect objects of antiquity on federal lands. *See Utah Ass'n of Ctys. v. Bush* ("*UAC*"), 316 F. Supp. 2d 1172, 1178 (D. Utah 2004). At the turn of the twentieth century, public lands were generally open to the public and available for homestead, mining, oil, gas, and other claims, unless Congress or the Executive Branch had "withdrawn" the land from the public domain and/or "reserved" the land for a particular purpose. As a result, many historic sites on public lands had been looted and destroyed. *See* H.R. Rep. No. 59-2224, at 3 (1906).

For several years, Congress debated proposals to provide withdrawal authority to the President or the Secretary of the Interior to protect historic and other resources. *See UAC*, 316 F. Supp. 2d at 1178. During these debates, some members of Congress expressed concern that such proposed legislation would permit large areas of land to be withdrawn from entry. For example,

Rep. John Stephens of Texas asked, "How much land will be taken off the market in the Western States by the passage of the bill?" The bill's sponsor, Rep. Lacey, responded, "Not very much. The bill provides that it shall be the smallest area [necessary] for the care and maintenance of the objects to be preserved." 40 Cong. Rec. 7888 (1906). *See also* Defs.' App'x, ECF No. 102-2 at US_APP000150 (Mr. Rodey (Del. N.M.): "Well, whatever you agree upon, the only thing I want to prevent is the possibility of a tremendous reservation.") The House Report on the enacted bill also noted that it was intended "to create small reservations reserving *only so much land* as may be *absolutely necessary* for the preservation of those interesting relics of prehistoric times." H.R. Rep. No. 59-2224, at 1 (emphasis added).

Congress understood that initial reservations of land might be inaccurate or uninformed, and therefore could be temporary or subject to modification, particularly in light of concerns by members of Congress in preventing over-expansive withdrawals. For example, Professor Edgar L. Hewett—acknowledged by Plaintiffs as the chief architect of the Antiquities Act—recognized in testimony to the House's Committee of the Public Lands that it was sometimes appropriate to reduce reservations addressing archeological resources. Responding to concerns about the potential size of such reservations, Professor Hewett noted:

> [T]he largest area that has ever been withdrawn for archaeological purposes is [an] area . . . of 7 ½ townships, in the case of the Pajarito National Park. This, however, can be reduced and has been reduced to 40 sections (a little more than 1 township), every section of which is covered with ruins. The Mesa Verde Park includes some 2 ½ townships, which probably could be reduced to 2 townships.

Defs.' App'x at US_APP000152. Later, addressing a question as to whether the proposed bill (a predecessor to the bill ultimately enacted as the Antiquities Act) would result in an "over-reservation of any sort there on the public domain," Mr. Hewett responded:

> I do not think it would have that effect, . . . if you say positively no more land shall be withdrawn than is necessary for the purposes. In the case of timber

> reserves, too much has been withdrawn; but the Department has gone to work to lop off and turn back what is not necessary.
>
> In the case of the Pajarito Park Reservation, which was made five years ago by the Department of the Interior, seven and a half townships were withdrawn. There is no reason why five of those townships should not now revert to the public domain. Since that time the reserve has been finally shaped so as to include only forty sections that are covered with ruins and leave the rest outside.

Id. at US_APP0000153.

As enacted, the Antiquities Act authorized the President "in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments. . . ." 34 Stat. 225, § 2. The statute also authorized the President to reserve only those lands necessary to protect the monument objects, stating that he "may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.*

In 2014, the Antiquities Act was recodified, and now reads, in relevant part:

> (a) Presidential declaration—The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest situated on land owned or controlled by the Federal Government to be national monuments.
>
> (b) Reservation of land—The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

54 U.S.C. § 320301.

II. Presidential Action under the Antiquities Act.

Theodore Roosevelt, President at the time of the Antiquities Act's passage, used this new

authority to proclaim eighteen monuments.[2] His successor, President Taft, proclaimed ten monuments, but also diminished two monuments established by President Roosevelt. NPS Monuments List *supra* n.2. In 1911, President Taft determined that the Petrified Forest National Monument, "through a careful geological survey of its deposits of mineralized forest remains," reserved "a much larger area of land than is necessary to protect the objects for which the Monument was created, and therefore the same should be reduced in area to conform to the requirement of the act authorizing the creation of National Monuments." Proc. 1167, 37 Stat. 1716 (July 31, 1911). He reduced the area of the monument by more than 40 percent. *Compare id.* (reducing reservation by 25,626.60 acres); *with* Proc. 697, 34 Stat. 3266 (Dec. 8, 1906) (reserving 60,776.02 acres); NPS Monuments List). President Taft also reduced the Navajo National Monument in Arizona three years after its establishment, finding that, "after careful examination and survey of the prehistoric cliff dwelling pueblo ruins," the original proclamation "reserve[d] a much larger tract of land than is necessary for the protection of such of the ruins as should be reserved, and therefore the same should be reduced in area to conform to the requirements of the act authorizing the creation of National Monuments." Proc. 1186, 37 Stat. 1733 (Mar. 14, 1912). He substantially reduced the monument to three separate tracts—two containing 160 acres each, and one containing forty acres—to protect three ruins. *Id.* at 1734.

Many other Presidents have reduced monuments, finding that the lands to be removed "[we]re not necessary for the proper care and management of the objects of scientific interest situated on the lands within the said monument." *See, e.g.*, Proc. 2393, 54 Stat. 2692 (Apr. 4,

[2] *See* Nat'l Park Serv., Archeology Program, Monuments List ("NPS Monuments List"), available at: https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (last visited Sept. 26, 2018); Nat'l Park Serv., Archeology Program, Frequently Asked Questions, available at: https://www.nps.gov/archeology/sites/antiquities/FAQs.doc (last visited Sept. 26, 2018).

1940) (reduction of Grand Canyon National Monument by President Franklin Roosevelt); Proc. 3344, 74 Stat. c56 (Apr. 8, 1960) (reduction of Black Canyon of the Gunnison National Monument by President Eisenhower).

Presidents have also cited other rationales as the basis for monument reduction. For example, President Truman excluded lands from Santa Rosa National Monument because those lands were needed by "the War Department for military purposes . . . ." Proc. 2659, 59 Stat. 877 (Aug. 13, 1945); *see also* Proc. 3089, 69 Stat. c27 (Mar. 31, 1955) (elimination by President Eisenhower of some lands from Glacier Bay National Monument that were "being used as an airfield for national-defense purposes and are no longer suitable for national-monument purposes"); Proc. 2454, 55 Stat. 1608 (Jan. 22, 1941) (reduction of Wupatki National Monument by President Franklin Roosevelt, noting that "such lands are needed in the construction and operation of a diversion dam in Little Colorado River to facilitate the irrigation of lands on the Navajo Indian Reservation"); Proc. 2295, 53 Stat. 2465 (Aug. 29, 1938) (reduction by President Franklin Roosevelt of White Sands National Monument to allow for U.S. Highway 70). In some cases, Presidents reduced monument reservations without providing an explanation. For example, Mount Olympus National Monument (now Olympic National Park) was diminished—on three separate occasions by three different presidents—without any reason cited in the proclamations. *See* Proc. 1191, 37 Stat. 1737 (Apr. 17, 1912) (President Taft); Proc. 1293, 39 Stat. 1726 (May 11, 1915) (President Wilson); Proc. 1862, 45 Stat. 2984 (Jan. 7, 1929) (President Coolidge).[3]

[3] Presidents have also modified monument boundaries after finding that additional lands are required for the protection of objects identified in a proclamation based on new or different information. For example, in 1909, President Taft added lands to the Natural Bridges National Monument, noting that "at the time this monument was created nothing was known of the location and character of the prehistoric ruins in the vicinity of the bridges, nor of the location of

Presidents have even eliminated and added lands within the same proclamation. President Kennedy modified the boundaries of Bandelier National Monument, adding lands but removing other lands "containing limited archaeological values which have been fully researched and are not needed to complete the interpretive story of [the Monument]." Proc. 3539, 77 Stat. 1006 (May 27, 1963). President Eisenhower revised the boundaries of Hovenweep National Monument (established by President Truman) on the basis that certain lands "contain[ing] no objects of historic or scientific interest were erroneously included" in the Monument, while other lands containing valuable ruins were "erroneously omitted from the monument." Proc. 3132, 70 Stat. c26 (Apr. 6, 1956); *see also* Proc. 3138, 70 Stat. c31 (Jun. 7, 1956) (President Eisenhower, removing and adding lands to Great Sand Dunes National Monument); Proc. 3307, 73 Stat. c69 (Aug. 7, 1959) (President Eisenhower, removing and adding lands to Colorado National Monument); Proc. 3360, 74 Stat. c79 (Jul. 22, 1960) (President Eisenhower, modifying Arches National Monument to exclude lands "which have no known scenic or scientific value," while adding other lands found necessary for the proper care and management of the objects on those lands and the original monument). All told, Presidents have eliminated lands from existing monuments on at least eighteen occasions.[4]

---

the bridges and the prehistoric cave springs…." Proc. 881, 36 Stat. 2501, 2502 (Sept. 25, 1909). Recently, President Obama expanded Papahānaumokuākea Marine National Monument based on his finding that additional area was required to protect the resources identified in the original monument. Proc. 9478, 81 Fed. Reg. 60227 (Aug. 26, 2016).

[4] *See* Proc. 1167, 37 Stat. 1716 (July 31, 1911) (Petrified Forest National Monument); Proc.1186, 37 Stat. 1733 (Mar. 14, 1912) (Navajo National Monument); Proc. 1191, 37 Stat. 1737 (April 17, 1912) (Mount Olympus National Monument), Proc. 1293, 39 Stat. 1726 (May 11, 1915) (Mount Olympus National Monument), Proc. 1862, 45 Stat. 2984 (Jan. 7, 1929) (Mount Olympus National Monument); Proc. 2295, 53 Stat. 2465 (Aug. 29, 1938) (White Sands National Monument); Proc. 2393, 54 Stat. 2692 (Apr. 4, 1940) (Grand Canyon National Monument); Proc. 2454, 55 Stat. 1608 (Jan. 22, 1941) (Wupatki National Monument); Proc. 2499, 55 Stat. 1660 (Jul. 18, 1941) (Craters of the Moon National Monument); Proc. 2659, 59 Stat. 877 (Aug.

III. Bears Ears National Monument

The Bears Ears National Monument was established and its boundaries initially designated by President Obama in December 2016. *See* Proc. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016) (the "2016 Proclamation"). In his discretion, President Obama reserved approximately 1.35 million acres of federal land managed by the BLM and U.S. Forest Service ("USFS" or "Forest Service") for the Monument, and withdrew those lands from entry, location, selection, sale, leasing, or other disposition under the public land laws—but subject to all valid existing rights. *Id.* at 1143. The 2016 Proclamation caused an instant controversy—there was significant local and national opposition to the creation of the Monument. *See, e.g.,* James R. Rasband, *Stroke Of The Pen, Law Of The Land?*, 63 Rocky Mtn. Min. L. Inst. 21, 21-2 - 21-3 (2017) (noting that "President Obama's proclamations drew strong protests from some in public land communities near the monuments and from many in the congressional delegations of the states containing the monuments").

The 2016 Proclamation instructed the Secretaries of Agriculture and the Interior to "jointly prepare a management plan for the monument and . . . promulgate such regulations for its management as they deem appropriate." 82 Fed. Reg. at 1143-44. It further instructed the Secretaries to prepare a transportation plan designating "where motorized and non-motorized, mechanized vehicle use will be allowed.")*Id.* at 1145. And, recognizing "the importance of

---

13, 1945) (Santa Rosa National Monument); Proc. 3089, 69 Stat. c27 (Mar.. 31, 1955) (Glacier Bay National Monument); Proc. 3132, 70 Stat. c26 (Apr. 6, 1956) (Hovenweep National Monument); Proc. 3138, 70 Stat. c31 (June 7, 1956) (Great Sand Dunes National Monument); Proc. 3307, 73 Stat. c69 (Aug. 7, 1959) (Colorado National Monument); Proc. 3344, 74 Stat. c56 (Apr. 8, 1960) (Black Canyon of the Gunnison National Monument); Proc. 3360, 74 Stat. c79 (July 22, 1960) (Arches National Monument); Proc. 3486, 76 Stat. 1495 (Aug. 14, 1962) (Natural Bridges National Monument); Proc. 3539, 77 Stat. 1006 (May 27, 1963) (Bandelier National Monument).

tribal participation" in the management of the Monument, the 2016 Proclamation established the "Bears Ears Commission," consisting of an elected officer from each of the five plaintiff Tribes, to "provide guidance and recommendations on the development and implementation of management plans and on management of the monument.")*Id.* at 1144. However, the 2016 Proclamation made clear that the Commission's role was limited to providing advice and information; it instructed the Secretaries only to "carefully and fully consider integrating the traditional and historical knowledge and special expertise of the Commission," or, in its absence, some comparable entity. *Id.* The 2016 Proclamation expressly authorized the Secretaries to reject any recommendation from the Commission—but required them to provide a written explanation for doing so. *Id.*

On December 4, 2017, President Trump issued Proclamation 9681. 82 Fed. Reg. at 58,081. Pursuant to the authority delegated to him in the Antiquities Act, the President declared "that the boundaries of the Bears Ears National Monument are hereby modified and reduced to those lands and interests in land owned or controlled by the Federal Government" within two "modified monument areas" to be known as the Indian Creek and Shash Jáa units. *Id.* at 58,085. The President determined that the modified boundaries, which encompass approximately 201,876 acres, comprise "the smallest area compatible with the proper care and management of the objects to be protected" by the Monument designation. *Id.*; *see also* 54 U.S.C. § 320301(b).

While the Proclamation reduced the number of acres that are within the Monument, the lands now removed from the Monument remain in federal ownership, subject to management and protection under numerous federal statutes. *See* 82 Fed. Reg. at 58,082. These statutes include, *inter alia*, the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1787; the Archaeological Resources Protection Act of 1979 ("ARPA"), 16

U.S.C. §§ 470aa-470mm; the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101-320303, the Federal Cave Resources Protection Act of 1988, 16 U.S.C. §§ 4301-4310; and the Paleontological Resources Preservation Act ("PRPA"), 16 U.S.C. §§ 470aaa-470aaa-11. *Id.* Certain of these statutes (such as the PRPA and ARPA) make violations punishable by criminal penalties. 16 U.S.C. §§ 470ee; 470aaa-5. Moreover, approximately 367,937 acres of the lands that were formerly within the Monument continue to be managed as Wilderness Study Areas ("WSAs"), which under FLPMA must be managed "so as not to impair" their suitability for future congressional designation as Wilderness. 43 U.S.C. § 1782(c); Decl. of Edwin Roberson ("Roberson Decl."), ECF No. 49-2, ¶¶ 6, 12. Another 46,326 acres now excluded from the Monument are part of the congressionally designated Dark Canyon Wilderness Area, which the USFS manages to maintain or enhance its wilderness character. Decl. of Nora Rasure ("Rasure Decl."), ECF No. 49-3, ¶¶ 8(a) & 10. An additional 77,688 acres of the now-excluded lands are within seven inventoried roadless areas (or "IRAs"). *Id.* ¶ 8(b). The USFS manages these IRAs under its 2001 Roadless Rule, which, among other things, generally prevents the creation of new roads. *Id.* ¶ 8(b) & 9.[5]

When Proclamation 9681 issued on December 4, 2017, no land use plan for the Monument had yet been created—nor had any specific "regulations for its management" been promulgated—pursuant to the 2016 Proclamation. *See* 82 Fed. Reg. at 1144. Accordingly, all of the lands designated as part of the Monument in the 2016 Proclamation continued to be managed under the land use plans that predate the Monument's creation, namely the BLM's

[5] Proclamation 9681 maintains the Bears Ears Commission (but renames it "Shash Jáa" commission). 82 Fed. Reg. at 58,086. It continues representation from the five plaintiff Tribes, and also adds a new member, an elected officer of the San Juan County Commission representing District 3. *Id.*

Monticello Resource Management Plan ("RMP") and Moab RMP (hereinafter the "BLM RMPs"),[6] for the lands managed by the BLM, and the Manti La-Sal National Forest Land and Resource Management Plan ("MLS Forest Plan"), for those lands managed by the Forest Service. Roberson Decl. ¶¶ 8, 16; Rasure Decl. ¶ 11. On February 6, 2020, the BLM adopted monument management plans for the lands that remain in the Monument following Proclamation 9681. *See* Declaration of Brian Quigley ("Quigley Decl."), ¶ 10.[7] The lands excluded from the Monument by Proclamation 9681 will continue to be governed (as they have been up to this point) by the BLM RMPs and MLS Forest Plan. *Id.*; Roberson Decl. ¶ 8, 15; Rasure Decl. ¶ 11.

IV. Plaintiffs' Claims

The Tribes, UDB, and NRDC each brought suits challenging the Proclamation shortly after it issued. In their amended complaints, they assert the following claims against the President, the Secretary of Agriculture, the Secretary of the Interior, and the official exercising the authority of the BLM:

(i) the Proclamation exceeded the scope of the President's delegated authority under the Antiquities Act and therefore was ultra vires and unlawful (Tribes' Count I; NRDC Plaintiffs' Count I; and UDB Count I);

(ii) the Proclamation violated the separation of powers (Tribes' Counts II & III; UDB Count III); NRDC Count II);

(iii) the Proclamation violates the Antiquities Act because it was based on improper considerations (NRDC Count III; UDB Count II); and

[6] About 1,142,049 acres of these lands are in the planning area managed by BLM's Monticello Field Office and subject to the Monticello RMP. Roberson Decl. ¶ 8. The other 8,871 acres are in the planning area managed by BLM's Moab Field Office and subject to the Moab RMP. *Id.*

[7] For its part, the Forest Service approved a Forest Plan amendment addressing based on the Shash Jáa MMP. *See* USFS Record of Decision, linked at https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=140966.

(iv) the implementation of the Proclamation (or non-implementation of the 2016 Proclamation) is therefore unlawful and can be enjoined under the Administrative Procedure Act, 5 U.S.C. § 706 (Tribes' Count IV; NRDC Count V).

Based on these allegations, Plaintiffs seek a declaratory judgment that the Proclamation is invalid and an injunction barring its implementation. *See* Tribes Am. Compl. ¶¶ 222-27; UDB Am. Compl. at 70-71; NRDC Am. Compl. at 60-61. The UDB Plaintiffs also seek a declaration that the 2016 Proclamation remains "controlling," and all Plaintiffs seek injunctive relief.

After the Court denied Federal Defendants' motion to dismiss Plaintiffs' complaints without prejudice, it ordered Plaintiffs to file amended complaints, and the parties to pursue an expedited, coordinated schedule for further merits briefing. The parties agreed to brief motions for partial summary judgment, addressing only Plaintiffs' first three claims (i.e., those included in numerals i, and ii above), which address the President's authority for Proclamation 9682 (hereinafter Plaintiffs' "Authority Claims"). ECF No. 129.

STANDARD OF REVIEW

Summary judgment is appropriate when a party demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)).

ARGUMENT

I. Plaintiffs have not established standing for all organizations and claims for relief.

A. The UDB Plaintiffs and Tribes have not demonstrated standing.

Consistent with Article III's case-or-controversy requirement, a plaintiff "must demonstrate standing to sue." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017). To do so, a plaintiff must show: (1) "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely

speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180–81 (2000). Moreover, plaintiffs who rest their "claims for declaratory and injunctive relief on predicted future injury" bear "a 'more rigorous burden' to establish standing." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (quoting *United Transp. Union v. ICC*, 891 F.2d 908, 913 (D.C. Cir. 1989)). Plaintiffs' "threatened injury must be *certainly impending* to constitute injury in fact," and "'[a]llegations of *possible* future injury' are not sufficient.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). The Tribes and the UDB Plaintiffs have failed to make this showing.[8]

1. The UDB Plaintiffs have not demonstrated organizational injury.

The UDB Plaintiffs assert that they have demonstrated "organizational standing" for their claims, focusing on plaintiff Friends of Cedar Mesa ("Friends") and plaintiff Utah Diné Bikéyah. UDB Pls.' Mot. for Partial Summ. J. 10-15, ECF No. 164 ("UDB Br."). But these plaintiffs do not make the showing required in this Circuit.[9]

"To establish organizational standing, a party must show that it suffers a 'concrete and demonstrable injury to [its] activities, distinct from a mere setback to [the organization's] abstract social interests." *Elec. Privacy Info. Ctr. v. FAA*, 892 F.3d 1249, 1255 (D.C. Cir. 2018) (internal quotation marks and citation omitted). The organization must show "a direct conflict

[8] For purposes of this motion, Defendants do not contest the associational standing proffer for the Plaintiffs in *NRDC v. Trump*. Federal Defendants reserve their right to later challenge jurisdiction to the extent evidence arises demonstrating that Plaintiffs lack standing.
[9] Although the standing of any one of the UDB Plaintiffs would be 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 attorneys' fees at taxpayer expense. *See Unification Church v. INS*, 762 F.2d 1077, 1082 (D.C. Cir. 1985).

between the defendant's conduct and the organization's mission," *id.* (citation omitted), and an expenditure of resources that makes the injury concrete. *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 23-24 (D.C. Cir. 2015). The D.C. Circuit has characterized this as a two-part inquiry: the court must "ask, first, whether the agency's action or omission to act injured the [organization's] interest and, second, whether the organization used its resources to counteract that harm." *Food & Water Watch, Inc. v. Vilsack* ("*F&WW*"), 808 F.3d 905, 919 (D.C. Cir. 2015) (citation omitted).

The relevant UDB Plaintiffs' asserted organizational standing fails on the first inquiry. In *Center for Responsible Science v. Gottlieb*, 346 F. Supp. 3d 29 (D.D.C. 2018), Judge Boasberg comprehensively explained the organizational interest injury requirement under Circuit precedent:

> To pass muster under this prong, the challenged conduct must perceptibly impair the organization's ability to provide services. . . . . Said otherwise, it must inhibit the organization's daily operations,— i.e., make the organization's activities more difficult. Articulations of this rule abound, but they all focus on the same point: the organization's tasks must be impeded. . . .[T]he Court's task is to differentiate between organizations that allege that their activities have been impeded — for whom the doors to the federal courts are open — from those that merely allege that their mission has been compromised — against whom the doors swing shut.

Id. at 37 (internal quotation marks, brackets, and citations omitted) (collecting cases). Or, as Judge Jackson put it in *New England Anti-Vivisection Society v. U.S. Fish & Wildlife Service*, 208 F. Supp. 3d 142 (D.D.C. 2016), for an organization to suffer concrete injury, "the challenged activity must hamper the organization's ability to *do what it does*" and "complaining that the organization's ultimate goal has been made more difficult is not sufficient." *Id.* at 166 (emphasis added) (citations omitted).[10]

[10] Recent decisions from this Court provide likewise. *See, e.g., Public Emps. for Envtl. Responsibility v. Bernhardt*, No. 18-1547, 2020 WL 601783, at *8 (D.D.C. Feb. 7, 2020)

None of the UDB Plaintiff organizations has shown that Proclamation 9681 interferes with its ability to provide services, or "to do what it does." Rather, the UDB Plaintiffs' arguments largely boil down to an allegation that the Proclamation will harm the environment and thus, by extension, harm the organizations that advocate for protection of the environment. But this is insufficient: "[t]he relevant showing for Article III standing is not injury to the environment but injury to the plaintiff." *Friends of the Earth*, 528 U.S. at 169. The fact that plaintiff organizations are spending money on conservation and education activities relating to lands excluded from the Monument does not mean that the exclusion of the lands harmed the organizations in a manner relevant to the organizational standing inquiry. They are still able to do what they do: namely, engage in conservation and education activities.

This fundamental defect in the UDB Plaintiffs' argument is illustrated by their assertions about a visitor center that Friends constructed. *See* UDB Br. 11-12. The UDB Plaintiffs contend that Friends needed to construct the visitor center because the modification of the Monument boundaries meant a reduction in the resources devoted to the Cedar Mesa area. Setting aside the lack of a factual basis for that allegation,[11] it is legally inadequate for purposes of organizational

---

(finding that plaintiff groups' "monitoring and advocacy efforts" in sensitive river basin were "relate[d] to pure issue advocacy" and did not support standing); *Tex. Low Income Hous. Info. Serv. v. Carson*, No. 18-cv-644-TJK, 2019 WL 6498816, at *5-6 (D.D.C. Dec. 3, 2019) ("standing must be based on more than an allegation that an agency's actions, or lack thereof, have put more distance between an organization and the ends it seeks"; "[t]he key inquiry is whether . . . the defendant's conduct perceptibly impaired the organization's ability to provide *services*" (internal quotation marks and citations omitted)); *Pub. Citizen v. Trump*, 361 F. Supp. 3d 60, 91 (D.D.C. 2019) (reiterating that plaintiffs cannot establish organizational standing "[b]y inflicting harm on themselves based on their fears of [the] hypothetical future harm" (quoting, indirectly, *Clapper*, 568 U.S. at 416)).

[11] Friends' speculation that the Proclamation reduced BLM resources dedicated to the Cedar Mesa area is unsupported. First, that the two ranger stations are now outside monument boundaries does not mean that they do not continue to provide visitor services and information to visitors about the area—including the lands excluded from the Monument. Quigley Decl. ¶ 25. In fact, there have been more ranger patrols in the Cedar Mesa area than before Proclamation

standing. The perceived lack of funding for visitor education would suggest an abstract injury to the public, or perhaps a speculative, broadly dispersed risk to the excluded lands (from visitors who are not educated about the resources there), but is not an injury to Friends as an organization. Similarly, the funds Friends has spent on the visitor center were not to "counteract" a harm to the organization; those funds were spent to counteract what Friends perceived to be a harm to the *land*, or a harm to the *public*. Thus, the allegation of injury to Friends fails both prongs of the organizational standing test. *See Gottlieb*, 346 F. Supp. 3d at 40 (organization's claim that "it ha[d] diverted its organizational resources to picking up the slack left from the FDA's desertion of its duties" did not demonstrate standing because organization did not identify "any activity predating [the challenged action] that [wa]s made more difficult by [challenged action]").

The UDB Plaintiffs come closer, but still fall short, when they assert that BLM has denied Friends' requests for funding for projects on the excluded lands. UDB Br. at 13. Although such a claim, if supported, could suggest injury to the organization itself, the suggestion in this case is without factual support. The BLM has not rejected or refused to fund any proposals from Friends based on the fact that the proposed project was outside the Monument boundaries. Quigley Decl. ¶ 22. In fact, BLM has continued to partner with Friends on projects on excluded lands after December 2017. *See id*. ¶ 23. Against this background, the claim that BLM asked Friends to "prioritize" funds it continues to receive from BLM for use on

---

9681. *Id.* ¶ 27. This is in part because both stations have hired two new permanent employees since 2017. *Id.* ¶ 26. And, Friends' claim that it built the visitor center solely in response to Proclamation 9681 is inconsistent with a pre-litigation fundraising appeal from Friends, which indicates that fundraising began before Proclamation 9681 issued, and that a longstanding concern over increased visitation (not concerns over Monument boundaries) drove the decision to construct the center. Friends of Cedar Mesa, https://www.friendsofcedarmesa.org/bears-ears-education-center (last visited Feb. 18, 2020).

projects within the new Monument boundaries does not show that any effort by Friends has actually been impeded.

Utah Diné Bikéyah also fails to identify a cognizable injury. Like Friends, Utah Diné Bikéyah asserts that it has been injured because it has diverted resources from ethnographic and economic development projects to protection efforts. It contends that these costs are traceable to Proclamation 9681 because, "[b]efore [the Proclamation], the BLM and the Forest Service would have been responsible for protecting these resources." UDB Br. 14. But, as noted, Utah Diné Bikéyah's diversion of resources to "pick up the slack" from the government in protecting cultural resources does not constitute a cognizable injury to it as an organization. *See Gottlieb*, 346 F. Supp. 3d at 41.[12]

The UDB Plaintiffs' allegations of injury to the other plaintiff organizations fail for similar reasons. In conclusory fashion, each organization states that it has diverted resources for advocacy and education relating following the Proclamation. UDB Br. at 14-15. But just as with Friends and Utah Diné Bikéyah, the diversion of resources by each organization "cannot alone constitute the harm." *Gottlieb*, 346 F. Supp. 3d at 41. *See also Turlock*, 786 F.3d at 24 ("the expenditure of resources on advocacy is not a cognizable Article III injury"). Because none of the UDB Plaintiffs has shown that its ability to provide services has been impeded, each organization's allegation of injury fails at the first step of the test.

[12] Moreover, there is no factual basis for the allegation that there is any "slack" to pick up. BLM and USFS are still authorized to, and engaged in, protecting resources on the federal lands they manage, both inside and outside the Monument. Roberson Decl. ¶ 15; Rasure Decl. ¶ 12. UDB provides no reason why its members cannot still "notif[y] BLM of a site's location" if investigation is needed. *See* UDB Br. 14 (alteration and internal quotation omitted).

2. The UDB Plaintiffs have not demonstrated actual or imminent injury to any of their members.

The UDB Plaintiffs' attempt to invoke associational standing is likewise flawed. Their primary theory of injury—that members of plaintiff Society for Vertebrate Paleontology ("SVP") will be impeded in their research because they cannot obtain funding from BLM's National Conservation Land Scientific Studies Support Program ("NCLS"), *see* UDB Br. 16-17—was marred by factual inconsistencies at the motion to dismiss stage, and it fails again for those reasons now.

First, while the UDB Plaintiffs correctly argue that the loss of federal funding can constitute injury sufficient to satisfy Article III, *see Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019), they cannot avail themselves of that argument because they do not identify any member who has actually lost NCLS funding as a result of the Proclamation. Although SVP member Robert Gay was conducting research at sites on the excluded lands prior to the Proclamation (namely the "White Canyon" and "P2N" sites), ECF No. 164-17 ("Gay Decl."), he was doing so using a grant of non-NCLS funds from BLM. Supplemental Roberson Declaration ("Suppl. Roberson Decl."), ECF No. 101-1, ¶ 21. Mr. Gay's belief that the funds came from the NCLS does not make it so—and is irrelevant because he did not actually lose the funds.[13] Similarly the UDB Plaintiffs claim that "at least 22 members had ongoing research projects" in

[13] Regardless of its source, Gay also appears to allege that he voluntarily ceased using his grant money after the Proclamation because he believed doing so would violate the grant agreement. Gay Decl. ¶ 18. Yet Gay does not cite any provision of the grant agreement, or any communication from BLM, requiring him to stop his work (or his use of the funding) if the lands were excluded from the Monument after his project began. And Gay's own research publication states that site preparation at P2N continued into 2018—*after the Proclamation issued*—raising questions about when he stopped using the funds. *See* A. Milner, R. Gay, X. Jenkins, Abstract: A Phytosaur Mass Death Site from the Upper Triassic Chinle Formation in Utah: Implications for the Adamanian-Revueltian Faunal Turnover (noting that site preparation "continued into 2018").

the excluded lands, but do not assert that these members had previously received NCLS funding for those projects. *See* UDB Br. 17. Furthermore, assertions that such "unidentified members have been injured" are "not enough." *Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 18 (D.D.C. 2018) (quoting *Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011)). Simply put, UDB Plaintiffs do not demonstrate any member lost federal funding due to the Proclamation.

Nor can UDB Plaintiffs establish injury based on the allegations of Mr. Gay (and another SVP member, Mr. Sumida) that they have abandoned "concrete plans" to seek NCLS funding to pursue research on lands that now fall outside the Monument's revised boundaries. To be sure, "a plaintiff suffers a constitutionally cognizable injury by the loss of *an opportunity to pursue a benefit* . . . even though the plaintiff may not be able to show that it was *certain to receive* that benefit had it been accorded the lost opportunity." *CC Distrib., Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989) (finding standing based on assertion of "the loss of a statutorily conferred opportunity to compete for a contract"). But SVP members cannot claim to have lost the opportunity to pursue NCLS funding—at most, they have lost the opportunity to pursue NCLS funding for projects on lands that were formerly within the Monument. SVP's members can still pursue NCLS funding for projects within the new Monument boundaries—and in fact, Mr. Gay identifies ongoing projects on lands still within the Monument. Gay Decl. ¶ 16 (noting two sites are within Shash Jáa unit). Nor have these members shown that they are unable to pursue projects in the excluded lands using funding other than NCLS grants. Indeed, Mr. Gay was conducting research at the P2N site using other grant funding before the Monument was designated by President Obama. *See* R. Gay, et al., A New Triassic Bonebed from the Bears Ears Region of Utah, at https://doi.org/10.6084/m9.figshare.4654567.v1.[14] Accordingly, the

[14] Similarly, Sumida expressly admits that his prior work on excluded lands was funded by a

UDB Plaintiffs' unsupported claim of injury based on a lost opportunity to seek NLCS funding does not demonstrate concrete injury.

The UDB Plaintiffs' other allegations in support of associational standing are all too general or too speculative to show injury to any organization's members. For example, the UDB Plaintiffs generally assert harm to SVP's members because "casual collection" of common invertebrate and plant paleontological resources" will now be allowed on those limited Forest Service lands now excluded from the Monument, but they do not identify any member who claims this as an injury, and they do not demonstrate—or even assert—that there are areas within such lands that are the subject of their members' present or even contemplated research. *See* UDB Br. 17-18.

Similarly, the UDB Plaintiffs cannot establish standing based on speculation that members of other Plaintiff organizations will be injured from potential oil and gas leasing, mining, or "increased looting, vandalism, and other forms of damage to important historic, cultural, and archaeological resources." *Id.* at 20. All of these asserted and implied injuries depend upon assumptions that third parties will seek to engage in certain types of resource development 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(b). But assumptions about third-party conduct are "overly speculative" for purposes of showing imminent injury, *F&WW*, 808 F.3d at 913 (citation omitted), and courts "may not assume" that agency decisionmakers will exercise their discretion

---

variety of other sources than the NCLS, including the David B. Jones Foundation. ECF No. 164-18 ¶ 7. His claimed injury is also confusing because he claims he "has been unable to perform any research in the Bears Ears area since July 2017," which is of course five months *before* Proclamation 9681 issued. *Id.* ¶ 9.

with respect to that conduct in any particular way. *Pub. Citizen*, 297 F. Supp. 3d at 25 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006)).[15]

In sum, the UDB Plaintiffs have failed to show that they or their members have suffered an injury in fact sufficient to establish jurisdiction in this Court.

3. The Tribes fail to demonstrate any concrete or imminent injury.

Like the UDB Plaintiffs, the Tribes fail to demonstrate with factual support any concrete or imminent injury satisfying Article III's requirements. The Tribes advance two theories of injury: that Proclamation 9681 harmed them in their capacity as sovereigns, based on the changes to an advisory commission; and that Proclamation 9681 harmed them as an organization, because it harms their interest in protecting cultural resources on lands excluded from the original Monument. Although there is no dispute about the value the Monument lands hold for them, neither of the Tribes' theories satisfies Article III's jurisdictional requirements.

As an initial matter, 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. Tribal Pls.' Mem. Supp. Mot. for Partial Summ. J. 11, ECF No. 163-1 ("Tribes Br."). 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 . . . .

[15] While the UDB Plaintiffs note in passing the current exploration operations at the Easy Peasy site, they do not demonstrate that any of their members uses lands in the vicinity of the site and is harmed by operations there.

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.

Similarly, the Tribes' assertion that the Court should find standing in light of their entitlement to "'special solicitude' as sovereign governments" is misplaced. Tribes Br. 12. First, the cases cited by the Tribes involved direct challenges to tribal authority over either activity occurring on a Tribe's property or the Tribe's activity itself. *See Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 464 (2d Cir. 2013) (Tribe had standing to challenge imposition of state taxes on slot machines operated by Tribe's casino on Tribe's reservation); *Otoe-Missouria Tribe of Indians v. N.Y. State Dept. of Fin. Servs.*, 974 F. Supp. 2d 353, 358-59 (S.D.N.Y. 2013), *aff'd*, 769 F.3d 105 (2d Cir. 2014) (allegations that "State has directly infringed the Tribes' sovereignty through letters that command Plaintiffs [including the Tribes themselves] to cease and desist from" from certain lending practices). Here, the Tribes do not claim injury based on government intrusion into their authority over their activities or reservation lands within the Tribes' sovereign jurisdiction.

Second, the D.C. Circuit has never sanctioned the proposition that a sovereign, such as a state or Tribe, is exempt from "the ordinary demands of Article III—that is, [to] establish injury-in-fact, causation and redressability." *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 178 (D.C. Cir. 2019); *see also id*. at 182 (noting that the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), despite its discussion of "special solicitude," related to Massachusetts' asserted "quasi-sovereign interests," still required the State to allege "a particularized injury"). As discussed below, the Tribes fail to meet the ordinary demands of Article III.

a. The Tribes fail to demonstrate concrete injury to themselves as sovereigns.

The Tribes contend that they have been injured as sovereigns by Proclamation 9681's changes to the Bears Ears Commission (since renamed the Shash Jáa Commission by Proclamation 9681). This theory is without merit because the changes do not impair their rights as sovereigns.

First, the Tribes contend that the changes to the Commission have "abrogate[d] the Tribes' right to participate, 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. 11. But that is simply not the case. As the Tribes acknowledge, the Defendant agencies have certain obligations (recognized under executive and secretarial orders) to consult and collaborate with tribal officials. *See* Executive Order No. 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249, 67,250 (2000) (agencies to consult with tribes "in the development of regulatory policies that have tribal implications"); Sec'y of the Interior Order No. 3342 (encouraging Interior bureaus to "consider how the Department can collaborate with tribes to better integrate tribal knowledge and concerns into the management of Federal lands and waters under the Department's charge").[16] Furthermore, the agencies are required by statutes and regulations, including under the ARPA, Native American Graves Protection and Repatriation Act, ("NAGPRA"), and NHPA, to consult with affected tribes on certain decisions. *See, e.g., Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006); 25 U.S.C. § 3003(b)(1)(A); 43 C.F.R. § 7.7(b); 36 C.F.R. § 800.3. Neither these

[16] Indeed, as the Tribes previously acknowledged, the Department of the Interior "has one of the strongest and most detailed tribal consultation policies." Tribes' Opp. to Mot. Dismiss, ECF No. 74 at 15. *See also* Dep't of the Interior, Tribal Consultation Policy, *available at* https://www.doi.gov/tribes/Tribal-Consultation-Policy (noting that Federal agencies have an obligation to "engage with Indian Tribes on a government-to-government basis . . . based on the U.S. Constitution and Federal treaties, statutes, executive orders, and policies").

principles nor the agencies' implementation of these consultation authorities and policies have changed because of the Proclamation. They still apply and require consultation with Tribes where proposed actions directly affect their interests, including actions on all of the lands within the original Monument boundaries.[17] Thus, the Tribes can continue to play an important role in the management of the relevant lands if they so choose. But they do not show that the Proclamation, including the changes to the Commission, eliminated any right to engage in government-to-government consultation on matters involving the excluded lands.

The Tribes also assert that they were harmed because the Shash Jáa Commission is only authorized to provide input as to the Shash Jáa unit, which encompasses substantially less land than the original Monument. Tribes Br. 14. But the Tribes do not establish that they have a legally enforceable right to participation in an advisory commission addressing the excluded lands, and the cases the Tribes cite therefore do not support their position. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), the Court addressed whether the Arizona legislature had standing to challenge a citizen-enacted proposition that amended Arizona's constitution to remove redistricting authority from the legislature. The Court noted, "'[t]o qualify as a party with standing to litigate,' the Arizona Legislature 'must show, first and foremost,' injury in the form of "'invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.'" *Id.* at 2663. The Court found, *inter alia*, that the Legislature adequately alleged an "invasion of a legally protected interest" because the State's Elections Clause vested in it "primary responsibility for

[17] In fact, independent of efforts to convene the Shash Jáa Commission, the agencies made extensive efforts to consult with the Tribes on the development of the new plans for the Monument. Quigley Decl. ¶ 11. Moreover, the BLM has continued to engage in tribal outreach on projects on lands excluded from the Monument by Proclamation 9681. *See id.*

redistricting." *Id.* Here, in contrast, the Tribes do not identify such a legally protected interest because they have not pointed to any statute or regulation that provides them with a right to participate in the Commission. The Antiquities Act does not mention, let alone require the creation of, any such advisory committees. 54 U.S.C. § 320301.[18]

Similarly, the Sixth Circuit, in *State by and through Tennessee General Assembly v. U.S. Department of State*, 931 F.3d 499 (6th Cir. 2019), noted that "interference with a legislative body's specific powers, such as its ability to subpoena witnesses, or a constitutionally assigned power, may create an injury that is concrete enough for Article III standing." *Id.* at 512. In that case, the Court held that Tennessee's legislature was unable to demonstrate standing to challenge federal statutes requiring states to provide Medicaid coverage to eligible refugees, because it failed to identify "an injury that it has suffered, such as disruption of the legislative process, a usurpation of its authority, or nullification of anything it has done." *Id.* at 514. So too here. Because they are unable to identify any legal entitlement to exercise any "authority" in the form of the Commission, they naturally are unable to identify any disruption, usurpation or nullification of that authority.

As for the lands retained within the Monument, the Tribes contend that the agencies have developed management plans for the Monument without consultation with the Commission. But any injury tied to that allegation is self-inflicted: the Commission has not met because the Tribes have declined to participate, despite receiving invitations to do so. Supp. Roberson Decl., ECF No. 101-1, ¶¶ 12-15. The Tribes also argue that adding a sixth seat to the Commission for the District 3 representative from the San Juan County Commission "dismantled the government-to-

[18] To the extent the Tribes rely on the government's obligation to engage in government- to-government consultation with the Tribes, as discussed above, that obligation remains in place.

government relationship" established by Proclamation 9558. Tribes' Br. 15. But there is no logic to their assertion that the addition of a single non-tribal member made it such that the "Commission no longer provides the Tribes with a mechanism to vindicate their sovereign rights." *Id.* The Tribes have not been removed from the Commission (except by their own refusal to participate)—they continue to be offered the same opportunity to provide guidance to the agencies informed by their "tribal expertise and traditional knowledge." *See* Tribes Br. 15. Further, five of the six seats on the Commission are designated for representatives of the Tribes, meaning they would always hold the majority. In sum, the Tribes are unable to identify any cognizable injury to them as sovereigns that would provide them with standing for their claims.

b. The Tribes fail to demonstrate concrete injury to them as sovereigns.

Alternatively, the Tribes, like the UDB Plaintiffs, assert "organizational standing." Tribes Br. 16. But their attempt to do so fails for the same reasons as the UDB Plaintiffs. In particular, they fail to provide any evidence that the Proclamation has "perceptibly impair[ed]" their ability "to provide services," *see F&WW*, 808 F.3d at 919, that it "inhibits" their "daily operations," *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015), or that it has made their "activities more difficult." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996). Instead, their allegations are that the reduction of the Monument "removed protections" from cultural resources. But such generalized allegations do not demonstrate a concrete and demonstrable injury to the Tribes as organizations.

Crow Creek Sioux is instructive here. In that case, 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. 331 F.3d at 913-14. The court held that the Tribe had failed to

demonstrate imminent injury because the 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.*[19]

The Tribes' theory that they will be injured by perceived lack of protection for 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 the NHPA, ARPA, and other statutes, which continue to apply on the excluded lands. *See id.* at 917. Moreover, the Tribes cannot show a concrete and particularized risk of injury with bare speculation about unspecified activities by unspecified third parties that might occur anywhere in an expanse of 1.1 million acres. The only specific development they identify is the Easy Peasy project. Tribes' Statements of Facts, ECF No. 163-2, Nos. 93-99. But they fail to identify any use by the Tribe (or any of its members) of the area in the vicinity of the project, let alone how they have been injured by it.[20]

Finally, the Tribes, addressing the second prong of the organizational standing analysis, note that they were forced to make expenditures aimed at "advocacy, education, and lobbying to protect excluded lands and objects, and to restore the complete monument." Tribes' Br. at 20.

[19]Similarly, in the Tribes' cited cases, the plaintiff tribes were required to demonstrate injury from specific, and imminent, third party actions. *See Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1162 n.3 (9th Cir. 2018) (uranium mining at a specific site); *Pit River Tribe*, 469 F.3d at 779 (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).
[20] The Tribes do not assert "associational standing" in their brief. If they did, however, their effort would fail, because they fail to identify any individual member who has been injured. *See Pub. Citizen,* 297 F. Supp. 3d at 17-18.

But in this Circuit, "the expenditure of resources on advocacy is not a cognizable Article III injury." *Turlock*, 786 F.3d at 24. *See also Gottlieb*, 346 F. Supp. 3d at 40 (allegations that an organization has reallocated resources to a new campaign "cannot save the day when the record reveals the educational campaign at issue to be functionally similar to the organization's normal-course campaigns independent of the challenged conduct.").[21] They therefore are unable to meet the second element of this Circuit's organizational standing test either.

No one disputes that the Tribes have strong interests in protecting resources on the lands within and excluded from the Monument. But, like all plaintiffs, the Tribes bear the burden of establishing this Court's Article III jurisdiction and their filings fall well short of that mark.

B. Plaintiffs lack standing to bring claims against the President, and those claims should be dismissed, because relief is available against subordinate officials.

Plaintiffs bring their claims against agency officials and the President himself. *See* NRDC Am. Compl. ¶ 51-57; Tribes Am. Compl. ¶¶ 30-34; UDB Am. Compl. ¶¶106-10. But Plaintiffs lack standing to seek relief against the President, because they have not shown that entry of their requested declaratory and injunctive relief against him would redress their injuries, or that the Court is likely to award such relief against the countervailing separation of powers concerns when there are subordinate officials also named as defendants. *See Swan v. Clinton*, 100 F.3d 973, 976-77 n.1 (D.C. Cir. 1996) (noting that an injunction or declaratory judgment against the President would present separation of powers concerns and was not warranted where

[21] Much of the Tribes' resources appear to have been expended in drafting an alternate land use management plan for the Monument. Tribes' SOF ¶¶ 70-72 and declarations cited therein. But the Departments of Interior and Agriculture—not the Tribes—are authorized under statute (and, for that matter, President Obama's Proclamation 9558) to establish the land use plans for the relevant lands. Thus, the Tribes' contention that the voluntary expenditure of such resources demonstrate an injury caused by Proclamation 9681 has no legal, or logical, merit.

relief was available against agency defendant); *see also, e.g.*, *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief" (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) and *Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992) (Scalia, J., concurring in part and concurring in the judgment)).

Here, all three sets of Plaintiffs have acknowledged that their asserted injuries can be redressed by a declaratory judgment and potential remedies directed to the Agency Defendants. Tribes Opp. MTD, ECF No. 74, at 21-22; NRDC Opp. MTD, ECF No. 72, at 13; UDB Opp. MTD, ECF No. 71 at 20. *See also, e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1334 (D.C. Cir. 1996). Thus, the proper course of action is for the Court to dismiss Plaintiffs' Authority Claims to the extent they name the President as a defendant under Rule 12(b)(1).

II. Federal Defendants are Entitled to Summary Judgment on Plaintiffs' *Ultra Vires* Claims Because the President has Authority to Modify the Monument Boundaries.

The fundamental question at issue in the parties' cross-motions for partial summary judgment is whether presidents have the authority under the Antiquities Act to modify the boundaries of national monuments. The answer is yes. The President possesses broad power under the Antiquities Act to modify reservations of land for national monuments, and in particular, to ensure compliance with the statutory directive to confine the reservation to the "smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b). The President expressly relied upon and exercised this authority. Defendants are therefore entitled to summary judgment on each of the Plaintiffs' Count I.

A. The President's interpretation of his authority is entitled to deference.

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."). This longstanding rule originates in concerns about separation of powers and the potential involvement of the judiciary in "considerations which are beyond the reach of judicial power." *Dakota Cent. Tel. Co. v. S. Dakota*, 250 U.S. 163, 184 (1919). Implicit in this limited review is the principle that courts should afford deference to the President's determination of the scope of the authority delegated to him by Congress. The Supreme Court has made clear that courts are to defer to an executive-branch agency's "interpretation of a statutory ambiguity that concerns the scope of [its] statutory authority." *City of Arlington v. FCC*, 569 U.S. 290, 296-97 (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 *Arlington*, 569 U.S. at 301).

There is no reason why similar – or even greater – deference should not be afforded the President in addressing statutory delegations of authority to him. *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, in *AFL-CIO v. Kahn*, the D.C. Circuit did just that, deferring to President's

[22]An amicus brief filed in *Western Watersheds Project v. BLM*, No. 08-cv-1472, 2009 WL 5045735 (Apr. 15, 2009 D. Ariz.) 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

long-standing interpretation of his authority under a statute and noting that the "'construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.'" 618 F.2d at 790 (citations omitted). Consistent with this principle, the D.C. Circuit has regularly afforded deference to agencies interpreting statutory authority that was directed to the President. *See Consarc Corp. v. U.S. Treasury 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) (deferring to EPA's interpretation of statute that vested initial authority in "the President," who had in turn delegated his authority to EPA).

The Court should therefore give deference to the President's determination that the Antiquities Act provides him with authority to modify 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. *See* 82 Fed. Reg. at 58,085. But even if deference were unavailable, the President's determination did not exceed his authority. Contrary to Plaintiffs' allegations, the text of the Antiquities Act does not foreclose the President's assertion of this modification authority—it reinforces it. *See Safari Club*, 878 F.3d at 326. *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the

---

> 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*, 306 F.3d at 1132; *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 813 (2003). One commentator has argued 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 . . .

Id. (emphasis added). This brief was filed on behalf of some of the same by Law Professors and Practitioners who filed an amicus brief in this case). *Compare id.*; ECF No. 76.

President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."). Congressional authorization is also corroborated by the fact that Presidents have repeatedly exercised the authority to reduce national monuments and Congress has not curtailed that conduct in 110 years, despite a clear opportunity to do so in the enactment of FLPMA in 1976. This Court should not disrupt the balance that has been struck between these co-equal branches.

B. The text, purpose, and legislative history of the Antiquities Act demonstrate that it authorizes the President to modify monument boundaries.

1. Presidential modification authority is consistent with the text and context of the Act.

Presidential authority to act "must stem either from an act of Congress or from the Constitution itself." *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown*, 343 U.S. at 585; *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981)). Here, the Antiquities Act delegates "broad power" to the President to designate national monuments and reserve lands for those monuments. *See Mountain States Legal Found. v. Bush* ("*Mountain States*"), 306 F.3d 1132, 1135 (D.C. Cir. 2002) (citations omitted). By its terms, the statute generally grants the President substantial flexibility, expressly leaving the declaration of a monument to the President's "discretion." 54 U.S.C. § 320301(a). Similarly, the President's decision to reserve lands for a monument is entirely discretionary. *See id.* § 320301(b) ("The President *may* reserve parcels of land . . . ." (emphasis added)).

However, the Antiquities Act provides an express directive to the President about the size of the reservations of land. Congress specifically instructed the President to ensure that "the limits of [such reservation] in *all cases* shall *be confined* to the smallest area compatible with the proper care and management of the objects to be protected." 34 Stat. 225, § 2 (1906) (emphasis added). In contrast to the discretionary language used in the rest of the statute, Congress used

strong and mandatory terms—"shall be confined"—to limit the area of lands reserved for a monument. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("When a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes a mandatory duty."). Dictionaries contemporaneous with the passage of the Antiquities Act confirm that "shall" indicated a firm obligation, defining the term as "[t]o be obliged; must." *See* Webster's Int'l Dictionary of the English Language 1322 (W.T. Harris ed. 1907), available at https://catalog.hathitrust.org/Record/100598138. Congress also chose the word "confine," which indicates an ongoing action or constraint. *See id.* at 300 (defining "confine" as "[t]o restrain within limits" and "to keep close"). In short, Congress departed from its use of discretionary language in other parts of the Antiquities Act to make clear that Presidents are to ensure that monument reservations are and remain "confined" to the smallest area the President deems to be consistent with protection of the monument objects. *See Sandifer v. U.S. Steel Corp*., 571 U.S. 220, 227 (2014) ("It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (internal quotation marks and citation omitted)).

The importance of confinement is confirmed by the Act's legislative history, where the limits on reservations were consistently emphasized. *See* H. R. Rep. No. 59-2224, at 1 (Antiquities Act intended "to create small reservations reserving *only so much land* as may be *absolutely necessary* for the preservation of those interesting relics of prehistoric times" (emphases added)). Indeed, a colloquy between the Act's sponsor, Representative John Lacey, and another representative, shows Congress' concern in ensuring that monument reservations would not be not unnecessarily expansive:

> Mr. STEPHENS of Texas. Will that take this land off the market, or can they still be settled on as part of the public domain?

> Mr. LACEY. It will take that portion of the reservation out of the market. It is meant to cover the cave dwellers and cliff dwellers.
> Mr. STEPHENS of Texas. How much land will be taken off the market in the Western States by the passage of the bill?
> Mr. LACEY. Not very much. The bill provides that it shall be the smallest area necessary for the care and maintenance of the objects to be preserved.
> Mr. STEPHENS of Texas. Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?
> Mr. LACEY. Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst the other reserves the forests and the water courses.

40 Cong. Rec. 7888 (1906). Were Congress not so intent on ensuring that monument reservations remained limited, Congress could have simply directed the President to "reserve" land in "*an* area compatible" with protection of monuments; its express instruction to "*confine*" the reservation to "*the*" area that is the "*smallest*" compatible with protection must be given significant weight.

It would be nonsensical to interpret this compulsory instruction from Congress to "confine" monument reservations as applying only to the initial reservation, and not encompassing the authority to modify monument reservation boundaries when the President subsequently finds that "the smallest area" compatible with protection is smaller than the area presently reserved. The President cannot fully comply with Congress' instruction to ensure that monument reservations remain "confined" to the smallest area without the power to revisit prior reservations. It is a well-settled principle that government entities have broad authority to reconsider decisions and correct errors. *See, e.g., Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950) ("The power to reconsider is inherent in the power to decide."); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008) ("The prohibition against doing something *not* authorized by statute is altogether different from the power to reconsider something that is authorized by statute . . . [because t]he power to reconsider is inherent in the

power to decide") (citing *Trujillo v. Gen. Elec. Co*., 621 F.2d 1084, 1086 (10th Cir.1980)); *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008) (same). A president is free to revoke prior presidents' executive orders, and take other actions—including reversals of prior decisions—necessary to fulfill his constitutional duty to "take Care that the Laws be faithfully executed." *See* U.S. Const. art II, § 3; Vivian S. Chu & Todd Garvey, Cong. Research Serv., RS20846, Executive Orders: Issuance, Modification, and Revocation 7 (2014) ("The President is free to revoke, modify, or supersede his own orders or those issued by a predecessor."). In light of the Antiquities Act's text, there is no reason to think that a President lacks similar authority to revise the boundaries of a predecessor's national monument designation to ensure compliance with the confinement requirement.

2. Plaintiffs' textual counterarguments are without merit.

Plaintiffs' textual arguments cannot be accepted because they ignore the importance of the Act's confinement requirement. Plaintiffs argue that the Act's language sustains only two narrow actions: declaring and reserving—not the "opposite" powers of "revok[ing] or reduc[ing] an existing 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. This authority is entirely consistent with the power to declare and reserve, and the cases cited by UDB and the Tribes to suggest otherwise are inapposite. In *University of Texas Southwestern 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 the text from its 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. 27 (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 the obligation to ensure only those lands necessary to do so are included in the reservation. *See infra* at Part II.C.

Plaintiffs claim that Federal Defendants' reading would impose a "mandatory and indefinite duty on the President to revisit the boundaries of every national monument ever designated . . . ." UDB Br. 27 (emphasis omitted). To the contrary, a statute can authorize Executive Branch action without imposing a mandatory duty to conduct a particular review. *See,*

[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, 3094 (2014).

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*, 809 F.3d 664, 671 (D.C. Cir. 2016) (distinguishing between grants of discretionary and mandatory authority). Further, the UDB Plaintiffs' reliance on *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), is plainly unwarranted. UDB Br. 28. 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.'" 573 U.S. at 324 (internal quotations omitted). Here, Presidential modification authority was first exercised over 100 years ago (and within mere years of the Antiquities Act's enactment).[24]

The UDB Plaintiffs also argue that the Supreme Court has held "that Congress can reduce or eliminate the Government's stake in federal land only if it does so expressly." UDB Br. 33. But each of the cases they cite involved a *grant* of federal property or property interests to a third party. *See Coosaw Mining Co. v. South Carolina ex. rel. Tillman*, 144 U.S. 550, 562 (1892); *United States v. Holt State 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

[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. 28; Tribes Br. 23.
[25]https://www.patagonia.com/protect-public-lands.html (last visited Feb. 17, 2020).

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 (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 is without merit.

3. 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. 29-30; Tribes Br. 29-34. 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 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 withdrawals. Act of Mar. 3, 1891, Ch. 563, § 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 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] which addressed presidential authority to modify or revoke forest reserves created under the Forest Reserve Act of 1891. *E.g.*, UDB Br. 30. While Plaintiffs claim that Congress believed the 1897

[26]The five statutes cited in by UDB Plaintiffs in a footnote are distinguishable on similar grounds. *See* UDB Br. 30-31 n.3. 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); 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-2587.

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 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* thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such 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*, 349 F Supp. 3d 48, 62 (D.D.C. 2018), *aff'd* 945 F. 3d 535 (D.C. Cir. 2019) ("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 and citations 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

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

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

C. Plaintiffs' arguments regarding the history and purposes of the Antiquities Act have no merit.

Plaintiffs argue that the legislative history and primary purpose of the Antiquities Act is incompatible with presidential authority to modify monument boundaries. *See, e.g.,* Tribes Br. 25-29. 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 not contrary to the "protective purposes" of the Antiquities Act. *See* 54 U.S.C. § 320301(b).

In fact, as discussed above, 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

Thus, while Plaintiffs are certainly correct that Congress intended to preserve objects of historic significance, it also 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 purposes of the statute.

Plaintiffs also argue that Defendants' interpretation of the Antiquities Act cannot be squared with its purpose and legislative history because both demonstrate that Congress intended the Act to provide permanent—not temporary—protections. Even assuming that is the case, however, there is no question that the Act also intended (indeed, it directed) the reservations to be "confined to the smallest area compatible with the proper care and management of the objects to be protected." Congress clearly did not intend permanent "protection" of land that was unnecessary for that purpose. In other words, the precise delineation of a monument reservation need not be permanent to be consistent with that general intent. To the contrary, Congress' express instruction to limit the size of monument reservations is consistent with the idea that Monument reservations can be modified.

D. Congressional acquiescence to the longstanding and extensive practice of presidential modification of monument boundaries should be afforded significant weight.

While the text, purpose, and history of the reservation provision amply demonstrate that modification of monuments is within the scope of the President's delegated authority, that conclusion is cemented by decades of presidential practice in modifying monument designations and congressional acquiescence to that practice despite numerous opportunities to curtail it.

"a very small amount."); *id*. at 17 (colloquy between Del. 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").

1. Congress has never rejected modification authority under the Antiquities Act.

When the elected branches of government are in accord on the meaning of a statute, courts are properly reluctant to intervene. "[T]he longstanding 'practice of the government' can inform [a court's] determination of 'what the law is.'" *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 401 (1819), and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Thus, courts afford a presumption of congressional consent to presidential action that is "known to and acquiesced in by Congress" over an extended period of time. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915); *Dames & Moore*, 453 U.S. at 686 (same). *See also Medellin*, 552 U.S. at 524 ("Presidential authority can derive support from 'congressional inertia, indifference or quiescence.'" (quoting *Youngstown*, 343 U.S. at 637)); *Al-Bihani v. Obama*, 619 F.3d 1, 26 (D.C. Cir. 2010) (en banc) ("courts presume that Congress authorized the President, except to the extent otherwise prohibited by the Constitution or statutes, to take at least those actions that U.S. Presidents historically have taken . . . ." (Kavanaugh, J., concurring)).

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. NPS Monuments List, *supra* n.2. 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.'" *Noel Canning*, 573 U.S. at 525 (quoting *McCulloch*, 4 Wheat at 401)); *Al-Bihani*, 619 F.3d at 26 (Kavanaugh, J., concurring).

The UDB Plaintiffs emphasize that congressional acquiescence cannot create authority for action not authorized by Congress. UDB Br. 36. But this mischaracterizes Federal Defendants' argument, which, as described above, is that Congress' refusal to address the longstanding practice of Presidential modification of monuments *corroborates* the President's understanding of his authority, not that it provides it.

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. 37-38. 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*, 573 U.S. at 525. Further, those instances where the Court has not found a "particularly longstanding practice" are quite distinct. *See Medellin*, 552 U.S. at 532. 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.* That stands in marked contrast to the situation here, where the Federal Defendants can point to eighteen prior examples over many decades.

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).

[30]Plaintiffs also cite a 1932 Interior Solicitor's Opinion, M. 27025, quoting it as noting that the

But 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 *Midwest Oil Co.*, 236 U.S. at 459, 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.[31]

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 *infra* at n. 30.

[31] The UDB Plaintiffs also seek to rely on a 1938 Attorney General opinion that the President cannot completely *abolish* a national monument. UDB Br. 37. But this same opinion expressly

Under binding precedent, the President's interpretation of his statutory authority is entitled to deference when he has acted on that interpretation and Congress has not acted to reverse that interpretation. In *AFL-CIO v. Kahn*, the D.C. Circuit addressed whether an executive order, authorizing denial of government contracts to companies that failed to comply with certain employment standards, was within the authority granted the President under the Federal Property and Administrative Services Act ("FPASA"). 618 F.2d at 785. In light of the FPASA's "imprecise definition" of presidential authority, the Court relied heavily on the President's past exercise of his authority under the Act and congressional acquiescence to that practice. The Court reasoned:

> Of course, the President's view of his own authority under a statute is not controlling, but *when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is "entitled to great respect.*" As the Supreme Court observed this Term, the "construction of a statute by those charged with its execution *should be followed* unless there are *compelling indications* that it is wrong."

Id. at 790 (quoting *Bd. of Governors of Fed. Reserve Sys. v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978) & *Miller v. Youakim*, 440 U.S. 125, 144 n.25 (1979) (emphasis added)). The court thus upheld the executive order. *Id.* at 793.

Consistent with *Kahn*, the President's view of modification authority under the Antiquities Act indisputably has "been acted upon over a substantial period of time without eliciting congressional reversal," and is therefore "entitled to great respect." *See id.* at 790. The

---

supports the Federal Defendants' position here, because it recognized 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 comp[a]tible 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).

Court, therefore, should follow the President's construction of the Act unless there are "compelling indications that it is wrong," *see id.* There are no such compelling indications here.

Plaintiffs insist that the "eighteen prior modifications are clearly distinguishable" for a variety of reasons. UDB Br. 40. But 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). Proc. 1167; NPS Monuments List, *supra* n.3. Similarly, President Wilson diminished Mount Olympus National Monument in 1915 by nearly 300,000 acres, almost a 50% diminishment of the original monument. Proc. 1293; NPS Monuments List, *supra* n.3.

Even more strikingly, 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); NPS Monuments List, *supra* n.3. The UDB Plaintiffs argue that "President Taft knew that the boundaries would have to be revised," and that "[t]he modification of the boundaries, then, was part of the plan from the start." UDB Br. 42. Quite so. *Mere years* after the Act's enactment, President Taft *relied* on the fact that it authorized boundary modification when he originally created (and then later modified) the monument. *See* Rothman at 19-21.

Finally, in a last gasp attempt, UDB claims that some modifications purported to rely on a separate grant of power. UDB at 41. To the contrary, every one of the relevant Proclamations invoked the Antiquities Act. *See* Defs.' App'x at US_APP0010-45. *See also* ECF No. 127 at 13-

14 (Defs.' Resp. Amici Br. addressing argument that reduction of Mt. Olympus National Monument was based on war powers).

2. The enactment of FLPMA conclusively demonstrates congressional acquiescence to presidential modification authority.

Plaintiffs' next argument, relying on the enactment of FLPMA (and its express prohibition of *the Secretary* modifying any withdrawal made under the Antiquities Act), ultimately is conclusive, but contrary to Plaintiffs' position. In FLPMA, Congress acted to comprehensively govern the executive branch's withdrawal and reservation authority. Subsection 1714(j), relied upon by Plaintiffs, focuses only on the Secretary's withdrawal authority, imposing general limits on that 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. . . .

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," as it did for the Secretary. *Cf. id.* Under these circumstances, FLPMA should 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 gloss over the fact that FLPMA addressed only the *Secretary*'s ability to modify monuments, and left the President's authority intact. They instead emphasize a House Report that they interpret as demonstrating Congressional intent that Congress alone would have authority to modify monument withdrawals under the Antiquities Act. UDB Br. 32 (citing H.R. Rep. No. 94-1163 at 9). In emphasizing this interpretation, Plaintiffs violate 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) (citation omitted). *See also 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"). 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, 583-84 (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.* at 422 (quoting 146 Cong. Rec. 5,611 (2000)) (emphasis added). But the court rejected the argument—relying instead on analysis of the language and structure of the statute. *Id.* (reasoning that "an omission is intentional where Congress has referred to something in one subsection but not in another") (citations omitted). The court rejected NAB's "evidence that Congress had a broader purpose" because the statement had "no statutory reference point." *Id.* (quoting *Shannon*, 512 U.S. at 583-84).

Similarly 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 contention that Congress had a broader purpose of maintaining *all* modification authority for itself, like in *NAB*, "appears nowhere in the statute." *Id.* 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) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (citations 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).[32]

Finally, the Tribes argue that Congress' addressing of monuments created by the 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. Plaintiffs' claim that the Proclamation unlawfully excludes objects from the Monument's reservation is not properly the subject of this briefing and fails in any event.

Plaintiffs also argue that the Proclamation did not just diminish the Monument, but also "excludes numerous landmarks, structures and objects that President Obama explicitly declared to be national monuments . . . ." UDB Br. 43-44. *See also* NRDC Br. 17-18; Tribes' Br. 23. This argument fails.

[32]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. The Tribal Plaintiffs similarly seek 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).

As an initial matter, Plaintiffs' assertion that the President's decision to exclude such objects is not a question of whether he has the authority to modify national monuments, but rather whether, in this case, he properly exercised that authority. That argument is therefore not within the scope of this partial summary judgment briefing.[33]

However, even assuming the arguments are properly addressed at this stage of briefing, they fail. First, Plaintiffs are wrong that President Obama designated "as national monuments" any individual "objects" described in the 2016 Proclamation. The 2016 Proclamation did not designate the expressly identified "objects" as separate "monuments." Rather, the 2016 Proclamation made clear that it was creating a singular "Bears Ears National Monument." 48 Fed. Reg. at 1143 (declaring "the objects identified above that are situated upon lands and interests in lands owned by or controlled by the Federal Government to be the Bears Ears National Monument . . .").

Moreover, it is simply untrue that all of the various resources described in the 2016 Proclamation are necessarily "objects" for purposes of the Antiquities Act. The 2016 Proclamation described a wide variety of natural and cultural resources ranging from specific and expressly identified objects (such as the Lime Ridge Clovis Site and the "Moki steps,") (82 Fed. Reg. at 1139); to whole plant and animal species (such as various wildflowers and "mule deer and elk"; to landscape features (some of which occurred only partially within the original Monument, such as Cedar Mesa, the Hole-in-the Rock trail) (Supp. Roberson Decl. ¶¶ 23-24) and the San Juan River; to generic descriptions of resources such as "tools and projectile points."

[33] *See* ECF No. 129. The same is true of UDB's contention that, assuming the President has authority to modify boundaries, an 85% diminution of the Monument size would be unlawfully excessive. *See* UDB Br. 43-44. Such argument must await briefing on UDB's abuse of discretion claim.

82 Fed. Reg. at 1139. The Proclamation nowhere states that every such resource described constitutes an "object"— which, if Plaintiffs were correct, would presumably include each and every "[m]ule deer and elk." *See* 82 Fed. Reg. at 1139.

Second, modifying monument boundaries such that some "objects" no longer fall within it is consistent with the Antiquities Act, to the extent the 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, prior Presidential modifications of monuments have removed "objects" from the monument's reservation. *See* Proc. 3539 (excluding "the detached Otowi section of the monument comprising 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)). *See also* 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). Similar to the general practice of modifying national monuments, the President's view as it relates to removing "objects" from monument reservations is "entitled to great respect" in light of Congress' acquiescence to the practice. *See AFL-CIO v. Kahn*, 618 F.2d at 790.

Moreover, Plaintiffs fail to demonstrate that the removal of "objects" named in

Proclamation 9558 was inconsistent with past practice or the President's 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. 9, 24, they do not identify objects that were specifically identified as such in the 2016 Proclamation and are now excluded from the Monument boundaries.

The only specific items that Plaintiffs identify are landscape features, namely Cedar Mesa, Valley of the Gods, Hideout Canyon, Elk Ridge, and the Hole-in-the-Rock trail.[34] Tribes' Br. 24; UDB Br. 7. But as noted above, the 2016 Proclamation does not expressly identify some of these features as "objects."[35] And for other excluded landscape features, such as Valley of the Gods and Hideout Canyon (which were characterized as objects under the 2016 Proclamation), 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 require the protections conferred by the Monument reservation. For instance, the Proclamation explains that Valley of the Gods is protected by an administratively designated "Area[] of Critical Environmental Concern." *Id.* Under that designation, BLM manages the area to preserve the

[34]Notably, only portions of the Hole-in-the-Rock trail were included in the Monument as originally established. Supp. Roberson Decl. ¶ 23.

[35]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. However, Proclamation 9558 is ambiguous as to whether Elk Ridge is an "object," and the BLM's determination that it is not should receive deference. *See Montana Wilderness Ass'n v. BLM*, 725 F. 3d 988, 1000 (9th Cir. 2013) (finding that the proclamation designating the Upper Missouri River Breaks National Monument was ambiguous as to whether an area named in the proclamation was an "object," and deferring to the BLM's understanding that it was not). 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.

scenic character of the landscape and minimal visual change from human activities is allowed. Supp. Roberson 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, which must be managed "so as not to impair [its] suitability for future congressional designation as Wilderness." 43 U.S.C. § 1782(c).

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 authority and consistent with prior practice. *See* 82 Fed. Reg. at 58,084.

III. Federal Defendants are Entitled to Summary Judgment on Plaintiffs' Constitutional Claims.

In their final Authority Claims, Plaintiffs assert that Proclamation 9681 was an unconstitutional exercise of legislative power and therefore violated the separation of powers doctrine. NRDC Count II; Tribes' Counts II & III; UDB Count III. But because, as demonstrated above, the President acted pursuant to lawfully delegated authority, there is no violation of the separation of powers doctrine nor violation of the Property Clause. Congress has 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.

The claims are defective for other reasons as well. First, because Plaintiffs' constitutional claims are all founded on the same arguments as their *ultra vires* claims, 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 statutory claim alleged "the same infirmities that underlie their separation of powers claim").

Even if this judicial canon could be avoided, Plaintiffs fail to allege a cognizable separation of powers violation. Plaintiffs' separation of powers claims assert that the President improperly exercised legislative authority by reducing the boundaries of the Monument. But, where a statute authorizes Executive branch action and "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform," there is no constitutional concern. *Whitman*, 531 U.S. at 472 (citation omitted). As discussed above, the "intelligible principle" standard is clearly met here, where Congress has instructed the President to confine monument reservations to the "smallest area compatible" with protection of the objects. *See Mountain States*, 306 F.3d at 1137 (Antiquities Act "includes intelligible principles to guide the President's actions"); *Tulare*, 306 F.3d at 1143 (same).[36]

The Tribes' claim that Defendants violated the Presentment Clause fares no better. They do not demonstrate 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. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 124 (D.D.C. 2007). *Cf. Clinton v. City of New York*, 524 U.S. 417, 447 (1998) (finding Presentment Clause violation where statute "gives the President the unilateral power to

[36] Nor does *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942) (cited by UDB at p. 44) support Plaintiffs' claims. In that case, the Court rejected the plaintiff tribe's argument that the President had, by executive order, conveyed title away from the United States to the tribe, given the absence of any Congressional delegation to do so. *Id.* at 326. Here, not only did the President not convey lands, but there is Congressional authorization for the action he took.

change the text of duly enacted statutes"). Their real challenge (addressed above) is that the Proclamation was inconsistent with the Antiquities Act—not that it amended the Act. *See* Tribes Am. Compl. ¶ 259. Accordingly, Federal Defendants are entitled to summary judgment on the Plaintiffs' constitutional claims.

IV. Plaintiffs are not Entitled to Injunctive Relief.

Plaintiffs UDB and NRDC assert that they are entitled to injunctive relief. But even if the Court were to rule for Plaintiffs on the merits of their claims, UDB makes no showing whatsoever, UDB Br. 45, and NRDC makes only cursory arguments (NRDC Br. 22), that the rigorous standard for permanent injunctive relief is met. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) (describing standard for injunctive relief). Plaintiffs also seek vacatur of Proclamation 9681, but they provide no reason that the "drastic and extraordinary remedy" of injunctive relief should *also* be granted. *See id.* ("If a less drastic remedy (such as . . . vacatur . . .) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted.").[37]

CONCLUSION

For the reasons set forth above, Federal Defendants have demonstrated that there is no genuine issue of material fact, and they are entitled to judgment as a matter of law.

Respectfully submitted this 19th day of February, 2020,

PRERAK SHAH
Acting Deputy Assistant Attorney General

/s/ Romney S. Philpott
Romney S. Philpott
U.S. Department of Justice

[37] To the extent there arises any question about the need for injunctive relief, the Court should order remedy briefing.

Environment and Natural Resources Division
Natural Resources Section
999 18th St., #370
Denver, CO 80202
Phone: 303-844-1810
E-mail: Romney.Philpott@usdoj.gov

Judith E. Coleman
U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044-7611
Phone: 202-514-3553
Email: Judith.Coleman@usdoj.gov

Attorneys for Federal Defendants