UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOPI TRIBE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 17-cv-2590 (TSC)
UTAH DINE BIKEYAH, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 17-cv-2605 (TSC)
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 17-cv-2606 (TSC) **CONSOLIDATED CASES**

ORDER

This action involves three separate challenges to President Donald J. Trump's December 4, 2017 proclamation, which decreased the size of the Bears Ears National Monument and divided it into two separate parcels.

The first challenge was brought on December 4, 2017 by the Ute Indian Tribe, Navajo Nation, Hopi Tribe, Ute Mountain Ute Tribe, and Zuni Tribe (collectively, "Tribal Plaintiffs"). The second was brought on December 6, 2017 by Utah Dine Bikeyah, Conservation Lands Foundation, Inc., Society of Vertebrate Paleontology, Patagonia Works, Friends of Cedar Mesa, National Trust for Historic Preservation, Archaeology Southwest, and The Access Fund (collectively, "UDB Plaintiffs"). And the third challenge was brought on December 7, 2017 by the Natural Resources Defense Council, Inc., National Parks Conservation Association, The Wilderness Society, Southern Utah Wilderness Alliance, Grand Canyon Trust, Great Old Broads for Wilderness, Western Watersheds Project, Sierra Club, Center for Biological Diversity, Wildearth Guardians, and Defenders of Wildlife (collectively, "NRDC Plaintiffs").

By Order dated February 15, 2018, pursuant to Federal Rule of Civil Procedure 42(a), the court granted Defendants' motion to consolidate the cases because they involve common questions of law and fact and adjudicating them together serves the interests of judicial economy. (ECF. No. 32.)

Before the court are four separate motions to intervene filed by American Farm Bureau Federation and Utah Farm Bureau Federation (collectively, "Farm Bureau Applicants") (ECF No. 38), San Juan County, Utah (ECF No. 41), Uinta Utah Indians, Tabeguache Colorado Indians, Mary Jenkins, Melvin Jenkins, Roger Kochampanasken, Tarah Amboh, Margret Reed, and Lynda Kozlowicz (collectively, "Uinta Applicants") (ECF No. 43), and the State of Utah (ECF No. 52).[1] Aside from the Uinta Applicants, who seek to intervene in only the Tribal Plaintiffs' challenge, the applicants seek to intervene in all three challenges. For the reasons

[1] At the September 24, 2018 status conference. The court granted the January 11, 2018 motion to intervene filed by Brandon Sulser, Biggame Forever, Sportsmen for Fish & Wildlife, Utah Bowmen's Association, Utah Wild Sheep Foundation, Michael Noel, Sandy Johnson, and Gail

stated herein, Farm Bureau Applicants, San Juan County, and the State of Utah's motions to intervene are **GRANTED** with conditions, and the Uinta Applicants' motion to intervene is **DENIED**.

I. BACKGROUND

The Antiquities Act provides that "[t]he 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 that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301.

On December 28, 2016, invoking this authority, President Barack Obama established the Bears Ears National Monument, which encompassed approximately 1.35 million acres of land in Utah. *See* Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1139 (Dec. 28, 2016). President Obama took this step after finding that it was "in the public interest to preserve the objects of scientific and historic interest on the Bears Ears lands" and determining that the boundaries of the monument were "confined to the smallest area compatible with the proper care and management of the objects to be protected." *Id.*

Almost one year later, on December 4, 2017, President Trump issued a proclamation finding that "the area of Federal land reserved in the Bears Ears National Monument established by Proclamation 9558 is not confined to the smallest area compatible with the proper care and management of those objects." Modifying the Bears Ears National Monument, 82 Fed. Reg. 58081 (Dec. 4, 2017). The proclamation decreased the Bears Ears National Monument by approximately 1,150,860 acres of land that President Trump found "unnecessary for the care and management of the objects to be protected within the monument." *Id.* In so doing, the once contiguous monument became two individual parcels. *See id.*

Johnson (17-cv-02605, ECF No. 17).

Shortly thereafter, the Tribal, UDP, and NRDC Plaintiffs sued, alleging that: (1) the presidential proclamation was not authorized by the Antiquities Act, and (2) it violates the United States Constitution. (*See* Tribal Pls.' Compl. ¶¶ 197–213; UDP Pls.' Compl. ¶¶ 189–220; NRDC Pls.' Compl. ¶¶ 181–200.) In addition, Tribal and NRDC Plaintiffs contend that because President Trump's proclamation was unlawful, the Secretaries of the Interior and Agriculture remain subject to President Obama's proclamation. (*See* Tribal Pls.' Compl. ¶ 218; NRDC Pls.' Compl. ¶ 203.) And, because the Secretaries of the Interior and Agriculture are no longer conducting business in accord with President Obama's proclamation, Tribal and NRDC Plaintiffs allege that the Secretaries of the Interior and Agriculture have failed to protect the Bears Ears National Monument, in violation of the Administrative Procedure Act. (*See* Tribal Pls.' Compl. ¶¶ 214–21; NRDC Pls.' Compl. ¶¶ 201–05.)

II. ANALYSIS

A. Motions to Intervene

Federal Rule of Civil Procedure 24 sets forth the requirements for intervention as of right and permissive intervention.

"The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard." *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972). Indeed, "[a] district court must grant a timely motion to intervene that seeks to protect an interest that might be impaired by the action and that is not adequately represented by the parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). In determining whether a party is entitled to intervene as a matter of right, courts in this Circuit assess the following four factors:

> (1) the timeliness of the motion; (2) whether the applicant "claims an interest relating to the property or transaction which is the subject of the action"; (3) whether "the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest"; and (4) whether "the applicant's interest is adequately represented by existing parties."

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)). In addition, because an intervenor seeks to participate on "equal footing" with the original parties, she must demonstrate that she has Article III standing. *Id.* at 732.

Permissive intervention, on the other hand, is an "inherently discretionary enterprise." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Pursuant to Rule 24(b), the district court, in exercising its discretion, "may" permit intervention where a putative intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). In determining whether permissive intervention is appropriate, courts in this Circuit assess whether the putative intervenor has presented: "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *E.E.O.C.*, 146 F.3d at 1046. "It remains . . . an open question in this Circuit whether Article III standing is required for permissive intervention.' *See In re Endangered Species Act Section 4 Deadline Litig.-MDL No. 2165*, 704 F.3d 972, 980 (D.C. Cir. 2013).

1. Farm Bureau Applicants, San Juan County, and State of Utah's Motions to Intervene

Farm Bureau Applicants, San Juan County, and the State of Utah petition this court to intervene in all three actions as a matter of right, or, in the alternative, to intervene permissively. (*See* ECF Nos. 38-4, 41-4, & 52.)

No existing party challenges their right to intervene. Tribal, UDB, and NRDC Plaintiffs take "no position" on these three motions to intervene. (*See* ECF Nos. 59 & 63.) Defendants have not responded to the Farm Bureau Applicants' motion to intervene, and state that they "do not oppose" San Juan County and the State of Utah's motions to intervene. (*See* ECF Nos. 61 & 62.)

Given the lack of opposition, the court finds that Farm Bureau Applicants, San Juan County, and the State of Utah have a right to intervene for the following reasons:

i. Farm Bureau Applicants' motion, which was filed before Defendants' answers were due, was timely. Farm Bureau Applicants' interest in federal grazing allotments relates to the property at issue. If Plaintiffs are successful on the merits, Farm Bureau Applicants' ability to exploit the property at issue for cattle grazing may be impaired. And, while Defendants and Farm Bureau Applicants contend that President Trump's proclamation is a valid exercise of presidential power, Defendants cannot adequately represent Farm Bureau Applicants' unique interests. Farm Bureau Applicants have also sufficiently set forth a basis for associational standing.

ii. San Juan County's motion, which was filed before Defendants' answers were due, was timely. The Bears Ears National Monument is located entirely within San Juan County, and the County's interest in the potential loss of county revenue and protecting property values within its jurisdiction, among other things, directly relates to the property at issue. If Plaintiffs are successful on the merits, San Juan County's ability to exploit the property at issue for mining, logging, and livestock grazing may be impaired. And, while Defendants and San Juan County contend that President Trump's proclamation is a valid exercise of presidential power, Defendants cannot adequately represent San Juan County's unique interests. San Juan County has also sufficiently set forth a basis for standing.

iii. The State of Utah's motion, which was filed before Defendants' answers were due, was timely. The Bears Ears National Monument is located entirely within Utah, and the State's interest in generating revenue and maintaining rights-of-way on roads crossing federal public lands, among other things, directly relates to the property at issue. If Plaintiffs are successful on the merits, the State of Utah's ability to provide road access to the public and exploit the property at issue for revenue-generating purposes through multiple avenues may be impaired. And,

> while Defendants and the State of Utah contend that President Trump's proclamation is a valid exercise of presidential power, Defendants cannot adequately represent the State of Utah's unique interests. Although the State of Utah did not set forth a basis for standing in its moving papers, the court finds that it has standing because (a) it benefitted from President Trump's Proclamation and the instant action would remove the benefit, (b) its injury is directly traceable to the instant challenge, and (c) it could prevent the injury by defeating the instant challenge.

2. Uinta Applicants' Motion to Intervene

The Uinta Applicants, seeking to protect their interest in the Uinta Valley Reserve, petition this court to intervene in the action initiated by Tribal Plaintiffs. (*See* ECF No. 43.)

Tribal Plaintiffs[2] oppose Uinta Applicants' motion to intervene on several grounds. (*See* ECF No. 58.) Defendants have not responded to the Uinta Applicants' motion to intervene.

Having reviewed the Uinta Applicants' motion and the Tribal Plaintiffs' response, the court will deny the Uinta Applicants' motion to intervene for two reasons.

First, the two *pro se* entity movants—Uintah Utah Indians and the Tabeguache Colorado Indians—are improper parties because corporations and entities may appear in federal court only through a licensed attorney. And, "[w]hile some federal courts have permitted *pro se* representation of a federally-recognized tribe, federal courts have refused to allow non-attorneys to represent Indian tribes that are not federally recognized." *Ute Indian Tribe of the Uintah and Ouray Indian Reservation v. United States of America, et al*, No. 18 Civ. 00546 (D.D.C. Aug. 24, 2018) (internal citation omitted) (collecting cases). Neither the Uintah Utah Indians nor the Tabeguache Colorado Indians is a federally-recognized tribe. *See* Interior

[2] The Court notes for the record that the Ute Tribe submitted its brief only on its behalf to avoid the appearance that other tribes are weighing in on internal Ute Tribe matters. The other Tribal Plaintiffs, however, agree with the Ute Tribe's conclusion that Uinta Applicant's motion to intervene should be denied.

Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 4235-02 (Jan. 30, 2018).

Second, the six *pro se* individual movants—Mary Jenkins, Melvin Jenkins, Roger Kochampanasken, Tarah Amboh, Margaret Reed, and Lynda Kozlowicz—have failed to establish a sufficient basis for either intervention as a matter of right or permissive intervention. Intervention as a matter of right is appropriate only where a putative intervenor possesses an interest relating to the property or transaction which is the subject of the action, and the individual movants' motion pertains to a separate parcel of land that is not included in either the current or former Bears Ears National Monument. Further, permissive intervention is not warranted, because the individual movants have not identified a claim or defense that shares with the main action a common question of law or fact.

B. Conditions for Intervenor's Participation

"[E]ven where the Court concludes that intervention as a matter of right is appropriate, its inquiry is not necessarily at an end: district courts may impose appropriate conditions or restrictions upon the intervenor's participation in the action." *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 20 (D.D.C. 2010) (citing *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 738 (D.C. Cir. 2003)).

Having reviewed the parties' arguments for and against the imposition of conditions, to better aid in the administration of its docket, the court hereby orders all intervenors to comply with the following conditions:

1. Intervenors shall confer with Defendants and other intervenors before filing any new substantive motions or briefs and endeavor to eliminate unnecessary repetition by incorporating one another's filings by reference when possible. The court will treat incorporation by reference as though the argument is fully set forth in the referring brief;

2. Intervenors are barred from raising additional non-compulsory claims or additional affirmative defenses beyond those raised in the answers attached to their respective motions to intervene; and

3. Intervenors are prohibited from seeking discovery in this case without leave of court.

III. CONCLUSION

For the foregoing reasons, Farm Bureau Applicants, San Juan County, and the State of Utah's motions to intervene are **GRANTED** with conditions, and the Uinta Applicants' motion to intervene is **DENIED**. The parties are directed to file a proposed joint briefing schedule for their briefs in support of the pending motion to dismiss on or before January 25, 2019. In so doing, because briefing has concluded, the intervenors are encouraged to consider whether their arguments would be more effectively presented in a single, longer brief.

Date: January 11, 2019

Tanya S. Chutkan

TANYA S. CHUTKAN
United States District Judge