UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOPI TRIBE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 1:17-cv-2590 (TSC)
UTAH DINÉ BIKÉYAH, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 1:17-cv-2605 (TSC)
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 1:17-cv-2606 (TSC) **CONSOLIDATED CASES**
AMERICAN FARM BUREAU FEDERATION, *et al.*, Defendants-Intervenors.	

TRIBAL PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Table of Contents

Table of Authorities

Cases

Constitutions

Statutes and Regulations

Court Rules

Other Authorities

Please note: Congressional materials not available on Westlaw have been submitted in a Joint Appendix, ECF No. 162-1. Joint Appendix (JA) Nos. are referenced below.

Plaintiffs Hopi Tribe, Navajo Nation, Ute Indian Tribe, Ute Mountain Ute Tribe, and Zuni Pueblo (the "Tribes"), through their undersigned counsel, submit this memorandum in support of their Motion for Partial Summary Judgment for the first, second and third claims in their First Amended Complaint. As this is entirely a legal issue, and there are no genuine disputes of material fact, the Tribes are entitled to judgment as a matter of law and the entry of declaratory and injunctive relief as set forth in the accompanying proposed order.

INTRODUCTION

For the first time in history, five federally recognized Tribes banded together to advocate for a national monument to protect, for all Americans and for all time, a place so wondrous it had drawn people to it for more than 13,000 years. Rich in ancient and modern Native culture, and literally part of the homeland and history of the five Tribes in this case, it is known as Bears Ears National Monument. To the Tribes, it is a living and vital place where ancestors passed from one world to the next, often leaving their mark in petroglyphs or painted handprints, and where modern day tribal members can still visit them. The Tribes worked for years to gather evidence and make a case for the protection of this landscape teeming with historical objects and sites. Recognizing that Bears Ears was exactly the kind of place for which the Antiquities Act was created, President Obama designated the Monument on December 28, 2016.

Less than a year later, in an effort to free up lands for uranium mining and other extractive industries, President Trump purported to revoke the Monument and replace it with two smaller, non-contiguous monuments. A stunning abuse of the Antiquities Act by any measure, the Trump Proclamation removed 85 percent of the original monument lands from protection, and removed 100 percent of protection from tens of thousands (and likely more) of cultural objects in the excised

lands. The Antiquities Act – a law created specifically to protect historical objects and places – was used instead to *remove* protection from irreplaceable historical objects and places.

The issue here is simple: whether the President had the authority to do what he did. He clearly did not. Neither the plain text of the Antiquities Act, nor its legislative history can be reasonably construed to allow the President to do what he purported to do here. To the contrary, in revoking the original Bears Ears Monument and replacing it with two remnants, President Trump usurped power reserved only to Congress – a power that Congress has repeatedly reaffirmed and claimed for itself. This is a pure issue of law.

The facts underlying this motion are not numerous and they are not subject to genuine dispute. President Obama created the Monument. President Trump purported to revoke it and replace with two smaller monuments. At the moment the Trump Proclamation was signed, the Tribes suffered enormous injury in the loss of protection of their cultural heritage and the abrogation of their right under President Obama's proclamation to collaboratively manage the Monument lands in a government-to-government fashion. Since that date, the harms have only multiplied as the Tribes have had to perform, at their own time and expense, functions that were meant to have been performed by the Bears Ears Commission. To add insult to injury, the formerly protected lands are now open to mining activity, new claims have been staked, and the objects on those unprotected lands are now vulnerable to everyday collection by any visitor.

The Plaintiff Tribes are entitled to partial summary judgment on claims one through three of their First Amended Complaint.

BACKGROUND

I. Bears Ears: Home Since Time Immemorial

The importance of the Bears Ears landscape to the Tribes and their members cannot be overstated. The opening sentences of President Barack Obama's Presidential Proclamation (the "Obama Proclamation") establishing the Bears Ears National Monument ("Bears Ears," or the "Monument") describe a landscape that is so ancient and unique it has no parallel:

> Rising from the center of the southeastern Utah landscape and visible from every direction are twin buttes so distinctive that in each of the native languages of the region their name is the same: Hoon'Naqvut, Shash Jáa, Kwiyagatu Nukavachi, Ansh An Lashokdiwe or "Bears Ears." For hundreds of generations, native peoples lived in the surrounding deep sandstone canyons, desert mesas, and meadow mountaintops, which constitute one of the densest and most significant cultural landscapes in the United States. Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

Tribal Plaintiffs' Separate Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment ("SS") ¶ 4. Bears Ears is the Tribes' ancient homeland, and it remains cherished by Native people for its cultural, spiritual, and archaeological importance. SS ¶¶ 11-37. The Tribes' connection to the Bears Ears area is described in great detail in the monument proposal they developed and sent to the President for consideration: "The importance of Bears Ears for our people is through our ancestral sites that were left behind eons ago by our ancestors. They documented the sites by using oral history, pictographs, and by leaving their belongings. When we visit Bears Ears, we connect with our migration history immediately without doubt." (quoting Phillip Vicenti, Zuni). SS ¶¶ 4-5.

Bears Ears is home to more than 100,000 Native American cultural sites and even more objects of historic and scientific importance. SS ¶ 14. The Plaintiff Tribes identify with many specific sites and locations within Bears Ears. For the Navajo, for example, Bears Ears contains many important historical sites, such as the towering spires in the Valley of the Gods that are

ancient Navajo warriors frozen in stone, Bears Ears is also where famed Navajo headman K'aayélii, was born around 1800, as well as where Manuelito (Navajo name Hastiin Ch'ihaajin) was born. SS ¶¶ 32-33.

For the Ute Mountain Ute Tribe and the Ute Indian Tribe of the Uintah and Ouray Reservation, there are many important historical and spiritual places within Bears Ears: "Water Canyon or River-Flowing-From the Sunrise (San Juan River), Sagebrush Canyon or Crows Canyon (Montezuma Canyon), Slick Rock Mound (Comb Ridge), [and] Two Rocks Canyon (Cow Canyon)." SS ¶¶ 34-35. The Ute Bear Dance, which is a spring ceremony symbolic of nature's awakening, was performed in many areas in and around Bears Ears — both historically and to this day. *Id.*

For the Zuni and Hopi, places and petroglyphs within Bears Ears literally document their migration through the region. SS ¶¶ 36-37. To the Hopi and Zuni, the historical objects left behind by their ancestors – villages, springs, migration routes, artifacts, and physical remains – are footprints testifying to their historical and current connections to the lands. *Id*. In short, places and objects within Bears Ears are immensely important to all of the Tribes, and are intimately tied to their beliefs and history as peoples.

Additionally, all of the Tribes and their members continue to regularly use Bears Ears to collect plants, minerals, objects and water for religious and cultural ceremonies, and for medicinal purposes. SS ¶¶ 15, 17, 18. They also go there to hunt and fish, to make offerings at sacred sites, and to conduct ceremonies on the land. SS ¶ 18. In fact, Bears Ears is so culturally and spiritually significant that some ceremonies, such as those practiced by the Navajo, are specific to Bears Ears itself. SS ¶ 32.

Archaeological information supports the oral and written history of the Tribes that they have been hunting and gathering in the Monument for at least 13,000 years. SS ¶ 19. The Lime Ridge Clovis Site in the southeast corner of Bears Ears is one of the oldest archaeological sites in Utah. SS ¶ 20. These sites are so ancient that the Hisatsinom (Hopi word for "the people of long ago") who resided in them would have experienced a different climate, cooler and wetter, and survived on animals such as mammoths and ground sloths that are now extinct. SS ¶ 21. Comparatively, more recent sites dating back at least 8,500 years are Old Man Cave on Cedar Mesa and the Green Mask site in Grand Gulch. SS ¶ 22. These sites are more ancient than the Egyptian pyramids and Stonehenge.

Native people continued to live in the Bears Ears landscape through the Basketmaker II period, which was from 500 BCE to 500 CE. SS ¶ 23. It is during this time that they built houses, storage pits, campsites, rock shelters and created many pictographs that can still be seen today. SS ¶ 24. They remained through the Basketmaker III period, approximately 500-750 CE, a time noted for increased technological innovation such as cooking pottery and the bow and arrow. SS ¶ 25. Basketmaker III sites in Bears Ears show an increased use of maize and bean-based agriculture, as well as pottery and the recently-created bow and arrow, which replaced the less efficient atlatl or throwing board. SS ¶ 26. This was a key period in the history of human technological advances and its evidence can be found everywhere in Bears Ears. SS ¶ 27. From the Basketmaker III to Pueblo II period (AD 500-AD 1150), the Native inhabitants also constructed kivas and more dispersed villages, which can also be seen today, particularly in Cedar Mesa (a region now entirely excluded from the monument). SS ¶ 28. With the advent of more and more dispersed villages, the people developed a road system, the most well-known being the Et Al network that connected those living on Cedar Mesa with all the surrounding villages. SS ¶ 29. Over time, the habitation

pattern shifted to become much more defense-oriented and around 1150 CE, people began to move into the cliff dwellings that are so well known today. SS ¶ 30.

Because of this incredibly long period of habitation, there are more than 100,000 cultural sites in Bears Ears, and many more historic and scientific objects. SS ¶ 14. Many of these ancient and important sites would be left unprotected under the Trump Proclamation, including an extraordinary structure known as The Perfect Kiva. *See* SS ¶ 38 (picture of the Perfect Kiva attached to Honahnie Declaration).

When non-Native settlers moved into the Bears Ears landscape in the nineteenth century – in and around what is now Bluff, Utah – they quickly realized the cultural and archaeological treasurers that could be found in Bears Ears and they developed what can only be described as a looting culture. SS ¶ 1. During this period, practices such as pot hunting and grave robbing took hold, and great quantities of pottery and other relics prized in markets on the East Coast and in Europe were removed from Bears Ears. *See, e.g.* Ronald F. Lee, *The Antiquities Act of 1906* 8 (Nov. 16, 1970), available at http://npshistory.com/publications/antiquities-act-1906.pdf. ("In general the vandalism committed in this venerable relic of antiquity defies all description . . . treasure hunters . . . have recklessly and ruthlessly disturbed the abodes of the dead."). While these practices are now largely unlawful and are considered unethical, they continue to occur with alarming frequency. *See, e.g.*, Kathleen Sharp, *An Exclusive Look at the Greatest Haul of Native American Artifacts, Ever*, Smithsonian Magazine (Nov. 2015), https://www.smithsonianmag.com/history/exclusive-greatest-haul-native-american-artifacts-looted-180956959/. The widespread looting in Bears Ears has resulted in several highly publicized trials and numerous convictions. SS ¶ 2. More recently, this included a two-and-a-half-years long Federal Bureau of Investigation sting operation that resulted in federal charges being brought in

2009 against almost two dozen individuals, many of whom were Blanding, Utah residents. SS ¶¶ 2, 3. Very real oncerns about the theft of the Tribes' cultural and historic patrimony from Bears Ears were one of the primary drivers behind the most recent movement to protect the region through monument status.

II. Establishment of the Bears Ears National Monument

After much advocacy by the Plaintiff Tribes, on December 28, 2016, President Obama signed a Proclamation establishing the Bears Ears National Monument encompassing 1.35 million acres of public lands in the Bears Ears region. SS ¶¶ 6, 8. The Obama Proclamation catalogued the extensive, unique and invaluable historic and scientific objects to be protected. SS ¶ 9. In determining the area to be protected, the Administration relied upon an enormous array of evidence ranging from 300 million year-old paleontological remnants to modern day uses by the Tribes. SS ¶¶ 9-18. These sources, numbering almost 250, are provided in the detailed bibliography attached to the Presidential Memorandum. Presidential Memorandum at 20, SS ¶ 10. In a profound passage, the Obama Proclamation recognized that "traditional ecological knowledge amassed by the Native Americans whose ancestors inhabited this region, passed down from generation to generation, offers critical insight into the historic and scientific significance of the area. Such knowledge is, itself, a resource to be protected and used in understanding and managing this landscape sustainably for generations to come." SS ¶ 16.

The Obama Proclamation established, as requested by the Tribes, a robust federal-tribal system of government-to-government collaborative management for the new Monument. SS ¶¶ 55-59. This was meant to ensure the proper care and management of the "objects" to be protected through use of indigenous knowledge. SS ¶ 55. This management model was to be facilitated by a five-member Bears Ears Commission ("Commission") created by President Obama in the

Proclamation. SS ¶¶ 55-56. The Commission was to have representatives appointed by each of the five Tribes, and was to work closely with the Bureau of Land Management and Forest Service in managing the monument. SS ¶ 56. Among other provisions on collaborative management, the federal agencies were directed "to *ensure* that management decisions affecting the monument reflect tribal expertise and traditional and historical knowledge." SS ¶ 57. The Obama Proclamation ensured that the Tribes would have a meaningful government-to-government role in the Monument's management. SS ¶¶ 57-58.

III. Revocation of the Bears Ears National Monument and the Bears Ears Commission

On April 26, 2017, President Trump issued an executive order, "Review of Designations under the Antiquities Act." Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (May 1, 2017). The order directed new Interior Secretary Ryan Zinke to review all monuments larger than 100,000 acres proclaimed since January 1, 1996—27 monuments in all—and make recommendations based on compliance with the Antiquities Act and other factors not mentioned in the Act. Secretary Zinke's 20-page final report was notably brief and superficial, and put forth no specific recommendations.[1] Memorandum from Ryan Zinke, Sec'y of Interior, to the President on Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act (Dec. 5, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/revised_final_report.pdf, ("Zinke Memorandum").

[1] After nine pages of formalities and background information, the remaining eleven pages were dedicated to the impossible task of making recommendations on no fewer than 10 monuments. The report included just one page on Bears Ears, recommending only that "the boundary should be revised." Zinke Memorandum at 10-11.

On December 4, 2017 President Trump issued a proclamation ("Trump Proclamation") purporting to revoke the Bears Ears National Monument and replace it with two new units ("Trump Units"). Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017); SS ¶¶ 60-64. These Trump Units included only 15 percent of the original Bears Ears lands. *Id*. It was the largest rollback, whether by a President or Congress, of federally protected lands in United States history. Further, the Trump Proclamation eliminated the Bears Ears Commission, and created in its place the Shash Jáa Commission. SS ¶¶ 66-67. The Shash Jáa Commission's management role does not apply to all of the 201,876 acres of protected lands identified in the Trump Proclamation, but rather only applies "to the Shash Jáa unit as described" in the Trump Proclamation. SS ¶ 68. The Trump Proclamation further modified the Bears Ears Commission by including on the Shash Jáa Commission "the elected officer of the San Juan County Commission representing District 3 acting in that officer's official capacity." SS ¶ 69.

The Trump Proclamation provided almost no justification for removing Antiquities Act protections for 1.1 million acres of public lands and tens of thousands of historical objects or destroying the unique government-to-government relationship that was created with the Bears Ears Commission. Instead it stated, in conclusory fashion, that "[s]ome of the objects [the Obama Proclamation] identifies are not unique to the monument and some of the particular examples of these areas within the monument are not of scientific or historic interest." SS ¶ 62. This is false. It is also pre-text for the real reason for the rollback, which was to pave the way for extractive development. SS ¶ 65. Most importantly, however, it is illegal because as described below, there is no basis on which one President may simply revoke the monument status of objects and lands established by a previous President.

STANDARD OF REVIEW

Plaintiffs are entitled to summary judgment "if the movant shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of a case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is "appropriate for purely legal questions." *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 13, 17 (D.D.C. 2004). An issue is "presumptively reviewable" and summary judgment is appropriate where it is a purely legal claim, as is the case here. *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 757 (D.C. Cir. 2003). In fact, this Circuit has specifically held that allegations that the Executive branch has "exceeded its statutory authority" are proper for summary judgment. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005).

STANDING

I. The Tribes have Article III Standing.

To establish standing,

> a plaintiff must show (1) it has suffered 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 speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000). These requirements are often described in short form as injury, causation and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The Tribes easily meet the requirements for standing and do so under at least two different theories: injury to their sovereign interests and organizational standing.

A. The Trump Proclamation Has Injured the Tribes Directly as Sovereign Entities by Abrogating Their Right to Participate on a Government-to-Government Basis in the Management of All Lands Within the Original Monument Boundaries through the Bears Ears Commission.

It should be self-evident that the Tribes have standing to challenge President Trump's unlawful Proclamation. Bears Ears was established at the Tribes' request to ensure the safety of their sacred ancestral lands and a myriad of enumerated objects of significance to the Tribes' histories and cultures. SS ¶¶ 4-7. Recognizing that "Indian nations have substantial interests in access to and control of their cultural resources," Felix Cohen, Handbook of Federal Indian Law §20.01[1] (2012 ed.) (discussing, *inter alia*, tribal liberty and property interests in tribal cultural resources); *cf. Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002) ("In many if not most cases the petitioner's standing to seek review of administrative action is self-evident. . . ."), the Obama Proclamation further established an entity, the Bears Ears Commission, to enable the Tribes to participate in management of the entire 1.35 million acres within the original Monument. SS ¶¶ 55-58. The Commission enabled the Tribes to share their expertise with the federal government and to ensure appropriate management and protection of the cultural and historic resources in which the Tribes have concrete sovereign interests. *Cf. Summers v. Earth Island Inst.*¸ 555 U.S. 488 (2009) (deprivation of procedural right connected to concrete interests sufficient to establish standing).

By unilaterally removing Monument protection from one million acres of the Tribes' ancestral homelands, revoking the monument status of all of the tribal cultural objects contained in the excised lands, and abrogating the Tribes' government-to-government rights to participate in the collaborative management of all of the original Monument lands through the Bears Ears Commission, the Trump Proclamation causes significant, concrete (and certainly far more than "procedural") injuries to the Tribes and creates a substantial risk of future additional injuries. SS

¶¶ 61-69. This injury is ongoing, as the Secretaries have implemented the Trump Proclamation and proceeded to developing monument management plans for the remnants of the Monument without "meaningfully engag[ing]" the Bears Ears Commission in the development of the management plan, as they were required to do pursuant to the Obama Proclamation. SS ¶¶ 70-88. These injuries can be redressed by the Court declaring the Trump Proclamation unlawful and entering an injunction prohibiting the Departments of the Interior and Agriculture from implementing it.

These harms constitute discrete, direct injury to the Tribes, sufficient to establish Article III standing under any standard. The Tribes are not, however, ordinary litigants because the court should afford them "special solicitude" as sovereign governments alleging direct injuries apart from those suffered by their citizens. *Mashantucket Pequot Tribe v. Town of Ledyard,* 722 F.3d 457, 463 (2nd Cir. 2013); *Otoe-Missouria Tribe of Indians v. N.Y. State Dept. of Fin. Servs.,* 974 F. Supp. 2d 353, 357-58 (S.D.N.Y. 2013), *aff'd* 769 F.3d 105 (2nd Cir. 2014). This special standing was first formally recognized in *Massachusetts v. EPA,* 549 U.S. 497, 518-9 (2007).[2]

As sovereign entities who used and occupied the lands within Bears Ears since time immemorial, the Tribes have special solicitude standing in this case. In establishing the Commission, the Obama Proclamation recognized the Tribes' sovereign interests in Bears Ears and established a collaborative government-to-government management system to hold the federal government accountable for vindicating those interests. SS ¶¶ 56-59. Recognition of the Tribes'

---

[2] While the term "special solicitude" was coined in *Massachusetts v. EPA*, the idea that sovereigns can suffer direct injury is well-established. *See e.g. Wyoming v. Oklahoma*, 502 U.S. 437, 447-49, (1992) (discussing the differences specifically between state standing for direct injury and *parens patriae*); *See also Hunt v. Wash. State Apple Advert. Comm'n,* 432 U.S. 333, 341-45 (1977).

special interests is evident in the Commission's creation and the prerogatives vested therewith, which were reflective of the Tribes' sovereign status and centered around rights to consultation and collaboration. SS ¶¶ 55-58.

These rights to consultation and collaboration embodied by the Commission are well-established in existing law[3] and affirmed in the language creating the Commission. SS ¶¶ 55-56. After the Tribes' years of unprecedented cooperation and advocacy to protect the Bears Ears region as a national monument, the establishment of the Commission in the Obama Proclamation represented a promise of the federal government to the Tribes that they would be able to engage *directly and exclusively* with the United States in ensuring proper protection of their historical, cultural, and traditional resources within Bears Ears. SS ¶¶ 55-59. The Commission was to play an active, collaborative role in management of the Monument, extending from creation to

---

[3] "The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions." Exec. Order No. 13,175 § 2(a), 65 Fed. Reg. 67,249 (Nov. 9, 2000); *see also* Sec'y of the Interior Order No. 3342 § 2(b) (Oct. 21, 2016) (recognizing that the "Federal trust responsibility to tribes . . . is a well-established legal obligation that originates from the unique, historical relationship between the United States and tribes."). "Indian tribes" are acknowledged three times in the U.S. Constitution. U.S. Const. art. I, § 2, cl. 3; U.S. Const. art. I, § 8 (the "Indian commerce clause" that treats tribes as separate from the federal government and states); U.S. Const. amend, XIV, § 2 (amending art. I, § 2). These specific provisions in the Constitution grant the federal government the power to make treaties and engage in commerce with tribes as foreign governments, and recognize the pre-existing sovereignty of the tribes. Congress dealt with tribes in their sovereign capacity as they would foreign governments. Today, the United States government still deals with tribes as sovereigns through a government-to-government relationship and presidents still issue orders directing all executive agencies to consult with tribes on a government-to-government basis. *E.g.*, Exec. Order No. 13,175. For a more complete history of the legal origins of the federal-tribal relationship and how it evolved into the consultation duty, *see* Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. Mich. J.L. Reform 417 (2013); Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D.L. Rev. 37 (2015).

implementation of a management plan. *Id*. This design was established in recognition of the Tribes' "expertise [in] and traditional and historic knowledge [of]" their sacred ancestral lands at Bears Ears. SS ¶ 55. Naturally, then, the Commission was to be composed *solely* of representatives from each of the Tribes. SS ¶ 56. And, in the event the Secretaries decided not to follow management recommendations of the Commission, the Tribes had a right to be provided reasons, *in writing*, from the federal agency choosing not to adopt a Commission's recommendation. SS ¶ 58. The Obama Proclamation exemplified a government-to-government relationship in which several sovereigns share one table to manage together for the benefit of all.

The Trump Proclamation is a direct injury to that government-to-government relationship. Far more than a mere "procedural" injury, it gutted the Commission and marginalized tribal participation, eviscerating the unique government-to-government relationship that was established with the Obama Proclamation. SS ¶¶ 66-69. The Trump Proclamation also purports to unilaterally "exclude . . . 1,150,860 acres of land" from the Monument. SS ¶ 61. Further, it limits the Commission's purview to just one of the two greatly reduced remnant Trump Units, designated "Shash Jáa" (its title being appropriated from the Navajo language). SS ¶¶ 64, 66-68. Therefore, not only did the Trump Proclamation reduce the Monument by 85 percent, but it also removed more than 90 percent of Monument lands from the Commission's managerial influence, and removed 100 percent of the Commission's ability to ensure cohesive and meaningful protection of all objects located on lands removed from the Monument. This usurpation and complete nullity of authority over 90 percent of the Monument lands is a sufficient injury for purposes of standing. *Cf. Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015) (nullification of authority of legislature was sufficient for standing); *Tennessee v. U.S. Dep't of*

State, 931 F.3d 499, 511–14 (6th Cir. 2019) (interference with, or usurpation of, a governmental bodies specific powers is sufficient for standing).

The Trump Proclamation further dismantled the government-to-government relationship in adding a sixth seat to the originally purely tribal Commission, the new seat to be filled by a San Juan County representative. SS ¶ 69. Local governments, unlike federally recognized tribes, do not enjoy a government-to-government relationship with the federal government. Therefore the Commission no longer provides the Tribes with a mechanism to vindicate their sovereign rights; this undermining and dilution of tribal authority is likewise sufficient for purposes of standing. *Cf. Ariz. State Leg.*, 135 S. Ct. at 2665 (nullification of authority of legislature was sufficient for standing); *Tennessee*, 931 F.3d at 511–14 (interference with, or usurpation of, a governmental bodies specific powers is sufficient for standing). The newly constituted commission can no longer serve as a body solely composed of members with "tribal expertise and traditional knowledge" in and of Bears Ears. SS ¶ 55.

The Trump Proclamation thus has caused direct and on-going injury to the Tribes from the day it was signed, having abrogated and altered the Commission and interfered with the Tribes' government-to-government relationship with the federal government, nullified its authority over 90% of the lands it was to have authority over, and eliminated tribal input it was originally intended to facilitate. This injury to the Tribes suffices for purposes of Article III standing, *Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n*, 226 F.3d 1226, 1230 (11th Cir. 2000), as the Tribes are owed "special solicitude" in analyzing standing. *Mashantucket Pequot Tribe*, 722 F.3d at 463 (quoting *Massachusetts*, 549 U.S. at 520). The injury is an egregious breach of the government-to-government relationship contemplated for the Commission by the original Proclamation.

B. The Trump Proclamation Has Injured the Tribes Directly in their Organizational Capacities, as Entities Committed to Protecting the Religious, Cultural, and Historic Lands and Patrimony Left Exposed by the Proclamation.

Each of the Tribal Plaintiffs endeavors to serve as protectors of their culture and history, as codified in their duly authorized tribal laws and resolutions. SS ¶¶ 39-51. The Trump Proclamation has injured the Tribes in their organizational capacities by exposing countless objects of historical and cultural importance to the Tribes to harm. "There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin,* 422 U.S. 490, 511 (1975). Tribes may be regarded as analogous to organizations for standing purposes when they suffer direct injury. *S. Fork Band v. U.S. Dep't of Interior,* 643 F. Supp. 2d 1192, 1200 (D. Nev. 2009) ("The court finds that provided Plaintiff tribes . . . can satisfy both the constitutional and prudential limits on standing, their standing can be viewed as analogous to organizational standing."), *aff'd in part, rev'd in part on other grounds,* 588 F.3d 718 (9th Cir. 2009). Here, the Tribes satisfy the D.C. Circuit's test for organization standing, because 1) the defendant's allegedly unlawful activities injured the plaintiff's interest in promoting their mission, and 2) the plaintiffs used their resources to counteract that injury. *Am. Soc'y For Prevention of Cruelty to Animals v. Feld Entm't,* 659 F.3d 13, 25 (D.C. Cir. 2011).

Federal law recognizes that tribes have an interest in preserving their cultural practices, beliefs, ways of life, and cultural and historic patrimony. *See, e.g.* 25 U.S.C. § 3001 (codifying

tribal ownership of items of cultural patrimony);[4] 16 U.S.C. § 470cc(c) (requiring notice to tribes for applications for permits for activities that "may result in harm to, or destruction of, any religious or cultural site" which the Tribe "may consider" to be of religious or cultural importance); 25 U.S.C. § 2901 (finding that the United States has the responsibility to work with tribes to ensure the survival of tribal cultures); 16 U.S.C. § 668a (recognizing that tribes have their own interests in the religious practices of their people, and authorizing tribes, in certain circumstances, to engage in the taking of bald and golden eagles); 54 U.S.C § 302706(b) (congressionally recognizing that tribes possess important interests in protecting historic properties of religious and cultural importance, and requiring federal agencies to consult with tribes as sovereign governments before undertaking actions that may affect those properties); *see also* Cohen, *supra* at §1.05 (discussing how the Indian Reorganization Act shifted federal policy from one seeking to destroy tribal cultures to one seeking to preserve them).

Consistent with the unique nature of tribal governments and the numerous federal laws that recognize tribal interests in tribal cultural patrimony, courts have routinely exercised jurisdiction in cases brought to vindicate those interests. *E.g.*, *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995) (National Historic Preservation Act ("NHPA") claim); *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 789 (9th Cir. 2006) (NEPA claim, holding that the Tribe "adequately demonstrated an injury in fact" based on threatened harm to lands the Tribe used "for cultural and

[4] 25 U.S.C. § 3001 is a provision of the Native American Graves Protection and Repatriation Act. That Act distinguishes between interests of individual tribal members and the interests of the Tribe as a sovereign government. In general, where human remains and associated funerary objects can be traced to lineal descendants, those individuals have the primary interest, but for older objects or others that cannot be traced to a lineal descendant, the Tribe has the primary interests. 25 U.S.C. § 3002(a).

religious ceremonies 'for countless generations.'"). The same principle applies here—the Tribes have their own standing based on the injuries to their collective cultural and religious practices as described in the separate statement. SS ¶¶ 11-38, 61-74. Indeed, courts have recognized that tribes possess concrete and particularized interests in protecting the sacred lands and cultural patrimony of their people and in protecting the ability of their tribal members to continue to engage in cultural practices. *Havasupai Tribe v. Provencio*, No. 15-15754, 2018 WL 5289028, at *4, n.3 (9th Cir. Oct. 25, 2018) (Tribe had standing because "[c]ontinued uranium mining . . . causes concrete injury to the Tribe's religious and cultural interests"); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 60 (D.D.C. 2018) (Tribe had standing because of members' "use of the areas" affected by agency's decision for traditional and religious purposes). In other words, the Tribes themselves have standing based on their own particularized cultural and spiritual interests.

It is indisputable that preservation of the cultural, religious, and historical resources in Bears Ears has been a priority of the Tribes. SS ¶¶ 39-51. As each of the Tribal Plaintiffs' laws and resolutions demonstrate, each of the Tribes has deep connection to the land and patrimony of Bears Ears, and it is a key part of each Tribe's mission and purpose to protect their cultural heritage. *Id*. The years of effort and tremendous resources expended to create the original Monument stand as testament to their interest in preserving their connection to Bears Ears. Establishing and protecting Bears Ears is clearly part of each Tribe's mission, purpose, and mandate. *Id*.

The Trump Proclamation has severely impaired this mission. Not only did the Trump Proclamation remove protections to the Monument, but it did so in the interest of resource extraction industries, which are likely to inflict significant harm to Bears Ears. SS ¶ 65. As the brief filed by NRDC explains, the Trump Proclamation has opened up excluded lands to extensive mining activities, oil and gas leasing, and motorized vehicle use. SS ¶¶ 93-99. Already, new claims

and ground-disturbing activities have commenced and new mining claims staked. *See* Declaration of Creed Murdock, Exhibit A (showing mining claims located after February 2, 2018), attached to the Motion for Partial Summary Judgment filed in case no. 17-cv-2606 (January 9, 2020). These injuries are not speculative – they have already begun. In order to avoid duplicative briefing as directed by the Court in its order on consolidation of these cases, the Tribes incorporate by reference pages 5-17, of the Memorandum in Support of Partial Summary Judgment filed by the Natural Resources Defense Council (NRDC), under Case No. 17-cv-2606 (January 9, 2020). There they describe not only the rather lax process to begin mining, but also they describe the mining activity that has already begun and the effects it is already having.

In the absence of protection as a national monument, the lands and objects within the Bears Ears are not protected from damage caused by the location of mining claims or other notice-level mining activities,. Moreover, the lands excised from the monument are now available for oil and gas leasing. For example, the Archaeological Resources Protection Act ("ARPA") has a savings clause specifically allowing mining activities. 16 U.S.C. §470kk(a). Moreover, ARPA even allows "casual collecting" of cultural artifacts– one of the very things the Tribes want to prevent in Bears Ears. 16 U.S.C. §470kk(b). Whether a looter "collects" objects for his or her own use, or sells such objects for profit makes no difference; the irreparable damage is done. Moreover, as described in pages 20-21 of the Memorandum in Support of Motion for Partial Summary Judgment filed by UDB in Case No. 17-cv-2605 (January 9, 2020) and incorporated here by reference, these statutes have already proven wholly ineffective at deterring looting. In contrast, when the objects of interest are protected by national monument designation, the lands these objects are located on are to be *managed specifically for the protection* of these objects. Now, because of the Trump

Proclamation, countless objects of invaluable importance to the Tribes are vulnerable to significant risk of harm by uranium and oil and gas developers, among others.

The Tribes have also suffered injury by having to divert substantial resources to their efforts to protect, as best they can, the areas and objects that Trump removed from Bears Ears. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (an organization has standing to sue when it is forced to divert resources in response to a defendant's unlawful conduct); *S. Fork Band*, 643 F. Supp. 2d at 1200 (tribes have standing to bring claims for injuries akin to those suffered by organizations). In July of 2015, leading to the Obama Proclamation, the Tribes formed the Bears Ears Inter-Tribal Coalition (the Tribal Coalition) whose mission began as promoting the creation of Bears Ears. Once the Obama Proclamation was issued, the Tribes turned their focus to the Commission, formally naming their representatives on March 17, 2017. SS ¶ 59. Following the Trump Proclamation, the Tribal Plaintiffs were forced to re-establish the Tribal Coalition and turn the Coalition's efforts toward advocacy, education, and lobbying to protect excluded lands and objects, and to restore the complete Monument. SS ¶¶ 70-71. Each of the Tribes has expended significant resources in these efforts, averaging $80,000 per Tribe and hundreds of hours of staff time to delegate representatives to serve on the Tribal Coalition. SS ¶¶ 72-73. The Tribes have incurred enormous out-of-pocket costs to send representatives to regular Tribal Coalition meetings, and to educational and lobbying events. SS ¶ 74. These concrete and demonstrable costs of time and money would not have been necessary but for the Trump Proclamation. Thus, the Tribes have yet another basis for standing to challenge this unlawful conduct. *See Havens Realty*, 455 U.S. at 379; *S. Fork Band*, 643 F. Supp. 2d at 1200.

C. The Tribes' Injuries are Traceable to the Defendants' Conduct, and Redressable by this Court.

President Trump, through issuance of his Proclamation, directly caused current injury to the Tribes by impairing their right as sovereigns to engage with the federal government on a government-to-government basis, by diminishing the Commission's role in collaboratively developing a cohesive management plan for the Monument that would adequately protect the Tribes' interests in their historical, cultural, and spiritual patrimony in Bears Ears, and by creating a "substantial risk" of injury to the Tribes' interests in those lands and that patrimony. SS ¶¶ 60-99. The Trump Proclamation is, therefore, the cause of these many injuries for purposes of standing. *Lujan*, 504 U.S. at 590 (injury must be "fairly traceable to the defendant's allegedly unlawful conduct"). The Secretaries are also causally connected to those injuries because they are charged with implementing the Trump Proclamation and have already begun to develop monument management plans – over the vociferous objections of the Plaintiff Tribes – for the greatly reduced Trump Units without engaging the originally comprised Bears Ears Commission. SS ¶¶ 75-92.

The Court can redress the Tribes' injuries through a favorable decision by declaring the Trump Proclamation unlawful and enjoining its implementation, thereby reaffirming the original boundaries of the Bears Ears National Monument and the makeup and purview of the Commission. Federal courts (including the Supreme Court) have adjudicated numerous claims under the Antiquities Act and never once dismissed for lack of jurisdiction on redressability grounds. *E.g.*, *United States v. California*, 436 U.S. 32 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir 2002); *Tulare Cty. v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002); *Utah Ass'n of Ctys. v. Bush*, 455 F.3d 1094 (10th Cir. 2006); *Mass. Lobstermen's Ass'n v. Ross*, No. 17-406, 2018 WL 4853901 (D.D.C. Oct. 5, 2018). In order to avoid duplication of arguments on this point, the Tribes further incorporate by reference pages 21-

22 of the Memorandum in Support of Motion for Partial Summary Judgment filed by UDB in Case No. 17-cv-2605 (January 9, 2020).

II. Plaintiffs' Claims Are Ripe.

As long as the Tribes have met the injury requirement of constitutional standing—which they have—then their claims satisfy the constitutional dimensions of ripeness. In order to avoid duplication of arguments on this issue, the Tribes incorporate by reference pages 22-24 of the Memorandum in Support of Motion for Partial Summary Judgment filed by UDB in Case No. 17-cv-2605 (January 9, 2020).

As described, the Trump Proclamation caused immediate injury to the Tribes' sovereign interests and threatens imminent injury to their interests in the lands and resources in the Bears Ears area. These injuries require no further action on the part of the federal government, and therefore distinguish this case from the one presented in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998) that the Defendants relied upon so heavily in the prior round of briefing. In *Ohio Forestry*, plaintiffs challenged forest plans that had *no immediate effect* whatsoever: "they do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations." *Id.* at 733. The Trump Proclamation, on the other hand, immediately opened the affected lands to prospecting for hard rock minerals *without any federal oversight.*

Equally as important, it specifically deprived the Tribes of the vested right to participate in the collaborative management of the entire Monument and its objects. The Bears Ears Commission was so unique because it created a requirement that agencies would follow its management recommendations unless they could justify their departures in writing. SS ¶ 58. While based on

the unique historical relationship between the United States and the Tribes, this represented a different, more elevated role for the Tribes. It represented a profound step forward and its loss certainly renders the Tribes' claims ripe for resolution.

ARGUMENT

I. The President Violated the Antiquities Act.

A. The President has No Authority to Revoke the Monument Status of Objects Designated as Part of the Bears Ears National Monument.

The Antiquities Act does not authorize presidents to revoke a national monument once it has been established. The Act authorizes the President to "declare . . . 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(a), not strip objects constituting the corpus of a national monument of their status. There is no precedent, either in statute or caselaw for the complete revocation of protection over all the objects in removed lands. Instead, the Executive Branch has consistently held the contrary view. For example, a 1938 Attorney General's Opinion concluded that the President utterly lacks authority to abolish a national monument once established, Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185 (1938), and the Solicitor General reiterated that view before the U.S. Supreme Court in 2004. *See* U.S. Reply Br. in Resp. to Exceptions of Alaska at 32 n.20, *Alaska v. United States*, 545 U.S. 75 (2005).

President Trump has purported to revoke the Bears Ears National Monument with respect to each object of scientific and historic interest originally proclaimed a part of the monument, but now deleted. He has done so because he has decided some objects are "not unique," "not of significant scientific or historic interest," "not under threat" or simply not "in the public interest" to protect. 82 Fed. Reg. at 58,085. The number of objects as to which the Bears Ears National

Monument has been revoked is breathtaking in scope. The Bears Ears area "constitutes the densest and most significant cultural landscapes in the United States." 82 Fed. Reg. 1139. Countless archeological and historic sites evidencing human habitation and activity over the millennia and areas that remain "closely tied to native stories of creation, danger, protection and healing" have been removed from the monument, including the Valley of the Gods and Hideout Canyon. *Compare* 82 Fed. Reg. at 58,084 *with* 82 Fed. Reg. 1139. So too have the paleontological resources in Indian Creek's Chinle Formation, *id.* at 1141, recently reported to contain "[o]ne of the world's richest troves of Triassic-period fossils."[5] All of those objects have not had their protection "modified" or "reduced" – it is completely gone as to each and every object.

B. The Antiquities Act Does Not Delegate Authority to President Trump to Revoke the Monument Status of Objects Designated as Part of the Bears Ears National Monument or to Remove Virtually All of the Lands Reserved as Part of It.

The Antiquities Act is the sole source of authority invoked by the Defendants as the basis for the Trump Proclamation, and therefore the only issue here is one of "statutory interpretation." *Dalton v. Specter*, 511 U.S. 462, 474, n.6 (1994). But the text of the Act, its purpose and history, the contrast between it and other contemporaneous public lands statutes, and subsequent indications of Congress's understanding of Presidential authority all demonstrate that President Trump does not possess the authority he claims. *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012) (analyzing traditional tools of statutory construction); *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (same); *see also Dames & Moore v. Regan*, 453 U.S. 654,

---

[5] *See* Darryl Fears & Juliet Eilperin, *Spectacular Fossils Found at Bears Ears – Right Where Trump Removed Protections*, The Washington Post (Feb. 22, 2018), https://www.washingtonpost.com/news/speaking-of-science/wp/2018/02/22/spectacular-fossils-found-at-bears-ears-right-where-trump-removed-protections/.

671-674 (1981) (analyzing statutory text, legislative history, and purpose to determine whether President had statutory authority for action). The President also has not acquired additional statutory authority under the doctrine of acquiescence. Thus, the Court should grant summary judgment to the tribal Plaintiffs on claims one through three.

1. The text of the Antiquities Act does not authorize the President's action.

The Antiquities Act vests two explicit and limited powers in the President: First, he may identify only certain types of objects—those of "historic and scientific interest"—to be protected by a national monument. 54 U.S.C. § 320301(a). Second, he may reserve only those federal lands that are "the smallest area compatible with the proper care and manage of the objects to be protected." *Id.* § 320301(b). These powers do not encompass the powers President Trump claims. For the President to say that he has declared a national monument by revoking it, or reserved lands by removing the vast majority of lands from a monument, "is to utter a *non sequitur* or an oxymoron, like a dirty, clean handkerchief." *Greater Yellowstone Coalition v. Bosworth*, 209 F. Supp. 2d 156, 161 (D.D.C. 2002) (rejecting agency's interpretation of the verb "adhere" to include "modify" and "amend" because they "are antonyms"). That is, Defendants cannot rely solely on cases that examined a President's discretion to establish monuments when the reality is that there is *no caselaw* to support what the President has done to Bears Ears. In order to avoid duplication of this argument as directed by this Court's order on consolidation, the Tribes incorporate by reference pages 25-28, of the Memorandum in Support of Motion for Partial Summary Judgment filed by UDB in Case No. 17-cv-2605 (January 9, 2020).

2. The President's claimed powers contravene the protective purposes of the Antiquities Act.

The purpose of the Antiquities Act, as demonstrated by its structure and history, reinforces that Congress did not intend for Presidents to revoke monuments and restore their lands to the

public domain. From beginning to end, the Act aims to *protect* objects of historic and scientific interest, and "[t]he words of the statute should be read in context, the statute's place in the 'overall statutory scheme' should be considered, and the problem Congress sought to solve should be taken into account." *PDK Labs. Inc. v. U.S. Drug Enf't Admin.*, 362 F.3d 786, 796 (D.C. Cir. 2004) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

Congress designed the Antiquities Act to protect historic and scientific resources from potentially irreversible and swift harm. The imminence of threats to those resources from looting, mining, and other uses of federal lands, Congress concluded, required equally swift action ill-suited to the deliberative legislative process, and so it delegated only the power to protect to the President. Carol Hardy Vincent, Congressional Research Service, *National Monuments and the Antiquities Act* 2 (2016), https://fas.org/sgp/crs/misc/R41330.pdf ("The Antiquities Act was a response to concerns over theft from and destruction of archaeological sites and was designed to provide an expeditious means to protect federal lands and resources."); *see also* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 553-54 (2003) ("The impetus to pass the law came from the concern that spectacular public land resources might be harmed before Congress could act to protect them."); Kelly Y. Fanizzo, *Separation of Powers and Federal Land Management: Enforcing the Direction of the President Under the Antiquities Act*, 40 Envtl. L. 765, 781 (2010) ("It was clear that the protection to be offered to American antiquities must be expeditious.") (quotation marks omitted)).

Congress infused each of the Act's original four sections with its protective purpose: Section 1 made it a federal crime to "appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity" on federal land. 34 Stat. 225 § 1, *codified at* 18 U.S.C. § 1866(b). Section 2 authorized the President to unilaterally designate objects of

historic and scientific interest as a national monument and reserve lands for protection of those objects without any process other than the issuance of a public proclamation, and it also authorized the Secretary of the Interior to accept private lands needed to protect designated objects if relinquished by their owners. 34 Stat. 225 § 2, *codified at* 54 U.S.C. § 320301(a); 54 U.S.C. §§ 320301(a)-(b). Section 3 created a permitting regime for the study and excavation of "ruins," "archeological sites" and "objects of antiquities" on federal land, ensuring that the study of these resources would not endanger them. 34 Stat. 225 § 3, *codified at* 54 U.S.C. § 320302. Finally, section 4 authorized the Secretary of the Interior to promulgate regulations to effectuate the Act's purposes. 34 Stat. 225 § 4, *codified at* 54 U.S.C. § 320303. These provisions created a sensible solution to the problem with which Congress was concerned: rapid and emerging threats require a rapid response. Congress reserved for itself the decision of whether a monument ought to be revoked or modified based on the virtually limitless other considerations that could counterbalance the public's interest in protecting historic and scientific resources and, as will be discussed, Congress has demonstrated its competency to carry out that task.

The history leading up to the enactment confirms this understanding of the Antiquities Act. In the late 1880s settlers in the Southwestern United States discovered evidence of Native American habitation dating back millennia, and news soon spread of rampant looting of artifacts from these sites. Lee, *supra* at 47.[6] These events led to public outcry and between 1900 and 1906 legislation was introduced to protect scientific and historic resources on public lands. *E.g.*, H.R.

[6] Ronald Lee served as Special Assistant to the National Park Service Director when he prepared this report to "fill a gap in knowledge of one of the foundation stones of the National Park System" as part of a "series devoted to the evolution of Federal participation in historic preservation in the United States." Lee, *supra* at 1-2.

11021, 56th Cong. (1900).[7] Congress considered, but declined to enact, legislation authorizing temporary, rather than permanent, reservations to protect antiquities.[8] *E.g.*, Amendment to S. 5603 § 2, 58th Cong. (Apr. 26, 1904) (Rep. Teller proposed, but Congress did not approve, an amendment which would have provided "[T]he Secretary of the Interior may make temporary withdrawals of the land on which prehistoric ruins, monuments, archaeological objects, and other antiquities are located, including only the land necessary for such preservation and not exceeding in one place one section of land."). In 1906, Congressman John Lacey, the chairman of the House Public Lands Committee, introduced the bill that would become the Antiquities Act eschewing this temporary approach in favor of permanent protection. H.R. 11016, 59th Cong. (1906); Lee, *supra*, at 71. *See* General Land Office (GLO), Report of the Commissioner of the General Land Office to the Secretary of the Interior For the Year Ended June 30, 1906 47–48 (indicating that passage of the Antiquities Act fulfilled GLO's prior request for permanent protection legislation); General Land Office, Report of the Commissioner of the General Land Office to the Secretary of the Interior For the Fiscal Year Ended June 30, 1908 at 19–20 ("All of the national monuments are worthy, in the broadest sense, of that fostering care of the Government necessary to preserve them intact for the benefit and enjoyment of the people for all time.").

---

[7] H.R. 11021 would have authorized the President to reserve public lands for a range of purposes, including to protect "scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest, or springs of medicinal or other properties." H.R. 11021 § 1. For this and other legislative predecessors to the Antiquities Act, *see* Department of the Interior, *History of Legislation Relating to The National Park System Through the 82d Congress* (Compiled by Edmund B. Rodgers, 1964).

[8] All Congressional materials not available on Westlaw are being contemporaneously herewith in a Plaintiffs' Joint Appendix.

While Congress intended the Antiquities Act to protect America's legacy, President Trump has invoked it for the opposite purpose, revoking protections for over 1.1 million acres of public land and tens of thousands of historic and scientific objects of national importance. Nothing could more starkly conflict with Congress's intention. For example, the Trump Proclamation excludes archeological and historic sites that evidence human habitation on Cedar Mesa that date back 8,500 years. SS ¶ 19-22 *Compare* maps at 82 Fed. Reg. at 58,084 *with* 82 Fed. Reg. 1139. It strains credulity to claim such a site has no historical or cultural significance and is thus unworthy of protection. But the implications of the Trump Proclamation sweep more broadly still, because the President has claimed an unlimited, unilateral power to *revoke* national monuments and restore their lands to the public domain for any reason, or no reason at all. Such a power would upend the permanent protection envisioned by Congress and, if left unchecked by the Court, render all national monuments subject to the impulse of every new President.

3. In contrast to the Antiquities Act, other contemporaneous public lands statutes expressly authorized the President to revoke and modify reservations and withdrawals.

Unlike the Antiquities Act, other public lands statutes from the same period expressly provided the Executive Branch with authority to revoke or modify withdrawals and reservations

of federal land.[9] Because "Congress did not enact" the Antiquities Act "in a vacuum," *Kokoska v. Belford*, 417 U.S. 642, 650 (1974), its "silence . . . becomes more eloquent" in contrast to the alternative approach taken elsewhere. *United States v. Vermont*, 317 F.2d 446, 449-450 (2d Cir. 1963) (quoting Friendly, J.). These other statutes demonstrate that when Congress wanted to authorize the President or other Executive Branch officials to restore lands to the public domain, it "did so in explicit terms." *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 877 (1999); *see W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 99 (1991) (holding that "attorney's fees" did not include expert fees because "contemporaneous statutes" explicitly included both).

The Forest Service Organic Act of 1897 has particular significance because it arose from congressional deliberation over whether a law enabling the President to reserve public lands also vested him with the implied power to restore lands to the public domain, and because both it and the Antiquities Act were sponsored by Congressman John Lacey, the chairman of the House Committee on Public Lands.[10] *See Great N. Ry. Co. v. United States*, 315 U.S. 262, 274 (1942) (considering statements sponsor of legislation made about legislation on similar topic); *United States v. Otherson*, 637 F.2d 1276, 1279 n. 2 (9th Cir. 1981) (contrasting related bills "proposed

---

[9] Reservations and withdrawals are similar, but somewhat distinct, mechanisms to protect public lands by removing them from the public domain, and the terms are sometimes used interchangeably. For example, Congress authorized the President to "set apart and reserve . . . public land bearing forests" as national forests, General Revision Act of 1891 § 24, 26 Stat. 1103 (1891) (repealed by Pub. L. 94-579 § 704(a) (1976)), yet the Supreme Court described these lands as "withdrawn as a 'Government reservation.'" *United States v. N. Pac. Ry. Co.*, 311 U.S. 317, 354 (1940). Where the two terms are distinguished, "[a] withdrawal makes land unavailable for certain kinds of private appropriation under the public land laws. . . . A reservation, on the other hand, goes a step further: it not only withdraws the land from the operation of the public land laws, but also dedicates the land to a particular public use." *S. Utah Wilderness All. v. BLM*, 425 F.3d 735, 784 (10th Cir. 2005).

[10] Congress enacted the Forest Service Organic Act as part of the Sundry Civil Appropriations Act of 1897. 30 Stat. 11-61 (1897).

by same senator"); *United States v. Dupris*, 612 F.2d 319, 326 (8th Cir. 1979), *vacated as moot* 446 U.S. 980 (1980) (comparing bills on similar subject "sponsored by essentially the same Congressmen").

Prior to 1897, the General Revision Act of 1891 authorized the President, by "public proclamation," to reserve "public lands wholly or in part covered with timber or undergrowth," but was silent about restoration of lands to the public domain. General Revision Act of 1891 § 24. Exercising that authority, President Grover Cleveland reserved 21 million acres of national forests in 1897. Gerald W. William, *The USDA Forest Service – The First Century* (2005), https://www.fs.fed.us/sites/default/files/media/2015/06/The_USDA_Forest_Service_TheFirstCentury.pdf. This action caused significant concern and opposition in Congress, particularly because the President's proclamation was based on factual errors about the character and extent of development within the areas reserved. *E.g.*, 30 Cong. Rec. 1284 (May 27, 1897) (statement of Sen. Pettigrew) (explaining that the new national forests included areas "where there are no forests, but where there are cities and towns and railroads and mills and mines and farms"). The President acknowledged his mistake, and "President Cleveland conceded that if he had the power to modify these forest reservations he would do so; but he contended the law gave him no such power, and that consequently he could not modify them." 30 Cong. Rec. 982 (May 10, 1897) (statement of Sen. Shafroth); *see also* 30 Cong. Rec. 914 (May 6, 1987) (statement of Sen Gray) (noting President Cleveland's view that he lacked authority). Representative Lacey and other members of Congress shared the view that the President's authority to reserve national forests did not include a correlative power to revoke or modify them. *E.g.*, 29 Cong. Rec. 2677 (Mar. 2, 1897) (statement of Rep. Lacey) ("The Act of 1890 gave [the President] the power to create a reserve, but no power to restrict it or annul it. . . ."); *id.* at 2679 (statement of Rep. Cannon) (describing bill as making it

"possible for the President of the United States to repeal . . . or to modify" President Cleveland's forest reserve proclamation); 30 Cong. Rec. 911 (May 6, 1897) (statement of Sen. Allison) (describing as "rightfully claimed" and "correct" the view the President could not modify reserves); *id.*at 916 (statement of Sen. Gray) ("I am willing now to put into the power of the President an order that will modify . . . those orders issued by President Cleveland. . . .").

Congress enacted the Forest Service Organic Act 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 [] Executive orders and proclamations [reserving national forests], or any part thereof, from time to time as he shall deem best for the public interest." Forest Service Organic Act of 1897, ch. 2, 30 Stat. 34, 36 (1897) (codified as amended at 16 U.S.C. § 473).[11] This amendment demonstrates that the President did not previously possess the powers it provided. *See Stone v. I.N.S.*, 514 U.S. 386, 397 (1995) ("When congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."); *Public Citizen, Inc. v. U.S. Dep't of Health & Human Servs.* 332 F.3d 654, 670 (D.C. Cir. 2003) (same).

Even if a few Members of Congress questioned the need for the Forest Service Organic Act in 1897, it belies logic that Congress would soon thereafter intend the Antiquities Act to silently authorize the President to revoke national monuments or restore their lands to the public domain without expressly saying so. More telling still, the very same member of Congress, Representative Lacey, introduced the first bill designed to protect antiquities (and also the bill that

[11] The current version of the United States Code omits the introductory clause included in the Forest Service Organic Act. 16 U.S.C. § 473.

became the Antiquities Act) only one year after enacting the Forest Service Organic Act. H.R. 11021. Over the next few years, Congress considered numerous bills of varying breadth to authorize reservation of public lands to protect scientific and historic resources, yet Congress did not include language addressing revocation of monuments or modification of reservations.[12]

During this same period, Congress enacted two other laws with the explicit provisions lacking in the Antiquities Act. The Reclamation Act of 1904 authorized the Secretary of the Interior to "withdraw . . . those lands required for any irrigation works contemplated under the provisions of this Act," and to "restore to public entry the lands so withdrawn when, in his judgment, such lands are not required." 32 Stat. 388, Ch. 1093 § 3 (1902). It also authorized the Secretary to "withdraw . . . any public lands believed to be susceptible of irrigation from said works," but to restore "said lands to entry" if the Secretary determined that an irrigation project was "impracticable or unadvisable." *Id.* Congress selected a different, but similarly explicit, approach in the Pickett Act of 1910, authorizing the President to "temporarily withdraw . . . public lands . . . and reserve the same for water-power sites, irrigation, classification of lands, or other

[12] H.R. 13478 § 1, 58th Cong. (1904) (authorizing reservation of lands to protect historic, scientific, or scenic resources); H.R. 12447 § 1, 58th Cong. (1904) (authorizing reservation of lands "on which are located aboriginal monuments, ruins, or other antiquities"); S. 4127 § 1, 58th Cong. (1904) (same); H.R. 10451, 56th Cong. (1900) (authorizing reservations in certain states and territories of up to 320 acres to protect historic resources); H.R. 9245, 56th Cong. (1900) (authorizing reservations up to 320 acres to protect "ruins"); H.R. 8066 § 7, 56th Cong. (1900) (authorizing reservations to protect historic sites and "any natural formation of scientific or scenic value or interest"). Other proposals considered by Congress to protect historic or scientific resources did not authorize the reservation of public lands. *E.g.*, S. 5603 (creating criminal penalties and permitting regime and requiring Secretary of the Interior to recommend to Congress public lands to be reserved to protect historical resources); H.R. 13349, 56th Cong. (1904) (same); H.R. 12141, 58th Cong. (1904) (creating criminal penalties and permitting regime); H.R. 14227, 56th Cong. (1901) (creating criminal penalties and permitting regime); H.R. 8195, 56th Cong. (1900) (creating criminal penalties).

public purposes to be specified in the orders of withdrawals" and providing that "such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." 36 Stat. 847 § 1 (1910).

Before, during, and after enactment of the Antiquities Act, Congress explicitly delegated the power to revoke or modify reservations of public lands in other public lands statutes, but it did not do so in the Antiquities Act. Therefore, Congress's silence as to that power with respect to national monuments cannot be viewed as inadvertence. *Cf. Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 729 (1989) (explaining that it was "quite inconceivable that the same legislators who opposed" imposing vicarious liability on municipalities in congressional debates about one statute "would have silently adopted the same principle" in another). It was deliberate.

4. Subsequent legislation demonstrates that Congress retained for itself authority over National Monuments after they are established.

Congress has repeatedly demonstrated its competency to review national monuments after they are established and also confirmed that the President lacks authority to revoke national monuments or remove lands from them, first by considering—and rejecting—legislation to grant the President those very powers (at the request of the Executive Branch), and then by enacting the Federal Land Policy and Management Act in 1976, which was predicated on Congress's understanding that no such authority existed.

Congress has enacted legislation to transform national monuments into some of America's most cherished national parks, like the Grand Canyon, Bryce Canyon, Olympic, and Zion. Pub. L. 75-778, 52 Stat. 1241 (1938) (Olympic); Pub. L. 68-227, 43 Stat. 593 (1924) (Bryce Canyon, originally called Utah National Park); Pub. L. 66-83, 41 Stat. 356 (1919) (Zion); Pub. L. 65-277, 40 Stat. 1175 (1919) (Grand Canyon). It has transferred national monuments to states and cities where it has determined that local management will better serve the public interest. *E.g.*, Pub. L.

83-360, 68 Stat. 98 (1954) (transferring Shoshone Cavern National Monument to city of Cody, Wyoming); Pub. L. 75-343, 50 Stat. 746 (1937) (transferring Lewis and Clark Caverns National Monument to Montana). It has removed lands from national monuments and added others. *See* Pub. L. 108-480 § 203, 118 Stat. 3907 (2004) (removing 3.1 acres and adding 0.45 acres to the Castillo de San Marcos National Monument); Pub. L. 104-333 § 205, 110 Stat. 4093, 4106 (1996) (modifying boundaries of national monuments including by removing 315 acres and adding 210 acres to Craters of the Moon National Monument); 95 Pub. L. No. 625 § 301, 92 Stat. 3467, 3474-75 (1978) (modifying boundaries of national monuments including by adding 7 acres and removing 0.11 acres from Tumacacori National Monument). And it has revoked national monuments where it determined the lands were better put to different uses. *E.g.*, Pub. L. 84-179, 69 Stat. 380 (1956) (revoking Old Kasaan National Monument); Pub. L. 81-648, 64 Stat. 404 (1950) (revoking Holy Cross National Monument).

While Congress has legislatively administered national monuments, it has rebuffed efforts to expand the authority of the President. The 68th and 69th Congresses considered legislation to grant the President the authority to modify the boundaries of national monuments. In 1925, the Secretary of the Interior transmitted a letter to the House and Senate explaining that the land within a national monument was "a fixed reservation subject to restoration only by legislative act," and the Executive Branch requested that Congress give the President the power to "restore lands to the public domain reserved by public proclamation as national monuments, and validating any such restorations heretofore so made by Executive Order." S. Rep. No. 68-849, 68th Cong. (1925) (reprinting letter); H. Rep. No. 68-1119, 68th Cong. (1925). The House and Senate considered, but declined to give the President that power. S. 3840, 68th Cong. (1925); H.R. 11357, 68th Cong. (1925). Yet now the President asserts that he can, with the stroke of a pen, create the very power

over federal land that Congress chose not to give him. While subsequent legislative history or events ordinarily cast little light on the meaning of earlier enactments, this circumstance is unusual because it so closely resembles the issue presented to Congress with respect to national forests, at which time Congress *did amend* an earlier statute in precisely the manner that it declined to do for the Antiquities Act.

In 1925, the Secretary also requested legislation to modify the boundaries of the Casa Grande Ruins National Monument to eliminate lands needed for an irrigation project, explaining that "such elimination would not affect or injure the monument for the purpose for which it was created." S. Rep. No. 68-1127, 68th Cong. (1925) (reprinting letter). *Id.* Bills were introduced in the House and Senate to remove the identified lands and to generally authorize the President "to eliminate lands from national monuments by proclamation." S. 3826, 68th Cong. (1925); H.R. 11363, 68th Cong. (1925). These bills were not enacted.

The following year, the Secretary again asked for legislation to remove lands from Casa Grande National Monument. S. Rep. No. 423, 69th Cong. (1926) (reprinting letter); H. Rep. No. 69-1268, 90th Cong. (1968) (same). A bill was again introduced in the Senate to both remove those lands and generally authorize boundary modifications. S. 2703, 60th Cong. (1926), 67 Cong. Rec. 6805 (1926). The Senate Committee on Indian Affairs amended the bill to strip out the general provisions, S. Rep. No. 423, 69th Cong. (1926); 69 Cong. Rec. 6805 (1926), and Congress enacted legislation to remove the lands requested.

Until recently, Congress never again considered legislation to vest the President with authority to generally revoke or modify national monuments.[13] Numerous laws support the plain language of the Antiquities Act as vesting the President with only affirmative authority to establish national monuments and reserve lands as part of them. The Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1782 (1976), further demonstrates that same principle. FLPMA overhauled the land management system and during its passage there was extensive discussion reaffirming that only Congress holds the power to modify or revoke monuments. In order to avoid duplicative briefing on this issue, the Tribes incorporate by reference pages 31-36, of the Memorandum in Support of Motion for Partial Summary Judgment filed by UDB at 17-cv-2605 (January 9, 2020).

5. The President has not acquired Antiquities Act authority to revoke and modify the Bears Ears National Monument through Congressional acquiescence.

Congress did not authorize the President to revoke national monuments or remove lands from them when it enacted the Antiquities Act and nothing has transpired since that time to re-write the Act to confer those authorities. Any expected invocation of the doctrine of acquiescence does not change that fact.

At pages 36-42 of their Memorandum in Support of Motion for Partial Summary Judgment, and incorporated here by reference, UDB plaintiffs catalogue reasons that the doctrine of acquiescence does not validate President Trump's action, including that: 1) Congress repealed implied presidential authority over withdrawals of public lands when it enacted FLPMA; 2) the

[13] Congress is currently considering legislation to allow the President to "remove" lands from national monuments. H.R. 3990 § 2, 115th Cong. (2017).

executive practice of removing lands from national monuments has neither been consistent nor unbroken; 3) to the contrary, the Executive Branch has specifically requested that Congress grant the President the authority now claimed, and Congress has denied those requests; and 4) the few examples of president's removing lands from national monuments arose in unique circumstances that do not provide insight to Congress's view of general presidential authority.[14] Moreover, a very close review of Congressional actions from 1906 to 2017 reveals that Congress repeatedly claimed the power of reduction and revocation to itself alone. In order to avoid duplicative briefing on this subject, the Tribes incorporate by reference pages 32-40 of the Memorandum in Support of the Motion for Partial Summary Judgment filed by The Wilderness Society in consolidated Case No. 1:17-cv-02587 (January 9, 2020).

II. To Avoid a Constitutional Question, the Antiquities Act Should Not Be Construed to Delegate the Unfettered Power over National Monuments that President Trump Has Claimed.

If the text, history, and context of the Antiquities Act left any ambiguity about the scope of the President's authority under the Antiquities Act—and they do not—the Act should not be interpreted to grant the President the unfettered power to revoke national monuments and remove reservations of monument lands for any reason, or no reason at all, because such an interpretation would present a constitutional question under the nondelegation doctrine. The Supreme Court "repeatedly ha[s] said that when Congress confers decisionmaking authority upon agencies Congress 'must lay down by legislative act an intelligible principle to which the person or body

[14] Professor John Ruple identifies six separate opinions issued by the Department of the Interior addressing presidential authority to remove lands from a national monument: opinions in 1915, 1935, and 1947 concluding that President possesses such authority and opinions in 1924, 1932, and 1943 reaching the opposite conclusion. John C. Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications*, 43 Harv. Envtl. L. Rev. 1, 36 (2019).

authorized to act is directed to conform.'" *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).[15] Interpreting the Antiquities Act to vest the President with an implied power to revoke or modify national monuments would be entirely unchecked by any principle established by Congress.

The Antiquities Act establishes "clear standards and limitations" to govern the two express powers granted to the President. *Tulare Cty*, 185 F. Supp. 2d at 26; *Utah Ass'n of Ctys.*, 316 F. Supp. 2d at 1191. He may identify only certain types of objects—those of "historic and scientific interest"—to be protected by a national monument. 54 U.S.C. § 320301(a). And he may reserve only those federal lands that are "the smallest area compatible with the proper care and manage of the objects to be protected." *Id.* § 320301(b). The Antiquities Act, thus, "details the types of objects that can be included in monuments and a method for determining the size of monuments." *Tulare Cty.*, 185 F. Supp. 2d at 26. While the President's discretion in exercising these two express powers may be broad, it is governed by clear and specific statutory criteria.

The purported authority of the President to *revoke* the designation of objects as national monuments and to reverse the reservation of public lands stands on different footing entirely. If that were so, the Antiquities Act includes no "intelligible principle" to govern such a revocation. *J.W. Hampton*, 276 U.S. 394. Congress has said nothing about when and why a President could exercise those powers, because they do not arise from the text of the statute. Inferring such presidential authority, therefore, could constitute the rare circumstance where "there is an absence of standards for the guidance [of delegated authority] . . . so that it would be impossible in a proper

[15] The principle that Congress must provide an intelligible principle to guide the exercise of authority delegated to the Executive Branch applies with equal force whether the delegation is to an agency or the President. *Tulare Cty.*, 185 F. Supp. 2d at 26 .

proceeding to ascertain whether the will of Congress has been obeyed," *Yakus v. United States*, 321 U.S. 414, 426 (1944), and the Court should not interpret the Act to delegate a constitutionally questionable power to the President. *See Misretta v. United States*, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

President Trump's treatment of national monuments generally, and the Bears Ears National Monument specifically, reveal that the power he claims lacks any congressional sideboards or guidance. Executive Order 13792, which initiated his review of national monuments, is full of concerns and criteria that have nothing to do with the Antiquities Act. It suggests that national monuments interfere with "achieving energy independence" and were created without "public outreach and proper coordination" with non-federal actors. 82 Fed. Reg. at 20,429. Not a word about energy can be found in the Antiquities Act, and it requires no public process.[16] The Executive Order then requires the Secretary of Interior to "consider" a laundry list of public policies also untethered to the Antiquities Act, including: 1) the effects a monument may have on "the available uses of designated Federal lands . . . [and] the available uses of Federal lands beyond the monument

[16] While a lengthy public process would undermine the Act's immediate, protective purpose, President Obama did utilize a public process when creating Bears Ears.

boundaries," 2) "the use and enjoyment of non-Federal lands within or beyond monument boundaries," 3) "concerns of State, tribal, and local governments . . . including th[eir] economic development and fiscal condition," 4) "the availability of Federal resources to properly manage designated areas," and 5) "such other factors as the Secretary deems appropriate." *Id.*[17] The Department of the Interior followed the President's directive and focused its review on the location of mineral and oil and gas resources and whether "mines or processing facilities [are] near or adjacent to a National Monument."[18]

The Trump Proclamation also relies on considerations apart from those identified by the Antiquities Act. It is based on the assertion that some objects identified for protection "are not unique to the monument," and that "many of the objects . . . were not under threat of damage or destruction." 82 Fed. Reg. at 58,082. Those are not, however, statutory criteria. The decision also relies on the mistaken understanding that objects protected under other legal regimes cannot properly be designated as objects under the Antiquities Act. *Id.* The D.C. Circuit directly considered—and rejected—that legal view in *Mountain State Legal Foundation*, explaining that "federal laws . . . provide[] overlapping sources of protection," 306 F.3d at 1138, and that mistake

---

[17] The Executive Order also requires the Secretary to consider the "requirements and original objects of the Act," including the size of the reserved lands and whether objects were appropriately designated. 82 Fed. Reg. at 20,429.

[18] Email from Kenneth Mahoney to Sheldom Wimmer et al., (Jun. 1, 2017), available at https://www.documentcloud.org/documents/4391967-National-Monuments-a-Look-at-the-Debate-From.html#document/p110/a407706 (document starts at page 110 of 208); Email from Brandon Boshell to Rody Cox et al., (May 22, 2017) available at https://www.documentcloud.org/documents/4391967-National-Monuments-a-Look-at-the-Debate-From.html#document/p82/a407703 (document starts at page 82 of 208); Memorandum from Larry Garahana, Geologist, U.S. Dep't of Interior, on Cursory Review of the Mineral Potential/Occurrence within the Bears Ears NM (Jan. 31, 2017), available at https://www.documentcloud.org/documents/4391967-National-Monuments-a-Look-at-the-Debate-From.html#document/p61/a07706 (document starts at page 62 of 208).

of law is alone a sufficient basis for invalidating the President's decision. *Cf. Ark Initiative v. Tidwell*, 64 F. Supp. 3d 81, 90 (D.D.C. 2014) ("[C]ourts 'have held it an abuse of discretion for [an agency] to act if . . . the decision was based on an improper understanding of the law.") (quoting *Kazarian v. Citizenship & Immigration Servs.*, 596 F.3d 1115, 1118 (9th Cir. 2010).

III. The President Violated the Separation of Powers Doctrine

The Tribal Plaintiffs are entitled to summary judgment on their Constitutional claim for the same reasons that they prevail on the Antiquities Act claims: the President simply does not have the power he asserts here. In order to avoid duplicative briefing on this subject, the Tribes incorporate by reference pages 21-22 of the Memorandum in Support of Motion for Partial Summary Judgment filed by NRDC in Case No. 1:17-cv-2606 (January 9, 2020).

In addition, the Tribes have alleged in their second claim for relief (separation of powers) that in claiming power he does not have, the President violates the Presentment Clause. To the degree the President seeks to "coopt Congress's power to legislate," *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018), he is effectively amending the Antiquities Act to grant to himself new powers in addition to those delegated by Congress. The Constitution, however, does not "authorize[] the President to enact, to amend, or to repeal statutes." *Clinton v. N.Y.C.*, 524 U.S. 417, 438 (1998). Rather, the Antiquities Act may be amended only through bicameralism and presentment, *see I.N.S. v. Chadha*, 462 U.S. 919, 946 (1983). By unilaterally rewriting the Antiquities Act according to his own policy preferences, the President has ignored these "integral parts of the constitutional design for the separation of powers," and thereby acted unconstitutionally. *Id.*; *see also City & Cty. of S.F.*, 897 F.3d at 1235 (holding that an "Executive Order violates the constitutional principle of the Separation of Powers" by withholding funds in a manner unauthorized by Congress).

CONCLUSION

The Tribal Plaintiffs have an unbroken connection to and reliance on Bears Ears that spans millennia before the United States existed. In an act untethered to principle or caselaw, President Trump did what no other President has done: revoked a national monument and replaced it with two small units comprising less than 15 percent of the original size of the Monument. In so doing, he acted well beyond the law and well beyond the Constitutional limits of his power. For the foregoing reasons, the Plaintiffs are entitled to partial summary judgment on claims one through three of their First Amended Complaint.

Respectfully submitted, this 9th day of January 2020,

/s/ nlandreth

Natalie A. Landreth
NATIVE AMERICAN RIGHTS FUND
745 W. 4th Avenue, Suite 502
Anchorage, AK 99501
Phone: (907) 257-0501
Fax: (907) 276-2466
Email: landreth@narf.org

Matthew Lee Campbell
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
Phone: (303) 447-8760
Fax: (303) 443-7776
Email: mcampbell@narf.org

Justin Robert Pidot
University of Arizona James E. Rogers College of Law
(for identification purposes only)
1201 East Speedway Blvd.
P.O. Box 210176
Tucson, AZ 85721
Phone: (520) 621-5576

jpidot@law.arizona.edu

Attorneys for the Hopi Tribe, Ute Mountain Ute Tribe and Pueblo of Zuni

Paul Spruhan, Asst. Attorney General
Litigation and Employment Unit
NAVAJO NATION DEPARTMENT OF JUSTICE
Post Office Box 2010
Window Rock, Arizona (Navajo Nation) 86515
Phone: (928) 871-6210
Fax: (928) 871-6177
Email: pspruhan@nndoj.org

Attorney for the Navajo Nation

Rollie Wilson
FREDERICKS PEEBLES & MORGAN, LLP
401 9th St., N.W.
Washington, D.C. 20004
Phone: (202) 450-4887
Fax: (202) 450-5106
Email: rwilson@ndnlaw.com

Jeffrey S. Rasmussen, *pro hac vice*
FREDERICKS PEEBLES & MORGAN, LLP
1900 Plaza Drive
Louisville, CO 80027
Phone: (303) 673-9600
Fax: (303) 673-9155
Email: jrasmussen@ndnlaw.com

Attorneys for the Ute Indian Tribe

Lloyd Miller
SONOSKY, CHAMBERS, SACHSE, MILLER & MONKMAN LLP
725 East Fireweed Lane
Suite 420
Anchorage, AK 99503
Phone: (907) 258-6377
Fax: (907) 272-8332
Email: lloyd@sonosky.net

David Mielke

SONOSKY, CHAMBERS, SACHSE, MILLER,
MIELKE & BROWNELL LLP
500 Marquette Avenue, NW
Suite 660
Albuquerque, NM 87102
Phone: (505) 247-0147
Fax: (505) 843-6912
Email: dmielke@abqsonosky.com

Attorneys for the Zuni Tribe

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January 2020, I filed the above pleading with the Court's CM/ECF system, which provided notice of this filing by e-mail to all counsel of record.

/s/ Natalie A. Landreth
Natalie A. Landreth