

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HOPI TRIBE, et al.,)	
)	
Plaintiffs,)	
)	Case No. 1:17-cv-02590-TSC
v.)	
)	
DONALD J. TRUMP, et al.,)	
)	
Defendants.)	
UTAH DINÉ BIKÉYAH, et al.,)	
)	
Plaintiffs,)	
)	Case No. 1:17-cv-2605-TSC
v.)	
)	
DONALD J. TRUMP, et al.,)	
)	
Defendants,)	
)	
BRANDON SULSER; BIGGAME)	
FOREVER; SPORTSMEN FOR FISH &)	
WILDLIFE; UTAH BOWMEN’S)	
ASSOCIATION; UTAH WILD SHEEP)	
FOUNDATION; MICHAEL NOEL; SANDY)	
JOHNSON; and GAIL JOHNSON,)	
)	
Defendant-Intervenors.)	
NATURAL RESOURCE DEFENSE)	
COUNCIL, INC., et al.,)	
)	
Plaintiffs,)	Case No. 1:17-cv-2606-TSC
)	
v.)	
)	
DONALD J. TRUMP, et al.,)	
)	
Defendants.)	CONSOLIDATED CASES
)	

**DEFENDANT-INTERVENORS’ MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS**

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INTRODUCTION¹

Defendant-Intervenors Brandon Sulser, BigGame Forever, Sportsmen for Fish & Wildlife, the Utah Bowmen's Association, the Utah Wild Sheep Foundation, Michael Noel, Sandy Johnson, and Gail Johnson (collectively, "Defendant-Intervenors") file this brief in support of Defendants' motion to dismiss.

Plaintiffs ask the Court to hold unlawful Proclamation 9681 of December 4, 2017, that amended Proclamation 9558 of December 28, 2016, and reduced the size of the Bears Ears National Monument. *See* Complaint, Dkt. 1*², Prayer for Relief. In effect, Plaintiffs ask this Court to expand the boundaries of the Bears Ears National Monument to its originally designated 1.35-million acres, *id.*, which would severely restrict access to, and multiple uses of, hundreds of thousands of acres of federal land in Utah. *See, e.g.*, Declaration of Ryan Benson, Dkt. 17-3* ¶ 14; Declaration of Brandon Sulser, Dkt. 17-2* ¶¶ 9, 10. Because Proclamation 9681 was a lawful exercise of the President's delegated authority under the Antiquities Act, Defendant-Intervenors respectfully request that this Court dismiss Plaintiffs' Complaint.

¹ Pursuant to this Court's order, Defendant-Intervenors have striven to avoid duplicating the arguments made in Defendants' motion to dismiss. Defendant-Intervenors incorporate by reference Defendants' arguments for dismissal.

² Docket numbers with an asterisk refer to filings in Case No. 1:17-cv-2605-TSC prior to consolidation.

BACKGROUND

I.

ANTIQUITIES ACT

In 1906, Congress passed the Antiquities Act. It 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(a). The President may reserve public lands to protect national monuments, but only if the reservation is “confined to the smallest area compatible with the proper care and management of the objects to be protected.” 54 U.S.C. § 320301(b).

As its name suggests, the Antiquities Act was passed primarily to protect American Indian archeological sites from looting. Ronald F. Lee, *The Antiquities Act, 1900–1906, in The Story of the Antiquities Act* (National Park Service 2001).³ Specifically, those who originally proposed the idea for a bill bemoaned the fact that, unlike many European countries, the United States had no law protecting antiquities. *Id.* The use of the Antiquities Act has greatly expanded in recent years, with the previous three administrations designating more, and larger, monuments than their predecessors. John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 *Yale J. on Reg.* 617, 653–55 (2018).

³ Available at <https://www.nps.gov/archeology/pubs/lee/index.htm>.

Presidents have also long used the Antiquities Act to reduce national monuments. Eight of the nineteen presidents serving since 1906 have issued proclamations reducing the size of national monuments, including Presidents Kennedy, Roosevelt (Franklin), and Taft. *See, e.g.*, Proclamation No. 1186, 37 Stat. 1733 (Mar. 14, 1912); Proclamation No. 1293, 39 Stat. 1726 (May 11, 1915); Proclamation No. 1862, 45 Stat. 2984 (Jan. 7, 1929); Proclamation No. 2499, 55 Stat. 1660 (July 18, 1941); Proclamation No. 2659, 59 Stat. 877 (Aug. 13, 1945); Proclamation No. 3307, 73 Stat. c69 (Aug. 7, 1959); Proclamation No. 3539, 77 Stat. 1006 (May 27, 1963). The reasoning for these reductions varied by President, ranging from the need to construct a state highway, 55 Stat. 1660, to the fact that the original designation contained limited archeological values, 77 Stat. 1006. Some Presidents even reduced the size of monuments without explanation. 39 Stat. 1726. Thus, as a matter of historical practice, the reduction of a national monument is as well established as monument creation.

II.

BEARS EARS NATIONAL MONUMENT

On December 28, 2016, during the final days of his administration, President Obama signed Proclamation 9558, which established the 1.35-million acre Bears Ears National Monument in San Juan County, in southeastern Utah. Proclamation No. 9558 of December 28, 2016, 82 Fed. Reg. 1139. The Proclamation was signed despite strong and unanimous opposition from the Utah Congressional Delegation and despite the positions of the Utah Governor and state legislature. Furthermore, the

Monument was designated notwithstanding a proposed compromise bill that would have established portions of the area as a conservation area. Utah Public Lands Initiative Act, H.R. 5780, 114th Cong. (Introduced July 14, 2016.)

On December 4, 2017, President Trump signed Proclamation 9681, reducing the size of the Bears Ears National Monument to approximately 200,000 acres. Presidential Proclamation Modifying the Bears Ears National Monument (Dec. 4, 2017).⁴ The Proclamation stated that it “is in the public interest to modify the boundaries of the monument to exclude from its designation” those areas that were “unnecessary for the care and management of the objects to be protected within the monument.” *Id.* Two days later, Plaintiffs filed this action challenging the December 4, 2017, Proclamation. Complaint, Dkt. 1*.

III.

HOW THE BEARS EARS NATIONAL MONUMENT IMPACTED DEFENDANT-INTERVENORS

Defendant-Intervenors are individuals and nonprofit organizations that recreate, work, and volunteer on the public lands in and around the Bears Ears National Monument. They have engaged in these activities for years, but the original establishment of the Monument threatened to prevent them from continuing their undertakings on the public land. Defendant-Intervenors’ interests are diverse, but they are united in their desire to ensure that the public lands at issue remain open for multiple use.

⁴ Available at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/>.

Of all the intervenors, Sandy and Gail Johnson have the most experience with the public lands at issue. Since 1978, they have owned a ranch and grazed cattle on the land. Declaration of Sandy Johnson, Dkt. 17-8*, ¶ 3. The original designation of the Bears Ears National Monument placed the entirety of their grazing allotment within the Monument boundaries. *Id.* ¶ 6. Based on ranchers' experiences with other national monuments, they knew that a monument designation would harm their ranching operations and likely result in the end of their ranch. *Id.* ¶ 8. The reduction in the Monument's size has alleviated these fears. *Id.* ¶ 11.

The original Monument designation impacted Defendant-Intervenors in other ways. Like some of the Plaintiffs, many of the individuals and organizational members enjoy recreating on the public lands in Utah. But the original designation threatened their ability to continue to enjoy the outdoors in this area. For example, Brandon Sulser was involved in a life-altering accident and was diagnosed a quadriplegic when he was 18. Declaration of Brandon Sulser, Dkt. 17-2*, ¶ 5. While he still enjoys the outdoors, his accident significantly altered how he can enjoy the outdoors. *Id.* ¶ 9. He must use off-highway and other motorized vehicles to recreate on the public lands, but the original Monument boundaries threatened to limit or eliminate these means of travel. *Id.* ¶ 10.

Finally, the original designation threatened the conservation efforts of the Intervenor organizations. BigGame Forever has conducted transplants as well as habitat and water-conservation projects to ensure that wild game herds in southern Utah remain robust and healthy. Declaration of Ryan Benson, Dkt. 17-3* ¶ 13.

Similarly, Sportsmen for Fish & Wildlife and the Utah Wild Sheep Foundation engage in wildlife conservation projects on the land in and around the original boundaries of the Bears Ears National Monument. Declaration of Travis Jenson, Dkt. 17-6* ¶¶ 9, 10; Declaration of Troy Justensen, Dkt. 17-4* ¶ 10. Under the original Monument designation, it is likely that these organizations' efforts would have been significantly hampered.

To ensure that they could continue to use the land as they have for years, Intervenor-Defendants filed their motions to intervene on January 11, 2018. Dkt. 17*. This Court granted intervention September 24, 2018. Dkt. 48. They now file this brief in support of Defendants' motion to dismiss.

ARGUMENT

I.

STANDARD OF REVIEW

In evaluating a motion to dismiss under either Rule 12(b)(1) or 12(b)(6), the Court must "treat the complaint's factual allegations as true and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (internal citations omitted) (quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979)). The Court, however, should not accept any inferences drawn by the plaintiff if they are unsupported by facts alleged in the Complaint, and the Court need not accept Plaintiffs' legal conclusions. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002).

II.

THIS COURT SHOULD DISMISS PLAINTIFFS' COMPLAINT BECAUSE THE PRESIDENT'S DECISION TO REDUCE THE BEARS EARS NATIONAL MONUMENT WAS LAWFUL

In their Complaint, Plaintiffs allege that Proclamation 9681 violates the Antiquities Act, the constitutional separation of powers, and the constitutional duty to “take care that the laws be faithfully executed.” U.S. Const. art. II, § 3, cl. 5; Complaint ¶¶ 189-220. All of these separate counts rely on one argument: that the Antiquities Act does not authorize the President to modify his predecessor’s monument proclamation to reduce the size of national monuments. Complaint ¶¶ 194, 206, 211, 217–218. Because Plaintiffs’ central premise is incorrect, this Court should dismiss the entire Complaint.

Courts have long recognized a basic principle of American law that where an executive official is given a purely discretionary authority to take some action, it includes the power to modify or reverse the action through the same means absent some indication to the contrary. *See* Yoo & Gaziano, 35 Yale J. on Reg. at 639–47. For instance, Congress routinely delegates to agencies authority to issue regulations in their discretion, without addressing whether those regulations can later be modified or repealed. In these circumstances, courts have nonetheless consistently recognized that regulations may be modified or repealed through the same procedure, unless the statute contains other mandatory language inconsistent with such power. *See, e.g., Commonwealth of Pa. v. Lynn*, 501 F.2d 848, 855-56 (D.C. Cir. 1974). This principle is not limited to the regulatory state, but applies broadly to executive actions. *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509, (2010) (“Under

the traditional default rule, removal is incident to the power of appointment.”); *see also* Yoo & Gaziano, 35 Yale J. on Reg. at 639–47 (collecting other examples of this basic principle of American law).

If the Antiquities Act’s “object,” “land owned or controlled by the Federal Government,” and “smallest area compatible” requirements are satisfied, the statute gives the President absolute discretion whether to establish a monument. 54 U.S.C. § 320301 (The President “may, in the President’s discretion . . .”); *id.* (The President “may” reserve parcels of land for a monument’s protection.). He could decline to create a monument, for instance, for any reason or no reason at all, no matter how clear-cut the case for the monument is. *See Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1135–38 (D.C. Cir. 2002). Thus, this is precisely the sort of discretionary power that courts have long recognized gives the executive the same discretion to modify or reverse the action later through the same procedures.

The Antiquities Act contains nothing inconsistent with this power. There is no explicit restriction on the President’s ability to modify or revoke past proclamations. Nor is there any other mandatory language in the statute that is inconsistent with this power, either explicitly or implicitly. On the contrary, several provisions of the Act show that Congress expected monuments to be updated from time to time. *See* 54 U.S.C. §§ 320301-03 (monument regulatory may be updated “from time to time”).

Also supporting the presumption that the President has the ability to modify past monuments is the President’s constitutional duty to take care the laws are faithfully executed. Among the laws the President must faithfully execute is the

Antiquities Act, which provides that national monuments “shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.” 54 U.S.C. § 320301(b). There is no time limit to this requirement, and the use of the word “shall” places a mandatory duty on the President to ensure that a monument is no larger than necessary to achieve its purpose. *Id.* Thus, restricting the President’s ability to modify a monument would restrict his ability to comply with the requirements of the Antiquities Act. *Cf. Lynn*, 501 F.2d at 856 (“If the programs are indeed disserving congressional policy, their continued operation at normal levels for the nine-month period deemed necessary for their evaluation would implicate the Secretary in a massive frustration of that policy.”).

Many Presidents have recognized their continuing obligation to ensure that monuments are no larger than necessary to protect the monument objects. For example, President Taft modified the Navajo National Monument after it had “been found to reserve a much larger tract of land than is necessary for the protection of such of the ruins” and therefore he reduced the size of the monument in order to “conform to the requirements of the act authorizing the creation of National Monuments” Proclamation No. 1186, 37 Stat. 1733 (Mar. 14, 1912). Subsequent Presidents made similar determinations in reducing monuments. *See, e.g.*, Proclamation No. 2499, 55 Stat. 1660 (July 18, 1941); Proclamation No. 3307, 73 Stat. c69 (Aug. 7, 1959).

Apart from reducing the overall size, the next President may determine that a given monument with a patchwork of private inholdings is better protected by

concentrating the monument within the federal land that the government owns and controls. *See, e.g., Wilkenson v. Dep't of the Interior*, 634 F. Supp. 1265, 1280-81 (D. Colo. 1986) (holding that the United States could not completely restrict travel on a preexisting right of way through a national monument). There is nothing in the Act that privileges the original designation and regulations over a later presidential determination. In fact, the Antiquities Act contemplates the opposite: that the President and his administration will use their discretion “from time to time” to carry out the provisions of the Antiquities Act. Pub. L. 59-209, 34 Stat. 225 (1906) (codified at 54 U.S.C. §§ 320301-03 (2018)).

Additionally, later Presidents may discover new ways to better manage and protect federal property near national monuments with available resources. *See Yoo & Gaziano*, 35 *Yale J. on Reg.* at 661. The belief that increasing federal regulation is always the best means of protecting something is more ideologically than empirically based, especially when it excludes all other options. Cooperation with state authorities and private property owners who own adjoining land can promote superior land-use decisions, including better protections for such properties. Such consultation and multiparty agreements tend to increase support for the resulting decisions and increase fundamental fairness, since some prior designations have walled in private lands and restricted the reasonable use of such private property. *See Stillwater Technical Solutions* (prepared for San Juan County Commission), *The Advisability of Designating the Bears Ears as a Monument Under the Antiquities Act*

(Oct. 2016).⁵ The evidence surrounding many recent monument designations also suggests that large-scale reservations for monuments create economic hardship for local communities and injustice to those who may have reasonably depended on the timber, grazing, or mineral resources. *Id.* at 16–20. This is the case for Sandy and Gail Johnson, whose ranching operations were placed at risk by the original Monument designation. Declaration of Sandy L. Johnson, Dkt. 17-8* ¶¶ 7, 8.

Furthermore, such designations may actually be counterproductive to the ecological and environmental interests that past Presidents claimed to protect. Indeed, BigGame Forever, Sportsmen for Fish & Wildlife, and the Utah Wild Sheep Foundation engage in conservation efforts that could be hindered by the original Monument designation. Declaration of Ryan Benson, Dkt. 17-3*, ¶ 6, 13, 14; Declaration of Troy Justensen, Dkt. 17-4*, ¶¶ 8, 10, 11; Declaration of Travis Jenson, Dkt. 17-6*, ¶¶ 7, 11. Large monument reserves also contribute to an estimated \$13.5- to \$20-billion maintenance backlog on Department of Interior land-management responsibilities and deny the federal government any reasonable return on land-use fees and leases. Anu K. Mittal and Frank Rusco, Dirs., Gov. Accountability Office Nat. Res. and Env't Team, Testimony Before the Subcommittee on Interior, Environment, and Related Agencies, House of Representatives Committee on Appropriations (Mar. 1, 2011).⁶ A more careful accounting of federal land policy might lead a President to conclude that some vast monument reserves, under the

⁵ Available at https://www.heartland.org/_template-assets/documents/publications/Advisability%20of%20Designating%20the%20Bears%20Ears.pdf.

⁶ Available at <http://www.gao.gov/assets/130/125531.pdf>.

Antiquities Act and other acts, diffuse attention and resources from higher priorities and contribute to environmental degradation, soil erosion, and other forms of mismanagement of federal property. The Antiquities Act does not prevent the President from altering management approaches when new evidence or ideas are presented to him. *See* Proclamation No. 3307, 73 Stat. c69 (Aug. 7, 1959).

Finally, that Proclamation 9681 reduced the size of the Bears Ears Monument by 1-million acres is irrelevant. *See* Complaint ¶ 4 (pointing out the size of the reduction). The size of the reduction has no bearing on its lawfulness. 54 U.S.C. § 320301(b). Indeed past Presidents have significantly reduced the size of monuments. President Eisenhower reduced the reservation for the Great Sand Dunes National Monument by 25%. Proclamation No. 3138, 70 Stat. C31 (Jan. 3, 1956). President Truman diminished the reservation for Santa Rosa Island National Monument by almost half. Proclamation No. 2659, 59 Stat. 877 (Aug. 13, 1945). Presidents Taft, Wilson, and Coolidge collectively reduced the reservation for Mount Olympus by almost half, the largest by President Wilson in 1915 (cutting 313,280 acres from the original 639,200-acre monument). Gail H. E. Evans, *Historic Resource Study, Appendix A: A Chronology of the Public Domain*, Nat'l Park Serv. (1983).⁷ The largest percentage reduction was the previously mentioned modification to the Navajo National Monument by President Taft in 1912, which was a 90% reduction. Proclamation No. 1186, 37 Stat. 1733 (Mar. 14, 1912).

⁷ Available at http://www.nps.gov/parkhistory/online_books/olymp/hrs/appa.htm.

With the passage of the Antiquities Act, Congress delegated to the President not only the authority to establish monuments, but also to modify or revoke previously designated monuments. In fact, Congress placed a continuing obligation on the President to modify existing monuments that are larger than necessary for the proper care and management of the objects. With the signing of Proclamation 9681, the President lawfully exercised his authority to modify the Bears Ears National Monument, and this Court should reject Plaintiffs' arguments to the contrary.

CONCLUSION

This Court should dismiss Plaintiffs' Complaint and enter judgment in favor of Defendants.

DATED: October 1, 2018.

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