UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE WILDERNESS SOCIETY, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case No. 1:17-cv-2587 (TSC)
GRAND STAIRCASE ESCALANTE PARTNERS, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case No. 1:17-cv-02591 (TSC) **CONSOLIDATED CASES**
AMERICAN FARM BUREAU FEDERATION, UTAH FARM BUREAU FEDERATION, GARFIELD COUNTY, KANE COUNTY, AND STATE OF UTAH Defendants-Intervenors.	

CONSOLIDATED REPLY BRIEF OF INTERVENORS STATE OF UTAH, GARFIELD COUNTY, KANE COUNTY, AMERICAN FARM BUREAU FEDERATION, AND UTAH FARM BUREAU FEDERATION SUPPORTING FEDERAL DEFENDANTS' MOTION TO DISMISS

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Defendant Intervenors State of Utah ("Utah"), Garfield County, Kane County (collectively the "Counties"), American Farm Bureau Federation and Utah Farm Bureau Federation (collectively the "Farm Bureaus" and together with Utah and the Counties, the "Intervenors") file this consolidated reply memorandum supporting the Federal Defendants'[1] motion to dismiss these consolidated cases.

The Antiquities Act expressly allows the President to modify national monument boundaries by requiring the President to limit any reservations to the "smallest area compatible with the proper care and management" of national monument objects. Under the Antiquities Act's express terms, no reservation of land is required to protect national monument objects, meaning that objects can be designated and protected without a corresponding reservation of land. In addition, national monument reservations do not always serve to protect national monument objects. The authority conferred by the Antiquities Act is not limited to creating and expanding national monuments, but also allows the President to revisit and revise national monument reservations when the President determines the reservations in their existing configurations are no longer necessary or appropriate for the care and management of the monument objects. This practice of revising monument reservations, which has endured since shortly after the Antiquities Act was adopted, is well known to, and has been acquiesced in by, Congress. For these reasons, as explained more fully below, the Federal Defendants' Motion to Dismiss should be granted and Plaintiffs' claims dismissed.

[1] Capitalized terms used in this brief have the same meaning and definition as the same terms used in Intervenors' opening brief.

ARGUMENT AND AUTHORITY

I. The Antiquities Act Expressly Allows The President To Modify National Monument Boundaries.

Plaintiffs' arguments incorrectly assume that a reservation of land equates to increased protection of national monument objects.[2] This assumption and interpretation of the Antiquities Act is at odds with the Antiquities Act's express language, which does not require any reservation of land to protect national monument objects, and is contrary to the actual, and detrimental, effect a land reservation has on many monument objects, particularly archaeological resources. Regardless, the President's modifications to GSENM and BENM comply with the Antiquities Act's express limitations on the President's authority to reserve only "the smallest area compatible with the proper care and management of the objects to be protected." 54 U.S.C. § 320301(b).

A. No Reservation Of Land Is Required Under The Antiquities Act To Protect National Monument Objects.

The Antiquities Act provides that the President "*may* reserve parcels of land," but if he exercises his discretion to do so, the limits of those reservations "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[3] Generally, "the signification of 'may,' in the construction of a statute, is ordinarily permissive" and will be construed as "shall" only "when it can be seen that the real intention of the legislature was to impose a duty and not to confer a discretionary power."[4] "[W]hether the word shall be

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[2] Plaintiffs' Joint Response in Opposition to Intervenors American Farm Bureau Federal *et al.*'s Opening Brief Supporting Federal Defendants' Motion to Dismiss ("Plaintiffs' Response Brief"), p.4–5, ECF Dkt. No. 92 in Case No. 1:17-cv-02587 (Mar. 1, 2019).

[3] 54 U.S.C.A. § 320301(b) (West 2019).

[4] *U.S. ex rel. Holzendorf v. Hay*, 20 App. D.C. 576, 579 (D.C. Cir. 1902); *see also Kingdomware Technologies, Inc. v. U.S.*, ___ U.S. ___, 136 S.Ct. 1969, 1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement.").

treated as permissive or mandatory, depends upon what may be ascertained to be the general intent and purpose of the statute."[5] As used in the Antiquities Act, the term "may" is permissive and does not require a reservation of land. The Antiquities Act does not impose a duty and instead provides discretionary authority to the President to declare monuments and reserve land, as recognized in *Utah Association of Counties v. Bush*.[6] Likewise, the provision granting authority to the President to reserve land also limits the President's authority, further demonstrating that any reservation of land is permissive instead of mandatory.

The power to reserve land for the protection of national monument objects is expressly limited and any reservations must 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). Plaintiffs have proffered no justification in support of their argument for applying this limitation to reservations only at the moment in time at which the monument is created. Instead, if later events, research, or analysis demonstrates that the original reservation does not comport with the Antiquities Act's limitations, the President is free to adjust the reservation to observe the limitations in the Antiquities Act. As set forth in Intervenors' opening brief, such re-analysis and corrections of monument reservations began in 1911, almost immediately after the Antiquities Act was enacted, and has continued throughout the history of the Antiquities Act.

[5] *Holzendorf*, 20 App. D.C. at 579.

[6] 316 F.Supp.2d 1172, 1197 (D. Utah 2004) ("Because Congress only authorized the withdrawal of land for national monuments to be done in the President's discretion, it follows that the President is the only individual who can exercise this authority because only the President can exercise his own discretion.").

B. The Antiquities Act Does Not Only Authorize Creation Or Expansion Of National Monuments.

The Antiquities Act is not a one-way ratchet that can never be adjusted by the President.[7] In the Antiquities Act, Congress granted the President complete discretion to declare national monuments on federal lands and reserve the smallest area of those lands for the monuments' care and management. This Court's construction of the Antiquities Act's empowerment of a President to declare national monuments may properly depart from the point where all parties agree— that "declare" was defined in 1906 as it is today to mean "'[t]o make known by language' or 'to proclaim.'"[8] Where, as here, a statute does not define its terms, the Court must look to its ordinary meaning.[9] Where the Act's language "is plain and admits of no more than one meaning" as the parties here agree, "the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."[10]

On December 4, 2017, President Trump exercised his discretion under the Act to declare the modification of the GSENM and BENM to confine them to his revised determination of the smallest area compatible for their care and management. Having done so, the President exercised the authority conferred upon him by the Antiquities Act.[11] Plaintiffs attempt to

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[7] *Cochnower v. U.S.*, 248 U.S. 405 (1919), upon which Plaintiffs rely for their argument that the Antiquities Act contains no "opposite" power to modify monument protections, Plaintiffs' Response Brief, p.3, was withdrawn and replaced by a judgment that does not contain the quoted language. *See Cochnower v. U.S.*, 249 U.S. 588 (1919). Assuming the original *Cochnower* opinion was still valid, however, any interpretation that the President does not have the authority to re-determine whether a reservation is still the smallest area compatible with the care and protection of monument objects "gives the qualification no purpose, makes it simply a confusion or clumsiness of words." *See Cochnower*, 248 U.S. at 407.

[8] Plaintiffs' Response Brief, p.2 (citing Webster's Int'l Dictionary 377 (1907)).

[9] *Lamar, Archer & Cofin, LLP v. Appling*, ___ U.S. ___, 138 S.Ct. 1752, 1759 (2018).

[10] *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917).

[11] *Am. Fed'n of Gov't Employees, AFL-CIO v. Trump*, 318 F.Supp.3d 370, 393 (D.D.C. 2018).

obscure the "clear standards and limitations"[12] of the Act by arguing that the overall context, scheme, and purpose of the Act further limit the President's discretion to prohibit Presidential modification of an existing monument.[13] For example, Plaintiffs assert that the President cannot modify an existing monument because the President is also authorized to "reserve" lands for monuments.[14] Plaintiffs do not acknowledge that the reservation must be the "smallest area compatible" with the monument and that a President's determination of that area is also wholly discretionary. Plaintiffs' statutory construction arguments thus fail on two levels, both on the plain meaning of the Act and its context and scheme.

The U.S. Supreme Court issued numerous decisions last year that guide the federal courts in construing statutes. In addition to the *Lamar* decision cited above, the Court repeated its oft-expressed rule that courts should "'look first to [the statute's] language, giving the words used their ordinary meaning.'"[15] Decided the same day as *Artis*, *Nat'l Ass'n of Mfrs. v. Dep't of Defense*[16] holds that courts are not "not free to 'rewrite the statute'" to a party's liking. Similarly, in *Cyan, Inc. v. Beaver Cty. Emps. Retirement Fund*,[17] the Court instructs it "has no license to 'disregard clear language' based on an intuition that 'Congress must have intended something broader'" and that "[i]f further steps are needed, they are up to Congress."

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[12] *Utah Assn of Ctys*, 316 F.Supp.2d at 1191.

[13] Plaintiffs' Response Brief, p. 2–5.

[14] Plaintiffs' Response Brief, p.3.

[15] *Artis v. District of Columbia*, ___ U.S. ___, 138 S.Ct. 594, 603 (2018) (citations and internal quotation marks omitted).

[16] ___ U.S. ___, 138 S.Ct. 617, 629 (2018) (citation omitted).

[17] ___ U.S. ___,138 S.Ct. 1061, 1078 (2018); *see also SAS Institute, Inc. v. Iancu*, ___ U.S. ___, 138 S.Ct. 1348, 1357 (2018) ("We need not and will not invent an atextual explanation for Congress's drafting choices when the statute's own terms supply an answer."); *Epic Systems Corp. v. Lewis*, ___ U.S. ___, 138 S.Ct. 1612, 1624 (2018) ("[I]t's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.")

Plaintiffs nevertheless find in the Antiquities Act's brief text a "one-way power to create" national monuments.[18] That atextual supposition simply cannot be found in Congress's delegation of discretion to the President to declare national monuments that are restricted to their smallest possible area. Congress could have written the Act as Plaintiffs wish it had. But "[t]his court has no authority to engraft restrictions onto the statute that its drafters did not choose to use, and that the members voting it into law never had the chance to consider."[19] Importing a "one-way power" into the Act would "unravel the 'carefully worked out compromise aimed at balancing legitimate interests on both sides.'"[20] As noted in Intervenors' opening brief, the Antiquities Act reflected Congress's balance of the desire to protect antiquities against the desire to limit monument reservations to the smallest area necessary.[21] President Trump's proclamations respect that balance; Plaintiffs' engrafted restriction on the President's power under the Act would upset it.

C. National Monument Reservations Do Not Always Serve To Protect National Monument Objects.

Although Plaintiffs claim Intervenors' assertions in this regard are "irrelevant" to the issue before the Court,[22] the validity of Plaintiffs' own arguments requires the conclusion that a

[18] Plaintiffs' Response Brief, p.3.

[19] *Overseas Educ. Ass'n, Inc. v. Federal Lab. Rel. Authority*, 876 F.2d 960, 975 (D.C. Cir. 1989).

[20] *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 (1989) (citations omitted).

[21] Consolidated Opening Brief of Intervenors State of Utah, Garfield County, Kane County, American Farm Bureau Federation, and Utah Farm Bureau Federation Supporting Federal Defendants' Motion to Dismiss ("Intervenors' Opening Brief"), p.14 n.56, ECF Dkt. No. 90 in case no. 1:17-cv-2587 (Feb. 15, 2019).

[22] Plaintiffs assert that arguments made to establish San Juan's interest in the case bolster Plaintiffs' own claims to standing. Intervenors clarify that, to the best of their knowledge, BLM has sold no oil and gas leases encompassing land within the original boundaries of BENM.

national monument reservation inherently serves to "protect" national monument objects.[23] As explained in Intervenors' opening brief, national monument reservations serve to accelerate destruction of archaeological resources by introducing visitors to areas that are incapable of being effectively policed for activities harming archaeological resources.[24] Plaintiffs' assumption that a reservation is equivalent to protection, therefore, is unfounded .

Unlike the circumstances existing in 1906 when the Antiquities Act was passed, where no protections existed for archaeological resources, numerous laws now exist to protect antiquities.[25] Similarly, Congress has enacted numerous other environmental and resource protection laws since 1906, including, among many others, the National Park Service Act[26], the Migratory Bird Conservation Act[27]; the Taylor Grazing Act of 1934[28]; the Bankhead Jones Farm Tenant Act of 1937[29]; the Fish and Wildlife Act of 1956[30]; the Multiple Use and Sustained Yield Act of 1960[31]; the Refuge Recreation Act[32]; the Wilderness Act[33]; the National Wildlife Refuge

[23] Plaintiffs' Response Brief, p. 1, 4–5.

[24] Intervenors' Opening Brief, p.36–39.

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

[26] 54 U.S.C.A. §§ 100101, *et seq.* (West 2019).

[27] 16 U.S.C.A §§ 715, *et seq.* (West 2019).

[28] 43 U.S.C.A §§ 315, *et seq.* (West 2019).

[29] 7 U.S.C.A. §§ 1010, *et seq.* (West 2019).

[30] 16 U.S.C.A. §§ 742a, *et seq.* (West 2019).

[31] 16 U.S.C.A. §§ 528–31 (West 2019).

[32] 16 U.S.C.A §§ 460k–460k-4 (West 2019).

[33] 16 U.S.C.A. §§ 1131–36 (West 2019).

System Administration Act of 1966[34]; the National Trails System Act[35]; the Wild and Scenic Rivers Act[36]; the National Environmental Policy Act of 1969[37]; the Endangered Species Act[38]; the National Forest Management Act of 1976[39]; the Federal Land Policy and Management Act of 1976[40]; and the Paleontological Resources Preservation Act.[41] In addition, there are numerous classifications on the public lands that protect various resources. These classifications include, among others, wilderness, wilderness study areas, areas of critical environmental concern, visual resource management units, special recreation management areas, recreation management zone, extensive recreation management areas, primitive areas, roadless areas, and natural areas. There is no shortage of protection of national monument objects and superimposing a monument reservation over such objects will not serve to increase the protections afforded to those objects. Rather, the issue is one of enforcing existing laws rather than imposing new reservations and restrictions. Based upon these significant existing protections, the President is within his discretion in determining that a reservation of land may be unnecessarily large to protect national monument objects.

D. The President May Address And Revise National Monument Reservations.

The President may address and revise national monument proclamations when, in his discretion, he determines that a reservation is not the smallest area compatible with the proper

[34] 16 U.S.C.A. §§ 668dd–668ee (West 2019).

[35] 16 U.S.C.A. §§ 1241–51 (West 2019).

[36] 16 U.S.C.A. §§ 1271–87 (West 2019).

[37] 42 U.S.C.A. §§ 4321, *et seq.* (West 2019).

[38] 16 U.S.C.A. §§ 1531–44 (West 2019).

[39] 16 U.S.C.A. §§1600–14 (West 2019).

[40] 43 U.S.C.A. §§ 1701, *et seq.* (West 2019).

[41] 16 U.S.C. §§ 470aaa, *et seq.* (West 2019).

care and management of monument objects. The President undertook such an analysis in this case and determined that prior reservations should be modified. In both the GSENM Modifying Proclamation[42] and the BENM Modifying Proclamation,[43] the President reviewed the monument objects, the land reservations, and the applicable laws relating to the objects and land management and concluded that the original reservations did not comply with the Antiquities Act's limitation that any reservations be the smallest compatible with the proper care and management of monument objects.[44]

The GSENM Modifying Proclamation revised the GSENM based upon the President's conclusion that the original reservation was not consistent with the Antiquities Act. The GSENM Modifying Proclamation noted that "[d]etermining the appropriate protective area involves examination of a number of factors, including the uniqueness and nature of the objects, the nature of the needed protection, and the protection provided by other laws."[45] With respect to paleontological resources, the President noted the twenty years since GSENM was proclaimed "provided a better understanding of the areas with the highest concentrations of fossil resources and the best opportunities to discover previously unknown species" and that the "modified boundaries take into account this new information" and retained protections for high-potential areas.[46] Other geologic formations and landscape features were analyzed and retained in the

[42] Pres. Proc. No. 9682, Modifying the Grand Staircase-Escalante National Monument, 82 Fed. Reg. 58089 (Dec. 4, 2017) ("GSENM Modifying Proclamation").

[43] Pres. Proc. No. 9681, Modifying the Bears Ears National Monument, 82 Fed. Reg. 58081 (Dec. 4, 2017) ("BENM Modifying Proclamation") (together with the GSENM Modifying Proclamation the "Modifying Proclamations").

[44] *See* Modifying Proclamations, *passim*.

[45] 82 Fed. Reg. at 58089.

[46] *Id.*

revised monument boundaries or were deemed to be "common across the Colorado Plateau both within and outside of" the modified monument boundaries.[47] The revised boundaries also retain reservations for the vast majority of the archaeological and historical resources specifically described in the GSENM Proclamation,[48] but given the prevalence throughout the region and the lack "of any unique or distinctive scientific or historic significance" of the more generally identified archaeological and historical resources, the original reservation was deemed to be inconsistent with the requirement that the reservation be the smallest area compatible with such objects' care and management.[49] The President concluded that the original monument reservation was unnecessary, stating:

> Thus, many of the objects identified by Proclamation 6920 are not unique to the monument, and some of the particular examples of those objects within the monument are not of significant historic or scientific interest. Moreover, many of the objects identified by Proclamation 6920 are not under threat of damage or destruction such that they require a reservation of land to protect them; in fact, many are already subject to Federal protection under existing law and agency management designations. The BLM manages nearly 900,000 acres of lands within the existing monument as Wilderness Study Areas, which the BLM is already required by law to manage so as not to impair the suitability of such areas for future congressional designation as Wilderness.[50]

Because numerous other laws provide protection for the identified resources, and "in light of the research conducted since designation," the President concluded that the GSENM's current boundaries were "greater than the smallest area compatible with the protection of the objects for which lands were reserved" and that the GSENM should be reduced.[51]

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[47] *Id.* at 58089–90.

[48] Pres. Proc. No. 6920, Establishment of the Grand Staircase-Escalante National Monument, 61 Fed. Reg. 50223 (Sep. 18, 1996).

[49] 82 Fed. Reg. at 58090.

[50] *Id.*

[51] *Id.* at 58090–91.

The BENM Modifying Proclamation similarly analyzed the protections available to monument objects and concluded that the original reservation was unnecessary for the care and management of monument objects. After reviewing the objects designated and the laws protecting such objects, the President concluded, that to reservation was not consistent with the Antiquities Act's express language, stating,

> "[g]iven the nature of the objects identified on the lands reserved by Proclamation 9558, the lack of a threat of damage or destruction to many of those objects, and the protects for those objects already provided by existing law and governing land-use plans, I find that the area of Federal land reserved in the Bears Ears National Monument established by Proclamation 9558 is not confined to the smallest area compatible with the proper care and management of those objects."[52]

The President then concluded that the monument objects could instead be better protected by "a smaller and more appropriate reservation of 2 areas."[53] Certain of the monument objects, or examples of monument objects, "are not within the monument's revised boundaries because they are adequately protected by existing law, designation, agency policy, or governing land-use plans."[54] Because it "is in the public interest to modify the boundaries of the monument" to exclude land that is "unnecessary for the care and management of the objects to be protected within the monument," the President reduced BENM to "the smallest area compatible with the protection of the objects of scientific or historic interest" as set forth in the BENM Modifying Proclamation. *Id.* at 58085.

The President's analyses and determinations regarding whether the original GSENM and BENM reservations complied with the Antiquities Act's express requirement to limit reservations to the smallest area compatible with the national monument objects' proper care and

[52] 82 Fed. Reg. at 58082.

[53] *Id.* at 58082.

[54] *Id.* at 58084.

management was appropriate, well within the discretion afforded to the President by the Antiquities Act, and should not be disturbed.

II. Congress Has Acquiesced In Presidential Modification Of National Monument Boundaries.

Congress has acquiesced in the President's authority to modify national monument reservations when the land reserved is not the "smallest area compatible with the proper care and management of the objects to be protected."[55] The most extensive analysis of congressional acquiescence in presidential actions relating to the public land is set forth in *U.S. v. Midwest Oil*.[56] Although the withdrawal authority recognized in *Midwest Oil* was eventually repealed by FLPMA, the Court's analysis of the relationship between Congress and the President, and Congress's acquiescence in executive actions relating to public land, illustrates our Presidents' extensive history of modifying national monuments to comply with the Antiquities' Act's limitation on the size of monument reservations.

In *Midwest Oil*, despite a statute stating that all public lands were free and open to oil and petroleum exploration and development, the President issued an order temporarily withdrawing public lands in California and Wyoming from oil exploration and production.[57] The United States sued Midwest Oil Company to recover for oil that was produced from a claim made after the withdrawal was proclaimed.[58] Although the Court did not "consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase," the Court addressed whether other grounds existed to

[55] 54 U.S.C.A. § 320301(b).

[56] 236 U.S. 459 (1915).

[57] *Id.* at 466–67.

[58] *Id.* at 467.

validate the withdrawal.[59] The Court noted the numerous orders that had been made since the earliest periods of the nation's government that affected a large amount of public land.[60] These reservations were not based upon "any general or special statutory authority" or any statute "empowering the President to withdraw any of these lands from settlement, or to reserve them for any of the purposes indicated."[61]

The Court explained the nature of the withdrawals, and Congress' acquiescence in the proclamations, stating that "[t]he President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location" and that "Congress did not repudiate the power claimed or the withdrawal orders made."[62] Instead, "it uniformly and repeatedly acquiesced in the practice."[63] The Court noted that "[i]n determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,-even when the validity of the practice is the subject of investigation."[64] Despite the fact that the President cannot "by his course of action, create a power," a "long-continued practice, known to and acquiesced in by Congress," raised a presumption that the actions were undertaken with Congressional consent or recognition of authority.[65] The court concluded that

[59] *Id.* at 469.

[60] *Id.* at 469–70.

[61] *Id.* at 470–71.

[62] *Id.* at 471.

[63] *Id.*; *see also id.* at 475 (noting the "multitude of orders extending over a long period of time, and affecting vast bodies of land" that "were known to Congress, as principal, and in not a single instance was the act of the agent disapproved").

[64] *Id.* at 473.

[65] *Id.* at 474.

the Presidential withdrawal of lands from oil production was appropriate and within the President's power, as acquiesced in by Congress.[66]

The reasoning in *Midwest Oil* has been reinforced by subsequent cases and establishes that Congress has acquiesced in Presidential actions diminishing the size of national monuments. In *Am. Fed'n of Labor & Cong. Of Indus. Organizations v. Kahn*, the D.C. Circuit observed, "[o]f course, the President's view of his own authority under a statute is not controlling, but when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is entitled to great respect."[67] The persuasiveness of numerous Presidents' "longstanding interpretation" is accentuated by the fact that "Congress recodified the Antiquities Act with minor changes in 2014 but without modifying the Act's reach."[68] Almost immediately after the Antiquities Act was adopted, Presidents began to modify national monument reservations.[69] These actions continued unbroken through the present date and have never been addressed or revoked by Congress. Instead, Congress has expressly left intact the President's discretion and authority under the Antiquities Act on two separate occasions – when FLPMA was enacted in 1976 and when the Antiquities Act was recodified in 2014. Congress's

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[66] *Id.* at 475

[67] 618 F.2d 784, 790 (D.C. Cir. 1979) (quotation and citation omitted); *see also Miller v. Youakim*, 440 U.S. 125, 144 n.25 (1979) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong") (quotations omitted); *Dames & Moore v. Regan*, 453 U.S. 654, 678–79 (1981) ("[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent Presidential responsibility[.]' At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of Congressional acquiescence in conduct of the sort engaged in by the President.") (internal citation omitted) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

[68] *Massachusetts Lobstermen's Ass'n v. Ross*, 349 F.Supp.3d 48, 57 (D.D.C. 2018).

[69] Intervenors' Opening Brief, Ex.6.

refusal to amend or revise the Antiquities Act in the face of longstanding Presidential practice of modifying national monument reservations to comply with the Antiquities Act's strictures demonstrates Congressional acquiescence in the practice.

Plaintiffs' speculation that Congress was not aware of or did not rely upon the CRS Report, *Authority of a President to Modify or Eliminate a National Monument* (2000)[70], is unsupported and does not avoid the undeniable conclusion that Congress has acquiesced in the President's practice of modifying national monument proclamations. In analyzing whether acquiescence was present, *Midwest Oil* noted a report provided to Congress identifying a significant number of withdrawals made without statutory authority, rather pursuant to "a right to take such action in the public interest "as exigencies might demand . . .."'"[71] The Court reasoned that, "Congress, with notice of this practice and of this claim of authority, received the report," but did not "ever repudiate the action taken or the power claimed."[72] Accordingly, "[i]ts silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress."[73] As in *Midwest Oil*, Congress has received numerous research reports regarding Presidential practices and actions under the Antiquities Act, including a report specifically addressing Presidential modification of national monuments. Despite this knowledge, Congress has never amended the Antiquities Act to revoke the President's authority to modify national monument reservations. Plaintiffs' speculation does not demonstrate that the reports and research, which were prepared especially for Congressional review, were not available to or considered by Congress.

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[70] Plaintiffs' Response Brief, p.6–7.

[71] 236 U.S. at 480–81.

[72] *Id.* at 481.

[73] *Id.*

Given the long history of Presidents modifying national monument reservations to meet the strictures of the Antiquities Act; Congress's knowledge of the practice and research regarding the issue; and the absence of any meaningful amendment to the Antiquities Act, Congress has acquiesced in Presidential modification of national monuments like that undertaken in the Modifying Proclamations.

III. Congress Did Not Ratify GSENM Through Subsequent Corrections To GSENM's Boundaries.

In the 1997 litigation filed by the Utah Association of Counties challenging the creation of GSENM, the district court was presented with, and rejected, the ratification argument now advanced by Plaintiffs.[74] The district court analyzed the Utah School and Land Exchange Act (the "Exchange Act"), which was signed on October 31, 1998[75] and which transferred Utah's school trust lands within GSENM to the federal government in exchange for a cash payment of $50 million and other land and mineral interests located elsewhere.[76] The district court, in response to a motion to dismiss based upon alleged Congressional ratification, determined that Congress had not ratified GSENM.

As the court explained, "Courts have been hesitant to find ratification where there is no explicit language or deliberate congressional action in support of the official action."[77] The court concluded that the Exchange Act did not ratify GSENM and "was not dependent upon the

[74] Plaintiffs' Response Brief, p.9–10; Memorandum Decision and Order ("Ratification Ruling"), ECF Dkt 128 in *Utah Ass'n of Counties v. Bush*, Case No. 2:97-cv-00479 (D. Utah Aug. 12, 1999), attached as Exhibit 1.

[75] Pub. L. No. 105–335, 112 Stat. 3139 (1998)

[76] Ratification Ruling, p.15–17.

[77] *Id.* at 23.

creation" of GSENM.[78] Instead, the court found persuasive the arguments that "the Exchange Act's main purpose was to mitigate the effects of [GSENM], rather than to ratify."[79] Because the Exchange Act addressed "an issue unresolved for over six decades" and was a "resolution on the coat-tails of a controversial presidential proclamation," the court was "not persuaded that Congress intended to ratify creation of [GSENM] through passage of the Utah Lands Exchange Act."[80] Based upon the reasoning of the district court's memorandum decision, which Intervenors incorporate herein by reference, Congress has not ratified GSENM's original boundaries.

IV. The Balance Of Competing Interests In The Federal Lands Is Relevant To The Court's Analysis.

Intervenors' arguments regarding the Modifying Proclamations' effects on competing interests in the public lands are properly before the Court in connection with Plaintiffs' motion to dismiss. Plaintiffs denigrate the State's policy arguments[81] while advancing their own policy preferences.[82] Although Plaintiffs claim that these arguments and analyses are "irrelevant" to their claims, Plaintiffs' complaint references arguments and analyses asserting contrary policy arguments, including allegations that GSENM draws in visitors,[83] that monument resources will

[78] *Id.* at 31.

[79] *Id.*

[80] *Id.* The court also found unpersuasive the allegations that other congressional actions, including border adjustments in the Automobile National Heritage Area Act of 1998, H.R. 3910, 112 Stat. 3247 (1998) and appropriations in 1998 and 1999, ratified GSENM's creation. *Id.* at 28–31, 32–33.

[81] Plaintiffs' Response Brief, p.10–13.

[82] *See e.g.*, Plaintiffs' Response Brief, p.11 (citing TWS's complaint alleging that monument designations protect sensitive resources).

[83] *See* Complaint, ¶ 8, ECF Dkt. No. 1 in case no. 1:17-cv-2587 (Dec. 4, 2017).

be destroyed,[84] and that the original GSENM reservation complied with the Antiquities Act.[85] Plaintiffs' *amici* also addressed these policy matters in great detail in their briefing, arguing, among other things, that the national monuments fostered recreation and research and provided economic opportunities for nearby communities[86] and that local voices were ignored in declaring the modified monument boundaries.[87] Intervenors' policy arguments not only support Intervenors' interest in these proceedings and respond directly to issues raised by Plaintiffs' *amici*, but also inform the Court of the context in which the Modifying Proclamations were issued and the effect the various monument proclamations have on Intervenors and others. Given that these issues were raised by the pleadings and expressly addressed by *amici* filings, Intervenors have the right, and opportunity, to address such issues and they are properly before the Court.

Regardless, the Antiquities Act grants to the President discretion to determine whether a reservation is necessary to protect national monument objects and, if so, the smallest area necessary to properly care for and manage such objects. The President exercised his discretion in a manner that provides more protection to the monument resources and that addressed local concerns regarding the monument reservation. Although the parties advance different policy

[84] Complaint, ¶ 9.

[85] Complaint, ¶ 73.

[86] *See Amicus Curiae* Brief of the States of Washington, California, Hawaii, Maine, Maryland, New Mexico, New York, Oregon, Rhode Island, and Vermont, and the Commonwealth of Massachusetts in Support of Plaintiffs' Opposition to Federal Defendants' Motion to Dismiss, p.19–25, ECF Dkt. No. 74 in Case No. 1:17-cv-02587 (Nov. 19, 2018).

[87] *See Amicus* Brief of Local Elected Officials in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss, *passim*, ECF Dkt. No. 69–1 in Case No. 1:17-cv-02587 (Nov. 19, 2018).

arguments in support of their respective positions, they agree[88] on one fundamental point: Congress is the body to make policy decisions, not this Court.[89] This Court should not engage in policymaking by writing the Plaintiffs' policy preferences into the Act and should instead defer to the Antiquities Act's express language and past Presidential practice in which Congress has acquiesced.

CONCLUSION

For the foregoing reasons, the Federal Defendants' Motion to Dismiss should be granted and Plaintiffs' claims should be dismissed.

Respectfully submitted this 15th day of March, 2019.

[88] Plaintiffs' Response Brief, p.13.

[89] *SAS Institute, Inc.*, 138 S.Ct. at 1357–58 ("It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 15, 2019, the undersigned electronically transmitted the **CONSOLIDATED REPLY BRIEF OF INTERVENORS STATE OF UTAH, GARFIELD COUNTY, KANE COUNTY, AMERICAN FARM BUREAU FEDERATION, AND UTAH FARM BUREAU FEDERATION SUPPORTING FEDERAL DEFENDANTS' MOTION TO DISMISS** to the Clerk's Office using the CM/ECF system which will send notification of this filing to all counsel of record.

/s/ Anthony L. Rampton

EXHIBIT 1

Ratification Ruling

FILED
CLERK, U.S. DISTRICT COURT
99 AUG 12 P 2:28
DISTRICT OF UTAH
BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

UTAH ASSOCIATION OF COUNTIES, on behalf of its members,

Plaintiffs,

vs.

WILLIAM J. CLINTON, in his official capacity as PRESIDENT OF THE UNITED STATES; THE UNITED STATES OF AMERICA; KATHLEEN A. McGINTY, in her official capacity as CHAIR OF THE COUNCIL ON ENVIRONMENTAL QUALITY; THE COUNCIL ON ENVIRONMENTAL QUALITY; BRUCE BABBITT, in his official capacity as SECRETARY OF THE INTERIOR; THE DEPARTMENT OF THE INTERIOR,

Defendants.

MOUNTAIN STATES LEGAL FOUNDATION and its members,

Plaintiffs,

vs.

WILLIAM J. CLINTON, President of the United States; KATHLEEN A. McGINTY, Chair, Council on Environmental Quality; BRUCE BABBITT, Secretary of the Interior; and THE UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OPINION AND ORDER

Case Nos. 2:97 CV 479
2:97 CV 492
2:97 CV 863

I. INTRODUCTION

The present matter comes before the Court on defendants' motion to dismiss the complaints of plaintiffs Utah Association of Counties (UAC) and Mountain States Legal

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Foundation (MSLF) for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Defendants argue that the Grand Staircase-Escalante National Monument (Grand Staircase or the Monument), which was established by presidential proclamation on September 18, 1996, has been ratified by Congress through a series of recent congressional acts.[1]

II. BACKGROUND

A. The Lawsuits and Their Contentions

On June 23, 1997, UAC filed suit against defendants William J. Clinton, the United States of America, Kathleen A. McGinty, the Council on Environmental Quality (CEQ), Secretary of Interior Bruce Babbitt, and the DOI. UAC's complaint requests the Court to set aside the presidential proclamation creating the Monument on the grounds that (1) the President violated the Antiquities Act of 1906 and the separation of powers doctrine under the U.S. Constitution by withdrawing public lands from operation of mining laws and mineral leasing laws when Congress has reserved this power to the secretary of the interior; (2) the President exceeded his constitutionally delegated authority under the Antiquities Act to effect wilderness preservation of the subject lands when Congress has reserved that authority to itself; and (3) the President exceeded his authority under the Antiquities Act to reserve only the "smallest area" compatible with the protection of specific objects. UAC's complaint also alleges that defendant McGinty, as chair of the CEQ, failed to implement and enforce the National Environmental

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[1] The present motion to dismiss due to congressional ratification is a separate motion from defendants' July 31, 1998, motion to dismiss or alternatively for summary judgment which argues that the Court lacks subject matter jurisdiction and that defendants are entitled to judgment as a matter of law. The July 31, 1998, motion has yet to be fully briefed and will be decided at a later date. Therefore, the scope of the Court's present opinion is limited solely to the issue of whether subsequent congressional action has served to ratify the President's creation of Grand Staircase.

Policy Act (NEPA) and worked with defendants Babbitt and the DOI to avoid complying with NEPA with respect to creation of the Grand Staircase. In addition, UAC claims that defendant Babbitt and the DOI violated federal law by recommending the creation of the Grand Staircase without complying with procedures imposed by federal law.

On June 25, 1997, the Utah Schools and Institutional Trust Lands Administration (SITLA) filed suit against defendants Clinton, Babbitt, the DOI , McGinty, the CEQ, the Bureau of Land Management (BLM), and Sylvia Baca, Interim Director of the BLM, also alleging that the President exceeded his authority under the Antiquities Act and the Constitution when he created Grand Staircase. Additionally, plaintiff SITLA alleged that the DOI, its officers and agencies, violated the Federal Land Policy and Management Act (FLPMA) and NEPA, and that the proposed withdrawal violated the Utah Enabling Act of 1894 and the "Equal Footing" doctrine.[2]

Defendants filed answers to both complaints. On November 7, 1997, defendants filed a motion to consolidate the UAC and SITLA claims pursuant to DUCivR 42-1. Plaintiffs did not object to consolidation. On December 29, 1997, the two cases were consolidated under the UAC case, Civil No. 2:97 CV 0479B.

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[2] The Supreme Court has stated that the "equal footing" doctrine contemplates that

> new States are admitted to the Union on an 'equal footing' with the original 13 colonies and succeed to the United States' title to the beds of navigable waters within their boundaries. Although the United States has the power to divest a future State of its equal footing title to submerged lands, we do not 'lightly infer' such action.

U.S. v. Alaska, 521 U.S. 1, 5 (1997).

MSLF filed suit against defendants Clinton, Babbitt, and the United States of America on November 5, 1997. A month later, MSLF filed an amended complaint, which added defendant McGinty. MSLF's complaint requests the Court to find that the President's creation of Grand Staircase violated the Antiquities Act because (1) the President failed to confine the withdrawn land to the smallest area compatible with the land to be protected, (2) the President did not confine his proclamation to objects of scientific and historic interest, and (3) the President's designation was arbitrary and capricious. MSLF alleges that the President's actions exceeded his authority under the U.S. Constitution. Additionally, MSLF claims that by creating Grand Staircase all of the defendants violated the FLPMA, the Federal Advisory Committee Act, the Anti-Deficiency Act, and the U.S. Constitution. On February 3, 1998, based on the stipulation of both parties, the MSLF case was also consolidated under the UAC case.

On July 31, 1998, defendants filed a motion for summary judgment based on the grounds that this Court lacks jurisdiction to hear the case and that plaintiffs' claims fail as a matter of law. Before plaintiffs responded, however, defendants filed the present motion to dismiss due to congressional ratification. Defendants argue that this Court should address the present motion, irrespective of the prior motion for summary judgment or the ongoing proceedings before the Magistrate Judge. Defendants assert that if the Court grants the present motion, there will be no need for any further litigation.

Shortly after the filing of the present motion, the parties to the SITLA action reached a settlement and the case was dismissed pursuant to DUCivR 54-1(d) and Fed. R. Civ. P. 4(a)(1)(ii). Under the settlement agreement, the State of Utah and the DOI agreed to exchange certain federal lands, federal mineral interests, and payment of money (a $50,000,000 lump sum payment) for lands and mineral interests managed by SITLA and within the boundaries of Grand

Staircase. The remaining plaintiffs, UAC and MSLF, filed responses to defendants' motion to dismiss due to congressional ratification and on March 9, 1999, this Court heard oral argument regarding that motion to dismiss.

B. The Antiquities Act

The Antiquities Act of 1906, 16 U.S.C. § 431, gives the President authority to create national monuments.[3] Since its enactment, presidents have used the Antiquities Act over 100 times to withdraw lands from the public domain as national monuments. President Clinton's recent use of the Antiquities Act to create Grand Staircase was the first in over two decades. The Antiquities Act authorizes the President, "by his discretion," to establish as national monuments "objects of historic or scientific interest that are situated upon the lands owned or controlled by the government of the United States." *Id.* The Act requires the president to reserve land confined

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[3] The full text of the Act reads as follows:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

16 U.S.C. § 431 (1976).

to "the smallest area compatible with the proper care and management of the objects to be protected." *Id.* For purposes of this litigation, it is important to look to the creation of the Act and how it has been used and interpreted since its creation in 1906.

1. Legislative History

The original purpose of the Act was to protect objects of antiquity.[4] The substance of the Act, developed over a period of more than six years, was created in response to the demands of archaeological organizations. Although the scope of the archaeological organizations' proposals was limited to preservation of antiquities on federal lands, the DOI proposed adding the protection of scenic and scientific resources to the Act. For six years Congress rejected attempts to include the Department's proposal. It appears, however, that Congress was unable to pass the limited archaeologists' bill because of bureaucratic delays and various disagreements between museums and universities seeking authority to excavate ruins on public lands. *See* Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act,* 56 Wash. L. Rev. 439, 448 (1981).

Edgar Lee Hewitt, a prominent archaeologist, drafted the bill that was finally enacted in 1906. Government officials persuaded Hewitt to broaden the scope of his draft by including the phrase "other objects of historic or scientific interest." This phrase allowed the DOI's proposal, which Congress had previously rejected, to be included in the bill. In addition, while earlier

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[4] The phrase "objects of antiquity," while not in § 431 but found in § 433, has commonly been interpreted to include such items as paleontological and archaeological artifacts. When faced with interpreting the precise meaning, however, courts have disagreed with the adequacy of the phrase. *See e.g., U.S. v. Diaz*, 499 F.2d 113, 114-15 (9th Cir. 1974) (finding that the phrase "objects of antiquity" was "fatally vague in violation of the due process clause of the Constitution."); *but see U.S. v. Smyer*, 596 F.2d 939, 941 (10th Cir. 1979) (holding that "when measured by common understanding and practice," the phrase was sufficiently definite to define the protected object). At present, this Court need not settle the matter.

proposals had limited the reservations to 320 or at the most 640 acres, Hewitt's draft allowed the limit to be set according to "the smallest area compatible with the proper care and management of the objects to be protected." Despite the presence of this broader language, Congress apparently intended to limit the creation of national monuments to small land areas surrounding specific objects. Indicative of this intent is House Report No. 2224, which states "[t]here are scattered throughout the southwest quite a large number of very interesting ruins . . . [t]he bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics." H.R. REP. NO. 2224, 59TH CONGRESS, 1ST SESS. at 1 (1906).

2. Examples of Use

Despite what appears to have been the original intent of the Act, use of the Antiquities Act has clearly been expanded beyond the protection of antiquities and "small reservations" of "interesting ruins." Nothing in the language of the Act authorizes the creation of national monuments for scenic purposes or for general conservation purposes. Nonetheless, several presidents have used or attempted to use the Act to withdraw large land areas for scenic and general conservation purposes. President Theodore Roosevelt was the first president to withdraw land under the Act, establishing a precedent other presidents later followed to create large scenic monuments. Within two years of enactment of the Act, President Roosevelt made eighteen withdrawals of land.[5]

[5] Some of the more notable of these withdrawals include the Grand Canyon (818,560 acres), Mount Olympus, Washington (639,200 acres) and the Petrified Forest in Arizona (60,776 acres).

There have been several monuments created within the general vicinity of the Grand Staircase. In Utah alone, there are six national monuments, Cedar Breaks, Hovenweep, Timpanogos Cave, Dinosaur, Rainbow Bridge, and Natural Bridges. Surrounding areas in Colorado and Arizona have also been designated as monuments under the Antiquities Act. Presidential proclamations creating these monuments cited geologic, paleontologic, archaeologic and other features similar to those in the Grand Staircase proclamation. For example, Zion National Park to the west of Grand Staircase was originally Mukuntuweap National Monument, created by President Taft in 1909 in order to protect its "many natural features of unusual archaeologic, geologic, and geographic interest." *See* Proclamation No. 877, 36 Stat. 2498. President Wilson enlarged it in 1918 and Congress made it into a national park in 1919.

President Hoover established Arches National Monument to the northeast of Grand Staircase in 1929, citing its "unique wind-worn sandstone formation, the preservation of which is desirable because of their educational and scenic value." Proclamation No. 1875, 46 Stat. 2988. Congress made it into a National Park in 1971. President Franklin D. Roosevelt established Cedar Breaks National Monument, located west of Grand Staircase, in 1933, (Proclamation No. 2054, 48 Stat. 1705.), and Capitol Reef National Monument, which is located to the immediate east of Grand Staircase, in 1938. (Proclamation No. 2246, 50 Stat. 1856.)

Coincidentally, during the 1930s, the Roosevelt administration considered the creation of a monument in virtually the same area as Grand Staircase. President Roosevelt received a recommendation to withdraw 4.4 million acres of Utah's red rock country, creating Escalante National Monument. The Roosevelt administration rejected the idea, in large part because of local opposition. *See* James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 488 (1999).

Most of the presidential withdrawals have been noncontroversial. However, litigants have challenged the use of the Act five times since its creation. In all five instances, the challenges were unsuccessful.[6]

C. The Wilderness Act

Also of significance to the present motion is the Wilderness Act, 16 U.S.C. §§ 1131-36 (1964). The Wilderness Act, signed into law in 1964, was intended to preserve the undeveloped character of designated areas. Prior to the passage of the Wilderness Act, the United States Forest Service and the United States National Park Service were the only two federal agencies with a management scheme to preserve wilderness areas. Selection and management of the lands was discretionary. Concerned that some areas were not receiving the necessary protection, Congress created a means by which a system of wilderness could be created that would provide the appropriate safeguards. *See* Leann Foster, *Wildlands and System Values: Our Legal Accountability to Wilderness*, 22 VT. L. REV. 917, 921-22 (1998).

The Wilderness Act instructed the Secretary of Agriculture and the Secretary of the Interior to review certain land within their jurisdictions and make recommendations as to their suitability for wilderness classification. *See id.* § 1132 (d)(1). Areas deemed suitable were identified as Wilderness Study Areas (WSAs). *See id.* § 1131. Once the lands were inventoried, BLM was to conduct a study of each WSA, pursuant to Section 603 of the FLPMA, 43 U.S.C. § 1782. The BLM then makes a recommendation to the President, who in turn recommends to Congress, whether any of the WSAs should be designated as wilderness. Until such designation

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[6] *See Cameron v. United States*, 252 U.S. 450 (1920); *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945); *Cappaert v. United States*, 426 U.S. 128 (1976); *Anaconda Copper Co. v. Andrus*, No. A79-101 (D. Alaska, filed June 26, 1980); *Alaska v. Carter*, 462 F.Supp. 1155 (D. Alaska 1978).

occurs, the administering agency is to manage the WSAs so as not to impair their suitability for wilderness classification until Congress makes a final decision regarding the status of the area. *See* 16 U.S.C. § 1133. The management criterion prohibits commercial enterprises, roads, motorized equipment, mining oil and gas leasing in designated wilderness areas. *See id.*

About 900,000 acres within the Grand Staircase have been classified as WSAs and are managed by law to preserve their suitability for preservation as wilderness areas pursuant to the Wilderness Act. Congress has not made a final determination with regards to the WSAs within Grand Staircase.[7]

D. Events Leading to the Grand Staircase Proclamation

From 1978 to 1991, the BLM conducted various studies, in which 1.9 million acres of federal land in Utah were recommended by the BLM for wilderness designation. This recommendation, which included the lands now part of Grand Staircase, was forwarded by DOI Secretary Manuel Lujan to President Bush in October, 1991. The recommendation was supported by a final EIS, and more than 11 years of BLM evaluation and public involvement. However, a change in presidential administrations thwarted the proposed designation.

Regarding Utah wilderness, defendant Secretary Babbitt disagreed with the recommendations of his predecessor, Secretary Lujan. In 1994, then BLM Director Jim Baca wrote to an environmental group stating that the 1.9 million acre wilderness recommendation made by former DOI Secretary Lujan was "off the table." However, Secretary Babbitt's ability to undertake a new wilderness study pursuant to Section 603 of the FLPMA had expired. Nevertheless, Secretary Babbitt testified before Congress on several occasions, urging that a

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[7] *See infra* note 8 and accompanying text.

considerable number of additional wilderness areas should be designated in Utah. Consequently, the 104th Congress (1995-96) considered several different Utah wilderness bills, including a bill sponsored by members of Utah's congressional delegation, which would designate about two million additional acres of wilderness. Also in consideration, was a bill sponsored by Congressman Hinchey of New York and supported by national and Utah environmental groups. The Hinchey bill sought to designate 5.7 million acres of wilderness in Utah. Neither bill reached the floor of the House, and a filibuster of the Senate bill which included the Utah wilderness legislation precluded a vote in the Senate. Thereafter, Secretary Babbitt directed a second wilderness inventory, the Utah Wilderness Review, in hopes of showing that Congressman Hinchey's proposed 5.7 million acres of public land in Utah warranted wilderness designation. This Utah Wilderness Review evaluated the wilderness characteristics of approximately 800,000 acres o f public land now part of Grand Staircase.[8]

Plaintiffs assert, and the record appears to support, that a driving force behind Secretary Babbitt's, the DOI's, and eventually the President's efforts to create the Grand Staircase was to prevent the proposed Andalex Smoky Hollow coal mining operation in Kane County, Utah from

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[8] Of the 1.7 million acres eventually included within Grand Staircase, the BLM made a preliminary conclusion that approximately 900,000 acres were roadless and natural and otherwise suitable for designation as wilderness study areas (WSAs). The remaining 800,000 acres were not roadless or natural and were released from further wilderness study. After 11 years of study, the BLM and Secretary Lujan recommended approximately 350,000 acres of the 900,000 acres of WSAs for wilderness designation in 1991. The BLM later concluded that the mineral potential and actual land uses outweighed the merits of wilderness protection for the balance of the WSAs.

Coincidentally, the above mentioned 800,000 acres are the very acres that became the subject of Secretary Babbitt's second wilderness inventory, the Utah Wilderness Review. This Utah Wilderness Review is the subject of litigation in *State of Utah, et al. v. Babbitt*, United States District Court for the District of Utah, Civ. No. 96-CV-870B.

ever coming to fruition.[9] Besides supporting Congressman Hinchey's proposed wilderness designation, which would encompass the property proposed for the Smoky Hollow mine, Secretary Babbitt and the DOI also attacked the validity of the federal Smoky Hollow coal leases by attempting to cancel the suspension in the interest of conservation granted to the holders of the coal leases several years earlier by the Utah BLM State Director. The suspension in the interest of conservation was originally granted to allow Andalex sufficient time to secure mining permits and complete preparation of the EIS. Andalex challenged DOI's efforts to cancel the suspension in the interest of conservation in proceedings before the Interior Board of Land Appeals (IBLA). The IBLA stayed the cancellation of the suspension and the case has been pending before the IBLA for more than two years. During this time, Andalex neared completion of its mining application permits and the draft EIS which was scheduled to be published in the fall of 1996.

From the exhibits submitted by plaintiffs, the majority of which were secured by congressional subpoena, it appears that in early 1996, DOI officials approached the White House and the CEQ for support in creating a national monument in Utah by way of a presidential proclamation.[10] Internal memoranda indicate that as early as March, 1996, the DOI requested

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[9] The Andalex Smoky Hollow coal mine was designed as an underground mine, affecting approximately 60 acres of surface space, to be located on property that is part of the Kaiparowits coal field. The Kaiparowits coal field is estimated by the Utah Geological Survey to contain 62.3 billion tons of coal, of which at least 11.3 billion tons could be recovered. The estimated total federal royalty payments over time from full production of Kaiparowits coal is approximately $20 billion, and the State of Utah and Utah counties would have been entitled to 50% of that amount under the Mineral Leasing Act.

[10] The Court acknowledges that the issue whether the DOI or the President instigated inquiry into the national monument proclamation is not important for purposes of deciding the present motion. While such an inquiry may be significant when reviewing the legality of the proclamation itself, at this stage it is sufficient to do as the Court must and view every ambiguity in the light most favorable to the plaintiff. *See Zinermon v. Burch*, 494 U.S. 113, 118 (1990)

that CEQ or White House officials send a letter to Secretary Babbitt under the President's signature requesting an investigation and recommendations for a Utah national monument. Plaintiffs argue that the reasoning behind the request was to enable defendants to avoid having to comply with the NEPA and the FLPMA, because the President is not a federal agency and not subject to either the NEPA or the FLPMA. An internal CEQ memorandum from Ms. McGinty to Todd Stern reveals even broader reasoning behind the request that the President sign a letter to be sent to Secretary Babbitt:

> the president will do the utah event on aug 17. however, we still need to get the letter (from the President to Interior Secretary Babbitt) signed asap. the reason: under the antiquities act, we need to build a credible record that will withstand legal challenge that: (1) the president asked the secretary to look into these lands to see if they are of important scientific, cultural, or historic value; (2) the secy undertook that review and presented the results to the president; (3) the president found the review compelling and therefore exercised his authority under the antiquities act. presidential actions under this act have always been challenged. they have never been struck down, however. so, letter needs to be signed asap so that secy has what looks like a credible amount of time to do his investigation of the matter. we have opened the letter with a sentence that gives us some more room by making it clear that the president and babbitt had discussed this some time ago. [sic]

(McGinty, e-mail to Todd Stern, July 29, 1996). Plaintiffs allege that no letter signed by the President, if there even was such a letter, was ever sent to Secretary Babbitt as contemplated.

(holding that when ruling on a defendant's motion to dismiss, the court assumes the truth of all well-pleaded facts in plaintiff's complaint and views them in the light most favorable to plaintiff); *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 543 (10th Cir. 1995) (stating that the court views all reasonable inferences in favor of the plaintiff, and the pleadings are construed liberally). The Court accordingly assumes for purposes of the present motion only that plaintiffs are correct in their assertions that the DOI, on its own initiative, instigated the inquiry into the Utah monument proclamation.

From March, 1996 to September 18, 1996, DOI officials worked closely with CEQ Director Kathleen McGinty and others to identify the lands to include in the proclamation and the actions needed to ensure that the proclamation would survive judicial scrutiny. In August, 1996, the DOI conducted a database and bibliography search to prepare a record to support the proclamation. The overriding reasons for creating Grand Staircase focused on the proposed Smoky Hollow coal mine and contentions that this mine would irreversibly damage the environment and Utah's public lands. These contentions, plaintiffs allege, were flatly contradicted by the BLM's draft EIS.

Notwithstanding this history, the proclamation itself took place on September 18, 1996, when President Clinton stood at the rim of the Grand Canyon in Arizona and announced the establishment of the 1.7-million-acre monument and his "concern[] about a large coal mine proposed for the area" and his belief that "we shouldn't have mines that threaten our national treasures." *Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument*, 32 Weekly Comp. Pres. Doc. 1785 (Sept. 23, 1996).

Turning to the actual language of the proclamation, President Clinton cited "geologic treasures" as the initial reason for creation of the monument. *See* Proclamation No. 6920, 61 Fed. Reg. 50,223 (1996). Specifically, the President noted "sedimentary rock layers . . . offering a clear view to understanding the processes of the earth's formation" and "in addition to several major arches and natural bridges, vivid geological features are laid bare in narrow, serpentine canyons, where erosion has exposed sandstone and shale deposits in shades of red, maroon, chocolate, tan, gray, and white. Such diverse objects make the monument outstanding for purposes of geologic study." *Id.* Secondly, the President cited "world class paleontological sites" as grounds for the proclamation. *Id.* According to the President, those things in need of

protection consisted of "remarkable specimens of petrified wood" and "significant fossils, including marine and brackish water mollusks, turtles, crocodilians, lizards, dinosaurs, fishes, and mammals . . . ." *Id.* Archeological interests in "Anasazi and Fremont cultures" were also said to be "of significant scientific and historic value worthy of preservation for future study." *Id.* Finally, the President mentioned the "spectacular array of unusual and diverse soils," "cryptobiotic crusts," and the "many different vegetative communities and numerous types of endemic plants and their pollinators" as warranting protection since "[m]ost of the ecological communities contained in the monument have low resistance to, and slow recovery from, disturbance." *Id.*

E. Congressional Activity After the Proclamation

A clear understanding of the congressional action taken following the Presidential Proclamation is necessary in order to adequately address whether Congress has ratified creation of Grand Staircase.

1. Utah School and Land Exchange Act

On October 9, 1998, Congress passed the Utah School and Land Exchange Act, H.R. 3830, 144 Cong. Rec. S12101 (1998). The President signed the bill on October 31, 1998. Pub. L. No. 105-355, 112 Stat. 3139 (1998). Pursuant to the Land Exchange Act, all state school trust lands, approximately 176,000 acres, within Grand Staircase pass into federal ownership. The school trust lands were granted to the State of Utah pursuant to the Utah Enabling Act of 1894, 28 Stat. 107, for the purpose of providing funds for Utah schoolchildren. Under the Enabling Act, SITLA is responsible for management of the lands granted to Utah. Funds generated from the use of the lands are deposited in the Utah Permanent School Fund and the accrued interest from the Permanent School Fund is distributed annually to Utah's public school system.

Specifically, the federal government granted the 2nd, 16th, 32nd, and 36th sections of each township to the State, providing a broad sample of all lands and attempting to ensure that the State would receive lands of value. The government anticipated that private concerns would quickly acquire the state trust lands, thus creating sizable trust funds for the school children. Unfortunately, before the lands could be acquired, the federal government started a policy shift toward public land retention. The creation of national parks, national forests, national monuments and Indian reservations effectively eliminated the possibility that private concerns would ever acquire the state trust lands. As a result, the state trust lands generated little income for Utah schoolchildren. In some instances, the lands even became a liability.

In the last fifteen years, there have been several failed attempts to exchange state lands for federal lands. *See* Scott T. Evans, *Revisiting the Utah School Trust Lands Dilemma: Golden Arches National Park*, 11 J. ENERGY NAT. RESOURCES & ENVTL. L.347 (1991). The most prominent proposal, Project BOLD, failed due to disputes over the value of the federal lands versus the state lands and opposition of various interest groups. Attempts to exchange state trust lands for federal lands have also failed because almost 300,000 acres of Utah school trust lands are surrounded by federal lands in national parks, forests, monuments, and reservations. The federal land surrounding the trust lands is managed to preserve its natural and scenic qualities. This places tremendous political and public pressure on the state land managers not to use the trust lands for economic development. There is a state constitutional requirement, however, that the school trust lands be managed to maximize income. *See National Parks and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 918-21 (Utah 1993) (holding that the primary objective of the school land trust is to maximize the economic value of school trust lands). Although Utah was required to generate the maximum income from the state trust lands, political

and public pressure made that increasingly difficult. *See* Evans at 355. For example, in April of 1989, the State Land Board approved a resolution expressing frustration over repeated attempts to convince the federal government to trade state trusts land for federal property outside of national parks and reservations. *See id.* In addition, the Board expressed its desire to start using the trust lands, specifically lands in Glen Canyon National Recreation Area, to generate funds for Utah school children. The proposal stimulated protest throughout the state, making the proposal short-lived. *See id.*

It is against this backdrop that Utah Governor Mike Leavitt and Secretary Babbitt proposed the Utah School and Land Exchange Act. Under the agreement, the federal government receives state lands and mineral interests located within various national parks, reservations and monuments, including 176,699 acres of land and 24,000 acres of mineral holdings within Grand Staircase. The State receives federal lands and mineral interests located elsewhere in the State and $50 million in cash. Those involved in the land exchange act are hopeful that it will assist the federal government in resolving long-standing environmental conflicts regarding the state school trust lands. *See* H.R. 3830. In support of the Land Exchange Act, Secretary Babbitt stated that, "[p]assage and enactment of this legislation would mark the end of six decades of controversy over the issue of Utah's state trust land inholdings within national parks, forests, monuments, and reservations." *Utah Schools and Lands Exchange Act: Hearings on S. 2146 Before the Subcomm. On Parks and Public Lands*, 105th Cong. 1, 4 (1998) (statement of Bruce Babbitt, Secretary, U.S. Department of Interior). As noted above, the Utah School and Land Exchange Act was signed into law by President Clinton on October 31, 1998.

2. The Automobile National Heritage Area Act

On October 10, 1998, the House of Representatives approved the Automobile National Heritage Area Act of 1998 (Automobile Act). H.R. 3910, 112 Stat. 3247 (1998). The Automobile Act is named for and primarily concerned with approving a Michigan heritage area honoring the Michigan automobile industry. However, Title II of the Act is entitled "Grand Staircase-Escalante National Monument" and seeks to correct errors in the original Grand Staircase proclamation by making minor boundary adjustments.

Specifically, Section 201 of Title II of the Automobile Act, entitled "Boundary Adjustments and Conveyances, Grand Staircase-Escalante National Monument, Utah" identifies certain exclusions and inclusions to be made. Section 201(a) provides that several Garfield County towns within the National Monument, namely Henrieville Town, Cannonville Town, Tropic Town, and Boulder Town, are excluded from Grand Staircase. In addition, Section 201(b) adds the East Clark Bench in Kane County as part of the Monument, and Section 203 creates a utility corridor in Kane County along U.S. Route 89 on BLM lands between Glen Canyon Recreation Area and Mount Carmel Junction as another addition to the Monument. Nothing in the Act expresses either approval or disapproval of the President's creation of Grand Staircase.

3. Congressional Appropriations

No funds were appropriated for Grand Staircase in either of the FY 1996 or FY 1997 DOI Appropriations Acts. In the FY 1998 DOI Appropriations Act (Pub.L. No. 105-83, 111 Stat. 1543 (1997)) both the House and Senate Committees on Appropriations approved $6,400,000 for maintenance of the Grand Staircase monument. In the FY 1999 DOI Appropriations Act, the House and Senate Committees on Appropriations directed that the BLM "retain funding for the monument at the fiscal year 1998 level of $6,400,000." S. Rep. No. 105-227, 105th Cong.,2d

Sess. at 10 (1998); H.R. 105-609, 105th Cong., 2d Sess., at 12 (1998). Additionally, the House-Senate conference agreement included an increase of one million dollars above the recommendation for a Grand Staircase visitor facility. 144 Cong. Rec. H11367 (1998).

4. Omnibus National Parks and Public Lands Act of 1998

On October 7, 1998, the House of Representatives voted to omit from the eventually defeated Omnibus National Parks and Public Lands Act (Omnibus Act), a proposal which would significantly limit the President's authority under the Antiquities Act. Under the proposed Omnibus Act, the Antiquities Act would have been amended to require the President to (1) provide 30 days notice to the governor of the state in which a national monument exceeding 50,000 acres is proposed and (2) solicit the Governor's written comments prior to issuing a proclamation. 144 Cong. Rec. H9790 (1998). Additionally, the Act would have provided that any presidential proclamation creating a national monument exceedng 50,000 acres would cease to be effective two years after issuance unless Congress has approved it through legislation. *Id.*

5. Committee Reports Regarding Grand Staircase

Beginning in March, 1997, the Subcommittee on National Parks and Public Lands (Subcommittee) of the Committee on Resources of the House of Representatives (Resources Committee) launched an investigation into the creation of Grand Staircase. The culmination of the Subcommittee's nine-month long investigation was a majority staff report submitted to the Resources Committee on November 7, 1997. Entitled "Behind Closed Doors: The Abuse of Trust and Discretion in the Establishment of the Grand Staircase-Escalante National Monument," the majority staff report concludes that the documents received by the Committee, through congressional subpoena, revealed the following points "quite clearly":

> (1) the designation of the Monument was almost entirely politically motivated; (2) the plan to designate the monument was purposefully kept secret from Americans and Utah Members of Congress; (3) the Monument designation was put forward even though the Administration officials did not believe that the lands proposed for protection were in danger; (4) use of the Antiquities Act was intended to overcome Congressional involvement in land designation decisions; (5) use of the Antiquities Act for monument designation was planned to evade the National Environmental Policy Act.

Behind Closed Doors, H.R. No.105-D, 105th Cong., 1st Sess. at 4 (Comm. Print 1997).

On October 14, 1998, the Resources Committee issued a second report which was adopted by the House of Representatives. 144 Cong. Rec. D11201-01 (1998). The 1998 report, entitled "Monumental Abuse: The Clinton Administration's Campaign of Misinformation in the Establishment of the Grand Staircase-Escalante National Monument," indicates that "[w]hile the earlier staff report demonstrates that the President acted without legal authority in designating the Utah Monument, this Committee report shows that the President's environmental conservation justification was just as illusory." *Monumental Abuse*, H.R. No. 105-824, 105th Cong., 2nd Sess. at 6 (Comm. Print 1998). Primarily, the 1998 report concludes that the lands contained within the Monument do not qualify as "threatened or endangered." *Id.* at 3. The report states that "a comprehensive preliminary draft environmental impact statement . . . shows that the characterization of the project as a threat to the lands designated under the Antiquities Act was purely a pretext and not supported by the record." *Id.* Additionally, the report states that "the language of the Antiquities Act makes clear . . . that the land reserved 'shall be confined to the smallest area compatible with the proper care and management of the objects to be protected,'" and that the Antiquities Act "contemplates that objects to be protected must be threatened or endangered in some way." *Id.* at 4. The report argues that the Clinton Administration knew that

the lands within Grand Staircase were not threatened or endangered. As evidence, the report points to, *inter alia*, an e-mail message dated March 25, 1996, from the Chair of CEQ, Kathleen McGinty, to T.J. Glauthier at the Office of Management and Budget and Linda Lance at CEQ, which states the following:

> I'm increasingly of the view that we should just drop these utah ideas. we do not really know how the enviros will react and I do think there is a danger of "abuse" of the withdraw/antiquities authorities especially because these lands are not really endangered. [sic]

Id. at 4.

III. DISCUSSION

With this background in mind, the Court will decide whether plaintiffs' claims must be dismissed due to congressional ratification. In ruling on defendants' motion to dismiss, the court assumes the truth of all well-pleaded facts in plaintiff's complaint and views them in the light most favorable to plaintiff. *See Zinermon v. Burch*, 494 U.S. 113, 118 (1990); *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 543 (10th Cir. 1995). The court may dismiss the complaint for failure to state a claim upon which relief can be granted only if it appears to a certainty that plaintiffs can prove no set of facts in support of its claim which would entitle plaintiffs to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Cessna Aircraft*, 55 F.3d at 543.

A. History of Ratification

Beginning in 1862, there is a long history of decisions upholding the exercise of presidential authority based on congressional ratification. *See The Amy Warwick,* 67 U.S. 635 (1862) (subsequent congressional recognition and legalization of President's proclamations, acts and orders regarding naval blockades); *Mattingly v. District of Columbia*, 97 U.S. 687 (1878) (subsequent congressional action ratifying board of public works assessments); *U.S. v. Alaska*,

521 U.S. 1 (1997) (Congress ratified 1923 Executive Order by enacting § 11(b) of the Alaska Statehood Act). Congressional ratification occurs when Congress recognizes and validates presidential or other executive branch actions. *See Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147 (1937) (Congress recognized the validity of executive action through subsequent legislation); *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301 (1937) (holding that Congress has power to recognize and validate the Secretary of Commerce's actions). Ratification has the ability to "give force of law to official action unauthorized when taken." *Swayne*, 300 U.S. at 301-302. Consequently, ratification has been the subject of much litigation.[11]

[11] However, the history of ratification should not be written solely from the findings of courts faced with resolving ratification lawsuits. Much can be gleaned from those instances where Congress ratified an executive act and no lawsuit followed. For example, on at least three prior occasions, Congress ratified the creation of a national monument by declaring the monument in question a national park. *See, e.g.*, 16 U.S.C. § 441e-1 (Changing designation of "Badlands National Monument," established by Presidential Proclamation on January 25, 1939, to "Badlands National Park"); Act of June 5, 1936, c. 525, § 2, 49 Stat. 1483 (Changing designation of "Colonial National Monument" to "Colonial National Historical Park," and declaring that the national park shall be entitled to receive and to use all funds previously or hereafter appropriated for the Colonial National Monument); and Pub. L. 92-501, October 18, 1972, 86 Stat. 904 (Changing designation of "Sitka National Monument," established by Presidential proclamation, to "Sitka National Historical Park").

Judicial precedent has loosely established two types of ratification–express and implied.[12] Express ratification occurs where there is deliberate congressional action, such as legislation, that expressly validates the official action. Implied ratification is ratification inferred from a group of indirect congressional actions. Courts have been hesitant to find ratification where there is no explicit language or deliberate congressional action in support of the official action.

An example of a decision upholding executive action based on express congressional ratification is *Isbrandtsen-Moller*, 300 U.S. 139 (1937), where the plaintiff challenged the validity of the President's transfer of the functions of the Shipping Board to the Secretary of Commerce. *See id.* at 141. Plaintiff alleged that the President was without authority to order such a transfer. *See id.* Defendants responded that Congress had ratified the order through a series of appropriations acts and subsequent legislation that referenced the order. *See id.* at 147. Plaintiffs argued that the references to the transfer were casual and, therefore, should not be taken as ratification. *See id.* The Court found the plaintiff's arguments unpersuasive, however, because Congress had expressly ratified the order through the Merchant Marine Act, which stated that the functions of the former shipping board were now "vested in the Department of Commerce pursuant to § 12 of the President's Executive Order." *Id.* at 148.

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[12] After carefully studying the applicable cases, the Court finds itself in disagreement with plaintiffs who assert that there are clearly two distinct categories of ratification and that if the underlying executive act is of questionable constitutionality, as is alleged here, then only express ratification is sufficient. The Court acknowledges that there are those cases which have characteristics of either express or implied ratification. By and large, however, the cases addressing the issue appear to this Court to be primarily focused on ascertaining congressional intent, irrespective of which artificial category such intent falls under–express or implied. Thus, while the Court references these two categories for ease of organization, it does not agree with plaintiffs that such categories provide the Court with the analytical framework necessary for resolving the issue. In the end, the Court must make its decision solely from an analysis of congressional intent.

The Supreme Court most recently recognized congressional ratification in *U.S. v. Alaska*, 521 U.S. 1 (1997). In a 1923 Executive Order, the President reserved lands along Alaska's Arctic Coast. The suit involved a dispute between the United States and Alaska over ownership of submerged lands within the reserve. *See id.* at 43. Alaska claimed that the President lacked the authority to reserve submerged lands. *See id.* Even though the President may have lacked the authority to reserve the submerged lands, the Court found that Congress expressly ratified the reservation in § 11(b) of the Alaska Statehood Act. *See id.* at 44. Section 11(b) noted that the United States owned the reserve and included a statement of exclusive legislative jurisdiction under the Enclave Clause. *See id.* at 46. The section clearly reflected Congress' intent to ratify the inclusion of submerged lands within the reserve and to defeat the state's title to those lands. *See id.* at 42-43 (holding that "§ 11(b) thus reflects *a clear congressional statement*" to defeat state title) (emphasis added).

Congressional ratification can also be much more implied in nature. In *Bob Jones University*, 461 U.S. at 574, the Court found that Congress had impliedly ratified an IRS action. Prior to 1970, the IRS granted tax-exempt status to private schools, regardless of their admissions policies. *See id.* at 577. However, in 1970, the IRS concluded that it could not justify allowing tax-exempt status under IRS code § 501(c)(3) to private schools whose admissions policies were racially discriminatory. *See id.* at 578. Bob Jones University, which refused to admit individuals involved in interracial relationships, had its tax exempt status revoked. *See id.* at 581. As a result, the University brought suit, challenging the IRS's authority to revoke its tax-exemption. *See id.* Although ordinarily courts are slow to attribute significance to congressional inaction, the Court found that the inaction in this case was compelling. *See id.* at 601. Congress held hearings on the exact issue and rejected thirteen bills in twelve years which

attempted to overturn the IRS interpretation. *See id.* In addition, Congress manifested its acquiescence when it created § 501i of the Code, which denied tax exempt status to private social clubs which practiced racial discrimination. *See id.* Even more significant was the fact that both the House and Senate Reports creating § 501 focused on the Court's affirmance of *Green v. Connally*, 330 F.Supp. 1150 (DC 1971), as having established that "discrimination on account of race is inconsistent with an educational institution's tax exempt status." *Bob Jones University*, 461 U.S. at 601 (quoting S. REP. NO. 94-1318, at 7-8, H.R. REP. NO. 94-1353 at 8, and n. 5). The Court found that "the actions of Congress since 1970 leave no doubt that the IRS reached the correct conclusion in exercising its authority." *Id.* at 599.

Although the Court recognized implied ratification in *Bob Jones University*, courts have generally been hesitant to find ratification through indirect measures, such as appropriations or statutory references. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the United States Supreme Court held that years of appropriations were insufficient to constitute ratification of a project violating the Endangered Species Act. In the area of the Tennessee River, the Tennessee Valley Authority (TVA) began constructing the Tellico Dam and Reservoir Project in 1967. *See id.* at 157. In 1973, Congress passed the Endangered Species Act. *See id.* at 159. Pursuant to that Act, the Secretary of Interior labeled the snail darter, a species of fish found in the Tennessee River, an endangered species and the Tennessee River its "critical habitat." *See id.* at 161-62. Although the dam was near completion, the Secretary of Interior issued a regulation that all federal agencies should ensure that actions authorized, funded, or carried out by them would not damage the critical habitat of the snail darter. *See id.* at 162. Local citizens and national conservation groups brought suit in district court to enjoin completion of the dam, claiming that the dam violated the Act and would lead to the snail darter's extinction. *See id.* at

164. At various times, before, during and after the judicial proceedings, TVA represented to several congressional Appropriations Committees that the Endangered Species Act did not prevent completion of the project and that their efforts to transport the snail darter were going well. *See id.* at 163. The Committees consistently recommended appropriations for the project. *See id.* at 164. At times, members of Congress even stated their views that the Endangered Species Act did not prohibit completion of the dam at this advanced stage. *See id.* at 170. Each year, Congress approved TVA's general budget, which contained funds for the dam's construction. *See id.* at 189. The defendants argued that the appropriations measures represented an implied repeal of the Act. *See id.* The Court found that although Congress had appropriated over $100 million for the project, such appropriations did not constitute an implied repeal. *See id.* at 172-73. *See also Morton v. Ruiz,* 415 U.S. 199 (1974) (holding that Congress, by appropriating funds for the general assistance of needy Native Americans, did not ratify the Bureau of Indian Affairs policy); *Green v. McElroy*, 360 U.S. 474 (1959) (finding that congressional inaction and appropriations were not enough to constitute ratification of Munitions Board's use of specified hearing procedures).

In *EEOC v. CBS*, 743 F.2d 969 (2nd Cir. 1984), plaintiff challenged the transfer of authority from the Secretary of Labor to the EEOC. Plaintiff claimed that the President did not have the authority to reorganize and expand the functions of the EEOC. Defendants responded that the transfer was ratified by Congress, specifically through a number of appropriations acts and references to the plan in § 905 of the Civil Service Reform Act. *See id.* at 974. The Court of Appeals held that both the appropriations acts and references were insufficient to constitute implied ratification. *See id.* at 974-75. Significant to the Second Circuit's holding was the fact that references to the plan in relation to the EEOC were buried in lengthy and comprehensive

appropriations measures. There was no reference to the specific transfer of enforcement authority at issue, nor were there the type of deliberate congressional actions that would ratify an otherwise unauthorized transfer. *See id.* at 975. The court found that in areas of doubtful constitutionality, mere acquiescence or nonaction is not enough for ratification. *See id.* at 974.

B. Standard of Review under the Doctrine of Congressional Ratification

The Supreme Court has yet to formally announce a precise standard to be applied to decide whether Congress has ratified an executive branch act of questionable constitutionality.[13] However, after closely reviewing the reasoning employed by the Supreme Court and other lower courts that have addressed the issue, it is apparent to this Court that a general policy regarding ratification has emerged. Interpreting existing ratification law, the court in *EEOC* found that "[a]lthough congress may ratify otherwise unauthorized actions, to do so its ratifying legislation must recognize that the actions involved were unauthorized when taken and must also expressly ratify those actions in *clear and unequivocal language*." *EEOC*, 743 F.2d at 974 (referencing *Isbrandtsen-Moller*, 300 U.S. at 147-48 and *Swayne*, 300 U.S. at 301-02) (emphasis added).

Absent an express ratification by Congress, in order to find congressional ratification this Court should find that either a single congressional act or the totality of congressional acts reflects a distinctively clear intent on the part of the national legislature to ratify the underlying executive act. By its very nature, this standard, the Court believes, requires a higher showing than a mere preponderance of the evidence reflecting such intent. The Court should not find congressional ratification by a mere tilting of the ratification scale, which would be the result

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[13] The Court must assume, for purposes of the present motion only, that the President exceeded his authority in the creation of the Grand Staircase under the Antiquities Act. Otherwise, there would be no need to address defendants' ratification arguments. The proclamation would stand on its own.

under a preponderance of the evidence standard. To find ratification in the present case this Court must be satisfied that Congress, through its acts, clearly intended to ratify the President's creation of Grand Staircase.

C. Ratification of Grand Staircase

With respect to the creation of Grand Staircase, defendants base their motion to dismiss on the grounds that Congress has ratified the creation of Grand Staircase through the congressional actions described above, namely, (1) the boundary adjustment legislation, (2) the Utah School and Lands Exchange Act, (3) the appropriations acts, and (4) rejection of a bill that would have limited the President's authority under the Antiquities Act. Additionally, defendants argue that if insufficient on their own, in the aggregate these legislative acts equal congressional ratification of the Monument's creation.

1. Ratification through Boundary Adjustment Legislation

Defendants assert that Congress recognized the validity of the monument by making adjustments to Grand Staircase boundaries in the Automobile National Heritage Area Act of 1964. Defendants cite *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970), for the proposition that Congressional legislation modifying boundaries has been held to ratify and confirm boundaries set by the Executive branch. In *Georgia-Pacific*, an Assistant Secretary of the Interior issued a public land order reducing the boundaries of the Siskiyou National Forest. The issue before the court was whether the executive branch's public land order was invalid for lack of authority to issue such an order. *See id.* at 102. The court found that Congress had ratified the boundary reduction through subsequent congressional action in which Congress extended the boundaries of the national forest without disturbing the boundary retraction made by the Assistant Secretary of the Interior. *See id.* at 102-03.

Consequently, defendants argue that in this case "Congress must have intended to incorporate fully those provisions of Grand Staircase which it left undisturbed in Grand Staircase boundary adjustment legislation." (Def. Mem. Supp. at 22). Defendants cite *Lorillard v. Pons*, 434 U.S. 575 (1978), for the argument that when Congress exhibits selectivity in modifying or selectively incorporates provisions of prior legislation, this "strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully" those provisions which it left undisturbed. *Id.* at 582.

In response, Plaintiffs argue, and this Court agrees, that passage of the Automobile National Heritage Act does not sufficiently indicate congressional ratification of the validity of Grand Staircase. The boundary modifications at issue here are not clear evidence of congressional intent to ratify.

Nothing in the language of the ANHAA indicates direct approval or disapproval of the creation of Grand Staircase. The Act itself primarily deals with the Michigan Automobile Heritage Area and the single section addressing Grand Staircase boundaries was added in conjunction with other "non-controversial" provisions relating to national park and heritage areas throughout the nation. These facts alone do not leave the Court persuaded that Congress intended to "recognize and validate" the creation of Grand Staircase as contemplated by the Court in *Isbrandtsen-Moller* and *Swayne*.

Plaintiffs correctly recognize that these boundary adjustments could just as logically be seen as an attempt to mitigate one of the many possible "severe impacts" of the Monument rather than to validate its creation. The modifications essentially removed certain towns within the boundaries of the Monument which could not justifiably be part of the Monument to begin with. The small addition to Grand Staircase, the East Clark Bench, appears to this Court to be nothing

more than a maintenance of the status quo. In any event, these boundary changes fail to convince the Court of clear legislative intent to ratify the monument.

2. Ratification through the Utah Schools and Lands Exchange Act

Defendants argue that passage of the Utah Schools and Land Exchange Act constitutes an additional ground to find ratification of Grand Staircase. Defendants point to the Act's language, congressional findings, and legislative history for proof of ratification. The language of the Act references Grand Staircase and the authority under which it was created. The congressional findings acknowledge the extensive historic and scientific resources that were included in the Monument, providing that "[c]ertain State school trust lands within the Monument, like the Federal lands comprising the Monument, have substantial noneconomic scientific, historic, cultural, scenic, recreational, and natural resources, including ancient Native American archaeological sites and rare plant and animal communities." Pub. L. No. 105-335, 112 Stat. 3139 (1998). Defendants also assert that the legislative history of the land exchange act is further evidence of congressional acknowledgment of Grand Staircase. Defendants point to statements made by members of congress, specifically Utah Senator Orrin Hatch, which recognize the President's creation of Grand Staircase. Senator Hatch acknowledged to his congressional colleagues that nearly two years earlier President Clinton had announced "the formation of the country's newest national monument, the Grand Staircase-Escalante National Monument in southern Utah." 144 Cong. Rec. S5787, S5788 (1998). He also indicated that "[t]he collaboration that should have taken place prior to the establishment of the Grand Staircase-Escalante National Monument has finally taken place to mitigate one of the severest impacts of that presidential declaration." *Id.* at S5788. In addition, Senator Hatch recognized the extraordinary lands within Grand Staircase. He observed that the lands to be conveyed were

"several hundred foot red rock cliffs located within the Grand Staircase-Escalante National Monument." *Id.* at S5789.

Plaintiffs argue that passage of the land exchange act does not indicate congressional recognition of the validity of the monument. Rather, the focus of the land exchange act was to mitigate the possible harm caused by the monument to the school children of Utah. Plaintiffs quote Senator Hatch as saying, "[t]he principle purpose of this bill is to put the . . . agreement into effect and to ensure *that the President's promise to protect Utah's school children does not ring hollow.*" *Id.* (Emphasis added).

Even taking defendants' arguments as true, the Court is not persuaded the Exchange Act, nor the accompanying comments by Senator Hatch, evinces a clear intent by Congress to validate the creation of Grand Staircase. The agreement reached in the Exchange Act was not dependent upon the creation of Grand Staircase. Creation of Grand Staircase, at the most, triggered a long-anticipated settlement of an issue unresolved for over six decades. Plaintiffs' arguments that the Exchange Act's main purpose was to mitigate the effects of Grand Staircase, rather than to ratify, are persuasive.

The fact that the much disputed Utah lands issue found its resolution on the coat-tails of a controversial presidential proclamation does not provide the requisite clear evidence of congressional intent to ratify. The Exchange Act could just as easily have been accomplished, and indeed, many would argue inevitably would have happened, without the creation of the Grand Staircase. Therefore, the Court is not persuaded that Congress intended to ratify creation of the Monument through passage of the Utah Lands Exchange Act.

3. Ratification through Congressional Appropriations

Defendants argue that through repeated appropriations, Congress has ratified the creation of Grand Staircase. *See Fleming v. Mohawk Wrecking and Lumber Co.*, 331 U.S. 111, 116 (1947) (holding that the creation of a new agency by Executive Order was ratified by appropriations). While neither the 1996 nor 1997 DOI Appropriations Acts appropriated any monies for Grand Staircase, the 1998 and 1999 DOI Appropriations Acts included appropriations for Grand Staircase. Pub.L. No. 105-83 (November 14, 1997), 111 Stat. 1543 (1997); 144 Cong. Rec. H11367 (1998). Defendants assert that it is inconceivable that Congress would have repeatedly appropriated funds for the Monument if it did not recognize its validity.

Plaintiffs counter that in the absence of express ratification or authorizing language, the Supreme Court has consistently held that appropriations of funds does not equal congressional ratification. Plaintiffs cite *TVA v. Hill*, 437 U.S. at 189, 193 (1978), for the proposition that repeated appropriations of funds does not authorize the underlying action or alter the application of the existing law. Additionally, plaintiffs argue that defendants' reliance on *Fleming*, 331 U.S. at 111 (1947), is misplaced. In *Fleming,* the Court held that the creation of a new agency by executive order was ratified by Congressional appropriation based on the authority of the President under the First War Powers Act of 1941. *See id.* at 116. Congressional appropriations during war are often found to constitute implied ratification of executive action. *See, e.g., Orlando v. Laird*, 443 F.2d 1039, 1042 (2nd Cir. 1971) (holding that congressional appropriations during the Vietnam War was sufficient to authorize or ratify military activity in Vietnam). Finally, plaintiffs argue no ratification since only meager appropriations were made in the 1998 Appropriations Act and the same level of funding was retained in the 1999 Act.

Defendants' arguments of ratification through appropriations are not persuasive. As a general rule, courts have been hesitant to find ratification based on appropriations of funds. In *TVA*, the Supreme Court clarified:

> We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. [This would] lead to the absurd result of requiring members to review exhaustively the background of every authorization before voting on the appropriation . . . .

TVA, 437 at 193.

Furthermore, this Court agrees with the Second Circuit's holding that, "[s]ince the substantive aspects of appropriations bills are subject to much less scrutiny than the substantive programs themselves, an appropriations bill is a particularly unsuitable vehicle for an implied ratification of unauthorized actions funded therein." *EEOC*, 743 F.2d at 975.

Even when the appropriations themselves have been substantial or longstanding, courts are reluctant to find the requisite congressional intent to ratify. *See e.g., TVA*, 437 U.S. at 172-73 (finding that appropriations of over $100 million insufficient). Neither the amount, nor the number of years of funding in this case is persuasive to this Court. Indeed, two years of funding at $6,400,000 for a 1.7-million-acre monument is not sufficient evidence of a clear intent by Congress to validate creation of Grand Staircase.

4. Ratification through Legislative Inaction

Defendants argue that Congress has recognized the validity of Grand Staircase by rejecting legislation that would have limited the President's authority to create national

monuments under the Antiquities Act. 144 Cong. Rec. H9790 (1998). Defendants primarily rely on the Supreme Court's decision in *Bob Jones University* for this argument. In *Bob Jones University,* the Court acknowledged that "[o]rdinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation," but went on to hold that nonaction may be significant when Congress has failed to act on bills concerning an issue of which Congress has developed a "prolonged and acute awareness." *Bob Jones University*, 461 U.S. at 598-600. In this case, defendants argue that Congress was well aware of the President's creation of Grand Staircase and this awareness is demonstrated by the consideration and rejection of the Omnibus National Parks and Public Lands Act which would have limited the President's authority to create monuments under the Antiquities Act.

Defendants' arguments do not persuade this Court to depart from the general rule. As the Supreme Court noted in *Red Lion*, "unsuccessful attempts at legislation are not the best guides to legislative intent." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 n.11 (1969). The only exception to this general rule is where Congress' inaction concerns an issue of which it has developed a prolonged and acute awareness. In the present case, the Court cannot justify such a finding–especially when comparing the circumstances under which the Supreme Court has, in the past, found inaction sufficient to support a finding of ratification to the circumstances of the present case. In *Bob Jones University*, the "prolonged and acute awareness" had developed over a twelve-year period, including thirteen failed attempts to pass legislation to overturn the IRS rulings. *See id.* Furthermore, in *Red Lion*, the period of congressional inaction spanned over thirty years and was joined with other evidence of explicit congressional intent. *See Red Lion*, 395 U.S. at 382. In the present case, Grand Staircase is not an issue of which Congress has developed a prolonged and acute awareness. Nor is there other evidence of explicit

congressional intent resulting from rejection of the Omnibus Act. The fact that Congress failed to adopt the Omnibus Act has no clear connection with the validity of the creation of the Grand Staircase Monument in any event.

5. Congressional Actions as a Whole

Defendants' final argument for ratification is an argument based on the totality of the circumstances. Defendants assert that even if this Court were to find that none of the above arguments on their own support a finding of ratification, taken together they establish that Congress clearly intended to recognize the validity of Grand Staircase.

The Court does not agree. This is not one of those instances in which the whole is greater than the sum of its individual parts. There must still be clear evidence of ratification. In this case, the boundary adjustments, the appropriations, and the Exchange Act can all be seen, especially in light of the history of the wilderness debate regarding the land within Grand Staircase, as merely maintaining the status quo. Plaintiffs have some merit in their argument that these acts reveal an intent by Congress to simply mitigate harm rather than validate the President's action. The Court must keep in mind that in addition to the above legislative actions referenced by defendants, the House of Representatives also recognized a Committee Report which outlined abuse of the Antiquities Act and asserted that the proclamation was political rather than legally or environmentally justifiable. Weighing all of this, the Court cannot find that defendants have met their burden of showing congressional intent to ratify.

Furthermore, in their written submissions and again in oral argument, defendants have sought to convince the Court that *U.S. v. Alaska* justifies a finding of ratification. After careful consideration, however, the Court is unpersuaded that *U.S. v. Alaska* dictates a finding of ratification in the present case. In *U.S. v. Alaska*, the Court held that Congress had ratified

President Harding's reservation of land in the National Petroleum Reserve in the ownership of the United States. President Harding created the *Reserve* by Executive Order in 1923. It was this 1923 order that Congress referred to in § 11(b) of the Alaska Statehood Act. In that Act Congress gives the power of exclusive legislation over land owned by the U.S. and held for military purposes, including the National Petroleum Reserve. Alaska argued that the President went beyond his authority (the authority only gave him the right to withdraw certain lands) because there is no need to withdraw "submerged lands." The Court said that even if that were true, Congress ratified the Executive Order by passing § 11(b) of the Statehood Act. Understood this way, *U.S. v. Alaska* is not particularly helpful in resolving the issue of ratification in the present case. The present case would only be analogous if first, President Clinton reserved Grand Staircase before Utah was a state, and then Congress later passed the Utah Statehood Act and expressly referred to Grand Staircase by name and stated it would stay in the "ownership" of the United States. This, however, is not the case before this Court and congressional intent to ratify is not clear.

What the Court has taken from *U.S. v. Alaska* is the reaffirmation that the critical issue when deciding whether ratification exists is determining congressional intent. The common difference between those cases in which ratification was found to exist and the present case is evidence showing a clear intent by Congress to ratify. Here, the Court is not confronted with evidence of clear intent to ratify creation of Grand Staircase. Furthermore, even if the standard were lower than that adopted by this Court in the foregoing discussion, as with a standard met by a preponderance of the evidence, the Court's decision would still be the same in this case. There is lacking the kind of congressional conduct from which a conclusion could reasonably be reached under any appropriate standard that Congress intended to validate the President's

possibly illegal act. Finally, it should be remembered that if Congress indeed intended to ratify the creation of the Grand Staircase Monument by congressional edict, it may still do so at its pleasure. Congress is unquestionably free to exercise its constitutional authority any time it so chooses, and that authority unquestionably includes clear ratification of the creation of a national monument, or the creation itself of a National Monument, or changing the status of a national monument to that of a national park. *See* 16 U.S.C. § 441e-1 (Changing designation of "Badlands National Monument," established by Presidential Proclamation on January 25, 1939, to "Badlands National Park"); Act of June 5, 1936, c. 525, § 2, 49 Stat. 1483 (Changing designation of "Colonial National Monument" to "Colonial National Historical Park," and declaring that the national park shall be entitled to receive and to use all funds previously or hereafter appropriated for the Colonial National Monument); and Pub. L. 92-501, October 18, 1972, 86 Stat. 904 (Changing designation of "Sitka National Monument," established by Presidential proclamation, to "Sitka National Historical Park").

To find congressional ratification on the record here would raise serious concerns about the exercise of authority under our constitutional system of separated and limited powers. Our analysis of course begins in this case with the assumption that the President exceeded his authority in creating the Grand Staircase. Otherwise a discussion of congressional ratification would be irrelevant. Accordingly, we recognize that one of the three branches of government–the Executive–did not have the authority to do what it attempted to do. Congress, however, as the branch of government squarely entrusted with the authority to make laws could unquestionably do what the President did not have the power to do. This is the essence of congressional ratification. Congress is clearly empowered to pass legislation to make the Grand Staircase a national monument, a national park, or a military base, if it can muster the votes to do

so. And it follows that Congress is equally empowered to ratify the President's creation of the Monument, even if the President had not been delegated the power to so act in his own right.

The role of the judicial branch is limited to one of interpretation of the laws. On the issue of congressional ratification the court's authority is limited to a determination whether the legislative branch actually intended to validate the Executive Branch's otherwise illegal act. The Court obviously may not create a National Monument. So understood, it is obvious ratification is no different than any other judicial effort to divine legislative intent. It is also obvious that Congress should not be held to have essentially created a National Monument unless it intended to do so.

If the court were to find congressional ratification based on the limited record in the present case it could quite possibly be the final act in a drama that accomplishes a set aside of 1.7 million acres of Utah land in which not one branch of government operated within its constitutional authority. It could be in effect an unintentional conspiracy of the three branches of government to do something none of them actually legally did, and thereby rob the people of their voice. First the President did something he was not empowered to do. Second, Congress, lacking the votes and the will to vote directly into law what the president had done, nevertheless passed just enough legislation (to provide slight financial support and make some necessary boundary adjustments) to create an argument to the judicial branch for congressional ratification. Finally, the Judiciary, by a finding of ratification, would validate the illegal set aside and recognize as valid something Congress could not have accomplished in a vote where everyone knew what they were voting on.

Congressional ratification is a legitimate doctrine, and in many cases it makes perfect sense, especially where it clearly reflects the will of the people through their elected

representatives. But in the instant case we are dealing with a subject that is significantly important to many Americans, and has its own special history. As noted above, by establishing the Grand Staircase as a National Monument, President Clinton apparently accomplished by a simple stroke of his pen the reservation of hundreds of thousands of acres of *de facto* wilderness in Southeastern Utah. This was done in the aftermath of the Wilderness Act of 1964, which included eleven years of congressionally mandated study of the subject area with full public participation and a final recommendation that only certain specified Utah lands should be designated as wilderness. This designation did not include a good many of the acres within the Grand Staircase in Utah. The nationwide effort regarding wilderness was controversial, contentious and protracted. It is presently undergoing reevaluation and possible reconsideration by Congress. Against this backdrop of years of intense public debate, and against the further reality that Congress, despite considerable effort, has been unable to resolve the wilderness question in Utah for the past several years, the defendants are asking this court to assume that the President violated the law, and that Congress, a body that so far has been unable even to bring the Utah wilderness issue to a vote in either House of Congress, ratified the President's illegal act. To adopt such an argument would undermine the very concept of congressional ratification as a useful tool. It would violate the doctrine of separate powers, and would disenfranchise the American vote.

As stated earlier, if Congress disagrees with this decision, it is an easy task for Congress to remedy the problem. Congress can simply pass the appropriate legislation supporting the President and the President will no doubt sign that legislation into law. This is the clearest and cleanest possible check on whether Congress (and more importantly, the people they represent) really intended to ratify the creation of the Grand Staircase National Monument. But this court

should by no means interfere with the correct constitutional structure by finding intent of Congress where such intent is not clear. Unless Congress chooses to act, and thereby render moot much, if not all, of this lawsuit, this case should be decided on the merits. Either the President validly exercised his authority under the Antiquities Act, or he did not. The Court DENIES the defendants' motion to dismiss based on congressional ratification. The Court will proceed to consider the other outstanding motions.

IV. CONCLUSION

For the above stated reasons, the Court DENIES defendants' motion to dismiss due to congressional ratification.

DATED this 11th day of August, 1999.

Dee Benson
United States District Judge

United States District Court
for the
District of Utah
August 16, 1999

*** * MAILING CERTIFICATE OF CLERK * ***

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