IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE WILDERNESS SOCIETY, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 1:17-cv-02587 (TSC)
GRAND STAIRCASE-ESCALANTE PARTNERS, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants,	Case No. 1:17-cv-2591 (TSC) **CONSOLIDATED CASES**
STATE OF UTAH, *et al.*, Defendants-Intervenors.	

DEFENDANTS-INTERVENORS' JOINT REPLY MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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Pursuant to the Court's Order dated February 10, 2020, as amended May 5, 2020, Defendants-Intervenors State of Utah, American Farm Bureau Federation, Utah Farm Bureau Federation, Kane County, Utah and Garfield County, Utah[1] file this reply memorandum supporting the Federal Defendants' cross-motion for partial summary judgment. For the reasons below, there are no genuine issues of material fact and the Defendants are entitled to judgment as a matter of law.

I. The Take Care Clause Vests In The President The Discretionary Power To Ensure That Delegations Of Authority Are Properly Exercised.

The President is empowered by the Constitution to ensure that delegations of authority to the President were, and continue to be, properly exercised. Plaintiffs' contention that the President has no continuing authority to review the prior exercises of authority under the Antiquities Act and correct the misuse of that authority is without merit. Under the Take Care clause of the Constitution, the President "shall take Care that the Laws be faithfully executed."[2] Fundamentally, the Take Care clause places obligations on the President and those under executive supervision to faithfully execute statutes enacted by Congress.[3] The Supreme Court has clearly articulated the balance of powers between Congress and the President and expressed the importance of Presidential oversight in administering the laws:

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[1] Defendants-Intervenors Kane County, Utah and Garfield County, Utah join only part I of the brief

[2] U.S. Const. art. II, §3.

[3] *See e.g., Medellin v. Texas,* 552 U.S. 491, 532 (2008) ("this authority allows the President to execute the laws, not make them."); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and vetoing of laws he thinks bad."); *Lear Siegler, Inc. v. Lehman,* 842 F. 2d 1102, 1124 (9th Cir. 1988) ("To construe this duty to faithfully execute the laws as implying the power to forbid their execution perverts the clear language of the 'take care' clause…).

> The Constitution does not leave to speculation who is to administer the laws enacted by Congress; The President, it says, 'shall take care that the Laws be faithfully executed,' personally and through officers whom he appoints…The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well-known…That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.[4]

The Take Care clause grants discretion to the President to ensure executive branch officials obey Congressional commands. "Under Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory mandates so long as there is appropriated money available and the President has no constitutional objection to the statute."[5] "[A]bsent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions."[6]

As it applies to this case, the directives contained in the Take Care clause allow the President to ensure that his exercise of delegated authority was proper and to address any instances in which the authority was not properly used. The President, therefore, was within his authority to review the proclamation of Grand Staircase-Escalante National Monument ("GSENM"), conclude that land in excess of that authorized by the Antiquities Act was reserved, and modify the national monument reservation so it was consistent with the Antiquities Act's directives and prohibitions. The President's actions are justified, especially in light of the numerous proclamations by previous Presidents removing land from national monument reservations because the land was no longer necessary for the proper care and management of national monument objects. The President's authority to make such modifications was not

[4] *Printz v. United States,* 521 U.S. 898, 936 (1997).

[5] *In re Aiken Cty.*, 406 U.S. App. D.C. 382, 725 F.3d 255 (2013).

[6] *Id.*

altered by the Federal Land Policy and Management Act ("FLPMA"),[7] and was properly exercised in this case.

A. The President Was Within His Authority To Review Whether The Authority Delegated By The Antiquities Act Was Appropriately Exercised.

The President was well within his duty under the Take Care clause and the Antiquities Act to address the prior improper exercise of authority granted by the Antiquities Act. The Antiquities Act grants the authority to declare national monuments and provides intelligible standards restricting how the delegated authority must be exercised.[8] First, any objects declared to be national monuments must be "historic landmarks, historic and prehistoric structures, [or] other objects of historic or scientific interest."[9] Second, any parcels of land reserved as part of the national monuments "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[10] These restrictions are "intelligible principles" that are capable of review to ensure compliance.[11] Because there are principles guiding any declarations made under the Antiquities Act, the President was within his discretion to review those proclamations to ensure that the delegations contained in the Antiquities Act were faithfully executed and observed.

The President's review to ensure that the Antiquities Act's delegation authority was properly exercised comports with the President's obligations under the Take Care clause, especially given the fact that the original monument proclamation greatly exceeded the authority

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[7] 43 U.S.C. §§ 1701, *et seq.* (West 2020).

[8] 54 U.S.C. § 320201 (West 2020)

[9] 54 U.S.C. § 320201(a).

[10] 54 U.S.C. § 320301(b).

[11] *See Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002).

granted by the Antiquities Act. The Antiquities Act allows the President to "reserve parcels of land as part of the national monuments," but limits these reservations to "the smallest area compatible with the proper care and management of the objects to be protected."[12] By its express terms, the Antiquities Act requires first that national monument objects be identified, followed by a reservation of land that is the smallest necessary to protect those objects. If the location of the objects is unknown, unsurveyed, or uninventoried, then a reservation of land for their care and management is inappropriate.[13] The Antiquities Act does not allow for the drawing of an arbitrary boundary followed by a description of whatever items may be located on the land, as was done in the establishing proclamation.[14]

Contrary to the approach required by the Antiquities Act's express terms and using boundaries largely borrowed from proposed legislation, the establishing proclamation catalogued numerous items that may be located inside the monument, regardless of whether the location of these items was fixed or known or whether the item was of "historic or scientific interest." With respect to potential national monument objects, the establishing proclamation identified many items that, if they were intended to be national monument objects, were outside the scope of the

[12] 54 U.S.C. § 320301(b).

[13] The Act provides for monument designations of only "landmarks, historic and prehistoric *structures,* and other *objects* of historic or scientific interest that are situated *upon the land*." 54 U.S.C. §§ 320301-03 (emphasis added); *See also Anaconda Copper Co. v. Andrus*, A79-161 Civ., (D.Al. July 1, 1980) (concluding that though the withdrawals before that court did not exceed the President's authority, the Act limited the authority of the President as to size and subject matter of withdrawals).

[14] *See Wyoming v. Franke*, 58 F. Supp. 890, 895 (1945). The *Franke* Court conceded that it had limited authority to review proclamation decisions under an "arbitrary and capricious" standard, but noted that "if a monument were to be created on a bare stretch of sage-brush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest, the action in attempting to establish it by proclamation as a monument, would undoubtedly be arbitrary and capricious and clearly outside the scope and purpose of the Monument Act." *Id.* at 895-896.

Antiquities Act's original intent. These items include geologic uplift, remoteness, trails, mountain lion, bear and desert bighorn sheep, "over 200 species of birds, including bald eagles and peregrine falcons," and "scattered water sources," and "desert floras ." [15] To the extent these or other identified items were intended to be national monument objects, they illustrate the overreaching nature of the proclamation.

With respect to the reservation, the original reservation did not comply with the Antiquities Act because it was not confined to the smallest area compatible with the proper care and management of national monument objects. It is impossible to reserve the smallest area compatible with the care and management of an object when what the object is or where it is located is unknown. As of September 1996, there were approximately 8,500 known archaeological sites in the GSENM and the Utah Geological Survey estimated "more than 100,000 archaeological sites" may have existed at the time of the monument designation.[16] Indeed, shortly after the time of the monument's creation, the Utah Geologic Survey concluded, "the nature of archaeological resources in the Grand Staircase-Escalante National Monument is so poorly known that it may be difficult to plan any viable management strategy."[17] Given that the location of items identified in the proclamation were largely unknown and unfixed, and given the numerous protections already existing for those items, the original GSENM boundaries were not, and could not possibly be, the smallest area compatible with the objects' care and management.

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[15] *See* Pres. Proc. No. 6920, 82 Fed. Reg. 58089, *passim* (Sep. 18, 1996).

[16] *See* Utah Geologic Survey, *Archaeological Resources Within Grand Staircase Monument*, (Sept. 1996). Available at https://ugspub.nr.utah.gov/publications/circular/C-95.pdf

[17] *Id.* at 8-9.

In light of the scope of the GSENM reservation, the President undertook an extensive analysis to determine whether authority delegated by the Antiquities Act had been properly exercised by the President in the GSENM establishing proclamation. In Executive Order 13792, *Review of Designations Under the Antiquities Act*,[18] the President stated that designations under the Antiquities Act "should be made in accordance with the requirements and original objectives of the Act and appropriately balance the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities."[19] The President ordered the Secretary of the Interior to conduct a review that considered, among other things, the Antiquities Act's "requirements and original objectives," including whether there should be limitations on objects and reservation sizes.[20]

The final report issued by the Secretary of the Interior pursuant to Executive Order 13792, and concurred in by the Secretary of Agriculture, recommended modifying the proclamation establishing GSENM.[21] The final report noted that GSENM, as originally proclaimed, "contains many objects that are common or not otherwise of particular scientific o[r] historic interest" and recommended that the boundary be revised "to continue to protect objects and ensure the size of the monument reservation is limited to the smallest area compatible with the protection of the objects identified."[22]

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[18] 82 Fed. Reg. 20429 (May 1, 2017).

[19] 82 Fed. Reg. at 20429.

[20] 82 Fed. Reg. at 20429.

[21] Memorandum to the President from Ryan K. Zinke, *Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act*, p.10-11 ("Final Report"), attached as **Exhibit 1**.

[22] Final Report, p.13-14.

B. The President Properly Concluded That The Establishing Proclamation Reserved Land In Excess Of That Authorized By The Antiquities Act.

Using information provided in the review, the President properly determined that the proclamation establishing GSENM identified objects that were not of historic or scientific interest and reserved more land than allowed under the Antiquities Act. After the review requested by Executive Order 13792 was concluded, the President issued Proclamation 9682, modifying GSENM (the "GSENM Modifying Proclamation").[23] The GSENM Modifying Proclamation noted that "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 scientific or historic interest."[24] The President also noted that objects identified in the establishing proclamation were "not under threat of damage or destruction such that they require a reservation of land to protect them" and that "many [objects were] already subject to Federal protection under existing law and agency management designations."[25] Based upon the President's findings, the President concluded that "the current boundaries of the Grand Staircase-Escalante National Monument established by Proclamation 6920 are greater than the smallest area compatible with the protection of the objects for which lands were reserved."[26] The President then revised GSENM's boundaries to meet the limitations of the Antiquities Act's delegation authority.

[23] Proclamation 9682, 82 Fed. Reg. 58089 (Dec. 4, 2017).

[24] 82 Fed. Reg. at 58090.

[25] *Id*.

[26] 82 Fed. Reg. at 58091.

1. The President Properly Reviewed Whether Items Referenced In The Establishing Proclamation Were Appropriately Proclaimed To Be National Monuments.

The President appropriately analyzed whether the objects identified in the establishing proclamation were properly proclaimed national monument objects. In addition to containing a provision limiting the size of Presidential proclamations, the bill enacted as the Antiquities Act omitted language that would have allowed for scenic reservations, which was a point of concern for the western Congressional delegations. Early versions of the Antiquities Act contained more expansive descriptions of objects that may be declared to be national monuments, including items "of scenic value or interest"[27] or tracts of land containing "scenic beauty, natural wonders or curiosities."[28] These expansive descriptions of national monument objects were eventually replaced in the final bill by the more limited authority to identify "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest."[29] The inclusion of

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[27] Mark Squillace, The Monumental Legacy of the Antiquities Act of 1906, 37 GA. L. REV. 473, 478-79 (2003) ("Squillace 2003") (quoting H.R. 8066, 56th Cong. (1900))

[28] Id. at 480 (quoting H.R. 11021, 58th Cong. (1900)).

[29] 54 U.S.C. § 320301(a). The difference between the proposed and enacted versions of the Antiquities Act was intentional. In 1911, the Chief Clerk of the General Land Office addressed the creation of monuments, and expressed his understanding that the Antiquities Act did not extend to scenic vistas, stating:

> "I have at times been somewhat embarrassed by requests of patriotic and public-spirited citizens who have strongly supported applications to create national monuments out of scenery alone . . . The terms of the monument act do not specify scenery, nor remotely refer to scenery, as a possible raison d'etre for a public reservation."

Lee, THE ANTIQUITIES ACT, Ch. 8; *see also* Hal Rothman, AMERICA'S NATIONAL MONUMENTS: THE POLITICS OF PRESERVATION, Ch.5 (1989) (noting that General Land Office Commissioner attempted to persuade Congressman "that 'topographic conditions seem to offer nothing but scenery . . . and [the Antiquities Act] does not provide for the reservation of public land for the protection of scenery'") (citing GLO Commissioner Fred Dennett to Congressman Carl Hayden, 28 April 1913, NA, RG 79, Series 6, Proposed National Parks, Papago Saguaro, file O-32) (alterations in original).

express limitations within the Antiquities Act regarding what items may be declared national monument objects is a principle guiding, and limiting, the President's discretion to declare national monuments.

The President properly exercised his discretion in determining that items identified in the proclamation establishing GSENM were not objects that warranted protection under the Antiquities Act. Not only is this determination expressly committed to the President by the Antiquities Act's express terms,[30] but under the Take Care clause, it is the President's prerogative to determine whether and to what extent the authority delegated to identify and declare national monuments was properly exercised. Because there is an intelligible principle guiding's the President's review of national monument objects, the President was within his authority to determine whether and to what extent items set forth in the establishing proclamation should be declared as national monument objects and to correct any overly expansive declaration.

2. The President Properly Reviewed Whether The Monument Reservation Was The Smallest Area Compatible With The Proper Care And Management Of Monument Objects.

The President also properly determined that the proclamation establishing GSENM reserved more land than was necessary for the proper care and management of objects and that a reduction in the reservation was warranted. There is ample precedent for the President's modification of the GSENM boundaries to address the fact that the reservation was unnecessarily large. As set forth in **Exhibit 2**, there have been numerous modifications diminishing national monument reservations. Many of these modifying proclamations expressly stated that, upon

[30] 54 U.S.C. § 320301(a) ("The President may, *in the President's discretion*, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments.") (emphasis added).

further review, the original proclamation reserved more land than necessary. For example, the Petrified Forest National Monument was diminished by President Taft in 1911. The President concluded that the national monument "has been found, through a careful geological survey of its deposits of mineralized forest remains, to reserve a much larger area of land than is necessary to protect the objects for which the Monument was created, and therefore the same should be reduced in area to conform to the requirements of the act authorizing the creation of National Monuments."[31]

Similarly, the Navajo National Monument in Arizona was diminished by the President in 1912 when he concluded, "after careful examination and survey of the prehistoric cliff dwelling pueblo ruins, [the original national monument proclamation] has been found to reserve a much larger tract of land than is necessary for the protection of such of the ruins as should be reserved, and therefore the same should be reduced in area to conform to the requirements of the act authorizing the creation of National Monuments."[32]

Likewise, in 1940, President Franklin D. Roosevelt diminished the second Grand Canyon National Monument. In the proclamation, the President stated that "certain lands within the Grand Canyon National Monument in the State of Arizona . . . are not necessary for the proper care and management of the objects of scientific interest situated on the lands within the said monument; and . . . it appears that it would be in the public interest to exclude such lands from the said national monument." Accordingly, the President modified the boundary by reducing the 273,145 acre monument by 71,854 acres.[33]

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[31] Proclamation, Petrified Forest National Monument, Ariz. (Jul. 31, 1911).

[32] Proclamation, Navajo National Monument, Ariz. (Mar. 14, 1912).

[33] Proclamation No. 2393, Modifying the Grand Canyon National Monument—Arizona (Apr. 4, 1940).

Finally, numerous other proclamations removed land from monument reservations because, like the land removed from GSENM, it was unnecessary for the care and management of national monument objects.[34] For example, Proclamation No. 2499, Excluding Land from the Craters of the Moon National Monument—Idaho (Jul. 18, 1941), stated that lands excluded from the monument were "not necessary for the proper care and management of the objects of scientific interest situated on the lands within the said monument" and noted that the land was "needed for the construction of Idaho State Highway No. 22 . . ." Proclamation No. 3138, Revising the Boundaries of Great Sand Dunes National Monument, Colorado (Jun. 7, 1956), provided that retaining certain land was no longer necessary for "the preservation of the great sand dunes and additional features of scenic, scientific, and educational interests" and that it was "in the public interest to exclude such lands from the monument." Proclamation No. 3132, Revising the Boundaries of Hovenweep National Monument Utah and Colorado (Apr. 6, 1956), stated that lands removed from the monument "contain no objects of historic or scientific interest [and] were erroneously included in the Hovenweep National Monument in Utah and Colorado by Proclamation No. 1654 of March 2, 1923." Proclamation No. 3344, Excluding Lands from the Black Canyon of the Gunnison National Monument—Colorado (Apr. 8, 1960), concluded that certain lands were "no longer required for the proper care, protection, and management of the objects of scientific interest situated on lands within the monument, and it would be in the public interest to exclude such lands from the monument." In Proclamation No. 3486, Modifying the Natural Bridges National Monument, Utah (Aug. 14, 1962), President John F. Kennedy expressed that, with respect to the acres removed, "it also appears that it would be in the public

[34] A summary of these proclamations, and others diminishing national monument reservations, are set forth in **Exhibit 2**.

interest to exclude from the monument approximately three hundred and twenty acres of land, known as Snow Flat Spring Cave and Cigarette Spring Cave, which no longer contain features of archaeological value and are not needed for the proper care, management, protection, interpretation, and preservation of the monument." Finally, in Proclamation No. 3539, Revising the Boundaries of the Bandelier National Monument, New Mexico (May 27, 1963), President Kennedy stated that it would be "in the public interest to exclude" certain lands from the monument that contained "limited archaeological values which have been fully researched and are not needed to complete the interpretive story of the Bandelier National Monument."

These numerous proclamations addressing and correcting the size of national monument reservations demonstrate the President's authority to ensure that national monument proclamations comply with the limitations of the Antiquities Act. Although "the President's view of his own authority under a statute is not controlling, . . . when that view has been acted upon over a substantial period of time without eliciting congressional reversal it is entitled to great respect" and "construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."[35] No compelling indications exist in this case to suggest that the President does not have authority to diminish national monuments when excess land has been reserved. Instead, the unbroken practice of Presidents has been to remove unnecessary land from national monument reservations when the land is deemed in excess of "the smallest area compatible with the proper care and management of the objects to be protected."[36]

[35] *Am. Fed'n of Labor & Cong. Of Indus. Organizations v. Kahn*, 618 F.2d 784, 790 (D.C. Cir. 1979) (internal quotations and citations omitted).

[36] 54 U.S.C. § 320301(b).

C. FLPMA Did Not Affect The President's Authority To Review And Modify National Monument Reservations.

The passage of the Federal Land Policy and Management Act ("FLPMA") in 1976[37] did not affect the President's authority to diminish national monument reservations when the reservation exceeded the limitations of the Antiquities Act. FLPMA Section 704(a) provides that "[e]ffective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (*U.S. v. Midwest Oil Co.*, 236 U.S. 459) . . . are repealed."[38] Reservations reserve land for specific purposes and withdrawals close land to entry. *See Sierra Club v. Block*, 622 F. Supp. 842, 854-55 (D. Colo. 1985). By passing this provision, Congress intended to remove from the President the vast reservation authority recognized in *Midwest Oil*, not prevent him from diminishing reservations already made that were deemed to be excessive.

Nothing in FLPMA suggests that the President's reservation authority under the Antiquities Act was affected by FLPMA. Instead, in light of the President's consistent practice of modifying and diminishing national monument reservations to ensure that the reservations were the smallest area compatible with the proper care and management of monument objects, Congress left intact the provisions of the Antiquities Act.[39] Rather than addressing the President's modification authority, Congress limited only the Secretary of the Interior's ability to "modify or revoke any withdrawal creating national monuments."[40] The restriction of the Secretary's, but not the President's, authority to modify national monument reservations

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[37] 43 U.S.C. §§ 1701, *et seq.* (West 2020).

[38] Public Law 94-579 (Oct. 21, 1976).

[39] Public Law 94–579—Oct. 21, 1976, §§ 704 – 706.

[40] 43 U.S.C.A. § 1714(j).

demonstrates that Congress did not intend to revoke or modify the President's ability to modify national monument reservations under the Antiquities Act and confirms the President's authority to continue to do so.[41]

II. Plaintiffs Are Not Entitled To Injunctive, Declaratory, Or Other Relief Against The President Or Those Implementing His Directives.

Equitable relief against the President, whether in the form of an injunction or declaratory relief, implicates significant separation of powers issues.[42] Unlike traditional challenges under the Antiquities Act, where the propriety and limits of the original reservation are challenged, this case involves the President's determination that a prior proclamation was issued in error and exceeded the delegated authority.[43] This situation implicates the additional question of whether, in accordance with the President's obligations under the Take Care clause, the President may correct the error. Although the Court may in certain circumstances enjoin underlying officers from engaging in actions directed by the President,[44] to award such relief in this case requires declaring the President's factual conclusions to be meritless and setting aside his judgment regarding whether a prior President faithfully executed the laws. Such relief is unavailable to Plaintiffs.

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[41] A 2016 report prepared by the Congressional Research Service summarized the authority of the of the President after FLPMA by saying, "executive branch officials *other than the President* are barred from modifying or revoking any withdrawal creating national monuments under the Antiquities Act. CRS Report R44687, *Antiquities Act: Scope of Authority for Modification of National Monuments*, available at https://fas.org/sgp/crs/misc/R44687.pdf (emphasis added)

[42] *See Doe 2 v. Trump*, 319 F. Supp. 3d 539, 541 (D.D.C. 2018) (noting that "[s]ound separation-of-power principles" counseled against granting request for the Court "to enjoin a policy that represents an official, non-ministerial act of the President, and declare that policy unlawful"); *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996) (noting that "similar considerations regarding a court's power to issue relief against the President himself apply to [the plaintiff's] request for a declaratory judgment").

[43] 82 Fed. Reg. at 58081-84.

[44] *Franklin*, 505 U.S. 788, 828-29 (1992) (Scalia, J., concurring opinion).

A. Plaintiffs Are Not Entitled To Relief Against Subordinate Officials Implementing The GSENM Modifying Proclamation.

Plaintiffs are not entitled to relief against subordinate officials because their actions are extensions of the President's actions and fulfillment of duties. Within the context of the Antiquities Act, actions by subordinate officials in furtherance of national monument proclamations has been deemed "presidential action." In *Tulare County v. Bush*,[45] the plaintiffs sought relief under the Administrative Procedures Act based upon the assertions that management of the Giant Sequoia National Monument violated the National Forest Management Act and the National Environmental Planning Act because the monument was being managed based upon the proclamation establishing the national monument while a formal monument management plan was being devised. The court held that the monument's management was presidential action over which the court did not have jurisdiction, explaining:

> [T]he Forest Service is merely carrying out the directives of the President, and the APA does not apply to presidential action. Any argument suggesting that this is agency action would suggest the absurd notion that all presidential actions must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action. The court refuses to give the term "presidential action" such a confusing and illogical interpretation. Using this same logic, [the claim pursuant to the National Environmental Policy Act] fails . . . because NEPA requires agency action, and the action in question is an extension of the President's action.[46]

In this case, as in *Tulare County*, actions of subordinate officials in furtherance of the modifying proclamation are Presidential action and subject to the same constraints and considerations attendant to review of the President's actions. Plaintiffs, therefore, are not entitled to relief against subordinate officials *in lieu* of relief against the President.

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[45] 185 F. Supp. 2d 18, 28 (D.D.C. 2001), *aff'd on other grounds*, 306 F.3d 1138 (D.C. Cir. 2002).

[46] *Id.* at 28-29. Although this case was appealed, it was affirmed on other grounds and this portion of the ruling was unaffected. *See Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85, 101-02 n.12 (D.D.C. 2016), *aff'd other grounds* 883 F.3d 895 (D.C. Cir. 2018).

B. Plaintiffs Have Not Pleaded Or Proven Facts Sufficient To Justify Their Requested Relief.

Regardless, assuming the Plaintiffs could otherwise demonstrate that their requested relief is appropriate under some circumstance, Plaintiffs have neither pleaded nor proven facts sufficient to demonstrate that any objects removed from the establishing proclamation were, in the President's discretion, actually of historic or scientific interest, or that the revised proclamation is not "the smallest area compatible with the proper care and management of the objects to be protected."[47] With respect to the objects, Plaintiffs have not demonstrated whether and to what extent any item mentioned in the establishing proclamation was intended to be a "national monument object" protected by a reservation. The GSENM Modifying Proclamation specifically notes that many of the objects identified in the establishing proclamation were not only "not unique to the monument" and "not of significant historic or scientific interest," but also "not under threat of damage or destruction before designation such that they require a reservation of land to protect them."[48] As discussed in Intervenors' opening brief, Plaintiffs' theories of recovery would also require them to demonstrate that the establishing proclamation comported with the Antiquities Act's limitations, which Plaintiffs have not done. Plaintiffs proffer no facts upon which their challenge to the conclusions in the GSENM Modifying Proclamation could be sustained, or upon which it could be concluded that the establishing proclamation was proper. Plaintiffs' requests for relief fail on that basis alone.[49]

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[47] 54 U.S.C. § 320301(b).

[48] 82 Fed. Reg. at 58090.

[49] *See Tulare Cty. v. Bush*, 306 F.3d 1138, 1141-44 (D.C. Cir. 2002); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1133 (D.C. Cir. 2002); *Massachusetts Lobstermen's Ass'n v. Ross*, 945 F.3d 535, 544 (D.C. Cir. 2019).

The Plaintiffs' requested relief seeks to have the Court substitute its judgment for that of the President regarding whether objects are of scientific or historic interest or whether the President previously reserved more land than is allowed for the proper care and management of national monument objects. Because the Plaintiffs have not provided facts sufficient to support any such relief, the Plaintiffs' motions for summary judgment should be denied.[50]

III. Conclusion

Federal Defendants have demonstrated the absence of genuine issues of material fact. They and Defendants-Intervenors are entitled to judgment as a matter of law.

[50] *See Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996); *Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010).

Respectfully submitted this 9th day of June 2020.

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CERTIFICATE OF SERVICE

I certify that on June 9, 2020, the undersigned electronically transmitted the **DEFENDANTS-INTERVENORS' JOINT REPLY MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT** to the Clerk's Office using the CM/ECF system which will send notification of this filing to all counsel of record.

/s/ Cassie Thompson