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.	Civil Action No. 1:17-cv-02587 (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.	Civil Action No. 1:17-cv-02591 (TSC) **CONSOLIDATED CASES**

AMICUS CURIAE BRIEF OF LAW PROFESSORS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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STATEMENT OF INTEREST

Amici are law school professors who are experts in the fields of public land law and natural resources law. They have decades of experience in these fields, and, through their teaching and scholarship, promote understanding of the laws governing management of federal public lands and the history of public land law development.

These cases challenge President Donald J. Trump's effort to strip legal protections from nearly 900,000 acres of historically and scientifically significant land and resources designated by President William J. Clinton as the Grand Staircase Escalante National Monument (the "Monument" or "Grand Staircase"). The undersigned professors are well-situated to assist the Court in understanding the legal and historical context for Congressional and presidential authority under the Antiquities Act as exercised with respect to the Monument. Specifically, amici are well-suited to opine on the legal effect of the Monument's ratification by Congress, as well as the risk of imminent harm to important scientific and other resources that would result from a reduction of the Monument's Congressionally-ratified boundaries and protections—both issues that are significant to this Court's review of Federal Defendants' motion to dismiss (ECF No. 43) ("Fed. Def. MTD").

This brief is filed pursuant to D.C. Local Rule 7(o)(2).[1] A full list of amici is attached as Appendix A hereto.

[1] The undersigned counsel for law professors are the sole authors of this brief. No party's counsel authored the brief in whole or in part, and no party, party's counsel, or other person contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

President Clinton established Grand Staircase in 1996 in accordance with the Antiquities Act, pursuant to which "[t]he President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301(a). As described in detail in Proclamation No. 6920 (the "Grand Staircase Proclamation"), Grand Staircase was created to protect "a spectacular array of scientific and historic resources" in southern Utah "present[ing] exemplary opportunities for geologists, paleontologists, archeologists, historians and biologists."[2] In 1998, the State of Utah and the federal government reached an agreement to exchange tracts of state land in the area protected by the Monument for federal lands outside Grand Staircase, and later that year, Congress enacted legislation ratifying this agreement and confirmed the inclusion of the former state land as integral elements of the Monument. In subsequent legislation, Congress has continued to exert its authority to modify and affirm the boundaries and conservation purposes of the Monument.

On December 4, 2017, President Trump issued Proclamation 9682 (the "Trump Proclamation"), which purports to remove nearly 900,000 acres of public lands (and the resources therein) from Grand Staircase, thereby opening these lands for mining activities and other uses that have been prohibited since 1996.[3] Plaintiffs are geologists, paleontologists, archeologists, historians, biologists, and other parties interested in the

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[2] *Establishment of the Grand Staircase-Escalante National Monument*, Proclamation No. 6920, 61 Fed. Reg. 50223 (Sept. 18, 1996).

[3] *Modifying the Grand Staircase-Escalante National Monument*, Proclamation No. 9682, 80 Fed. Reg. 235 (Dec. 4, 2017).

continued conservation of the resources within the Monument as established by the Grand Staircase Proclamation and ratified by Congress. Plaintiffs have alleged that the Trump Proclamation creates a risk of imminent harm to historical and scientific resources in the lands that would be removed from the Monument. For instance, the Trump Proclamation subjects the lands removed from protection to the General Mining Law of 1872,[4] which permits a wide range of explorative activities that could occur with minimal or no notice, irreparably damaging sensitive resources. The resulting risk of imminent harm clearly makes Plaintiffs' complaints ripe for judicial review.

As argued by amici law professors in a separate matter before this Court regarding the Bears Ears National Monument, which President Trump similarly has sought to reduce by presidential proclamation, the authority that Congress delegated to the President under the Antiquities Act does not include the authority to modify or revoke national monument designations made by prior presidents. For this reason, the Trump Proclamation is ultra vires and must not be allowed to stand. Further, Congress has enacted legislation ratifying Grand Staircase, affirming its conservation purpose and expanding its boundaries. Accordingly, the Trump Proclamation is in contravention of the exercise of Congress' authority with respect to the Monument and, if permitted to stand, would be an action contrary to the will of Congress as expressed by statute. For these reasons, the Court should deny Federal Defendants' motion to dismiss.

[4] 30 U.S.C. §§ 21 *et seq*.

ARGUMENT

I. THE PLAINTIFFS FACE RISK OF IMMINENT INJURY DUE TO EXPLORATIVE USES PERMITTED UNDER THE GENERAL MINING LAW OF 1872, MAKING THIS CASE RIPE FOR JUDICIAL REVIEW

Plaintiffs correctly assert that the Trump Proclamation creates a risk of imminent harm to their recreational, aesthetic, scientific, and other interests in the protected resources within Grand Staircase. Plaintiffs in *The Wilderness Society v. Trump* allege, inter alia, that under the General Mining Law of 1872, 30 U.S.C. §§ 21 *et seq*. ("Mining Law"), public lands removed from the protection of the Monument by the Trump Proclamation will be immediately vulnerable to "the risk that prospectors will engage in exploration activities ("casual use" and "notice use" activities) on public lands and mining claims where they previously could not."[5] Similarly, Plaintiffs in *Grand Staircase Escalante Partners v. Trump* allege, inter alia, that the Trump Proclamation "undermines protections essential to preventing the degradation of sensitive resources" due to the "untrammeled access" that the Mining Law provides the general public "without prior permit or authorization from any government agency . . . to enter federal land in search of mineral deposits."[6]

The Trump Proclamation purports to open nearly 900,000 acres of previously-protected federal land to "location, entry and patent under the mining law."[7] Harm caused by activities permitted under the Mining Law are more than sufficient to meet the *Summers*

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5 Civ. No. 1:17-cv-02587 (ECF No. 1) at 46-47.

6 Civ. No. 1:17-cv-02591 (ECF No. 1) at 7, 13.

7 Proclamation No. 9682, 82 Fed. Reg. at 58094. The Trump Proclamation also authorizes the Secretary of the Interior to "allow motorized and non-mechanized vehicle use on roads and trails existing immediately before the issuance of Proclamation 6920 and maintain roads and trails for such use."

standing test.[8] The Mining Law authorizes citizens of the United States to enter unreserved and unappropriated public lands to explore for valuable mineral deposits, such as gold or copper, and to stake claims to any deposits they discover, which can create vested private property rights within such public lands. *See* 30 U.S.C. § 21; *United States v. Locke*, 471 U.S. 84, 86, 104 (1985). Irrespective of whether valuable minerals ultimately are uncovered, prospective miners enjoy "*pedis possessio*," which has been construed as, among other rights, the exclusive right to diligently work the land and be protected against intrusions by others as they seek to make a discovery of valuable minerals. *Union Oil Co. v. Smith*, 249 U.S. 337, 346–48 (1919).

The Mining Law is in effect over many federal public lands not protected by monument status.[9] It not only permits initial mineral exploration on such lands without notice, but also provides for invasive mineral exploration, including significant soil disturbance, drilling, and removal of vegetation, with only nominal notice to federal government authority and without the need for governmental approval. *Id.* Such activities, if allowed within lands protected by the Monument, would have an immediate and irreversible impact on sensitive ecological, geological, and other important resources of historical and scientific interest, causing harm to Plaintiffs' interests in the Monument. These risks of harm are imminent, a fact implicitly acknowledged by Federal Defendant's

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[8] *Summers v. Earth Island Institute*, 555 U.S. 488, 494 (2009) (noting that "[w]hile generalized harm to the forest or the environment will not alone support standing, *if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice*." (emphasis added) (citations omitted). *See also, U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14 (1973), (observing that "an identifiable trifle is enough for standing") (citations omitted).

[9] Mining Law; *see also* John Leshy, *The Mining Law: A Study in Perpetual Motion* (1987); Mark Squillace, *The Enduring Vitality of the General Mining Law of 1872*, 18 Envtl. L. Rep. 10261 (1988).

argument that Plaintiff's alleged injuries "stem *largely* from future, discrete agency decisions." Fed. Def. MTD at 24 (emphasis added).

In response to serious degradation of public lands historically caused by indiscriminate exploration and mining activities permitted under the Mining Law, the U.S. Department of the Interior's Bureau of Land Management ("BLM") has promulgated rules that govern the surface occupancy of public lands for mineral exploration and mining purposes. 43 C.F.R. § 3809 (2017).[10] In many circumstances, these rules require only minimal notice to BLM before invasive exploration activities can proceed (so-called "notice-level" activities). *Id.* With as little as 15 calendar days prior notice to BLM (to which BLM is not required to respond), mineral explorers may enter into and disturb up to *five* acres of public land, including by clearing vegetation and using earth-moving equipment and vehicle-mounted drilling equipment. *Id.* at § 3809.21. Notice-level activities would have dramatic impacts on formerly protected resources, and the short time frame for notice does not afford Plaintiffs a realistic opportunity to seek an injunction or other relief with respect to harm that such activities would cause to important and sensitive resources.

In addition to notice-level activities, and as troubling for the extremely sensitive ecosystems removed from Grand Staircase, the BLM rules preserve a right of "self-

[10] The U.S. Forest Service has adopted a similar set of rules at 36 C.F.R. § 228.4 (2017). Like the BLM, the Forest Service authorizes certain surface disturbing activities without prior notice to the agency. *Id.* at 228.4(a). While those rules generally require operators to file "a notice of intent to operate … from any person proposing to conduct operations which might cause significant disturbance," operators can avoid such filings for activities that the operators determine to be non-significant. *Id.*

initiation,"[11] without notice to BLM, for any activities identified as "casual use" activities. 43 C.F.R. § 3809. Casual use activities encapsulate a broad array of actions that disturb the landscape, including "the collection of geochemical, rock, soil, or mineral specimens using hand tools; hand panning; or non-motorized sluicing," the use of "small portable suction dredges" and various battery-operated devices, and the use of "motorized vehicles." 43 C.F.R. § 8341.1(a). The Trump Proclamation is explicit regarding the ability of the public to engage in off-road vehicle use within the nearly 900,000 acres of federal land stripped of protection, as it provides that the Secretary of the Interior may "allow motorized and non-mechanized vehicle use on roads and trails existing immediately before the issuance of [the Grand Staircase Proclamation] and maintain roads and trails for such use." Proclamation No. 9682, 82 Fed. Reg. at 58094.

The lands protected within Grand Staircase contain geological, archeological, ecological, and other sensitive resources that could be severely degraded by even the least invasive of the causal use activities permitted under the Mining Law. To take just one example, the Grand Staircase Proclamation identifies "[f]ragile cryptobiotic crusts" as an ecological feature of "significant biological interest" within the Monument, as they "play a critical role throughout the monument, stabilizing the highly erodible desert soils and providing nutrients to plants."[12] According to the National Park Service, "cryptobiotic soils can take anywhere from a few years to several decades or longer to recover" once they are compacted.[13] Mineral exploration activities, including off-road vehicle use and

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[11] "Self-initiation" has long been a feature of the Mining Law. *See, e.g.,* Hardrock Mining and Reclamation Act of 2007, H.R. 2262, 110th Congress, 1st Sess. (2007), which proposed reform of the 1872 Mining Law "consistent with the principles of self-initiation of mining claims."

[12] *Id*. at 1790.

[13] *Cryptobiotic Soil Crusts*, Glen Canyon National Recreation Area, National Park Service (2007), https://www.nps.gov/glca/learn/nature/soils.htm *See also*, Jeffrey E Lovich, and David

trampling by human foot traffic in conjunction with the collection of geochemical, rock, soil, or mineral specimens can cause substantial surface disturbance and pose a significant risk of harm to these soils, with the result that the foundations of unique local ecosystems are compromised.[14] If the Trump Proclamation is permitted to take effect, mere casual use entry upon formerly protected lands will place cryptobiotic soils and other important ecological resources at risk of imminent harm.

The Grand Staircase Proclamation as originally issued by President Clinton and later ratified by Congress expressly reserved all federal lands and land interests within the Monument from entry and location under the Mining Law, thereby precluding the kinds of destructive exploration activities that are otherwise authorized under the BLM's rules without prior notice, or with nominal notice for notice-level activities. Following the announcement of the Trump Proclamation, there already have been reports of private mining claims being filed in Colt Mesa, within the Circle Cliffs formation, an area formerly protected within the Monument.[15] Such actions plainly demonstrate that there is an

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Bainbridge, *Anthropogenic Degradation of the Southern California Desert Ecosystem and Prospects for Natural Recovery and Restoration*, 24 Envtl. Mgmt. 309 (1999). (Arguing that "[r]ecovery to predisturbance plant cover and biomass may take 50-300 years, while complete ecosystem recovery may require over 3000 years.).

[14] Jayne Belnap, *Cryptobiotic Soils: Holding the Place in Place* (USGS, 2016), https://geochange.er.usgs.gov/sw/impacts/biology/crypto/ ("Cryptobiotic soil crusts are highly susceptible to soil-surface disturbance such as *trampling by hooves or feet*, or driving of off-road vehicles, especially in soils with low aggregate stability such as areas of sand dunes and sheets in the Southwest, in particular over much of the Colorado Plateau.… When crusts in sandy areas are broken in dry periods, previously stable areas can become moving sand dunes in a matter of only a few years") (emphasis added); *see also Clarification of Cultural Resource Considerations for Off-Highway Vehicle Designations and Travel Management,* IM 2012-067, Instruction Memorandum from U.S. Dep't of the Interior, Bureau of Land Mgmt. (Feb. 10, 2012) (representing the BLM's acknowledgment that off-road vehicle use also harms cultural and historic properties).

[15] *See* Brad Barber*, Guest Opinion: Turning a Win-Win Public Lands Compromise into a Loss for All Americans*, Deseret News (October 19, 2018), https://www.deseretnews.com/article/900037634/guest-opinion-turning-a-win-win-public-lands-

imminent risk of harm to sensitive geological, archeological, ecological, and other resources. Given Plaintiffs' scientific, recreational, aesthetic and other interests in the Monument's resources, the potential imminent harm resulting from both "notice-level" and "casual use" activities permitted under the Mining Law is sufficient for the Court to find that Plaintiffs' allegations are ripe for judicial review.

II. THE TRUMP PROCLAMATION EXCEEDS THE AUTHORITY DELEGATED TO THE PRESIDENT BY CONGRESS UNDER THE ANTIQUITIES ACT

The Constitution vests plenary authority over the public lands in Congress. U.S. Const. art, IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States"). The Supreme Court has characterized Congress's authority over the public lands under the Property Clause as "without limitation." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (citing *United States v. San Francisco*, 310 U.S. 16, 29 (1940)). Accordingly, presidential authority over public lands is limited to that which specifically has been delegated by Congress.

In the case of the Antiquities Act, the President has the authority to "reserve" public lands. 54 U.S.C. § 320301(a). However, Congress did not expressly delegate to the President the power to modify or revoke national monument designations made by other presidents. *Id*. Nor can delegation of such authority by the Antiquities Act reasonably be implied where Congress, in separate legislation that is largely contemporaneous with the Antiquities Act, specifically granted broad presidential authority to modify and revoke similar public land protection. *See* Mark Squillace, et al., *Presidents Lack the Authority to*

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compromise-into-a-loss-for-all-americans.html.

Abolish or Diminish National Monuments, 103 Va. L. Rev. Online 55 (2017). The brief submitted by amici law professors in consolidated cases before this Court concerning the Bears Ears National Monument (Case Nos. 1:17-cv-02590 (TSC), 1:17-cv-02605 (TSC), and 1:17-cv-02606 (TSC)) (the "Bears Ears Amicus Brief") fully sets for the legal and historical bases for these arguments, which apply to Grand Staircase just as they do to the Bears Ears National Monument.[16] As discussed in detail in that brief, the President's attempt to substantially reduce the boundaries of Grand Staircase by nearly 900,000 acres is *ultra vires* and beyond the authority delegated to him by the Congress under the Antiquities Act. In order to respect the Court's time and to avoid making redundant arguments, we hereby incorporate the arguments set forth in the Bears Ears Amicus Brief regarding presidential authority with respect to the Bears Ears National Monument, which also apply to Grand Staircase.

III. CONGRESSIONAL RATIFICATION OF THE MONUMENT'S BOUNDARIES PRECLUDES MODIFICATION BY PRESIDENTIAL DECLARATION

As referenced above and discussed by Plaintiffs and other amici, the President lacks authority under the Antiquities Act to reduce the scope of a national monument. In the case of the Monument, the President also lacks this authority by virtue of the fact that Congress has, by legislation, exerted its authority and expressed clear intent as to the Monument's boundaries and conservation purpose, precluding contrary presidential action to reduce the scope of the Monument.

[16] Amicus Curiae Brief of Law Professors Supporting Plaintiffs' Opposition to Motion to Dismiss, *Hopi Tribe v. Trump*, No.1:17-cv-02590-TSC, (D.D.C. Nov. 16, 2018), ECF No. 75.

A. The President may not exercise authority delegated by Congress in a manner that is contrary to Congressional intent

It is axiomatic that, when exercising delegated authority, the President is prohibited from acting in a manner that is contrary to the will of Congress expressed by statute. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804) (rejecting presidential order to seize ships sailing *from* French ports when statute authorized seizure only of ships sailing *to* French ports); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952) (finding presidential action unlawful when incompatible with "the plan Congress adopted" in the Taft-Hartley Act); *Food and Drug Administration v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 155 (rejecting asserted authority of FDA to regulate tobacco products where Congressional actions "[t]aken together . . . preclude [the] interpretation."). As famously described by Justice Jackson, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); *see Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (employing the framework set forth by Justice Jackson in *Youngstown*).

Under this principle, even assuming *arguendo* that the President was delegated authority under the Antiquities Act to reduce the boundaries of a national monument (he was not), that authority could not be exercised in contravention of legislation by Congress establishing or ratifying the scope of such a monument. Here, because Congress has ratified and modified the boundaries of the Monument through legislation, the President may not now, by proclamation or otherwise, shrink those boundaries and open those public lands to uses in direct contravention of Congressional intent.

B. Congress adopted and ratified the boundaries and purposes of the Monument under the Utah Schools and Lands Exchange Act of 1998

On October 31, 1998, Congress enacted the Utah Schools and Lands Exchange Act of 1998 ("Lands Exchange Act").[17] The Lands Exchange Act ratified an agreement between the United States and the State of Utah in which state lands that were within the outer boundaries of the Monument under the Grand Staircase Proclamation were exchanged for federal lands outside the Monument. Both the context and the plain language of the Lands Exchange Act demonstrate Congress' intention to ratify the Monument and fix its boundaries in order to protect the extraordinary objects of scientific, historical, recreational, aesthetic, geological and ecological interest contained therein. In the Lands Exchange Act, Congress approved the land exchange for the express purpose of "enhanc[ing] management of the Grand Staircase-Escalante National Monument." Lands Exchange Act, § 2(3). It directed federal exchange of lands suitable for development outside the Monument for state lands "within the Monument" that have "scientific, historic, cultural, scenic, recreational and natural resources . . . like the Federal lands comprising the Monument." *Id*. at § 2(2). And the Lands Exchange Act specifically referenced the "exterior boundaries . . . established by" President Clinton's proclamation. *Id*. at § 2(1). Moreover, in the Lands Exchange Act, Congress explicitly incorporated, ratified, and confirmed the "terms [and] conditions" and other "provisions" of the Agreement, "as a matter of Federal law," including the modification of the Monument's area to incorporate the state land grant tracts. *Id*. at § 3(b).

To understand Congress's ratification of the Monument under the Lands Exchange Act, one must begin with the particular circumstances of Utah's entry into the Union as a

[17] Pub. L. No. 105-335, 112 Stat. 3139 (1998).

State with respect to the allocation of federal and state public lands, which led to the inclusion of more than 175,000 acres of state land distributed as one square mile tracts within the boundaries of the Monument as designated in 1996.[18] As with many other western States, the land that ultimately would comprise the State of Utah largely was federally owned. Much of this land was unsurveyed. What legal descriptions existed relied on a "Township and Range" survey system that was originally proposed by Thomas Jefferson and utilized in states that were admitted to the Union after the original thirteen colonies.[19] Under this system, public land was divided into six square mile "townships," and these Townships were then divided into 36 one square mile, 640 acre "sections," numbered in a zigzag pattern beginning in the upper right hand corner and proceeding to the left.[20] Beginning with Ohio in 1803, states admitted to the Union received a single section in every township under this survey system for the benefit of the state's schools.[21] Many later states received two "school" sections, and by the time that Utah became a state in 1894 it was awarded four "school" sections in every township, specifically, sections 2, 16, 32, and 36. Utah Statehood Enabling Act, Ch. 138, § 6, 28 Stat. 107 (1894). While this statehood grant gave Utah four square miles out of every 36 square mile township, they were spread out like square-mile "freckles" across the State's landscape.

This scheme made sense amid the prevailing policies of the late 19th and early 20th century, which provided for the privatization of federal and state public lands through the Homestead Act and similar legislation. *See e.g.,* James Rasband, et al., *Natural Resources*

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[18] A map illustrating the location of state land tracts within the Monument as of its initial designation is attached as Appendix B-1.

[19] *See The Public Land Survey System,* U.S. Geological Survey, https://nationalmap.gov/small_scale/a_plss.html.

[20] *Id*.

[21] Paul W. Gates, *History of Public Land Law Development* 291 (1968).

Law and Policy 129-145 (3d ed. 2016). The school land grant policy was premised on an expectation that the state parcels, like the federal land that surrounded them, would eventually pass into private hands or be leased for development, with the proceeds benefiting Utah's school children. *Id*. However, aridity—the American Southwest's defining feature—limited the potential uses over large tracts of public land, and as a result, very little of the public federal and state lands in the deserts of southern Utah were privatized. Beginning in the early 20th century, the President and Congress reserved significant areas of federal land in southern Utah for national monuments and national parks, beginning with President Taft's designation of the Mukuntuweap National Monument in 1909, which Congress later made part of Zion National Park.[22] In 1976, Congress enacted the Federal Land Policy and Management Act, which for the first time articulated a policy of retaining unreserved public lands in federal ownership and provided for comprehensive public lands management. 43 U.S.C. § 1710 *et. seq*. It was against this backdrop that President Clinton designated the Monument in 1996.

Due to the circumstances surrounding Utah's entry into the Union as a State, Grand Staircase as initially established in 1996 included school land grant tracts—the "freckles"—within the Monument's boundaries. The monetary value of these tracts, which accounted for more than 175,000 acres inside the approximately 1.7 million acre Monument, was affected because the surrounding public lands were no longer available for certain kinds of economic activity, such as mineral exploitation. Conversely, federal lands reserved for conservation as part of the Monument were pock-marked with state-

[22] Pub. L. No. 66-83, 41 Stat. 356 (1919). Other reserved federal lands in southern Utah, in the vicinity of the Monument, include Bryce Canyon National Park, Capitol Reef National Park, Arches National Park, Canyonlands National Park, and Bears Ears National Monument.

owned tracts that were beyond the jurisdiction of the federal land managers, even though many of them contained significant cultural, geological and biological resources of the kind identified in the Grand Staircase Proclamation. *See* Lands Exchange Act § 2(2).

At the time of Grand Staircase's designation as a national monument, negotiations were underway between the State of Utah and the federal government to exchange state lands within several other federally protected areas in Utah for unprotected federal lands outside those areas. President Clinton's announcement of the Grand Staircase Proclamation alluded to the negotiations, and suggested that the designation of the Monument would "accelerate the exchange process."[23] Specifically, President Clinton directed the Secretary of the Interior to work with Utah's governor and congressional delegation "to respond promptly to all exchange requests" and stated that his administration would "resolve reasonable differences in valuation in favor of the school trust."[24] He specifically linked the exchange with the Monument's designation, stating that "[b]y taking these steps, we can both protect the natural heritage of Utah's children and ensure them a quality educational heritage."[25]

In 1998, Utah and the federal government reached an agreement in which Utah would convey lands to the federal government to further federal conservation interests, including state lands within Grand Staircase, in exchange for federal lands of equal value to be developed for the benefit of the school trust. *Agreement to Exchange Utah School Trust Lands between the State of Utah and the United States of America* (May 8, 1998)

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[23] William J. Clinton, *Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona* (Sept. 18, 1996), transcript by Gerhard Peters and John T. Woolley, The American Presidency Project, University of California Santa Barbara, https://www.presidency.ucsb.edu/node/221204.

[24] *Id.*

[25] *Id.*

("Agreement"). Specifically, Utah transferred title to the United States "all lands within the exterior boundaries of the Monument, comprising approximately 176,698.62 acres of land and the mineral interest in approximately an additional 24,000 acres." *Id*. at § 2(E).[26] The Agreement provided that "lands and interests in land acquired by the United States within the exterior boundaries of the Monument . . . shall become a part of the Grand Staircase-Escalante National Monument, and shall be subject to all the laws and regulations applicable to the Monument." *Id*. at § 5(A). In return, the federal government agreed to convey to Utah federal lands outside the Monument and other conservation areas that were suitable for mineral or other economic development and the sum of $50 million. *Id*. at § 3.[27] The Agreement also explicitly stated that "[a]ny lands . . . acquired by the United States within the exterior boundaries of the Monument . . . shall become a part of the Grand Staircase-Escalante National Monument, and shall be subject to the laws and regulations applicable to the Monument." Agreement, § 5(A).

Within months of the Agreement in 1998, the modification of Grand Staircase to include the state land grant tracts was ratified by Congress via passage of the Lands Exchange Act.[28] The maps attached as Appendices B-1 and B-2 graphically illustrate the dramatic change in land ownership from the time the Monument was originally designated in 1996 to the current, post-Lands Exchange Act period.

In the operative language of the Lands Exchange Act, Congress "ratified and confirmed" and "hereby incorporated" "[a]ll terms, conditions, procedures, covenants,

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[26] A map showing the configuration of state and federal land in the vicinity of the Monument as a result of the Agreement is attached as Appendix B-2 hereto.

[27] The parties also agreed to take necessary actions to dismiss pending lawsuits filed by the state and by the School Lands Trust alleging that the President's designation of the Monument was unlawful. *Id*. at § 12.

[28] *See* Barber, *supra* note 15.

reservations, and other provisions" of the Agreement, and "set forth the obligations and commitments" of the parties, "as a matter of Federal law." *Id.* at § 3(b). In its findings, Congress affirmed and specifically enumerated the conservation benefits achieved by including the state tracts within the Monument, noting 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 archeological sites and rare plant and animal communities.

Lands Exchange Act, § 2(2). Further, Congress noted that "[d]evelopment of surface and mineral resources on State school trust lands within the Monument could be incompatible with the preservation of these scientific and historical resources for which the Monument was established." *Id*. at § 2(3).

The exchange of land ratified by the Lands Exchange Act was intended to ensure the protection of the important resources within the Monument and to provide an economic benefit to the State of Utah. The latter intention has been met: in addition to an upfront payment of $50 million, the former Associate Director of the State of Utah's School and Institutional Trust Lands Administration has indicated that the lands gained through the Exchange Act had produced nearly $341 million in revenues as of April, 2016.[29] The Trump Proclamation, however, directly contradicts Congressional intent to protect the resources within the Monument by purporting to reduce the size of the Monument. Given that such action is contrary to Congress's intent as clearly expressed in the Lands Exchange Act, it cannot be permitted to stand.

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[29] *See* Jennifer Yachnin, *Utah Land Swaps Could Foil a Trump Bid to Strip Protection*, Environ. & Energy News (May 2, 2017), https://www.eenews.net/stories/1060053899; Barber, *supra* note 15.

C. Subsequent legislation confirms Congress's authority and intent to protect resources within Grand Staircase, precluding Presidential modification of the Monument's area or boundaries

That Congress intended to assert its prerogative to provide for the protection of the Monument and to preclude any Presidential action to diminish that protection is further demonstrated by two enactments subsequent to the Exchange Act. In 1998, Congress exercised its constitutional authority to adjust the boundaries of Grand Staircase, adding an area known as the East Clark Bench and excluding lands within four townships. Automobile National Heritage Area Act, Pub. L. 115-355, § 201, 112 Stat. 3247, 3252 (1998). In 2009, Congress created the National Landscape Conservation System, consisting of permanently-designated conservation lands managed by the BLM, "to conserve, protect, and restore nationally significant landscapes that have outstanding cultural, ecological, and scientific values *for the benefit of current and future generations*." Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 2002(a), 123 Stat. 991, (emphasis added). Included among the conservation units in this new management system were "[e]ach area that is designated as . . . a national monument." *Id.* § 2002(b). In the same legislation, Congress made an additional minor boundary adjustment to Grand Staircase. *Id.* § 2604(c). By continuing to assert its prerogative to provide for permanent conservation management and to adjust the boundaries of the Monument, Congress has demonstrated its intent to administer and modify the Monument under its most expansive authority. The President has no authority to act contrary to Congress's intent that the Monument should protect and conserve the lands and resources within the bounds that Congress has recognized.

CONCLUSION

President Clinton's designation of Grand Staircase to protect a wide variety of important scientific and historic resources in southern Utah was ratified by Congress's enactment of the Lands Exchange Act in 1998. The Trump Proclamation purporting to reduce the area of the Monument and open formerly protected public lands to exploration and exploitation creates a risk of imminent harm by virtue of the operation of the Mining Law, making Plaintiffs' complaints ripe for review. Further, the Trump Proclamation is *ultra vires*, as the President lacks the authority under the Antiquities Act to shrink a national monument, and directly contracts the intention of Congress as expressed by legislation ratifying the Monument and affirming its conservation purpose. For these reasons, Federal Defendants' motion to dismiss must be denied.

Respectfully Submitted: November 19, 2018

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