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[Utah Ass'n of Counties v. Bush 10 Cir dismissed - standing.docx](#)
[Utah Ass'n of Counties v. Bush.docx](#)

See attached for the District and Circuit court decisions in the challenges to GSENM and Giant Sequoia NM- looks like intervenors in both cases....thank you!

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As of: February 10, 2014 1:54 PM EST

Utah Ass'n of Counties v. Bush

United States District Court for the District of Utah, Central Division

April 19, 2004, Decided

Case No. 2:97CV0479, 2:97CV0863

Reporter: 316 F. Supp. 2d 1172; 2004 U.S. Dist. LEXIS 9865; 11 A.L.R. Fed. 2d 917

UTAH ASSOCIATION OF COUNTIES, on behalf of its members, Plaintiffs, vs. GEORGE W. BUSH, in his official capacity as PRESIDENT OF THE UNITED STATES, et al., Defendants, and SOUTHERN UTAH WILDERNESS ALLIANCE, et al., Defendants-Intervenors. MOUNTAIN STATES LEGAL FOUNDATION, on behalf of its members, Plaintiffs, vs. GEORGE W. BUSH, in his official capacity as PRESIDENT OF THE UNITED STATES, et al., Defendants, and SOUTHERN UTAH WILDERNESS ALLIANCE, et al., Defendants-Intervenors.

Subsequent History: Appeal dismissed by *Utah Ass'n of Counties v. Bush*, 455 F.3d 1094, 2006 U.S. App. LEXIS 18547 (10th Cir. Utah, July 24, 2006)

Prior History: *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 2001 U.S. App. LEXIS 15533 (10th Cir. Utah, 2001)

Disposition: **[**1]** Defendants' Motion to Dismiss and in the alternative motion for Summary Judgment GRANTED; plaintiffs' Motions for Summary Judgment DENIED in their entirety.

Core Terms

authority, monument, antiquity, wilderness, land, delegate, designate, national, creating, staircase, agency, judicial review, withdrawal, interior, violation, requirements, statute, proclamation, agency's action, presidential,

right of action, recommend, protection, public, review, constitute, object, executive order, exercise, law

Case Summary

Procedural Posture

Plaintiff counties and others sued defendant United States President and various federal agencies and officials, alleging that the Antiquities Act of 1906, *16 U.S.C.S. §§ 431-433* violated the delegation doctrine, that creation of the Grand Staircase Monument was ultra vires and violated the Property and Spending Clauses, and various federal laws. Defendants moved to dismiss or for summary judgment. Plaintiffs moved for summary judgment.

Overview

The case concerned the designation of 1.7 million acres of federal land as a national monument pursuant to the Antiquities Act. Inter alia, the court held that the President complied with the Antiquities Act by (1) designating, in his discretion, objects of scientific or historic value, and (2) setting aside, in his discretion, the smallest area necessary to protect the objects. These facts compelled a finding in favor of the President's actions. Supreme Court precedent instructed that judicial review in these circumstances was at best limited to ascertaining that the President in fact invoked his powers under the Antiquities Act. Beyond such a facial review the court was not permitted to go. The Antiquities Act's virtually unlimited grant of discretion to the President was a proper constitutional grant of authority and stood as valid law. Claims based on other federal acts were of no

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merit because the statutes did not provide for a private right of action and the Administrative Procedure Act required, in such cases, a finding of final agency action. The President was not an agency, and the other defendants were only assisting the President in the execution of his discretion.

Outcome

The court granted defendants' motion to dismiss or for summary judgment.

LexisNexis® Headnotes

Governments > Federal Government > Property
Real Property Law > Zoning > Historic Preservation

HN1 The Antiquities Act of 1906, 16 U.S.C.S. §§ 431-433, gives the President of the United States authority to create national monuments. The Antiquities Act authorizes the President, "in 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. The Act requires the president to reserve land confined to the smallest area compatible with the proper care and management of the objects to be protected.

Real Property Law > Zoning > Historic Preservation

HN2 See 16 U.S.C.S. § 431.

Energy & Utilities Law > Mining Industry > Mineral Leases > General Overview
Environmental Law > Natural Resources & Public Lands > Federal Land Management
Governments > Federal Government > Property
Real Property Law > Zoning > Comprehensive Plans

HN3 The Wilderness Act, 16 U.S.C.S. §§ 1131-36, directed the Secretary of Agriculture and the Secretary of the Interior to review certain lands within their jurisdictions and make recommendations as to their suitability for wilderness classification. 16 U.S.C.S. § 1132(d)(1). The areas to be studied were identified as Wilderness Study Areas (WSAs). 16 U.S.C.S. § 1131. Once the lands were inventoried, BLM was to conduct a study of each WSA, pursuant to § 603, 43 U.S.C.S. § 1782, of Federal Land

Policy and Management Act (FLPMA), 43 U.S.C.S. § 1701 et seq. The Bureau of Land Management would then make a recommendation to the President, who in turn would recommend to Congress whether any of the WSAs should be designated as wilderness. Until such designation occurs, the administering agency is to manage the WSAs so as not to impair their suitability for possible wilderness classification by Congress. 16 U.S.C.S. § 1133. Once an area receives actual wilderness status, commercial enterprises, roads, motorized equipment, mining, and oil and gas leasing are prohibited in the wilderness area.

Constitutional Law > Separation of Powers
Governments > Federal Government > Executive Offices

HN4 When the President is given such a broad grant of discretion as in the Antiquities Act of 1906, 16 U.S.C.S. §§ 431-433, the courts have no authority to determine whether the President abused his discretion. To do so would impermissibly replace the President's discretion with that of the judiciary.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Constitutional Law > The Judiciary > Jurisdiction > General Overview
Environmental Law > Natural Resources & Public Lands > Federal Land Management
Real Property Law > Zoning > Comprehensive Plans

HN5 A federal district court has the authority to review whether the President's actions violated the United States Constitution or another federal statute, such as the Wilderness Act, 16 U.S.C.S. §§ 1131-36.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action
Administrative Law > Separation of Powers > Legislative Controls > General Overview
Constitutional Law > Congressional Duties & Powers > Spending & Taxation
Constitutional Law > Relations Among Governments > General Overview
Constitutional Law > Relations Among Governments > Federal Territory & New States
Governments > Federal Government > Executive Offices
Governments > Federal Government > US Congress

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Governments > Legislation > Enactment
Real Property Law > Zoning > Historic Preservation

HN6 According to the United States District Court for the District of Utah, Central Division, Congress clearly had the authority to pass the Antiquities Act of 1906, 16 U.S.C.S. §§ 431-433. It is a proper constitutional grant of authority to the President. The Act itself, and the President's designations pursuant to the Act, are not inconsistent with the Constitution's Property Clause, Spending Clause, or the delegation doctrine; nor is the President's Proclamation in violation of the Wilderness Act or any other federal statute. No statute passed after the Antiquities Act has repealed or amended the Antiquities Act. It stands as valid law. Only Congress has the power to change or revoke the Antiquities Act's grant of virtually unlimited discretion to the President.

Governments > Federal Government > Executive Offices
Real Property Law > Zoning > Historic Preservation

HN7 Exec. Order No. 10355, adopted by the Executive Branch in 1952, did not eliminate the President's withdrawal authority under the Antiquities Act.

Constitutional Law > Separation of Powers
Governments > Federal Government > Executive Offices

HN8 The President has no law-making authority. The use of executive orders may be employed by the President in carrying out his constitutional obligation to see that the laws are faithfully executed and to delegate certain of his duties to other executive branch officials, but an executive order cannot impose legal requirements on the executive branch that are inconsistent with the express will of Congress .

Civil Procedure > ... > Justiciability > Standing > General Overview
Constitutional Law > Separation of Powers
Governments > Federal Government > General Overview
Governments > Federal Government > Executive Offices
Governments > Federal Government > Property

HN9 Executive Order 10355 by its express terms does not eliminate the President's authority, as granted specifically to the President by Congress . Furthermore, by specifically exempting the Antiquities Act from the reach of Federal Land Policy and Management Act (FLPMA), 43 U.S.C.S. § 1701 et seq., for example, Congress reaffirmed that the Antiquities Act was to continue to not be subjected to requirements that must be followed by lower-level executive officials. Whatever else may be said about the possible reach of Executive Order 10355, it is undisputed that since its passage in 1952 there have been 20 presidential proclamations creating national monuments and none have transferred the exercise of withdrawal authority to the Secretary of the Interior.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Civil Procedure > US Supreme Court Review > General Overview
Constitutional Law > Separation of Powers
Governments > Federal Government > Executive Offices

HN10 While there has been some debate among the United States Supreme Court justices as to whether judicial review of executive actions by the President are subject to judicial review at all, recent judgments have indicated the Court's willingness to engage in a narrowly circumscribed form of judicial review.

Administrative Law > Judicial Review > Reviewability > Preclusion
Constitutional Law > The Judiciary > Jurisdiction > General Overview
Constitutional Law > Separation of Powers

HN11 Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. For the judiciary to probe the reasoning which underlies the exercise of such discretion would amount to a clear invasion of the legislative and executive domains.

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Administrative Law > Judicial Review > Reviewability > Preclusion
 Constitutional Law > The Judiciary > Jurisdiction > General Overview
 Constitutional Law > Separation of Powers
 Governments > Federal Government > Executive Offices

HN12 A grant of discretion to the President to make particular judgments forecloses judicial review of the substance of those judgments altogether: Where a claim concerns not a want of Presidential power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.

Constitutional Law > The Judiciary > Jurisdiction > General Overview
 Constitutional Law > Separation of Powers
 Governments > Federal Government > Executive Offices

HN13 Although judicial review is not available to assess a particular exercise of presidential discretion, a court may ensure that a president was in fact exercising the authority conferred by the act at issue.

Governments > Federal Government > Property
 Real Property Law > Zoning > Historic Preservation

HN14 See 16 U.S.C.S. § 431.

Real Property Law > Zoning > Historic Preservation

HN15 The plain language of the Antiquities Act of 1906, 16 U.S.C.S. §§ 431-433, empowers the President to set aside objects of historic or scientific interest. 16 U.S.C.S. § 431. The Act does not require that the objects so designated be made by man, and its strictures concerning the size of the area set aside are satisfied when the President declares that he has designated the smallest area compatible with the designated objects' protection.

Governments > Legislation > General Overview
 Governments > Legislation > Interpretation
 Real Property Law > Zoning > Historic Preservation

HN16 A court generally has recourse to congressional intent in the interpretation of a statute only when the language of a statute is ambiguous. The "strong presumption" that the plain language of the statute expresses congressional intent is rebutted only in "rare and exceptional circumstances," when a contrary legislative intent is clearly expressed.

Administrative Law > Judicial Review > General Overview
 Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action
 Administrative Law > Judicial Review > Reviewability > Standing
 Environmental Law > Administrative Proceedings & Litigation > Judicial Review
 Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview

HN17 The National Environmental Policy Act (NEPA), 42 U.S.C.S. § 4332 et seq., supplies no private right of action. If an agency to which NEPA applies has violated its requirements, an aggrieved party must bring its complaint within the mechanism supplied by the Administrative Procedure Act (APA). The APA permits judicial review of final agency action for which there is no other adequate remedy in a court. 5 U.S.C.S. § 704. In order for a violation of NEPA to be redressable at law, therefore, the violation of which a plaintiff complains must form an element of a final agency action subject to judicial review under the APA.

Administrative Law > Judicial Review > General Overview
 Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action
 Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN18 In order for an agency's action to have that degree of finality that is amenable to judicial review under the Administrative Procedure Act, it must have some immediate effect beyond that of a recommendation: the action is final agency action only when the agency's action itself has a direct effect on the day-to-day business of the persons or entities affected by the action.

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Administrative Law > Judicial Review > General Overview
 Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action
 Civil Procedure > US Supreme Court Review > General Overview
 Constitutional Law > Congressional Duties & Powers > Census > General Overview
 Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN19 That an agency is incapable of taking "final agency action" in a particular set of circumstances can serve to insulate the agency's preliminary actions resulting in final presidential action from judicial review under the Administrative Procedure Act.

Administrative Law > Judicial Review > General Overview
 Administrative Law > Judicial Review > Reviewability > Factual Determinations
 Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action
 Environmental Law > Administrative Proceedings & Litigation > Judicial Review
 Governments > Courts > Authority to Adjudicate

HN20 Central to the determination whether there exists final agency action subject to review under the Administrative Procedure Act (Administrative Procedure Act) is the question whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties. When the statute does not permit the agency to act alone, but rather requires presidential action before there is any direct effect on the parties, there is no determinate agency action to challenge until the President acts. Even when the presidential action authorized by statute permits the exercise of only limited discretion, and the President will almost certainly rely quite heavily on agency recommendations, the fact that presidential action is required before there will be any effect eliminates the prospect of judicial review under the APA.

Administrative Law > Judicial Review > Standards of Review > General Overview
 Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

HN21 The United States Supreme Court summarily dismisses the possibility that the President is an agency within the meaning of the Administrative Procedure Act (APA). Although the definition of agency in the APA does not explicitly exclude the President, textual silence is not enough to subject the President to the provisions of the APA. It would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

Administrative Law > Judicial Review > General Overview
 Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action
 Environmental Law > Administrative Proceedings & Litigation > Judicial Review
 Governments > Courts > Authority to Adjudicate

HN22 Flaws in an agency process leading to a recommendation to the President, that in turn leads to presidential action, do not convert the action of the agency, or that of the President, into action subject to judicial review under the Administrative Procedure Act (Administrative Procedure Act), since the recommendation does not constitute final agency action.

Administrative Law > Judicial Review > General Overview
 Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action
 Administrative Law > Judicial Review > Reviewability > Preclusion
 Environmental Law > Administrative Proceedings & Litigation > Judicial Review
 Governments > Courts > Authority to Adjudicate

HN23 That an agency's process may have been flawed is not only irrelevant for purposes of review under the Administrative Procedure Act (Administrative Procedure Act), it is also powerless to transform a presidential action based on a flawed agency recommendation into a violation of a statute conferring presidential discretion. Although judicial review might be available outside the APA for some claims that a President exceeded the authority given by some statutes, longstanding authority holds that such review is not available when the statute in question commits the decision to the dis-

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cretion of the President. While some agency processes leading to presidential action are insulated from judicial review by the combination of an absence of final agency action and a grant of discretion to the President, the court best fulfils its own constitutional mandate by withholding judicial relief where Congress has permissibly foreclosed it.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
 Administrative Law > Judicial Review > Reviewability > Preclusion
 Governments > Courts > Authority to Adjudicate

HN24 Confronted by a statute expressly conferring discretion on the President, according to the United States District Court for the District of Utah, Central Division, how the President chooses to exercise the discretion Congress has granted him is not a matter for judicial review.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
 Governments > Courts > Authority to Adjudicate

HN25 As the Administrative Procedure Act does not expressly allow review of the President's actions, the court must presume that his actions are not subject to its requirements; although the President's actions may still be reviewed for constitutionality.

Administrative Law > Separation of Powers > Constitutional Controls > General Overview
 Administrative Law > Separation of Powers > Legislative Controls > General Overview
 Constitutional Law > Relations Among Governments > General Overview
 Constitutional Law > Relations Among Governments > Federal Territory & New States
 Governments > Federal Government > General Overview
 Governments > Federal Government > US Congress

HN26 While it is true that Congress has the express authority under the Constitution's Property Clause to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States, it is equally true that Congress may delegate this authority as it deems appropriate, and any delegation is constitutionally permis-

sible if Congress provides standards to guide the authorized action such that one reviewing the action could recognize whether the will of Congress has been obeyed.

Administrative Law > Separation of Powers > Constitutional Controls > General Overview
 Administrative Law > Separation of Powers > Legislative Controls > General Overview
 Constitutional Law > Congressional Duties & Powers > General Overview
 Constitutional Law > Relations Among Governments > General Overview
 Constitutional Law > Relations Among Governments > Federal Territory & New States
 Governments > Federal Government > US Congress

HN27 The Antiquities Act of 1906, 16 U.S.C.S. §§ 431-433, sets forth clear standards and limitations. The Act describes the types of objects that can be included in national monuments and a limitation on the size of monuments.

16 U.S.C.S. § 431. Although the standards are general, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. Accordingly, the non-delegation doctrine is not violated, nor is the Property Clause, which has repeatedly been construed as allowing Congress to delegate its authority to the executive and judicial branches, including the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. U.S. Const. Art. IV, § 3, cl. 2.

Governments > Federal Government > Executive Offices
 Governments > Federal Government > Property
 Real Property Law > Zoning > Historic Preservation

HN28 The Antiquities Act of 1906, 16 U.S.C.S. §§ 431-433, requires the President to reserve objects of historic or scientific interest that are situated upon lands owned or controlled by the government of the United States 16 U.S.C.S. § 431.

Governments > Federal Government > Property
 Real Property Law > Zoning > Historic Preservation
 Real Property Law > Zoning > Regional & State Planning

HN29 The fact that some of the acreage within

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the boundaries of a national monument is classified as Wilderness Study Areas does not preclude its inclusion in a national monument.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action
 Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
 Administrative Law > Judicial Review > Reviewability > Standing
 Civil Procedure > ... > Justiciability > Standing > General Overview
 Constitutional Law > ... > Case or Controversy > Standing > General Overview
 Governments > Courts > Authority to Adjudicate

HN30 When bringing a lawsuit for violation of statutory law parties must either find language in the statute itself which allows a private right of action, or demonstrate the occurrence of final agency action, which invokes the court's authority to review the claim under the Administrative Procedure Act. If parties fail to meet these requirements they are precluded from challenging the alleged statutory violation.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action
 Administrative Law > Separation of Powers > Constitutional Controls > Nondelegation Doctrine
 Administrative Law > Separation of Powers > Executive Controls

HN31 The Supreme Court of the United States has declared that the President is not an agency and cannot be defined as such under the Administrative Procedure Act. It follows that actions taken by the President pursuant to congressionally delegated authority cannot be considered final agency action.

Administrative Law > Separation of Powers > Executive Controls
 Governments > Federal Government > Executive Offices
 Governments > Federal Government > Property
 Governments > Public Lands > General Overview
 Real Property Law > Encumbrances > Ownership & Transfer > Public Entities

HN32 Exec. Order No. 10355, issued by President Harry S. Truman in 1952, delegated to the Secretary of the Interior the authority vested

in the President by section 1 of the act of June 25, 1910 (the Pickett Act), and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States for public purposes. 17 Fed. Reg. 4831 (May 26, 1952). The Secretary of the Interior was also authorized to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made. The Order further directed that all orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders and shall be submitted to the Division of the Federal Register for filing and for publication in the Federal Register.

Governments > Federal Government > Executive Offices

HN34 U.S.C.S. § 301 is a general authorization to delegate presidential functions.

Administrative Law > Separation of Powers > Executive Controls
 Governments > Federal Government > Executive Offices

HN33 3 U.S.C.S. § 301 states that the President may delegate any function which is vested in the President by law to an agency or department head. It also states that nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. 3 U.S.C.S. § 301. The President must publish such authorization in the Federal Register, but he may place terms, conditions, and limitations on the use of the delegated authority, and he may revoke the delegation "in whole or in part" at any time.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview
 Administrative Law > Separation of Powers > Executive Controls
 Administrative Law > Separation of Powers > Legislative Controls > General Overview
 Governments > Legislation > Interpretation

HN35 Administrative orders delegating authority to agency officials warrant the use of rules of construction similar to those used in

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statutory interpretation.

Administrative Law > Separation of Powers > Executive Controls
Governments > Legislation > Interpretation

HN36 Courts will generally give substantial deference to the President's or the applicable department's interpretation and use of an executive order.

Administrative Law > Separation of Powers > Executive Controls
Environmental Law > Natural Resources & Public Lands > Federal Land Management
Governments > Federal Government > Property

HN37 A President may only confer by Executive Order rights that Congress has authorized the President to confer. As the regulations implementing § 204 of Federal Land Policy and Management Act, 43 U.S.C.S. § 1701 et seq., recognized, Exec. Order No. 10355 conferred on the Secretary of the Interior all of the delegable authority of the President. 43 C.F.R. § 2300.0-3(a)(2)(2004).

Administrative Law > Separation of Powers > Executive Controls
Administrative Law > Separation of Powers > Legislative Controls > General Overview
Environmental Law > Natural Resources & Public Lands > Federal Land Management
Governments > Federal Government > Executive Offices
Governments > Federal Government > Property

HN38 Although 3 U.S.C.S. § 301 authorizes the President to delegate any function which is vested in him by law to a department or agency head in the executive branch, delegation of the authority to designate national monuments seems inconsistent with the Antiquities Act itself. The Antiquities Act provides that the President is authorized, in his discretion, to designate national monuments. 16 U.S.C.S. § 431. 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. Discretion is defined as a public official's power or

right to act in certain circumstances according to personal judgment and conscience. It is illogical to believe that the President can delegate his personal judgment and conscience to another.

Environmental Law > Natural Resources & Public Lands > Federal Land Management
Real Property Law > Zoning > Historic Preservation

HN39 Although Federal Land Policy and Management Act (FLPMA), 43 U.S.C.S. § 1701 et seq., imposes numerous requirements on the Secretary of the Interior when withdrawing land, the Antiquities Act of 1906, 16 U.S.C.S. §§ 431-433, was specifically exempted from the reach of FLPMA.

Governments > Federal Government > Property
Governments > Public Lands > General Overview
Real Property Law > Zoning > Historic Preservation

HN40 The Antiquities Act of 1906, 16 U.S.C.S. §§ 431-433, authorizes the President in his discretion to declare objects that have scientific interest, and are situated upon the public lands, to be national monuments. The Act authorizes only the President to declare these reservations and apparently this authority cannot be delegated.

Governments > Legislation > Expiration, Repeal & Suspension
Governments > Legislation > Interpretation

HN41 The test used to determine whether a statute has been repealed is also used for an executive order. A repeal may be explicit or implicit, and the ultimate question is whether repeal of the prior statute or order was intended.

Administrative Law > Separation of Powers > Executive Controls
Governments > Federal Government > Property

HN42 Any delegation of authority pursuant to 3 U.S.C.S. § 301 is revocable at any time by the President in whole or in part.

Environmental Law > Natural Resources & Public Lands > Federal Land Management
Governments > Federal Government > General Overview

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view

Governments > Federal Government > Executive Of
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Governments > Legislation > Expiration, Repeal &
SuspensionGovernments > Public Lands > General Overview
Real Property Law > Zoning > Historic Preservation

HN43 The Federal Land Policy and Management Act (FLPMA), 43 U.S.C.S. § 1701 et seq., and its regulations indicate that Congress intended to repeal any delegation authority to designate national monuments to the Secretary of the Interior. Through FLPMA, Congress specifically repealed the Pickett Act, the Midwest Oil doctrine and other Acts granting withdrawal authority to the President, thereby extinguishing Presidential authority to withdraw public lands in many circumstances. As a result, Congress also revoked any delegations of authority to other members of the Executive Branch related to the repeal of that authority. Notably, FLPMA specifically excludes the Antiquities Act of 1906, 16 U.S.C.S. §§ 431-433, from its reach and reaffirms the President's authority to designate national monuments. The Secretary of the Interior does not have authority to modify or revoke any withdrawal creating national monuments under the Antiquities Act. 43 C.F.R. § 2300.0-3(a)(1)(iii). Although the regulations go on to state that, by virtue of Exec. Order No. 10355, the Secretary still possesses all the delegable Presidential authority to make, modify and revoke withdrawals and reservations with respect to lands of the public domain, 43 C.F.R. § 2300.0-3(a)(2), it appears Congress never considered authority under the Antiquities Act as "delegable" in the first place.

Governments > Federal Government > Executive Of
fices

Governments > Federal Government > Property

HN44 Generally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders. Furthermore, to assert a judicially enforceable private cause of action under an executive order, a plaintiff must show (1) that the President

issued the order pursuant to a statutory mandate or delegation of authority from Congress, and (2) that the Order's terms and purpose evidenced an intent on the part of the President to create a private right of action.

Governments > Federal Government > Executive Of
fices

Governments > Federal Government > Property

HN45 In the context of an executive order, in the absence of an intent of to create a private right of action to enforce compliance on the face of the order, a court will not imply one.

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For WILLIAM JEFFERSON CLINTON, UNITED STATES OF AMERICA, KATHLEEN A. MCGINTY, COUNCIL ON ENVIRONMENTAL QUALITY, THE, BRUCE BABBITT, INTERIOR, DEPT OF, defendants (97-CV-479): Gary B. Randall, Lois J. Schiffer, US DEPARTMENT OF JUSTICE, Ann Navaro, DEPARTMENT OF JUSTICE, WASHINGTON, DC.

For WILLIAM JEFFERSON CLINTON, UNITED STATES OF AMERICA, KATHLEEN A. MCGINTY, COUNCIL ON ENVIRONMENTAL QUALITY, THE, BRUCE BABBITT, INTERIOR, DEPT OF, defendants (97-CV-479): Michael A. Gheleta, DEPARTMENT OF JUSTICE, DENVER, CO.

For WILLIAM JEFFERSON CLINTON, BRUCE BABBITT, UNITED STATES OF AMERICA, KATHLEEN A. MCGINTY, defendants (97-CV-863): Carlie Christensen, US ATTORNEYS OFFICE - UTAH.

For WILLIAM JEFFERSON CLINTON, BRUCE BABBITT, UNITED STATES OF AMERICA, KATHLEEN A. MCGINTY, defendants (97-CV-863): Gary B. Randall, US DEPARTMENT OF JUSTICE, WASHINGTON, DC.

For WILLIAM JEFFERSON CLINTON, BRUCE BABBITT, UNITED STATES OF AMERICA, KATHLEEN A. MCGINTY, defendants (97-CV-863): Michael A. Gheleta, US DEPARTMENT OF JUSTICE, DENVER, CO.

For BUREAU OF LAND MANAGEMENT, [**3] SYLVIA BACA, consolidated defendants (97-CV-479): Carlie Christensen, US ATTORNEYS OFFICE - UTAH.

For BUREAU OF LAND MANAGEMENT, SYLVIA BACA, consolidated defendants (97-

CV-479): Gary B. Randall, US DEPARTMENT OF JUSTICE, Ann Navaro, DEPARTMENT OF JUSTICE, WASHINGTON, DC.

For BUREAU OF LAND MANAGEMENT, SYLVIA BACA, consolidated defendants (97-CV-479): Michael A. Gheleta, US DEPARTMENT OF JUSTICE, DENVER, CO.

For SOUTHERN UTAH WILDERNESS ALLIANCE, THE WILDERNESS SOCIETY, GRAND CANYON TRST, ESCALANTE CANYON OUTFITTERS, ESCALANTE'S GRAND STAIRCASE B&B INN, BOULDER MOUNTAIN LODGE, intervenors-defendants (97-CV-479): Rodney R Parker, SNOW CHRISTENSEN & MARTINEAU, Stephen H. Bloch, SOUTHERN UTAH WILDERNESS ALLIANCE, SALT LAKE CITY, UT.

For SOUTHERN UTAH WILDERNESS ALLIANCE, intervenor-defendant (97-CV-479): Heidi J. McIntosh, SOUTHERN UTAH WILDERNESS ALLIANCE, SALT LAKE CITY, UT.

For SOUTHERN UTAH WILDERNESS ALLIANCE, THE WILDERNESS SOCIETY, GRAND CANYON TRST, ESCALANTE CANYON OUTFITTERS, ESCALANTE'S GRAND STAIRCASE B&B INN, BOULDER MOUNTAIN LODGE, intervenors-defendants (97-CV-479): William L. Underwood, Richard A. Duncan, Craig S. Coleman, FAEGRE & BENSON, MINNEAPOLIS, [**4] MN.

For THE WILDERNESS SOCIETY, GRAND CANYON TRST, ESCALANTE CANYON OUTFITTERS, ESCALANTE'S GRAND STAIRCASE B&B INN, BOULDER MOUNTAIN LODGE, intervenors-defendants (97-CV-479): Karleen M. O'Connor, FAEGRE & BENSON, MINNEAPOLIS, MN.

Judges: Dee Benson, United States District Judge.

Opinion by: Dee Benson

Opinion

[*1176] OPINION AND ORDER

INTRODUCTION

The present matter comes before the Court on defendants' Motion to Dismiss or in the alternative for Summary Judgment and plaintiffs' Motions for Summary Judgment. The motions were argued before the Court on January 15, 2004. The Court has considered the legal briefs and oral arguments of the respective parties and enters the following Opinion and Order.

BACKGROUND

A. THE LAWSUITS AND THEIR CONTENTIONS

On September 18, 1996, President William Jefferson Clinton, invoking his authority under the *Antiquities Act*, designated 1.7 million acres of federal land in southeastern Utah as the Grand Staircase-Escalante National Monument. On June 23, 1997, the Utah Association of Counties, (UAC) filed this lawsuit challenging the President's actions, naming as defendants the United States of America, William J. Clinton in his official capacity as [*5] President of the United States, Kathleen McGinty in her official capacity as chair of the Council on Environmental Quality (CEQ), Secretary of the Interior Bruce Babbitt, the United States Department of the Interior (DOI), and Patrick Shea, Director of the Bureau of Land Management (BLM).

On November 5, 1997 Mountain States Legal Foundation (MSLF) filed a similar suit against defendants Clinton, Babbitt, and the United States of America. A month later, MSLF filed an amended complaint, which added defendant McGinty. UAC's and MSLF's cases were consolidated.¹

Plaintiffs allege:

1) The Antiquities Act is unconstitutional because [*6] it violates the delegation doctrine. Plaintiffs claim that only Congress has the authority to withdraw such lands from the federal trust.

2) By creating the Grand Staircase Monument the President acted *ultra vires* and violated the following provisions of the United States Constitution:

a) the *Property Clause*, *U.S. Const., Art. IV, § 3, cl. 2*; because the authority to [*1177] manage federal lands rests exclusively with Congress; and

b) the Spending Clause, *U.S. Const., Art. I, § 8, cl. 1*; because only Congress has the authority to obligate money which will be drawn from the Treasury to purchase private property.

3) By creating the Grand Staircase Monument the President violated:

a) the Antiquities Act, *16 U.S.C. § 431*; because he failed to designate the requisite objects of historic or scientific value and he did not limit the size of the monument to the "smallest area" necessary to preserve the objects.

b) the Wilderness Act, *16 U.S.C.A. § 1131 et seq.*; because the President established as *de facto* wilderness areas within the Grand Staircase Monument, and only Congress has the authority to designate public lands as wilderness.

[*7] c) Executive Order 10355, because the President, rather than the Secretary of the Interior, withdrew the land.

4) By creating the Grand Staircase Monument the President and/or one or more of the other defendants violated:

a) the National Environmental Policy Act (NEPA), *42 U.S.C. § 4332 et seq.*; because the joint activities of the Department of the Inte-

¹ Pursuant to *Federal Rules of Civil Procedure 25(d)(1)*, defendants have since been substituted to reflect a presidential and administration change. Current individual defendants are now President George W. Bush; CEQ Chair James L. Connaughton; Department of the Interior Secretary Gale Norton and Bureau of Land Management Director Kathleen Clarke.

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rior and CEQ were carried out independently of the President and were in fact initiated by DOI, and therefore these actions required the preparation of an Environmental Impact Statement (EIS) and compliance with other NEPA regulations, which did not happen.

b) the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq.; because the President's withdrawal of public lands did not comply with FLPMA's withdrawal, notice and land use planning provisions.

C) the Federal Advisory Committee Act (FACA), 5 U.S.C. app 2; because advice and recommendations were received by the President and other defendants from various individuals who constituted an "advisory committee" within the meaning of FACA and therefore required compliance with FACA's procedural **[**8]** standards.

d) The Anti-Deficiency Act, 31 U.S.C. § 1341; because an improper appropriation was created.

Both plaintiffs seek summary judgment as to all of the above claims.

All of the defendants seek dismissal or in the alternative summary judgment as to all claims. They challenge the Court's jurisdiction to hear the case under the doctrines of standing (as to MSLF only), ripeness and lack of judicial review authority. As to the plaintiffs' claims of

violations of the United States Constitution and federal statutes, the defendants seek dismissal as a matter of law.

(1) THE ANTIQUITIES ACT

HNI The Antiquities Act of 1906, 16 U.S.C. § 431, gives the President authority to create national monuments.² Since its enactment,

[*1178] presidents have used the Antiquities Act more than 100 times to withdraw lands from the public domain as national monuments.

President Clinton's use of the Antiquities Act to create the Grand Staircase Monument in 1996 was the first use of the Antiquities Act in more than two decades. The Antiquities Act authorizes the President, "in his discretion," to establish as national monuments "objects of historic or scientific **[**9]** 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 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 helpful to look to the creation of the Act and how it has been used and interpreted since its creation in 1906.

[10]** The original purpose of the proposed Act was to protect objects of antiquity.³ 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 archaeologi-

² The full text of the Act reads as follows:

HN2 The President of the United States is authorized, in his discretion, to declare by public proclamation historic land marks, 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).

³ 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 interpreting its precise meaning, however, courts have disagreed with the adequacy of the phrase. See e.g., U.S. v. Diaz, 499 F.2d 113, 114 5 (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).

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cal organizations' proposals was limited to preservation of antiquities on federal lands, the United States Department of the Interior 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).

[**11] 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 essentially allowed the Department of the Interior's proposal, which Congress had previously rejected, to be included in the final bill. In addition, while earlier 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, there is some support for

the proposition that Congress intended to limit the creation of national monuments to small land areas surrounding specific objects. Illustrative of this intent is House Report No. 2224, which states "there are scattered throughout the southwest quite a large number of very interesting ruins ... the 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 [**12] CONGRESS, 1ST SESS. at 1 (1906).

Despite what may have been the intent of some members of Congress, use of the Antiquities Act has clearly expanded beyond the protection of antiquities and [**1179] "small reservations" of "interesting ruins." Nothing in the language of the Act specifically authorizes the creation of national monuments for scenic purposes or for general conservation purposes. Nonetheless, several presidents have used 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.⁴

⁴ The national monuments created by President Theodore Roosevelt:

9/24/06 Devils Tower, WY

12/8/06 El Morro, NM

12/8/06 Montezuma Castle, AZ

12/8/06 Petrified Forest, AZ

3/11/07 Chaco Canyon, NM

5/6/07 Cinder Cone, CA

5/6/07 Lassen Peak, CA

11/16/07 Gila Cliff Dwellings, NM

12/19/07 Tonto, AZ

1/9/08 Muir Woods, CA

1/11/08 Grand Canyon, AZ

1/16/08 Pinnacles, CA

2/7/08 Jewel Cave, SD

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[**13] Several monuments have been created within the general vicinity of the Grand Staircase Monument. In Utah alone, there are six such 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, archaeological, and other features similar to those in the Grand Staircase Monument proclamation. Zion National Park to the west of the Grand Staircase Monument was originally Mukuntuweap National Monument, created by President Taft in 1909 to protect its "many natural features of unusual archaeological, geologic, and geographic interest." See Proclamation No. 877, 36 Stat. 2498. President Wilson enlarged the boundaries of the monument in 1918 and Congress converted it to a national park in 1919.

President Hoover established Utah's Arches National Monument to the northeast of the Grand Staircase Monument in 1929, citing its "unique wind-worn sandstone formation, the preservation of which is desirable because of their educational and scenic value." Proclamation [**14] No. 1875, 46 Stat. 2988. Congress designated Arches a National Park in 1971. President Franklin D. Roosevelt established Utah's Cedar Breaks National Monument, located west of the Grand Staircase Monument, in 1933 (Proclamation No. 2054, 48 stat. 1705.), and Capital Reef National Monument, which is located to the immediate east of the Grand Staircase Monument, in 1938. (Proclamation No. 2246, 50 Stat. 1856.)

Coincidentally, during the 1930s, the Franklin D. Roosevelt administration considered the creation of a monument in virtually the same area as the Grand Staircase Monument. Presi-

dent Roosevelt received a recommendation to withdraw 4.4 million acres of Utah's red rock country, creating Escalante National Monument. The Roosevelt administration ultimately 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 uncontroversial. However, there have been several legal challenges to presidential monument designations under the Antiquities Act. Every challenge to date has been unsuccessful. [**15] See *Cameron* [**1180] v. *United States*, 252 U.S. 450, 64 L. Ed. 659, 40 S. Ct. 410 (1920) (the President's designation of the Grand Canyon as a national monument was a valid use of his authority under the Antiquities Act); *Wyoming v. Franke*, 58 F. Supp. 890 (D.Wyo.1945) (the proclamation creating the Jackson Hole National Monument complied with the standards set forth in the *Antiquities Act*); *Capaert v. United States*, 426 U.S. 128, 48 L. Ed. 2d 523, 96 S. Ct. 2062 (1976) (presidential proclamation withdrawing the Devil's Hole tract of land and accompanying water from the public domain and combining it with the Death Valley National Monument, explicitly reserved water rights to the federal Government and constituted a valid exercise of presidential authority under the Antiquities Act); *Anaconda Copper Co. v. Andrus*, No. A79-101 (D. Alaska, 1980); *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978) (president not subject to requirements of National Environmental Policy Act when proclaiming national monuments under the Antiquities Act).

2. THE WILDERNESS ACT

Also relevant to the present motions is the Wil-

4/16/08 Natural Bridges, UT

5/11/08 Lewis and Clark Cavern, MT

9/15/08 Tumacacori, AZ

12/7/08 Wheeler, CO

3/2/09 Mount Olympus, WA

derness Act, 16 U.S.C. §§ 1131-36(1964).

[**16] The Wilderness Act, signed into law in 1964, was intended to preserve the undeveloped character of designated areas. Prior to 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 and perhaps that some were receiving too much, Congress created a means by which a system of wilderness could be created that would provide the appropriate safeguards and that designated Congress alone as the final arbiter of which federal lands would actually achieve status as wilderness areas. See Leann Foster, *Wildlands and System Values: Our Legal Accountability to Wilderness*, 22 VT. L. REV. 917, 921-22 (1998).

HN3 The Wilderness Act directed the Secretary of Agriculture and the Secretary of the Interior to review certain lands within their jurisdictions and make recommendations as to their suitability for wilderness classification. See *id.* § 1132 (d)(1). The areas to be studied were identified as Wilderness [**17] 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 FLPMA, 43 U.S.C. § 1782. The BLM would then make a recommendation to the President, who in turn would recommend to Congress whether any of the WSAs should be designated as wilderness. Until such designation occurs, the administering agency is to manage the WSAs so as not to impair their suitability for possible wilderness classification by Congress. See 16 U.S.C. § 1133. Once an area receives actual wilderness status, commercial enterprises, roads, motorized equipment, mining, and oil and gas leasing are prohibited in the wilderness area. See *id.*

Approximately 900,000 acres, roughly one-half of the acreage within the Grand Staircase Monument, are classified as WSAs and therefore preserved for suitability for possible future

preservation as wilderness. Congress has not made a final determination with regard to the WSAs within the Grand Staircase Monument.

3. EVENTS LEADING TO THE GRAND STAIRCASE PROCLAMATION

From 1978 to 1991, the BLM conducted various studies which resulted in [**18] a recommendation that 1.9 million acres of WSAs in the state of Utah should receive wilderness designation. This recommendation, [**181] which included some of the land now part of the Grand Staircase Monument, was forwarded by then Secretary of the Interior Manuel Lujan to President George H. W. 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 in 1992 ended discussion about the proposed designation.

Regarding Utah wilderness, the new Secretary of the Interior, Bruce Babbitt, disagreed with the recommendations of his predecessor, believing significantly more land should be set aside. In 1994, then BLM Director Jim Baca wrote to an environmental group stating that the 1.9 million acre wilderness recommendation made by former Interior Secretary Lujan was "off the table." However, Secretary Babbitt's ability to undertake a new wilderness study pursuant to Section 603 of FLPMA had expired. Nevertheless, Secretary Babbitt testified before Congress on several occasions, urging that a considerable number of additional wilderness areas should be designated in Utah. [**19] 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, which was essentially the same as the previous recommendation from former Secretary Lujan. Also under 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 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 bill warranted passage. This Utah Wilderness Review included the evaluation of the wilderness characteristics of approximately 800,000 acres of public land now part of the Grand Staircase Monument. Eventually, however, Secretary Babbitt's efforts, along with all other efforts made by those in Congress to establish wilderness in the state of Utah, were unsuccessful.

Plaintiffs contend **[**20]** in this litigation that the lack of success in the effort to designate additional wilderness areas in Utah was a motivating factor behind the President's decision to designate the Grand Staircase Monument. Once the proclamation was announced the affected land was preserved in much the same manner as if it had received wilderness designation.

Plaintiffs assert, and the record appears to support, that another driving force behind Secretary Babbitt's, the DOI's, and eventually the President's efforts to create the Grand Staircase Monument was to prevent the proposed Andalex Smoky Hollow coal mining operation in Kane County, Utah from coming to fruition.⁵ 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 **[*1182]** 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 was originally granted to allow Andalex sufficient time to secure mining permits and complete preparation of an EIS. **[**21]**

From the exhibits submitted by plaintiffs, the majority of which were secured by congressional subpoena, it appears that in early 1996, efforts involving various officials within the executive branch of government began discussing the possibility of creating a national monument in Utah by way of a presidential proclamation. Internal memoranda indicate that as early as March 1996, the DOI requested that CEQ or White **[**22]** House officials send a letter to Secretary Babbitt under the President's signature requesting an investigation and recommendations for a Utah national monument. Plaintiffs assert that the reasoning behind the request was to enable defendants to avoid having to comply with NEPA and FLPMA, because the President is not a federal agency and not subject to either NEPA or 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 **[**23]** been challenged, they have never been struck down, however. so, letter needs to be signed asap so that secy has what looks

⁵ 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 are 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.

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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 such letter was sent to Secretary Babbitt.

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. Some of the reasons for creating Grand Staircase Monument focused on the proposed Smoky Hollow coal mine and contentions that the mine would irreversibly damage the environment and Utah's public lands. These contentions, plaintiffs allege, were contradicted by the BLM's draft EIS.

Following this history, the Proclamation itself took place on September 18, 1996, when [**24] President Clinton stood at the south rim of the Grand Canyon in Arizona and announced the establishment of the 1.7 million acre Utah monument. There was virtually no advance consultation with Utah's federal or state officials, which may explain the decision to make the announcement in Arizona. The monument created a good deal of controversy, heightened even more because the presidential election was less than 8 weeks away. In making the announcement, President Clinton emphasized his "concern[] about a large [**1183] 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).

In the written 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 [**25] 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 "most of the ecological communities contained in the monument have low resistance to, and slow recovery from, disturbance." *Id.*

The President's Proclamation [**26] designating the monument required that the BLM prepare an approved Monument Management Plan no later than September 18, 1999. The approved Management Plan did not make the September deadline, but was finally approved on February 28, 2000. Since approval of the Monument Management Plan the BLM has been responsible for management of the Grand Staircase Monument.

4. SUMMARY OF OPINION

The record is undisputed that the President of the United States used his authority under the Antiquities Act to designate the Grand Staircase Monument. The record is also undisputed

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that in doing so the President complied with the Antiquities Act's two requirements, 1) designating, in his discretion, objects of scientific or historic value, and 2) setting aside, in his discretion, the smallest area necessary to protect the objects. With little additional discussion, these facts compel a finding in favor of the President's actions in creating the monument. That is essentially the end of the legal analysis. Clearly established Supreme Court precedent instructs that the Court's judicial review in these circumstances is at best limited to ascertaining that the President in fact invoked his powers [**27] under the Antiquities Act. Beyond such a facial review the Court is not permitted to go. *Dalton v. Specter*, 511 U.S. 462, 128 L. Ed. 2d 497, 114 S. Ct. 1719 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992).

HN4 When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion. See *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371, 84 L. Ed. 1259, 60 S. Ct. 944 (1940). To do so would impermissibly replace the [**1184] President's discretion with that of the judiciary.

HN5 This Court has the authority to review whether the President's actions violated the United States Constitution or another federal statute, such as the Wilderness Act. See *Franklin v. Massachusetts*, 505 U.S. at 801; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863, 62 Ohio Law Abs. 417 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 79 L. Ed. 446, 55 S. Ct. 241 (1935); and *Chamber of Commerce v. Reich*, 316 U.S. App. D.C. 61, 74 F.3d 1322, 1327 (D.C. Cir. 1996). In the present case plaintiffs' constitutional and statutory [**28] claims are without factual or legal support. **HN6** Congress clearly had the authority to pass the Antiquities Act of 1906. It is a proper constitutional grant of authority to the President. The Act itself, and the President's designations pursuant to the Act, are not inconsistent with the *Constitution's Property Clause*, Spending Clause, or the delegation doctrine; nor

is the President's Proclamation in violation of the Wilderness Act or any other federal statute. No statute passed after the Antiquities Act has repealed or amended the Antiquities Act. It stands as valid law. Only Congress has the power to change or revoke the *Antiquities Act's* grant of virtually unlimited discretion to the President.

As for plaintiffs' myriad claims based on NEPA, FLPMA, FACA and the Anti-Deficiency Act, they too are of no merit. These statutes do not provide for a private right of action. The only way parties such as the plaintiffs here may complain of a violation of these statutes is through the *Administrative Procedure Act (APA)*, which requires a finding of final agency action. Here, there is no such final agency action. The President is not an agency, and the record is undisputed that the actions of [**29] the other defendants were only assisting the President in the execution of his discretion under the Antiquities Act.

Plaintiffs' claim that the President's designation of the Grand Staircase Monument violates the Wilderness Act is unavailing. Although a significant percentage of the land in the Grand Staircase Monument may qualify as wilderness under the Wilderness Act, the President did not designate wilderness; he designated a national monument. While the Antiquities Act and the Wilderness Act in certain respects may provide overlapping sources of protection, such overlap is neither novel nor illegal, and in no way renders the President's actions invalid.

HN7 Executive Order 10355, adopted by the Executive Branch in 1952, did not eliminate the President's withdrawal authority under the Antiquities Act. **HN8** The President has no law-making authority. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 587. The use of executive orders may be employed by the President in carrying out his constitutional obligation to see that the laws are faithfully executed and to delegate certain of his duties to other executive branch officials, but an executive order cannot impose legal [**30] requirements on the executive branch that are inconsistent with the express will of Congress. **HN9** Executive Or-

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der 10355 by its express terms does not eliminate the President's authority, as granted specifically to the President by Congress.

Furthermore, by specifically exempting the Antiquities Act from the reach of FLPMA in 1976, for example, Congress reaffirmed that the Antiquities Act was to continue to not be subjected to requirements that must be followed by lower-level executive officials. Whatever else may be said about the possible reach of Executive Order 10355, it is undisputed that since its passage in 1952 there have been 20 presidential proclamations creating national monuments and none have transferred the exercise of withdrawal authority to the Secretary of the Interior.

[*1185] B. DISCUSSION

1. JUDICIAL REVIEW⁶

[**31] Plaintiffs seek a searching review by this court of the President's actions in creating the Grand Staircase Monument. Both plaintiffs claim the proclamation was *ultra vires* and unconstitutional. MSLF seeks a further determination that the President abused his discretion, asking in particular for a finding that the President violated the Antiquities Act by a) not properly designating objects of scientific or historic value, b) setting aside too much property, and c) using the Act for improper purposes, such as stopping a local coal mining operation and improperly creating wilderness

areas. In conducting such a sweeping judicial review, the plaintiffs seek an interpretation of the Antiquities Act that requires a comprehensive examination of the Act's legislative history. The extensive judicial review sought by the plaintiffs is, however, not available in this case.

HN10 While there has been some debate among the United States Supreme Court justices as to whether judicial review of executive actions by the President are subject to judicial review at all,⁷ recent judgments have indicated the Court's willingness to engage in a narrowly circumscribed form of judicial review. This willingness [*32] does not, however, allow judicial review of sufficient scope to assist plaintiffs' cause; long-standing United States Supreme Court precedent has clearly foreclosed the broad review for which plaintiffs contend:

HN11 "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts." For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains.

⁶ With respect to the issue of standing to sue, the United States concedes that UAC has standing, but insists MSLF does not. The requirements for an initial showing sufficient to support standing in a case of this nature are relatively lenient, as set forth in *Utah v. Babbitt*, 137 F.3d 1193, (10th Cir. 1998), *Colorado Environmental Coalition v. Wenker*, 353 F.3d 1221 (10th Cir. 2004) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Given this relatively light burden at the present stage of the instant case and recognizing that many of the claims of UAC and MSLF are identical or similar, and in the interest of judicial economy the Court will not further address the standing question in this Opinion. While not expressly finding that MSLF has standing to sue, the Court will address all of the parties' claims, including those advanced solely by MSLF.

⁷ Justice Scalia's concurrence in *Franklin v. Massachusetts* articulates the most restrictive approach possible to the question of whether judicial review of the President's actions is permissible:

I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court.

505 U.S. 788, 827, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992). In this formulation, presidential action can be reviewed by seeking an injunction against those bound to enforce a President's directive, but the possibility of direct judicial review of the President's decision, for which plaintiffs contend, is eliminated altogether as inconsistent with "the constitutional tradition of the separation of powers." *Id.* at 828.

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United States v. George S. Bush & Co., 310 U.S. 371, 380, 84 L. Ed. 1259, 60 S. Ct. 944 (1940) (quoting Martin v. Mott, 25 U.S. 19, 12 Wheat. 19, 31-32, 6 L. Ed. 537 (1827)). **HN12** A grant of discretion to the President to make particular judgments forecloses judicial review of the substance of those judgments altogether:

[*1186] Where a claim "concerns not a want of [Presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. [****33**] This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

Dalton v. Specter, 511 U.S. 462, 474, 128 L. Ed. 2d 497, 114 S. Ct. 1719 (1994) (quoting Dakota Central Telephone Co. v. South Dakota ex rel. Payne, 250 U.S. 163, 184, 63 L. Ed. 910, 39 S. Ct. 507 (1919)).

[**34] If a Court may not review the President's judgment as to the existence of the facts on which his discretionary judgment is based, the holdings in *Dalton* and *George S. Bush* do leave open one avenue of judicial inquiry.

HN13 Although judicial review is not available to assess a particular exercise of presidential discretion, a Court may ensure that a president was in fact exercising the authority conferred by the act at issue. Thus, although this Court is without jurisdiction to second-guess the reasons underlying the President's designation of a particular monument, the Court may still inquire into whether the President, when designating this Monument, acted pursuant to the Antiquities Act.

The Antiquities Act offers two principles to guide the President in making a designation under the Act:

HN14 The President of the United States is authorized, in his discretion, to declare by public proclamation ... objects of historic or scientific interest ... 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.

[**35] 16 U.S.C. § 431. The Proclamation of which plaintiffs complain speaks in detail of the Monument's natural and archeological resources and indicates that the designated area is the smallest consistent with the protection of those resources. The language of the Proclamation clearly indicates that the President considered the principles that Congress required him to consider: he used his discretion in designating objects of scientific or historic value, and used his discretion in setting aside the smallest area necessary to protect those objects.

It is evident from the language of the Proclamation that the President exercised the discretion lawfully delegated to him by Congress under the Antiquities Act, and that finding demarcates the outer limit of judicial review. Whether the President's designation best fulfilled the general congressional intention embodied in the Antiquities Act is not a matter for judicial inquiry. This Court declines plaintiffs' invitation to substitute its judgment for that of the President, particularly in an arena in which the congressional intent most clearly manifest is an intention to delegate decision-making to the sound discretion [****36**] of the President.⁸

⁸ Plaintiffs devote considerable space in their Memorandum in Support of their Motion for Summary Judgment to a discussion of congressional intent and the evidence for it. According to plaintiffs, the legislative history surrounding the passage of the Antiquities Act demonstrates that Congress intended the Act be used to protect man made objects only, and was not intended to be avail

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[**37] [*1187] Even if broad judicial review of the exercise of the President's discretion is not available, plaintiffs still contend that the procedure which led to the designation fell so far afoul of the requirements of the National Environmental Policy Act (NEPA) as to warrant strip-mining the Monument. Plaintiffs contend that defendants conspired to violate the requirements of NEPA by (nefariously) creating a deceptive paper trail suggesting that it was the President, rather than the DOI, who provided the impetus to create the Grand Staircase Monument. In plaintiffs' formulation of the law, the *sine qua non* of a valid exercise of the President's discretion under the Antiquities Act is that the President proposed the idea to the DOI; the source of the inspiration for the monument determines whether NEPA and the Administrative Procedures Act (APA) are invoked:

Although Defendant Gale Norton and the Department of the Interior are required to implement NEPA, defendants correctly assert that presiden-

tial actions under the Antiquities Act are not subject to the requirements of NEPA. It is for this reason that it was essential to [*1188] Defendants to make it appear that the request for consideration [**38] of a national monument in Utah came from the President rather than originating, as it did, within the agencies.

(Plaintiffs' Combined Memo ISO Summary Judgment and Opp. Defendants' Motions to Dismiss or for Summary Judgment) (internal citations omitted). If plaintiffs' theory were correct, its evidence that the idea for the Grand Staircase Monument did not originate with the President would be relevant and perhaps sufficient to defeat a motion for summary judgment. Plaintiffs' brief is innocent of any legal authority, however, that would connect the premises that the DOI's final actions are subject to NEPA while the President's actions under the Antiquities Act are not, with the conclusion that it is es-

able as a means for furthering presidential environmental agendas. (Plaintiffs' Combined Memo at 17 *et seq.*) Excerpts from floor debates before the Act's passage are also enlisted to prove that the Act was only intended to allow the President to with draw very small plots of land to protect the man made artifacts suitable for designation. *Id.* at 18. This discussion, while no doubt of interest to the historian, is irrelevant to the legal questions before the Court, since *HN15* the plain language of the Antiquities Act empowers the President to set aside "objects of historic or scientific interest." 16 U.S.C. § 431. The Act does not require that the objects so designated be made by man, and its strictures concerning the size of the area set aside are satisfied when the President declares that he has designated the smallest area compatible with the designated objects' protection. There is no occasion for this Court to determine whether the plaintiffs' interpretation of the congressional debates they quote is correct, since *HN16* a court generally has recourse to congressional intent in the interpretation of a statute only when the language of a statute is ambiguous. See *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 135, 116 L. Ed. 2d 496, 112 S. Ct. 515 (1991). ("The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed") (citations omitted).

In addition to the plain language of the statute, there is plain language on which this Court may rely in several United States Supreme Court decisions upholding particular designations of natural objects as national monuments under the Antiquities Act. In *Cameron v. United States* the Court quoted from the proclamation in which President Theodore Roosevelt designated the Grand Canyon: "The Grand Canyon, as stated in the Proclamation, 'is an object of unusual scientific interest.'" 252 U.S. 450, 455, 64 L. Ed. 659, 40 S. Ct. 410 (1920). Far from indicating that only man made objects are suitable for designation, *Cameron* notes approvingly that the Canyon "affords an unexampled field for geologic study [and] is regarded as one of the great natural wonders." *Id.* at 456. The Court in *Cappaert v. United States* explicitly rejected the argument offered by the Plaintiffs before this Court: "Petitioners ... argue ... [that] the President may reserve federal lands only to protect archeologic sites. However, the language of the Act which authorizes the President to [designate] national monuments ... is not so limited. 426 U.S. 128, 142, 48 L. Ed. 2d 523, 96 S. Ct. 2062 (1976). In *Cappaert* the Court upheld a designation of a pool inhabited by "a peculiar race of desert fish ... found nowhere else in the world." *Id.* at 133. The Court has also upheld a designation of islands notable for "fossils ... and ... noteworthy examples of ancient volcanism, deposition, and active sea erosion," rather than for human artifacts. *United States v. California* 436 U.S. 32, 34, 56 L. Ed. 2d 94, 98 S. Ct. 1662 (1978).

United States v. California addresses not only the President's discretion to designate natural objects but the geographic scope of that discretion as well. Determining whether a designation had reserved only protruding rocks and islets or submerged lands and waters adjacent to them as well is "a question only of Presidential intent, not of Presidential power." *Id.* at 36. In light of this unambiguous United States Supreme Court precedent concerning the Antiquities Act, plaintiffs' reliance on legislative history is clearly misplaced, and their arguments regarding the objects and area of designation untenable.

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sential for the idea of a monument to have come from the President. Plaintiffs and defendants are correct that the requirements of NEPA do not apply to the exercise of presidential discretion under the Antiquities Act. To the extent that DOI takes action that could be characterized as final agency action for the purposes of the APA, Plaintiffs are also correct that the requirements of NEPA apply to DOI actions. However, plaintiffs do not cite any legal authority, nor is the Court [****39**] aware of any, which suggests that these considerations affect the exercise of presidential authority pursuant to the Antiquities Act.⁹ Plaintiffs err in importing a requirement of presidential inspiration into the Antiquities Act's grant of authority to the President.

[****40**] Since the Antiquities Act is silent as to whether there are limitations on the sources from which the President may draw the inspiration to act, if such a limitation exists it must be found in other statutory provisions, the Constitution, or in the common law. Although Plaintiffs have directed the Court to no statutory authority to suggest that NEPA has any application to the President's actions in this case, it is reasonable to look to NEPA for the source of the requirements for which plaintiffs contend. NEPA cannot be the end of the inquiry, however, for *HNI7* NEPA supplies no private right of action. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990). If an agency to which NEPA applies has violated its requirements, an aggrieved party must bring its complaint within the mechanism supplied by the APA. The APA permits judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. In order for a violation of NEPA to be redressable at law, there-

fore, the violation of which a plaintiff complains must form an element of a final agency action subject to judicial review under [****41**] the APA.

While the United States Supreme Court has not ruled on the precise question whether an agency's recommendation to the President that he designate a particular monument under the Antiquities Act constitutes final agency action subject to judicial review under the APA, there is good law suggesting the contrary. *HNI8* In order [****1189**] for an agency's action to have that degree of finality that is amenable to judicial review under the APA, it must have some immediate effect beyond that of a recommendation: the action is final agency action only when the agency's action itself "has a direct effect on the day-to-day business" of the persons or entities affected by the action. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967).

HNI9 That an agency is incapable of taking "final agency action" in a particular set of circumstances can serve to insulate the agency's preliminary actions (resulting in final *presidential* action) from judicial review under the APA. The United States Supreme Court, in *Franklin v. Massachusetts*, analyzed the President's role in communicating the results of the census to Congress for the purpose of reapportioning seats in the [****42**] House of Representatives. 505 U.S. 788 (1992). The statutory scheme at issue required the Secretary of Commerce to communicate the results of the census to the President, who then transmitted those results to Congress. 2 U.S.C. §§ 2a(a); 141(b). The fact that the statute *requires* the President to perform only ministerial functions, such as making apportionment calculations according to set formulae, does not transform the Secretary's action in carrying out the census into final agency action for the purposes of review

⁹ Plaintiffs' best and only case for the requirement that the idea for a monument originate with the President rather than the DOI is a series of emails and letters generated by personnel within the DOI and the CEQ. (Combined Memo ISO Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Motions to Dismiss or for Summary Judgment at 37 *et seq.*) At best, Plaintiffs have demonstrated that employees within these agencies believed that the idea for the Monument should appear to originate with the President. The machinations of a few agency employees, and the motivations that animated them, however, cannot take the place of some legal authority supporting the plaintiffs' proposition that the President cannot validly exercise his authority under the Antiquities Act unless the idea for a particular monument originates with him.

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under the APA. Because the statute did not require the President to use the data from the Secretary's report, and because the President is not precluded from directing the Secretary to amend or correct the report, it is the President's actions, and not those of the Secretary, that effect changes to apportionment. *Franklin*, 505 U.S. at 797-9.

HN20 Central to the determination whether there exists final agency action subject to review under the APA is the question "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.* at 797. **[**43]** When the statute does not permit the agency to act alone, but rather requires presidential action before there is any direct effect on the parties, "there is no determinate agency action to challenge" until the President acts. *Id.* at 799. Even when the presidential action authorized by statute permits the exercise of only limited discretion, and the President will almost certainly rely quite heavily on agency recommendations, the fact that presidential action is required before there will be any effect eliminates the prospect of judicial review under the APA.¹⁰

[44]** **HN22** Flaws in an agency process leading to a recommendation to the President, that in turn leads to presidential action, do not convert the action of the agency, or that of the President, into action subject to judicial review under the APA. In *Dalton v. Specter* the United States Supreme Court reiterated the rule that a process leading to a recommendation, which the President could then choose to accept or reject, even if flawed, did not permit of judicial review pursuant to the APA, since the recommendation did not constitute final agency action. *511 U.S. 462, 469-70, 128 L. Ed. 2d 497, 114 S. Ct. 1719* ("The action that 'will directly affect' the military **[*1190]** bases is taken by the President ... Accordingly, the Secretary's and Commission's reports serve

'more like a tentative recommendation than a final and binding determination ... The reports are, 'like the ruling of a subordinate official, not final and therefore not subject to review'") (citations omitted).

HN23 That an agency's process may have been flawed is not only irrelevant for purposes of review under the APA, it is also powerless to transform a presidential action based on a flawed agency recommendation into a violation of a statute conferring presidential **[**45]** discretion. The Court in *Dalton* conceded, *arguendo*, the proposition that judicial review might be available outside the APA for some claims that a President exceeded the authority given by some statutes, but "longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President." *511 U.S. 462, 474, 128 L. Ed. 2d 497, 114 S. Ct. 1719*. While recognizing that some agency processes leading to presidential action are insulated from judicial review by the combination of an absence of final agency action and a grant of discretion to the President, the Court observed that it best fulfils its own constitutional mandate by "withholding judicial relief where Congress has permissibly foreclosed it." *Id.* at 477. **HN24** Confronted by a statute expressly conferring discretion on the President to make precisely the sort of decision he made in designating the Grand Staircase Monument, this Court must conclude that "how the President chooses to exercise the discretion Congress has granted him is not a matter for [judicial] review." *Id.* at 476.

Assuming that plaintiffs are correct, that the original idea for **[**46]** the Monument was entirely the creature of the DOI, the actions of the DOI had no direct and immediate impact on the plaintiffs. It was the President's action, and not the action of the DOI, that had the legal effect of creating the Monument, and the DOI's activities therefore do not constitute fi-

¹⁰ **HN21** The Supreme Court summarily dismisses the possibility that the President is an agency within the meaning of the APA. Although the definition of agency in the APA does not explicitly exclude the President, "textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Franklin*, 505 U.S. at 800 801.

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nal agency action reviewable under the APA.

2. CONSTITUTIONAL CLAIMS

In contrast to the limited judicial review discussed above, judicial review to determine the constitutionality of a President's acts may be appropriate. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863, 62 Ohio Law Abs. 417 (1944); *Franklin v. Massachusetts*, 505 U.S. at 801^{HN25} ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements. Although the President's actions may still be reviewed for constitutionality"). Plaintiffs raise three constitutional claims in this case. First, they assert that the Antiquities Act itself is unconstitutional in violation of the delegation doctrine. In addition they claim that even if the Antiquities Act is **[**47]** constitutional the manner in which it was utilized in creating the Grand Staircase Monument violated the *Property Clause* and the Spending Clause.

A. Delegation Doctrine and *Property Clause*

Plaintiffs contend that Congress violated both the delegation doctrine (or perhaps more accurately, the non-delegation doctrine) and the *Property Clause* by giving the President, under the Antiquities Act, virtually unfettered discretion to regulate and make rules concerning federal property. Neither contention has merit. ^{HN26} While it is true that Congress has the express authority under the *Constitution's Property Clause* to "dispose of and make all needful Rules and Regulations respecting **[*1191]** the Territory or other Property belonging to the United States," it is equally true that Congress may delegate this authority as it deems appropriate. *Yakus v. United States*, 321 U.S. 414, 88 L. Ed. 834, 64 S. Ct. 660 (1944), and any delegation is constitutionally permissible if Congress provides "standards to guide the au-

thorized action such that one reviewing the action could recognize whether the will of Congress has been obeyed." See *Id.* at 425-26.¹¹ ^{HN27} The Antiquities Act sets **[**48]** forth clear standards and limitations. The Act describes the types of objects that can be included in national monuments and a limitation on the size of monuments. See *16 U.S.C. § 431*. Although the standards are general, "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby v. United States*, 500 U.S. 160, 165, 114 L. Ed. 2d 219, 111 S. Ct. 1752 (1991). Accordingly, the non-delegation doctrine is not violated, nor is the *Property Clause*, which has repeatedly been construed as allowing Congress to delegate its authority to the executive and judicial branches, including the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *U.S. Const. Art. IV, § 3, cl. 2*. See also *Tulare County v. Bush*, 353 U.S. App. D.C. 312, 306 F.3d 1138 (D.C.Cir. 2002); *Mountain States Legal Foundation v. Bush*, 353 U.S. App. D.C. 306, 306 F.3d 1132 (D.C.Cir.2002); *U.S. v. Garfield County*, 122 F. Supp.2d 1201 (D.Utah, 2000).

[49]** B. Spending Clause

Plaintiffs contend that the Grand Staircase Monument included privately owned land, the acquisition of which required the expenditure of federal monies. This claim is without merit. ^{HN28} The Antiquities Act requires the President to reserve objects of historic or scientific interest that are situated upon lands owned or controlled by the government of the United States. *16 U.S.C. § 431*. The President's Proclamation creating the Grand Staircase Monument clearly distinguishes between land owned or controlled by the Government of the United States and land privately owned or controlled. The Proclamation points out that in cre-

¹¹ The Courts have upheld virtually every congressional delegation of authority made by Congress for the last 100 years. In fact, there have only been two occasions in the 20th and 21st centuries where congressional delegations of authority were deemed unconstitutional. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935).

ating the Grand Staircase Monument the President solely withdrew lands owned or controlled by the United States Government. (Proclamation, A75) With respect to privately owned or controlled lands the Proclamation provides that "Lands and interests in lands not owned by the United States shall be reserved as a part of the monument upon acquisition of title thereto by the United States." (Proclamation, A75). The Proclamation clearly indicates that land privately owned or controlled does not pertain to the Monument, but also **[**50]** designates that such private land may become part of the Monument if it is acquired by future action. Nothing in the Proclamation or in the record supports plaintiffs' contention that federal monies were expended to acquire private land. Furthermore, plaintiffs have failed to allege any facts supporting their contention. The Court finds no violation of the Spending Clause.

[*1192] 3. STATUTORY CLAIMS:

A. Wilderness Act

The land within the Grand Staircase Monument amounts to approximately 1.7 million acres. This land, withdrawn by President Clinton, constitutes what he believed to be the requisite amount of land necessary to preserve the designated scientific and historic objects. The withdrawal, according to plaintiffs, constitutes a violation of the Wilderness Act because the President created *de facto* wilderness, which is a power reserved solely to Congress. Plaintiffs' arguments are without merit, finding no support in the language of either the Wilderness Act or the Antiquities Act, or in the case law. In fact, recent case law is to the contrary; in Mt. States Legal Found. v. Bush, 353 U.S. App. D.C. 306, 306 F.3d 1132 (D.C. Cir.2002), the D.C. Circuit Court of Appeals rejected **[**51]** this same argument.

It is undisputed that the President's designation of the Grand Staircase Monument was made pursuant to his authority under the Antiquities Act. All of the land found within the boundaries of the Monument is part of the Monument, regardless whether it could also qualify

as wilderness. Though the Antiquities Act and the Wilderness Act may provide overlapping sources of protection to land that fits within the parameters of both acts, it is beyond dispute that the land reserved within the Grand Staircase Monument is not wilderness and has never been declared to be wilderness pursuant to the Wilderness Act. **HN29** The fact that some of the acreage within the boundaries of the Grand Staircase Monument is classified as Wilderness Study Areas does not preclude its inclusion in a national monument.

Statutory overlap is not unusual. Numerous statutes provide environmental protection to public land and it is not surprising that some of them overlap. In MSLF v. Bush, the D.C. Circuit Court of Appeals recognized several examples of this, observing that in addition to their other purposes, the Wilderness Act, Wilderness Act 16 U.S.C. §§ 1131-36 (2000), the Park Service **[**52]** Organic Act, 16 U.S.C. §§ 1-4 (2000), the National Forest Management Act of 1976, Pub.L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.) (2000), FLPMA, 43 U.S.C. § 1701, and the Multiple Use Sustained Yield Act, 16 U.S.C. §§ 528-29, 531 (2000), all protect scenic values, natural wonders, and wilderness values. See Bush, 306 F.3d at 1138. If overlapping sources of protection were not allowed, the Park Service Organic Act would be a repeat offender, as it protects not only wilderness simultaneously with the Wilderness Act, but it also protects endangered species in a manner similar to the Endangered Species Act. As the D.C. Circuit stated, "MSLF misconceives federal laws as not providing overlapping sources of protection." Id. at 1138.

Plaintiffs' argument would prevent a President of the United States from including within a national monument not only lands already declared by Congress as "wilderness," a contention which is itself dubious, but also all lands that have previously been classified as Wilderness Study Areas and included in unsuccessful wilderness proposals **[**53]** of some members of the public and some members of Congress. Plaintiffs' contention is contrary to the purpose of the Antiquities Act, which is to

identify and protect important scientific and historic objects and to set aside the necessary surrounding land to insure their continued protection. If plaintiffs' position were sound, a President would be prohibited from including within a national monument any land with the possibility of being declared wilderness, even though such land qualifies as 1) an object of historic or scientific value, or 2) land that must be set aside in order to protect designated objects. Such an outcome would effectively repeal the Antiquities Act in these circumstances, [*1193] and no such intent to repeal was expressed implicitly or explicitly by Congress in the Wilderness Act. Furthermore, if the land deemed necessary to be included within a national monument includes wilderness areas or Wilderness Study Areas, it appears likely that such lands would continue in their existing state with the attendant restrictions on use. Any other result would be in violation of the Wilderness Act; but nothing in either the or the Antiquities Act prevents such lands [**54] from being part of a national monument.

An underlying theme of plaintiffs' position is a belief that President Clinton and those of his political persuasion were able to (improperly) accomplish through the Antiquities Act what they had been unsuccessful in accomplishing through the Wilderness Act. The proponents of wilderness designation for approximately 900,000 acres of the federal land that ended up within the Grand Staircase Monument had earlier failed to persuade Congress to designate the land as wilderness. Thereafter, however, according to plaintiffs, they achieved most, if not all, of the protection they were seeking for this land when the President included the acreage within the Grand Staircase Monument. Plaintiffs feel this second, successful, effort at protecting the land was unlawful. But they can point to no law that was broken in creating the Grand Staircase Monument. The President unquestionably had the authority to do what he did under the Antiquities Act.

After briefing was closed in this case, the United States District Court for the District of Wyoming decided Wyoming v. U.S. Dept. of Agri., et al., 277 F. Supp.2d 1197

(D.Wyo.2003). Plaintiffs [**55] urge this Court to follow the reasoning in that case in which the Department of Agriculture's Roadless Rule was found to be in violation of the Wilderness Act. That case and the instant case, however, have one critical difference that makes the Wyoming case inapplicable here. Wyoming concerned a rule promulgated solely within and pursuant to the authority of an executive branch department, whereas this case concerns not the rule-making authority of a lower-level department, but of the President himself as specifically designated by an act of Congress. This distinction is critical.

The Wyoming case addressed the actions of the U.S. Forest Service and the Clinton Administration which culminated in the so-called "Roadless Rule" being entered as a Record of Decision by the Secretary of Agriculture on January 5, 2001. The Roadless Rule was put on a very fast track, beginning with a directive from President Clinton to the U.S. Forest Service on October 13, 1999, and ending with a fully completed (and NEPA mandated) agency review process only 15 months later. The Roadless Rule specifically prohibited road construction and other uses in inventoried roadless areas of the National [**56] Forest System, and by so doing created 58.5 million acres of what the district court referred to as *de facto* wilderness because the protection and treatment of the subject acreage was virtually indistinguishable from wilderness. In addition to finding that the hurried-up process violated NEPA, the district court found that the Roadless Rule violated the Wilderness Act. Central to this latter finding were two main points. First, as stated above, the Court recognized that the land in question was *de facto* wilderness because a) the land was the same as wilderness in its definition (i.e. "roadless area" is virtually synonymous with "wilderness area"); b) the land had the same use restrictions as wilderness; and c) the land was virtually identical to the land recommended (unsuccessfully) as wilderness by the 1977 RARE II inventory. Second, the district court recognized that one of the primary objectives of the 1964 Wilderness Act was to end the then-existing practice of executive

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[*1194] branch agencies, including notably the Forest Service, designating wilderness areas in their sole discretion and as they saw fit, with no direct authority from Congress. As the district court stated: [*57]

To this end, the Wilderness Act removed the Secretary of Agriculture's and the Forest Service's discretion to establish de facto administrative wilderness areas, a practice the executive branch had engaged in for over forty years. Instead, the Wilderness Act places the ultimate responsibility for wilderness designation on Congress. In this regard, the Wilderness Act functions as a "proceed slowly order" until Congress-- through the democratic process rather than by administrative fiat-- can strike the proper balance between multiple uses and preservation. (citations omitted). *Id.* at 1233.

The *Wyoming* court concluded its review of the Wilderness Act by stating "this statutory framework necessarily acts as a limitation on agency action." *Id.* at 1233. Notably, the district court did not say "a limitation on Presidential action," and certainly nothing in the *Wyoming* opinion suggests the court would have employed the same reasoning to the creation by the President of a national monument under the Antiquities Act.

If the instant case involved actions by the Secretary of the Interior, or the BLM, to use departmental or agency rule-making [*58] authority to protect federal lands that had previously failed to achieve wilderness status after having been identified as candidates for such status, and if the protection was virtually identical to the protection afforded wilderness, the outcome here might be the same as in *Wyoming*. But those are not the facts of this case and that is not the issue before this Court. Here the Court is faced with an entirely different question involving presidential action performed precisely as granted and directed by Congress.

B. NEPA, FLPMA, FACA and the Anti-Deficiency Act

HN30 When bringing a lawsuit for violation of statutory law parties must either find language in the statute itself which allows a private right of action, or demonstrate the occurrence of final agency action, which invokes the Court's authority to review the claim under the Administrative Procedure Act. If parties fail to meet these requirements they are precluded from challenging the alleged statutory violation. Plaintiffs allege that in his designation of the Grand Staircase Monument the President and the other defendants violated NEPA, FLPMA, FACA and the Anti-Deficiency Act. These statutes, however, provide no private [*59] right of action to an aggrieved party. See *Lujan*, 497 U.S. 871, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990) (no private right of action available under NEPA and FLPMA); *Judicial Watch, Inc. v. National Energy Policy Development Group*, 219 F. Supp.2d 20, (D.D.C., July 2002); (Federal Advisory Committee Act creates no private right of action); *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442 (Fed.Cir.1997) (no private right of action available under the Anti-Deficiency Act).

Because none of these statutes provide private rights of action the plaintiffs are left with the insurmountable task in this case of demonstrating final agency action to invoke review under the APA. As stated previously in this Opinion **HN31** the Supreme Court of the United States has declared that the President is not an agency and cannot be defined as such under the APA. See *Franklin v. Massachusetts*, 505 U.S. 788, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992); *Dalton v. Specter*, 511 U.S. 462, 128 L. Ed. 2d 497, 114 S. Ct. 1719 (1994); *Armstrong v. Bush*, 288 U.S. App. D.C. 38, 924 F.2d 282, 288 (D.C.Cir.1991). It follows that actions taken by the President pursuant to congressionally [*60] [*1195] delegated authority cannot be considered final agency action.

Also as discussed previously in this Opinion, (see pp. 23-28), plaintiffs' contention that the defendant lower-level executive branch offi-

cials' recommendations to the President constituted final agency action is also without merit. Recommendations and actions taken by the lower-level executive branch officials encouraging designation of the Grand Staircase Monument constituted nothing more than recommendations and assistance to the President and failed to meet the legal requirements for final agency action. See generally Franklin, 505 U.S. at 800. All decisions and actions constituting final action were made by the President in his official capacity. The ultimate decision to create the Grand Staircase Monument rested with, belonged to, and was made by, President Clinton.

C. Executive Order 10355

UAC next argues that the President's designation of the Grand Staircase Monument was invalid because it violated Executive Order 10355 (E.O. 10355). *HN32* E.O. 10355 was issued by President Harry S. Truman in 1952. It delegated to the Secretary of the Interior "the authority vested in the President by section [****61**] 1 of the act of June 25, 1910 [the Pickett Act], and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States ... for public purposes." *17 Fed. Reg. 4831 (May 26, 1952)*. The Secretary of the Interior was also authorized to "modify or revoke withdrawals and reservations of such lands hertofore or hereafter made." *Id.* The Order further directed that "all orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders and shall be submitted to the Division of the Federal Register for filing and for publication in the FEDERAL REGISTER." *Id.*

President Truman issued E.O. 10355 by virtue of section 301 of title 3 of the United States Code,¹² which *HN33* states that the President may delegate "any function which is vested

in the President by law" to an agency or department head. It also states "that nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions." 3 U.S.C. § 301. The President [****62**] must publish such authorization in the Federal Register, but he may place terms, conditions, and limitations on the use of the delegated authority, and he may revoke the delegation "in whole or in part" at any time. *Id.*

Plaintiffs contend that the phrase "authority otherwise vested in him" in E.O. 10355 include the authority to withdraw lands under the Antiquities Act and transfers the President's authority under that Act exclusively to the Secretary of the Interior. For this [****63**] argument to prevail, several prerequisites must have been fulfilled: 1) E.O. 10355 must have contemplated the transfer of the President's authority under the Antiquities Act, 2) the transfer must have been valid, that is, the underlying statute must allow such a transfer, 3) the transfer must have been complete, meaning that the President retained no authority under the Antiquities Act, and 4) E.O. 10355 must still be in [****1196**] force; i.e. it has not since been repealed or revoked. If any of these conditions has not been met, E.O. 10355 poses no restraint on the President's authority to designate a national monument under the Antiquities Act.

1. Delegation of Authority under the Antiquities Act

It is questionable whether E.O. 10355 ever delegated the authority granted to the President under the Antiquities Act. Although the language of the Order is general, to construe the Order as granting every withdrawal authority possessed by the President would, in the Court's view, be an overly broad interpretation. E.O. 10355 specifically delegates to the Secretary of the Interior the President's authority under the

¹² *HN34* 3 U.S.C. § 301 is a general authorization to delegate presidential functions. Both parties in this case seem to mistakenly believe that E.O. 10355 was issued pursuant to "statutory authority under the Pickett Act" and implied authority under the *Midwest Oil* doctrine. Although it delegated the withdrawal authority under the Pickett Act and the *Midwest Oil* doctrine, the authority to delegate those withdrawal powers came from 3 U.S.C. § 301, not from the withdrawal authority itself.

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Pickett Act as well as "the authority otherwise vested in [the President] [****64**] to withdraw and reserve lands ..." The broad, almost all-encompassing language of the Order presents an ambiguity and should be interpreted with reference to the entire Order. *See, In re Crowell*, 305 F.3d 474, 478 (6th Cir. 2002) **HN35** (administrative orders delegating authority to agency officials warrant the use of rules of construction similar to those used in statutory interpretation); *U.S. v. Brown*, 348 F.3d 1200, 1209 (10th Cir. 2003) (to determine the meaning of ambiguous language in regulations, a court should look for clues elsewhere in those regulations); *citing, Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1005 (10th Cir. 2001) (similar rule for statutory construction).

The defendants argue that "the authority otherwise vested in him" refers to the authority granted to the President under the *Midwest Oil* doctrine,¹³ which seems reasonable given that the authority under both the Pickett Act and the *Midwest Oil* doctrine are similar and related. This interpretation would also help explain why President Truman did not refer specifically to the Antiquities Act in delegating the

President's withdraw authority, a practice to which [****65**] he seemed accustomed. *See, e.g.,* Exec. Order No. 10250, *16 Fed. Reg. 5385 (June 5 1951)*, reprinted as amended in *3. U.S.C.A. § 301* at 849-51 (1997) (delegating functions to the Secretary of the Interior and specifying more than 15 statutes from which those functions were derived).

Moreover, **HN36** courts will generally give substantial deference to the President's or the applicable department's interpretation and use of an executive order. *See [****66**] e.g., Alaniz v. Office of Pers. Mgmt.*, 728 F.2d 1460, 1465 (Fed. Cir. 1984) ("it is recognized that an agency has presumed expertise in interpreting executive orders charged to its administration, and judicial review must accord great deference to the agency's interpretation"), *citing Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S. Ct. 792, 801-2, 13 L. Ed. 2d 616 (1965).¹⁴ Since E.O. 10355 [***1197**] was issued, land has been withdrawn on 20 different occasions to create national monuments.¹⁵ Each of these monuments was designated by the President. No national monument has been designated by the Secretary of

¹³ The *Midwest Oil* doctrine stems from the Supreme Court case *United States v. Midwest Oil Co.*, 236 U.S. 459, 59 L. Ed. 673, 35 S. Ct. 309 (1915). In *Midwest Oil*, President Theodore Roosevelt issued a special Order in anticipation of the Pickett Act withdrawing all public lands which were being used for petroleum exploration. The Order was challenged, but was upheld by the Court. The Court recognized that the President was not acting in a novel manner, but rather was following a precedent that had been set many years before by his predecessors.

¹⁴ *Udall* is particularly relevant to the present dispute. In *Udall*, the Supreme Court upheld the actions of the Secretary of Interior and deferred to the Secretary's interpretation of an executive order granting him authority to act. The Court's language is particularly helpful:

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order ... "It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in 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."

Udall, 380 U.S. at 16-17, 85 S. Ct. at 801-2, 13 L. Ed. 2d 616, quoting *Midwest Oil*, 236 U.S. at 472-3, 35 S. Ct. at 319, 59 L. Ed. 673.

¹⁵ Below is a list of national monuments designated pursuant to the Antiquities Act since E.O. 10355 was issued, along with the respective President who exercised the withdrawal authority.

Dwight D. Eisenhower

7/14/56 Edison Laboratory, NJ

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the Interior pursuant to E.O. 10355 since its enactment in 1952. Such action on the part of both the President and the Secretary of the Interior strongly indicates that neither interpreted E.O. 10355 to include the authority granted under the Antiquities Act. As a result, this Court will not imply such an interpretation.

2.Validity of a delegation of Antiquities Act Authority

Even assuming that E.O. 10355 originally contemplated within its language delegating the authority to withdraw land for designating national monuments, *HN37* "a President may only **[**68]** confer by Executive Order rights that Congress has authorized the President to confer." *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1375 (Fed. Cir. 2000). As the regulations implementing section 204 of FLPMA recognized, E.O. 10355 "conferr[ed]"

1/18/61 Chesapeake and Ohio Canal, MD WV

John F. Kennedy

5/11/61 Russell Cave, AL

12/28/61 Buck Island Reef, VI

Lyndon B. Johnson

1/20/69 Marble Canyon, AZ

Jimmy Carter

12/1/78 Admiralty Island, AK (Forest Service)

12/1/78 Aniakchak, AK

12/1/78 Becharof, AK

12/1/78 Bering Land Bridge, AK

12/1/78 Cape Krusenstern, AK

12/1/78 Denali, AK

12/1/78 Gates of the Arctic, AK

12/1/78 Kenai Fjords, AK

12/1/78 Kobuk Valley, AK

12/1/78 Lake Clark, AK

12/1/78 Misty Fjords, AK (Forest Service)

12/1/78 Noatak, AK

12/1/78 Wrangell St. Elias, AK

12/1/78 Yukon Charley, AK

12/1/78 Yukon Flats, AK

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on the Secretary of the Interior all of the *delegable* authority of the President..." 43 C.F.R. § 2300.0-3(a)(2)(2004)(emphasis added).

HN38 Although 3 U.S.C. § 301 authorizes the President to delegate "any function which is vested in [him] by law" to a department or agency head in the executive branch, delegation of the authority to designate national monuments seems inconsistent with the Antiquities Act itself. The Antiquities Act provides that "[t]he President ... is authorized, in his discretion, to [designate national monuments]." 16 U.S.C. § 431 (2000) (emphasis added). 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. **[**69]** Discretion is defined as "[a] public official's power or right to act in **[*1198]** certain circumstances according to personal judgment and conscience." BLACK'S LAW DICTIONARY 479 (7th ed. 1999). It is illogical to believe that the President can delegate his personal judgment and conscience to another.

Moreover, E.O. 10355 authorizes the Secretary of the Interior to "redelegate the authority delegated to him by this order to ... the Under Secretary of the Interior and [to] the Assistant Secretaries of the Interior." If the Court were to accept UAC's argument, the unfettered discretion¹⁶ of the President to withdraw public lands for national monuments could potentially

be vested in several individuals. Such a result is untenable and clearly beyond what Congress intended when passing the Antiquities Act.

[70]** This Court is persuaded that the President, and only the President, may designate National monuments under the Antiquities Act regardless whether President Truman intended to delegate this authority by means of E.O. 10355. The Court finds support for its interpretation in State of Alaska v. Carter, 462 F. Supp. 1155, 1159 (D. Alaska 1978) **HN40** ("The Antiquities Act authorizes the President 'in his discretion' to declare objects that have scientific interest, and are situated upon the public lands, to be national monuments. The Act authorizes only the President to declare these reservations and apparently this authority cannot be delegated." (citations omitted)).

3. Complete delegation of authority

UAC's reliance on E.O. 10355 also assumes that the delegation of authority was complete; that is, that the President relinquished all of his authority under the Antiquities Act to the Secretary of the Interior, forbidding any future action by the President himself pursuant to the Act. This interpretation is suspect where the language of E.O. 10355 does not specifically limit the President nor empower the Secretary of the Interior in such a manner. Additionally, history has **[**71]** shown that presidents after Harry S. Truman continued to designate national monuments using the authority granted by the Antiquities Act.

The Second Circuit faced a similar question in

¹⁶ **HN39** Although FLPMA imposes numerous requirements on the Secretary of the Interior when withdrawing land, the Antiquities Act was specifically exempted from the reach of FLPMA. In passing FLPMA, the House stated:

The main authority used by the Executive to make withdrawals is the 'implied' authority of the President recognized by the Supreme Court in U.S. v. Midwest Oil Co. (236 U.S. 459, 59 L. Ed. 673, 35 S. Ct. 309). The bill would repeal this authority and, with certain exceptions, all identified withdrawal authority granted to the President or the Secretary of the Interior. The exceptions, which are not repealed, are contained in the Antiquities Act (national monuments), Alaska Native Claims Settlement Act (native and public interest withdrawals), the Defense Withdrawal Act of 1958, and Taylor Grazing Act (grazing districts).

H.R. Rep. No. 94 1163, 94th Cong., 2d Sess. 5 (1976), reprinted in 1976 U.S.C.C.A.N. 6175, 6203.

Therefore, when the President is creating national monuments pursuant to the Antiquities Act, his discretion would be unquestioned by Congress. If E.O. 10355 did indeed delegate to the Secretary of the Interior the President's Antiquities Act authority, it

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Clarry v. United States, 85 F.3d 1041 (2d Cir. 1996). In *Clarry*, former air traffic controllers had been indefinitely barred by President Reagan from employment with the Federal Aviation Administration (FAA) and private entities that contracted with the FAA because of their participation in a strike against the United States. The President ordered the indefinite bar notwithstanding the regulations [*1199] promulgated by the Office of Personnel Management (OPM), which provided for only a three year ban. The regulations had been issued pursuant to authority delegated to the OPM by the President in two prior executive orders. The Second Circuit found that the President had not specifically delegated to the OPM his statutory authority "to prohibit the employment of individuals who have participated in a strike against the United States." *Id.* at 1048. Because there was no specific delegation, the executive orders did not constitute a complete delegation of the President's authority. [*72] Therefore, nothing prevented the President from implementing an indefinite employment bar pursuant to his statutory authority and notwithstanding regulations to the contrary. *Id.*

We are faced with a similar situation. UAC argues that the President may no longer use the authority granted to him under the Antiquities Act because of E.O. 10355. However, there is nothing in the language of the Order to indicate that, even if the authority to designate national monuments was delegated to the Secretary of the Interior - which the Court does not find - there was a complete delegation of authority. Without a specific reference to the Antiquities Act, and some indication that the President no longer intended to designate national monuments, this Court cannot conclude that E.O. 10355 constituted a complete delegation of the President's authority. On the contrary, the fact that Presidents continued to exercise Antiquities Act authority indicates that, even if E.O. 10355 was a valid delegation of authority, the authority to withdraw national monuments remained concurrently with the

President and did not solely reside with the Secretary of the Interior.

4. Revocation of E.O. 10355

[**73] In addition to the previous arguments, defendants contend that FLPMA implicitly repealed E.O. 10355, transferring all authority under the Antiquities Act, if it ever was delegated, back to the President. *HN41* "The test used to determine whether a statute has been repealed is also used for an executive order. A repeal may be explicit or implicit, [and] [t]he ultimate question is whether repeal of the prior statute [or order] was intended." *Mille Lacs Band of Chippewa Indians v. Minnesota Dep't of Natural Resources*, 861 F.Supp 784, 829 (D. Minn. 1994) citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-54, 48 L. Ed. 2d 540, 96 S. Ct. 1989 (1976).

HN42 Any delegation of authority pursuant to *3 U.S.C. § 301* is "revocable at any time by the President in whole or in part." Because Presidents continued to withdraw public land for national monuments after E.O. 10355 was issued, the logical conclusion is that any delegation of authority under the Antiquities Act that E.O. 10355 may have made was implicitly revoked. Such a revocation is well within the President's authority to partially revoke his own executive order.

HN43 Additionally, FLPMA and its attendant regulations also [*74] indicate that Congress intended to repeal any delegation authority to designate national monuments to the Secretary of the Interior. Through FLPMA, Congress specifically repealed the Pickett Act, the *Midwest Oil* doctrine and other Acts granting withdrawal authority to the President, thereby extinguishing Presidential authority to withdraw public lands in many circumstances. As a result, Congress also revoked any delegations of authority to other members of the Executive Branch related to the repeal of that authority. Notably, FLPMA specifically excludes the Antiquities Act from its reach and reaffirms the

stands to reason that FLPMA would remain inapplicable to the actions of the Secretary if the Secretary designated a national monument.

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President's authority to designate national monuments. Even more, the regulations seem to indicate that, even if the Secretary of the Interior previously enjoyed authority [*1200] to designate national monuments, that was no longer the case: "the Secretary of the Interior does not have authority to ... modify or revoke any withdrawal creating national monuments under the Act of June 8, 1906 (16 U.S.C. 431-433), sometimes referred to as the Antiquities Act." 43 C.F.R. § 2300.0-3(a)(1)(iii). Although the regulations go on to state that, [*75] by virtue of E.O. 10355, the Secretary still possesses all the delegable Presidential authority to "make, modify and revoke withdrawals and reservations with respect to lands of the public domain ...," 43 C.F.R. § 2300.0-3(a)(2), it appears evident that Congress never considered authority under the Antiquities Act as "delegable" in the first place.

Therefore, any effect E.O. 10355 may have had on the President's authority to withdraw land for national monuments under the Antiquities Act has been repealed, both by Presidential action and Congressional legislation.

5. Private Right of Action to Enforce Executive Orders

Finally, even if this Court were to accept UAC's argument that because of E.O. 10355 the Secretary of the Interior is currently the only individual invested with authority to withdraw public land to create national monuments pursuant to the Antiquities Act, the Court questions whether UAC or a court can enforce E.O. 10355. It is well settled that *HN44* "generally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders." Zhang v. Slattery, 55 F.3d 732, 747 (2nd Cir. 1995) [*76] (quotations and citations omitted). Furthermore, "to assert a judicially enforceable private cause of action under an executive order, a plaintiff must show (1) that the President issued the order pursuant to a statutory mandate or delegation of authority from Congress, and (2) that the Order's terms and purpose evidenced an intent [on the part of the President] to create a private right of action." Centola v. Potter, 183 F.

Supp.2d 403, 413 (D. Mass. 2002), citing In-dep. Meat Packers Ass'n. v. Butz, 526 F.2d 228, 234-35 (8th Cir. 1975). E.O. 10355 fails on both counts to create a private right of action.

First, E.O. 10355 was not issued pursuant to a "statutory mandate" from Congress and therefore does not have the effect of law. Were this so, there would be some language in the Antiquities Act itself directing the President to delegate or otherwise employ the authority granted to him. There is no such mandate from Congress. Rather, President Truman resorted to 3 U.S.C. § 301 as authority for E.O. 10355, which grants broad delegation authority to the President. This authority seems managerial in nature, giving the President [*77] the ability to direct and delegate the affairs of the executive branch in a manner he deems best. Because this was an internal delegation in the executive branch, revokable at any time by the President, E.O. 10355 does not have the force or effect of law.

Second, there is nothing in E.O. 10355 itself indicating that President Truman intended to create a private right of action to enforce compliance with the order. *HN45* In the absence of such an intent on the face of the order, this Court will not imply one.

UAC's argument that E.O. 10355 forbids the President from withdrawing public lands for national monuments fails on many levels, any one of which is sufficient for this Court to hold that E.O. 10355 did not prohibit the President from designating the Grand Staircase Monument under the Antiquities Act.

CONCLUSION

For the foregoing reasons, defendants' Motion to Dismiss and in the alternative for Summary Judgment is GRANTED; [*1201] plaintiffs' Motions for Summary Judgment are DENIED in their entirety. IT IS SO ORDERED.

Dated this 19th day of April, 2004.

Dee Benson

United States District Judge



Caution

As of: February 10, 2014 2:00 PM EST

Tulare County v. Bush

United States Court of Appeals for the District of Columbia Circuit
September 5, 2002, Argued ; October 18, 2002, Decided
No. 01-5376

Reporter: 306 F.3d 1138; 2002 U.S. App. LEXIS 21902; 353 U.S. App. D.C. 312; 33 ELR 20081

TULARE COUNTY, ET AL., APPELLANTS v. GEORGE W. BUSH, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL., APPELLEES; NATURAL RESOURCES DEFENSE COUNCIL, ET AL., INTERVENORS

Subsequent History: **[**1]** Rehearing En Banc Denied February 4, 2003, Reported at: 317 F.3d 227, 2003 U.S. App. LEXIS 1823. Rehearing, en banc, denied by Tulare County v. Bush, 354 U.S. App. D.C. 325, 317 F.3d 227, 2003 U.S. App. LEXIS 1823 (2003). US Supreme Court certiorari denied by Tulare County v. Bush, 2003 U.S. LEXIS 5536 (U.S., Oct. 6, 2003)

Prior History: Appeal from the United States District Court for the District of Columbia. (No. 00cv02560).

Tulare County v. Bush, 185 F. Supp. 2d 18, 2001 U.S. Dist. LEXIS 23856 (D.D.C., 2001)

Disposition: Affirmed.

Core Terms

proclamation, monument, historic, object, land, antiquity, review, protection, scientific, factual allegations, authority, designate, national forest, violate, fail, claim, management, statute, landmark, public, identify, smallest, declare, part

Case Summary

Procedural Posture

Appellant county sought review of an order of the United States District Court for the District of Columbia, which dismissed the county's complaint challenging a Presidential Proclamation under the Antiquities Act of 1906 (Act).

Overview

President Clinton established by Proclamation the Giant Sequoia National Monument pursuant to his authority under the Act. The county's first claim assumed that the Act required the President to include a certain level of detail in the Proclamation. The court, however, found that no such requirement existed. By identifying historic sites and objects of scientific interest located within the designated lands, the Proclamation adverted to the statutory standard. The second claim alleged that the President designated nonqualifying objects for protection. However, inclusion of such items as ecosystems and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features. The third claim alleged that no one in the Clinton Administration made a meaningful investigation or determination of the smallest area necessary to protect any specifically identified objects of genuine historic or scientific interest. The Act, however, did not impose upon the President an obligation to make any particular investigation. Further, the claim that the Proclamation violated the Property Clause failed because no Property Clause was before the court.

Outcome

The district court's order was affirmed.

LexisNexis® Headnotes

Governments > Federal Government > Property
Real Property Law > Zoning > Historic Preservation

HN1 The Antiquities Act provides, in part, that the President, in his discretion may declare historic landmarks and other objects of historic or scientific interest situated upon federal lands to be national monuments, and may reserve parcels of land confined to the smallest area compatible with the proper care and management of the objects to be protected. 16 U.S.C.S. § 431.

Governments > Federal Government > Executive Of
fices
Real Property Law > Zoning > Historic Preservation

HN2 The Antiquities Act authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest. 16 U.S.C.S. § 431.

Governments > Federal Government > Executive Of
fices
Real Property Law > Zoning > Historic Preservation

HN3 The Antiquities Act provides that, in addition to historic landmarks and structures, other objects of historic or scientific interest may qualify, at the President's discretion, for protection as monuments. 16 U.S.C.S. § 431.

Civil Procedure > Appeals > Standards of Re
view > General Overview

HN4 Although in reviewing the dismissal of a complaint the court must take all factual allegations in the complaint as true, the court is not bound to accept as true a legal conclusion couched as a factual allegation.

Governments > Federal Government > Executive Of
fices
Real Property Law > Zoning > Historic Preservation

HN5 The Antiquities Act does not impose upon the President an obligation to make any particular investigation.

Constitutional Law > Relations Among Govern
ments > General Overview
Constitutional Law > Relations Among Govern
ments > Federal Territory & New States
Real Property Law > Zoning > Historic Preservation

HN6 The Antiquities Act includes intelligible principles to guide the President's action.

Environmental Law > Natural Resources & Public
Lands > Forest Management
Governments > Federal Government > Property
Governments > Public Lands > General Overview
Governments > Public Lands > Forest Lands

HN7 The National Forest Management Act of 1976 provides that no national forest land shall be returned to the public domain except by an act of Congress. 16 U.S.C.S. § 1609(a).

Administrative Law > Judicial Review > Reviewabil
ity > Jurisdiction & Venue
Environmental Law > Natural Resources & Public
Lands > National Environmental Policy Act > General
Overview
Environmental Law > Natural Resources & Public
Lands > Forest Management
Governments > Federal Government > Executive Of
fices

HN8 Presidential actions are not subject to Administrative Procedure Act review.

Counsel: Gary G. Stevens argued the cause and filed the briefs for appellants.

Susan Pacholski, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were Ellen J. Durkee, Michael Gheleta and Ann Navaro, Attorneys, U.S. Department of Justice.

Andrew E. Wetzler argued the cause for intervenors Natural Resources Defense Council, et al. With him on the brief were Nathaniel S.W. Lawrence, Michael R. Sherwood, Anne Harper and James S. Pew.

Raissa S. Lerner, Deputy Attorney General, Attorney General's Office of the State of California, argued the cause for intervenor People of the State of California. With her on the brief were Bill Lockyer, Attorney General, Richard

M. Frank, Chief Assistant Attorney General and Theodora Berger, Senior Assistant Attorney General.

Judges: Before: EDWARDS and ROGERS, Circuit Judges, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge ROGERS.

Opinion by: ROGERS

Opinion

[*1140] ROGERS, *Circuit Judge*: This is the second case we decide today involving a challenge to Presidential authority under the [*2] Antiquities Act of 1906 ("Act"), 16 U.S.C. § 431 (2000). In Mountain States v. Bush, 306 F.3d 1132, 1133 (D.C. Cir. 2002), the court, upon *de novo* review, affirmed the dismissal of the complaint, holding that the complaint, which challenged a series of monument designations under the Act, contained insufficient factual allegations under Federal Rule of Civil Procedure 8(a) to trigger *ultra vires* review of the President's Proclamations. *Id.* at 1137. The court also held that the complaint failed as a matter of law insofar as it alleged that the Proclamations violated the plain terms of the Antiquities Act and other federal statutes. *Id.* at 1137. We likewise hold, upon *de novo* review, that the complaint in the instant case fails for the same reasons. Accordingly, we affirm the dismissal of the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

I.

In April 2000 President Clinton established by proclamation the Giant Sequoia National Monument pursuant to his authority under the Antiquities Act. Proclamation [*3] 7295, 65 Fed. Reg. 24,095 (Apr. 15, 2000). The Monument, which encompasses 327,769 acres of land in the Sequoia National Forest in south-central California, contains groves of giant sequoias, the world's largest trees, and their surrounding ecosystem. *Id.* at 24,095-97, 24,100.

Tulare County, which contains land near and within the Grand Sequoia National Monument ("Monument"), along with a number of other public and private entities that use the Monument area for business or recreational purposes (hereinafter "Tulare County"), filed a complaint seeking declaratory and injunctive relief. Tulare County alleged that the Proclamation violated various provisions of the Antiquities Act and the Property Clause of the Constitution, as well as the National Forest Management Act, the National Environmental Policy Act, and the parties' existing rights under a prior mediated settlement agreement. The district court, concluding that only facial review was appropriate, dismissed the complaint. Tulare County v. Bush, 185 F. Supp. 2d 18 (D.D.C. 2001).

II.

On appeal, Tulare County contends that in dismissing its complaint prior to discovery, the [*4] district court erred in failing to accept as true the facts alleged in the complaint and in limiting its review to the face of the Proclamation rather than reviewing the President's discretionary factual determinations. Tulare County does not contend that the President lacks authority under the Antiquities Act to proclaim national monuments like Giant Sequoia, as the Supreme Court has long upheld such authority. Cappaert v. United States, 426 U.S. 128, 142, 48 L. Ed. 2d 523, 96 S. Ct. 2062 (1976); Cameron v. United States, 252 U.S. 450, 455, 64 L. Ed. 659, 40 S. Ct. 410 (1920). Rather, in Counts 1-4 of the complaint, Tulare County alleged that the Proclamation violated the Antiquities Act because it: (1) failed to identify the objects of historic or [*1141] scientific interest with reasonable specificity; (2) designated as the basis for the Monument objects that do not qualify under the Act; (3) did not confine the size of the Monument "to the smallest area compatible with proper care and management of the objects to be protected," 16 U.S.C. § 431; and (4) increased the likelihood of harm by fires to any objects of alleged historic or [*5] scientific interest within the Monument rather than protecting those objects. In Count 5, Tulare County argued that, absent judicial review of the President's action under the Antiqui-

ties Act, the statute constitutes an unconstitutional delegation of congressional authority. The remaining counts alleged that other federal statutes barred the Proclamation and that the Proclamation violated extant legal rights arising from a mediated settlement agreement with the National Forest Service prior to the Proclamation.

HNI The Antiquities Act provides, in relevant part, that the President, "in his discretion" may declare "historic landmarks ... and other objects of historic or scientific interest ... situated upon [federal] lands ... to be national monuments, and may reserve ... parcels of land ... confined to the smallest area compatible with the proper care and management of the objects to be protected...." 16 U.S.C. § 431.

The court pointed out in *Mountain States*, after reviewing Supreme Court authority discussing the scope of judicial review of discretionary Presidential decisionmaking, that the court "is necessarily sensitive to pleading requirements where, as [****6**] here, it is asked to review the President's actions under a statute that confers very broad discretion on the President and separation of powers concerns are presented." *Mountain States*, 306 F.3d at 1137.

Acknowledging that Congress has entrusted the courts with responsibility for determining the limits of statutory grants of authority, *id.* at 1136, the court nonetheless declined to engage in *ultra vires* review in light of the absence of allegations or arguments in the record to indicate any infirmity in the challenged Proclamations. *Id.* at 1137. Consequently, we review Tulare County's complaint to determine whether it contains factual allegations to support an *ultra vires* claim that would demonstrate the district court erred in declining to engage in a factual inquiry to ensure that the President complied with the statutory requirements.

Count 1 of Tulare County's complaint is premised on the assumption that the Antiquities Act requires the President to include a certain level of detail in the Proclamation. No such requirement exists. **HN2** The Act authorizes the President, "in his discretion, to declare by public proclamation historic landmarks, historic and [****7**] prehistoric structures, and other ob-

jects of historic or scientific interest." 16 U.S.C. § 431. The Presidential declaration at issue complies with that standard. The Proclamation lyrically describes "magnificent groves of towering giant sequoias," "bold granitic domes, spires, and plunging gorges," "an enormous number of habitats," "limestone caverns and ... unique paleontological resources documenting tens of thousands of years of ecosystem change," as well as "many archaeological sites recording Native American occupation ... and historic remnants of early Euroamerican settlement." Proclamation at 24,095. By identifying historic sites and objects of scientific interest located within the designated lands, the Proclamation adverts to the statutory standard. Hence, Count I fails as a matter of law.

Count 2 alleges that the President has designated nonqualifying objects for protection.

HN3 The Antiquities Act provides that, in addition to historic landmarks and structures, "other objects of historic or scientific interest" may qualify, at the President's discretion, for protection as [****1142**] monuments. 16 U.S.C. § 431. Inclusion of such items as ecosystems [****8**] and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features. In *Cappaert*, 426 U.S. at 141-42, the Supreme Court rejected a similar argument, holding that the President's Antiquities Act authority is not limited to protecting only archeological sites.

As relevant to Count 3 of the complaint, the Proclamation states that the Monument's 327,769-acre size "is the smallest area compatible with the proper care and management of the objects to be protected." Proclamation at 24,097. It also states that the sequoia groves are not contiguous but instead comprise part of a spectrum of interconnected ecosystems. *Id.* Tulare County alleges that no one in the Clinton Administration "made any meaningful investigation or determination of the smallest area necessary to protect any specifically identified objects of genuine historic or scientific interest." Compl. P 149. Instead, it alleges, President Clinton "bowed to political pressure ... in designating a grossly oversized Monument unneces-

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sary for the protection of any objects of genuine historic or scientific interest." Compl. P 150. This allegation is a legal conclusion [****9**] couched as a factual allegation. **HN4** "Although in reviewing the dismissal of a complaint the court must take 'all factual allegations in the complaint as true,' the court is 'not bound to accept as true a legal conclusion couched as a factual allegation.'" Mountain States, 306 F.3d at 1137 (quoting Papasan v. Al-lain, 478 U.S. 265, 286, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986)).

Contrary to the assumption underlying Count 3, **HN5** the Antiquities Act does not impose upon the President an obligation to make any particular investigation. And to the extent that Tulare County alleges that the Proclamation designates land that should not be included within the Monument, the complaint fails to identify the improperly designated lands with sufficient particularity to state a claim. *Id.* Insofar as Tulare County alleges that the Monument includes too much land, i.e., that the President abused his discretion by designating more land than is necessary to protect the specific objects of interest, Tulare County does not make the factual allegations sufficient to support its claims. This is particularly so as its claim that the Proclamation covered too much land is [****10**] dependent on the proposition that parts of the Monument lack scientific or historical value, an issue on which Tulare County made no factual allegations. *Cf.* Dalton v. Specter, 511 U.S. 462, 473-74, 128 L. Ed. 2d 497, 114 S. Ct. 1719 (1994); United States v. George S. Bush & Co., 310 U.S. 371, 379, 84 L. Ed. 1259, 60 S. Ct. 944 (1940).

Count 4 of the complaint alleges that the Monument designation actually increases the risk of harm from fires to many of the objects that the Proclamation aims to protect. However, the Proclamation expressly addresses the threat of wildfires and the need for forest restoration and protection. The Proclamation observes that forest renewal is needed because environmental change "has led to an unprecedented failure in sequoia reproduction," and that "a century of fire suppression and logging" has created "an increased hazard of wildfires of a severity that

was rarely encountered in pre-Euroamerican times." Proclamation at 24,095. Count 4 contains no factual allegations, only conclusions, *see, e.g.*, Compl. P 160, and it refers to current management rather than the designation under the Proclamation as the cause for [****11**] likely increases in catastrophic fires, Compl. P 159.

Count 5, alleging that if judicial review is not available under the Antiquities [***1143**] Act then the Act violates the Property Clause of the Constitution as an improper delegation of congressional authority to the President, fares no better. As the court held in Mountain States, "no Constitutional Property Clause claim is before us, as the President exercised his delegated powers under the Antiquities Act, and **HN6** that statute includes intelligible principles to guide the President's action." 306 F.3d at 1137 (citing Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457, 474, 149 L. Ed. 2d 1, 121 S. Ct. 903 (2000); Dalton, 511 U.S. at 473-74 & n.6).

Tulare County's remaining contentions, involving other federal statutes and contractual rights, fail as a matter of law. Contrary to Count 6 of the complaint, the Proclamation does not violate the National Forest Management Act of 1976 ("NFMA"), Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.) (2000), by unlawfully withdrawing land from the national forest system. **HN7** The NFMA provides that no national forest [****12**] land "shall be returned to the public domain except by an act of Congress." 16 U.S.C. § 1609(a). The Proclamation states that "all federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from entry, location, selection, sale, leasing, or other disposition under the public land laws...." Proclamation at 24,097. The Proclamation also states that "nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation." *Id.* at 24,098. The Proclamation thus conceives of the designated land as having a dual status as part of both the Monument and

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the Sequoia National Forest. Cameron, 252 U.S. at 455; Tulare County, 185 F. Supp. 2d at 27. Compare United States v. California, 436 U.S. 32, 40, 56 L. Ed. 2d 94, 98 S. Ct. 1662 (1978). The Proclamation is therefore wholly consistent with NFMA.

Tulare County alleges alternatively, in Counts 7 and 8, that if the Proclamation did not remove land from the national forest system, then the current management of the **[**13]** Monument by the National Forest Service violates the NFMA and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4332 (2000). Neither NFMA nor NEPA provides a cause of action, so the claims must be brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2000). Because **HN8** Presidential actions, of course, are not subject to APA review, Franklin v. Massachusetts, 505 U.S. 788, 800-01, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992), Tulare County attempts to overcome this bar by challenging the non-presidential actions of the Forest Service, referring to two Forest Service documents--an internal Forest Service memorandum interpreting the Proclamation and an interim plan that directs the day-to-day management of the Monument--allegedly showing that the Service is not acting consistently with the Proclamation.

Although Tulare County refers to the existence of foresters on the ground, the complaint does not identify these foresters' acts with sufficient specificity to state a claim.

Finally, regarding Count 9, the Proclamation explicitly states that "the establishment of the monument is subject to valid **[**14]** existing rights." Proclamation at 24,097. Tulare County alleges that the Proclamation violates existing rights that were established by the Mediated Settlement Agreement in 1990, which provided that commercial logging would continue to be available in the Converse Basin area of the Monument. Tulare County ignores the fact that the settlement agreement did not create in any of the parties a right to **[*1144]** actual timber harvest, cf. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733, 140 L. Ed. 2d 921, 118 S. Ct. 1665 (1998), and it failed to allege that any of the appellants possess a contract for timber harvest. The allegation that the Proclamation violates the Sequoia National Forest Trail Plan likewise fails for lack of sufficient particularity.

Accordingly, because "at no point has [Tulare County] presented factual allegations that would occasion ... *ultra vires* review of the Proclamation[]" Mountain States, 306 F.3d at 1137, we affirm the dismissal of the complaint.



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Document(1)

1. Tulare County v. Bush, 185 F. Supp. 2d 18

Client/matter: None



Positive

As of: February 10, 2014 1:59 PM EST

Tulare County v. Bush

United States District Court for the District of Columbia

September 28, 2001, Decided

Civil Action No.: 00-2560 (RMU), Document Nos.: 15, 25, 30, 46

Reporter: 185 F. Supp. 2d 18; 2001 U.S. Dist. LEXIS 23856

TULARE COUNTY et al., Plaintiffs, v.
GEORGE W. BUSH et al., Defendants.

Disposition: **[**1]** Defendants' motion to dismiss granted. Motions to intervene and related submissions denied as moot. Motion to appear pro hac vice denied as moot.

Core Terms

proclamation, monument, land, antiquity, management, review, violate, agency's action, object, claim, seq, motion to dismiss, authority, national forest, jurisdiction, historic, reserve, agency, scientific, forest, public, count, judicial, requires, presidential, plan, current, relief, subject-matter, standards

Case Summary

Procedural Posture

Plaintiffs, various individuals and groups, sued the defendants, the President of the United States and various federal agencies, alleging that a presidential proclamation creating a national monument and its implementation violated four federal acts, the plaintiffs' rights, and *U.S. Const. art. IV, § 3, cl. 2*. The defendants moved to dismiss for lack of subject matter jurisdiction or, alternatively, for failure to state a claim.

Overview

The plaintiffs' claimed that the proclamation and its implementation violated the Antiquities Act of 1906 (Act), the National Forest Man-

agement Act (NFMA), *16 U.S.C.S. § 1600 et seq.*, the National Environmental Policy Act (NEPA), *42 U.S.C.S. § 4321 et seq.*, and the Administrative Procedure Act (APA), *5 U.S.C.S. § 701 et seq.* The court could only review the face of the proclamation, since the Act did not provide for judicial review of presidential actions. The plaintiffs failed to state a claim for relief. Because the proclamation had meaningful limitations and followed standards delineated by the U.S. Congress, it did not violate the *Property Clause*. Since the proclamation did not remove land from the national forest system, plaintiffs failed to state a claim for relief under the NFMA. Because the President was not an administrative agency within the meanings of the APA and the NEPA, the actions were not subject to judicial review under those statutes. Since the proclamation recognized existing rights, it did not violate existing rights. Additionally, the current management of the monument was not ripe for judicial review.

Outcome

The defendants' motion to dismiss was granted. Motions to intervene and related submissions were denied as moot, as was a motion to appear pro hac vice.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HNI In reviewing a motion to dismiss for lack

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of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the court must accept all the complaint's well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2 On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN3 In evaluating whether subject-matter jurisdiction exists in the context of a Fed. R. Civ. P. 12(b)(1) motion, a court must accept all uncontroverted, well-pleaded facts as true and attribute all reasonable inferences to the plaintiffs. The court is not required, however, to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN4 In the context of deciding a Fed. R. Civ. P. 12(b)(1) motion, a court need not limit itself to the allegations of the complaint. Rather, the court may consider such materials outside the pleadings as it deems appropriate to determine whether it has jurisdiction in the case.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint
Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN5 For a complaint to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, it need only provide a short and plain statement of the claim and the grounds on which it rests. Fed. R. Civ. P. 8(a)(2).

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview
Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN6 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests not whether the plaintiff will prevail on the merits, but instead whether the plaintiff has properly stated a claim. The plaintiff need not plead the elements of a prima-facie case in the complaint. Thus, a court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

Environmental Law > Natural Resources & Public Lands > General Overview

HN7 See 16 U.S.C.S. § 431.

Environmental Law > Natural Resources & Public Lands > General Overview
Governments > Federal Government > Executive Offices

HN8 The Antiquities Act of 1906 (Act) sets forth no means for reviewing a President's proclamation other than specifying that a President has discretion in his or her use of the Act.

Environmental Law > Natural Resources & Public Lands > General Overview
Governments > Federal Government > Executive Offices

HN9 The Antiquities Act of 1906 empowers the President of the United States to establish reserves embracing objects of historic or scientific interest.

Constitutional Law > Separation of Powers
Governments > Federal Government > Executive Offices

HN10 Courts are severely limited in their review of congressionally authorized presidential actions. It has long been held that where the U.S. Congress authorizes a public officer to take some specified legislative action, when in his judgment that action is necessary or appropriate to carry out the policy of the U.S. Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.

Constitutional Law > Separation of Powers
Governments > Federal Government > Executive Offices

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fices

HN11 While a court can evaluate whether a President has exercised his discretion in accordance with the standards of the Antiquities Act of 1906 (Act), a court cannot review the President's determinations and factual findings. To do so would invade the legislative and executive domains because the U.S. Congress has directed that the President, in his discretion, make those findings. 16 U.S.C.S. § 431. Accordingly, a court must limit its examination to the face of a proclamation issued under the Act.

Constitutional Law > Relations Among Governments > General Overview
 Constitutional Law > Relations Among Governments > Federal Territory & New States

HN12 See U.S. Const. art. IV, § 3, cl. 2.

Constitutional Law > Relations Among Governments > Federal Territory & New States
 Governments > Public Lands > General Overview

HN13 The Property Clause is read expansively. The power over the public land thus entrusted to the U.S. Congress is without limitations. When delegating authority, the U.S. Congress must provide standards to guide the authorized action such that one reviewing the action could recognize whether the will of the U.S. Congress is being obeyed.

Environmental Law > Natural Resources & Public Lands > General Overview

HN14 The Antiquities Act of 1906 establishes clear standards and limitations for actions taken under it.

Constitutional Law > Congressional Duties & Powers > General Overview
 Constitutional Law > Relations Among Governments > General Overview
 Constitutional Law > Relations Among Governments > Federal Territory & New States
 Environmental Law > Natural Resources & Public Lands > General Overview

HN15 The Antiquities Act of 1906 details the types of objects that can be included in monuments and a method for determining the size

of monuments. 16 U.S.C.S. § 431. Even if standards and limitations are somewhat broad, the U.S. Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors.

Environmental Law > Natural Resources & Public Lands > Forest Management
 Governments > Public Lands > General Overview
 Governments > Public Lands > Forest Lands
 Real Property Law > Exemptions & Immunities > Homestead Exemptions

HN16 The National Forest Management Act (NFMA) of 1976, 16 U.S.C.S. § 1600 et seq., states that no land reserved from the public domain as a national forest can be returned to the public domain except by an Act of Congress. 16 U.S.C.S. § 1609(a). Public domain refers to land available for sale or settlement under homestead laws, or other types of dispositions pursuant to land laws. The NFMA also requires the Secretary of Agriculture to manage the forest system lands, ensuring that the uses of these lands comply with other statutes. 16 U.S.C.S. § 1600 et seq.

Environmental Law > Natural Resources & Public Lands > General Overview
 Governments > Federal Government > Property

HN17 A reservation under the Antiquities Act of 1906 (Act) means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another. The Act gives the President discretion to create a national monument and reserve land for its use. The terms of the Act include federal lands owned or controlled by the United States that may already have been designated for a specific management purpose.

Environmental Law > Natural Resources & Public Lands > Forest Management
 Governments > Federal Government > Executive Offices
 Governments > Public Lands > General Overview
 Governments > Public Lands > Forest Lands

HN18 National Forest Management Act, 16 U.S.C.S. § 1600 et seq., does not limit the Presi-

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dent's authority under the Antiquities Act of 1906 by prohibiting proclamations that reserve land in national forests as monuments.

Environmental Law > Natural Resources & Public Lands > Forest Management
Governments > Public Lands > General Overview

HN19 In no way does 16 U.S.C.S. § 1609 demonstrate a congressional intent to repeal the Antiquities Act of 1906 as it applies to national forest lands.

Administrative Law > Judicial Review > General Overview
Administrative Law > Judicial Review > Reviewability > General Overview
Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action
Administrative Law > Judicial Review > Reviewability > Standing
Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN20 The Administrative Procedure Act, 5 U.S.C.S. § 701 et seq., provides that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review. 5 U.S.C.S. § 702. That provision requires a complainant to identify some particular agency action, and the agency action in question must be final agency action.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview
Governments > Federal Government > Claims By & Against

HN21 The National Environmental Policy Act, 42 U.S.C.S. § 4321 et seq., applies specifically to federal agencies, making no mention of presidential actions.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action
Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Governments > Federal Government > Claims By & Against

HN22 A court has subject-matter jurisdiction to review an agency action under the Adminis-

trative Procedure Act (APA), 5 U.S.C.S. § 701 et seq., only when a final agency action exists. 5 U.S.C.S. § 704. Because the President is not a federal agency within the meaning of the APA, presidential actions are not subject to review pursuant to the APA.

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act > General Overview
Environmental Law > Assessment & Information Access > Environmental Impact Statements
Governments > Federal Government > Property

HN23 The President is not a federal agency for the purposes of the National Environmental Policy Act (NEPA), 42 U.S.C.S. § 4321 et seq., Consequently, the President is not subject to the impact statement requirement of NEPA when exercising his power to proclaim national monuments under the Antiquities Act of 1906.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

HN24 Courts deem an agency action final if (1) the action marks the consummation of the agency's decisionmaking process, and (2) the action determines rights or obligations or resolves issues from which legal consequences flow. Final agency action must not be of a tentative or interlocutory nature.

Civil Procedure > ... > Justiciability > Ripeness > Tests for Ripeness
Constitutional Law > The Judiciary > Case or Controversy > Ripeness

HN25 The test for ripeness requires a court to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. With respect to the fitness for judicial decision prong, a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all. Similarly, with respect to the hardship to the parties prong, an abstract harm is not sufficient; there must be an immediate harm with a direct effect on the day-to-day business of the plaintiffs.

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For Defendants: Michael A. Gheleta, U.S. DEPARTMENT OF JUSTICE, Denver, Colorado.

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For BILL LOCKYER, ATTORNEY [**2] GENERAL EX REL., movant: Raissa S. Lerner, CALIFORNIA ATTORNEY GENERAL'S OFFICE, Oakland, CA.

Judges: Ricardo M. Urbina, United States District Judge.

Opinion by: Ricardo M. Urbina

Opinion

[*21] MEMORANDUM OPINION

GRANTING THE DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

On April 15, 2000, pursuant to the Antiquities Act of 1906, President Clinton issued a proclamation establishing the Giant Sequoia National Monument ("the Monument"). Proclamation Number 7295 ("the Proclamation") declared that the Monument would encompass 327,769 acres of land in the Sequoia National Forest in southern central California. According to the Antiquities Act, the President may, "in his discretion," designate federal land as a national Monument when it includes "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." See 16 U.S.C. § 431.

The plaintiffs in this action are various individuals and groups that have interests in the use of the Sequoia National Forest land within the boundaries of the Monument. The plaintiffs filed this action against the defendants, President Clinton and various other entities of the United [**3] States government, seeking declaratory relief. The plaintiffs allege that the Proclamation and the Forest Service's current implementation of the Proclamation violate the Antiquities Act, the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 et seq., the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., the plaintiffs' rights, and the Property Clause of the Constitution, U.S. CONST. art. IV, § 3, cl. 2. This matter is before the court on the defendants' motion to dismiss for lack of subject-matter jurisdiction or, alternatively, for failure to state a claim on which relief can be granted. For the reasons that follow, the court will grant the defendants' motion to dismiss.

II. BACKGROUND

On April 15, 2000, President Clinton issued a proclamation establishing the Giant Sequoia National Monument pursuant to the Antiquities Act of 1906. See 16 U.S.C. § 431; 65 Fed. Reg. 24095 (2000). The Proclamation states that

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the Monument encompasses "the smallest area compatible [**4] with the proper care and management of the objects to be protected," 327,769 acres of land located within the Sequoia National Forest in southern central California. *See* 65 Fed. Reg. at 24097. The Proclamation reserves this land for the purpose of protecting a variety of objects of historic and scientific interest such as: "rich and varied landscape," "magnificent groves of towering [**22] giant sequoias," "gigantic domes," and "archeological sites recording Native American occupation and adaptations." *See* 65 Fed. Reg. at 24095-24097. According to the Proclamation, "the monument is rich in rare plants and is home to more than 200 plant species endemic to the southern Sierra Nevada mountain range " *See id.*

Regarding the use of land included in the Monument, the Proclamation provides for "continued public and recreational access and use consistent with the purposes of the monument." *See id. at 24097*. The Proclamation states that "the establishment of this monument is subject to valid existing rights." *See id. at 24097*. The Proclamation also provides for the continuing existence of timber sales under contract on [**5] the date of the Proclamation and states that the Proclamation will not affect existing special use authorizations. *See id. at 24097-98*. As to the management of the Monument, the Forest Service shall manage the Monument, "pursuant to applicable legal authorities, to implement the purposes and provisions of this proclamation." *Id. at 24097*. Finally, the Proclamation gives the Secretary of Agriculture three years from the date of the Proclamation to develop an official management plan for the Monument. *See id.*

Tulare County, one of the plaintiffs, is a county in the State of California that holds land near and within the Monument. *See* Compl. P 12. Other plaintiffs include Sierra Forest Products, High Desert Multiple-Use Coalition, Kent Duysen, Sierra Nevada Access Multiple-Use & Stewardship Coalition, Sugarloafers Snowmobile Association, Montecito-Sequoia Camp, and Navelencia Resource Conservation District. *See* Compl. PP 12-77. Generally speak-

ing, the plaintiffs use the Monument area for business and recreational purposes. *See id.*

Two of the plaintiffs, Sierra Forest Products and High Desert Multiple-Use Coalition were involved in an [**6] administrative appeal of the Land and Resource Plan, the Forest Service's management plan for the Sequoia National Forest. *See* Compl. PP 87-89; Pls.' Opp'n at 39. The Forest Service adopted this Land and Resource Plan in 1988 to preserve old-growth Giant Sequoias. *See* Compl. P 87. In 1990, these plaintiffs, other appellants of the management plan, and the Forest Service entered into a Mediated Settlement Agreement ("MSA") with the Forest Service. *See* Compl. P 89.

On October 25, 2000, the plaintiffs, seeking declaratory relief, filed a complaint, alleging nine claims: (1) the Proclamation violates the Antiquities Act because the alleged objects of historic and scientific interest have not been identified with reasonable specificity; (2) the Proclamation violates the Antiquities Act because it designates non-qualifying objects as the basis for the Monument; (3) the Proclamation violates the Antiquities Act because the size of the Monument is not confined to the smallest area compatible; (4) the Proclamation violates the Antiquities Act because it increases the likelihood of harm to any objects of alleged historic and scientific interest within the Monument; (5) the Proclamation [**7] violates the Property Clause of the Constitution; (6) the Proclamation violates the NFMA by withdrawing land from the National Forest System; (7) the current management by the Forest Service of the Monument is in violation of the NFMA and its forest planning regulations; (8) the current management of the Monument is in violation of the NEPA; and (9) the Proclamation violates valid existing rights, including those contained in the Mediated Settlement Agreement. *See* Compl. PP 131-204.

[**23] The plaintiffs allege that the Monument is physically over-inclusive. *See* Pls.' Opp'n at 1. According to the plaintiffs, the "Giant Sequoia groves constitute only about 20,000

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acres or 6% of Monument area." *See id.* Also, the plaintiffs charge that the Forest Service's current management of the Monument area significantly decreases timber sales, recreational uses, and rights of access to the Monument. *See* Compl. PP 108-14.

On March 23, 2001, the defendants filed a motion to dismiss under both Federal Rule of Civil Procedure 12(b)(1), lack of jurisdiction, and Rule 12(b)(6), failure to state a claim on which relief could be granted. *See* Defs.' Mot. to Dismiss ("Mot. to Dismiss") at 1.

[**8] III. ANALYSIS

A. Legal Standard for Motion to Dismiss

HN1 In reviewing a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), the court must accept all the complaint's well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *See, e.g., Pitney Bowes v. United States Postal Serv.*, 27 F. Supp.2d 15, 19 (D.D.C. 1998) (Urbina, J.). **HN2** On a motion to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. *See District of Columbia Retirement Bd. v. United States*, 657 F. Supp. 428, 431 (D.D.C. 1987). **HN3** In evaluating whether subject-matter jurisdiction exists, the court must accept all uncontroverted, well-pled facts as true and attribute all reasonable inferences to the plaintiffs. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683, 71 Ohio Op. 2d 474 (1974), *overturned on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). The Court is not required, however, to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations. *See, e.g., Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990).

[**9]

Moreover, **HN4** the court need not limit itself to the allegations of the complaint. *See Hohri v. United States*, 251 U.S. App. D.C. 145, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other*

grounds by 482 U.S. 64, 96 L. Ed. 2d 51, 107 S. Ct. 2246 (1987). Rather, the court may consider such materials outside the pleadings as it deems appropriate to determine whether it has jurisdiction in the case. *See Herbert v. National Academy of Sciences*, 297 U.S. App. D.C. 406, 974 F.2d 192, 197 (D.C. Cir. 1992).

HN5 For a complaint to survive a Rule 12(b)(6) motion to dismiss, it need only provide a short and plain statement of the claim and the grounds on which it rests. *See FED. R. CIV. P. 8(a)(2); Conley v. Gibson*, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). **HN6** A motion to dismiss under Rule 12(b)(6) tests not whether the plaintiff will prevail on the merits, but instead whether the plaintiff has properly stated a claim. *See FED. R. CIV. P. 12(b)(6); Scheuer*, 416 U.S. at 236. The plaintiff need not plead the elements of a prima-facie case in the complaint. *See Sparrow v. United Air Lines, Inc.*, 342 U.S. App. D.C. 268, 216 F.3d 1111, 1114 (D.C. Cir. 2000). Thus, the court may dismiss a complaint for failure to state a **[**10]** claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *See His-hon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); *Atchinson v. District of Columbia*, 315 U.S. App. D.C. 318, 73 F.3d 418, 422 (D.C. Cir. 1996). Moreover, the court should draw all reasonable inferences in the nonmovant's favor. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 7 (D.D.C. 1995). **[*24]**

B. The Court Dismisses Counts One Through Four Because the Proclamation Does Not Violate the Antiquities Act

In Counts One through Four, the plaintiffs allege that the Proclamation violates the Antiquities Act in various ways. *See* Compl. PP 131-60. Reviewing the Proclamation on its face, this court determines that there is no set of facts on which the plaintiffs could demonstrate that the Proclamation violates the Antiquities Act. Consequently, the court dismisses Counts One through Four pursuant to Rule 12(b)(6).

1. The Antiquities Act

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HN7 The Antiquities Act authorizes the President of the United States:

in his discretion, to declare by public proclamation historic landmarks . . . and other objects of **[**11]** historic and scientific interest that are situated upon 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.

16 U.S.C. § 431. **HN8** The Antiquities Act sets forth no means for reviewing a President's proclamation other than specifying that a President has discretion in his or her use of the Act. *See id.*

Presidents have used the Antiquities Act to declare national monuments more than 120 times and in at least 27 states. *See Esplin v. Clinton*, No. 00-0148 at 6 (D. Ariz. Nov. 20, 2000) (Defs.' Ex. 2) ("Esplin").¹ Denying parties' claims that the use of the Antiquities Act should be limited, the Supreme Court has explained that **HN9** "the act under which the President proceeded empowered him to establish reserves embracing 'objects of historic or scientific interest.'" *Cameron v. United States*, 252 U.S. 450, 455, 64 L. Ed. 659, 40 S. Ct. 410 (1920); *see also Cappaert v. United States*, 426 U.S. 128, 141, 48 L. Ed. 2d 523, 96 S. Ct. 2062-142 (1976); *United States v. California*, 436 U.S. 32, 36, 56 L. Ed. 2d 94, 98 S. Ct. 1662 (1978). **[**12]**

HN10 Courts are severely limited in their review of congressionally authorized presidential actions:

It has long been held that where Congress has authorized a public officer

to take some specified legislative action[,] when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.

[13]**

United States v. George S. Bush & Co., 310 U.S. 371, 380, 84 L. Ed. 1259, 60 S. Ct. 944 (1940) (internal citations omitted). Considering that the judgment of any public officer taking legislative action cannot be reviewed by the courts, the court deems it highly logical that presidential decisions, made pursuant to a statute that provides the President with discretion, are also not reviewable. In *George S. Bush & Co.*, the Supreme Court reviewed the President's 1934 proclamation increasing the duty on canned clams imported from Japan pursuant to the Tariff Act of 1930. *See id.* at **[*25]** 375; 19 U.S.C. § 1001 et seq. The Court explained that probing the reasoning of the President in issuing this proclamation would be an invasion of the legislative and executive domains. *See id.* at 380.

2. Analysis

HN11 While this court can evaluate whether President Clinton exercised his discretion in accordance with the standards of the Antiquities Act, this court cannot review the President's determinations and factual findings, as the plaintiffs suggest. To do so would invade the legislative and executive domains because Congress has directed **[**14]** that the President, "in his discretion," make these findings. *See George Bush & Co.* 310 U.S. at 380; 16 U.S.C. § 431. Accordingly, this court limits its examination to the face of the Proclamation. *See Cameron*, 252 U.S. at 455-56; *Cappaert*, 426

¹ The use of the Antiquities Act has been challenged six times and courts have upheld the use of the Antiquities Act each time. *See Esplin* at 6 and n.1; *see, e.g., United States v. California*, 436 U.S. 32 (1978); *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*, 14 ERC 1853 (D. Alaska 1980) (Defs.' Ex. 3); *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978).

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U.S. at 141-142; *Anaconda Copper Co. v. Andrus*, 14 ERC 1853, 1854 (D. Alaska 1980) (Defs.' Ex. 3).

Counts One and Two assert that President Clinton violated the Antiquities Act by not reasonably identifying objects of historic and scientific interest and by designating non-qualifying objects as the basis for the Monument. *See* Compl. PP 131-44. In contrast, the Proclamation begins by stating, "the rich and varied landscape of the Giant Sequoia National Monument holds a diverse array of scientific and historic resources." *See 65 Fed. Reg. at 24095*. The Proclamation specifies, "only one other North American tree species . . . holds such lengthy and detailed chronologies of past changes and events." *See id.* In addition, "the monument is rich in rare plants," "rare amphibians," and "archaeological sites . . . are found in the monument." *See id. at 24095-96*. **[**15]** In sum, the Proclamation, on its face, describes with specificity the objects of historic and scientific interest to be included in the Monument and does not designate non-qualifying objects.

Count Three alleges that the Proclamation violates the Antiquities Act because the size of the Monument is not confined to the smallest area compatible with the proper care and management of the objects to be protected. *See* Compl. PP 145-53. On a similar note, Count Four asserts that the Proclamation increases the likelihood of harm to objects of historic and scientific interest within the Monument. *See id. PP 154-60*. In contrast, however, the Proclamation addresses the reason for the size of the Monument, the risk of wildfire, and the need to protect the objects of historic and scientific interest. *See 65 Fed. Reg. at 24095-97*. As required by the Antiquities Act, the Proclamation specifically states that the land reserved for the Monument consists of "approximately 327,769 acres, which is the smallest area compatible with the proper care and management of the objects to be protected" *See id. at 24097*.

Finally, a facial review of the Proclamation **[**16]** leads the court to determine that the plaintiffs can prove no set of facts in support of their claims that could entitle them to relief. *See George S. Bush & Co.*, 310 U.S. at 380-81; *Conley*, 355 U.S. at 45-46. Consequently, the court dismisses Counts One through Four.

C. The Court Dismisses Count Five Because the Proclamation Does Not Violate the Property Clause of the Constitution

In Count Five, the plaintiffs allege that the Antiquities Act and the Proclamation violate the Property Clause of the Constitution. *See* Compl. PP 161-68. The court disagrees.

[*26] 1. The Property Clause

HN12 The Property Clause states: "The Congress shall have Power to dispose of and make all needful Rules and regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. The Supreme Court has read **HN13** the Property Clause expansively, noting that "the power over the public land thus entrusted to Congress is without limitations." *See United States v. San Francisco*, 310 U.S. 16, 29, 84 L. Ed. 1050, 60 S. Ct. 749 (1940). The Court has also explained that when delegating authority, Congress must provide standards to guide the **[**17]** authorized action such that one reviewing the action could recognize whether the will of Congress has been obeyed. *See Yakus v. United States*, 321 U.S. 414, 425, 88 L. Ed. 834, 64 S. Ct. 660, 28 Ohio Op. 220-26 (1944).

2. Analysis

In this case, the plaintiffs claim that "Congress has ceded its Constitutional power 'to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States' by delegating unlimited discretion to the President." *See* Compl. P 166. The plaintiffs allege that the Proclamation violates the non-delegation doctrine and the Property Clause because it is "without meaningful limitation." *See id.* PP 167-68.

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On the contrary, **HN14** the Antiquities Act establishes clear standards and limitations.

HN15 The Antiquities Act details the types of objects that can be included in monuments and a method for determining the size of monuments. See 16 U.S.C. § 431. Even if standards and limitations are somewhat broad, "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." Touby v. United States, 500 U.S. 160, 165, 114 L. Ed. 2d 219, 111 S. Ct. 1752 (1991). [****18**] Therefore, the Antiquities Act represents a proper delegation of congressional authority to the President under the Property Clause.

In addition, as described above, President Clinton's Proclamation has meaningful limitations and follows the standards delineated by Congress in the Antiquities Act. See subsection "A" *supra*; 65 Fed. Reg. 24095-97. Accordingly, the Proclamation also does not violate the Property Clause of the Constitution. In conclusion, the court dismisses Count Five.

D. The Court Dismisses Count Six Because the Proclamation Does Not Violate the National Forest Management Act

In Count Six, the plaintiffs allege that the Proclamation violates NFMA by wrongfully withdrawing land from the National Forest System. See Compl. PP 169-75; 16 U.S.C. §§ 472a(a) and 1600 et seq. This Count fails to state a claim on which relief could be granted because the Proclamation does not remove the Monument land from the National Forest System.

1. The National Forest Management Act

HN16 The National Forest Management Act of 1976 states that no land reserved from the public domain as a national forest can "be returned to the public [****19**] domain except by an Act of Congress." See 16 U.S.C. § 1609(a). The Supreme Court has defined public domain as referring to land available for sale or settlement under homestead laws, or other types of dispositions pursuant to land laws. See

Hagan v. Utah, 510 U.S. 399, 412, 127 L. Ed. 2d 252, 114 S. Ct. 958 (1994). NFMA also requires the Secretary of Agriculture to manage the Forest System lands, ensuring that the [****27**] uses of these lands comply with other statutes. See 16 U.S.C. § 1600 et seq.

In 1978, after the enactment of NFMA, the Supreme Court commented on the use of the Antiquities Act: **HN17** "A reservation under the Antiquities Act means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another." California, 436 U.S. at 40. The Court explained that the Antiquities Act gives the President discretion to create a national monument and reserve land for its use. See *id.* Furthermore, the Court specified that the terms of the Antiquities Act include federal lands "owned or controlled by the United States that may already have been designated for a specific management purpose. [****20**] " See *id.*

2. Analysis

In creating the Giant Sequoia National Monument, President Clinton did not withdraw land from the national forest system, though he did withdraw land from disposition under public land laws, such as the sale and leasing of the land. See 65 Fed. Reg. at 24096. The Proclamation establishes that the Monument land will have dual status as a monument and a part of the Sequoia National Forest. See *id.* at 24098. In addition, the Proclamation explicitly states that the Secretary of Agriculture, through the Forest Service, shall manage the Monument and the underlying forest pursuant to applicable legal authorities. See *id.* at 24097; 16 U.S.C. § 1600 et seq.

Enacted by Congress 70 years after the Antiquities Act, **HN18** NFMA does not limit the President's authority under the Antiquities Act by prohibiting proclamations that reserve land in

national forests as monuments.² The Proclamation complies with NFMA because it does not withdraw land from the National Forest System, the Secretary of Agriculture will continue to manage the land in question, and it states that the management of the [****21**] Monument must comply with existing laws. See 65 Fed. Reg. 24095; 16 U.S.C. § 1600 et seq.

Count Six fails to state a claim on which relief could be granted because the Proclamation in no way violates NFMA.

E. The Court Dismisses Counts Seven and Eight Because the APA and NEPA Do Not Apply to Presidential Actions

The court dismisses Counts Seven and Eight for lack of subject-matter jurisdiction because the Counts wrongly allege a right to judicial review pursuant [****22**] to the APA and the NEPA.

1. The Administrative Procedure Act and the National Environmental Policy Act

HN20 The Administrative Procedure Act, 5 U.S.C. § 701 et seq., provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review." 5 U.S.C. § 702 (emphasis added). This provision requires a complainant to "identify some [particular] 'agency action,'" and "the 'agency action' in question must be 'final agency action,'" Lujan v. National Wildlife Fed'n., 497 U.S. 871, 882, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990) (internal citations omitted). **HN21** The National [****28**] Environmental Policy Act also applies specifically to federal agencies, making no mention of presidential actions. See 42 U.S.C. § 4321 et seq. In contrast, when Congress has imposed duties on the President, they have specifically mentioned that office. See Alaska v. Carter, 462 F. Supp. 1155, 1160 (D. Alaska

1978).

HN22 A court has subject-matter jurisdiction to review an agency action under the APA only when a final agency [****23**] action exists. See 5 U.S.C. § 704. Because the President is not a federal agency within the meaning of the APA, presidential actions are not subject to review pursuant to the APA. See Dalton v. Specter, 511 U.S. 462, 470, 128 L. Ed. 2d 497, 114 S. Ct. 1719 (1994); Franklin v. Massachusetts, 505 U.S. 788, 800, 120 L. Ed. 2d 636, 112 S. Ct. 2767-01 (1992); Armstrong v. Bush, 288 U.S. App. D.C. 38, 924 F.2d 282, 289 (D.C. Cir. 1991); 5 U.S.C. §§ 701(b)(1), 551(1). Applying similar logic, **HN23** the President is not a federal agency for the purposes of NEPA. See Alaska, 462 F. Supp. at 1159-60; Armstrong, 924 F.2d at 289; c.f. Franklin, 505 U.S. at 800-01. Consequently, "the President is not subject to the impact statement requirement of NEPA when exercising his power to proclaim national monuments under the Antiquities Act." See *id.*

On a separate point, **HN24** courts will deem agency action final if (1) the action "mark[s] the 'consummation' of the agency's decisionmaking process," and (2) the action determines "rights or obligations" or resolves issues "from which legal consequences . . . flow." Bennett v. Spear, 520 U.S. 154, 177, 137 L. Ed. 2d 281, 117 S. Ct. 1154-78 (1997) [****24**] (internal citations omitted). The D.C. Circuit has explained further that final agency action must not be of a tentative or interlocutory nature. See Appalachian Power Co. v. E.P.A., 341 U.S. App. D.C. 46, 208 F.3d 1015, 1022 (D.C. Cir. 2000).

2. Analysis

In Count Seven, the plaintiffs charge that the Proclamation leaves the Monument within the National Forest System, and therefore the Monument land is subject to the NFMA planning

² Had Congress intended to limit Presidents' uses of the Antiquities Act, it could have done so as it did in the Weeks Act. See 16 U.S.C. § 521. With the Weeks Act, Congress required that certain lands be permanently reserved and administered as national forest lands. See *id.* This type of explicit language is absent from section 1609 of NFMA. **HN19** In no way does section 1609 demonstrate a congressional intent to repeal the Antiquities Act as it applies to national forest lands.

and administrative appeal process.³ See Compl. P 180. In both Counts Seven and Eight, the plaintiffs seek relief pursuant to the APA, alleging that the Forest Service's management of the Monument violates the NFMA (Count Seven) and the NEPA (Count Eight). See Compl. PP 176-92. Also, in both Counts, the plaintiffs specifically refer to the Forest Service's current management of the Monument, which is occurring pursuant to the Clinton Proclamation, until the Secretary of Agriculture devises a formal plan. See Compl. PP 181, 184, 187, 189; *65 Fed. Reg. at 24097*. A memorandum from the Forest Supervisor and a "background document" allegedly govern the current management. See Compl. PP 181, 189. The plaintiffs do not allege that [**25] any of the management changes that have been instituted are not mandated by the Proclamation. See generally Compl.

Counts Seven and Eight both request judicial review pursuant to the APA. These Counts fail to allege jurisdiction, however, because the Forest Service is merely carrying out directives of the President, and the APA does not apply to presidential action. See *Franklin*, 505 U.S. at 800-01; *Armstrong*, 924 F.2d at 298. Any argument suggesting that this action is agency action would suggest the absurd notion that all presidential actions [**29] must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action. See generally *id.* The court refuses to [**26] give the term "presidential action" such a confusing and illogical interpretation. Using this same logic, Count Eight also fails in its claim pursuant to NEPA because NEPA requires agency action, and the action in question is an extension of the President's action. See *Alaska*, 462 F. Supp. at 1159-60.

Even if the action were agency action, this court could not review it under the APA because it is tentative, interlocutory, and there-

fore not final action. See *Appalachian Power Co.*, 208 F.3d at 1022. In the Proclamation, the President directs the Secretary of Agriculture to devise a management plan for the Monument within three years, with the advice of a scientific advisory board. See *65 Fed. Reg. at 24097*. Accordingly, the current management plan is merely a temporary measure acting on the President's immediate requests and managing the forest until the agency devises a management plan. See Compl. PP 176-92; Defs.' Ex. 7, Pls.' Ex 2.

In sum, as the APA only applies to final agency action, and NEPA only applies to agency action, Counts Seven and Eight fail because the court has no subject-matter jurisdiction over the allegations [**27] contained therein.

F. The Court Dismisses Count Nine Because the Proclamation Does Not Violate Existing Rights and the Matter Is Not Ripe for Review

In Count Nine, the plaintiffs allege that the Proclamation and the Forest Service's management of the lands within the boundaries of the Monument violate plaintiff's valid existing rights as created by the Mediated Settlement Agreement executed in 1990. See Compl. PP 193-204; Defs.' Ex. 8. The court dismisses this Count because the Proclamation does not violate existing rights and because the current management of the Monument is not ripe for judicial review.⁴

1. The Proclamation Does Not Violate Existing Rights

On its face, the Proclamation preserves existing rights by broadly asserting that "the establishment of this monument is subject to valid existing rights." *65 Fed. Reg. at 24097*. [**28] More specifically, the Proclamation provides for the continuing existence of uses such as tim-

³ While the plaintiffs' allegations and arguments in and pertaining to Count Six focus on the assertion that the Proclamation removes lands from the Sequoia National Forest, the plaintiffs' allegations in Count Seven seem to contradict this notion.

⁴ Because the Proclamation recognizes existing rights, the court need not decide whether the MSA creates valid existing rights for the plaintiffs who were party to the MSA.

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ber sales, water rights, and grazing permits under contract or reserved as of the date of the Proclamation. See *id.* at 24097-98. The Proclamation also states that it will not affect existing special use authorizations. See *id.* at 24098. Given the plain language of the Proclamation, the plaintiffs fail to state a claim with regard to the Proclamation.

2. The Current Management of the Monument Is Not Ripe for Judicial Review

In their complaint, the plaintiffs also raise the possibility that the Forest Service's current implementation of the Proclamation violates existing rights. See Compl. PP 202, 204. These claims, however, are not ripe for judicial review.

HN25 The test for ripeness requires a court to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration," *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). With respect to the "fitness for judicial decision" prong, a [*30] claim is not ripe for adjudication if it rests upon "contingent future events that may not occur [*29] as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 580, 87 L. Ed. 2d 409, 105 S. Ct. 3325-81 (1985). Similarly, with respect to the "hardship to the parties" prong, an abstract harm is not sufficient; there must be an immediate harm with a "direct effect on the day-to-day business of the plaintiffs." *Texas*, 523 U.S. 296, 301, 140 L. Ed. 2d 406, 118 S. Ct. 1257 (quoting *Abbott Labs.*, 387 U.S. at 152) (internal citations omitted).

The plaintiffs cannot demonstrate ripeness with respect to their claim that the current management of the Monument violates their rights because the Secretary of Agriculture has not yet implemented the final management plan called

for in the Proclamation. See *Ohio Forestry Association, Inc., v. Sierra Club et al.*, 523 U.S. 726, 732, 140 L. Ed. 2d 921, 118 S. Ct. 1665-34 (1998). In addition, the plaintiffs have not pled in their complaint that any interim plan is causing them specific, imminent and certain harm. See *id.* at 738. Therefore, the court dismisses Count Nine.

IV. CONCLUSION

For all these reasons, the court grants the defendants' motion to dismiss. An order directing the parties in a manner consistent with [*30] this Memorandum Opinion is separately and contemporaneously executed and issued this 28th day of September, 2001.

Ricardo M. Urbina

United States District Judge

ORDER

GRANTING THE DEFENDANTS' MOTION TO DISMISS

For the reasons stated in this court's Memorandum Opinion separately and contemporaneously executed and issued this 28th day of September, 2001, it is

ORDERED that the defendants' motion to dismiss is **GRANTED**; and it is

FURTHER ORDERED that the motions to intervene and the related submissions are **DENIED** as moot; and it is

ORDERED that the motion to appear *pro hac vice* is **DENIED** as moot.

SO ORDERED.

Ricardo M. Urbina

United States District Judge



Positive

As of: February 10, 2014 1:58 PM EST

Utah Ass'n of Counties v. Bush

United States Court of Appeals for the Tenth Circuit
July 24, 2006, Filed
No. 04-4132

Reporter: 455 F.3d 1094; 2006 U.S. App. LEXIS 18547; 36 ELR 20146

UTAH ASSOCIATION OF COUNTIES, on behalf of its members, Plaintiff, MOUNTAIN STATES LEGAL FOUNDATION, on behalf of its members, Plaintiff-Appellant, v. GEORGE W. BUSH, in his official capacity as President of the United States, UNITED STATES OF AMERICA, JAMES L. CONNAUGHTON, in his official capacity as Chair of the Council on Environmental Quality, GALE NORTON, in her official capacity as Secretary of the Interior, and KATHLEEN CLARKE, Director of the Bureau of Land Management, Defendants-Appellees, SOUTHERN UTAH WILDERNESS ALLIANCE, THE WILDERNESS SOCIETY, GRAND CANYON TRUST, ESCALANTE CANYON OUTFITTERS, ESCALANTE'S GRAND STAIRCASE B&B INN, and BOULDER MOUNTAIN LODGE, Defendants-Intervenors-Appellees, STATE OF UTAH, Amicus Curiae.

Prior History: **[**1]** Appeal from the United States District Court for the District of Utah. (D.C. Nos. 2:97-CV-479 and 2:97-CV-863).

Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 2004 U.S. Dist. LEXIS 9865 (2004)

Disposition: Appeal DISMISSED.

Core Terms

standing, monument, claims, injury, challenge, filed, summary judgment, requirement, motion, time, individual, appeal, bring, jurisdiction, evaluate, judgment, party, district court, federal

court, affidavit, protected, assert, burden, standing to sue, proclamation, antiquity, business, creation, suffered, violated

Case Summary

Procedural Posture

Plaintiffs, including a foundation, sued defendants, the President of the United States (President), the United States, federal officials, and agencies, challenging the legality of the creation of the Grand Staircase-Escalante National Monument (Monument). The United States District Court for the District of Utah granted summary judgment in favor of defendants. The foundation appealed.

Overview

In 1996, the President established the Monument, a set-aside of federal land. The foundation alleged that the creation of the Monument was illegal for various reasons. The district court declined to address the question of the foundation's standing. The foundation argued that individual standing existed through a member of the foundation. The individual's company went out of business after its mining claims were voided. The foundation alleged that the individual's inability to refile the claims was an injury-in-fact and he owed the loss of his business to the designation of the Monument. Under Article III, the appellate court determined that the foundation did not meet its burden of establishing standing, because the individual's alleged injury could not serve as a basis for the foundation's standing. The individual's affidavit did not demonstrate an injury-in-fact as of the time the action was brought, because

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the foundation's complaint and amended complaint were filed in 1997 and the individual's mining claims were not voided until 1998.

Outcome

The appellate court dismissed the foundation's appeal for lack of standing.

LexisNexis® Headnotes

Constitutional Law > ... > Case or Controversy > Standing Overview

HN1 The requirement that a plaintiff have standing is grounded in Article III of the U.S. Constitution, which restricts federal court adjudication to actual cases or controversies. Standing to invoke the power of the federal courts is not a mere technical hoop through which every plaintiff must pass, but rather is 'a part of the basic charter promulgated by the Framers of the Constitution. Where a plaintiff challenges an action of the President of the United States, proper evaluation of standing is particularly important. Where plaintiffs have invoked Article III jurisdiction to challenge the conduct of the executive branch of government, the necessity of a case or controversy is of particular import.

Constitutional Law > ... > Case or Controversy > Standing > General Overview

HN2 Standing is determined as of the time the action is brought.

Constitutional Law > ... > Case or Controversy > Standing > Elements
Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN3 Where an association is bringing suit on behalf of its members, it could only have standing if (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Although this quotation refers to "members," plural, if even one member of the association would have had standing to sue in his or

her own right, that is sufficient. The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN4 In evaluating whether the first prong of associational standing has been met, the court asks whether any member of the plaintiff would have had standing individually to bring these

claims. The requirements for an individual to have standing in federal court are threefold. First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between that injury and the challenged action of the defendant - the injury must be "fairly traceable" to the defendant, and not the result of the independent action of some third party. Finally, it must be likely, not merely speculative, that a favorable judgment will redress the plaintiff's injury. The court therefore must evaluate whether any individual plaintiff members, at the time the plaintiff filed its complaint had suffered a redressible injury caused by defendants.

Civil Procedure > ... > Summary Judgments > Burdens of Proof > Movant Persuasion & Proof
Constitutional Law > ... > Case or Controversy > Standing > Elements

HN5 The party asserting jurisdiction has the burden of establishing the elements of standing. Where standing is challenged in a motion that is alternatively designated as a motion for summary judgment, the defendant must "set forth" by affidavit or other evidence "specific facts," which for purposes of the summary judgment motion will be taken to be true.

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J. Mark Ward, Assistant Attorney General and Mark L. Shurtleff, Utah Attorney General, filed a brief for amicus curiae State of Utah on behalf of appellant.

Judges: Before KELLY, SEYMOUR, **[**2]** and EBEL, Circuit Judges.

Opinion by: EBEL

Opinion

[*1096] EBEL, Circuit Judge.

In this case, Mountain States Legal Foundation ("MSLF") challenges the legality of the 1996 creation of the Grand Staircase-Escalante National Monument in southern Utah. Because we conclude that MSLF lacked standing to bring this claim, we dismiss the appeal.

I. BACKGROUND

A. The Monument

On September 18, 1996, in the midst of his 1996 re-election campaign, President Clinton issued a Presidential Proclamation establishing the Grand Staircase-Escalante National Monument (the "Monument"), a set-aside of approximately 1.7 million acres of federal land in

southern Utah. See Proclamation No. 6920, *61 Fed. Reg. 50,223 (Sept. 18, 1996)*. The Proclamation described the Monument area as a "geologic treasure" and an "outstanding biological resource" that includes "world class paleontological sites" and is "rich in human history." *Id.* at 50,223-224. Among the items to be protected in the Monument are "arches and natural bridges"; "remarkable specimens of petrified wood"; numerous types of "[e]xtremely significant fossils"; ancient Native American "rock art" and occupation **[**3]** sites; "trails, inscriptions, [and] ghost towns" from Mormon pioneers; "[f]ragile cryptobiotic crusts"; and "[o]ver 200 species of birds, including bald eagles and peregrine falcons." *Id.* at 50,223-225.

The proclamation claimed the authority to establish the Monument based on the Antiquities Act of 1906 ("Antiquities Act"), which provides:

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.

Antiquities Act of 1906 *§ 2, 16 U.S.C. § 431 (2000)*; see Proclamation No. 6920, *61 Fed. Reg. at 50,225* (the President's declaration that the Monument is set aside "by the authority vested in me by *section 2* of the [Antiquities Act]").

Establishment **[**4]** of the Monument generated intense criticism, including in some Congressional circles. Notably, the majority staff of the House Committee on Resources produced two reports critical of President Clin-

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ton's decision. See "Behind Closed Doors: The Abuse of Trust and Discretion in the Establishment of the Grand Staircase-Escalante National Monument." H.R. Rep. No. 105-D (Comm. Print 1997); "Monumental Abuse: The Clinton Administration's Campaign of Misinformation in the Establishment of the Grand Staircase-Escalante National Monument." H.R. Rep. No. 105-824 (Comm. Print 1998).¹

[*1097] Despite these and other criticisms of the Monument, since 1996 Congress has passed several pieces of legislation that relate to the Monument. [*5] For example, in the Automobile National Heritage Area Act, Pub. L. No. 105-355, 112 Stat. 3247 (1998), Congress modified the boundaries of the Monument to exclude certain Utah towns and to take in the "East Clark Bench" area. Id. §§ 201-02. Congress has also appropriated funds both for acquiring mineral rights within the Monument, see Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, app. C, § 601, 113 Stat. 1501 (1999), and for construction and the development of programs at the Monument. See, e.g., S. Rep. No. 106-99, at 14-15 (1999); S. Rep. No. 105-227, at 10, 13-14 (1998); H.R. Rep. No. 105-609, at 12 (1998).

B. Procedural Background

In June 1997, about nine months after the Monument was established, the Utah Association of Counties ("UAC") and the Utah Schools and Institutional Trust Lands Administration ("SITLA") each filed a complaint in Utah federal district court asserting that the creation of the Monument was illegal. See Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 1176 (D. Utah 2004). The Appellant in this case, MSLF, filed a similar complaint in November 1997.² Id. The complaints named as defendants the President, [*6] the United States, and several federal officials and agencies (collectively, "Defendants"). The plaintiffs chal-

lenged the creation of the Monument on numerous grounds, claiming that: (1) the Antiquities Act is unconstitutional because it violates the delegation doctrine; (2) in designating the Monument, President Clinton acted *ultra vires* and in violation of the Property and Spending Clauses of the United States Constitution; (3) President Clinton violated the Antiquities Act by failing to designate "objects of historic or scientific interest" and failing to confine the Monument "to the smallest area compatible with the proper care and management of the objects to be protected"; (4) President Clinton violated the Wilderness Act by creating *de facto* wilderness, a power reserved to Congress; (5) President Clinton violated Executive Order 10355, which requires that land be withdrawn by the Secretary of the Interior, not the President; and (6) the Defendants violated the National Environmental Policy Act, the Federal Land Policy and Management Act, the Federal Advisory Committee Act, and the Anti-Deficiency Act in the creation of the Monument. See id. at 1176-77. [*7] Given the relatedness of the complaints, the actions by UAC, SITLA, and MSLF were soon consolidated; however, SITLA eventually reached a settlement with Defendants and was dismissed as a plaintiff. See id. at 1176; The Utah Schools and Land Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. 3139 (1998) (Congress's ratification of the settlement). In a prior related appeal, we allowed several environmental groups and businesses located near the Monument to intervene as defendants in the consolidated action. See Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1256 (10th Cir. 2001).

In July 1998, Defendants filed a motion to dismiss or in the alternative for summary judgment, alleging, *inter alia*, that the district court lacked subject-matter jurisdiction [*8] to hear the case. Utah Ass'n of Counties, 316 F. Supp. 2d at 1177. Specifically, [*1098] Defen-

¹ The view expressed in Monumental Abuse was not unanimous; the minority Democratic Party members of the Committee on Resources issued a rebuttal response, supporting President Clinton's action. Dissenting Views: Staff Report on Grand Staircase-Escalante NM, at 13 (Oct. 9, 1998).

² The MSLF describes itself as "a voluntary, non profit, public interest corporation . . . [that] is dedicated to individual liberty, the right to own and use property, limited government, and the free enterprise system."

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dants claimed that the case was not ripe, that the court had no judicial authority to review the President's action, and that MSLF lacked standing to challenge the Monument. *Id.* Both remaining plaintiffs (UAC and MSLF) opposed Defendants' motion and filed their own motions for summary judgment. *Id.*

In an April 19, 2004 order, the district court granted summary judgment for Defendants and denied the plaintiffs' summary judgment motions. *Id.* at 1200-01. As for Defendants' claim that MSLF lacked standing, the court stated:

the United States concedes that UAC has standing, but insists MSLF does not..... Given th[e] relatively light burden [to show standing] at the present stage of the instant case and recognizing that many of the claims of UAC and MSLF are identical or similar, and in the interest of judicial economy the Court will not further address the standing question in this Opinion. While not expressly finding that MSLF has standing to sue, the Court will address all of the parties' claims, including those advanced solely by MSLF.

[**9] *Id.* at 1185 n.6. Proceeding to the merits, the district court rejected all of UAC's and MSLF's challenges to the creation of the Monument. *Id.* at 1190-1200.

MSLF timely filed a notice of appeal; however, UAC -- the only other remaining plaintiff -- did not appeal the district court's decision.

II. DISCUSSION

On appeal, MSLF asserts both that it had standing to bring its challenge and that the district court erred in granting summary judgment to Defendants on the merits of its claims.³ We conclude that MSLF lacked standing to bring its action; therefore, we need not address its arguments on the merits.⁴

[**10] A. Necessity of a Standing Analysis

Because the Defendants conceded below that UAC had standing, the district court declined "in the interest of judicial economy" to address the question of MSLF's standing. *Id.* at 1185 n.6. Nevertheless, MSLF's standing is a critical issue in this appeal because only MSLF has appealed the district court decision.

HNI The requirement that a plaintiff have standing "is grounded in Article III of the U.S. Constitution, which restricts federal court adjudication to actual cases or controversies." *Utah v. Babbitt*, 137 F.3d 1193, 1201 (10th Cir. 1998); see also *San Juan County v. United States*, 420 F.3d 1197, 1203 (10th Cir. 2005) ("Article III of the Constitution limits the power of federal courts to deciding 'cases' and 'controversies.' Standing to sue . . . is an aspect of the case-or-controversy requirement." [**1099]) (quotations, citations omitted). We have noted that "[s]tanding to invoke the power of the federal courts is not a mere technical hoop through which every plaintiff must pass, but rather is 'a part of the basic charter promulgated by the Framers of the Constitution.'" *Babbitt*, 137 F.3d at 1202 [**11] (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)). Where, as here, a plaintiff challenges an action of the President, proper evalu-

³ Although the plaintiffs' complaints asserted numerous challenges, on appeal MSLF challenges only the district court's conclusion that the Monument designation did not violate the Antiquities Act or the Wilderness Act.

⁴ We note, however, that we have various other concerns with MSLF's claims. For example, the cause of action on which MSLF relies is not clear from its briefs. At oral argument, counsel for MSLF asserted for the first time that MSLF was relying on an implied private right of action under the Antiquities Act. Given our conclusion on standing, we need not decide whether such a right of action exists, although we note the strict standard established by the Supreme Court for implying rights of action. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002) (stating that Congress must provide for an implied right of action "in clear and unambiguous terms"); *id.* at 286 ("[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit . . . under an implied right of action.").

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ation of standing is particularly important. See *id.* ("Because Plaintiffs have invoked Article III jurisdiction to challenge the conduct of the executive branch of government, the necessity of a case or controversy is of particular import."). We therefore must address whether MSLF had standing to bring its claims against Defendants.

B. MSLF's Standing

As we recently noted, *HN2* "[s]tanding is determined as of the time the action is brought." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) ("[W]e have an obligation to assure ourselves that [plaintiff] had Article III standing at the outset of the litigation."); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003) ("Article III standing must be determined as of the time at [*12] which the plaintiff's complaint is filed."); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991) ("As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint.")). Therefore, we must evaluate MSLF's standing as of the time it filed its complaint.

1. Associational standing

MSLF is relying on the doctrine of associational standing in this case and is not asserting separate independent injury to itself. Thus, *HN3* because MSLF is an association bringing suit on behalf of its members, it could only have standing if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). Although this quotation refers to "members," plural, if even one member of the association would have had standing to sue in his or her own right, that is

sufficient. See *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)

[*13] ("The association must allege that its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action.") (emphasis added).

2. Individual standing

HN4 In evaluating whether the first prong of associational standing has been met, we ask whether any member of MSLF would have had standing individually to bring these claims. The requirements for an individual to have standing in federal court are threefold.

First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between that injury and the challenged action of the defendant - the injury must be "fairly traceable" to the defendant, and not the result of the independent action of some third party.

Finally, it must be likely, not merely

[*1100] speculative, that a favorable judgment will redress the plaintiff's injury.

Nova Health Sys., 416 F.3d at 1154 (internal citations omitted). We therefore must evaluate whether any individual MSLF members, at the time MSLF filed

[*14] its complaint, *see id.*, had suffered a redressible injury caused by Defendants.

3. Burden of proof

HN5 The party asserting jurisdiction -- here, MSLF -- has the burden of establishing the elements of standing. *Id.* ("As the party seeking to invoke federal jurisdiction, the plaintiff . . . has the burden of establishing each of the[] three elements of Article III standing."). Because standing was challenged in a motion that was alternatively designated as a motion for sum-

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mary judgment, MSLF "must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citation omitted); see also *Nova Health Sys.*, 416 F.3d at 1154 ("At the summary judgment stage, the plaintiff must set forth by affidavit or other evidence specific facts that, if taken as true, establish each of the[] elements [of standing]."); Cf. *United States v. Hays*, 515 U.S. 737, 743, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995) ("We have . . . made clear that it is the burden of the party who seeks the exercise [**15] of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. And when a case has proceeded to final judgment after a trial, as this case has, those facts (if controverted) must be supported adequately by the evidence adduced at trial to avoid dismissal on standing grounds.") (quotations, citations omitted). Moreover, MSLF concedes on appeal that standing in this case should now be evaluated under summary judgment standards because it acknowledged it is required to "demonstrate specific facts necessary to support the claim of injury."

4. Analysis

a. Affidavit of Don Wood

MSLF claims that it has established the "specific facts" necessary to show individual standing through an MSLF member -- specifically, Don Wood. It points to the affidavit of Mr. Wood, which states that he is a member of MSLF and that his business, Southwest Stone, mined alabaster from mines on what is now

Monument land for nearly 20 years. Approximately sixty to seventy percent of Southwest Stone's alabaster sales came from three such mines. In 1998, the Bureau of Land Management voided Southwest Stone's three mining claims for [**16] failure to comply with annual filing requirements. Because the Monument had been established in the area two years earlier, Southwest Stone was unable to refile its mining claims, the loss of which put Southwest Stone out of business in 1999. Mr. Wood maintains in his affidavit that "[b]ut for the creation of the Monument," he and his business partner "would simply have refiled the claims and preserved our business." MSLF argues that this inability to refile the mining claims by Mr. Wood is the injury-in-fact and that "Mr. Wood owes the loss of his entire business and livelihood to the designation of the Monument."⁵

[**17] [*1101] b. Timing problem

There is a glaring problem with MSLF's reliance on this alleged injury to Mr. Wood, even taking all of the facts alleged in his affidavit as true, *Nova Health Sys.*, 416 F.3d at 1154. MSLF's Complaint in this action was filed on November 5, 1997, and its Amended Complaint was filed on December 15, 1997. Mr. Wood's mining claims, however, were not voided until 1998. Thus, Mr. Wood's alleged injury -- the inability to refile his three voided mining claims -- could not have occurred until *after* the "time th[is] action [wa]s brought." *Nova Health Sys.*, 416 F.3d at 1154. Because standing is determined as of the time of the filing of the complaint, Mr. Wood's alleged injury cannot serve as a basis for MSLF's standing in this case.⁶

⁵ We note that the *voiding* of Mr. Wood's mining claims, although clearly injurious to his business, could not be used to establish standing because it was not caused by Defendants' actions in designating the Monument, but by Mr. Wood's failure to comply with filing requirements. Cf. *United States v. Locke*, 471 U.S. 84, 107, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) ("The[] property loss was one appellees could have avoided with minimal burden; it was their failure to file on time not the action of Congress that caused the property right to be extinguished.").

⁶ Dismissal based on a statute of limitation can occur where the complaint is filed too long *after* the injury occurs. Here, we are presented with the opposite situation: MSLF filed its complaint *before* the asserted injury on which it attempts to rely occurred. Although this basis for dismissal is arguably a peculiar one, especially if Mr. Wood's loss was an otherwise sufficient injury in fact (an issue we do not address), the peculiarity is due solely to MSLF's *post hoc* reliance on an injury that had not even occurred when MSLF filed its complaint. Mr. Wood's loss simply could not have been part of the "legal harm" alleged in MSLF's

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[18] c. Conclusion**standing to bring this action.⁸

Because MSLF relies solely on Mr. Wood's declaration for the "specific facts" necessary to support its standing allegations,⁷ our conclusion that Mr. Wood's affidavit does not demonstrate an injury-in-fact "as of the time the action [wa]s brought" means that MSLF has not met its burden of establishing constitutional

[19] III. CONCLUSION**

For the foregoing reasons, we DISMISS this appeal on the ground that MSLF has not met its burden of establishing the elements of standing.

complaint because it had not yet happened.

We note that in its reply brief, MSLF argues that "Mr. Wood was 'injured' because he was deprived of his statutory right to enter upon and locate additional mining claims within the lands withdrawn by designation of the Monument." Because the inability to locate new mines happened at the time the Monument was created, this alleged injury would not seem to suffer from the same timing problem as Mr. Wood's inability to *refile* his voided claims. However, we decline to address this issue since it was raised for the first time in a reply brief. Stump v. Gates, 211 F.3d 527, 533 (10th Cir. 2000). In any event, this claim is not supported by the evidence.

⁷ Although MSLF states that the experience of Mr. Wood is "but one poignant example of the injuries suffered by MSLF members in the Monument area and throughout Utah and the Southwest as a result of the Monument designation," it gives no other specifics of those injuries and we have found none in the record.

⁸ Because we conclude that MSLF has not established an injury, we need not address the second and third prongs of individual standing (causation and redressibility). And, because MSLF has not shown "specific facts" establishing that any of its members would have standing to bring this action, we need not address the second and third prongs of associational standing.