

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

<p>THE WILDERNESS SOCIETY et al, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, et al, Defendants.</p>

Civil Action No. 1:17cv-02587 (TSC)

<p>GRAND STAIRCASE ESCALANTE PARTNERS, et al, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, et al, Defendants.</p>
--

Civil Action No. 1:17cv-02591 (TSC)

CONSOLIDATED CASES

AMICUS CURIAE BRIEF OF LAW PROFESSORS IN SUPPORT OF
3/(\$, 17,)) 6 ¶ 2 3 3 2 6 , 7 , 2 1 7 2 0 2 7 , 2 1 7 2 ' , 6 0 , 6 6

TABLE OF CONTENTS

	Pages
TABLE OF AUTHORITIES.....	ii.
STATEMENT OF INTEREST.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	

TABLE OF AUTHORITIES

Cases	Page(s)
Dames & Moore v. Regan 453 U.S. 654 (1981).....	11
Food and Drug Administration v. Brown & Williamson Tobacco Corp 529 U.S. 120.....	11
Kleppe v. New Mexico 426 U.S. 529 (1976).....	9
Little v. Barreme 6 U.S. (2 Cranch) 170 (1804).....	11
Summers v. Earth Island Institute 555 U.S. 488 (2009).....	4-5
United States v. San Francisco 310 U.S. 16 (1940).....	9
U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP) 412 U.S. 669 (1973).....	5
Union Oil Cnf0/CID 22>> BDC q ET mithn BT /F1 12 Tf 1 0 0 1 108.02 380.23 Tm 0 g 0 G [(4	

General Mining Law of 1872,
 Ch. 152, 17 Stat. 91 (1872) (codified at 30 U.S.C. § 21).....passim

Omnibus Public Land Management Act of 2009,
 Pub. L. No. 11411, § 2002(a), 123 Stat. 992 (2009).....18

Utah Schools and Lands Exchange Act of 1998,
 Pub. L. No. 105335, 112 Stat. 3139 (1998).....passim

Utah Statehood Enabling Act,
 Ch. 138, § 6, 28 Stat. 107 (1894).....13

Zion National Park Act,
 Pub. L. No. 6683, 41 Stat. 356 (1919) (codified at 16 U.S.C. § 344)14

Presidential Documents

Proclamation No. 6921 Establishment of the Grand Staircase-Escalante
 National Monument, 61 Fed. Reg. 50223 (Sept. 18, 1996).....7, 8, 15

Proclamation No. 9682 Modifying the Grand Staircase-Escalante
 National Monument, 80 Fed. Reg. 235 (Dec. 4, 2017).....2, 4, 7

Federal Regulations

36 C.F.R. § 228.4 (2017).....6

43 C.F.R. § 3809 (2017).....6-7

43 C.F.R. § 8341.1(a).....7

Congressional Documents

Hardrock Mining and Reclamation Act of 2007, H.R. 2262,
 110th Congress, 1st Sess. (2007).....7

Related Filings

§ P L F X V & X U L D H % U L H I R I / D Z 3 U R I H V V R t b V 6 X S S R U W L Q J 3
 Motion to Dismiss Hopi Tribe v. Trump No. 1:17cv-02590-TSC,
 (D.D.C. Nov. 16, 2018), ECF No. 75.....10

William J. Clinton, Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona (Sept. 18, 1996), transcript by Gerhard Peters and John T. Woolley, The American Presidency Project, University of California Santa Barbara, <https://www.presidencycsb.edu/node/221204>.....15

STATEMENT OF INTEREST

SUMMARY OF ARGUMENT

President Clinton established Grand Staircase in 1996 in accordance with the Antiquities Act, pur

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

P D N H V 3 O D L Q W L I I V ¶ F R P S O D L Q W V U L S H I R U M X G L F L D O U H

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

G H Q \) H G H U D O ' H I H Q G S Q W V ¶ P R W L R Q W R G L V P L

⁴ 30 U.S.C. §§ 2 et seq

ARGUMENT

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

Plaintiffs correctly assert that the Trump Proclamation creates a risk of imminent harm to their recreational, aesthetic, scientific and other interests in the protected resources within Grand Staircase-Plateau National Monument. Plaintiffs in *The Wilderness Society v. Trump*, allege inter alia, that under the General Mining Law of 1872, 30 U.S.C. §§ 21 seq. 30 L Q L Q J / D Z ' public lands removed from the protection of the Monument by the Trump Proclamation will be immediately vulnerable to the risk that prospectors will engage in exploration activities. *F D V X D O X V H ' D Q G 3 Q R W P U B L I C L A N D S A N D M I N I N G L A W S L H V Z K H U H W K H \ S U H Y E S W A D Y P A R T N E R S O F G R A N D S T A I R C A S E E S C A L A N T E P A R T N E R S v. T R U M P*, allege inter alia, *W K D W W K H 7 U X P S 3 U R F O D P D W L R Q 3 X Q H V V H Q W L D O W R S U H Y H Q W L Q J W K H G 3 H I J W B G W K W L R Q Q R M U V D H P C* access that the Mining Law

standingest.⁸ The Mining Law authorizes citizens of the United States to enter unreserved and unappropriated public lands to explore for valuable mineral deposits, such as gold or copper, and to stake claims to any deposits they discover, which can create vested private property rights within such public lands.

argument that Plaintiff V DOOHJHG la@M from future, White agency
dHFLVLRQV ')HG 'HI 07' DW HPSKDVLV DGGHG

LQLWL¹ZWWRKQ XW QRWLFH WR %/0 IRU DQ\ DFWLYLWLHV L
43 C.F.R. §3809 Casual use activities encapsulate a broad array of actions that disturb
the landscape, including W KH FROOHFWLRQ RI JHRFKHPLFDO URFN
using hand tools; hand paining; or non P R W R U L J H G W K H X F L H Q R I ³ V P D O O S R
V X F W L R Q G U H G J H V - o p e r a t e d v e h i c l e u s e E D P R W R U L J H G Y H K L F O H
43 C.F.R. § 8341.1(a). The Trump Proclamation is explicit regarding the ability of the
public to engage in offroad vehicle use within the nearly 900,000 acres of federal land
stripped of protection, as it provides that the Secretary of the Interior may O O R Z P R W R U L J H G
and nonmechanized vehicle use on roads and trails existing immediately before the
issuance of [the Grand Staircase Proclamation

imminent risk of harm to sensitive geological, archeological, ecological, and other resources. * L Y H Q 3 O S I E N T I F I C I N T E R E S T S I N C L U D I N G A E S T H E T I C A N D O T H E R I N T E R E S T S T H E

0 R Q X P H Q W † V U H V R X U F H V W K H S R W E I R Q W K B Q R L W P E R B I Q W K D

3 F D V X D O X V p e r m i t t e d u n d e r t h e M i n i n g L a w i s s u f f i c i e n t f o r t h e C o u r t t o f i n d t h a t P l a i n t i f f a l l e g a t i o n s a r e r i p e f o r j u d i c i a l r e v i e w .

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

The Constitution vests plenary authority over the public lands in Congress.

Const. art, IV, † F O 3 7 K H & R Q J U H V V V K D O O K D Y H 3 R Z H U W R

5 X O H V D Q G 5 H J X O D W L R Q V U H V S H F W L Q J W K H 3 U R S H U

6 X S U H P H & R X U W K D V F K D U D F W H U L J H G & R Q J U H V V † V D X W

P r R S H U W \ & O D X V H D V 3 Z e p p e v K R e v M e x O c 1 2 6 U S D 5 2 9 L 3 0 (1 9 7 6)

(citing United States v. San Francisco 310 U.S. 16, 29 (1940)) Accordingly, presidential

authority over public lands is limited to that which specifically has been delegated by Congress.

In the case of the Antiquities Act, the President has the auth R U L W \ W R 3 U H V H U Y H ´ S

lands. 54 U.S.C. § 320301(a) However, Congress

Abolish or Diminish National Monuments 103 Va. L. Rev. Online 55 (2017). The brief submitted by amici law professors in consolidated cases before this Court concerning Bears Ears National Monument (Case Nos. 1:17-cv-02590 (TSC), 1:17-cv-02605 (TSC), and 1:17-cv-02606 (TSC)) WKH 3 (DHUJ \$ PLFXV ULI % ULHI RI /DZRO @ ð 0 D Fp ^gŽ;`1 õ € Ài8.59 Tmg 0 044>9<0 historical bases for these arguments, which apply to Grand Staircase just as they do to the Bears Ears National Monument. As discussed in detail in that brief WKH 3 UHV LG HQ W ¶ attempt to substantially reduce the boundaries of Grand Staircase by nearly 900,000 acres is ultra vires and beyond the authority delegated to him by the Congress under the Antiquities Act. , Q R UGHU WR UHVSHFW WKH & RXUW ¶ V WLP H D arguments, we hereby incorporate the arguments set forth in the Bears Ears Amicus Brief regarding presidential authority with respect to the Bears Ears National Monument, which also apply to Grand Staircase

III. CONGRESSIONAL RATIFICATION OF) 7+(02180(17 ¶ 6 BOUNDARIES PRECLUDES MODIFICATION BY PRESIDENTIAL DECLARATION

As referenced above and discussed Plaintiffs and other amici, the President lacks authority under the Antiquities Act to reduce the scope of a national monument. In the case of the Monument, the President lacks this authority by virtue of the fact that Congress has, by legislation, exerted its authority and expressed clear intent as to the 0 R Q X P H Q W ¶ V E R X Q G D U L H V D Q G F R Q V H U Y D W L R Q S X U S R V H to reduce the scope of the Monument.

¹⁶ \$ PLFXV & XULDH % ULHI RI /DZRO @ ð 0 D Fp ^gŽ;`1 õ € Ài8.59 Tmg 0 044>9<0

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

It is axiomatic that, when exercising delegated authority, Presidents prohibited

Law and Policy 129-145 (3d ed. 2016). The school land grant policy was premised on an expectation that the state parcels, like the federal land that surrounded them, would eventually pass into private hands or be leased for development, with the proceeds benefiting the state. However, the American West's defining feature limited the potential uses over large tracts of public land, and as a result,

owned tracts that were beyond the jurisdiction of the federal land managers, even though many of them contained significant cultural, geological and biological resources of the kind identified in the Grand Staircase Proclamation. See Lands Exchange Act § 202.

At the time negotiations were underway between the State of Utah and the federal government to exchange state lands within several other federally protected areas in Utah for unprotected federal lands outside those areas. President Clinton's Proclamation alluded to the negotiations, and suggested that the designation of the Monument would be specifically. President Clinton directed the Secretary of the Interior to comply with all exchange requests that his administration received.

³ § J U H H P Specifically, Utah transferred W L W O H W R W K H 8 Q L W H G 6 W D W H the exterior boundaries of the Monument, comprising approximately 176,698.62 acres of O D Q G D Q G W K H P L Q H U D O L Q W H U H V W L Q I D A S S (E) ³⁶ [L P D W H O \ The Agreement P R Y L G H G W K D W ³ O D Q G V D Q G L Q W H U H V W V L Q O within the exterior boundaries of the Monument . . . shall become a part of the Grand Staircase-Escalante National Monument, and shall be subject to all the laws and regulations applic D E O H W R W K H d. of § 6 (X) P H e n , the federal government agreed to convey to Utah federal lands outside the Monument and other conservation areas that were suitable for mineral or other economic development and the sum of \$50 million. Id. at

UHVHUYDWLRQV DQG RWKHU SURYLVLQRQV RI WKH \$JUHI
FRPPLWPHQWV RI WKH SDUWLHM. at § 3(b) On 12/11/13, U RI)HG

Congress affirmed and specifically enumerated the conservation benefits derived by
including the state tracts within the Monument, stating that

[c]ertain State school trust lands within the Monument, like the Federal lands comprising the Monument, have substantial noneconomic scientific, historic, cultural, scenic, recreational, and natural resources, including ancient Native American archeological sites and rare plant and animal communities.

Lands

C. 6XEVHTXHQW OHJLVODWLRQ FRQILUPV &RQJUHVV
protect resources within Grand Staircase, precluding Presidential

CONCLUSION

3 U H V L G H Q W & O L Q W C R O J S T A I C A S E P R O T E C T A W I D E R A N G E of
 important scientific and historic resources V R X W K H U Q 8 W D K Z D V U D W L I L H G
 enactment of the Lands Exchange Act in 1998. The Trump Proclamation purporting to
 reduce the area of the Monument and open formerly protected public lands to exploration
 and exploitation creates a risk of imminent harm by virtue of the operation of the Mining
 / D Z P D N L Q J 3 O D L Q W L I I V ¶ F R P S O D L Q W V U L S H I R U U H Y L H Z
 ultra vires, as the President lacks the authority under the Antiquities Act to shrink a national
 monument, and directly contracts the intention of Congress as expressed by legislation
 ratifying the Monument and affirming its conservation purpose. For reasons, Federal
 Defendants ¶ motion to dismiss must be denied.

Respectfully Submitted: November 19, 2018

/s/ Douglas W. Baruch
Douglas W. Baruch (D.C. Bar No. 414354)

Appendix A

ON BEHALF OF THE FOLLOWING LAW PROFESSOR SIGNATORIES:

B

CHRISTINE A. KLEIN
Chesterfield Smith Professor of Law
University of Florida Levin College of Law

SARAH KRAKOFF
Moses Lasky Professor of Law
University of Colorado Law School

MONTE MILLS
Associate Professor of Law and
Co-Director, Margery Hunter Brown Indian Law Clinic
Alexander Blewett III School of Law
The University of Montana