

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UTAH DINÉ BIKÉYAH, et al.,	)	No. 1:17-cv-02605-TSC
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
DONALD J. TRUMP, et al.,	)	
	)	
Defendants,	)	
	)	
BRANDON SULSER; BIGGAME	)	
FOREVER; SPORTSMEN FOR FISH &	)	
WILDLIFE; UTAH BOWMEN'S	)	
ASSOCIATION; UTAH WILD SHEEP	)	
FOUNDATION; MICHAEL NOEL; SANDY	)	
JOHNSON; and GAIL JOHNSON,	)	
	)	
Applicant Defendant-Intervenors.	)	
_____	)	

**MEMORANDUM IN SUPPORT OF  
DEFENDANT-INTERVENORS' MOTION TO INTERVENE  
(FRCP 24)**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION .....	1
APPLICANTS.....	2
BACKGROUND .....	7
I.    ANTIQUITIES ACT.....	7
II.   BEARS EARS NATIONAL MONUMENT.....	9
ARGUMENT .....	10
I.    APPLICANTS SATISFY RULE 24(a) AND SHOULD BE GRANTED INTERVENTION AS OF RIGHT .....	10
A.   Applicants Have Standing.....	10
1.    Organizational Applicants.....	11
a.    Direct Organizational Standing .....	11
b.    Associational Standing.....	13
2.    Individual Applicants .....	16
B.   Applicants’ Motion to Intervene Is Timely .....	19
C.   Applicants Have Significantly Protectable Interests in This Action .....	20
D.   Disposition of This Case May Impair or Impede Applicants’ Interests .....	21
E.   None of the Parties Adequately Represent Applicants’ Interests.....	21
II.   IN THE ALTERNATIVE, APPLICANTS SATISFY THE STANDARD FOR PERMISSIVE INTERVENTION .....	23
CONCLUSION .....	23
CERTIFICATE OF SERVICE .....	25

## TABLE OF AUTHORITIES<sup>1</sup>

### Cases

<i>*Crossroads Grassroots Policy Strategies v. Fed. Election Comm’n</i> , 788 F.3d 312 (D.C. Cir. 2015) .....	10, 13, 15, 17
<i>*Cty. of San Miguel, Colo. v. MacDonald</i> , 244 F.R.D. 36 (D.D.C. 2007) .....	12, 15-16, 20-22
<i>Defs. of Wildlife v. Kempthorne</i> , No. CIV A 04-1230 GK, 2006 WL 2844232 (D.D.C. Sept. 29, 2006), on reconsideration in part sub nom. <i>Defs. of Wildlife v. Salazar</i> , 842 F. Supp. 2d 181 (D.D.C. 2012) .....	17
<i>E.E.O.C. v. Nat’l Children’s Ctr., Inc.</i> , 146 F.3d 1042 (D.C. Cir. 1998) .....	23
<i>Foster v. Gueory</i> , 655 F.2d 1319 (D.C. Cir. 1981) .....	21
<i>Fund For Animals, Inc. v. Norton</i> , 322 F.3d 728 (D.C. Cir. 2003) .....	20-22
<i>Havens Realty Corp. v. Coleman</i> , 455 U.S. 363 (1982) .....	11
<i>Hunt v. Washington State Apple Advert. Comm’n</i> , 432 U.S. 333 (1977) .....	13
<i>Nuesse v. Camp</i> , 385 F.2d 694 (D.C. Cir. 1967) .....	20
<i>Spann v. Colonial Vill., Inc.</i> , 899 F.2d 24 (D.C. Cir. 1990) .....	11
<i>Trbovich v. United Mine Workers of Am.</i> , 404 U.S. 528 (1972) .....	21
<i>United States v. Am. Tel. &amp; Tel. Co.</i> , 642 F.2d 1285 (D.C. Cir. 1980) .....	19-20

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<sup>1</sup> Authorities upon which Applicants chiefly rely are marked with an \*.

## Statutes

54 U.S.C. § 320301(a) .....	7
54 U.S.C. § 320301(b) .....	7
Proclamation No. 1186, 37 Stat. 1733 (Mar. 14, 1912) .....	8
Proclamation No. 1293, 39 Stat. 1726 (May 11, 1915) .....	8
Proclamation No. 1862, 45 Stat. 2984 (Jan. 7, 1929) .....	8
Proclamation No. 2499, 55 Stat. 1660 (July 18, 1941) .....	8
Proclamation No. 2659, 59 Stat. 877 (Aug. 13, 1945) .....	8
Proclamation No. 3307, 73 Stat. c69 (Aug. 7, 1959) .....	8
Proclamation No. 3539, 77 Stat. 1006 (May 27, 1963) .....	8

## Rules

Fed. R. Civ. P. 24 .....	1
Fed. R. Civ. P. 24(a) .....	2, 10
Fed. R. Civ. P. 24(a)(2) .....	20
Fed. R. Civ. P. 24(b) .....	2
Fed. R. Civ. P. 24(b)(2) .....	23

## Other Authorities

Anderson, Matthew, Op-Ed, <i>Bears Ears Monument runs counter to American ideals</i> , The Salt Lake Tribune Online, Dec. 19, 2016, <i>available at</i> <a href="http://archive.sltrib.com/article.php?id=11567219&amp;itype=storyID">http://archive.sltrib.com/article.php?id=11567219&amp;itype=storyID</a> .....	18
Bureau of Land Management, <i>Bears Ears National Monument Fast Facts and Q&amp;A</i> (Dec. 28, 2016), <i>available at</i> <a href="https://www.blm.gov/programs/national-conservation-lands/national-monuments/utah/bears-ears/fast-facts">https://www.blm.gov/programs/national-conservation-lands/national-monuments/utah/bears-ears/fast-facts</a> .....	14-15
Gaziano, Todd F. & Yoo, John, <i>Presidential Authority to Revoke or Reduce National Monument Designations</i> (July 18, 2017), Yale Journal on Regulation, Vol. 35, No. 2, 2018; UC Berkeley Public Law Research Paper, <i>available at</i> SSRN: <a href="https://ssrn.com/abstract=3004821">https://ssrn.com/abstract=3004821</a> .....	7-8

Lee, Ronald F., <i>The Antiquities Act, 1900–1906</i> , in <i>The Story of the Antiquities Act</i> (National Park Service, Mar. 15, 2016), available at <a href="https://www.nps.gov/archeology/pubs/lee/index.htm">https://www.nps.gov/archeology/pubs/lee/index.htm</a> .....	7
Presidential Proclamation Modifying the Bears Ears National Monument (Dec. 4, 2017), available at <a href="https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/">https://www.whitehouse.gov/presidential-actions/ presidential-proclamation-modifying-bears-ears-national-monument/</a> .....	9, 19
Press Release, Department of Interior, Secretary Zinke Recommends Keeping Federal Lands in Federal Ownership, Adding Three New Monuments (Dec. 5, 2017), available at <a href="https://www.doi.gov/pressreleases/secretary-zinke-recommends-keeping-federal-lands-federal-ownership-adding-three-new">https://www.doi.gov/pressreleases/secretary-zinke- recommends-keeping-federal-lands-federal-ownership-adding-three-new</a> .....	22
Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).....	9
Utah Public Lands Initiative Act, H.R. 5780, 114th Cong. (Introduced July 14, 2016).....	9

## INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, Brandon Sulser, BigGame Forever, Sportsmen for Fish & Wildlife, the Utah Bowmen's Association, the Utah Wild Sheep Foundation, Michael Noel, Sandy Johnson, and Gail Johnson (collectively, "Applicants") move to intervene to protect their interests at stake in this litigation.

Plaintiffs ask the Court to hold unlawful the December 4, 2017 Presidential Proclamation that amended Proclamation 9558 of December 28, 2016 and reduced the size of the Bears Ears National Monument. *See* Complaint, Dkt. 1, Prayer for Relief. In effect, Plaintiffs ask this Court to expand the boundaries of the Bears Ears National Monument to its originally designated 1.35 million acres, *id.*, which would severely restrict access to, and multiple uses of, hundreds of thousands of acres of federal land in Utah. *See, e.g.*, Declaration of Ryan Benson ¶ 14; Declaration of Brandon Sulser ¶¶ 9, 10.

Applicants seek to intervene to defend their interests that are protected by the December 4, 2017 Proclamation. Specifically, before December 2016, Applicants engaged in conservation, recreational, and business activities on the public lands that would become the original Bears Ears National Monument. Declaration of Ryan Benson ¶¶ 13, 14; Declaration of Brandon Sulser ¶ 9; Declaration of LeRoy Hampton ¶ 7; Declaration of Troy Justensen ¶ 10; Declaration of Travis Jensen ¶ 9; Declaration of Michael Noel ¶ 8; Declaration of Sandy Johnson ¶ 6. The 2016 designation threatened Applicants' use of and access to these lands. The President's December 4,

2017 Proclamation reduced the boundaries of the monument, and restored hundreds of thousands of acres to the regulatory scheme that was in place for decades before December 2016. As a result, the December 4, 2017 Proclamation benefits Applicants, its invalidation would harm Applicants, and they seek to ensure that this 2017 Proclamation remains in effect.

Because this case will profoundly impact the interests of Applicants and their members, they are entitled to intervention as of right. Fed. R. Civ. P. 24(a). Alternatively, Applicants move for permissive intervention. Fed. R. Civ. P. 24(b). Accordingly, the Motion to Intervene should be granted.

#### **APPLICANTS**

Intervenor Brandon Sulser is a resident of Utah, an outdoorsman, conservationist, and the partner coordinator for Intervenor BigGame Forever. Declaration of Brandon Sulser ¶¶ 4, 5, 6. When he was 18, Sulser was involved in an accident and was diagnosed a quadriplegic. As a result, he often relies on off-highway and other motorized vehicles to access public lands in Utah, including those lands within the boundaries of the former Bears Ears National Monument. *Id.* ¶¶ 5, 9, 10. The original Bears Ears Monument designation threatened, and if reestablished would threaten, both his personal and professional use of the public lands in Utah. *Id.* ¶10.

Intervenor BigGame Forever is a non-profit corporation in Utah established to counter threats to wildlife and sportsmen's rights. Declaration of Ryan Benson ¶¶ 5, 6. Its mission is to unite sportsmen to address the most serious threats to wildlife,

hunters' rights, and America's outdoor heritage. *Id.* ¶ 5. BigGame Forever has approximately 55,000 members, including members who are active hunters and conservationists in Utah. *Id.* ¶ 6. To promote its members' interests, BigGame Forever engages in legislative and legal strategies to tackle the most complex and challenging issues threatening wildlife populations and the North American Model of user-based conservation. *Id.* ¶ 8. BigGame Forever engages with state and local governments to protect diverse wildlife populations. *Id.* It also participates in strategic litigation to further these interests. *Id.* For decades, BigGame Forever's members have been stewards of the land in and around the former Bears Ears National Monument. *Id.* ¶ 13. These members and other sportsmen have conducted transplants of wildlife as well as habitat and water conservation projects to ensure that wild game herds in southern Utah remain robust and healthy. *Id.* The original, excessive Bears Ears Monument designation threatened these proven conservation efforts, and threatened to constrain the rights of BigGame Forever and its members to carry out these projects on public land in and around the Bears Ears area. *Id.* ¶¶ 13, 14. The original designation also threatened its members' use of these public lands by preventing off-highway and other motorized-vehicle access. BigGame Forever's elderly and disabled members would be especially impacted by the additional regulations and loss of access that would result from the reversal of the December 4, 2017 Proclamation. *Id.* ¶ 14.

Intervenor Sportsmen for Fish & Wildlife is a non-profit corporation in Utah dedicated to the perpetuation of wildlife and committed to creating a future for



wildlife and hunters. Declaration of Troy Justensen ¶ 5. Sportsmen for Fish & Wildlife has approximately 7,000 members, including members who are active hunters and conservationists in Utah. *Id.* ¶ 6. Sportsmen for Fish & Wildlife members have raised millions of dollars and volunteered tens of thousands of hours and equipment to rehabilitate public lands and restore wildlife populations in Utah. *Id.* ¶ 7. Thousands of acres of critical deer and elk winter habitat have been purchased, treated with chaining and burning, and preserved with Sportsmen for Fish & Wildlife funds. *Id.* ¶ 8. Sportsmen for Fish & Wildlife and its members have also participated in interstate and in-state transplants of buffalo, bighorn sheep, elk, turkey, and mule deer that result in a more abundant and healthier wildlife for everyone. *Id.* The original Bears Ears Monument designation threatened, and if reestablished would threaten, these proven conservation efforts, and threatened, and if reestablished would threaten, the rights of Sportsmen for Fish & Wildlife and its members to carry out these projects on public land in and around the Bears Ears area. *Id.* ¶ 11.

Intervenor Utah Bowmen's Association is an organization made up of bowhunters, archers, and archery clubs, whose primary function is to help coordinate and cultivate the interests of all Utahans with respect to archery and bowhunting. Declaration of LeRoy Hampton ¶ 5. It has approximately 1,700 members in Utah. *Id.* Members of the Utah Bowmen's Association regularly use, and plan to continue to use, the public lands in and around the original boundaries of the Bears Ears National Monument. *Id.* ¶¶ 5, 7. Like the other sportsmen organizations, the original

Bears Ears Monument designation threatened to limit or eliminate certain means of access to these public lands. *Id.* ¶ 8.

Intervenor Utah Wild Sheep Foundation is a non-profit organization founded to promote and enhance increasing populations of indigenous wild sheep in Utah, to safeguard against the decline or extinction of such species, and to fund programs for professional management of these populations, keeping all administrative costs to a minimum. Declaration of Travis Jenson ¶ 5. The Foundation annually funds a wide variety of meaningful and essential projects with some major areas of consideration being: wildlife enhancement, management, the re-establishment of wild sheep, and sportsmen's rights. *Id.* ¶ 6. To that end, the Foundation and its members, as well as partner organization Sportsmen for Fish and Wildlife, have made major investments in capture/transplants, paying for Bighorn sheep research and habitat studies, building water catchments, and purchasing wild sheep from other western states. *Id.* ¶ 7. This work has been the critical component to Utah's status as the state with the most aggressive and successful wild sheep program in the west. *Id.* Much of the Foundation's conservation work has taken place on public lands that were within the original boundaries of the Bears Ears National Monument. *Id.* ¶ 9.

Intervenor Michael Noel is a Utah resident, rancher, and a Representative in the Utah House of Representatives, representing the 73rd District. Declaration of Michael Noel ¶¶ 3, 4, 5. Representative Noel's constituents include residents who live and work on and near the public lands at issue in this case. *Id.* ¶ 5. Representative Noel opposed the designation of the Bears Ears National Monument and supported

the December 4, 2017 Proclamation that reduced the size of the Monument. *Id.* ¶ 6. Representative Noel has accessed the public lands within the original boundaries of the Bears Ears National Monument and plans to continue to do so in the future. *Id.* ¶ 7. His personal access, like the access of his constituents, was threatened by Proclamation 9558. *Id.* Furthermore, as a rancher, Representative Noel is aware of the negative effects to ranching that result when public lands are designated as a national monument. *Id.* ¶ 8. Representative Noel represents several ranchers who work on the public lands at issue in this case, and wishes to prevent the increased regulatory burdens on ranching that would have resulted from Proclamation 9558 and that will result if this proclamation is reinstated. *Id.*

Sandy and Gail Johnson, residents of San Juan County, Utah, own property in southern Utah that was surrounded by the original boundaries of the Bears Ears National Monument. Declaration of Sandy Johnson ¶ 6. Additionally, Sandy Johnson, with his son Preston Johnson, holds a grazing allotment on Bureau of Land Management land on the public lands at issue in this case. *Id.* ¶ 4. The original boundaries of the Bears Ears National Monument covered the entirety of the Johnson's allotment. *Id.* ¶ 6. The Johnsons knew that the Bears Ears National Monument, as originally designated, would negatively impact their lives and business, and expressed those concerns when Secretary Zinke visited the area in May of 2017. *Id.* ¶ 9. The Johnsons will be harmed if the original monument designation is reinstated.

## BACKGROUND

### I.

#### ANTIQUITIES ACT

In 1906, Congress passed the Antiquities Act. It provides that “[t]he President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.” 54 U.S.C. § 320301(a). The President may reserve public lands to protect national monuments, but only if the reservation is “confined to the smallest area compatible with the proper care and management of the objects to be protected.” 54 U.S.C. § 320301(b).

As its name suggests, the Antiquities Act was passed primarily to protect American Indian archeological sites from looting. Ronald F. Lee, *The Antiquities Act, 1900–1906, in The Story of the Antiquities Act* (National Park Service, Mar. 15, 2016).<sup>2</sup> Specifically, those who originally proposed the idea for a bill bemoaned the fact that, unlike many European countries, the United States had no law protecting antiquities. *Id.*

The use of the Antiquities Act has greatly expanded in recent years, with the previous three administrations designating more, and larger, monuments than their predecessors. See Todd F. Gaziano & John Yoo, *Presidential Authority to Revoke or Reduce National Monument Designations* at 7 (July 18, 2017), Yale Journal on

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<sup>2</sup> Available at <https://www.nps.gov/archeology/pubs/lee/index.htm>.

Regulation, Vol. 35, No. 2, 2018; UC Berkeley Public Law Research Paper, *available at* SSRN: <https://ssrn.com/abstract=3004821>.

But the Antiquities Act has also been used to reduce national monuments. Prior to this year, seven presidents issued proclamations reducing the size of national monuments. *See, e.g.*, Proclamation No. 1186, 37 Stat. 1733 (Mar. 14, 1912); Proclamation No. 1293, 39 Stat. 1726 (May 11, 1915); Proclamation No. 1862, 45 Stat. 2984 (Jan. 7, 1929); Proclamation No. 2499, 55 Stat. 1660 (July 18, 1941); Proclamation No. 2659, 59 Stat. 877 (Aug. 13, 1945); Proclamation No. 3307, 73 Stat. c69 (Aug. 7, 1959); Proclamation No. 3539, 77 Stat. 1006 (May 27, 1963). The reasoning for these reductions varied by President, ranging from the need to construct a state highway, 55 Stat. 1660, to the fact that the original designation contained limited archeological values, 77 Stat. 1006. Some Presidents even reduced the size of monuments without explanation. 39 Stat. 1726. The reduction of a national monument is no more unprecedented than the establishment of a national monument.

## II.

### BEARS EARS NATIONAL MONUMENT

On December 28, 2016, during the final days of his administration, President Obama signed Proclamation 9558, which established the 1.35 million acre Bears Ears National Monument in San Juan County, in southeastern Utah. Proclamation No. 9558 of December 28, 2016, 82 Fed. Reg. 1139. The Proclamation was signed despite strong and unanimous opposition from the Utah Congressional Delegation and despite the positions of the Utah Governor and state legislature. Furthermore, the Monument was designated notwithstanding a proposed compromise bill that would have established portions of the area as a conservation area. Utah Public Lands Initiative Act, H.R. 5780, 114th Cong. (Introduced July 14, 2016).

On December 4, 2017, President Trump signed a Proclamation reducing the size of the Bears Ears National Monument to approximately 200,000 acres. Presidential Proclamation Modifying the Bears Ears National Monument (Dec. 4, 2017).<sup>3</sup> The Proclamation stated that it “is in the public interest to modify the boundaries of the monument to exclude from its designation” those areas that were “unnecessary for the care and management of the objects to be protected within the monument.” *Id.*

Two days later, Plaintiffs filed this action challenging the December 4, 2017 Proclamation. Complaint, Dkt. 1. Plaintiffs allege that the December 4, 2017

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<sup>3</sup> Available at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/>.

Proclamation violates the Antiquities Act, the constitutional principle of separation of powers, and the Take Care Clause of the United States Constitution. *Id.* ¶¶ 189-220.

## ARGUMENT

### I.

#### APPLICANTS SATISFY RULE 24(a) AND SHOULD BE GRANTED INTERVENTION AS OF RIGHT

A party has a right to intervene if it (a) applies in a timely manner, (b) claims an interest relating to the subject of the case, which will be impaired or impeded by its disposition, and (c) its interests aren't adequately represented by the existing parties. Fed. R. Civ. P. 24(a). Additionally, the D.C. Circuit has held that intervenors, including intervenor-defendants, must have standing to intervene as of right. *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015). Applicants satisfy all requirements to intervene as of right.

#### A. Applicants Have Standing

"The standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability." *Crossroads*, 788 F.3d at 316. The D.C. Circuit has "generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Id.* at 317. That is the case here, as all applicants benefit from the December 4, 2017 Proclamation challenged here and would be injured if this Court grants Plaintiffs' requested relief

and restores the boundaries of the Bears Ears National Monument to its originally designated 1.35 million acres.

## **1. Organizational Applicants**

### **a. Direct Organizational Standing**

The organizational applicants (BigGame Forever, Sportsmen for Fish & Wildlife, Utah Bowmen's Association, and the Utah Wild Sheep Foundation) have standing to intervene in this case. "An organization has standing on its own behalf if it meets the same standing test that applies to individuals. The organization must show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990). A "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests" and constitutes an injury sufficient for standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Here, each organizational applicant has standing. The designation of the Bears Ears National Monument caused actual and threatened injuries to the organizations' activities. Declaration of Ryan Benson ¶¶ 13, 14; Declaration of LeRoy Hampton ¶ 8; Declaration of Troy Justensen ¶ 11; Declaration of Travis Jenson ¶ 11. Specifically, the organizations have used the public land in and around the Bears Ears area for their conservation and recreational activities. Declaration of Ryan Benson ¶¶ 13, 14; Declaration of LeRoy Hampton ¶ 7; Declaration of Troy Justensen ¶ 10; Declaration



of Travis Jenson ¶ 9. The increased regulatory restrictions that result from a monument designation impaired, and if reestablished would again impair, these activities and restrict access to the public lands. *Cty. of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 44 (D.D.C. 2007) (granting intervenor-defendants’ application for intervention because “allegations of expected increase in regulatory restrictions on their members’ use of public and private land, including their members’ access to federal lands, impairment of their members’ existing and future conservation efforts, and a reduction in the profitability of their members’ business concerns, constitute concrete and imminent injuries”).

For example, BigGame Forever has conducted transplants as well as habitat- and water-conservation projects to ensure that wild game herds in southern Utah remain robust and healthy. Declaration of Ryan Benson ¶ 13. The original Bears Ears National Monument designation threatened these proven conservation efforts, and threatened the rights of BigGame Forever to carry out these projects on public land in and around the Bears Ears area. *Id.*

Similarly, Sportsmen for Fish & Wildlife and the Utah Wild Sheep Foundation engage in wildlife conservation projects and recreational activities on the land in and around the original boundaries of the Bears Ears National Monument. Declaration of Travis Jenson ¶¶ 9, 10; Declaration of Troy Justensen ¶ 10. The same is true for the Utah Bowmen’s Association, which engages in recreational activities on public lands in Utah, including the lands at issue in this case. Declaration of LeRoy

Hampton ¶¶ 7, 8. Like BigGame Forever, these activities would be threatened if this Court grants Plaintiffs’ requested relief.

Because the organizational applicants have suffered and would again suffer injuries sufficient to intervene, they also meet the traceability and redressability prongs of the standing test. *See Crossroads Grassroots Policy Strategies*, 788 F.3d at 316 (If proposed intervenor-defendant “can prove injury, then it can establish causation and redressability.”). If this Court grants Plaintiffs’ requested relief, then the injuries resulting from the original Bears Ears National Monument designation would be restored. The organizations can prevent these injuries by defeating Plaintiffs’ challenge to the President’s December 4, 2017 Proclamation. *See id.* Therefore, the organizational injuries are traceable to this lawsuit and redressable through a judgment in favor of Defendants. Accordingly, the organizational applicants have standing to intervene.

#### **b. Associational Standing**

BigGame Forever, Sportsmen for Fish & Wildlife, the Utah Bowmen’s Association, and the Utah Wild Sheep Foundation also have standing to intervene on behalf of their members. An organization has standing to bring suit on behalf of its members when “(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. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

The original boundaries of the Bears Ears National Monument threatened the ability of these organizations' members to use and enjoy the land. Declaration of Ryan Benson ¶¶ 13, 14; Declaration of LeRoy Hampton ¶ 8; Declaration of Troy Justensen ¶ 11; Declaration of Travis Jenson ¶ 11. Members of BigGame Forever, Sportsmen for Fish & Wildlife, and the Utah Wild Sheep Foundation have worked with each of these organizations to conduct conservation and wildlife rehabilitation activities on the lands at issue in this case. Declaration of Ryan Benson ¶¶ 13, 14; Declaration of Troy Justensen ¶¶ 7, 10; Declaration of Travis Jenson ¶¶ 7, 9. Restoring the original boundaries of the Bears Ears National Monument would limit these individuals' ability to continue this conservation work. *Id.*

Furthermore, the original Bears Ears National Monument would have limited recreational access for the members of BigGame Forever, Sportsmen for Fish & Wildlife, the Utah Bowmen's Association, and the Utah Wild Sheep Foundation. Declaration of Ryan Benson ¶¶ 13, 14; Declaration of LeRoy Hampton ¶ 8; Declaration of Troy Justensen ¶ 11; Declaration of Travis Jenson ¶ 11. This is especially true for disabled and elderly members who rely on motorized vehicle use to access the public lands. *See* Declaration of Ryan Benson ¶¶ 13, 14; Declaration of LeRoy Hampton ¶ 8; Declaration of Troy Justensen ¶ 11. Use of motorized and off-highway vehicles would have been limited within the original boundaries of the Bears Ears National Monument. *See* Bureau of Land Management, *Bears Ears National Monument Fast Facts and Q&A* at 4 (Dec. 28, 2016) (explaining how monument

designation would impact off-highway vehicle and other motorized vehicle use);<sup>4</sup> Complaint ¶ 108.

This “increase in regulatory restrictions on their members’ use of public and private land, including their members’ access to federal lands” is sufficient injury for standing. *Cty. of San Miguel, Colo.*, 244 F.R.D. at 44. Likewise, these injuries are traceable to this lawsuit and would be redressed through a judgment in favor of Defendants. *Crossroads Grassroots Policy Strategies*, 788 F.3d at 316. Accordingly, these organizations’ members would otherwise have standing to sue in their own right.

The interests these organizations seek to protect are germane to their purposes. BigGame Forever’s mission is to unite sportsmen to address the most serious threats to wildlife, hunters’ rights, and America’s outdoor heritage. Declaration of Ryan Benson ¶¶ 5, 13. Similarly, Sportsmen for Fish & Wildlife is dedicated to the perpetuation of wildlife and committed to creating a future for wildlife and hunters. Declaration of Troy Justensen ¶¶ 5, 10. The Utah Wild Sheep Foundation works with Sportsmen for Fish & Wildlife, and other organizations, to promote and enhance increasing populations of indigenous wild sheep to Utah, to safeguard against the decline or extinction of such species, and to fund programs for professional management of these populations. Declaration of Travis Jenson ¶¶ 5, 10. The Utah Bowmen’s Association is an organization made up of bowhunters, archers,

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<sup>4</sup> Available at <https://www.blm.gov/programs/national-conservation-lands/national-monuments/utah/bears-ears/fast-facts>.

and archery clubs, whose primary function is to help coordinate and cultivate the interests of all Utahans with respect to archery and bowhunting. Declaration of LeRoy Hampton ¶¶ 5, 7. The projects the Association engages in to further these goals were threatened by Proclamation 9558 and would be injured by the reestablishment of the original Bears Ears National Monument boundaries. Furthermore, the Utah Bowmen's Association promotes using the public lands for recreational purposes, including hunting. Because Proclamation 9558 reduces access to public lands, it also threatens the activities promoted by the Association.

Finally, the participation of individual members in the lawsuit is not necessary. BigGame Forever, Sportsmen for Fish & Wildlife, the Utah Bowmen's Association, and the Utah Wild Sheep Foundation seek to intervene to defend against Plaintiffs' challenge, and merely ask this Court to deny Plaintiffs' requested relief. Accordingly, BigGame Forever, Sportsmen for Fish & Wildlife, the Utah Bowmen's Association, and the Utah Wild Sheep Foundation have standing to intervene on behalf of their members.

## **2. Individual Applicants**

The individual applicants (Brandon Sulser, Michael Noel, and Sandy and Gail Johnson) also have standing to intervene in this case. Like the organizational applicants, the increased regulatory regime that results from a monument designation will affect their use of the public lands at issue in this case. *See Cty. of San Miguel, Colo.*, 244 F.R.D. at 44. These injuries are traceable to Plaintiffs'

requested relief and would be redressed if this Court grants judgment in favor of Defendants. *Crossroads Grassroots Policy Strategies*, 788 F.3d at 316.

As a conservationist, hunter, and recreationist, Brandon Sulser has accessed, and plans to continue to access, the public lands at issue in this case. Declaration of Brandon Sulser ¶ 9. Because he has been diagnosed a quadriplegic, Mr. Sulser must use off-highway and other motorized vehicles to participate in recreational and other activities on public lands in Utah. *Id.* ¶ 10. The original Bears Ears National Monument designation, by increasing restrictions on activities and means of transportation allowed within the monument, limits his access to these public lands. *Id.*; see Complaint ¶ 108 (describing how Proclamation 9558 would impact motorized vehicle access).

Furthermore, as partner coordinator for BigGame Forever, Mr. Sulser's professional interests will be injured if Plaintiffs' requested relief is granted. *Cf. Defs. of Wildlife v. Kempthorne*, No. CIV A 04-1230 GK, 2006 WL 2844232, at \*9 (D.D.C. Sept. 29, 2006), *on reconsideration in part sub nom. Defs. of Wildlife v. Salazar*, 842 F. Supp. 2d 181 (D.D.C. 2012) (holding that plaintiffs had standing to challenge listing determination under Endangered Species Act because of their "recreational, aesthetic, and professional interests" in an animal (internal quotations omitted)). In that capacity, Mr. Sulser works with partners and members of BigGame Forever to coordinate projects for the organization. Declaration of Brandon Sulser ¶¶ 6, 7. As demonstrated above, the original Monument designation threatened BigGame Forever's conservation and other projects on the public lands in Utah.

Michael Noel also has standing to intervene in this case. As a resident of Utah, Representative Noel has accessed the public lands in and around the original boundaries of the Bears Ears National Monument. Declaration of Michael Noel ¶ 7. Like the other Applicants, the increased regulatory restrictions resulting from a monument designation threaten his access to these public lands. Accordingly, Representative Noel has standing to intervene in this case.

Finally, Sandy and Gail Johnson have standing to intervene because the original monument designation injured their business and personal interests. The designation of the Bears Ears National Monument changed the regulatory regime that governed the Johnsons' grazing on public lands. Declaration of Sandy Johnson ¶ 8. The history of a nearby national monument, the Grand Staircase-Escalante National Monument, demonstrates how a monument designation negatively impacts ranchers. See Matthew Anderson, Op-Ed, *Bears Ears Monument runs counter to American ideals*, The Salt Lake Tribune Online, Dec. 19, 2016.<sup>5</sup> In the nearly twenty years since the Grand Staircase-Escalante National Monument was established, the number of animals grazing on the monument has declined by almost a third, and ranchers have been limited in their ability to move water lines within their allotments, fence riparian areas, and maintain roads. *Id.*; Declaration of Sandy Johnson ¶ 8.

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<sup>5</sup> Archived article available at <http://archive.sltrib.com/article.php?id=4713970&i type=CMSID>.

The December 4, 2017 Proclamation, on the other hand, modifies Paragraph 35 of Proclamation 9558 to ensure that grazing remains unchanged on the federal lands of the Bears Ears area. Presidential Proclamation Modifying the Bears Ears National Monument (Dec. 4, 2017) (“Nothing in this proclamation shall be deemed to affect authorizations for livestock grazing, or administration thereof, on Federal lands within the monument. Livestock grazing within the monument shall continue to be governed by laws and regulations other than this proclamation.”). Therefore, if this Court grants Plaintiffs’ requested relief and overturns the December 4, 2017 Proclamation, the Johnsons’ grazing would be governed by the more stringent regulatory regime of Proclamation 9558. Declaration of Sandy Johnson ¶¶ 7, 8, 10; *see also* Complaint ¶ 173(e) (noting that the December 4, 2017 Proclamation “removes any effect of Proclamation 9558 on livestock grazing”). This outcome would harm the Johnsons’ business interests and profitability. Furthermore, like the other applicants, the limitations on motorized vehicle access would impact the Johnsons’ access to the public lands for personal and business purposes. *Id.* ¶¶ 8, 12. Accordingly, Sandy and Gail Johnson have standing to intervene in this case.

## **B. Applicants’ Motion to Intervene Is Timely**

The timeliness of a motion to intervene “is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant’s rights, and the probability of prejudice to those already parties in the case.” *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295



(D.C. Cir. 1980). Here, Applicants move to intervene at the earliest stage of this litigation, and thus, delay is not an issue. Plaintiffs filed their Complaint on December 6, 2017, Dkt. 1; no answers or responsive motions have been filed; and the Court has not issued a scheduling order. *See Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (noting that a motion to intervene was timely when it was filed within two months of the filing of the complaint and before defendants filed an answer).

Given the early stage of this litigation, intervention will not prejudice any of the parties, and this Motion to Intervene will not result in significant disruption or delay. Consequently, Applicants' motion is timely.

**C. Applicants Have Significantly Protectable Interests in This Action**

To intervene as of right, a party must have an "interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). This interest test is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). Furthermore, "by satisfying the requirements of standing a party can demonstrate that a legally protected interest exists." *Cty. of San Miguel, Colo.*, 244 F.R.D. at 46.

As demonstrated above, all Applicants have standing to intervene in this case. These organizations and individuals have considerable property and liberty interests at stake because Plaintiffs' requested relief would restrict Applicants' members' use

of federal land. Accordingly, Applicants have an interest in this litigation and satisfy this requirement for intervention as of right.

**D. Disposition of This Case May Impair or Impede Applicants' Interests**

Disposition of this case plainly threatens to impair and impede Applicants' interests. The threshold for demonstrating potential impairment of interests is low, as Rule 24(a)'s requirement addresses whether, as a practical matter, denial of intervention would impede a prospective intervenor's ability to protect its interests. *See Fund For Animals, Inc.*, 322 F.3d at 735. This standard can be met even when there is merely a "possibility" that an applicant's ability to protect its interests could be impaired or impeded by the legal consequences of the suit. *Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir. 1981).

If Plaintiffs' requested relief is granted, then Applicants will be subject to the regulatory regime imposed by Proclamation 9558. As demonstrated above, these increased regulatory burdens will harm Applicants' use and enjoyment of the public lands at issue in this case. Accordingly, Applicants satisfy this requirement for intervention as of right.

**E. None of the Parties Adequately Represent Applicants' Interests**

Finally, none of the other parties in this case will represent Applicants' interests. Inadequacy of representation is satisfied "if the applicant shows that representation of [its] interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (citation omitted); *Cty. of San Miguel, Colo.*, 244 F.R.D. at

48. The D.C. Circuit has “often concluded that governmental entities do not adequately represent the interests of aspiring intervenors.” *Fund for Animals*, 322 F.3d at 736. The court “has reached this conclusion because government entities are usually charged with ‘represent[ing] the interests of the American people,’ whereas aspiring intervenors . . . are dedicated to representing their personal interests or the interests of their members or members’ businesses.” *Cty. of San Miguel, Colo.*, 244 F.R.D. at 48 (quoting *Fund for Animals*, 322 F.3d at 736) (alteration in original).

Applicants in this case meet the threshold for demonstrating that the government will not adequately represent their interests. The government’s public interests are not such that it will undoubtedly pursue all of Applicants’ arguments. The government has an interest in asserting strong federal control over these lands, regardless of whether the land is designated a monument. Furthermore, Defendants have an interest in keeping the President’s authority under the Antiquities Act broad and ill-defined, as demonstrated by the Interior Secretary’s recommendation to establish three new national monuments. *See* Press Release, Department of Interior, Secretary Zinke Recommends Keeping Federal Lands in Federal Ownership, Adding Three New Monuments (Dec. 5, 2017).<sup>6</sup> For these reasons, the government’s representation of Applicants’ interests “may” be inadequate, and they are entitled to intervene as of right.

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<sup>6</sup> Available at <https://www.doi.gov/pressreleases/secretary-zinke-recommends-keeping-federal-lands-federal-ownership-adding-three-new>.

## II.

### IN THE ALTERNATIVE, APPLICANTS SATISFY THE STANDARD FOR PERMISSIVE INTERVENTION

If the Court denies Applicants' motion to intervene as of right, the Court should alternatively grant Applicants permission to intervene pursuant to Rule 24(b)(2). On a timely motion, this Court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(2). The D.C. Circuit has "eschewed strict readings of the phrase 'claim or defense,'" and instead has adopted "a flexible reading of Rule 24(b)." *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

In this case, Applicants seek to intervene to defend the legality of the President's December 4, 2017 Proclamation. This defense has questions of law in common with Plaintiffs' claims—if Plaintiffs' argument is correct, the December 4, 2017 Proclamation is either unconstitutional or unlawful under the Antiquities Act, and Proclamation 9558 would control. Given the importance of this issue, Applicants' stakes in it, and the early stage of this litigation, the Court should allow permissive intervention.

### CONCLUSION

The practical effect of a ruling in favor of Plaintiffs would severely restrict the rights of Applicants and Applicants' members from engaging in conservation efforts and recreational and business activities on the public lands at issue in this case.

Consequently, the Applicants should be permitted to intervene in this case to defend their and their members' interests.

DATED: January 11, 2018.

Respectfully submitted,

s/ Jonathan Wood

JONATHAN WOOD

D.C. Bar No. 1045015

E-mail: jwood@pacificlegal.org

TODD F. GAZIANO, *Of Counsel*

Tex. Bar No. 07742200

E-mail: tgaziano@pacificlegal.org

Pacific Legal Foundation

3033 Wilson Blvd., Suite 700

Arlington, Virginia 22201

Telephone: (202) 888-6881

OLIVER J. DUNFORD, *Of Counsel*

Ohio Bar No. 0073933

E-mail: odunford@pacificlegal.org

JEFFREY W. McCOY\*

Colo. Bar No. 43562

E-mail: jmccoy@pacificlegal.org

Pacific Legal Foundation

930 G Street

Sacramento, California 95814

Telephone: (916) 419-7111

*\*Pro Hac Vice Pending*

*Attorneys for Applicant Defendant-Intervenors*

### **CERTIFICATE OF SERVICE**

I hereby certify that on January 11, 2018, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Douglas P. Wheeler III  
douglas.wheeler@hoganlovells.com

Adam M. Kushner  
adam.kushner@hoganlovells.com

John Houston Shaner  
houston.shaner@hoganlovells.com

James Taylor Banks  
james.banks@hoganlovells.com

Romney Sharpe Philpott  
romney.philpott@usdoj.gov

Judith E. Coleman  
judith.coleman@usdoj.gov

s/ Jonathan Wood  
JONATHAN WOOD