IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

GARFIELD COUNTY, UTAH, a Utah political subdivision; KANE COUNTY, UTAH, a Utah political subdivision; THE STATE OF UTAH, by and through its Governor, SPENCER J. COX, and its Attorney General, SEAN D. REYES;

Plaintiffs,

ZEBEDIAH GEORGE DALTON; BLUERIBBON COALITION; KYLE KIMMERLE; and SUZETTE RANEA MORRIS;

Consolidated Plaintiffs,

v.

JOSEPH R. BIDEN, JR. in his official capacity as President of the United States; DEB HAALAND, in her official capacity as Secretary of Interior; DEPARTMENT OF THE INTERIOR; TRACY STONE-MANNING, in her official capacity as Director of the Bureau of Land Management; BUREAU OF LAND MANAGEMENT; TOM VILSACK, in his official capacity as Secretary of Agriculture; DEPARTMENT OF AGRICULTURE; RANDY MOORE, in his official capacity as Chief of the Forest Service; FOREST SERVICE,

Defendants,

HOPI TRIBE; NAVAJO NATION; PUEBLO OF ZUNI; and UTE MOUNTAIN UTE TRIBE;

Intervenor-Defendants.

GARFIELD COUNTY PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO INTERVENE BY SUWA ET AL.

Lead Case No. 4:22cv00059 DN-PK

Member Case No. 4:22cv00060 DN

Judge David Nuffer

Magistrate Judge Paul Kohler

"One of the arts of litigation is keeping matters as simple as possible. We have been instructed from childhood that too many cooks spoil the broth." *San Juan Cty. v. United States*, 503 F.3d 1163, 1206 (10th Cir. 2007) (plurality op.) (denying SUWA's intervention). The briefing on these motions confirms that wisdom and illustrates why allowing intervention of these movants under these circumstances would be a mistake. The parties and this Court must read and assess a combined 2,400 pages of briefs and exhibits; evaluate movants' standing, defenses, and allegations; consider the theories of 24 putative new parties; and respond to and decide their four simultaneous motions—plus any motions for reconsideration and appeals that might follow. If admitted, the proposed intervenors will repeat this process at every turn for the entire course of this litigation. They will make discovery demands and objections, bring their own motions on their own timelines, and could double or triple the time that the Court must allocate for every in-court hearing and for trial. If experience is any guide, they will "dominate[] the proceedings by [their] motion practice" and file as many as "four times as many motions as any other party before the court." *Kane Cty. v. United States*, 2022 WL 1978748, at *21 (D. Utah June 6) (describing conduct of three of the proposed intervenors here). They will pile briefing before the Court on every imaginable issue as they transform this into an unmanageable, 44-party case.

It doesn't need to be this way. The proposed intervenors must establish Article III standing, but they do not attempt to. They also do not establish a Rule 24 interest that will be impaired because this litigation will not prevent their planned activities from continuing. And any Rule 24 interests that they do have in this litigation are adequately represented by the Administration that championed and intends to defend every inch of the current reservations and the four Tribes who have already intervened to defend them. They are not entitled to intervene and the Court should deny their motion.

BACKGROUND

The Antiquities Act of 1906 authorizes the president to reserve land only when necessary to protect "historic landmarks," "historic and prehistoric structures," or "other objects of historic or

scientific interest." 54 U.S.C. §320301(a). Presidents have recently been admonished for attempting to transform that narrow statutory authorization "into a power without any discernible limit to set aside vast and amorphous expanses of terrain." *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 981 (2021) (statement of Roberts, C.J.). Even so, in 2021, President Biden invoked the Act to reserve 3.23 million acres of land in Southern Utah. Doc. 2 (Compl.) at 1. He claimed that his multi-million-acre reservations were authorized because they protected things like "landscape[s]," "region[s]," "potato[es]," "views," and "minnow[s]." *Bears Ears Nat'l Monument*, 86 Fed. Reg. 57321 (Oct. 15, 2021); *Grand Staircase-Escalante Nat'l Monument*, 86 Fed. Reg. 57335 (Oct. 15, 2021).

The land that President Biden reserved was already heavily protected by countless federal laws. Compl. 13-19. President Biden purported to prohibit theft and desecration of items on the land—acts that were already illegal under laws passed in the century since the Antiquities Act. *Id.* at 15-16. President Biden instead made it illegal for caretakers of the land, including Plaintiffs, to enter the land to manage it, care for its natural wildlife, and heal its wounds. *Id.* at 32-38, 42-50. The reservations attracted droves of tourists who desecrated, trashed, and littered areas and items once pristine. *Id.* at 21, 24, 30-34. 42-45, 50, 74. Vandalism on the land increased exponentially. *Id.* at 29-31, 34, 50, 74. The reservations drew tourists into dangerously remote areas without providing for rangers, cell service, or maps, then forbade search-and-rescue crews from saving them. *Id.* 33-34. The reservations accomplished little except to give politicians and interest groups a story to sell to faraway constituents who wouldn't know better.

Plaintiffs, impeded from caring for the homeland they loved, sued. They challenged the reservations as beyond the President's Antiquities Act power. *Id.* 78-80. Local plaintiffs brought similar claims and the cases were consolidated. Doc. 39. President Biden's Department of Justice entered an appearance to defend the reservations. Doc. 20. Four Tribes were allowed intervention. Doc. 52. Then, *24 additional parties* moved to intervene. Docs. 27, 31, 33, 34-36, 40, 42, 43, 44.

ARGUMENT

The proposed intervenors' motions should be denied because they lack Article III standing and are not entitled to as-of-right or permissive intervention. If any are admitted, they should be subject to strict limitations to maintain order in this case.

I. The proposed intervenors lack Article III standing.

The proposed intervenors must have Article III standing. The Supreme Court recently held that "at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the [original party] requests." *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017). A court therefore must "address the standing of the intervenor-defendants" unless their "position is identical to the [defendants']." *McConnell v. FEC*, 540 U.S. 93, 233 (2003), *overruled on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010).

The proposed intervenors' position is not identical to the United States'. In fact, the proposed intervenors sought intervention without even waiting to see the United States' position. *See* Doc. 27. They intend to "amend their answer or add any additional defenses or objections to Plaintiffs' claims that may become known and available as this action proceeds," without any limitations. *See* Doc. 27-13 at 43. And throughout their briefing, they emphasize how their legal positions differ from the United States. *E.g.* Doc. 27 at 10 ("the federal government and SUWA Intervenors have taken different positions on some of the very same legal issues raised by Utah's complaint here").

The proposed intervenors therefore must have Article III standing, but they do not. The proposed intervenors do not allege any Article III injuries, only Rule 24 "interests." But "Article III standing requirements are more stringent than those for intervention under Rule 24(a)." *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1252 (10th Cir. 2001). To the extent that proposed intervenors rely on their alleged Rule 24 "interests" to satisfy Article III, they fall short.

First, the proposed intervenors cannot establish standing based on their being "vocal supporters" of the reservations, their "conservationist goals," or their past participation in the "public process that led to the 2020 management plans." Doc. 27 at 7-8. "No matter how deeply committed [proposed intervenors] may be to upholding [the reservations] or how zealous their advocacy, that is not a particularized interest sufficient to create a case or controversy under Article III." *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (cleaned up). That is true even if they played a "'unique,' 'special,' and 'distinct'" legal role in enacting the challenged policy. *Id.* at 706; *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) ("Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated.").

Second, the proposed intervenors cannot base standing on their members' "regular[] use and enjoy[ment of] areas in the [reservations] for aesthetic, scientific, educational, and recreational purposes." Doc. 27 at 8. That theory of injury is too attenuated and speculative a chain of causation to satisfy Article III. *See Clapper v. Amnesty Int'l U.S.A.*, 568 U.S. 398 (2013) (holding that Article III injury cannot depend on four-step speculative chain of causation). For example, the proposed intervenors offer the affidavit of a member who says that a return to the pre-reservation status quo would injure him because it would cause "noise and lights of industrial development" to "diminish the precious sense of solitude and natural quiet and the dark night skies of these remote places" that he wants to enjoy on a planned trip to a reservation. Doc. 27-1 at 8. But that same member fondly recounts visiting the land now encompassed by that reservation since 1978, and swears under penalty of perjury that he spent that time fully able to appreciate "the remote, wild, undeveloped nature of these landscapes; the unique, dramatic, and one-of-a-kind geologic features; the largely untrammeled wildlife habitat," and "the sense of solitude and natural quiet and the dark night skies of these remote places." *Id.* at 7. His speculation that a return to the pre-reservation status quo would injure him with "noise and lights" in his planned trip back the reservation requires speculation that: (1) an

"industrial[ist]" will seek to take action on the land now despite having not done so from 1978 to 2015; (2) the purported industrial activity is forbidden by the current reservations but allowed by all other applicable federal land laws, *but see* Compl. 13-19; (3) this approved industrial activity and the member's planned visit will coincide in the same place at the same time, even though the reservation land is bigger than some entire States; (4) the industrial activity will emit "noise and lights" during the member's visit, even though some industrial activity, including "mining," 27-1 at 5, currently takes place near the reservations and emits no noise or lights; and (5) all of these steps will, upon this Court's resolution of the case, be "certainly impending." *Clapper*, 568 U.S. at 409. That makes a mockery of Article III.

Separately, the proposed intervenors injuries do not satisfy the Supreme Court's tightened Article-III standing doctrine announced in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). Under *TransUnion*, a party seeking to satisfy Article III must show that its "asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 2209. This strict test requires an element-by-element comparison between the party's alleged harms and a traditional cause of action. *Id.* at 2210. The proposed intervenors allege no *TransUnion*-qualifying harm that would be caused by the resolution of this case, so they lack standing.

II. The proposed intervenors are not entitled to Rule 24 intervention.

A. The proposed intervenors are not entitled to intervention as of right.

Under Rule 24, a proposed intervenor-as-of-right must establish (1) an "interest relating to the property or transaction that is the subject of the action" (2) that may be "impair[ed]" by the action, and (3) that is not "adequately represent[ed]" by "existing parties." Fed. R. Civ. P. 24(a)(2); *Tri-State Generation & Transmission Ass'n, Inc. v. N.M. PRC*, 787 F.3d 1068, 1071 (10th Cir. 2015). "The inquiry required under Rule 24(a)(2) is a flexible one, and a practical analysis of the facts and circumstances of each case is appropriate." *San Juan Cty.*, 503 F.3d at 1191.

The proposed intervenors do not satisfy either the "impair[ment]" requirement or the "[in]adequate representation" requirement. First, the proposed intervenors' interests will not be "impair[ed]" by this litigation. Fed. R. Civ. P. 24(a)(2). No matter the outcome of this litigation, the land will be subject to dozens of overlapping federal protections that will ensure that the proposed intervenors can continue to enjoy the land's pristine character. Compl. 13-19. The proposed intervenors' own evidence shows that they and their members enjoyed the reservations without qualification before the reservations were put in place, so they cannot now argue that a return to the pre-reservation status quo will impair their continued enjoyment. *E.g.*, Doc. 27-1 at 8. In fact, the reservations have worsened the conditions for the proposed intervenors' interests and activities. *See* Compl. at 21, 24, 30-34. 42-45, 50, 74.

Second, the "existing parties" *do* "adequately represent" the proposed intervenors' interests. Fed. R. Civ. P. 24(a)(2). "The most common situation in which courts find representation adequate arises when the objective of the applicant for intervention is identical to that of one of the parties." *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986). Even when the party is the government, a proposed intervenor is adequately represented when all of its interests "flow from [their] objective of preserving [the government's action]," and the government has the "identical litigation objective" of preserving that action. *Tri-State Generation*, 787 F.3d at 1072-74. Courts adopt a "presumption that representation is adequate when the objective of the [proposed intervenor] is identical to that of [the United States]." *San Juan Cty.*, 503 F.3d at 1204 (plurality op.) (cleaned up). A proposed intervenor does "not overcome" that presumption even when its "ultimate motivation in th[e] suit may differ" and even when the United States must balance "additional interests stemming from its unique status as lawyer for the entire federal government." *Id.* at 1204. *Cf.* Doc. 27 at 9-10 (arguing to the contrary). Here, there can be little doubt that the United States will seek to preserve

the challenged reservations in full, so it adequately represents the proposed intervenors' interests and pursues common objectives.

In prior cases, a proposed intervenor has overcome the presumption that the government will adequately represent its interests by: (1) showing that the government is bound by "conflicting statutory obligations," *San Juan Cty.*, 503 F.3d at 1207 (plurality op.); (2) providing record-based "reason to think that the [government] will not vigorously argue in favor of its statutory authority," such as the government's demonstrated "reluctance" to defend its own authority, *Tri-State Generation*, 787 F.3d at 1074; or (3) pointing to a change in administrations along with the government's on-the-record equivocation about whether it would adequately represent the proposed intervenors' interests, *Kane Cty., Utah v. United States*, 928 F.3d 877, 895 (10th Cir. 2019); *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001). Those circumstances are absent here. The proposed intervenors cannot, for instance, point to "the new administration c[oming] into office" and moving "to stay the case to allow settlement discussions to resolve the remaining issues," *Kane Cty.*, 928 F.3d at 895-96, or any governmental "silence on any intent to defend" the proposed intervenors' interests, *Utah Ass'n of Ctys.*, 255 F.3d at 1256. Nothing in the record indicates that the United States' defense of the reservations will be anything but emphatic and excellent. So "[a]lthough the two may have diverging views about how to oppose Plaintiffs' claims, any interests SUWA may have are still adequately represented by the United States." *Kane Cty.*, 2022 WL 1978748, at *13. And of course, assuming the proposed intervenors could satisfy standing and the other requirements for intervention, they could seek to intervene later if the United States ever abandons its defense. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394-95 (1977).

If the Court decides that the United States does not adequately represent the proposed intervenors' interests, it should admit only one additional intervenor and only with respect to the Grand Staircase-Escalante reservation. Four "existing parties" plainly "adequately represent" the

proposed intervenors' interests with respect to the Bears Ears reservation: the Hopi Trible, Navajo Nation, Pueblo of Zuni, and Ute Mountain Ute Tribe. Fed. R. Civ. P. 24(a)(2); Docs. 26, 29, 52. The Tribes adequately represent the proposed intervenors' interests as to the Bears Ears reservation because they vow to outflank the United States' legal positions in defense of the reservation and pledge to stand in if the United States ever adopts a "policy shift." Doc. 29 at 8-9. They have submitted a 56-page answer with denials and affirmative defenses. Docs. 29-1; 53. The proposed intervenors do not explain why the Tribes are "[in]adequate" as to Bears Ears or why each other is "[in]adequate" as to Grand Staircase-Escalante.

B. The proposed intervenors are not entitled to permissive intervention.

A proposed intervenor may be entitled to permissive intervention, subject to the Court's discretion, after the Court takes into account whether intervention will "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3); *Tri-State Generation*, 787 F.3d at 1074. The involvement of an additional 24 parties in this case will cause undue delay and prejudice. In another case, a district court came to regret allowing some of the proposed intervenors here to permissively intervene because they "dominated the proceedings by [their] motion practice," "hindered the resolution of these proceedings to the actual detriment of the original parties," and derailed the litigation into a parallel state-court action based on a legal theory that the Utah Supreme Court ultimately held to be "absurd." *Kane Cty.*, 2022 WL 1978748, at *21, *17, *19 (citing *Garfield Cty., v. United States*, 2017 UT 41, ¶ 1, 424 P.3d 46). This Court should, in its discretion, avoid that.

III. If any proposed intervenors are allowed to intervene, they should be limited.

"It is now a firmly established principle that reasonable conditions may be imposed even upon one who intervenes as of right." *See San Juan Cty.*, 503 F.3d at 1189 (cleaned up); *see also* Fed. R. Civ. P. 24, Advisory Committee Notes, 1966 Amendments ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the

requirements of efficient conduct of the proceedings."); *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 537 (1972). This Court has broad discretion to limit intervenors' participation and limit their role in discovery. *See, e.g.*, *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1239-40 (10th Cir. 2012); *Cummings v. GMC*, 365 F.3d 944, 952-53 (10th Cir. 2004), *abrogated on other grounds*, *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006); *Davoll v. Webb*, 194 F.3d 1116, 1139 (10th Cir. 1999).

Limitations on the proposed intervenors' participation would be especially warranted here. Their involvement could make the case nearly impossible to conduct. *See Sevier Cty. v. United States*, 2013 WL 2643608, at *4 (D. Utah June 12). ("If SUWA were allowed to intervene, without strict limitations … this case would become 'fruitlessly complex or unending,' to the prejudice of the parties."). Some of the proposed intervenors here have in the past "perplexed" and "no doubt perturbed" courts with their approach to intervention, *San Juan Cty.*, 503 F.3d at 1169, attempted "end runs around the conditions set by the court," "show[n] a disregard for the court's rulings," "bristled over [court-imposed] restrictions and sought to thwart them," "ignored" court orders, "not be[en] candid with the court," and "mischaracterize[ed] information to gain an advantage," *Kane Cty.*, 2022 WL 1978748, at *18-*26. The proposed intervenors' unusual numerosity here would exacerbate these problems.

If this Court grants intervention, it should therefore require that the proposed intervenors (1) seek leave of Court before filing any independent motions, subpoenas, or discovery requests, and before calling any witnesses; (2) seek leave of Court before raising any independent claims, cross-claims, counter-claims, or defenses; and (3) direct any objections or questions during depositions or trial testimony through the United States or the Tribes. *See Sevier Cty.*, 2013 WL 2643608, at *5 (imposing stricter limitations on intervenors); *In re Managed R.S. 2477 Rd. Cases Litig.*, 2013 WL 12144076 (same).

CONCLUSION

This Court should deny the motion to intervene.

Dated: December 27, 2022

Respectfully submitted,

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