MELISSA HOLYOAK (Utah Bar No. 9832)
Utah Solicitor General
ANTHONY L. RAMPTON (Utah Bar No. 2681)
Assistant Utah Attorney General
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
(801) 538-9600
melissaholyoak@agutah.gov
arampton@agutah.gov

Counsel for Plaintiff State of Utah

TYLER R. GREEN (Utah Bar No. 10660)
Consovoy McCarthy PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com

Counsel for Plaintiffs Garfield County, Utah; Kane County, Utah; State of Utah

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
SOUTHERN REGION OF THE CENTRAL DIVISION

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. et al.,

Defendants,

HOPI TRIBE; et al.

Intervenor-Defendants.

***GARFIELD COUNTY* PLAINTIFFS' OPPOSITION TO MOTIONS TO DISMISS**

Lead Case No. 4:22cv00059 DN-PK

Member Case No. 4:22cv00060 DN

Judge David Nuffer

Magistrate Judge Paul Kohler

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President Biden's 3.23-million-acre national monument reservations exceed the scope of the Antiquities Act. Under the Antiquities Act, a President may declare something on federal land to be a national monument only if it falls into one of three limited categories. Those three categories are "historic landmarks," "historic and prehistoric structures," and "other objects of historic or scientific interest."[1] Once the President has validly declared a national monument, he may "reserve" a parcel of land surrounding it, but only insofar as it is the "smallest area compatible with the proper care and management" of the monument.[2] The Act permits only "small reservations,"[3] but President Biden's Bears Ears and Grand Staircase-Escalante national monument reservations are the size of nation-states. As President Biden has read the Act, he can declare as "other objects of historic or scientific interest"—and therefore as "national monuments"—everything under the sun. "National monuments" now include "mule deer," "parsley," "bees," "red sandstone cliffs," and million-acre "landscapes" themselves[4]—hundreds of things that would surprise "a speaker of ordinary English."[5]

In their amended complaint challenging President Biden's declarations and reservations, Utah Plaintiffs—the State of Utah, Garfield County, and Kane County—allege multiple independent bases for standing and state a claim for relief. Federal Defendants' arguments against Utah Plaintiffs' standing are all fact-bound and misplaced in a pre-discovery motion to dismiss. In any event, Utah Plaintiffs—who are entitled to special solicitude—have alleged standing and submit declarations with this opposition rebutting Federal Defendants' allegations. The monument reservations deprive Utah

[1] 54 U.S.C. §320301(a).
[2] *Id.* §320301(b).
[3] H.R. Rep. No. 59-2224 (1906).
[4] Proclamation 10285, *Bears Ears National Monument*, 86 Fed. Reg. 57321, 57321-34 (Oct. 8, 2021) [hereinafter, *Bears Ears National Monument* (Biden)]; Proclamation 10286, *Grand Staircase-Escalante National Monument*, 86 Fed. Reg. 57335, 57335-47 (Oct. 8, 2021) [hereinafter, *Grand Staircase-Escalante National Monument* (Biden)].
[5] *Mass. Lobstermen's Ass'n v. Raimondo*, 141 S. Ct. 979, 980 (2021) (statement of Roberts, C.J.).

Plaintiffs of specific sources of revenue, deny the effect of their laws, impede their planned activities on the land, impose financial costs, and threaten their property interests in land and wildlife.

As to the merits, under any fair reading of the Act, Utah Plaintiffs plausibly allege that the proclamations do not constitute the smallest area compatible with the proper care and management of any historic landmarks, historic and prehistoric structures, or other objects of historic or scientific interest. The landscapes that President Biden declared to be "other objects of historic or scientific interest" are arbitrary areas of land never before formally associated. The hundreds of other items that President Biden declared to be "other objects of historic or scientific interest" do not satisfy the Act. The reservations do not represent the "smallest area compatible" with the proper care and management of any qualifying items because landscape-scale reservations actually undermine good care and management, and any qualifying items would reasonably require a tiny fraction of the 3.23 million acres reserved here. Defendants' position that the President can reserve every inch of federal land in America as national monuments without having to explain himself to anyone has no basis in the law. Finally, the agency management plans are final agency action because they interpret laws, direct agency staff, and implement rules governing activities on the reservations now.

This Court should deny the motions to dismiss.

BACKGROUND

A. The Antiquities Act of 1906

This case turns on the text of the first two operative provisions of the Antiquities Act of 1906. That Act authorizes the President to create national monument reservations through a two-step process. First, the President may declare something on federal land to be a national monument, but only if it falls into one of three narrow categories:

> The 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) (emphasis added). In other words, a president can declare something to be a national monument only if it is a "historic landmark[]," a "historic and prehistoric structure[]," or an "other object[] of historic or scientific interest." If an item is one of those three things, the President need not declare it a national monument—he simply "may, in [his] discretion." But if it isn't one of those three things, he may not.

Second, once the President validly declares a qualifying item to be a national monument, he may reserve—*i.e.*, limit uses of—a parcel of land containing that national monument. But the Act mandates that his reservation be the "smallest" parcel of land needed for the national monument's care and management:

> The President may reserve parcels of land as a part of the national monuments. The ***limits*** of the parcels ***shall be confined to the smallest area compatible with the proper care and management of the objects to be protected***.

54 U.S.C. §320301(b) (emphasis added). This "unique constraint" means that any land reserved under the Act cannot be larger than necessary to protect a valid national monument.[6]

As Chief Justice Roberts has explained, any reservation of land under the Act raises two questions: "[t]he scope of the objects that can be designated under the Act," and "how to measure the area necessary for their proper care and management."[7]

The Act also includes a third provision. It punishes anyone who harms such a monument:

> A person that appropriates, excavates, injures, or destroys any historic or prehistoric ruin or monument or any other object of antiquity that is situated on land owned or controlled by the Federal Government without the permission of the head of the Federal agency having jurisdiction over the land on which the object is situated, shall be imprisoned not more than 90 days, fined under this title, or both.

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[6] *Mass. Lobstermen's*, 141 S. Ct. at 980 (statement of Roberts, C.J.).
[7] *Id.* at 981.

18 U.S.C. §1866(b).

"Most commentators who have considered the [Antiquities] Act and its legislative history have concluded that it was designed to protect only very small tracts of land around archaeological sites."[8] "Congress did *not* have in mind authorizing withdrawals of vast areas for designation as national monuments when it passed the Antiquities Act."[9] In fact, before passing the Act, Congress rejected proposals to allow Presidents to declare sweeping features like "natural formation[s] of scientific or scenic value or interest" or "natural wonder[s] or curiosit[ies]" as a national monuments—the very sorts of things that President Biden declared to be national monuments here.[10] The Act's congressional report specified that it authorized only "small reservations."[11] The sponsor assured his colleagues that "[n]ot very much" land could be encumbered through the Antiquities Act.[12]

Federal Defendants' precursors recognized the narrow scope of the Act. In 1913, the head of the General Land Office—the precursor to the Bureau of Land Management—explained that the Act "does not provide for the reservation of public land for the protection of scenery."[13] Its Chief Clerk explained that "[t]he terms of the monument act do not specify scenery, nor remotely refer to scenery, as a possible raison d'etre for a public reservation."[14]

An early national monument reservation illustrates how the Act was supposed to work. In December 1906, President Theodore Roosevelt declared as a national monument "Montezuma's

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[8] Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 477 (2003).
[9] David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 Nat. Resources J. 279, 301-02 (1982) (emphasis added).
[10] Squillace, *supra* note 8, at 478-79 (quoting H.R. Rep. 56-8066 (1900)).
[11] H.R. Rep. 59-2224, 59th Cong., 1st Sess. 1 (1906)
[12] 40 Cong. Rec. 7888 (Jun. 5, 1906) (statement of Rep. Lacey).
[13] Hal Rothman, *America's National Monuments: The Politics of Preservation*, ch. 5 (1989), perma.cc/PMN6-T5MJ.
[14] Ronald F. Lee, *The Story of the Antiquities Act*, at 109 (1970) (citing Frank Bond, *The Administration of National Monuments, Proceedings of the National Park Service Conference held at Yellowstone National Park, September 11 and 12, 1911*, at 80-81 (1912)), perma.cc/P22X-F4LZ.

Castle" in Arizona.[15] Montezuma's Castle was a valid national monument because it is a one-of-a-kind "prehistoric structure[]"—a towering dwelling, with five stories and twenty rooms.[16] For the "proper care and management" of Montezuma's Castle, President Roosevelt reserved a parcel of land of only 160 acres—less than .005% of the land President Biden reserved here.[17]

B. Federal Lands

Monument reservations lock down federal land, which is otherwise vibrant with community and commerce. Absent a monument reservation, federal lands must be managed for multiple uses, including conservation, recreation, grazing, timber, watershed, and wildlife and fish habitat.[18] Living in Utah—which is roughly 63% federal land—is inextricably intertwined with using federal public lands and sharing the responsibilities that come with that use. States, counties, and their citizens engage in a wide range of activities on federal land, have official duties on federal land, enact laws and policies with respect to federal land, and regularly use federal land for a multitude of purposes.[19] They manage vegetation and soils, graze cattle, engage in roadwork, care for wildlife, and recreate. A national monument reservation displaces this multiple-use management regime; prohibits or limits "recreational, commercial, and agriculture uses" of the land; and impedes state and local activities.[20]

C. Presidential Abuse of the Antiquities Act

Modern presidents have repurposed the Antiquities Act to reserve large sections of America as national monuments. Though most reservations are less than 10,000 acres, modern presidents have

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[15] Proclamation 696, *Montezuma Castle Nat'l Monument*, 34 Stat. 3265 (Dec. 8, 1906).
[16] Foundation Document: Montezuma Castle National Monument, Nat'l Park Serv., at 3 (Mar. 2016), perma.cc/PPL5-EFPX.
[17] *See* Doc. 91 (Am. Comp.) ¶62; Proclamation 696, *Montezuma Castle Nat'l Monument*, 34 Stat. 3265 (Dec. 8, 1906).
[18] 16 U.S.C. §§528 et seq.; Doc. 91 (Am. Compl.) ¶¶78, 84, 85, 147-50.
[19] Doc. 91 (Am. Compl.) ¶¶147-50, 151-244; *see also, e.g.*, 54 U.S.C. §302303 (federal law assigning duties to state employees on federal land).
[20] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (statement of Roberts, C.J.) (summarizing Carol Vincent, Cong. Res. Serv., R41330, National Monuments and the Antiquities Act 8-9 (2018)).

used the Act to declare as national monuments things that fall outside the Act's three limiting categories and to reserve parcels of land with no respect for its smallest-area-compatible requirement.[21]

In 2021, Chief Justice Roberts identified and condemned this "trend of ever-expanding antiquities."[22] In *Massachusetts Lobstermen's Association*, a case involving a sweeping reservation along the northeast coast, he called for the Court to decide—in a more appropriate case and for the first time—whether landscape-scale national monument reservations "can be justified under the Antiquities Act."[23] He wrote that expansive monument reservations would not strike "a speaker of ordinary English" as lawful under the text of the Antiquities Act.[24] As he read the statutory text, the smallest-area-compatible limit imposed a "unique constraint" that "has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea."[25] And he emphasized that the Supreme Court "ha[s] never considered how a monument of … 3.2 million acres … can be justified under the Antiquities Act."[26]

D. History of Grand Staircase and Bears Ears National Monuments

In 1996, President Clinton reserved 1.7 million acres of land in south-central Utah as the "Grand Staircase-Escalante National Monument."[27] The Grand Staircase reservation was predicated on President Clinton's declaration that scores of things in the region qualified as national monuments,

[21] National Park Service, National Monument Facts and Figures, perma.cc/GK6C-GNJQ.
[22] *See Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980 (statement of Roberts, C.J.).
[23] *Id.* at 981.
[24] *Id.* at 980.
[25] *Id.* at 980-81.
[26] *Id.* at 981.
[27] Proclamation 6920, *Grand Staircase-Escalante National Monument*, 61 Fed. Reg. 50223 (Sept. 18, 1996) [hereinafter, *Grand Staircase-Escalante National Monument* (Clinton)].

including "sedimentary rock layers," "occupation sites," "five life zones," and a strip of carbon-spewing coal.[28]

In late 2016, President Obama reserved 1.35 million acres of land in southeast Utah—starting about 25 miles east of the Grand Staircase reservation and extending almost to the Colorado border—as the "Bears Ears National Monument."[29] The Bears Ears reservation was predicated on President Obama's declaration that scores of things in the region qualified as national monuments, including "ricegrass," the "diversity of the soils," and the "quality of deafening silence."[30]

These two reservations left southern Utahns' beloved land less well preserved, more difficult to protect, more susceptible to damage and desecration, impossible to work on, and more difficult to coexist with.[31] Responding to local pleas, President Trump in 2017 reduced the two reservations by over 60 percent.[32] His reductions restored the multiple-use approach in the areas that were previously subject to the reservations. The reduced reservations totaled 1.11 million acres combined.[33]

E. President Biden's Expansions

In 2021, President Biden issued proclamations nearly tripling the combined size of these two national monument reservations.[34] On the same day, President Biden announced an expansion of

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[28] *Id.* at 50223-26.
[29] Proclamation 9558 of Dec. 28, 2016, *Establishment of the Bears Ears National Monument*, 82 Fed. Reg. 1139 (Dec. 28, 2016) [hereinafter, *Establishment of the Bears Ears National Monument* (Obama)].
[30] *Id.* at 1139-47.
[31] Doc. 91 (Am. Compl.) ¶¶115-20.
[32] *See Id.* ¶¶117-21; Proclamation 9681*, Modifying the Bears Ears National Monument*, 82 Fed. Reg. 58081 (Dec. 4, 2017) [hereinafter, *Modifying the Bears Ears National Monument* (Trump)]; Proclamation 9682*, Modifying the Grand Staircase-Escalante National Monument*, 82 Fed. Reg. 58089 (Dec. 4, 2017) [hereinafter, *Modifying the Grand Staircase-Escalante National Monument* (Trump)].
[33] Doc. 91 (Am. Compl.) ¶125; *see also Modifying the Bears Ears National Monument* (Trump); *Modifying the Grand Staircase-Escalante National Monument* (Trump).
[34] Proclamation 10285, *Bears Ears National Monument*, 86 Fed. Reg. 57321 (Oct. 8, 2021) [hereinafter, *Bears Ears National Monument* (Biden)]; Proclamation 10286, *Grand Staircase-Escalante National Monument*, 86 Fed. Reg. 57335 (Oct. 8, 2021) [hereinafter, *Grand Staircase-Escalante National Monument* (Biden)]; Doc. 91 (Am. Compl.) ¶125-128.

Grand Staircase to 1.87 million acres and of Bears Ears to 1.36 million acres. President Biden's combined 3.23-million-acre reservations are twice as large as Delaware, more than 150 times the size of Manhattan, larger than 20 percent of all the nations in the world, and orders of magnitude larger than the other four national monuments in southern Utah—which total less than 15,000 acres combined.[35] President Biden included land not included in either of the original two reservations.[36]

As for his legal justification, President Biden declared "the entire landscape[s] within the boundaries reserved" to be national monuments.[37] In the alternative, he declared hundreds of generic and ubiquitous items—along with many plants, animals, archaeological, paleontological, and historical items—to be national monuments. *Id.* He declared as national monuments "soil," "shrubs," "rice-grass," "bees," "sunflower[s]," "bighorn sheep," "minnow[s]," "beetle[s]," "pinyon," "juniper," "areas," "views," "forested slopes," "wheel ruts," "unimpeded views of the night sky," and hundreds of other things.[38] He "incorporated" the original Clinton and Obama proclamations, declaring anew all the items they listed as national monuments, and superseded them with many newly declared items.[39] He reasoned that all of these listed items were national monuments because they all fell into the third category of the once-modest Antiquities Act: "other objects of historic or scientific interest."[40]

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[35] Doc. 91 (Am. Compl.) ¶¶128-32.
[36] *Id.* ¶139.
[37] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57330-31; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57344.
[38] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57321-32; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57335-46; *Establishment of the Bears Ears National Monument* (Obama), 82 Fed. Reg. 1139-46.
[39] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57331-32 ("I find that all the historic and scientific resources identified above and in [President Obama's] Proclamation 9558 are objects of historic or scientific interest in need of protection under 54 U.S.C. 320301" and "incorporate[ing] by reference" the "terms, conditions, and management direction" of the original proclamation); *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57343-44.
[40] *Id.* at 57331, 57345.

For the "proper care and management" of these hundreds of declared national monuments, President Biden reserved parcels of land coterminous with the "landscapes" themselves. Alternatively, he reasoned that the various listed items were "distribut[ed]" and therefore needed a parcel of the entire landscape for their care and management.[41] He did not explain what "care and management" was actually appropriate for any of the listed items.[42]

The proclamations lock down a once-vibrant part of Utah.[43] By declaring as national monuments hundreds of items, plants, animals, regions, and landscapes, the proclamations make it a federal crime to "injure[]" any of those things.[44] They make it a federal crime to injure every blade of "rice-grass"'; every inch of "soil"; and every "bee," "sunflower," and "beetle" within the millions of reserved acres.[45] They also ban anyone from taking any action "to appropriate, injure, destroy, or remove any feature of the monument."[46] They direct that all federal lands within the enlarged reservations be "withdrawn from all forms of entry, location, selection, sale, or other disposition," from "location, entry, and patent under the mining laws," and from "disposition under all laws relating to mineral and geothermal leasing."[47] They "retire from livestock grazing" any voluntarily relinquished allotments.[48]

The proclamations assign management of the reservations to Federal Defendants.[49] They direct them to prepare new management plans and regulations to manage the land.[50] Two months after

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[41] *Id.*
[42] *Id.* at 57332, 57345.
[43] *Id.* at 57331, 57345; *see also* Doc. 91 (Am. Compl.) ¶¶140-44.
[44] 18 U.S.C. §1866(b).
[45] *See generally Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57321-34; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57335-47; *Establishment of the Bears Ears National Monument* (Obama), 82 Fed. Reg. 1139-47; *Grand Staircase-Escalante National Monument* (Clinton), 61 Fed. Reg. at 50223-27.
[46] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57333; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57346.
[47] *Id.* at 57331, 57345.
[48] *Id.* at 57332, 57346.
[49] *Id.* at 57331-32, 57345-46.
[50] *Id.* at 57332, 57346.

the proclamations were issued, Defendants published interim management plans governing the reservations.[51] These management plans interpret the proclamations and governing law and implement detailed and restrictive rules governing the monument reservations.[52] They state that any planned activity on the reservations must yield to a "determin[ation] that the proposal is also consistent with the protection of the monument objects and values."[53] They acknowledge a wide range of activities affected by their rules, including "certain [vegetation] treatment methods allowed under the [previous] monument management plans."[54] Defendants' agents have prohibited Utah Plaintiffs and others from engaging in planned activities in the reservations.[55] The interim management plans are not subject to any further review until permanent plans are finalized—apparently in "early 2024 or later."[56]

F. President Biden's Hundreds of Declared "National Monuments"

Almost all the hundreds of items declared to be "other objects of historic or scientific interest"—and therefore "national monuments"—lack important characteristics as a matter of fact.

The proclamations declare two million-plus-acre landscapes to be "national monuments," but those landscapes were of no specific significance before the reservations. They are nebulous and reflect arbitrary boundaries that enclose large areas of land never before formally associated.[57]

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[51] *Interim Management of the Bears Ears National Monument*, Dep't of Int. (Dec. 16, 2021) [hereinafter, Bears Ears Management Plan], perma.cc/8WU9-MMH9; *Interim Management of the Grand Staircase-Escalante National Monument*, Dep't of Int. (Dec. 16, 2021) [hereinafter, Grand Staircase Management Plan], perma.cc/8J37-ELHR.
[52] Bears Ears Management Plan 2-8; Grand Staircase Management Plan 2-7.
[53] Bears Ears Management Plan 3-4; Grand Staircase Management Plan 3.
[54] Bears Ears Management Plan 5; Grand Staircase Management Plan 5.
[55] *E.g.*, Doc. 91 (Am. Compl.) ¶¶142-43, 149-50, 164, 171,188, 225, 353; Ex. A (Brooks Decl.) ¶¶5-7; Ex. B (Bremner Decl.) ¶¶7-11; Ex. C (Dodds Decl.) ¶4; Ex. D (Harris Decl.) ¶9; Ex. E (Weppner Decl.) ¶¶5-10.
[56] Doc. 114 (Tribal Intervenor-Defendants' MTD) at 26; Doc. 113 (Federal Defendants' MTD) at 66.
[57] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57331; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57345; *see also* Doc. 91 (Am. Compl.) ¶289.

The proclamations declare approximately 200 plants and animals to be "national monuments"—like "sagebrush" and "mule deer"—but those plants and animals are animate, generic, or not fixed to the land. Many are also nondescript, inconspicuous, or were listed with no indication of their past specific significance.[58] The proclamations declare dozens of qualities and experiences to be "national monuments"—like "deafening silence" and "unimpeded views of the night sky"—but those qualities and experiences are nebulous, generic, and not fixed to the land. Many are also nondescript, inconspicuous, or were listed with no indication of their past specific significance.[59]

The proclamations declare scores of generic geological items to be "national monuments"—like "red sandstone cliffs" and "multihued cliffs"—but those items are listed only generically or categorically.[60] Many are also nondescript, inconspicuous, were listed with no indication of their past specific significance, or are large and nebulous.[61] The proclamations declare approximately 150 specific geological items to be "national monuments"—like "[a] perennial stream" and "Beef Basin"—but those specific geological items are nondescript, inconspicuous, were listed with no indication of their past specific significance, or are large and nebulous. They are largely the canyons and formations of Utah's red rock sandstone that define southern Utah.[62]

Finally, the proclamations declare over 150 archaeological, historical, and paleontological items to be "national monuments"—like "potential fossil yield," "an Upper Triassic microvertebrate

[58] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57325-28; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57343; *see also* Doc. 91 (Am. Compl.) ¶¶293-95.
[59] Doc. 91 (Am. Compl.) ¶¶293-95.
[60] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57326; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57338.
[61] *See generally id.* at 57321-34, 57335-47; *see also* Doc. 91 (Am. Compl.) ¶¶302-05.
[62] *See* Doc. 91 (Am. Compl.) ¶¶305.

site," and "stock trails"—but most are listed only generically or categorically, and others are nondescript, inconspicuous, or were listed with no indication of their past specific significance.[63]

Nine of the items declared to be "national monuments" likely do not share these shortcomings: the Bears Ears Buttes, Butler Wash Village, Doll House, Moon House, Newspaper Rock, San Juan Hill, Dance Hall Rock, Twentymile Wash Dinosaur Megatrackway, and Grosvenor Arch.[64] To the extent that these nine items need care and management, they do not require 3.23 million acres of land to be set aside. Nor do they require great distance from activities like cattle grazing, vegetation treatment, or search-and-rescue efforts.[65] And while paved walkways, parking lots, and restrooms might make them more accessible, even building in generous assumptions, that would entail no more than 6,480 combined acres for their proper care and management.[66] That is 0.2% of the 3.23 million acres reserved today.

The federal government does not know what items are within about 90 percent of the reservations. As of 2022, less than 10% of the area within the reservations had been physically inventoried by archaeologists. As a result, the government knows little about the distribution, densities, and types of items within about 2.97 million acres. [67]

G. Effects of the Monument Reservations

As a matter of substantive law and practice, the monument reservations do not protect anything. The Antiquities Act was designed for an age when it was otherwise legal to unilaterally acquire federal land, use it for any purpose, or take anything found on it.[68] Now, a vast array of land-use and

[63] *See generally Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57321-34; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57335-47; *see also* Doc. 91 (Am. Compl.) ¶¶311-14.
[64] *See* Doc. 91 (Am. Compl.) ¶¶320-24.
[65] *Id.* ¶¶328-33.
[66] *Id.* ¶¶83-84; 328, 341-48.
[67] *Id.* ¶349.
[68] *Id.* ¶¶65-80.

criminal laws protect all federal land against acquisition, appropriation, and uses detrimental to historical and cultural items, vulnerable habitats, and the environment.[69]

While the monument reservations add nothing helpful to this array of preexisting protections, they do paradoxically result in increased vandalism, desecration, and theft.[70] What were once cherished places known only by locals have become soiled with trash, litter, and human biological waste.[71] Visitors drawn by the reservations have degraded local roads and brought on unprecedented looting of ancient artifacts.[72]

The monument reservations do prevent caretakers from keeping the land and habitat healthy. By declaring as national monuments things like plants and soils, the reservations prevent vegetation management, wildfire prevention, and wildlife support that would otherwise occur on the federal lands. As a result, they cause lush landscapes to decay and native plants and animals to die.[73]

The reservations harm the State of Utah, Kane County, and Garfield County. They cause them to lose revenues from mineral leasing and grazing fees.[74] They render their laws ineffective, including laws about resource yields from federal land, grazing promotion, wildlife management, and search-and-rescue procedures.[75] They disrupt their planned activities on the land, including vegetation removal, wildfire prevention, road maintenance, soil management, wildlife support, and general use.[76] They cause a series of financial burdens and lost revenue for things like new equipment, additional obligations for state employees, hundreds of thousands of dollars in additional search-and-rescue

[69] *Id.* ¶¶81-89.
[70] *Id.* ¶¶151-61.
[71] *Id.* ¶¶17, 104, 116, 156-58, 175, 198, 353.
[72] *Id.* ¶¶17, 21, 151-61, 221-27.
[73] *Id.* ¶¶162-64, 174-91.
[74] *Id.* ¶¶206-19.
[75] *Id.* ¶¶186-91, 236-38.
[76] *Id.* ¶¶186-91.

expenses, difficult and expensive road-maintenance burdens, and increased expenditures for the service of restroom facilities within the reservations.[77] And they harm their land and wildlife property.[78]

H. Procedural History

Utah Plaintiffs sued Defendants last August. Individual Plaintiffs—Zebediah George Dalton, BlueRibbon Coalition, Kyle Kimmerle, and Suzette Ranea Morris—also sued and the cases were consolidated.[79] Four Tribal Defendant-Intervenors' unopposed motion to intervene was granted.[80] Federal Defendants'—the officials and entities responsible for creating and enforcing the reservations and their management plans—moved to dismiss in January.[81] In response to Federal Defendants' arguments, both sets of Plaintiffs amended their complaints within 21 days as the rules allow.[82]

Utah Plaintiffs' amended complaint raises four claims. Two are ultra vires claims that the Bears Ears and Grand Staircase national monument reservations exceed the scope of the Antiquities Act.[83] Two are APA claims that the agency interim management plans implementing the Bears Ears and Grand Staircase national monument reservations are illegal because they likewise exceed the scope of the Antiquities Act.[84] Utah Plaintiffs ask this Court to declare unlawful President Biden's proclamations and the agencies' implementation of them and enjoin Federal Defendants from implementing or enforcing them, in part or in full.[85] President Biden's proclamations incorporate and supersede the previous proclamations, so all acres encompassed by the current reservation boundaries are unlawfully designated regardless of whether those lands were covered by any pre-2021 reservations.[86]

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[77] *E.g.*, *id.* ¶¶152-54, 158, 161, 165-73, 221, 227; Exs. A-E.
[78] Doc. 91 (Am. Compl.) ¶¶151-164, 174-91, 239.
[79] Doc. 39.
[80] Doc. 52.
[81] Doc. 78.
[82] Docs. 88, 91.
[83] Doc. 91 (Am. Compl.) ¶¶370-83.
[84] *Id.* ¶¶384-99.
[85] *Id.* at 95.
[86] *Id.* ¶357.

Federal Defendants moved to dismiss both amended complaints. They argued that Plaintiffs lack standing, fail to allege with specificity which parcels of reserved land are excessive, do not state a violation of the Antiquities Act, and are blocked by sovereign immunity or the APA's final-agency-action requirement.[87] Federal Defendants' motion attached about 100 pages of declarations and exhibits, including many of their own witnesses' factual allegations.[88]

Tribal Intervenor-Defendants also moved to dismiss. They raised the same arguments, except that their arguments addressed only the Bears Ears reservation.[89] SUWA Intervenor-Defendants also moved to dismiss. They incorporated most of Federal Defendants' and Tribal Intervenor-Defendants' motions, but did not join them in seeking dismissal for lack of standing.[90]

Utah Plaintiffs proposed a discovery plan in early February.[91] Defendants have indicated that they believe such discovery is improper.[92] No discovery has begun.

LEGAL STANDARDS

Federal Defendants misapprehend the legal standards governing a motion to dismiss. As to standing, "the plaintiff's burden in establishing standing is lightened considerably" at the motion-to-dismiss stage.[93] When assessing standing, the Court "must accept as true all material allegations of the complaint."[94] It must construe that complaint in favor of the plaintiffs and "presum[e] that general

[87] Doc. 113 (Federal Defendants' MTD) 1-2.
[88] *See* Docs. 113-1, 113-2, 113-3, 113-4, 113-5, 113-6, 113-7, 113-8, 113-9, 113-10, 113-11.
[89] Doc. 114.
[90] Doc. 141 at 1-2.
[91] Docs. 100 (Motion for Scheduling Conference), 100-1 (Attorney Planning Meeting Report).
[92] Doc. 105 (Defendants' Response to Motion for Scheduling Conference) at 5; Doc. 105-1 (Defendants' Attorney Planning Meeting Report and Proposed Schedule) at 4.
[93] *Cressman v. Thompson*, 719 F.3d 1139, 1144 (10th Cir. 2013) (cleaned up).
[94] *Id.* (cleaned up).

allegations embrace those specific facts that are necessary to support the claim."[95] And it "must assume for purposes of the standing inquiry that each claim is legally valid."[96]

Contravening those rules, Federal Defendants ask this Court to ignore many of Utah Plaintiffs' well-pleaded factual allegations and substitute their own.[97] For example, after Utah Plaintiffs alleged that they are impeded from "maintaining and repairing roads," Federal Defendants respond that this allegation is "not consistent with the facts" *as Federal Defendants allege them*.[98] Likewise, though Utah Plaintiffs provided detailed allegations about their impeded search-and-rescue operations, Federal Defendants ask the Court to disregard those allegations because two of their witnesses say they are not *personally aware* of the events described.[99] Federal Defendants have seemingly forgotten that they are before the Court on a motion to dismiss, not a post-trial brief.

In a motion to dismiss, none of this has any place. "[I]n determining whether to grant a motion to dismiss, the district court … [is] limited to the legal sufficiency of the allegations contained within the four corners of the complaint."[100] "[A] court commits error at the pleading stage if it relies on unsolicited facts provided by a defendant in resolving a motion to dismiss for lack of standing."[101] When defendants move to dismiss on the theory that allegations were "untrue," as Federal Defendants have here, the Supreme Court directs district courts to "deny[] the [defendants'] motion to dismiss"

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[95] *SUWA v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013); *see also City of Albuquerque v. DOI*, 379 F.3d 901, 912-13 (10th Cir. 2004); *Atlas Biologicals, Inc. v. Kutrubes*, 50 F.4th 1307, 1330 (10th Cir. 2022).
[96] *Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014).
[97] *E.g.*, Doc. 113 (Federal Defendants' MTD) at 20-22, 24, 29, 33-36 (citing Federal Defendants' witnesses' disagreements with Utah Plaintiffs' well-pleaded standing allegations).
[98] Doc. 113 (Federal Defendants' MTD) at 35. *But see* Exs. A-D.
[99] *See* Doc. 113-10 (Lundell Decl.) ¶22; Doc. 113-11 (Nelson Decl.) ¶16 (same).
[100] *Jojola v. Chavez*, 55 F.3d 488, 494 (10th Cir. 1995).
[101] *Cherokee Nation v. DOI*, 2022 WL 17177622, at *7 (D.D.C. Nov. 23) (citing *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107-08 (D.C. Cir. 2005)); *see also Riggs v. City of Albuquerque*, 916 F.2d 582, 584 (10th Cir. 1990) (despite defendants' attempted factual disputes, court must "treat all material allegations in the complaint as true and construe the complaint in favor of the plaintiff").

and reminds the defendants that they should have "moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were [a] sham."[102]

On the merits, the same legal presumptions apply in favor of Utah Plaintiffs. The Court must "take Plaintiffs' well-pleaded facts as true, view them in the light most favorable to Plaintiffs," "draw all reasonable inferences from the facts in favor of Plaintiffs," and "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."[103] It cannot rely on documents beyond the complaint's four corners except in rare circumstances—such as when referred to in the complaint and central to the plaintiffs' claims.[104] But even in those rare circumstances, "the documents may only be considered to show their contents, not to prove the truth of matters asserted therein."[105]

After making all those presumptions and assumptions in favor of the plaintiffs, the only question is whether the plaintiffs' legal claims are "facially plausible." A "claim is facially plausible when the allegations give rise to a reasonable inference that the defendant is liable."[106] "Plausible does not mean 'likely to be true.'"[107] All it requires is that the complaint "give the court reason to believe that [the] plaintiff has a reasonable likelihood of mustering factual support for [its] claims."[108]

ARGUMENT

Federal Defendants have reserved more than three million acres of land—more than twice the size of Delaware—as untouchable. These reservations come with real-world consequences for the

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[102] *United States v. Scrap*, 412 U.S. 669, 689 (1973).
[103] *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021); *Palma*, 707 F.3d at 1152 (cleaned up); *see also City of Albuquerque v. DOI*, 379 F.3d at 912-13.
[104] *Thomas v. Kaven*, 765 F.3d 1183, 1197 (10th Cir. 2014); *Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006).
[105] *Tal*, 453 F.3d at 1265 n.24 (cleaned up); *See also Emps.' Ret. Sys. of R.I. v. Williams Cos.*, 889 F.3d 1153, 1158 (10th Cir. 2018) ("We may look to the contents of a referenced document … only for what they contain, not to prove the truth of their contents." (cleaned up)).
[106] *Solid Q Holdings, LLC v. Arenal Energy Corp.*, 2018 WL 5268208, at *1 (D. Utah Oct. 23) (Nuffer, J.).
[107] *Grayeyes v. Cox*, 2018 WL 3730866, at *2 (D. Utah Aug. 6) (Nuffer, J.).
[108] *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009).

State and Counties, whose policies and activities are deeply intertwined with that land. The monument reservations make it a federal crime for the State and Counties to disturb the millions of acres of soil or invasive plants within those monument boundaries. They enhance the risk of wildfires and invasive-species infestation. They halt the mining of minerals—and specific taxes and revenue from the production of the same. They fate grazing allotments—and revenues from the same—to retirement. They increase search-and-rescue burdens and road-maintenance costs. And they pollute and soil Utah's beautiful lands. Federal Defendants' response? These harms are *too insignificant* to establish standing. If Federal Defendants get their way, the special solicitude due to States in cases like this would fall into special desuetude—and instead *they* would get special solicitude for their own version of the facts and law. That's error. Utah Plaintiffs have standing to challenge the reservation of millions of acres of land within their borders, and the harmful consequences that flow from it.

On the merits, Utah Plaintiffs more than plausibly allege that the reservations exceed the scope of the Antiquities Act. The amended complaint does so thoroughly and on multiple independent grounds. Neither the landscapes themselves nor most of the items declared to be national monuments within them have the protectable characteristics required by the Antiquities Act's text. Within the reservations lie huge swaths of land where no arguably qualifying items are present, or where the federal government is unaware of the land's contents due to a lack of inventories. Taking all of Utah Plaintiffs' allegations as true, and construing them in Utah Plaintiffs' favor, the amended complaint states several plausible claims that the reservations exceed the Act. Defendants' attempts to avoid the limitations of the statutory text all fall short. Chief Justice Roberts made clear that judicial precedent has not yet resolved this question, Congress has not saved them, and there is simply no basis in law for treating the President as if he holds "a power without any discernible limit."[109]

[109] *Mass. Lobstermen's*, 141 S. Ct. at 981 (statement of Roberts, C.J.).

I. Utah Plaintiffs have standing.

"The requirements for an initial showing sufficient to support standing in a case of this nature are relatively lenient."[110] The "Article III standing inquiry … seeks to determine whether the plaintiff has such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues."[111] A plaintiff has standing whenever he alleges an "injury in fact" that is "traceable to the conduct complained of" and "redressable by a decision of the court."[112] And in a case like this involving multiple plaintiffs, the Court "should proceed to [the] merits when one plaintiff has standing even if others do not."[113] Particularly relevant here, three additional points of standing doctrine warrant clarification.

First, when a plaintiff is injured by an action derivative of another action, such as an implementing regulation, it has standing to challenge both the implementing regulation and the action authorizing it.[114] So where, as here, an enforcement action or management plan cannot operate independent of the authorizing proclamations, Utah Plaintiffs "have standing to challenge" the proclamations themselves based on injuries caused by the enforcement actions and management plans.[115]

Second, though a plaintiff's injury must be to a "legally protected interest," that term does not "open the door to merits considerations at the jurisdictional stage."[116] When assessing standing, Plaintiffs' legal claims must be assumed to be valid. The "legally protected interest" question is, at most, a

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[110] *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1185 n.6 (D. Utah 2004).
[111] *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241 (10th Cir. 2008) (cleaned up).
[112] *Id.* (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).
[113] *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1453 (10th Cir. 1994) (citing *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1994)).
[114] *FEC v. Cruz*, 142 S. Ct. 1638, 1649-50 (2022).
[115] *Id.*
[116] *Initiative Referendum Institute v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006). *Cf.* Doc. 113 (Federal Defendants' MTD) at 27 (Utah Plaintiffs lack standing because they have no "legal right to impose their management preferences on federal lands"); Doc. 114 (Tribal Defendant-Intervenors' MTD) at 16-20 (similar).

threshold inquiry to discard claims "so preposterous as to be legally frivolous," such as an allegation that a plaintiff is harmed because a challenged action would make already-illegal "criminal activity more difficult."[117] Anything more risks merging the assessment of Plaintiffs' standing with the assessment of the merits of Plaintiffs' legal claims. The Tenth Circuit and Supreme Court have thus repeatedly "warn[ed] against use of a 'legal interest test' for standing purposes."[118]

Third, "[i]t is of considerable relevance that the party seeking review here is a sovereign State and not … a private individual."[119] As the Supreme Court has explained, "States constitute a special class of plaintiffs for federal jurisdiction purposes."[120] States like Plaintiff Utah "are not normal litigants for the purposes of invoking federal jurisdiction."[121] They are entitled to "special solicitude."[122] For example, when a State alleges that its coastline will someday be marginally diminished because federal agency inaction will increase pollutants, which allegedly will cause the ocean to rise, the State has Article III standing to sue that agency.[123] Special solicitude applies to injuries to States' private interests, such as to their property or economic interests,[124] as well as injuries to their quasi-sovereign or sovereign interests, such as to their interests in vindicating their duly-enacted laws.[125] It applies to "*each* basis" for standing asserted by a State.[126]

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[117] *Walker*, 450 F.3d at 1093.
[118] *Id.* (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp,* 397 U.S. 150, 153 n.1 (1970)); *see also, e.g.*, *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 697 (10th Cir. 2009) ("states may have concrete environmental interests even in lands they do not own") (citing *Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007)). *Cf. Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999).
[119] *Massachusetts v. EPA*, 549 U.S. at 518.
[120] *Wyoming ex rel. Crank*, 539 F.3d at 1241-42.
[121] *Massachusetts v. EPA.*, 549 U.S. at 518.
[122] *Id.* at 520.
[123] *Id.* at 521-27.
[124] *E.g.*, *Utah ex rel. Div. of Forestry, Fire, & State Lands v. United States*, 528 F.3d 712, 721 (10th Cir. 2008) (property); *New Mexico v. DOI*, 854 F.3d 1207, 1215 (10th Cir. 2017) (procedural rights); *New Mexico ex rel. Richardson*, 565 F.3d at 697 n.13 (lands and economic harms).
[125] *E.g., Wyoming ex rel. Crank*, 539 F.3d at 1241 (enforcement of law); *New Mexico ex rel. Richardson*, 565 F.3d at 697 n.13 (all lands within borders); *Massachusetts v. EPA.*, 549 U.S. at 518 (similar).
[126] *New Mexico v. DOI*, 854 F.3d at 1219 (emphasis added).

This Court should reject Federal Defendants' challenge to Utah Plaintiffs' standing because it is predicated on factual disagreements with Utah Plaintiffs' well-pleaded allegations.[127] Once Federal Defendants' improper factual allegations and mischaracterizations of the complaint are removed, nothing is left of their arguments, and this Court should not rehabilitate them. In the alternative, Utah Plaintiffs' 399-paragraph complaint alleges dozens of valid bases for standing because the monument reservations have upended their activities, operations, economies, and laws. The State and Counties have standing to challenge the reservations on a wide range of independent bases, which fall into at least five categories. First, the monument reservations cause Utah Plaintiffs to lose "specific" revenues, including lost "severance tax revenues,"[128] the "loss of revenue sharing proceeds"[129] from mineral leasing, and lost grazing fees.[130] Second, the reservations "interfere with" Utah Plaintiffs' "sovereign interest" in "creat[ing] and enforc[ing] a legal code"[131] by rendering their laws ineffective.[132] Third, the reservations upset Utah Plaintiffs' "plans to use the [affected area] in the future" for a wide range of "pursuits that would be harmed" by the reservations,[133] including active land management, road maintenance, and general use.[134] Fourth, the reservations cause a series of "financial burden[s]" for Utah Plaintiffs,[135] including hundreds of thousands of dollars in additional search-and-rescue expenses, difficult and expensive road maintenance obligations, and increased funding to service facilities

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[127] *E.g.*, Doc. 113 (Federal Defendants' MTD) at 20-22, 24, 29, 33-36 (citing Federal Defendants' witnesses' disagreements with Utah Plaintiffs' well-pleaded standing allegations).
[128] *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992).
[129] *Mount Evans Co.*, 14 F.3d at 1453; *Arkla Expl. Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 354 (8th Cir. 1984).
[130] *See* Utah Code Ann. §§59-2-102(32)(b), 59-2-201, 59-2-101 *et seq.*; 59-5-202(1); 59-21-1; 30 U.S.C. §191; Doc. 91 (Am. Compl.) at ¶¶214-15, 202.
[131] *Wyoming ex rel. Crank*, 539 F.3d at 1241.
[132] *See, e.g.*, Utah Code Ann. §63J-8-104(1)(d)-(e); §23A–2–201(2)(a) (recodified §23-14-1(2)(a)); *see also* Kane Cty. Code §9-27A-3(Y). For more conflicts, see Am. Compl. ¶¶186-91, 236-38.
[133] *New Mexico ex rel. Richardson*, 565 F.3d at 697 n.13.
[134] Doc. 91 (Am. Compl.) at ¶¶165-91.
[135] *New Mexico ex rel. Richardson*, 565 F.3d at 697 n.13; *see also Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 194, 197 (2017).

within the reservations.[136] And fifth, the reservations harm Utah Plaintiffs' "propriety interests" in wildlife and land to which they hold title, and "even in lands they do not own."[137]

A. Federal Defendants' standing arguments are improper in a motion to dismiss.

Federal Defendants' motion to dismiss for lack of standing should be denied because all of Federal Defendants' standing arguments are predicated on their factual disagreements with Utah Plaintiffs' allegations.[138] Instead of "accept[ing] as true all material allegations in the complaint," construing them in a manner "most favorable to" Utah Plaintiffs, and "presum[ing] that general allegations embrace those specific facts that are necessary to support the claim,"[139] Federal Defendants invite this Court to discredit Utah Plaintiffs' well-pleaded allegations and accept their own instead.[140]

Federal Defendants nowhere explain their extraordinary departure from these elementary principles of civil litigation. Instead, they simply quote the standard for both a "factual" and "facial" challenge to jurisdiction, then do not say which challenge they are making.[141] Their only cited case says nothing about how a party may make a "factual" challenge to a plaintiff's *standing* because that case did not even present a factual challenge.[142]

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[136] *E.g.*, Doc. 91 (Am. Compl.) at ¶¶152-54, 158, 161, 167-73, 221, 227.
[137] *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982); *Massachusetts v. EPA*, 549 U.S. at 522; *New Mexico ex rel. Richardson*, 565 F.3d at 697 n.13; Doc. 91 (Am. Compl.) ¶¶151-164, 174-91, 239; Utah Code Ann. §§23A–1–102, 23A–2–201**;** §§23A-1-101(recodified §§23-13-1, *et. seq.*). The state wildlife resources code was recently recodified. The new codification goes into effect on July 1, 2023. Utah Plaintiffs cite the new codification for ease of reference.
[138] Doc. 113 (Federal Defendants' MTD) at 20-36.
[139] *Cressman*, 719 F.3d at 1144 (cleaned up); *Palma*, 707 F.3d at 1152 (cleaned up); *see also City of Albuquerque v. DOI*, 379 F.3d at 912-13; *Atlas Biologicals*, 50 F.4th at 1330.
[140] *E.g.*, Doc. 113 (Federal Defendants' MTD) at 20-22, 24, 29, 33-36.
[141] Doc. 113 (Federal Defendants' MTD) at 11. Federal Defendants repeat this standard a second time, but again do not say that which course they are taking. *Id.* at 20. They then repeatedly refer to the standard for a facial challenge throughout their standing argument. *E.g.*, *id.* at 22-23 ("plausibly allege facts").
[142] *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001).

The truth is that Federal Defendants' "factual" attack against Utah Plaintiffs' standing is aberrational and legally erroneous. Plaintiffs must support each element of their standing with no more and no less than "the manner and degree of evidence required at the successive stages of the litigation."[143] "At the pleading stage," that means that plaintiffs need make only "general factual allegations of injury" to survive a motion to dismiss.[144] When defendants attempt to transplant the factual-challenge mechanism to hold plaintiffs to a summary-judgment standard on standing at the pleading stage, courts reject the gambit as premature. At the motion to dismiss stage, a "plaintiff is protected from an evidentiary attack on his asserted [standing] theory by the defendant."[145] Although the plaintiff "can freely augment *his* pleadings with affidavits … the defendant is barred at this stage of the proceedings from attacking the claims made therein."[146] The Tenth Circuit and Supreme Court have made clear that when defendants want to argue that "plaintiffs are unable to establish a factual basis" for standing, they must afford the plaintiffs a "fair opportunity to develop the facts" and then "mo[ve] for summary judgment."[147]

And in those circumstances where factual inquiries into jurisdiction are allowed at the motion-to-dismiss stage, they look nothing like this case. "Factual" challenges to jurisdiction are uncommon and almost always concern non-standing jurisdictional requirements, such as whether the dispute involves the required amount-in-controversy.[148] Beyond that, the decision to inquire into jurisdictional

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[143] *Lujan*, 504 U.S. at 561.
[144] *Id.*
[145] *Haase v. Sessions*, 835 F.2d 902, 906-08 (D.C. Cir. 1987).
[146] *Id.* (emphasis added)*; see also Riggs*, 916 F.2d at 584; *Chesapeake Climate Action Network v. Exp.-Imp. Bank of the United States*, 78 F. Supp. 3d 208, 222 (D.D.C. 2015) (even in deciding standing at *summary judgment*, "the Court will not credit any statements in the [defendants'] declaration that are contradicted by Plaintiffs' specific facts").
[147] *Riggs*, 916 F.2d at 586; *see also Scrap*, 412 U.S. at 688-90.
[148] *E.g.*, *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936).

facts must be initiated by "only the *court*, not the … defendant."[149] This Court has not called for any such inquiry. And given the higher level of proof required, plaintiffs subject to an inquiry into jurisdictional facts must first be afforded a wide range of discovery rights.[150] Utah Plaintiffs have had no such opportunity. Federal Defendants opposed any discovery until "these cases survive the pleading stage," then asked the Court to credit their version of the "evidence" in their motion to dismiss.[151] And even under a factual challenge to jurisdiction, "the complaint will be construed broadly and liberally"[152] and the court "must still accept all of the factual allegations in the complaint as true,"[153] contrary to Federal Defendants' arguments that this Court should weigh the evidence.

This Court should reject Federal Defendants' attempt to interpose factual disputes at the motion-to-dismiss stage and deny their standing arguments based on them.[154] Nonetheless, Utah Plaintiffs have attached short declarations rebutting the central factual claims in Federal Defendants' declarations.[155] The proper course is for the Court to consider Federal Defendants' fact-bound standing arguments at summary judgment if they are still willing to make them in light of the record.[156] To the extent that the Court elects to consider Federal Defendants' declarations in resolving this motion,

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[149] *Haase*, 835 F.2d at 908 ("In considering standing under 12(b)(1), only the court, not the plaintiff (or defendant) can elicit information outside the pleadings."); *Riggs*, 916 F.2d at 586 (only "the court may require plaintiff to supply additional information").

[150] *Haase*, 835 F.2d at 907-08 ("Once the inquiry moves into this latter, fact-based stage, discovery by the parties must be allowed subject to whatever defenses and privileges a party can properly assert in response to the discovery process."); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 67-68, 72 (1978) (district court held four days of hearings to decide motion to dismiss for want of standing); *Riggs*, 916 F.2d at 586 ("fair opportunity to develop the facts").

[151] *See* Doc. 105 (Defendants' Response to Motion for Scheduling Conference) at 5; Doc. 105-1 (Defendants' Attorney Planning Meeting Report and Proposed Schedule) at 4.

[152] 5B C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure §1350 (3d ed.).

[153] *Kareem v. Haspel*, 986 F.3d 859, 867 n.7 (D.C. Cir. 2021) (cleaned up); *Settles*, 429 F.3d at 1107-08 ("As the nonmoving party, Settles remains entitled to the benefit of all reasonable inferences of fact for purposes of determining whether material facts are in dispute.").

[154] *See* Doc. 113 (Federal Defendants' MTD) at 20-22, 24, 29, 33-36.

[155] *See* Ex. A (Brooks Decl.), Ex. B (Bremner Decl.), Ex. C (Dodds Decl.), Ex. D (Harris Decl.), Ex. E (Weppner Decl.)

[156] *Scrap*, 412 U.S. at 688-90.

Utah Plaintiffs request an evidentiary hearing so that they can have a "fair opportunity to develop the facts" by cross-examining Federal Defendants' witnesses and introducing their own, as is their right.[157] Even if the Court were to consider and credit Federal Defendants' declarations at this motion-to-dismiss stage, and not give Utah Plaintiffs an evidentiary hearing, Utah Plaintiffs nevertheless have standing on multiple grounds that Federal Defendants' declarations do not even address.[158]

B. Utah Plaintiffs allege many independently sufficient bases for standing.

Though Federal Defendants do not properly address them, Utah Plaintiffs have alleged a wide range of independently sufficient bases for standing. They fall into at least five categories of harm.

1. The monument reservations deprive Utah Plaintiffs of specific sources of revenue.

Utah Plaintiffs are injured by the loss of specific sources of revenue. A governmental plaintiff has standing when it alleges a "direct injury in the form of a loss of specific tax revenues."[159] In *Wyoming v. Oklahoma*, the Supreme Court held that "Wyoming clearly had standing" to challenge a law hurting the Wyoming coal industry because Wyoming "impose[s] a severance tax upon the privilege of severing or extracting coal from land within its boundaries."[160] The Supreme Court distinguished standing based on "a decline in *general* tax revenues" (possibly insufficient) from standing based on "direct injury in the form of a loss of *specific* tax revenues" ("clearly" sufficient).[161] Because Wyoming specifically alleged that the challenged law "deprive[d] Wyoming of severance tax revenues," Wyoming "clearly" had Article III standing.[162]

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[157] *Riggs*, 916 F.2d at 586; *Haase*, 835 F.2d at 907-08.
[158] *E.g.* §§I.B.2, I.B.5 *infra*.
[159] *Wyoming v. Oklahoma*, 502 U.S. at 448.
[160] *Id.* at 442, 447.
[161] *Id.* at 447-48 (emphases added).
[162] *Id.* at 447-48. Defendants may compare dollar amounts lost between this case and *Wyoming*, but that is irrelevant to the Article III inquiry. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420, 430-431 (1961) (five-dollar loss). Defendants may also note that the Supreme Court scrutinized Wyoming's lost-revenue evidence, but that's because the case was decided at the summary-judgment stage. *Wyoming v. Oklahoma*, 502 U.S. at 440; *see, e.g. Petrella v. Brownback*, 697 F.3d 1285, 1292 (10th Cir. 2012) ("[T]he

The Supreme Court and the Tenth Circuit have reaffirmed that a government plaintiff is "injured by a loss of revenue sharing and sales tax monies,"[163] by the "diminish[ment of] of its tax base,"[164] or by its "lost tax revenue" when alleged specifically.[165] Even Federal Defendants' best case on lost-revenue standing reaffirmed *Wyoming*'s central premise: "reduced tax revenues can provide a state with Article III standing" so long as they are "*specific* tax revenues," such as natural-resource taxes.[166] The analysis is more straightforward when the government plaintiff is statutorily "entitled to … revenues derived from the lease of public lands located within its border" and the challenged action puts those revenues in jeopardy.[167] For instance, when Arkansas was entitled to 50 percent of revenues from mineral leasing, it "[c]learly" had standing to challenge an agency decision that would have diminished that mineral leasing activity.[168] A government plaintiff, the Tenth Circuit has explained, "has standing as a result of its alleged injury which resulted from its loss of revenue sharing proceeds."[169]

Here, Utah Plaintiffs allege multiple direct injuries in the form of losses of specific revenues. First, Utah Plaintiffs impose specific natural-resources property taxes—taxes that apply to minerals now within the monument reservations.[170] Taxable minerals include uranium, vanadium, copper, and others. Utah collects over $100 million per year in natural resources taxes.[171] The Counties collect the

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dismissal for lack of standing came at the pleading stage, not on a motion for summary judgment or later in the litigation. Consequently, [the plaintiffs'] burden in establishing standing is lightened considerably.").

[163] *Mount Evans Co.*, 14 F.3d at 1451.

[164] *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 110-11 (1979), *limited on other grounds by Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175 (2011); *see also Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 345 (1977) (holding that state plaintiff had standing, among other reasons, because challenged law would "result[] in a contraction of the market" for the state apple industry, which "could reduce the amount of the assessments due the Commission and used to support is activities").

[165] *City of Miami*, 581 U.S. at 197.

[166] *Wyoming v. DOI*, 674 F.3d 1220, 1234-35 (10th Cir. 2012).

[167] *Arkla Expl. Co.*, 734 F.2d at 354 n.9.

[168] *Id.*

[169] *Mount Evans Co.*, 14 F.3d at 1453.

[170] Utah Code Ann. §§59-2-102(32)(b), 59-2-201, 59-2-101 *et seq.*

[171] Doc. 91 (Am. Compl.) ¶215.

natural-resources tax and receive funds out of it.[172] Second, Utah Plaintiffs impose specific severance taxes, equal to 2.6 percent of the taxable value of all metals or metalliferous minerals, including uranium and vanadium, sold or otherwise disposed from federal land.[173] And third, Utah Plaintiffs receive revenue from mineral leasing on federal lands within its borders. By federal statute, Utah is entitled to 50 percent of revenues from such mineral leases—a critical financial interest given that most of Utah is federal land.[174] Utah Plaintiffs allege that the natural resources that trigger these sources of revenue are "plentiful" on the monument reservations and would be mined absent the reservations.[175] The reservations are rich with uranium, vanadium, clean coal, and other natural resources, including in areas newly encompassed by the Biden proclamations.[176]

The challenged proclamations and the operative management plans cut off these sources of revenue. As alleged in Utah Plaintiffs' complaint, mining is restricted on all monument reservation lands.[177] The proclamations remove the lands "from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing."[178] As detailed in the operative management plans, "no new mining claims may be located, and no new mineral leases may be issued, on lands within the monument."[179] Even miners who already located their claims and received their leases cannot operate without paying the "costs of the mineral examination,"[180] which

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[172] *Id.*
[173] Utah Code Ann. §59-5-202(1); *id.* §59-21-1; Doc. 91 (Am. Compl.) at ¶214.
[174] 30 U.S.C. §191; Doc. 91 (Am. Compl.) at ¶214.
[175] Am. Compl. ¶214.
[176] Doc. 91 (Am. Compl.) ¶¶206-218; *see also* BLM & U.S.F.S., *Bears Ears National Monument Resource Management Plan and Environmental Impact Statement: Analysis of the Management Situation* 6-140 (Sept. 2022), perma.cc/D76U-7NMJ (combined 449,140 acres of "high" or "moderate" potential for "uranium and vanadium development" within expanded Bears Ears reservation).
[177] Doc. 91 (Am. Compl.) ¶¶206-219.
[178] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57331; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57345.
[179] Bears Ears Management Plan 2; Grand Staircase Management Plan 2.
[180] *Id.*

either heavily delay their mining or render it impossible.[181] The monument reservations therefore will cause Utah to lose tax revenue from "untold quantities and values of minerals … within monument reservation boundaries," including potentially "over one million pounds of uranium and up to millions of pounds of high-grade vanadium" in one region of Bears Ears; revenue from "the Spring Water mine on the eastern bank of South Cottonwood"; "significant tax revenue generated from the Avalanche Mine"; 50 percent of revenues from all mineral leasing; and "revenues from other mining on the covered land."[182]

Individual Plaintiffs further detail how the enlarged reservations will impede mining.[183] Any Individual Plaintiff whose mining activity will decrease confers standing to the State because the State, by law, loses tax revenue from that Individual Plaintiff's lost mining. Federal Defendants originally did not contest Plaintiff Kimmerle's standing based on lost mining.[184] Now, their only argument against it is that "the *Dalton* Plaintiffs do not allege that such archaic habitation structures [as Federal Defendants allege exist around Kimmerle's mining claims] are unprotectable under the Antiquities Act," so they must concede that the proclamations are valid insofar as they injure him.[185] That mischaracterizes Individual Plaintiffs' factual allegations and legal arguments, but it is inapposite to the follow-on injury to Utah Plaintiffs, who do allege—and provide a map illustrating—that the area around Kimmerle's mining claims is predicated exclusively on non-qualifying items.[186] Federal

[181] *E.g.*, Docs. 88-6 (Shumway Decl.) ¶7; 88-7 (Kimmerle Decl.) ¶¶9-13.
[182] Doc. 91 (Am. Compl.) ¶¶214-217; *see also* Docs. 88-6 ¶7; 88-7 ¶¶9-13 (describing impeded mining that would generate revenue for Utah).
[183] *E.g.*, Doc. 88 (Individual Plaintiffs' Am. Compl.) ¶¶128-48; Doc. 88-6 (Shumway Decl.); Doc. 88-7 (Kimmerle Decl.); Doc. 88-8 (Dalton Decl.).
[184] Doc. 78 (Federal Defendants' first MTD) at 19, 19 n.93.
[185] Doc. 113 (Federal Defendants' MTD) at 40-41.
[186] Doc. 88-7 (Kimmerle Decl.) ¶10 ("Geitus Mine is located at the edge of Deer Flat in Southeastern Utah"); *id.* ¶12 (""the Geitus claims did fall within the borders of the expanded [Bears Ears] Monument"); *Geitus Mine Plan of Operations* 15-16 (2021), perma.cc/4DT9-NNKP (showing precise locations); Doc. 91 (Am. Compl.) at 83 (map showing *non*-reservable land, including the Geitus Mine area).

Defendants therefore have no answer to Utah Plaintiffs' revenue injury deriving from Kimmerle's lost mining.[187] Kimmerle already estimates the loss of millions of dollars in lost profits that Utah Plaintiffs would have shared in.[188] Because "[t]he effect of the [monument reservations is] to deprive [Utah] of severance [and natural resources] tax revenues," Utah "clearly" has Article III standing.[189] And the Counties do too because they collect the natural-resources tax and receive funds out of it.[190]

Federal Defendants surmise that the Bears Ears and Grand Staircase monument reservations will not, in fact, impede mining of natural resources. That factual contention has no legal place in this motion to dismiss.[191] In any event, it is also false. Federal Defendants themselves have detailed the reductions in mining caused by the challenged actions.[192] They do not dispute that Kimmerle's mining is impeded as a result of the proclamations.[193] And in the words of the proposed intervenors, President Biden's proclamations are the only "protection from oil and gas development" and their removal would "send mining trucks up and through" the reservation, making them "gravely concerned about

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See also Doc. 88-7 (Kimmerle Decl.) ¶17 ("If the [Geitus] mine was approved, we would be mining a deposit with an in-ground valuation of over $22 million.").

[187] Federal Defendants reference a "Congressional prohibition" that, they imply, would prevent mining on the reservations no matter what. Doc. 113 at 32 n.164 But that prohibition applies only to funds spent for a particular year from a particular source, not to all funds for all time. *Consolidated Appropriations Act*, 2022, Pub. L. No. 117-103, §408, 136 Stat. 49, 410-11 (2022). And in any event, it does not apply to the Bears Ears reservation at all because of its "January 20, 2001" benchmark. *Id.*

[188] Doc. 88-7 (Kimmerle Decl.) ¶16.

[189] *Wyoming v. Oklahoma*, 502 U.S. at 447-48.

[190] Doc. 91 (Am. Compl.) at. ¶215.

[191] *Riggs*, 916 F.2d at 586; *Scrap*, 412 U.S. at 688-90.

[192] BLM & U.S.F.S., *Bears Ears National Monument Resource Management Plan and Environmental Impact Statement: Analysis of the Management Situation* 6-140 (Sept. 2022), perma.cc/D76U-7NMJ ("Twenty of the [76 active mining] claims [within Bears Ears] were filed in 2018, shortly after the boundaries of BENM were shrunk by Presidential Proclamation 9681."); Bears Ears Management Plan 2-3 (suspending mining on existing leases); Doc. 113 (Federal Defendants' MTD) at 33 (acknowledging that mining is suspended, that mining claims in South Cottonwood were "located in 2017," "remain[] active," and now cannot be developed unless it clears the "valid existing rights" hurdle created by "Proclamation 10,285"); *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57321 (proclamations "necessary to protect the objects of historic and scientific interest" precisely because they "withdraw the lands from the operation of the public land, mining, and mineral leasing laws").

[193] Doc. 113 (Federal Defendants' MTD) at 40-41.

an increase in private mining activities on [Trump-]excluded lands."[194] Even if this Court construed all facts against Plaintiffs and ignored undisputed facts to conclude that the reservations do not prevent a single dollar's worth of mining activity, the lengthy procedural delay created by the now-mandatory mineral examinations before any mining resumes[195] would itself be an Article III injury.[196]

Finally, Utah Plaintiffs suffer a separate lost-revenue injury based on the retirement of grazing allotments. The State receives revenue from federal grazing fees under a statutory revenue-sharing formula.[197] The fees are a function of the "number of grazing allotments in the State."[198] Grazing is common on reservation lands. But the proclamations direct that—unlike on non-reservation land—when "grazing permits or leases [are] voluntarily relinquished by existing holders, the Secretaries [of Interior and Agriculture] *shall* retire from livestock grazing the lands covered by such permits or leases."[199] The reservations also reduce grazing fees because grazing is undermined by the management

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[194] GSE Partners' MTD Opp., *Wilderness Society v. Trump*, 1:17-cv-02587, 2018 WL 6037722 (D.D.C. Nov. 15), Doc. 63; Doc. 33-4 ¶10; Doc. 33-3 ¶25. *See also*, *e.g.,* Doc. 79 at 3 ("When President Trump stripped monument status from parts of Bears Ears and Grand Staircase in 2017, the harms anticipated in *UAC* materialized: mining … commenced.").

[195] Bears Ears Management Plan 2; Grand Staircase Management Plan 2.

[196] 13A C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure §3531.4 (3d ed.) ("Delayed payment is a concrete injury."); *Doyle v. Jewell*, 2014 WL 2892828, at *1 (D. Utah June 26) (federal agency defendant's "delay alone is causing [the plaintiff] harm and constitutes a redress[a]ble injury"); *Ensminger v. Credit L. Ctr., LLC,* 2019 WL 4341215, at *3 (D. Kan. Sept. 12) (collecting cases for the proposition that "the loss of time value of money represents a tangible economic injury and … is sufficient to confer standing"); *MSPA Claims 1, LLC v. Tenet Fla., Inc.*, 918 F.3d 1312, 1318 (11th Cir. 2019) ("The question is whether delay alone is a 'concrete' injury. It is."); *Van v. LLR, Inc.*, 962 F.3d 1160, 1164 (9th Cir. 2020) ("the temporary loss of use of one's money constitutes an injury in fact for purposes of Article III"); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1234-35 (10th Cir. 2004) ("The obligations and burdens imposed by those statutes speak for themselves, and no additional evidence is necessary to establish standing."); *Am. Fed'n of Gov't Emps. v. Office of Pers. Mgmt.*, 928 F.3d 42, 66 (D.C. Cir. 2019) ("The delay in those Plaintiffs' receipt of their refunds, and the forgone time value of that money, is an actual, tangible pecuniary injury.").

[197] Doc. 91 (Am. Compl.) ¶202; 43 U.S.C. §§1901, 1905. Executive Order 12548, *Grazing Fees*, 51 Fed. Reg. 5985 (February 19, 1986); Vincent, Grazing Fees: Overview and Issues, Cong. Res. Serv., RS21232 (Mar. 4, 2019).

[198] Doc. 91 (Am. Compl.) ¶202.

[199] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57332 (emphasis added).

plans' restricting vehicles and equipment except when "consistent with the protection of the objects and values within the monument."[200] "The proclamations have caused a decline in grazing," so "the State … loses revenue it would otherwise earn from grazing permits."[201]

2. The monument reservations undermine Utah Plaintiffs' ability to enforce their own laws.

Utah Plaintiffs are injured because the reservations undermine their ability to enforce their legal codes. "States have a legally protected sovereign interest in the exercise of sovereign power over individuals and entities within the relevant jurisdiction, which involves the power to create and enforce a legal code."[202] In *Wyoming ex rel. Crank*, for example, the Tenth Circuit held that Wyoming had standing to challenge a federal law that interfered with Wyoming's ability to enforce its own laws.[203] Specifically, a federal agency deemed Wyoming's law insufficient to expunge convictions for purposes of restoring certain convicts' rights to possess firearms under federal law.[204] Even though the Court concluded that Wyoming's law had no effect, it had Article III standing based on its interest in "enforc[ing] its legal code."[205] "[B]ecause the [agency's] interpretation of [the statute] interferes with Wyoming's ability to enforce its legal code," and "[i]n light of the 'special solicitude' the *Massachusetts* Court afforded to states in our standing analysis," Wyoming "sufficiently alleged an injury-in-fact."[206]

The monument reservations limit Utah's ability to enforce its laws in multiple ways. For example, Utah law directs federal lands to be managed to "achieve and maintain at the *highest reasonably*

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[200] Bears Ears Management Plan 3-4; Grand Staircase Management Plan 3. *See also* Doc. 91 (Am. Compl.) ¶¶196-202; Raymond B. Wrabley, Jr., *Managing the Monument: Cows and Conservation in Grand Staircase-Escalante National Monument*, 29 J. Land, Resources, & Env'l L. 253 (2009).
[201] Doc. 91 (Am. Compl.) ¶¶199, 202.
[202] *Wyoming ex rel. Crank*, 539 F.3d at 1242 (cleaned up) (quoting *Alfred L. Snapp & Son, Inc*, 458 U.S. at 601).
[203] *Id.*
[204] *Id.* at 1243. The law also applied to two other similar federal laws and a state law derivate of them. *Id.*
[205] *Id.* at 1242.
[206] *Id.*

sustainable levels a continuing yield of energy, hard rock, and nuclear resources."[207] But the monument reservations prohibit all new mining—of coal, uranium, vanadium, and other natural resources.[208] Utah law also directs land-use policies on federal land to "achieve and maintain livestock grazing in the subject lands at the highest reasonably sustainable levels."[209] But the monument reservations require the "retire[ment] from livestock grazing" of leases voluntarily relinquished.

Utah law also requires the state's wildlife agency to "protect, propagate, manage, conserve, and distribute protected wildlife" on all lands throughout the State,[210] which Utah understands to require the state agency to undertake projects on federal land, including building wells, clearing vegetation, and patch-burn grazing.[211] But the monument reservations impede actions necessary to protect and manage that wildlife.[212] In fact, the proclamations declare as national monuments precisely the things that Utah officials believe they must remove—such as pinyon-juniper[213]—to carry out their statutory duty to "protect, propagate, manage, conserve, and distribute protected wildlife."[214] "[B]ecause the [challenged action] interferes with [Utah's] ability to enforce its legal code," and "[i]n light of the 'special solicitude' the *Massachusetts* Court afforded to states in our standing analysis," Utah has "sufficiently alleged an injury-in-fact."[215]

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[207] Utah Code Ann. §63J-8-104(1)(d) (emphasis added).
[208] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57321; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57335; Bears Ears Management Plan 4; Grand Staircase Management Plan 4.
[209] Utah Code Ann. §63J-8-104(1)(e).
[210] *Id.* §23A–2–201(2)(a) (recodified §23-14-1(2)(a)).
[211] Doc. 91 (Am. Compl.) ¶¶162-64, 174-91.
[212] *Id.* ¶¶186-88, 191.
[213] *Compare Id.* ¶¶164, 180-89, 199 *with Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57324-25, 57328; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57340.
[214] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57324-25, 57328; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57340. ("pinyon," "juniper," "pinyon and juniper," "pinyon-juniper forests," "pinyon and juniper woodlands").
[215] *Wyoming ex rel. Crank.*, 539 F.3d at 1242.

Other similar conflicts abound for Utah Plaintiffs. For instance, Kane County law directs its search-and-rescue crews to give the "highest priority" to human safety, notwithstanding the reservations' restrictions. Even when seeking to "access areas prohibited by federal agencies" within the reservations, Kane County law "charge[s]" personnel to proceed anyway.[216]

Federal Defendants offer two responses. First, they argue that Utah Plaintiffs cannot have standing based on their interest in enforcing their legal codes because "state law and county [laws] 'must yield to federal law regarding conduct on federal land.'"[217] That conflates a merits question with Plaintiffs' standing. Precisely because Utah Plaintiffs' laws may have to "yield" to the supremacy of federal law, Plaintiffs have suffered an Article III injury.[218] Federal Defendants' single cited case says nothing about standing; it is about the merits of a preemption claim.[219] Second, Federal Defendants promise—only in response to Kane County's search-and-rescue conflict and not to all the others—to use their discretion to give search-and-rescue crews more freedom.[220] But the government's "representations in this litigation are not binding on this or future administrations."[221] Federal officers can ignore the government's in-court representations—and that is the reality today.[222] Plus, under *Wyoming ex rel. Crank*, it is irrelevant to standing that Federal Defendant believe—even if it they are ultimately

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[216] Kane Cty. Code §9-27A-3(Y). For more conflicts, see Am. Compl. ¶¶236-38..
[217] Doc. 113 (Federal Defendants' MTD) at 27 n.132 (quoting *United States v. Bd. of Cnty. Cmm'rs of Cnty. of Otero*, 843 F.3d 1208, 1215 (10th Cir. 2016)).
[218] *E.g.*, *Wyoming ex rel. Crank.*, 539 F.3d at 1241 (standing to challenge federal "determin[ation] that federal—not state—law governed the definition of "expunge" for [federal-law] purposes").
[219] *Bd. of Cnty. Comm'rs of Cnty. Of Otero*, 843 F.3d at 1215 (10th Cir. 2016) (noting that the Board "d[id] not challenge the district court's rulings on standing").
[220] Doc. 113 (Federal Defendants' MTD) at 36.
[221] *Citizens for Responsible Gov't v. Davidson*, 236 F.3d 1174, 1193 (10th Cir. 2000); *see also Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 395 (1988).
[222] Doc. 91 (Am. Compl.) ¶¶170-71; Ex. E (Weppner Decl.) ¶10 ("BLM agents commonly impose similar restrictions on our search-and-rescue efforts throughout the monument reservation."); Kane Cty. Code §9-27A-3(Y) ("Attempting to obtain permission during a crisis to access areas prohibited by federal agencies in matters of life and death can endanger human life. This has caused considerable conflict between the Kane County search and rescue agencies and the federal government.").

correct—that a state law does not conflict with the federal law, so long as Utah Plaintiffs believe that the federal government's interpretation is wrong.[223]

Federal Defendants may argue that Utah's laws are not implicated because *some* apply "to the maximum extent consistent with federal law," and therefore present no conflict. That's wrong for two reasons. First, it begs the question: Assuming Utah Plaintiffs are correct on the merits, the monument reservations are *not* "consistent with federal law." In its standing analysis, the Court "must … assume that on the merits the plaintiffs would be successful in their claims."[224] Second, it forgets *Wyoming ex rel. Crank*. There, Wyoming had standing even though the Tenth Circuit ultimately held on the merits that its law was ineffectual and therefore presented no conflict with federal law.[225]

3. The monument reservations impede Utah Plaintiffs' planned activities in many ways, each independently sufficient to establish standing.

In a challenge to federal-land policy, a plaintiff has standing when it intends to engage in an activity on that federal land that is impeded by the policy. "A plaintiff who has repeatedly visited a particular site, has imminent plans to do so again, and whose interests are harmed by a defendant's conduct has suffered injury in fact that is concrete and particularized."[226] When a plaintiff alleges that he "plans to use the [affected area] in the future" for "pursuits that would be harmed by the [challenged action]," that is "plainly sufficient to support individual standing."[227] Even when a plaintiff alleges merely that he has "repeatedly visited the [affected] site, that he had imminent plans to do so again,

[223] *Wyoming ex rel. Crank*, 539 F.3d at 1242.
[224] *Walker*, 450 F.3d at 1093 (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003); *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1207 (10th Cir. 2014) ("If correct on the merits, *as we must assume for standing purposes*…") (emphasis in original).
[225] *Wyoming ex rel. Crank*, 539 F.3d at 1243.
[226] *Palma*, 707 F.3d at 1156.
[227] *New Mexico ex rel. Richardson v. BLM*, 565 F.3d at 697 n.13.

and that his interests in [his planned activities] would be harmed if the [challenged action] went forward," that is "sufficient to establish Article III standing."[228]

For example, when an employee of the State of Utah monitored archaeological sites "at least quarterly," and "[h]er position as a site steward for the State of Utah requires her to go to these sites regularly," she had standing to challenge an action that caused her to slightly alter her planned activities.[229] Namely, as a result of the challenged action, she "continued to make those visits, [but] she no longer brings her dogs with her and she limits hiking in the area." She had standing because "she would like to return to her prior use of this land."[230] Similarly, a plaintiff has standing in the Tenth Circuit if he "frequently visit[s] and use[s] the lands affected by the leasing decisions for various purposes, including hunting, camping, bird watching, sightseeing, and enjoying solitude," "plans to return as often as possible, but certainly within a year," and alleges that "specific areas will be affected by [the challenged action], and stated his interests will be harmed by such activity."[231]

A plaintiff's planned activity need not be regulated or prohibited—only detrimentally affected—for him to have standing.[232] But if his planned activity is regulated or prohibited, his standing is even more straightforward.[233]And a State has standing on all bases available to a private individual.[234]

Utah Plaintiffs intend to engage in many activities on federal land that are impeded by the reservations because "the State and Counties take responsibility for maintaining and improving federal

[228] *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).
[229] *Grand Canyon Trust v. Energy Fuels Res. (U.S.A.) Inc.*, 269 F. Supp. 3d 1173, 1190-91 (D. Utah 2017).
[230] *Id.* at 1191.
[231] *Palma*, 707 F.3d at 1153-56.
[232] *Id.*
[233] *Lujan*, 504 U.S. at 561.
[234] *Massachusetts v. EPA.*, 549 U.S. at 518.

lands within their territory" and they "engage in a wide range of official duties on federal public lands."[235] Consider six such planned activities, each of which is independently sufficient for standing.

- **Vegetation removal and soil management.** "But for the monument designation, the State would be actively engaged in such vegetation management around the Skutumpah Terrace and elsewhere within the reservation boundaries," including "treatment for Pinyon-Juniper and decadent sagebrush encroachment."[236] They would use large "equipment" and "vehicles," like bulldozers, that "disturb the soil and plants and other features" listed in the proclamations.[237] The State would also deploy methods to maintain healthy soil—such as chaining.[238] The reservations "impede[] the State's ability to initiate such proactive projects" because they prohibit activities that injure "pinyon," "juniper," and "sagebrush," as well as things like "soil," "ricegrass," and "views" that would be affected in any such undertaking.[239]
- **Road maintenance.** But for the monument reservations, Utah Plaintiffs would pursue road maintenance that they must now abandon or modify. They are responsible for maintaining many roads in areas newly encompassed by the Biden expansion.[240] Utah Plaintiffs' declarations detail how as a result of the reservations, "federal land managers do not make available local road materials that they make available on other federal lands," including by forbidding the County from "develop[ing] borrow pits for gravel, dirt, and other base materials essential

[235] Doc. 91 (Am. Compl.) ¶148; *see also, e.g.*, 54 U.S.C. §302303 (federal law assigning duties to state employees on federal land).
[236] Doc. 91 (Am. Compl.) ¶180.
[237] *Id.* ¶178.
[238] *Id.* ¶¶176-80, 182, 191.
[239] *Id.* ¶178; *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57324-25, 57328; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57340; *Establishment of the Bears Ears National Monument* (Obama), 82 Fed. Reg. at 1141.
[240] Doc. 91 (Am. Compl.) ¶223.

for road maintenance on monument lands."[241] Their planned activities are prohibited by the reservations. Utah Plaintiffs face similar conflicts when they attempt to install culverts, perform simple maintenance fixes, and improve surfaces on roads within the reservations.[242]

- **Wildfire prevention.** But for the monument reservations, Utah Plaintiffs would act to reduce wildfire risk—including in areas newly encompassed by the Biden expansions in the "northwestern fringe of Grand Staircase-Escalante."[243] But Utah Plaintiffs' wildfire prevention would entail "chaining," "modifying vegetation," "vehicles," "equipment," and "controlled burns."[244] The reservations "identify for protection the very brush and vegetation that must be cleared" and limit the use of chaining, vehicles, equipment, and controlled burns—all of which can upset vegetation and species now identified as "national monuments."[245]
- **Search and rescue.** Utah Plaintiffs are responsible for and engage in search-and-rescue missions throughout the reservations, but federal agents prevent their planned activities because they could disrupt a listed item.[246] "These agents demand that alternative measures be used regardless of the urgency of a patient's needs, all in the name of protecting proclamation

[241] Ex. A (Brooks Decl.) ¶5-8; *see also* Ex. B (Bremner Decl.) ¶7 ("road maintenance and management became much more difficult and expensive," "access to local road materials were no longer available," "monument staff criticized and thwarted routine maintenance efforts," and "necessary improvements were prohibited")' Ex. C (Dodds Decl.) ¶4 ("Because of the monument designation, land managers do not make available local road materials of the sort that they do make available on other, similar federal lands. Monument staff do not allow the County to develop borrow pits for gravel, dirt, and other base materials essential for road maintenance on monument lands. This forces the County to truck road materials from long distances despite the availability of materials at or near the roads in need of maintenance."); Ex. D (Harris Decl.) ¶9 ("Because of President Biden's monument reservation, land managers will not authorize access to these materials located all along the nearly 33-mile-long road.").
[242] Doc. 91 (Am. Compl.) ¶¶223-26.
[243] *Id.* ¶¶182, 184.
[244] *Id.* ¶¶182-84.
[245] *Id.* ¶183.
[246] *Id.* ¶196; Ex. B (Bremner Decl.) ¶11.

items."[247] As a search-and-rescue declarant explains, "BLM agents have impeded search-and-rescue teams" because their planned rescue would "place[] monument objects at risk"—such as by delaying their planned rescue for hours, only for two rescueees to die.[248] Federal agents "commonly impose similar restrictions on … search-and-rescue efforts" by Utah Plaintiffs' personnel throughout the expanded boundaries.[249]

- **Wildlife support.** But for the monument reservations, the State would "clear corridors for wildlife migration," "engag[e] in habitat restoration," and "install[] … new water facilities needed to protect and propagate wildlife during periods of drought."[250] But these planned activities require disturbing protected items, and therefore are impeded by reservations.
- **Use and enjoyment.** In all their activities on the reservations, Utah Plaintiffs' use and enjoyment is harmed by the reservations. Utah Plaintiffs spend thousands of hours on the reservations for a wide range of pursuits, operations, and events.[251] The expanded reservations harm their use and enjoyment of the land by increasing human feces, litter, and vandalism.[252] "What was once a pristine natural landscape has become trash-strewn and an outhouse."[253]

Although Federal Defendants nitpick the details of Utah Plaintiffs' planned activities, "[n]either [the Tenth Circuit] nor the Supreme Court has ever required an environmental plaintiff to show it has traversed each bit of land that will be affected by a challenged agency action."[254] In any event, Utah

[247] Doc. 91 (Am. Compl.) ¶¶166-71.
[248] Ex. E (Weppner Decl.) ¶¶5, 8-10. Among those impeded were Utah Plaintiffs' own search-and-rescue personnel. *Id.* ¶7.
[249] *Id.* ¶10.
[250] Doc. 91 (Am. Compl.) ¶164.
[251] *E.g.*, *id.* ¶¶235, 166-91; Exs. A-E.
[252] Doc. 91 (Am. Compl.) ¶¶115, 151-64, 175; Ex. B (Bremner Decl.) ¶¶8-9, 11.
[253] *Id.* ¶175; *see also*, *e.g.*, Ex. B (Bremner Decl.) ¶¶8, 12 (reservation restrictions increase "noise from heavy trucks and equipment … fugitive dust, and … other environmental impacts").
[254] *Palma*, 707 F.3d at 1155.

Plaintiffs' activities span all parts of both the Bears Ears and Grand Staircase reservations, including acreage only within the expanded reservations.[255] "The State and Counties would resume these activities if the reservations were declared unlawful."[256]

Federal Defendants respond that these planned activities are not actually impeded.[257] But that's an impermissible factual contention,[258] and a false one at that. The activities are impeded many times over. To conduct the activities, Utah Plaintiffs would remove, injure, or destroy items listed as protected objects in the proclamations. For example, vegetation-removal means destroying "pinyon," "juniper," and "sagebrush," all of which are enumerated as "objects of … scientific interest" by the proclamations.[259] This enumeration makes them so-called "monuments" under federal law, which means that it would be a federal crime to "excavate[], injure[], or destroy[]" them.[260] The proclamations themselves ban anyone from taking any action "to appropriate, injure, destroy, or remove any feature of the monument."[261] The interim management plans confirm that any planned activity must yield to a "determin[ation] that the proposal is also consistent with the protection of the monument objects and values."[262] The planned activity will be forbidden when not "consistent with the protection of the monument objects."[263] And the plans even acknowledge that "certain [vegetation] treatment methods allowed under the [previous] monument management plans or resource management plan may not be

[255] *E.g.*, Doc. 91 (Am. Compl.) ¶¶166, 223.
[256] *Id.* ¶191.
[257] *E.g.*, Doc. 113 (Federal Defendants' MTD) at 29 ("it cannot be predicted what specific prohibitions they will contain, and it is pure speculation that the future plans (or implementation decisions made under the plans) will prohibit the types of projects to which Plaintiffs vaguely allude").
[258] *Kaven*, 765 F.3d at 1197; *Tal*, 453 F.3d at 1265 n.24; *Emps.' Ret. Sys. of R.I.*, 889 F.3d at 1158.
[259] Doc. 91 (Am. Compl.) ¶¶176-80, 191; *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57324-25, 57328; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57340.
[260] 18 U.S.C. §1866(b).
[261] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57333; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57346.
[262] Bears Ears Management Plan 3-4; Grand Staircase Management Plan 3.
[263] Bears Ears Management Plan 3-4; Grand Staircase Management Plan 3.

consistent with the protection of the objects" under the enlarged reservations.[264] As Utah Plaintiffs extensively allege and their declarants detail, federal agents and policies already prohibit Utah Plaintiffs and others from engaging in these activities in the reservations.[265]

Finally, Federal Defendants imply that Utah Plaintiffs' impeded activities cannot give rise to an Article III injury because Utah Plaintiffs must first apply for permission to engage in these activities. But that is not how standing doctrine works. Plaintiffs need only allege their intent to engage in activity that is impeded by the challenged action.[266] To "effectively establish[] an exhaustion requirement"—seemingly premised on the hope that the Federal Defendants will simply change their minds—where one doesn't exist is an "error [that is] clear."[267] That's especially true when Utah Plaintiffs allege that the application procedures themselves are unlawful because they derive from the proclamations.[268]

4. The monument reservations cause increased expenditures on municipal services.

Utah Plaintiffs are injured based on increased expenditures. A government plaintiff has standing to challenge an action that causes it to "spend more on 'municipal services that it provided and still must provide to remedy [problems arising] as a result of [the challenged action].'"[269] For instance, when States alleged that an EPA rule would increase the risk of chemical releases in their State that they would spend money cleaning up, they had standing because "[m]onetary expenditures to mitigate

[264] Bears Ears Management Plan 5; Grand Staircase Management Plan 5.
[265] Doc. 91 (Am. Compl.) ¶¶353, 225, 171, 164, 142-50, 188; Ex. A (Brooks Decl.) ¶5-8; Ex. B (Bremner Decl.) ¶7; Ex. C (Dodds Decl.) ¶4; Ex. D (Harris Decl.) ¶9; Ex. E (Weppner Decl.) ¶¶5-10.
[266] *Palma*, 707 F.3d at 1153-56; *Grand Canyon Trust*, 269 F. Supp. 3d at 1190-91; *Summers*, 555 U.S. at 494.
[267] *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2173 (2019).
[268] *See Utah Animal Rts. Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1256 (10th Cir. 2004); *see also Skull Valley Band Of Goshute Indians*, 376 F.3d at 1234-35.
[269] *City of Miami*, 581 U.S. at 194.

and recover from harms that could have been prevented absent the [challenged agency action] are precisely the kind of 'pocketbook' injury" that is "sufficient to support standing."[270]

Here, the new monument boundaries generate increased visitation—on top of the already increased visitation brought on by the notoriety of the earlier reservations or reductions.[271] Increased visitation generates costs for Utah Plaintiffs, including "an additional search-and-rescue helicopter and additional rescue sleds," "additional work by state archaeologists," and "hundreds of thousands of dollars in reimbursable [search-and-rescue] expenses."[272] Utah Plaintiffs' declarations further detail the increased costs caused by the enlarged reservations, including expensive road obligations.[273] And the enlarged reservations have caused Kane County to spend increased funding for the service of restroom facilities within the reservations—now up to $26,000 each year.[274]

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[270] *Air All. Houston v. EPA*, 906 F.3d 1049, 1059-60 (D.C. Cir. 2018); *see also New Mexico ex rel. Richardson*, 565 F.3d at 697 n.13 (when a State alleged that a federal resource management plan would lead to "a financial burden through the costs of lost resources," it thereby "alleged an imminent injury that was caused by the [action] and would be redressed by an injunction"); *ANR Pipeline Co. v. Corp. Comm'n of State of Okl.*, 860 F.2d 1571, 1579 (10th Cir. 1988). *See also* Complaint 11-12, *Utah Ass'n of Counties v. Bush*, 2:97-cv-00479 (D. Utah June 23, 1997) (allegations of standing based on counties' increased expenditures on medical services and law enforcement caused by Grand Staircase reservation); *Utah Ass'n of Counties*, 316 F. Supp. 2d at 1185 n.6 ("the United States concedes that UAC has standing").

[271] *E.g.*, Doc. 91 (Am. Compl.) at ¶¶152-54, 158, 172.

[272] *Id.* ¶¶161, 167-73; *see also* Ex. B (Bremner Decl.) ¶11.

[273] *E.g.*, Ex. A (Brooks Decl.) ¶¶5-7 ("Because of the monument designation, federal land managers do not make available local road materials that they make available on other federal lands," so "the County is forced to haul gravel by truck for over 70 miles in order to maintain the surface of 'Hole In The Rock Road,'" "the County purchased the right to collect road base material off of a small privately owned piece of property," and now "Garfield County cannot afford to maintain this road."); Ex. B (Bremner Decl.) ¶¶7-11; Ex. C (Dodds Decl.) ¶4 ("Because of the monument designation, land managers do not make available local road materials of the sort that they do make available on other, similar federal lands. Monument staff do not allow the County to develop borrow pits for gravel, dirt, and other base materials essential for road maintenance on monument lands. … By forcing the County to secure source sites outside the monument boundaries, the monument designation ensures that road maintenance costs will remain high[.]"); Ex. D (Harris Decl.) ¶9 ("President Biden's October 8, 2021 national monument proclamation has made road maintenance and construction more difficult."); *see also* Doc. 91 (Am. Compl.) ¶221.

[274] Doc. 91 (Am. Compl.) ¶227.

Federal Defendants and Tribal Intervenor-Defendants respond that these costs are not traceable to the challenged actions or redressable by this Court because even reduced monument reservations will have costs.[275] That argument ignores what Utah Plaintiffs have alleged in great detail—that the expansions *increase* the costs.[276] It also ignores that, as the Supreme Court has explained, plaintiffs satisfy the traceability and redressability prongs as long as the risk of harm "would be reduced to some extent if [they] received the relief they seek."[277] If Federal Defendants are right that a plaintiff must allege their costs would go to zero, that "would doom most challenges to regulatory action," which typically ameliorate but do not eliminate harm.[278]

And it ignores that Utah Plaintiffs have alleged that "[a]ll acres encompassed by the current monument boundaries are unlawfully designated regardless of whether those lands were covered by any pre-2021 reservations,"[279] and that they seek an injunction against the proclamations and

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[275] Doc. 113 (Federal Defendants' MTD) at 22-26; Doc. 114 (Tribal Intervenor-Defendants' MTD) at 20-24.

[276] *E.g.*, Doc. 91 (Am. Compl.) ¶153 ("President Biden's proclamations themselves drew even more visitors."); ¶152 ("The reservations inherently increase visitation to the reserved lands due to their presidential-proclaimed notoriety."); ¶245 ("Each of these injuries is caused by President Biden's proclamations and reservations, and an order from this Court declaring those actions to be *ultra vires* would remedy those harms."); ¶89 ("The monument proclamations draw attention to these federal lands and increase visitation.").

[277] *Massachusetts v. EPA*, 549 U.S. at 526; *see also Skull Valley Band Of Goshute Indians*, 376 F.3d at 1238 ("[T]he other contingencies noted by the Utah officials—such as the possibility that the NRC may deny PFS's license application or that the Department of the Interior may rescind its conditional approval of the Skull Valley Band's lease—do not render the case unfit for judicial review. Although such decisions would clearly affect the issue of ultimate concern to the parties—whether the SNF storage facility is constructed—the question of whether the federal licensing proceeding can now proceed without a separate Utah state licensing scheme imposing additional legal requirements upon PFS and the Skull Valley Band is a legal issue that currently affects the parties and may now be decided."); *see also Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 757 (10th Cir. 2010).

[278] *Massachusetts v. EPA*, 549 U.S. at 524.

[279] Doc. 91 (Am. Compl.) ¶¶375, 382; *id.* ¶357 ("To the extent that the reservations rely on the validity of President Trump's, Obama's, or Clinton's descriptions of items within them, or on their descriptions of the care and management required to protect those items, they fail as to those items for substantially the same reasons. Every President's proclamations must comply with the Act. All acres encompassed by the current reservation boundaries are unlawfully designated regardless of whether those lands were covered by any pre-2021 reservations.").

management plans as to all 3.23 million acres (or further relief that the Court deems proper).[280] The previous proclamations have been fully incorporated into the Biden proclamations, as Federal Defendants like to emphasize.[281] On a motion to dismiss, Federal Defendants must take these allegations as true and "must … assume" that Utah Plaintiffs will prevail on their requested relief.[282]

Finally, Federal Defendants note that Utah Plaintiffs themselves have websites that might increase visitation.[283] But "[s]tanding is not defeated merely because the plaintiff has in some sense contributed to his own injury."[284] Otherwise, the federal government could have defeated standing in *Massachusetts v. EPA* by observing that Massachusetts drives vehicles that contribute to climate change, and every tort case involving contributory negligence would have to be dismissed for lack of jurisdiction.[285] Nor does it matter "whether the injury is outweighed by benefits [to] the plaintiff," such as the commercial benefits of tourism.[286]

5. The monument reservations threaten Utah-owned animals, Utah-owned land, and Utah's environmental interests in federal lands.

Utah has standing on three additional independent bases. First, a harm to a plaintiff's "propriety interest[]" is a prototypical injury-in-fact.[287] A government plaintiff's allegation of "damage to its property constitutes a threatened or imminent injury to a concrete and particularized legally protected

[280] Doc. 91 (Am. Compl.) at 95.
[281] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57330-31; *Grand Staircase-Escalante National Monument* (Biden), 86 Fed. Reg. at 57344; *E.g.* Doc. 113 (Federal Defendants' MTD) at 86 n.187.
[282] *Walker*, 450 F.3d at 1093; *WildEarth Guardians v. EPA*, 759 F.3d at 1207.
[283] Doc. 113 (Federal Defendants' MTD) at 22-23, 25.
[284] 13A C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure §3531.5 (3d ed.)
[285] *See Massachusetts v. EPA*, 549 U.S. 497; *Sauer v. Burlington N. R. Co.*, 106 F.3d 1490, 1493 (10th Cir. 1996); *see also FEC v. Cruz*, 142 S. Ct. at 1647 ("an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred").
[286] 13A C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure §3531.4 (3d ed.).
[287] *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601; *see also Massachusetts v. EPA*, 549 U.S. at 522.

interest."[288] Here, Utah holds property title to and authority over wildlife within its borders.[289] The monument reservations injure State-owned wildlife by drawing visitors who frighten wildlife and compress their habitats and by causing the wildlife to suffer from lack of water facilities or corridors for migration.[290] Accordingly, Utah has standing to protect their wildlife property and authority.

Second, when a State "alleges harm to its lands," it is injured.[291] Here, Utah Plaintiffs hold thousands of acres of lands adjacent to and near the reservations that are at increased risk of wildfire and pollution as a result of the reservations, which alone gives them standing.[292] The reservations have even impeded Utah's access to its lands and diminished the value that it could extract from that land.[293]

And third, under Tenth Circuit law, Utah has standing based on harms to federal land within the State so long as the harm is concrete, as it is here. In *New Mexico ex rel. Richardson v. BLM*, New Mexico could seek judicial relief "from pending environmental harm," including on "lands they do not own" because it alleged a "concrete" environmental harm arising from the federal government's decision to allow oil and gas development on federal land in New Mexico.[294] Here, the monument reservations have generated vandalism, litter, human waste, pollution, and destruction of natural resources on federal land within Utah, so Utah has standing on this basis as well.[295]

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[288] *Catron County v. Fish & Wildlife Service*, 75 F.3d 1429, 1433 (10th Cir. 1996).
[289] Utah Code Ann. §§23A–1–102, 23A–2–201**;** §§23A-1-101(recodified §§23-13-1, *et. seq.*); *see Kleppe v. New Mexico,* 426 U.S 529, 545 (1976) (recognizing States' sovereign and quasi-sovereign authority to protect and manage all wildlife within its borders, including on federal land). *Cf. Beaver Cnty. v. DOI*, 2017 WL 4480750, at *3 (D. Utah Oct. 6) (county plaintiffs, not State).
[290] Doc. 91 (Am. Compl.) ¶¶162-64.
[291] *New Mexico ex rel. Richardson*, 565 F.3d at 697 n.13.
[292] Doc. 91 (Am. Compl.) ¶239.
[293] *Id.* ¶233-34.
[294] *New Mexico ex rel. Richardson*, 565 F.3d at 697 n.13 (citing *Massachusetts v. EPA*, 549 U.S. at 522-23); *see also City of Albuquerque v. DOI*, 379 F.3d at 904-05 (recognizing government plaintiff's "concrete interest in the development of its central business area").
[295] Doc. 91 (Am. Compl.) ¶¶151-161, 174-91.

II. Utah Plaintiffs plausibly allege that the monument reservations are unlawful.

The monument reservations exceed the scope of the Antiquities Act. Taking Utah Plaintiffs' factual allegations as true, the 3.23 million acres are not the "smallest area" necessary to protect "other objects of historic or scientific interest" under any interpretation of the Act, let alone the correct one. Nor are Defendants' anti-textual positions saved by sparse precedent, congressional action that did not address the validity of the reservations, or farfetched theories of presidential deference. Nor can they avoid the merits: ultra vires claims are not subject to a sovereign immunity defense and the interim management plans constitute final agency action because their interpretations and implementations of law are currently governing the reservations.

A. The monument reservations exceed the scope of the Antiquities Act.

1. Taking Utah Plaintiffs' allegations as true, the monument reservations exceed the scope of the Antiquities Act.

"Interpretation of a statute must begin with the statute's language."[296] The Antiquities Act's language carefully describes two steps to creating a national monument reservation. First, to declare something a national monument, that item must fall within one of only three categories: (1) "historic landmarks," (2) "historic and prehistoric structures," or (3) "other objects of historic or scientific interest."[297] Second, the "parcel" of land reserved for that national monument "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[298]

As Chief Justice Roberts has explained, a case arising under the Act therefore raises two questions: "[t]he scope of the objects that can be designated under the Act," and "how to measure the area

[296] *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989).
[297] 54 U.S.C. §320301(a) (emphasis added).
[298] *Id.* §320301(b) (emphasis added).

necessary for their proper care and management."[299] No reservation can be upheld unless it clears both hurdles.

Neither set of Defendants offers answers to these questions. Neither defines "other objects of historic or scientific interest," or explains how it does not subsume the other two categories or comports with original understanding of the Act. And neither says how to determine whether a reservation has been "confined to the smallest area compatible with the proper care and management of the objects to be protected."[300]

Utah Plaintiffs answer the two key statutory questions—and did so in their complaint[301]—but also prevail at this stage under a wide range of interpretations of the Act. As to the first question, the category "other objects of historic or scientific interest" refers to specific, discrete items that are fixed to a place; that have some past significance to humans; that have generated interest based on their place in history or scientific study; and that are not animate, inconspicuous, nondescript, nebulous, or orders of magnitude larger than landmarks and structures.

This interpretation follows all the tools of statutory interpretation. It starts with the contemporaneous dictionary definitions of each of the operative words in the Act.[302] It ensures that the

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[299] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (statement of Roberts, C.J.).

[300] *See* Doc. 113 (Federal Defendants' MTD) at 54-60; Doc. 114 (Tribal Intervenor-Defendants' MTD) at 30-44.

[301] Doc. 91 (Am. Compl.) ¶¶260-87 (scope of objects); *id.* ¶¶320-57 (care and management).

[302] Fowler, A Dictionary of Modern English Usage 247 (1922) ("The ordinary adjective of *history* is *historical*," but "*historic* means memorable, or assured of a place in history," and "the use of one in a sense now generally expressed by the other is a definite backsliding."); ***Historical***, Webster's New International Dictionary (1913) ("historical" is "the more usual form" for "[o]f, pertaining to, or of the nature of, history," whereas "historic" is "the more usual form" for "associated with, or famous in, history; as a historic spot; a historic event"); ***Historic***, Oxford English Dictionary V (H-K) 304 (1913) ("the prevailing current sense" of "historic" was "[f]orming an important part or item of history; noted or celebrated in history; having an interest or importance due to conne[ct]ion with historical events"); ***Landmark***, Webster's New International Dictionary 1210 (1913) ("a mark to designate the boundary of land; any mark or fixed object (as a monument of any sort, a marked tree, a stone, a ditch) by which the limits of a farm, a town, or other portion of territory may be known and preserved" or "[a]ny conspicuous object on land that marks a locality or serves as a guide, esp. as a guide to

category "other objects of historic or scientific interest" will "apply only to persons or things of the same general kind or class" as the two preceding categories, which are narrow.[303] It applies the lesson of *Yates v. United States*, which held that the phrase "tangible object"—because it followed the words "record" and "document"—referred to "only objects one can use to record or preserve information, not all objects in the physical world."[304] It adheres to the statutory canon that text should be understood in reference to the statutory title—"An Act for the Preservation of American Antiquities"[305]—because an "antiquity" is a rare thing, a "relic or monument of ancient times," not a nondescript or common thing.[306] It avoids the constitutional delegation problems that would be created by granting

navigation at sea"); ***Prehistoric***, Oxford English Dictionary VIII (Poy-ry) 1273 (1913) ("of, belonging to, or existing in the period antecedent to history, or to the first historical accounts of a people"); ***Structure***, Oxford English Dictionary X (Sole-Sz) 1165 (1913) ("[a] building or edifice of any kind," especially "of some considerable size and imposing appearance"); ***Object***, Oxford English Dictionary VII (O) 14 (1913) ("[s]omething placed before the eyes, or presented to the sight or other senses; an individual thing seen or perceived"); ***Scientific***, Oxford English Dictionary IX (S-Soldo) 222 (1913) ("[o]f or pertaining to science or the sciences"); ***Antiquity***, Webster's Dictionary (1913) (""relic[s] or monument[s] of ancient times; as, a coin, a statue, etc."); ***Situate; Situated***, Webster's Dictionary (1913) ("hav[ing] a site, situation, or location" or "permanently fixed; placed; located").

[303] Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012). The addition of the word "other" doubly compels this reading. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020).

[304] 574 U.S. 528, 536 (2015); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 115 (2001) (holding that final clause in statute concerning "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" referred to only other workers involved in transportation).

[305] Scalia & Garner, *supra* note 303, at 221 ("The title and headings are permissible indicators of meaning."); *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947).

[306] *Antiquity*, Webster's Dictionary (1913). *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980 (statement of Roberts, C.J.) ("Which of the following is not like the others: (a) a monument, (b) an antiquity (defined as a 'relic or monument of ancient times') or (c) 5,000 square miles of land beneath the ocean? If you answered (c), you are not only correct but also a speaker of ordinary English." (cleaned up)).

the President power to reserve and control all federal land.[307] And it's the only interpretation that doesn't make a mockery of the legislative history.[308]

As to the second question, the "smallest area compatible with the proper care and management of the objects to be protected" depends on the threats to those objects absent a reservation, the measures needed to protect from those threats, and the space needed to implement those measures.[309] For example, where the primary threat is direct human contact, little more space is needed than for a small enclosure or fence to prevent such contact.[310]

This approach to answering the "smallest area compatible" question ensures that objects will be protected but that the statute's "unique constraint" will not disappear.[311] It also respects the rule that the term "shall"—as used here in reference to the "smallest area compatible" limitation—means that the President has no discretion to disregard this constraint. "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."[312]

Even if the Court has different answers to these interpretive questions, Defendants' motion fails. As to Federal Defendants' rationale that the entire "landscapes" are "objects of historic or scientific interest," Utah Plaintiffs alleged that those landscapes are ubiquitous to southern Utah. Those

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[307] *Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."); U.S. Const., Art. IV, §3 ("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"); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *Cf. NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (requiring clear authorization for executive power over questions with major economic or political implications).

[308] H.R. Rep. No. 59-2224, at 1 (1906) ("small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times"); 40 Cong. Rec. 7888 (Jun. 5, 1906) (Rep. Lacey) ("[n]ot very much" land affected); H.R. 56-11021, (1900) (rejecting "scenic beauty," "natural wonders," and "curiosities").

[309] Doc. 91 at ¶¶328-30.

[310] *Id.*

[311] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980 (statement of Roberts, C.J.).

[312] *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) (cleaned up).

landscapes cannot be reserved for the same reason that "all the beaches of Florida, the bayous of Louisiana, the prairies of Kansas, or the forests of Vermont could not be either if all those were on federal land. All those features are admittedly beautiful, unique to those States, a habitat for wildlife, and a place for exploration. But none of them qualify in one broad swath as 'monuments.'"[313] As Utah Plaintiffs alleged, the proclamations demarcate arbitrary boundaries that enclose large areas of land that had no specific significance before the reservations.[314]

As to Federal Defendants' "distributed objects" rationale, Utah Plaintiffs allege that "the federal government does not know what potentially designable items are within about 90 percent of the reservations" because, contrary to science and reason, it has surveyed only 10 percent and then extrapolated from there.[315] Utah Plaintiffs allege that almost all the items declared to be national monuments are nondescript, inconspicuous, or listed with no indication of their past specific significance; animate, generic, nebulous, or not fixed to the land; or lack sufficient information from which to discern the area to be reserved or the smallest area compatible with their protection.[316]

Utah Plaintiffs have gone through all of the proclamations' listed items one-by-one, categorized them based on their characteristics, and explained why those characteristics do not meet the Act's standards.[317] For example, they list each of the approximately 200 plants and animals declared to be "national monuments"[318] and explain that these are ineligible for declaration because they are

[313] Doc. 91 (Am. Compl.) ¶305.
[314] *Id.* ¶289.
[315] *Id.* ¶349.
[316] *Id.* ¶¶288-319.
[317] *Id.*
[318] *See id.* ¶¶293-95 (listing the following items, all of which were declared as national monuments by the proclamations: *Townsend's big-eared bats; beavers; ringtail cats; lush green foliage; dense fir and aspen forests; hanging gardens, springs, and riparian areas; Four Corners potato, goosefoot, wolfberry, and sumac; pockets of ancient Engelmann spruce; rare stands of old-growth ponderosa pine, aspen, and subalpine fir; stands of ponderosa pine, oak, and pinyon and juniper; forests of pinyon, juniper, and Gambel oak; stands of ponderosa pine and mixed conifers; pinyon-juniper forests; aspen grove; Native perennial grasses, shrubs, and some cacti; rare and important plant and animal species; eyries for peregrine falcons; potential nesting sites for bald and golden eagles; winter grounds for big-game*

animate, generic, not fixed to the land, and in many cases nondescript, inconspicuous, or listed with no indication of their past specific significance.[319] Utah Plaintiffs repeat this analysis for the proclamations' approximately 150 specific geological items,[320] dozens of qualities and experiences,[321] scores of

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species; potential habitat for endangered fish and threatened plant species; habitat for Mexican spotted owls, peregrine falcons, golden eagles, and spotted bats; habitat for a wide range of wildlife, including known populations of Mexican spotted owl; foraging habitat for golden eagles and peregrine falcons; a genetically distinct population of Kachina daisy; habitat for the threatened yellow- billed cuckoo and the endangered southwestern willow flycatcher; the largest minnow in North America; razorback sucker; mule deer; elk; bighorn sheep; desert cottontail; black-tailed jackrabbit; prairie dog; Botta's pocket gopher; white-tailed antelope squirrel; chipmunk; canyon mouse; deer mouse; pinyon mouse; desert woodrat; tassel- eared squirrels; rare shrews; badger; coyote; striped skunk; ringtail gray fox; bobcat; mountain lion; porcupines; black bears; tiger salamander; red-spotted toad; Woodhouse's toad; canyon tree frog; Great Basin spadefoot; northern leopard frog; night lizard; sagebrush lizard; eastern fence lizard; tree lizard; side-blotched lizard; plateau striped whiptail; western rattlesnake; night snake; striped whipsnake; gopher snake; golden eagle; peregrine falcon; bald eagle; northern harrier; northern goshawk; red-tailed hawk; American kestrel; flammulated owl; great horned owl; Mexican spotted owl; Merriam's turkey; Williamson's sapsucker; common nighthawk; white- throated swift; ash-throated flycatcher; violet-green swallow; cliff swallow; mourning dove; pinyon jay; sagebrush sparrow; canyon towhee; rock wren; sage thrasher; southwestern willow flycatcher; 15 species of bats, including the big free-tailed bat, pallid bat, Townsend's big-eared bat, spotted bat, and silver-haired bat; pothole beetles; freshwater shrimp; an endemic moth; ancient Engelmann spruce; ponderosa pine; subalpine fir; pinyon-juniper woodlands; big sagebrush; low sage; blackbrush; rabbitbrush; bitterbrush; four-wing saltbush; shadscale; winterfat; Utah serviceberry; western chokecherry; hackberry; barberry; cliff rose; greasewood; yucca; cacti such as prickly pear, claret cup, and Whipple's fishhook; mountain mahogany; ponderosa pine; alder; sagebrush; birch; dogwood; Gambel's oak; aspen; bluegrass; bluestem; giant ryegrass; ricegrass; needle and thread; yarrow; common mallow; balsamroot; low larkspur; horsetail; peppergrass; pinnate spring parsley; habitat for sensitive fish species and for the threatened Navajo sedge; Navajo penstemon; Canyonlands lomatium; Abajo daisy; Fremont cottonwood; western sandbar willow; yellow willow; box elder; hanging gardens; moisture-loving plants; relict species such as Douglas fir; relict plant communities; Kachina daisy; alcove columbine; cave primrose; beardtongue; evening primrose; aster; Indian paintbrush; yellow and purple beeflower; straight bladderpod; Durango tumble mustard; scarlet gilia; globe mallow; sand verbena; sego lily; cliffrose; sacred datura; monkey flower; sunflower; prince's plume; hedgehog cactus; columbine; important potential habitat for the Mexican spotted owl; intrepid beavers; and a herd of desert bighorn sheep; an astounding biodiversity of bees; hundreds of bee species; mountain lion; bear; pronghorn and desert bighorn sheep; hundreds of species of birds; winter habitat for elk; chuckwalla; a population of desert night lizard; herd of desert bighorn sheep; nesting areas for a high density of raptors; habitat for many raptor species; pinyon and juniper woodlands, ponderosa pine forests, and aspen groves; winter range for the renowned Paunsaugunt mule deer herd; hanging gardens; tinajas; rock crevice, canyon bottom, and dunal pocket communities; desert pavement; biological soil crusts; relict plant communities; Atwood evening primrose; Smoky Mountain globemallow; relict plant communities; Higgins spring parsley; Kane breadroot; remarkable specimens of petrified wood; riparian vegetation; rich riparian area; habitat for the endangered southwestern willow flycatcher; and petrified wood.).

[319] *Id.* ¶293.

[320] *Id.* ¶¶302-05.

[321] *Id.* ¶¶296-98.

generic geological items,[322] and over 150 archaeological, historical, and paleontological items.[323] For almost every listed item, Utah Plaintiffs provide multiple alternative reasons, such as that the item is both "animate" and "generic."[324] Accepting the factual portions of these allegations as true, no reasonable interpretation of the Act encompasses such items. For example, even if Defendants were right that the Act encompasses all "rare or endemic species and habitat found almost nowhere else,"[325] Utah Plaintiffs do not allege any such species—and certainly not enough to justify 3.23 million acres.

Utah Plaintiffs also allege details about the proper care and management of listed items that independently foreclose relief for Defendants. Utah Plaintiffs allege that, under the circumstances on the ground in south-central and southeastern Utah, *no* reservation is necessary for the proper care and management of most or all qualifying objects because (1) large-scale reservations undermine proper care and management by drawing people to areas that will spread local rangers impossibly thin,[326] and (2) the objects are already properly cared for and managed under existing laws.[327] Alternatively, Utah Plaintiffs allege that even if a reservation were needed to care for and manage some qualifying items, even with the most generous assumptions afforded for the federal government, that would warrant a reservation of often no more than a few acres for most items, and almost never more than 160 acres.[328]

Even if the Act's reference to "other objects of historic or scientific interest" category were broad enough to embrace, say, *every* specific archaeological, historical, or paleontological item listed in either proclamation, the reservations would still be unlawful. There are between 150 and 175 specific archaeological, historical, and paleontological items listed in the proclamations (depending on how

[322] *Id.* ¶¶299-301.
[323] *Id.* ¶¶311-14.
[324] *E.g.*, *id.* ¶¶293.
[325] Doc. 113 (Federal Defendants' MTD) at 55.
[326] Doc. 91 (Am. Compl.) ¶354
[327] *Id.* ¶¶351-53
[328] *Id.* ¶¶342-351.

you count them), so each one of those items could be granted its own 160 acres of protection, and that would still justify reserving no more than 28,000 acres—0.8% of the land President Biden reserved. In fact, even if every item on Federal Defendants' own maps[329]—improperly submitted in their motion to dismiss—qualified as a "national monument," and even if each one needed its own *1,000* acres for its care and management, that would justify under six percent of the current reservations.

Federal Defendants' statutory argument consists mostly of quoting President Biden's proclamations for the truth of the matters asserted therein, to make the point that certain items are in fact more special or magnificent than Utah Plaintiffs allege. For example, they argue that the entire landscapes qualify as "other objects of historic or scientific interest" because President Biden said that the landscapes contain a "unique density of significant cultural, historical, and archaeological artifacts" and constitute an "outdoor laboratory."[330] These counterfactuals violate the rules of civil procedure and cannot be credited by the Court.[331] They're also unhelpful to answering the antecedent interpretive questions. For example, even assuming that the landscapes were "outdoor laborator[ies]," that wouldn't make the landscapes "objects of historic or scientific interest." No "speaker of ordinary English"[332] would describe an outdoor laboratory as an "object" at all, let alone the narrow sort of object described by the Act. And Defendants have no theory of the "smallest area compatible" with the care and management of nebulous outdoor laboratories, as they must to justify a "reserv[ation]."[333]

Federal Defendants make two specific defenses of the listed items. First, they argue that the proclamations do not list "generic" items—as Utah Plaintiffs say they do—because "[n]either

[329] Docs. 113-8 (approximately 90 items), 113-9 (approximately 75 items).
[330] Doc. 113 (Federal Defendants' MTD) at 57.
[331] *Tal*, 453 F.3d at 1265 n.24; *Emps.' Ret. Sys. of R.I.*, 889 F.3d at 1158.
[332] *Mass. Lobstermen's*, 141 S. Ct. at 980 (statement of Roberts, C.J.).
[333] 54 U.S.C. §320301(b).

proclamation uses the term 'generic.'"[334] But a word can be generic without labeling itself as such.[335] The proclamations list generic items—like when they list "prehistoric roads, structures, shrines, ceremonial sites, graves, pots, baskets, tools, petroglyphs, pictographs, and items of clothing"[336]—without identifying anything specific about the items except their region. Federal Defendants pick out one single item—the "cliffs of the Grand Staircase"—that it says Utah Plaintiffs misclassified, but the "cliffs of the Grand Staircase" refers to innumerable rock formations within a massive area.[337] Second, Federal Defendants argue that they are forbidden from listing specific items because of "statutory confidentiality obligations," so should be forgiven if they fall short of the Act's requirements.[338] But if a statute forbids Federal Defendants from publicly "declar[ing]" any items to be national monuments, then the solution is to not declare those items national monuments, rather than using one statute to violate another.[339] In any event, Federal Defendants do not know what is on about 90 percent of the reservations because it has not inventoried them, statutory confidentiality obligations or not.[340]

Finally, Federal Defendants tell this Court that the "Plaintiffs have *conceded* that the plain language of the Antiquities Act delegates 'broad' authority to the President to designate 'objects of historic or scientific interest.'"[341] They cite two paragraphs of Utah Plaintiffs' amended complaint that supposedly make this concession, but neither paragraph says the word "broad" or even discusses the Act.[342] When Utah Plaintiffs eventually say the word "broad" in their complaint, they do not "concede[]" that the Act is broad, but *deny* that the Act is broad—they say only that the Act's final category

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[334] Doc. 113 (Federal Defendants' MTD) at 59.
[335] *See, e.g.*, *Helvering v. Amer. Dental Co.*, 318 U.S. 322, 330 (1943) ("[g]ifts … is a generic word").
[336] *Bears Ears National Monument* (Biden), 86 Fed. Reg. at 57322.
[337] Doc. 113 (Federal Defendants' MTD) at 59.
[338] *Id.* at 5, 7.
[339] *See* Doc. 114 (Tribal Intervenor-Defendants' MTD) at 33 ("declare" means "make known publicly, publish, proclaim").
[340] Doc. 91 (Am. Compl.) ¶349.
[341] Doc. 113 (Federal Defendants' MTD) at 54 (emphasis added).
[342] *Id.* 54 n.292 (citing "*Garfield* Compl. ¶¶234-35."); Doc. 91 (Am. Compl.) ¶¶234-35.

"is *not* as broad as it might seem" and "*cannot* fairly be read in this broad sense."[343] Denials are not concessions. Federal Defendants' mischaracterizations of Utah Plaintiffs' pleadings are unhelpful.

2. Defendants' remaining merits arguments fall short.

a. Utah Plaintiffs' allegations are sufficiently "particular."

Utah Plaintiffs' complaint lists all the hundreds of items declared to be national monuments in the proclamations,[344] categorizes them,[345] makes allegations about the characteristics of each,[346] identifies nine listed items that likely do qualify,[347] analyzes the proper care and management of those nine items,[348] proposes precise boundaries to protect those nine items based on that analysis,[349] reiterates that the remaining vast expanses of land were "not justified by any likely qualifying items or by their proper care and management," alleges that the "reservations cover these [remaining] enormous areas without legal authority," and prepares maps detailing exactly which areas were properly covered and which were not.[350] To this, Federal Defendants say Utah Plaintiffs "fail[ed] to identify the improperly designated lands with sufficient particularity to state a claim."[351] And Tribal Intervenor-Defendants say that Utah Plaintiffs "do not *specify* any … lands" that were improperly designated.[352]

Defendants' arguments are astounding. Utah Plaintiffs squarely meet these unreasonable demands for particularity. The demands are unreasonable because they invert Rule 8. In the American

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[343] Doc. 91 (Am. Compl.) ¶¶276-77 (emphases added).
[344] Doc. 91 (Am. Compl.) ¶¶280-319. Federal Defendants say that one item "appear[s] in neither Proclamation," Doc. 113 at 60 n.318, but the Obama Bears Ears Proclamation did list that item. 82 Fed. Reg. at 1139. The Biden Bears Ears Proclamation "find[s] that all the historic and scientific resources identified … in [President Obama's] Proclamation 9558 are objects of historic or scientific interest in need of protection under 54 U.S.C. 320301." 86 Fed. Reg. at 57331.
[345] Doc. 91 (Am. Compl.) ¶¶280-319.
[346] *Id.*
[347] *Id.* ¶¶321-25.
[348] *Id.* ¶¶328-56.
[349] *Id.* at 83-84.
[350] *Id.* ¶347.
[351] Doc. 113 (Federal Defendants' MTD) 49-50; Doc. 114 (Tribal Intervenor-Defendants' MTD) 33.
[352] Doc. 114 (Tribal Intervenor-Defendants' MTD) at 34.

legal system, plaintiffs need only make "a short and plain statement of the claim showing that the pleader is entitled to relief,"[353] and courts must furthermore "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."[354] Putting that problem aside, it's hard to imagine how Utah Plaintiffs could have been any more particular. Utah Plaintiffs described the qualifying and non-qualifying objects in detail and then made maps showing how they applied to the land. Tribal Intervenor-Defendants do not suggest what more they could have done. Federal Defendants, for their part, argue only that Utah Plaintiffs' maps wrongly exclude two items that Federal Defendants say are "indisputable" qualifying items and wrongly conclude that two ruins likely qualify while two other ruins don't.[355] But Utah Plaintiffs "disput[ed]" both of the items to which the Defendants referred.[356] And Utah Plaintiffs specifically alleged why the two ruins don't qualify.[357] That might not be the particularity Defendants prefer, but it is particularity nonetheless.

Federal Defendants also say Utah Plaintiffs make "conclusory" allegations "about vast expanses of terrain lacking qualifying items."[358] An allegation is "conclusory" when it contains no factual allegations beyond a "formulaic recitation of the elements."[359] Utah Plaintiffs' 20 pages of allegations and analysis about why each listed item doesn't qualify and what specific areas are needed for the care and management of any qualifying objects are the opposite of conclusory.[360]

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[353] Fed. R. Civ. P 8(a)(2).
[354] *Palma*, 707 F.3d at 1152; *see also City of Albuquerque v. DOI*, 379 F.3d at 912-13; *Atlas Biologicals*, 50 F.4th at 1330.
[355] Doc. 113 (Federal Defendants' MTD) at 50-51.
[356] Doc. 91 (Am. Compl.) ¶¶295, 312.
[357] *Id.* ¶¶311-12.
[358] Doc. 113 (Federal Defendants' MTD) at 50.
[359] *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).
[360] Doc. 91 (Am. Compl.) ¶¶288-357.

b. No binding precedent saves Defendants.

When confronting a multi-million-acre monument reservation, Chief Justice Roberts said that the precedential slate was clean. The Supreme Court, he said, "ha[s] never considered how a monument of these proportions … can be justified under the Antiquities Act."[361] Three of its opinions are relevant to the question, but none comes close to deciding cases like this.

First, in *Cameron v. United States*—a 1920 case primarily about a specific mining decision—the Supreme Court said that the Grand Canyon could qualify as a national monument because it (1) was "the greatest eroded canyon in the United States, if not the world," (2) "is over a mile in depth," (3) "has attracted wide attention among explorers and scientists," (4) "affords an unexampled field for geologic study," (5) "is regarded as one of the great natural wonders," (6) *and* "annually draws to its borders thousands of visitors."[362] Instead of holding that *all* large scenic geological formations qualified as national monuments, the Court emphasized all the ways in which Grand Canyon was different from all others. Here, Utah Plaintiffs do not allege that the hundreds of items declared to be national monuments are nearly as preeminent and unique across so many dimensions, so *Cameron* counsels against recognizing any of the listed items here as valid.

Second, in *Cappaert v. United States*—a 1976 water-rights dispute that implicated the validity of a 40-acre national monument reservation—the Court said that a famous and unique prehistoric limestone pool known as "Devil's Hole" containing the rarest fish in the world qualified as a national monument, but that it was lawful only "to the extent necessary to preserve its scientific interest," which meant a tightly confined area.[363] The declared "national monument" was only the pool, not the

[361] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (statement of Roberts, C.J.).
[362] *Cameron v. United States*, 252 U.S. 450, 455-56 (1920).
[363] 426 U.S. 128, 141-42 (1976).

fish within it.[364] The Court confirmed in a later case, *Unites States v. New Mexico*, that the district court had appropriately "tailor[ed] its injunction" protecting the declared monument to a "minimal" scope.[365] Here, Utah Plaintiffs do not allege that the hundreds of items declared to be national monuments are as famous, unique, or spectacular as Devil's Hole. If some of the listed items do meet this bar, then *Cappaert* and *New Mexico* show that even a 40-acre reservation to protect them—less than 0.001% of the current reservations—would be closely scrutinized.

And third, in *Alaska v. United States*—a 2005 land-dispute case—the Supreme Court hypothesized but did not decide that an ecosystem might qualify as for protection under the Act.[366] But as Chief Justice Roberts has explained, this was only a "suggest[ion]."[367] The Court offered no further explanation of the meaning of the Act. Neither has the Tenth Circuit.

c. Congress has not ratified the Grand Staircase reservation.

Contrary to Defendants' suggestions, Congress did not ratify the Grand Staircase reservation in any of its legislation with respect to it.[368] Congressional ratification of an executive action usually must be explicit, and implicit ratification is only recognized in extreme circumstances.[369] Even Congress's repeated conduct predicated on the validity of an executive action does not amount to implicit ratification of that action. For example, the Supreme Court held that Congress did not ratify the construction of a dam and reservoir in conflict with the Endangered Species Act despite repeatedly passing statutes funding the dam and reservoir while knowing it likely conflicted with the Act.[370]

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[364] Proclamation 2961, *Addition of Devil's Hole, Nevada, to Death Valley National Monument—California and Nevada* (Jan. 17, 1952), perma.cc/PP2F-CQF8.
[365] *United States v. New Mexico*, 438 U.S. 696, 700 n.4 (1978).
[366] *Alaska v. United States*, 545 U.S. 75, 103 (2005).
[367] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (statement of Roberts, C.J.).
[368] *See* Doc. 113 (Federal Defendants' MTD) at 59.
[369] *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147-48 (1937).
[370] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-95 (1978); *see also Morton v. Ruiz*, 415 U.S. 199, 230 (1974); *Green v. McElroy*, 360 U.S. 474, 505-06 (1959).

Here, Congress decided to exchange other federal land for State land within the Grand Staircase reservation, slightly adjusted the reservation boundaries, and withdrew a small portion of the reservation.[371] Congress's enactments did not explicitly ratify the underlying reservation.[372] They were not enacted to express Congress's legal position about a controversial executive action, but to, for example, "mark the end of six decades of controversy over the issue of Utah's state trust land inholdings within national parks, forests, monuments, and reservations."[373] They thus fell well short of the bar for implicit ratification of the original reservation or of any other unlawful executive action. Judge Benson rightly rejected a similar ratification argument the last time Federal Defendants made it.[374]

d. The President is not above the law.

Finally, Defendants argue that no matter what the Antiquities Act says, and no matter how little precedent is on their side, the President can do whatever he wants. He can declare as a national monument something that is indisputably *not* a "historic landmark," "historic or prehistorical structure," *or* "other object of historic or scientific interest." He can reserve a parcel of land that is indisputably larger than the "smallest area compatible" with the proper care and management of the monument. "[T]he President is the sole and exclusive judge," they say, "as to the existence of facts satisfying those standards."[375] They say that "the Act only requires the President to, in his discretion, 'declare' national monuments."[376] The President's declaration proves the validity thereof. Both Defendants appear to take the position that the President can reserve every inch of federal land in America—from Alaskan oil fields to federal courthouses—as national monuments without having to explain himself

[371] *Utah Schools and Land Exchange Act of 1998*, Pub. L. 105-335, 112 Stat. 3139 (1998); *see also Utah Ass'n of Cntys. v. Clinton*, 1999 U.S. Dist. LEXIS 15852, at *31 (D. Utah Aug. 12).
[372] *Utah Ass'n of Cntys. v. Clinton*, 1999 U.S. Dist. LEXIS 15852, at *31.
[373] S. Rept. 105-331, at 9 (1998) (statement of Sec'y Interior Babbitt).
[374] *Utah Ass'n of Cntys. v. Clinton*, 1999 U.S. Dist. LEXIS 15852, at *31.
[375] Doc. 113 (Federal Defendants' MTD) at 16.
[376] Doc. 114 (Tribal Intervenor-Defendants' MTD) at 32.

to anybody.[377] In Chief Justice Roberts's words, Defendants believe that this modest century-old statute gives the President a "power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea."[378]

That is not how executive power works in America. "[W]hen the President takes official action, the Court has the authority to determine whether he has acted within the law."[379] "The President … is … subject to the law. "[380] His executive actions are "ineffective" when he can "point[] to no statutory or constitutional authority" allowing them.[381] So, as Chief Justice Roberts recently confirmed, any national monument reservation is subject to the judiciary's determination of (1) "[t]he scope of the objects that can be designated under the Act" and (2) "how to measure the area necessary for their proper care and management."[382]

Defendants' best contrary cases are two district court decisions—*Utah Association of Counties* and *Wyoming v. Franke.*[383] Both cases misread the Act to confer to the President discretion over *whether* something is an "other object[] of historic or scientific interest," instead of discretion over *whether to declare* an item as a national monument or not once it meets that objective standard. Even unduly deferential courts recognize that this was wrong: The Act "places discernible limits on the President's

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[377] Doc. 113 (Federal Defendants' MTD) at 19 ("Should Plaintiffs disagree with the President's discretionary judgments, they can petition Congress to change the President's determinations."); Doc. 114 (Tribal Intervenor-Defendants' MTD) at 44 (Plaintiffs are not without recourse, but that power 'belongs to Congress alone.'"); *see also* Oral Argument at 21:22-22:42, *Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019) (No.18-5353) (taking this position).

[378] *Mass. Lobstermen's*, 141 S. Ct. at 981 (statement of Roberts, C.J.).

[379] *Clinton v. Jones,* 520 U.S. 681, 703 (1997) (citing *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952)); *See, e.g.*, *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 681 (1986) ("We ordinarily presume that Congress intends the executive to obey its statutory commands and … expects the courts to grant relief when an executive agency violates such a command.").

[380] *Trump v. Vance*, 140 S. Ct. 2412, 2422 (2020).

[381] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 193-94 (1999).

[382] *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (statement of Roberts, C.J.).

[383] *Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945); *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004).

discretion."[384] It does not give the President "discretion" to declare as monuments items that fail to meet the statutory requirements, or to make reservations beyond the smallest area compatible with the protection of such items. His only "discretion" is to decide, once those items and land meet the statutory requirements, whether to use his power to declare the items and reserve the land.[385] Defendants' reading would render the detailed statutory text—and the years of legislative wrangling over the statutory conditions—pointless.[386] It would also defy the Supreme Court cases arising under the Act, which could not be explained were the Act's limits judicially unenforceable.[387]

And in any event, even the courts in *Wyoming v. Franke* and *Utah Association of Counties* were not so deferential as to dismiss the plaintiffs' claims before discovery or on jurisdictional grounds. *Wyoming v. Franke* was not decided until after "[t]rial was had and trial briefs [were] submitted."[388] *Utah Association of Counties* was not decided until more than six years after the defendants moved to dismiss, and after the plaintiffs were allowed to pursue discovery.[389]

3. Utah Plaintiffs have a cause of action not barred by sovereign immunity because they bring ultra vires claims.

Utah Plaintiffs have a cause of action. Their cause of action is "the ultra vires doctrine, permitting suits for prospective relief when government officials act beyond the limits of statutory authority."[390] Utah Plaintiffs allege the President's "lack of statutory authority" to make the

[384] *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002).
[385] 54 U.S.C. §320301.
[386] *E.g.*, H.R. 56-11021 (1900).
[387] *Cameron*, 252 U.S. at 455-56; *Cappaert*, 426 U.S. at 141-42.
[388] *Franke*, 58 F. Supp. at 893.
[389] Motion to Dismiss, *Utah Ass'n of Ctys. v. Bush*, 2:97-cv-0497B, (D. Utah December 19, 1997), Doc. 21; *E.g.*, Order, *Utah Ass'n of Ctys. v. Bush*, 2:97-cv-0497B (D. Utah October 6, 1998), Doc. 81 (ordering defendants to "comply with the discovery requests made by [a plaintiff]").
[390] *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1232-33 (10th Cir. 2005).

reservations.[391] They allege over and over that the President had no power to make the reservations because they "exceed [the] limitations" of the Antiquities Act.[392] That is the definition of an ultra vires claim.[393]

Utah Plaintiffs' claims are not barred by sovereign immunity. As Federal Defendants recognize,[394] "the ultra vires doctrine" provides "the traditional exception to sovereign immunity."[395] In other words, everyone agrees that if Utah Plaintiffs present ultra vires claims, sovereign immunity is no independent obstacle to relief. Furthermore, the APA waives sovereign immunity for *all* non-damages actions against the federal government.[396] No wonder that no court has ever held that an Antiquities Act challenge is barred by sovereign immunity.[397] Instead, those to consider the question have concluded that "review is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority."[398]

Federal Defendants are left to argue that Utah Plaintiffs' claims are not really ultra vires claims. They say that the Antiquities Act gives the President discretion to reserve *any* federal land in the entire

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[391] Doc. 91 (Am. Compl.) ¶¶371, 378, pp. 90-91.
[392] *Id.* 68; *see also id.* ¶¶288-318.
[393] *Ultra Vires*, Black's Law Dictionary (10th ed. 2014) ("unauthorized, beyond the scope of power allowed or granted … by law).
[394] Doc. 113 (Federal Defendants' MTD) at 14 ("*ultra vires* exception to sovereign immunity").
[395] *Simmat*, 413 F.3d at 1232; *see also Dugan v. Rank*, 372 U.S. 609, 621-23 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996).
[396] 5 U.S.C. §702; *see also Simmat*, 413 F.3d at 1233; 14 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure §3659 (4th ed.) ("the APA … waiver of immunity applies to suits seeking non-statutory review of an officer's action even when review is not available under the APA itself"); *id.* n.21 (collecting cases); *Brnovich v. Biden*, 562 F. Supp. 3d 123, 150 & n.16 (D. Ariz. 2022).
[397] *E.g.*, *Am. Forest Res. Council v. Hammond*, 422 F. Supp. 3d 184, 192 n.8 (D.D.C. 2019) (holding sovereign immunity does not bar Antiquities Act suit); *cf. Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 54 (D.D.C. 2018) (rejecting the Government's argument that Antiquities Act proclamations are unreviewable and noting a "raft of precedent hold[s] otherwise").
[398] *Mountain States Legal Found.*, 306 F.3d at 1136; *see also Mass. Lobstermen's Ass'n v. Ross*, 945 F.3d at 540 (D.C. Cir. 2019).

country, so it is impossible for him to act beyond his statutory authority.[399] But this is just a repeat of their merits argument that Utah Plaintiffs' ultra vires claims should lose, not an argument that they are not ultra vires claims in the first place. "Whether the [President's] decision in this case was ultra vires as the State claims … turns solely upon [this Court's] legal construction of the [Antiquities Act]."[400] Here—unlike in Defendants' cases[401]—the President "lack[ed] statutory authority" to make the reservations and the reservations "exceed [the] limitations" of the Antiquities Act, so they are subject to an ultra vires challenge, and that challenge is not subject to sovereign immunity.[402]

B. The agency management plans are unlawful for the same reasons.

All parties appear to agree that Utah Plaintiffs' APA claims challenging the interim management plans present the same merits question as their ultra vires claims—whether the reservations are authorized by the Antiquities Act. And all parties appear to agree that the APA claims arise under a valid cause of action and are not barred by sovereign immunity. The only disagreement unique to the APA claims is about whether the management plans are "final agency action." They are.

1. Implementation of an illegal proclamation is illegal.

Federal Defendants do not argue that the implementing regulations could be upheld on some independent basis if the reservations exceed the scope of the Antiquities Act.[403] That is because when a presidential directive is unlawful, agency actions implementing it are unlawful.[404] The interim

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[399] Doc. 113 (Federal Defendants' MTD) at 13-14. *But see* Doc. 91 (Am. Compl.) ¶¶288-319, 371, 378, pp. 61, 90-91.
[400] *Wyoming v. United States*, 279 F.3d 1214, 1230 (10th Cir. 2002); *cf.* Doc. 113 (Defendants' MTD) at 1 (calling this an "independent reason[]" for dismissal).
[401] *See Dalton v. Specter*, 511 U.S. 462, 476 (1994) (discretionary base closure decision); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948) (discretionary flight routes); *United States v. George S. Bush & Co.*, 310 U.S. 371, 379-80 (1940) (discretionary rate changes); *Dakota Cent. Tel. Co. v. Payne*, 250 U.S. 163, 181, 184 (1919) (discretionary wartime measures).
[402] Doc. 91 (Am. Compl.) ¶¶90-91, 288-318.
[403] Doc. 113 (Federal Defendants' MTD) at 60-66.
[404] *See Youngstown Sheet & Tube Co.*, 343 U.S. at 588-89; *see also Franklin v. Massachusetts*, 505 U.S. 788, 828-29 (1992) (Scalia, J., concurring in part and concurring in the judgment).

management plans implementing the proclamations direct federal agents to displace the multiple-use laws governing all other federal land by prioritizing the protection of monument objects, then give a variety of specific instructions and interpretations predicated on the validity of the reservations.[405] If the reservations themselves are beyond the scope of the Act, then the management plans must fall.

2. The management plans are final agency action.

The interim management plans are final agency action. "Agency action is final" whenever it "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow.'"[406] "The Supreme Court has 'interpreted the finality element in a pragmatic way.'"[407] The interim management plans meet both elements because they immediately decided rules and rights within the 3.23 million reserved acres. They govern the use of the covered land with agency interpretations and directions *right now*. They will continue to do so until 2024 "or later."[408]

First, an action marks the "consummation of the agency's decisionmaking process" so long as the "agency has issued a 'definitive statement of its position, determining the rights and obligations of the parties' … notwithstanding 'the possibility of further proceedings in the agency' on related issues."[409] Agencies cannot avoid judicial review by making agency actions "interim." The "consummation" of the decisionmaking process does not need to be permanent, so long as it is immediately effective.[410] "[A]n interim agency resolution counts as final agency action despite the potential for a

[405] Bears Ears Management Plan 2-8; Grand Staircase Management Plan 2-7.
[406] *Cure Land, LLC v. Dep't of Agric.*, 833 F.3d 1223, 1230-31 (10th Cir. 2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)) (cleaned up).
[407] *Ctr. For Native Ecosystems v. Cables*, 509 F.3d 1310, 1329 (10th Cir. 2007) (quoting *FTC v. Std. Oil of Cal.*, 449 U.S. 232, 239 (1980)).
[408] Doc. 114 (Tribal Intervenor-Defendants' MTD) at 26.
[409] *Cure Land*, 833 F.3d at 1232 (quoting *Bell v. New Jersey*, 461 U.S. 773, 779-80 (1983)).
[410] *E.g.*, *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 79-80 (D.C. Cir. 2020); *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017); *Scenic Am., Inc. v. DOT*, 836 F.3d 42, 56 (D.C. Cir. 2016).

different permanent decision, as long as the interim decision is not itself subject to further consideration by the agency."[411] That's because the "interim resolution is the final word from the agency on what will happen *up to the time* of any different permanent decision."[412] Likewise, it is irrelevant if an "agency has not dressed its decision with the conventional procedural accoutrements of finality."[413]

Here, Federal Defendants do not even suggest that they are open to reconsidering the interim management plans—let alone that those plans are not in effect—but instead acknowledge that the plans will remain in place until sometime in 2024.[414] They take the ambitious position that nobody can "challenge the agencies' monument management approach … before the agencies adopt relevant [*i.e.*, permanent] management plans, which they have been directed to do by March 2024."[415] That is exactly the gambit that courts have rejected time and again when agencies have emphasized that their actions should be immune from review because they will not remain in place forever.[416] Because the "interim resolution is the final word from the agency on what will happen up to the time of any different permanent decision," it is the consummation of their decisionmaking process.[417]

Second, most agency actions satisfy the "rights or obligations" or "legal consequences" element. Agency actions satisfy this element even when they merely "implement" or "interpret" existing law.[418] For example, guidance documents satisfy this element even when they merely "come[] to a definitive conclusion" about how a law applies to a class of activities.[419] The Supreme Court has held

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[411] *Wheeler*, 955 F.3d at 78; *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 823 F.2d 608, 615 (D.C. Cir. 1987).
[412] *Wheeler*, 955 F.3d at 78 (emphasis added); *see also Scenic Am., Inc.*, 836 F.3d at 56.
[413] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001); *see also, e.g.*, *Bhd. of Locomotive Eng'rs & Trainmen v. FRRA*, 972 F.3d 83, 100 (D.C. Cir. 2020) ("[a]gency action generally need not be committed to writing to be final"); *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1163 (9th Cir. 2018) (similar).
[414] Doc. 113 (Federal Defendants' MTD) at 66. *But see Int'l Union*, 823 F.2d at 615 (D.C. Cir. 1987).
[415] Doc. 113 (Federal Defendants' MTD) at 66; Doc. 114 (Tribal Intervenor-Defendants' MTD) at 26.
[416] *E.g.*, *Wheeler*, 955 F.3d at 79-80; *Clean Air Council*, 862 F.3d at 6; *Scenic Am., Inc.*, 836 F.3d at 56.
[417] *Wheeler*, 955 F.3d at 79-80 (emphasis added).
[418] *Biden v. Texas*, 142 S. Ct. 2528, 2545 (2022); *see also Whitman*, 531 U.S. at 479.
[419] *Scenic Am., Inc.*, 836 F.3d at 56.

that this element was met when an agency issued a document merely "specifying which commodities the Interstate Commerce Commission believed were exempt by statute from regulation, and which it believed were not."[420] That document constituted final agency action even though it "'had *no* authority except to *give notice* of how the Commission interpreted' the relevant statute, and 'would have effect only if and when a particular action was brought.'"[421] Its only effect was to "warn[] every carrier" of the (preexisting, unchanged) governing law.[422] Agency actions also satisfy this element even when they merely issue directions to the agency's own "staff."[423]

Here, the management plans determine "rights or obligations" and have "legal consequences." At a minimum, they "implement" or "interpret" existing law and provide specific direction about how the agency interprets existing law.[424] For example, the management plans explain that they interpret the proclamation to mean that "certain [vegetation] treatment methods allowed under the applicable monument management plans or resource management plan may not be consistent with the protection of the objects."[425] They announce that holders of valid existing mineral-leasing claims within the reservations are forbidden to do anything except "taking samples to confirm or corroborate mineral exposures" and "complet[ing] minimum necessary annual assessment work" until they pay for a mineral examination report.[426] The plans also impose a wide range of directions on their own "staff,"[427] including that they install entrance signs, undertake a two-part analysis before issuing any activity authorization, and engage in monitoring and surveillance of approved activities.[428] They also incorporate

[420] *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 599-600 (2016) (citing *Frozen Food Express v. United States,* 351 U.S. 40 (1956)).
[421] *Id.* (emphasis added).
[422] *Id.* (quoting *Frozen Food Express*, 351 U.S. at 44).
[423] *Biden v. Texas*, 142 S. Ct. at 2545.
[424] *Id.* at 2545; *see also Whitman*, 531 U.S. at 479.
[425] Bears Ears Management Plan 5; Grand Staircase Management Plan 5.
[426] Bears Ears Management Plan 3; Grand Staircase Management Plan 2-3.
[427] *Biden v. Texas*, 142 S. Ct. at 2545.
[428] *E.g.*, Bears Ears Management Plan 4-5, 7.

"Section 1.6 of BLM Manual 6220," thereby imposing comprehensive rules governing management of national monument reservations.[429]

The management plans also do more than that. Federal Defendants repeatedly argue that Utah Plaintiffs lack standing because the proclamations do not "mention"—and therefore must not implicate—activities like "active management" and "motor vehicle use."[430] But if that is true, then the management plans have stark legal consequences because they *do* explicitly implicate those activities. The management plans say that "vegetation treatment … methods allowed [previously] may not be consistent with the protection of the objects," and must now "be consistent with the protection of monument objects"[431]; and that "[r]outes designated as open under the existing travel management plan" must be identified for "appropriate action" because they "may have an adverse impact on monument objects."[432] Even on a more honest reading of the proclamations—which do restrict active management and motor vehicle use, to the extent they disturb blades of now-"monument"-designated grass, vegetation, or other items—the management plans "come[] to a definitive conclusion" about how the proclamations apply to certain classes of activities and announce that conclusion.[433] And they certainly "give notice of how [Federal Defendants] interpret" the proclamations."[434] That is textbook final agency action, so Utah Plaintiffs' APA claims must be decided on the merits.[435]

CONCLUSION

This Court should deny the motions to dismiss.

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[429] *Id.* at 2.
[430] Doc. 113 (Federal Defendants' MTD) at 9, 20, 30 n.150.
[431] Bears Ears Management Plan 5; Grand Staircase Management Plan 5.
[432] Bears Ears Management Plan 4; Grand Staircase Management Plan 4.
[433] *Scenic Am., Inc.*, 836 F.3d at 56.
[434] *Hawkes Co.*, 578 U.S. at 599-600 (citing *Frozen Food Express,* 351 U.S. 40 (1956)).
[435] *See also* 5 U.S.C. §§551(15), 551(4) (defining agency action to include "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency"). *Cf.* Doc. 113 (Federal Defendants' MTD) at 62.

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Respectfully submitted,

MELISSA HOLYOAK (Utah Bar No. 9832)
Utah Solicitor General
ANTHONY L. RAMPTON (Utah Bar No. 2681)
Assistant Utah Attorney General
350 N. State Street, Suite 230
P.O. Box 142320
Salt Lake City, UT 84114-2320
(801) 538-9600
melissaholyoak@agutah.gov
arampton@agutah.gov

Counsel for Plaintiff State of Utah

/s/ Tyler R. Green
TYLER R. GREEN (Utah Bar No. 10660)
Consovoy McCarthy PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com

Taylor A.R. Meehan (pro hac vice)
Jeffrey S. Hetzel (pro hac vice)
Consovoy McCarthy PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
(703) 243-9423
taylor@consovoymccarthy.com
jhetzel@consovoymccarthy.com

Counsel for Plaintiffs Garfield County, Utah; Kane County, Utah; State of Utah