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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

GARFIELD COUNTY, UTAH, a Utah political subdivision; KANE COUNTY, UTAH, a Utah political subdivision; and 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 Plas, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, et al.; Defendants,	**DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINTS** Case No. 4:22-cv-00059-DN-PK (lead case) Case No. 4:22-cv-00060-DN-PK District Judge David Nuffer Magistrate Judge Paul Kohler

HOPI TRIBE, NAVAJO NATION, PUEBLO OF ZUNI, and UTE MOUNTAIN UTE TRIBE; Intervenor-Dfts.	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

Statutes

Rules

Presidential Proclamations

Congressional Materials

Other Authorities

MOTION

Defendants respectfully move the Court to dismiss the Amended Complaints in these consolidated cases pursuant to Federal Rule of Civil Procedure 12.

MEMORANDUM IN SUPPORT

I. Introduction

The Grand Staircase-Escalante and Bears Ears National Monuments guard world-renowned antiquities in southern Utah, protecting a dense array of archaeological, paleontological, geologic, historic, and other scientific objects. Established in 1996 and 2016, respectively, the monuments shield these invaluable resources from damage and destruction. After the previous President reduced the size of those monuments in 2017, President Biden restored the prior monument boundaries—and the protections previously afforded—in October 2021. Through their Amended Complaints in these consolidated actions, Plaintiffs seek to strip monument protections from nearly two million acres of federal land, and the numerous designated objects located thereon, while failing to articulate any cognizable interest in nearly all of that land.

This Court should reject Plaintiffs' unprecedented request to invalidate these Presidential Proclamations for four independent reasons. *First*, Congress has not provided for judicial review of Presidential actions establishing national monuments under the Antiquities Act. In light of that choice, no court has ever invalidated a President's designation of a national monument for violating the Antiquities Act. The Court should thus dismiss Plaintiffs' challenges to the Proclamations for lack of jurisdiction, as Congress has neither waived the United States' sovereign immunity to, nor created a cause of action for, Antiquities Act challenges.

Second, the Court should dismiss Plaintiffs' claims for lack of standing. Plaintiffs have failed to allege relevant injuries caused by President Biden's actions or redressable by available relief. Instead, their pleadings focus either on harms attributed to the original creation of these

monuments years ago, which is not at issue, or on speculative fears about what might happen should Congress approve a land exchange between Utah and the federal government, or should the Secretaries of the Interior or Agriculture ultimately adopt and subsequently implement monument management plans with provisions that Plaintiffs oppose.

Third, to the extent that any claims can survive these threshold jurisdictional deficiencies, they must be dismissed for failure to state a claim upon which relief can be granted. The Antiquities Act explicitly authorizes the President to reserve parcels of land for the proper care and management of designated objects of historic or scientific interest. Thus, where a plaintiff contends that the reservation is too expansive or otherwise improper, the plaintiff must at least allege with particularity which parcels of reserved land exceed the smallest area compatible with such care and management. Because no Plaintiff has done so, the Court should dismiss Plaintiffs' claims for failure to state a claim for relief.

Fourth, Plaintiffs' claims should be dismissed for failing as a matter of law by misinterpreting the Antiquities Act. Plaintiffs ask the Court to ignore the plain statutory language of the Antiquities Act, which vests broad discretion in the President, and several binding Supreme Court decisions approving similar object designations. For this reason also, Plaintiffs' claims should be dismissed for failure to state a claim upon which relief can be granted.

Finally, Plaintiffs' separate challenges to various agency documents or decisions allegedly taken in furtherance of the Proclamations should be dismissed for lack of jurisdiction. Plaintiffs are attempting to challenge purely informational memoranda, when those memoranda do not constitute agency actions, let alone final agency actions. To the extent Plaintiffs seek to challenge other final agency action, they have failed to meet their threshold burden of identifying those actions and explaining how they are final. Any challenges to agency action are thus premature.

II. Factual Background

A. Four Presidents have established or modified the challenged monuments.

President Clinton established the Grand Staircase-Escalante National Monument ("GSENM") to protect, *inter alia*, "the last place in the continental United States to be mapped" as it provided "exemplary opportunities for geologists, paleontologists, archeologists, historians, and biologists."[1] Prominent features in the GSENM include "a vast geologic stairway, named the Grand Staircase by pioneering geologist Clarence Dutton, which rises 5,500 feet to the rim of Bryce Canyon in an unbroken sequence of great cliffs and plateaus," and "world class paleontological sites" that provide "one of the best and most continuous records of Late Cretaceous terrestrial life in the world."[2] Although that monument originally consisted of approximately 1.7 million acres, Congress adjusted the monument boundaries on three occasions, ultimately increasing the Federal lands reserved for the monument by more than 180,000 acres.[3]

President Obama established the Bears Ears National Monument ("BENM") to protect the Bears Ears buttes and the historic and scientific objects that surround them, including "[a]bundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts [that] provide an extraordinary archaeological and cultural record."[4] The area provides evidence of human history from as early as 13,000 years ago, when early people hunted now-extinct megafauna; to 2,500 years ago, when early farmers occupied the land; to the late 19th century, when Mormon settlers

[1] Establishment of the Grand Staircase-Escalante National Monument, 61 Fed. Reg. 50223, 50223 (Sept. 24, 1996).
[2] *Id.* at 50223–24.
[3] Grand Staircase-Escalante National Monument, 86 Fed. Reg. 57335, 57344 (Oct. 15, 2021) (citing Utah Schools and Lands Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. 3139; Automobile National Heritage Area Act, Pub. L. No. 105-355, tit. II, 112 Stat. 3247, 3252 (1998); and the Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 2604, 123 Stat. 991, 1120).
[4] Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1139, 1139 (Jan. 5, 2017).

arrived in the area.[5] That monument reserved approximately 1.35 million acres of Federal lands and interests in lands.[6]

In 2017, President Trump altered the boundaries and conditions of these monuments. He excluded approximately 860,000 acres of land from GSENM.[7] And he modified BENM to exclude over 1.1 million acres of Federal lands, while adding 11,200 new acres of Federal land.[8]

In October 2021, President Biden issued Presidential Proclamations 10,285 and 10,286 (hereinafter the "BENM Proclamation" and "GSENM Proclamation," respectively).[9] President Biden restored boundaries and conditions that existed in both monuments before President Trump's actions, while retaining approximately 11,200 acres added to BENM by President Trump. In total, President Biden restored monument status to about two million acres of federal lands.

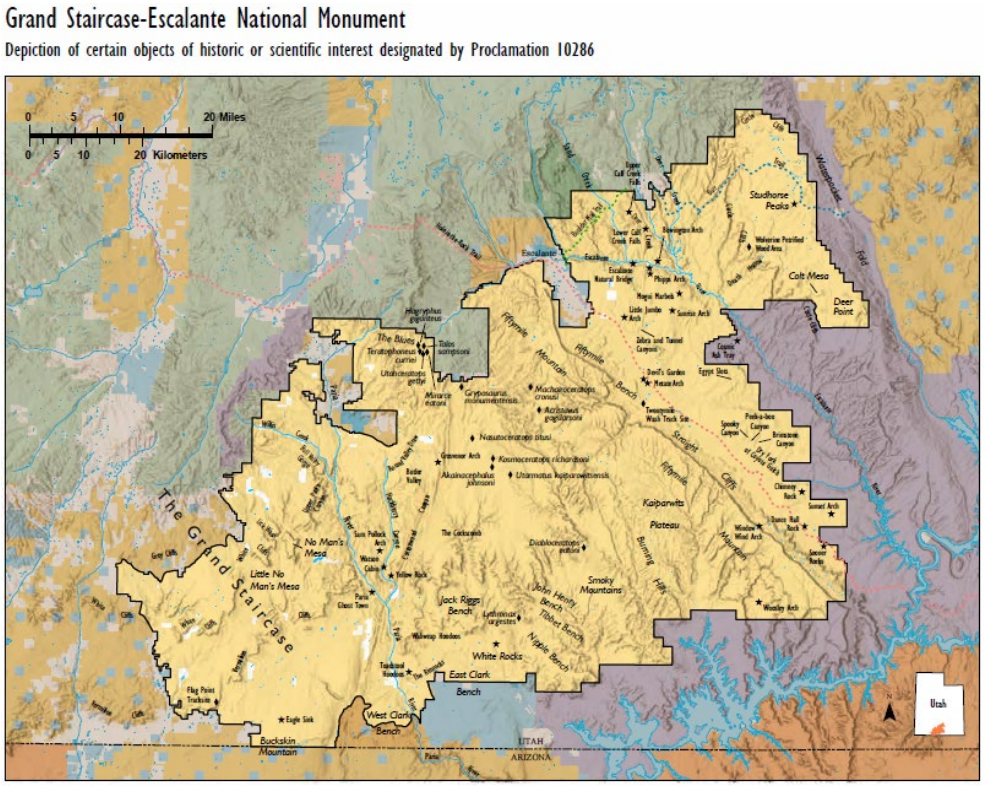
B. President Biden's Proclamations designate numerous objects of historic or scientific interest for protection under the Antiquities Act.

In restoring monument status to those lands, President Biden's Proclamations found that numerous "historic and scientific resources" in these monuments are "objects of historic or scientific interest in need of protection" under the Antiquities Act.[10] Those objects include geologic features (*e.g.*, Grand Staircase, Bears Ears Buttes), paleontological resources (*e.g.*, world-class paleontological sites amidst the fossil-rich formations in Kaiparowits Plateau), archaeological resources (*e.g.*, a "village with structures and pottery from multiple Ancestral Pueblo periods"),[11] and biological resources (*e.g.*, the Valley of the Gods, which "provides habitat

[5] *Id.* at 1139–40.
[6] *Id.* at 1143.
[7] Modifying the Grand Staircase-Escalante National Monument, 82 Fed. Reg. 58,089, 58,093 (Dec. 8, 2017).
[8] Modifying the Bears Ears National Monument, 82 Fed. Reg. 58,081, 58,085 (Dec. 8, 2017).
[9] Bears Ears National Monument, 86 Fed. Reg. 57321 (Oct. 15, 2021) ("BENM Procl."); Grand Staircase-Escalante National Monument, 86 Fed. Reg. 57335 (Oct. 15, 2021) ("GSENM Procl.").
[10] GSENM Procl., 86 Fed. Reg. at 57344.
[11] BENM Procl., 86 Fed. Reg. at 57326.

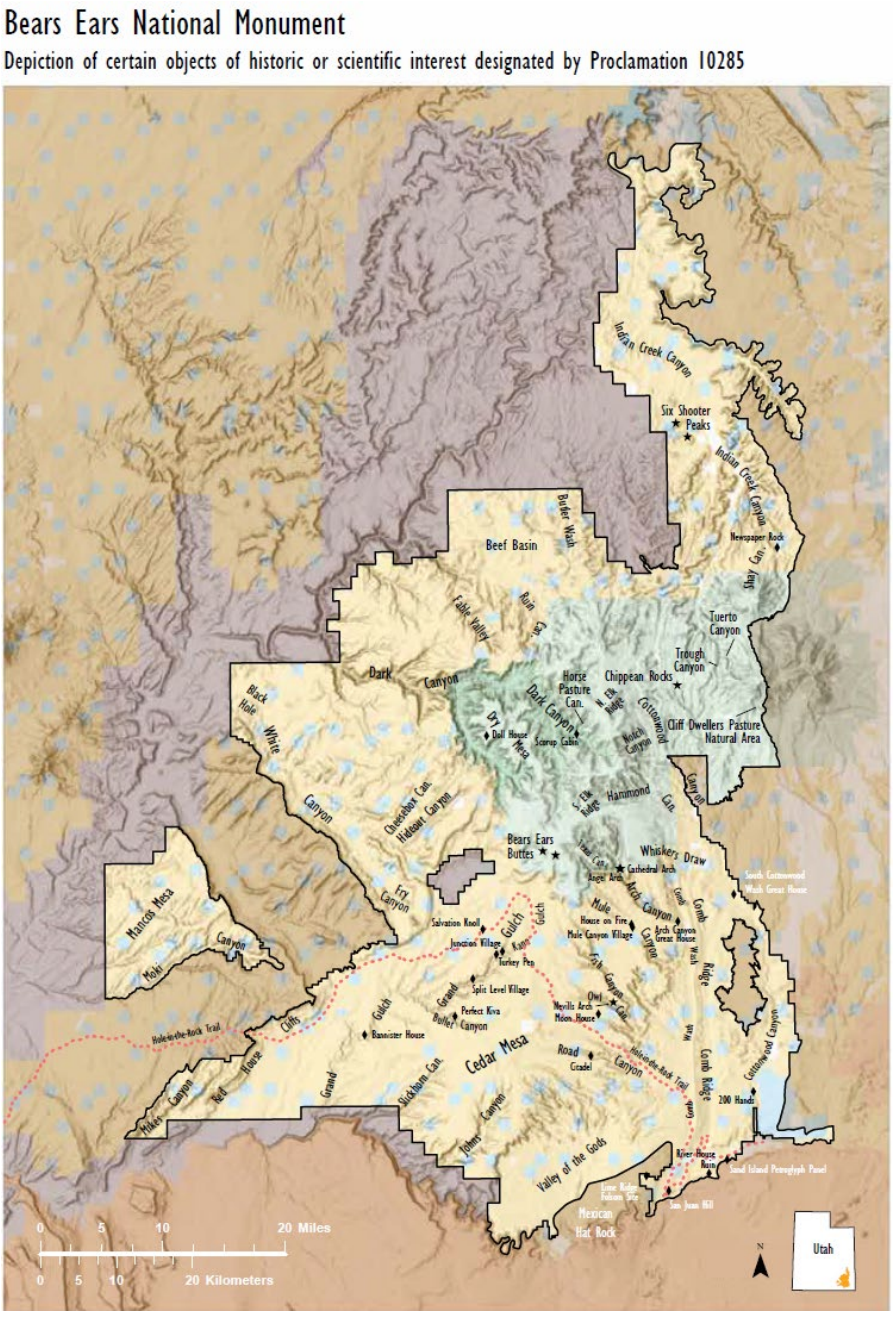
for *Eucosma navajoensis*, an endemic moth that lives nowhere else").[12] The Proclamations also determined that both monuments contain "innumerable objects of historic or scientific interest," some so "rare" or "vulnerable to vandalism and theft" that "revealing their specific names and locations could pose a danger to the objects."[13] Consistent with statutory confidentiality obligations,[14] the Proclamations do not disclose the locations of all designated objects.

As the maps below illustrate, the objects designated in the Proclamations are distributed at a high density throughout the lands that the Proclamations reserved for their proper care and management. Beginning with GSENM, the map shows numerous geologic formations (*e.g.*, Grand Staircase), paleontological sites (*e.g.*, *Nasutoceratops*) and archaeological sites (*e.g.*, Fiftymile Mountain area)—each designated in the Proclamation—distributed throughout the monument:



[12] *Id.* at 57328.
[13] *Id.* at 57322; GSENM Procl., 86 Fed. Reg. at 57336.
[14] *See* 16 U.S.C. § 470hh(a); *see also* 54 U.S.C. § 320302 (granting agencies authority to authorize permits for examining, excavating, or gathering objects).

Similarly, the BENM map shows numerous geologic formations (*e.g.*, Bears Ears Buttes, Grand Gulch), archaeological sites (*e.g.*, House on Fire, Doll House), and habitats (*e.g.*, Valley of the Gods), each of which is also designated in the Proclamation:



15

[15] The Court may take judicial notice of geographic locations. *Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013). Full size versions of these maps are in Exhibits G and H.

Even these maps depict only a fraction of the numerous objects of historic and scientific interest designated in the Proclamations, and they necessarily omit objects subject to statutory confidentiality obligations. Thus, the actual density of protected objects is higher than depicted.

In addition to the foregoing objects, the Proclamations identify certain "areas" as objects of historic or scientific interest. For example, the Kaiparowits Plateau area of GSENM contains "roughly 1,600 square miles of sedimentary rock that towers over the surrounding area."[16] The "stratified geology" of this area provides, *inter alia*, "the only evidence in our hemisphere of mammals from the Cenomanian through Santonian ages and one of the world's best and most continuous records of Late Cretaceous terrestrial life."[17] "To date, many thousands of fossil sites have been documented on the plateau, including evidence of at least 15 previously unknown species of dinosaur."[18] The GSENM Proclamation describes the different geologic formations found on the Kaiparowits Plateau area, and explains the contribution of each formation to important paleontological discoveries.[19] The Proclamation then details the significant historical or scientific features of each region of the Kaiparowits Plateau ranging from the Smoky Mountain area with "naturally occurring underground coal fires that have been smoldering for hundreds, if not thousands, of years" providing a "home to a number of rare and endemic plant species," to the "Fiftymile Mountain area" with "a high density of archaeological sites, including masonry structures" suggesting a convergence of the Ancestral Pueblo and Fremont cultures.[20]

The Proclamations also designate certain "landscapes" themselves as objects of historic and scientific interest. For example, the BENM Proclamation explains how the Bears Ears

[16] GSENM Procl., 86 Fed. Reg. at 57339.
[17] *Id.* at 57340.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 57340–41.

landscape provides "one of the most extraordinary cultural landscapes in the United States" due to its "unique density of significant cultural, historical, and archaeological artifacts."[21] "[O]wing to the area's arid environment and overall remoteness, as well as the building techniques that its inhabitants employed," this landscape "retains remarkable" evidence of human use and habitation "from the Paleoindian Period, through the time of the Basketmakers and Ancestral Pueblos, to the more recent Navajo and Ute period," to a "series of passages and hideouts used by men like Butch Cassidy, the Sundance Kid, and other members of the Wild Bunch," to archaeological evidence demonstrating "the settlement of Latter-day Saint communities."[22] "Despite millennia of human habitation," the Bears Ears landscape also contains unique paleontological resources and habitat for rare and endemic species.[23] Given "the unique nature of the Bears Ears landscape, and the collection of objects and resources therein," President Biden determined, in his discretion, that "the entire landscape within the boundaries reserved by this proclamation" constitutes "an object of historic and scientific interest in need of protection."[24]

C. The Proclamations are subject to valid existing rights, and direct agencies to involve the public when preparing new monument management plans.

Although the Biden Proclamations reserve federal lands within the monument boundaries from new disposition under public land laws, mining laws, and mineral and geothermal leasing laws, the Proclamations are "subject to valid existing rights," such as existing valid mining claims. And they do not displace "livestock grazing as authorized under existing permits or leases."[25]

[21] BENM Procl., 86 Fed. Reg. at 57321.
[22] *Id.* at 57322–33.
[23] *Id.*
[24] BENM Procl., 86 Fed. Reg. at 57330–31; GSENM Procl., 86 Fed. Reg. at 57345.
[25] BENM Procl., 86 Fed. Reg. at 57332; GSENM Procl., 86 Fed. Reg. at 57346.

Contrary to claims in Plaintiffs' Amended Complaints,[26] there are many things that the challenged Proclamations do not prohibit. They neither close roads nor foreclose motorized vehicle use.[27] The Proclamations make no mention of active management, analyses under the National Environmental Policy Act ("NEPA"), installing new water facilities, or removing invasive species.[28] Nor do they reduce the ability of Tribal members to engage in "collection of medicines, berries and other vegetation, forest products, and firewood for personal noncommercial use."[29]

The Proclamations direct the Secretaries of the Interior and Agriculture (collectively, the Secretaries) to prepare management plans for the monuments.[30] "The Secretaries shall provide for maximum public involvement in the development of [those plans], including consultation with federally recognized Tribes and State and local governments."[31] While those management plans are being prepared, the monuments are governed by other legal authorities, including previously adopted management plans, statutes, and Presidential Proclamations. Those other legal authorities are summarized in two interim guidance memoranda issued by the Bureau of Land Management ("BLM") on December 16, 2021.[32]

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[26] *See infra* p.20 & n.101.

[27] *See generally* BENM Proclamation & GSENM Proclamation (not mentioning "motor" or "vehicle"). Although Proclamation 9,558 directed the agencies to prepare a transportation plan regarding vehicle use in BENM, no such plan has yet been prepared.

[28] *See generally* BENM Proclamation & GSENM Proclamation (not mentioning "active management," "National Environmental Policy Act," "water facilities," or "invasive species").

[29] Establishment of BENM, 82 Fed. Reg. at 1145; BENM Procl., 86 Fed. Reg. at 57332 (incorporating the "the terms, conditions, and management direction" from Proclamation 9,558 into Proclamation 10,285); GSENM Procl., 86 Fed. Reg. at 57346.

[30] GSENM Procl., 86 Fed. Reg. at 57345 (directing the Secretary of the Interior to "prepare and maintain a new management plan" for GSENM); BENM Procl., 86 Fed. Reg. at 57332 (directing the Secretaries of the Interior and Agriculture to "jointly prepare and maintain a new management plan for" BENM).

[31] BENM Procl., 86 Fed. Reg. at 57332.

[32] BLM-Utah, Interim Management of BENM (Dec. 16, 2021) ("BENM Memo."); BLM-Utah, Interim Management of GSENM (Dec. 16, 2021) ("GSENM Memo.").

III. Procedural Background

Ten months after President Biden issued the GSENM and BENM Proclamations, two lawsuits were filed in this Court challenging those Proclamations. On August 24, 2022, Garfield County, Kane County, and the State of Utah (collectively, the "*Garfield* Plaintiffs") filed suit, alleging that President Biden's Proclamations exceed the President's authority under the Antiquities Act of 1906.[33] On August 25, 2022, three individuals (Zebediah Dalton, Kyle Kimmerle, and Suzette Morris) and an organization (BlueRibbon Coalition) (collectively, the "*Dalton* Plaintiffs") filed a similar suit.[34] Both suits allege that the challenged Proclamations designate ineligible objects as monuments[35] and reserve more land than is necessary to care for the eligible objects.[36] And both suits seek declaratory and injunctive relief against both President Biden and the Secretaries.[37]

After Defendants moved to dismiss those Complaints, both the *Garfield* and *Dalton* Plaintiffs filed Amended Complaints including new challenges under the Administrative Procedure Act ("APA") to BLM's interim guidance memoranda.[38] The *Dalton* Plaintiffs also purport to challenge "other final agency actions," including various alleged permit denials.[39]

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[33] Compl., Docket no. 2, filed August 24, 2022 ("*Garfield* Compl.").
[34] Comp., Docket no. 2, *Dalton v. Biden*, No. 4:22-cv-60 (D. Utah Aug. 25, 2022) ("*Dalton* Compl.").
[35] *E.g.*, *Garfield* Compl. ¶¶ 246–52 (alleging that landscapes and animals are ineligible); *Dalton* Compl. ¶ 3 (same).
[36] *E.g.*, *Garfield* Compl. ¶¶ 272–309 (alleging that too much land has been reserved to protect qualifying objects); *Dalton* Compl. ¶ 158 (relying on similar allegations).
[37] *Garfield* Compl. p.80; *Dalton* Compl. p.52.
[38] Am. Compl. ¶¶ 191–92, Docket no. 90, filed January 26, 2023 ("*Dalton* Am. Compl."); Am. Compl. ¶¶ 386, 394, Docket no. 91, filed January 26, 2023 ("*Garfield* Am. Compl.").
[39] *Dalton* Am. Compl. ¶ 193.

LEGAL STANDARD

Rule 12(b)(1) permits dismissal of a case for "lack of subject-matter jurisdiction."[40] On a facial attack under this rule, the court applies the same standards applicable to a Rule 12(b)(6) motion and accepts the allegations in the complaint as true.[41] "In addressing a factual attack, the court does not presume the truthfulness of the complaint's factual allegations, but has wide discretion . . . to resolve disputed jurisdictional facts."[42]

To survive a motion under Rule 12(b)(6), a complaint must contain factual allegations sufficient to state a claim that is plausible on its face.[43] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[44] "[T]he mere metaphysical possibility that *some* plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims."[45] Plaintiffs bear the burden of demonstrating that the complaint meets this threshold.[46] The Court accepts the allegations of the complaint as true and draws all reasonable inferences in the plaintiff's favor.[47] However, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation."[48] The Court may also use Rule 12(b)(6) to dispose of a claim that "fails as a matter of law."[49]

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[40] Fed. R. Civ. P. 12(b)(1).
[41] *Muscogee Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 & n.1 (10th Cir. 2010).
[42] *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1203 (10th Cir. 2001) (cleaned up).
[43] *Anderson v. Suiters*, 499 F.3d 1228, 1232 (10th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560–63 (2007)).
[44] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).
[45] *Ridge at Red Hawk, LLC, v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).
[46] *Olson v. Carmack*, 641 F. App'x 822, 826–27 (10th Cir. 2016) (citing *Twombly*, 550 U.S. at 556).
[47] *Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 385–86 (10th Cir. 2016).
[48] *Papasan v. Allain*, 478 U.S. 265, 286 (1986).
[49] *Albers v. Bd. of Cnty. Comm'rs of Jefferson Cnty., Colo.*, 771 F.3d 697, 704 (10th Cir. 2014).

ARGUMENT

I. Congress Has Not Provided For Judicial Review Of The Biden Proclamations.

A. Plaintiffs lack an applicable waiver of sovereign immunity to challenge Presidential actions.

"It is well settled that the United States . . . [is] immune from suit, unless sovereign immunity has been waived."[50] Because "the defense of sovereign immunity is jurisdictional in nature,"[51] a party asserting a claim against the United States bears "the burden of establishing that its action falls within an unequivocally expressed waiver of sovereign immunity by Congress."[52] Any such waivers "must be unequivocal and are to be strictly construed."[53]

Neither Amended Complaint identifies an applicable waiver of sovereign immunity. Although Plaintiffs identify several general jurisdictional provisions,[54] "[s]overeign immunity is not waived by general jurisdictional statutes such as 28 U.S.C. § 1331 (federal question jurisdiction), . . . and 28 U.S.C. § 1361 (action to compel a government officer to perform his duty)."[55] "Nor does the declaratory judgment statute, 28 U.S.C. § 2201, itself confer jurisdiction on a federal court where none otherwise exists."[56] Instead, Plaintiffs "must find an explicit waiver

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[50] *Atkinson v. O'Neill,* 867 F.2d 589, 590 (10th Cir. 1989) (per curiam); *FDIC v. Meyer*, 510 U.S. 471 (1994); *United States v. Mitchell*, 445 U.S. 535, 538 (1980).
[51] *Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002).
[52] *Dunn v. Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007); *accord Lonsdale v. United States*, 919 F.2d 1440, 1444 (10th Cir. 1990).
[53] *Rosson v. United States*, 127 F. App'x 398, 400 (10th Cir. 2005); *see United States v. Mottaz*, 476 U.S. 834, 841 (1986); *United States v. Testan*, 424 U.S. 392, 399 (1976).
[54] *E.g.*, *Garfield* Am. Compl. ¶ 26 (citing 28 U.S.C. §§ 1331, 1361, 2201, 2202).
[55] *Lonsdale*, 919 F.2d at 1444; *Burns Ranches, Inc. v. U.S. Dep't of the Interior*, 851 F. Supp. 2d 1267, 1270–71 (D. Or. 2011) (recognizing that 28 U.S.C. § 2201 does not waive sovereign immunity, and collecting cases); *W. Shoshone Nat'l Council v. United States*, 408 F. Supp. 2d 1040, 1047–48 (D. Nev. 2005) ("[T]he Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, does not constitute the United States' consent to be sued, it 'merely grants an additional remedy in cases where jurisdiction already exists in the court.'"(citation omitted)).
[56] *Wyoming*, 279 F.3d at 1225.

of sovereign immunity."[57] Because "a complaint must state the jurisdictional basis for all of the claims alleged therein," Plaintiffs' failure to identify an explicit statutory waiver of sovereign immunity requires dismissal of their challenges to the Proclamations.[58]

Section 702 of the APA does not waive sovereign immunity for challenges to Presidential actions, as that provision is limited to claims against "an agency or an officer or employee thereof."[59] As Congress explained when adding that provision, it constituted a "[p]artial [e]limination of [s]overeign [i]mmunity" "applicable only to functions falling within the definition of 'agency'" under the APA.[60] Because the President is not an "agency,"[61] § 702 does not waive sovereign immunity for challenges to Presidential actions.

Plaintiffs, moreover, cannot rely on the nonstatutory *ultra vires* doctrine to circumvent the United States' sovereign immunity. As the Tenth Circuit has explained, "the question of whether a government official acted *ultra vires* is quite different from the question of whether that same official acted erroneously or incorrectly as a matter of law."[62] As "the ultra vires doctrine is grounded on 'the officer's *lack* of delegated power,'" a "claim of error in the *exercise* of that power is therefore not sufficient."[63] "The mere allegation that the official acted wrongfully 'does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign.'"[64] Thus, where a plaintiff does not question an official's "*power* to determine" a certain issue, but instead asserts that the official's "decision was *incorrect* as a matter of law,"

[57] *Lonsdale*, 919 F.2d at 1444.
[58] *Mocek v. City of Albuquerque*, 813 F.3d 912, 932 (10th Cir. 2015) (affirming dismissal based on failure to allege federal waiver of sovereign immunity).
[59] 5 U.S.C. § 702.
[60] S. Rep. No. 94-996, at 10 (1976).
[61] *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992).
[62] *Wyoming*, 279 F.3d at 1230.
[63] *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548–49 (10th Cir. 2001) (quoting *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 690 (1949)).
[64] *Id.* (quoting *Larson*, 337 U.S. at 693).

courts have "rejected such arguments asserted in the attempt to avoid the shield of sovereign immunity."[65]

These cases confirm that Plaintiffs' claims fall outside of the narrow *ultra vires* exception to sovereign immunity. Plaintiffs do not dispute that the President has the power to designate national monuments on federal lands in Utah.[66] Instead, they disagree with how the President allegedly declared these monuments: by insufficiently describing the significance of designated objects; designating ineligible objects of historic or scientific interest; reserving too much land to protect the qualifying objects; insufficiently justifying the amount of land reserved; and not making separate reservations for each of the designated objects.[67] None of these arguments assert that the President lacked the "power to determine" the existence of objects of interest or reserve land to protect those objects; instead, they represent disagreement with the choices the President has made (or processes he allegedly used) in exercising his authority under the Antiquities Act. This Court should therefore reject Plaintiffs' "attempt to avoid the shield of sovereign immunity."[68]

B. The President's exercise of discretion in issuing the challenged Proclamations is not judicially reviewable because Congress has not created such a cause of action.

Just as Congress has not waived sovereign immunity for Plaintiffs' claims, it has also not created a cause of action to review the challenged Presidential Proclamations. In a pair of landmark decisions, the Supreme Court described the strict limits on judicial review of Presidential actions. In *Dalton v. Specter*, the Supreme Court, relying on its earlier decision in *Franklin v. Massachusetts*, concluded that Presidential actions were not reviewable under the APA because

[65] *New Mexico v. Regan*, 745 F.2d 1318, 1320 n.1 (10th Cir. 1984).
[66] *E.g.*, *Garfield* Am. Compl. ¶¶ 341–343; *Dalton* Am. Compl. ¶ 186.
[67] *E.g.*, *Garfield* Am. Compl. ¶ 316; *id.* ¶¶ 293–313; *id.* ¶ 289; *Dalton* Am. Compl. ¶ 5; *id.* ¶ 8; *id.* ¶ 6.
[68] *Regan*, 745 F.2d at 1320 n.1.

the President is not an "agency" within the meaning of that Act.[69] The Supreme Court then "assume[d] for the sake of argument" that some claims that the President violated a statutory mandate may nevertheless be judicially reviewable outside the framework of the APA, before concluding that such "review is not available when the statute in question commits the decision to the discretion of the President."[70] Instead, the Supreme Court "require[s] an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."[71]

In the present case, Plaintiffs claim that President Biden exceeded his authority under the Antiquities Act by designating items that do not qualify as "objects of historic or scientific interest," and by failing to reserve only "the smallest area compatible with the proper care and management of" the identified objects.[72] Plaintiffs do not allege that the President lacked the authority to create monuments in southern Utah. Nor have Plaintiffs presented any constitutional challenges to the Antiquities Act or the President's exercise of authority under that Act. Rather, Plaintiffs contend that the President improperly exercised the discretionary authority conferred on him pursuant to the Antiquities Act.

As in *Dalton*, judicial review of these statutory claims is not available because, through the Antiquities Act, Congress has conferred the authority to designate national monuments upon the President and committed that decision to his discretion. Specifically, the Act expressly authorizes the President "in [his] discretion" to declare objects of historic or scientific interest to be national monuments.[73] The Act further provides that the President "may reserve" as a part thereof, parcels

[69] 511 U.S. 462, 468–70 (1994) (citing *Franklin*, 505 U.S. at 798–99).
[70] *Dalton*, 511 U.S. at 474; *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018).
[71] *Franklin*, 505 U.S. at 801.
[72] 54 U.S.C. § 320301.
[73] *Id.* § 320301(a).

of land "confined to the smallest area compatible with the proper care and management of the objects to be protected.[74] Although the Act contains standards that guide the exercise of the President's discretion in making such reservations, the President is the sole and exclusive judge as to the existence of facts satisfying those standards because Congress has not provided an "express statement" authorizing review of the President's discretionary determinations.[75] Thus, while the Act requires the President to determine that there are objects of historic or scientific interest to be protected by the designation and that the land reserved is the smallest area compatible with the proper care and management of those objects, it is the President's judgment on those facts that is determinative of whether a national monument should be proclaimed. Consequently, the President's judgment on these facts is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment. "How the President chooses to exercise the discretion Congress has granted him is not a matter for [judicial] review," because "no question of law is raised when the exercise of the President's discretion is challenged."[76]

This principle is firmly established by *Dalton* and a long line of Supreme Court decisions beginning with *Dakota Central Telephone Co. v. State of South Dakota ex rel. Payne*.[77] The plaintiff there sought to enjoin implementation of an intrastate rate schedule prepared by the Postmaster General, who had assumed control of the telephone companies under presidential proclamation. In rejecting the plaintiff's claim that the President had exceeded the power given him by Congress, the Supreme Court explained that claims asserting an excess or abuse of discretion by the President are not judicially reviewable:

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[74] *Id.* § 320301(b).
[75] *See Franklin*, 505 U.S. at 801; *see also United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940).
[76] *Dalton*, 511 U.S. at 476 (cleaned up).
[77] 250 U.S. 163 (1919).

> But as the contention at best concerns not a want of [presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, *the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.*[78]

Similarly, in *United States v. George S. Bush & Co.*,[79] the Supreme Court reversed a determination by the Court of Customs and Patent Appeals that invalidated a presidential proclamation issued pursuant to the Tariff Act of 1930. It is "the judgment of the President on those facts which is determinative of whether or not the recommended rates [of duty] will be promulgated" and "the judgment of the President . . . is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment."[80]

Finally, in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*,[81] the Supreme Court concluded that the President's decision to approve or disapprove orders of the Civil Aeronautics Board was not reviewable because "the final orders embody Presidential discretion as to political matters beyond the competence of the courts."[82] And the Court reached this conclusion despite recognizing that the consequence of its decision was to foreclose judicial review altogether:

> The dilemma faced by those who demand judicial review of the Board's order is that, before Presidential approval, it is not a final determination . . . and after Presidential approval, the whole order, both in what is approved without change, as well as in amendments which he directs, derives its vitality from *the exercise of unreviewable Presidential discretion*.[83]

The President's unique status under the Constitution distinguishes him from other executive officials.[84] He is entrusted under the Constitution "with supervisory and policy

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[78] *Id.* at 184 (emphasis added).
[79] 310 U.S. 371 (1940).
[80] *Id.* at 379–80.
[81] 333 U.S. 103 (1948).
[82] *Id.* at 112–14.
[83] *Id.* at 113 (emphasis added).
[84] *Nixon v. Fitzgerald*, 457 U.S. 731, 749–50 (1982).

responsibilities of utmost discretion and sensitivity," including the responsibility to "take Care that the Laws be faithfully executed."[85] Accordingly, the Supreme Court's refusal to subject presidential action to judicial review is supported by the separation of powers doctrine and the President's unique position in that constitutional scheme.[86]

Two decisions from sister courts in this Circuit confirm that the Court cannot second-guess the President's discretionary judgments in establishing national monuments. In *Utah Association of Counties v. Bush*, plaintiffs sought judicial review of their claims that President Clinton had improperly designated objects of scientific or historic interest and reserved too much land in establishing GSENM.[87] Judge Benson held that he lacked authority to undertake the requested review, as a "grant of discretion to the President to make particular judgments forecloses judicial review of the substance of those judgments altogether."[88] Instead, Judge Benson concluded that his review was limited to "inquir[ing] into whether the President, when designating this Monument, acted pursuant to the Antiquities Act."[89] Similarly, in *State of Wyoming v. Franke*, this general principle of non-reviewability was applied to a similar challenge to presidential action under the Antiquities Act.[90] In denying plaintiffs' request for a judicial declaration voiding the Presidential Proclamation that created the Jackson Hole National Monument, the court stated:

> It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review . . . . Whenever

[85] *Id.* at 750 (quoting U.S. Const. art. II, § 3).
[86] *See Franklin*, 505 U.S. at 800–01 ("Out of respect for the separation of powers and the unique constitutional position of the President . . . textual silence is not enough to subject" the President's decisions to judicial review under the APA); *Nixon*, 457 U.S. at 749 (absolute immunity from private damage suits is a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers").
[87] 316 F. Supp. 2d 1172, 1185 (D. Utah 2004).
[88] *Id.*
[89] *Id.* at 1186 (finding this narrow review standard easily met).
[90] 58 F. Supp. 890, 892 (D. Wyo. 1945)

> a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains.[91]

The court then concluded as follows: "In short, this seems to be a controversy between the Legislative and Executive Branches of the Government in which, under the evidence presented here, the Court cannot interfere."[92]

The Antiquities Act undeniably confers authority upon the President to create national monuments, and it is beyond dispute that President Biden invoked that authority in issuing the Proclamations. Rather than dispute this authority, Plaintiffs contend that the President acted in excess of or abused his authority under the Act when he restored the challenged monuments. Such claims are beyond the reach of judicial power.[93] Should Plaintiffs disagree with the President's discretionary judgments, they can petition Congress to change the President's determinations.[94]

II. Plaintiffs Lack Standing

The Court should dismiss all Plaintiffs for failing to adequately establish standing. Consistent with Article III's case-or-controversy requirement, Plaintiffs must establish standing to sue. To do so, a plaintiff must establish: (1) "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly

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[91] *Id.* at 896 (internal quotation marks omitted) (quoting *George S. Bush & Co.*, 310 U.S. at 380).
[92] *Id.*
[93] *See Dalton*, 511 U.S. at 476 ("How the President chooses to exercise the discretion Congress has granted him is not a matter for our review"); *George S. Bush & Co.*, 310 U.S. at 380 ("No question of law is raised when the exercise of [the President's] discretion is challenged"); *Dakota Cent. Tel. Co.*, 250 U.S. at 184 (claim of "mere excess or abuse of discretion in exerting a power given . . . involves considerations which are beyond the reach of judicial power").
[94] *E.g.*, Pub. L. No. 104-333 § 205, 110 Stat. 4093, 4106 (1996) (removing acreage from Craters of the Moon National Monument); Pub. L. No. 83-360, 68 Stat. 98 (1954) (transferring Shoshone Cavern National Monument to city of Cody, Wyoming); Pub. L. No. 84-179, 69 Stat. 380 (1956) (revoking Old Kasaan National Monument).

traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[95] At the pleading stage, a plaintiff must "clearly . . . allege facts demonstrating" each standing element.[96] Those facts must establish at least a plausible basis for the plaintiff's standing,[97] and their truthfulness is not assumed on a factual standing attack. "Thus, as a constitutional minimum, 'the plaintiff must allege some concrete injury, whether actual or threatened, and some chain of causation linking that injury to the challenged actions of the defendant.'"[98]

Plaintiffs' challenges focus not on actual concrete injuries, but on their disagreement with the President's policy decision to protect the relevant lands and resources. But "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy."[99] Plaintiffs' here fail to make the requisite "factual showing of perceptible harm" caused by Defendants' actions, and which could be redressed by the requested relief.[100] When it comes to describing the challenged Proclamations, the Amended Complaints provide conclusory assertions that the Proclamations foreclose various activities—*e.g.*, road repair, NEPA analyses, installation of water facilities[101]—that they do not mention, let alone prohibit.[102] To the contrary, BLM has approved

[95] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).
[96] *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (alteration in original) (citation omitted).
[97] *See Iqbal*, 556 U.S. at 679 ("only a complaint that states a plausible claim for relief survives a motion to dismiss," including a motion to dismiss under Rule 12(b)(1)); *see also Muscogee (Creek) Nation*, 611 F.3d at 1227 n.1 ("we apply the same standards under Rule 12(b)(1) that are applicable to a Rule 12(b)(6) motion to dismiss for failure to state a cause of action").
[98] *State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 881 (10th Cir. 1992) (quoting *Glover River v. U.S. Dep't of Interior*, 675 F.2d 251, 253 (10th Cir. 1982)); *see also State of Utah v. Babbitt*, 137 F.3d 1193, 1212 (10th Cir. 1998) ("the burden is on Plaintiffs to show they are 'immediately in danger of sustaining some direct injury' as a result of the [challenged action] and that the threat of injury is 'real and immediate, not conjectural or hypothetical'" (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983))).
[99] *Bear Lodge Multiple Use Ass'n. v. Babbitt*, 175 F.3d 814, 822 (10th Cir. 1999) (citation omitted).
[100] *Id.* at 821 (quotation and citations omitted).
[101] *E.g.*, *Dalton* Am. Compl. ¶¶ 93–99; *Garfield* Am. Compl. ¶¶ 163–64.
[102] *See* BENM Procl., 86 Fed. Reg. at 57321–34; GSENM Procl., 86 Fed. Reg. at 57335–47.

and continues to undertake such activities in the monuments since the Proclamations issued.[103] Elsewhere, Plaintiffs tacitly concede that their alleged injuries have not yet materialized.[104] Ultimately, the allegations of the Amended Complaints, even liberally construed, cannot meet Article III's requirements because Plaintiffs have not met their burden to establish standing.

A. The *Garfield* Plaintiffs do not allege a cognizable injury, caused by the Proclamations, that would be redressed by a favorable decision.

The *Garfield* Plaintiffs challenge the Biden Proclamations (and non-specific agency implementation actions), asserting four basic theories of standing: harms from increased visitation to southern Utah; harms to alleged interests in the management of federal lands; decreased revenue to the State; and impairment of Kane and Garfield County's ("the Counties") road maintenance and search and rescue operations. As discussed below, none of these standing theories meets Article III requirements.

1. The State and the Counties cannot demonstrate standing based on allegations of harm arising from increased visitation to southern Utah.

Permeating their Amended Complaint is the *Garfield* Plaintiffs' contention that, in contradiction to the judgment of Congress, the creation of monuments under the Antiquities Act in fact "endanger[s] what they purport to protect" by causing increased visitation to the relevant regions in southern Utah.[105] They further allege that this increase in visitors causes harms ranging

[103] Decl. of Ade K. Nelson ¶¶ 5, 11, 13, 15, 30, 33 ("Nelson Decl."); Decl. of Michael J. Lundell ¶¶ 12–13, 15, 19, 21 ("Lundell Decl.").
[104] *E.g.*, *Dalton* Am. Compl. ¶ 83 ("the Monuments portend a future [of] . . . closed trails and roads; restricted campgrounds; limits on motorized access; and caps on group sizes that will block family or religious gatherings").
[105] *Garfield* Am. Compl. ¶ 17 ("[The reservations] draw visitors from all over the world who trample on flora, traumatize fauna, and leave trails and roads overrun with trash and human waste"); *id.* ¶ 152 ("The reservations inherently increase visitation to the reserved lands due to their presidentially-proclaimed notoriety").

from harm to local wildlife populations and archeological and paleontological resources to increased search-and-rescue, law enforcement, and road maintenance costs.[106]

As an initial matter, the *Garfield* Plaintiffs' allegation that they are injured by—and would prefer to avoid—increased tourism to the area is neither plausible on its face nor consistent with Plaintiffs' own statements and efforts.[107] To the contrary, all three *Garfield* Plaintiffs manage public websites designed to attract more visitors to southern Utah by advertising these very monuments, thereby causing their own "injury." Regardless, even assuming they have plausibly alleged injury due to increased visitation, the *Garfield* Plaintiffs do not allege facts plausibly showing that that the Biden Proclamations—which did not *create* either monument—caused the increased visitation, or that any resulting injuries would be redressed if the Court grants them relief.[108]

To establish causation, a plaintiff must establish "a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact."[109] If "'speculative inferences are necessary to connect [the] injury to the challenged action,' this burden has not been met."[110] And "self-

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[106] *Id.* ¶¶ 21–23, 104, 116, 152, 155, 156, 159, 160, 164, 166, 168, 173, 221.

[107] *See, e.g.,* Ex. A, Utah Office of Tourism Website, Grand Staircase-Escalante 2 ("Grand Staircase-Escalante National Monument is phenomenal."); Ex. B, Utah Office of Tourism Website, Bears Ears National Monument 2 ("A pair of towering buttes stand against beautiful scenery."); Ex. C, Kane County Travel Council Website 1 ("Have you ever hoped to find the perfect vacation destination, far from the crowds, and surrounded by amazing scenic splendor? Well Now You Have! Kane County, in Southern Utah, offers easier access to more National Parks and Monuments than any other place on earth [including] the Grand Staircase-Escalante National Monument."); Ex. D, Garfield County Tourism Website 1 (stating Garfield County "works diligently to attract visitors to [its] world-class destinations" and directing visitors to Bryce Canyon Country website); Ex. E, Bryce Canyon Country Website 2 ("When visiting Grand Staircase-Escalante, you'll find numerous things to do and places to see that will make your experience unique and memorable."). The Court may take judicial notice of these websites. *Garling v. EPA*, 849 F.3d 1289, 1297 n.4 (10th Cir. 2017).

[108] *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008).

[109] *Id.* (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005)).

[110] *Id.* (quoting *Nova Health Sys.,* 416 F.3d at 1157).

inflicted injuries cannot satisfy the requirements for Article III standing because they break the causal chain linking the defendant's conduct to the asserted injury."[111]

Here, not even speculative inferences could connect the *Garfield* Plaintiffs' alleged injuries to the Biden Proclamations. Ultimately, the *Garfield* Plaintiffs' position is that the existence of the two monuments brings unwanted visitors to southern Utah.[112] But both monuments were established *years* prior to President Biden's 2021 Proclamations.[113] Further, Plaintiffs expressly allege that it was these initial "reservations"—reservations that they do not challenge in this litigation—that resulted in the increased visitation and alleged resultant harms.[114] Other allegations corroborate this point. For instance, they describe the alleged harm from increased search and rescue costs as commencing in "1996, when the original Grand Staircase-Escalante reservation went into effect . . . ."[115]

As a result, Plaintiffs cannot plausibly allege facts establishing a "substantial likelihood" that any increased visitation was caused by the Biden Proclamations, as opposed to the earlier proclamations—unchallenged here—or to other factors, such as Plaintiffs' own tourism initiatives. In fact, their own pleading proves the opposite. It relies on a July 2022 Salt Lake Tribune article for the proposition that in 2021, Kane County experienced a "massive influx of visitors."[116] The

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[111] *Colorado v. EPA*, 989 F.3d 874, 888 (10th Cir. 2021) (internal citation omitted).
[112] *Garfield* Am. Compl. ¶¶ 17, 104.
[113] *Id.* ¶ 108 (GSENM established by Proclamation 6,920 in 1996); ¶ 111 (BENM established by Proclamation 9,558 in 2016).
[114] *Id.* ¶ 116 ("The reservations [by Presidents Clinton and Obama] also attracted visitation and attention from all over the world, straining local infrastructure and increasing litter and waste, damage to the land, harm to animals, and desecration of archaeological sites").
[115] *Id.* ¶ 172 (alleging "over 750 search-and-rescue missions within San Juan, Garfield, and Kane counties," since 1996, "over 85% of them involving visitors"); *see also id.* ¶ 159 (alleging that since "President Obama created the Bears Ears reservation, vandalism and other harms to archeological resources within it have increased"); *id.* ¶ 161 (Utah launched "Pledge to Protect the Past" to address archeological vandalism in 2020 before the challenged Proclamations).
[116] *Id.* ¶ 154 (citing Eddington, *As Kanab reels from pandemic tourism, officials hope kindness campaign can curb vandalism and trash*, Salt Lake Trib. (July 16, 2022)).

article, however, emphasizes that increased visitation to the region resulted from "pandemic tourism," rather than, for instance, the 2021 Proclamations.[117] Furthermore, while the article references a substantial increase in tourist visits to Kane County between 2020 and 2021—the Biden Proclamations issued in *October* 2021—late in the year and at the tail end of the monument's tourism season.[118] This article, therefore, demonstrates that increased visitation was occurring immediately *before* the Biden Proclamations issued, at a time when the monument boundaries were significantly contracted under President Trump's Proclamations. The *Garfield* Plaintiffs, in their Amended Complaint, try to plead around this fact by claiming that "President Biden's well-publicized plans to enlarge the monuments" caused a larger influx of visitors—but they cannot rely on alleged injury that predates the challenged Proclamations.[119] Similarly unavailing is their reliance on agency documents that discuss visitation increasing by 2020, when monument boundaries were contracted.[120] Accordingly, the *Garfield* Plaintiffs' own allegations undermine their assertion of a link between increased tourism and the challenged Proclamations.

For similar reasons, the *Garfield* Plaintiffs do not adequately allege redressability for their alleged injuries arising from increased visitation.[121] To adequately plead a redressable injury, a plaintiff "must allege facts from which it reasonably could be inferred that . . . if the court affords

[117] Ex. F, Eddington 1–2, *supra* n.116 (noting that "during the pandemic . . . people from coronavirus-infested cities and suburbs have sought sanctuary in Kane County's wide open spaces and nearby national monuments and parks").
[118] *Garfield* Am. Compl. ¶ 154; *see also* Lundell Decl. ¶ 24; Nelson Decl. ¶ 32.
[119] *Id.* ¶ 153.
[120] *Id.* ¶ 159 (citing a 2020 document from BLM and a Forest Service document discussing how visitor use increased by 2020); *see also* U.S. Forest Service, Cultural Site Visitor Management for Doll House, Lewis Lodge, Dry Wash and Twin Kivas Cultural Sites, Draft Environmental Assessment, Finding of No Significant Impact 2 (June 2022) (stating that visitor use increased from 2016 to 2020).
[121] *See Habecker*, 518 F.3d at 1224 ("it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision").

the relief requested, the [injury] will be removed."[122] Here, the *Garfield* Plaintiffs seek (1) judicial declarations that the Biden Proclamations (and actions taken implementing them) are unlawful; and (2) an injunction preventing Federal Defendants from implementing the Proclamations.[123] They do not allege that this relief will stop people from visiting the regions where the monuments are located—nor would such an allegation be plausible.

Moreover, Plaintiffs' requested remedies would not eliminate either of the two monuments. Both monuments are the subject of prior proclamations—those originally creating the monuments; and those in 2017 modifying their boundaries.[124] Although there may be some question as to which proclamations would control the monuments' boundaries, were the Biden Proclamations to be vacated, there is *no* relief under which the monuments—encompassing, at a minimum, 1.11 million acres—would simply cease to exist.[125] As such, even accepting Plaintiffs' unsupported allegations that the monuments are responsible for the increased visitation to the regions in which they are located, the monuments—and their alleged "presidential-proclaimed notoriety"—will continue to exist, and under Plaintiffs' theory, continue to draw visitors, regardless of whether Plaintiffs prevail.[126] Further, even if the monuments themselves somehow *did* cease to exist, the public would still be aware of the existence of resources within the relevant lands from the *Garfield* Plaintiffs' own websites and the prior monument proclamations. Because Plaintiffs cannot

[122] *Producers of Renewables United for Integrity Truth & Transparency v. EPA*, No. 19-9532, 2022 WL 538185, at *9 (10th Cir. Feb. 23, 2022) (alterations in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 504 (1975)).
[123] *Garfield* Am. Compl. at p.95.
[124] *Id.* ¶¶ 107–11, 122, 125.
[125] *See id.* ¶¶ 122, 125, p.27. The two 2017 Trump proclamations modifying the monuments' boundaries are subject to challenges in still-pending litigation in the U.S. District Court for the District of Columbia. *The Wilderness Soc'y v. Biden*, No. 17-cv-2587 (D.D.C. filed Dec. 4, 2017); *Hopi Tribe v. Biden*, No. 17-cv-2590 (D.D.C. filed Dec. 4, 2017).
[126] *See Garfield* Am. Compl. ¶¶ 152, 356.

plausibly allege that vacating the Biden Proclamations would eliminate public knowledge of the monument resources, they cannot plausibly allege redressability for their tourism-related injuries.

In sum, the *Garfield* Plaintiffs have failed to establish that their alleged injuries flowing from increased visitation are either caused by the Biden Proclamations or redressable by an order from this Court. Accordingly, these theories of injury do not support standing.

2. The State and Counties cannot demonstrate standing based on alleged injuries to resources in which they do not allege a legally protectable interest.

The *Garfield* Plaintiffs also allege that the Biden Proclamations cause them injury because they "preempt [Utah's] laws and policies"; "impede its ability to work on the land"; "impose new administrative burdens on [Utah's] workers"; and cause unidentified "impositions" to the Counties' administrative planning, land management, facilities maintenance; etc.[127] However, these alleged injuries are not cognizable injuries for purposes of Article III standing. A plaintiff must demonstrate "an 'injury in fact'"—which must, among other things, comprise "an invasion of a legally protected interest."[128] And, the legally protected interest must be particularized to the plaintiffs—they must clearly "allege facts demonstrating that [they are] a proper party to invoke judicial resolution of the dispute."[129]

The *Garfield* Plaintiffs allege harms related to a variety of items for which they lack a legally protected interest, because the reservations apply only to federal land. The State, for instance, asserts injury due to alleged inconsistencies between how it speculates the monuments will be managed by the United States, and how it believes the relevant federal lands should be

[127] *Garfield* Am. Compl. ¶¶ 21–23.
[128] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotations and citations omitted).
[129] *Schaffer v. Clinton*, 240 F.3d 878, 883 (10th Cir. 2001) (quoting *United States v. Hays*, 515 U.S. 737, 743 (1995)).

managed.[130] Similarly, Plaintiffs allege that "the reservations preempt the resource-management plans of local governments, including Kane County and Garfield County."[131] But these allegations fail to identify a cognizable injury as a matter of law—states and counties do not have a legal right to impose their management preferences on federal lands within their boundaries.[132] Their management interests in federal lands are instead governed by, *inter alia*, the Federal Land Policy and Management Act ("FLPMA"),[133] which exists in harmony with the Antiquities Act, by affording a consultation role and limited other rights to states and counties while recognizing the supremacy of Federal law and management interests. Courts have made it clear that FLPMA imposes no obligation on the federal government to yield to State or local government preferences.[134]

The *Garfield* Plaintiffs allege that the Monuments deprive them of federal statutory procedural rights under FLPMA, 43 U.S.C. § 1712(c)(9).[135] But the relevant section of FLPMA provides only that, in the development and revision of land use plans, the Secretary of the Interior shall "coordinate" with State and local governments.[136] Nothing in the Biden Proclamations is

[130] *Garfield* Am. Compl. ¶ 21 (alleging that "the reservations preempt [Utah's] law and policies"); ¶ 236 (alleging that "the reservations also preempt the State's policies" such as the "State of Utah Resource Management Plan for Federal Lands"); ¶ 238 (alleging that monuments are "antithetical" to States' goals with respect to "Utah Grazing Agricultural Commodity Zones").
[131] *Id.* ¶ 237.
[132] *See United States v. Bd. of Cnty. Cmm'rs of Cnty. of Otero*, 843 F.3d 1208, 1215 (10th Cir. 2016) (noting state law and county resolution "must yield to federal law regarding conduct on federal land").
[133] 43 U.S.C. § 1712(c)(9).
[134] *Kane Cnty. Utah v. Salazar*, 562 F.3d 1077, 1088 (10th Cir. 2009) (Section 1712(c)(9) "gives the Secretary of the Interior discretion to determine the extent to which the agency's land use plans are consistent with State and local plans"); *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 877 (9th Cir. 2017) (FLPMA requires, at most, that "Interior fully acknowledge[] and consider[] the Counties' concerns").
[135] *Garfield* Am. Compl. ¶¶ 230, 231, 236–37.
[136] 43 U.S.C. § 1712(c)(9).

inconsistent with this requirement.[137] Both Proclamations expressly reinforce this requirement by instructing the agencies, in preparing monument management plans, to "provide for maximum public involvement in the development of that plan, including consultation with federally recognized Tribes and State and local governments."[138] And any harms based on Plaintiffs' anticipated outcomes of that cooperative planning process are speculative, as that planning process has not yet concluded.

The *Garfield* Plaintiffs also allege that the Biden Proclamations will prevent them from "engaging in active land management," including to "maintain healthy soils, safeguard against fire, protect native vegetation, and preserve wildlife habitats."[139] But the Biden Proclamations, which govern only federal lands, do not prevent the *Garfield* Plaintiffs from undertaking whatever management they deem appropriate on their *own* lands. Recognizing this, the *Garfield* Plaintiffs also claim that the Proclamations prevent them from undertaking "active management" on *federal* lands, to promote their theories of soil and vegetation health and fire suppression.[140] But they fail to allege how they have a legally protectable interest in managing such *federal* resources—and therefore why they would face cognizable injury from the alleged mismanagement of such resources.[141] Rather, the lands impacted by the Proclamations are *federal* lands, managed by the federal land agencies.[142]

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[137] *See Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1199 (D. Utah 2004).
[138] BENM Procl., 86 Fed. Reg. at 57332; GSENM Procl., 86 Fed. Reg. at 57345.
[139] *Garfield* Am. Compl. ¶ 191.
[140] *See, e.g., Garfield* Am. Compl. ¶¶ 15, 143, 176, 177, 179, 191, 255
[141] *See Beaver Cnty., Utah v. U.S. Dept. of the Interior*, No. 2:17-CV-00088-CW, 2017 WL 4480750, at *3 (D. Utah Oct. 6, 2017) (finding county's concern for welfare of wild horses was "misplaced because it has no cognizable interest in managing or protecting wild free-roaming horses and/or burros").
[142] The Complaint alleges that the monuments increase risk of damage to state and local property because they "prevent State and local efforts to clear brush and other fire fuels." *Garfield* Am. Compl. ¶ 239. But as noted above, nothing in the Proclamations can be deemed as having any impact on management of non-federal land.

Even assuming the *Garfield* Plaintiffs could assert a legally protected interest in the management of federal lands, moreover, they fail to allege any specific instance where their request to undertake such activity was prohibited by the Biden Proclamations. To that end, they allege that the Skutumpah Terrace Sagebrush Steppe Enhancement Project was barred under an Interior Board of Land Appeals decision "based in part on its noncompliance with the [GSENM] reservations' restrictions."[143] But the allegation finds no support in the referenced decision. For starters, the referenced decision issued in 2019—years before Proclamation 10,286 issued. And even setting that fundamental defect aside, the specific management issue found unlawful—the use of non-native seeds for limited revegetation work—was found inconsistent, not with any Proclamation, but with a specific provision of an agency-promulgated Monument Management Plan that is no longer in place.[144] While the Biden Proclamations both require the preparation of new management plans, 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—such as the removal of invasive vegetation; or efforts to "maintain or improve soil site stability, hydrologic function, riparian habitat condition, biological integrity and ecosystem resiliency."[145] Indeed, the agencies may determine such efforts are not only consistent with, but appropriate and necessary, for the protection and restoration of Monument objects.[146] Accordingly, to the extent Plaintiffs are alleging that federal agencies will not in the future undertake or approve "active management" that

[143] *Garfield* Am. Compl. ¶ 188.
[144] Order 12–15, IBLA 2019-94 (Sept. 16, 2019); Notice of availability, 85 Fed. Reg. 9802 (Feb. 20, 2020).
[145] *See Garfield* Am. Compl. ¶ 189.
[146] *See* Nelson Decl. ¶ 33; Lundell Decl. ¶ 19.

the Plaintiffs desire, those allegations are both speculative and involve unripe APA claims, as they have not identified any such specific agency action or inaction.[147]

In a similar vein, the *Garfield* Plaintiffs allege, counterintuitively, that the Biden Proclamations harm (or will harm) paleontological and archeological resources.[148] These allegations largely rely on Plaintiffs' contentions regarding increased visitation which, as discussed above, are defective as to causation and redressability. But these allegations also fail to show injury in fact because, again, Plaintiffs allege no ownership of—or any other legally-protectable interest in—archaeological and paleontological resources located on federal land.[149] To the contrary, the Amended Complaint expressly recognizes the pervasive *federal* oversight over the management of such resources.[150]

Finally, the *Garfield* Plaintiffs allege a variety of harms, which would accrue not to themselves, but to their citizens and residents.[151] But a plaintiff's complaint must establish that the plaintiff has "such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction," not that of a third party.[152] And it is well-established that

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[147] *See Kane Cnty. Utah v. Salazar*, 562 F.3d 1077, 1089–90 (10th Cir. 2009) (rejecting county water district's challenge that monument management plan's water resource provisions "impaired the District's water rights" because the District could—and in fact had—filed an application for a groundwater diversion on the monument, and "it [was] entirely possible" that BLM would grant it).

[148] *Garfield* Am. Compl. ¶¶ 151–57.

[149] *Cf. Catron Cnty. Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996) (allegations that federal designation of critical habitat would "prevent the diversion and impoundment of water *by the County*, thereby causing flood damage to county-owned property" alleged actual injury (emphasis added)).

[150] *Garfield* Am. Compl. ¶ 83. Arguably, the State can assert a protectable interest with respect to some wildlife. However, its alleged harm in the Amended Complaint is the inability to undertake management activities, such as installing water facilities or preparing NEPA analyses, *id.* ¶ 164, that the Proclamations do not prohibit, *see supra* p.9.

[151] *See Garfield* Am. Compl. ¶¶ 184 (private property owners at Deer Springs Ranch); 192–98 (grazers); 205–08; 212 ("local workers"); 240–43 (Native American interests").

[152] *See Laufer v. Looper*, 22 F.4th 871, 876 (10th Cir. 2022) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)) (emphasis added).

entities such as the *Garfield* Plaintiffs cannot bring an action against the federal government on behalf of their citizens.[153] Nor, are allegations of harm to local economies sufficient to establish standing for state or local governments.[154]

In summary, the *Garfield* Plaintiffs' effort to establish standing relies in large part on activities and resources for which they lack a legally protected interest, which is fatal to their effort.

3. The State cannot demonstrate standing based on alleged lost revenue or similar allegations.

The *Garfield* Plaintiffs also allege that the Proclamations "deprive [the State] of revenue."[155] While these allegations at least identify a potentially cognizable injury,[156] they ultimately fail due to their speculative nature.

First, the State alleges that it will lose revenue because it receives "fees . . . tied to the number of grazing allotments in the State," and President Biden's "proclamations require the retirement of grazing allotments."[157] But as the State implicitly admits, the Proclamations do not themselves reduce the number of grazing allotments. Rather, they only provide that, should "grazing permits or leases be voluntarily relinquished by existing holders," the associated lands will be retired from grazing.[158] The State's speculation about possible future injury from other entities' voluntary relinquishment of a permit or lease is inadequate to demonstrate a certainly

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[153] *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1232 (10th Cir. 2012); *State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992); *Stewart v. Norton*, No. 2:06 CV 209, 2006 WL 3305409, at *4 (D. Utah Sept. 29, 2006), *aff'd sub nom. Stewart v. Kempthorne*, 554 F.3d 1245 (10th Cir. 2009) (grazing allotment) ("The Counties concede that their claimed injury cannot flow from a parens patriae interest in the outcome of the litigation").

[154] *Wyoming*, 674 F.3d at 1232.

[155] *Garfield* Am. Compl. ¶ 21.

[156] *See Mt. Evans Co. v. Madigan*, 14 F.3d 1444, 1451 (10th Cir. 1994).

[157] *Garfield* Am. Compl. ¶ 201. Utah also alleges that it "provides grants, loans and aid to ranchers to support grazing" but that "restrictions that accompany the reservations impede some of those State-funded projects." *Id.* ¶ 204. It is entirely unclear what this means—but in any case, the alleged injury would appear to be that of the grazing beneficiaries, not the State.

[158] GSENM Procl., 86 Fed. Reg. at 57346.

impending injury as of the date of the Complaint.[159] Furthermore, even if the State had adequately alleged injury from a reduction of grazing allotments, such injury would not be redressable, because the Court cannot order agencies to issue grazing permits.[160]

Similarly, the State alleges that it will lose revenue from "rare-earth-mineral, critical-mineral mining and other mining."[161] But, as an initial matter, the Proclamations do not bar all future mineral development within the monument boundaries.[162] Furthermore, the State's specific allegations of potential lost revenue tie directly to the 1996 Clinton Proclamation—which they do not challenge—and not to the Biden Proclamations,[163] and even that alleged harm has been overtaken by Congressional prohibition.[164] In contrast, the State has not clearly alleged

[159] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient") (quotations omitted); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 44–45 (1976) ("indirectness of injury . . . may make it substantially more difficult to meet the minimum requirement of Art. III") (quotation omitted).

[160] *See Bischoff v. Myers*, 216 F.3d 1086 (10th Cir. 2000) (finding that, even for owner of grazing leases, the loss of such leases "is not redressable in court because a court may not order the agency to perform what is a purely discretionary act"); *Baca v. King*, 92 F.3d 1031, 1037 (10th Cir. 1996) ("No court has the power to order the BLM or the Department of Interior to grant Mr. Baca another grazing lease, because the very determination of whether to renew grazing permits and whether public lands should even be designated for grazing purposes are matters completely within the Secretary of Interior's discretion") (citing 43 U.S.C. §§ 315, 315b).

[161] *Garfield* Am. Compl. ¶ 213.

[162] *See, e.g.*, BENM Procl., 86 Fed. Reg. at 57331 (providing that "[t]his proclamation is subject to valid existing rights"); GSENM Procl., 86 Fed. Reg. at 57345 (same); *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1149 (10th Cir. 2013) (noting that under prior Proclamation, "new mineral leasing within the monument is prohibited, although mineral development is permitted under *existing* leases").

[163] *Garfield* Am. Compl. ¶ 216 (alleging that State was projected to receive substantial direct and indirect revenues from the "high-grade coal" in GSENM, as reported in a 1998 House of Representatives report).

[164] *See* Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, § 408, 136 Stat. 49, 410–11 (2022) ("No funds provided in this Act may be expended to conduct preleasing, leasing and related activities under either the Mineral Leasing Act (30 U.S.C. 181 et seq.) . . . within the boundaries of a National Monument established pursuant to the Act of June 8, 1906 (16 U.S.C. 431 et seq.) as such boundary existed on January 20, 2001, except where such activities are allowed under the Presidential proclamation establishing such monument."); *see also*

supportable facts that the Biden Proclamations, by restoring the lands reserved for the two monuments, have (or imminently will) result in lost revenue to the State. For instance, Plaintiffs allude vaguely to "the Avalanche Mine," a mining claim they assert "is still held by a family unable to mine it due to the reservation."[165] But BLM's search of its records determined that the only claims to which Plaintiffs might be referring were located and staked in 2004—and closed in *2010*, after the claimant failed to pay annual fees.[166] So any implication that the mine would soon be operational (and revenue-generating), but for Proclamation 10,285, is unwarranted. Plaintiffs also allege that the "Spring Water mine on the eastern bank of South Cottonwood," estimated to hold over "one million pounds of uranium and up to millions of pounds of high-grade vanadium" is now "out of reach" because it is within monument boundaries.[167] But because the relevant claim was located in 2017 and remains active, it may qualify as valid existing rights under Proclamation 10,285, and if so, could be developed.[168] Thus, the State has not made any factual allegations to support its contention that that the Biden Proclamations have prevented any of the referenced mineral development projects. As such, the State fails to demonstrate any current, or "certainly impending," loss of revenue caused by either of the Proclamations.[169]

Finally, the State's allegation that it is harmed by being "forced to give up its own school trust lands within the reservations' boundaries" fails as a matter of law. The State voluntarily exchanged its School and Institutional Trust Lands Administration ("SITLA") lands within the

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Dept. of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107–63, § 331, 115 Stat 414 (2001) (same).

[165] *Garfield* Am. Compl. ¶ 218.

[166] Lundell Decl. ¶ 6.

[167] *Garfield* Am. Compl. ¶ 218.

[168] Lundell Decl. ¶ 7; *see also, e.g., Grand Canyon Tr. v. Provencio*, 26 F.4th 815, 819 (9th Cir. 2022) (upholding Forest Services' valid existing right determination, allowing uranium mine to resume operations on lands that had been withdrawn from location and entry under the mining laws).

[169] *Clapper*, 568 U.S. at 409.

boundaries of GSENM in 1998,[170] and the BENM Proclamation provides only that "the Secretary of the Interior shall explore entering into a memorandum of understanding with the State of Utah that would set forth terms, pursuant to applicable laws and regulations, for an exchange of land owned by the State of Utah . . . within the boundary of the monument."[171] The Court, therefore, may disregard the allegation that the Proclamation "forces" Utah to enter into a land exchange agreement.[172] Nor do the States' allegations that it was "impeded in its attempt to complete water development well projects" on SITLA lands in the Mancos Mesa and Grand Gulch areas have merit.[173] The BLM has received no applications from the State with respect to any such proposed projects.[174] Accordingly, these claimed injuries cannot support standing for the State.

4. The Counties cannot demonstrate standing based on alleged impairment of road maintenance and search and rescue activities.

The *Garfield* Plaintiffs also allege that the Counties have standing based on injuries relating to road maintenance and search and rescue activities. These allegations rely in large part on contentions regarding increased visitation which, as discussed above, are defective as to causation and redressability. However, to the extent the Counties claim that the Proclamations otherwise burden these activities, the allegations are also meritless.

[170] *See* Utah Schools and Land Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. at 3140 (explaining that "the State of Utah and the United States have reached an agreement under which the State would exchange all its State school trust lands within [GSENM] . . . for various Federal lands and interests in lands located outside the Monument").
[171] BENM Procl., 86 Fed. Reg. at 57332.
[172] *See, e.g., eCash Techs., Inc. v. Guagliardo*, 210 F. Supp. 2d 1138, 1144 n.7 (C.D. Cal. 2001) ("the Court may disregard allegations . . . if they are contradicted by facts established by reference to documents" relied on in the pleading and "the Court need not accept as true allegations that contradict facts which may be judicially noticed by the Court").
[173] *Garfield* Am. Compl. ¶¶ 200 & 234.
[174] Lundell Decl. ¶ 23.

The *Garfield* Plaintiffs allege that the Counties are impeded from "adequately maintaining and repairing roads within the [GSENM] reservation[]," relying on three specific instances.[175] Yet again, the allegations are not consistent with the facts. *First*, Plaintiffs claim that Kane County has been denied approval for culvert installation on House Rock Valley Road.[176] However, BLM did not outright deny Kane County's request—but rather instructed Kane County to seek approval for the project under Title V of FLPMA in 2019 before the Biden Proclamations issued.[177] Kane County has not yet done so, but that avenue remains available to it. *Second*, Plaintiffs allege that Garfield County sought to improve the surface of Hole in the Rock Road, but the request was denied, "due in part to President Biden's proclamation."[178] To the contrary, the project was not allowed to commence as requested under the terms of the applicable resource management plan and in light of pending Quiet Title Act litigation between the County and the United States—not Proclamation 10,286.[179] Furthermore, BLM similarly invited the County to seek permission for the project under Title V—and that invitation remains open (and, as of yet, not acted upon by the County).[180] *Third*, Plaintiffs allege that "[i]t takes sometimes up to a year for Kane County to perform simple maintenance fixes on [Cottonwood Canyon Road] because of the proclamation's restrictions."[181] BLM is aware of an instance where approximately a year passed between receiving a proposal for work on that specific road and Kane County completing it—but, as described in the Nelson Declaration, this was not a result of Proclamation 10,286.[182] Finally,

[175] *Garfield* Am. Compl. ¶ 223.
[176] *Id.*. ¶ 224.
[177] Nelson Decl. ¶¶ 6–7; *see also id.* ¶ 8 (BLM authorized road repair within BENM in March 2022).
[178] *Garfield* Am. Compl. ¶ 225.
[179] Nelson Decl. ¶¶ 9–12.
[180] *Id.* ¶ 10–12.
[181] *Garfield* Am. Compl. ¶ 226.
[182] Nelson Decl. ¶¶ 13–14.

Plaintiffs broadly allege that Kane County is no longer able to use materials from beside and near the roads it maintains on GSENM because, "[a]s a result of the reservations, this material is off-limits."[183] In fact, the GSENM Proclamation has not changed the availability of materials for use by Kane or Garfield County in road maintenance.[184] In sum, the *Garfield* Plaintiffs' allegations of injury to the Counties' road maintenance activities do not have a basis in fact.

Nor is there any basis for the Counties' claims of impairment of search and rescue operations. Plaintiffs allege that unidentified "federal agents" have "sought to prevent search-and-rescue personnel from entering closed roads, going off trails, and even from landing medical helicopters during search-and-rescue missions," "all in the name of protecting proclamation items."[185] Plaintiffs allege no specific instances of such conduct—and BLM has been able to identify none[186]—but even if the Court were to credit such allegations, they could not arise from the Biden Proclamations. To the contrary, the Proclamations explicitly authorize prior approaches to "emergency response activities."[187] Under these circumstances, the Counties' vague allegations are not sufficient to establish their standing.

B. The *Dalton* Plaintiffs fail to adequately allege standing.

The *Dalton* Plaintiffs challenge the two Biden Proclamations and their alleged implementation on nearly identical grounds as the *Garfield* Plaintiffs. The *Dalton* Plaintiffs include: (1) Zebediah George Dalton, owner of TY Cattle Company LLC, with operations in southwestern Utah; (2) Suzette Ranea Morris, a member of the Ute Mountain Ute Tribe, who resides in the vicinity of BENM; (3) Kyle Kimmerle, managing member of Kimmerle Mining

[183] *Garfield* Am. Compl. ¶ 223.
[184] Nelson Decl. ¶ 19.
[185] *Garfield* Am. Compl. ¶ 171.
[186] Nelson Decl. ¶ 16; Lundell Decl. ¶ 22.
[187] GSENM Procl., 86 Fed. Reg. at 57346; Establishment of BENM, 82 Fed. Reg. at 1145.

LLC, with mining interests in southeastern Utah; and (4) the BlueRibbon Coalition ("BRC"), a non-profit focused on protecting public recreation access to public lands.[188] As explained below, none of these Plaintiffs have standing.

1. Plaintiffs Dalton and Morris fail to adequately allege standing.

The *Dalton* Complaint fails to clearly allege facts establishing any standing for Plaintiffs Dalton and Morris.[189] Beginning with Mr. Dalton, he alleges that "three-quarters of [his] ranch is now within the Bears Ears National Monument."[190] His primary concern arises from his perception of the overly burdensome nature of federal regulation of his operations.[191] But much of this allegedly pervasive "federal regulation" predates the BENM Proclamation, as demonstrated by many of his specific examples.[192] In other instances, Mr. Dalton alleges newly increased regulatory burdens with respect to federal lands *outside* the Monument's borders. For example, Mr. Dalton complains about a recent BLM inquiry involving the hydrologic impact of two off-Monument wells,[193] and he complains that BLM informed him for the first time after the BENM Proclamation issued that he must apply for a formal right-of-way to cross certain off-Monument federal lands.[194] But neither of these alleged impositions involving land outside the Monument is caused by the challenged BENM Proclamation.[195]

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[188] *Dalton* Am. Compl. ¶¶ 12–15, 112, 127, 142.
[189] *Lujan*, 504 U.S. at 560; *Schaffer*, 240 F.3d at 883.
[190] *Dalton* Am. Compl. ¶ 149.
[191] *Id.* ¶¶ 152–55.
[192] *See id*. ¶ 152 (discussing "onerous" federal regulations before the monument was created); ¶ 158 ("*For years,* [Mr. Dalton] has tried to obtain permission . . ."") (emphasis added); ¶ 153 (alleging that it took 20 years for BLM approval of a fence); *see also* Declaration of Zebediah George Dalton ¶ 11, Docket no. 90-8, filed January 26, 2023 ("Dalton Decl.") (asserting that he is awaiting approval of 2016 application of 6 wells from BLM and 2018 application for 19 wells from Forest Service).
[193] *Dalton* Am. Compl. ¶ 161. In fact, Mr. Dalton never responded to BLM's request for information. Lundell Decl. ¶ 17.
[194] *Dalton* Am. Compl. ¶ 161.
[195] Lundell Decl. ¶¶ 17–18.

More generally, Mr. Dalton offers his personal belief that federal oversight will become even more onerous under the BENM Proclamation. But again, he fails to allege any supporting facts. For instance, he generally claims that before the BENM Proclamation, decisions regarding range improvements "were made in the ordinary course," but now "because of President Biden's proclamation," the standard and burden for obtaining approvals will become more onerous, and any applications will "be stalled so long as the Monument is in effect."[196] In fact, BLM has not denied any applications from Mr. Dalton since the issuance of Proclamation 10,285—and his only pending applications were submitted in 2018 and 2019—when the monument was defined by President Trump's 2017 Proclamation.[197] Thus, Mr. Dalton has not demonstrated any connection between BLM's treatment of those applications and the Proclamation challenged here.[198] Nor is there any basis for Mr. Dalton's claim that BLM review of such applications will "be stalled"; BLM continues to actively process requests for range improvements on lands within both monuments.[199]

Finally, Mr. Dalton expresses concern that the SITLA lands he uses for cattle grazing may be transferred to the United States, but this speculative injury cannot support standing.[200] As discussed above, the BENM Proclamation does not (and could not) mandate a land exchange.[201] Nor does it affect any private lands, as the Proclamation applies only to federal lands. Rather, any land exchange would, assuming that it was successfully negotiated between the United States and Utah, have to be approved through future action.[202] Because he has provided no allegations that

[196] *Dalton* Am. Compl. ¶¶ 154, 158.
[197] Lundell Decl. ¶¶ 14–16.
[198] *See id.* ¶ 13.
[199] *Id.* ¶¶ 12–13.
[200] *See Dalton* Am. Compl. ¶¶ 162–64.
[201] *See generally* BENM Procl., 86 Fed. Reg. at 57321–34.
[202] *See, e.g.,* Utah Schools & Lands Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. 3139 (approving prior land exchange between the United States and Utah).

such action is imminent (let alone that it would cause him concrete harm), these allegations cannot establish a "certainly impending" injury.[203] Mr. Dalton should be dismissed as a plaintiff.

The *Dalton* Plaintiffs similarly fail to allege facts demonstrating an actual injury to Ms. Morris. Ms. Morris, a member of the Ute Mountain Ute Tribe, alleges that she and her community "depend on ready access" to lands within BENM.[204] But nothing in the challenged Proclamation prevents Ms. Morris from visiting the federal lands comprising BENM. Ms. Morris next expresses concerns that the BENM Proclamation may prohibit gathering of firewood, cedar posts for the Bear Dance, "choke cherries, wild onions, sage, willows, sweet grass, yucca, medicinal herbs and the like."[205] But the challenged Proclamation expressly recognizes the continuing importance of such practices by tribal members like Ms. Morris, explaining:

> Resources found throughout the Bears Ears region, including wildlife and plants that are native to the region, continue to serve integral roles in the development and practice of indigenous ceremonial and cultural lifeways. From family gatherings, dances, and ceremonies held on these sacred lands, to gathering roots, berries, firewood, pinon nuts, weaving materials, and medicines across the region, Bears Ears remains an essential landscape that members of Tribal Nations regularly visit to heal, practice their spirituality, pray, rejuvenate, and connect with their history.[206]

Seeking to draw a distinction between the challenged Proclamation and President Obama's earlier Proclamation 9,558 establishing BENM, Ms. Morris then notes that the Obama Proclamation "protected Native American access for 'traditional cultural and customary uses,'"[207] and posits that the challenged Proclamation does not similarly accommodate Native American access and

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[203] *See Kan. Nat. Res. Coal. v. U.S. Dep't of Interior*, 971 F.3d 1222, 1234 (10th Cir. 2020) (allegations relating to an "analysis that has yet to take place," the outcome of which is unknown, "cannot show a certainly impending injury").
[204] *Dalton* Am. Compl. ¶ 174.
[205] *Id.* ¶¶ 174–75.
[206] BENM Procl., 86 Fed. Reg at 57323.
[207] *Dalton* Am. Compl. ¶ 175 (quoting Establishment of BENM, 82 Fed. Reg. at 1145).

uses.[208] In fact, the provision from Proclamation 9,558 protecting cultural and customary uses by individuals such as Ms. Morris is incorporated by reference in the challenged Proclamation.[209] Under these circumstances, the Amended Complaint fails to "clearly allege facts" supporting an actual, imminent injury to Ms. Morris (including with respect to her fear of prosecution).[210]

2. Plaintiff Kimmerle fails to adequately allege standing.

Plaintiff Kimmerle claims that he is principally harmed by the BENM Proclamation because the plan of operations for his Geitus mining claims will now be subject to a validity examination.[211] But this claimed injury is neither caused by any alleged deficiencies in the BENM Proclamation nor redressable through this lawsuit, because the Geitus claims are located on parcels of land containing "habitation structures . . . documented in recorded cultural sites corresponding to the Pueblo I–III periods (from approximately 750 to 1350 CE)."[212] Because the *Dalton* Plaintiffs do not allege that such archaic habitation structures are unprotectable under the Antiquities Act, and indeed concede that other habitation structures like Moon House are protectable under the Antiquities Act,[213] they cannot establish that Mr. Kimmerle's injury is

[208] BENM Procl., 86 Fed. Reg at 57323; *see also* Establishment of BENM, 82 Fed. Reg. at 1145 (requiring the Secretaries of the Interior and Agriculture, "to the maximum extent permitted by law and in consultation with Indian tribes . . . provide access by members of Indian tribes for traditional cultural and customary uses . . . including collection of medicines, berries and other vegetation, forest products, and firewood for personal noncommercial use….").
[209] *See* BENM Procl., 86 Fed. Reg. at 57332 (providing that Secretaries shall manage the monument under its terms and "unless otherwise specifically provided herein, those provided by Proclamation 9558, the latter of which are incorporated herein by reference").
[210] *Spokeo*, 578 U.S. at 338 (cleaned up); *see also Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006) (quoting *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004)) (plaintiff claiming injury from chilling effect of statute must establish "an objectively justified fear of real consequences" such as a "credible threat of prosecution"). The requirements under Tenth Circuit law for adequately alleging harm due to a pre-enforcement fear of prosecution are more fully discussed *infra* pp.45–47. Ms. Morris does not meet these standards because she has not established a credible threat of prosecution for engaging in cultural or customary uses.
[211] *Dalton* Am. Compl. ¶¶ 136–42.
[212] Lundell Decl. ¶¶ 8–9.
[213] *See Dalton* Am. Compl. ¶ 186.

caused by any alleged illegality in the BENM Proclamation. Nor can they establish that any plausible remedy in this litigation would redress Mr. Kimmerle's injury, because even if the Court were to find other aspects of the BENM Proclamation unlawful—whether based on the designation of an ineligible object or on an overly expansive reservation of lands relative to the designated Monument objects—the Proclamation's severability clause makes clear that the President intended for other valid elements of the Proclamation to remain in effect.[214]

Mr. Kimmerle's remaining injuries are similarly deficient. His claim that local mills would not refine the ore from another of his claims "because of political heat" is traceable to those third parties or the general political environment, not the challenged BENM Proclamation.[215] Also unavailing is his speculative assertion that the value of his non-Geitus mining claims has decreased because of the BENM Proclamation.[216] The Tenth Circuit has rejected far less conclusory allegations that the decisions of third-party commodity purchasers following government action are either caused by the government or redressable by judicial relief.[217]

3. BlueRibbon Coalition fails to adequately allege standing.

Plaintiff BRC is an organization that "work[s] to protect public recreation access to public lands."[218] An organization such as BRC can assert standing in two ways: First, it may have standing to bring suit on behalf of its members ("associational standing") "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the

[214] BENM Procl., 86 Fed. Reg. at 57333 ("If any provision of this proclamation, including its application to a particular parcel of land, is held to be invalid, the remainder of this proclamation and its application to other parcels of land shall not be affected thereby.").
[215] Decl. of Kyle Kimmerle ¶ 19, Docket no. 90-7, filed January 26, 2023 ("Kimmerle Decl.").
[216] Suppl. Decl. of Kyle Kimmerle ¶ 4, Docket no. 90-7, filed January 26, 2023 ("Supp. Kimmerle Decl.").
[217] *See Producers of Renewables*, 2022 WL 538185, at *5–9.
[218] *Dalton* Am. Compl. ¶ 13.

participation of individual members in the lawsuit."[219] Alternatively, an organization may assert standing on its own behalf ("organizational standing"), if it meets the standing requirements that apply to individuals.[220]

BRC cannot establish associational standing because the Amended Complaint's allegations do not establish that its members have standing. For instance, it alleges that the two monuments "gutted many local economies," causing harm to BRC's members—but it also describes these impacts as arising under the *original* creation of the two monuments.[221] Plaintiffs, therefore, cannot establish a "substantial likelihood" that the Biden Proclamations caused the alleged harm, which—by Plaintiffs' own admissions—commenced years before October 2021.[222] And it necessarily follows that vacating the Biden Proclamations and enjoining Defendants will not re-establish allegedly harmed local economies, creating significant redressability problems.[223] In addition, these alleged injuries relate to the BRC members' economic prospects, not to BRC's purpose of "protect[ing] public recreation access to public lands."[224] Injuries not germane to BRC's purposes cannot support BRC's associational standing.[225] For the same reason, allegations regarding the impact of BENM on BRC member Shane Shumeway's ranching, construction, and

[219] *Friends of the Earth, Inc*, 528 U.S. at 181.
[220] *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1397 (10th Cir. 1992).
[221] *See Dalton* Am. Compl. ¶¶ 85–93 (describing ways in which President Clinton's Proclamation "gutted many local economies" and resulted in changes to local communities based on people leaving or having to find jobs related to seasonal tourist industry); *id.* ¶ 95 (alleging harm cause by President Obama's Proclamation, including causing "a massive influx of visitors"). Any challenges to Proclamations that issued over six years ago are barred by 28 U.S.C. § 2401(a).
[222] *See Habecker*, 518 F.3d at 1225 (citation omitted).
[223] *See id.* (complaint must allege facts establishing that it would be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.").
[224] *Dalton* Am. Compl. ¶ 13.
[225] *See Friends of the Earth, Inc*, 528 U.S. at 181.

mining interests cannot support BRC's alleged standing, and the same is true of Ms. Griffith's allegations about impacts of the "monument-induced seasonal economy."[226]

Other allegations regarding injury to BRC members are also defective. For instance, BRC member Trail Hero allegedly runs a business, the "biggest function" of which is running an "annual off-roading event in Southern Utah."[227] The *Dalton* Plaintiffs allege that "[b]ut for the Monuments, we would be bringing Trail Hero to other places in Utah—for instance, the Hole in the Rock Road."[228] But they do not allege that an application was ever made for the Trail Hero event to occur on either GSENM or BENM—let alone that such an application was denied. Plaintiffs' vague statements of allegedly thwarted, potential future plans are therefore insufficient to describe an actual, imminent injury.[229]

Furthermore, Trail Hero's belief that it necessarily will not receive permission for any event on Monument lands is indisputably speculative because BLM continues to allow other organized rides within monument boundaries after the Biden Proclamations issued. For instance, in 2022, BLM both renewed a special recreation permit ("SRP") that allows off-highway vehicle (OHV) tours within BENM and authorized OHV tours in GSENM.[230]

The president of the Utah/Arizona ATV Club ("Club") nonetheless complains that BLM issued "permits" allowing the Club to "host a large group ride along Inchworm Arch Road (and

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[226] *Dalton* Am. Compl. ¶¶ 10, 88, 91, 117.
[227] *See* Suppl. Declaration of Richard Klein ¶ 4, Docket no. 90-4, filed January 26, 2023 ("Klein Suppl. Decl.").
[228] *Dalton* Am. Compl. ¶ 112 and Klein Suppl. Decl. ¶ 6. *See also* Klein Suppl. Decl. ¶ 4 (asserting that Trail Hero has "consider[ed]" "locations now within the Monuments for possible events" but have been "deterred from doing so because of the higher regulatory burden that currently attaches to hosting events on monument lands")
[229] *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").
[230] Lundell Decl. ¶¶ 20–21; Nelson Decl. ¶¶ 25, 30.

other trails) as part" of their annual "Jamboree" in 2020 and 2021, but withheld the same permission in 2022.[231] Not so. In 2015, BLM granted the Club an SRP—with a ten year term—allowing the Club's once-a-year event on specific roads within GSENM designated in the operating plan submitted by the Club.[232] On an annual basis, BLM would issue an "Operating Authorization" under that SRP.[233] But the use of the Inchworm Arch Road was never included within the permission granted by BLM—for 2020, 2021, 2022—or any other year because the Club's 2015 operating plan did not include Inchworm Arch Road.[234] So Plaintiffs' attempt to tie the Biden Proclamations to any permit denial involving Inchworm Arch Road is baseless.

The Amended Complaint also alleges that other members, such as Brent Johansen and Simone Griffith are harmed due to closures of roads or areas within BENM and GSENM respectively.[235] However, the *Dalton* Plaintiffs fail to allege that any of these named individuals has previously used a specific road or campsite that they allege is now closed as a result of the Biden Proclamations. These allegations are therefore inadequate.[236] Indeed, by their terms, neither of the Biden Proclamations closes any roads. Plaintiffs instead merely speculate about what the "future" may "portend" when the agencies adopt monument management plans,[237] but such speculation falls short of Plaintiffs' burden to show a "*certainly impending*" injury.[238] To the

[231] *Dalton* Am. Compl. ¶¶ 106–108.
[232] Nelson Decl. ¶ 22.
[233] *Id.* ¶ 23. However, contrary to Plaintiffs' allegation, BLM did not do so in 2020, because Kane County and the Club cancelled the Jamboree due to the Covid epidemic. *Id.* ¶ 24 & Ex. P.
[234] *Id.* ¶¶ 22, 25–29.
[235] *Dalton* Am. Compl. ¶¶ 115, 120; *see also* Decl. of Brent Johansen ¶ 5, Docket no. 90-5, filed January 26, 2023 ("Johansen Decl.") (alleging that unidentified "[r]oad and trails are being closed, denying access. Favorite camping spots are being closed").
[236] *See Summers*, 555 U.S. at 499 ("[P]laintiffs must show that they 'use the area affected by the challenged activity and not an area roughly in the vicinity of' a project site….") (quoting *Lujan*, 504 U.S. at 566).
[237] *Dalton* Am. Compl. ¶ 83.
[238] *See Clapper*, 568 U.S. at 409 ("allegations of *possible* future injury are not sufficient" (cleaned up)).

extent the Amended Complaint identifies specific roads or off-roading areas as being closed, the allegations either are false because the referenced roads and areas remain open (as in the case of the Little Desert OHV area, the Kitchen Corral road, and Inchworm Arch road)[239] or their closed status predated the Biden Proclamations (as in the case of Park Wash, Deer Springs Wash, and Paria Canyon).[240]

Seeking to cure this defect, the *Dalton* Plaintiffs now allege that BRC members are injured because "the proclamations' broad language has created a specter of legal liability that has chilled members . . . from riding on monument lands as they did before."[241] But under Tenth Circuit precedent, to establish standing based on the alleged chilling effect of a law, "a plaintiff must typically demonstrate (1) 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the challenged] statute,' and (2) that 'there exists a credible threat of prosecution thereunder.'"[242] Thus, "mere allegations of a subjective chill are 'not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'"[243] The plaintiff's conduct "must be inhibited by 'an objectively justified fear of real consequences, which can be satisfied by showing a credible threat of prosecution or other consequences following from the statute's enforcement.'"[244]

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[239] Decl. of Harry Barber ¶¶ 7–9, 11 ("Barber Decl.").
[240] Barber Decl. ¶ 10; Nelson Decl. ¶ 31.
[241] *Dalton* Am. Compl. ¶¶ 123–24.
[242] *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 545 (10th Cir. 2016) (alteration in original) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)). Although Plaintiffs are not directly challenging the enforcement provision of the Antiquities Act itself, *see* 18 U.S.C. § 1866(b), that provision allegedly gives rise to their fear that they could be prosecuted for impacting objects protected by the Proclamations. *Dalton* Am. Compl. ¶ 123. The framework for analyzing standing for a pre-enforcement challenge to a statute is therefore appropriate.
[243] *D.L.S.*, 374 F.3d at 975 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)).
[244] *Winsness*, 433 F.3d at 732 (quoting *D.L.S.*, 374 F.3d at 975).

The BRC members' alleged fears satisfy neither requirement. First, the *Dalton* Plaintiffs do not allege that they have a constitutional right or any other right to off-road recreation on the monuments.[245] BRC members thus lack a protected interest sufficient to justify pre-enforcement review of the Proclamations. But even if BRC members did have a constitutional interest in off-road vehicle recreation (or could present a pre-enforcement challenge without one), the allegations do not establish a credible threat of prosecution. The Amended Complaint's speculation that BRC members could be prosecuted for "altering" the monuments' landscapes by driving their vehicles over them has no basis in law or experience.[246] There is no allegation that anyone—let alone any member of BRC—has ever been prosecuted (or threatened with prosecution) under the Antiquities Act for driving a vehicle or engaging in similar recreational activity on monument land.[247] To the contrary, past prosecutions have involved excavation and appropriation of artifacts.[248] Indeed, Plaintiffs' fears are even more farfetched in light of their desire to ride on land that remains "nominally open after the Proclamations."[249] All areas in both monuments that were previously

[245] *See, e.g., Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1350 (11th Cir. 2011) (plaintiff's desire to "admit patrons under twenty-one while also serving alcohol" was "not constitutionally protected" activity that could support pre-enforcement review of statute); *Brady Campaign to Prevent Gun Violence v. Brownback*, 110 F. Supp. 3d 1086, 1099-100 (D. Kan. 2015) (mayor's "participation in enforcing federal gun control laws" was "not arguably affected with a constitutional interest"); *Jones v. Schneiderman*, 101 F. Supp. 3d 283, 289 n.4 (S.D.N.Y. 2015) (engaging in mixed martial arts competitions was not constitutionally protected conduct).
[246] *Dalton* Am. Compl. ¶ 123.
[247] *See Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1154 (9th Cir. 2017) ("[W]e look to whether the plaintiffs have articulated a concrete plan to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute." (citation omitted)); *Tingley v. Ferguson,* 47 F.4th 1055, 1067 (9th Cir. 2022) ("Neither the mere existence of a proscriptive statute nor a generalized threat of prosecution" suffices. (citation omitted)).
[248] *See, e.g., Black Hills Inst. of Geological Rsch. v. U.S. Dep't of Just.*, 967 F.2d 1237, 1239 (8th Cir. 1992) (T-Rex bones); *United States v. Smyer*, 596 F.2d 939, 940 (10th Cir. 1979) ("prehistoric Mimbres ruin at an archaeological site"); *United States v. Jones*, 607 F.2d 269, 270 (9th Cir. 1979) ("clay pots, bone awls, stone metates and human skeletal remains"); *United States v. Diaz*, 499 F.2d 113, 114 (9th Cir. 1974) (face masks on Indian Reservation).
[249] *Dalton* Am. Compl. ¶ 123.

available for all-terrain vehicle use remain so, and a BLM official has disclaimed any new mandatory restrictions even in areas where the BLM has requested that the public refrain from off-highway travel.[250] Where, as here, the plaintiffs merely speculate about a novel form of enforcement,[251] but have not themselves been threatened with prosecution,[252] and indeed have been assured that their conduct is permissible,[253] the prospect of prosecution is not credible enough to support standing. In sum, because the Amended Complaint does not allege any actual and imminent injury facing BRC's members, it fails to establish that BRC has associational standing.

BRC's attempt to allege organizational standing also fails. As noted above, an "organization has standing on its own behalf if it meets the standing requirements that apply to individuals."[254] In doing so, it must show more than "simply a setback to the organization's abstract social interests."[255] Rather, it must show a "concrete and demonstrable injury to the organization's activities."[256] In some cases, this showing can be supported by a "consequent drain

[250] Barber Decl. ¶¶ 9–11.
[251] *Poe v. Ullman*, 367 U.S. 497, 507-08 (1961) (explaining that "[e]ighty years of Connecticut history" demonstrated the state had "not chosen to press the enforcement of this statute"); *Colo. Outfitters Ass'n*, 823 F.3d at 554 (finding threat insufficiently credible where new state gun regulation "technically 'criminalize[d]' some of the sheriffs' job duties" but prosecution was not a priority (internal citation omitted)); *cf. Blum v. Yaretsky*, 457 U.S. 991, 1000–01 (1982) (finding threat that nursing home residents would be discharged "realistic" due to "similar determinations already made by the committee of physicians").
[252] *See, e.g., Younger v. Harris*, 401 U.S. 37, 41–42 (1971) (finding no standing where plaintiffs "d[id] not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible").
[253] *Faustin v. City, Cnty. of Denver*, 268 F.3d 942, 948 (10th Cir. 2001) (finding that plaintiff lacked standing "[i]n light of the city prosecutor's determination that [she] was not violating the posting ordinance").
[254] *Romer*, 963 F.2d at 1396.
[255] *Id*. at 1397 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).
[256] *Id.* (citation omitted).

on the organization's resources."[257] However, the mere "expenditure of resources on advocacy is not a cognizable Article III injury."[258]

BRC fails to establish organizational standing under these principles. It alleges that the Biden Proclamations forced it to divert resources from its core programs—such as working toward "securing, protecting, and expanding shared outdoor recreation access" to "new efforts designed to educate members and other stakeholders about the consequences and regulations of the two national monuments at issue here."[259] This allegation lacks plausibility on its face: the monuments are not newly-formed. GSENM has existed since 1996, and BENM has existed since 2016.[260] Further, although the boundaries of both monuments were reduced during a period from late 2017 to 2021, they still collectively encompassed approximately 1.11 million acres and have existed, albeit in a reduced state, since their respective establishments.[261] Even setting this factual implausibility aside, however, Plaintiffs' alleged new activities do not appear to be a diversion from its core activities, e.g., "securing, protecting, and expanding shared outdoor access," which activities, in any case, are the type of advocacy expenditures and self-inflicted budgetary choices that courts have refused to recognize as "cognizable Article III injury."[262]

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[257] *Id.* (citation omitted).
[258] *See Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 23–24 (D.C. Cir. 2015); *see also Animal Leg. Def. Fund v. Kelly*, 434 F. Supp. 3d 974, 996 (D. Kan. 2020) (finding that plaintiff organization's decision to "channel money from certain programs into others, in response to the Act, is a 'self-inflicted budgetary choice'" (internal citation omitted)), *aff'd*, 9 F.4th 1219 (10th Cir. 2021); *Equal Means Equal v. Ferriero,* 478 F. Supp. 3d 105, 123 (D. Mass. 2020) (holding that alleged "policy and advocacy based injuries" based on the expenditure of "significant resources educating, advocating and communicating with the public around the country to counteract Defendant's unlawful actions" were insufficient to establish the plaintiff organizations' injury (internal quotations and citation omitted)), *aff'd,* 3 F.4th 24 (1st Cir. 2021).
[259] *Dalton* Am. Compl. ¶ 124.
[260] *Id.* ¶¶ 56 & 67.
[261] *See id.* ¶¶ 57-58, 69, pp.18 & 22.
[262] *See Turlock Irrigation Dist*., 786 F.3d at 24; *Animal Leg. Def. Fund*, 434 F. Supp. 3d at 996.

BRC's allegations that the "Monuments have also directly interfered with [its] initiatives"[263] are equally unavailing. Plaintiffs allege only that BRC has recently started "the Dispersed Camping Access Alliance," which "advocates in favor of dispersed camping."[264] The nature of this endeavor is unclear at best, but the Amended Complaint contains no facts demonstrating that BRC is somehow no longer able to continue "advocating" with respect to dispersed camping. Instead, BRC's claimed injury appears to be that BRC believes future management of the monuments may be inconsistent with its policy preferences. Such a concern—of a potential future "setback to the organization's abstract social interests"—is neither sufficiently imminent nor concrete to describe an actual injury for Article III.[265] Accordingly, the Amended Complaint also fails to clearly allege facts that could establish organizational injury to BRC.

III. Plaintiffs' Claims Should Be Dismissed For Failing To Identify Improperly Designated Lands With Sufficient Particularity.

Even if the Court could review the President's discretionary judgments under the Antiquities Act and Plaintiffs established standing to bring such claims, their challenges to the Biden Proclamations must still be dismissed for failure to state a claim upon which relief can be granted. As the D.C. Circuit explained in *Tulare County v. Bush*,[266] a plaintiff lodging an Antiquities Act challenge must, at a minimum, direct the court with specificity to the lands that are allegedly designated without statutory authority to survive Rule 12(b)(6). In that case, for example, the plaintiffs alleged that President Clinton had violated the Antiquities Act by reserving too much land when creating the Grand Sequoia National Monument. But the D.C. Circuit upheld the dismissal of their complaint for "fail[ing] to identify the improperly designated lands with

[263] *Dalton* Am. Compl. ¶ 125.
[264] *Id*.
[265] *See Romer*, 963 F.2d at 1397 (citation omitted).
[266] 306 F.3d 1138, 1142 (D.C. Cir. 2002).

sufficient particularity to state a claim."[267] The court explained that their claim "depend[ed] on the proposition that parts of the Monument lack scientific or historical value," an issue that required specific factual allegations identifying the allegedly improperly reserved land.[268] Thus, Plaintiffs' must meet the threshold pleading requirement of specifically identifying reserved parcels of land lacking historic or scientific value that cause their injury.

Here, Plaintiffs have failed to provide adequate allegations that any relevant portion of either monument lacks historic or scientific value. The *Garfield* Plaintiffs fail to make nonconclusory—or even consistent—allegations that any areas of either monument lack historic or scientific value. Although they include two maps allegedly demonstrating that "vast expanses of terrain are not justified by any likely qualifying items or by their proper care and management,"[269] these maps omit numerous indisputable objects of historic or scientific interest. For example, their Bears Ears map omits the Grand Gulch—a canyon "replete with thousands of cliff dwellings and rock writing sites"[270]—that Congress specifically cited when enacting the Antiquities Act.[271] Similarly, their Grand Staircase-Escalante map omits numerous fossil sites for "taxa that are entirely new to science, including a vast array of horned dinosaurs, such as the *Nasutoceratops*, *Kosmoceratops*, and *Utahceratops*, a new species of *Gryposaurus* possessing a more robust skull, a new raptor, and the tyrannosaurid *Teratophoneus*."[272] Because both Grand Gulch and these unique fossil sites indisputably qualify for protection under the Antiquities Act, the Court should not credit the *Garfield* Plaintiffs' conclusory allegation about vast expanses of terrain lacking qualifying items. The Court should similarly reject the *Garfield* Plaintiffs'

[267] *Id.*
[268] *Id.*
[269] *Garfield* Am. Compl. ¶ 347.
[270] BENM Procl., 86 Fed. Reg. at 57329.
[271] H.R. Rep. No. 59-2224, at 5 (1906).
[272] GSENM Procl., 86 Fed. Reg. at 57340.

conclusion as "self-contradictory,"[273] because they provide no explanation for their inconsistent allegations that certain historic structures—Doll House and Moon House—likely qualify for protection, while other historic structures—House on Fire and River House—do not.[274]

The *Dalton* Plaintiffs attempt to meet this burden by providing conclusory allegations that Mr. Dalton's grazing allotment and Mr. Kimmerle's mining claims—to the best of those Plaintiffs' knowledge—"do not include any 'objects' of historic or scientific interest, as understood under the Antiquities Act."[275] Because the ambiguous reference to the legal standard—"'objects' . . . as understood under the Antiquities Act"[276]—strips any factual content from these allegations, such bare legal conclusions fail to state a plausible claim for relief.[277] The *Dalton* Plaintiffs notably do not assert that there are no historic structures or landmarks on Mr. Dalton's allotment or Mr. Kimmerle's mining claims. And the Court can judicially notice that Mr. Dalton's allotment encompasses portions of the historic Hole-the-Rock trail and Salvation Knoll, a landmark "from which lost Latter-day Saint pioneers were able to obtain their bearings on Christmas Day in 1879" during the Hole-in-the-Rock expedition.[278] Because the *Dalton* Plaintiffs do not allege sufficient factual content from which the Court could find it plausible that Mr. Dalton's allotment or Mr. Kimmerle's mining claims lack historic or scientific value, the Court should dismiss their challenges under *Tulare County*, particularly in light of the "unique density of significant cultural, historical, and archaeological artifacts" in BENM.[279]

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[273] *Frappied v. Affinity Gaming Black Hawk*, LLC, 966 F.3d 1038, 1053 (10th Cir. 2020).
[274] *Compare Garfield* Am. Compl. ¶ 322, *with id.* ¶ 312.
[275] *Dalton* Am. Compl. ¶¶ 148, 168.
[276] *Id.* ¶ 5.
[277] *See Iqbal*, 556 U.S. at 678.
[278] BENM Procl., 86 Fed. Reg. at 57328; *see also* Kenneth Mays, *Picturing history: Salvation Knoll*, Deseret News (Mar. 8, 2017).
[279] BENM Procl., 86 Fed. Reg. at 57321.

Rather than meet these straightforward pleading standards by identifying specific parcels of reserved land that allegedly cause their injury and lack historic or scientific value, Plaintiffs instead suggest that they can state a claim merely by identifying a single designated "object" that does not qualify for protection under the Antiquities Act, because that in turn would compel a finding that the corresponding reservation of land was broader than necessary to provide for the proper care and management of "valid" monument objects.[280] But, as an initial matter, Plaintiffs' proposed approach overlooks that "[i]f any provision of this proclamation, including its application to a particular parcel of land, is held to be invalid, the remainder of this proclamation and its application to other parcels of land shall not be affected."[281] Thus, for example, even were Plaintiffs to prevail on their argument that landscapes cannot be objects of historic or scientific interest, the monument status of the remaining objects of interest—such as archaeological and paleontological sites—would not be disturbed. And given both the distribution[282] and density[283] of these remaining objects, Plaintiffs have provided no plausible allegation that the reservation of land would change.

Moreover, even setting aside severability, no court has ever sanctioned such a sweeping approach to judicial review of Presidential actions under the Antiquities Act, under which even a single invalid object designation would invalidate an entire proclamation. This Court should decline to do so because, even without separate smallest area determinations for each designated object, the challenged Proclamations reflect Presidential intent to, at a minimum, reserve parcels

[280] *E.g.*, *Dalton* Am. Compl. ¶ 6.
[281] *E.g.*, BENM Procl., 86 Fed. Reg. at 57333.
[282] *See supra* pp.5–6.
[283] *E.g.*, BENM Procl., 86 Fed. Reg. at 57321 (describing "the landscape's unique density of significant cultural, historical, and archaeological artifacts spanning thousands of years…."); GSENM Procl., 86 Fed. Reg. at 57336 ("Scientists have utilized every corner of the monument in their efforts to better understand our environment, our history, our planet's past, and our place in the universe.").

of land containing any of the designated objects of interest pursuant to the Antiquities Act.[284] Such Presidential actions "pursuant to an Act of Congress [are] supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack" them.[285] Given the strong presumption in favor of Presidential actions pursuant to express Congressional authorization, the Court should hold Plaintiffs to the threshold pleading requirement to specifically identify reserved parcels of land lacking historic or scientific value that cause their injury.[286] Plaintiffs' requested approach, on the other hand, "would produce needless head-on confrontations between district judges and the Chief Executive."[287] If all it took to challenge a Presidential Proclamation under the Antiquities Act were disagreement with a single object designation coupled with an interest somewhere (anywhere) in the reserved lands, district courts would confront numerous challenges asking them to review Presidential judgments about which objects are sufficiently interesting from a historic or scientific standpoint to merit monument protections.[288] Because the Court should be most reluctant to "substitute its judgment for that of the President, . . . in an arena in which the congressional intent most clearly manifest is . . . to delegate decision-making to the sound discretion of the President,"[289] the Court should be especially "sensitive to pleading requirements."[290]

[284] *See* BENM Procl., 86 Fed. Reg. at 57333.
[285] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
[286] *See Tulare Cnty.*, 306 F.3d at 1142.
[287] *Franklin*, 505 U.S. at 828 (Scalia, J., concurring).
[288] *See, e.g.*, *Garfield* Am. Compl. ¶¶ 272, 276 (asking the Court to determine which objects are "socially momentous or had an assured place in history").
[289] *Utah Ass'n of Counties*, 316 F. Supp. 2d at 1186.
[290] *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002).

IV. Plaintiffs Have Failed To State A Claim For Violation Of The Antiquities Act Because Their Claims Fail As A Matter Of Law.

Given Plaintiffs' failure to identify any specific portions of either monument that allegedly lack archaeological artifacts, and in light of the density of archaeological artifacts described in both Proclamations, the Court need not consider on the merits whether other types of "objects" qualify for designation. Should the Court do so, however, those claims fail on merits, as explained below. No court has ever invalidated a Presidential designation of a monument for violating the Antiquities Act, and this Court should decline to be the first. The Court should dismiss Plaintiffs' claims for contradicting the plain text of the Antiquities Act, overlooking on-point Supreme Court precedent, and mischaracterizing the challenged Proclamations.

A. The President's Antiquities Act authority is not confined to protecting archaeological objects.

Plaintiffs first assert that the President's delegated authority to designate "objects of historic or scientific interest" should be limited to archaeological antiquities.[291] The Court should reject this argument for contradicting the plain text of the Antiquities Act and Supreme Court precedent.

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."[292] But they ask the Court to cabin this "broad" language to cover only "relics or monuments of ancient times," such as "a coin" or "a statue."[293] Nothing in the text of the Antiquities Act suggests such a limitation—indeed, many "objects of . . . scientific interest" come from the natural world and not from human creations of "ancient times." And, in any event, the Supreme Court already rejected

[291] *E.g.*, *Garfield* Am. Compl. ¶¶ 41, 46–49.
[292] *Garfield* Compl. ¶¶ 234–35.
[293] *Garfield* Am. Compl. ¶ 282.

the parallel argument that, under the Antiquities Act, "the President may reserve federal lands only to protect archeologic sites."[294] Instead, the Court held that the Grand Canyon qualified as "an object of unusual scientific interest,"[295] and that both a rare species and its habitat "are 'objects of historic or scientific interest,'" under the Antiquities Act.[296] Plaintiffs provide no reasoned basis to disregard the Supreme Court's holdings on this topic.

B. Species and their habitats can be "objects of historic or scientific interest."

The Court should also reject Plaintiffs' argument that the challenged habitats or species cannot constitute "objects of historic or scientific interest."[297] Like Plaintiffs' prior argument, this claim defies the text of the Act—as confirmed by its earliest application[298]—and Supreme Court precedent. In *Cappaert*, the Court stated that rare "fish" were "features of scientific interest," and upheld Presidential action finding that "the natural habitat of the species" should also "be preserved."[299] Similar to the species and habitat at issue in *Cappaert*, the challenged Proclamations protect rare or endemic species and habitat found almost nowhere else.[300] The

[294] *Cappaert v. United States*, 426 U.S. 128, 141–42 (1976).
[295] *Cameron v. United States*, 252 U.S. 450, 455–56 (1920).
[296] *Cappaert*, 426 U.S. at 141–42.
[297] *E.g.*, *Garfield* Am. Compl. ¶¶ 283, 293–95; *Dalton* Am. Compl. ¶ 5
[298] One of the earliest monuments was established by President Theodore Roosevelt to protect elk habitat as an object of "unusual scientific interest." Mount Olympus National Monument, 35 Stat. 2247 (1909).
[299] *Cappaert*, 426 U.S. at 141.
[300] *E.g.*, BENM Procl., 86 Fed. Reg. at 57328 (the Valley of the Gods "provides habitat for *Eucosma navajoensis*, an endemic moth that lives nowhere else"); GSENM Procl., 86 Fed. Reg. at 57337 (describing the "high number of endemic species" in "the Grand Staircase-Escalante landscape, which contains 50 percent of Utah's rare flora and 125 species of plants that occur only in Utah or on the Colorado Plateau"); *id.* at 57341 (the Smoky Mountain area is "home to a number of rare and endemic plant species, including Atwood evening primrose and Smoky Mountain globemallow"); *id.* at 57342 ("Cottonwood Canyon and the nearby Rimrocks area are home to a number of rare plants, such as the Tropic goldeneye and Atwood's pretty phacelia. . . . and is home to a number of rare bee species as well as a number of hot desert endemic species of bees . . . ."); *id.* at 57343 (the Grand Staircase area contains "rare and endemic plant species, such as the Higgins spring parsley and Kane breadroot").

Proclamations describe the relationships between these rare species and unique characteristics of the reserved land, explaining how the habitat has affected the species, similar to how the underground pool affected the fish in *Cappaert*:

> An abundance of unique, isolated plant communities can be found, such as hanging gardens, tinajas, and rock crevice, canyon bottom, and dunal pocket communities. Large expanses of various exposed geologic strata, each with unique physical and chemical characteristics, have resulted in a spectacular array of unusual and diverse soils, including desert pavement and biological soil crusts, which support a wide range of vegetative communities, such as relict plant communities that have existed since the Pleistocene, and a multitude of endemic plants and pollinators. For example, lands within the Grand Staircase-Escalante landscape contain an astounding biodiversity of bees due, in large part, to the substantial elevational gradient, diversity of habitats, and abundance of flowering plants. The area is home to hundreds of bee species, including dozens of species that are believed to be unique to this landscape. Many of the species found in the Grand Staircase-Escalante region are highly localized, with small populations occurring in only a few locations or near certain flowering plants.[301]

Despite the *Cappaert* precedent, Plaintiffs contend that species cannot be considered "objects . . . that are situated on land."[302] "Situated" means "[h]aving a site, situation, or location; being in a relative position; permanently fixed; located"[303] and "residing."[304] At a minimum, species such as the "*Eucosma navajoensis*, an endemic moth that lives nowhere else" plainly "reside" or are "located" in that unique habitat. Accordingly, the Court should dismiss Plaintiffs' challenge to the inclusion of species, habitat, and ecosystems in the challenged Proclamations.[305]

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[301] GSENM Procl., 86 Fed. Reg. at 57337.
[302] *Dalton* Am. Compl. ¶ 182; *Garfield* Am. Compl. ¶ 293.
[303] Webster's New International Dictionary of the English Language 1965 (G. & C. WEBSTER, 1917).
[304] Webster's Practical Dictionary 388 (1906).
[305] *See Tulare Cnty.*, 306 F.3d at 1141–42 (dismissing challenge to Proclamation including ecosystems).

C. The Bears Ears and Grand Staircase-Escalante landscapes qualify as "objects of historic or scientific interest."

The Court should also reject Plaintiffs' challenge to the designation of the GSENM and BENM landscapes as objects of historic or scientific interest. President Biden appropriately designated the BENM landscape as an object of interest, given the "the landscape's unique density of significant cultural, historical, and archaeological artifacts spanning thousands of years, including remains of single family homes, ancient cliff dwellings, large villages, granaries, kivas, towers, ceremonial sites, prehistoric steps cut into cliff faces, and a prehistoric road system that connected the people of Bears Ears to each other and possibly beyond."[306] Indeed, the BENM landscape was instrumental to the passage of the Antiquities Act, as the legislative history specifically notes the importance of protecting the "very numerous" ruins along "Cottonwood Creek, Butler Wash, Comb Wash, and Grand Gulch," even though "[c]omparatively little" was known about these ruins at this time.[307] Rather than protect these numerous ruins individually, Congress considered protecting them by "principal groups or districts of ruins of each great culture area," such as that along the "great basins" of rivers like the San Juan.[308]

Similarly, President Biden appropriately designated the GSENM landscape as an object of interest because "in the 25 years since its [initial] designation [in 1996], Grand Staircase-Escalante has fulfilled the vision of an outdoor laboratory with great potential for diverse and significant scientific discoveries. During this period, hundreds of scientific studies and projects have been conducted within the monument, including":

> investigating how the monument's geology provides insight into the hydrology of Mars; discovering many previously unknown species of dinosaurs, some of which have become household names; unearthing some of the oldest marsupial fossils ever identified; conducting extensive inventories of invertebrates, including the

[306] BENM Procl., 86 Fed. Reg. at 57321.
[307] H.R. Rep. No. 59-2224, at 5.
[308] *Id.* at 3.

> identification of more than 600 species of bees, some of which likely exist nowhere else on Earth; performing hydrologic research in the Escalante River and Deer Creek; studying and restoring habitat for amphibians, mammals, and bird species, including the reintroduction of bighorn sheep and pronghorn to their native range; completing rangeland science assessments, including a complete Level III soils survey; carrying out widespread archaeological surveys that have documented important sites and rock writings; and implementing social science projects related to visitor experiences and impacts. New scientific discoveries are likely just around the corner; for example, scientists have collected thousands of specimens of invertebrates from the monument that await further study and are expected to yield new species that are endemic to the monument.[309]

As the GSENM Proclamation explains, "[s]cientists have utilized every corner of the monument in their efforts to better understand our environment, our history, our planet's past, and our place in the universe."[310] Given the extensive use of GSENM as an outdoor laboratory, protection of the landscape as an object of scientific interest is appropriate.

Plaintiffs nonetheless focus on the size of the landscapes, suggesting that a sizeable landscape cannot be an object protected by the Antiquities Act.[311] To begin, nothing in the statutory text supports that assertion. On the contrary, the Act provides that a President may designate a monument containing any object of historic or scientific interest, regardless of size.

Even assuming the size of a monument bears on the legality of the President's Antiquities Act designation, there is nothing remarkable about the size of the two Monuments challenged here. National monuments "vary widely in size . . . . from less than 1 acre to about 283 million acres."[312] At roughly 1.35 million and 1.87 million acres, respectively, BENM and GSENM fall comfortably within this range. They are comparable in size to the 0.8-million-acre Grand Canyon National

[309] GSENM Procl., 86 Fed. Reg. at 57335–36.
[310] *Id.* at 57336.
[311] *E.g.*, *Garfield* Am. Compl. ¶ 336 (comparing smaller national monuments).
[312] Congressional Research Service, National Monuments and the Antiquities Act 4 (2022), https://sgp.fas.org/crs/misc/R41330.pdf.

Monument approved by the Supreme Court in *Cameron*. And even before President Biden's proclamations, these Monuments collectively reserved 1.11 million acres of land.

Even more conclusively, Congress responded to the original GSENM boundary of approximately 1.7 million acres by *expanding* the Monument to include 180,000 additional acres.[313] Thus, even assuming size were a relevant factor, Congress has spoken to indicate that at least GSENM is appropriately sized at 1.87 million acres.

D. Plaintiffs have failed to demonstrate that the Proclamations protect "generic" objects.

The Court should dismiss Plaintiffs' claim that the challenged Proclamations designate allegedly "generic" objects of interest.[314] This claim fails at the outset. Neither Proclamation uses the term "generic," and there is no basis in either Proclamation to conclude that the President sought to protect so-called "generic" objects.[315] The *Garfield* Amended Complaint demonstrates that Plaintiffs are taking Proclamation statements out of context to manufacture "generic" objects. For example, the *Garfield* Plaintiffs complain that the "cliffs of the Grand Staircase" are "generic geological items . . . with no indication of their past specific significance."[316] But the GSENM Proclamation describes the geological, paleontological, and archaeological significance of these cliffs at length.[317]

Even had Plaintiffs successfully identified contextually "generic" items in the Proclamations—such as "ancient cliff dwellings; ceremonial sites; countless other artifacts;

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[313] *See supra* p.3 & n.3.
[314] *E.g.*, *Garfield* Am. Compl. ¶¶ 306–310.
[315] *See supra* pp.4–8.
[316] *Garfield* Am. Compl. ¶¶ 299–301.
[317] GSENM Procl., 86 Fed. Reg. at 57343; *see also* 61 Fed. Reg. at 50223 (describing how these cliffs form a "vast geologic stairway").

baskets; pottery; weapons; remains of single family dwellings"[318]—those items would still be protectable under the Antiquities Act, as Congress explained: "Every cliff dwelling, every prehistoric tower, communal house, shrine, and burial mound is an object which can contribute something to the advancement of knowledge, and hence is worthy of preservation."[319]

E. The Proclamations do not designate "experiences" as "objects of historic or scientific interest."

Plaintiffs mischaracterize the Proclamations as designating "qualities and experiences" as "objects of historic or scientific interest."[320] For example, the *Garfield* Plaintiffs incorrectly claim that the BENM Proclamation designates "hunting grounds" as objects under the Antiquities Act.[321] To the contrary, the Proclamation explicitly states that such "outdoor recreation opportunities" are "not objects of historic and scientific interest designated for protection."[322] Because neither Proclamation designates "qualities and experiences" as monuments, the Court should dismiss this portion of Plaintiffs' challenge.

V. The Court Lacks Jurisdiction Over Plaintiffs' APA Claims, Which Fail To Challenge An Identifiable, "Final Agency Action."

In addition to directly contesting the Biden Proclamations, Plaintiffs challenge certain alleged agency actions under Section 706(2) of the APA.[323] The *Garfield* and *Dalton* Plaintiffs both challenge two interim guidance memoranda issued by the Director of the BLM in December

[318] *Garfield* Am. Compl. ¶ 307. Some of Plaintiffs' recited phrases (*e.g.*, "countless other artifacts") appear in neither Proclamation.
[319] H.R. Rep. No. 59-2224, at 2.
[320] *Garfield* Am. Compl. ¶¶ 296–98.
[321] *Id.* ¶ 297.
[322] BENM Procl., 86 Fed. Reg. at 57322; *see also id.* at 57330 (distinguishing the monument's "numerous objects or historic and scientific interest" from its "other resources that contribute to the social and economic well-being of the area's modern communities as a result of world-class outdoor recreation opportunities").
[323] *Garfield* Am. Compl. ¶¶ 390, 398; *Dalton* Am. Compl. ¶ 190–96.

2021, which summarize law applicable to management of the two monuments.[324] And the *Dalton* Plaintiffs also purport to challenge "all agency actions done to implement President Biden's proclamations," including the alleged denial of unspecified permits.[325]

However, Plaintiffs' APA claims fail for the basic reason that neither Amended Complaint identifies a "final agency action" subject to judicial review. Under the APA's "limited waiver of sovereign immunity,"[326] courts "have jurisdiction to review only 'final agency actions.'"[327] Plaintiffs bear the burden of identifying "specific federal conduct and explaining how it is 'final agency action'" before their claim can go forward.[328] Because Plaintiffs have not carried this burden, their APA claims should be dismissed.

A. The BLM's interim guidance memoranda are not final agency actions, or even agency actions, because they merely summarize existing law applicable to the monuments.

To be "final," an agency action must (1) mark "the consummation of the agency's decisionmaking process," and (2) determine "rights or obligations" or otherwise result in "legal consequences."[329] Agency documents merely restating applicable law satisfy neither prong of this test.[330] Such purely informational documents do not involve a "decisionmaking process," and thus cannot be said to represent the culmination such a process.[331] And they have no legal consequences because they "*inform*"—rather than establish—legal requirements, and thus do not

[324] *Garfield* Am. Compl. ¶¶ 386–87, 394–95.
[325] *Dalton* Am. Compl. ¶ 192–94.
[326] *Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1028 (10th Cir. 2017).
[327] *McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1253 (10th Cir. 2010) (citing 5 U.S.C. § 704).
[328] *Colo. Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000).
[329] *See Mobil Expl. & Producing U.S., Inc. v. Dep't of Interior*, 180 F.3d 1192, 1197–98 (10th Cir. 1999) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).
[330] *E.g.*, *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 428, 431–32 (4th Cir. 2010) (holding that a "simply informational" agency publication did not constitute agency action or final agency action); *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) (quoting *AT&T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001)).
[331] *Golden & Zimmerman*, 599 F.3d at 432.

themselves alter the legal landscape.[332] Consequently, agency explanations of existing law—whether in a letter,[333] a reference guide,[334] or an instruction manual[335]—are not "final agency action."

Courts have similarly recognized that purely informational documents do not even constitute "agency action" under the APA. The definition of "agency action" at 5 U.S.C. § 551(13) is "meant to cover comprehensively every manner in which an agency may *exercise its power*."[336] It does not encompass activities that utilize no agency power at all, such as when an agency merely "expresses its view of what the law requires."[337]

The BLM's interim guidance memoranda for BENM and GSENM are simply informational documents that do not constitute agency action, let alone final agency action. These seven- to eight-page memoranda are nothing like monument management plans that span hundreds of pages, are prepared following a thorough public participation and consultation process,[338] and explain in detail how each portion of the monument should be managed. The memoranda instead explain that their purpose is to provide "interim guidance for managing the monument[s] while the agency develops . . . monument management plan[s]" of its own.[339] While the agency is working to develop those management plans, the guidance memoranda summarize how the Biden

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[332] *Id.* at 433.
[333] *Advanced Integrative Med. Sci. Inst., PLLC v. Garland*, 24 F.4th 1249, 1258 (9th Cir. 2022); *Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065, 1070 (7th Cir. 2020); *Clayton Cnty. v. Fed. Aviation Admin.*, 887 F.3d 1262, 1267 (11th Cir. 2018).
[334] *Golden & Zimmerman*, 599 F.3d at 432–33.
[335] *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1007–10 (9th Cir. 2021).
[336] *See Fund for Animals v. BLM*, 460 F.3d 13, 19 (D.C. Cir. 2006) (emphasis added) (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478 (2001)).
[337] *Indep. Equip. Dealers Ass'n*, 372 F.3d at 427 (quoting *AT&T*, 270 F.3d at 975); *see also Golden & Zimmerman*, 599 F.3d at 431–32.
[338] *See generally* 43 C.F.R. Part 1600.
[339] BENM Memo. at 1; GSENM Memo. at 1.

Proclamations, applicable statutes, and existing management plans govern the monuments during this interim period.

The *Garfield* Plaintiffs nonetheless challenge the statement in the memoranda that "no new mining claims may be located, and no new mineral leases may be issued," on monument land as a final agency action.[340] Tellingly, their quotation omits the preceding word "[t]herefore," which demonstrates that the guidance memoranda are merely restating the withdrawal effect of the Proclamations, not creating some new legal consequence.[341]

The rest of the guidance memoranda similarly restate how the Biden Proclamations fit into the existing legal framework for managing discretionary activities within national monuments.[342] When evaluating whether to authorize activities like recreation, grazing, and vegetation management, the memoranda provide that BLM personnel must "verify that the proposal conforms to the applicable resource management plan" and "determine that the proposal is also consistent with the protection of the monument objects and values."[343] In addition, the memoranda explain that the agency must review existing activities within the monuments to ensure compliance with the Proclamations and monitor monument land to ensure protected objects are not threatened.[344] In these respects, the memoranda merely describe the effect of the Proclamations, previously adopted management plans, and previously expressed agency policy.[345]

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[340] *Garfield* Am. Compl. ¶¶ 387, 395; BENM Memo. at 2; GSENM Memo. at 2.
[341] BENM Memo. at 2 (quoting BENM Procl., 86 Fed. Reg. at 57331); GSENM Memo. at 2 (quoting GSENM Procl., 86 Fed. Reg. at 57345).
[342] BENM Memo. at 3–5; GSENM Memo. at 3–5.
[343] GSENM Memo. at 3; BENM Memo. at 4.
[344] BENM Memo. at 4-5; GSENM Memo. at 4–5.
[345] *E.g.*, BENM Procl., 86 Fed. Reg. at 57332 (directing BLM to "manage the monument . . . in accordance with the terms, conditions, and management direction provided by this proclamation"); *id.* at 57331 ("it is in the public interest to ensure the preservation, restoration, and protection of the objects of scientific and historic interest on the Bears Ears region"). The memoranda also discuss previously expressed agency policy at BLM Manual 6220.

It does not change the analysis that, in addition to summarizing the Proclamations, the memoranda pass along the Proclamation's directions to BLM personnel. *Whitewater Draw* is instructive in this regard.[346] In considering whether an instruction manual on how to implement a statute was a "final agency action," the court held that the manual's use of mandatory language like "must" and "requirement" was inconsequential.[347] What mattered was that the statute, not the manual, was "the source of any binding legal obligations to which [the agency] is subject."[348] Because the manual "facilitate[ed]" but did not "augment or diminish" those obligations, it was not a final agency action.[349] Here, likewise, the Biden Proclamations are the source of BLM's obligation to integrate monument protection into its management practices; the memoranda simply summarize the effect of those Presidential actions. The memoranda, therefore, do not purport to "make policy for the monument reservation."[350]

For similar reasons, the court in *Tulare County v. Bush* rejected an APA challenge to a interim memorandum regarding the Giant Sequoia National Monument.[351] As the court explained, the Forest Service's "memorandum" and "background document" guiding management until the agency developed a monument management plan were "merely a temporary measure" and therefore not a "final agency action."[352] The memoranda in this case repeatedly highlight their interim nature and lay out steps for developing the agency's formal management plan.[353] Therefore, these are purely informational documents that do not constitute agency action, let alone final agency action, and they are not subject to challenge under the APA.

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[346] 5 F.4th 997.
[347] *Id.* at 1005, 1009.
[348] *Id.* at 1009.
[349] *Id.*
[350] *Garfield* Am. Compl. ¶¶ 385, 393.
[351] 185 F. Supp. 2d 18, 29 (D.D.C. 2001), *aff'd on other grounds*, 306 F.3d 1138 (D.C. Cir. 2002).
[352] *Id.* at 28–29.
[353] BENM Memo. at 6–8; GSENM Memo. at 6–7.

B. To the extent the *Dalton* Plaintiffs base their over-broad APA claim on the alleged 2022 denial of a special recreation permit, this too was not a final agency action.

The *Dalton* Plaintiffs' indiscriminate challenge to "all agency actions done to implement" the Biden Proclamations, including the denial of "federal permits,"[354] does not satisfy their burden to identify "specific federal conduct" and "explain[] how it is 'final agency action.'"[355] APA claims attacking an "entire 'program'" consisting of "many individual actions referenced in the complaint, and presumably actions yet to be taken," are foreclosed by the Supreme Court's decision in *Lujan v. National Wildlife Federation*.[356] The Court should thus reject the *Dalton* Plaintiffs' attempt to base their APA claim on agency conduct they have not alleged "with sufficient specificity to state a claim."[357]

To the extent their APA claim is based on the alleged 2022 SRP denial—the only permit denial alleged in the Amended Complaint—the *Dalton* Plaintiffs still fail to identify a final agency action, as they are challenging a fictionalized denial that never occurred. The *Dalton* Plaintiffs contend that the Club received yearly SRPs to hold its annual "Jamboree" ride on Inchworm Arch Road in 2020 and 2021, but that a similar request was denied in 2022 after the Biden Proclamations were issued.[358] In fact, as discussed above, the BLM approved a 10-year SRP to the Club in 2015, but the Club's application did not include Inchworm Arch Road in its operating plan.[359] Thus,

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[354] *Dalton* Am. Compl. ¶¶ 193–94.
[355] *Colo. Farm Bureau*, 220 F.3d at 1173. To the extent that the *Garfield* Plaintiffs also attempt to challenge other agency action by seeking relief as to "any agency action," *Garfield* Am. Compl. p.95, their claims would fail for the same reason.
[356] 497 U.S. 871, 893 (1990).
[357] *See Tulare Cnty.*, 306 F.3d at 1143 (rejecting APA challenge to Forest Service's implementation of a presidential proclamation establishing a new national monument where complaint did not specifically identify acts by agency personnel).
[358] *Dalton* Am. Compl. ¶¶ 106–08; *see also* Declaration of Tony Wright ¶¶ 10–12, ECF No. 90-3 ("Wright Decl.").
[359] Nelson Decl. ¶ 22.

contrary to the *Dalton* Plaintiffs' allegations, the Club never received approval to hold its Jamboree ride on Inchworm Arch Road in 2020 or in 2021, as several Club representatives acknowledged during a recent meeting with BLM.[360] Because the BLM did not do anything new in 2022 and instead merely abided by the 2015 SRP sought by the Club, the 2022 decision does not constitute final agency action, as "the implementation of a 'final disposition' already made" without revisiting the original issue is not a "final agency action."[361] If the Club wishes to hold group rides on Inchworm Arch Road, it can seek a new SRP with an appropriate operating plan.

In sum, Plaintiffs' APA claims are either wholly premature or fictitious. They cannot challenge the agencies' monument management approach—and certainly not on a wholesale basis—before the agencies adopt relevant monument management plans, which they have been directed to do by March 2024. And they cannot challenge alleged permit denials that are actually validations to proceed, on an annual basis, in accordance with the very permit and operating plans that they sought and obtained. Accordingly, Plaintiffs' APA claims should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' Amended Complaints pursuant to Federal Rule of Civil Procedure 12.

[360] Nelson Decl. ¶¶ 24–29.

[361] *Chem. Weapons Working Grp., Inc. (CWWG) v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494 (10th Cir. 1997) (holding that, where Army had not "revisited the question of how precisely it planned to destroy the chemical weapons," disposal of chemical weapons according to previously-determined plan was not "final agency action").

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Respectfully submitted,

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