Nos. 23-4106 & 23-4107

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GARFIELD COUNTY, UTAH, et al., *Plaintiffs-Appellants*,

ZEBEDIAH GEORGE DALTON, et al., *Consolidated Plaintiffs-Appellants*,

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, et al., *Defendants-Appellees*,

HOPI TRIBE, et al., *Defendant Intervenors-Appellees*,

Appeal from the United States District Court for the District of Utah
Case No. 4:22-cv-00059-DN (Hon. David Nuffer)

UNOPPOSED *AMICI CURIAE* BRIEF OF AMERICAN ANTHROPOLOGICAL ASSOCIATION, ARCHAEOLOGICAL INSTITUTE OF AMERICA, AND SOCIETY FOR AMERICAN ARCHAEOLOGY IN SUPPORT OF SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL., DEFENDANT-INTERVENORS AND AFFIRMANCE

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RULE 29(a)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part. No party or its counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amici curiae*, including their members and counsel, contributed money that was intended to fund preparing or submitting this brief.

/s/ William C. Mumby

IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

The American Anthropological Association ("AAA"), Archaeological Institute of America ("AIA"), and Society for American Archaeology ("SAA") (collectively, "*amici*") submit this brief as *amici curiae* in support of Southern Utah Wilderness Alliance, et al. ("SUWA") Intervenors.[1] The district court recognized that *amici* "possess unique, detailed, helpful factual knowledge" about archaeology.[2] Memorandum Decision and Order Staying Decisions on Interventions, ECF 176. As this Court anticipated, *amici* are compelled to file this brief to correct the record on the limits of the Antiquities Act (the "Act"), and, relatedly, the archaeological and scientific principles upon which the Act is built. *See* Order, *supra* note 1, at 2 (inviting *amici* to file an amicus brief in this appeal).

On October 8, 2021, President Biden issued Proclamations 10285 and 10286 ("2021 Proclamations") under the Act, restoring the boundaries of Bears Ears National Monument ("Bears Ears") and Grand Staircase-Escalante National Monument ("Grand Staircase") (collectively, the "Monuments"), while retaining

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[1] All parties consented to the timing and filing of this brief. *Amici*'s brief complies with Fed. R. App. P. 29(a)(6) because it is filed "no later than 7 days after the principal brief of the party being supported is filed." *See* Order 11035717 at 3 (Oct. 11, 2023) (SUWA Intervenors are parties).

[2] This brief refers to archaeology and anthropology collectively as "archaeology" and will note instances where the disciplines diverge or have distinct considerations.

approximately 11,200 acres added to Bears Ears by President Trump. Appellants'[3] goal of eliminating or drastically reducing the Monuments—and their eagerness to distort the Act in service of this goal—would irreparably impair *amici's* and their members' interests in conserving and studying the objects these Monuments protect.

First, *amici* have an interest in the proper administration of the Act. As the oldest professional archaeological organizations in the United States, *amici* were instrumental in the drafting and passage of the Act and other laws to protect archaeological resources. *See* Fed. Defs.' Br. at 11-15. Since the Act's enactment, *amici* have worked to maintain its efficacy. For example, *amici* submitted an *amicus* brief in other litigation contesting President Trump's claim that the Act enabled him to reduce the Monuments' boundaries. *See* Br. of Amicus Curiae Archaeological Ass'ns, *Hopi Tribe, et al., v. Trump*, No. 1:17-cv-2590 (D.D.C., filed Mar. 20, 2019) (hereinafter, "D.D.C. *Amicus* Brief").

Second, as evidenced by the nine declarations submitted in support of our motion to intervene, *amici* and their members have extensively researched the objects of historic and scientific interest within the Monuments. *See* Motion to Intervene as Defendants and Memorandum in Support, ECF 34. *Amici* have worked to conserve these objects against human-caused threats and plan to continue these

[3] "Appellants" refers collectively to Plaintiffs-Appellants Garfield County, Utah, et al. ("Garfield County"), and Consolidated Plaintiffs-Appellants Zebediah George Dalton, et al. ("Dalton").

efforts in the future to satisfy professional, avocational, and enthusiast interests.

Third, *amici* share archaeological information gained through their members' research in the Monuments at conferences and by publishing articles, reports, photographs, and letters. AIA publishes ARCHAEOLOGY magazine to nearly 200,000 subscribers, covering archaeological discoveries in the Monuments among other topics. Members also supervise student research to spread knowledge to the archaeological community.

INTRODUCTION

Appellants' merits arguments are premature. *Amici* agree with SUWA Intervenors that if this Court reverses the district court's reviewability analysis, it must remand the remaining jurisdictional issues before reaching the merits. *See* SUWA Br. at 1. Reaching the merits is particularly inappropriate here because this Court lacks a reasoned district court decision, informed by full adversarial briefing, on the other threshold issues raised in the motions to dismiss. *Id.* This Court's normal practice counsels remanding to the district court to resolve these questions in the first instance before any court considers whether the objects designated and the lands reserved by the 2021 Proclamations comply with the Act.[4]

[4] Irrespective of the analysis in this brief, the Act ultimately empowers the President to determine whether an object should be declared as a national monument and to determine the smallest area compatible with its proper care and management. Identifying the outer bounds of presidential discretion is beyond the scope of this brief, but this is an unresolved threshold question.

Nevertheless, Appellants' theories about what qualifies for protection under the Act are so scientifically and statutorily inaccurate that *amici* weigh in here to correct the record. Under the Act, and long-recognized archaeological best practices, landscapes themselves may qualify as objects of historic or scientific interest. Additionally, objects can become historically or scientifically interesting because of their relation to other objects in a given landscape. Therefore, properly caring for and managing objects of historic and scientific interest may require reserving broad landscapes, both as "objects" and as areas within which other objects of historic and scientific interest are located.

ARGUMENT

Appellants' claims largely boil down to arguing the Monuments are too big, and in particular, that the President may not protect landscapes of historical or scientific interest. These contentions come in many different flavors, but they all misconstrue the archaeological and scientific considerations and purposes at the heart of the Act.[5] The Act's text and legislative history make clear the Act was designed to delegate broad discretion to the President to protect objects of historic and scientific interest and to reserve lands necessary to ensure their proper care and management in accordance with archaeological best practices. This necessarily

[5] Archaeology was already recognized as a science at the time of the Act's passage, as were its aims to unlock secrets of human and pre-human history. *See infra* § III.

includes authority to protect landscapes, because it was understood at the time of the Act's passage that landscapes are themselves objects and that protecting the broader context in which sites and artifacts are discovered is scientifically necessary.

I. Studying Objects of Historic and Scientific Interest at the Landscape Level is an Archaeological Best Practice.

Archaeology studies the ancient and recent human past through material remains.[6] Anthropology draws and builds upon the humanities and social, biological, and physical sciences to study the development of human societies and cultures.[7] These disciplines are fundamentally interested in the natural settings that facilitated human adaptations to specific environments, and in the relationship of objects to each other and to the natural setting.

Analysis of landscapes is considered a best practice for archaeological research.[8] The study of individual sites and artifacts in isolation, as opposed to viewing them in relationship to each other, offers considerably less insight into the significance of those objects over space and time. Isolated objects do not fully illustrate how early humans moved across, adapted to, and used the land within a

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[6] *What is Archaeology?,* SOC'Y FOR AM. ARCHAEOLOGY (last visited Jan. 16, 2024), https://www.saa.org/about-archaeology/what-is-archaeology.

[7] *What is Anthropology?,* AM. ANTHROPOLOGICAL ASS'N (last visited Jan. 16, 2024), https://americananthro.org/learn-teach/what-is-anthropology/.

[8] *See* W.H. Doelle, et al., *Incorporating Archaeological Resources in Landscape-Level Planning and Management*, 4 ADVANCES IN ARCHAEOLOGICAL PRAC. 118 (2016).

region in the same way that relational and spatial analyses do. King Decl. at ¶ 16, ECF 34-5. Landscape-level analysis, on the other hand, examines historic and prehistoric sites within the context of the environmental variables that influenced the human behavior that created those sites.[9] In the context of ancient peoples of the Colorado Plateau, landscapes include objects like "biota (e.g., plants and animals used by humans), non-biotic (i.e., tool stone quarry sites, pottery clay sources, cliff faces suitable for granaries and rock art, alcoves for habitation, floodplains for growing crops, etc.), and viewsheds when such viewsheds are relevant to human subsistence (i.e., observation points along big game migration corridors)." Spangler Decl. at ¶ 10 fn. 3, ECF 34-1.

Analysis of landscapes in the Monuments informs our understanding of the relationships between places connected via roads and trails. Severing connections between sites sacrifices the connectivity and holistic nature of the designation. For example, most of the documented archaeological sites President Trump excluded from Grand Staircase were non-architectural sites indicative of shorter-term hunting and gathering activities. *Id.* at ¶ 10. Individually, these sites might appear of lesser importance, but taken in the aggregate and studied within the context of broader landscapes, these sites help explain human responses to shifting food resources

[9] César Pacero-Oubiña, et al., *Landscape Archaeology*, ENCYCLOPEDIA OF GLOBAL ARCHAEOLOGY 1 (2014).

through time and in response to changing climates. *Id.* Archaeological research requires landscape analysis, which can only be achieved if landscapes, themselves objects of historic and scientific interest, are conserved.

Archaeologists recognized landscape analysis as a best practice at the time of the Act's passage. In the late nineteenth century, "tomb raiders had made way for a growing canon of archaeological practice that emphasized recording obligations, systematic scientific analysis and conclusions, and greater cultural context[.]"[10] The "networks of natural and constructed places perceived and made meaningful by particular human communities have been a special intellectual concern for Southwest archaeologists and anthropologists since the late nineteenth century."[11] Landscape analysis unlocked information about Indigenous and other communities, like pioneers, not accessible by analyzing sites and artifacts in isolation.

II. The Act Allows the President to Protect Landscapes as Objects and to Reserve Land at the Landscape Level.

Amici agree with SUWA Intervenors that no court should reach the merits of Appellants' claims unless this Court reverses the district court's justiciability analysis and the district court resolves remaining jurisdictional issues in Appellants'

[10] Robin Willscheidt, *Poking a Sleeping Bear: Cultural Landscapes in the 1906 Antiquities Act*, 97 S. CAL. L. REV. 107-08 (forthcoming Apr. 2024).
[11] Severin Fowles, *The Southwest School of Landscape Archaeology*, 39 ANN. REV. ANTHROPOLOGY 453, 455 (2010); *see generally* Carl Sauer, *The Morphology of Landscape*, UNIVERSITY OF CALIFORNIA PRESS (1925).

favor on remand. SUWA Br. at 1. If, however, the Court finds it necessary to examine the Act as part of its justiciability analysis, *amici* stress that Appellants' narrow interpretation of the Act is plainly wrong. Monuments that protect landscapes, both as objects and as "containers" of objects at the landscape level, are consistent with the Act's ordinary meaning.

A. Appellants' Interpretation of "Other Objects of Historic or Scientific Interest" is Flawed.

The Act provides that the "President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." 54 U.S.C. § 320301(a). Appellants aim to narrow the phrase "other objects of historic or scientific interest" to include only objects like historic landmarks or structures. Garfield Br. at 36-37; Dalton Br. at 17-18.[12] This interpretation is both incorrect and unhelpful. It reads the phrase "or scientific" out of the statute, and it cannot explain

[12] Garfield County points to the interpretative canons of *noscitur a sociis* and *ejusdem generis* as evidence that this phrase should be construed narrowly. Canons of construction are often "conveniently selective and . . . contradictory." *United States v. United Mine Workers*, 330 U.S. 258, 349 n.11 (1947). Here, the whole-text canon—interpreting ambiguous text in light of its linguistic, structural, and statutory context—counsels the opposite conclusion. *See Lawrence v. First Fin. Inv. Fund V, LLC*, 444 F. Supp. 3d 1313, 1323 (D. Utah 2020) (describing the whole text canon). This phrase is the only place the word "scientific" appears in the Act, strongly suggesting the phrase is meant to encompass items distinct from the landmarks and structures Appellants emphasize.

what it means for a scientific object to be akin to a historic landmark or structure. The Act plainly states that scientific inquiry alone is a sufficient reason for the President to declare an object a national monument.

B. Isolated Objects Can Gain Historical and Scientific Interest When Analyzed at the Landscape Level.

Appellants' related arguments that landscapes, species, habitats, and generic or inconspicuous objects cannot constitute objects of historic or scientific interest are also inconsistent with the Act's plain meaning. *Amici* agree with, and will not repeat, Federal Defendants' explanation of why landscapes, species, and habitats are eligible objects under the Act. *See* J.A. Vol. II at 478-82. However, as authorities on archaeology, *amici* note that Appellants' theory that an object must be singularly rare or memorable to be of historic or scientific interest contradicts basic archaeological methodology. *Contra* Garfield Br. at 36-38.

Objects that Appellants dismiss as insignificant are imbued with historic and scientific interest because they are part of a landscape that unlocks new information about human adaptation over time and space in a region. Appellants stress the need to identify objective criteria against which the historic or scientific interest of an object can be judged. *Amici* can think of no better criteria than archaeology itself, which, even before the Act's passage, recognized that protecting landscapes as objects is appropriate for areas as archaeologically rich as the Monuments. Indeed,

amici helped design the Act to protect landscapes as objects of historic and scientific interest in accordance with archaeological best practices.[13]

C. The Proper Care and Management of Protected Objects Can Occur at the Landscape Level.

Tellingly, Appellants do not subject the Act's reservation clause, which authorizes the President to reserve "as a part of the national monuments . . . the smallest area compatible with the proper care and management of the objects to be protected[,]" to the same analysis. 54 U.S.C. § 320301(b). This begs a question Appellants leave unanswered: What constitutes the "proper care and management" of such an object?[14]

Archaeologists have long recognized that properly caring for objects requires preserving their context. Before the Act's passage, archaeologists understood that recording and studying the ruins from which objects derived offered "valuable data," the permanent loss of which would "sacrifice science for the sake of plunder."[15] The Act addressed this concern by allowing the President to reserve landscapes, confined to the smallest area necessary, when essential to protect their context.

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[13] *Amici* do not suggest that the President is precluded from relying on other scientific disciplines to inform decisions about what objects are of historic or scientific interest or about the area necessary for the proper care and management of such objects.

[14] For reasons described *infra* § IV, this Court should reject Garfield County's unsubstantiated interpretation of this clause.

[15] T. Mitchell Prudden, *The Prehistoric Ruins of the San Juan Watershed in Utah, Arizona, Colorado, and New Mexico*, 5 AM. ANTHROPOLOGIST 224, 288 (1903).

III. Legislative History Confirms the President's Authority to Protect Landscapes as Objects and to Reserve Land at the Landscape Level.

At the time of the Act's passage, archaeologists recognized that scientific research requires sites and artifacts to be studied in relation to one another and within their broader context, not in isolation. Thus, it is unsurprising that the Act—drafted by Edgar Lee Hewett, a foremost expert in archaeology, and endorsed by AAA and AIA—keeps with the prevailing archaeological views at the time and allows the President to broadly protect landscapes. The Act's legislative history and historical context confirm Congress's intent to empower the President thusly.

A. The Act Was Born Out of a Pressing Need to Protect Objects of Historic and Scientific Interest and Their Surrounding Context from Plunder.

As public and academic interest in Southwestern archaeology began to swell in the late nineteenth century, so too did the demand for authentic prehistoric objects from private collectors, exhibitors, museum curators, and others.[16] Spiking interest in these objects caused an extensive and unregulated rush on prehistoric ruins by amateur excavators that left many sites depleted and destroyed.[17]

At the time, no federal laws protected against the looting and destruction of prehistoric sites on public lands.[18] Archaeologists routinely encountered vandalism

[16] *See* Ronald F. Lee, Off. of Hist. & Hist. Architecture, U.S. Dep't of the Interior, Nat'l Park Serv., *The Antiquities Act of 1906* 29 (1970).
[17] *Id.* at 31-32, 35-38.
[18] *Id.* at 29.

to archaeological sites and historic structures. *See* D.D.C. *Amicus* Brief at 12. Moreover, "indiscriminate digging" and "pot-hunting" by amateur excavators and looters were causing irreparable damage to site *context*, an irretrievable loss of scientific knowledge concerning ancient cultures and history.[19]

In 1896, Dr. Jesse Fewkes, a preeminent archaeologist who researched ancient ruins throughout the Southwest, pleaded in *American Anthropologist* for protective legislation, stating: "It would be wise legislation . . . and good science to put all excavation of ruins in trained hands."[20] Several years later, archaeologist T. Mitchell Prudden published an article noting the need to preserve the context of objects located in what later became the Monuments.[21]

B. Early Antiquities Bills Grappled with the Proper Breadth and Scope of Presidential Authority to Reserve Objects and Surrounding Areas.

Recognizing that this plunder hindered archaeological research in the region, AIA and the American Association for the Advancement of Science ("AAAS") jointly crafted corrective legislation to allow the President to reserve a wide range of objects, including certain objects of historic and scientific interest, and surrounding areas.[22] A slightly modified version of the bill, introduced in the House on February 5, 1900, authorized the President, *inter alia*, to:

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[19] *See* Lee, *supra* note 17, at 29-38.
[20] *Id.* at 32.
[21] *See* Prudden, *supra* note 16.
[22] *See* Lee, *supra* note 17, at 47-48.

> [w]ithdraw from sale and set aside for use as a public park or reservation … any prehistoric or primitive works, monuments, cliff dwellings, cave dwellings, cemeteries, graves, mounds, forts, or any other work of prehistoric or primitive man, and also any natural formation of scientific or scenic value or interest, or natural wonder or curiosity on the public domain together with such additional area of land surrounding or adjoining the same, as he may deem necessary for the proper reservation or suitable enjoyment of said reservation.

H.R. 8066, 56th Cong. § 7 (1900).

The next day, Representative John Shafroth, a member of the Public Lands Committee, introduced a much narrower bill making it a federal crime for an unauthorized person to harm an aboriginal antiquity on public land. *See* H.R. 8195, 56th Cong. (1900). Recognizing his proposal was overly simplistic, Rep. Shafroth introduced another bill directing the Department of the Interior ("Interior") to have the Geological Survey survey public lands in four Western states and territories to identify prehistoric structures worthy of permanent protection. *See* H.R. 9245, 56th Cong. (1900). The bill also authorized the Secretary of the Interior ("Secretary") to reserve up to 320 acres of land for each qualifying structure. *Id.*

Dissatisfied with the limited scope of these bills, then-General Land Office ("GLO") Commissioner Binger Hermann drafted a substitute bill embodying Interior's view that the President should have *broader* authority to set aside tracts of public land for the permanent protection of a wide range of resources, including

objects of scientific or historic interest, and to determine a reservation's size.[23] Interior wanted Presidential authority to extend beyond narrowly protecting archaeological sites, artifacts, and small tracts of adjacent land.[24] Rather, Interior's bill allowed the President to protect broader natural, cultural, and archaeological landscapes, consistent with archaeological best practices. The bill stated:

> The President of the United States may, from time to time, set apart and reserve tracts of public land, which for their scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historic interest, or springs of medicinal or other properties it is desirable to protect and utilize in the interest of the public; and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

H.R. 11021, 56th Cong. (1900). As discussed *infra*, the final Act adopted key elements of Interior's bill.

Interior's bill was met with a cool response from Western state members of the Public Lands Committee who were reluctant to delegate general authority to the President to create new national parks.[25] These members were keenly aware that a broad delegation of authority to the President could result in large-scale reservations of Western lands. Just a decade prior, Congress had enacted the General Revision Act of 1891, delegating broad authority to the President to create forest reserves. *See*

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[23] *See* Lee, *supra* note 17, at 52-53.
[24] *See* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 436, 477-78 (2003).
[25] *See* Lee, *supra* note 17, at 55.

26 Stat. 1103 (1891). By 1901, the President had established 41 forest preserves on over 46 million acres of public land.[26]

In response, Rep. Shafroth introduced another narrow bill. *See* H.R. 10451, 56th Cong. (1990). In stark contrast to Interior's bill, Rep. Shafroth's bill authorized the Secretary to set apart and reserve from sale, entry, and settlement only those public lands in four Western states "containing monuments, cliff dwellings, cemeteries, graves, mounds, forts, or any other work of prehistoric, primitive, or aboriginal man, each such reservation not to exceed 320 acres." *Id.* Congress took no action on any of the bills.

By 1904, two new bills emerged. The first, introduced by Senator Henry Lodge, required the Secretary to recommend to Congress ruins or groups of ruins that should be made national reservations, over which Congress would retain control. S. 5603, 58th Cong. (1904). The second bill, introduced by Senator Shelby Cullom, like Interior's bill, authorized the President to reserve antiquities and determine their boundaries. S. 4127, 58th Cong. (1904). The Cullom bill also included a detailed list of objects eligible for protection:

> mounds, pyramids, cemeteries, graves, tombs, and burial places and their contents, including human remains; workshops, cliff dwellings, cavate lodges, caves, and rock shelters containing evidences of former occupancy; communal houses, towers, shrines, and other places of worship, including abandoned mission houses or other church edifices; stone heaps, shell heaps, ash heaps, cairns, stones artificially placed,

[26] *See* Lee, *supra* note 17, at 44.

> solitary or in groups, with or without regularity; pictographs and all ancient or artificial inscriptions; also fortifications and inclosures [*sic*], terraced gardens, walls standing or fallen down, and implements, utensils, and other objects of wood, stone, bone, shell, metal, and pottery, or textiles, statues or statuettes, and other artificial objects.

Id. It limited reservations around ruins to 640 acres.[27]

The Senate Subcommittee on Public Lands held hearings to consider both bills, but concerns that the Cullom bill granted outsized influence to the Smithsonian Institution caused Congress to end the legislative session without passing either, notwithstanding calls from witnesses to take "immediate" action to protect objects from vandalism.[28] *See* 56th Cong., 2d Sess., Comm. Pub. Lands, "Preservation of Historic and Prehistoric Ruins, Etc." 4-7 (Apr. 22, 1904).

C. The Final Act Delegated Authority to the President to Broadly Protect Landscapes as Objects and to Reserve Lands at the Landscape Level.

Against the backdrop of this yearslong effort to define the parameters of an antiquities law, AAA and AIA met in 1905 to develop a consensus bill that could pass the Congress due to convene in January 1906.[29]

Hewett was tasked to lead this charge. Hewett had come into national prominence around this time as an expert on Native American ruins in the Southwest.[30] Although his knowledge was secondary to that of Indigenous

[27] *See* Lee, *supra* note 17, at 66-67.
[28] *Id.* at 57-67.
[29] *See* Lee, *supra* note 17, at 65.
[30] *Id.* at 68.

knowledge, Hewett was well-qualified to champion this effort due to his western background, farming and teaching experience, and first-hand experience conducting archaeological research of prehistoric ruins on federal lands in the Southwest. Hewett was respected for his knowledge and experience by members of Congress, bureau chiefs, professional societies, research institutions, and university staffs.[31]

Following Congress's failure to pass legislation in 1904, GLO's then-Commissioner William Richards requested that Hewett conduct a review of Native American antiquities located on federal lands in Arizona, New Mexico, Colorado, and Utah.[32] Accordingly, Hewett compiled a comprehensive memorandum, which included a map identifying the locations of major ruins within the Rio Grande, San Juan, Little Colorado, and Gila basins, and many individual ruins located therein.[33]

Importantly, Hewett understood that separate, smaller monuments for individual archaeological or cultural sites were not practical or adequate to ensure meaningful conservation. His memorandum contemplated the importance of large archaeological reserves to protect historic and cultural objects across the Southwest, which included lands in what is now Bears Ears. He envisioned reserves capable of protecting broad physiographic features, such as river drainages, alongside cultural

[31] *Id.* at 69.
[32] *Id.*
[33] *See* Edgar L. Hewett, Dep't of the Interior, General Land Office, *Circular Relating to Historic and Prehistoric Ruins of the Southwest and Their Preservation* (1904).

remains, including architectural features, burials, and evidence of hunting and agricultural practices.[34] Hewett posited that the distribution of Pueblo culture was largely determined by physical aspects of the landscape, especially river drainages.[35]

Throughout 1905, Hewett worked with federal agencies to develop consensus antiquities legislation that honored the interests of AIA and AAA, while also "me[eting] the wishes of the various federal departments."[36] On December 28, 1905, Hewett presented his draft bill at a joint meeting between AAA and AIA, where it was unanimously endorsed. In early 1906, identical versions of Hewett's draft bill passed the House (H.R. 13349) and the Senate (S. 4698).[37] On June 8, 1906, President Roosevelt signed the Act into law. *See* Pub. L. 59-209, 34 Stat. 225, *codified at* 54 U.S.C. § 320301 (previously codified at 16 U.S.C. § 431).

The heart of the Act is Section 2, which states:

> That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected….

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[34] Edgar L. Hewett, *A General View of the Archaeology of the Pueblo Region, Smithsonian Report for 1904*, 583-86 (1905).
[35] *Id.* at 587.
[36] *See* Lee, *supra* note 17, at 71.
[37] *Id.* at 72-73.

Id. § 2.

As is clear on the face of the Act, Hewett embraced Interior's longstanding support for a broad delegation of authority to the President. Among the various bills Congress considered from 1900 to 1906, the Act most closely tracks Interior's first draft bill, H.R. 11021, which gave the President discretion to set aside lands containing a wide range of resources and to determine the reservation's size.[38] This is unsurprising, as Hewett worked with federal agencies to develop the bill that would later be enacted with no material changes.

D. The Final Act's Text and Structure Resolved Key Questions Regarding the Breadth and Scope of Presidential Authority Delegated by Congress.

The Act's text evidences how Congress intended to resolve key questions regarding the breadth and scope of Presidential authority:

First, Congress resolved *who* should possess the authority to protect eligible objects and make reservations of land. The Act plainly gives the President the authority and discretion to protect eligible landmarks, structures, and objects, and to

[38] *See* John D. Leshy, *Our Common Ground: A History of America's Public Lands* 257-58 (2022) (noting that Hewett's drafting was "particularly adroit" because it committed to the President's discretion how small an area must be for it to be compatible with the proper care and management of the protected objects, a question which is itself dependent upon the President's view as to the kind of care and management that is "proper" for protected objects). The Act also tracks closely with the first antiquities bill introduced in Congress, drafted by the AIA and AAAS, which granted the President authority to reserve a wide range of objects, including certain objects of historic and scientific interest and their surrounding areas. *See* H.R. 8066, 56th Cong. (1900).

reserve the land necessary to protect them. *See* H.R. 11021, H.R. 8066, S. 4127. Congress rejected proposals to delegate that authority to the Secretary, *see* H.R. 9245, H.R. 10451, or retain it for itself, *see* S. 5603.

Second, Congress resolved the question of *what* objects qualify for protection. Lifting language from Interior's original bill, the Act makes historic landmarks, historic and prehistoric structures, and "other objects of historic or scientific interest" eligible for protection. *See* H.R. 11021, H.R. 8066 (including "any natural formation of scientific or scenic value or interest" as eligible for protection). That this language was taken from Interior's bill makes Interior's rationale for drafting it meaningful.

Interior's view was that the President's authority must extend beyond antiquities and include permanent protection of scientific resources on public lands, because "[i]nteresting discoveries were constantly being made of caves, craters, mineral springs, unusual geological formations, and other scientific features that appeared to merit special protection."[39] Congress had considered proposals that excluded objects of scientific interest, *see, e.g.,* H.R. 9245, S. 4127, and expressly rejected that approach, as evidenced by the Act.

Third, Congress resolved the question of *how much* land could be reserved to protect objects under the Act. The Act grants the President discretion to determine what kind of care and management of an object is proper and what size reservation

[39] *See* Lee, *supra* note 17, at 45.

of land is necessary to achieve this standard.[40] In so doing, Congress expressly rejected placing a numerical limit on a monument's size. *See, e.g.,* H.R. 9245 (limiting reservations to 320 acres); S. 5603 (limiting reservations to 640 acres).

Taken together, these drafting choices, informed by the legislative history, illustrate Congress's intent to empower the President with the discretion and flexibility necessary to protect landscapes as objects of historic and scientific interest as well as objects contained within landscapes, in accordance with archaeological best practices at the time. Significantly, Congress's consideration of the several bills before it from 1900 to 1906 did not occur in a vacuum, but occurred just 10 years after Congress passed the General Revision Act, a comparably broad grant of authority to the President to create forest reserves unilaterally. Accordingly, the questions Congress sought to resolve while considering the Act were not novel and the consequences of its drafting decisions were reasonably understood.

IV. It Is Inappropriate for This Court to Invalidate the 2021 Proclamations or the Monuments at This Procedural Stage.

If this Court finds that Appellants' amended complaints are not barred by sovereign immunity, it should remand all remaining jurisdictional questions, including whether Appellants demonstrated Article III standing, so that the district

[40] However, the Act does not also authorize the President to reduce a monument's size. As discussed in the D.D.C. *Amicus* Brief, such an act would be antithetical to the Act's preservationist purpose.

court can resolve those issues in the first instance, consistent with this Court's ordinary practice. SUWA Br. at 1-2.

Appellants ask this Court to circumvent this well-worn order of judicial operations and invalidate the Monuments on appeal. Dalton Br. at 32-35. To do so here would break from a century of precedent and make this the first court to rule that a monument designation violated the Act. *See* Fed. Defs.' Br. at 1; SUWA Br. at 11-12. The factual determinations and analysis necessary to draw that conclusion must be made, in the first instance, in the district court.[41] No court has thoroughly analyzed the 2021 Proclamations, defined their terms, compared them against the text of the Act, or determined whether factual development is necessary. These are tasks the district court is best suited to undertake.

Appellants' arguments for voiding the Monuments are inconsistent with basic archaeological principles incorporated into the Act.

A. Landscapes Are Objects of Historic and Scientific Interest and Objects Can Be Studied at the Landscape Level.

Appellants argue the Monuments are unlawful because they protect supposedly ineligible objects. Garfield County claims that objects like landscapes

[41] *See Kerns v. Bader*, 663 F.3d 1173, 1182 (10th Cir. 2011) (Gorsuch, J.) ("[R]emanding the matter back to the district court to finish the work of answering the [problem at issue] bears the advantage of allowing the adversarial process to work through the problem and culminate in a considered district court decision, a decision that will minimize the risk of an improvident governing appellate decision from this court.").

and viewsheds, flora and fauna, purportedly generic and nondescript geological objects, and purportedly generic and nondescript historical and scientific objects are outside the scope of the Act. J.A. Vol. II at 382-91. Dalton claims that monuments must, by definition, be discrete, material, and stationary. Dalton Br. at 17-18. But these arguments fail to acknowledge that the Act's legislative history, and the contemporary understanding of archaeological practice as exemplified by Hewett's own work, consider landscapes to be objects of historic and scientific interest as well as objects that can be studied at the landscape level.

B. Appellants' Arguments That the Monuments Are Too Big Are Not Supported by Factual or Scientific Analysis.

Appellants argue that the Court should intuit from the size of the Monuments that they are not confined to the smallest area compatible with the proper care and management of the protected objects. Garfield County argues, without any corroborating factual or scientific analysis, that the smallest area compatible with the proper care and management of the protected objects "depends on the threats to those objects absent a reservation, the measures needed to protect from those threats, and the space needed to implement those measures." Garfield Br. at 38. Under this wholly invented standard, Appellants claim "a reservation of approximately 40 acres would be more than sufficient for Newspaper Rock and San Juan Hill because that would allow for an enclosure that protected against threats to those items and would allow for a small parking lot, paved walkway, and restrooms if appropriate." J.A.

Vol. II at 395. But no evidence has been submitted to determine whether a parking lot, or the attendant increased motor activity, would help or harm the proper care and management of this resource. It is not intuitive that the impact of a parking lot is protective or even benign. It is well-recognized that the greatest threats to the integrity of archaeological landscapes are posed by human interference through activities like road building and motor traffic. Liebow Decl. at ¶ 19, ECF 34-6.

Dalton's argument about the size of the reservation is entirely based on the purported inclusion of ineligible objects, stating that "[a]s a matter of basic logic, once part of this mass is eliminated, the 'smallest area' required to protect the residuum must be smaller too." Dalton Br. at 33. But as Garfield County acknowledges, a Proclamation can reserve land that is capable of protecting multiple objects. Garfield Br. at 12. It follows that even the inclusion of purportedly ineligible objects would not render the 2021 Proclamations overbroad *per se*.[42]

C. The Act Does Not Require Landscapes to Be Surveyed or Inventoried to Be Eligible for Designation as Monuments.

Appellants spin the largely uninventoried nature of the Monuments as evidence that they are too large. Garfield Br. at 12. But whether an object is

[42] Dalton attempts to refute this point by arguing that "it makes no difference the Proclamations contain a severability clause, or happen to include some valid 'objects' within them" because the Proclamations "do not specify what lands are set aside for what objects." Dalton Br. at 35. Two sentences later, Dalton concedes "[t]his is not to say that the President is under any legal obligation to show his work." *Id.*

inventoried has no bearing, as a legal matter, on whether that object is of historic or scientific interest. Nowhere does the Act prescribe that objects must be inventoried to be eligible for protection. It is true that archaeologists have only begun to scratch the surface of scientific opportunities the Monuments afford. Grand Staircase contains 4,225 known archaeological sites and Bears Ears contains 10,000 known sites, although only about 10 percent of the landscapes have been intensively surveyed. Schmid Decl. at ¶¶ 14-15, ECF 35-1. But the fact that the landscapes have not yet been fully surveyed does not mean that they are not replete with objects of historic or scientific interest, or even that archaeologists are unaware of the objects there. Rather, archaeologists expect the unsurveyed portions of the landscapes to resemble the surveyed portions with respect to the density of objects of historic and scientific interest. Spangler Decl. at ¶¶ 15-16, ECF 34-1.

By studying individual environmental characteristics related to resource distribution, environmental productivity, climatic features, landscape attributes, and soil qualities, archaeologists can predict, with varying levels of probability, the presence of archaeological sites. *Id.* at ¶ 17. This methodology is how archaeologists make new discoveries and reflects the scientific importance of protecting landscapes so that they can be studied. Through years of conducting research like this in the Monuments, archaeologists now understand that the Monuments are dense with objects of historic and scientific interest. *See* Geib Decl. at ¶ 7, ECF 35-6 (stating

the "quality and concentration of significant archaeological, historic, scientific, and cultural resources in this area are unique, as is the integrity of the landscape").

To illustrate, when archaeologists analyzed some of the previously unsurveyed lands President Trump purported to exclude from the Monuments, predictive modeling identified at least five excluded areas where existing inventory data suggested site density could be 60 to 80 sites per square mile. Spangler Decl. at ¶ 17, ECF 34-1. If such areas were permanently denied monument status, then it is likely that these archaeological resources, which qualify for protection under the Act, would be irreparably damaged.

It is wrong to conclude that protecting swaths of unsurveyed landscapes is unnecessary simply because they have not already been recorded and studied. Indeed, archaeologists and looters alike understood these landscapes to be rich with objects of historic or scientific interest. *Id.* at ¶ 16. Appellants' suggestion that inventorying must always precede protection misunderstands archaeology and reads a requirement into the Act that does not exist and its drafters did not intend.

CONCLUSION

If this Court finds that Appellants' amended complaints are not barred by sovereign immunity, this Court should remand any remaining jurisdictional questions and, if necessary, questions regarding the sufficiency of Appellants' allegations, to the district court to resolve in the first instance.

Respectfully submitted this 16th day of January 2024.

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1. This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,325 words, which is no more than one-half the maximum length authorized by Federal Rule of Appellate Procedure 32(a)(7) for a party's principal brief.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

January 16, 2024 */s/* William C. Mumby

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I certify that the foregoing brief was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

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