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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

GARFIELD COUNTY, UTAH, a Utah political subdivision; et al.;
Plaintiffs,

ZEBEDIAH GEORGE DALTON; BLUERIBBON COALITION; KYLE KIMMERLE; and SUZETTE RANEA MORRIS;
Consolidated Pls.,

v.

JOSEPH R. BIDEN, JR. in his official Capacity as President of the United States; et al.;
Defendants,

HOPI TRIBE, NAVAJO NATION, PUEBLO OF ZUNI, AND UTE MOUNTAIN UTE TRIBE;
Intervenor-Defs.,

SOUTHERN UTAH WILDERNESS ALLIANCE et al.
Intervenor-Defs.

HOPI TRIBE, NAVAJO NATION, PUEBLO OF ZUNI, AND UTE MOUNTAIN UTE TRIBE REPLY IN SUPPORT OF MOTION TO DISMISS

Lead Case No. 4:22-cv-00059-DN-PK
Member Case No. 4:22-cv-00060-DN-PK

District Judge David Nuffer
Magistrate Judge Paul Kohler

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I. Introduction.

Utilizing inapplicable canons of construction, dictionaries from another time, and a strained construction, Plaintiffs' responses are an attempt to narrow the application of the Antiquities Act. Under their definitions, it is really only historic landmarks and historic or prehistoric structures that can be protected. Their construction leads to absurd and confusing results, and it ignores the plain language of the Act. Running head long into a century of precedent to the contrary, Plaintiffs' restricted and improper construction is the foundation for their claims that President Biden's Proclamations exceeded his authority, and it stains the entirety of their complaints. These legal conclusions are then applied to each of the Plaintiffs assertions in an attempt to mask those legal conclusions as facts. But they are just that – legal conclusions.

Plaintiffs' facial attack on the Proclamations deprive key words in the Antiquities Act of their independent and ordinary significance and improperly narrow other words in the Act. "Scientific" is seemingly ignored altogether, despite the plain language, the legislative history, and Courts all recognizing that the Antiquities Act protects objects of scientific interest. Plaintiffs then rely on handpicked phrases of the legislative history to instill ambiguity into the Act. But the legislative history is not as partial as Plaintiffs would have the Court believe. Rather, the Antiquities Act was a compromise that was achieved after half a decade's worth of negotiations.

In a last ditch effort, Plaintiffs fall back on their position that these reservations are just too large. That the President abused his discretion in determining what lands were necessary to protect the kivas, cliff dwellings, towers, ceremonial sites, and all of the many other objects of historic and scientific interest within the monuments. Plaintiffs' attempts to have the Court second guess the President's discretionary determination should be disregarded.

Finally, Plaintiffs fail to meet their burden to show they have standing, and fail to point to any final agency action to support their Administrative Procedure Act claim. For all of these reasons, the Tribal Nations respectfully request that the motions to dismiss be granted.

II. Argument.

A. Legal Conclusions Couched as Facts Are Not Entitled to the Assumption of Truth.

Plaintiffs, in an effort to shift the burden onto the President, contend it is the Defendants who are inverting the pleading requirements of Rule 8.[1] It is Plaintiffs, however, that ignore long held plausibility requirements. While it is true Plaintiffs do not need detailed factual allegations, the rules demand more than an "unadorned, the-defendant-unlawfully-harmed-me accusation."[2] It has long been held that Courts need not accept "legal conclusions," or "[t]hreadbare recitals of the elements of a cause of

[1] Pls.' Opp'n to Mot. to Dismiss at 54-55, ECF No. 154.
[2] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

action, supported by mere conclusory statements."[3] Rather, legal conclusions "couched" as factual allegations are not entitled to an assumption of truth.[4] While Rule 8 marks a notable "departure from the hypertechnical, code-pleading regime of a prior era," it does not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[5] That is particularly true when Courts are "sensitive to pleading requirements" because they are asked to "review the President's actions under a statute that confers very broad discretion on the President and separation of powers concerns are presented."[6] The Court should thus be sensitive to opening the doors to discovery against the President here.

The Plaintiffs attempt to route around these constraints. They start with myopic views of the Antiquities Act, ignoring the plain language of the Act and case law to the contrary.[7] Those incorrect legal assertions then pollute their remaining allegations as they go on to apply their legal definitions to the Proclamations to conclude that they are illegal under their constricted interpretation.[8] These legal conclusions "couched" as facts are not entitled to an assumption of truth. What the Plaintiffs are left with are bare legal

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[3] *Needham v. Fannie Mae*, 854 F. Supp. 2d 1145, 1148 (D. Utah 2012).
[4] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
[5] *Iqbal*, 556 U.S. at 678–79.
[6] *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002) (citing *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002)).
[7] Pls.' Am. Compl. at 62-68, ECF No. 91 (adding non-statutory requirements to the legal definition of object of historic or scientific interest); Individual Pls.' Am. Compl. at 61-63, ECF No. 90 (concluding certain objects do not fit the definition of the Act).
[8] Pls.' Am. Compl. at 68-77, ECF No. 91; Individual Pls.' Am. Compl. at 61-63, ECF No. 90.

assertions that do not allow the court to draw the "reasonable inference" that the President is liable.[9] Because Plaintiffs' legal conclusions are faulty as explained in the motions to dismiss and herein, the Court should grant the motions to dismiss.

B. Plaintiffs Must Show There is "No Set Of Circumstances" in Which the Proclamations Might Be Applied Consistent with the Antiquities Act.

In their response, the Dalton Plaintiffs make no secret that they are bringing a facial challenge to the Proclamations.[10] While they do not come out and say it, the Utah Plaintiffs clearly are as well.[11] They ignore, however, that to prevail in a facial challenge, Plaintiffs must normally "show that there is 'no set of circumstances'" in which the regulations being challenged might be applied consistent with the law.[12] This is a "demanding standard."[13]

Both Plaintiffs admit that the Proclamations do indeed properly declare objects of historic or scientific interest for protection.[14] How could they not? Plaintiffs do not even

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[9] *Iqbal*, 556 U.S. at 678.

[10] Pls.' Opp'n to Mot. to Dismiss at 10, ECF No. 153 (noting the Proclamations "facially" exceed President's authority), 36 (same).

[11] *See* *Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1243 (10th Cir. 2011) (describing claim that agency "exceeded the scope" of authority as facial challenge); Pls.' Opp'n to Mot. to Dismiss at 49-50, ECF No. 154 (analyzing the face of the Proclamations and asserting they do not meet Plaintiffs' legal test); Pls.' Am. Compl. at 90-92, ECF No. 91 (asserting President exceeded authority).

[12] *Cf. Scherer*, 653 F.3d at 1243; *accord* *Chamber of Com. of United States of Am. v. Nat'l Lab. Rels. Bd.*, 118 F. Supp. 3d 171, 185 (D.D.C. 2015).

[13] *Scherer*, 653 F.3d at 1243.

[14] Pls.' Opp'n to Mot. to Dismiss at 54, ECF No. 153 (identifying Grosvenor Arch or Newspaper Rock as qualifying for protection), 56 (agreeing that canyons qualify); Pls.' Am. Compl. at 77, 81-83, ECF No. 91 (identifying appropriate land, according to Plaintiffs, needed to protect qualifying objects under Plaintiffs' definitions).

attempt to grapple with the many historic and scientific objects the Tribal Nations identified in the Proclamation. For example, Bears Ears has a "unique density of significant cultural, historical, and archaeological artifacts spanning thousands of years[.]"[15] This includes cliff dwellings, large villages, kivas, ceremonial sites, among others.[16] President Biden identified "a prehistoric road system that connected the people of Bears Ears to each other and possibly beyond."[17] Within each of the regions of Bears Ears, President Biden identified important objects of great historic, scientific, and cultural significance to the Tribal Nations.[18] Plaintiffs would rather attempt to "flip the burden" in their facial challenge so that the President must prove his Proclamations are always lawful rather than having to prove they are never lawful.[19]

In an attempt to get around this demanding standard, Plaintiffs assert that the Proclamations are unlawful in full.[20] But the Court can uphold administrative action when an agency bases a decision on multiple independent reasons, so long as one of them is valid.[21] Here, the President,[22] in his discretion, provides two valid, independent

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[15] Proclamation No. 10285, (Oct. 8 2021) Bears Ears National Monument, 86 FR 57321 ("Biden Bears Ears Proclamation").
[16] *Id.*
[17] Biden Bears Ears Proclamation at 57321.
[18] *Id*. at 57323-330 (identifying objects within each geographic subregion that hold cultural and historical significance to Tribal Nations).
[19] *Scherer*, 653 F.3d at 1245.
[20] Pls.' Opp'n to Mot. to Dismiss at 51, ECF No. 153.
[21] *Zzyym v. Pompeo*, 958 F.3d 1014, 1033–34 (10th Cir. 2020).
[22] The President is undoubtedly not an agency, so this rational seemingly does not apply in any event. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). To the extent it does, Tribal Nations address its application.

reasons for the establishment of Bears Ears.[23] First, the monument is necessary to protect the "distribution of the objects across the Bears Ears landscape[.]"[24] Given the unique density of significant cultural, historical, and archaeological artifacts spanning thousands of years dispersed across the Bears Ears landscape, the Court can easily uphold the Proclamation on this basis alone. Second, the landscape itself is an object in need of protection.[25] This too, is valid.[26]

Plaintiffs must prove that there is no set of circumstances in which the Proclamations might be applied consistent with the Antiquities Act, and they have not done so here.

C. The Plaintiffs Ignore the Plain Language.

i. "Or" is Disjunctive and the Words it Connects are to Be Given Separate Meanings.

In an attempt to narrow the scope of the Antiquities Act and place non-statutory requirements onto the President, Plaintiffs settle on the idea that an "object" must be akin to a "historic landmark" or a "historic" or "prehistoric" structure.[27] This narrow conception is contrary to the Act's plain language and settled principles of interpretation.

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[23] Biden Bears Ears Proclamation at 57331 (noting that additional and independent reasons).
[24] *Id*.
[25] *Id*.
[26] Intervenor-Defs.' Mot. to Dismiss at 39, ECF No. 114.
[27] Pls.' Opp'n to Mot. to Dismiss at 47, ECF No. 154 (historic or scientific objects apply only to persons or things of the same kind or class as preceding categories); Pls.' Opp'n to Mot. to Dismiss at 38, ECF No. 153 (object must be akin to a landmark or structure).

When the legislature passed the Antiquities Act in 1906, "object" was defined very broadly as "that with which the mind is occupied in the act of knowing; any visible or tangible thing."[28] Plaintiffs point to dictionaries past 1906 for the definition of "object." These definitions, however, were not the definition "at the time Congress enacted the statute."[29] As a result, Plaintiffs define "object" as something "discrete."[30] But the word "discrete" does not appear in the definition of "object," not even in the dictionaries Plaintiffs point to.[31] Rather, an object is a very expansive concept.

Having failed to constrain "object" through its definition, Plaintiffs rely on statutory construction doctrines to support their narrow vision.[32] The use of these canons

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[28] *Object*, Webster's Practical Dictionary (1906); *Object*, The Modern World Dictionary (1906).

[29] *United States v. Mobley*, 971 F.3d 1187, 1198 (9th Cir. 2020) (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)); Pls.' Opp'n to Mot. to Dismiss at 37, ECF No. 153 (citing dictionaries from 1909); Pls.' Opp'n to Mot. to Dismiss at 47, n. 302 ECF No. 154 (citing dictionary from 1913).

[30] Pls.' Opp'n to Mot. to Dismiss at 46, ECF No. 154; Pls.' Opp'n to Mot. to Dismiss at 37, ECF No. 153.

[31] Pls.' Opp'n to Mot. to Dismiss at 46-47, n. 302, ECF No. 154 (*Object*, Oxford English Dictionary VII (O) 14 (1913) ("[s]omething placed before the eyes, or presented to the sight or other senses; an individual thing seen or perceived")); Pls.' Opp'n to Mot. to Dismiss at 37-38, n.239 (See, e.g., Webster's New International Dictionary, at 1482 (1909) ("That which is put, or which may be regarded as put, in the way of some of the senses; something visible or tangible"); 10 Oxford English Dictionary, at 14 (1909) ("Something placed before the eyes, or presented to the sight or other sense; an individual thing seen or perceived, or that may be seen or perceived; a material thing"); Webster's International Dictionary, at 990 (1893) (listing as examples: "he observed an object in the distance; all the objects in sight; he touched a strange object in the dark")).

[32] Pls.' Opp'n to Mot. to Dismiss at 46-47, ECF No. 154 (relying on *ejusdem generis*); *see* Pls.' Opp'n to Mot. to Dismiss at 38, ECF No. 153; *see also* *United States v. West*, 671 F.3d 1195, 1200 (10th Cir. 2012) (describing *ejusdem generis* as limiting general terms which follow specific ones to matters similar to those specified). A similar cannon is *noscitur a*

is unpersuasive. For one, Courts have concluded that a list of three items – the provision here has two – is too short to be particularly illuminating.[33] Courts also should not "woodenly apply limiting principles every time Congress includes a specific example along with a general phrase."[34]

More problematic, under Plaintiffs' interpretation, the "or" in "historic or scientific" is effectively nullified. Plaintiffs' strained construction would have the Court ignore the disjunctive "or" and rob the term "scientific" of its independent and ordinary significance.[35] "Or" is "almost always disjunctive, that is, the words it connects are to 'be given separate meanings.'"[36] The substantive connection between the terms "historic landmarks," "historic and prehistoric structures," and objects of "scientific interest" is not so self-evident as to demand that the Court "rob" any one of them "of its independent and ordinary significance."[37] It would be absurd to conclude that a scientific object is limited only to a historic landmark. While a scientific object may encompass a historic landmark, it is also much more.

If the Court utilizes these statutory construction tools, which the Tribal Nations are not suggesting, the structure of the statute dictates that they logically would be

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sociis, which literally translated as "it is known by its associates," counsels lawyers reading statutes that "a word may be known by the company it keeps[.]" *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 287 (2010).

[33] *Graham Cnty.*, 559 U.S. at 288.

[34] *West*, 671 F.3d at 1200.

[35] *See United States v. Woods*, 571 U.S. 31, 45–46 (2013).

[36] *Id.* at 45.

[37] *Graham Cnty.*, 559 U.S. at 288.

limited to "objects of historic" interest. There at least, the list is conjunctive – *i.e.*, separated by an "and."[38] "[H]istoric landmarks, historic and prehistoric structures, and other objects of historic . . . interest[.]"[39] In the Act, a historic object is a general term that follows specific terms that are all related – they are all historic. The Court should be cautious, though, not to "obscure and defeat the intent and purpose of congress" but rather effectuate its intent.[40]

The legislative history also bears out that Congress intended "historic" and "scientific" to have independent meanings. For example, in the House Report for the Antiquities Act, it noted that a bill is needed to protect the remains of the historic past and that it was important to protect many of these objects for science.[41] If there were any doubt, Courts have likewise confirmed as much. In *Cameron*, the Court confirmed that the President is empowered to establish reserves embracing "objects of historic or

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[38] *Massachusetts Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 61 (D.D.C. 2018), *aff'd as modified*, 945 F.3d 535 (D.C. Cir. 2019).

[39] 54 U.S.C.A. § 320301(a).

[40] *West*, 671 F.3d at 1200. As will be discussed below, Congress intended "historic" to have a broad meaning as well.

[41] H.R. Rep. No. 59-2224 at 1 (1906) (noting a bill is needed to protect "remains of the historic past"), 3 and 8 (referring to the importance of protecting objects for science); *see also* H.R. Rep. No. 58-3704 at 1 (1905) (providing an amendment to protect "historic and prehistoric" objects); Ronald F. Lee, *The Antiquities Act of 1906*, 52, (1970) ("Lee") at http://www.cr.nps.gov/aad/pubs, reprinted in Raymond Harris Thompson, An Old and Reliable Authority, 42 J. OF THE S.W. 198 (2000) (*citations omitted*) (noting the Department of Interior initially supported a proposal that would have protected lands "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.").

scientific interest."[42] The Court then confirmed that the Grand Canyon is indeed an "object of unusual scientific interest."[43] And in *Tulare County v. Bush*, the D.C. Circuit noted the Act protected both "historic or scientific" objects and that the Act was not "limited to protecting only archeological sites."[44]

Under Plaintiffs' interpretation the disjunctive "or" is read out of the Act in an attempt to limit what a qualifying "object" is. It is not for the Court, however, "to question whether Congress adopted the wisest or most workable policy, only to discern and apply the policy it did adopt."[45] In this instance, Congress most certainly intended "scientific" to have independent meaning from "historic." The structure, legislative history, and case law interpreting the Antiquities Act all bear that out. Accordingly, objects under the Antiquities Act can be historic or scientific.

ii. Objects of Historic or Scientific Interest are Broad Terms.

1. "Historic" Broadly Means "Pertaining to or Connected With History."

Compounding the error that objects can only be "historic," Plaintiffs rely on later dictionaries to assert that to be "historic" an object must be "memorable or had an assured place in history."[46] Plaintiffs' definition is not the definition "at the time Congress enacted

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[42] *Cameron v. United States*, 252 U.S. 450, 455 (1920).
[43] *Id.*
[44] *Tulare Cnty.* 306 F.3d at 1141-42.
[45] *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1943–44 (2022).
[46] Pls.' Opp'n to Mot. to Dismiss at 46, ECF No. 154.

the statute."[47] Rather, the definition of historic in 1906 was broad, and was defined as "pertaining to or connected with history."[48] This broader reading of "historic" comports with how the administration[49] and courts have interpreted the Antiquities Act over the years.[50]

Plaintiffs' attempts to limit other "objects of historic" interest to "historic landmarks" and "historic or prehistoric structures" likewise misses the mark. They wish to take the general term "objects of historic" interest and place a size limit on them.[51] Under Plaintiffs' approach, objects of historic interest cannot be "much too small or much too large to be reasonably commensurate with the 'landmarks' and 'structures' covered by the Act."[52] But even in this context, Plaintiffs' claims are not plausible as the the law is clear that canyons are qualifying objects.[53] It is evident that Plaintiffs size limitations place no barrier to the Proclamations here. And as described further below, the Act gives the President discretion to reserve the land that is necessary.

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[47] *Mobley*, 971 F.3d at 1198.
[48] *Historic*, Modern World Dictionary of English Language (1906). *See also Historic*, Webster's Practical Dictionary (1906) (defining Historic to mean containing, pert. to, contained or exhibited in, deduced from, or representing history).
[49] *See generally* SUWA Intervenors Reply in Supp. of Mot. to Dismiss at 2-4, ECF No. 164 (collecting proclamations).
[50] *Tulare Cnty.*, 306 F.3d at 1141 (concluding that many archaeological sites recording Native American occupation and historic remnants of early Euroamerican settlement qualified as historic).
[51] Pls.' Am. Compl. at 66, ECF No. 91.
[52] *Id*.
[53] Pls.' Opp'n to Mot. to Dismiss at 56, ECF No. 153 (*citing Cameron*, 252 U.S. at 450).

2. Plaintiffs effectively ignore "scientific" altogether.

As we have seen, "scientific" is to be given separate and independent meaning. Consistent with the other definitions in the Antiquities Act, "scientific" in 1906 had a broad meaning, just as it does today. It meant "pertaining to science."[54] Plaintiffs imbue "scientific" with their improper definitions of "object" and "historic."[55] They maintain that a scientific object must be a discrete item fixed to a place that has some past significance to humans that have generated interest based on their place in history or scientific study that are not animate, inconspicuous, nondescript, nebulous, or orders of magnitude larger than landmarks or structures.[56] Plaintiffs' interpretation of "scientific" defies their own logic.

Take for example the Grand Canyon. On the one hand, Plaintiffs' maintain that an object must be fixed to the land,[57] and that it cannot be land.[58] But in an about face, Plaintiffs concede that canyons are undoubtedly objects of historic or scientific interest that are situated on the land.[59] Likewise, they agree that "hills," "buttes," and "arches"

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[54] *Scientific*, Modern World Dictionary of English Language (1906); *see* Pls.' Opp'n to Mot. to Dismiss at 47, ECF No. 154.
[55] Pls.' Opp'n to Mot. to Dismiss at 47, ECF No. 154.
[56] Pls.' Opp'n to Mot. to Dismiss at 46, ECF No. 154. Individual Pls.' Opp'n to Mot. to Dismiss at 55, ECF No. 153.
[57] Individual Pls.' Opp'n to Mot. to Dismiss at 39, ECF No. 153; Pls.' Opp'n to Mot. to Dismiss at 48, ECF No. 154.
[58] Individual Pls.' Opp'n to Mot. to Dismiss at 44, ECF No. 153.
[59] Individual Pls.' Opp'n to Mot. to Dismiss at 56, ECF No. 153.

are as well.[60] Contrary to their own definition of "object," however, each of these features is land.[61] That land can be a protected object should come as no surprise. As the Tribal Nations pointed out, a landmark includes "natural objects or features by which a place is known or distinguished."[62] The case law also bears this out.

Just as the Lobstermen argued that "ecosystems and natural resources" are not "objects" under the Antiquities Act,[63] Plaintiffs do here as well.[64] But courts have repeatedly found ecosystems to be objects of scientific interest under the Act.[65] The authority is "not limited to protecting only archeological sites."[66] In *Cappaert*, the

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[60] Pls.' Am. Compl. at 77, 81, ECF No. 91 (noting Bears Ears Buttes, San Juan Hill, and Grosvenor Arch qualify under the act).

[61] *Canyon*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/canyon (last visited May 4, 2023) (defining canyon as nothing more than a deep narrow valley); *Hill*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/hill (last visited May 4, 2023) (defining hill as a rounded natural elevation of land lower than a mountain). *Butte*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/butte (last visited May 4, 2023) (defining butte as an isolated hill or mountain with steep or precipitous sides usually having a smaller summit than a mesa).

[62] Intervenor-Defs.' Mot. to Dismiss at 41, ECF No. 114.

[63] *Massachusetts Lobstermen's Ass'n*, 349 F. Supp. 3d at 68.

[64] Pls.' Opp'n to Mot. to Dismiss at 41, ECF No. 153; Pls.' Opp'n to Mot. to Dismiss at 57, ECF No. 154.

[65] *Massachusetts Lobstermen's Ass'n*, 349 F. Supp.3d at 68 (*citing* Alaska v. United States, 545 U.S. 75, 103 (2005); Cappaert v. United States, 426 U.S. 128, 141–42 (1976); *Cameron*, 252 U.S. at 455–56; *Tulare County*, 306 F.3d at 1142 ("Inclusion of such items as ecosystems and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features.").

[66] *Tulare Cnty.*, 306 F.3d at 1142 (citing *Cappaert,* 426 U.S. at 141-42); *Mountain States Legal Found.*, 306 F.3d at 1137 (citing *Cameron*, 252 U.S. at 464) ("That argument fails as a matter of law in light of Supreme Court precedent interpreting the Act to authorize the President to designate the Grand Canyon and similar sites as national monuments."); State of Wyoming v. Franke, 58 F. Supp. 890, 892, 895 (D. Wyo. 1945) (upholding

Supreme Court concluded that a proclamation protecting a "peculiar race of desert fish . . . which is found nowhere else in the world" was well within the language of the Antiquities Act.[67]

Next, Plaintiffs argue that the term "monuments" places discernable limits on what scientific objects are. According to Plaintiffs, a "monument" is only a "building, pillar, stone, or the like, erected to preserve the remembrance of a person, event, action, etc., or to indicate a limit or to mark a boundary."[68] When a statute includes an explicit definition, however, the Courts' must follow that definition, "even if it varies from a term's ordinary meaning."[69] In the Antiquities Act, the President is permitted to "declare" the objects identified "to be national monuments."[70] Thus, the historic or scientific objects the President identifies in the Proclamation are *ipso facto* monuments. To conclude otherwise would be to ignore the language in the Act.

The Plaintiffs then maintain that a scientific object must be fixed to land. But they go on to conclude that a subterranean pool – or water – easily meets their definition.[71] *Cappaert v. United States* confirms water is a liquid that is not "fixed" to the land.[72] The issue in that case arose because the Cappaerts were pumping groundwater on their ranch

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proclamation over objection that it contains no objects of an historic or scientific interest required by the Act).

[67] *Cappaert,* 426 U.S. at 141.

[68] Pls.' Opp'n to Mot. to Dismiss at 39, ECF No. 153.

[69] *Tanzin v. Tanvir,* 141 S. Ct. 486, 490 (2020).

[70] 54 U.S.C.A § 320301(a).

[71] Pls.' Opp'n to Mot. to Dismiss at 55, ECF No. 153.

[72] *See Cappaert*, 426 U.S. at 133.

2 ½ miles from Devil's Hole, which turned out to be the same source of water for the pool and when they pumped they were draining the pool.[73] Cappaert confirms the Plaintiffs' interpretations are too narrow. Further confusing the issue, Plaintiffs assert that the pool of water is "akin to a historical structure."[74] Contrary to Plaintiffs interpretations, the case law properly supports a broad reading of the term objects of scientific interest.[75]

In a last ditch effort, Plaintiffs point to the statutory title – the "Antiquities" Act – to conclude a scientific object must be a "relic or monument of ancient times," rather than a "nondescript or common thing."[76] The more persuasive interpretation of the term "scientific" does not require inserting adjectives "in front of the word to achieve a desired meaning."[77] Indeed, titles are "not meant to take the place of the detailed provisions of the text."[78] As in *Lawson*, the "under-inclusiveness" of the heading Antiquities Act is "apparent."[79] The title here refers to antiquities, but fails to include "scientific objects," which the language of the Act makes plain are covered. In the end, titles are just titles, not meant to "undo or limit" the "detailed provisions of the text."[80]

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[73] *Cappaert*, 426 U.S. at 133.
[74] Pls.' Opp'n to Mot. to Dismiss at 55, ECF No. 154.
[75] *See Cappaert,* 426 U.S. at 141-42, *Cameron*, 252 U.S. at 455-56, *Alaska*, 545 U.S. at 98.
[76] Pls.' Opp'n to Mot. to Dismiss at 47, ECF No. 154; Individual Pls.' Opp'n to Mot. to Dismiss at 39, ECF No. 153
[77] *Massachusetts Lobstermen's Ass'n*, 349 F. Supp. 3d at 63.
[78] *Lawson v. FMR LLC*, 571 U.S. 429, 446 (2014).
[79] *Id*.
[80] *Id*. at 446-7.

3. The Legislative History Shows that The Antiquities Act was a Compromise that Protects Both Historic and Scientific Objects.

Plaintiffs turn to the legislative history to support their narrow interpretation.[81] The words of the Act, however, are what "constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."[82] Indeed, "when the meaning of the statute's terms is plain," the Court's job is at an end.[83] The Courts sometimes consult legislative history, but only when interpreting "ambiguous statutory language."[84] But legislative history "is meant to clear up ambiguity, not create it."[85]

The legislative history shows the final version of the Act was a compromise.[86] For years leading up to the Act's passage, Interior's General Land Office lobbied Congress to enact legislation granting the President a distinct power "to set apart, as national parks,

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[81] Pls.' Opp'n to Mot. to Dismiss at 42, ECF No. 153; Pls.' Opp'n to Mot. to Dismiss at 48, ECF No. 154.
[82] *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020).
[83] *Id*. at 1749.
[84] *Id*.
[85] *Id*.; *see also* *Nelson v. United States*, 40 F.4th 1105, 1116-17 (10th Cir. 2022) (disregarding statements in legislative history where "the plain text of [the statute] is sufficiently clear").
[86] *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1178 (D. Utah 2004) (noting the demands of archaeological organizations contrasted with the Department of Interior's desire to protect scenic and scientific resources).

tracts of public land which . . . it is desirable to protect and utilize in the interest of the public."[87] The Interior Department's early efforts at proposing such legislation included key language that was later incorporated into the Antiquities Act. The original draft bill leading to the Antiquities Act would have authorized the President to designate "any natural formation of scientific or scenic value or interest, or natural wonder or curiosity together with such additional area of land surrounding or adjoining the same."[88] A modified version of this bill was introduced by Rep. Jonathan P. Dolliver on February 5, 1900.[89] In response to these and related bills, then-Commissioner of the General Land Office, Binger Hermann, emphasized "the need for legislation which shall authorize the setting apart of tracts of public land as National Parks, *in the interest of science and for the preservation of scenic beauties and natural wonders and curiosities*, by Executive Proclamation, in the same manner as forest reservations are created."[90] Later, the Interior Department's Land Office proposed a replacement bill, which Representative John F. Lacey introduced on April 26, 1900, titled "A Bill to establish and administer national parks, and for other purposes."[91] This bill put "greater emphasis on scenic and natural areas."[92] It would have authorized reservations of "public land . . . for their scenic beauty, natural wonders or

[87] Comm'r of the Gen. Land Office, *Annual Report of the Commissioner of the General Land Office to the Secretary of the Interior* 117 (1902); *see also* Lee, *supra* n. 44, at 53.
[88] Lee, *supra* n. 44, at 48.
[89] *Id*. at 50.
[90] *Id.* at 52.
[91] *Id*. at 53.
[92] *Id*.

curiosities, ancient ruins or relics, or other objects of scientific or historic interest."[93] Though these early-1900s bills were initially met with "a cool response,"[94] they set the stage for the Antiquities Act's ultimate authorization to protect objects of "historic or scientific interest."

Congress also initially rejected early legislation targeting discrete, enumerated antiquities and landmarks that did *not* protect scientific interests. Legislation championed by Senator Henry Cabot Lodge focused on protecting "ruins," with strict regulation of "excavations" and other similar activities.[95] Similarly, legislation championed by the Smithsonian Institute would have protected specific, clearly defined structures and landmarks, including "mounds, pyramids, cemeteries, graves, tombs," and several other enumerated objects, with no protection for historical, scenic, or scientific resources on public lands.[96] But these bills, including a version that would have limited designations to 640 acres, also failed to garner sufficient support, and Congress declined to pass them into law.[97]

What finally became the Antiquities Act was a bill that "reconciled the conflicting interests that had plagued antiquities legislation for six years," incorporating language from the Lodge bill (which "had been limited to historic and prehistoric antiquities and

[93] *Id.*
[94] *Id.* at 55.
[95] *Id.* at 59–61.
[96] *Id.* at 61–62.
[97] *Id.* at 63–67.

made no provision for protecting natural areas") *and* the early Interior bills (which encompassed broad "scientific" interests warranting designations akin to national parks).[98] As can be seen, the legislative history shows that the Antiquities Act was a compromise that protected both historic and scientific objects.[99]

iii. The President Has Broad Discretion to Reserve Land.

Failing to overcome the clear language of the Act, Plaintiffs launch factual attacks against the size of the land reserved with only legal conclusions.[100] The Utah and County-Plaintiffs have failed to meet their burden altogether, as they do not specify any such lands that lack objects. They simply assert that legally, as they have interpreted the act, the reservation is too large. And the Dalton Plaintiffs seem to give up on this point as they failed to address the Tribal Nations arguments in their Motion to Dismiss. There, the Tribal Nations noted that the Dalton Plaintiffs complaint is not plausible because, as they assert based on their belief, "objects of historic or scientific interest" are not on their lands.[101] They say nothing about whether "historic landmarks" or "historic and prehistoric structures" are on the lands they identify.[102]

This is Plaintiff's effort to shift the pleading burden onto the President, but it misses the mark. It was "incumbent upon [Plaintiffs] to allege that some part of the

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[98] Lee, *supra* n. 44, at 71, 74.
[99] 54 U.S.C.A. § 320301(a).
[100] *See supra* at II.A. (noting that Plaintiffs' allegations are just legal conclusions couched as facts).
[101] Intervenor-Defs.' Mot. to Dismiss at 34, ECF No. 114.
[102] *Id.* at 59; Consol. Pls.' Am. Compl. at 50, 57, 63, ECF No, 90.

Monument did not, in fact, contain natural resources that the President sought to protect."[103] Having failed to do so, Plaintiffs have failed to plausibly allege a claim for relief as they have not identified any lands that lack identifiable objects.[104]

Instead, Plaintiffs attack the President's discretion head on by asserting that the most generous amount of land that could be reserved is not more than a few acres for each item and never more than 160 acres.[105] The Antiquities Act, however, places no acreage limits on the amount of federal land that can be reserved, but rather gives the President broad discretion to reserve the land that is necessary. The legislative history supports this understanding.[106]

In an influential memorandum that he submitted to the House Committee on Public Lands, Professor Hewett noted the need to enact "legislation to the end that these *regions* may be" protected.[107] "Unquestionably," Hewett went on, "some of these *regions* are sufficiently rich in historic *and scientific interest and scenic beauty* and to warrant their organization into permanent national parks," rather than being "temporarily withdrawn."[108] Given the clarity of the statutory text, Plaintiffs' mischaracterization of legislative history should not override it.[109]

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[103] *Massachusetts Lobstermen's Ass'n*, 945 F.3d 535, 544 (D.C.Cir. 2018).
[104] *Id.*
[105] Pls.' Opp'n to Mot. to Dismiss at 51, ECF No. 154.
[106] Intervenor-Defs.' Mot. to Dismiss at 43, ECF No. 114 (noting Congress contemplated creating limits but did not).
[107] H.R. Rep. No. 59-2224 at 2-3 (1906) (emphasis added).
[108] *Id*. at 3 (emphasis added).
[109] *See Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011).

Finally, Plaintiffs utilize hyperbolic language about abuse of the Antiquities Act. But as discussed in the Tribal Nations Motion to Dismiss, a region more worthy of protection under the Antiquities Act is hard to imagine.[110] And indeed, the Tribal Nations advocated for an even larger monument.[111] But the President declined that request.

The President has broad discretion to reserve the necessary land to protect the monument objects. Plaintiffs' have failed to overcome that discretion.

D. Standing.

Plaintiffs fail to address Tribal Nations' standing arguments. They also falsely assert that Tribal Nations raise the same arguments as federal Defendants.[112] But Tribal Nations' distinct standing arguments must be addressed. By conflating Tribal Nations' and federal Defendants' standing arguments, Plaintiffs' response is left with significant gaps. For instance, Utah Plaintiffs are defenseless against Tribal Nations' argument that County Plaintiffs fail to establish injury as to Bears Ears altogether. In fact, Utah Plaintiffs only confirm this is the case with the six declarations they submit, which are all from

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[110] Intervenor-Defs.' Mot. to Dismiss at 39-40, ECF No. 114.

[111] Zak Podmore, *San Juan County asks President-elect Joe Biden to immediately restore Bears Ears National Monument*, THE SALT LAKE TRIBUNE (Dec. 2, 2020), https://www.sltrib.com/news/2020/12/02/san-juan-county-asks/ (noting that San Juan County Utah and the Bears Ears Inter-Tribal Coalition requested the monument to be 1.9 million acres, not 1.3 million).

[112] Pls.' Opp'n to Mot. to Dismiss at 15, ECF No. 154 ("Tribal Intervenor-Defendants also moved to dismiss. They raised the same arguments, except that their arguments addressed only the Bears Ears reservation."); Pls.' Opp'n to Mot. to Dismiss at 16, n.89, ECF No. 153 ("The Tribal Intervenors mirror the Government's arguments.").

persons with interests and activities solely in Grand Staircase.[113] All Plaintiffs are silent as to Tribal Nations' argument that they fail to establish injury to the extent they rely upon harm to others than themselves.

Plaintiffs barely respond to Tribal Nations' distinct arguments that Plaintiffs fail to establish causation and redressability. Plaintiffs fail to distinguish the harms caused by the Biden Proclamations from the prior proclamations as a general matter. In so doing, it is impossible to evaluate whether they can establish standing, as the harms are not alleged with sufficient particularity. Plaintiffs thus fail to carry their burden to establish causation and redressability by tracing their alleged harms to the Biden Proclamations.[114] Utah Plaintiffs have repeatedly asserted that the harms have existed from the time of the Clinton and Obama Proclamations.[115] Dalton Plaintiffs complain that "the Biden Administration decided to markedly expand the Monuments in recent years."[116] Even if this response had any merit, it would fail as to Bears Ears, as the Biden Proclamation includes no lands not already encompassed by the Obama and Trump Proclamations, and there is no way the Biden Bears Ears Proclamation can be said to have "expanded" the area protected. The Obama Bears Ears Proclamation alone covers around 99% of the

[113] Pls.' Opp'n to Mot. to Dismiss Exs. A-E, ECF No. 154.
[114] Intervenor-Defs.' Mot. to Dismiss at 15, ECF No. 114.
[115] *See, e.g.*, Garfield Cty. Pls.' Opp'n to Mot. to Dismiss Exs. A-E, ECF No. 154.
[116] Pls.' Opp'n to Mot. to Dismiss at 34, ECF No. 153.

land mass covered by the Biden Bears Ears Proclamation.[117] Dalton Plaintiffs have indisputably traced their harms to the Obama Bears Ears Proclamation.[118]

It is perplexing how Plaintiffs can profusely attest that they have been suffering harms of increased visitation and regulatory burdens on a constant basis ever since the prior Proclamations and yet insist such harms would cease by getting rid of just the Biden Proclamations. Utah Plaintiffs cryptically suggest they clear this hurdle by having alleged that "all acres encompassed by the current monument boundaries are unlawfully designated regardless of whether those lands were covered by any pre-2021 reservations, and that they seek an injunction against *the proclamations* and management plans as to all 3.23 million acres."[119] This may be true, but it doesn't negate the fact that "the proclamations" they have challenged and sought declaratory and injunctive relief against

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[117] *See* Proclamation No. 9558, 82 FR 1139, at 1143 (Dec. 28, 2016) Establishment of the Bears Ears National Monument, 82 FR 1139 ("Obama Proclamation"), https://www.federalregister.gov/documents/2017/01/05/2017-00038/establishment-of-the-bears-ears-national-monument ("These reserved Federal lands and interests in lands encompass approximately 1.35 million acres").

[118] Individual Pls.' Am. Comp. at 26, 29-30, ECF No. 90; *see also* Individual Pls.' Opp'n to Mot. to Dismiss at 27-28, ECF No. 153.

[119] Pls.' Opp'n to Mot. to Dismiss at 42-43, ECF No. 154 (internal marks omitted) (emphasis added). Utah Plaintiffs also suggest here that these allegations are entitled to an assumption of truth. That is incorrect. Only factual allegations are entitled to an assumption of truth at the motion to dismiss stage. By contrast, their suggestions that their requested relief would satisfy redressability for establishing Article III standing is a legal conclusion not entitled to an assumption of truth. *Iqbal*, 556 U.S. at 678; *Matney v. Barrick Gold of N. Am., Inc.*, No. 2:20-CV-275-TC-CMR, 2022 WL 1186532, 2 (D. Utah Apr. 21, 2022) ("The court must accept all well-pled factual allegations as true and construe them in the light most favorable to the nonmoving party…But that rule does not apply to legal conclusions.")

are President Biden's, not any of the prior Proclamations. Plaintiffs cannot establish the Biden Proclamations are the cause of their harm.

Plaintiffs also fail to separate the alleged harms they have suffered from each Monument, as necessary to establish standing to challenge them both. As raised in Tribal Nations' Motion, standing is not dispensed in gross, and therefore each element of standing must be established as to each Monument separately.[120] "[A] litigant cannot, by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him."[121] Therefore, contrary to Dalton Plaintiffs' suggestion otherwise,[122] the Court should consider each indispensable element of standing as to each Plaintiff with respect to each Monument.

Proceeding in this sequential manner, County Plaintiffs fail to establish any of the elements as to Bears Ears and they cannot rely upon harms to others to establish standing.[123] It is then left to those Plaintiffs alleging legitimate personal harms to prove injury. But even there, Plaintiffs fail. For example, the Little Desert OHV Area is located in Grand Staircase, and as such cannot be used to establish standing as to Bears Ears.[124]

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[120] Intervenor-Defs.' Mot. to Dismiss at 15, ECF No. 114 (citing *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)).

[121] *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1650 (2022) (internal marks and citation omitted).

[122] Pls.' Opp'n to Mot. to Dismiss at 36, ECF No. 153.

[123] Intervenor-Defs.' Mot. to Dismiss at 19, ECF No. 114 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)).

[124] Pls.' Opp'n to Mot. to Dismiss at 27, n.175, ECF No. 153 (Plaintiffs' cite to a BLM website for support, which identifies the Little Desert OHV Area as falling within Grand Staircase. The link appears to be broken. However, Tribal Nations believe this

The BlueRibbon Coalition asserts the Biden Bears Ears Proclamation is the source of their inability to use ATVs at Inchworm Arch Road.[125] However, BlueRibbon Coalition itself acknowledges on its website[126] that Inchworm Arch Road also falls within Grand Staircase, not Bears Ears. As such, the Coalition's assertion that the Biden Bears Ears Proclamation caused its alleged harms at Inchworm Arch Road cannot be true.

With regard to some of the more explicit harms Plaintiffs raise that could pertain to Bears Ears, they still fail to meet their burden. Zeb Dalton asserts that he is being subjected to new regulations for his range improvement plans.[127] But, Mr. Dalton's alleged injuries all predate President Biden's monument.[128] And Mr. Dalton does not allege he has applied for other range improvement plans since the Biden Proclamation. As a result, the cases he relies on are inapposite.[129] And any potential land transfer will

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BLM page is what Dalton Plaintiffs intended to cite: https://www.blm.gov/utah-paria-river-do/public-room/data/little-desert-highway-vehicle-ohv-open-area.

[125] Pls.' Opp'n to Mot. to Dismiss at 27-28, ECF No. 153.

[126] BlueRibbon Coalition, *BLM Accepting Scoping Comments for Grand Staircase-Escalante National Monument Resource Management Plan*, SHARETRAILS.ORG (Aug 29, 2022), https://www.sharetrails.org/blm-accepting-scoping-comments-for-grand-staircase-escalante-national-monument-resource-management-plan/#/78/.

[127] Individual Pls.' Opp'n to Mot. to Dismiss at 18-19, ECF No. 153.

[128] *See* Defs.' Mot. to Dismiss Am. Compl. at 37, ECF No. 113; Pls.' Am. Compl. at 2, ECF No. 90-8(noting that he has "pending" applications), 5 (noting that before the Proclamation there were regulations), at 7 (noting he applied for a right of way "before the Monument" and speculating about how it might play out now).

[129] *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015) (noting the bureau there had already exercised its broad regulatory authority to impose new obligations on the Plaintiff Bank); *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1144–45 (10th Cir. 2010) (here, the case dealt with "the outlay of funds" necessary to secure "a second UIC permit from EPA" on the same original permit).

only be a harm "once" it "goes through."[130] Until then, such injuries are "conjectural or hypothetical."[131] Similarly, Kyle Kimmerle's complaints of being subjected to mining validity examinations[132] are insufficient for standing. This is because, absent a validity exam, a Plaintiff cannot establish that it possesses a protectable property interest to an unpatented mining claim.[133] Unless and until Plaintiff receives a validity determination, neither the BLM, the Forest Service, nor this Court can determine if and how the Proclamation will impact Plaintiff's unpatented mining claims.[134]

…

Despite having had the opportunity to amend their complaints after being challenged by federal Defendants on these deficiencies, Plaintiffs fail to deliver anything new to establish standing. Plaintiffs' opinions on the imperfections of federal land management, interspersed in vague allegations of harm from the Biden Monuments, are appropriately addressed by the legislative branch. And those harms Plaintiffs trace to the prior Proclamations could only have potentially attached to an action against those Proclamations. Any harms Plaintiffs foresee to their legally protected interests based on their interpretations of the Proclamations and the BLM memos would be properly addressed in the first place via the consultation and public participation strongly directed

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[130] Individual Pls.' Opp'n to Mot. to Dismiss at 21, ECF No. 153.
[131] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).
[132] Individual Pls.' Opp'n to Mot. to Dismiss at 21-24, ECF No. 153.
[133] *Vane Mins. (US), LLC v. United States*, 116 Fed. Cl. 48, 62 (Fed. Cl. 2014).
[134] *Id.*

by the Proclamations and acknowledged in the BLM memos.[135] These avenues provide Plaintiffs the opportunity to protect their interests without speculating that the administration may one day harm them.

E. Final Agency Action.

Plaintiffs also fail to address Tribal Nations' final agency action arguments. They continue to insist that the interim management memos constitute final agency action and misleadingly designate the memos as "plans." And this only after Utah Plaintiffs' original complaint made nary a reference to the memos and Dalton Plaintiffs conspicuously changed their reference to the memos from "guidance" to "plans."[136]

Even so, Plaintiffs' repeated conclusory assertions that the memos constitute final agency action because they satisfy the "consummation of agency decisionmaking" and "legal consequences" factors—as explained in Tribal Nations' Motion[137]—do not move the needle any in their favor. Instead, Plaintiffs continue to point the finger at Presidential actions. However, the Proclamations cannot be challenged as final agency action, as the President is not an "agency" for purposes of the APA.[138] By extension, if the memos merely raise to the Utah BLM Director's attention what the Proclamations say without

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[135] Intervenor-Defs.' Mot. to Dismiss at 30, ECF No. 114.
[136] *See* Pls. Am. Compl., ECF No. 91; *e.g.* Individual Pls. Am. Compl., at 21, ECF No 90. ("[T]he BLM Director issued interim guidance for managing the Monument while the Government develops a full monument management plan.").
[137] Intervenor-Defs.' Mot. to Dismiss at 24-30, ECF No. 114.
[138] Intervenor-Defs.' Mot. to Dismiss at 30, n. 132, ECF No. 114 (*citing Franklin*, 505 U.S. at 800-01).

establishing any rules, regulations, or enforcement mechanisms or adjudicating any discrete matters—as is the case—they are not final agency action and cannot be challenged.

Conflating the memos with binding documents delivering legal consequences, Plaintiffs leverage misleading assertions, such as Utah Plaintiffs' statements that the memos "acknowledge a wide range of activities *affected by their rules*, including 'certain [vegetation] treatment methods allowed under the [previous] monument management plans,'" provide "*interpretations and implementations* of law currently *governing* the reservations," and "are *not subject to any further review* until permanent plans are finalized."[139] In truth, the memos do not create any rules or render any interpretations of law. They do not "govern" anything, but unmistakably provide that until a final management plan created jointly with USFS issues, the prior management plans control.[140] The memos are thus not "subject to review" until the final management plan issues because there is no reason to review them. Plaintiffs mischaracterize the memos in

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[139] Pls.' Opp'n to Mot. to Dismiss at 10, 45, 63, ECF No. 154 (internal marks omitted) (emphasis added).

[140] *E.g.*, Bureau of Land Mgmt., *Interim Mgmt. of the Bears Ears National Monument*, at 7, BLM.GOV, https://www.blm.gov/sites/default/files/docs/2021-12/BENM%20Interim%20Guidance%2012-16-21_Final508.pdf (last visited May 5, 2023) ("The existing monument management plans that were approved in February 2020 and the portions of the 2008 Monticello Resource Management Plan that is applicable to the restored monument boundaries will remain in effect until the BLM approves a new management plan for the entire monument."); *see also* Bureau of Land Mgmt., *Interim Mgmt. of the Grand Staircase-Escalante National Monument*, at 4, BLM.GOV, https://www.blm.gov/sites/default/files/docs/2021-12/GSENM_Interim_Guidance_12-16-21_Final508_0.pdf (last visited May 5, 2023).

an attempt to get around not being able to challenge the Proclamations as final agency action.

That the memos create no rules nor enforcement mechanisms is a critical consideration for the legal consequences factor, to which Plaintiffs have no substantive response. Plaintiffs' throwing out terms like "governing document" and "interpretation" mischaracterizes their limited effect. The memos merely inform of applicable laws and direct the BLM Director to work with USFS to create a plan.[141] Consequently, Plaintiffs are unable to provide any discrete examples of federal officials invoking the memos to enforce them against Plaintiffs. This cuts against them not only in the final agency action analysis, but also with respect to establishing that the memos are the cause of their alleged injuries for purposes of Article III standing.

The BLM memos are likewise not management plans, whether in a temporary or final sense, that could deliver legal consequences for Plaintiffs. A management plan is a comprehensive, detailed, highly technical document that could in no way be fulfilled by an 8-page memo. Setting aside the fact that the memos neither direct nor authorize any immediate management or enforcement action, the memos merely point out from a 30k-foot view the terrain of applicable laws. In any event, Plaintiffs have failed to show they experienced legal consequences traceable to the memos. For example, Utah Plaintiffs allege that they have been "prohibited by federal agents from engaging in planned

[141] Intervenor-Defs.' Mot. to Dismiss at 28-30, ECF No. 114.

activities."[142] But following the citations to their complaint and declarations in support of this assertion, it turns out they have not pled or declared any discrete incident involving a direct connection between the memos and federal agent prohibitions. Instead, the cited portions of their complaint and declarations charge the Proclamations as the source of the harm.[143]

Just three of the eleven paragraphs in Utah Plaintiffs' complaint mention "prohibitions" on their activities, and those state unduly vague connections between the actions of federal agents and the Biden Proclamations (not the memos).[144] These allegations are generalized, failing to furnish a minimum level of detail about any discrete incidents where federal agents have invoked the memos or the Proclamations to prohibit activities.[145] What details Plaintiffs do provide only confirm the incidents pre-date the Biden Proclamations.[146] As a result, the Court cannot determine whether Plaintiffs can

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[142] Pls.' Opp'n to Mot. to Dismiss at 9-10, ECF No. 154.
[143] Pls.' Opp'n to Mot. to Dismiss at 10, n. 55, ECF No. 154.
[144] Pls. Am. Compl. at 37, 53, ECF No. 91.
[145] Pls. Am. Compl. at 37, ECF No. 91 ("Defendants' agents *have sought to prevent* [Plaintiffs'] activities.") (emphasis added); *see also, e.g., Id.* at 53 (vague allegation that "due in part to President Biden's Proclamation" BLM prohibited a road-improvement project at Hole in the Rock); *see also* Pls.' Opp'n to Mot. to Dismiss Exs. A-E ECF Nos. 154-1 - 154-5 (alleging not that federal agents have prohibited activities, but that the agents have not allowed Plaintiffs to borrow resources).
[146] Pls.' Opp'n to Mot. to Dismiss Exs. A-E ECF Nos. 154-1-154-5 (conceding that the conduct of the agents was not a consequence of the Biden Proclamations but occurred prior thereto); *e.g.,* Pls.' Opp'n to Mot. to Dismiss Ex. D at 3-4, ECF No. 154-4 (alleging that refusal to allow borrowing pits for road maintenance began with the Clinton Grand Staircase Escalante National Monument); (*see also, e.g.,* Pls.' Opp'n to Mot. to Dismiss Ex. at 3-4, ECF No. 154-5 ("One stark example of the BLM agents impeding search and rescue efforts *occurred in September of 2008*…") (emphasis added).

satisfy the factors for final agency action and establish Article III injury.[147] On the one occasion Utah Plaintiffs identify a discrete incident—though, it is immediately unclear as to whether they were personally involved, due to their superb use of the passive voice (i.e., "[a]n illustration of how the reservations impede activity arose recently…")—they explicitly identify the incident as having occurred in 2018, well-before the Biden Proclamations.[148] Thus, even were the Biden Proclamations challengeable under the APA, Plaintiffs would have failed to provide sufficient particularity about federal officials invoking them to prohibit Plaintiffs' activities, as necessary establish the final agency action factors.

…

The foregoing examples are just a sample of the inadequate response Plaintiffs offer in defense of complaints fatally lacking in clarity. Even if Plaintiffs did not have the standing deficiencies outlined above, the APA challenges are premature, as no final agency action has occurred.

III. Conclusion

For the forgoing reasons, the Tribal Nations respectfully request that the Court dismiss Plaintiffs' claims pursuant to Rule 12(b).

Dated: May 5, 2023 Respectfully submitted,

[147] Intervenor-Defs.' Mot. to Dismiss at 29, n. 128, ECF No. 114.
[148] Pls. Am. Compl. at 42-43, ECF No. 91.

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