TODD KIM
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice
MICHAEL S. SAWYER
Senior Attorney, Natural Resources Section
DANIEL C. LUECKE
Trial Attorney, Natural Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 514-5273 (Sawyer)
(202) 598-7863 (Luecke)
Email: michael.sawyer@usdoj.gov
daniel.luecke@usdoj.gov

ROMNEY S. PHILPOTT
Senior Attorney, Natural Resources Section
999 18th Street, #370
Denver, CO 80202
Telephone: (303) 844-1810
Email: romney.philpott@usdoj.gov

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

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

Plaintiffs,

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

Consolidated Plas,

v.

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

Defendants,

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINTS

Case No. 4:22-cv-00059-DN-PK (lead case)
Case No. 4:22-cv-00060-DN-PK

District Judge David Nuffer
Magistrate Judge Paul Kohler

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

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Plaintiffs do not dispute that they ask the Court to do something no other court has ever done: invalidate a Presidential Proclamation for violating the Antiquities Act. In seeking such unprecedented relief, however, Plaintiffs have not established a waiver of sovereign immunity or a cause of action providing a right to judicial review, much less presented a manageable approach to judicial review. Instead, they ask the Court to substitute its judgment for the President's about whether hundreds of objects are protectable under the Act. Because there is no basis for judicial review—and Plaintiffs have no standing—the Court should dismiss all of Plaintiffs' claims.

ARGUMENT

I. Judicial Review Is Not Available For Plaintiffs' Claims.

As Defendants have explained, Congress has neither waived sovereign immunity to nor created a cause of action for Plaintiffs' claims.[1] In response, Plaintiffs mischaracterize Defendants' argument as asserting that "the President may reserve any federal land for any reason as long as he cites the Act."[2] To the contrary, Congress expressly limited the President's power to, for example, create national monuments in Wyoming,[3] and the Act places discernible limits on the President's power to designate objects and reserve parcels of land.[4] But those limits are created by Congress, not the courts. And Congress has created no role for the courts in reviewing Presidential actions under the Antiquities Act.

Searching for a Congressional waiver of sovereign immunity, Plaintiffs misread 5 U.S.C. § 702 as "waiv[ing] sovereign immunity for *all* non-damages actions against the federal government."[5] Courts have rejected this argument, holding that § 702 does not waive the

[1] Defs.' Mot. to Dismiss, ECF No. 113, at 12–19 (Mot.).
[2] *Dalton* Opp'n, ECF No. 153, at 9; *see also Garfield* Opp'n, ECF No. 154, at 58–59.
[3] 54 U.S.C. § 320301(d); *see also* Act of Dec. 2, 1980, Pub. L. No. 96-487, § 1326(a), 94 Stat. 2371, 2488 (restricting the President's power to create large monuments in Alaska).
[4] 54 U.S.C. § 320301(a)–(b).
[5] *Garfield* Opp'n 61; *see also Dalton* Opp'n 12.

President's sovereign immunity as he is not an agency.[6] In limiting its waiver to "an agency or an officer or employee thereof," § 702 textually excludes the President.[7] While Plaintiffs note that the "waiver 'is not limited to suits under the [APA],"[8] that observation merely recognizes that certain non-APA claims—such as constitutional claims—may proceed where the defendant "is an agency within the meaning of the APA."[9] Because the President is not an "agency or an officer or employee thereof," § 702 does not waive his immunity to suit.

Nor does § 702 waive immunity over claims seeking relief against future agency action. The text of the waiver is limited to actions "stating a claim that an agency or an officer or employee thereof *acted or failed to act*."[10] In using the past tense, Congress excluded claims that an agency *will* act by, for example, adopting monument management plans next year.[11] Accordingly, Congress has not waived sovereign immunity to claims "premised on stopping unlawful subordinate executive action" before that action has occurred.[12] And, as explained below, Plaintiffs have failed to carry their burden to identify agency action that has already occurred in their Amended Complaints.[13]

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[6] *Alexander v. Trump*, 753 F. App'x 201, 206 (5th Cir. 2018) ("[Section] 702's waiver does not apply to Alexander's claims against President Trump"); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 41 (D.D.C. 2010) (similar).
[7] *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992).
[8] *Dalton* Opp'n 12 (quoting *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir. 2005)).
[9] *Simmat*, 413 F.3d at 1239; *see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549–50 (10th Cir. 2001) (construing § 702 as "a general waiver of sovereign immunity . . . does not allow [the] claims to proceed" where plaintiff "failed to identify any federal statute other than the APA itself that provides an express or implied cause of action in its favor").
[10] 5 U.S.C. § 702 (emphasis added).
[11] *See, e.g.*, *Carr v. United States*, 560 U.S. 438, 448 (2010) ("we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach"); *see also Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011) (holding that statutory language in the "past tense" was "backward-looking language" that excluded future developments).
[12] *Dalton* Opp'n 12.
[13] *See infra* 30–33.

Lacking a Congressional waiver of sovereign immunity, Plaintiffs turn to a judicial exception to sovereign immunity—the *ultra vires* doctrine.[14] In describing this doctrine, however, Plaintiffs discount a century of Supreme Court precedent—*Dalton*, *Waterman*, *Bush*, & *Dakota*—establishing that *ultra vires* "review is not available when the statute in question commits the decision to the discretion of the President."[15] And the Antiquities Act explicitly entrusts monument declarations to "the President's discretion."[16]

Attempting to distinguish these longstanding precedents, Plaintiffs incorrectly claim that the "*Dalton* line of cases arose in a particular fact pattern: A statute charged the President with making a 'discrete specific decision,' but provided 'no limitations on the President's exercise of that authority.'"[17] To the contrary, as the *en banc* Federal Circuit recognized, "both *Dakota* and *Bush* involved situations where the Court insulated Presidential action from judicial review for abuse of discretion despite the presence of some statutory restrictions on the President's discretion."[18] The relevant statutory restrictions—the President's judgment that duty rates were "necessary to equalize . . . differences in costs of production" and that seizure was "necessary for the national security or defense"[19]—concerned areas where plaintiffs sought judicial review of how the President accounted for the "costs of production" or justified "national security" needs. But in both cases the Supreme Court held that such claims were beyond judicial power.[20]

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[14] *Dalton* Opp'n 10, 13–15; *Garfield* Opp'n 60–62.
[15] *Dalton v. Specter*, 511 U.S. 462, 474 (1994); *see also* Mot. 14–19 (citing *Dalton*, 511 U.S. 462; *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940); *Dakota Central Telephone Co. v. State of South Dakota ex rel. Payne*, 250 U.S. 163 (1919)).
[16] 54 U.S.C. § 320301(a).
[17] *Dalton* Opp'n 13–14 (quoting *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996)); *see also Garfield* Opp'n 62 & n.401.
[18] *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1361 (Fed. Cir. 2006) (per curiam).
[19] *Id.* at 1361 (quoting *Bush*, 310 U.S. at 379, and *Dakota*, 250 U.S. at 181).
[20] *Bush*, 310 U.S. at 379 ("The President's method of solving the problem was open to scrutiny neither by the Court of Customs and Patent Appeals nor by us."); *Dakota*, 250 U.S. at 184.

Plaintiffs do not seriously dispute that many of their claims seek judicial review of how the President exercised his authority under the Act. In particular, the *Garfield* Plaintiffs repeatedly ask the Court to review whether the President sufficiently described the "past specific significance" of designated objects, even for categories of items they concede are protectable under the Antiquities Act.[21] And all Plaintiffs ask the Court to review whether the President did enough to "justify" the challenged reservations,[22] advancing the same argument *Dakota* rejected as "beyond the reach of judicial power."[23] In sum, claims seeking to review the President's methods, motives, or evidence for a discretionary action are not viable *ultra vires* claims as they "at best concern[] not a want of power, but a mere excess or abuse of discretion in exerting a power given."[24]

Similarly beyond the scope of judicial power are Plaintiffs' remaining claims asking the Court to establish an "objective standard" for the statutory phrase "objects of historic or scientific interest."[25] When Congress entrusts such concededly "broad" language[26] to "the President's discretion[ary]" judgment,[27] courts reject claims seeking to review whether the "conditions at the time the power was exercised" met the broad statutory requirement.[28] This result follows from

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[21] ECF No. 91 ¶¶ 299 ("[g]eological items could be declared monuments"), 302, 306 ("archaeological, historical, and paleontological items could be declared monuments"), 308–11.
[22] *E.g.*, ECF No. 90 ¶ 186; ECF No. 91 ¶¶ 317–18.
[23] *Dakota*, 250 U.S. at 184 (rejecting argument seeking review of whether conditions "justified the calling into play of the authority" exercised by the President).
[24] *Id.* (no judicial power to review "motives" behind Presidential action); *see also Bush*, 310 U.S. at 379 (no judicial power to review the "President's method of solving the problem"); *Motion Sys.*, 437 F.3d at 1360 (no judicial power to review claim alleging that the President's action lacked "evidentiary support").
[25] *Garfield* Opp'n 59.
[26] ECF No. 2 ¶ 235. The *Garfield* Plaintiffs wrongly accuse Defendants of mischaracterizing "two paragraphs of Utah Plaintiffs' amended complaint." *Garfield* Opp'n 53 (citing Mot. 54 n.292). But Defendants were characterizing the original *Garfield* Complaint, not the Amended Complaint. Mot. 54 & n.292. And "the earlier pleading may . . . be exposed as evidence of the declaration by the pleader." *Raulie v. United States*, 400 F.2d 487, 526 (10th Cir. 1968).
[27] 54 U.S.C. § 320301(a).
[28] *Dakota*, 250 U.S. at 184.

Justice Story's longstanding rule of construction: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."[29] Accordingly, out of respect for the separation of powers, courts have declined to judicially establish standards for "costs of production," "national security or defense," or the "national economic interest."[30] Similarly here, the Court should decline Plaintiffs' invitation to create a supposedly "objective standard" for "objects of historic or scientific interest."

Plaintiffs' proposed "objective standard" demonstrates why the Court cannot review Plaintiffs' claims without invading the legislative and executive domains. Plaintiffs not only ask the Court to establish nebulous standards for "objects"—such as having "some past significance to humans,"[31] being "akin to a historical structure,"[32] and not being "too small" or "too large"[33]—but they also ask the Court to resolve factual disputes between Plaintiffs and the President about whether such amorphous standards are met for a given resource.[34] As Judge Benson recognized, such arguments invite the Court "to substitute its judgment for that of the President," something the Court must decline to do "particularly in an arena in which the congressional intent most clearly manifest is an intention to delegate decision-making to the sound discretion of the President."[35]

Dismissal on sovereign immunity grounds or for lack of a cause of action is consistent with Supreme Court precedent affirming Presidential designations under the Antiquities Act. In

[29] *Bush*, 310 U.S. at 380 (quoting *Martin v. Mott*, 25 U.S. 19, 31–32 (1827)).
[30] *Id.* at 379; *Dakota*, 250 U.S. at 181; *Motion Sys.*, 437 F.3d at 1361–62.
[31] *Garfield* Opp'n 46.
[32] *Dalton* Opp'n 55.
[33] ECF No. 91 ¶ 280.
[34] *See Garfield* Opp'n 51–54.
[35] *Utah Ass'n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1186 (D. Utah 2004).

Cappaert v. United States[36] and *Cameron v. United States*,[37] the United States sought judicial relief to enforce reservations of land under the Antiquities Act. Similarly, in *United States v. California*,[38] the United States sought a decree that it had dominion over submerged lands. Because the United States invoked the jurisdiction of the federal courts in those suits, its sovereign immunity was not at issue. Here, by contrast, Plaintiffs have invoked the Court's jurisdiction against the President, thus requiring them to establish a waiver of sovereign immunity. Because they have failed to do so, the Court should dismiss their claims as nonjusticiable.

II. Plaintiffs Lack Standing.

The Court also lacks jurisdiction over all Plaintiffs' claims because Plaintiffs lack standing. As Defendants' Motion demonstrated, Plaintiffs' claimed injuries are speculative and often counterfactual.[39] Plaintiffs respond that the Court must accept their allegations as true, because resolving "factual disagreements" about jurisdiction is somehow "improper."[40] They overlook Tenth Circuit law instructing the opposite: "a district court may not presume the truthfulness of the complaint's factual allegations" when "reviewing a factual attack on subject matter jurisdiction."[41] Indeed, because the Tenth Circuit expressly upheld a dismissal under Rule 12(b)(1) for lack of standing based on a similar factual challenge,[42] Plaintiffs' reliance on a

[36] 426 U.S. 128, 141–42 (1976).
[37] 252 U.S. 450, 455–56 (1920).
[38] 436 U.S. 32, 33 (1978).
[39] *See generally* Mot. 19–49.
[40] *Garfield* Opp'n, ECF No. 154, at 22; *see also Dalton* Opp'n, ECF No. 153 at 17 n. 94 ("the Government's fact-bound standing arguments are inappropriate on a motion to dismiss posture").
[41] *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995) (noting district court's "wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)"), *abrogated on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425, 437 (2001); *see also Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir. 2004) (same).
[42] *Wyoming v. U.S. Dep't of Int.*, 674 F.3d 1220, 1231–33 (10th Cir. 2012) ("where the court is presented with a factual attack on the petition, 'a district court may not presume the truthfulness of the [petition's] factual allegations.'") (quoting *Holt*, 46 F.3d at 1003).

dated extra-circuit case is unavailing.[43] So too is their citation of older cases that predate the now well-accepted distinction between facial and factual attacks under Rule 12(b)(1).[44]

Nor must the Court first allow discovery where no additional fact finding would affect the outcome.[45] Plaintiffs make only an inadequate "general blanket request to conduct discovery."[46] Similarly, an evidentiary hearing is unnecessary because the Plaintiffs "do not explain in any specific terms" what additional evidence they might adduce that is not already presented in the parties' extensive filings.[47] And the Court should avoid evidentiary hearings here, where judicial review, if any, is confined to the "language of the Proclamation[s]."[48] In sum, the Court may evaluate standing by resolving disputed issues of fact based on the filings before it.

A. The *Garfield* Plaintiffs still fail to establish a cognizable injury, caused by the Proclamations, that would be redressed by a favorable decision.

As demonstrated in Defendants' Motion, the *Garfield* Plaintiffs' theories of standing fail. The primary theory of injury in their pleading (increased visitation) is defective: they cannot establish that the Biden Proclamations—as opposed to the prior existence of the Monuments, pandemic tourism, and even their own active efforts to attract tourists—caused the increased

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[43] *See Garfield* Opp'n 23–24 (*citing Haase v. Sessions*, 835 F.2d 902, 906–08 (D.C. Cir. 1987)).
[44] *Compare Riggs v. City of Albuquerque*, 916 F.2d 582, 584 (10th Cir. 1990) (not mentioning either Rule 12(b)(1) or the factual attack standard), *with Wyoming*, 674 F.3d at 1231–35 (weighing the State's evidence of its alleged injury, in the form of declarations, against the movants' evidence showing lack of injury in a factual attack under Rule 12(b)(1)). Nor did the Supreme Court hold in *United States v. U.S. v. Students Challenging Reg. Agency Procedures (SCRAP)*, 412 U.S. 669 (1973) that a District Court could *not* "take evidence on the issue of standing" at the preliminary stages of that case—merely that it "could not be faulted for failing" to do so given how the issues had been litigated before it. *Id.* at 690 n.15.
[45] *Bell Helicopter Textron, Inc. v. Heliqwest Intern., Ltd.*, 385 F.3d 1291, 1299 (10th Cir. 2004) (affirming district court's refusal to allow jurisdictional discovery); *see also Wilderness Watch v. Ferebee*, 445 F. Supp. 3d 1313, 1326 (D. Colo. 2020) (explaining that "the Court is not persuaded that plaintiffs have alleged any facts or evidence that they believe limited discovery would reveal and would make their claims ripe for review").
[46] *See Weinstein v. U.S.A.F.*, 468 F. Supp. 2d 1366, 1372 (D.N.M. 2006).
[47] *Id.*
[48] *Utah Ass'n of Ctys.*, 316 F. Supp. 2d at 1186.

visitation that they now complain about. Nor can the Court issue an order that remedies these alleged increased-visitation harms. Tellingly, their opposition pivots, downplaying the tourism theory to instead focus on still-insufficient theories about decreased revenues, the inability to enforce state laws on federal land, and alleged increased expenditures.

1. *Garfield* Plaintiffs cannot demonstrate standing based on alleged lost revenue.

The *Garfield* Plaintiffs' revenue arguments fail because they assert "hypothetical future harm that is not certainly impending."[49] When faced with a similar lost-potential-mineral-revenue standing theory, the Tenth Circuit rejected it as "conjecture based on speculation that is bottomed on surmise."[50] The *Garfield* Plaintiffs suggest that a less-stringent rule applies to "specific" tax revenues, but *Wyoming v. Oklahoma* does not support their position, as the loss of revenue in that case was an "undisputed fact."[51] Here, by contrast, Defendants have disputed that the proclamations would cause Utah to receive less mineral revenue, as the examples in the *Garfield* pleading involve either long-abandoned claims or claims that can still be developed.[52]

Rather than defend any of the unhelpful allegations in their pleading, the *Garfield* Plaintiffs pivot to borrowing allegations from the *Dalton* Plaintiffs.[53] But those allegations come with admissions: "if there were minerals" on the monuments, "they've already been discovered and recovered" as the land was open to resource extraction for decades.[54] While the *Garfield* Plaintiffs attempt to show current interest in mineral development by citing to agency analysis discussing

[49] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401–02 (2013).
[50] *State ex rel. Sullivan v. Lujan*, 969 F.2d 877, 882 (10th Cir. 1992) (rejecting Wyoming's standing based on alleged lost revenue from a coal exchange).
[51] 502 U.S. 437, 448 (1992).
[52] Mot. 32–33.
[53] *Garfield* Opp'n 28–29.
[54] BlueRibbon Coalition (BRC), Defend Your Ground Podcast, Episode 11, at 9:43–56. Although BRC notes that small mining claims may still proceed, the *Garfield* Plaintiffs have failed to allege facts establishing that any such small claims would exceed the applicable severance tax exemption. *See* Utah Code Ann. 59-5-202(3).

mining claims filed in 2018, they ignore the relevant conclusion: "interest in uranium and vanadium mining on existing claims is not expected to occur unless prices increase."[55] Kimmerle admits the same.[56] The *Garfield* Plaintiffs cannot base standing on the theory that they might eventually receive revenue should mineral prices increase to the point that claimants are willing to develop their claims but could be deterred from doing so because of the cost of a validity examination.[57] Those are simply "too many contingencies" to support standing,[58] particularly on a factual attack with countervailing evidence.[59] Nor can the theory that a future Congress might abandon a decades-long prohibition on mineral development support standing.[60]

Next, the *Garfield* Plaintiffs barely defend their grazing-revenue theory of standing. They offer no response to its dispositive redressability problem.[61] Nor do they explain how a third party's decision to voluntarily relinquish a grazing allotment is traceable to Defendants. And they have not alleged a reduction in the *number* of grazing allotments, which they admit drives their revenue.[62] Accordingly, these claimed revenue injuries cannot support standing for the State.

2. *Garfield* Plaintiffs' claim that the proclamations undermine their ability to "enforce" their own laws does not support standing.

The *Garfield* Plaintiffs argue that the proclamations "undermine their ability to enforce their legal codes."[63] But the case they rely on, *Wyoming ex rel. Crank v. United States*, recognized

[55] BLM & USFS, *Bears Ears National Monument Resource Management Plan and Environmental Impact Statement: Analysis of the Management Situation* 6-142 (Sept. 2022).
[56] *See* ECF No. 90-7 ¶ 16 ("we need the ability to capitalize on high uranium prices when they are available").
[57] To the extent the *Garfield* Plaintiffs suggest standing based on the ability to levy property taxes on federal lands, they have no legally cognizable interest in "a tax on the property" of the United States. *United States v. Colorado*, 627 F.2d 217, 219 (10th Cir. 1980).
[58] *Sullivan*, 969 F.2d at 882.
[59] *See Wyoming*, 674 F.3d at 1231–35.
[60] *Compare* Mot. 32–33 n.164, *with Garfield* Opp'n 29 n.187.
[61] *Compare* Mot. 32 & n.160, *with Garfield* Opp'n 30–31.
[62] *See Garfield* Opp'n 30–31.
[63] *Id.*

state interests in "the exercise of sovereign power over *individuals and entities* within the relevant jurisdiction[, which] involves the power to create and enforce a legal code."[64] The Wyoming law there—addressing a procedure to expunge convictions of domestic violence misdemeanors—clearly fell within the state's authority over individuals and entities within its jurisdiction.

Here, in contrast, the *Garfield* Plaintiffs are not asserting an impairment of their "sovereign power"—indeed, they are not even alleging an impairment in their ability to regulate activity occurring on federal land.[65] Rather, they assert an inability to impose their policy preferences on how the federal lands making up the monuments are managed. They argue that Utah law directs federal lands to be managed to "achieve and maintain at the *highest reasonably sustainable levels* a continuing yield of energy, hard rock, and nuclear resources" and "directs land-use policies on federal land to 'achieve and maintain livestock grazing at the highest reasonably sustainable levels.'"[66] But this alleged impairment of Utah's ability to direct how the United States manages federal public lands pursuant to state law is not a cognizable injury because Utah lacks any such authority. It is well established that "state jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may require rights in them."[67] Thus, it is not just that federal law would pre-empt any contrary state law (which the *Garfield* Plaintiffs argue is solely a merits issue).

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[64] 539 F.3d 1236, 1242 (10th Cir. 2008) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)) (emphasis added).
[65] *Cf. California Coastal Comm'n. v. Granite Rock Co*., 480 U.S. 572, 588 (1987) (discussing "Congress' treatment of environmental regulation and land use planning as generally distinguishable," and recognizing relevant distinction for preemption analysis).
[66] *Garfield* Opp'n 31–32 (citing various statutes).
[67] *Wyoming v. United States* 279 F.3d 1214, 1227 (10th Cir. 2002) (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917)); *see also Utah Power*, 243 U.S. at 404 (rejecting argument that state law could authorize use of federal land).

Rather, the *Garfield* Plaintiffs lack authority to direct which uses should be made of federal lands—and therefore they have no legally protectable interest at issue to support their standing.[68]

3. Alleged impairment of "planned activities" does not support standing.

The *Garfield* Plaintiffs next allege that a plaintiff has standing to challenge a "federal-land policy" when "it intends to engage in an activity on that federal land that is impeded by the policy."[69] But the cases Plaintiffs cite for support provide only that standing may be based on the personal (*e.g.*, aesthetic, recreational) interests of *individuals*.[70] Nonindividuals, like states and corporations, cannot assert the same personal interests.[71] Nor may states assert the "interests of . . . local people" on behalf of their citizens against the Federal Government.[72] The *Garfield* Plaintiffs cite no authority that "a State has standing on all bases available to private individual."[73]

The *Garfield* Plaintiffs contentions fail on the facts as well. As demonstrated in Defendants' Motion, the Proclamations' alleged impairment of the *Garfield* Plaintiffs' "planned"

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[68] The *Garfield* Plaintiffs' assertion that legal obligations related to search and rescue operations are obstructed by the proclamations is baseless, because the proclamations explicitly authorize prior—and human-health and safety focused—approaches to "emergency response activities." Mot. 36. The only "evidence" they offer in response involves an alleged incident from 2008, ECF No. 154-5, long before the Biden Proclamations issued with these emergency response provisions.

[69] *Garfield* Opp'n 34.

[70] *Id.* (citing *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013) (environmental group had standing to challenge oil and gas lease activity based on its members' individual interests in visiting and recreating in area); *New Mexico ex rel. Richardson v. Bureau of Land Mgt.*, 565 F.3d 683, 697 n.13 (10th Cir. 2009) (similar); *Grand Canyon Tr. v. Energy Fuels Resources (U.S.A.) Inc.*, 269 F. Supp. 3d 1173, 1188 (D. Utah 2017) (similar)).

[71] *Snapp*, 458 U.S. at 607; *Optimus Steel, LLC v. U.S. Army Corps of Engineers*, 492 F. Supp. 3d 701, 718 (E.D. Tex. 2020) (collecting cases).

[72] *Sullivan*, 969 F.2d at 882–83. *Garfield* Plaintiffs' discussion of *Grand Canyon Trust* misleadingly suggests that the State may assert its employees' recreational interests. *Garfield* Opp'n 35. To the contrary, the cited recreational interests were relevant given the individual's membership in the nonprofit plaintiff. *Grand Canyon Tr.*, 269 F. Supp. 3d at 1188–89.

[73] *Garfield* Opp'n 35. Although Plaintiffs cite *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007) in support, that case offers no support for such a far-reaching proposition. There, the tate had standing because the "rising seas ha[d] already begun to swallow Massachusetts' coastal land," not because it was asserting personal interests on behalf of its citizens. *Id.* at 522.

activities is, at best, "possible future injury" insufficient to support standing.[74] Ultimately, the *Garfield* Plaintiffs speculate as to how the defendant agencies will respond to future applications to undertake various vegetation removal and soil management, road maintenance, wildlife prevention, search and rescue, and wildlife support activities.[75] The *Garfield* Plaintiffs try to avoid the prematurity of their assertions by taking out of context a case addressing whether a plaintiff must effectively exhaust its state law remedies before bringing a Fifth Amendment takings claim.[76] But that case does not even mention Article III standing. The issue here is not exhaustion, but whether the alleged future injuries are sufficiently imminent and concrete. The Tenth Circuit has repeatedly held that they are not.[77]

4. Alleged increased expenditures do not support standing.

The *Garfield* Plaintiffs assert that they are injured by increased tourism that their own websites encourage. The dissonance on this issue between their court filings and their official tourism offices, which actively seek such increased visitation, is impossible to square. They analogize to a contributory negligence tort case, where a plaintiff "has in some sense contributed to his own injury."[78] But this is not a mere question of partial causation, as "self-inflicted harm" "does not amount to an 'injury' cognizable under Article III."[79] Instead, it goes to the very existence of an "injury": if monument tourism were actually harming *Garfield* Plaintiffs,

[74] *Clapper*, 568 U.S. at 409.
[75] *Garfield* Opp'n 35–38.
[76] *Garfield* Opp'n 40 (citing *Knick v. Township of Scott, Penn.*, 139 S. Ct. 2162, 2173 (2019)).
[77] *See Kan. Nat. Res. Coal. v. U.S. Dep't of Interior*, 971 F.3d 1222, 1234 (10th Cir. 2020) (allegations relating to an "analysis that has yet to take place," the outcome of which is unknown, "cannot show a certainly impending injury"); *Kane Cnty. Utah v. Salazar*, 562 F.3d 1077, 1089–90 (10th Cir. 2009) (finding county water district's challenge to monument management plan's water resource provisions premature given opportunity for county to obtain approval of project).
[78] *Garfield* Opp'n 43 (cleaned up).
[79] *Nat'l Fam. Plan. & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006).

presumably their tourism offices would stop trying to attract visitors to these monuments. "No State can be heard to complain about damage inflicted by its own hand."[80]

Their tourism-harm theory also fails on causation and redressability grounds. They fail to allege facts capable of showing some *additional* tourism occurred—which then resulted in some specific, concrete *additional* costs—"but for" the expanded monument boundaries.[81] Plaintiffs' theory accordingly fails to meet its burden by requiring "speculative inferences . . . to connect [the] injury to the challenged action."[82] Nor can Plaintiffs establish redressability, as they provide no facts making it "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[83] This is particularly so because both monuments, together encompassing (at a minimum) over 1 million acres, will continue to exist regardless of the outcome of this case.[84]

As to road expenditures, the *Garfield* Plaintiffs provide declarations stating that certain road maintenance practices are made more expensive due to restrictions arising from the proclamations.[85] They do not identify any newly-imposed prohibition on, or denial of use of, borrow pits, but rather a continuation of the pre-2021 status quo.[86] Nor have the *Garfield* Plaintiffs

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[80] *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976).
[81] *See Santa Fe All. for Pub. Health and Safety v. City of Santa Fe, New Mexico*, 993 F.3d 802, 815 (10th Cir. 2021).
[82] *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008) (quotation omitted).
[83] *Id.* at 1224 (quotation omitted).
[84] Mot. 25. The *Garfield* Plaintiffs mischaracterize their requested relief to the extent they now seek to invalidate prior proclamations. *Compare Garfield* Opp'n 42–43, *with* ECF No. 91, at 95. Nor do they explain how they could ask this Court to invalidate the Trump Proclamations that they intervened to defend in another federal lawsuit.
[85] *See Garfield* Opp'n 41.
[86] *See, e.g.* Declaration of Brian Bremner, ECF No. 154-2, ¶ 1 (addressing prohibitions on use of borrow pits for gravel, dirt, and other material, but also noting that his employment with Garfield County concluded in May 2021, i.e., before the challenged Proclamations issued); Declaration of Bert Harris, ECF No. 154-4 ¶ 5 (asserting that under Biden Proclamation, "BLM has continued this policy of refusing to permit the removal of road material").

sought to obtain materials from borrow pits since the proclamations issued.[87] Accordingly, they lack standing on their increased-expenditures theory.

5. Proprietary and quasi-sovereign interests do not support standing.

Finally, the *Garfield* Plaintiffs claim injury related to the State's propriety interest in its wildlife and property. But they fail to clearly allege facts that demonstrate any imminent harm to those interests. Plaintiffs instead rely on their self-inflicted tourism "injury" and speculation that agencies in the future may deny approval for unspecified projects for habitat improvements or vegetation management. But, as already discussed, those standing theories fail.

Further, while Utah claims injury from alleged environmental degradation to *federal* land, states have no generally recognized quasi-sovereign interest in federal lands within their boundaries.[88] Nor is this a case where environmental consequences, such as rising sea levels, on non-state land might affect state boundaries. Even the case cited by *Garfield* Plaintiffs found standing based on the state's allegation of harm to "its lands," rather than federal lands.[89] For all of these reasons, the *Garfield* Plaintiffs lack standing for their claims.

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

The *Dalton* Plaintiffs likewise fail to establish standing for their claims. As a preliminary matter, they are not "objects of the Proclamations."[90] Accordingly, they cannot rely on the proposition that "a regulated individual or entity [ordinarily] has standing to challenge an allegedly

[87] Supp. Declaration of Ade K. Nelson (Supp. Nelson Decl.) ¶ 5.
[88] *Wyoming*, 674 F.3d at 1238 (holding that *Massachusetts* "does *not* eliminate the state petitioner's obligation to establish a concrete injury") (quotation omitted); *Sullivan*, 969 F.2d at 883 (state lacked standing to challenge federal land exchange within its borders).
[89] *Richardson*, 565 F.3d at 697 n.13 (finding state established standing based on alleged "harm to *its lands* as well as a financial burden through the costs of lost resources such as water from the Salt Basin Aquifer").
[90] *Dalton* Opp'n 17.

illegal statute or rule under which it is regulated."[91] Even assuming the *Dalton* Plaintiffs could plausibly identify as "objects of the Proclamations," that still would not entitle them to presumptive standing. The D.C. Circuit in *Lew* did not establish any such presumption; instead it expressly recognized a lack of standing when the plaintiff bank had not been subject to additional costs, even though its industry had been regulated.[92] Consistent with *Lew*, the *Dalton* Plaintiffs must meet the normal standing requirements. They fail to do so.

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

Mr. Dalton's primary alleged injury is how preexisting laws regulate ranching on Bureau of Land Management (BLM) lands. But this injury is not traceable to the proclamations. Indeed, the *Dalton* Plaintiffs confirm that "when a ranch is on federal land, a rancher needs to get federal approval to make . . . improvements," and further that "obtaining federal permission for range improvements—whether on monument land or not—involves time, resources, and compliance costs."[93]

While Dalton has no argument that the proclamations subject him to new procedural requirements, he complains that his preexisting procedural obligations may be evaluated under different criteria. And he believes that those criteria make "it less likely that [his] pending applications for new range improvements will be approved."[94] But the Tenth Circuit has repeatedly rejected such standing theories as "premature" because "it is entirely possible that the BLM will grant [Dalton's applications], in which event [Dalton] will have suffered no injury."[95]

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[91] *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015).
[92] *Id.* at 54–55.
[93] *Dalton* Opp'n 18.
[94] ECF No. 90-8 ¶ 4.
[95] *Kane Cnty.*, 562 F.3d at 1089–90; *see also Kan. Nat. Res. Coal.*, 971 F.3d at 1234.

Despite these precedents, Dalton claims that different review criteria constitute a "new regulatory regime," thus inverting the holding of *Hydro Resources, Inc. v. E.P.A.*[96] There, the government challenged a mine owner's standing to contest EPA's determination that it—and not the state agency—had jurisdiction over aspects of his mine because EPA's oversight was no more stringent than that of the state.[97] The Tenth Circuit disagreed because, regardless of stringency, the plaintiff had to incur "out of pocket costs" by obtaining a new, additional permit from EPA.[98]

The *Dalton* Plaintiffs identify no similar circumstances: there is no indication that Dalton must, because of the Proclamation, seek new or additional authorizations for his activities. Instead, he alleges only that his applications will be evaluated under different criteria, a plainly premature standing theory.[99] Nor does he specifically identify any reason why (if he applies for authorization for new activities in the future) doing so will now require a more costly procedure. Indeed, "the issuance of Proclamation 10,285 did not change the process by which Zebediah Dalton or any other livestock grazing permittees apply to the BLM for authorization to construct range improvements on public lands."[100] Furthermore, his speculation that pending authorizations *may* be denied in the future, as well as that there *may* be a land transfer between the United States and Utah that *may* impact his ability to obtain approvals—do not suffice to demonstrate cognizable injury under Article III.[101] Dalton should thus be dismissed as a plaintiff.

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[96] *Dalton* Opp'n 19 (citing *Hydro Res., Inc. v. E.P.A.*, 608 F.3d 1131, 1144 (10th Cir. 2010) (en banc)).
[97] *Hydro Resources*, 608 F.3d at 1144–45.
[98] *Id.*
[99] *Kane Cnty.*, 562 F.3d at 1089 (rejecting challenge to new "criteria" while application was pending under those criteria).
[100] Declaration of Michael J. Lundell (Lundell Decl.) ECF No. 113-10 ¶ 13.
[101] *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1282 (10th Cir. 2002) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) ("Article II injury must be more than a possibility."); *id.* (noting that "the threat of injury must be both real and immediate").

The *Dalton* plaintiffs also fail to establish standing for Ms. Morris, whose primary concern is the ability to continue "practicing aspects of her heritage" relating to the collection of certain resources (such as cedar posts and medicinal herbs) from the Monument.[102] But the proclamations expressly recognize the continuing importance of such practices by tribal members like Morris.[103] Plaintiffs are therefore reduced to fighting a strawman. They argue that Defendants' "careful wording" concedes only that Ms. Morris can "visit" the monument, but it is clear that her traditional gathering and collection activities are protected as well.[104] Thus, any fears Morris has about liability for "removing" resources for such purposes are objectively unreasonable. Morris should be dismissed for lack of standing.

2. Plaintiff Kimmerle fails to adequately allege standing.

Mr. Kimmerle claims that he is principally harmed because the plan of operations for his Geitus mining claims will now be subject to a validity examination.[105] Because the Geitus claims are located on parcels of land containing ancient Pueblo habitation structures, [106] Kimmerle cannot establish that his injury is caused by any alleged illegality in the proclamations, as he concedes that the Act may be used to protect "Pueblo ruins in the American Southwest."[107] Nor can he establish that any plausible remedy in this litigation would redress his injury, given the severability provision in the proclamations.

He offers only one, unavailing response to this argument: "For jurisdictional purposes, courts assume plaintiffs' claims have merit."[108] That sole response overlooks that "not all

[102] *Dalton* Opp'n 25.
[103] Mot. 39–40.
[104] *Id.*
[105] *Dalton* Am. Compl., ECF No. 90 ¶¶ 136–42.
[106] Mot. 40–41.
[107] *Dalton* Opp'n 41 (citation omitted).
[108] *Dalton* Opp'n 23.

meritorious legal claims are redressable in federal court."[109] Indeed, the Tenth Circuit has rejected a claim for lack of redressability precisely because the challenged provisions were "severable from the rest of the . . . program and thus the program would remain viable even absent those" challenged provisions,[110] thereby demonstrating the propriety of evaluating severability in a standing analysis. The Court can likewise consider the effect of the proclamations' severability clauses when analyzing redressability here.

Kimmerle's remaining theories are also deficient. His opposition abandons his "political heat" theory of standing.[111] And his only defense of his non-Geitus claims misapplies "principles of elementary economics," as the "demand curve" would mean that a contracted supply of new mining claims should increase the value of existing ones.[112] His declaration provides insufficient information to apply such economic principles "to the standing analysis," as he never explains when this alleged diminution in value occurred.[113] And his suggestion that BLM told him that they had already decided to invalidate his claims is untrue.[114] Thus, Kimmerle lacks standing.

3. BlueRibbon Coalition fails to adequately allege standing.

As Defendants demonstrated in their Motion, plaintiff BRC can neither establish standing to bring suit on behalf of its members ("associational standing"), nor standing on its own behalf ("organizational standing"), for its claims.[115] BRC's opposition does not rebut that demonstration.

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[109] *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018).
[110] *Cache Valley Elec. Co. v. State of Utah Dept. of Transp.*, 149 F.3d 1119, 1123 (10th Cir. 1998); *see also Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (recognizing that "the severability clause would prevent a court from redressing this inequality" in certain ways).
[111] *Compare* Mot. 41, *with Dalton* Opp'n 23–24.
[112] *See Mescalero Apache Tribe v. State of N.M.*, 630 F.2d 724, 727 (10th Cir. 1980).
[113] *Brown v. Herbert*, 850 F. Supp. 2d 1240, 1247 n.4 (D. Utah 2012) (holding that "post-complaint affidavits—swearing to such facts as they exist at the date of the affidavit—have no bearing on the standing analysis"); *see also Palma*, 707 F.3d at 1153 (standing "is assessed at the time of the original complaint, even if the complaint is later amended") (citation omitted).
[114] Declaration of Robert N. James ¶¶ 4–12.
[115] Mot. 41–49.

Beginning with associational standing, BRC offers three reasons why it believes its members have suffered cognizable injury from the proclamations, but each lacks merit. *First*, BRC argues that "the Monuments have changed the regulatory regime for obtaining 'special use permits'" for off-roading events and (again, leaning on *Hydro Resources*) that BRC members "must pay out-of-pocket cost[s]' as part of 'obeying' this new scheme."[116] But there is no change: holding an off-roading event on BLM-managed land—whether inside or outside monument boundaries—requires a special use permit.[117] Indeed, this is corroborated by the parallel special use permits and annual authorization letters issued to BRC member Utah/Arizona ATV Club (Club) for rides within and without monument boundaries.[118] These documents also rebut the claim of a change in the relevant "regulatory regime." BLM's authorizations to the Club—both before and after the issuance of the Biden Proclamations—occurred pursuant to the same pre-existing special recreation permit from 2015 and utilized the same process for obtaining an annual authorization. Thus, unlike in *Hydro Resources*, where the petitioner had incurred new costs to obtain a similar permit from a different agency, BRC Members must seek the same authorization regardless of the Biden Proclamations (and indeed, the Club did exactly that).

BRC also asserts that road-use related "permits have been denied."[119] But the only discrete example it identifies is not even a permit denial, as BLM approved the previously authorized permit.[120] BRC now asserts that other members have been "deterred" by the proclamations—but (1) as discussed above, the proclamations have not changed the administrative process for

[116] *Dalton* Opp'n 25 (quoting *Hydro Resources*, 608 F. 3d at 1144).
[117] Declaration of Ade K. Nelson (Nelson Decl.) ECF No. 113-11 ¶ 21; 43 C.F.R. subpart 2932.
[118] Nelson Decl. ¶ 22, Exs. N, Q, R.
[119] *Dalton* Opp'n 26, 29.
[120] Nelson Decl. ¶¶ 22, 26–27.

obtaining a permit; and (2) any alleged "deterrence" based on fears that applications might be rejected is entirely premature.[121]

Second, BRC claims that its members have been harmed by the closure of roads or areas to offroad use. But as Defendants already established, to the extent the Amended Complaint identifies specific roads or areas as being closed, the allegations cannot establish injury caused by the proclamations because either (1) the referenced roads and areas remain open (as in the case of the Little Desert OHV area, the Kitchen Corral road, and Inchworm Arch road)[122] or (2) their closed status predated the Biden Proclamations (as in the case of Park Wash, Deer Springs Wash, and Paria Canyon).[123] Moreover, the *Garfield* Plaintiffs' claim that they can no longer ride in the Paria Canyon is not a cognizable injury tied to the proclamations because "Paria Canyon has been designated closed to public motorized vehicle use since 2000."[124]

BRC also claims the proclamations impair its members ability to "ride on—or help construct—new trails."[125] But again, they fail to establish that this is a concrete, imminent injury caused by the proclamations. They provide no information about any thwarted trail construction plan. While they claim to have helped "develop and build," and maintain Inchworm Arch road, that road remains open.[126]

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[121] *Kan. Nat. Res. Coal.*, 971 F.3d at 1234; *Kane Cnty.*, 562 F.3d at 1089–90.
[122] Decl. of Harry Barber (Barber Decl.) ECF No. 113-1 ¶¶ 7–9, 11.
[123] Barber Decl. ¶ 10; Nelson Decl. ¶ 31. Similarly, while the *Dalton* Plaintiffs emphasize that open travel is discouraged at the Little Desert OHV area—and speculate that it may be officially closed in the future, *Dalton* Opp'n 27 & n.173—such speculation falls short of Plaintiffs' burden to show a "*certainly impending*" injury. *See Clapper*, 568 U.S. at 409 ("allegations of *possible* future injury are not sufficient" (cleaned up)).
[124] Nelson Decl. ¶ 31. Plaintiffs do not contest this, but argue that "the on-the-ground rules were relaxed during the Trump Administration." *Dalton* Opp'n 27. That claim is also incorrect. *See* Supp. Nelson Decl. ¶¶ 6–7.
[125] *Dalton* Opp'n 27.
[126] Declaration of Tony Wright (Wright Decl.) ECF No. 90-3 ¶ 8; Barber Decl. ¶¶ 7–9, 11. Curiously, BRC's brief asserts that Mr. Wright's organization "spent hundreds of hours building

Third, the *Dalton* Plaintiffs claim that the "Proclamations subject BRC's members to new criminal liability," and go so far as to assert in their brief that "ATVs are collecting dust for fear of criminal sanctions for riding on the Monuments' 'landscapes.'"[127] They fail, however, to show the requisite factors, namely: "(1) 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the challenged] statute,' and (2) that 'there exists a credible threat of prosecution thereunder.'"[128]

As to the first component, the *Dalton* Plaintiffs principally advance an extra-circuit case questioning the "constitutional interest" requirement adopted by the Tenth Circuit.[129] The Tenth Circuit standard, of course, is binding on the Court. They also attempt to assert that government limitations of ORV use on federally-managed land invokes their constitutional rights to free exercise of religion and freedom of association rights.[130] But they fail to provide any precedent supporting those claims, and there is ample precedent to the contrary.[131]

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and maintaining a new trail *connected to* the Inchworm Arch Road." *Dalton* Opp'n 28. But Wright expressly declares that the work was on Inchworm Arch Road itself. Wright Decl. ¶ 8.

[127] *Dalton* Opp'n 28–29.

[128] *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 545 (10th Cir. 2016) (alteration in original) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)).

[129] *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 384 n.4 (2d Cir. 2015) (questioning whether a constitutional interest was required, but then explaining that "plaintiffs' intended conduct here is affected by such an interest"). While they also cite *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 128–29 (2007), that case has little relevance as it addresses not government action, but a patent license dispute.

[130] *Dalton* Opp'n 31–32.

[131] *Cf. Empl. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990) ("the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)") (internal quotation omitted); *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988) (noting that whatever constitutional rights petitioners might have had to use an area of federal land they deemed sacred, "those rights do not divest the Government of its right to use what is, after all, *its* land"); *Fields v. City of Tulsa*, 753 F.3d 1000, 1012 (10th Cir. 2014) (finding no cognizable violation of freedom of association where plaintiff did not "assert that he has been prevented from engaging in any association").

Even if they could advance a cognizable constitutional interest, they still fail to establish a credible risk of prosecution because "it is not sufficient for Plaintiffs to simply argue that they felt threatened."[132] They provide no objective reason to suspect that BRC members could be prosecuted under the Antiquities Act's creation of criminal liability for anyone who "appropriates, excavates, injures, or destroys" any part of a "monument."[133] They identify no instance of a prosecution (or threatened prosecution) for driving a vehicle or engaging in similar recreational activity on any of the 150 national monuments in the United States. Instead, they contend that their fear of prosecution is credible because the activity at issue "fit[s] within the plain language of the statute."[134] To be sure, in *Cressman v. Thompson,* the Tenth Circuit found an individual who wanted to cover part of his license plate faced a credible risk of prosecution under an Oklahoma statute that expressly criminalized operating a vehicle "upon which the license plate is covered, overlaid or otherwise screened with any material"—but the individual was also expressly warned by multiple state officials against the activity.[135] Here, in contrast, nothing in the Antiquities Act, the proclamations, or Defendants' conduct indicate that engagement in otherwise lawful ATV use is criminal activity. Accordingly, the *Dalton* Plaintiffs provide only "mere allegations of a subjective chill" insufficient to support standing.[136] In sum, BRC lacks associational standing because it fails to describe any actual or imminent injury to its members.

The *Dalton* Plaintiffs also cannot establish organizational standing for BRC. As Defendants explained in their Motion, an "organization has standing on its own behalf if it meets

[132] *Brown v. Herbert*, 850 F. Supp. 2d 1240, 1246 (D. Utah 2012).
[133] *Dalton* Opp'n 28 (quoting 18 U.S.C. § 1866(b)).
[134] *Dalton* Opp'n 32 (quoting *Cressman v. Thompson*, 798 F.3d 938, 947 (10th Cir. 2015)).
[135] *Cressman*, 798 F.3d at 947–48; Okla. Stat. Ann. tit. 47, § 1113.
[136] *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004) (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)).

the standing requirements that apply to individuals."[137] In doing so, an organization must show a "concrete and demonstrable injury to the organization's activities."[138] As its opposition confirms, BRC cannot demonstrate any discrete way that the proclamations "impaired the organization's ability to" undertake its normal activities[139]—or "hamper[ed] the organization's ability to do what it does."[140] Instead, BRC contends that it was forced to "divert resources" from core programs (like "reducing undue federal regulations" that impair access to public lands) to efforts "counteracting the Proclamations" ("by resisting additional regulations").[141] Given how closely related advocacy is to BRC's core programs, it has failed to establish any "diversion," let alone diversion amounting to concrete harm.

Even if BRC could establish such diversion, however, it would still lack standing because any such diversion here is based on hypothetical fears.[142] "Diversion of resources" itself is not sufficient to demonstrate cognizable injury for an organization.[143] Instead, it must be coupled with "concrete harm to an identifiable community, not speculative fears of future harm."[144] And while another district court from this Circuit opined that "diversion of resources is a cognizable harm"

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[137] *Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1396 (10th Cir. 1992).
[138] *Id.* at 1397 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).
[139] *Id.*.
[140] *New England Anti-Vivisection Soc'y v. United States Fish & Wildlife Serv.*, 208 F. Supp. 3d 142, 166 (D.D.C. 2016).
[141] *Dalton* Opp'n 33.
[142] *City of S. Miami v. Gov.,* 65 F.4th 631, 638 (11th Cir. 2023) ("Although an organization can establish standing under a diversion-of-resources theory, it cannot do so by inflicting harm on itself to address its members' 'fears of hypothetical future harm that is not certainly impending.'") (quoting *Clapper*, 568 U.S. at 416).
[143] *See Fair Empl. Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994) (explaining that the *Havens Realty* Court "did not base standing on the diversion of resources from one program to another, but rather on the alleged injury that the defendants' actions themselves had inflicted upon the organization's programs"); *Ctr. for Responsible Sci. v. Gottlieb,* 346 F. Supp. 3d 29, 41 (D.D.C. 2018) (noting that the diversion of resources issue "comes into play only after Plaintiff shows an initial impairment to its programs").
[144] *City of S. Miami*, 65 F.4th at 639.

for purposes of standing under *Havens Realty*,[145] the Tenth Circuit appears to have interpreted *Havens Realty*, like its sister circuits, as requiring more than just a diversion of resources.[146] Were diversion of resources alone sufficient, "the time and money that plaintiffs spend in bringing suit against a defendant would itself constitute a sufficient 'injury in fact', a circular position that would effectively abolish the requirement altogether."[147] Ultimately, it is questionable whether BRC's alleged new activities are actually distinct from its core activities, but regardless, because BRC identifies no alleged injury other than diversion, it fails to establish organizational standing.[148]

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

As Defendants explained, Plaintiffs failed to provide any nonconclusory allegations identifying reserved areas of either monument that lack historic or scientific value, let alone tied such an area to an alleged injury to Plaintiffs.[149] Although Plaintiffs provided maps showing that smaller monuments were allegedly possible if far fewer objects were protected, Defendants explained how those maps omitted indisputably qualifying objects, such as Grand Gulch, House on Fire, Salvation Knoll, and the *Gryposaurus* site. Given this failure to identify areas lacking

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[145] *Colorado Montana Wyoming State Area Conf. of NAACP v. U.S. Election Integrity Plan*, 22-CV-00581-PAB, 2022 WL 1266612, at *3 (D. Colo. Apr. 28, 2022).

[146] *Romer*, 963 F.2d at 1397 (expressly recognizing that *Havens Realty* Court found standing based on "[a] concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources.")

[147] *Fair Empl. Council of Greater Washington*, 28 F.3d at 1277.

[148] *See Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 23–24 (D.C. Cir. 2015) (mere "expenditure of resources on advocacy is not a cognizable Article III injury"); *see also Animal Leg. Def. Fund v. Kelly*, 434 F. Supp. 3d 974, 996 (D. Kan. 2020) (finding that plaintiff organization's decision to "channel money from certain programs into others, in response to the Act, is a 'self-inflicted budgetary choice'" (internal citation omitted)), *aff'd*, 9 F.4th 1219 (10th Cir. 2021); *Equal Means Equal v. Ferriero,* 478 F. Supp. 3d 105, 123 (D. Mass. 2020) (holding that alleged "policy and advocacy based injuries" based on the expenditure of "significant resources educating, advocating and communicating with the public around the country to counteract Defendant's unlawful actions" were insufficient to establish the plaintiff organizations' injury (internal quotations and citation omitted)), *aff'd,* 3 F.4th 24 (1st Cir. 2021).

[149] Mot. 49–53.

scientific or historic value, Defendants explained why these challenges to the scope of the reservations should be dismissed.[150]

Plaintiffs offer several unavailing responses. *First*, Plaintiffs claim this argument violates Rule 8.[151] But the *en banc* D.C. Circuit already rejected that argument, explaining that the pleading standard of Rule 8 made it "incumbent upon [plaintiffs] to allege that some part of the Monument did not, in fact, contain natural resources that the President sought to protect."[152] And Plaintiffs do not dispute the importance of pleading requirements in suits challenging Presidential actions.[153]

Second, Plaintiffs claim to have provided sufficiently particular allegations through "20 pages of allegations and analysis."[154] Those twenty pages, though verbose, are replete with legal conclusions couched as factual allegations, which the Court need not accept as true.[155] Nor need the Court credit Plaintiffs' inadequate "disjunctive allegations."[156] Rather than provide specific factual allegations, Plaintiffs repetitively apply their preferred construction of "objects of historic or scientific interest" to nearly every noun in the challenged proclamations, before finding all but nine wanting.[157] But Plaintiffs neither allege specific facts about why Grand Gulch, Salvation Knoll, or the *Gryposaurus* site are unprotectable under the Act, nor provide consistent allegations to explain why Doll House is a qualifying object but House on Fire is not. And neither opposition even mentions these four objects, let alone provides any explanation as to why these objects would not qualify for protection, even under Plaintiffs' preferred construction of the Act. Because

[150] *Id.* (citing *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002)).
[151] *Garfield* Opp'n 54–55.
[152] *Tulare Cnty. v. Bush*, 317 F.3d 227 (D.C. Cir. 2003) (per curiam).
[153] *See* Mot. 52–53.
[154] *Garfield* Opp'n 55 (citing ECF No. 91 ¶¶ 288–357).
[155] *Tulare Cnty. v. Bush*, 306 F.3d at 1142 (quoting *Mountain States Legal Found., v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002)).
[156] *Crab House of Douglaston, Inc. v. Newsday, Inc.*, 418 F. Supp. 2d 193, 207–08 (E.D.N.Y. 2006).
[157] *See* ECF No. 91 ¶¶ 288–324.

Plaintiffs have not defended their maps' exclusion of these qualifying objects, they have failed to adequately allege that monument areas lack historic or scientific value. The Court should therefore dismiss their challenges to the scope of the reservations.

Third, Plaintiffs claim that the foregoing pleading failure should doom only their "smallest area" claims, while allowing their "bad object" claims to proceed.[158] But Plaintiffs overlook that this pleading requirement provides a manageable framework for resolving the numerous "bad object" claims Plaintiffs have placed before the Court.[159] Plaintiffs ask the Court to pass judgment on several hundred "objects" merely because they appear in the challenged proclamations, an approach that would not only burden the Court but also supplant the President's discretion under the Act.[160] Rather than undertake such an unwieldy and constitutionally dubious approach, the Court should instead eschew "bad object" claims that are unsupported by an improper reservation allegation. That approach would not prejudice Plaintiffs, as their injuries arise from allegedly overbroad reservations of land, not allegedly improper object designations. Accordingly, the Court need only evaluate, if at all, those "bad object" claims that are implicated by an improper reservation allegation. Because Plaintiffs' contentions that Grand Gulch, House on Fire, Salvation Knoll, and the *Gryposaurus* site are ineligible objects fail as a matter of law, the Court need not reach the remainder of their "bad object" claims.

IV. Plaintiffs' Antiquities Act Claims Fail As A Matter of Law.

Defendants alternatively moved to dismiss elements of Plaintiffs' claims on five specific grounds for failure to state a claim under the Antiquities Act.[161] In response, both Plaintiffs ask the Court to undertake far-reaching construction of numerous terms in the Act, many of which

[158] *Dalton* Opp'n 58–59.
[159] *See* ECF No. 91 ¶¶ 288–324.
[160] *See supra* 4–5.
[161] Mot. 54–60.

exceed the basis for Defendants' Motion.[162] Because Defendants, not Plaintiffs, are the moving parties, the Court should not allow Plaintiffs to interpose new issues, especially when Defendants have limited space in this reply. In response to the five specific issues raised by Defendants, Plaintiffs have not shown that dismissal is inappropriate.

First, Plaintiffs do not defend their attempt to limit the Antiquities Act to the protection of archaeological objects, nor could they as the Supreme Court has already rejected that argument.[163] Instead, they fall back to adjacent positions that protectable objects must "have some past significance to humans"[164] or be somehow "akin to a historical structure."[165] But there is no basis in the text of the Act or relevant case law for limiting "objects of . . . scientific interest" to those with past significance to humans or similarities to a historical structure. To the contrary, modern science can gain invaluable knowledge by discovering fossils of "previously unknown species of dinosaur."[166] No speaker of ordinary English would say that heretofore unknown fossils were not "objects of scientific interest" because they had no past significance to humans or lacked attributes similar to a historic structure. Because neither opposition provides any cogent explanation for construing the Antiquities Act to exclude fossils, the Court should reject Plaintiffs' fallback statutory construction positions.

Second, Plaintiffs provide no valid grounds for excluding species, habitats, or ecosystems as qualifying objects under the Antiquities Act. To start, Plaintiffs misread the Supreme Court's *Cappaert* decision as placing "the only 'object' at issue [to be] a subterranean pool," thus excluding the fish that lived in the pool.[167] To the contrary, *Cappaert* explicitly held the "pool in Devil's

[162] *Dalton* Opp'n 36–54; *Garfield* Opp'n 45–54.
[163] *Cappaert*, 426 U.S. at 141–42.
[164] *Garfield* Opp'n 46.
[165] *Dalton* Opp'n 55.
[166] Grand Staircase-Escalante National Monument, 86 Fed. Reg. 57335, 57340 (Oct. 15, 2021).
[167] *Dalton* Opp'n 55; *Garfield* Opp'n 56–57.

Hole *and its rare inhabitants* are 'objects of historic or scientific interest,'" because the "fish are one of the features of scientific interest."[168] The Supreme Court has thus already resolved the question at hand: species can be "objects of scientific interest." That holding makes eminent sense as entire scientific fields—*e.g.*, botany, zoology—are devoted to studying such species.

Undaunted by this adverse Supreme Court holding, Plaintiffs maintain that species cannot be "objects of . . . scientific interest that are situated on land" because they are not "affixed" to the land.[169] But neither Plaintiff provides any reason why the Court should prefer the "affixed" definition of "situated" over alternate contemporaneous definitions such as "residing" or "having a site."[170] Because endemic species, at a minimum, reside or are sited in their unique habitat, Plaintiffs have failed to establish that such species are unprotectable under the Act.

As to ecosystems, Plaintiffs contend that they cannot be objects because they are "imprecisely demarcated concept[s]."[171] But the ecosystems at issue here are not "imprecisely demarcated concepts." Instead, they are naturally demarcated by, for example, "canyons, many of which contain important riparian ecosystems."[172] Thus, because the ecosystems at issue here have clear natural boundaries, similar to the underground pool in *Cappaert*, the premise of Plaintiffs' argument is incorrect.

Third, regarding landscapes, Plaintiffs mischaracterize Defendants' Motion as advancing a "'land as object' theory."[173] Defendants have instead explained that the specific landscapes at issue constitute "objects of historic or scientific interest."[174] Plaintiffs seek to conflate "land" and

[168] *Cappeart*, 426 U.S. at 141–42 (emphasis added).
[169] *Dalton* Opp'n 55.
[170] *See* Mot. 56.
[171] *Dalton* Opp'n 40.
[172] 86 Fed. Reg. at 57,340.
[173] *Dalton* Opp'n 57.
[174] Mot. 57–59.

"landscapes," when those distinct words refer to distinct things. A "landscape" refers to "the landforms of a region in the aggregate."[175] And Plaintiffs concede that "natural formations," such as "canyons," fit "comfortably" as "objects" under the Antiquities Act, "regardless of their size."[176] Just as "natural formations" fall comfortably within the meaning of "objects," so too should a group of natural formations in a region.

Fourth, as to allegedly "generic" items, the *Garfield* Plaintiffs offer no response to the legislative history establishing that Congress sought to protect "[e]very cliff dwelling, every prehistoric tower, communal house, shrine, and burial mound" because those "object[s] . . . can contribute something to the advancement of knowledge, and hence [are] worthy of preservation."[177] Thus, that unrebutted legislative history demonstrates that Congress was using the term "historic" to mean "[c]ontaining [or] representing history,"[178] rather than "famous" in history, as the *Garfield* Plaintiffs contend.[179]

Fifth, the *Garfield* Plaintiffs all but abandon their attack on "qualities" and "experiences" referenced in the proclamations. They do not contest that President Biden excluded qualities or experiences like "outdoor recreation opportunities" from the "objects of historic and scientific interest designated for protection."[180] Accordingly, the Court should dismiss these portions of their Antiquities Act challenges.

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[175] Merriam-Webster Dictionary (2023).
[176] *Dalton* Opp'n 56.
[177] H.R. Rep. No. 59-2224, at 2 (1906).
[178] Webster's Practical Dictionary 179 (1906) (defining "historic" as ""Containing, pert. to, contained or exhibited in, deduced from, or representing history"); *see also* Century Dictionary and Cyclopedia 2842 (1911) (defining "historic" as "Of or pertaining to history or historians; containing or conveying history").
[179] *See Garfield* Opp'n 46 n.302.
[180] Bears Ears National Monument, 86 Fed. Reg. 57321, 57322, 57330 (Oct. 15, 2021).

V. Plaintiffs Fail to Identify A Reviewable "Agency Action."

As Defendants demonstrated in their opening brief, the Court lacks jurisdiction over Plaintiffs' APA claims because the Amended Complaints fail to identify a "final agency action" subject to judicial review. Plaintiffs challenge to two interim guidance memoranda by the Director of the BLM fails because these documents do not mark "the consummation of the agency's decisionmaking process" and do not create "legal consequences" independent of the authorities they summarize.[181] Instead, they merely inform BLM staff of how the Biden Proclamations fit into the existing legal framework that governs the monuments until the agencies complete new monument management plans. Numerous courts have held that this type of informational document is not a "final agency action"[182] and indeed is not an "agency action" at all.[183] And while the *Dalton* Plaintiffs also challenge the denial of unspecified permits, the only "denial" they identify never actually took place and therefore cannot support their APA claim.[184]

Plaintiffs' arguments in opposition are unpersuasive. *First*, the *Garfield* Plaintiffs' insistence that the interim guidance memoranda generate legal consequences because they "interpret" the Biden Proclamations in based on a misreading of the memoranda. The *Garfield* Plaintiffs point to passages explaining that "vegetation treatment … methods allowed [previously] *may* not be consistent with the protection of the objects" and that "[r]outes [previously] designated

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[181] *See Mobil Expl. & Producing U.S., Inc. v. Dep't of Interior*, 180 F.3d 1192, 1197–98 (10th Cir. 1999) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).
[182] *Advanced Integrative Med. Sci. Inst., PLLC v. Garland*, 24 F.4th 1249, 1258 (9th Cir. 2022); *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1007–10 (9th Cir. 2021); *Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065, 1070 (7th Cir. 2020); *Clayton Cnty. v. Fed. Aviation Admin.*, 887 F.3d 1262, 1266–67 (11th Cir. 2018); *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 428, 432–33 (4th Cir. 2010).
[183] *Indep. Equip. Dealers Ass'n v. E.P.A.*, 372 F.3d 420, 427–28 (D.C. Cir. 2004).
[184] *See* Mot. 43–44, 65–66 (explaining that the Utah/Arizona ATV Club never applied for a new permit to hold its annual "Jamboree" on Inchworm Arch Road within the monument in 2022).

as open . . . *may* have an adverse impact on monument objects."[185] Far from announcing "stark legal consequences,"[186] this language reaches no decisions about the proclamations' impact on any specific treatments or routes.[187] And the memoranda's summary of limitations on mining claims, which the *Garfield* Plaintiffs also cite,[188] derives from existing regulations requiring the BLM to perform a mineral examination report for claims on lands that have been withdrawn from location and entry under the mining laws.[189] So this too is not a new interpretation of the proclamations.

The *Garfield* Plaintiffs' reliance on *Frozen Food Express v. United States* is therefore misplaced.[190] There the Supreme Court concluded that an order by the Interstate Commerce Commission constituted a "final agency action" because it found specific commodities were "agricultural" and thus exempt from permitting requirements.[191] Here, in contrast, the interim guidance memoranda make no findings about how the proclamations affect particular objects and do not create new "civil and criminal risks" for Plaintiffs, as explained above.[192]

Second, the *Garfield* Plaintiffs argue that the memoranda "implement" the proclamations by giving directions to staff about how to protect objects on monument land and incorporating BLM Manual 6220.[193] Not so. The memoranda merely summarize certain provisions of preexisting agency policy in BLM Manual 6220, such as putting up entrance signs or monitoring

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[185] *Garfield* Opp'n 66 (quotations omitted, emphasis added); *see also id.* at 65.
[186] *Id.* at 66.
[187] *See Holistic Candlers & Consumers Ass'n v. Food & Drug Admin.*, 664 F.3d 940, 944–45 (D.C. Cir. 2012) (FDA letters warning of potential enforcement actions based on the appearance that plaintiffs' products were misbranded medical devices were not final agency actions).
[188] *Garfield* Opp'n 65 (quotations omitted).
[189] 43 C.F.R. § 3809.100(b).
[190] *Garfield* Opp'n 64–65 (citing *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 599–600 (2016), which cites *Frozen Food Express v. United States*, 351 U.S. 40 (1956)).
[191] *Frozen Food Express*, 351 U.S. at 44.
[192] *Id.*
[193] *Garfield* Opp'n 65.

monument objects.[194] Nor does the opposition identify how those provisions impose new legal consequences on Plaintiffs, as entrance signage does not injure Plaintiffs. Indeed, the memoranda's incorporation of BLM Manual 6220 is just another example of how the memoranda remind BLM staff of the existing governance framework.

Third, the *Dalton* Plaintiffs' contention that the memoranda eliminate discretion by prohibiting new mining claims and new mineral leases finds no support in the proclamations.[195] The proclamations permit BLM to "exchange" "lands and interests in lands" under existing laws if the exchange "furthers the protective purposes of the monument[s]."[196] Beyond this narrow exception, however, the proclamations prohibit any disposal of federal lands under the public land laws, the mining laws, or laws relating to mineral and geothermal leasing. Against that backdrop, the referenced part of the memoranda merely communicates the proclamations' prohibition on disposals in the form of *new* mining claims and *new* mineral leases. Contrary to the *Dalton* Plaintiffs' contention, it does not curtail, or even speak to, the government's remaining discretion to exchange *existing* lands or interests in lands (including existing mineral leases under 43 C.F.R. Subpart 3515). Consequently, there is no conflict between the memoranda and the proclamations. And, in any event, the *Dalton* Plaintiffs have no alleged desire to exchange a lease—much less one covered by Subpart 3515—and thus lack standing to challenge the memoranda on this basis.

Fourth, although both sets of Plaintiffs insist that the interim nature of the memoranda does not exempt them from review,[197] they ignore the fact that these documents provide interim guidance because the agencies have yet to complete the land-use planning process to reach

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[194] *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 899 (1990) (holding that a plaintiff "cannot demand a general judicial review of the BLM's day-to-day operations"); *see also Chem. Weapons Working Grp., Inc. (CWWG) v. U.S. Dep't of the Army*, 111 F.3d 1485, 1494 (10th Cir. 1997).
[195] *See Dalton* Opp'n 65.
[196] 86 Fed. Reg. at 57331.
[197] *Garfield* Opp'n 64; *Dalton* Opp'n 64.

decisions about how to manage the monuments under the proclamations. Just as in *Tulare County v. Bush*, the Director's memoranda are "merely a temporary measure" to summarize the proclamations' protections "until *the agency* devises a management plan."[198]

Finally, the *Dalton* Plaintiffs' try to salvage their APA claim by arguing that Defendants merely dispute "*why* recent permits have been denied."[199] Tellingly, the *Dalton* Plaintiffs make no effort to defend their fictionalized account of the permit denial; instead, they merely suggest that the Court should not resolve factual disputes at this stage. But the Court must resolve factual disputes affecting its jurisdiction, and the Tenth Circuit treats the "final agency action" requirement as jurisdictional.[200] Further, the Court need not defer to allegations that contradict the pertinent documents, including the permit application in question that indisputably omits Inchworm Arch Road.[201] An "implementation of a 'final disposition' already made" cannot support review under the APA, especially when Plaintiffs' members requested that very disposition.[202] All of Plaintiffs' APA claims therefore warrant dismissal.

CONCLUSION

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

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[198] 185 F. Supp. 2d 18, 29 (D.D.C. 2001), *aff'd on other grounds*, 306 F.3d 1138 (D.C. Cir. 2002) (emphasis added).
[199] *Dalton* Opp'n 66.
[200] *Vivint, Inc. v. Mayorkas*, 614 F. Supp. 3d 993, 1000 n.6, 1001 (D. Utah 2022).
[201] *See* Nelson Decl., Ex. N.
[202] *Chem. Weapons Working Grp.*, 111 F.3d at 1494 (citation omitted).

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Respectfully submitted,

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division
U.S. Department of Justice

/s/ Michael S. Sawyer
MICHAEL S. SAWYER
Senior Attorney, Natural Resources Section
ROMNEY S. PHILPOTT
Senior Attorney, Natural Resources Section
DANIEL C. LUECKE
Trial Attorney, Natural Resources Section

Counsel for Defendants