

No. 23-4106

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

GARFIELD COUNTY, UTAH, ET AL.,

Plaintiffs-Appellants,

ZEBEDIAH GEORGE DALTON, ET AL.,

Consolidated Plaintiffs-Appellants,

v.

JOSEPH R. BIDEN, JR., ET AL.,

Defendants-Appellees,

HOPI TRIBE, ET AL.,

Defendants-Intervenors-Appellees.

On Appeal from the United States District Court for the
District of Utah, No. 4:22-CV-0059 (Nuffer, J.)

**OPENING BRIEF OF PLAINTIFFS-APPELLANTS
GARFIELD COUNTY, UTAH, ET AL.**

Stanford E. Purser
Kathy A.F. Davis
Utah Attorney General's Office
1600 E. 300 S.
Salt Lake City, UT 84114-2320
(801) 538-9600

*Counsel for Plaintiff-Appellant
State of Utah*

Dated: October 30, 2023

Tyler R. Green
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com

Taylor A.R. Meehan
Kathleen L. Smithgall
Jeffrey S. Hetzel
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423

*Counsel for Plaintiffs-Appellants Garfield
County, Utah; Kane County, Utah; State of
Utah*

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PRIOR OR RELATED APPEALS

Dalton et al. v. Biden et al., No. 23-4107 (10th Cir.), is related to and was consolidated with this appeal.

JURISDICTIONAL STATEMENT

The district court had jurisdiction because Utah alleged that Federal Defendants violated federal law. 28 U.S.C. §1331. This Court has jurisdiction because Utah appeals from a final order dismissing its entire case. *Id.* §1291. The district court entered that order on August 11, 2023, and Utah timely appealed three days later. J.A. Vol. IV at 965-993.

STATEMENT OF ISSUES

1. The Antiquities Act authorizes the President to declare as a national monument a “historic landmark[],” “historic and prehistoric structure[],” or “other object[] of historic or scientific interest.” 54 U.S.C. §320301(a). It authorizes him to “reserve” surrounding land if it is the “smallest area compatible” with the monument’s care. *Id.* §320301(b). President Biden declared over 500 things in Utah as national monuments and then reserved 3.23 *million* acres. Utah claimed these declarations and reservations exceeded statutory authority. “Sovereign immunity does *not* prevent a suit against a federal officer who is acting in excess of his authority.” *Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 651 (10th Cir. 1960). Does sovereign immunity bar Utah’s suit? (No.)

2. President Biden interpreted the Act’s category for “other objects of historic or scientific interest” to include hundreds of plants and animals, generic items, and ubiquitous items—from “mule deer” to “boulders” to “potato[es].” He then reserved 3.23 million acres as the “smallest area compatible” with their care even though proper caretaking of any valid monument requires much less. Did these national monument declarations and reservations exceed the scope of the Antiquities Act? (Yes.)

3. An agency action is final if it takes effect without further review and has legal consequences, even if labeled as “interim.” *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020). After President Biden declared the monuments and created the reservations, agencies enacted management plans that took effect without further review and that regulate activities on the land. Were they final agency action? (Yes.)

STATEMENT OF THE CASE

This case is about limiting the unlawful “trend of ever-expanding antiquities” under the Antiquities Act of 1906. *Mass. Lobstermen’s Ass’n v. Raimondo*, 141 S. Ct. 979, 980 (2021) (statement of Roberts, C.J.). The Act authorizes the President to declare national monuments and reserve land for their protection only under narrow, limited circumstances. 54 U.S.C. §320301(a)-(b). Congress intended the Act to allow only “small reservations.” H.R. Rep. 59-2224, 59th Cong., 1st Sess. 1 (1906). But recent Presidents have, despite judicial reproach, “transformed” the Act “into a power without any discernible limit to set aside vast and amorphous expanses of terrain.” *Mass. Lobstermen’s Ass’n*, 141 S. Ct. at 981 (statement of Roberts, C.J.).

President Biden’s choices exemplify the problem. In 2021, he invoked the Antiquities Act to reserve 3.23 million acres of land in Utah—double the size of the entire State of Delaware—for the Bears Ears and Grand Staircase Escalante National Monument reservations. In doing so, he made it a crime for southern Utahns to go on land that they have lived and worked on for generations to turn over soil, do roadwork, prevent wildfires, remove invasive species, or care for wildlife.

The State of Utah, Garfield County, and Kane County—for simplicity, “Utah”—sued to challenge President Biden’s two national monument reservations as beyond statutory authority. The district court dismissed their claims. It held that *no one* can challenge national monument reservations or the agency actions implementing and

enforcing them. This holding splits from every court to decide that question and reads the Antiquities Act's limits out of its text. This Court should reverse and remand.

- I. **Congress authorizes the President to declare national monuments and reserve land for their proper care and management, but only when strict preconditions are met.**
 - A. **The Antiquities Act of 1906 imposes two important preconditions on the creation of national monument reservations.**

The Antiquities Act authorizes the President to create national monument reservations through a two-step process.

First, the President may declare something on federal land to be a national monument, but only if it falls into one of three narrow categories:

The President may, in the President's discretion, declare by public proclamation [1] *historic landmarks*, [2] *historic and prehistoric structures*, and [3] *other objects of historic or scientific interest* that are *situated* on land owned or controlled by the Federal Government to be national monuments.

54 U.S.C. §320301(a) (emphases added). If something falls within one of those three categories, the President need not declare it a national monument—he simply “may, in [his] discretion.” But if it doesn't fall within one of those three categories, he may not proceed any further.

Second, if the President validly declares something to be a national monument, he may reserve—*i.e.*, limit the use of—a parcel of land containing that national monument. But the Act mandates that his reservation be the “smallest” parcel of land needed for the national monument's care and management:

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

54 U.S.C. §320301(b) (emphases added). This “unique constraint” means that any land reserved under the Act cannot be larger than necessary to protect a validly declared national monument. *Mass. Lobstermen’s Ass’n*, 141 S. Ct. at 980 (statement of Roberts, C.J.).

Consistent with that textual limit, and with the Act’s congressional report that the Act would allow only “small reservations” of land to protect ancient relics, H.R. Rep. No. 59-2224, early reservations under the Act were often a few hundred acres, *e.g.*, Proclamation 695, *El Morro National Monument*, 34 Stat. 3264, 3264-65 (Dec. 8, 1906) (originally 160 acres).

The Act also added a third provision to the U.S. Code. Codified in a different title, it punishes anyone who harms such a monument:

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

18 U.S.C. §1866(b).

“Most commentators who have considered the [Antiquities] Act and its legislative history have concluded that it was designed to protect only very small tracts of land around archaeological sites.” Squillace, *The Monumental Legacy of the Antiquities Act of*

1906, 37 Ga. L. Rev. 473, 477 (2003). The Act’s congressional report emphasized its limits. H.R. Rep. 59-2224. The sponsor assured his colleagues that “[n]ot very much” land could be encumbered through the Antiquities Act. 40 Cong. Rec. 7888 (Jun. 5, 1906) (Rep. Lacey). Congress rejected proposals to reach broader items like “natural wonders” and “curiosities.” H.R. 11021, 56th Cong. (1900) (published in Rogers, *History of Legislation Relating to The National Park System Through the 82d Congress (the Antiquities Act)*, Dep’t of Interior, App’x A (1958), perma.cc/AS9A-JRB2).

Confirming the point, early administrators of the Act recognized that it “does not provide for the reservation of public land for the protection of scenery.” Rothman, *America’s National Monuments: The Politics of Preservation*, ch. 5 (1989), perma.cc/PMN6-T5MJ. It does not “remotely refer to scenery, as a possible *raison d’être* for a public reservation.” Lee, *The Antiquities Act of 1906*, at 109 (1970), perma.cc/P22X-F4LZ (citing Bond, *The Administration of Nat’l Monuments, Proceedings of the Nat’l Park Service Conference held at Yellowstone Nat’l Park, Sept. 11 and 12, 1911*, at 80-81 (1912)).

An early national monument reservation illustrates how the Act was supposed to work. In December 1906, President Theodore Roosevelt declared as a national monument “Montezuma’s Castle” in Arizona. Proclamation 696, *Montezuma Castle National Monument*, 34 Stat. 3265, 3265-66 (Dec. 8, 1906). Montezuma’s Castle was a valid national monument because it is a one-of-a-kind “prehistoric structure,” *id.* at 3265—a towering ancient dwelling, with five stories and twenty rooms. *Foundation Document: Montezuma Castle National Monument*, Nat’l Park Serv., 3 (Mar. 2016), perma.cc/PPL5-EFPX.

For the “proper care and management” of Montezuma’s Castle, President Roosevelt reserved a parcel of land of only 160 acres—less than .005% of the land President Biden reserved here. 34 Stat. 3265-66.

B. National monument reservations change the rules for managing federal lands.

A national monument reservation locks down federal land. Absent a monument reservation, federal lands must be managed for multiple uses, including recreation, grazing, timber, watershed, and wildlife habitat. 16 U.S.C. §§528 et seq. States, counties, and their citizens engage in a wide range of activities on federal land, have official duties on federal land, enact laws and policies with respect to federal land, and use federal land for a multitude of purposes. When the land is managed for multiple uses, they manage vegetation and soils, graze cattle, engage in roadwork, care for wildlife, and recreate. J.A. Vol. II at 344-73; *see also, e.g.*, 54 U.S.C. §302303 (assigning duties to state employees on federal land). A national monument reservation displaces this multiple-use management regime; prohibits or limits “recreational, commercial, and agriculture uses” of the land; and impedes state and local activities. *Mass. Lobstermen’s Ass’n*, 141 S. Ct. at 981 (statement of Roberts, C.J.).

C. Chief Justice Roberts calls for stricter enforcement of the Act’s plain textual limits.

Modern presidents have repurposed the Antiquities Act to reserve large parcels of America as national monuments. Though most early reservations are under 10,000 acres, modern presidents from both parties have used the Act to declare as national

monuments things that fall outside the Act’s three limiting categories and to reserve parcels of land with no respect for its smallest-area-compatible requirement. *Nat’l Monument Facts and Figures*, Nat’l Park Service, perma.cc/GK6C-GNJQ.

In 2021, Chief Justice Roberts identified and condemned this “trend of ever-expanding antiquities.” *Mass. Lobstermen’s Ass’n*, 141 S. Ct. at 980 (statement of Roberts, C.J.). He called for the Supreme Court to decide—in a more appropriate case and for the first time—whether landscape-scale national monument reservations “can be justified under the Antiquities Act.” *Id.* at 981. He wrote that expansive monument reservations would not strike “a speaker of ordinary English” as lawful under the Antiquities Act’s text. *Id.* at 980. As he read the statutory text, the smallest-area-compatible limit imposed a “unique constraint” that “has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea.” *Id.* at 980-81. And he emphasized that the Supreme Court “ha[s] never considered how a monument of ... 3.2 million acres ... can be justified under the Antiquities Act.” *Id.* at 981.

II. The history of Grand Staircase-Escalante and Bears Ears National Monuments in Utah typifies the problems with presidential overreach under the Antiquities Act.

A. Presidents Clinton and Obama establish Grand Staircase-Escalante and Bears Ears National Monuments.

In 1996, President Clinton reserved 1.7 million acres of land in south-central Utah as the “Grand Staircase-Escalante National Monument.” Proclamation 6920,

Grand Staircase-Escalante National Monument, 61 Fed. Reg. 50223 (Sept. 18, 1996). The Grand Staircase reservation was predicated on President Clinton’s declaring that dozens of things in the region qualified as national monuments, including “sedimentary rock layers,” “occupation sites,” “five life zones,” and a strip of carbon-spewing coal. *Id.* at 50223-24.

In late 2016, President Obama reserved 1.35 million acres of land in southeast Utah—starting about 25 miles east of the Grand Staircase reservation and extending almost to the Colorado border—as the “Bears Ears National Monument.” Proclamation 9558, *Establishment of the Bears Ears National Monument*, 82 Fed. Reg. 1139 (Dec. 28, 2016). The Bears Ears reservation was predicated on President Obama’s declaring that dozens of things in the region qualified as national monuments, including “ricegrass,” the “diversity of the soils,” and the “quality of deafening silence.” *Id.* at 1141.

These two reservations left the land beloved by southern Utahns less well preserved, more difficult to protect, more susceptible to damage and desecration, impossible to work on, and more difficult to coexist with. J.A. Vol. II at 338-39. The reservations drew attention to and caused vandalism of relics that had gone untouched for centuries. *Id.* at 335-37.

B. After careful review, President Trump reduces the boundaries of both monuments.

Responding to local pleas, President Trump in 2017 reduced the two reservations by over 60 percent. Proclamation 9681, *Modifying the Bears Ears National Monument*, 82

Fed. Reg. 58081 (Dec. 4, 2017); Proclamation 9682, *Modifying the Grand Staircase-Escalante National Monument*, 82 Fed. Reg. 58089 (Dec. 4, 2017). His reductions restored the multiple-use approach in the areas that were previously subject to the reservations. The two reduced reservations still totaled 1.11 million acres combined.

C. President Biden expands both monuments, then agency defendants adopt management plans that take effect immediately for each monument.

In 2021, President Biden issued proclamations nearly tripling the combined size of these two national monument reservations. Proclamation 10285, *Bears Ears National Monument*, 86 Fed. Reg. 57321 (Oct. 8, 2021); Proclamation 10286, *Grand Staircase-Escalante National Monument*, 86 Fed. Reg. 57335 (Oct. 8, 2021). He expanded Grand Staircase to 1.87 million acres and Bears Ears to 1.36 million acres. President Biden's combined 3.23-million-acre reservations are twice as large as Delaware, more than 150 times the size of Manhattan, and larger than 20 percent of all the nations in the world. They are orders of magnitude larger than the other four national monuments in southern Utah.¹

¹ Hovenweep National Monument (President Harding) is 784 acres. Cedar Breaks National Monument (President Roosevelt) is 6,155 acres. Natural Bridges National Monument (President Roosevelt) is 7,636 acres. Rainbow Bridge National Monument (President Taft) is 160 acres.

To justify those massive reservations under the Antiquities Act, President Biden declared “the entire landscape[s] within the boundaries reserved” to be “other objects of historic or scientific interest.” 86 Fed. Reg. at 57330-31; 86 Fed. Reg. at 57344. He also declared virtually everything within those landscapes to fall within the same category. *Id.* He declared as national monuments “soil,” “shrubs,” “grasses,” “bees,” “big-horn sheep,” “minnow[s],” “beetles,” “pinyon,” “juniper,” “areas,” “forested slopes,” “wheel ruts,” “unimpeded views of the night sky,” and hundreds of other random things. 86 Fed. Reg. at 57321-32; 86 Fed. Reg. at 57335-46; 82 Fed. Reg. at 1139-46 (incorporated by 86 Fed. Reg. 57346).

All told, President Biden declared over five hundred things to be “objects of historic or scientific interest.” He declared as objects of historic or scientific interest approximately 200 plants and animals—like “pinyon” and “bats,” J.A. Vol. II at 383-84; dozens of qualities and experiences—like “deafening silence” and “unimpeded views of the night sky,” *id.* at 373-74; dozens of generic geological items—like “red sandstone cliffs” and “multihued cliffs,” *id.* at 374-75; approximately 150 specific geological items—like “[a] perennial stream” and “Beef Basin,” *id.* at 375-76; and over 150 archaeological and paleontological items—like “potential fossil yield” and “stock trails,” *id.* at 377-80. Most of these items were nondescript, inconspicuous, animate, not fixed to the land, of no special past significance, or large and nebulous. *Id.* at 371-80. And to reiterate, among the objects of historic or scientific interest that President Biden

declared were both of the million-plus-acre landscapes themselves—large areas of land never before formally associated. *Id.* at 371.

No more than nine of the items declared to be “national monuments” likely qualify for protection. Those nine require no more than a few thousand acres for their proper care and protection. *Id.* at 380-87.

The federal government does not even know what items are within about 90 percent of the reservations. As of 2022, less than 10 percent of the area within the reservations had been physically inventoried by archaeologists. As a result, the government knows little about the distribution, densities, and types of items within about 2.97 million acres. *Id.* at 388.

For the “proper care and management” of his hundreds of declared national monuments, President Biden reserved parcels of land coterminous with the “landscapes” themselves. 86 Fed. Reg. at 57330-33; 86 Fed. Reg. at 57343-46. He did not explain what “care and management” was actually appropriate for any of the items. *Id.*

By declaring as national monuments hundreds of items, plants, animals, regions, and landscapes, the proclamations make it a federal crime to “injure[]” any of those things. *See* 18 U.S.C. §1866(b). They effectively ban a wide range of activities by making it a federal crime to injure every blade of “grass[]”; every inch of “soil”; and every “bee,” “shrub,” and “beetle” within the millions of reserved acres. They also ban anyone from taking any action “to appropriate, injure, destroy, or remove any feature of the monument.” 86 Fed. Reg. at 57333. They explicitly direct that all federal lands within

the enlarged reservations be “withdrawn from all forms of entry, location, selection, sale, or other disposition”; from “location, entry, and patent under the mining laws”; and from “disposition under all laws relating to mineral and geothermal leasing.” *Id.* at 57331, 57345. And they “retire from livestock grazing” any voluntarily relinquished allotments. *Id.* at 57332, 57346.

Two months after the proclamations were issued, Defendant Department of Interior published interim management plans governing activities within the reservations. *Interim Management of the Bears Ears National Monument*, Dep’t of Int. (Dec. 16, 2021), perma.cc/8WU9-MMH9 [hereinafter, Bears Ears Management Plan]; *Interim Management of the Grand Staircase-Escalante National Monument*, Dep’t of Int. (Dec. 16, 2021), perma.cc/8J37-ELHR [hereinafter, Grand Staircase Management Plan]. Those management plans interpret the proclamations and governing law and implement detailed and restrictive rules about activities on the land. They state that any planned activity on the reservations must yield to a “determin[ation] that the proposal is also consistent with the protection of the monument objects and values.” Bears Ears Management Plan 3-4; Grand Staircase Management Plan 3. They acknowledge a wide range of activities affected by their rules, including “certain [vegetation] treatment methods allowed under the [previous] monument management plans.” Bears Ears Management Plan 5; Grand Staircase Management Plan 5. Defendants’ agents have prohibited Utah and others from engaging in planned activities in the reservations. *E.g.*, J.A. Vol. II at 344-57, 367,

400; J.A. Vol. IV at 849, 854-55, 859-60, 864-65. These interim management plans are not subject to any further review until permanent plans are finalized years later.

III. National monument reservations harm Utah, its people, its relics, and its land.

“The creation of a national monument is of no small consequence.” *Mass. Lobsterman’s Ass’n*, 141 S. Ct. at 980 (statement of Roberts, C.J.). Monument reservations increase vandalism, desecration, and theft. J.A. Vol II at 345-48. In the case of these two reservations, what were once cherished places known only by locals have become soiled with trash, litter, and human biological waste. *Id.* at 318, 336, 338, 346-47, 352-53, 360, 400. Visitors drawn by the reservations have degraded local roads and brought on unprecedented looting. *Id.* at 318, 345-48, 366-68.

The monument reservations prevent Utahns from caring for the land they love. By declaring as national monuments things like plants and soils, the reservations prevent vegetation management, wildfire prevention, and wildlife support that would otherwise occur on the federal lands. As a result, lush landscapes decay and native plants and animals die. *Id.* at 348-49, 352-60.

Meanwhile, the lands and items within the reservations are already protected by other federal laws. The Antiquities Act was designed for an age when it was otherwise legal to unilaterally acquire federal land, use it for any purpose, or take anything found on it. *Id.* at 325-28. Now, a vast array of land-use and criminal laws protect *all* federal

land against acquisition, appropriation, and uses detrimental to historical and cultural items, vulnerable habitats, and the environment. *Id.* at 328-34.

The reservations cause Utah to lose revenues from mineral leasing and grazing fees. *Id.* at 362-65. They disrupt Utah's planned activities on the land, including vegetation removal, wildfire prevention, road maintenance, soil management, wildlife support, and general use. *Id.* at 353-58. They render state and local laws ineffective, including laws about resource yields from federal land, grazing promotion, wildlife management, and search-and-rescue procedures. *Id.* at 356-58, 368-71. They cause a series of financial burdens and lost revenue for things like new equipment, additional obligations for state employees, hundreds of thousands of dollars in additional search-and-rescue expenses, difficult and expensive road-maintenance burdens, and increased expenditures for the service of restroom facilities within the reservations. *E.g., id.* at 345-52, 366-68; J.A. Vol. IV at 847-871. And they harm Utah's land and wildlife property. J.A. Vol. II at 345-49, 352-58, 371-82.

IV. Utah sues and the district court dismisses its claims as unreviewable.

A. Utah challenges President Biden's national monument declarations and reservations.

In 2022, Utah sued President Biden and the agencies and officers responsible for administering and enforcing the national monument reservations, including the Department of Interior, Bureau of Land Management, Department of Agriculture, National Forest Service, and their respective heads—collectively, Federal Defendants. J.A. Vol.

I at 51. Individual Plaintiffs—Zebediah George Dalton, BlueRibbon Coalition, Kyle Kimmerle, and Suzette Ranea Morris—sued in a separate case, and the cases were consolidated. *Id.* at 29. Two coalitions intervened to defend the reservations. *Id.* at 30, 40-41.

Utah’s amended complaint raised two pairs of claims. First, Utah alleged that both national monument reservations exceeded statutory authority, or were “ultra vires,” because the declared national monuments did not fit the Antiquities Act’s three categories and the reserved land was more than the smallest area compatible with any valid monument’s proper care and management. J.A. Vol. II at 404-406 (Counts I & II). Second, Utah alleged that both agency management plans regulating activities on the national monument reservations also exceeded statutory authority. *Id.* at 406-408 (Counts III & IV). Utah sought a declaration that both reservations and both management plans are unlawful, and sought an injunction against their enforcement. *Id.* at 409.

Federal Defendants moved to dismiss Utah’s amended complaint. They argued that Utah lacked standing, failed to allege with specificity which parcels of reserved land are excessive, did not state a violation of the Antiquities Act, and was barred by sovereign immunity or the Administrative Procedure Act’s final-agency-action requirement. J.A. Vol. II at 424-25.

Utah opposed the motion to dismiss. J.A. Vol. III at 763. It explained that Utah has standing because the reservations deprive it of specific sources of revenue, deny the effect of its laws, impede its planned activities on the land, impose financial costs, and

threaten its property interests in land and wildlife. *Id.* at 801-820. Utah explained that its action was not barred by sovereign immunity because its claims allege that President Biden acted ultra vires and because Section 702 of the APA waived sovereign immunity for its claims against all Federal Defendants except the President. *Id.* at 836-38. Specifically, Utah explained that President Biden exceeded his statutory authority and therefore acted ultra vires because he declared ineligible things as national monuments and because the land he reserved was not confined to the smallest area compatible with their proper care and management. *Id.* at 821-33. And it explained that the management plans were final agency action because they were effective immediately and determined the rights of those who wished to undertake now-banned activities on the reservations. *Id.* at 838-39.

B. The district court dismisses Utah’s claims as barred by sovereign immunity.

The district court dismissed all claims under Rule 12(b)(6). J.A. Vol. IV at 992.

First, the district court dismissed Utah’s ultra vires claims. It acknowledged that an ultra vires claim for an action beyond statutory authority presents an “exception to sovereign immunity.” *Id.* at 920. But it held that Utah did not allege an ultra vires claim. It said that no plaintiff can ever challenge an Antiquities Act reservation—no matter how broad that reservation’s reach—because “no court of appeals has addressed how to interpret the Act’s ‘smallest area compatible’ requirement.” *Id.* at 982 (cleaned up). “[W]ithout additional guidance from Congress or a higher court,” the district court said

“the President’s actions are not ultra vires.” *Id.* So, according to the court, “President Biden’s judgment in drafting and issuing the Proclamations as he sees fit is not an action reviewable by a district court.” *Id.* at 992. The court suggested the President has discretion in determining whether something satisfies the Act’s limits. *Id.* at 982-83. And it said that because Utah conceded that the President could *sometimes* act within the Act’s limits, Utah could not *ever* allege that he exceeded those limits. *Id.* It also clarified that even if the plaintiffs “were granted leave to amend their complaint, ... they would not be able to plead the ultra vires exception.” *Id.* at 982. In so holding, the district court did not address, acknowledge, or attempt to distinguish any of the court of appeals or district court opinions that reach the opposite conclusion—that a plaintiff *can* bring an ultra vires claim against a national monument reservation. *See id.* at 981-83.

The district court also held that Section 702 of the APA could not waive sovereign immunity as to any Federal Defendants. It explained that because the President *authored* the proclamations, Utah could not obtain an injunction against any subordinate officers and agencies because the APA does not waive sovereign immunity against the President. *Id.* at 979-81.

Finally, the district court dismissed the APA claims challenging the management plans. *Id.* at 983-90. It held that they were not final agency action because they were labeled “interim,” were directed to government officials, and were merely interpretive. *Id.*

The district court dismissed the Individual Plaintiffs' complaint on the same grounds. *See generally id.* at 976-92.

Utah timely appealed. J.A. Vol. IV at 995-996.

SUMMARY OF ARGUMENT

I. The district court erred in holding that Utah's claims were barred by sovereign immunity. The "traditional exception to sovereign immunity" known as the ultra vires doctrine "permit[s] suits for prospective relief when government officials act beyond the limits of statutory authority." *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1232-33 (10th Cir. 2005). That's because "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign action." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). To state an ultra vires claim, a plaintiff therefore must allege that the executive official acted "beyond those powers Congress extended." *Wyoming v. United States*, 279 F.3d 1214, 1229 (10th Cir. 2002).

The Antiquities Act limits the President's authority in two respects. First, he can declare only three narrow categories of things—certain (1) landmarks, (2) structures, and (3) objects—to be national monuments. Second, he can reserve only the "smallest [land] area compatible" with the monument's proper care and management. 54 U.S.C. §320301. The President has no discretion to redefine those limits, which courts must independently enforce. *See Cappaert v. United States*, 426 U.S. 128, 142 (1976).

Here, Utah alleged that Federal Defendants exceeded both limits because President Biden declared ineligible objects and reserved more land than what's compatible with any valid monument's proper care and management. A "raft of precedent" holds that such claims are not barred by sovereign immunity. *Mass. Lobstermen's Ass'n v. Ross*, 349 F. Supp. 3d 48, 54 (D.D.C. 2018).

As to all Federal Defendants except the President, sovereign immunity is doubly waived. Section 702 of the APA waives sovereign immunity for non-monetary claims like these, regardless of whether they allege an excess of statutory authority. 5 U.S.C. §702.

II. Utah stated a claim that the national monument reservations exceed the Antiquities Act. Most of the things declared to be national monuments do not satisfy even a broad interpretation of the category that they supposedly all fall into: "other objects of historic or scientific interest." 54 U.S.C. §320301(a). That category must refer to items akin to "historic landmarks" or "historic and prehistoric structures." *See Yates v. United States*, 574 U.S. 528, 536 (2015). But the things that President Biden declared to be national monuments are animate, ubiquitous, nondescript, or inconspicuous things like plants, animals, and common geological features. And even accepting all of President Biden's items to be valid objects, 3.23 million acres is at least an order of magnitude larger than the "smallest area compatible" with the proper care and management of those objects.

III. The management plans governing the reservations are final agency action and therefore reviewable as beyond statutory authority. An agency action is “final” whenever it marks the “consummation of the agency’s decisionmaking process” and has “legal consequences.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). An “interim” action meets the first element “as long as the interim decision is not *itself* subject to further consideration by the agency,” which these are not. *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) (emphasis added); accord *Nat’l Air Carrier Ass’n v. C.A.B.*, 436 F.2d 185, 191 (D.C. Cir. 1970). And an action meets the second element even if it simply states how the agencies interpreted the law, which these do. *Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956). The management plans here are therefore final. Any other result would allow agencies to act unlawfully for years while escaping judicial scrutiny.

This Court should reverse and remand.

STANDARD OF REVIEW

This Court reviews *de novo* the dismissal of a complaint under Rule 12(b)(6) for failure to state a claim, including due to sovereign immunity. *Silva v. United States*, 45 F.4th 1134, 1137 (10th Cir. 2022); *Hennessey v. Univ. of Kan. Hosp. Auth.*, 53 F.4th 516, 527 (10th Cir. 2022). In so doing, this Court must “take Plaintiffs’ well-pleaded facts as true, view them in the light most favorable to Plaintiffs,” “draw all reasonable inferences from the facts in favor of Plaintiffs,” and “presume[e] that general allegations embrace those specific facts that are necessary to support the claim.” *Brooks v. Mentor Worldwide*

LLC, 985 F.3d 1272, 1281 (10th Cir. 2021); *SUWA v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013). After making all those presumptions and assumptions in the plaintiffs’ favor, the only question is whether the plaintiffs’ legal claims are “facially plausible.” “A claim is facially plausible when the allegations give rise to a reasonable inference that the defendant is liable.” *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 858 (10th Cir. 2016).

ARGUMENT

I. Utah’s claims are not barred by sovereign immunity.

Sovereign immunity does not protect officers who act “ultra vires,” which means beyond statutory limits. *Simmat*, 413 F.3d at 1232-33. The Antiquities Act limits both what can be declared a national monument and how much surrounding land can be reserved. Its limits are objective and enforceable. Utah alleged that President Biden exceeded both limits. It therefore brought standard ultra vires claims. Beyond that, Section 702 of the APA independently waives sovereign immunity because this action seeks non-monetary relief against the federal executive officers who enforce currently binding rules that govern activities within the reservations. *See* 5 U.S.C. §702.

A. Ultra vires claims are exempt from sovereign immunity.

“Sovereign immunity does not prevent a suit against a federal officer who is acting in excess of his authority.” *Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 651 (10th Cir. 1960). The “traditional exception to sovereign immunity, commonly referred to as the ultra vires doctrine, permit[s] suits for prospective relief when government officials

act beyond the limits of statutory authority.” *Simmat*, 413 F.3d at 1232-33. The ultra vires doctrine “reflects a long history of judicial review of illegal executive action, tracing back to England.” *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

The doctrine flows from the common-sense conclusion that when the executive goes beyond the power that the legislature has granted, its action is no longer the sovereign’s. “[W]here the officer’s powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign action.” *Larson*, 337 U.S. at 689. The officer is no longer “doing the business which the sovereign has empowered him to do.” *Id.* “To permit [the Executive Branch] to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to [it] power to override Congress.” *Wyoming*, 279 F.3d at 1229. So if not for the ultra vires doctrine, “sovereign immunity would unjustifiably protect the Government in the exercise of powers it does not possess.” *Id.* at 1225.

To state an ultra vires claim, a plaintiff therefore must allege that the executive officer acted “beyond those powers Congress extended.” *Id.* at 1229. The Supreme Court and this Court have stated this rule in a variety of ways, but it always turns on whether the plaintiff alleges an executive action beyond the limits of statutory authority. The plaintiff must allege that “the officers have exceeded their statutory powers,” *Pierson*, 284 F.2d at 652, went “beyond their statutory powers,” *Dugan v. Rank*, 372 U.S. 609, 621 (1963), or acted “beyond the limits of statutory authority,” *Simmat*, 413 F.3d at 1233; *see also Dalton v. Specter*, 511 U.S. 462, 472 (1994) (“beyond his statutory

powers”). If the plaintiff alleges an act beyond the limits of statutory authority, then the executive defendants cannot escape judicial review through “[t]he cloak of immunity.” *Frost v. Garrison*, 201 F. Supp. 389, 391 (D. Wyo. 1962).

This Court’s decision in *Pierson* is illustrative. 284 F.2d 649. In *Pierson*, an energy-company plaintiff sued BLM and Interior under the ultra vires doctrine. *Id.* at 650. The company alleged that when they sought to cancel its oil lease in an administrative proceeding, they acted beyond their statutory authority. *Id.* at 651. By statute, the agencies could cancel the company’s lease administratively only if the land did not “contain valuable deposits of oil or gas.” *Id.* at 654. The company alleged that the land here *did* contain valuable deposits of oil and gas, so the agencies exceeded their authority and therefore had no sovereign immunity. *Id.* This Court agreed. It held that the executive defendants had no sovereign immunity because the company alleged an act beyond statutory authority. *Id.* at 656. A plaintiff “aggrieved by governmental action, and precluded from a suit against the sovereign by the doctrine of immunity” may bring a suit against “the government officer responsible for that action” when it alleges that “the officers have exceeded their statutory powers.” *Id.* at 651-52. This Court therefore reversed the district court’s dismissal and held on the merits that the plaintiffs stated a claim because the defendants’ administrative cancellation was “without statutory authority.” *Id.* at 656.

The ultra vires doctrine remains a standard mechanism for challenging executive actions beyond statutory authority. *See, e.g., California v. Trump*, 379 F. Supp. 3d 928

(N.D. Cal. 2019) (holding presidential wall-funding order ultra vires); *Make the Road N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 258 (S.D.N.Y. 2020) (holding presidential immigration proclamation ultra vires); *Texas v. Biden*, 2023 WL 6281319, at *2 (S.D. Tex. Sept. 26) (holding presidential wage directive ultra vires); *see also* Section I.B.3, *infra* (compiling cases allowing ultra vires Antiquities Act challenges).

B. Utah alleged that Federal Defendants exceeded their statutory authority.

Utah brought textbook ultra vires claims. It alleged that Federal Defendants’ “powers are limited by statute” and that the national monument reservations went “beyond those limitations.” *Larson*, 337 U.S. at 689.

1. The Antiquities Act limits the President’s authority in two ways.

The Antiquities Act’s plain text discloses two critical limits. First, before the President can declare something a national monument, that item must be “situated” on federal land and fall within one of only three specific categories: (1) “historic landmarks,” (2) “historic and prehistoric structures,” or (3) “other objects of historic or scientific interest.” 54 U.S.C. §320301(a). Second, the parcel of land reserved for that national monument “shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.” *Id.* §320301(b).

A president acts ultra vires by exceeding either of those statutory limits. A president exceeds the first limit if he declares as a national monument *anything* that is not situated on federal land or not a historic landmark, historic or prehistoric structure, or

other object of historic or scientific interest. For example, he exceeds the first limit if he declares as a national monument the State of Colorado or a raindrop. And a president exceeds the second limit if he reserves more than the smallest area compatible with the proper care and management of a valid object. For example, he exceeds the second limit if his object needs one acre for its protection, but he reserves one hundred acres. That's why Chief Justice Roberts called on courts to more stringently enforce both the limit on "[t]he scope of the objects that can be designated under the Act" and the limit on "the area necessary for their proper care and management." *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (statement of Roberts, C.J.).

The district court, however, held that the Act does not limit the President's authority. "President Biden's judgment in drafting and issuing the Proclamations as he sees fit," the district court held, "is not an action reviewable by a district court." J.A. Vol. IV at 992. The district court did not base that conclusion on an analysis of the Act's text. Instead, it refused to enforce the text because "[n]o court of appeals has addressed ... how to interpret" it. *Id.* 982. "[W]ithout additional guidance from Congress or a higher court," the district court held, "the President's actions are not *ultra vires*." *Id.*

But Congress already set strict statutory limits—and multiple courts of appeals have already held that those limits are enforceable. *See* Section I.B.3, *infra*. In any event, the Act's limits must be applied regardless of whether a higher court has defined them; even without the prior precedent on these questions, Utah's claims would have

presented “question[s] of first impression” of the kind that district courts often must answer. *Anderson v. Commerce Const*, 531 F.3d 1190, 1195 (10th Cir. 2008). The district court cited no cases licensing it to ignore statutory limits because it thought them not previously and sufficiently defined by higher courts. It erred in concluding that it could.

2. Utah alleged that Federal Defendants exceeded both limits.

Because the Act has limits, Utah properly stated ultra vires claims if it alleged that Federal Defendants went “beyond” those limits. *Larson*, 337 U.S. at 689. Utah did just that for both of the Act’s limits.

Utah alleged that President Biden exceeded the first limit because he declared as national monuments many things that are *not* historic landmarks, historic or prehistoric structures, or other objects of historic or scientific interest. 54 U.S.C. §320301(a). For example, he declared as national monuments entire one-million-plus acre “landscapes.” He declared as national monuments plants and animals like “potato[es]” and “sheep.” And he declared as national monuments generic things like “boulders.” President Biden declared over 500 things, over the course of two lengthy proclamations, to be national monuments. 86 Fed. Reg. at 57321-32; 86 Fed. Reg. at 57335-46. Utah’s amended complaint contains factual allegations addressing those objects one-by-one and alleged that all but nine of them did not qualify for protection under the Act. J.A. Vol. II at 382-91. For nearly every object, Utah alleged multiple reasons why it did not qualify, such as that it was “animate” and “generic.” *Id.* Utah therefore alleged that President Biden

violated the Act's first limit by declaring as national monuments things "beyond his statutory powers." *Dalton*, 511 U.S. at 472.

Utah also alleged that President Biden exceeded the Act's second limit because, even if all of his separate objects satisfied the first limit, his 3.23 million-acre reservations were not the "smallest area compatible" with their "proper care and management." 54 U.S.C. §320301(b). Utah's amended complaint contains factual allegations describing the relevant threats to each item, the measures needed to protect them from those threats, and the space needed to implement those measures. J.A. Vol. II at 392-93. Utah provided maps showing the areas needed for protection of qualifying items and cited real-life examples of proper protection. *Id.* at 394-401. It explained that even accepting every item on the map of qualifying objects that *Federal Defendants* themselves submitted, and even granting each item a more-than-necessary and non-overlapping 1,000 acres per item, that would justify reserving—at most—less than six percent of the land covered by the current reservations. *Id.* at 428-29. Utah therefore properly alleged that in reserving 3.23 million acres, President Biden again went "beyond his statutory powers." *Dalton*, 511 U.S. at 472.

The district court suggested Utah did not allege an excess-of-statutory-authority claim because Utah does not dispute that—in the abstract—presidents have "the authority to withdraw federal land as national monuments" *somewhere*. J.A. Vol. IV at 982. The court therefore conceived of Utah's claims as arguing not a "lack of delegated power," but an "error in the exercise of that power." *Id.* at 981-82. But every ultra vires

claim assumes that the statute has some valid applications. It would have been no defense in *Pierson*, for example, to observe that the Secretary could cancel oil leases in *other circumstances*. 284 F.2d at 654. Because Utah alleged that the national monument reservations *here* exceeded the Antiquities Act’s two limits, Utah’s amended complaint alleges all facts necessary for this lawsuit to state claims falling within the “traditional exception to sovereign immunity, commonly referred to as the *ultra vires* doctrine, permitting suits for prospective relief when government officials act beyond the limits of statutory authority.” *Simmat*, 413 F.3d at 1233.

3. The district court’s holding splits with every other court’s sovereign-immunity holdings—without even acknowledging those contrary holdings.

Every other court that has previously considered whether Antiquities Act challenges are barred by sovereign immunity disagrees with the district court’s conclusion. Those courts “have consistently reviewed claims challenging national monument designations.” *Am. Forest Res. Council v. United States*, 77 F.4th 787, 797 (D.C. Cir. 2023). “In reviewing challenges under the Antiquities Act,” the D.C. Circuit has held, “review is available to ensure that ... the President has not exceeded his statutory authority.” *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002); accord *Murphy Co. v. Biden*, 65 F.4th 1122, 1128-31 (9th Cir. 2023); *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002). When “claims assert that the President exceeded his statutory authority under the Antiquities Act—*i.e.*, that the Proclamation was *ultra vires*—they are generally reviewable.” *Mass. Lobstermen’s Ass’n v. Ross*, 349 F. Supp. 3d at 54. Indeed, in

everywhere but the District of Utah, it is “well settled that courts may engage in ultra vires review of presidential proclamations that designate federal lands as national monuments.” *W. Watersheds Project v. BLM*, 629 F. Supp. 2d 951, 960 (D. Ariz. 2009). Courts faced with sovereign-immunity arguments “easily conclude that the plaintiffs’ claims are reviewable.” *Am. Forest Res. Council*, 77 F.4th at 797. Courts can—and must—engage in “review of the President’s actions in this area.” *Mass. Lobstermen’s Ass’n*, 141 S. Ct. at 981 (statement of Roberts, C.J.).

The district court’s holding that sovereign immunity shields challenges to national monument reservations flouts this “raft of precedent.” *Mass. Lobstermen’s Ass’n v. Ross*, 349 F. Supp. 3d at 54. Unfortunately, the district court did not engage with any of those contrary cases. It did not even acknowledge them, let alone explain what they got wrong or try to distinguish them. J.A. Vol. IV at 981-84; *cf. United States v. Wilkins*, 30 F.4th 1198, 1209 (10th Cir. 2022) (“we are ordinarily reluctant to create a circuit split without a ‘sound reason’”). They are not distinguishable. Every other court is right. Utah stated and properly pleaded ultra vires claims.

C. The President does not have discretion to define the Act’s limits.

Nor does the Act make the President the final arbiter over what satisfies its limits. Within the first limit, a president can declare something to be a national monument if it is situated on federal land and a qualifying landmark, structure, or object. 54 U.S.C. §320301(a). If an item objectively qualifies as one of those three things, the President *need not* declare it a national monument—he simply “may, in [his] discretion.” *Id.*

(emphasis added). But if it does not objectively qualify as one of those three things, he may not declare it a monument.

Federal Defendants have theorized that the word “discretion” in the Act instead gives the President unchallengeable discretion to decide *whether* something is a qualifying landmark, structure, or object. J.A. Vol. II at 438-39. On this account, the Act authorizes the President to declare *anything* a national monument. He could declare that a squirrel is a “historic landmark,” and no court could second-guess him. The district court implied but did not explicitly say that it accepted Federal Defendants’ “discretion” theory. *See* J.A. Vol. IV at 976 (quoting *Martin v. Mott*, 25 U.S. 19, 31-32 (1827)). Of course, if Federal Defendants’ theory were true, then the President could not exceed the Act’s first limit. Any ultra vires claim would have to proceed solely on the smallest-area-compatible limit.

But Federal Defendants’ unchallengeable-discretion theory is wrong for at least three reasons. First, it’s foreclosed by Supreme Court precedent. The Supreme Court has twice discussed the requirement that the President declare as monuments only qualifying landmarks, structures, and objects. In both cases, it held the President to an objective standard. In *Cappaert v. United States*, the Court held that the declared national monument objectively qualified as an “object[t] of historic or scientific interest” because it was a one-of-a-kind geological pool formation. 426 U.S. at 142. In *Cameron v. United States*, the Court said the same about the Grand Canyon, again based on objective criteria. 252 U.S. 450, 455-56 (1920). On Federal Defendants’ theory, the Supreme

Court committed legal error by inquiring into whether these monuments qualified under objective criteria because only the President had discretion to decide that.

Second, Federal Defendants' theory is not consistent with ordinary usage. When a statute authorizes someone to take action "in his discretion" upon certain conditions, it means that the conditions are objective but the action is optional. When a statute says that the Attorney General "may, in [his] discretion" waive deportation for an alien if she is "the spouse, parent, son, or daughter of a citizen of the United States," 8 U.S.C. §1227(a)(1)(H), it means that the alien must objectively fall into one of those categories, but that the later waiver is optional. *See INS v. Yueh-Shaio Yang*, 519 U.S. 26, 29-30 (1996) ("The meaning of this language is clear. While it establishes certain prerequisites to eligibility for a waiver of deportation, it imposes no limitations on the factors that the Attorney General ... may consider in determining who, *among the class of eligible aliens*, should be granted relief.") (emphasis added).

Likewise, when a statute authorizes a district court to award attorney's fees "in its discretion" if someone is a "prevailing party," 42 U.S.C. §1988(b), it means that the party must objectively prevail, but that awarding fees is optional. *Kan. Judicial Watch v. Stout*, 653 F.3d 1230, 1235 (10th Cir. 2011) ("Whether a litigant qualifies as a 'prevailing party' under ... §1988 is a question of law that we review de novo."). So when a statute authorizes the President to declare something a national monument "in [his] discretion" if it is a historic landmark, historic or prehistoric structure, or other object of historic

or scientific interest, 54 U.S.C. §320301(a), it means that the thing must objectively fall within one of those three categories, but that the declaration is optional.

Third, history belies Federal Defendants' theory. If the President had sole discretion to determine whether something is a qualifying landmark, structure, or object, then the drafters of the Antiquities Act would not have obsessed over the precise wording of those limits. But the Act was "carefully drawn" and reflected *years* of debate and compromise over those words. S. Rep. No. 59-3797, at 1 (1906); *see Lee, supra*, at 47-77 (documenting drafting history and debates); H.R. 11021, 56th Cong. (1900) (rejecting broader proposal for items of "scenic beauty," "natural wonders," and other "curiosities"). The "discretion" theory renders those years of legislative deliberation a pointless charade.

Federal Defendants' interpretation would also raise separation-of-powers concerns. If the President may declare *anything* a national monument, then the Antiquities Act would unconstitutionally delegate the legislative power to regulate federal land. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935); U.S. Const., Art. IV, §3. And before holding that Congress conferred to the President the unreviewable power to lock down any federal land as a national monument, this Court would have to conclude that its intent to do so was "clear." *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022).

D. The APA independently waives sovereign immunity.

If Utah's claims did not fall within the ultra vires exception, Utah could still bring them as to every Federal Defendant except the President. Section 702 of the APA

waives sovereign immunity from suits for “non-monetary relief” against all federal “official[s]” other than the President. *Match-E-Be-Nash-She-Wish Band of Pottowatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012); *see also* 5 U.S.C. §702. “This waiver is not limited to suits under the Administrative Procedure Act.” *Simmat*, 413 F.3d at 1233.

Utah’s first pair of claims sought non-monetary relief—an injunction and declaration preventing enforcement of the proclamations—against all Federal Defendants. J.A. Vol. II at 404-06, 409. Federal Defendant officers and agencies implement and enforce the unlawful proclamations, and Utah wants them to stop. The district court held that Section 702 did not waive sovereign immunity as to those claims. J.A. Vol. IV at 979-81. It suggested that because the President *authored* the proclamations, Utah could not obtain an injunction against any subordinate officers and agencies. *Id.* But when a suit against the President himself is not available, “[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President’s directive.” *Chamber of Com. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996). Section 702’s plain text waives sovereign immunity for this relief. *Simmat*, 413 F.3d at 1233. Therefore, even if the ultra vires doctrine were not satisfied, Utah’s first two claims may proceed against everyone except the President.

II. Utah stated valid claims.

If this Court agrees with every other American court and holds that sovereign immunity is no bar to relief, it should have little trouble concluding that Utah stated meritorious claims for relief. Taking all of Utah’s factual allegations as true, as the Court

must at this stage, Utah’s allegations that the President exceeded his statutory authority amply clear Rule 12’s plausibility threshold. *Rhodes*, 843 F.3d at 858.

A. The President declared ineligible things as national monuments.

Utah stated a claim that President Biden declared as national monuments things that do not fit within the Act’s three categories of historic landmarks, historic and pre-historic structures, and other objects of historic or scientific interest. 54 U.S.C. §320301(a). Of the more than 500 items that President Biden’s proclamations declare to be national monuments, all but a few handfuls do not fit any of those three categories. They are instead ordinary things like “soil,” “shrubs,” “rice-grass,” “bees,” “sun-flower[s],” “bighorn sheep,” “minnow[s],” “beetle[s],” “pinyon,” “juniper,” “areas,” “views,” and “forested slopes.” 86 Fed. Reg. at 57321-32; 86 Fed. Reg. at 57335-46; 82 Fed. Reg. at 1139-46 (incorporated by 86 Fed. Reg. at 57346). In fact, President Biden declared as national monuments over 200 plants and animals, dozens of qualities and experiences, nearly 200 geological items, and over 150 archaeological and paleontological items. J.A. Vol. II at 382-91. Most of these were ubiquitous, generic, or nondescript, like “red sandstone cliffs” or “stock trails.” *Id.* He even declared as national monuments the entire 3.23 million acre “landscapes” themselves. *Id.* at 382.

Federal Defendants have forfeited any argument that any of those items satisfy either of the Antiquities Act’s first two categories. 86 Fed. Reg. at 57331, 57345; J.A. Vol. II at 477-83. They put all their chips on the final category, “other objects of historic or scientific interest.” 54 U.S.C. §320301(a). But this category does not encompass

Federal Defendants’ kitchen-sink list of items. To any “speaker of ordinary English,” *Mass. Lobstermen’s Ass’n*, 141 S. Ct. at 980 (statement of Roberts, C.J.), things like plants, animals, and landscapes are not “objects.” And ubiquitous, generic, nondescript items like “boulders” are not “of historic or scientific interest.”

In fact, sound statutory construction counsels a narrow reading of the Act’s third category of “other objects of historic or scientific interest.” The words in that phrase carry important restraints that cannot be reconciled with these two national monument reservations. “Historic,” for example, describes only things that are “memorable, or assured of a place in history,” not just things that are old. Fowler, *A Dictionary of Modern English Usage* 247 (1922).² And any qualifying “objects” must *also* be “situated on land,” 54 U.S.C. §320301(a), which means they must be ““permanently fixed; placed; located.” *Situate; Situated*, Webster’s Dictionary (1913).

² *Accord Historical*, 2 Webster’s New International Dictionary 1021 (1913) (“historical” is “the more usual form” for “[o]f, pertaining to, or of the nature of, history,” whereas “historic” is “the more usual form” for “associated with, or famous in, history; as a historic spot; a historic event”); *Historic*, Oxford English Dictionary V (H-K) 304 (1913) (“the prevailing current sense” of “historic” was “[f]orming an important part or item of history; noted or celebrated in history; having an interest or importance due to conne[ct]ion with historical events”).

The Act’s third category also cannot be read broadly because it must “apply only to persons or things of the same general kind or class” as the first two categories. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012); see also *Wash. State Dep’t of Soc. and Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 384 (2003) (“under the established interpretative canons of *noscitur a sociis* and *eiusdem generis*, where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words” (cleaned up)). Any qualifying “object of historic or scientific interest” *must be* akin to “historic landmarks” or “historic and prehistoric structures.” In a closely analogous statutory-interpretation case, the Supreme Court held that where the phrase “tangible object” follows the words “record” and “document,” it refers to “only objects one can use to record or preserve information, not all objects in the physical world.” *Yates*, 574 U.S. at 536; see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 115 (2001) (similar). The Act’s use of the word “other” further narrows this category. See *Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020).

A narrow reading of the third category also is most consistent with the Act’s title because an “antiquity” is a rare thing—a “relic or monument of ancient times”—not a nondescript or common thing. *Antiquity*, Webster’s Dictionary (1913); see *I.N.S. v. Nat’l Ctr. for Immigrants’ Rts., Inc.*, 502 U.S. 183, 189 (1991) (“the title ... can aid in resolving an ambiguity in the legislation’s text”); accord *Mass. Lobstermen’s Ass’n*, 141 S. Ct. at 980 (statement of Roberts, C.J.). A narrow reading avoids constitutional delegation

problems. *See supra*, I.B.2; *see Gomez v. United States*, 490 U.S. 858, 864 (1989) (“It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.”). And it’s most consistent with the legislative history, which promised a modest Act for rare items, and discarded broader categories. H.R. Rep. No. 59-2224, at 1 (“small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times”); 40 Cong. Rec. 7888 (Jun. 5, 1906) (Rep. Lacey) (“small reservations” only); H.R. 11021 56th Cong. (1900) (“scenic beauty,” “natural wonders,” “curiosities”); *see Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (“We ordinarily will not assume that Congress intended ‘to enact statutory language that it has earlier discarded in favor of other language.’”).

B. The President reserved more land than the smallest area compatible with any valid monument’s proper care and management.

Utah also stated a claim that President Biden exceeded his statutory authority by reserving more than the “smallest area compatible with the proper care and management of the objects to be protected.” 54 U.S.C. §320301(b). Utah alleged facts showing what the proper care and management of all listed items would require. It explained that the “smallest area compatible with the proper care and management of the objects to be protected” depends on the threats to those objects absent a reservation, the measures needed to protect from those threats, and the space needed to implement those measures. J.A. Vol. II at 395-400. Utah alleged, based on modern standards of

care, that even with the most generous assumptions afforded for the federal government, most items needed a reservation of often no more than a few acres, and almost none needed more than 160 acres. *Id.* And yet, even granting double that many acres to every item listed would justify reserving under six percent of the current reservations.

Alternatively, Utah alleged that, under the circumstances on the ground, no reservation is necessary for the proper care and management of most or all qualifying objects because large-scale reservations undermine proper care and management by drawing people to areas that will spread local rangers impossibly thin, and the objects are already properly cared for and managed under existing laws. J.A. Vol. II at 400. While an Antiquities Act reservation was necessary to properly care for and manage ruins on federal land early in the 20th century, new laws make it no longer so.

The “smallest area compatible” limitation imposes a “unique constraint.” *Mass. Lobstermen’s Ass’n*, 141 S. Ct. at 980 (statement of Roberts, C.J.). Congress wrote it to ensure that national monument reservations would implicate “[n]ot very much” land. 40 Cong. Rec. 7888 (Jun. 5, 1906) (Rep. Lacey). It would not have passed without this constraint. Norris, *The Antiquities Act and the Acreage Debate*, 23 *George Wright Forum* 6, 8 (2006). And Congress used the term “shall” in reference to the “smallest area compatible” requirement, 54 U.S.C. §320301(b), to make this constraint inflexible. *See Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012) (“shall is mandatory and may is

permissive”). Taking Utah’s allegations about proper care and management as true, it stated a claim that the 3.23-million-acre reservations exceeds the Act’s second limit.

III. Utah may separately challenge the management plans as final agency action.

After President Biden created the national monument reservations, BLM published formal “management” plans regulating all activities within the reserved 3.23 million acres. Bears Ears Management Plan, *supra*; Grand Staircase Management Plan, *supra*. These management plans implement detailed and restrictive rules governing the monument reservations. They “provide[] specific direction to ensure that ... the BLM will manage the [reservations] in a manner consistent with [the proclamations].” *Id.* at 2. The management plans announce certain regulatory rules that apply to the reservations, including that: mineral miners with preexisting rights would need to pay for a “mineral examination” before continuing with their mining; any “proposed recreation use or activity is evaluated for monument management plan ... conformance and consistency with the proclamation prior to being authorized ... notwithstanding whether an event or activity has been permitted in the past”; and “certain [vegetation] treatment methods allowed under the [previous] monument management plans” be reconsidered for prohibition. *Id.* at 2, 5.

Utah separately challenged these management plans as in excess of statutory authority. J.A. Vol. II at 406-08. Everyone agreed that that if the reservations themselves exceed the Antiquities Act’s scope, the management plans could not be upheld on any

independent basis. For when a presidential directive is unlawful, agency actions implementing it are unlawful. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952); *see also Franklin v. Massachusetts*, 505 U.S. 788, 828-29 (1992) (Scalia, J., concurring in part and concurring in the judgment). The district court held that Utah did not state a claim that the management plans were unlawful for only one reason: because those plans were not “final agency action” and therefore could not be judicially reviewed. J.A. Vol. IV at 983-90. That was error.

The final-agency-action requirement is not hard to meet. Courts recognize a “presumption in favor of judicial review of administrative action.” *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 348 (1984). The APA was intended to “cover a broad spectrum of administrative actions,” and the review provisions must be given a “hospitable interpretation.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). It is irrelevant if an “agency has not dressed its decision with the conventional procedural accoutrements of finality.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 479 (2001). Only where there is “‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.” *Abbott Labs.*, 387 U.S. at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 380 (1962)).

An agency action is “final” under the APA if it meets two conditions. “First, the action must mark the ‘consummation’ of the agency’s decisionmaking process,” and “second, the action must be one by which ‘rights or obligations have been determined,’

or from which ‘legal consequences will flow.’” *Bennett*, 520 U.S. at 177-78. The monument management plans meet both finality conditions.

A. The management plans represent the consummation of the agency decisionmaking process.

An action is the “consummation of the agency’s decisionmaking process” when it is effective without further review. As long as the challenger has “no entitlement to further Agency review,” such as an administrative appeal, the agency action marks the consummation of the decisionmaking process. *Sackett v. EPA*, 566 U.S. 120, 127 (2012). “The mere possibility that an agency might reconsider ... does not suffice to make an otherwise final agency action nonfinal.” *Id.* For example, an agency action represents the consummation of a decisionmaking process when it provides the “definitive statement of its position, determining the rights and obligations of the parties’... notwithstanding ‘the possibility of further proceedings in the agency’ on related issues.” *Cure Land, LLC v. Dep’t of Agric.*, 833 F.3d 1223, 1230-31 (10th Cir. 2016) (quoting *Bell v. New Jersey*, 461 U.S. 773, 779-80 (1983)). The question then is not whether the agency’s decision is permanent but whether it is immediately effective. *Nat’l Air Carrier Ass’n*, 436 F.2d at 191; accord *Wheeler*, 955 F.3d at 79-80 (D.C. Cir. 2020); *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017); *Scenic Am., Inc. v. DOT*, 836 F.3d 42, 56 (D.C. Cir. 2016).

These management plans are the consummation of the agency Defendants’ decisionmaking process. They are binding today. Federal Defendants apply them to regulate Utah and others. J.A. Vol. II at 344-57, 367, 400; J.A. Vol. IV at 849, 854-55, 859-

60, 864-65. For this reason, they are not like a notice of proposed rulemaking—a statement in the Federal Register of how an agency intends to bind regulated parties *in the future*. Nor are they in abeyance pending any internal administrative appeals or further review process. Rather, they have been binding since 2021 and will continue to regulate activities on the reservations until some undefined time in at least 2024 when the agency says it will replace them with more detailed plans. J.A. Vol. II at 489. They therefore “firmly establish[] [BLM’s] current position” and thus constitute final agency action. *Wheeler*, 955 F.3d at 79.

The district court held that the challenged management plans did not mark the consummation of a decisionmaking process because they were labeled “interim.” J.A. Vol. IV at 988. The agencies’ stated intent to eventually replace those plans, the district court reasoned, makes them nonfinal because “[t]he phrase ‘interim guidance’ is mentioned at the very beginning and throughout.” *Id.*

But “interim” decisions are final as long as they are effective without further review. Any other rule would allow agencies to “evade judicial review of their actions even if they impose substantial obligations on regulated parties over a considerable period of time.” *Wheeler*, 955 F.3d at 78. “[A]s long as the interim decision is not *itself* subject to further consideration by the agency,” then it represents the consummation of a decisionmaking process. *Id.* Interim decisions mark “the final word from the agency on what will happen up to the time of any different permanent decision,” so they must be reviewable. *Id.*; see also *Pruitt*, 862 F.3d at 6 (holding that a stay of a regulations

pending resolution of a petition for reconsideration qualified as final agency action); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 823 F.2d 608, 614-15 (D.C. Cir. 1987) (holding that a grant of interim relief from a safety standard pending resolution of a petition to modify the standard constituted final agency action). “The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.” *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000).

B. The management plans have immediate legal consequences.

The monument management plans also meet *Bennett*'s second finality requirement. An agency action has legal consequences when it states how the agency interprets the law or directs agency officials how to administer the law. When a guidance document “comes to a definitive conclusion” about how a law applies to a class of activities, it is final for purposes of judicial review. *Scenic Am., Inc.*, 836 F.3d at 56. Even a document simply providing notice of how an agency interprets a particular law that “would have effect only if and when a particular action was brought” qualifies as final. *Army Corps of Engs v. Hawkes Co.*, 578 U.S. 590, 599-600 (2016) (quoting *Frozen Food Express*, 351 U.S. at 44).

These monument management plans state how the agency interprets the law and direct agency officials how to administer the law. They “come[] to a definitive conclusion” about how the law applies to certain classes of activities. *Scenic Am., Inc.*, 836 F.3d at 56. For example, they conclude that the proclamations require mineral miners with

preexisting rights to pay for a “mineral examination” before continuing with their mining. Bears Ears Management Plan, *supra*, at 2. They provide notice of how an agency interprets a particular statute that “would have effect only if and when a particular action was brought.” *Hawkes*, 578 U.S. at 599-600 (quoting *Frozen Food Express*, 351 U.S. 40). For example, they provide notice that the agency interprets the proclamations and the Antiquities Act to restrict both “certain [vegetation] treatment methods allowed under the [previous] monument management plans” and “proposed recreation use or activity” that had been “permitted in the past.” Bears Ears Management Plan, *supra*, at 3-5.

The district court reasoned that the plans did not have legal consequences because they just represented the agency’s interpretations of the proclamations and preexisting law. J.A. Vol. IV at 987-90. But agency interpretations are classic final agency action. *Cal. Cmty. Against Toxics v. EPA*, 934 F.3d 627, 635 (D.C. Cir. 2019) (“interpretive rules can be final”); accord *Frozen Food Express*, 351 U.S. at 44. So are actions that implement presidential orders. *E.g.*, *City of Albuquerque v. Dep’t of Interior*, 379 F.3d 901, 913-14 (10th Cir. 2004). The district court also reasoned that they were not final agency action because they did not “directly and immediately” regulate Utah, but instead instructed federal employees how to regulate Utah. J.A. Vol. IV at 982-83. But final agency action often takes the form of directions to officers as to how to interpret and administer the law. *E.g.*, *Qwest Commc’ns Int’l, Inc. v. FCC*, 398 F.3d 1222, 1226 (10th Cir. 2005). Modern final-agency-action law has displaced the direct-and-immediate

requirement with a more flexible one. *See Bennett*, 520 U.S. at 177-78. And Federal Defendants apply the management plans against them and others—directly and immediately—today. J.A. Vol. II at 344-57, 367, 400; J.A. Vol. IV at 849, 854-55, 859-60, 864-65.

Because the management plans are final agency action, Utah can challenge them. And because they enforce and implement proclamations beyond the scope of the Antiquities Act, Utah stated a claim that they are contrary to law.

CONCLUSION

This Court should reverse the district court's judgment and remand so that this case can proceed to final judgment.

Respectfully submitted,

Dated: October 30, 2023

/s/ Tyler R. Green

Stanford E. Purser
Kathy A.F. Davis
Utah Attorney General's Office
1600 E. 300 S.
Salt Lake City, UT 84114-2320
(801) 538-9600

Tyler R. Green
CONSOVOY MCCARTHY PLLC
222 S. Main Street, 5th Floor
Salt Lake City, UT 84101
(703) 243-9423
tyler@consovoymccarthy.com

*Counsel for Plaintiff-Appellant
State of Utah*

Taylor A.R. Meehan
Kathleen L. Smithgall
Jeffrey S. Hetzel
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423

*Counsel for Plaintiffs-Appellants Garfield
County, Utah; Kane County, Utah; State of
Utah*

STATEMENT WITH RESPECT TO ORAL ARGUMENT

Utah respectfully requests oral argument. The district court held that plaintiffs challenging national monument reservations under the Antiquities Act are barred by sovereign immunity. If affirmed, that holding would split with the D.C. and Ninth Circuits. *Mountain States Legal Found.*, 306 F.3d 1132; *Murphy Co. v. Biden*, 65 F.4th 1122. This appeal also presents questions raised by Chief Justice Roberts in a recent statement regarding the denial of certiorari about the enforceable limits of the Antiquities Act of 1906. *Mass. Lobsterman's Ass'n*, 141 S. Ct. 979 (2021) (statement of Roberts, C.J.).

Oral argument would assist the Court in considering these important questions.

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7) because it contains 11,456 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: October 30, 2023

s/ Tyler R. Green

CERTIFICATE OF DIGITAL SUBMISSION

With respect to this brief, all required privacy redactions have been made; the hard copies submitted to the clerk are exact copies of the ECF submission; the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Word 2016, and according to the program is free of viruses.

Dated: October 30, 2023

s/ Tyler R. Green

CERTIFICATE OF SERVICE

I filed this brief with the Court via ECF, which will email everyone requiring notice.

Dated: October 30, 2023

s/ Tyler R. Green

ATTACHMENT

1. District Court Order dated August 11, 2023 (J.A. Vol. IV 965).
2. District Court Judgment dated August 11, 2023 (J.A. Vol. IV 993).

THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

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

Plaintiffs,

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

Consolidated Plaintiffs,

v.

JOSEPH R. BIDEN, JR. in his official capacity as President of the United States; DEB HAALAND, in her official capacity as Secretary of Interior; DEPARTMENT OF THE INTERIOR; TRACY STONE-MANNING, in her official capacity as Director of the Bureau of Land Management; BUREAU OF LAND MANAGEMENT; TOM VILSACK, in his official capacity as Secretary of Agriculture; DEPARTMENT OF AGRICULTURE; RANDY MOORE, in his official capacity as Chief of the Forest Service; FOREST SERVICE;

Defendants,

HOPI TRIBE, NAVAJO NATION, PUEBLO OF ZUNI, and UTE MOUNTAIN UTE TRIBE;

Intervenor-Defendants,

SOUTHERN UTAH WILDERNESS ALLIANCE, CENTER FOR BIOLOGICAL DIVERSITY, GRAND CANYON TRUST, GREAT OLD BROADS FOR WILDERNESS, NATIONAL PARKS CONSERVATION ASSOCIATION, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, THE WILDERNESS SOCIETY, WESTERN WATERSHEDS PROJECT, and WILDEARTH GUARDIANS.

Intervenor-Defendants.

MEMORANDUM DECISION AND ORDER GRANTING MOTION TO DISMISS, dkt no. 113, and MOTION TO DISMISS, dkt no. 114

Case No. 4:22-cv-00059-DN-PK

District Judge David Nuffer
Magistrate Judge Paul Kohler

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BACKGROUND

Introduction

“The creation of a national monument is of no small consequence.”¹ When President Jimmy Carter withdrew 56 million acres in Alaska to be national monuments in 1978,² Alaskans protested and broke “over 25 Park Service rules in a two-day period.”³ Utahns protested when President Clinton withdrew the Grand Staircase-Escalante National Monument. The signing ceremony took place at the South Rim of the Grand Canyon, Arizona “[t]o avoid protests that would mar a photo opportunity.”⁴ “[S]olemn and angry,” Kanab, Utah residents wore black arm

¹ *Mass. Lobstermen’s Ass’n v. Raimondo*, 141 S. Ct. 979, 980 (2021) (Roberts, C.J., statement respecting cert denial).

² Proclamation Nos. 4611-4627, 3 C.F.R. 69-104 (1978 Comp.).

³ *Sturgeon v. Frost*, 577 U.S. 424, 430 (2016).

⁴ *New Reserve Stirs Animosity in Utah*, N.Y. Times, Oct. 13, 1996.

bands, released 50 black balloons, and bore signs saying, “Shame on you Clinton.”⁵ Northeast-based commercial fishing associations sued federal officials for “injury from the restrictions on commercial fishing” imposed by the Northeast Canyons and Seamounts Marine National Monument.⁶ That monument is “an area roughly the size of Connecticut that sits 130 miles off the coast of Cape Cod.”⁷ In 2020, the University of Hawaii and the Pacific Islands Fisheries Science Center published their results of the economic impact of Papahānaumokuākea Marine National Monument.⁸ President Bush proclaimed the monument, 139,793 square miles, in 2006⁹ and President Obama expanded it to 442,781 square miles in 2016,¹⁰ resulting in millions of dollars of lost fishing revenue in the first sixteen months after the expansion.¹¹

“The President’s unique status under the Constitution distinguishes him from other executive officials,”¹² causing him to have “unreviewable Presidential discretion.”¹³ Chief Justice Roberts recognized “[t]he broad authority that the Antiquities Act vests in the President stands in marked contrast to other, more restrictive means” used to “preserve portions of land and sea.”¹⁴ He also pointed out that the Antiquities Act “has been transformed into a power

⁵ 1996: *Clinton Takes a 1.7 million-acre Stand in Utah*, High Country News, Sep. 30, 1996; see *Strong Emotions Reignited on 20th Anniversary of Utah Monument*, CBS News, Sep. 18, 2016.

⁶ *Massachusetts Lobstermen’s Ass’n v. Ross*, 349 F. Supp. 3d 48, 53 (D.D.C. 2018), *aff’d as modified*, 945 F.3d 535 (D.C. Cir. 2019).

⁷ *Obama Creates Atlantic Ocean’s First Marine Monument*, N.Y. Times, Sep. 15, 2016.

⁸ Hing Ling Chan, *Economic Impacts of Papahānaumokuākea Marine National Monument Expansion on the Hawaii Longline Fishery*, Marine Policy, Vol. 115 (2020).

⁹ Proclamation No. 8031, 71 Fed. Reg. 36441, 36444 (June 2006).

¹⁰ Proclamation No. 9478, 81 Fed. Reg. 60227, 60230 (Aug. 2016).

¹¹ Chan, *Economic Impacts* at 12.

¹² *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982).

¹³ *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 113 (1948).

¹⁴ *Raimondo*, 141 S. Ct. at 980 (Roberts, C.J., statement respecting cert denial).

without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea.”¹⁵

“How the President chooses to exercise the discretion Congress has granted him is not a matter for [a court’s] review.”¹⁶ Instead, according to the 9th Circuit, “[w]hen Congress has wished to restrict the President’s Antiquities Act authority, it has done so expressly.”¹⁷ Twice, Congress has responded when a president has withdrawn land as a national monument. President Franklin D. Roosevelt proclaimed the Jackson Hole National Monument, 221,610 acres,¹⁸ on March 15, 1943.¹⁹ In 1950, Congress aggressively responded, amending the Antiquities Act itself to prohibit “further extension or establishment of national monuments in Wyoming...except by express authorization of Congress.”²⁰ And later, in response to President Carter’s 1978 Alaska proclamations, Congress passed a law that prohibited “future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska.”²¹ Congress knows how to restrict statutory presidential power. Otherwise, the terms of the statute control.

Procedural History

This action stems from two cases:

Consolidated Plaintiffs against President Biden, the Secretary of the Interior, the Director of the Bureau of Land Management, the Secretary of Agriculture, the Chief of the Forest Service, the Department of the Interior, the Bureau of Land

¹⁵ *Id.* at 981.

¹⁶ *Dalton v. Specter*, 511 U.S. 462, 476 (1994).

¹⁷ *Murphy Co. v. Biden*, 65 F.4th 1122, 1132 (9th Cir. 2023).

¹⁸ *Id.*

¹⁹ Ronald F. Lee, *The Antiquities Act of 1906: The Proclamation of National Monuments Under the Antiquities Act, 1906-1970*, Article 8, US Department of the Interior, National Park Service (1970).

²⁰ 54 U.S.C. § 320301(d) (“Limitation on Extension or Establishment of National Monuments in Wyoming”).

²¹ Act of Dec. 2, 1980, Pub. L. No. 96-487, § 1326(a), 94 Stat. 2371, 2488.

Management, the Department of Agriculture, and the Forest Service (“Federal Defendants”);²² and

Plaintiffs (“Utah Plaintiffs”) against Federal Defendants.²³ Federal Defendants filed an unopposed motion to consolidate²⁴ which was granted.²⁵

Intervenor-Defendants Tribal Nations (“Tribal Nations”) filed a motion to intervene as defendants,²⁶ which was granted soon after the cases were consolidated.²⁷

Additional organizations requested to be added as defendants,²⁸ but only the Southern Utah Wilderness Alliance and affiliates²⁹(“SUWA Intervenors”) were permitted to intervene.³⁰ Other motions to intervene await final decision, pending entry of this order.³¹

Consolidated Plaintiffs³² and Utah Plaintiffs³³ (collectively “Plaintiffs”) filed separate amended complaints. They collectively allege:

²² Civil Docket, case no. 4:22-cv-00060, Complaint filed Aug. 25, 2022.

²³ Civil Docket, case no. 4:22-cv-00059, Complaint filed Aug. 24, 2022.

²⁴ Unopposed Motion to Consolidate Civil Cases 4:22-cv-59 and 4:22-cv-60, [docket no 25](#), filed Nov. 16, 2022.

²⁵ Order Granting Motion to Consolidate Cases, [docket no. 39](#), filed Nov. 30, 2022; Order for Consolidation, case no. 4:22-cv-000060, [docket no. 63](#), filed Nov. 30, 2022.

²⁶ Proposed Intervenors’ Second Amended Rule 24 Motion to Intervene, [docket no. 29](#), filed Nov 22, 2022.

²⁷ Order Granting Movants Hopi Tribe, Navajo Nation, Pueblo of Zuni, and Ute Mountain Ute Tribe’s Amended Motion to Intervene, [docket no. 52](#), filed Dec. 8, 2022.

²⁸ Motion to Intervene and Memorandum in Support, [docket no. 27](#), filed Nov. 22, 2022; Rule 24 Motion of Grand Staircase Escalante Partners, Society of Vertebrate Paleontology, and Conservation Lands Foundations to Intervene as Defendants, [docket no. 31](#), filed Nov. 23, 2022; Motion to Intervene Under Rule 24 and Memorandum of Law in Support of Utah Diné Bikéyah, Friends of Cedar Mesa, The Society of Vertebrate Paleontology Archaeology Southwest, Conservations Lands Foundation, Inc., Patagonia Works, The Access Fund, and The National Trust for Historic Preservation in the United States, [docket no. 33](#), filed Nov. 23, 2022; Motion to Intervene as Defendants and Memorandum in Support, [docket no. 34](#), filed Nov. 23, 2022.

²⁹ Motion to Intervene and Memorandum in Support 1 n.2 (“Movants are Southern Utah Wilderness Alliance, Center for Biological Diversity, Grand Canyon Trust, Great Old Broads for Wilderness, National Parks Conservation Association, Natural Resources Defense Council, Sierra Club, The Wilderness Society, Western Watersheds Project, and WildEarth Guardians.”).

³⁰ Memorandum Decision and Order on Proposed Intervenors’ Motions to Intervene 2, [docket no. 122](#), filed March 17, 2023.

³¹ Memorandum Decision and Order Staying Decision on UDB Intervenors’ Objection, GSEP Intervenors’ Objection, Archaeological Intervenors’ Objection and Plaintiffs’ Objection 4-5, [docket no. 176](#), filed July 7, 2023.

³² Amended Complaint for Declaratory and Injunctive Relief (“Amended Complaint 90”), [docket no. 90](#), filed Jan. 26, 2023.

(1) President Biden violated the Antiquities Act (“the Act”) with the Bears Ears National Monument Proclamation³⁴ and the Grand Staircase-Escalante National Monument Proclamation³⁵ (collectively “Proclamations”); and

(2) all Federal Defendant agencies are adversely affecting Plaintiffs through

(a) the Bears Ears National Monument and Grand Staircase-Escalante National Monument interim memoranda³⁶ (“the Memoranda”) which Plaintiffs allege are “final agency actions,”³⁷ and

(b) the denial of permits, which Plaintiffs also allege are “final agency actions.”³⁸

Plaintiffs seek (1) a declaration that the Act does not authorize President Biden’s Proclamations and that they “are therefore unlawful, unenforceable, and void”³⁹; (2) “an injunction forbidding Defendants and their successors from implementing, administering, or enforcing” the Proclamations;⁴⁰ and (3) a declaration that the alleged final agency actions by Defendants are unlawful.⁴¹

Federal Defendants,⁴² Tribal Nations,⁴³ (collectively “Defendants”) and SUWA Intervenors⁴⁴ filed separate motions to dismiss. The National Wildlife Federation filed an *amicus*

³³ Amended Complaint of Garfield County, Kane County, and The State of Utah (“Amended Complaint 91”), [docket no. 91](#), filed Jan. 26, 2023.

³⁴ Amended Complaint 90, ¶¶ 180, 183; Amended Complaint 91, ¶ 373.

³⁵ Amended Complaint 90, ¶¶ 180, 183; Amended Complaint 91, ¶ 380.

³⁶ Amended Complaint 90, ¶ 191; Amended Complaint 91, ¶¶ 388, 391, 396, 399.

³⁷ Amended Complaint 90, ¶ 192; Amended Complaint 91, ¶¶ 386, 394.

³⁸ Amended Complaint 90, ¶ 193.

³⁹ Amended Complaint 90 at 66; *see* Amended Complaint 91 at 95.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Defendants’ Motion to Dismiss Amended Complaints, [docket no. 113](#), filed March 2, 2023.

⁴³ Hopi Tribe, Navajo Nation, Pueblo of Zuni, and Ute Mountain Ute Tribe Motion to Dismiss, [docket no. 114](#), filed March 2, 2023.

curiae brief in support of these motions.⁴⁵ The motions were fully briefed.⁴⁶ The Separation of Powers Clinic filed an *amicus curiae* brief in support of Plaintiffs' arguments.⁴⁷

Consolidated Plaintiffs filed a motion for summary judgment soon after the motions to dismiss were filed.⁴⁸ Defendants motion to stay briefing on the motion for summary judgment pending disposition of this motion⁴⁹ was granted.⁵⁰

For reasons stated below, Federal Defendants' and Tribal Nations' motions to dismiss are GRANTED and the case is DISMISSED with prejudice.

The Antiquities Act

Enacted in 1906, the Antiquities Act "was the first U.S. law to provide general legal protection of cultural and natural resources of historic or scientific interest on Federal lands."⁵¹ Ten years later, the National Parks System was created "to conserve the scenery, natural and historic objects, and wildlife in the System units and to provide for the enjoyment of the scenery,

⁴⁴ SUWA Intervenors' Motion to Dismiss Amended Complaints and Memorandum in Support, [docket no. 141](#), filed March 30, 2023.

⁴⁵ Brief of Proposed *Amicus Curiae* National Wildlife Federation, Utah Wildlife Federation, New Mexico Wildlife Federation, Arizona Wildlife Federation, and Colorado Wildlife Federation in Support of Intervenor-Defendants' and Federal Defendants' Motions to Dismiss, [docket no 124](#), filed March 20, 2023.

⁴⁶ Individual Plaintiffs' Opposition to Motions to Dismiss, [docket no 153](#), filed April 14, 2023; Garfield County Plaintiffs' Opposition to Motions to Dismiss, [docket no 154](#), filed April 14, 2023; SUWA Intervenors' Reply in Support of Motion to Dismiss, [docket no 164](#), filed May 5, 2023; Hopi Tribe, Navajo Nation, Pueblo of Zuni, and Ute Mountain Utah Tribe Reply in Support of Motion to Dismiss, [docket no 165](#), filed May 5, 2023; Defendants' Reply in Support of Motion to Dismiss Amended Complaints, [docket no. 166](#), filed May 5, 2023.

⁴⁷ Brief of Proposed *Amicus Curiae* Separation of Powers Clinic, [docket no. 161](#), filed April 27, 2023.

⁴⁸ Individual Plaintiffs' Motion for Summary Judgment, [docket no 117](#), filed March 9, 2023.

⁴⁹ Defendants' Motion to Stay Summary Judgment Briefing or, Alternatively, to Extend Deadline for Filing Response to Summary Judgment Motion, [docket no. 129](#), filed March 24, 2023; Hopi Tribe, Navajo Nation, Pueblo of Zuni, and Ute Mountain Ute Tribe Motion to Stay Summary Judgment Briefing or to Extend Deadline for Filing Response to Motion for Summary Judgment, [docket no. 138](#), filed March 27, 2023; SUWA Intervenors' Motion to Stay Summary Judgment Briefing, and to Incorporate SUWA Intervenors' Motion to Dismiss into Existing Briefing Schedule, [docket no. 142](#), filed March 30, 2023.

⁵⁰ Memorandum Decision and Order Granting Defendants' Motion to Stay, Intervenor-Defendants Tribal Nations' Motion to Stay and SUWA Intervenor-Defendants' Motion to Stay, [docket no. 149](#), filed April 4, 2023.

⁵¹ *Statement for the Record*, Designation of Monuments Pursuant to the Authorities Provided in the Antiquities Act.

natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”⁵²

The process for a President to establish or enlarge a national monument under the Antiquities Act is two-fold. “The President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.”⁵³ Then the President “may reserve[s] parcels of land as a part of the national monuments.”⁵⁴ These parcels “shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”⁵⁵

Since 1920, there have been several challenges to a president’s authority to withdraw land as a national monument under the Antiquities Act. These include challenges to the Grand Canyon,⁵⁶ Jackson Hole,⁵⁷ Devil’s Hole,⁵⁸ Grand Sequoia,⁵⁹ Grand Canyon-Parashant, Canyons of the Ancients, Cascade-Siskiyou, Hanford Reach, Ironwood Forest, Sonoran Desert,⁶⁰ Grand Staircase-Escalante,⁶¹ and Northeast Canyons and Seamounts Marine⁶² national monuments. Each of these challenges has been unsuccessful.

⁵² 54 U.S.C.A. § 100101.

⁵³ 54 U.S.C. § 320301(a).

⁵⁴ *Id.* at § 320301(b).

⁵⁵ *Id.*

⁵⁶ *Cameron v. United States*, 252 U.S. 450 (1920).

⁵⁷ *State of Wyoming v. Franke*, 58 F. Supp. 890 (D. Wyo. 1945).

⁵⁸ *Cappaert v. United States*, 426 U.S. 128 (1976).

⁵⁹ *Tulare Cnty. v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002).

⁶⁰ *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1133-34(D.C. Cir. 2002).

⁶¹ *Utah Ass’n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1176 (D. Utah 2004) *appeal dismissed Utah Ass’n of Ctys. v. Bush*, 455 F.3d 1094, 1096 (10th Cir. 2006).

⁶² *Massachusetts Lobstermen’s Ass’n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019) (cert. denied *Massachusetts Lobstermen’s Ass’n v. Raimondo*, 209 L. Ed. 2d 486 (2021)).

The Bears Ears and Grand Staircase-Escalante National Monuments

The Grand Staircase-Escalante National Monument (“GSENM”) was established on September 18, 1996 by President Clinton with Proclamation 6920.⁶³ It then “consist[ed] of approximately 1.7 million acres.”⁶⁴ President Trump reduced the monument to 1,003,863 acres on December 4, 2017.⁶⁵ President Biden enlarged the monument to 1.87 million acres on October 8, 2021.⁶⁶

The Bears Ears National Monument (“BENM”) was established on December 28, 2016, by President Obama with Proclamation 9558.⁶⁷ It consisted of “approximately 1.35 million acres.”⁶⁸ President Trump reduced the monument to 201,876 acres.⁶⁹ President Biden enlarged the monument to 1.36 million acres on October 8, 2021.⁷⁰

⁶³ Proclamation No. 6920, 3 C.F.R. 64 (Sep. 18, 1997).

⁶⁴ Proclamation No. 6920 at 67.

⁶⁵ Proclamation No. 9682, 82 Fed. Reg. 58089, 58093 (Dec. 4, 2017).

⁶⁶ Proclamation No. 10286, 86 Fed. Reg. 57335, 57345 (Oct. 8, 2021).

⁶⁷ Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

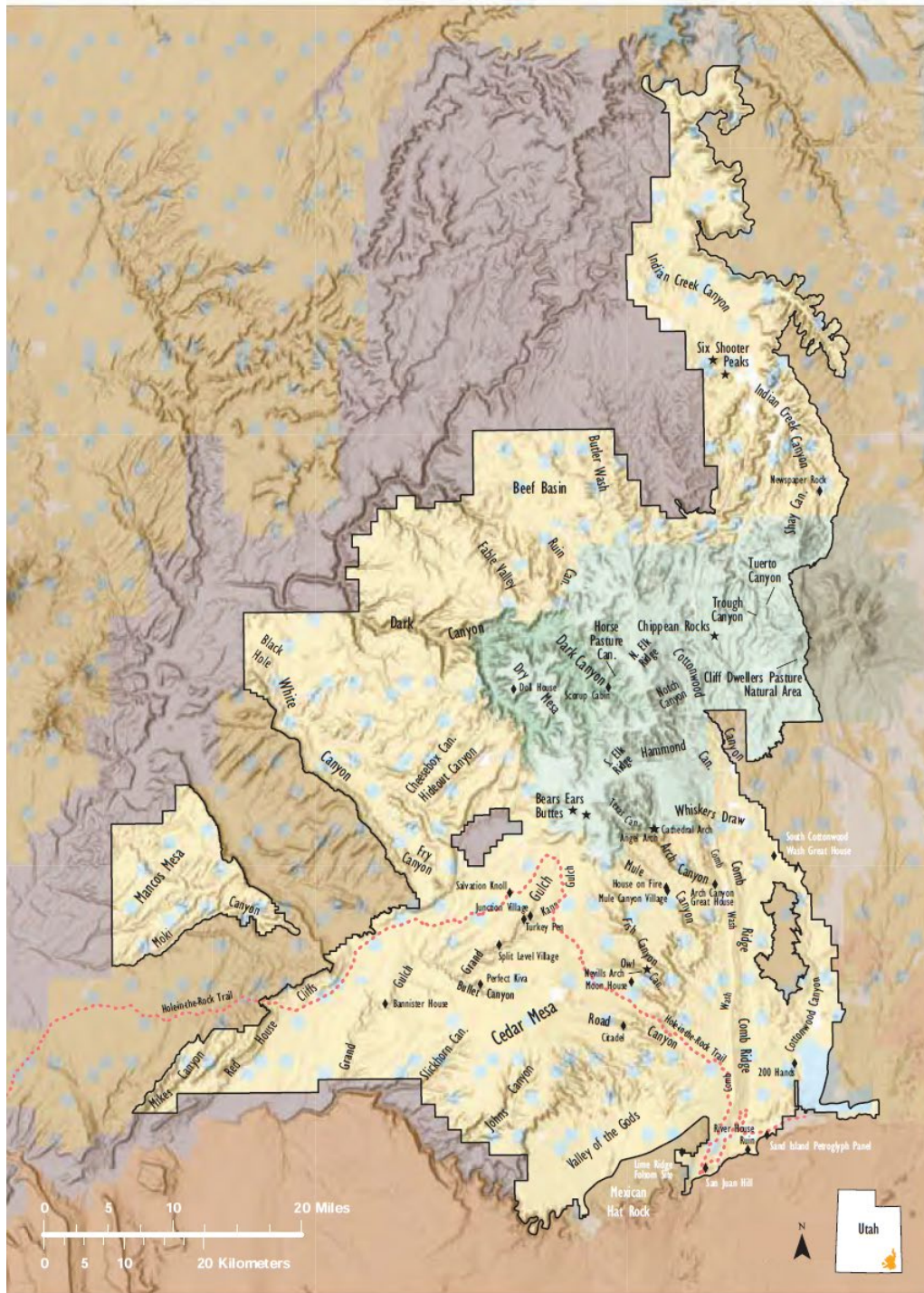
⁶⁸ Proclamation No. 9558 at 1143.

⁶⁹ Proclamation No. 9681, 82 Fed. Reg. 58081, 58085 (Dec. 4, 2017).

⁷⁰ Proclamation No. 10285, 86 Fed. Reg. 57321, 57331 (Oct. 8, 2021).

Bears Ears National Monument

Depiction of certain objects of historic or scientific interest designated by Proclamation 10285



Bears Ears National Monument image: Exhibit G, [docket no. 113-8](#), filed March 2, 2023.

STANDARD OF REVIEW

Defendants bring their Motion to Dismiss under Fed. R. Civ. P. 12.⁷¹ “[T]o withstand a motion to dismiss, a complaint must contain enough allegations of fact ‘to state a claim to relief that is plausible on its face.’”⁷² Dismissal is appropriate under Rule 12(b)(6) when the complaint, standing alone, is legally insufficient to state a claim on which relief may be granted.⁷³ Each cause of action must be supported by enough sufficient, well-pleaded facts to be plausible on its face.⁷⁴ In reviewing a complaint on a Rule 12(b)(6) motion to dismiss, factual allegations are accepted as true and reasonable inferences are drawn in a light most favorable to the plaintiff.⁷⁵ However, “assertions devoid of factual allegations” that are nothing more than “conclusory,” and “formulaic recitation” of the law are disregarded.⁷⁶

DISCUSSION

“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.”⁷⁷

This rule bars Plaintiffs’ claims. Plaintiffs allege President Biden exceeded his authority by enlarging the GSENM and BENM via the Proclamations. Before deciding if the Proclamations are unlawful, the court must decide if they can be reviewed by a court. They cannot. Judicial review requires a waiver of sovereign immunity, which is not present.

⁷¹ Defendants’ Motion to Dismiss Amended Complaints 1; Tribal Nations’ Motion to Dismiss 1.

⁷² *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

⁷³ Fed. R. Civ. P. 12(b)(6); see *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999).

⁷⁴ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

⁷⁵ *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

⁷⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681 (2009).

⁷⁷ *Martin v. Mott*, 25 U.S. 19, 31–32 (1827).

Plaintiffs also allege that the Memoranda written by the Bureau of Land Management (“the BLM”) constitute “final agency action” according to the Administrative Procedures Act. They do not. And Plaintiffs do not have standing to allege a denial of a permit because they were not harmed.

**Judicial review of these two Proclamations is not permitted
without a waiver of sovereign immunity**

Plaintiffs allege that President Biden’s Proclamations are reviewable by a federal district court.⁷⁸ “The United States, as sovereign, is immune from suit save as it consents to be sued.”⁷⁹ “The government consents to be sued only when Congress unequivocally expresses its intention to waive the government's sovereign immunity in the statutory text.”⁸⁰ Without a statutory waiver by Congress, judicial review of a president’s actions is only permitted for constitutional challenges⁸¹ and *ultra vires* challenges.⁸² Without either of those bases, “[judicial] review is not available when the statute in question commits the decision to the discretion of the President.”⁸³

Plaintiffs’ claims are statutory challenges, not constitutional challenges

Plaintiffs allege that President Biden violated the Act by enlarging the BENM and GSENM with the Proclamations. These are statutory—not constitutional—claims, similar to those in *Dalton v. Specter*.⁸⁴ In that case, the President had recently received the authority to close a Philadelphia naval shipyard “pursuant to the Defense Base Closure and Realignment Act

⁷⁸ Individual Plaintiffs’ Opposition to Motions to Dismiss 9-15; Utah Plaintiffs’ Opposition to Motions to Dismiss 61.

⁷⁹ *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 769, 85 L. Ed. 1058 (1941).

⁸⁰ *United States v. Murdock Mach. & Eng’g Co. of Utah*, 81 F.3d 922, 930 (10th Cir. 1996) (internal quotations omitted).

⁸¹ *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

⁸² *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949).

⁸³ *Dalton*, 511 U.S.462, 474 (1994).

⁸⁴ *Id.*

of 1990 (1990 Act or Act).”⁸⁵ “The decision to close the shipyard was the end result of an elaborate selection process prescribed by the 1990 Act.”⁸⁶ “[T]he Act provide[d] for three successive rounds of base closings—in 1991, 1993, and 1995.”⁸⁷ “For each round,” the Secretary of Defense (“Secretary”) “prepare[d] closure and realignment recommendations,” and “submit[ted] his recommendations to Congress and to the Defense Base Closure and Realignment Commission (Commission).”⁸⁸ The Commission conducted its own review and issued its recommendations and report.⁸⁹ After receiving the Commission’s report, the President was required to “decide whether to approve or disapprove” the recommendations.⁹⁰ If the President approved the recommendations, “the President must submit the recommendations...to Congress.”⁹¹ If Congress did not pass a joint resolution of disapproval, “the Secretary must close all military installations recommended for closure by the Commission.”⁹² Respondents—“shipyard employees and their unions; Members of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New Jersey, and Delaware, and officials of those States; and the city of Philadelphia”⁹³—“sought to enjoin the [Secretary] from carrying out” the President’s decision.⁹⁴ Respondents filed their action under the Administrative Procedure Act (“the APA”) and the 1990 Act, alleging the Commission’s recommendations were faulty.⁹⁵ The Supreme

⁸⁵ *Id.* at 464 (parenthetical in original).

⁸⁶ *Id.* at 464.

⁸⁷ *Id.* at 464-65.

⁸⁸ *Id.* at 465 (parenthetical in original).

⁸⁹ *Id.* at 465.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 464 n.1.

⁹⁴ *Id.* at 464.

⁹⁵ *Id.* at 466.

Court held that the claims were statutory because the President was “said to have violated the terms of the 1990 Act by accepting procedurally flawed recommendations.”⁹⁶ The claims in this case are also statutory. President Biden is accused of violating the Antiquities Act with his Proclamations that enlarge GSENM and BENM. The claims target the President’s actions under the statute. Therefore, they are statutory claims, and judicial review is unavailable.

A “President’s actions may...be reviewed for constitutionality.”⁹⁷ Plaintiffs did not make any constitutional challenges in their amended complaints.⁹⁸

§702 of the APA does not waive sovereign immunity

Rather than making constitutional challenges, Plaintiffs argue that § 702 of the APA waives the Federal Government’s sovereign immunity.⁹⁹ § 702 of the APA states “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”

Individual Plaintiffs assert “[s]ection 702 has been read to operate as a ‘general waiver’ of federal sovereign immunity for all injunctive or declaratory relief.”¹⁰⁰ Individual Plaintiffs assert that the Proclamations “necessarily must be implemented by executive branch subordinates” and therefore “claims concerning such proclamations are inherently premised on stopping unlawful subordinate executive action.”¹⁰¹

Their argument stems from *Brnovich v. Biden*, a District of Arizona case involving vaccination requirements relating to federal contractors and subcontractors (“the Contractor

⁹⁶ *Id.* at 474.

⁹⁷ *Franklin*, 505 U.S. at 801.

⁹⁸ See Amended Complaint 90 ¶¶ 179-96; Amended Complaint 91 ¶¶ 370-99.

⁹⁹ Individual Plaintiffs’ Opposition to Motions to Dismiss 12; Utah Plaintiffs’ Opposition to Motions to Dismiss 61.

¹⁰⁰ Individual Plaintiffs’ Opposition to Motions to Dismiss 12 (citing to *U.S. v. Murdock Mach. & Eng’g Co.*, 81 F.3d 922, 929 n.8 (10th Cir. 1996)).

¹⁰¹ *Id.*

Mandate.”)¹⁰² The district court explained that the mandate “involve[d] a substantial number of officials and entities within the executive apparatus that are unquestionably subject to this Court’s equitable jurisdiction.”¹⁰³ And that court concluded that “Plaintiffs’ claims implicat[ing] presidential action” “[did] not preclude judicial review”¹⁰⁴ of the actions of the subordinate officials and entities.

Brnovich v. Biden does not apply to this case. Individual Plaintiffs’ amended complaint identifies only the President—and not any other Defendant—as the lone official connected to the Proclamations. The complaint’s claims include: “President Biden’s proclamations”¹⁰⁵; “President Biden’s reservation of land”¹⁰⁶; “the President lacks the power to declare a reservation that covers the affected area”¹⁰⁷; “the President’s discretion”¹⁰⁸; “the [Antiquities] Act gives the President the limited power”¹⁰⁹; “every President’s proclamations must comply with the [Antiquities] Act”¹¹⁰; and “the President has exceeded his authority.”¹¹¹ As Individual Plaintiffs’ amended complaint points out, there are no intermediary officials involved in the issuance of the Proclamations. Their arguments attempt to sidestep the reality that the President is the one

¹⁰² *Brnovich v. Biden*, 562 F. Supp. 3d 123, 132-33 (D. Ariz. 2022) (reversed on other grounds *Mayes v. Biden*, 67 F.4th 921 (9th Cir. 2023)).

¹⁰³ *Id.* at 150.

¹⁰⁴ *Id.*

¹⁰⁵ Amended Complaint 90 ¶¶ 180-83; Amended Complaint 91 ¶¶ 373, 380.

¹⁰⁶ Amended Complaint 91 ¶¶ 374, 381.

¹⁰⁷ *Id.* at ¶¶ 376, 383.

¹⁰⁸ *Id.*

¹⁰⁹ Amended Complaint 90 ¶ 180.

¹¹⁰ Amended Complaint 91 ¶¶ 375, 382.

¹¹¹ *Id.* at ¶¶ 371, 378.

“vest[ed]...with authority to administer the [Antiquities] Act and manage the [Proclamations].”¹¹²

Utah Plaintiffs do not fare any better. They allege “the APA waives sovereign immunity for *all* non-damages actions against the federal government.”¹¹³ They reference a Tenth Circuit case, *Simmat v. U.S. Bureau of Prisons*.¹¹⁴ But this case actually said, “Congress passed legislation in 1976 to waive sovereign immunity in most suits for nonmonetary relief.”¹¹⁵ Utah Plaintiffs fail to acknowledge the *Franklin v. Massachusetts* ruling by the Supreme Court in 1992, which distinguished the APA term “agency” from “the President.” The Supreme Court held that “[t]he President is not an agency within the meaning of the [APA].”¹¹⁶ “As the APA does not expressly allow review of the President’s actions,” “his actions are not subject to its requirements” nor “reviewable for abuse of discretion under the APA.”¹¹⁷ Therefore, Utah Plaintiffs’ argument fails.

President Biden’s actions are not within the *ultra vires* exception to sovereign immunity

Plaintiffs allege that the Proclamations are *ultra vires* President Biden’s authority.¹¹⁸ An exception to the sovereign immunity doctrine is “suits for specific relief” when an “officer is not doing the business which the sovereign has empowered him to do” and “[h]is actions are *ultra vires* his authority.”¹¹⁹ This exception is narrow, available “only because of the officer’s lack of

¹¹² *Wyoming v. United States*, 279 F.3d 1214, 1228 (10th Cir. 2002).

¹¹³ Utah Plaintiffs’ Opposition to Motions to Dismiss at 61.

¹¹⁴ 413 F.3d 1225 (10th Cir. 2005).

¹¹⁵ *Id.* at 1233.

¹¹⁶ *Franklin*, 505 U.S. at 796.

¹¹⁷ *Id.* at 801.

¹¹⁸ Amended Complaint 91 ¶¶ 371, 378; Individual Plaintiffs’ Opposition to Motions to Dismiss 11-12; Utah Plaintiffs’ Opposition to Motions to Dismiss 60-62.

¹¹⁹ *Larson*, 337 U.S. at 689.

delegated power.”¹²⁰ Merely an “error in the exercise of that power is therefore not sufficient”¹²¹ to satisfy the exception. Invoking *ultra vires* is an “attempt to avoid the shield of sovereign immunity.”¹²²

Plaintiffs’ amended complaint does not assert that President Biden lacks the authority to withdraw federal land as national monuments.

Individual Plaintiffs declare in their opposition that “the President went *beyond the bounds* of his authority to wield a power he does not possess and declare as ‘objects’ things the Antiquities Act categorically does not reach.”¹²³ And their opposition argues that “this suit rests on the President’s *lack* of authority to fashion these monuments.”¹²⁴ However, Individual Plaintiffs do not cite to any claims from their amended complaint to support these allegations. Even if Individual Plaintiffs were granted leave to amend their complaint, they would not be able to plead the *ultra vires* exception. “No court of appeals has addressed...how to interpret the [Act’s] ‘smallest area compatible’ requirement.” At most, Individual Plaintiffs would be able to make the same arguments Utah Plaintiffs make, *infra*. But without additional guidance from Congress or a higher court, the President’s actions are not *ultra vires*.

Utah Plaintiffs declare in their opposition that they “allege over and over (in their amended complaint) that the President had no power to make the reservations because they ‘exceed [the] limitations] of the Antiquities Act.”¹²⁵ They cite to paragraphs 288-318 of their amended complaint for support. But those factual statements are allegations that President Biden

¹²⁰ *Id.* at 690.

¹²¹ *Id.*

¹²² *State of N.M. v. Regan*, 745 F.2d 1318, 1320 n.1 (10th Cir. 1984).

¹²³ Individual Plaintiffs’ Opposition to Motions to Dismiss 11-12 (emphasis in briefing).

¹²⁴ *Id.* at 12 (emphasis in briefing).

¹²⁵ Utah Plaintiffs’ Opposition to Motions to Dismiss 61.

misused his authority, not that he lacked it. They claim he exceeded the limitations of the Act¹²⁶ by declaring things as monuments “that are not qualifying landmarks, structures, or objects under the Act.”¹²⁷ They allege his designations are too generic.¹²⁸ For example, “items are listed as categories, such as ‘broad desert mesas,’ rather than as specific objects, such as ‘Dance Hall Rock.’”¹²⁹ They allege that only nine items¹³⁰ “qualif[y] for monument designation under the Act.”¹³¹ And while their first two claims for relief are “lack of statutory authority under Antiquities Act,” their amended complaint does not contain allegations that President Biden lacked the authority to designate federal land as the BENM and the GSENM.

Plaintiffs cannot rely on the *ultra vires* exception.

The Memoranda are not “final agency action” reviewable under the APA

On December 16, 2021, the director of the BLM issued Memoranda to the Utah State Director for the BLM.¹³² One addressed the BENM Proclamation No. 10,285¹³³ and the other, the GSENM Proclamation No. 10,286.¹³⁴ The subject of each was “Interim Management of the [National Monument].”¹³⁵ The Memoranda claim to “(a) provide[] interim guidance for managing the monument while the agency develops a monument management plan; and (b)

¹²⁶ Amended Complaint 91 at 68.

¹²⁷ *Id.* at 61; ¶¶ 293-98, 302-05, 311-313.

¹²⁸ *Id.* at ¶¶ 299-301, 306-310.

¹²⁹ *Id.* at ¶ 299.

¹³⁰ *Id.* at ¶¶ 322-23 (“Bears Ears Buttes, Butler Wash Village, Doll House, Moon House, Newspaper Rock, and San Juan Hill”; “Dance Hall Rock, Twentymile Wash Dinosaur Megatrackway, and Grosvenor Arch”).

¹³¹ Amended Complaint 91 ¶ 314.

¹³² Memorandum from the BLM Director to the BLM Utah State Director re: Interim Mgmt. of the Bears Ears Nat’l Monument (Dec. 16, 2021) (“BENM Memorandum”); Memorandum from the BLM Director to the BLM Utah State Director re: Interim Mgmt. of the Grand Staircase-Escalante Nat’l Monument (Dec. 16, 2021) (“GSNM Memorandum”).

¹³³ BENM Memorandum.

¹³⁴ GSNM Memorandum.

¹³⁵ BENM Memorandum 1; GSNM Memorandum 1.

direct[] [the BLM Utah State Director] to begin preparing a monument management plan, with a goal of finalizing that plan no later than March 1, 2024.”¹³⁶

Plaintiffs allege that the Memoranda should be reviewed because they are considered “final agency action” under § 706(2) of the APA.¹³⁷

As stated *supra*, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”¹³⁸ “[T]he person claiming a right to sue must identify some ‘agency action’ that affects him in the specified fashion.”¹³⁹ “Agency action” “ha[s] the meaning[] given [it] by [5 U.S.C. §551].”¹⁴⁰ “[A]gency action’ includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”¹⁴¹ “[A]ction...is meant to cover comprehensively every manner in which an agency may exercise its power.”¹⁴²

Agency action must be by statute or final agency action.¹⁴³ “[F]inal agency action for which there is no other adequate remedy in a court are subject to judicial review.”¹⁴⁴ “Final agency action” is not defined in the US Code.

¹³⁶ *Id.*

¹³⁷ Amended Complaint 90 ¶¶ 190-96; Amended Complaint 91 ¶¶ 385-99.

¹³⁸ 5 U.S.C. § 702.

¹³⁹ *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990).

¹⁴⁰ 5 U.S.C. §701(b)(2).

¹⁴¹ *Id.* at § 551(13).

¹⁴² *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 478 (2001).

¹⁴³ 5 U.S.C. § 704.

¹⁴⁴ *Id.*

The Memoranda do not meet the three requirements for “final agency action”

To determine if agency action is final depends on (1) whether its impact on a plaintiff is “direct and immediate”¹⁴⁵; (2) whether the action “mark[s] the consummation of the agency’s decisionmaking (sic) process”¹⁴⁶; and (3) whether the action is “one by which rights or obligations have been determined, or from which legal consequences will flow.”¹⁴⁷ The Memoranda—almost identical to one another in text—(1) do not have a direct and immediate impact on Plaintiffs; (2) are not the end of the BLM’s decision making process; and (3) do not establish rights, obligations, nor legal consequences.

(1) *The Memoranda do not have a direct and immediate impact on Plaintiffs*

In order to have a direct and immediate impact on a plaintiff, an agency action must “purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all [plaintiffs].”¹⁴⁸ An example is given in *Abbott Laboratories v. Gardner*. The Commissioner of Food and Drugs published a regulation¹⁴⁹ that, “effective immediately upon publication,”¹⁵⁰ required “labels, advertisements, and other printed matter relating to prescription drugs to designate the established name of the particular drug involved

¹⁴⁵ *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 152 (1967) (abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)).

¹⁴⁶ *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotations omitted).

¹⁴⁷ *Id.*

¹⁴⁸ *Abbott Lab’ys*, 387 U.S. at 152.

¹⁴⁹ *Id.* at 138 (“If the label or labeling of a prescription drug bears a proprietary name or designation for the drug or any ingredient thereof, the established name, if such there be, corresponding to such proprietary name or designation, shall accompany each appearance of such proprietary name or designation.” 21 CFR s 1.104(g)(1).”).

¹⁵⁰ *Id.* at 152.

every time its trade name [was] used anywhere in such material.”¹⁵¹ This necessitated “destroy[ing] stocks of printed matter” and “invest[ing] heavily in new printing type and new supplies.”¹⁵² If plaintiffs—“a group of 37 individual drug manufacturers and...the Pharmaceutical Manufacturers Association”¹⁵³—chose not to comply, they “would risk serious criminal and civil penalties for the unlawful distribution of ‘misbranded’ drugs.”¹⁵⁴ That consequence was direct and immediate impact.

The Memoranda do not have a direct and immediate impact on Plaintiffs. Plaintiffs assert that the Memoranda “restrain [their] use of the land, cut off potential revenue, and impede other projects.”¹⁵⁵ And that “[they] have been subjected to new rules, regulations, restrictions, and standards imposed and caused by both interim management plans.”¹⁵⁶ However, the contents of the Memoranda do not support these allegations.

The Memoranda are directed to the BLM’s Utah State Director¹⁵⁷ (“BLM-UT”), and the BLM-UT is the only person given directives in the Memoranda.¹⁵⁸ The Memoranda only mention State and local governments and citizens for consultation purposes. The Memoranda “direct[] the Secretary of the Interior and the Secretary of Agriculture” to “coordinat[e] with State and local governments” “in the development of the monument management plan.”¹⁵⁹ They advise that “[t]he planning process should...provide for maximum public involvement, including

¹⁵¹ *Id.* at 139.

¹⁵² *Id.* at 152.

¹⁵³ *Id.* at 138.

¹⁵⁴ *Id.* at 153.

¹⁵⁵ Amended Complaint 91 ¶¶ 388, 396.

¹⁵⁶ Amended Complaint 90 ¶ 192.

¹⁵⁷ BENM Memorandum 1; GSENM Memorandum 1.

¹⁵⁸ BENM Memorandum 2-8; GSENM Memorandum 2-7.

¹⁵⁹ BENM Memorandum 6; GSENM Memorandum 6.

consultation with State and local governments, community members, and other interested stakeholders.”¹⁶⁰ And the Proclamations require the monument advisory committees “to include representatives from ‘State and local governments, Tribal Nations, recreational users, conservation organizations, educators, local business owners, private landowners, and the scientific community.’”¹⁶¹ No action of any Plaintiff is compelled by the Memoranda. There are no immediate deadlines for Plaintiffs in the Memoranda; only the deadlines for a BLM planning process: “within one year”¹⁶²; 6 months¹⁶³; within 45 days¹⁶⁴; and “expeditiously (by January 31, 2022).”¹⁶⁵ Nothing in the Memoranda’s language directly or immediately impacts Plaintiffs.

(2) *The Memoranda are not a consummation of the BLM’s decision making process*

Plaintiffs’ claim that the Memoranda are the “consummation of BLM’s decisionmaking (sic) process.”¹⁶⁶ Plaintiffs do not cite to any text in the Memoranda for support.¹⁶⁷ A “decision [that is] effectively the last word of the agency” constitutes “final agency action.”¹⁶⁸ “[I]t must not be of a merely tentative or interlocutory nature.”¹⁶⁹ In *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, the Supreme Court held that a pre-permit, “approved jurisdictional decision”

¹⁶⁰ BENM Memorandum 8; GSENM Memorandum 7.

¹⁶¹ GSENM Memorandum 6; *see* BENM Memorandum 7.

¹⁶² BENM Memorandum 7; GSENM Memorandum 6.

¹⁶³ BENM Memorandum 7; GSENM Memorandum 6.

¹⁶⁴ BENM Memorandum 8; GSENM Memorandum 7.

¹⁶⁵ BENM Memorandum 4; GSENM Memorandum 4.

¹⁶⁶ Individual Plaintiffs’ Opposition to Motions to Dismiss 64; Utah Plaintiffs’ Opposition to Motions to Dismiss 63-64.

¹⁶⁷ Individual Plaintiffs’ Opposition to Motions to Dismiss 64; Utah Plaintiffs’ Opposition to Motions to Dismiss 64.

¹⁶⁸ *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183, 1192 (10th Cir. 2014).

¹⁶⁹ *Bennett*, 520 U.S. at 178 (internal citation omitted).

constituted “final agency action” because it was “issued after extensive factfinding by the Corps” and was “typically not revisited if the permitting process move[d] forward.”¹⁷⁰

Conversely, these Memoranda are only preliminary, internally directive, informative, and suggestive. The phrase “interim guidance” is mentioned at the very beginning and throughout.¹⁷¹ The Memoranda “provide[] specific direction to ensure that, until the new [joint management] plan is prepared, the BLM will manage the [National Monuments] in a manner consistent with [the Proclamations].”¹⁷² The Memoranda do not give new information. They simply inform BLM-UT how they should comply with the Proclamations until the 2024 management plan is created.

The Memoranda reference the actions directed in the Proclamations and the monument management plans (forthcoming before March 1, 2024¹⁷³) as the source of any direction.¹⁷⁴ The Memoranda themselves do not give any requirements. They are simply a connector between the Proclamations and future monument management plans.

The Memoranda also reference other documents as controlling (the BLM Manual,¹⁷⁵ CFRs,¹⁷⁶ and the Omnibus Act¹⁷⁷). But, again, the Memoranda do not give any order or compel any action.

The Memoranda contain language that suggests more guidance could come:

More specific guidance regarding particular types of uses and activities follows.
Note, however, that this guidance is not intended to be comprehensive; additional,

¹⁷⁰ 578 U.S. 590, 597–98 (2016).

¹⁷¹ GSENM Memorandum 1, 2, 6; BENM Memorandum 1, 2, 6.

¹⁷² BENM Memorandum 2; GSENM Memorandum 1-2.

¹⁷³ BENM Memorandum 1; GSENM Memorandum 1.

¹⁷⁴ BENM Memorandum 1-7; GSENM Memorandum 1-7.

¹⁷⁵ BENM Memorandum 2, 5, 7; GSENM Memorandum 2, 5, 6.

¹⁷⁶ BENM Memorandum 2-3; GSENM Memorandum 2.

¹⁷⁷ BENM Memorandum 2; GSENM Memorandum 3.

detailed direction may be provided as particular issues are identified, including through the decision making and public involvement processes.¹⁷⁸

Nothing in the Memoranda suggest that they are anything more than informative dicta and internal agency direction.

(3) *The Memoranda do not “generate legal consequences”*

Plaintiffs allege that the Memoranda “generate legal consequences”¹⁷⁹ and “determine rights or obligations.”¹⁸⁰ Final agency action must have “direct and appreciable legal consequences.”¹⁸¹ Agency action that binds multiple agencies and prohibits them from bringing a lawsuit against a property owner for five years has legal consequences.¹⁸² Or a document may be agency action if it “warns...of incurring criminal penalties;” “issue[s] a cease and desist order” that is “enforceable by the courts;” or “revo[kes] [a] certificate or permit.”¹⁸³ Agency action that “carries no direct consequences” and “serves more like a tentative recommendation than a final and binding determination” is not final.¹⁸⁴ The Memoranda are “purely advisory.”¹⁸⁵

Plaintiffs allege legal consequences based on the statement in the Memoranda: “no new mining claims may be located, and no new mineral leases may be issued.”¹⁸⁶ This is incorrect. The Memoranda only quote the Proclamations, and then summarize them: “Therefore, no new mining claims may be located, and no new mineral leases may be issued, on lands within the

¹⁷⁸ BENM Memorandum 5; GSENM Memorandum 5.

¹⁷⁹ Individual Plaintiffs’ Opposition to Motions to Dismiss 65.

¹⁸⁰ Utah Plaintiffs’ Opposition to Motions to Dismiss 65.

¹⁸¹ *Bennett*, 520 U.S. at 178.

¹⁸² *U.S. Army Corps of Engineers*, 578 U.S. 590, 598-99 (2016).

¹⁸³ *Frozen Food Exp. v. United States*, 351 U.S. 40, 44 (1956).

¹⁸⁴ *Franklin*, 505 U.S. at 798.

¹⁸⁵ *Bennett*, 520 U.S. at 178.

¹⁸⁶ Amended Complaint 91 ¶¶ 387, 395; Individual Plaintiffs’ Opposition to Motions to Dismiss 65.

monument.”¹⁸⁷ The Memoranda do not add new restrictions, as Plaintiffs allege. The Memoranda do not warn of civil penalties or trigger criminal punishments, nor do they impose fines. They frequently cite to or quote the Proclamations. They do not create anything new that was not already created by the Proclamations. The Memoranda do not impose legal consequences, nor do they declare rights or obligations.

The Biden Proclamations are the source of BLM’s obligations, and the Memoranda merely summarize the effects. They are not “final agency action” and therefore are not reviewable under the APA.

Individual Plaintiffs do not have standing to bring the claim for denial of permits

Individual Plaintiffs allege “[they] have been harmed when they have had federal permits denied as a result of President Biden’s proclamations and their implementing regulations.”¹⁸⁸ Individual Plaintiffs claim that “[a] permit denial is “final agency action.”¹⁸⁹ “Plaintiffs have the burden of identifying specific federal conduct and explaining how it is ‘final agency action’ within the meaning of section 551(13).”¹⁹⁰ The first requirement of 5 U.S.C. § 702 is “the person claiming a right to sue must identify some ‘agency action’ that affects him in the specified fashion.”¹⁹¹ “The burden is on the party seeking review under § 702 to set forth specific facts...showing that he has satisfied its terms.”¹⁹²

¹⁸⁷ BENM Memorandum 2; GSENM Memorandum 2.

¹⁸⁸ Amended Complaint 90 at 193.

¹⁸⁹ *Id.*

¹⁹⁰ *Colorado Farm Bureau Fed’n v. U.S. Forest Service*, 220 F.3d 1171, 1173 (10th Cir. 2000).

¹⁹¹ *Lujan*, 497 U.S. at 882.

¹⁹² *Id.* at 884.

Individual Plaintiffs do not specify in their “claims for relief” what specific permit was denied; which agency denied it; or specifically when it was denied.¹⁹³ Individual Plaintiffs did state in the body of the Amended Complaint that BLM Defendant “denied the [Utah/Arizona ATV] Club’s request” “for a special recreation permit to host part of its Jamboree on Inchworm Arch Road.”¹⁹⁴ Individual Plaintiffs allege that the Utah/Arizona ATV Club (“the Club”) was granted a permit for this event in 2020 and 2021 by BLM.¹⁹⁵ And in 2022, “[t]he only intervening change was that President Biden had issued his proclamations, and BLM had issued its interim management plan¹⁹⁶ implementing them.”¹⁹⁷

Even if the specific statement in the body of the amended complaint is sufficient, the Club does not have standing to bring this claim. The Club is “an outdoor off-highway vehicle recreation club” that “boasts a number of members from Utah” and is a member of BlueRibbon Coalition.¹⁹⁸

The Club is not a party to this lawsuit. The Club is only a member of the BlueRibbon Coalition. BlueRibbon “is a 501(c)(3) non-profit that has worked to protect access to public lands...since 1987.”¹⁹⁹ It “is a membership-based organization, with thousands of members across every State in the country.”²⁰⁰ “In Utah, BlueRibbon has...almost 30 members who are business or organizations.”²⁰¹

¹⁹³ Amended Complaint 90 at 193.

¹⁹⁴ *Id.* at ¶ 108.

¹⁹⁵ *Id.* at ¶¶ 106-07.

¹⁹⁶ Apparently a reference to the Memoranda.

¹⁹⁷ *Id.* at ¶ 108.

¹⁹⁸ *Id.* at ¶ 104.

¹⁹⁹ *Id.* at ¶ 80.

²⁰⁰ *Id.*

²⁰¹ *Id.* at ¶ 81.

[An] “entire ‘program’—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of the respondent’s members.”²⁰²

The Club is not joined as a party to this action, so Individual Plaintiffs cannot seek for relief for a permit denied to the Club.

CONCLUSION

In spite of the sincere and deeply held view of the Plaintiffs, there is no relief for them in this action.

It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.²⁰³

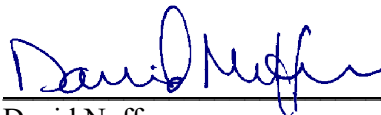
President Biden’s judgment in drafting and issuing the Proclamations as he sees fit is not an action reviewable by a district court.

ORDER

Federal Defendants’ and Tribal Nations’ motions to dismiss are hereby GRANTED with prejudice. The clerk is directed to close the case.

Signed August 11, 2023.

BY THE COURT



David Nuffer
United States District Judge

²⁰² *Lujan*, 497 U.S. at 893.

²⁰³ *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940).

THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

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

Plaintiffs,

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

Consolidated Plaintiffs,

v.

JOSEPH R. BIDEN, JR. in his official capacity as President of the United States; DEB HAALAND, in her official capacity as Secretary of Interior; DEPARTMENT OF THE INTERIOR; TRACY STONE-MANNING, in her official capacity as Director of the Bureau of Land Management; BUREAU OF LAND MANAGEMENT; TOM VILSACK, in his official capacity as Secretary of Agriculture; DEPARTMENT OF AGRICULTURE; RANDY MOORE, in his official capacity as Chief of the Forest Service; FOREST SERVICE;

Defendants,

HOPI TRIBE, NAVAJO NATION, PUEBLO OF ZUNI, and UTE MOUNTAIN UTE TRIBE;

Intervenor-Defendants,

SOUTHERN UTAH WILDERNESS ALLIANCE, CENTER FOR BIOLOGICAL DIVERSITY, GRAND CANYON TRUST, GREAT OLD BROADS FOR WILDERNESS, NATIONAL PARKS CONSERVATION ASSOCIATION, NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, THE WILDERNESS SOCIETY, WESTERN WATERSHEDS PROJECT, and WILDEARTH GUARDIANS.

Intervenor-Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 4:22-cv-00059-DN-PK

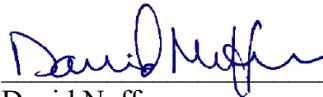
District Judge David Nuffer
Magistrate Judge Paul Kohler

IT IS ORDERED AND ADJUDGED THAT

Plaintiffs' causes of action are dismissed with prejudice.

Signed August 11, 2023.

BY THE COURT

A handwritten signature in blue ink, appearing to read "David Nuffer", is written over a horizontal line.

David Nuffer

United States District Judge