

WAYNE G. PETTY (Utah Bar No. 2596)
WAYNE G. PETTY LAW, PLLC
8 East Broadway, Suite 540
Salt Lake City, Utah 84111
(801) 521-0250
wayne@pettylegal.com

Lori Potter (*Pro Hac Vice* Pending)
Nathaniel H. Hunt (*Pro Hac Vice* Pending)
Sarah C. Judkins (*Pro Hac Vice* Pending)
William C. Mumby (*Pro Hac Vice* Pending)
Brandon M. Rattiner (*Pro Hac Vice* Pending)
Timothy A. Roth (*Pro Hac Vice* Pending)

KAPLAN KIRSCH & ROCKWELL, LLP
1675 Broadway, Suite 2300
Denver, CO 80202
(303) 825-7008
lpotter@kaplankirsch.com
nhunt@kaplankirsch.com
sjudkins@kaplankirsch.com
wmumby@kaplankirsch.com
brattiner@kaplankirsch.com
troth@kaplankirsch.com

*Attorneys for Proposed Intervenor-Defendants American Anthropological Association,
Archaeological Institute of America, and Society for American Archaeology*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

GARFIELD COUNTY, UTAH, *et al.*,
Plaintiffs,
ZEBEDIAH GEORGE DALTON, *et al.*,
Consolidated Plaintiffs,

v.
JOSEPH R. BIDEN, JR., *et al.*,
Defendants,
HOPI TRIBE, *et al.*,
Tribal Nation Intervenors.

ARCHAEOLOGICAL INTERVENORS'
REPLY TO GARFIELD COUNTY
PLAINTIFFS' AND FEDERAL
DEFENDANTS' BRIEFS IN
OPPOSITION TO INTERVENTION

Case No. 4:22-cv-0059-DN (lead case)
Case No. 4:22-cv-00060-DN-PK

District Judge David Nuffer
Magistrate Judge Paul Kohler

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INTRODUCTION

Garfield County Plaintiffs allege participation from Archaeological Intervenors in this case would spoil the broth. They try to support this allegation in three ways: (1) with plainly erroneous legal arguments; (2) by asserting the interests of Archaeological Intervenors would not be impaired if this Court nullified protections covering millions of acres that Archaeological Intervenors study; and (3) by suggesting that a case of national importance would be undermined by participation from four separately represented groups of Proposed Intervenors.

Contrary to Garfield County Plaintiffs' third allegation, Archaeological Intervenors coordinated with other Proposed Intervenors to streamline our replies. For that reason, this reply does not rehash the legal errors in Garfield County Plaintiffs' and Federal Defendants' responses. Archaeological Intervenors instead incorporate by reference Sections I and II of SUWA Intervenors' Reply Brief, ECF No. 79.¹

Archaeological Intervenors are entitled to intervene as of right under Federal Rule 24(a), or alternatively should be permitted to intervene under Rule 24(b). Archaeological Intervenors stand ready to work under the same reasonable conditions applied to Garfield County Plaintiffs when they intervened in related litigation involving the same Monuments.²

¹ Like SUWA Intervenors, Archaeological Intervenors seek dismissal of Plaintiffs' complaints—the same relief as Federal Defendants—and therefore need not demonstrate Article III standing. *See* Defs.' Mot. to Dismiss at 1, ECF No. 78 (“Defendants respectfully move the Court to dismiss these consolidated cases pursuant to Federal Rule of Civil Procedure 12(b).”); *see also* Archaeological Intervenors Proposed Answer to Garfield Cnty. Pls.' Compl. at 37, ECF No. 36-2 (asking the Court to “[d]ismiss this action with prejudice” in Prayer for Relief); Archaeological Intervenors Proposed Answer to the Dalton Pls.' Compl. at 23, ECF No. 44-3 (same).

² *See* Order at 7, *The Wilderness Society v. Trump*, No. 17-cv-02587 (D.D.C. Jan. 11, 2019), ECF No. 83 (“Intervenors shall confer with Defendants and other intervenors before filing any new substantive motions or briefs and endeavor to eliminate unnecessary repetition by incorporating one another’s filings by reference when possible.”); *see also* Order at 8, *Hopi Tribe v. Trump*, No. 17-cv-02590-TSC (D.D.C. Jan. 11, 2019), ECF No. 105 (same) (hereinafter, “D.D.C. Orders”).

ARGUMENT

I. Archaeological Intervenors have demonstrated that this litigation may impair their many interests in the Monuments

Garfield County Plaintiffs concede that Archaeological Intervenors have an interest relating to the Monuments.³ Yet they maintain that removing protections bestowed by a law that Archaeological Intervenors specifically helped to draft to protect such interests will cause Archaeological Intervenors no harm.⁴ This is mistaken—and the harm Archaeological Intervenors will suffer if Plaintiffs prevail justifies intervention under Rule 24.⁵

First, eliminating the Monuments will harm Archaeological Intervenors' scientific interests in the objects and lands protected by monument status. *Utah Association of Counties v. Clinton*⁶ is directly on point. In that case, the Tenth Circuit held that intervenors' scientific activities in the Grand Staircase-Escalante National Monument amounted to “an interest relating to the monument and its continued existence,” and that plaintiffs' desire to eliminate the monument impaired this interest and supported intervention as of right.⁷ Archaeological Intervenors have the same scientific interests as those granted intervention in *Utah Association of Counties*.⁸ Those same

³ Garfield Cnty. Pls.' Resp. in Opp. to Mot. to Intervene by Grand Staircase Escalante Partners *et al.* at 6, ECF No. 56 (disputing only the second and third elements required under Rule 24).

⁴ Ex. 4 to Archaeological Intervenors' Mot. to Intervene, ECF No. 34-5, King Decl. ¶¶ 6-7; Ex. 5 to Archaeological Intervenors' Mot. to Intervene, ECF No. 34-6, Liebow Decl. ¶¶ 9-10

⁵ See *San Juan County v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007) (“Although the intervenor cannot rely on an interest that is wholly remote and speculative, the intervention may be based on an interest that is contingent upon the outcome of the litigation.”) (quoting *United States v. Union Elec. Co.*, 64 F.3d 1152, 1162 (8th Cir. 1995)).

⁶ 255 F.3d 1246 (10th Cir. 2001).

⁷ *Id.* at 1251-54.

⁸ See *id.* (finding intervenors that “regularly visit the monument for aesthetic, scientific and recreational purposes” had an interest in “preserving the undeveloped nature of the lands encompassed by the monument”).

interests would likewise be impaired by the loss of monument status. For example, Garfield County Plaintiffs have made their intent to mine these lands clear.⁹ Archaeological Intervenors' declarations show how increased mining activity forecloses their research opportunities and disturbs the sensitive and irreplaceable contexts necessary for successful archaeological research.¹⁰

Relatedly, the argument that other federal land management laws render monument protections unnecessary is contradicted by various examples of damage to archaeological objects that occurred after President Trump purported to shrink the Monuments.¹¹ Moreover, “[w]here a proposed intervenor’s interest will be prejudiced if it does not participate in the main action, the mere availability of alternative forums is not sufficient to justify denial of a motion to intervene.”¹²

Second, Archaeological Intervenors have shown how their economic interests may be impaired by this litigation if Plaintiffs prevail. As this Court has recently found, economic harm caused by public land management decisions supports intervention.¹³ The loss of archeological

⁹ See, e.g., Garfield Cnty. Pls. Complaint at ¶ 182 (lamenting the purported harms of not being able to mine natural resources on Monument lands).

¹⁰ Ex. 4 to Archaeological Intervenors’ Mot. to Intervene, ECF No. 34-5, King Decl. ¶ 18 (citing reports that Monument reductions were motivated by coal and uranium mining interests which threatened to damage archaeological objects and prevent researchers from accessing and enjoying sites due to air, noise, water, and light pollution); Ex. 5 to Archaeological Intervenors’ Mot. to Intervene, ECF No. 34-6, Liebow Decl. ¶¶ 19-20 (stating that his group’s research “depend[s] on retaining the integrity of archaeological features and sites, and it has long been recognized that the greatest threats to this integrity are posed by human interference through activities such as road building, agricultural and mineral production, and the development of cities and towns”).

¹¹ Ex. 3 to Archaeological Intervenors’ Mot. to Intervene, ECF No. 34-3, Ewing Decl. ¶¶ 10-11 (documenting illegal roads, logging, and looting in areas removed from Bears Ears by President Trump); Ex. 5 to Archaeological Intervenors’ Mot. to Intervene, ECF No. 34-6, Liebow Decl. ¶ 20 (describing mining, vandalism, and off-road vehicle traffic on lands President Trump excluded from the Monuments).

¹² *Utah Ass’n of Cnty. v. Clinton*, 255 F.3d 1246, 1254(10th Cir. 2001) (quoting *Commodity Futures Trading Comm’n v. Heritage Capital Advisory Serv.*, 736 F.2d 384, 387 (7th Cir. 1984)).

¹³ See *W. Watersheds Project v. Nat’l Park Serv.*, 2020 U.S. Dist. LEXIS 21960, *5 (D. Utah Feb. 7, 2020) (Kohler, Mag. J.) (unpublished) (finding that the State of Utah’s financial interest from

research funding that would result from the removal of monument status in established archaeological study areas illustrates the direct causal relationship between the relief Plaintiffs seek and the harm to Archaeological Intervenors' protected economic interests.¹⁴

II. No other parties adequately represent Archaeological Intervenors' interests

Archaeological Intervenors' unique interests are not adequately represented by other parties in this litigation. First, Federal Defendants do not adequately represent Archaeological Intervenors. Similar to SUWA Intervenors, Archaeological Intervenors have been adverse to the Federal Government with respect to the appropriate size of the same National Monuments at issue in this litigation.¹⁵ Furthermore, Federal Defendants cannot adequately represent Archaeological Intervenors in this litigation because Federal Defendants must consider a broad spectrum of views in representing the public interest and are also subject to unanticipated policy shifts.¹⁶

Second, Tribal Nation Intervenors do not adequately represent Archaeological Intervenors. Just as the Tribal Nations who have intervened have no obligation to represent SUWA Intervenors' environmental protection interests, Tribal Nation Intervenors are similarly under no obligation to represent the unique interests of Archaeological Intervenors, which include the proper

grazing and trailing on federal lands within a national park, which provides direct and indirect contributions to the State, is a protectable interest substantially and directly related to grazing and trailing decisions and management challenged by plaintiff for purposes of intervention).

¹⁴ Archaeological Intervenors' Mot. to Intervene at 9, ECF No. 34; Ex. 1 to Archaeological Intervenors' Mot. to Intervene, ECF No. 34-1, Spangler Decl. ¶¶ 19-20 (stating his funding for research in Grand Staircase-Escalante is contingent on study area having Monument status); Ex. 3 to Archaeological Intervenors' Mot. to Intervene, ECF No. 34-3, Ewing Decl. ¶¶ 25-26 (noting grants and Congressional appropriations of funding prioritize protection of areas in monuments).

¹⁵ See Archaeological Intervenors' Mot. to Intervene at 5, ECF No. 34 (stating Archaeological Intervenors submitted an amicus brief opposing Federal Defendants in related D.D.C. litigation).

¹⁶ *Id.* at 10-11.

administration of the Antiquities Act—a statute Archaeological Intervenors had a hand in passing into law—as well as the study and enjoyment of archaeological sites.¹⁷

Third, other Proposed Intervenors are not “existing parties” under Rule 24(a)(2) and, in any case, do not adequately represent Archaeological Intervenors. Archaeological Intervenors are focused specifically on archaeological and historical interests, including heritage conservation and the preservation of the human past in both Monuments. These interests are distinct from the other Proposed Intervenors’ environmental conservation, paleontological, and recreational interests.¹⁸

CONCLUSION

As explained above, in Sections I and II of SUWA Intervenors’ Reply Brief which we incorporate by reference, and in Archaeological Intervenors’ opening brief, Archaeological Intervenors meet the requirements of Rule 24(a)(2). Hence, this Court should grant their motion to intervene as of right. Alternatively, this Court may grant permissive intervention under Rule 24(b). Archaeological Intervenors will continue coordinating with other parties to minimize any burden on the Court.¹⁹

Dated: January 6, 2023

Respectfully Submitted,

s/ Wayne G. Petty
WAYNE G. PETTY (Utah Bar No. 2596)

¹⁷ See *id.* at 6-7, ECF No. 34; Ex. 4 to Archaeological Intervenors’ Mot. to Intervene, ECF No. 34-5, King Decl. ¶¶ 6-7; Ex. 5 to Archaeological Intervenors’ Mot. to Intervene, ECF No. 34-6, Liebow Decl. ¶¶ 9-10.

¹⁸ SUWA Intervenors’ Reply Br. at 7, ECF No. 79.

¹⁹ See D.D.C. Orders, *supra* note 2.

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KAPLAN KIRSCH & ROCKWELL, LLP
1675 Broadway, Suite 2300
Denver, CO 80202
(303) 825-7008
lpotter@kaplankirsch.com
nhunt@kaplankirsch.com
sjudkins@kaplankirsch.com
wmumby@kaplankirsch.com
brattiner@kaplankirsch.com
troth@kaplankirsch.com

*Attorneys for Proposed Intervenor-Defendants
American Anthropological Association,
Archaeological Institute of America, and
Society for American Archaeology*

CERTIFICATE OF COMPLIANCE

I, Wayne G. Petty, certify this **REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS** contains 1,618 words and complies with DUCivR 7-1(a)(4)(D).

January 6, 2023

/s/ Wayne G. Petty

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2023, I caused the foregoing document to be filed with the Clerk of Court using the Court's CM/ECF system, and service was thereby effected electronically to all counsel of record.

January 6, 2023

/s/ Wayne G. Petty