IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOPI TRIBE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 17-cv-2590 (TSC)
UTAH DINÉ BIKÉYAH, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 17-cv-2605 (TSC)
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 17-cv-2606 (TSC) **CONSOLIDATED CASES**
STATE OF UTAH, *et al.*, Defendant-Intervenors.	

REPLY IN SUPPORT OF NRDC PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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To eliminate unnecessary repetition, NRDC Plaintiffs in this matter (concerning Bears Ears National Monument) and TWS Plaintiffs in the related *The Wilderness Society v. Trump* matter (concerning Grand Staircase-Escalante National Monument) have set forth their merits arguments only once, in the TWS Plaintiffs' brief. For clarity, Plaintiffs use the following naming conventions in both briefs.

Filings in *Hopi Tribe v. Trump*, No. 17-cv-2590

NRDC Pls.' Am. Compl.	NRDC Plaintiffs' Amended and Supplemented Complaint for Injunctive and Declaratory Relief, ECF No. 149-1 (Nov. 8, 2019)
NRDC Pls.' Br.	Memorandum in Support of NRDC Plaintiffs' Motion for Partial Summary Judgment, ECF No. 165-1 (Jan. 9, 2020)
NRDC Pls.' SUF	NRDC Plaintiffs' Statement of Material Facts as to Which There Is No Genuine Dispute, ECF No. 165-2 (Jan. 9, 2020)
Defs.' BE Br.	Federal Defendants' Memorandum in Support of Cross-Motion for Partial Summary Judgment and Opposition to Plaintiffs' Motions for Partial Summary Judgment, ECF No. 169-1 (Feb. 19, 2020)
Defs.' Resp. to NRDC Pls.' SUF	Federal Defendants' Responses to NRDC Plaintiffs' Statement of Undisputed Facts and Federal Defendants' Further Statement of Material Facts, ECF No. 169-5 (Feb. 19, 2020)
Intervenors' BE Br.	Defendants-Intervenors' Joint Memorandum in Support of Federal Defendants' Cross-Motion for Partial Summary Judgment, ECF No. 173 (Mar. 5, 2020)
NRDC Pls.' Reply SUF	NRDC Plaintiffs' Response and Reply Statement of Material Facts and Statement Pursuant to Local Civil Rule 7(h)(1) (Apr. 10, 2020)

Filings in *The Wilderness Society v. Trump*, No. 17-cv-02587

TWS Pls.' Am. Compl.	TWS Plaintiffs' Amended and Supplemented Complaint for Injunctive and Declaratory Relief, ECF No. 119 (Nov. 7, 2019)
TWS Pls.' Br.	Memorandum in Support of TWS Plaintiffs' Motion for Partial Summary Judgment, ECF No. 132-1 (Jan. 9, 2020)
Pls.' JA	Plaintiffs' Joint Appendix, ECF No. 131-1 (Jan. 9, 2020)
Defs.' GSE Br.	Federal Defendants' Memorandum in Support of Cross-Motion for Partial Summary Judgment and Opposition to Plaintiffs' Motions for Partial Summary Judgment, ECF No. 136-1 (Feb. 19, 2020)
Defs.' Resp. to TWS Pls.' SUF	Federal Defendants' Responses to TWS Plaintiffs' Statement of Undisputed Facts and Federal Defendants' Further Statement of Material Facts, ECF No. 136-4 (Feb. 19, 2020)
Intervenors' GSE Br.	Defendants-Intervenors' Joint Memorandum in Support of Federal Defendants' Cross-Motion for Partial Summary Judgment, ECF No. 138 (Mar. 5, 2020)
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INTRODUCTION

The parties' cross-motions for partial summary judgment have reduced the issues before this Court to a single, narrow question of statutory interpretation: Did the Antiquities Act authorize the President to dismantle an existing national monument—here, Bears Ears National Monument—leaving countless objects of historic and scientific interest stranded outside its dramatically reduced boundaries? The answer is no. The Act delegates to the President the power to declare national monuments and reserve parcels of land as a part thereof, but it does not confer the power to revoke monument protections.

President Trump's proclamation revoked monument status from roughly 1.15 million acres of land, or 85% of the Monument, excluding irreplaceable cultural and archaeological sites, unusual geological formations, and vulnerable desert ecosystems. Defendants' exclusive reliance on the Antiquities Act's "smallest area" clause to defend the proclamation is misplaced. That clause *limits* the President's authority, when establishing a national monument, to "reserve" public lands "as part of" that monument. It does not confer the separate power to un-reserve land and eliminate it from a national monument after the fact. That distinct power belongs to Congress alone.

Finally, Defendants concede NRDC Plaintiffs' standing to sue, and they identify no genuine issues of material fact. The Court should grant summary judgment to NRDC Plaintiffs on their First and Second Claims for Relief.

ARGUMENT

I. The Undisputed Facts Establish Plaintiffs' Standing, and Defendants Do Not Argue Otherwise.

As demonstrated by Plaintiffs' member declarations and other evidence, Plaintiffs have associational standing based on ongoing and future harms to their members' interests from

hardrock mining activity. *See* NRDC Pls.' Br. at 3-19 (ECF No. 165-1). Defendants do not contest NRDC Plaintiffs' standing to sue. *See* Defs.' BE Br. at 13 n.8 (ECF No. 169-1). And while Defendants respond with certain limited disputes and objections to some of Plaintiffs' facts and word choices, *see generally* Defs.' Resp. to NRDC Pls.' SUF (ECF No. 169-5), none of those disputes or objections are material to the resolution of the pending motions. *See* NRDC Pls.' Reply SUF (filed herewith).

There is no genuine dispute about the following facts. The Trump Proclamation "open[ed]" previously protected Monument lands to hardrock mining location and entry under the General Mining Law. Proclamation No. 9681, Modifying the Bears Ears National Monument, 82 Fed. Reg. 58,081, 58,081, 58,085 (Dec. 4, 2017) (hereinafter "Trump Proclamation"). President Trump's revocation of the mineral withdrawal became effective on February 2, 2018—60 days after the Proclamation was signed—with no need for a new management plan or any other implementing agency action. NRDC Pls.' SUF (ECF 165-2) ¶ 22 (citing 82 Fed. Reg. at 58,085). Between February 2018 and November 2019, Defendants admit that "ten [new] mining claim location notices were recorded with the BLM" on lands excluded from the Monument. Defs.' Resp. to NRDC Pls.' SUF ¶ 38.

One such claim is "Easy Peasy 1," which Kimmerle Mining LLC located in 2018. *Id.*; *see also* NRDC Pls.' Reply SUF ¶¶ 42-43. Defendants do not dispute that "[m]ining activity" is underway at Easy Peasy. *See* Defs.' Resp. to NRDC Pls.' SUF ¶ 41; *see also id.* ¶ 46. In June 2018, Kimmerle Mining notified BLM of its intention to begin operations at the Easy Peasy mine site and on its access road, remove "999 tons of presumed ore," and truck the ore to Energy Fuels' White Mesa Mill. NRDC Pls.' SUF ¶ 44. Surface-disturbing activities at the Easy Peasy mine site "include the use of heavy equipment to excavate and remove materials, and the

deposition of waste rock and tailings." *Id.* ¶ 46. When Plaintiff Grand Canyon Trust member Tim Peterson visited the area in October 2019, he was harmed by the sight of "machinery, mining and ventilation equipment, fuel and water tanks, trash and discarded orange fencing, and other mining-related detritus on the site." *Id.*[1]

Defendants aver that "the 'activity' [at Easy Peasy] is … limited to exploration work, not mining," Defs.' Resp. to NRDC Pls.' SUF ¶ 41, but that semantic distinction is immaterial. *See* NRDC Pls.' Reply SUF ¶¶ 41, 51. Defendants do not dispute that notice-level activity (i.e., exploratory activity) can include the use of mechanized earth-moving equipment, the use of truck-mounted drilling equipment, and road construction; that it can involve surface disturbance of up to five acres of land or the removal of up to one thousand tons of presumed ore; or that it can be conducted with only fifteen days' notice to BLM. *See id.* ¶¶ 28-29. It is undisputed that notice-level activities can cause visual and auditory impacts that impair Plaintiffs' members' use and enjoyment of the surrounding lands. Indeed, Defendants "do not dispute that, as a general matter, mining activity"—including both notice-level and plan-of-operations-level activities—"can scrape scars into the landscape, produce waste and debris, disturb native vegetation and wildlife habitat, increase erosion, and harm water quality," Defs.' Resp. to NRDC Pls.' SUF ¶ 34; can "harm cultural, archaeological, and paleontological resources," *id.* ¶ 35; and can have auditory and visual impacts on surrounding lands, "including dust and haze, mechanical noise, and light pollution," *id.* ¶ 36. With respect to the Easy Peasy mine site specifically, Defendants do not dispute that the ongoing activities harm Plaintiffs' members—including Steven Allen, Ray Bloxham, Neal Clark, Wayne Hoskisson, Tim Peterson, and Kevin Walker—who use the

[1] Defendants "object to the terms 'waste rock' and 'tailings'" as "vague and ambiguous," but they do not otherwise dispute these facts or Mr. Peterson's account of what he witnessed. Defs.' Resp. to NRDC Pls.' SUF ¶ 46.

nearby Cheese and Raisins Hills and the Cottonwood Wash Road for quiet recreation, study of the area's history and cultural resources, and appreciation of its natural beauty. *Id*. ¶¶ 50-51; *see also id.* ¶ 47.[2]

The harms from mining activity at the Easy Peasy mine site suffice to establish Plaintiffs' standing to sue. *See Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 314 (D.C. Cir. 1987). In addition to Easy Peasy 1, however, private claimants have located other mining claims in the excluded lands—including "Hammond Mine (A)," "RWH Mine (B)," and "Lucky Lady 2"—and they present a substantial likelihood of additional harm to Plaintiffs' members. NRDC Pls.' SUF ¶¶ 39-40. It is undisputed that Plaintiffs' members enjoy visiting areas near these mining claims, *id.*, and that their enjoyment of these areas would be diminished or ruined by the sights and sounds of mining activity (including notice-level activity), *id*. ¶¶ 34-36. Defendants do not seriously dispute these facts. Instead, they argue with a strawman, asserting it is "speculative" to suggest that plan-of-operations-level development will "necessarily" occur on these claims. Defs.' Resp. to NRDC Pls.' SUF ¶¶ 39, 40. Plaintiffs need not show, however, that development will *necessarily* occur. Their injuries are imminent for standing purposes because there is a "'substantial risk'" of surface-disturbing activity. *See* NRDC Pls.' Br. at 16 (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019)). Given the Trump Proclamation's express purpose of opening Monument lands to mineral entry and location, the actual location of multiple new mining claims since the Proclamation went into effect, and the fact that claimants

[2] Defendants' concessions as to the Cheese and Raisins Hills and Cottonwood Wash Road render immaterial their asserted dispute about whether the activities at Easy Peasy are *also* visible from Whiskers Draw. *See* Defs.' Resp. to NRDC Pls.' SUF ¶ 50; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986) (Rule 56 "provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact") (emphasis in original).

may commence notice-level surface-disturbing activities with a mere fifteen days' notice to the federal government, *see* 43 C.F.R. §§ 3809.21(a), 3809.312(a); 36 C.F.R. § 228.4(a)(2), it is "predictable" that at least some surface-disturbing activity will occur on these new claims, too. *Dep't of Commerce*, 139 S. Ct. at 2565; *see also* NRDC Pls.' Br. at 16-17 (discussing cases).

Finally, there is no question that the above described mining-related activity—ranging from the location of new hardrock mining claims to the commencement of surface-disturbing activities at the Easy Peasy mine site—could not have occurred if the 2016 Monument Proclamation's mineral withdrawal were still in effect. *See* NRDC Pls.' Reply SUF ¶ 23. By re-drawing the Monument's boundaries and revoking the Monument's mineral withdrawal from the excluded lands, the Trump Proclamation harms Plaintiffs' members' ability to "view and enjoy" these lands in their natural, undeveloped state, and to "observe [the landscape] for purposes of studying and appreciating its history." *Sierra Club v. Jewell*, 764 F.3d 1, 5 (D.C. Cir. 2014); *see also In re Idaho Conservation League*, 811 F.3d 502, 509 (D.C. Cir. 2016). These and other harms are directly traceable to the Trump Proclamation, and they are likely to be redressed by a favorable decision. *See* NRDC Pls.' Br. at 17-19. Plaintiffs face other imminent harms as well, but the undisputed facts above suffice to establish their standing—and Defendants do not argue otherwise. NRDC Plaintiffs therefore have associational standing to sue.

II. The Antiquities Act Does Not Authorize the President to Dismantle National Monuments.

Pursuant to the Court's direction that the parties "eliminate unnecessary repetition by incorporating one another's filings by reference where possible," Order Regarding Consolidation at 2, ECF No. 32 (Feb. 15, 2018), NRDC Plaintiffs hereby incorporate by reference the merits arguments of TWS Plaintiffs in their simultaneously filed brief. *See* TWS Pls.' Opp. & Reply

Br., ECF No. 139 and 140, *The Wilderness Soc'y v. Trump*, No. 17-cv-02587-TSC (D.D.C. filed Apr. 10, 2020) at 4-23, 28-41 (Argument Section II).

III. Plaintiffs Are Entitled to Relief.

No material facts are in dispute, and the law is clear: The Antiquities Act did not authorize President Trump to dismantle the Bears Ears National Monument. Plaintiffs have therefore demonstrated they are entitled to summary judgment on their *ultra vires* claim and/or their constitutional claim.[3] While Intervenors—and to a lesser degree, Defendants—raise certain limited remedy-related objections, they do not (and cannot) dispute that the Court has the "power to review the legality" of the President's action and "to compel subordinate executive officials to disobey illegal Presidential commands." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (citation omitted). Consistent with this settled law, Plaintiffs seek (1) a declaration that the Trump Proclamation is unlawful, and, secondarily, (2) an injunction prohibiting Agency Defendants from implementing it. The Court can, and should, issue such relief at this time.

Defendants, notably, do not object to Plaintiffs' request for declaratory relief as against the Agency Defendants. *See* Defs.' BE Br. at 28 (acknowledging, in section heading, that "relief is available against subordinate officials"); *see also id.* at 29, 57. Declaratory relief is routine and unquestionably within the Court's authority, *see, e.g.*, *Aid Ass'n for Lutherans v. U.S. Postal*

[3] As noted in Plaintiffs' opening brief, "[t]he Court need not decide the constitutional question if it grants summary judgment to Plaintiffs on their *ultra vires* or statutory claims." NRDC Pls.' Br. at 21 n.6 (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). That does not mean Plaintiffs' constitutional claim is "defective," however, Defs.' BE Br. at 55, or that Defendants are entitled to summary judgment on that claim. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 576, 593 (2009) (where petitioners "raise[d] a statutory claim … and a constitutional claim, … [and a] decision for petitioners on their statutory claim would provide the relief sought," the Court held that "[p]etitioners are entitled to summary judgment on their Title VII claim, and we therefore need not decide the underlying constitutional question").

Serv., 321 F.3d 1166, 1171 (D.C. Cir. 2003) (affirming district court order "declar[ing] invalid" an agency's *ultra vires* interpretation of statute), including in cases where presidential action is at issue, *see Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 579 (S.D.N.Y. 2018) (granting declaratory relief addressed to subordinate official charged with carrying out unlawful presidential directive), *aff'd*, 928 F.3d 226 (2d Cir. 2019); *see also League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013, 1031 (D. Alaska 2019) (vacating unlawful section of executive order), *appeal docketed*, No. 19-35460 (9th Cir.). Declaratory relief need not be "against the President" in any sense that might implicate the separation of powers doctrine. *Contra* Intervenors' BE Br. at 14-15 (ECF No. 173). Instead, the Court may simply address its declaratory judgment to Agency Defendants who are charged with carrying out the Trump Proclamation, and whose future actions Plaintiffs seek to have conform to the law. *See* NRDC Pls.' Br. at 18-19, 21; NRDC Pls.' Am. Compl. at 55 (ECF No. 149-1). Given Defendants' non-opposition to declaratory relief addressed to the Agency Defendants, the Court should enter that relief now.

If the Court determines that "declaratory relief against the [agency defendants] alone" will likely redress Plaintiffs' injuries, *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (plurality op.), then the decision whether to issue injunctive relief too lies, as usual, within the Court's discretion. There is no question that courts *may* issue injunctive relief against agency officials to prevent them from carrying out unlawful presidential directives, *see* NRDC Pls.' Br. at 18 (citing, *inter alia*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584, 588 (1952)), and Plaintiffs have established that injunctive relief is warranted in this case, *id*. at 21-22 (discussing factors under *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010)). Defendants make no effort to explain why they believe injunctive relief should not be issued

here. *See* Defs.' BE Br. at 57. Nor is there any basis for additional "remedy briefing" about "the need for injunctive relief." *Id*. at 57 n.37. "Federal Defendants have had ample opportunity" to respond to Plaintiffs' requested relief, and additional briefing would only "further delay" the resolution of this case, threatening more harm to the excluded lands and to Plaintiffs' members' interests. *California v. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1179 (N.D. Cal. 2019).[4]

Intervenors, for their part, erroneously argue that Plaintiffs' injuries are not "irreparable," Intervenors' BE Br. at 18-19, but their arguments are misplaced for the reasons explained in the TWS Plaintiffs' brief. *See* TWS Pls.' Opp. & Reply Br. at 43-44. Intervenors offer a laundry list of land classifications and statutes that, as a general matter, afford varying types of protection to various public resources, *see* Intervenors' BE Br. at 19-22, but they never assert that these other statutes and land classifications will prevent the harm that hardrock mining causes to Plaintiffs' members' enjoyment of the excluded lands. Similarly, Intervenors' perverse theory that monument designations are actually anti-protective—that they "accelerate destruction of archaeological resources" and "serve[] to increase, not limit, the destruction of cultural resources," *id.* at 19, 24—is utterly unsupported by admissible evidence, and in any event, it has nothing to do with Plaintiffs' undisputed harms from *mining* activity.

In sum, the undisputed material facts establish that, because of the Trump Proclamation, Plaintiffs' members face irreparable harm from hardrock mining. Injunctive relief is warranted against Agency Defendants "barring their implementation of the Trump Proclamation (including

[4] Defendants also urge the Court to dismiss the President from the suit, but they cite no case holding that the Court must dismiss the President under Fed. R. Civ. P. 12(b)(1), *cf. Doe 2 v. Trump*, 319 F. Supp. 3d 539, 542 (D.D.C. 2018) (dismissing the President, but noting that the caselaw does not clearly hold that "must" be the result), or that the availability of relief against subordinate officials somehow means Plaintiffs lack standing to sue the President. The Court may decide, in its discretion, not to issue relief against the President, *see supra* at 7, but that does not mean the Court lacks jurisdiction or that the President was not properly named as a party.

any management plans or subsidiary plans premised on the Trump Proclamation) and directing them to carry out the mandatory duties imposed on them in the 2016 Proclamation." NRDC Pls.' Am. Compl. at 55. Such equitable relief is urgently needed to restore monument status and protections to these vulnerable public lands. If the Court determines that declaratory relief alone will likely redress Plaintiffs' injuries, however, Plaintiffs respectfully request that the Court retain jurisdiction so that it may issue injunctive relief at a later date if declaratory relief proves to be insufficient. *See, e.g.*, *Food Chem. News v. Young*, 709 F. Supp. 5, 9 (D.D.C. 1989) (issuing declaratory relief, and providing that "plaintiffs retain the ability to apply for injunctive relief if the Court's confidence in federal defendant should prove to be misplaced"), *rev'd on other grounds*, 900 F.2d 328 (D.C. Cir. 1990); *Knight*, 302 F. Supp. 3d at 579 ("conclud[ing] that injunctive relief may be awarded" against subordinate official, but "declin[ing] to do so *at this time* because declaratory relief is likely to achieve the same purpose" (emphasis added)).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for partial summary judgment, deny Defendants' cross-motion for partial summary judgment, and, at a minimum, issue declaratory relief advising the agency defendants that the Trump Proclamation "modifying" Bears Ears National Monument is null and void *ab initio*.

Dated: April 10, 2020

Respectfully submitted,

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