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**
AMERICAN FARM BUREAU FEDERATION, *et al.*, Defendant-Intervenors.	

NRDC PLAINTIFFS' RESPONSE AND REPLY STATEMENT OF MATERIAL FACTS AND STATEMENT PURSUANT TO LOCAL CIVIL RULE 7(h)(1)

Pursuant to Federal Rule of Civil Procedure 56(e) and Local Civil Rule 7(h)(1), NRDC Plaintiffs submit the following response and reply to 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) (hereinafter "Defs.' Resp. to NRDC Pls.' SUF").

Federal Defendants do not challenge NRDC Plaintiffs' standing, and they do not dispute most of NRDC Plaintiffs' facts. Federal Defendants have not submitted any "statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated," L. Civ. R. 7(h)(1), and as explained below, their limited objections and alleged disputes are immaterial to the resolution of NRDC Plaintiffs' motion for partial summary judgment.

Federal Defendants have interspersed their responses to NRDC Plaintiffs' facts with certain "further" statements and citations to new declarations, *see, e.g.*, Defs.' Resp. to NRDC Pls.' SUF ¶¶ 39, 47, and they have also offered their own "Further Statement of Facts" in support of their cross-motion for partial summary judgment, *id.* at 26. NRDC Plaintiffs therefore submit the following responses and select replies, explaining that Defendants identify no "material facts as to which … there exists a genuine issue necessary to be litigated." L. Civ. R. 7(h)(1).

I. NRDC Plaintiffs' Responses to Defendants' Further Statement of Facts

Federal Defendants' Fact ¶ 1: Proclamation 9558 caused an instant controversy—there was significant local and national opposition to the creation of the Monument. *See, e.g.*, James R. Rasband, Stroke Of The Pen, Law Of The Land?, 63 Rocky Mtn. Min. L. Inst. 21, 21-2 - 21-3 (2017) (noting that "President Obama's proclamations drew strong protests from some in public land communities near the monuments and from many in the congressional delegations of the states containing the monuments"); Nora R. Pincus, Chapter 14 Annual Mining And Public Land Law Update, 63 Rocky Mtn. Min. L. Inst. 14, 14-9 (2017) (noting that "Bears Ears was one of the most controversial of President Obama's new monuments, drawing strong opposition from the State of Utah and numerous elected officials . . .").

NRDC Plaintiffs' Response:

NRDC Plaintiffs object to this allegedly undisputed fact because it is unsupported by any admissible evidence. *See* Fed. R. Civ. P. 56(c)(1)(B), (c)(2). The citations offered to support the assertion are hearsay. *See* Fed. R. Evid. 801(c), 802. Regardless, Defendants have failed to show how this allegedly undisputed fact is material to its motion for partial summary judgment.

Federal Defendants' Fact ¶ 2: Proclamation 9558 instructed the Secretaries of Agriculture and the Interior to jointly prepare a land use management plan for the monument and to "promulgate such regulations for its management as they deem appropriate." 82 Fed. Reg. at 1143-44.

NRDC Plaintiffs' Response:

NRDC Plaintiffs admit this statement.

Federal Defendants' Fact ¶ 3: It further instructed the Secretaries to prepare a transportation plan designating "where motorized and non-motorized, mechanized vehicle use will be allowed." *Id*. at 1145.

NRDC Plaintiffs' Response:

NRDC Plaintiffs admit this statement.

Federal Defendants' Fact ¶ 4: Proclamation 9558 established the "Bears Ears Commission," consisting of an elected officer from each of the five plaintiff Tribes, to "provide guidance and recommendations on the development and implementation of management plans and on management of the monument." *Id*. at 1144.

NRDC Plaintiffs' Response:

NRDC Plaintiffs admit this statement.

Federal Defendants' Fact ¶ 5: However, Proclamation 9558 made clear that the Commission's role was limited to providing advice and information: it instructed the Secretaries only to "carefully and fully consider integrating the traditional and historical knowledge and special

expertise of the Commission," or, in its absence, some comparable entity, but also expressly authorized the Secretaries to reject any recommendation from the Commission. *Id*.

NRDC Plaintiffs' Response:

NRDC Plaintiffs deny this statement as unsupported, and incorporate by reference the Tribal Plaintiffs' Response. Moreover, Defendants have not established that this asserted fact is material to NRDC Plaintiffs' standing or to Defendants' motion for partial summary judgment against NRDC Plaintiffs.

Federal Defendants' Fact ¶ 6: Proclamation 9681 reduces the number of acres that are within the Monument, but noted that those lands that have been excluded from the monument remain in federal ownership, subject to management and protection under numerous federal statutes. *See* 82 Fed. Reg. at 58,082.

NRDC Plaintiffs' Response:

NRDC Plaintiffs dispute as unsupported Defendants' assertion that "those lands that have been excluded from the monument remain … subject to management and protection under numerous federal statutes." Proclamation 9681 does note the applicability and potential applicability of "[f]ederal protections under existing laws and agency management designations," including various federal laws that "give authority to the BLM and USFS to condition permitted activities on Federal lands, whether within or outside a monument," but Proclamation 9681 does not assert that all those sources of protection apply to *all* the excluded lands, or that they provide the same level and kind of "protection and management" as a monument designation. Proclamation No. 9681, 82 Fed. Reg. 58,081, 58,081–82 (Dec. 4, 2017) (Trump Proclamation). Regardless, this dispute is not material to the resolution of NRDC Plaintiffs' motion because Federal Defendants elsewhere admit that the 2016 Proclamation withdrew the Monument lands from location and entry under the General Mining Law, *see* Defs.' Resp. to NRDC Pls.'

SUF ¶ 6, and that the Trump Proclamation revoked that mineral withdrawal on the excluded lands, *see id.* ¶ 22. Hardrock mining-related harm is the basis for NRDC Plaintiffs' standing.

Federal Defendants' Fact ¶ 7: Approximately 367,937 acres of the lands that were formerly within the Monument continue to be managed as Wilderness Study Areas ("WSAs"), which BLM, consistent with the requirements under FLPMA, manages "so as not to impair their suitability for future congressional designation as Wilderness." 43 U.S.C. 1782(c); Roberson Decl. ¶¶ 6, 12.

NRDC Plaintiffs' Response:

NRDC Plaintiffs admit that approximately 367,937 acres of the lands excluded from the Monument (roughly 32%) are Wilderness Study Areas ("WSAs"), but Defendants have failed to show how that fact is material to their motion for partial summary judgment. NRDC Plaintiffs have asserted associational standing based on injuries from hardrock mining, and Defendants have not contested NRDC Plaintiffs' standing. Defendants have not asserted that any of the hardrock mining claims mentioned in Plaintiffs' members' declarations are located in a WSA, and, in any event, hardrock mining is not categorically prohibited in WSAs. *See* 43 U.S.C. § 1782(c); 43 C.F.R. §§ 3802.0-2(a), 3802.0-6.

Federal Defendants' Fact ¶ 8: Approximately 46,326 acres now excluded from the Monument are part of the congressionally designated Dark Canyon Wilderness Area, which the USFS manages to maintain or enhance its wilderness character. Rasure Decl. ¶¶ 8(a) & 10.

NRDC Plaintiffs' Response:

NRDC Plaintiffs admit that approximately 46,326 acres of the lands excluded from the Monument (roughly 4%) are within a designated wilderness area, but Defendants have failed to show how that fact is material to their motion for partial summary judgment. NRDC Plaintiffs have asserted associational standing based on injuries from hardrock

mining, and Defendants have not contested NRDC Plaintiffs' standing. Defendants have not asserted that any of the hardrock mining claims mentioned in Plaintiffs' members' declarations are located in a wilderness area.

Federal Defendants' Fact ¶ 9: An additional 77,688 acres of the now-excluded lands are also included in seven inventoried roadless areas (or "IRAs"). *Id*. ¶ 8(b). The USFS manages these IRAs under its 2001 Roadless Rule, which, among other things, generally prevents the creation of new roads. *Id*. ¶ 8(b) & 9.

NRDC Plaintiffs' Response:

NRDC Plaintiffs admit that approximately 77,688 acres of the lands excluded from the Monument (roughly 7%) are within inventoried roadless areas, but Defendants have failed to show how that fact is material to their motion for partial summary judgment. NRDC Plaintiffs have asserted associational standing based on injuries from hardrock mining, and Defendants have not contested NRDC Plaintiffs' standing. Defendants have not asserted that any of the hardrock mining claims mentioned in Plaintiffs' members' declarations are located in an inventoried roadless area.

Federal Defendants' Fact ¶ 10: When Proclamation 9681 issued on December 4, 2017, no land use plan for the Monument had yet been created or approved—nor had any specific "regulations for its management" been promulgated—pursuant to the 2016 Proclamation. *See* Proc. 9558, 82 Fed. Reg. at 1144. As a result, both following the Monument's designation in 2016, and from its modification in December 2017 until Records of Decision were signed on February 6, 2020, the BLM continued to manage the monument lands pursuant to the 2008 Monticello RMP and the USFS has continued to manage monument lands pursuant to the 1986 Manti-La Sal LRMP. Roberson Decl. ¶ 8; Rasure Decl. ¶ 7; Quigley Decl. ¶ 8.

NRDC Plaintiffs' Response:

NRDC Plaintiffs admit the first sentence. NRDC Plaintiffs dispute the assertion in Defendants' second sentence—that from the Monument's designation in 2016 until the Records of Decision were signed on February 6, 2020, "the BLM continued to manage

the monument lands pursuant to the 2008 Monticello RMP and the USFS has continued to manage monument lands pursuant to the 1986 Manti-La Sal LRMP"—as underinclusive. From the date of the Monument's designation, even in the absence of new management plans, the 2016 Proclamation required BLM and the Forest Service to manage the Monument lands for the protection of the objects of historic and scientific interest located there. *See* Desormeau Decl., Exh. B at 7 (ECF No. 165-3) (Memorandum for the President from Ryan K. Zinke, Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act (2017)) (explaining that a national monument designation overlays a "more restrictive management regime [than normally applies under FLPMA], which mandates protection of the objects identified" and "has the effect of narrowing the range of uses and limiting BLM's multiple-use mission"). Regardless, this dispute is not material to the resolution of the pending motions because Federal Defendants elsewhere admit that the 2016 Proclamation withdrew the Monument lands from location and entry under the General Mining Law, *see* Defs.' Resp. to NRDC Pls.' SUF ¶ 6, and that the Trump Proclamation revoked that mineral withdrawal on the excluded lands, *see id.* ¶ 22. Hardrock mining-related harm suffices to establish NRDC Plaintiffs' standing.

Federal Defendants' Fact ¶ 11: When the Approved Monument Management Plans issued on February 7, 2020, they did not change the management of lands excluded from the Monument. Quigley Decl. ¶ 10.

NRDC Plaintiffs' Response:

NRDC Plaintiffs admit that the Approved Monument Management Plans issued on February 7, 2020, do not apply to the lands that President Trump excluded from the Monument, and therefore they "did not change the management" of those lands. The

Trump Proclamation, in contrast, did materially change the management of those excluded lands—among other things, by revoking the 2016 Proclamation's mineral withdrawal. *See* Defs.' Resp. to NRDC Pls. SUF ¶¶ 6, 22.

Federal Defendants' Fact ¶ 12: Proclamation 9681 maintains the Bears Ears Commission (but renames it "Shash Jáa" commission). It continues representation from the five plaintiff Tribes, and also adds a new member—a designee from the San Juan County Board of County Commissioners. 82 Fed. Reg at 58,086.

NRDC Plaintiffs' Response:

NRDC Plaintiffs admit that Proclamation 9681 renamed the Bears Ears Commission and added a new member, a designee of the San Juan County Board of County Commissioners. NRDC Plaintiffs dispute Defendants' use of the terms "maintains" and "continues," which in this context are inadmissible opinions. *See* Fed. R. Evid. 701. As the Tribal Plaintiffs explain in their Response, the addition of a non-tribal representative materially changed the Commission. This dispute is not material to NRDC Plaintiffs' standing, however, which is not premised on harms to the Bears Ears Commission.

Federal Defendants' Fact ¶ 13: BLM has attempted to convene the Shash Jáa Commission, however, the representatives have declined to attend. Roberson Suppl. Decl. ¶¶ 10-15.

NRDC Plaintiffs' Response:

NRDC Plaintiffs admit this statement and incorporate by reference the Tribal Plaintiffs' Response. Defendants have not established, however, that this asserted fact is material to NRDC Plaintiffs' standing or to Defendants' motion for partial summary judgment against NRDC Plaintiffs.

Federal Defendants' Fact ¶ 14: As described in the Bears Ears National Monument Management Plan Record of Decision, issued February 7, 2020, the BLM and the U.S. Forest Service prioritized engagement with the Tribes during the planning process. The BLM invited 30

tribes to be cooperating agencies in the planning process, including the five plaintiff tribes, but only the Kaibab Band of Paiute Indians and Pueblo of San Felipe accepted cooperating agency status. Quigley Decl. ¶ 11.

NRDC Plaintiffs' Response:

NRDC Plaintiffs dispute as unsupported Defendants' use of the term "prioritized," and incorporate by reference the Tribal Plaintiffs' Response. Moreover, Defendants have not established that this asserted fact is material to NRDC Plaintiffs' standing or to Defendants' motion for partial summary judgment against NRDC Plaintiffs.

II. NRDC Plaintiffs' Replies to Certain of Defendants' Responses

NRDC Plaintiffs' Fact ¶ 7: The 2016 Proclamation allowed "valid," pre-existing hardrock mining claims within the Monument to remain in place, 82 Fed. Reg. at 1143, but the conferral of monument status placed certain limitations on the development of those claims. *See* 43 C.F.R. § 3809.11(c)(7) (requiring a "plan of operations for any operations causing surface disturbance greater than casual use in the following special status areas . . . National Monuments"); *id.* § 3809.100(a) ("After the date on which the lands are withdrawn from appropriation under the mining laws, BLM will not approve a plan of operations or allow notice-level operations to proceed until BLM has prepared a mineral examination report to determine whether the mining claim was valid before the withdrawal, and whether it remains valid.").

Federal Defendants' Response: Federal Defendants object that the statement that the 2016 Proclamation placed certain limitations on the development of pre-existing hardrock mining claims is a legal conclusion. Without waiving the objection, the cited regulations do not place limitations on the nature or extent of operations on valid, pre-existing mining claims, but rather change the process by which operations related to such claims can be approved. 43 C.F.R. § 3809.11(c)(7) (requiring a "plan of operations for any operations causing surface disturbance greater than casual use in the following special status areas . . . National Monuments"); *id.* § 3809.100(a) ("After the date on which the lands are withdrawn from appropriation under the mining laws, BLM will not approve a plan of operations or allow notice-level operations to proceed until BLM has prepared a mineral examination report to determine whether the mining claim was valid before the withdrawal, and whether it remains valid.").

NRDC Plaintiffs' Reply:

Defendants' disagreement with Plaintiffs' use of the word "limitations" does not give rise to a genuine dispute of material fact. Defendants admit that the cited regulations "change

the process" for approving mining operations on any pre-existing hardrock mining claims inside national monuments. Regardless, this disagreement over wording is immaterial. In light of Defendants' clarification regarding the Easy Peasy claim location date, the parties now agree that none of the hardrock mining claims NRDC Plaintiffs cite in support of their standing are "pre-existing" claims located before the Monument's designation in 2016; instead, they were all located *after* the Trump Proclamation. *See* Defs.' Resp. to NRDC Pls.' SUF ¶¶ 38, 43. Defendants' characterization of these regulations is therefore not material to the pending motions.

NRDC Plaintiffs' Fact ¶ 21: BLM and the Forest Service have reverted to managing the lands excluded from the Monument under their pre-Monument management regimes. Desormeau Decl., Exh. C at ES-1 (2019 FEIS) ("Lands that were excluded from the BENM by Proclamation 9681 will continue to be managed by the BLM and USFS as currently directed under the Monticello RMP and the Manti-La Sal LRMP, respectively."); Roberson Decl. ¶ 8 (ECF No. 49-2); Rasure Decl. ¶¶ 5-7 (ECF No. 49-3).

Federal Defendants' Response: Federal Defendants dispute this statement. The BLM and the Forest Service have not reverted to managing lands excluded from Bears Ears under their pre-designation management regimes. The lands excluded from the Monument were managed under the Monticello RMP, Moab RMP, and the Manti-La Sal LRMP before the 2016 Proclamation issued, after the 2016 Proclamation issued, and continue to be so. Roberson Decl. ¶ 8, ECF No. 49-2; Rasure Decl., ¶ 7, ECF No. 49-3.

NRDC Plaintiffs' Reply:

Defendants' disagreement with NRDC Plaintiffs' statement appears to center on Plaintiffs' use of the word "reverted." Defendants do not, however, dispute the material fact that BLM and the Forest Service are now managing the excluded lands pursuant to the agencies' pre-Monument management regimes. To the extent Defendants suggest that the Monument's designation in 2016 and President Trump's subsequent removal of lands from the Monument did not change the agencies' approach to managing the affected lands, that suggestion is unsupported by the declarations Defendants cite, and it is further

contradicted by Interior Secretary Zinke's report to the President. *See* Desormeau Decl., Exh. B at 7 (ECF No. 165-3) (explaining that a national monument designation overlays a "more restrictive management regime, which mandates protection of the objects identified" and "has the effect of narrowing the range of uses and limiting BLM's multiple-use mission").

Regardless, this dispute is not material to the resolution of NRDC Plaintiffs' motion because Federal Defendants elsewhere admit that the 2016 Proclamation withdrew the Monument lands from location and entry for hardrock mining purposes, *see* Defs.' Resp. to NRDC Pls.' SUF ¶ 6, and that the Trump Proclamation revoked that mineral withdrawal on the excluded lands, *see id.* ¶ 22. Hardrock mining-related harm is the basis for NRDC Plaintiffs' standing.

NRDC Plaintiffs' Fact ¶ 23: BLM and the Forest Service are no longer observing the 2016 Proclamation's mineral withdrawal on the excluded lands. Instead, since February 2018, BLM has recorded new mining claims located by private parties on those lands, and BLM or the Forest Service will review and process claimants' development proposals on claims located on those lands, in accordance with the General Mining Law of 1872 and the agencies' respective regulations. Roberson Decl. ¶ 33 (ECF No. 49-2); Rasure Decl. ¶ 6 (ECF No. 49-3).

Federal Defendants' Response: Federal Defendants object to the phrases "observing the 2016 Proclamation's mineral withdrawal" and "development proposals" as being vague and subject to varying interpretations. Subject to and without waiving this objection, Federal Defendants dispute that the BLM has "recorded new mining claims," as mining claimants, not the BLM, locate and "record" claims. 43 C.F.R. §§ 3833.1, 3833.11.

NRDC Plaintiffs' Reply:

Defendants' disagreement with Plaintiffs' use of the term "record" is immaterial. Plaintiffs admit that mining claimants "record" their claims, but it is undisputed that BLM *accepts* those mining claim recordation notices and *maintains* mining claim records. *See* Newell Decl., ¶¶ 2-12 & Exhs. A-H (ECF No. 165-4). There is no genuine

dispute that BLM is no longer observing the 1996 Proclamation's mineral withdrawal on the excluded lands.

NRDC Plaintiffs' Fact ¶ 27: Further, on non-withdrawn BLM land, a claimant may undertake "notice"-level activities—that is, activities greater than casual use, "causing surface disturbance" of up to five acres and removing up to one thousand tons of presumed ore—by sending BLM a "notice" of planned operations and waiting fifteen calendar days after BLM receives it. *Id.* §§ 3809.10(b), 3809.11(b), 3809.21(a). *See also id.* § 3809.11(c)(7) (within national monuments and other protected categories, any surface disturbance greater than casual use requires a plan of operations; proceeding based on a notice of intent is not allowed).

Federal Defendants' Response: Federal Defendants object that this statement is a legal conclusion, and further is vague as to the term "non-withdrawn BLM land." Without waiving these objections, Federal Defendants further explain that the type of "'notice'-level activities" that Plaintiffs refer to encompass only exploration operations, and any mine development and extractive mining operations—regardless of acreage—require a plan of operations. *See* 43 C.F.R. § 3809.11.

NRDC Plaintiffs' Reply:

Defendants do not identify any dispute of material fact. Although Defendants describe notice-level activities as "only exploration operations," they do not dispute that such activities by definition may cause "surface disturbance" of up to five acres or the removal of up to one thousand tons of presumed ore. 43 C.F.R. § 3809.21(a); *see id.* §§ 3809.5; 3809.11(a)-(b); *see also* Reply to Fact ¶ 41, *infra*. Defendants also do not dispute that the hardrock mining regulations allow an operator to engage in notice-level activities after sending BLM a "notice" of planned operations and waiting fifteen calendar days after BLM receives it. *Id.* § 3809.21(a).

NRDC Plaintiffs' Fact ¶ 28: Notice-level activities may include road construction, the use of mechanized earth-moving equipment, and the use of truck-mounted drilling equipment. 43 C.F.R. § 3809.5 (defining what "[c]asual use" generally does and does not include, and defining "[e]xploration" and "[o]perations"); *id.* § 3809.21(a) ("[Y]ou must submit a complete notice of your operations 15 calendar days before you commence exploration"). Unless BLM requests additional information or takes other specific actions within that fifteen-day window, the claimant may proceed with ground-disturbing work. *Id.* §§ 3809.312(a), 3809.313.

Federal Defendants' Response: Federal Defendants object that this statement is a legal conclusion. Without waiving these objections, Federal Defendants further state that all exploration operations under a notice must prevent unnecessary or undue degradation of the public lands, be conducted in accordance with the performance standards in 43 C.F.R. § 3809.420 and be reclaimed in accordance with the standards in that same section. All notice-level operators must provide the BLM with a financial guarantee covering the full cost of reclaiming the operation before surface disturbance may begin. *See* 43 C.F.R. §§ 3809.500-599; Roberson Decl. ¶¶ 35, 37.

NRDC Plaintiffs' Reply:

Defendants have not identified any dispute of material fact. Although Defendants aver that all operations under a notice must prevent *unnecessary* or *undue* degradation of the public lands, *see* 43 U.S.C. § 1732(b), they do not dispute that such notice-level operations may include road construction, the use of mechanized earth-moving equipment, and the use of truck-mounted drilling equipment, or that by definition such operations may cause "surface disturbance greater than casual use." 43 C.F.R. § 3809.5.

NRDC Plaintiffs' Fact ¶ 29: For more extensive mining activities on non-withdrawn BLM land—activities that involve, for example, removing a thousand tons or more of presumed ore or disturbing more than five acres—BLM requires a "plan of operations," including detailed information about the proposed disturbance and mitigation measures, and must issue an affirmative approval before operations begin. *See id.* §§ 3809.10(c), 3809.11, 3809.21(a). *See also id.* § 3809.401.

Federal Defendants' Response: Federal Defendants object that this statement is a legal conclusion, and further is vague as to the term "non-withdrawn BLM land." Federal Defendants further object that the term "more extensive mining activities" is vague and subject to varying interpretations. Without waiving these objections, Federal Defendants state that all operations under a plan of operations must prevent unnecessary or undue degradation of the public lands, be conducted in accordance with the performance standards in 43 C.F.R. § 3809.420, and be reclaimed in accordance with the standards in that same section. All operators must provide the BLM with a financial guarantee covering the full cost of reclaiming the operation before surface disturbance may begin. *See* 43 C.F.R. §§ 3809.500-599; Roberson Decl. ¶¶ 35, 37.

NRDC Plaintiffs' Reply:

Defendants have not identified any dispute of material fact. Although Defendants aver that all operations under a plan of operations must prevent *unnecessary* or *undue* degradation of the public lands, *see* 43 U.S.C. § 1732(b), they do not dispute that such plan-level operations may include removing a thousand tons or more of presumed ore or disturbing more than five acres.

NRDC Plaintiffs' Fact ¶ 36: The auditory and visual effects of surface-disturbing mining activities—including dust and haze, mechanical noise, and light pollution—can have far-reaching impacts in this rocky desert landscape, especially on mesas and slickrock expanses where there is relatively little vegetation to dampen sound or to obstruct viewsheds. Supp. Bloxham Decl. ¶ 20; Supp. Clark Decl. ¶¶ 14, 16; Walker Decl. ¶ 8; *see also* Supplemental Declaration of Michael Mason, Exhs. A, B (viewshed and sound impact analysis for Easy Peasy mine).

Federal Defendants' Response: Federal Defendants object to this statement as speculative and lacking the context necessary to form a response. Subject to and without waiving this objection, Federal Defendants do not dispute that, as a general matter, mining activity "can" result in the impacts this statement, but explain further that all exploration and mining operations on federal lands must be conducted in accordance with the applicable performance standards (43 C.F.R. § 3809.420; 36 C.F.R. § 228.8) and reclaimed in accordance with the standards in those sections. Roberson Decl. ¶¶ 35, 37. Moreover, operators on BLM-managed lands must provide the BLM with a financial guarantee covering the full cost of reclaiming the operation before surface disturbance may begin. *Id.*; *see also* 43 C.F.R. §§ 3809.500-599.

NRDC Plaintiffs' Reply:

Defendants have not identified any dispute of material fact. They do not dispute that surface-disturbing activities can result in the impacts asserted, including dust and haze, mechanical noise, and light pollution, affecting surrounding lands. Nor do they dispute the accuracy of Plaintiffs' viewshed and sound impact analysis.

NRDC Plaintiffs' Fact ¶ 37: Even if exploratory activity never leads to more extensive plan-level development, it will leave long-lasting scars on the land—including unsightly pits or adits, discarded fencing, waste piles, disturbed vegetation, and vehicle tracks in the fragile desert

soils—that will continue to harm Plaintiffs' aesthetic interests in using these areas for years to come. Walker Decl. ¶ 8 ("Even an exploratory hard-rock mining site that never gets developed can leave a permanent scar on the land, an eyesore that changes the look of the place. It disturbs the native plants and introduces weeds and erosion."); Peterson Decl. ¶ 29 (describing notice-level activity at Easy Peasy mine).

Federal Defendants' Response: Federal Defendants object to this statement as speculative and lacking the context necessary to form a response. Subject to and without waiving this objection, Federal Defendants dispute that any "exploratory activity will leave long-lasting scars on the land—including unsightly pits or adits, discarded fencing, waste piles, disturbed vegetation, and vehicle tracks in the fragile desert soil." All exploration and mining operations on federal lands must be conducted in accordance with the applicable performance standards (43 C.F.R. § 3809.420; 36 C.F.R. § 228.8) and reclaimed in accordance with the standards in those sections. Roberson Decl. ¶¶ 35, 37 (ECF No. 49-2). Moreover, operators on BLM-managed lands must provide the BLM with a financial guarantee covering the full cost of reclaiming the operation before surface disturbance may begin. *Id*.; *see also* 43 C.F.R. §§ 3809.500-599. Accordingly, it is not the case that exploratory activity will necessarily result in the type of impacts referred to in this statement. Decl. of Brian Quigley ("Quigley Decl.") ¶ 21.

NRDC Plaintiffs' Reply:

Defendants' asserted dispute is unsupported. The regulation they cite requires mining claimants to "[r]eclaim the area disturbed, *except* to the extent necessary to preserve evidence of mineralization, by taking *reasonable* measures to prevent or control on-site and off-site damage[.]" 43 C.F.R. § 3809.420(b)(3)(i) (emphases added). The regulation does not require claimants to eliminate all traces of mining activity; it defines "reasonable measures," *id.*, as including "isolat[ing] … toxic materials" (but not necessarily "remov[ing]" them), and "[r]eshaping" and "revegetat[ing]" disturbed areas (but only "where reasonably practicable"), *id*. § 3809.420(b)(3)(ii). Defendants' declarant admits that "[e]xploration under 43 C.F.R. Subpart 3809 *can* leave surface impacts, including pits, waste piles, disturbed vegetation, and vehicle tracks." Quigley Decl. ¶ 21 (ECF No. 172) (emphasis added). Mr. Quigley further asserts that "exploration does not *necessarily* result in these types of impacts over the long term," *id.* (emphasis added), which

Plaintiffs admit—some signs of mining activity may eventually fade—but that does not establish that reclamation will eliminate all traces of any past mining activity. In the end, there is no genuine dispute that exploration may result in long-term impacts.

NRDC Plaintiffs' Fact ¶ 38: Between February 2, 2018 (the effective date of President Trump's revocation of the mineral withdrawal), and November 7, 2019 (the date of Plaintiffs' amended and supplemental complaint), BLM records show that private prospectors located at least six new mining claims in the excised lands: "Hammond Mine A," "RwH Mine B," "Cute Girl," "Pretty Girl," "Lucky Lady 2," and "Cedar 4." Declaration of Landon Newell, Exhs. A-H (Serial Register Pages); Declaration of Creed Murdock, Exh. A (map of claim locations). Two of these claims have since been closed. *See* Newell Decl. ¶¶ 9-10. The rest are listed as "active." *See id*. ¶¶ 3-8, 11-12. The Lucky Lady 2 and Cedar 4 claims were located by Kimmerle Mining LLC, the operator of the Easy Peasy mine discussed *infra* at ¶¶ 41-47. *See* Newell Decl. ¶¶ 11-12 and Exhs. G & H.

Federal Defendants' Response: Federal Defendants dispute this statement. Between February 2, 2018 and November 7, 2019, ten mining claim location notices were recorded with the BLM. Decl. of Matthew Janowiak ¶ 6. Five of these claims have since been closed, and five remain "active" as of February 18, 2020. *Id*. Kimmerle Mining LLC located "Cedar 4", "Easy Peasy 1", and "Luck Lady 2". Furthermore, contrary to Plaintiffs' assertion, Kimmerle Mining LLC does not operate a "mine" at the Easy Peasy site; rather, its operations at that site are limited to exploration. *Id*. Federal Defendants further explain that the status of a mining claim as "active" indicates that a mining claim is in compliance with all recordation and maintenance fee requirements. It does not indicate claim validity (i.e., that the claim is supported by the discovery of a valuable mineral deposit), nor does it indicate that any surface disturbing operations are occurring on the claim. *Id*.

NRDC Plaintiffs' Reply:

Defendants have not identified any genuine dispute of material fact. Plaintiffs averred that BLM records show prospectors located "at least" six new mining claims during the relevant time period; Defendants count ten. There is no discrepancy between those two statements. Defendants do not dispute that these new claims include "Hammond Mine A," "RwH Mine B," "Cute Girl," "Pretty Girl," "Lucky Lady 2," and "Cedar 4." Defendants additionally identify one more newly recorded claim: "Easy Peasy 1." Janowiak Decl. ¶ 11 (ECF No. 169-6). Plaintiffs admit that the Easy Peasy 1 claim was

located by Kimmerle Mining LLC after February 2, 2018. Defendants' further assertion that "Kimmerle Mining LLC does not operate a 'mine' at the Easy Peasy site" is unsupported by the declaration that Defendants cite. In fact, two of Defendants' other declarants refer to "the Easy Peasy Mine." Roberson Decl. ¶ 38 (ECF No. 49-2); Quigley Decl. ¶ 12 (ECF No. 172). Regardless, whether one calls it a "mine," a "site," or a "mining claim where exploratory operations are occurring" is irrelevant. The material fact—which Defendants admit, *see* Defs.' Resp. to Pls.' SUF ¶ 41—is that Kimmerle Mining LLC has begun surface-disturbing operations there.

NRDC Plaintiffs' Fact ¶ 39: For example, two new mining claims near Dark Canyon—Hammond Mine A and RWH Mine B—threaten Plaintiffs' members' interests in visiting the Dark Canyon area for hiking and backpacking, solitude, nature study, and aesthetic appreciation. Declaration of Daniel Kent ¶¶ 15-16. Mr. Kent camps in the vicinity of the mine site every year. *Id*. at ¶ 16. He describes this as a "glorious area," with "gorgeous aspen glades and ancient scrub oak rings" with habitat for nesting great horned owls and bears. *Id*. at ¶ 15. He seeks out this area because of its remoteness, silence, uncrowded roads, beautiful forests, prime views, and easy camping. *Id*. at ¶ 16. Mining here would have leave Mr. Kent "crushed, dispirited, [and] angry" due to the inevitable scarring of the magnificent wild landscapes that he prizes here. *Id*. at ¶ 22. Because of these kinds of impacts, he avoids landscapes where uranium mining occurs. *Id*. Mr. Peterson has also visited the area of the Hammond mine claim, where he viewed the new uranium claims. Peterson Decl. ¶¶ 15, 28 (describing the beauty of the lands on which the claims are staked and the harm it poses to his interests, the land, natural resources, and native plants and animals).

Federal Defendants' Response: Federal Defendants object to the suggestion that uranium mining will necessarily occur on the Hammond Mine (A) and the RWH Mine (B) mining claims as speculative. Federal Defendants further explain that when a claimant records a notice of location with the BLM, there is no requirement to inform the BLM of the intended mineral. *See* 43 C.F.R. Part 3832. Federal Defendants also dispute that the claims located for Hammond Mine A and RWH Mine B will necessarily threaten Plaintiffs' members' interests in visiting the Dark Canyon area. The location and recordation of a mining claim does not necessarily mean it will be developed. *See* Roberson Decl. ¶ 38. Further, the conduct of all mining operations on BLM land is governed by 43 C.F.R. Part 3800, which implements FLPMA's mandate to prevent unnecessary or undue degradation of the lands (43 U.S.C. § 1732(b)). All exploration and mining operations on federal lands must be conducted in accordance with the applicable performance standards (43 C.F.R. § 3809.420; 36 C.F.R. § 228.8) and reclaimed in accordance with the standards in those sections. Roberson Decl. ¶¶ 35, 37. Moreover,

operators on BLM-managed lands must provide the BLM with a financial guarantee covering the full cost of reclaiming the operation before surface disturbance may begin. *Id*.; *see also* 43 C.F.R. §§ 3809.500-599.

NRDC Plaintiffs' Reply:

Defendants' objection that uranium mining will not "necessarily occur" at Hammond Mine A or RWH Mine B does not give rise to a genuine dispute of material fact. Defendants do not dispute the material facts (1) that private claimants located and recorded these new claims after the Trump Proclamation went into effect, *see* Defs.' Resp. to NRDC Pls.' SUF ¶ 38; (2) that BLM regulations allow claimants to undertake notice-level surface-disturbing activities a mere fifteen days after providing notice to BLM, *see id.* ¶¶ 27-28; or (3) that Plaintiffs' members use of the surrounding lands would be impacted by such activities. Whether these undisputed facts give rise to a substantial risk of future injury under controlling caselaw is a legal determination, as explained in Plaintiffs' briefs.

Further, Defendants' citation to a BLM regulation requiring claimants to "[r]eclaim the area disturbed, *except* to the extent necessary to preserve evidence of mineralization, by taking *reasonable* measures to prevent or control on-site and off-site damage," 43 C.F.R. § 3809.420(b)(3)(i) (emphases added), creates no dispute of material fact. Defendants do not assert that such measures would necessarily eliminate unsightly traces of past mining activity. *See* NRDC Plaintiffs' Reply ¶ 37, *supra*.

NRDC Plaintiffs' Fact ¶ 40: Additionally, the Lucky Lady 2 mine claim is located at the base of what Mr. Kent calls "the gorgeous, wildly articulated spires of Chimney Park and Notch Canyon, just north of Hammond Canyon." Kent. Decl. ¶ 17. The Lucky Lady 2 mine claim is visible from several "spectacular viewpoints," including East Point, which contains "isolated ponderosa giants, huge thickets of bear-friendly brush, and stunning views of these finest of canyons." *Id*. Although Mr. Kent enjoys the scenic, natural beauty of the area, if the mine were developed he "would probably not choose to backpack or camp here anymore." Kent Decl. ¶ 18.

Federal Defendants' Response: Federal Defendants do not dispute this statement, but further explain that it is speculative that the Lucky Lady 2 mining claim will necessarily be developed, for the reasons discussed in response to SOF #39.

NRDC Plaintiffs' Reply:

Defendants' opinion that development of the Lucky Lady 2 mining claim is "speculative" does not give rise to a genuine dispute of material fact for the reasons explained in NRDC Plaintiffs' Reply to Fact ¶ 39, *supra*.

NRDC Plaintiffs' Fact ¶ 41: Mining activity has recently resumed on the so-called "Easy Peasy" uranium and vanadium mine, with BLM's approval. *See* Newell Decl. ¶ 16 & Exh. L (BLM notice to mine operator that prior order temporarily suspending mine operations was lifted after operator provided required financial assurances); Murdock Decl., Exh. A (map of mining claims); Peterson Decl. ¶ 29 (describing recent visit to Easy Peasy mine site).

Federal Defendants' Response: Federal Defendants object to this statement in that the term "with BLM's approval" is vague and ambiguous, and subject to different interpretations. Without waiving this objection, Federal Defendants state that under 43 C.F.R. subpart 3809, the BLM does not "approve" notices. 43 C.F.R. §§ 3809.311-12. Federal Defendants further explain that the "activity" is, by terms of the claimant's notice, limited to exploration work, not mining. Quigley Decl., Exh. A. Federal Defendants further explain that in a letter dated February 14, 2019, the BLM informed Kimmerle Mining LLC that the Immediate Temporary Suspension Order the BLM issued on December 6, 2018 for failure to provide the required financial guarantee and obtain necessary approval from the Utah Division of Oil, Gas and Mining was terminated. Newell Decl., Ex. L.

NRDC Plaintiffs' Reply:

Defendants have not identified any dispute of material fact; they admit that exploration work has commenced at Easy Peasy. Defendants' proffered distinction between "exploration work" and "mining" is immaterial. As Defendants elsewhere admit, notice-level or "exploration" work, by definition, may cause surface disturbance of up to five acres or the removal of up to one thousand tons of presumed ore, and it may include road construction, the use of mechanized earth-moving equipment, and the use of truck-

mounted drilling equipment. *See* Defs.' Resp. to NRDC Pls.' Fact ¶ 27; *see also* Quigley Decl., Exh. A at 1 (ECF No. 172) ("'Exploration' includes, but is not limited to: sinking shafts; tunneling; drilling holes and digging pits or cuts; building of roads, and other access ways[] (and constructing and operating other facilities related to these activities)").

NRDC Plaintiffs' Fact ¶ 43: Easy Peasy is located on a claim called Coral #9, which was originally recorded in 2005, before Bears Ears was designated as a monument. Newell Decl. ¶ 4 & Exh. B. The claimant—Kimmerle Mining LLC—described the site as including a "pre-existing small underground mine site and access road that have been reclaimed," i.e., have returned to a natural state. *Id*. ¶ 13 & Exh. I at 5. Although Kimmerle Mining located the claim in 2005, it did not develop the site or submit a notice of operations until June 2018, after the Trump Proclamation lifted the withdrawal. *Id*. ¶ 4 & Exh. B.

Federal Defendants' Response: Federal Defendants dispute that the Easy Peasy exploration operations are situated on a mining claim called Coral #9. The operations are situated on the Easy Peasy 1 claim, located by Kyle Kimmerle, in 2018. Quigley Decl. ¶ 18.

NRDC Plaintiffs' Reply:

Plaintiffs admit that the Easy Peasy operations are located on a hardrock mining claim called "Easy Peasy 1." (Plaintiffs note that, in its Notice of Intent, Kimmerle Mining LLC identified the relevant "Claim" as "Coral #9 Amended." Quigley Decl., Exh. A at 4 (ECF No. 172); *accord* Newell Decl., Exh. I at 4 (ECF No. 165-4). That statement by Kimmerle Mining LLC appears to have been a mistake, *see* Quigley Decl. ¶ 18, but an immaterial one for present purposes.) Plaintiffs admit that the Easy Peasy 1 mining claim was located after the Trump Proclamation lifted the mineral withdrawal.

NRDC Plaintiffs' Fact ¶ 47: Mining trucks and machinery are visible at a distance from the mine site. Supp. Mason Decl. ¶ 11 (viewshed analysis projecting that "mining activities at the Easy Peasy mine site will be visible as far as 21 miles away, … [including from] East Point (near Dark Canyon Wilderness), Twin Peaks (Abajo Mountains), Abajo Peak and Jackson Ridge (Abajo Mountains), South Mountain (Abajo Mountains), and Black Mesa").

Federal Defendants' Response: Federal Defendants object to this statement as vague and ambiguous, in that it refers to "at a distance" and further that it is speculative and lacks the context necessary to form a response. Without waiving this objection, Federal Defendants do not dispute this statement, but further explain that actual visibility on the landscape is affected by distance, haziness, the size of the site, the colors of the vehicles, and other factors. Quigley Decl. ¶ 19.

NRDC Plaintiffs' Reply:

Defendants do not dispute Plaintiffs' viewshed analysis or the material facts that operations at Easy Peasy may be visible from East Point, Twin Peaks, Abajo Peak and Jackson Ridge, and South Mountain. *See* Quigley Decl. ¶ 19 (ECF No. 172). Defendants' general list of factors that might affect visibility does not create a dispute of material fact. *See id*.

NRDC Plaintiffs' Fact ¶ 50: Plaintiffs' members have visited the Cheese and Raisins area, which is within view of the Easy Peasy mine, and intend to return this year to hike, explore, view its natural beauty and experience the quiet environment there. Supp. Bloxham Decl. ¶ 20 (explaining that he visits the area to explore, hike, take photographs and enjoy the scenery, and that he plans to return in 2020); Supp. Clark Decl. ¶ 16 (describing his appreciation of the natural quiet and solitude of the Cheese and Raisins area and his intent to return in 2020); Hoskisson Decl. ¶ 11 (describing his travels within a mile of the Easy Peasy site to hike in the area and enjoy the scenic drive, and his plans to return); Allen Decl. ¶¶ 14-15 (explaining that the Easy Peasy mining activities will harm his enjoyment of the hiking opportunities, natural beauty and quiet at Cheese and Raisins and Whiskers Draw, and noting his plans to return in October 2020); Peterson Decl. ¶ 29 (describing harm that ongoing mining at the Easy Peasy site causes to his spiritual and aesthetic interests); Walker Decl. ¶¶ 6-7 (describing his plans to visit the Cheese and Raisins Hills and Comb Ridge in the summer of 2020, and explaining that he drives the Cottonwood Wash Road, a "very lightly traveled" road that passes by the Easy Peasy site and is in its viewshed, to access backpacking destinations in the Cheese and Raisins Hills and beyond).

Federal Defendants' Response: Federal Defendants dispute the indication from one of the cited declarations that the Easy Peasy site would harm hiking opportunities, natural beauty, and quiet at Whiskers Draw, because the Easy Peasy site would not be visible from Whiskers Draw or its immediate vicinity due to topographic screening. Quigley Decl. ¶ 20. Federal Defendants do not otherwise dispute the statement.

NRDC Plaintiffs' Reply:

Given that Defendants do not dispute that mining activities at Easy Peasy are visible from the Cheese and Raisins Hills and Cottonwood Wash Road, Defendants' asserted dispute about whether "the Easy Peasy site" is *also* visible from Whiskers Draw is not material to resolving NRDC Plaintiffs' motion.

NRDC Plaintiffs' Fact ¶ 51: So long as mining activity continues, with its auditory and visual disturbance of the area's scenery and natural quiet and its impact on cultural and other resources, Plaintiffs' members' enjoyment of the surrounding areas will be diminished, or they will be forced to curtail their use of those areas altogether. Walker Decl. ¶¶ 8, 10 (describing harm from "sight and sound of mining activity" and the additional noise and traffic of mining trucks on the sparsely traveled Cottonwood Wash Road). Mr. Clark plans to return to the Cheese and Raisins area in 2020, but may be deterred due to mining activity at Easy Peasy. Supp. Clark Decl. ¶ 16 ("I plan to return to the Cheese and Raisins area in the spring of 2020 and to continue exploring and photographing the landscape. However, I may be less likely to do so because construction, waste generation, and radioactive radon venting from uranium mining exploration has and will continue to harm my enjoyment in visiting this area."). Mr. Bloxham intends to return to Cheese and Raisins, as well as Comb Ridge, but may not because mining activity will be visible and audible from both locations. Supp. Bloxham Decl. ¶ 20 ("The mining will be visible and audible from the rims of Comb Ridge, the Cheese and Raisins area, and other nearby hiking areas I visit and will and negatively affect my use of that area, interfering with my quiet recreation, quest for solitude in wild lands as well as my aesthetic appreciation of the area."); Kent Decl. ¶¶ 22-23 (citing his desire to avoid uranium mining sites due to their impact on the environment).

Federal Defendants' Response: Federal Defendants do not dispute this statement, but further explain that that the "mining activity" is, by terms of the claimant's notice, limited to exploration work. Quigley Decl., Exh. A.

NRDC Plaintiffs' Reply:

Defendants' disagreement with Plaintiffs' use of the general term "mining activity" to encompass notice-level exploration work is immaterial. Regardless, whether one calls the activity occurring at Easy Peasy "mining activity" in general, or "exploration work" or "notice-level activity" more specifically, there is no dispute over the material facts that Kimmerle Mining LLC has begun surface-disturbing activity at Easy Peasy, including the use of mechanized equipment to excavate and remove materials; that Plaintiffs' members

use the surrounding lands; and that so long as that activity continues, their enjoyment of those lands will continue to be diminished.

Dated: April 10, 2020

Respectfully submitted,

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