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' MEMORANDUM IN SUPPORT
OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Bears Ears National Monument is one of the most pristine, remote areas in the contiguous United States, featuring a rugged labyrinth of towering cliffs and rock arches, sinuous canyons, ancient juniper forests, and desert mesas. It is also "one of the densest and most significant cultural landscapes in the United States." *See* Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016) ("2016 Proclamation"). As the Tribal Plaintiffs powerfully explain, it is the ancestral homeland of several Native American tribes, whose collective proposal and years of advocacy led to the Monument's establishment in 2016. *See* Tribal Br. 3-7.[1] President Obama's conferral of monument status on 1.35 million acres of federal land provided needed protection to the region's magnificent cultural and archaeological sites, geological formations, ecosystems, and cultural and archaeological sites. Yet, in December 2017, President Trump issued a proclamation carving 1.15 million acres out of the Monument—leaving less than 15% of the original acreage intact—and exposing the excised lands and invaluable monument objects to permanent damage. *See* Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017) ("Trump Proclamation"). This proclamation, together with President Trump's contemporaneous proclamation dismantling Grand Staircase-Escalante National Monument, effected the single largest roll-back of federal public land protections in American history.

The Constitution assigns to Congress, not the President, the sole authority to manage federal public lands. The Antiquities Act, a narrow delegation of Congress's otherwise exclusive Property Clause power, authorizes Presidents to "declare" national monuments to protect objects

[1] Where appropriate, to minimize repetition, NRDC Plaintiffs have incorporated by reference the briefs submitted by plaintiffs in *Hopi Tribe v. Trump*, No. 17-cv-02590-TSC (D.D.C. Jan. 9, 2020) ("Tribal Br."); *Utah Diné Bikéyah v. Trump*, No. 17-cv-02605-TSC (D.D.C. Jan. 9, 2020) ("UDB Br."); and *The Wilderness Society v. Trump*, No. 17-cv-02587-TSC (D.D.C. Jan. 9, 2020) ("TWS Br.").

of scientific or historic interest, and to "reserve" federal public lands as part of those monuments for the "proper care and management of the objects to be protected." 54 U.S.C. § 320301(a)-(b). Congress thereby authorized Presidents to act swiftly to create national monuments and protect certain irreplaceable resources on federal land. But Congress did not authorize the President to reduce or revoke those monuments: Congress preserved that prerogative for itself. In issuing his proclamation dismantling the Monument, President Trump arrogated that exclusive congressional power. His proclamation removed roughly 85% of the Monument's acreage and revoked protections for countless deserving objects of scientific and historic interest located on those excised lands. There is no constitutional or statutory authority for the President's action.

Plaintiffs Natural Resources Defense Council *et al.* ("NRDC Plaintiffs") hereby move for partial summary judgment on their First and Second Claims for Relief, which turn on legal issues and require no factual discovery. *See* NRDC Plaintiffs' Amended and Supplemented Complaint ¶¶ 194-202, ECF No. 149-1 ("Compl."). Summary judgment on either of these claims for relief would invalidate the Trump Proclamation and redress Plaintiffs' injuries, making it unnecessary for the Court to reach Plaintiffs' remaining claims.

BACKGROUND AND FACTS

Plaintiffs hereby incorporate by reference the "Background" sections in the Tribal and UDB Plaintiffs' briefs. *See* Tribal Br. 3-10; UDB Br. 3-9.

STANDARD OF REVIEW

As the D.C. Circuit has repeatedly held, "[judicial] review is available to ensure that the [President's] Proclamations are consistent with constitutional principles and 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 Mass. Lobstermen's Ass'n v. Ross*, --- F.3d ----, 2019 WL

7198513, at *3 (D.C. Cir. Dec. 27, 2019); *Tulare County v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002). The D.C. Circuit has recognized two categories of Antiquities Act claims: "those justiciable on the face of the proclamation and those requiring factual development." *Mass. Lobstermen's*, 2019 WL 7198513, at *3. The claims on which Plaintiffs seek summary judgment here belong to the former category: they "turn on questions of statutory interpretation" and thus may be "resolved 'as a matter of law.'" *Id.* (quoting *Tulare County*, 306 F.3d at 1140).

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law," and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

ARGUMENT

I. Plaintiffs Have Standing to Challenge President Trump's Proclamation

NRDC Plaintiffs have standing to challenge the Trump Proclamation because, as "'set forth' by affidavit [and] other evidence," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), they meet all three elements of associational standing. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (describing three-factor associational standing test). First, safeguarding Bears Ears from destructive activities like mining is undeniably "germane" to the Plaintiffs' organizational purposes of protecting public lands and their resources. *Id.* at 343; *see* Statement of Undisputed Material Facts ("SUF") ¶ 52. Second, Plaintiffs' members need not participate in this litigation because none of the claims asserted or the relief sought requires individualized proof. *Hunt*, 432 U.S. at 343. Third, the Plaintiff organizations have "members [who] would . . . have standing to sue in [their] own right." *Id.* As explained below, Plaintiffs'

members would have standing to sue in their own right because (1) they have suffered "an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000).[2]

A. Plaintiffs have demonstrated injury in fact.

Plaintiffs' members enjoy visiting the Monument—including areas that the Trump Proclamation stripped of monument protection—for quiet recreation, aesthetic appreciation, scientific and historical study, and spiritual reflection in an awe-inspiring natural setting. SUF ¶¶ 48-50 (citing declarations). Some members live within a short drive of the Monument; they know the landscape intimately and return to it multiple times each year. SUF ¶ 48. They come to enjoy its beauty, remoteness, and largely unspoiled nature, and to study and learn from the rock art, cliff dwellings, cultural sites and other objects of scientific and historic interest found throughout the excluded lands. SUF ¶¶ 49. They value the opportunity to view undisturbed centuries-old cultural sites and learn about the history of the area and its earliest inhabitants. *Id*. It is well settled that injuries to aesthetic, educational, and scientific interests like these—such as the ability to "view and enjoy" an unspoiled landscape or to "observe it for purposes of studying

[2] To satisfy Article III, Plaintiffs "need only demonstrate that one or more of their members would have standing" to sue. *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 314 (D.C. Cir. 1987) (internal quotation marks omitted); *see also Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (once a court finds standing for one party, it "need not consider the standing of the remaining" parties to consider the claim in question). For purposes of this motion for partial summary judgment, Plaintiffs focus on the harms certain members face from hardrock mining. Plaintiffs' amended and supplemented complaint alleges other types of compelling injuries as well. *See* Compl. ¶¶ 162-69 (oil and gas leasing), *id*. ¶¶ 170-77 (motorized vehicle use), *id*. ¶¶ 178-85 (damage to cultural and paleontological resources). Plaintiffs do not seek summary judgment based on those other injuries at this time, but they may seek to prove those injuries later in the course of the litigation, if necessary.

and appreciating its history"—are cognizable injuries for standing purposes. *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); *Friends of the Earth*, 528 U.S. at 183.

Plaintiffs' members have already been harmed by the Trump Proclamation, and they face ongoing and future injuries as well—in particular, as explained below, from hardrock mining.[3]

1. The Trump Proclamation opened the excluded lands to mining activity.

President Obama's 2016 proclamation establishing Bears Ears "withdr[e]w" the Monument's lands from "location [and] entry . . . under the mining laws." 2016 Proclamation, 82 Fed. Reg. at 1143. The 2016 Proclamation thereby immediately prohibited the location of new mining claims for hardrock minerals anywhere within the Monument. SUF ¶ 6; *cf. Cameron v. United States*, 252 U.S. 450, 455 (1920) (describing mineral withdrawal in Grand Canyon National Monument). And while the 2016 Proclamation allowed "valid," pre-existing hardrock mining claims within the Monument to remain in place, 82 Fed. Reg. at 1143, the conferral of monument status imposed limitations and additional conditions on the development of those claims. *See infra* at 12. Thus, the 2016 Proclamation sharply limited mining activity within the Monument, safeguarding the Monument's unspoiled natural character "for the benefit of all Americans." 82 Fed. Reg. at 1143.

There are deposits of hardrock minerals—primarily uranium, but also vanadium, copper, placer gold, and limestone—inside the Monument's original boundaries. SUF ¶ 8; *see also* 43 C.F.R. § 3830.11 (defining locatable, i.e. hardrock, minerals). Both before and after 2016,

[3] Standing is evaluated as of the date on which Plaintiffs filed their amended and supplemented complaint. *See* Fed. R. Civ. P. 15(d) (supplemental pleadings may "set[] out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented"); *see also Scahill v. Dist. of Columbia*, 909 F.3d 1177, 1184 (D.C. Cir. 2018).

mining interests expressed their desire to explore and exploit these resources, SUF ¶¶ 9, 12-13. Indeed, removing "barriers" to such resource exploitation was one of President Trump's stated considerations in launching his 2017 monuments review. *See* Exec. Order 13,792, 82 Fed. Reg. 20,429, 20,429 (Apr. 26, 2017) (justifying review in part by asserting that monuments "may . . . create barriers to achieving energy independence" and "curtail economic growth"); SUF ¶ 11.

More specifically, Energy Fuels Resources (USA) Inc., which owns a large uranium mine west of the Monument and a uranium mill east of the Monument, repeatedly lobbied the Interior Department to reduce the size of the Monument. SUF ¶¶ 12-13. In its May 25, 2017 comment letter submitted during Secretary Zinke's monument review, Energy Fuels advocated for the reduction of the Monument out of concern that it "could affect existing and future mill operations." SUF ¶ 13. Its letter also highlighted that there are "many other known uranium and vanadium deposits located within [the Monument] that could provide valuable energy and mineral resources in the future." *Id.* Energy Fuels followed up on this letter with a meeting with Interior Department officials, including the Secretary's acting deputy chief of staff, "[t]o discuss the Bears Ears National Monument and Monticello Field Office." SUF ¶ 12. Energy Fuels' lobbying turned out to be effective: Barely a month after this meeting, Interior Secretary Ryan Zinke reported to the President that "mining [has been] . . . unnecessarily restricted" in landscape-scale monuments like Bears Ears. SUF ¶ 14. Secretary Zinke recommended that the President "revise[]" the Monument's boundary. *Id*.

The Trump Proclamation did just that, revoking monument status and the attendant mineral withdrawal from 85% of Bears Ears, and opening the excluded lands to the location and development of hardrock mining claims, including uranium claims, under the General Mining Law of 1872. *See* 82 Fed. Reg. at 58,085. The re-drawn Monument boundaries conspicuously

exclude several areas where the federal government has identified uranium deposits. SUF ¶ 18. The Trump Proclamation's revocation of the mineral withdrawal was self-executing. It became effective on February 2, 2018—i.e., "60 days after" President Trump's signature, 82 Fed. Reg. at 58,085—with no need for a new management plan or any other implementing agency action. SUF ¶ 22. Thus, by its terms, the Trump Proclamation allowed prospectors to locate new claims and to develop existing claims in ways that would have been impermissible under the 2016 Proclamation.

BLM and the Forest Service have complied with the President's direction: they are no longer observing the 2016 Proclamation's mineral withdrawal on the excluded lands. Instead, BLM is now recording new mining claims located by private parties on the excluded lands, and BLM and the Forest Service will review and process claimants' exploration and development proposals on claims located on those lands, in accordance with the General Mining Law of 1872. SUF ¶ 23.

The 1872 Mining Law aims "[t]o encourage mining" on federal public lands in the western United States. *Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 699 (D.C. Cir. 2009). It is extraordinarily permissive: it allows private citizens to enter onto federal land and "stake, or 'locate,' claims to extract minerals without prior government permission." *Id.*; *see also* 30 U.S.C. §§ 22-54, 611-15 (1872 Mining Law); 43 C.F.R. part 3800 (BLM regulations); 36 C.F.R. §§ 228.1-228.15 (Forest Service regulations for locatable minerals). Private parties have broad latitude to prospect, explore, develop, and extract minerals on public lands, *see* 43 C.F.R. § 3802.0-6, all of which can disturb or destroy public lands and resources. They may establish hardrock mining claims simply by "locating" the lands they wish to claim—that is, marking the ground with wooden stakes, flags, or other signage—and they may "record" their

claim by filling out simple forms and filing them with the local county recorder and BLM office, along with a small fee. *See* 43 C.F.R. §§ 3832.1(a), 3832.11(c); *see generally Mount Royal Joint Venture v. Kempthorne*, 477 F.3d 745, 750 n.3 (D.C. Cir. 2007) (defining mineral location and entry). Claimants do not need permits or prior authorization from BLM or any other government agency before prospecting for minerals or locating and recording a claim; nor do those activities undergo any review under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*.; *Orion Reserves*, 553 F.3d at 699.

Most of the 1.15 million acres that President Trump excluded from the Monument are managed by BLM, and subject to BLM's regulations governing hardrock mining activities. SUF ¶ 20 (BLM manages roughly 78% of excluded lands). Pursuant to BLM's regulations, once a claimant has located a mining claim on non-withdrawn (e.g., non-Monument) land, she may undertake a variety of mining activities. *First*, a claimant may undertake "[c]asual use" activities at any time, and she "need not notify BLM" before doing so. 43 C.F.R. § 3809.10(a). "Casual use" activities are those that "ordinarily result[] in no or negligible disturbance," such as collecting samples without mechanized earth-moving equipment. *Id*. § 3809.5.

Second, a claimant may also undertake more extensive "notice"-level activities—that is, activities "causing surface disturbance" of up to five acres, or removing up to a thousand tons of presumed ore—simply 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). Notice-level activities may include road construction, the use of mechanized earth-moving equipment, and the use of truck-mounted drilling equipment. *See* 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. BLM conducts no NEPA review, and no affirmative approval from BLM is required. *See id*. § 3809.301.

Third, a claimant may engage in even more extensive "plan of operations"-level mining activities that involve, for example, removing a thousand tons or more of presumed ore or disturbing more than five acres. *See* 43 C.F.R. §§ 3809.10(c), 3809.11, 3809.21(a). For these activities, BLM conducts a NEPA analysis and requires detailed information about the proposed disturbance, including mitigation measures. *Id*. §§ 3809.401, 3809.411, 3809.412; SUF ¶ 29.

The remainder of the 1.15 million acres excluded from the Monument are managed by the Forest Service. SUF ¶ 20 (Forest Service manages roughly 22% of excluded lands). On those lands, surface-disturbing mining activities are governed by the Forest Service's regulations, which set out a tripartite scheme similar to—but affording local officials more discretion than—BLM's regulations. *See Karuk Tribe of California v. U.S. Forest Serv*., 681 F.3d 1006, 1012–13 (9th Cir. 2012) (en banc) (describing "three categories of mining activity" under Forest Service regulations).

First, for activities that "will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study," claimants may proceed without giving any notice to the federal government. 36 C.F.R. § 228.4(a)(1)(ii), (iv). *Second*, for activities that "might cause" significant disturbance of surface resources, claimants must submit a "notice of intent to operate." *Id*. § 228.4(a); SUF ¶ 33 (notice should "describe briefly what the operator intends to do"). The Forest Service will not prepare

any NEPA analysis for a claimant's notice of intent. "[W]ithin fifteen days of receipt," the Forest Service must determine whether the noticed activity is sufficiently "significant" that it belongs in the *third* category: activities for which a more detailed "plan of operations is required before the operations may begin." 36 C.F.R. § 228.4(a)(2).[4] If so, the Forest Service generally must conduct a NEPA analysis and either approve a proposed plan of operations or notify the claimant of any required changes to the proposal within thirty days. 36 C.F.R. §§ 228.4(f), 228.5(a). Otherwise, the noticed activity may proceed without a plan of operations and without NEPA review.

Whether on BLM or Forest Service land, surface-disturbing mining activities can have substantial on-the-ground impacts. Surface-disturbing activities can scrape lasting scars into the landscape, produce unsightly waste and debris, disturb native vegetation and wildlife habitat, increase erosion, and harm water quality. SUF ¶ 34. Surface-disturbing activities can also harm fragile cultural, archaeological, and paleontological resources, which are widely dispersed throughout the excised lands. SUF ¶ 35; Peterson Decl. ¶ 30 (describing his distress at witnessing "ongoing ground-disturbing mining activity in close proximity to important and sensitive cultural sites"). These harms can flow not only from plan-level operations, but from notice-level activities, too. SUF ¶ 37; 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."); *see, e.g.*, *infra* at 13 (describing notice-level mining activities at the Easy Peasy mine site).[5]

[4] The regulations do not define what qualifies as "significant"; the Forest Service makes this determination on a "case-by-case" basis. SUF ¶ 33. The Forest Service's website states that "[i]n most cases, environmental impact statements are not necessary." *Id*.

[5] In fact, even before surface-disturbing activity begins, the staking of new claims can negatively affect the look of a place. A mining claimant generally must mark her claim with some "conspicuous and substantial" markers, making it easily visible to others. SUF ¶ 25. *See* Peterson

Moreover, the auditory and visual effects of these mining activities can extend well beyond the boundaries of the mining claims themselves. Dust and haze, mechanical noise, light pollution, and increased traffic can impact large areas that would otherwise be quiet and pristine. SUF ¶ 36. These impacts threaten the unique character of the Monument, which the 2016 Proclamation described as "one of the most intact and least roaded areas in the contiguous United States." 82 Fed. Reg. at 1141; *see also id.* (noting the Monument's "rare and arresting quality of deafening silence" and its "absolutely black night sky"). Visual and auditory disturbances 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. SUF ¶ 36. *Cf. WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 62 (D.D.C. 2019) (describing far-reaching visual impacts from oil and gas drilling in "open, undeveloped landscape").

2. Mining activity in the Monument presents ongoing and imminent future injuries to Plaintiffs' interests.

The Trump Proclamation is already having direct and deleterious effects on the ground in Bears Ears. In particular, mining activity has proceeded on at least one claim: the so-called "Easy Peasy" uranium and vanadium mining site. SUF ¶ 41. Easy Peasy is located on BLM-managed lands near the Cheese and Raisins Hills, on land that the Trump Proclamation excluded from the Monument. SUF ¶ 42. The claimant, Kimmerle Mining LLC, first recorded a claim here in 2005, before Bears Ears was designated as a monument; there was already an old, abandoned mine on the site, and the claimant described the site as having been "reclaimed." SUF ¶ 43. Kimmerle did not develop the mine or submit a notice of intent to conduct mining operations, however, until

Decl. ¶ 28 (describing recent visit to excluded lands, where he saw "the Hammond claims, new uranium claims that could not have been staked under President Obama's Proclamation.").

after the Trump Proclamation lifted the mineral withdrawal for the excluded lands. *Id*. In June 2018, Kimmerle Mining notified BLM and state officials of its intention to reopen the Easy Peasy mine and access road, remove "999 tons of presumed ore," and truck the ore to Energy Fuels' White Mesa Mill, located just east of the original Monument boundaries. SUF ¶ 44. BLM initially found the notice incomplete and ordered Kimmerle Mining to temporarily halt operations, but after corrections to the paperwork and payment of a bond, BLM allowed work to resume in February 2019. SUF ¶ 45.

If BLM were still complying with the 2016 Proclamation's mineral withdrawal, Kimmerle Mining would have been strictly limited in its ability to develop this site (if at all). Specifically, BLM could not have allowed Kimmerle Mining to undertake any surface-disturbing activity greater than casual use without submitting a full plan of operations; proceeding based on a notice of intent alone is not permitted inside national monuments. *See* 43 C.F.R. § 3809.11(c)(7). Additionally, BLM would have been required to prepare a "mineral examination report" and determine that the claim was indeed valid (i.e., containing a mineral deposit that can be extracted, removed, and marketed at a profit) at the time of the withdrawal, and that it remained valid, before Kimmerle Mining could undertake any surface-disturbing activity. 43 C.F.R. § 3809.100(a). And BLM would have prepared a NEPA analysis, subject to public review and comment, that considered, analyzed, and disclosed the impacts of the proposed mining on environmental, paleontological, and cultural resources. 43 C.F.R. §3809.411(a)(3)(ii); (iii).

Because of the Trump Proclamation, however, BLM did none of these things. BLM did not produce a mineral examination report or make a validity determination before allowing Kimmerle Mining to begin operations; it simply authorized the mining activity to proceed. *See*

SUF ¶ 45. Nor did BLM require Kimmerle to provide a full plan of operations, including detailed information and plans for remediation, as would be required for mining operations of this size inside a national monument. *See* 43 C.F.R. § 3809.11(c)(7). Nor did BLM prepare any NEPA analysis before allowing Kimmerle to proceed, which resulted in the public having no opportunity to review and comment on a NEPA analysis.

Surface-disturbing operations have now begun at Easy Peasy. They include the use of heavy equipment to excavate and remove materials, and the deposition of waste rock and tailings. Grand Canyon Trust member Tim Peterson visited the area in October 2019 and describes being "shocked, saddened, and dismayed" to see "recently excavated piles of waste rock and tailings, discarded bright orange and highly visible plastic fencing, machinery and mining and ventilation equipment, fuel and water tanks, a discarded hydraulic fuel container, and other trash at the site." SUF ¶ 46 ; Peterson Decl. ¶ 29 (with photos of Easy Peasy site).

Mining activity at Easy Peasy is causing harm to Plaintiffs' members, including Mr. Peterson, Mr. Hoskisson, Mr. Bloxham, Mr. Allen, Mr. Clark, and Mr. Walker, all of whom use the surrounding lands for recreation, study, education, quiet solitude, hiking, and immersing themselves in the area's natural beauty, quiet, and all of whom intend to return there in the future. SUF ¶ 48 (detailing members' plans to return to this area); ¶ 49-50 (describing the importance of the Monument to members). Mr. Hoskisson has documented centuries-old cultural resources near the Easy Peasy mine site, including pot shards along the access route to the mine that are in danger of being displaced and crushed by heavy vehicles. SUF ¶ 49. Moreover, mining machinery will also be visible at a distance from the mine site, including in the Cheese and Raisins Hills, Comb Ridge, the Abajo Mountains, East Point, and the Cottonwood Wash Road, which Plaintiffs' members use for recreation and to which they plan to return. SUF ¶¶

40, 50; *see also* Supp. Mason Decl. ¶ 11 & Exh. B (viewshed analysis projecting that Easy Peasy mining activities can be seen up to 21 miles away). The noise and traffic of mining trucks going to and from the site on the sparsely traveled Cottonwood Wash Road will impact Plaintiffs' experience of the area as well. SUF ¶ 50. So long as mining activity continues, Plaintiffs' members' enjoyment and study of the surrounding lands, and the uniquely valuable Monument resources that are found there, will be diminished, or the members will be forced to curtail their use of those areas altogether. SUF ¶ 51.

Easy Peasy is not the only site where mining activity threatens Plaintiffs' members' interests. Between February 2018 (when the Trump Proclamation's revocation of the mineral withdrawal took effect) and November 2019 (when Plaintiffs filed their amended and supplemental complaint), BLM records show that 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." SUF ¶ 38. BLM accepted these new recordations and, as directed by the Trump Proclamation, processed them in accordance with the 1872 Mining Law. *Id*.; Newell Decl., Exhs. A-H. None of these claims could have been located and recorded under the 2016 Proclamation's mineral withdrawal.

For example, two new mining claims on Forest Service land near Dark Canyon—the so-called Hammond Mine A and RWH Mine B—threaten Plaintiffs' members' interests in visiting the Dark Canyon area for hiking and backpacking, solitude, and aesthetic appreciation. SUF ¶ 39; Peterson Decl. ¶¶ 15, 28 (describing recent visit to the Hammond claim, and attaching photograph); Kent Decl. ¶ 15 (describing frequent visits to "glorious" area near Hammond and RwH claims). So does a new mining claim called "Lucky Lady 2," which was located by Kimmerle Mining, the operator of the Easy Peasy mine. SUF ¶ 38. Lucky Lady 2 is situated in

an area with particularly dense cultural and archaeological sites, and which would be "visible from East Point, a wonderfully pristine and remote" viewpoint. SUF ¶ 40; Kent Decl. ¶ 17. At any time, with a mere fifteen days' notice to the Forest Service, these claimants can begin notice-level surface-disturbing activity on their claims. The Forest Service will not conduct any NEPA analysis before the claimants may proceed with notice-level activities. *See supra* at 9-10. And even if such exploratory activity never leads to more extensive plan-of-operations-level development, it will leave long-lasting scars on the land—including pits, 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. SUF ¶¶ 40, 50-51.

The D.C. Circuit has repeatedly recognized these sorts of harms as cognizable injuries in fact. *See, e.g.*, *Sierra Club*, 764 F.3d at 6 (plaintiffs injured where their members enjoyed learning from and "observing the landscape from surrounding areas," where mining would mar those views); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305-06 (D.C. Cir. 2013) (similar); *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 715 (D.C. Cir. 1988) (similar); *see also WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 62 (plaintiffs injured where oil and gas drilling would create "haze and dust in the air" visible "up to hundred miles" away, affecting areas their members intended to visit). It is well settled, too, that plaintiffs suffer injury in fact if they curtail their use of certain areas because of aesthetic degradation. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 184 (plaintiffs injured where "continuous . . . discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway"); *Sierra Club v. FERC*, 827 F.3d 59, 66 (D.C. Cir. 2016) (similar).

Plaintiffs have thus demonstrated both *ongoing* and imminent *future* injuries to their interests in enjoying and learning about the Monument in its pristine, natural state and in

protecting the innumerable objects of historic and scientific interest found there. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) ("future injuries" may be "imminent" for Article III purposes "if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur"). The D.C. Circuit routinely draws on common sense to find standing where, as here, plaintiffs challenge government action that will injure them by removing barriers to harmful third-party activity. *See, e.g., Air All. Houston v. Envtl. Prot. Agency*, 906 F.3d 1049, 1058 (D.C. Cir. 2018) (per curiam) ("When challenging [a] failure to regulate, a petitioner need demonstrate only a substantial probability that local conditions will be adversely affected, and thus will harm members of the [plaintiff] organization." (quotation marks and citation omitted)); *NRDC v. EPA*, 755 F.3d 1010, 1017 (D.C. Cir. 2014) (deeming it "'a hardly-speculative exercise in naked capitalism' to predict that facilities would take advantage of" a challenged rule loosening regulatory restrictions); *Idaho Conservation League*, 811 F.3d at 510 (similar, regarding agency's failure to finalize hazardous waste regulations for hardrock mining facilities); *Sierra Club*, 764 F.3d at 7-8 (finding "substantial probability" of injury to plaintiffs' aesthetic interests due to likelihood of resumed coal mining); *cf. Carpenters Indust. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) (applying "[c]ommon sense and basic economics" to conclude that regulation restricting logging posed a risk of future harm to timber industry).

Here, it was entirely "predictable" that mining activity would commence in the excluded monument lands because of President Trump's proclamation. *Dep't of Commerce*, 139 S. Ct. at 2566 (finding standing based on "the predictable effect of Government action on the decisions of third parties."); *see supra* at 6 (describing purpose of monument "review"). Opening the excluded lands to mineral extraction was one of the animating considerations of President Trump's review and Secretary Zinke's recommendation to dismantle the Monument, SUF ¶ 11,

and it was the express purpose of President Trump's revocation of the 2016 Proclamation's mineral withdrawal, 82 Fed. Reg. at 58,085. It is no surprise, then, that new mining claims have now been located in the lands stripped of monument protection. And because mining activity is *already* occurring on the excluded lands, it is "predictable," too, *Dep't of Commerce*, 139 S. Ct. at 2566, that claimants will continue to locate and develop mining claims on the excluded lands, seeking to exploit the hardrock resources that BLM has determined are present, SUF ¶ 8. *See In re Idaho Conservation League*, 811 F.3d at 509 (member who lived near two mine sites, one "currently operating" and one where operator had "concrete plan" to proceed, had standing); *Sierra Club*, 764 F.3d at 7-8 (similar). Given these new mining claims and activity since February 2018, the demonstrated industry interest in developing those claims, and the fact that mining claimants do not need any affirmative approval from the government before certain surface-disturbing operations can begin, Plaintiffs have demonstrated ongoing and imminent injuries that will continue, absent an order from this Court.

B. Plaintiffs' injuries are traceable to the Trump Proclamation and would be redressed by a favorable decision.

It is "well-established" that traceability and redressability are satisfied where a plaintiff challenges government action authorizing third-party conduct "that allegedly caused the plaintiff's injuries" if "that conduct would allegedly be illegal otherwise." *NRDC*, 755 F.3d at 1017 (quotation marks omitted); *accord Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) (en banc). Here, on the lands excised from the Monument, the Trump Proclamation expressly allows mining activities that would have been illegal under the 2016 Proclamation. 82 Fed. Reg. at 1143. Plaintiffs' injuries are thus directly traceable to the Trump Proclamation, and they would be redressed by the relief Plaintiffs seek. *See Sierra Club*, 764

F.3d at 5 (traceability and redressability are "two sides of a causation coin," and depend on whether the requested relief "would afford . . . protections from surface mining").

Specifically, Plaintiffs ask this Court to declare the Trump Proclamation unlawful and to enjoin its implementation. To be sure, "injunctive relief against the President *personally* is an extraordinary measure not lightly to be undertaken," *Swan v. Clinton*, 100 F.3d 973, 980 (D.C. Cir. 1996) (emphasis added), but Plaintiffs seek injunctive relief only "against Agency Defendants," Compl. 55 (prayer for relief). It is well settled that "courts have power to compel subordinate executive officials to disobey illegal Presidential commands." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (quotation marks omitted); *see also, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584, 588 (1952) (affirming injunction prohibiting Commerce Secretary from carrying out President's unlawful steel seizure order).

Here, the relief Plaintiffs seek—a declaration that the Trump Proclamation is unlawful, and an injunction prohibiting the Agency Defendants from implementing it, *see* Compl. 55—would eliminate future harm to Plaintiffs' members by reinstating monument protections for the entire 1.35-million-acre Monument. *See Swan*, 100 F.3d at 980-81 (availability of injunctive relief against subordinate officials charged with carrying out President's decision "is sufficient to satisfy the redressability requirement of standing"). Thus, BLM could no longer accept and process new mining claims on those lands; such claims would again be prohibited by the 2016 Proclamation's mineral withdrawal. 82 Fed. Reg. at 1143.

That alone suffices to establish redressability. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[T]he relevant inquiry is whether . . . the plaintiff has shown *an* injury to himself that is likely to be redressed by a favorable decision," not "that a favorable decision will relieve

his *every* injury." (citation omitted)). But in addition, an order reinstating the Monument's boundaries would meaningfully limit—and perhaps halt—the development of existing claims located before the 2016 Monument designation (such as Easy Peasy) or after the Trump Proclamation took effect (such as the Hammond claims and Lucky Lady 2). Those claims, being located within a national monument, would be subject to more restrictive requirements: no surface-disturbing activity could go forward without a validity determination, a full plan of operations, and a NEPA analysis (subject to public review and comment) of the operation's impact on environmental, cultural, and paleontological resources. *See* 43 C.F.R. §§ 3809.11(c)(7), 3809.100(a), 3809.411(a)(3)(ii); (iii). Any hardrock mining activity on these claims would therefore be limited, if it were allowed to occur at all. And no mining activity could occur that would be inconsistent with "the proper care and management of the [Monument] objects to be protected." 54 U.S.C. § 320301(b).

In sum, it is likely that injunctive relief directed at the Agency Defendants would redress Plaintiffs' injuries, and such relief is well within the Court's power.

II. President Trump Had No Authority to Dismantle Bears Ears National Monument.

"The President's power, if any," to issue a proclamation dismantling a national monument "must stem either from an act of Congress or from the Constitution itself." *Youngstown*, 343 U.S. at 585; *accord Medellín v. Texas*, 552 U.S. 491, 524 (2008). Here, the President had neither constitutional nor statutory authority to dismantle the Bears Ears National Monument. As explained below, Plaintiffs are entitled to summary judgment on their First and Second Claims for Relief.

A. The President has no independent constitutional authority to manage federal lands.

The Property Clause of the Constitution grants exclusive power over the nation's public lands to Congress, not the President. U.S. Const. art. IV, § 3, cl. 2 (empowering Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). Congress's "complete power" over federal lands is "without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976) (quotation marks omitted). When it comes to managing or disposing of federal lands, the President may exercise only such power as Congress has delegated to him. *See Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942) (President's power to dispose of public lands "must be traced to Congressional delegation of [such] authority"). The Constitution does not confer any free-standing presidential power to create or abolish national monuments.

Defendants have acknowledged as much: "No authority has been asserted by the President to support the Proclamation in the event the Antiquities Act is held not to authorize it." Mem. in Support of Defs.' Mot. to Dismiss at 41, ECF No. 49-1 (Oct. 1, 2018); *see* SUF ¶ 17. Because the Trump Proclamation relies "entirely upon authority said to be delegated by statute, and make[] no appeal to constitutional powers of the Executive," the "central issue in this case" is whether the Antiquities Act "indeed grants to the President the powers he has asserted." *AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979) (en banc). It does not.

B. The President has no statutory authority to dismantle Bears Ears.

As explained in detail in the other briefs filed today in support of plaintiffs' motions for summary judgment, the Antiquities Act does not grant the President authority to dismantle national monuments; that power resides exclusively in Congress. Its protective purpose, legislative history, and numerous other congressional enactments all reaffirm the statutory text:

Congress delegated to the President the authority to create national monuments, but not to abolish them in whole or in part. To avoid unnecessary repetition of these legal arguments, Plaintiffs hereby incorporate by reference their arguments in *The Wilderness Society v. Trump*, No. 1:17-cv-02587 (TSC) TWS Br. 22- 40 (Argument Sections II(A), II(B)(1)-(4)).

III. Plaintiffs Are Entitled to Summary Judgment on their First and Second Claims

For the foregoing reasons, the Antiquities Act gives the President no authority to remove 1.15 million acres of land from the Monument. The Trump Proclamation is therefore *ultra vires*. *See Aid Ass'n for Lutherans v. USPS*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003); *cf. Mountain States*, 306 F.2d at 1136. Plaintiffs are entitled to summary judgment on their First Claim for Relief. *See* Compl. ¶¶ 194-97 (*ultra vires* action).

In addition, President Trump's arrogation of Congress's exclusive Property Clause power violates the Constitution's separation of powers doctrine. When the President "takes measures incompatible with the . . . will of Congress" and has no inherent power of his own to act, his power is "at its lowest ebb." *Youngstown,* 343 U.S. at 637 (Jackson, J., concurring). President Trump's proclamation revoking monument status from roughly 85% of the Monument purported to do by executive fiat what only Congress can do. Plaintiffs are entitled to summary judgment on their Second Claim for Relief. *See* Compl. ¶¶ 198-202 (separation of powers).[6]

A grant of summary judgment on either of these claims would invalidate the Trump Proclamation, and an injunction barring the Agency Defendants from implementing the Trump Proclamation is the appropriate remedy. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S.

[6] The Court need not decide the constitutional question if it determines that Plaintiffs are entitled to relief on their *ultra vires* claim. *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

139, 156-57 (2010). First, as described in detail above, *supra* at 13-15, Plaintiffs will suffer "irreparable injury" to their recreational and aesthetic interests from hardrock mining activity absent an injunction. *Id.* at 156. Second, "remedies available at law, such as monetary damages, are inadequate to compensate for that injury." *Id*. As the Supreme Court has observed, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). Indeed, as Plaintiffs' members have described, the "scars from hardrock mining can last decades in this harsh and arid environment," Supp. Clark Decl. ¶ 16, and cultural objects, once destroyed, can never be recovered. *See also* SUF ¶¶ 34-35, 37 (documenting long-lasting harm from mining activity).

Third, the "balance of hardships" between the parties favors an injunction. *Monsanto*, 561 U.S. at 157. Plaintiffs have demonstrated ongoing and future injuries caused by the Trump Proclamation, which will continue absent injunctive relief. Defendants, for their part, "cannot suffer harm from an injunction that merely ends an unlawful practice." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015). Finally, "the public interest" would be served by injunctive relief, *Monsanto*, 561 U.S. at 157, as it would restore the Monument's lawful boundaries and ensure its continued protection "for the benefit of current and future generations," 16 U.S.C. § 7202(a), as Congress envisioned. *See Nat'l Wildlife Fed'n*, 835 F.2d at 326 (district court did not abuse discretion in holding that "the injunction would serve the public interest in protecting the environment from any threat of permanent damage"). Injunctive relief is warranted.

CONCLUSION

In passing the Antiquities Act, Congress authorized the President to create national monuments, not to dismantle them. The President's proclamation subverts the statute's text and intrudes on Congress's sole authority by eliminating monument protections from roughly 85% of Bears Ears. No colorable reading of the statute supports the President's action. Because the law is clear, and there are no material facts in dispute, Plaintiffs ask that the Court grant them summary judgment as to their First and Second Claims for Relief, declare that President Trump's proclamation is unlawful and void, and enjoin the Agency Defendants from implementing that unlawful proclamation.

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Respectfully submitted,

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