IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE WILDERNESS SOCIETY, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, *Defendants*.	**CASE NO.** 17-2587 (TSC)
GRAND STAIRCASE ESCALANTE PARTNERS, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, *Defendants*.	**CASE NO.** 17-2591 (TSC)
AMERICAN FARM BUREAU FEDERATION, *et al.*, *Defendant-Intervenors*.	

PLAINTIFFS' REPLY
IN SUPPORT OF THEIR MOTION FOR A STATUS CONFERENCE

Plaintiffs have requested that the Court set a status conference to discuss two discrete issues that have arisen since they were last before the Court: (1) Federal Defendants' interpretation of their obligations to notify Plaintiffs of ground-disturbing activity under the

Court's Notice Order, ECF No. 57 (Oct. 30, 2018), and (2) the federal government's expected forthcoming management plans for Grand Staircase-Escalante National Monument and their relevance to the pending cases. *See* Pls.' Mot. for a Status Conference, ECF No. 105 (July 30, 2019) ("Pls.' Mot."). Federal Defendants do not oppose Plaintiffs' request, but they call Plaintiffs' concerns "baseless" and "question whether a status conference is necessary." Federal Defs.' Resp. at 1-2, ECF No. 107 (Aug. 13, 2019) ("Defs.' Resp.").

Respectfully, Plaintiffs submit that a status conference is warranted. Roughly one year has passed since the last status conference held on September 24, 2018, and the facts on the ground are changing—including in ways that may impact the direction of this litigation. Plaintiffs wish to update the Court on these developments, to seek clarification of Federal Defendants' continuing obligation to comply with the Notice Order, and to discuss an orderly procedure by which Plaintiffs may file any additional legal claims challenging aspects of the forthcoming management plans without unduly complicating the Court's resolution of the pending motions to dismiss in these cases. Plaintiffs do not request a status conference lightly. One is warranted here.

1. **Seeking clarification of Defendants' obligations under the Court's Notice Order**

Contrary to Federal Defendants' suggestion, Plaintiffs are not asking the Court to order any new "relief." Defs.' Resp. at 8. Rather, Plaintiffs seek the Court's assistance in clarifying Federal Defendants' *existing* obligations under the Notice Order. Despite the exchange of multiple emails between Plaintiffs' and Federal Defendants' counsel over the course of two weeks, from July 9 until July 23, the parties were unable to reconcile their differing interpretations of the Notice Order, and so Plaintiffs request the Court's assistance.

The Notice Order requires Defendants to provide notice "[a]t least 2 business days prior to the effective date of . . . (iii) [the Bureau of Land Management's (BLM's)] decision to authorize a use of a road or trail by a third party or BLM that was not permitted as of December 4, 2017." Notice Order ¶ 1(e). Defendants do not dispute that the BLM authorized a third-party contractor, ARS, to drive motorized vehicles across approximately 2,500 miles within the Monument's original boundaries that were "closed" to motorized travel under BLM's management plan. Defs.' Resp. at 2-3.[1] Plaintiffs believe that, pursuant to the Court's Notice Order, Federal Defendants should have notified us of this route inventory work prior to its start-date of March 25, 2019. *See* Pls.' Mot. at 5-6 (citing Attach. 1, ECF No. 105-1 at 2). Defendants disagree, advancing two technical arguments.

First, Defendants argue that ARS's route inventory does not qualify as "use . . . that was not permitted as of December 4, 2017," Notice Order ¶ 1(e), because in their view, BLM *could* theoretically have authorized ARS to conduct such an inventory before December 4, 2017. Defs.' Resp. at 5-6. Defendants' argument rests on a misreading of the Notice Order's text: they contend that "[t]he purpose of the Notice Order was to provide Plaintiffs with notice of new activities that *would not have been* permitted" prior to the President's 2017 proclamation, *id*. at 5 (emphasis added), but that is not what the Notice Order says. Instead, by its terms, the Notice Order applies to activity "that *was not permitted* as of December 4, 2017." Notice Order ¶ 1(e) (emphasis added). For purposes of Defendants' notice obligations, it does not matter whether

[1] BLM's contract authorizes ARS to drive "an estimated 3,150 miles" of routes, plus another "[o]ptional" 600 miles, within the Monument's original boundaries. Attach. 3, ECF No. 105-1 at 18. Under the monument management plan, in contrast, only 908 miles of routes are open to public motorized use (Ex. 4 TRAN-5, ECF No. 107-1 at 73), plus another 182 miles of trail open to administrative motorized use only (Ex. 4 TRAN-15, ECF No. 107-1 at 75); all remaining routes are closed.

BLM *could* have authorized ARS to drive vehicles on closed routes before December 4, 2017, but whether it *did*. It did not. As Defendants state, BLM first signed the contract permitting ARS to conduct a route inventory in September 2018, nearly a year after the President's 2017 proclamation. *See* Defs.' Resp. at 2 (citing ECF No. 105-1 at 7).[2] Because BLM had "not permitted" ARS to perform its route inventory "as of December 4, 2017," Notice Order ¶ 1(e), the route inventory fits within the terms of the Notice Order.

Second, Defendants contend that they had no obligation to notify Plaintiffs about the route inventory because BLM signed its underlying contract with ARS in September 2018, a few weeks before the issuance of the Notice Order. Defs.' Resp. at 7-8; *see also* Attach. 3, ECF No. 105-1 at 8 (listing a "Period of Performance" from "09/17/2018 to 09/16/2019"). Yet BLM's subsequent "Authorization for Route Inventory," which is dated March 18, 2019, identifies the "Dates/Times of Use" as "March 25, 2019 - September 16, 2019"—a period of performance beginning long *after* the Court issued its Notice Order. Attach. 1, ECF No. 105-1 at 2. Whatever the reason for the mismatch in effective dates between these two documents—and Defendants offer none—the fact remains that on March 18, 2019, BLM issued an Authorization Letter stating that ARS was authorized to perform route inventory work *starting* one week later, on

[2] BLM's route inventory is, of course, a direct outgrowth of the President's 2017 proclamation purporting to re-draw the Monument's boundaries. The President's proclamation specifically authorized the Interior Secretary (and therefore BLM) to "allow motorized and non-mechanized vehicle use on roads and trails existing immediately before" the Monument's creation in 1996. Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,094 (Dec. 4, 2017). Pursuant to the President's instruction, BLM initiated a route inventory in anticipation of re-opening closed routes. *See* Attach. 1, ECF No. 105-1 at 2. Defendants acknowledge as much, noting: "BLM is presently in the process of preparing new land use plans . . . and the travel route inventory data will be used to inform travel plans that BLM will prepare after [the plans] . . . are adopted." Defs.' Resp. at 2.

March 25, 2019. *Id*.[3] Under a plain reading of the Notice Order, Plaintiffs believe BLM's action in March 2019 triggered its duty to notify Plaintiffs' counsel of the planned ground-disturbing activity. *See* Notice Order ¶ 1(e) (requiring notice "[a]t least 2 business days prior to the *effective date* of . . . [BLM's] decision to authorize a use of a road or trail by a third party" (emphasis added)).

Plaintiffs therefore believe that Defendants were obligated to notify them of ARS's route inventory work. To the extent the terms of the Notice Order allow for ambiguity, Plaintiffs respectfully submit that such ambiguity should be resolved consistent with the purpose of the Order, which is to provide Plaintiffs with meaningful notice *before* potentially irreparable ground-disturbing activity occurs within the Monument's original boundaries. *See* Tr. of Status Hr'g at 14 (Sept. 24, 2018) ("[S]ince the government is in the best position to know what is taking place or what activities have taken place, then the simplest solution is to have the government inform [Plaintiffs] of that activity.").

Plaintiffs are relieved to hear Federal Defendants' representation that "BLM has since confirmed that no additional on-the-ground Inventory work is planned under the Inventory Contract." Defs.' Resp. at 4. Given Federal Defendants' cramped interpretation of their obligations under the Court's Notice Order, however, Plaintiffs have no reason to believe Defendants will notify us if that changes, or when a similar situation arises down the road.[4]

[3] Defendants do not argue that BLM's start-date is inaccurate or that ARS's route inventory work actually began before this date.

[4] Indeed, since filing their initial motion for a status conference, Plaintiffs have also been notified that a developer intends to develop and pursue alabaster mining operations at the "Creamsicle mine site" on lands purported to be excluded from the Monument by President Trump, and that BLM has been actively working with the developer to perfect regulatory notice requirements, without providing copies of those conversations to Plaintiffs within the timeframes under Paragraph 1(b) of the Notice Order.

Therefore, Plaintiffs respectfully request a status conference to seek the Court's guidance to confirm and clarify Federal Defendants' ongoing notice obligations with respect to future ground-disturbing activities.

2. Seeking the Court's guidance on the procedural implications of BLM's forthcoming management plans

As explained in Plaintiffs' motion, BLM recently issued its final proposed management plan for Bears Ears National Monument, *see* 84 Fed. Reg. 36,118 (July 26, 2019), and BLM expects to release the final plan and record of decision for Grand Staircase-Escalante before the end of the year. *See* Defs.' Resp. at 4. Based on BLM's stated intentions for managing Grand Staircase-Escalante and the purportedly excluded lands, Plaintiffs anticipate challenging certain aspects of BLM's management plans once they are formally adopted. Because the plans, and therefore challenges to those plans, will necessarily implicate the core legal issue already pending before this Court—the President's lack of authority to remove land from a national monument—Plaintiffs believe it would be prudent to advise the Court of their intentions in advance. Plaintiffs would like to discuss with the Court the best approach to managing any issues the management plans may present consistent with judicial economy and the efficient resolution of the pending motions to dismiss. We have proposed that conversation now to avoid injecting unnecessary urgency into that conversation or wasting judicial resources with unnecessary motions practice.

* * *

For the foregoing reasons, Plaintiffs respectfully request a status conference at the Court's earliest convenience to discuss (1) Federal Defendants' compliance with this Court's Notice Order and (2) procedural issues related to BLM's impending final management plans and their impact on the pending litigation.

Dated: August 20, 2019

Respectfully submitted,

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