JEFFREY BOSSERT CLARK
Assistant Attorney General
JEFFREY H. WOOD
Principal Deputy Assistant Attorney General
Environment & Natural Resources Division

LISA LYNNE RUSSELL, Chief
GUILLERMO A. MONTERO, Assistant Chief
SEAN C. DUFFY (NY Bar No. 4103131)
MARISSA A. PIROPATO (MA Bar No. 651630)
CLARE BORONOW (admitted to MD Bar)
FRANK J. SINGER (CA Bar No. 227459)
ERIKA NORMAN (CA Bar No. 268425)
Trial Attorneys
Natural Resources Section
601 D Street NW
Washington, DC 20004
Telephone: (202) 305-0445
Facsimile: (202) 305-0506
sean.c.duffy@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 6:15-cv-01517-AA

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' FIRST MOTION IN LIMINE SEEKING JUDICIAL NOTICE (ECF No. 415)

Defendants hereby respond to Plaintiffs' Motion for Reconsideration of this Court's Opinion and Order Granting in Part and Denying in Part Plaintiffs' First Motion in Limine Seeking Judicial Notice (ECF No. 415). In that motion, Plaintiffs ask the Court to reconsider its refusal to take judicial notice of nine documents: Exhibits 3, 9, 11, 20, 100, 107, 110, 130, and 326 to their First Motion in Limine for Judicial Notice. *See* ECF No. 254 (Pls.' First Mot. in Limine); ECF No. 368 (Order Granting in Part & Denying in Part Pls.' First Mot. in Limine).

Plaintiffs argue that reconsideration is appropriate because, they contend, this Court appears not to have considered their supplemental declarations filed after briefing was complete on their motion. *See* ECF No. 334 (Suppl. Decl. of Andrea K. Rodgers); ECF No. 351 (Second Suppl. Decl. of Andrea K. Rodgers). Insofar as the Court declined to consider those supplemental declarations, however, the Court committed no error because the supplemental declarations were improper surreplies filed without leave of the Court (or conferral with Defendants). *See* LR 7-1(e)(3) ("Unless directed by the Court, no further briefing is allowed" on a motion other than a response and reply). As Defendants previously explained to the Court, each supplemental declaration improperly presented new arguments in support of particular documents after the close of briefing. ECF No. 336 at 13 (noting in joint status report Defendants' position that Plaintiffs' supplemental declaration "is essentially a surreply to their own reply").

Defendants also object to the extent Plaintiffs suggest these supplemental declarations were necessitated by Defendants' change in position on certain documents after Plaintiffs had filed their reply. ECF No. 415 at 2-3. In fact, Defendants provided their position on every document in their response brief. *See* ECF No. 327. In so doing, Defendants significantly

narrowed the scope of the disputed issues based on the limited information Plaintiffs chose to provide during the meet and confer process and in their opening brief.

In a further effort to help the narrow the disputed issues before this Court, Defendants later changed their position on certain documents after Plaintiffs belatedly provided additional foundational information for some eighty documents. Further stymieing Defendants' efforts to narrow the scope of disputed issues, however, Plaintiffs filed their reply brief four days early, thus depriving Defendants of any meaningful opportunity to review the new information. Plaintiffs provided the supplemental foundational information on July 31, one week before their reply was due, but inexplicably filed their reply brief only three days later, on August 3. *See* ECF No. 331 (Plaintiffs' reply brief); ECF No. 334-1 (Defendants' response to Plaintiffs regarding additional information received on July 31). Plaintiffs also continued to provide additional information regarding certain documents piecemeal throughout August and September, well after briefing on the motion had been completed. *See* ECF No. 351-1 (Defendants' response to Plaintiffs regarding additional information received after July 31).

In sum, Defendants object to Plaintiffs' supplemental declarations as improper and unauthorized surreplies, and note that any confusion or inefficiencies in the briefing process is of Plaintiffs' making and could have been avoided with a more meaningful meet and confer process, as required by Local Rule 7-1(a). On that basis, Plaintiffs' motion for reconsideration should be denied.

However, if the Court nonetheless opts to reconsider its decision in light of Plaintiffs' supplemental declarations, Defendants specifically object to Exhibit 100 because there is insufficient foundation for the video; the referenced URL provides no information about the source of the video or whether and how it has been edited. As to all other documents,

Defendants reiterate that Plaintiffs must still meet their burden under Federal Rule of Evidence 201 to establish that the existence and authenticity of each document is "generally known" within the District of Oregon or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also* ECF No. 327 at 4; ECF No. 357 at 5. Moreover, Defendants reiterate that any order granting judicial notice of documents should be limited to a finding of authenticity, and that the Court should not admit into evidence any judicially noticed documents prior to a showing of their admissibility and relevance at trial. *See Romero v. Securus Techs., Inc.*, 216 F. Supp. 3d 1078, 1084 n.1 (S.D. Cal. 2016) ("While matters of public record are proper subjects of judicial notice, a court may take notice only of the existence and authenticity of an item, not the truth of its contents." (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001))); *Shaterian v. Wells Fargo Bank, Nat'l Ass'n*, No. C-11-920 SC, 2011 WL 2314151, at *1 n.3 (N.D. Cal. June 10, 2011) ("[T]he Court may not take judicial notice of the truth of the facts recited within a judicially noticed document." (citation omitted)); *United States v. Flattum*, No. CR 91-349-2-FR, 1992 WL 365334, at *2 (D. Or. Nov. 25, 1992) ("The court will not admit into evidence any evidence of which it takes judicial notice prior to a showing of its admissibility and relevance at trial."); *Galvan v. City of La Habra*, No. SACV 12-2103, 2014 WL 1370747, at *2-3 (C.D. Cal. Apr. 8, 2014) (granting judicial notice but separately considering evidentiary objections).

Dated: November 16, 2018

Respectfully submitted,

JEFFREY BOSSERT CLARK
Assistant Attorney General
JEFFREY H. WOOD
Principal Deputy Assistant Attorney General
Environment & Natural Resources Division

/s/ Clare Boronow
LISA LYNNE RUSSELL
GUILLERMO A. MONTERO
SEAN C. DUFFY (NY Bar No. 4103131)
MARISSA PIROPATO (MA Bar No. 651630)
CLARE BORONOW (admitted to MD Bar)
FRANK J. SINGER (CA Bar No. 227459)
ERIKA NORMAN (CA Bar No. 268425)
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
601 D Street NW
Washington, DC 20004
Telephone: (202) 305-0445
Facsimile: (202) 305-0506
sean.c.duffy@usdoj.gov

Attorneys for Defendants