IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE WILDERNESS SOCIETY, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 1:17-cv-02587 (TSC)
GRAND STAIRCASE ESCALANTE PARTNERS, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	Case No. 1:17-cv-02591 (TSC) **CONSOLIDATED CASES**
AMERICAN FARM BUREAU FEDERATION, *et al.*, Defendants-Intervenors.	

TWS 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), TWS Plaintiffs submit the following statement and reply to Federal Defendants' Response to TWS Plaintiffs' Statement of Material Facts, ECF No. 136-4 (Feb. 19, 2020) (hereinafter "Defs.' Resp. to TWS Pls.' SUF").

Federal Defendants do not challenge TWS Plaintiffs' standing, and they do not dispute most of TWS 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, Defendants' limited objections and alleged disputes are immaterial to the resolution of TWS Plaintiffs' motion for partial summary judgment.

Federal Defendants have not submitted a separate "statement of material facts" in support of their own cross-motion for partial summary judgment. L. Civ. R. 7(h)(1). They have, however, interspersed their responses to TWS Plaintiffs' facts with certain "further state[ments]" and citations to new declarations. *See, e.g.*, Defs.' Resp. to TWS Pls.' SUF ¶¶ 13, 18, 49, 52. TWS Plaintiffs therefore submit the following limited replies to certain of Defendants' responses, explaining that they identify no "material facts as to which … there exists a genuine issue necessary to be litigated." L. Civ. R. 7(h)(1).

TWS Plaintiffs' Fact ¶ 5: The 1996 Proclamation immediately prohibited the location of any new mining claims for hardrock minerals (e.g. copper, uranium, and alabaster) pursuant to the General Mining Law of 1872, 30 U.S.C. §§ 22 *et seq.*, and withdrew the lands from coal, oil, and gas leasing. 1996 Proclamation, 61 Fed. Reg. at 50,225; *see* Desormeau Decl., Exh. A at 51-52, 84 (1999 Monument Management Plan) (describing mineral withdrawal as prohibiting new mining claims and imposing limitations on the surface disturbing activity including the development of existing valid claims).

> **Federal Defendants' Response:** Federal Defendants object that this statement is a legal conclusion. Without waiving this objection, Federal Defendants state that it is not supported by the citation (which is a general citation to the Mining Law of 1872) and that the 1996 Proclamation provided that "[t]he establishment of th[e] Monument is subject to valid existing rights." Proclamation No. 6920, 61 Fed. Reg. 50223, 50225 (Sept. 24, 1996) ("Proclamation 6920"). Federal Defendants further object that the statement that the mineral withdrawal placed certain limitations on the development of pre-existing hardrock mining claims is a legal statement. Further, the cited regulations do not place limitations on the nature or extent of operations on valid, pre-exi[s]ting 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.").

TWS Plaintiffs' Reply:

There is no genuine dispute that the 1996 Proclamation prohibited the location of any new mining claims for hardrock minerals on Monument lands, or that it withdrew those lands from coal, oil, and gas leasing. Defendants overlook that, in addition to citing the 1996 Proclamation, Plaintiffs cite BLM's 1999 Monument Management Plan, which affirms that "[t]he Proclamation establishing the Monument withdrew all Federal lands and interests in lands within the Monument from entry, location, selection, sale, leasing, or other disposition … under the public land laws, including the mineral leasing and mining laws. Thus, no new Federal mineral leases or prospecting permits may be issued, nor may new mining claims be located in the Monument." Desormeau Decl., Exh. A at 51 (1999 Monument Management Plan) (ECF No. 132-3 at 18).

Further, 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 pre-existing hardrock mining claims inside national monuments. Regardless, this disagreement over wording is immaterial: Defendants have not asserted that any of the mining claims relevant to Plaintiffs' standing are pre-existing claims (located before the Monument was declared in 1996) that would be subject to these regulations. Defendants' characterization of these regulations is therefore not material to the pending motions.

TWS Plaintiffs' Fact ¶ 13: In 2000, Congress appropriated $19.5 million to buy back preexisting coal leases from Andalex Corporation and PacifiCorp on parcels of land within the Monument. Department of the Interior and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-215; *see also* Desormeau Decl., Exh. A at iv (1999 Monument Management Plan). According to BLM, purchasing the coal leases "improved [BLM's] ability to manage the lands within the Monument as an unspoiled natural area." Desormeau Decl., Exh. A at iv (1999 Monument Management Plan); Murdock Decl., Exh. C (map showing location of lease buy-backs).

Federal Defendants' Response: Federal Defendants object that the first sentence is a legal conclusion. Without waiving this objection, Federal Defendants state that Pub. L. No. 106-113, which Congress passed in November 1999, appropriated funds for FY 2000. Federal Defendants further state that Congress appropriated $19.5 million to "acquire mineral rights within the Grand Staircase-Escalante National Monument," but did not appropriate those funds to specifically buy back preexisting coal leases from Andalex Corporation and PacifiCorp. *See* Department of the Interior and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-215.

TWS Plaintiffs' Reply:

TWS Plaintiffs admit that Public Law No. 106-113 did not *name* the *specific* coal leases to be repurchased with the appropriated funds, but that is immaterial. The material fact—which is undisputed—is that Congress appropriated $19.5 million to buy back existing mineral leases "within the Grand Staircase-Escalante National Monument." Pub. L. No. 106-113, 113 Stat. 1501, 1501A-215. Defendants also do not dispute that the federal government actually used the appropriated funds to purchase coal leases from Andalex and PacifiCorp.

TWS Plaintiffs' Fact ¶ 18: Prior to the 1996 Proclamation, Monument lands were also open to hardrock mineral location. Desormeau Decl., Exh. A at 51 (1999 Monument Management Plan) (noting that 68 mining claims covering 2,700 acres existed in the Monument as of 1999).

Federal Defendants' Response: Federal Defendants object that this statement is a legal conclusion. Without waiving that objection, Federal Defendants state that the Calf Creek Recreation Area, Wolverine Petrified Wood Natural Area, and Devil's Garden Instant Study Area were withdrawn from operation of the mining laws prior to the 1996 designation of Grand Staircase-Escalante National Monument. Decl. of Harry A. Barber ("Barber Decl."), ¶ 7.

TWS Plaintiffs' Reply:

Plaintiffs do not dispute Defendants' statement that the listed areas (totaling less than 8,000 acres) were withdrawn from hardrock mineral location prior to the Monument's designation, but this statement is not material to resolving the pending motions. Plaintiffs' standing is not based on hardrock mining in those areas.

TWS Plaintiffs' Fact ¶ 31: Among the lands excluded from the Monument are some parcels for which Congress appropriated money to buy back coal leases in 2000. Murdock Decl. ¶ 13 & Exh. C (map showing location of bought-back coal leases).

Federal Defendants' Response: Federal Defendants object to this statement as a legal conclusion. Without waiving this objection, Federal Defendants dispute that Congress appropriated money with specific instruction to buy back any specific leases, let alone addressing any specific parcel. *See* Department of the Interior and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-215.

TWS Plaintiffs' Reply:

Plaintiffs incorporate their Reply to Fact ¶ 13, *supra*. Defendants' objection is immaterial, as they do not dispute the accuracy of TWS Plaintiffs' map or the fact that the Trump Proclamation excluded from the Monument some lands on which bought-back coal leases were located.

TWS Plaintiffs' Fact ¶ 38: As directed by the President, BLM is no longer observing the 1996 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 it will review and process claimants' development proposals on claims located on those lands, in accordance with the General Mining Law of 1872 and BLM's regulations. *See* Declaration of Landon Newell, ¶¶ 3-8 & Exhs. A-F (describing new hardrock mining claims filed with BLM).

Federal Defendants' Response: Federal Defendants object to the phrase "observing the 1996 Proclamation's mineral withdrawal" as being vague and subject to varying interpretations. Without waiving this objection, Federal Defendants dispute the first sentence as unsupported. Federal Defendants also object to the phrase "will review and process … development proposals" as being vague and subject to varying interpretations, and speculative. Without waiving this objection, Federal Defendants further dispute that

BLM has "recorded new mining claims," as mining claimants, not the BLM, locate and "record" claims. 43 C.F.R. §§ 3833.1, 3833.11.

TWS Plaintiffs' Reply:

Plaintiffs' first sentence (asserting that "BLM is no longer observing the 1996 Proclamation's mineral withdrawal on the excluded lands") is supported by the Declaration of Landon Newell and attached exhibits, which demonstrate that since February 2018, BLM has (1) accepted mining claim recordation notices and annual fees relating to hardrock mining claims that have been located and recorded by private parties on the excluded lands; (2) maintained records relating to those claims; and (3) corresponded with claimants and reviewed paperwork and proposals relating to those claims. *See* Newell Decl. ¶¶ 2-17 & Exhs. A-O (ECF No. 132-4). There is no genuine dispute, therefore, that BLM is no longer observing the 1996 Proclamation's mineral withdrawal on the excluded lands. 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.

TWS Plaintiffs' Fact ¶ 42: 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. 43 C.F.R. §§ 3809.10(b), 3809.11(b), 3809.21(a); *see also* 43 C.F.R. § 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 state 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.

TWS 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 "caus[e] 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). Defendants also do not dispute that the 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).

TWS Plaintiffs' Fact ¶ 43: 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. BLM conducts no NEPA review, and no affirmative approval from BLM is required. *See* 43 C.F.R. § 3809.301.

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. ¶¶ 23, 25 (ECF No. 43-2).

TWS 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.

TWS Plaintiffs' Fact ¶ 44: 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 conducts NEPA review and requires a "plan of operations," including detailed information about the proposed disturbance and mitigation measures. 43 C.F.R. §§ 3809.10(c), 3809.11, 3809.21(a), 3809.401, 3809.411, 3809.412.

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. ¶¶ 23, 25 (ECF No. 43-2).

TWS 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.

TWS Plaintiffs' Fact ¶ 47: 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 where there is relatively little vegetation to dampen sound or to obstruct viewsheds. *See* Allen Decl. ¶¶ 22, 27; Bloxham Supp. Decl. ¶¶16-18; Harrington Decl. ¶¶ 13-14; Supplemental Declaration of Ellen Heyn ¶ 14; Marienfeld Supp. Decl. ¶¶ 12, 22; *see also, e.g.*, Supplemental Declaration of Michael Mason ¶¶ 10, 12 & Exhs. A, B (viewshed and sound impact analysis for Creamsicle); *id*. ¶¶ 14, 16 & Exhs. C, D (same, for Berry Patch 4).

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 mining can result in

impacts asserted in this paragraph 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) and reclaimed in accordance with the standards in those sections. Roberson Decl. ¶¶ 23, 25 (ECF No. 43-2). Moreover, operators 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.

TWS Plaintiffs' Reply:

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

TWS Plaintiffs' Fact ¶ 48: Even if exploratory activity never leads to more extensive plan-level development, it leaves long-lasting impacts on the land—including mine pits, 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. *See* Harrington Decl.¶ 12; Marienfeld Supp. Decl. ¶ 10.

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) and reclaimed in accordance with the standards in those sections. Roberson Decl. ¶¶ 23, 25 (ECF No. 43-2). Moreover, operators 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.

TWS Plaintiffs' Reply:

Defendants' asserted dispute is unsupported. The regulation they cite requires mining claimants to "reclaim 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 do not assert that such measures will necessarily eliminate unsightly traces of any past exploratory activity.

TWS Plaintiffs' Fact ¶ 49: 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 nineteen new mining claims in the excised lands: "Creamsicle 1-3," "Mesa 1-10," "Berry Patch 1 & 4," "Rasberry 1," and "Vulcan 1-3." Newell Decl. ¶¶ 5-8 & Exhs. C-F. Nine of these claims have since been closed. *See* Newell Decl. ¶¶ 4, 8 (listing Mesa 5-10 and Vulcan 1-3 as closed). The rest are listed as "active." *See id.* ¶¶ 3-7.

Federal Defendants' Response: Federal Defendants dispute this statement. Between February 2, 2018 and November 7, 2019, 20 mining claims location notices were recorded with the BLM. Decl. of Matthew Janowiak ("Janowiak Decl.") ¶ 6. The BLM is also aware of two other claims that were located but never recorded with the BLM Utah State Office. *Id*. Of these, 10 remain "active" as of [insert date]. *Id.* Federal Defendants note 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.* ¶ 7.

TWS Plaintiffs' Reply:

Defendants have not identified any genuine dispute of material fact. Plaintiffs averred that BLM records show prospectors located "at least nineteen" new mining claims during the relevant time period; Defendants count twenty. There is no discrepancy between those two statements. Defendants do not dispute that these new claims include "Creamsicle 1-3," "Mesa 1-10," "Berry Patch 1 & 4," "Rasberry 1," and "Vulcan 1-3."

TWS Plaintiffs' Fact ¶ 50: Creamsicle: In September 2018, a company called Penney's Gemstones staked multiple claims for alabaster mining at the Creamsicle mine site, near Upper Slick Rock and Wiggler Bench, on land carved out of the Monument's northern boundary. Newell Decl. ¶ 3 & Exhs. A, O. On August 1, 2019, Penney's Gemstones submitted to BLM a notice of intent to conduct exploration activity (i.e., notice-level activities). *See* Newell Decl., Exh. O at 2 (describing mining operations, including excavation with a "Cat[erpillar] excavator" to remove "up to 125 tons of material per year"). BLM subsequently deemed the notice complete. Newell Decl., Exh. H. No further BLM approval, review, or environmental or archaeological analysis is required before the claimant can proceed with mineral extraction and ground-disturbing activities. *See* Newell Decl., Exh. A (listing site status as active), Exh. I (cultural resources notice), Exh. J (financial guarantee).

Federal Defendants' Response: Federal Defendants object that the fourth sentence is a legal conclusion. Without waiving that objection, Federal Defendants dispute that Penney's Gemstones is engaged in "mineral extraction" or "mining operations." Under a notice, an operator may only conduct exploration; that is, any minerals removed are for sampling and evaluation and not for commercial use or sale. 43 C.F.R. §§ 3809.5, 3809.11, 3809.12. Federal Defendants do not otherwise dispute this statement.

TWS Plaintiffs' Reply:

Defendants have not identified any genuine dispute of material fact. Defendants disagree with Plaintiffs' use of the phrases "mineral extraction" and "mining operations" to describe the notice-level activities occurring at Creamsicle, but there is no dispute over what those activities at Creamsicle include: the mechanized removal of up to 125 tons of material per year. Newell Decl., Exh. O at 2 (ECF No. 132-4 at 82). 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* Plaintiffs' Reply to Fact ¶ 42, *supra*; *see also* Newell Decl., Exh. O at 2 (ECF No. 132-4 at 82) (BLM form noting that "[e]xploration" activities may include, in general, "[a]ccess route construction and use," "[d]rill site construction," "[t]renching or surface sampling," "[u]nderground sampling or excavation," "[b]ulk sample or waste stockpile placement," and "[s]upport facilities

construction and operation"). Defendants' disagreement over wording is not material to the resolution of the pending motions.

TWS Plaintiffs' Fact ¶ 52: Mining activity at Creamsicle impacts neighboring areas, including viewpoints in nearby Bryce Canyon National Park. *See* Mason Supp. Decl. ¶¶ 10, 12 & Exh. B (projecting that mining at Creamsicle will be visible from Bryce Canyon National Park overlooks, including Fairyland, Ponderosa Point, Whiteman Trailhead, Fairview Point, and Rainbow Point).

Federal Defendants' Response: Federal Defendants object to the characterization of the referenced operations as "mining activity." The "activity" referred to is limited to exploration. Barber Decl., Exh. B. Federal Defendants dispute that exploration at the Creamsicle site can be seen from viewpoints in Bryce Canyon National Park. *Id.* ¶ 16.

TWS Plaintiffs' Reply:

Defendants' asserted dispute about whether "exploration at the Creamsicle site" itself can be seen from Bryce Canyon is not material to resolving Plaintiffs' motion for summary judgment. Mr. Barber's declaration does not dispute that dust and haze *from* activities at the Creamsicle mine site—if not "the actual Creamsicle Mine Site" itself—can be seen from Bryce Canyon National Park. Barber Decl. ¶ 16 (ECF No. 136-6). Defendants also do not dispute the separate fact that activity at Creamsicle is visible from Cottonwood Canyon Road. *See* Defs.' Resp. to TWS Pls.' Fact ¶ 55. Defendants' disagreement with Plaintiffs' use of the general term "mining activity" to encompass notice-level work is immaterial for the reasons explained in Plaintiffs' Replies to Facts ¶¶ 42 and 50, *supra*.

TWS Plaintiffs' Fact ¶ 53: SUWA member Kya Marienfeld enjoys visiting those areas in Bryce Canyon National Park for hiking and photography. Her most recent trip was in November 2019, and she "plan[s] to return there in the spring of 2020." Marienfeld Supp. Decl. ¶ 12. The sight of mining activity at Creamsicle will "harm my ability to photograph and aesthetically appreciate this part of the Monument from Bryce Canyon National Park and its overlooks." *Id*. ¶ 12; *see also id.* ¶ 13 (describing plans to "hike, explore and take photographs near Bull Valley Gorge along the Skutumpah Road" in summer 2020, but noting her "appreciation of this area and its sweeping vistas will be diminished by the sight of mining activities at the Creamsicle mine

site"); Mason Supp. Decl., Exh. B (projecting that mining at Creamsicle will be visible from parts of the Skutumpah Road).

Federal Defendants' Response: Federal Defendants object to the characterization of the referenced operations as "mining activity." The "activity" referred to is limited to exploration. Barber Decl., Exh. B. Federal Defendants dispute that exploration at the Creamsicle site can be seen from Bull Valley Gorge. *Id*. ¶ 17. Federal Defendants further explain that the while it may be possible to see the Creamsicle area from Skutumpah Road, the BLM has not received any notices or plans of operations that propose operations on portions of the Creamsicle area that are visible from Skutumpah Road. *Id*. ¶ 18.

TWS Plaintiffs' Reply:

Defendants' asserted dispute about whether activity at Creamsicle can be seen from Bull Valley Gorge and the Skutumpah Road is not material to resolving Plaintiffs' motion for summary judgment. Defendants do not dispute the separate fact that activity at the Creamsicle mine site is visible from Cottonwood Canyon Road. *See* Defs.' Resp. to TWS Pls.' Fact ¶ 55. Defendants also do not dispute that dust and haze from activities at the Creamsicle mine site can be seen from Bryce Canyon National Park. *See* Plaintiffs' Reply to Fact ¶ 52, *supra*.

TWS Plaintiffs' Fact ¶ 54: SUWA member Ray Bloxham also recreates in the areas surrounding Creamsicle and enjoys taking photographs of the landscape. Bloxham Supp. Decl. ¶¶ 14, 16. He enjoys visiting Bryce Canyon National Park, which is "west of the Creamsicle mine site and has commanding, uninterrupted views of the areas as it sits several thousand feet above it." *Id*. ¶ 16. He "plan[s] to return to this area in the first half of 2020," but may be deterred from doing so "because of mining impacts from the Creamsicle mine site." *Id*.

Federal Defendants' Response:
Federal Defendants dispute that exploration at the Creamsicle site can be seen from viewpoints in Bryce Canyon National Park. Barber Decl. ¶ 16.

TWS Plaintiffs' Reply:

Defendants' asserted dispute about whether "exploration at the Creamsicle site" itself can be seen from Bryce Canyon is not material to resolving Plaintiffs' motion for summary judgment for the reasons explained in Plaintiffs' Reply to Facts ¶¶ 52 and 53, *supra*.

TWS Plaintiffs' Fact ¶ 55: Great Old Broads for Wilderness member Steve Allen plans to visit this area to enjoy its "natural beauty and profound quiet" in May 2020, and he will access his trailheads from the Cottonwood Wash Road. Allen Decl. ¶ 21. Mining activities at Creamsicle will be visible from parts of the Cottonwood Canyon Road. *See* Mason Supp. Decl., Exh. B (viewshed map). For Mr. Allen, entering the Monument "from the north" via the Cottonwood Canyon Road, the sight of mining at Creamsicle will be his "introduction to the Monument" and will "detract from [his] ability to recreate in a remote and natural setting and harm my enjoyment of the area's natural beauty." Allen Decl. ¶ 22. The "mine-related traffic, and the generation of dust from use of the dirt access routes and mine activity would mar the natural beauty and quiet of the area." *Id*.

Federal Defendants' Response: Federal Defendants object to the characterization of the referenced operations as "mining activity" and "mine-related traffic." The "activity" referred to is limited to exploration. Barber Decl., Exh. B.

TWS Plaintiffs' Reply:

Defendants have not identified any dispute of material fact. Defendants object to Plaintiffs' use of the phrases "mining activity" and "mine-related traffic," but they do not dispute the material facts that the activity at Creamsicle impacts the Cottonwood Canyon Road; nor do they dispute that this activity will harm Mr. Allen's experience and enjoyment of that area. Defendants' disagreement with Plaintiffs' use of the general term "mining activity" to encompass notice-level work is immaterial for the reasons explained in Plaintiffs' Replies to Facts ¶¶ 42 and 50, *supra*.

TWS Plaintiffs' Fact ¶ 58: Mining activity at Berry Patch will have far-reaching visual and auditory impacts. *See* Mason Supp. Decl. ¶¶ 14, 16 & Exhs. C, D (viewshed and sound impact maps, projecting that mining activities will be visible and audible from Grosvenor Arch). Mr. Bloxham "plan[s] to return to … the southern Cockscomb near Grosvenor Arch to hike, camp and take photos in the spring of 2020 when the weather cooperates." Bloxham Supp. Decl. ¶ 14.

If mining activity is underway, it will impair Mr. Bloxham's enjoyment of the area. *Id*; *see also* Declaration of Laura Welp ¶ 17 (similar, stating she visits Grosvenor Arch "annual[ly]" and the mine's "visual and/or auditory effects are noticeable from several points along the road and from the arch").

Federal Defendants' Response: Federal Defendants object that this statement is speculative and lacking the context necessary to form a response, as there is no exploration or mining operations currently occurring at Berry Patch. Barber Decl. ¶ 22. Federal Defendants explain further that if exploration or mining operations were to occur at Berry Patch, it must be conducted in accordance with the applicable performance standards (43 C.F.R. § 3809.420) and reclaimed in accordance with the standards in those sections. Roberson Decl. ¶¶ 23, 25 (ECF No. 43-2). Moreover, operators 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.

TWS Plaintiffs' Reply:

Defendants' characterization that future mining activity at Berry Patch is "speculative" does not create a factual dispute. Defendants do not dispute any of the material facts regarding the proposed operations at Berry Patch (*see* Defs.' Resp. to TWS Pls.' Facts ¶¶ 56-57); nor do they dispute Plaintiffs' members' concrete plans to return to Grosvenor Arch and nearby lands in 2020. 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 "reclaim 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), does not create a dispute of material fact for the reasons explained in Plaintiffs' Reply to Fact ¶ 48, *supra*. That the regulation would eventually require *some* reclamation measures does not create a factual dispute about whether the proposed mining activity at Berry Patch, if and when it commences, would harm Plaintiffs' members.

TWS Plaintiffs' Fact ¶ 60: NRDC member Susan Harrington plans to "backpack in and around Chop Rock Canyon—a spectacular and remote canyon" near Colt Mesa to which she returns every few years—in March or April 2020. Harrington Decl. ¶ 11. The Colt Mesa site "is located just off the Burr Trail, not far down the small dirt spur road that [she] use[s] to access the Chop Rock, Silver Falls, and Moody Canyons." *Id*. "[T]o get to Chop Rock Canyon, [she] will need to drive or walk near or through the Mesa mining claims." *Id*. Ms. Harrington returns to this area "to escape from sights and sounds like those, and to experience the rare feeling of being in a peaceful, unspoiled wilderness. Mining activity at the Mesa claims will change the whole character of the place" and impair her enjoyment. *Id*. ¶ 13. The noise, dust, and traffic from mining trucks will also negatively impact Ms. Harrington's use of the Burr Trail, a small, scenic road that she uses to access the canyons. "Once mining activity begins, the addition of heavy truck traffic will totally change the experience of traveling on that road." *Id.* at ¶ 14; *see also* Desormeau Decl., Exh. C at 125 (Analysis of Management Situation) (describing the "Burr Trail Scenic Backway" as "one of the most picturesque drives in Utah").

Federal Defendants' Response: Federal Defendants do not dispute the assertions in the first four sentences of this statement. Federal Defendants object that the last two sentences in this statement are speculative and lacking the context necessary to form a response, as there is no exploration or mining operations currently occurring on the Colt Mesa claims. Barber Decl. ¶ 23.

TWS Plaintiffs' Reply:

Defendants' characterization that future mining activity at Colt Mesa is "speculative" does not create a factual dispute. The material facts—which Defendants do not dispute—are (1) that a claimant located ten new mining claims at Colt Mesa in 2018, that four of those claims remain listed as "active" in BLM's records, and that the claimant sent BLM a notice of intent to hold all ten claims in 2019, *see* TWS Pls.' SUF ¶ 59; (2) that under BLM's regulations, the claimant may commence with notice-level activities after sending BLM a "notice" of planned operations and waiting fifteen calendar days after BLM receives it, *id.* ¶¶ 42-43; and (3) that Plaintiffs' members have concrete plans to return to Colt Mesa and nearby lands in 2020, *id.* ¶¶ 60-61. 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.

TWS Plaintiffs' Fact ¶ 61: Mr. Allen, a regular visitor to the Circle Cliffs area near Colt Mesa, "will be returning … in March 2020 as part of a thirty day backpack trip to thoroughly explore the canyons of the Waterpocket Fold." Allen Decl. ¶ 25. Mining at Colt Mesa poses an "immediate threat to the peace and equanimity" that he enjoys when hiking in this remote area. *Id.* ¶ 27. Mr. Allen describes: "Standing 700 feet above the surrounding terrain, this small mesa provides a wonderful viewing platform of the surrounding country. A mine in this area will radically affect my enjoyment. The noise from heavy machinery and truck traffic will echo off the walls of the plethora of canyons in the area …." *Id.*; *see also* Bloxham Supp. Decl. ¶ 18 (similar, describing past visits to Colt Mesa and plans to return "in the fall of 2020," unless mining activity deters him); Heyn Supp. Decl. ¶ 15 (similar, describing her intent to hike nearby Silver Falls Canyon); Marienfeld Supp. Decl. ¶ 14 (similar, describing plans to "camp[] and hik[e] in the south Colt Mesa area as soon as the weather is warm enough again in the first half of 2020"); Welp Decl. ¶¶ 15-16 (similar, stating Colt Mesa "lies immediately east of the Wolverine Loop road," which she plans to visit in the "spring or fall of 2020").

Federal Defendants' Response: Federal Defendants object that this statement is speculative and lacking the context necessary to form a response, as there is no exploration or mining operations currently occurring on the Colt Mesa claims. Barber Decl. ¶ 23. Federal Defendants further object that the term "Circle Cliffs" is vague and lacking the context necessary to form a response. The Circle Cliffs are the name for a regional area, but the actual Circle Cliffs are located approximately 12 miles to the north of Colt Mesa. *Id*. ¶ 24.

TWS Plaintiffs' Reply:

Plaintiffs incorporate by reference their Reply to Fact ¶ 60, *supra*.

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Respectfully submitted,

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