

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CONSERVE SOUTHWEST UTAH;
CONSERVATION LANDS FOUNDATION;
CENTER FOR BIOLOGICAL DIVERSITY;
DEFENDERS OF WILDLIFE; SOUTHERN
UTAH WILDERNESS ALLIANCE;
WILDERNESS SOCIETY and WILDEARTH
GUARDIANS,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR; UNITED STATES BUREAU OF
LAND MANAGEMENT; and UNITED STATES
FISH AND WILDLIFE SERVICE,

Defendants,

and

UTAH DEPARTMENT OF TRANSPORTATION
and WASHINGTON COUNTY, UTAH,

Intervenor-Defendants.

No. 1:21-CV-01506-ABJ

**PLAINTIFFS' OPENING MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY JUDGEMENT**

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LIST OF COMMONLY USED ACRONYMS

ACHP	Advisory Council on Historic Preservation
AR	Administrative Record
BA	Biological Assessment
BLM	Bureau of Land Management
BO	Biological Opinion
DEIS	Draft Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FWS	U.S. Fish and Wildlife Service
HCP	Habitat Conservation Plan
LWCF	Land and Water Conservation Fund
ITP	Incidental Take Permit
ITS	Incidental Take Statement
MOA	Memorandum of Agreement
NCA	National Conservation Area
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
PA	Programmatic Agreement
RMP	Resource Management Plan
ROD	Record of Decision
ROW	Right-of-way
RPM	Reasonable and Prudent Measure
SHPO	State Historic Preservation Officer
SITLA	Utah School and Institutional Trust Lands Administration
SOF	Statement of Facts
UDOT	Utah Department of Transportation
UVRU	Upper Virgin River Recovery Unit

INDEX TO KEY DOCUMENTS IN THE ADMINISTRATIVE RECORD

Short Title	File Name¹	Bates Page Nos.
Biological Assessment	20200923_Jacobs_NC Biological Assessment.pdf	099257-431
Biological Opinion, Northern Corridor Highway	20210112_USFWS_Final BO for Northern Corridor and RMPs.pdf	101757-856
Biological Opinion, Washington County Amended Habitat Conservation Plan	20210112_USFWS_BO for Amended HCP.pdf	101646-756
Biological Report for the Upper Virgin River Recovery Unit of Mojave Desert Tortoise	20210100_USFWS_Upper Virgin River MDT Rpt.pdf	059145-305
Final Environmental Impact Statement (Vol. 1, Ex. Summ.)	20201113_BLM and USFWS_NC Final EIS Volume 1 Executive Summary.pdf	099892-921
Final Environmental Impact Statement (Vol. 2, Ch. 1-4)	20201113_BLM and USFWS_NC Final EIS Volume 2 Chapters 1-4.pdf	099922-100225
Final Environmental Impact Statement (Vol. 3, Glossary and Appendices A-J)	20201113_BLM and USFWS_NC Final EIS Volume 3 Glossary and Appendices A-J.pdf	100226-553
Final Environmental Impact Statement (Vol. 4, Appendices K-O)	20201113_BLM and USFWS_NC Final EIS Volume 4 Appendices K-O.pdf	100554-101489
Findings and Recommendations for Issuance of Incidental Take Permit	20210113_USFWS_HCP ITP Findings and Recs.pdf	102057-102
Incidental Take Permit		Att. A ²
Plaintiffs' Scoping Comments	00000000_Scoping Comments on the Proposed EIS for the Northern Corridor Highway.pdf	000368-557

¹ This "File Name" corresponds to the "File Name/Searchable Link" Federal Defendants assigned to the document as reflected in the Administrative Record Index.

² Plaintiffs have been unable to locate in the Administrative Record ("AR") the final Incidental Take Permit, and attach it hereto as Att. A. Federal Defendants provided this document to Plaintiffs, and Federal Defendants have no objection to Plaintiffs attaching the document hereto and the Court supplementing the AR accordingly.

Short Title	File Name	Bates Page Nos.
Plaintiffs' Comments on DEIS	20200910 2009~Tom Butine~[EXTERNAL] Red Cliffs Conservation Coalition Comments on the Northern Corridor Draft Environmental Impa.pdf; 20201026 0828_BLM_Red Cliffs Coalition Issues with FEIS Cost Estimates.pdf	034013-344, 037714-31
Plaintiffs' Protest	20201214_1305_Email_Protest of the Northern Corridor.pdf	039534-649
Record of Decision and Approved RMP, Red Cliffs NCA (2016), Att. A: EFFECTS OF THE PROPOSED NORTHERN CORRIDOR ROUTE ON THE THREATENED MOJAVE DESERT TORTOISE	20161200_BLM_Red Cliffs NCA Record of Decision and Approved RMP.pdf	088353-64
Record of Decision, Northern Corridor Highway and RMP Amendments	20210113_BLM_Record of Decision and Approved RMP Amendments.pdf	101857-102008
Record of Decision, Washington County Amended Habitat Conservation Plan	20210113_USFWS_Record of Decision Washington County HCP and Final EIS.pdf	102103-21
Right-of-Way Grant, Northern Corridor Highway	20210113 Northern Corridor ROW Grant signed.pdf	102813-46
Washington County Amended Habitat Conservation Plan (2020)	20201020_WASHCO_Final Amended HCP.pdf	099432-891
Washington County Habitat Conservation Plan (1995)	19951200_Washington County_Habitat Conservation Plan, Washington County, Utah.pdf	067549-758

INTRODUCTION

Plaintiffs hereby seek summary judgment reversing and vacating a series of Federal Defendants' decisions permitting a highway and other closely related actions through public lands set aside for wildlife conservation and protection in disregard of substantive and procedural protections of bedrock environmental and historic preservation statutes.

In the 2009 Omnibus Public Lands Management Act ("Public Lands Act"), Congress created the Red Cliffs National Conservation Area ("NCA") in southwestern Utah to "protect, conserve, and enhance" its ecological, wildlife, recreational, and other resources. 16 U.S.C. § 460www. Those resources include Mojave desert tortoise, a species listed as "threatened" with extinction under the Endangered Species Act ("ESA"), whose populations are continuing to decline due to threats including roads and other human encroachments, and wildfires.

Since then, the Department of the Interior ("Interior") has spent \$21 million under the Land and Water Conservation Fund ("LWCF") acquiring parcels within the Red Cliffs NCA to protect tortoise populations; and in 2016, the Bureau of Land Management ("BLM") adopted a Red Cliffs NCA management plan which denied a proposal for a new highway right-of-way ("ROW") through the NCA and tortoise habitat, as being incompatible with the "protect, conserve, and enhance" mandate. The U.S. Fish and Wildlife Service ("FWS") has repeatedly found that a highway through the Red Cliffs NCA posed unacceptable threats to the tortoise.

All that changed in the closing days of the Trump Administration, when then-Secretary of Interior Bernhardt signed a Record of Decision ("ROD") on January 13, 2021, granting an ROW for a new four-lane highway—the Northern Corridor Highway—through the Red Cliffs NCA and tortoise critical habitat, and amending two management plans to allow the highway. The same day, FWS approved the ROW under ESA Section 7, and issued an Incidental Take Permit

(“ITP”) under Washington County’s Amended Habitat Conservation Plan (“HCP”) and associated biological opinions, thus immunizing Washington County and Utah Department of Transportation (“UDOT”) from “take” liability under ESA Section 10 for the highway and HCP.

As explained below, the Court should reverse these decisions on both substantive and procedural grounds. Substantively, Defendants’ approval of the highway violates the Public Lands Act’s mandate to “protect, conserve, and enhance” the Red Cliffs NCA—indeed, impacts from the highway threaten to “compromise[] the integrity” of the entire NCA. *See, e.g.*, Administrative Record (“AR”) 100052, 099344. Likewise, the highway will destroy or degrade three parcels acquired to protect desert tortoise habitat and populations, in violation of the LWCF Act, 54 U.S.C. §§ 200301 *et seq.* *See Gifford Pinchot Task Force v. Perez*, Case No. 13-cv-00810-HZ, 2014 WL 3019165, at *10 (D. Or. July 3, 2014) (the purposes informing LWCF land acquisition controls “the manner of their development postacquisition”).

Procedurally, Defendants violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, by failing to adequately assess adverse impacts of the highway, including noise and its “growth inducing effects” that threaten sensitive resources in the NCA and surrounding communities, among other violations. *See TOMAC v. Norton*, 240 F. Supp. 2d 45, 51 (D.D.C. 2003), *aff’d*, 433 F.3d 852 (D.C. Cir. 2006) (NEPA analysis inadequate in failing to adequately analyze growth-inducing effects). Defendants also violated the National Historic Preservation Act (“NHPA”), 54 U.S.C. §§ 300101 *et seq.*, by approving the highway before completing NHPA Section 106 consultation and adopting measures to avoid, minimize, or mitigate adverse effects to historical properties. *See* 36 C.F.R. § 800.1(c) (agency “must complete the section 106 process” prior to approving decision); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 553 (8th Cir. 2003) (calling this an “unambiguous directive”).

Finally, FWS arbitrarily reversed its own findings that the highway poses unacceptable risks to the desert tortoise, ignored the highway's growth-inducing effects, and violated ESA Sections 7 and 10 in approving the ROW and ITP, despite the highway's direct and indirect impacts in killing or harming desert tortoise and its critical habitat, as detailed below.

Accordingly, the Court should grant Plaintiffs' motion for summary judgment and remand and vacate Defendants' challenged decisions approving the Highway ROD, ROW and associated decisions, and Washington County's HCP, ITP and associated decisions as unlawful under the Public Lands Act, LWCF Act, NEPA, NHPA, ESA, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

STATEMENT OF RELEVANT FACTS

Plaintiffs are submitting herewith a Statement of Facts ("SOF") under Local Civil Rule 7(h)(2), citing the Administrative Record in detail. Plaintiffs thus summarize only key facts here.

Red Cliffs NCA

In March 2009, Congress passed and President Obama signed the Public Lands Act, which (among other provisions) established the Red Cliffs NCA, and directed BLM to "protect, conserve, and enhance" its recreational, ecological, imperiled wildlife, and other resources. SOF ¶¶ 1-2; 16 U.S.C. § 460www. In addition, the Act directs BLM to "protect" desert tortoise. *Id.*

The Red Cliffs NCA encompasses some 44,725 acres of public lands in Washington County, Utah, managed by BLM, and the NCA includes 2,631 acres of private lands and 13,735 acres owned by the State of Utah. SOF ¶ 3. Along with the NCA, BLM administers about 629,000 surface acres of public lands in Washington County, located at the convergence of the Mojave Desert, Great Basin, and Colorado Plateau—an intersection of three distinct bio-regions that creates unmatched cultural, geologic, and ecological diversity. SOF ¶ 4.

The Red Cliffs NCA is known for its spectacular red rock canyons and basaltic lava flows, and is surrounded by the towering Pine Valley Mountains to the north, and an arc of growing communities to the south. SOF ¶¶ 5-7. It contains nearly 200 miles of non-motorized trails for hiking, mountain biking, and other recreation, and includes two designated Wilderness areas within its boundaries. SOF ¶ 9. The NCA is the largest block of undeveloped land contiguous to the City of St. George, Utah. SOF ¶ 6.

Mojave Desert Tortoise

The Mojave desert tortoise is a long-lived, slow-growing tortoise species found across portions of four states, including southwestern Utah and the Red Cliffs NCA. SOF ¶¶ 12-16. Threats to the desert tortoise include human actions that result in mortality and permanent habitat loss; and actions that fragment and degrade habitat, including the proliferation of roads and highways, habitat invasion by nonnative plants, and wildfires. SOF ¶¶ 17-21, 27.

Citing population declines and habitat losses, FWS listed the desert tortoise as a “threatened” species under the ESA in 1990. SOF ¶ 22. In 1994, FWS designated critical habitat for the tortoise and issued a recovery plan, which it revised in 2011. SOF ¶ 23. The recovery plan includes the Red Cliffs NCA and surrounding area within the Upper Virgin River Recovery Unit (“UVRRU”), which FWS considers of high importance to the range-wide status of the species due to its high population densities. SOF ¶¶ 24-25. Five of the UVRRU’s eleven geographic “Analytical Units” (“AUs”) are in the NCA. SOF ¶¶ 26-27.

Despite ESA listing, tortoise populations remain in trouble and declined range-wide by almost 125,000 adult tortoises between 2004-2014, a nearly 37% population decline. SOF ¶¶ 28-30. Within the UVRRU, tortoise populations declined 24%, and tortoise populations in the areas proposed for the highway declined 66% in recent years. *Id.* Desert tortoise densities in the

UVRU are declining at a rate of 3.2% per year. *Id.* FWS’s and the State of Utah’s leading tortoise scientists have warned that these trends for desert tortoise “indicate that this species is on the path to extinction under current conditions.” SOF ¶ 30.

1995 Washington County Habitat Conservation Plan and Incidental Take Statement

After the tortoise was listed, Washington County adopted an HCP in 1995 to guide management of tortoise habitat. SOF ¶ 45. The central element of the 1995 HCP was the creation of a 61,022-acre Red Cliffs Desert Reserve (“Reserve”) in Washington County. SOF ¶¶ 11, 46. Protection of desert tortoise populations and habitats is the highest priority inside the Reserve, while development of tortoise habitat is allowed in certain areas outside the Reserve. SOF ¶ 46.

The 1995 HCP also created five Management Zones, including Zone 3—which includes the Red Cliffs NCA—and which is to be managed for the protection of the tortoise. SOF ¶¶ 48-49. At the time, about two-thirds of the lands within the Reserve were owned by BLM or Utah State Parks, and the 1995 HCP adopted a strategy to use the LWCF Act to acquire remaining private and municipal lands. SOF ¶¶ 50-52.

In February 1996, FWS issued an ITP to Washington County under ESA Section 10, which allowed development to occur in tortoise habitat on non-federal lands outside the Reserve without liability for ESA “take” of desert tortoises. SOF ¶¶ 53-55. The ITP cited creation of the Reserve as a primary mitigation measure to offset the take of desert tortoise habitat. *Id.*

LWCF Land Acquisitions Since 1997

Since 1997, Interior has spent some \$21 million using LWCF funds to acquire 15 parcels of land totaling over 857 acres within the Reserve, for the purpose of protecting tortoise habitat. SOF ¶¶ 37-44. Yet as detailed further below, the approved ROW is sited directly over three of these LWCF parcels, threatening to permanently destroy the conservation values and the tortoise

habitats they were acquired to protect. SOF ¶ 40.

2016 Red Cliffs NCA Resource Management Plan

In December 2016, BLM approved the Red Cliffs NCA Resource Management Plan (“RMP”), which governs BLM’s management decisions within the NCA and implements the Public Lands Act’s “protect, conserve, and enhance” mandate. SOF ¶ 56. The RMP contains a number of protective measures, and, notably, it rejected Washington County’s proposed alternative designating a new transportation corridor within the NCA. SOF ¶¶ 57-62. According to BLM, this “northern transportation route” would cause significant adverse impacts to protected resources in the NCA, including desert tortoise. SOF ¶ 62.

FWS agreed with BLM, advising that “the proposed northern transportation route is inconsistent with the [1995 HCP] and NCA because the construction and operation of a multi-lane highway would have significant negative impacts to desert tortoise, their habitat, and the ecological functioning of the Red Cliffs Desert Reserve.” SOF ¶ 63.³

Northern Corridor Highway Project Initiation

Despite the 2016 RMP’s rejection of a “northern transportation route” through the Red Cliffs NCA, UDOT and Washington County pressed forward hoping to gain traction in the Trump Administration. SOF ¶¶ 65-74. On September 4, 2018, UDOT submitted to BLM an application for a ROW for its proposed highway, which would cross approximately 4.3 miles of the Red Cliffs NCA, including 1.9 miles on BLM lands. SOF ¶ 68. The route is nearly identical to the one BLM rejected in the 2016 RMP, and runs right through the Reserve and the most

³ This was not the first time federal scientists concluded that a road across the Reserve and the Red Cliffs NCA would harm tortoise populations and habitat. In 2000, 2006, 2007, 2011, 2015, and again in 2016, agency scientists concluded that a highway would be “biologically devastating.” SOF ¶ 64.

important high-density cluster of desert tortoises in the entire UVRRU recovery unit. SOF ¶¶ 89-90. The ROW would be up to 500-feet wide and accommodate a 4-lane highway with two 12-foot-wide travel lanes in each direction, 8-foot shoulders, and a 20-foot median. SOF ¶ 78. The highway would also include a 10- to 14-foot-wide trail on each side, curbs, gutters, drainage swales, ditches, and communications infrastructure; and would be posted with a 50-mile per hour speed limit. *Id.* The highway would include three major interchanges and intersections. SOF ¶ 79.

Meanwhile, Washington County submitted an application to FWS to renew “without changes” its 1996 ITP. SOF ¶ 65. But the County quickly pivoted to “see if [they] can get more take” of tortoise through the renewal process, and proposed adding a new Zone 6 to the Reserve to allow the Northern Corridor ROW. SOF ¶¶ 66-67.

On December 5, 2019, BLM and FWS published a notice of intent to prepare a joint Environmental Impact Statement (“EIS”) to examine UDOT’s ROW and Washington County’s ITP applications and associated decisions, and opened a public scoping period. SOF ¶ 69. They received 17,258 submissions from the public, including comments from Plaintiffs that identified a series of reasonable alternatives to the highway. SOF ¶ 75.

Washington County’s 2020 Habitat Conservation Plan

In October 2020, Washington County adopted an Amended Habitat Conservation Plan (“2020 HCP”), with the expressed intent to create a conservation program for conserving the Upper Virgin River population of desert tortoise in its native habitat in perpetuity. SOF ¶ 105. The 2020 HCP acknowledged that between 1995 and 2019, activities permitted under the 1995 HCP caused the loss of 16,037 acres of tortoise habitat and 6,785 acres of potential tortoise habitat on non-federal land. SOF ¶ 106. This loss of tortoise habitat in Washington County

swells to nearly 40,000 acres when including federally-owned lands. SOF ¶ 108.

Through its ITP application, Washington County sought ESA “incidental take” coverage for a variety of “covered activities⁴” causing habitat loss on 66,301 acres of potentially-suitable and occupied tortoise habitat in Washington County. SOF ¶¶ 109-17.

Draft Environmental Impact Statement (“DEIS”)

In June 2020, BLM and FWS issued a DEIS for public comment. SOF ¶ 76. BLM’s proposed action was to issue a 30-year renewable ROW grant for the construction, operation, and maintenance of the highway across tortoise critical habitat as requested by UDOT. SOF ¶¶ 77-81. The DEIS also included FWS’s proposal to issue an ITP to Washington County that would authorize the take of tortoises under the 2020 HCP. SOF ¶ 83. The agencies received nearly 15,500 public comments on the DEIS. SOF ¶ 84. Plaintiffs and others submitted hundreds of pages of comments, raising a host of concerns over the impacts of the proposed actions on the world-class resources in the Red Cliffs NCA. SOF ¶¶ 84-85.

2020 Wildfires in Red Cliffs NCA

In the summer and fall of 2020, four major wildfires burned nearly 25% (15,000 acres) of Red Cliffs NCA. SOF ¶ 33. These fires consumed at least 8,814 acres of tortoise critical habitat, including 2,526 acres of previously unburned habitat. *Id.* The fires “decimated native trees, shrubs, forbs and grasses to ash,” causing direct mortality to “significant number of tortoises” and “will likely have significant population-level effects on tortoises within their respective burn areas.” SOF ¶¶ 34-35.

In light of the extent and severity of the 2020 fires, Plaintiffs requested the agencies

⁴ “Covered activities” are lawful, non-federal land uses or land development activities under the direct control of Washington County and performed within the 2020 HCP area that are reasonably certain to take desert tortoise. AR 099436, 099478-79.

pause their environmental review of the highway and associated actions, and issue a supplemental environmental analysis for public comment that fully assessed and examined the impacts of the fires before proceeding further. SOF ¶ 36. Defendants refused to do so. *Id.*

Final Environmental Impact Statement (“FEIS”)

On November 12, 2020, BLM and FWS issued a joint FEIS for the highway and associated actions, which carried forward the identical alternatives from the DEIS and identified UDOT’s Northern Corridor route as the proposed action. SOF ¶ 86. The FEIS disclosed that the highway would directly impact native vegetation communities, increase the spread of exotic species, and exacerbate the wildfire cycle within the Red Cliffs NCA and Reserve. SOF ¶ 87. It would also cause direct loss of 275 acres of tortoise habitat and indirectly impact 2,333 additional acres, increase fragmentation of tortoise habitat within the NCA, and bisect “the most important high-density cluster of desert tortoises” in the area. SOF ¶¶ 88-91. The FEIS also concluded that the highway would “dramatic[ally] change” the recreational experience and resources within the NCA, causing a “stark or obvious visual change to the natural setting,” and visitors would “experience more frequent highway noise,” which could “degrad[e] the user experience.” SOF ¶¶ 93-94.

The FEIS also determined that granting the ROW would adversely affect historic properties located within the NCA, directly impact cultural resources, and cause permanent or long-term effects to archaeological sites eligible for listing on the National Register of Historic Places. SOF ¶ 92. The FEIS acknowledged the 2020 fires in the Red Cliffs NCA, but claimed the fires did not represent significant new circumstances warranting supplemental environmental review because fires are a “common occurrence” on this landscape. SOF ¶ 95. But the FEIS provided no data on the scale and scope, and impacts of the fires; burn severity and mapping;

desert tortoises killed, injured, or translocated; and other information needed to fully understand the ecological impacts of these fires. *Id.*

Despite admitting the many significant adverse impacts of the highway, the FEIS improperly ignored or downplayed some important impacts. SOF ¶¶ 96-97. In particular, as explained further below, the FEIS failed to develop an adequate noise baseline or examine the noise impacts of siting the highway in a current roadless area, and the FEIS adopted an improperly narrow indirect impacts analysis area. *Id.* And it never assessed the “growth-inducing” effects that the highway will have in spurring additional developments and roads. *Id.*

Final Decisions

Plaintiffs and many others filed protests with BLM. SOF ¶¶ 136-37. Defendants denied each protest, SOF ¶ 138, and issued final RODs on January 13, 2021, approving the Northern Corridor ROW, amendments to the Red Cliffs NCA and St. George Field Office RMPs, and the Washington County 2020 HCP and ITP. SOF ¶ 139-43. Those decisions are ripe for review.

APPLICABLE LEGAL STANDARDS

“The court shall grant summary judgment if 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). The APA’s standards of review apply to the Court’s review of Defendants’ challenged decisions here. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 686 (D.C. Cir. 1982). Under the APA, a reviewing court shall set aside agency action it finds to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of

agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”). While the Court’s scope of review is narrow, it must still conduct “a thorough, probing, in-depth review” of the agency’s decisions. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

ARGUMENT⁵

I. DEFENDANTS VIOLATED THE PUBLIC LANDS ACT.

The Court should reverse Defendants’ approval of the Highway ROD and ROW under Plaintiffs’ First Claim for Relief for violating the Public Lands Act, Pub. L. No. 111-11, 123 STAT. 991 (2009), 16 U.S.C. § 460www. *See* First Am. Compl. (ECF No. 16), ¶¶ 162-72.

In the Public Lands Act, Congress identified two purposes for creating the Red Cliffs NCA: (1) to “conserve, protect, and enhance for the benefit and enjoyment of present and future generations the ecological, scenic, wildlife, recreational, cultural, historical, natural, educational, and scientific resources of the National Conservation Area,” and (2) to protect “each” threatened and endangered species in NCA, including the desert tortoise. 16 U.S.C § 460www(a)(1), (2).

To achieve these two purposes, the Public Lands Act imposed twin statutory mandates for management of the Red Cliffs NCA, both of which are violated here. First, Congress directed that BLM “shall manage” the Red Cliffs NCA “in a manner that conserves, protects and enhances the *resources* of the [NCA]” *Id.* at § 460www(e)(1)(A) (emphasis added). Second, it directed that BLM “shall only allow uses of the [NCA]” that would further the *purposes* for which the NCA was established, as set forth above. *Id.* at § 460www(e)(2) (emphasis added).

⁵ Plaintiffs are filing herewith eleven declarations from members and staff to establish standing. *See* Decls. of Sarah M. Thomas, Betty Adamson, Mary Jo Vilicich, Thomas R. Nead, Holly Snow Canada, Richard Spotts, Randi Spivak, Kathleen Corr, Scott Miller, Vera Smith, and Charlotte Overby.

Defendants’ approval of the highway violates both these statutory commands. *See* SOF ¶¶ 87-94. Indeed, the FEIS documented that the highway would adversely impact *each and every* natural and ecological “resource” protected under the Public Lands Act. *See* AR 100006 (highway would result in “adverse effects” to sensitive plant habitat); AR 100065, 100067 (highway “would result in direct and indirect adverse impacts to special status wildlife species”); AR 100078 (highway “would disturb sensitive soils, soil crusts, and topsoil”); AR 100085-86 (highway “would result in permanent loss or temporary construction impacts to floodplains and potential [waters of the United States].” *See also* AR 099988-100014 (FEIS, Table ES.5-1) (summarizing impacts to protected resources); AR 100013-16 (“Construction of the highway would result in habitat loss within the footprint of the highway, and habitat degradation to areas that remain unpaved within the ROW and areas adjacent to the ROW.”).

These adverse impacts extend to historic properties and cultural resources, and the FEIS concluded that construction of the highway would “result in adverse effects to historic properties . . . [and] directly impact cultural resources . . . causing permanent or long-term effects to . . . archaeological sites.” AR 100125-27. The FEIS documented that the highway would also “adversely impact areas with high scenic quality and high visual sensitivity,” AR 100113, and cause a “dramatic change to the recreation setting” resulting in a “degraded user experience,” AR 100129-40, 100135, 100137.

All these adverse impacts—documented by Defendants themselves—demonstrate that their approval of the Highway violates the Public Lands Act’s first statutory command that BLM “shall manage” the NCA “in a manner that conserves, protects and enhances the resources of the [NCA],” 16 U.S.C. § 460www(e)(1)(A), alone requiring reversal.

The record also documents that BLM’s approval violates the further statutory mandate

that BLM “shall only allow uses of the [NCA]” that further the *purposes* for which the NCA was established, which expressly includes protecting the desert tortoise and its habitat. *See id* § 460www(a)(2) (requiring BLM to “protect” tortoise and other listed species); SOF ¶¶ 88-91.

Indeed, the highway route bisects the highest tortoise density area within the NCA. *See* AR 100318 (map); *see also* AR 099323-27, 101805-07. The FEIS admits the “Northern Corridor would impact Mojave desert tortoise through direct loss and fragmentation of occupied habitat,” and that the highway would permanently eliminate 275 acres of tortoise habitat within the footprint of the ROW. AR 100058, 099911; *see also* AR 101822 (“all critical habitat physical and biological features within the ROW will be permanently lost”). And its indirect effects are far greater, as the FEIS admitted:

Indirect effects include disturbance of Mojave desert tortoise adjacent to the ROW from noise and vibrations associated with construction and use of the highway, facilitating human intrusion into Mojave desert tortoise habitat, spreading trash and toxins in the environment, influencing predator abundance and distribution, facilitating invasion of nonnative plants, increasing the probability of fire ignition, disrupting home range and landscape movement patterns, and fragmenting habitat within lands specifically identified for the protection and long-term management of Mojave desert tortoise through the designation of Mojave desert tortoise critical habitat, establishment of the Reserve, and designation of the Red Cliffs NCA.

AR 100051, 099347. These direct and indirect impacts thus “may result in long-term consequences to the conservation of the Mojave desert tortoise.” AR 100052.

In light of the record evidence demonstrating these adverse effects—and more—from the Highway upon the protected resources of the Red Cliffs NCA, the Court should hold Defendants violated the Public Lands Act in approving it. *See* 5 U.S.C. § 706(2).

II. DEFENDANTS VIOLATED THE LWCF ACT.

Defendants also violated the LWCF Act by permitting a four-lane highway to be sited over, adjacent to, and through public lands acquired using LWCF Act funds for the protection

and preservation of tortoise populations and habitat. The Court should thus grant summary judgment on Plaintiffs' Second Claim for Relief. *See* First Am. Compl., ¶¶ 173-76.

A. Under LWCF, Purposes of Acquisition Inform Post-Acquisition Management.

The LWCF Act became law on January 1, 1965. P.L. 88-578; 54 U.S.C. 200301-310; AR 044523-30. The purposes of the LWCF Act are:

to assist in preserving, developing, and assuring accessibility to all citizens of the United States of America of present and future generations . . . such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States.

AR 044523. Congress achieved these conservation and recreation goals by creating the LWCF as the primary funding source to acquire conservation land. 54 U.S.C. § 200302; AR 044523-24.

The LWCF Act's federal-side program represents the principal source of funds for federal acquisition of land to achieve the LWCF Act's purposes. 54 U.S.C. § 200306. It provides that money "appropriated from the Fund for Federal purposes shall . . . be allotted by the President" for enumerated activities only, including land acquisition in areas administered by Interior for recreational purposes, and land acquisition for the preservation of wildlife threatened with extinction. *Id.* § 200306(a)(1); *id.* §§ 200306(a)(2)(A), (a)(2)(C).

In contrast with the LWCF Act's state-side acquisition program, lands acquired through the federal-side program must remain in federal ownership and may not be converted to other uses. *Compare id.* § 200305(f)(3) (allowing conversion of state-side acquisitions), *with id.* § 200306 (federal-side program, conversion authority absent). Thus, the purposes guiding federal acquisition of LWCF lands "control[] not just the initial acquisition of the lands, but the manner of their development postacquisition." *Perez*, 2014 WL 3019165, at *10.

In *Perez*, the Forest Service acquired lands to "aid in the preservation" of the Green River and "the scenic beauty of th[e] area." *Id.* at *9. The Forest Service later proposed to allow

exploratory drilling on a small portion of the land, which plaintiffs challenged as inconsistent with the acquisition purposes of the lands. *Id.* at *1. In response, the Forest Service argued the LWCF Act only limited its authority to *acquire* lands for enumerated purposes, not how they may be used thereafter. *Id.* at *10.

The court rejected the Forest Service’s argument as “irreconcilable with the [LWCF Act’s] statutory language expressing that a purpose of the acquisition is to preserve and develop accessibility to outdoor recreation for future generations by providing funds for the development of certain lands.” *Id.* at *11. It held that before permitting any action on lands acquired via the LWCF Act federal-side program, the agency must determine that the proposed use is consistent with the purposes informing acquisition. *Id.* at *10.

B. Defendants Erred in Permitting Lands Acquired for Wildlife Habitat Purposes to be Used as a Highway.

Similar to *Perez*, Defendants here have run afoul of the LWCF Act by allowing lands acquired with money from the LWCF for tortoise conservation to be converted into a four-lane Highway. Because this new use is inconsistent with the purposes guiding acquisition, Defendants’ decision is arbitrary and capricious. *Perez*, 2014 WL 3019165, at *10.

Here, Interior has spent nearly \$21 million under the LWCF federal-side program to acquire 15 separate parcels in the Red Cliffs NCA to protect desert tortoise habitat, among other purposes. SOF ¶¶ 37-44. Yet the highway ROW is sited directly over three of these parcels. *Id.* The FEIS admits that “construction of the Northern Corridor could directly encumber a number of parcels the BLM previously acquired with LWCF Funds.” AR 100143.

In light of the mountain of record evidence documenting the adverse effects the highway will have on tortoises and tortoise habitat—including degrading “the most important high-density cluster of desert tortoise in the recovery unit,” AR 100054, resulting in loss and

fragmentation of critical habitat, displacement, destruction of burrows, as well as indirect effects including noise, vibrations, lights, increased risk of fire, and exacerbating the explosion of non-native weeds across tortoise habitat—it cannot be disputed that the highway will undermine the purposes guiding acquisition of these LWCF parcels. *See* SOF ¶¶ 87-97 (discussing threats).

C. Defendants Erroneously Claim the Northern Corridor Highway is Consistent with the Wildlife Habitat Purposes Informing Acquisition of these Parcels.

In the ROD, Defendants wrongly claim that the highway adheres to the purposes guiding acquisition because “so few acres will be impacted.” AR 101869; *see also* AR 100054 (“due to the small amount of acreage potentially encumbered within the ROW corridor . . . the encumbered lands will continue to fulfill wildlife habitat purposes in the NCA and the ROW is not inconsistent with LWCF”). This argument fails for two reasons.

First, the ROD under-reports the area impacted by the highway by identifying only the number of acres in each parcel located immediately within the highway footprint—*i.e.*, only the area that will be directly paved. *See* AR 100143-44, Table 3.16-1. The impact area is far greater, and Defendants’ own Biological Assessment examining the impacts of the highway on tortoise identified a far larger “action area” to include “those areas to be affected directly or indirectly by the [highway] and not merely the immediate construction footprint.” AR 099288. *Compare* AR 099289 (Fig. 4) (map of action area) *and* AR 099325 (Fig. 14) (map of tortoise density in action area) *with* AR 056131 (map showing LWCF parcels). The ROD never explained why it refused to examine impacts of the highway on LWCF parcels across this same “action area,” which would include both parcels to be paved and other LWCF parcels indirectly impacted.

Second, determining whether a proposed use is inconsistent with the purpose guiding acquisition does not turn on the acreage of the impacted area. *Perez* rejected this precise argument. *See* 2014 WL 3019165, at *16. There, drilling was to occur on only one-quarter acre

out of 900 acres acquired under the LWCF Act. *Id.* at *1. Despite this small area, the court held the agency must consider impacts of the drilling on the purposes informing acquisition, and its “failure to make an express determination that the Project is not inconsistent with the purposes [guiding acquisition] is contrary to the requirements of the governing law and thus, is arbitrary and capricious.” *Id.* at *16. Here too, Defendants’ refusal to consider the direct and indirect impacts of the highway on the wildlife habitat purposes is unlawful, also requiring reversal under the LWCF Act and the APA. *Id.* at *10; 5 U.S.C. § 706(2)(A).

III. DEFENDANTS VIOLATED NEPA.

Defendants also violated NEPA in multiple ways, as explained below, by: (1) failing to consider growth-inducing impacts of the highway; (2) inadequately examining noise impacts; (3) using an inadequate indirect impacts analysis area; and (4) refusing to prepare a supplemental DEIS for public comment after the 2020 wildfires. The Court should thus grant summary judgment under Plaintiffs’ Third and Fourth Claims for Relief. *See* First Am. Compl. ¶¶ 177-87.

A. NEPA Requires a Comprehensive Review of Environmental Impacts.

NEPA is the basic national charter for protection of the environment. *See* 40 C.F.R. § 1500.1(a).⁶ NEPA’s twin aims are: (1) to foster informed decision-making by requiring agencies to consider the environmental impacts of their proposed actions; and (2) to ensure agencies inform the public of these impacts. 42 U.S.C. § 4331; 40 C.F.R. § 1500.1. To accomplish these goals, a federal agency must prepare an EIS examining the effects of each “major Federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C).

An EIS must provide a “full and fair discussion of significant environmental impacts,”

⁶ The regulations at 40 C.F.R. §§ 1500-1508 were amended through a Final Rule taking effect on September 14, 2020. *See* 85 Fed. Reg. 43304. Federal Defendants elected to apply the prior NEPA regulations. AR 099901, 101869 n.2.

and inform “decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R.

§ 1502.1; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA requires a supplemental EIS when there are “significant new circumstances or information” bearing on the proposed action” 40 C.F.R. § 1502.9(d)(1)(ii). To satisfy NEPA, an agency must take “hard look” at direct and indirect effects of a proposed action. 40 C.F.R. §§ 1508.7, 1508.8; *see also Pub. Utilities Comm’n v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990).

B. The FEIS Failed to Consider Growth-Inducing Impacts.

The FEIS violated NEPA, first, by failing to examine the reasonably foreseeable effects of additional growth and development enabled and incentivized by the construction and operation of the highway. *See* SOF ¶¶ 130-32.

Under NEPA, an agency’s “hard look” obligation requires consideration of “all foreseeable direct and indirect impacts” and “a discussion of adverse impacts that does not improperly minimize negative side effects.” *Loper Bright Enters. v. Raimondo*, 544 F. Supp. 3d 82, 117 (D.D.C. 2021), *aff’d*, 45 F.4th 359 (D.C. Cir. 2022) (cleaned up). Indirect impacts are those that are “later in time or farther removed in distance” from the immediate action, and include “*growth inducing effects* . . . related to induced changes in the pattern of land use.” 40 C.F.R. § 1508.8(b) (emphasis added); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 17 (D.D.C. 2009), *TOMAC*, 240 F. Supp. 2d at 50–51 (reversing analysis because it failed to adequately analyze growth-inducing effects).

Here, the highway is sited through the Red Cliffs NCA and Reserve, and lands directly to the west, south, and east are privately- or municipally-owned. AR 100271. The highway will provide access between these areas, linking road networks and increasing access to residential

areas, particularly in St. George. *Id.* Given the current absence of paved access across this area, the highway will incentivize and create opportunities for growth in the surrounding area—a key reason why UDOT and Washington County have pressed so hard for it. *See* AR 099901.

These types of growth-inducing effects have adverse implications for sensitive resources in the NCA and Reserve as well as the surrounding communities. Development poses direct and indirect threats to tortoises and other wildlife by killing or injuring individuals as they attempt to cross the roads, and fragmenting habitat by expanding the wildland-urban interface. AR 101796. Roads in particular “may have the largest effect on wildlife movement and habitat connectivity.” *Id.* Native plants are also vulnerable to urban development and population growth due to habitat fragmentation and loss, and human-related disturbances. AR 100020, 100002. Humans also experience adverse impacts from roads via noise, light pollution, degradation of recreational experiences, and impairment of natural landscapes. AR 100181-83, 100109-11–86, 100137-38.

The FEIS thus should have examined two types of possible induced growth: (1) development of private lands; and (2) construction of new roads. First, the stated objective of the highway is to address local population growth and corresponding demand on the transportation network. AR 099901. The area south-southeast of the highway is mostly privately-owned, and there are a number of private inholdings within the NCA and Reserve immediately surrounding the highway. AR 100271, 011313. The record confirms there is already growing pressure to develop these private lands. *See* AR 011315 (discussing how one of the largest private inholdings in the Reserve, the Brennan property, “could be at risk of development,” and “[t]he risk is especially great considering that Washington County has been one of the fastest growing areas in the nation”); AR 011321 (map of Brennan inholding); AR 011368–71 (appraisal report for Brennan property discussing development trends in St. George area, including a 3,196-home

residential development plan and commercial development).

Second, the highway is likely to create the need and opportunity for construction of new interchange locations or points of access. For instance, the 2019 appraisal report for the Brennan property identified existing and proposed roadways in the St. George area. AR 011391. It discussed how “it is reasonable to assume that the proposed roads and utility lines would be constructed to improve access to the immediate area and to the [Brennan property].” *Id.*; *see also* AR 011392–93 (map of proposed roadways and highway relative to Brennan property). Additionally, the regional transportation plan identified future transportation projects in the area, including highway widening, overpass construction, and new roads. AR 091799. The plan referred to the highway as a “vital transportation connection[] to [u]rban area residents,” *id.*, and it identified several new projects that would connect directly to the highway, AR 091841, 091800–05. Moreover, further road development in the NCA remains a possibility under the Washington County 2020 HCP. *See* AR 099478 (covered activities include utilities and roads).

Although the record is replete with information underscoring the reasonably foreseeable growth and development that may result from construction of the highway, the FEIS failed to discuss *any* of these possible growth-inducing effects. Instead, BLM asserted only that it does not “believe the actions analyzed in the EIS would result in increased development pressure on the non-Federal lands within the Red Cliffs Desert Reserve or NCA.” AR 100879. Yet elsewhere BLM acknowledged that one of the primary threats to East Cottonwood AU of the UVRRU—the precise area of private, State, and municipal lands along the eastern section of the Highway—includes “potential for development with independent HCPs on non-Federal lands.” AR 100033; *see also* AR 100321 (map of analytical units); SOF ¶¶ 25-27. Nowhere in its analyses does BLM attempt to reconcile these statements.

This Court has previously underscored agencies' NEPA duty to analyze how growth-inducing impacts of a project may affect sensitive resources and exacerbate adverse effects. In *TOMAC*, this Court found the environmental analysis for a new casino violated NEPA even though it catalogued some growth-inducing effects, because it failed to address impacts on public services, endangered species, air quality, and other resources and failed to explain its finding that there would be no significant effect on a small community. 240 F. Supp. at 51-52. *See also Friends of the Earth v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 41 (D.D.C. 2000) (rejecting agency's argument that growth impacts were "highly speculative and indefinite"). By failing to provide any analysis of the growth-inducing effects of the highway, Defendants again violated NEPA. *See TOMAC*, 240 F. Supp. 2d at 51 (noting that case was a "much closer call than cases in which agencies simply failed to address growth inducing effects at all").

C. The FEIS's Noise Analysis was Inadequate.

The FEIS also violated NEPA by failing to take the required "hard look" at impacts of highway noise on the Red Cliffs NCA and Reserve, desert tortoise, and the surrounding communities. Instead, the FEIS unlawfully deferred a complete noise analysis into the future, and wrongly relied on an abbreviated report based on insufficient baseline data.

i. Defendants Unlawfully Deferred Analysis of Noise Impacts to an Unknown Later Date.

First, the FEIS violated NEPA by unlawfully deferring a full noise impacts analysis. NEPA requires an agency to "fully assess[] the possible environmental consequences of activities which have the potential for disturbing the environment," including noise impacts. *Grand Canyon Tr. v. Fed. Aviation Admin.*, 290 F.3d 339, 342-47 (D.C. Cir. 2002) (cleaned up) (holding agency must consider impacts of increased noise); *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1172-73 (10th Cir. 2007) (same). NEPA "obligates every federal agency

to prepare an adequate [EIS] *before* taking any major action [t]he statute does not permit an agency to act first and comply later.” *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm’n*, 896 F.3d 520, 523 (D.C. Cir. 2018).

The record shows that noise—like noise from cars driving on highways—can have significant adverse impacts to wildlife and other resources. AR 100020, 100060. Noise and vibration adversely impact desert tortoise behavior, communication, and hearing. AR 100020 (citing *Mojave Desert Tortoise Recovery Plan*, USFWS 2011a), AR 100014 (“Noise from construction of the highway would disturb wildlife in the vicinity and potentially cause reproductive failure for species breeding nearby.”). Noise also adversely impacts humans; quiet natural landscapes, like the NCA, offer many intangible benefits to humans, like spiritual fulfillment and serving as an important place of respite from daily life. *See* Adamson Decl. ¶ 6; Vilicich Decl. ¶¶ 13–15; Nead Decl. ¶ 10 (filed herewith).

The FEIS anticipated a “noticeable change in noise levels” in and around the highway, given that it is sited in a current roadless area. AR 100172-73. There are also temporary noise impacts associated with highway construction. AR 100173. But instead of doing a thorough analysis of impacts from this anticipated increase in noise to sensitive resources like the desert tortoise and the NCA—or to the neighboring communities⁷—the FEIS relied upon an abbreviated noise report prepared by a private contractor. AR 100168-69, 100558-77. BLM deferred a full analysis to after completion of the EIS. AR 100172.

Such deferral of a complete noise impacts analysis violates NEPA’s central purpose that

⁷ The FEIS failed to even consider potential noise impacts to the neighboring Green Springs community, even though commenters repeatedly requested this analysis. *See* AR 100172-74, 018299 (Green Springs residents’ comment expressing concern over noise impacts from highway); AR 018854 (Red Cliffs Coalition comments urging adequate noise analysis); AR 020628 (State of Utah commenting on lack of noise analysis).

an agency looks before it leaps. *Robertson*, 490 U.S. at 349 (“NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.”). Moreover, BLM’s failure to analyze noise impacts in the FEIS robbed the public of their right to be informed of the highway’s impacts, also at the core of what NEPA requires. *See Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) (“overarching question is whether an EIS’s deficiencies are significant enough to undermine informed public comment and informed decisionmaking”); *Wilderness Soc’y v. Salazar*, 603 F. Supp. 2d 52, 60–61 (D.D.C. 2009) (“an [EIS] which is incomplete due to the omission of ascertainable facts . . . violates the disclosure requirement of [NEPA]”) (cleaned up).

Deferring such analysis and discussion to an unknown future date is too little too late, in violation of NEPA. *State Farm*, 464 U.S. at 43.

ii. Defendants Unlawfully Relied on Inaccurate and Incomplete Baseline Data.

The abbreviated noise report also violates NEPA because it lacked adequate baseline data. The starting point of any NEPA analysis is the collection and description of adequate baseline data, which is essential to assessing current conditions. 40 C.F.R. § 1502.15; *see also Pub. Emps. for Env’t Resp. v. Hopper*, 827 F.3d 1077, 1081 (D.C. Cir. 2016) (agency decision to issue a lease for a wind project “without first obtaining sufficient site-specific data” violated NEPA); *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988) (“without establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA”).

Here, to determine background noise levels, the private consultant relied on (1) a figure developed by the National Park Service (“NPS”) depicting sound levels in Washington County, and (2) noise measurements from five field locations, all of which were along existing roads or

in existing residential areas. *See* AR 100172, 100558-77. The noise report did not collect *any* field monitoring locations on or around UDOT's highway route through the undeveloped public lands in the heart of the NCA, or within desert tortoise designated critical habitat. AR 100573. Moreover, the NPS noise figure that purportedly depicts the natural soundscape of the undeveloped areas does not identify when and where data was collected or its spatial scale. AR 100571, 100574. The private consultant made no effort to determine the relevance, representation, and reliability of this noise data; thus, there is no way to judge the validity or accuracy of this data, which appears to have been modeled or collected in a broad, non-specific manner. AR 100558-77; SOF ¶¶ 96-97.

In the absence of reliable data measuring the background noise levels in the current roadless areas where the highway is slated to be built, the FEIS lacked adequate baseline information to assess noise impacts on these undeveloped areas and their wildlife and recreation resources, violating NEPA. *See Hausrath v. U.S. Air Force*, 491 F. Supp. 3d 770, 789-90 (D. Idaho 2020) (holding Air Force violated NEPA in failing to obtain accurate baseline noise data in wildland areas impacted by training overflights); *see also Great Basin Res. Watch v. BLM.*, 844 F.3d 1095, 1104 (9th Cir. 2016) (reversing NEPA analysis resting on inadequate baseline data).

D. The FEIS Used an Unreasonably Small Indirect Impacts Analysis Area.

The FEIS also violated NEPA by using an unreasonably narrow indirect impacts analysis area for the tortoise that is contrary to the science in the record and not based on rational decision-making, resulting in an underestimation of the adverse effects. AR 099288, 100045.

NEPA requires an agency to consider “all areas to be affected directly or indirectly by the Federal Action and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. An analysis area must be reasoned and not arbitrary, and the agency must articulate a rational

explanation supported by the science. *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017); *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002).

As the FEIS acknowledged, the highway may result in a host of adverse indirect impacts to the tortoise—including disturbance from noise, vibration, the presence of humans, increased invasion of non-native plants and probability of fire ignition, disruption of tortoise home range and landscape movement patterns, and habitat fragmentation. *See* AR 100051. To assess these indirect effects on tortoise habitat and populations, the FEIS defined an analysis area as including the highway ROW itself, a 508-meter (1,667 feet) buffer north from the ROW, and habitat from the south of the ROW to the Reserve boundary. AR 099288, 100045. The buffer area “is based on the annual home range size of an adult male tortoise.” AR 009934, 100045. Using this analysis area, the FEIS concluded that just 2,333 acres of tortoise habitat and 328 adult tortoises would be indirectly impacted by the highway. AR 100049, 100052.

This analysis area is not based on rational decision-making and significantly underestimates the highway’s indirect impacts to the desert tortoise, as science in the record confirms. As an initial matter, the zone of impact of an unfenced roadway “is a function of the size and frequency of use of the road.” AR 057496. The impact from a heavily-used highway without exclusion fencing can extend more than four kilometers from the road—almost ten times the FEIS’s 508-meter buffer. *Id.* (referring to a study that found tortoise populations “to be depressed from less than 175 meters to up to 4.6 kilometers from a roadway”). The FEIS did not justify the indirect impacts analysis area against the anticipated size of and amount of traffic to use the highway, which would influence the zone of impact to tortoises.

Moreover, the FEIS did not discuss how the chosen analysis area is reasonable in light of scope and breadth of anticipated indirect effects to the desert tortoise, discussed above. For

instance, the FEIS established that one of the likely indirect effects from the highway to desert tortoise is the spread of non-native plants, which reduces forage quality and increases the risk of fire within tortoise habitat. AR 100051, 099309–10. The FEIS admitted that the spread of non-native invasive species would extend up to one kilometer from the edge of the highway—over twice as far as the chosen 508-meter buffer in its analysis for the tortoise—thus causing indirect impacts to tortoise populations and habitat far beyond the chosen analysis area. AR 099984 n.3, 099985. But the FEIS fails to account for these indirect impacts, and neither does it reconcile this clear discrepancy. For other indirect effects to tortoise, like noise, the FEIS gives no reasonable estimate of how far impacts might extend from the highway. *See* AR 100172 (stating that a “noticeable change in noise levels is anticipated *near* the [highway]”) (emphasis added); *see also supra* at 24–28. As such, it is impossible to tell whether a 508-meter buffer was adequate to assess the impacts of noise and other disturbance to the tortoise. Overall, the FEIS did not justify or explain how the various indirect effects would be limited to the chosen analysis area, despite science in the record indicating impacts would extend far beyond that area, likely resulting in a significant underestimation of indirect effects to tortoise habitat and individual tortoises.

Courts reject such cramped indirect impacts analyses that are based on arbitrary, irrational, and unexplained decision-making. *See Standing Rock Sioux Tribes v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 138-39 (D.D.C. 2017) (rejecting use of 0.5 mile buffer because it excluded nearby lands that could be affected by oil pipeline); *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1179–80 (10th Cir. 2002) (rejecting 1,000 foot analysis area for highway when record documented potential impacts to wildlife outside this area); *Idaho Sporting Cong.*, 305 F.3d at 973 (invalidating EIS when agency used home range rather than landscape scale in its cumulative effect analysis despite the evidence in the record that effects must be

addressed at a landscape scale). Because the FEIS's indirect analysis area here similarly conflicts with the science in the record and is not based on a rational explanation justifying a much smaller impacts area, it too violates NEPA. *Standing Rock*, 255 F. Supp. 3d at 138-39.

E. Supplemental Analysis Was Required to Assess Recent Wildfires

Finally, Defendants violated NEPA by refusing to prepare a supplemental draft EIS ("SEIS") for public review and comment after the four major wildfires burned through Red Cliffs NCA and Reserve in 2020 following issuance of the DEIS, significantly impacting desert tortoise and other sensitive resources in the area. SOF ¶¶ 31-36, 95.

As noted above, these four major human-caused wildfires recently burned nearly 25% (15,000 acres) of Red Cliffs NCA. SOF ¶ 33. The first three fires burned 11,754 acres within Zone 3 of the NCA, including at least 8,814 acres of tortoise critical habitat and 2,526 acres that were previously unburned. *Id.*; *see also* AR 100028. Native vegetation communities and desert tortoise were adversely impacted. SOF ¶¶ 31-36.

Plaintiffs requested that Defendants pause the environmental review of the highway until they fully assessed ecological impacts of the 2020 fires, and Defendants demurred. SOF ¶ 36. Instead, they added a brief discussion in the FEIS, thus foreclosing public comment on their assessment of the fire impacts. *See* AR 099938, 100165-66. The FEIS asserted that major wildfires were now a "common occurrence" in the NCA and part of a "burn-reburn fire regime," for which it claimed impacts were already identified and analyzed. *Id.* The FEIS "determined that the 2020 wildfires do not represent a significant new circumstance." AR 099938, 100166.

This conclusion flies in the face of evidence in the record regarding the significant impacts of the fires upon the NCA and desert tortoises, as BLM and FWS staff acknowledged. For instance, a FWS wildlife biologist discussed internally the significance of the fires in terms

of their effect on native plant communities. AR 042349–50. The on-the-ground impacts of the fires also highlight their severity. *See* AR 042349 (BLM memo noting the 2020 fires “burned very hot and decimated native trees, shrubs, forbs and grasses to ash”); AR 101787 (FWS referring to the 2020 fires as “significant fires” in the UVRU); AR 099982 (FEIS stating “[b]ased on the severity [of the 2020 wildfires], it is unknown how long, if ever, the vegetation will take to return to pre-burn condition”).

The 2020 wildfires also burned thousands of acres of tortoise critical habitat, AR 099938, 100028, 100318, and at least 14 tortoises were killed in the Cottonwood Trail fire alone, AR 093887–88. *See also* AR 083890 (discussing how Cottonwood Trail and Turkey Farm fires “will likely have *significant population-level effects* on tortoises within their respective burn areas”) (emphasis added). These are significant impacts to tortoises and native vegetation far beyond what was previously considered in the DEIS, requiring an SEIS.

As this Court has stated, “the need for supplementation ‘turns on the value of the new information to the still pending decisionmaking process.’” *Friends of Cap. Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1058 (D.C. Cir. 2017) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989)). An SEIS is required when the proposed action “will affect the quality of the environment “in a significant manner or to a significant extent not already considered.” *Mayo v. Reynolds*, 875 F.3d 11, 16 (D.C. Cir. 2017) (quoting *Marsh*, 490 U.S. at 374). These standards are easily met here.

Moreover, the minimal discussion of the 2020 fires added to the FEIS after the public comment period does not satisfy NEPA. Fires exacerbate the adverse impacts caused by the highway: fires fragment and harm desert tortoises and their habitat, degrade native vegetation, and facilitate the spread of invasive plant species. Yet the FEIS provided no data on the scale and

scope of impacts from the 2020 fires, burn severity, impacts on desert tortoise (except for the limited Cottonwood Trail fire study), or other information needed to fully understand the ecological impact of the fires in conjunction with the highway. This again violates NEPA. *See Davis v. Latschar*, 202 F.3d 359, 369 (D.C. Cir. 2000) (SEIS is required for “changes that cause effects which are significantly different from those already studied”); *Cascadia Wildlands v. U.S. Forest Serv.*, Case No. 21-cv-01225-AA, 2021 WL 6112546, at *1 (D. Or. Dec. 27, 2021) (finding serious questions as to whether a supplemental NEPA analysis was necessary to address wildfires that changed resource conditions).

Finally, considering this significant new information for the first time in the FEIS is also unlawful under NEPA: without an SEIS published for public notice and comment, the public was not adequately informed, and had no opportunity to address the compounding impacts of the highway in a severely burned landscape. *See Sierra Club v. FERC*, 867 F.3d at 1368 (“[t]he overarching question is whether an EIS’s deficiencies are significant enough to undermine informed public comment and informed decisionmaking”). Defendants’ refusal to prepare a SEIS with accurate information and analysis of the 2020 fires’ impacts for public comment again violates NEPA, requiring reversal.

IV. DEFENDANTS VIOLATED NHPA SECTION 106.

Defendants also violated the NHPA, 54 U.S.C. §§ 300101 *et seq.*, by failing to resolve their determination that the highway will “result in adverse effects to historic properties under Section 106” before issuing the ROD, and similarly delaying resolution of adverse effects until an uncertain time in the future. The Court should thus grant summary judgment under Plaintiffs’ Fifth Claim for Relief. *See* First Am. Compl. ¶¶ 188-94.

A. NHPA Requires Completion of Section 106 Consultation Before Final Decision.

NHPA Section 106 requires that each federal agency, “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.” 54 U.S.C. § 306108. Section 106 mandates agencies to assess possible impacts of their actions on historic properties, and “take into account the effect of their actions on [historic] structures.” *Ill. Com. Comm’n v. Interstate Com. Comm’n*, 848 F.2d 1246, 1260-61 (D.C. Cir. 1988). Completing Section 106 consultation before approving an undertaking is an “unambiguous directive.” *Mid States*, 345 F.3d at 554.

Section 106 compliance involves four steps. First, the agency must identify the area potentially affected by the undertaking. *See* 36 C.F.R. §§ 800.4(a)(1), 800.16(d).⁸ Next, the agency must make a “reasonable and good faith effort” to identify historic properties within the APE. *Id.* § 800.4(b)(1).⁹ The agency must then evaluate whether the proposed action may have adverse impacts on identified historic properties. *Id.* § 800.5(a).

If the agency concludes that the undertaking may adversely affect historic properties, it must consult with affected parties “to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects.” *Id.* §§ 800.5(d)(2), 800.6(a). This resolution usually takes the form of a Memorandum of Agreement (“MOA”), which signifies agreement upon how the parties will resolve the detrimental impacts of the undertaking. *Id.* § 800.6(c). If adverse effects cannot be resolved, the process is elevated to the

⁸ An area of potential effects (“APE”) is defined as the “geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.” 36 C.F.R. § 800.16(d).

⁹ “Historic property” is broadly defined to mean “any prehistoric or historic district, site, building, structure, or object included in, or eligible for include in, the National Register of Historic Places,” and includes “artifacts, records, and remains that are located within such properties.” 36 C.F.R. § 800.16(l).

Advisory Council on Historic Preservation (“ACHP”) and agency head. *Id.* § 800.7.

Agencies are encouraged to coordinate their NEPA and NHPA review, *id.* § 800.2(d)(3), and may use the NEPA process to comply with NHPA obligations as long as certain public engagement standards are met, *id.* § 800.8(c)(1)-(3). “If the agency official has found, during the preparation of an . . . EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the . . . EIS to avoid, minimize, or mitigate such effects. . . .” *Id.* § 800.8(c)(4).

An agency satisfies its Section 106 responsibilities when it makes a binding commitment to such proposed measures in either a ROD or MOA. *Id.* § 800.8(c)(4)(i)(A)-(B). *See also Mid States*, 345 F.3d at 554 (§ 800.8 “requires that an agency develop measures to ‘avoid, minimize, or mitigate’ adverse effects and then bind itself to these measures in a record of decision”).

B. Defendants Violated Section 106 By Failing to Resolve Adverse Effects Before Approving the Federal Undertaking.

Defendants violated the NHPA by failing to complete their Section 106 obligations prior to issuing the ROD. *See Mid States*, 345 F.3d at 554; *see also* 40 C.F.R. § 1505.2 (ROD is decision document). Although they commenced the Section 106 process and made an “adverse effects” determination, Defendants failed to resolve those adverse effects before approving the ROD, as required under 36 C.F.R. §§ 800.1, 800.6 and 800.8(c)(4).

On February 5, 2020, BLM initiated Section 106 consultation with the Utah State Historic Protection Office (“SHPO”) over the impacts of the highway. *See* SOF ¶¶ 98-104. Later during the Section 106 consultation, BLM acknowledged the highway would “result in adverse effects to historic properties under Section 106 of NHPA and would directly impact cultural resources . . . causing permanent or long-term effects to [historic properties].” AR 100117-28; *see also* AR 037504-05 (letter seeking concurrence with adverse effects determination). More

specifically, BLM concluded that the highway can be expected to cause “[p]hysical destruction of or damage to all or part of the historic property,” AR 037504-05, which include a petroglyph panel with artifact scatter, prehistoric artifact scatters and other historic properties, among other adverse impacts. *Id.*; *see also* AR 043769. The SHPO agreed with BLM that the highway will cause adverse effects to historic properties. AR 043782.

This conclusion triggered further NHPA consultation requirements, including “to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects of historic properties.” 36 C.F.R. § 800.6(a); *id.* § 800.5(d)(2) (“If an adverse effect is found, the agency official shall consult further to resolve the adverse effects”).

Yet BLM failed to resolve its assessment that the highway will adversely affect historic properties prior to approving the ROD, as required by the NHPA regulations, and BLM failed to enter into any MOA or Programmatic Agreement. Instead, the Highway ROD stated only that BLM “will continue consultation to identify processes to resolve any adverse effects to historic properties,” through a future Notice to Proceed. AR 101892.¹⁰ This response runs contrary to the plain language of the Section 106 regulations, 36 C.F.R. §§ 800.1(c), 800.6 and 800.8(c)(4), which again require BLM to resolve adverse effects *before* approving the ROD. *See Corridor H Alts. v. Slater*, 166 F.3d 368, 372-73 (D.C. Cir. 1999) (agency cannot defer Section 106 process until after the ROD is issued); *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 263 (3rd Cir. 2001) (Section 106 “require[es] an agency to acquire and consider information prior to making a decision and approving a federal undertaking”).

¹⁰ BLM’s failure to complete Section 106 consultation over the adverse impacts of the highway on historic properties here contrasts with FWS, which completed its Section 106 obligations by entering into a Programmatic Agreement to resolve its determination that implementation of the Washington County HCP will adversely affect historic properties. AR 042069-87.

BLM's approach here also runs afoul of NHPA's substitution regulations, 36 C.F.R.

§ 800.8(c)(4)(i)(A)-(B), which require an agency to incorporate into a ROD (or MOA) any avoidance, minimization, or mitigation measures needed to resolve adverse impacts.

Closely on point here is *Mid States Coalition*, where petitioners challenged an agency license and ROD approving a new rail line without first identifying specific mitigation measures to avoid or mitigate identified adverse effects. 345 F.3d at 553. In response, the agency argued that the Section 106 regulations permit it to "defer" identifying specific mitigation measures until after the undertaking is approved. *Id.* at 554. The Eighth Circuit "disagree[d]," and held Section 106 regulations "require that NHPA issues be resolved by the time the license is issued." *Id.*

This Court should follow *Mid States*, and similarly reject BLM's decision to delay compliance with Section 106 until after it approved the undertaking and issued the ROD.

V. DEFENDANTS VIOLATED THE ENDANGERED SPECIES ACT.

Finally, Plaintiffs seek summary judgment under their Seventh through Ninth Claims for Relief, challenging FWS's Biological Opinion ("BO") approving the Highway ROW and associated plan amendments, its ITP granting incidental take coverage of desert tortoise, and BLM's reliance FWS' unlawful BO. *See* First Am. Compl., ¶¶ 200-13.

A. Requirements of the Endangered Species Act.

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Congress intended federal agencies to afford endangered species "the highest of priorities," *id.* at 174, and "to halt and reverse the trend towards species extinction, whatever the cost," *id.* at 184.

ESA Section 7(a)(2) requires each federal agency to ensure that a proposed action is not likely to jeopardize the continued existence of any threatened or endangered species, or result in

the destruction or adverse modification of their critical habitat. 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.02 (defining “jeopardy” and “destruction or adverse modification”). To fulfill these mandates, agencies must consult with FWS. 16 U.S.C. § 1536(a)(2). Consultation results in the FWS’s issuance of a BO, which presents its best analysis of the action’s effect on the species and its critical habitat. *Id.* § 1536(b)(3)(A). A BO must include a discussion of the environmental baseline, and examine “all” consequences of the proposed action. 50 C.F.R. §§ 402.02, 402.17.

If FWS finds no jeopardy or adverse modification, but determines that the action will result in incidental take of a protected species, then the BO must be accompanied by an Incidental Take Statement (“ITS”). *Pacific Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng’rs*, 538 F. Supp. 2d 242, 247 (D.D.C. 2008) (“*Pacific Shores*”). The ITS details the impact of the action on the species, identifies “reasonable and prudent measures” (“RPMs”) necessary to minimize this impact, and adopts terms and conditions that must be followed in order to minimize the impact on the species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1).

ESA Section 9 makes it unlawful for any person to “take” a listed species. 16 U.S.C. § 1538(a)(1)(B); *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002).¹¹ ESA Section 10 creates an exception to this prohibition, and FWS may issue an Incidental Take Permit (“ITP”) allowing “take” that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. 16 U.S.C. § 1539(a)(1)(B). To qualify for an ITP, an applicant must submit to FWS an HCP specifying the steps the applicant will take to minimize and mitigate impacts of the action, among other requirements. *Id.* § 1539(a)(2)(A). FWS shall issue the permit if the application meets five statutory conditions, including that the applicant will minimize and mitigate the

¹¹ “Take” is defined to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. 1532(19); 50 C.F.R. § 17.3.

impacts of such taking, and ensure adequate funding for the plan. *Id.* § 1539(a)(2)(B)(ii), (iii).

B. FWS’s Northern Corridor Highway BO and ITS Violate ESA Section 7.

On January 12, 2021, FWS issued a BO for the highway (“Highway BO”), concluding that constructing, operating, and maintaining the highway will not jeopardize the desert tortoise or adversely modify its critical habitat—even though FWS estimated that construction and use of the highway would “take” 448 adults, 2410 juveniles, 603 hatchlings, plus an additional 210 tortoises in all life stages, and permanently destroy or degrade over 2,600 acres of critical habitat. *See* SOF ¶¶ 123-29. FWS issued an ITS to authorize this level of take, which adopted four RPMs to minimize impact of expected take, including minimizing fragmentation by constructing certain tortoise passage structures. *Id.* As explained below, the Highway BO and ITS contain four errors, each of which requires reversal.

i. FWS Unlawfully Ignored Growth-Inducing Impacts of the Highway.

Just as the FEIS failed to evaluate growth-inducing effects of the highway in violation of NEPA, FWS likewise violated the ESA by failing to examine potential growth-inducing impacts of the highway on tortoise populations and habitat. *See* SOF ¶¶ 130-32.

A BO must contain an examination of the “effects of the action,” which means “all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action.” 50 C.F.R. § 402.02. In *National Wildlife Federation v. Coleman*, plaintiffs challenged an agency’s approval to build a highway through habitat for an endangered crane. 529 F.2d 359, 361 (5th Cir. 1976). The district court rejected as “mere speculation” plaintiffs’ concerns over the potential for residential and commercial development. *Id.* at 373. The Fifth Circuit reversed, holding that growth-inducing impacts of an action qualify as an “effect,” and the agency violated the ESA by failing to

consider the possibility of additional development, based on agency predictions of possible future development and other information in the record. *Id.*

Like in *Coleman*, FWS here refused to examine the possibility of development resulting from the highway, claiming only “[w]e do not anticipate any future road development within the Reserve and consider the Northern Corridor highway . . . will be the only substantial development project affecting the Reserve in the future.” AR 101827. Yet, like in *Coleman*, the record here undermines this assumption.

For example, the portion of the Red Cliffs NCA targeted for construction of the highway contains large expanses of private and state-owned lands. *See* SOF ¶¶ 6-7, 130-31; *see also* AR 100271, 100329, 100349. This area includes the East Cottonwood AU of the UVRRU where BLM acknowledged that threats include “potential for development . . . on non-Federal lands.” AR 100033. FWS itself noted the possibility of road development in the Reserve. AR 101708 (acknowledging that “landowners in the Reserve may decide to develop their land”).¹²

Indeed, some private land owners have already begun planning development of these lands, including by identifying existing and future access points, buried water lines, power lines, and sewer connections; and agreeing to share planning costs for these parcels once the highway is developed. AR 011327, 011329-401. The evidence in the record here concerning the potential

¹² Notably, in response to an earlier highway proposal, FWS found it “may cause induced growth on private lands in the Red Cliffs Desert Reserve” and “could result in landowners selling their properties to commercial developers with ensuing land use changes, timing, and rate of change given the current absence of paved access across this area.” AR 088357. FWS’s about-face in approving the Highway BO without analyzing growth-inducing effects is thus an arbitrary, unexplained change in position, also requiring reversal. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (requiring a “reasoned explanation” when agency changes a position); *Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) (“[A]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so.”).

for the highway to spur development exceeds the evidence in *Coleman*. The Court should thus hold that FWS violated ESA Section 7 by refusing to consider the growth-inducing impacts.

ii. FWS's No-Jeopardy Determination is Unlawful Because FWS Failed to Consider Whether the Highway May Preclude Tortoise Survival and Recovery.

In making a jeopardy determination, FWS must examine the effects of the action on a species' survival and recovery. *See* 50 C.F.R. § 402.02; *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 933 (9th Cir. 2008) (“*NWF*”). In preparing this analysis, FWS must “know roughly at what point survival and recovery will be placed at risk.” *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1000 (D. Ariz. 2011) (“*CBD*”) (quoting *NWF*, 524 F.3d at 936). Thus, “FWS must identify when a species will likely pass the tipping point for recovery, and determine whether the proposed action will cause the species to reach that tipping point.” *CBD*, 804 F. Supp. 2d at 999 (citing *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010)). Impairment of a species' recovery prospects alone may constitute jeopardy. *NWF*, 524 F.3d at 932.

Here, FWS found the highway was likely to adversely affect tortoise populations, which have already declined significantly since their ESA listing—including by 66% in Zone 3 where the highway is proposed. *See* SOF ¶¶ 28-30, 88-91, 123-29. FWS's own information shows that tortoise populations in the UVRRU continue to decrease by 3.2 percent per year, and FWS asserts that the highway will impact 21% of tortoises in Zone 3 and 8% within the UVRRU. AR 102072.¹³ In fact, because the highway crosses an area containing the highest-density desert tortoise in the Reserve, AR 101805-06, FWS concluded it is likely to “impair connectivity and fragment 1,616 ac[res] of desert tortoise home range habitat, resulting in demographic and

¹³ FWS's own data shows that the highway is expected to “take” up to 28% and 11% of all tortoises in Zone 3 and the UVRRU, respectively. *See* SOF ¶¶ 125-29.

genetic consequences that could negatively affect population viability,” AR 101821. *See also* AR 099344 (continued habitat fragmentation “compromises the integrity of the entire Reserve”); AR 102072 (FWS calling highway a “significant new anthropogenic stressor”). FWS’s own tortoise expert warned that “[t]he negative population trends . . . for Mojave desert tortoise indicate that this species is on the path to extinction under current conditions.” AR 091671.

Despite these depauperate baseline conditions and the likely significant impacts of the highway on tortoise populations and habitat, FWS concluded the highway is not likely to jeopardize the tortoise. AR 101826-29. But FWS failed to consider the tipping point at which the tortoise’s survival and recovery would be placed at risk – including the survival and recovery needs of the tortoise. *Id.* This oversight is particularly problematic because the current tortoise population in the East and West Cottonwood AUs remain below the 2,000-5,000 adult tortoises FWS determined was the *minimum* target for recovery under the 1994 Recovery Plan. *See* AR 066518 (population of between 5,000-50,000 tortoises needed for a genetically healthy population), AR 101794 (as few as 1,286 adult tortoises in these AUs), AR 101787 (tortoise populations have “declined significantly” in the UVRRU), AR 059238. Moreover, FWS never considered the additive impacts of the highway together with the depauperate baseline habitat and populations conditions, and whether this additional impact threatens to push the tortoise toward the tipping threshold that forecloses survival and recovery. AR 101826-29.

The Highway BO thus unlawfully failed to examine whether the environmental baseline and impacts of the highway push the desert tortoise towards the “tipping point,” making survival and recovery unattainable, requiring reversal. *See NWF*, 524 F.3d 933; *Wild Fish Conservancy*, 628 F.3d 527; *CBD*, 804 F. Supp. 2d 1000; *see also Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 441 F. Supp. 3d 843, 857 (D. Ariz. 2020) (“A tipping point analysis is often

necessary to prevent a ‘death by a thousand pinpricks’”) (quoting *Rock Creek All. v. U.S. Forest Serv.*, 703 F. Supp. 2d 1152, 1205 (D. Mont. 2010), *aff’d in part sub nom. Rock Creek All. v. U.S. Fish and Wildlife Serv.*, 663 F.3d 439 (9th Cir. 2011)).

iii. FWS’s No Adverse Modification Finding is Unlawful Because FWS Failed to Consider the Importance of the Fragmented and Destroyed Critical Habitat.

The ESA also requires FWS to ensure that a proposed action will not result in the “destruction or adverse modification” of designated critical habitat of the species. 16 U.S.C. § 1536(a)(2). Destruction or adverse modification of critical habitat occurs where there is a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the survival and recovery of a species. 50 C.F.R. § 402.02.

Here, the record establishes significant on-going degradation of tortoise critical habitat, and FWS acknowledged the highway will “permanently remov[e]” 275 acres of tortoise habitat, and “degrade” an additional 2,333 acres of tortoise critical habitat. AR 101808, 101822; *see also* AR 100016-039 (threats analysis). Yet, FWS concluded that the highway will not “alter critical habitat in a way that diminishes the value of critical habitat as a whole for the conservation of desert tortoises.” AR 101828. This conclusion is arbitrary and capricious for two reasons.

First, FWS rested its “no adverse modification” assessment on only the 275 acres “permanently removed” or “lost,” failing to consider whether degradation of an additional 2,333 acres of critical habitat surpasses the adverse modification threshold. AR 101829, 101808. This is an important impact that FWS should have considered. *See State Farm*, 464 U.S. at 43 (decision is arbitrary and capricious when it fails to consider an important aspect of the problem).

Second, FWS compounded this error by ignoring the local significance of the permanently destroyed critical habitat and looking only to the number of acres destroyed relative to range-wide and regional critical habitat acreage. AR 101828 (destroyed critical habitat

“represents less than 1 percent of the 56,187 ac[res] of designated critical habitat in the UVRU and the 6.4 million ac[res] of designated critical habitat rangewide”). But the size of the lost critical habitat is not determinative: the ESA does not permit adverse modification of critical habitat even if “the overall amount of impacted habitat is small.” *Town of Superior v. U.S. Fish and Wildlife Serv.*, 913 F. Supp. 2d 1087 (D. Colo. 2012). The Ninth Circuit has explained that “[f]ocusing solely on a vast scale can mask multiple site-specific impacts that, when aggregated, do pose a significant risk to a species.” *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1075 (9th Cir. 2004).

FWS itself acknowledged in its recent 2019 ESA regulation revisions that it is not “appropriate to mask the significance of localized effects of the action by only considering the larger scale of the whole [critical habitat] designation and not considering the significance of any effects that are occurring at smaller scales.” 84 Fed. Reg. 44,976, 44,983 (Aug. 27, 2019). “Thus, the size or proportion of the affected area is not determinative.” *Id.* at 44,983. In situations like this, FWS has acknowledged that “[l]ocal impacts could be significant . . . where a smaller affected area of the overall habitat is important in its ability to support the conservation of the species.” *Id.*; accord *Or. Nat. Desert Ass’n v. Lohn*, 485 F. Supp. 2d 1190, 1199 (D. Or. 2007).

Accordingly, FWS must analyze the importance of losing even relatively small areas of critical habitat before it can conclude that loss of such habitat will not appreciably diminish the value of such habitat to the conservation of the species. This is especially true here, because the highway is sited through “the most important high-density cluster of desert tortoises in the recovery unit,” and FWS considers this area as likely having “the greatest influence on resilience of the UVRU.” AR 100054, 100318, 101805-07; *see also* AR 100052 (highway “may result in long-term consequences to the conservation of the [] tortoise”).

iv. The ITS Failed to Include Terms and Conditions Implementing RPMs.

FWS further erred in adopting an ITS that failed to include any term and condition implementing the RPMs it identified to minimize tortoise habitat fragmentation. The ESA mandates that an ITS must “set[] forth the terms and conditions . . . that must be complied with” in order to implement “those reasonable and prudent measures that [FWS] considers necessary or appropriate to minimize [the] impact” of the proposed action. 16 U.S.C. § 1536(b)(4).

Courts have held that “an incidental take statement that fails to include terms and conditions governing the implementation of reasonable and prudent measures is ‘arbitrary and capricious.’” *Pacific Shores*, 538 F. Supp. 2d at 258 (quoting *Ctr. for Biological Diversity v. BLM*, 422 F. Supp. 2d 1115, 1141 (N.D. Cal. 2006)). In *Pacific Shores*, conservation groups challenged an ITS that identified three RPMs to minimize take of an endangered fish, yet adopted only two terms and conditions. 538 F. Supp. 2d at 258. The Court held the ITS was arbitrary and capricious, and FWS enjoyed no discretion in omitting identifying a term and condition implementing a required RPM. *Id.* at 258-59. In *Center for Biological Diversity v. BLM*, the court came to this same conclusion, and reversed a BO where FWS identified RPMs to reduce take of Mojave desert tortoise from recreational uses, but failed to adopt any term or condition implementing these protections. 422 F. Supp. 2d at 1141.

As in those cases, FWS here failed to include a term or condition implementing each required RPM. The Highway BO identified four RPMs necessary to minimize impacts of the highway on the tortoise, including that “[t]he action agency and the applicant will design the [highway] to minimize desert tortoise fragmentation by constructing passage structures to allow effective desert tortoise dispersal.” AR 101833. Yet the ITS failed to adopt any term or condition implementing this required minimization measure. *Id.* Its only terms and conditions concern reporting requirements regarding translocation and tortoise fatalities. *Id.*

This Court should follow *Pacific Shores* and *Center for Biological Diversity v. BLM*, and similarly hold that FWS’s failure to identify any term and condition requiring the minimization of fragmentation of desert tortoise habitat is arbitrary and capricious, and violates the ESA.

C. FWS’s Incidental Take Permit Violates Section 10 of the ESA.

Finally, FWS’s ITP approving the Washington County 2020 HCP runs afoul of the requirements of ESA Section 10 by relying on third-party mitigation measures, and other unfunded, uncertain, and unenforceable measures to meet its obligation to minimize and mitigate impacts on tortoise.

i. FWS Erred in Relying on Third-Party Mitigation Measures.

ESA Section 10 requires “the applicant” to minimize and mitigate the impacts of its taking. 16 U.S.C. § 1539(a)(2)(B)(ii). Courts have held FWS may only consider mitigation measures implemented by the applicant—and not a third party—in determining whether impacts have been minimized and mitigated. *Klamath-Siskiyou Wildlands Ctr. v. NOAA*, 99 F. Supp. 3d 1033 (N.D. Cal. 2015); *see also Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 578 (D.C. Cir. 2016) (noting that the ESA requires FWS to “examine and predict the efficacy of [the applicant’s] proposed minimization and mitigation measures”).

In *Klamath-Siskiyou*, FWS granted ITPs to a private landowner allowing take of a threatened owl. FWS concluded the applicant landowner minimized and mitigated impacts of the taking, relying upon the landowner’s designation of conservation areas designed to protect owl habitat. 99 F. Supp. 3d at 1047-49. Plaintiffs challenged this conclusion, noting that the U.S. Forest Service—not the applicant—owned and managed the overwhelming majority of lands in the conservation areas, and thus the Forest Service’s actions, and not the applicant’s actions, would provide beneficial impacts to the owl. The court agreed, and held FWS unlawfully relied

on third-party mitigation efforts to satisfy ESA Section 10(a)(2)(B)(ii). *Id.* at 1052.

Like in *Klamath-Siskiyou*, Washington County here has piggy-backed its efforts onto existing conservation efforts by third parties in violation of ESA Section 10. Indeed, the cornerstone of the County's claimed mitigation efforts is the creation and management of the Reserve to promote the conservation of the tortoise. AR 101657-58, 102071-74. Yet the County does not own these lands; BLM does. SOF ¶¶ 3, 7, 11, 50. Nor does the County have any management authority or obligations over much of the Reserve, which, again, falls primarily to BLM. *Id.* FWS cannot permit the County to piggyback on already-existing conservation efforts and other third-party measures to meet its ESA Section 10 obligations. *See Klamath-Siskiyou*, 99 F. Supp. 3d. at 1052.

ii. FWS Unlawfully Relied on Unfunded Mitigation Measures.

FWS also erred in relying on the County's unfunded mitigation measures in determining its 2020 HCP adequately minimized and mitigated adverse effects. *See Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274, 1282 (S.D. Ala. 1998) (holding that "FWS's speculative reliance on other unnamed sources to contribute funds to make up for the inadequacy of the amounts of [] mitigation funding required is simply contrary to law"); *Nat'l Wildlife Fed'n v. Babbitt*, 128 F. Supp. 2d 1274, 1294-95 (E.D. Cal. 2000) (same).

Here, the County's primary mitigation measure to offset the habitat fragmentation associated with the 2020 HCP and highway is to construct "three to five crossing structures" underneath Cottonwood Spring Road to ostensibly provide tortoise passage. AR 102073, 099600-601, 031197. The County will provide \$150,000 towards achieving this measure. AR 102073. But that is a small fraction of the cost, which could run as high as \$4.55 million. AR 032683 (UDOT identifying cost of up to \$910,00 for each crossing structure). The County

suggests it can make up this \$4.4 million shortfall by seeking outside money from other, unidentified sources. AR 099600 (stating the “County and the HCP Partners also commit to seek other sources of funding to help improve connectivity within the Reserve”). FWS’s reliance on speculative, unnamed sources to contribute funds to make up for the inadequacy of the amounts of mitigation funding is contrary to law. *Sierra Club*, 15 F. Supp. 2d at 1282.

iii. FWS Unlawfully Relied on Uncertain and Unenforceable Mitigation Measures.

This Court can similarly dispatch with the remaining mitigation measures, which lack objective criteria to ensure they minimize and mitigate impacts on tortoise, and are unenforceable. Courts have rejected mitigation measures containing uncertain and unenforceable measures. *Klamath-Siskiyou*, 99 F. Supp. 3d at 1054 (“The Secretary cannot make this [minimization and mitigation] finding by relying on mitigation that the [FWS] cannot enforce”).

Like in *Klamath-Siskiyou*, the FWS here relied upon aspirational measures to meet its “minimize and mitigate” requirements, including that the “County will continue to facilitate [land] acquisitions,” and would be in charge of “[a]dministration and adaptive management of the Reserve on non-Federal lands.” AR 102071-72. These measures lack any specific obligations to minimize impacts of the taking of tortoise resulting from the 2020 HCP, rely on actions by third parties to acquire the lands, and lack any criteria against which to measure compliance. *See Klamath-Siskiyou*, 99 F. Supp. 2d at 1053 (rejecting similar measure to “promote” conservation). “FWS cannot comply with the strict ESA mandate that the HCP ‘minimize and mitigate’ the effects of the projects to the ‘maximum extent practicable’ simply by relying on speculative future actions by others.” *Sierra Club*, 15 F. Supp. 2d at 1282.

FWS also arbitrarily concluded that Washington County would “exclude” covered activities on SITLA-owned lands in Zone 6, including land uses and land development activities. AR 102074. In truth, the 2020 HCP expressly *permits* a host of covered activities within Zone 6

that FWS admitted may cause incidental take of tortoise and critical habitat—including the construction, operation, and expansion of utilities, access roads, and parking lots. AR 099478-79. By incorrectly asserting the County would “exclude” these uses within the Reserve, and then relying on this phantom mitigation measure in reaching its conclusion that the 2020 HCP satisfied the “minimize and mitigate” requirement of Section 10(a)(2)(B)(ii), FWS again acted arbitrarily and capriciously. *State Farm*, 463 U.S. at 43.

D. BLM Violated the ESA by Relying on FWS’s Unlawful Highway BO.

Section 7 of the ESA imposes a substantive duty on BLM to ensure that the highway and associated decisions are not likely to jeopardize the continued existence of any listed species, or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2007) (recognizing substantive requirements); *Ctr. for Biological Diversity v. Ross*, 349 F. Supp. 3d 38, 42 (D.D.C. 2018) (same). Relying on an unlawful biological opinion violates this duty. *Ctr. for Biological Diversity v. BLM*, 698 F.3d 1101, 1127-28 (9th Cir 2012) (“*CBD I*”) (“BLM cannot meet its section 7 obligations by relying on a Biological Opinion that is legally flawed.”).

For all the above stated reasons, FWS’s Highway BO is unlawful, and BLM relied on the unlawful Highway BO in approving the Highway ROD and ROW, as well as associated plan amendments. Accordingly, BLM violated its substantive duty under ESA Section 7(a)(2), again requiring reversal. *CBD II*, 698 F.3d 1101, 1127-28.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs’ summary judgment motion, hold that Defendants violated the Public Lands Act, LWCF Act, NEPA, NHPA, ESA, and/or APA in approving the challenged decisions, and remand and vacate the challenged decisions.

Dated: February 27, 2023

Respectfully submitted,

/s/ Todd C. Tucci

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Biological Diversity, Defenders of Wildlife,
Southern Utah Wilderness Alliance, WildEarth
Guardians and The Wilderness Society

Attachment A



Permit Number: TE036719-1
Effective: 01/15/2021 Expires: 01/15/2046

Issuing Office:

Department of the Interior
U.S. FISH & WILDLIFE SERVICE
Endangered Species Permit Office
Denver Federal Center
P.O. Box 25486
Denver, CO 80225-0489

Noreen E. Walsh 1/13/2021
Regional Director, Interior Regions 5 & 7

Permittee:

WASHINGTON COUNTY
111 TABERNACLE STREET
ST. GEORGE, UT 84770
U.S.A.

Name and Title of Principal Officer:

CAMERON ROGNAN - HCP ADMINISTRATOR

Authority: Statutes and Regulations: 16 USC 1533(d); 50 CFR 17.32, 50 CFR 13.

Location where authorized activity may be conducted:

See permit conditions for location(s)

Reporting requirements:

ANNUAL REPORT DUE: 03/01

See permit conditions for reporting requirements

Authorizations and Conditions:

A. General conditions set out in Subpart B of 50 CFR 13, and specific conditions contained in Federal regulations cited above, are hereby made a part of this permit. All activities authorized herein must be carried out in accordance with and for the purposes described in the application submitted. Continued validity, or renewal of this permit is subject to complete and timely compliance with all applicable conditions, including the filing of all required information and reports.

B. The validity of this permit is also conditioned upon strict observance of all applicable foreign, state, local tribal, or other federal law.

C. Valid for use by permittee named above.

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**SPECIAL TERMS AND CONDITIONS FOR
PERMIT TE036719-1**

Species: **Mojave desert tortoise** (*Gopherus agassizii*)

This permit authorizes Washington County (Permittee) and its authorized HCP Partners, Participants, officers, employees, contractors, and agents conducting covered activities to incidentally take Mojave desert tortoise while conducting activities associated with development, infrastructure, recreation, grazing, agriculture, etc., in accordance with the Habitat Conservation Plan for Washington County, Utah: Restated and Amended (Amended HCP).

The term of this permit is 25 years from the effective date.

The authorization granted through this permit, under section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended, is subject to the following conditions:

- D. The Permittee shall comply with all applicable provisions of law and regulation, including without limitation Title 50 Code of Federal Regulations, Parts 13, 17.22, and 17.32. Washington County is responsible to ensure that the activities carried out under authority of this permit are in compliance with the terms and conditions of this permit.
- E. The continued validity of this permit is subject to full and complete compliance with, and implementation of the Amended HCP. These documents are herein incorporated by reference and are posted at: <https://www.fws.gov/utahfieldoffice/news.php>. To the extent of any conflict, the permit terms and conditions supersede and take precedence over any provisions in the Amended HCP or other associated documents. This permit and the Amended HCP are binding upon the Permittee, and any authorized officer, employee, contractor, or agent conducting covered activities in the covered area as described in the Amended HCP.
- F. The Implementation Agreement is incorporated into the incidental take permit as a term and condition of the permit. A failure of the permittee to comply with one or more terms of the Implementation Agreement may be grounds for considering the revocation of the incidental take permit. In all cases, the terms of an incidental take permit are controlling (HCP Handbook 14-16).
- G. The County will work with the Municipal Partners to update Interlocal Agreements as soon as practicable to ensure consistency with the language of the Amended HCP. These Interlocal Agreements will include commitments to continue to abide by the Amended HCP and the applicable terms and conditions of the ITP. The past agreements will remain in effect until these new agreements are finalized.

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- H. The Amended HCP states that the funds deposited into the HCP Trust Fund will be used annually to further the purposes of implementing the Amended HCP or for expenditures that are otherwise consistent with the conservation or recovery of the Mojave desert tortoise (p. 124).
- I. The Permittee shall conduct all activities under this permit in compliance with 1) applicable local, State, and Federal laws, regulations, and restrictions; and 2) the terms of the Amended HCP and its associated documents.
- J. Activities executed by the County that require handling of Mojave desert tortoises as part of the minimization measures must be conducted by individuals included on the List of Authorized Individuals for the Amended HCP or under the direct, on-site supervision of an experienced, permitted biologist (or tortoise veterinarian re: drawing blood).

Incidental Take

- K. This permit authorizes the incidental take of Mojave desert tortoises resulting from otherwise lawful conduct of covered activities, as described in the Amended HCP chapter 2 *Covered Activities*, on habitat assumed to be occupied by the Mojave desert tortoise within the Amended HCP take areas in Washington County, Utah, as described in HCP chapter 4.1 *Definitions, Location, and Extent*.

The amount and extent of authorized take of Mojave desert tortoise is measured using a surrogate habitat metric defined as the acres of modeled Mojave desert tortoise habitat below 4,000 feet elevation occurring on non-Federal or non-Tribal lands within the permit area that would be directly modified by the Covered Activities (i.e., Amended HCP take area). For more information on the criteria and analysis about appropriate use of this habitat surrogate for tracking take, see our HCP Biological Opinion and the Amended HCP. Authorized take includes the individual Mojave desert tortoises associated with the temporary and permanent loss of habitat assumed to be occupied by Mojave desert tortoise. Incidental take of Mojave desert tortoise is estimated through acres of habitat and may occur in the form of loss of habitat, injury, mortality, or harm from covered activities in the Amended HCP. The estimated take of Mojave desert tortoises is based on the take of modeled suitable habitat assumed to be occupied (HCP chapter 5, *Incidental Take* and our HCP Biological Opinion *Effects of the Action* section).

The potential number of animals we anticipate would be handled, killed, injured, or affected by loss of habitat in the Amended HCP take area are discussed as an effect of the action in our HCP Biological Opinion and were used to inform our jeopardy analysis. Nevertheless, we do not believe that the actual numbers are sufficiently reliable to form the basis of our assessment of the likely amount of take and so come into play only when we are considering the potential impacts of the taking. In the event of unanticipated effects beyond that analyzed in the HCP Biological Opinion, subject to applicable law and regulation, the FWS will work with Washington County and other partners on the Habitat Conservation Advisory Committee through the Adaptive Management process to determine measures to address the issue and minimize loss. Implementation of the Amended HCP Adaptive Management

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process is a term and condition of this permit, as identified in B, above. Using the habitat surrogate metric, in the HCP Biological Opinion we quantified habitat acres as a surrogate for tracking take of Mojave desert tortoises as follows:

- Of which no more than 62,960 acres of Mojave desert tortoise habitat loss associated with covered activities on the specified non-Federal, non-Tribal lands outside the Reserve in the permit area (assumes the Northern Corridor changed circumstance is occurring and approximately 3,400 acres of non-Federal land would be protected within Zone 6 as part of the Reserve). Up to 200 acres of impacts from covered activities to Mojave desert tortoise habitat may occur on the non-specified, non-Federal lands inside the Reserve (including Zone 6 under Northern Corridor circumstance),
- L. The Endangered Species Act (ESA) emphasizes the necessity for “reporting requirements... for determining whether [incidental take permit] terms and conditions are being complied with” (section 10(a)(2)(B)(v)). An applicant’s HCP must include steps to monitor the effects of take (50 CFR Part 17.22(b)(1)(iii)(B), 17.32(b)(1)(iii)(B), and 222.307). We interpret this to mean the Amended HCP monitoring programs must provide the information necessary to assess compliance and project impacts and verify progress toward the biological goals and objectives identified in the Amended HCP. Through the annual reports, the Permittee shall verify the take authorized by this permit will not be exceeded and that the avoidance, minimization, and mitigation measures described in the Amended HCP shall be fully implemented. The Permittee will ensure compliance with this permit’s take authorization and the Amended HCP as described in the section 7.6.2 *Annual Reporting*. The Permittee shall submit an Annual Report to the FWS following review and approval by the advisory committee and the Washington County Commission by March 1 for the preceding year during the life of this permit.
- M. In the event that the Mojave desert tortoise habitat acres defined in the Amended HCP as the Proposed Action and evaluated in the HCP Biological Opinion as the metric for tracking incidental take of Mojave desert tortoises are exceeded (62,960 acres), covered activities must immediately cease. The FWS Project Leader of the Utah Ecological Services Field Office and Special Agent (see List of Contacts) must be contacted within 48 hours of the occurrence of maximum take, as described in the Amended HCP chapter 5 and in our HCP Biological Opinion *Incidental Take Statement* (06E23000-2015-F-0340).

Coverage under this permit is provisional under the following restrictions:

- The Permittee must understand and agree to abide by 50 CFR Parts 13 for general permit regulations and 50 CFR 17.22 for endangered species permit regulations, as applicable.
- This permit does not grant the right of trespass. Such permission must be obtained from private landowners or the land management agency. The Permittee and designated members of their staff must carry a copy of this and all other required permits at all times while exercising its authority and conducting authorized activities.

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- If the Amended HCP is successfully implemented for its 25-year duration, we may consider renewing the HCP and this permit, if necessary, with appropriate analyses and compliance with the ESA section 10 and other required regulations.

List of Contacts:

Project Leader, U.S. Fish and Wildlife Service, Utah Ecological Services Field Office, 2369 West Orton Circle, Suite 50 West Valley City, Utah 84119, telephone (801) 975-3330

Resident Agent in Charge, USFWS Office of Law Enforcement, 2900 4th Avenue North, Suite 301, Billings, Montana 59101, telephone (406) 247-7356

Permit Coordinator, Ecological Services, P.O. Box 25486-DFC, Denver, Colorado 80225, telephone (303) 236-4263