IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSERVE SOUTHWEST UTAH, et al., Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, U.S. BUREAU OF LAND MANAGEMENT, U.S. FISH AND WILDLIFE SERVICE, Defendants.	Case No. 1:26-CV-00317-RDM

REPLY IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

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LIST OF ACRONYMS

APA	Administrative Procedure Act
BLM	Bureau of Land Management
ESA	Endangered Species Act
FWS	Fish and Wildlife Service
NCA	National Conservation Area
RMP	Resource Management Plan
ROW	Right-of-Way
UDOT	Utah Department of Transportation

INTRODUCTION

This Court can readily dismiss Defendants' and Intervenors' scattershot responses and opposition to Plaintiffs' Motion for Preliminary Injunction, and Plaintiffs have readily met the standards for the grant of a preliminary injunction. This Court should grant such relief, especially since Defendants and Intervenors are unnecessarily mandating the time crunch at play.[1]

Plaintiffs are cognizant of the admittedly unfortunate time pressure that this Motion presents, but Intervenors are largely responsible for this manufactured crisis. Intervenors argue that they are "required" to install fencing that would later mitigate highway harms on a rushed schedule between March 15 and May 15. Intv.-Defs. Opp'n to Pls.' Mot. for Prelim. Injunction (ECF No. 22) ("Intvs.' Resp.") at 9, 46.[2] But given that Intervenors recently publicly stated there is "not currently a timeline for design and construction" of the Northern Corridor Highway,[3] that

[1] Plaintiffs do not oppose Defendants' Motion for Leave to File Its Opposition to Plaintiffs' Motion for a Preliminary Injunction Nunc Pro Tunc. (ECF No. 26). Plaintiffs appreciate and understand Defendants' difficulties adhering to the Court's abbreviated scheduling on this motion. Plaintiffs similarly would not oppose the Court's *sua sponte* imposition of a short, immediate, 14-day administrative stay prohibiting ground-disturbing activities to allow this Court to issue a decision on the motion for preliminary injunction. *See Nat'l Council of Nonprofits v. OMB*, 763 F.Supp.3d 36, 43 (D.D.C. 2025) (administrative stay imposed to allow court to deliberate over motions for temporary restraining order and preliminary injunction). The issuance of an administrative stay—which seems to be in the Court's inherent discretion to manage its own docket, *see United States v. Texas*, 144 S. Ct. 797, 798 (2024)—simply "buys the court time to deliberate when the issues are not easy to evaluate in haste." *OMB*, 763 F.Supp.3d at 43 (citing *Texas*, 144 S. Ct. at 798 (2024) (Barrett, J., concurring)). A short administrative stay is an appropriate response to the very quick turn-around demanded by Intervenors.

[2] All pincites herein to documents on this case docket are to the court's ECF pagination; all pincites to exhibits are to the pdf page numbers, which correspond to the bates stamps.

[3] *See* The Salt Lake Tribune, *A habitat through tortoise habitat? What the Northern Corridor's revival means for southern Utah* (Feb. 15, 2026), https://www.sltrib.com/news/environment/2026/02/15/what-battle-over-northern-corridor/ (last visited Feb. 18, 2026).

the bidding process to build the highway has not taken place yet, Thornock Decl. (ECF No. 22-2) ¶ 23, and that the highway is not expected to be completed until between 2043 and 2050,[4] the immediacy with which they have rushed to break ground remains inscrutable.

In addition, as Intervenors identified, there is another seasonal window that would allow the Utah Department of Transportation ("UDOT") to begin its so-called tortoise mitigation measures this August, which can easily be after summary judgment briefing is complete. Pls.' Ex. 8 at 203 (August 20–October 20 clearance window); Thornock Decl. ¶ 14. Intervenors failed to explain why this alternative window would not alleviate asserted concerns regarding lost opportunities and costs. In the meantime, Intervenors' "hurry up and wait" strategy is poised "to cause immediate and irreparable harm to Mojave desert tortoise, and may push the entire Upper Virgin River Recovery Unit into a slide toward extirpation, which means it would not likely be possible to recover the tortoise." Hohman Decl., ¶ 7 (ECF No. 13-3).

Defendants and Intervenors also fail to refute Plaintiffs' showing of likelihood of success on their claims that the Bureau of Land Management's ("BLM") highway approval violated the plain language of the Omnibus Public Management Land Act ("Public Land Act"), was an unreasonable reversal from its prior position finding the highway violated the Public Land Act, and rested on a flawed biological opinion that failed to properly put the harm to Mojave desert tortoise and its critical habitat in context as required by the Endangered Species Act ("ESA"). And Defendants and Intervenors similarly fail to refute Plaintiffs' ample showing on the remaining injunction factors, as detailed below. For these reasons, the Court should grant Plaintiffs' Motion for Preliminary Injunction (ECF No. 13).

[4] *See* Dixie Metropolitan 2023–2050 Regional Transportation Plan at 23, https://dixie-mpo.com/2019-2050-regional-transportation-plan/ (last visited Feb. 18, 2026).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. BLM Violated the Omnibus Public Land Management Act.

Resolution of Plaintiffs' Public Land Act claim does not require the Court to decide whether any theoretical transportation route through Red Cliffs National Conservation Area ("NCA") could satisfy the Act. Rather, the only question before the Court is whether the route that was *actually approved* by BLM—the Northern Corridor Highway—complies with the Act's requirements. As Plaintiffs demonstrate in their opening brief and Defendants and Intervenors failed to refute, it does not.

1. BLM's Approval of the Northern Corridor Highway Right-of-Way Violates the Plain Meaning of Section 1974.

Tellingly, Defendants do not defend the highway approval against the plain meaning of Section 1974, and Intervenors largely attempt to sidestep that statutory text by knocking down arguments Plaintiffs did not make. Applying the plain language of Section 1974 to the actual highway that was approved by BLM, with its demonstrated adverse impacts, the only reasonable conclusion is that BLM violated the Act's two management mandates.

First, BLM's approval of the highway violates the mandate in subsection (e)(1) that BLM "shall manage" the Red Cliffs NCA "in a manner that conserves, protects, and enhances the resources of the [NCA]." 16 U.S.C. § 460www(e)(1)(A). Because the Public Land Act does not define "conserves," "protects," and "enhances," this Court should apply the ordinary and natural meaning of these words. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). "Conserve" means "to keep in a safe or sound state"; "protect" means "to cover or shield from exposure, injury, damage, or destruction"; and "enhance" means to "increase or improve in value, quality, desirability, or attractiveness." *Merriam-Webster Dictionary*, https://www.merriam-webster.com (last visited

February 17, 2026). As Plaintiffs' opening brief explained, the record before BLM is replete evidence that the Northern Corridor Highway fails "to keep in a safe or sound state," "cover or shield from . . . damage, or destruction," and "increase or improve in value" every resource of the NCA. *See* Pls.' Ex. 3 at 85 ("adverse impacts" to sensitive plant habitat); *id.* at 144–46 ("direct and indirect adverse impacts to special status wildlife species"); *id.* at 157 (disturbance to "sensitive soils, soil crusts, and topsoil"); *id.* at 164–65 ("permanent loss or temporary construction impacts to floodplains and potential [waters of the United States]"); *id.* at 204–06 ("adverse effects to historic properties . . . cultural resources . . . [and] archaeological sites"; *id.* at 192 ("adverse[] impact[s]" to "areas with high scenic quality and high visual sensitivity"); *id.* at 214–16 ("dramatic change to the recreation setting" and a "degraded user experience"); *see also* Pls.' Op. Br. at 10–12, 33–34.

In response, Defendants do not even attempt to argue that the highway complies with Section 1974(e)(1)'s management mandate. *See* Fed. Defs.' Opp'n to Pls.' Mot. for Prelim. Injunction (ECF No. 24) ("Defs.' Resp.") at 12–14. For their part, Intervenors also fail to seriously confront Plaintiffs' plain reading of the statute, instead miscasting Plaintiffs' arguments as asserting that "protect" means "prevent any impacts to." Intvs.' Resp. at 24.

But Plaintiffs have made no claim that BLM must prevent "any impact" to the NCA. *See* Mem. of Points and Auths. in Supp. of Pls.' Mot. for Prelim. Injunction (ECF No. 13-1) ("Pls.' Op. Br.") at 33–34. Instead, Plaintiffs argue that the Public Land Act says what it means: BLM is required to manage the Red Cliffs NCA in a manner that "conserves, protects, and enhances the resources of the [NCA]." 16 U.S.C. § 460www(e)(1)(A). Because Defendants' own analysis, recited above, shows that the Northern Corridor Highway *undermines* that mandate for nearly

each and every resource value for which Congress designated the NCA, the agency's approval of the highway is unlawful.

For similar reasons, this Court can readily reject Intervenors' argument that Section 1974 does not *per se* prohibit all uses that may impact the NCA's resources. Intvs.' Resp. at 24. Plaintiffs have made no such argument taking the categorical position that any conceivable transportation route or other impact is "per se" unlawful. Rather, Congress directed that the Secretary "shall only allow uses" of the NCA that would further the statute's underlying conservation and cultural purposes, including (1) to "conserve, protect and enhance . . . the ecological, scenic, wildlife, recreational, cultural, historical, natural, educational, and scientific resources of the [NCA]," or (2) to protect Mojave desert tortoise populations and habitat. 16 U.S.C. § 460www(e); *id.* § 460www(a). Many potential uses of the NCA—perhaps even transportation uses—may conceivably comport with this directive. But such possibilities cannot rehabilitate or resuscitate *this* specific proposed use, especially in the face of BLM's own data showing that the Northern Corridor Highway will harm nearly every protected NCA resource. [5]

[5] Intervenors' contention that "[w]hen a use is at issue, subsection (e)(2), not subsection (e)(1), governs" is both wrong as a matter of statutory construction and irrelevant. Intvs.' Resp. at 23–24. It is wrong because nothing in (e)(2) conflicts or overrides the general management obligation in (e)(1) to manage to "conserve, protecting and enhance" the resources within the NCA; the two provisions can be read consistently. *See Make The Rd. New York v. Wolf*, 962 F.3d 612, 644 n.12 (D.C. Cir. 2020) (general-specific canon "applies only when statutory provisions conflict") (citing Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180, 183 (2012)). It is also irrelevant because (e)(2) expressly incorporates the management standard in (e)(1) by requiring that all uses must "further a purpose described in subsection (a)," which in turn includes to "conserve, protect, and enhance for the benefit and enjoyment of present and future generations the ecological, scenic, wildlife, recreational, cultural, historic, natural, educational, and scientific resources of the [NCA]," and to "protect" Mojave desert tortoise. 16 U.S.C. § 460www(a). For these reasons, perhaps, even BLM does not agree with this reading of the statute.

Moreover, Intervenors misapprehend the narrow carve-out in the Public Land Act for certain uses. To be clear, the Public Land Act expressly permits certain narrowly prescribed activities within the NCA, including motorized vehicles "needed for administrative purposes, or to respond to an emergency," 16 U.S.C. § 460www(e)(3); livestock grazing "established before the date of enactment" of the Public Land Act, *id.* § 460www(e)(4); and wildland fire operations "consistent with the purposes of [the Act]," *id.* § 460www(e)(5). According to Intervenors, this narrow carve-out proves that the Public Land Act "does not prohibit uses that have impacts on resources." Intvs.' Resp. at 24. But nothing in these measures expressly allows the level adverse impacts flowing from the Northern Corridor Highway. Rather, the fact that Congress expressly allowed certain narrowly prescribed uses but did not include a highway among them demonstrates both that Congress knows how to create modest exceptions, and that Congress did not intend to allow a highway project like the Northern Corridor Highway to skirt the management obligation to conserve, protect, and enhance the resources of Red Cliffs NCA. *See* 16 U.S.C. § 460www(e)(3)–(5).

Second, BLM's highway approval undeniably violates subsection (e)(2), because a four-lane, high-speed highway through the densest population of Mojave desert tortoise in the NCA is plainly not an acceptable "use," and neither Defendants nor Intervenors make any effort to seriously argue that the highway meets the twin purposes of the NCA. *See* 16 U.S.C. § 460www(e)(2) (uses), *id.* at § 460www(a)(1), (2) (purposes). Instead, Defendants focus exclusively on the "relevan[ce]" of the "path for hiking and biking, as well as additional interpretative displays" in meeting the management obligation of subsection (e)(2). Defs.' Resp. at 14. Absent more, this Court can readily reject Defendants' half-hearted efforts to defend the Northern Corridor Highway as meeting the twin purposes of the Public Land Act.

This Court can similarly reject Intervenors' series of other scattershot responses. First, it is undeniably this Court's role to determine whether BLM's right-of-way ("ROW") grant is consistent with the statutory requirements of the Public Land Act. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392 (2024) (the Administrative Procedure Act ("APA") "specifies that courts, not agencies, will decide '*all* relevant questions of law' arising on review of agency action, [5 U.S.C.] § 706 (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it"). And to the extent that BLM enjoys some discretion in determining allowable uses under the Public Land Act, Intvs.' Resp. at 32, BLM cannot exercise that discretion unreasonably.[6] *See, e.g.*, *Multicultural Media, Telecom, & Internet Council v. FCC*, 873 F.3d 932, 937 (D.C. Cir. 2017) (agency discretion "must be both reasonable and reasonably explained").

Intervenors next argue that "Plaintiffs do not explain why the Secretary's findings that the ROW furthers 'a use'—indeed multiple uses—by allowing educational, scenic, and recreational opportunities for visitors to enjoy the area's resources are arbitrary and capricious." Intvs.' Resp. at 32. This amounts to little more than unintelligible assertions. Plaintiffs are not

[6] The Court can readily reject Intervenors' related point that there is "no law" to apply in determining whether a use is consistent with the Public Land Act's statutory purpose. Intvs' Resp. at 32 & n.13. The law to apply is clearly laid out in the Public Land Act itself, which explicitly defines the purposes of the NCA, and the required management regime within the NCA. *See* 16 U.S.C. 460www(a). This is not a case "analogous to an exercise of 'prosecutorial discretion'" where "[t]he only statutory reference point is the Administrator's own beliefs." *See Drake v. F.A.A.*, 291 F.3d 59, 72 (D.C. Cir. 2002); Intvs.' Br. at 32 n.13; *see also Sierra Club v. U.S. Fish & Wildlife Serv.*, 930 F. Supp. 2d 198, 204–05 (D.D.C. 2013) (action committed to agency discretion when "[n]othing in the text" of the statute "constrains [the Secretary's] determination, or otherwise limits the course of action the Secretary may adopt."). Rather, when a statute provides some guidelines or standards for a Court to evaluate the lawfulness of an agency's action—even if permissive or indeterminate—the Court can review. *See, e.g.*, *Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007); *see also Sierra Club*, 930 F. Supp. 2d at 206 (collecting cases).

arguing that the Northern Corridor Highway does not "further[] 'a use.'" Indeed, Plaintiffs do not even purport to understand what this means. Instead, as clearly discussed in their opening brief, Plaintiffs assert "that BLM's ROW grant violates the second statutory mandate that BLM 'shall only allow uses of the [NCA]' that 'further a purpose' for which the NCA was established." Pls.' Op. Br. at 34–35 (citing 16 U.S.C. § 460www(a)). This argument turns on whether the Northern Corridor Highway ROW grant furthers a statutory *purpose* of the NCA, and not whether it furthers a *use*, as Intervenors mistakenly believe.

Intervenors then double down on their efforts to focus attention away from whether the highway complies with the management requirements of the Public Land Act, and instead attempt to rely on plans for an ancillary bike path—which would not be constructed until after the second two lanes of the highway are built sometime between 2043–2050. Intvs.' Resp. at 33. Even accepting that a bike path may benefit some resources for which the Red Cliffs NCA was protected, Intervenors never explain why this could lawfully justify wholly ignoring the highway's long-term damage to all nine protected resources, including "dramatic" and "stark" impacts to recreational experience, Pls.' Ex. 3 at 214; "[l]ong-term, primarily adverse visual impacts" to "areas of high scenic quality and high visual sensitivity," *id.* at 191–92; "permanent or long-term effects to . . . archaeological sites" and "the loss of information important in history or prehistory," *id.* at 204; "direct and adverse impacts to vegetation communities, particularly on native desert scrub vegetation," *id.* at 65–66; and "direct and indirect adverse impacts to general wildlife within the Red Cliffs NCA" from habitat loss and degradation, noise disturbance, and spread of exotic invasive species that reduce foraging habitat and increase wildfire risk, *id.* at 92–93. *See also supra* p. 4; Pls.' Op. Br. at 10–12, 33–34.

2. The Plain Meaning of the Public Land Act Does Not Render Section 1977 Meaningless.

By requiring BLM to "identify" an alternative for a northern transportation route in Washington County, Congress plainly did not waive, exempt, or otherwise renounce BLM's obligation to manage the NCA to "conserve, protect, and enhance for the benefit and enjoyment of present and future generations the ecological, scenic, wildlife, recreational, cultural, historic, natural, educational, and scientific resources of the [NCA]," and to "protect" Mojave desert tortoise. *See* 16 U.S.C. § 460www(a). Defendants' and Intervenors' arguments to the contrary simply misread the statute.

Starting with the statutory language, Section 1977 of the Public Land Act provides that the Secretary "shall develop a comprehensive travel management plan for the land managed by the [BLM] in [Washington] County." Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 1977(b)(1), 123 Stat. 1088–89. In developing that plan, "the Secretary shall— . . . identify 1 or more alternatives for a northern transportation route in the County." *Id.* § 1977(b)(2).

In their opening brief, Plaintiffs showed that this statutory language and its legislative history support their interpretation that the Public Land Act did not require BLM to *approve* the Northern Corridor Highway to harmonize Sections 1974 and 1977. Pls.' Op. Br. at 36–39. In response, Defendants argue that "if BLM is required by Congress to 'identify' and 'plan' for such a highway, then BLM is consequently authorized to allow for such a right-of-way." Defs.' Resp. at 13; *see also id.* at n. 2 ("BLM understands Section 1977 to instruct the agency to identify and consider a ROW in the NCA and to permit it to authorize such a route through the NCA—even if it may impact some purposes for which the NCA was designated"). But Defendants provide no support for this atextual reading, the plain language of the Public Land

Act refutes this interpretation, and the legislative history makes clear that the final legislative language removed the mandated corridor designation for the Northern Corridor Highway contained in earlier versions of the bill, which were never passed.[7] *See* Pls.' Op. Br. at 37–39.

Intervenors argue that in Section 1977, Congress silently exempted the Northern Corridor Highway from the express management obligations of Section 1974(e)(1) and (2) "because it would make no sense for Congress to require BLM to collaborate with state and local stakeholders to identify a route through the NCA while simultaneously prohibiting it from approving such a route." Intvs.' Resp. at 29. But this approach has it exactly backwards: the process of engaging in collaboration is not an ends-driven process, whereby anything and everything that goes through the collaborative process results in a lawful decision. Intervenors appear to be arguing that simply because the BLM collaborated with UDOT and Washington County on the Northern Corridor Highway, BLM must approve the highway, otherwise "it would make no sense for Congress to require BLM to collaborate with state and local stakeholders." Intvs.' Resp. at 29. But this approach would read Section 1974(e)(1) and (2) completely out of the Public Land Act, and this Court is not free to ignore express statutory terms. *See Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 674 (2020) ("[W]hen the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as

[7] Intervenors' effort to discount the legislative history by raising an inapposite factual discrepancy does nothing to alter or refute the central premise that this legislative history illuminates: the language in Section 1977 of the Public Land Act requiring BLM to "identify" a northern corridor route replaced earlier (unpassed) legislative language requiring BLM to "designate" or "establish" a transportation corridor. Intvs.' Resp. at 30. *Compare* Washington County Growth and Conservation Act of 2006, S. 3636 109th Cong. (the Secretary "*shall establish* on public land . . . a corridor for transportation purposes") (emphasis added) *with* Washington County Growth and Conservation Act of 2008, S. 2834, 110th Cong. (the Secretary "shall *identify* 1 or more alternatives for a northern transportation Route in the County") (emphasis added); *see also* Pls.' Op. Br. at 38–39.

written, without fearing that courts might disregard its plain terms based on some extratextual consideration.").

B. BLM's Approval of UDOT's Right-of-Way is an Unreasonable, Unexplained, and Arbitrary Reversal of its Prior Position.

All parties appear to agree on the applicable standard of review for Plaintiffs' APA claim: BLM was free to change its position, so long as it gave a *reasoned* explanation for that change. *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009); *see also* Pls.' Op. Br. at 39–40; Defs.' Resp. at 14; Intvs.' Resp. at 25. But Defendants and Intervenors still fail to defend the reasonableness of BLM's reversal from its prior decision denying the Northern Corridor Highway in line with the requirements of the Public Land Act.

First, Defendants and Intervenors never grapple with Plaintiffs' argument that the 2026 decision approving the ROW is an unexplained and arbitrary about-face from the 2024 decision, when BLM found that the Northern Corridor Highway was inconsistent with the "conserve, protect, and enhance" standard in the Public Lands Act. Op. Br. at 40; *see* Pls.' Ex. 1 at 20–22 (rejecting ROW because highway "would not comply with [Public Land Act's] mandate that NCA management focus on the conservation, protection, and enhancement of threatened and endangered species" due to tortoise mortalities and translocation, critical habitat loss and degradation, and wildfires). Instead, BLM and Intervenors respond only to an argument Plaintiff never made—i.e., arguing BLM did not change its position at all because it has consistently maintained that it must satisfy both Section 1974 and 1977 of the Public Land Act. Defs.' Resp. at 14; Intvs.' Resp. at 26. This mischaracterization does not warrant a response.

Next, Defendants and Intervenors argue that the UDOT's information on the infeasibility of the Red Hills Parkway alternative—recycled in 2026 after making substantially similar presentations during the 2024 and 2020 environmental review processes—was, in fact, new, and

further justified BLM's reversal here. Defs.' Resp. at 15–16; Intvs. Resp. at 27–28. But they do not effectively dispute the crux of Plaintiffs' APA argument.

As an initial matter, Intervenors' argument that "Plaintiffs have it backwards" because it is the 2024 decision "rather than the new one that requires explanation" makes no sense. Intvs.' Resp. at 28. The 2024 decision did address this information and rejected the Northern Corridor Highway ROW despite it. *See* Pls.' Op. Br. at 41 (explaining BLM's prior consideration of feasibility information in supplemental environmental analysis process).

More fundamentally, BLM's key error lies in its premise that the feasibility of Red Hills Parkway Expressway ("Red Hills alternative") could form the sole basis for a change in the agency's position regarding the Northern Corridor Highway's compliance with the Public Land Act. As explained above, the feasibility of the Red Hills alternative was subordinate and peripheral to BLM's earlier determination of the unlawfulness of the Northern Corridor Highway alternative. *See also* Pls.' Op. Br. at 40–41.[8] Indeed, Defendants persist to double down on the infeasibility of the Red Hills alternative as the sole support for the change in position, rather than arguing the Northern Corridor Highway itself satisfies the Public Land Act's mandates. *See supra* p. 4; Defs.' Resp. at 12–14 (failing to argue that the highway complies with the Act's management mandates).

The fact that the agency's 2024 decision identified the Red Hills alternative as an "environmentally preferrable" alternative that would comply with the Public Land Act was

[8] Relatedly, Defendants and Intervenors assert that Plaintiffs do not dispute BLM's conclusion regarding the Red Hills Parkway Expressway's feasibility. Defs.' Resp. at 16; Intvs.' Resp. at 28. But the validity of this determination is a superfluous and a red herring in Plaintiffs' claim currently before the Court.

irrelevant to BLM's conclusion that the Northern Corridor Highway did not. *See* Pls.' Ex. 1 at 18–21.[9]

Finally, Defendants do not even attempt to explain BLM's failure to comply with the 2026 Settlement Agreement and 2024 Record of Decision's intended sequencing of decisionmaking that would have required amendment of the resource management plans ("RMPs") prior to BLM's reconsideration of UDOT's ROW application.[10] This further illustrates the unreasonableness of the agency's change in position. *See also* Pls.' Op. Br. at 42–43.

C. FWS's 2025 Northern Corridor Biological Opinion is Arbitrary and Capricious.

Regarding the claims against FWS's Biological Opinion, Defendants first err in their asserted technical and procedural arguments. Defs.' Resp. at 17–18. Legal claims over agency actions involving ESA Section 7 consultation typically take two forms—and cases like this often involve both. The first form is a claim against FWS due to infirmities in the Biological Opinion/ITS itself, and such a claim arises under the APA. *Bennett v. Spear*, 520 U.S. 154, 178–79 (1997). The second form is a claim against the action agency for its failure to insure against jeopardy to protected species and their habitat, a failure often illustrated as unreasonable reliance on an unlawful biological opinion. 16 U.S.C. § 1536(a)(2); *see Ctr. for Biological Diversity v. Regan*, 734 F. Supp. 3d 1, 56–57 (D.D.C.), *judgment entered*, 729 F. Supp. 3d 37 (D.D.C. 2024).

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[9] To the extent that the Court disagrees and finds that the viability of the Red Hills alternative was central to Defendants' 2024 rejection of UDOT's ROW, BLM's decision is still unlawful for the reasons described in subsection I, *supra* pp. 3–10.

[10] Plaintiffs nor Defendants have ever portrayed this requirement as one that would circumvent the typical RMP amendment process, including an opportunity for public notice and comment, as Intervenors attempt to argue. Intvs.' Resp. at 30–31. Indeed, it is because of these requirements for RMP amendments that the parties agreed for these decisions to happen on a longer timeline than the reconsideration of the other challenged decisions.

These claims arise under the ESA's citizen suit provision and cannot be filed until a 60-day notice period has run. 16 U.S.C. § 1540(g)(2)(A).

Due to Intervenors' manufactured time crunch, discussed *supra*, Plaintiffs have been forced to prepare their preliminary injunction materials, yet Plaintiffs are also poised to send to BLM and others a required 60-day notice letter under the ESA, and will later be seeking to amend their complaint to add claims taking the second form against Defendants here.[11] But contrary to Defendants' misunderstanding, this process does not somehow give BLM a free pass to unlawfully impact protected species or destroy critical habitat for at least 60 days with no prospect of court-ordered relief to prevent such harm.

Defendants are similarly mistaken in asserting that Plaintiffs' claims and injunction request only implicate BLM and not Fish and Wildlife Service ("FWS"). As Defendants note, an injunction may "grant relief of the same character as that which may be granted finally," *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015); Defs.' Resp. at 17.[12] Here, among the final relief Plaintiffs seek is vacatur of FWS's unlawful biological opinion. *See* Complaint (ECF No. 1) ¶ 199. Consequently, this Court may craft preliminary injunctive relief in a manner appropriate to prevent harm and preserve the status quo akin to the situation should Plaintiffs prevail on the merits. Rule 65 empowers the Court to bind all parties

[11] That notice letter will be transmitted early next week and will include additional related federal actions that occurred later than the ROW decisions challenged in Plaintiffs' current claims.

[12] For this reason, the remainder of the cases cited by Defendants are distinguishable. Defs.' Resp. at 18–19 & n.4. Additionally, Defendants' attempt to cast Plaintiffs' claim as impotent based on the "advisory" nature of FWS's biological opinion, Defs.' Resp. at 19, is clearly wrong in light of the "direct and appreciable legal consequences" of that action, *Bennett*, 520 U.S. at 178. Indeed, this Court has noted its "powerful coercive effect." *Ctr. for Biological Diversity v. Regan*, 734 F. Supp. 3d at 37 (quotation omitted).

in the case as well as their officers, agents, servants, and those who are in "active concert or participation." Fed. R. Civ. P. 65(d). And the Court can reject Defendants' "three stooges defense"—wherein each party points to the other as the responsible party—as courts routinely recognize the "privity between officers of the same government" in the context of injunctive orders.[13] *Nat. Res. Def. Council v. U.S. Env't Prot. Agency*, 38 F.4th 34, 57 n.18 (9th Cir. 2022) (internal citation omitted).

1. FWS's Jeopardy Analysis Was Inadequate under the ESA and APA.

a. Failure to address a tipping point

As Plaintiffs discussed in their opening, Pls.' Op. Br. at 44–47, FWS improperly issued a no-jeopardy conclusion for the highway without first determining whether the impacts from the Northern Corridor Highway would impair the likelihood of recovery and recovery—i.e., whether the highway would "tip" the species into jeopardy. Importantly, Defendants do not claim that they completed this analysis; instead, Defendants seeks to excuse this failure. This Court should reject this approach.

First, FWS first mischaracterizes Plaintiffs' tipping point argument as seeking a "single numeric point at which jeopardy occurs." Defs.' Resp. at 23. But that is wrong, miscasts Plaintiffs' argument, and the "tipping point" moniker simply operates as shorthand for a sufficient jeopardy analysis—one that looks at the tortoise's survival and recovery prospects to

[13] In an abundance of caution, Plaintiffs also hereby modify their request for injunctive relief to specifically include a request that this Court issue an administrative stay against FWS's Biological Opinion, which would postpone its effective date until the case is resolved on the merits. The APA empowers the Court to provide such relief. *See* 5 U.S.C. § 705; *Comm. for a Constructive Tomorrow v. U.S. Dep't of Interior*, No. CV 24-774 (LLA), 2024 WL 2699895, at *2 (D.D.C. May 24, 2024). Because the substantive legal standards for granting an administrative stay and a preliminary injunction are the same, *see id.*, the difference is largely semantic.

understand "roughly at what point survival and recovery will be placed at risk," and then assesses jeopardy by weighing the impacts of the proposed action against such risk assessment. *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1000 (D. Ariz. 2011).

FWS's Biological Opinion failed to undertake this analysis. Indeed, in their respective response briefs, Defendants and Intervenors did not point to any assessment of Mojave desert tortoise's so-called "tipping point." *See* Defs.' Resp. at 24–26 (arguing only that tipping point analysis was not required); Intvs.' Resp. at 38–40 (same). As Plaintiffs have explained, this omission is critical here, as the facts in the record demonstrate the Mojave desert tortoise's current perilous situation, *see* Pls.' Op. Br. at 45, and FWS cannot lawfully approve actions that would "deepen" the threat of jeopardy. *Am. Rivers v. FERC*, 895 F.3d 32, 47 (D.C. Cir. 2018).

Defendants concede that FWS cannot "assume a rosy baseline," Defs.' Resp. at 25, but absent a substantive assessment regarding the tortoise's survival and recovery prospects, FWS cannot comply with the ESA, regardless of having noted a less-than-"rosy" baseline.

For their part, Intervenors err in suggesting that a failure to address a tipping point can be excused by a "non-significance" distinction. Ints.' Resp. at 39. First, Intervenors sole source for this approach is a perfunctory and unpublished appellate order, and this Court should reject this novel test. *Id.* (citing *Oceana, Inc. v. Nat'l Marine Fisheries Serv.*, 705 F. App'x 577, 580 (9th Cir. 2017)). Second, the approach, to only require a tipping point analysis when an action would "significantly impair" recovery, Intvs.' Resp. at 39, would merely circle back to the jeopardy standard itself. An action that significantly impairs recovery will definitionally cause jeopardy, so this distinction cannot be a workable line upon which to afford an agency's analysis more or less scrutiny. Moreover, to the extent Intervenors argue FWS concluded that the highway's

effects would be non-significant to the tortoise, they point to nothing in the text of the Biological Opinion saying so. *See* Intvs.' Resp. at 40. Indeed, nothing does.

b. Failure to assess other roads and related development

In response to Plaintiffs' argument that FWS ignored evidence and concerns in the record regarding the prospect of the highway's indirect impacts on related development, *see* Pls.' Op. Br. at 47–48, Defendants argue that FWS need not concern itself with "speculative chains of third-party development." Defs.' Resp. at 27. But Plaintiffs' argument is that FWS did not even attempt to identify such indirect effects of the action despite evidence in the record showing that this was indeed a concern. FWS's error occurred in making a conclusory statement about the complete absence of this issue when the record demonstrated otherwise.[14] Growth and development pressures occur in a kind of feedback loop whereby these pressures and new infrastructure not only respond to but cause each other, and it is unreasonable—especially when prior analyses in the record raised this very concern—for FWS to frame the highway as only a "*response* to the growth and development," Defs.' Resp. at 28 (emphasis added), and somehow immune as a cause.

c. Failure to assess the highway's effects in combination with baseline and cumulative effects like climate change

All parties agree that the Biological Opinion acknowledged climate change and drought stressors on tortoise. But, where the parties diverge is whether simply acknowledging climate change and drought is sufficient, or whether the ESA requires more. Defs.' Resp. at 28; Intvs.' Resp. at 41–42. The ESA and implementing regulations clearly require that in evaluating jeopardy, the agency must "add" the effects of climate change and drought together with the

[14] For this reason, Intervenors' insistence that Defendants already analyzed induced growth and development makes no sense. Intvs.' Resp. at 40–41.

effects of the project. 50 C.F.R. § 402.14(g)(4). In other words, FWS must consider how factors like climate and drought may impact the outlook for tortoise over the 30 plus-year horizon that the highway would be impacting the tortoise, and whether or to what extent the population can sustain such additive harms before survival or recovery chances are impaired.

Defendants' response continues to demonstrate a failure to engage with this type of analysis. Defendants gesture to FWS's descriptions of mitigation and offset measures, but do not point to anywhere in the Biological Opinion substantively discussing how or whether these measures could render concerns about additive climate change and drought harms during the 30-year ROW a non-issue. "For obvious reasons, simply reciting the activities and impacts that constitute the baseline and cumulative effects and then separately addressing only the impacts of the particular agency action in isolation is not sufficient." *Appalachian Voices v. U.S. Dep't of Interior*, 25 F.4th 259, 278 (4th Cir. 2022) (cleaned up).

Defendants also offer that the Biological Opinion's acknowledgment of climate change and description of mitigation "allowed" the agency to "reasonably explain why future climate impacts would not likely jeopardize the tortoise." Defs.' Resp. at 29. But whether the information the agency had at its disposal might *allow* a reasonable explanation is beside the point if the agency did not in fact *provide* such an explanation. To evade this problem, Defendants respond to an argument that Plaintiffs did not make: whether the highway itself "causes additional climate impacts." Defs.' Resp. at 30. Rather, Plaintiffs' point is that over the highway's decades of impact, both it and ongoing climate change will harm Mojave desert tortoise, but FWS failed to assess these effects in combination. Courts have routinely invalidated biological opinions on similar grounds. *See* Pls.' Op. Br. at 49–50 (collecting cases).

2. FWS Unlawfully Permitted Destruction and Adverse Modification of Critical Habitat.

Plaintiffs' opening brief explained why it is unlawful to discount harms to critical habitat by simply comparing them to a broad-scale denominator of remaining habitat. Pls.' Op. Br. at 51–52. In response, Defendants largely just restate their justification relying on an acreage denominator. *See* Defs.' Resp. at 22; Intvs.' Resp. at 42, 43 (same).

To argue that FWS approved critical habitat destruction and modification based on more than meager arithmetic, Defendants pointed to the agency's look at a few highway "design features" that support tortoise habitat's "physical and biological features." Defs' Resp. at 31. For instance, Defendants pointed to fencing of the ROW, passage culverts, and an inchoate form of habitat restoration offsetting. *Id.* at 31–32. But simply describing the inclusion of these "design features" is a far cry from providing a rational and articulated explanation for why destruction and adverse modification of 6.1% of the area's critical habitat, Pls.' Ex. 5 at 68, will be reduced to a level that is non-"appreciable."

Just like with FWS's inadequate jeopardy analysis above, the agency makes no meaningful effort to explain what kind of critical habitat loss or damage the tortoise could sustain before the damage becomes appreciable, or how the highway's impacts compare to such a threshold. Nor does FWS examine how the features of the lost and degraded critical habitat impact its importance to the species.

And there are obvious problems with FWS's "design feature" justifications. For example, Defendants make no effort to address Plaintiffs' point that the passage features are unproven by the agency's own admission. *See* Pls.' Op. Br. at 46 n.7. This is particularly concerning since Defendants now argue that the connectivity impairment concerns were relevant "in the absence of *effective* passage." Defs.' Resp. at 31 (citing Pls.' Ex. 5 at 68) (emphasis added). Moreover,

speculative conservation aspirations cannot reasonably justify allowing loss or damage to designated critical habitat. *See Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d at 1001 (discussing the impropriety of discounting habitat damage based on mitigation when there is "difficulty in ascertaining exactly which projects are planned and [] uncertainties in estimate[ing] [the consequent benefits]"). "In addition, past mitigation measures 'may neither substitute for nor guarantee the future improvements.'" *Id*. at 936 (quoting *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935–36 (9th Cir. 2008)).

Further, an apples-to-oranges "offset" regarding conservation measures *outside critical habitat* cannot excuse violating the ESA's statutory prohibition on destroying or modifying critical habitat. *See* Intvs'. Resp. at 42–45. By definition, critical habitat is "essential" to the species' conservation. 16 U.S.C. § 1532(5)(A)(i)–(ii). "If we allow the survival and recovery benefits derived from a parallel habitat conservation project … that is not designated critical habitat to stand in for the loss of designated critical habitat in the adverse modification analysis, we would impair Congress' unmistakable aim that critical habitat analysis focus on the actual critical habitat." *Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059, 1075–76 (9th Cir. 2004).

II. IMMEDIATE INJUNCTIVE RELIEF IS NECESSARY TO AVOID IRREPARABLE HARM

Defendants and Intervenors attempt to rebut Plaintiffs' demonstration of irreparable harm by characterizing the imminent groundbreaking activities as mere "mitigation" and assuring that these activities will be done with care. Defs.' Resp. at 43 (citing "tortoise-specific controls"); Intvs' Resp. at 46 (describing the fencing as "reducing tortoise mortality adjacent to roads").[15]

[15] Defendants' assertion that Plaintiffs' expert declarations are improper extra-record evidence can easily be rejected. Defs.' Resp. at 20 n.5. The consideration of extra-record declarations for preliminary injunctions "fits squarely within [D.C.] Circuit's stated exceptions." *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 247 (D.D.C. 2003).

But these overly rosy characterizations miss the point. What matters is not how carefully the ground-disturbing activities are carried out, or how they will ease the greater harms of future full-blown road construction. What matters is the likely impact of the activities themselves.

The fencing authorized by BLM's recent notice to proceed is not mere plastic mesh fence that contractors will be rolling off a spool and could return to roll back up; Intervenors' argument that the fencing could be removed should they lose this case on the merits severely underplays the scale of this infrastructure. Intvs.' Resp. at 47. As the notice to proceed makes clear, the work may involve the use of "vehicles, skid steer, backhoe loader, concrete mixer truck, grader, and jackhammer" in the ROW. Pls.' Ex. 18 at 1. The associated vegetation removal will occur in two 20-foot swatches that stretch 1.9 miles, adding up to over nine acres of cleared ground (40 x 10,032 feet). *See id.* Tortoises will also be cleared from the area, if located. Pls.' Ex. 19. And beyond the vegetation removal, fencing, and clearing, these "mitigation" activities will render tortoise critical habitat throughout the ROW footprint inaccessible.

"Tortoise mortality would occur where tortoises pace along the exclusion fencing," and the ground disturbance will invite irreparable long-term harm from the removal of vegetation and invitation of runoff effects like invasive species. Hohman Decl. ¶¶ 95F, 97–99. "Exclusion fencing or fencing and blading would confine about two thirds of [the] high-density cluster south of the NCH alignment and prevent these tortoises from accessing other tortoises and other areas of their habitat north of the ROW they may require for feeding, breeding, or shelter until undercrossing (bridges) are completed, likely several years." Hohman Decl. ¶ 101. "Exclusion fences and a newly-disturbed landscape may inhibit access to these resources, increases exposure to extreme temperatures, elevates predation risk, particularly for juveniles, and can result in the loss of access to critical burrows and forage, thereby reducing individual fitness and survival."

LaRue Decl. ¶ 55. Moreover, despite their boasting about the care with which tortoises will be translocated from the right of way, *see* Intvs.' Resp. at 46–47, what this argument lays bare is that the imminent activities will undoubtedly result in some level of *take* of the protected species—take that Plaintiffs have challenged as unlawfully authorized through FWS's biological opinion in this case. *See also* Pls.' Ex. 3 at 131 ("even with the most thorough surveys, animals located deep in burrows, as well as eggs, hatchlings, and juveniles, could be missed and killed"); Pls.' Ex. 5 at 60. (describing harms from ground-disturbance).

The bottom line is that relative to the status quo, the ground-disturbing activities Plaintiffs seek to prevent would immediately damage and degrade tortoise critical habitat in the Red Cliffs NCA and harm, injure, and kill tortoises. Portraying these actions as beneficial "mitigation" would only be persuasive if the concern here was redressing existing harms of an already-built or fully underway larger construction project. But that is not the posture of this motion, where Plaintiffs seek only to prevent Defendants from causing new environmental harm that would *worsen* the status quo during the pendency of this litigation.

III. THE BALANCE OF HARMS FAVORS AN INJUNCTION

Intervenors attempt to broaden this Court's balance-of-harms analysis to consider their long-term concern for a "transportation solution," arguing that any roadblocks to progress are "severe and irreparable." Intvs.' Resp. at 47. This dramatically overstates the actual stakes of Plaintiffs' Motion, which merely involves a request that groundbreaking activities be delayed for a period of months while this case is resolved on the merits. Despite Intervenors' appeal to a "carefully balanced schedule," *id.*, it is apparent that there is no realistic prospect of full highway construction in the immediate term (the plan of development remains in draft form, and the bidding process has not even taken place, *see* Thornock Decl. ¶¶ 16, 23; *supra* p. 1–2).

And as Intervenors admit, another tortoise clearance survey period is available from August 20–October 20, regardless of this timing being inexplicably "less ideal," Intvs.' Resp. at 50, which also belies Defendants' and Intervenors' complaints about delay extending beyond a year. Defs.' Resp. at 38; Intvs.' Resp. at 50. Plaintiffs are ready and willing to brief this case on the merits as quickly as possible and are fully confident that can be accomplished by late August.

Next, Intervenors attempt to downplay the harms to a federally-protected species and its critical habitat, which must be balanced against their claims of mere construction delay. Intvs.' Resp. at 47–49. Intervenors err in relying on *Maine Lobstermen's Ass'n v. National Marine Fisheries Service*, 70 F.4th 582 (D.C. Cir. 2023), for the notion that heavily weighing equitable concerns for ESA-protected species is somehow now disfavored. That case was not about a Court's exercise of equitable authority in issuing injunctions at all; rather, the court in *Maine Lobstermen* simply faulted the National Marine Fisheries Service for, in the face of scientific uncertainty, adopting an aggressive presumption to "distort" its analysis in favor of the species by structuring a biological opinion around exaggerated and speculative worst-case scenario models. *Id.* at 596. The situation here is entirely different in both legal and factual context. Plaintiffs do not ask the Court to exaggerate or speculate about harms but rather are seeking to prevent discrete, known, and imminent harm to an ESA-protected species. When balancing the equities in the injunction context, it remains perfectly appropriate to weigh that harm heavily because it cannot be lightly undone. *See* Pls.' Op. Br. at 55–56 (citing cases).

Intervenors also attempt to counterbalance the environmental harms against projected economic losses. But any actual harm suffered by UDOT Intervenor will be wholly self-inflicted, and UDOT assumed the risk in entering into contracts for fencing, especially because it was well aware of the prior litigation seeking to protect Red Cliffs NCA and threatened Mojave desert

tortoise. Lost profits or economic inconvenience are "the nature of doing business, especially in an area fraught with bureaucracy and litigation." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017). And a small delay in construction activity represents only a temporary concern, far from permanent and having no meaningful or irreversible impact on economic interests long-term should the project proceed. *See, e.g., Indigenous Env't Network v. U.S. Dep't of State*, 369 F.Supp.3d 1045, 1051-52 (D. Mont. 2018) (environmental harms to plaintiffs outweighed economic harms to developers from loss of construction season).

Finally, when, as here, environmental injury is "sufficiently likely," the balance of harms "will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545 (1987).

IV. THE PUBLIC INTEREST FAVORS AN INJUNCTION

As explained above, Intervenors miss the mark by attempting to blow out the Court's evaluation of the public interest factor to encompass the broad-scale "interests of local and state transportation planners in accomplishing important local and regional goals in transportation infrastructure." Intvs.' Resp. at 51. There is simply no scenario in which usable transportation infrastructure would be on the ground prior to this case's merits resolution, and the public interest factors at play here are significant: lawful federal action, public lands management and conservation, and protection of threatened wildlife.

Intervenors next argue that the public interest "favors allowing the increased protections for [Mojave desert tortoise] associated with Zone 6," and without the highway, their exchange of tortoise protections in that area would evaporate. Intvs.' Resp. at 51. But this argument again sweeps too much into the Court's analysis of the present motion. Indeed, Plaintiffs have

numerous substantive concerns about the Zone 6 scheme—its size and isolation, ongoing adverse uses, uncertain protection promises and timelines, and lack of critical habitat, *see, e.g.,* LaRue Decl. ¶¶ 6, 53K; Hohman Decl. ¶¶ 42, 95Q–R—and such issues may arise in greater detail as this case proceeds through litigation. But the public interest factor relevant to the present motion concerns only whether to allow ground-disturbing activities in the ROW during the short-term pendency of litigation; this is not an appropriate context to raise the threat of withheld tortoise benefits in the Zone 6 area should the agencies' actions ultimately be vacated. Intervenors' argument is a crude attempt at hostage-taking that the Court should not accede to.

CONCLUSION

For these reasons, and those stated in Plaintiffs' opening brief, the Court should grant Plaintiffs' Motion for Preliminary Injunction to enjoin imminent ground-disturbing activities.

Respectfully submitted this 18th day of February 2026.

/s/ *Hannah Goldblatt*
Hannah A. Goldblatt (OR Bar # 205324)*
Todd C. Tucci (D.C. Bar # ID0001)
Andrew Hursh (MT Bar # 68127109)*
**admitted pro hac vice*
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83702
(208) 342-7024
hgoldblatt@advocateswest.org
ttucci@advocateswest.org
ahursh@advocateswest.org

Attorneys for Plaintiffs