

**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,

and

UTAH DEPARTMENT OF
TRANSPORTATION and WASHINGTON
COUNTY, UTAH,

Intervenor-Defendants.

Case No. 1:26-CV-00317-RDM

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

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TABLE OF RELEVANT DECISIONS¹

Decision Short Name	Decision Author	Actions Covered	Status
1995 Washington County HCP	Washington County	- For Washington County's ESA compliance - Prerequisite to County's Incidental Take Permit	Superseded by 2020 Amended HCP
1996 Incidental Take Permit	FWS	- For Washington County's ESA compliance - Authorized Washington County to take listed species	Superseded by 2021 Incidental Take Permit
2016 Red Cliffs NCA RMP	BLM	- For BLM's management of Red Cliffs NCA and its resources to comply with "conserve, protect, and enhance" mandate	Amended by 2021 Record of Decision
Decisions Pertaining to Initial Right-of-Way Approval			
2020 FEIS	BLM and FWS	- NEPA analysis for proposed UDOT's Northern Corridor Highway Right-of-Way, RMP amendments, and amended Incidental Take Permit to Washington County	Incorporated by reference in 2026 EA and FONSI
2020 Amended HCP	Washington County	- For Washington County's ESA compliance - Amended 1995 HCP - Included Northern Corridor Highway as potential development - Prerequisite to new Incidental Take Permit under amended HCP	Remains active
2021 Record of Decision	BLM and FWS	- Approved Northern Corridor Highway Right-of-Way - Approved RMP amendments	Remanded by 2023 court order; Right-of-Way decision reversed by 2024 Record of Decision; RMP amendments remain active

¹ This table was included in Plaintiffs' First Amended and Supplemental Complaint to summarize the decisions at issue, and which are challenged in this lawsuit. *See* Dkt. 53 ¶ 74.

2021 HCP Biological Opinion	FWS	- For FWS's ESA compliance - Analyzed FWS's issuance of Incidental Take Permit based on 2020 Amended HCP, <i>including</i> Northern Corridor Highway	Incorporated by reference in 2024 HCP Biological Opinion
2021 Incidental Take Permit	FWS	- For Washington County's ESA compliance - Amended 1996 Incidental Take Permit in conjunction with 2020 Amended HCP, <i>including</i> Northern Corridor Highway	Superseded by 2024 Incidental Take Permit
2021 Northern Corridor Biological Opinion	FWS	- For BLM's ESA compliance - Analyzed BLM's issuance of Northern Corridor Highway Right-of-Way	Withdrawn, then superseded by 2025 Northern Corridor Biological Opinion
Decisions Pertaining to Court Remand Process and Right-of-Way Denial			
2024 SEIS	BLM & FWS	- NEPA analysis supplementing 2020 FEIS based on new information - Included new alternative to terminate UDOT's Northern Corridor Highway Right-of-Way	Incorporated by reference in 2026 EA and FONSI
2024 ROD	BLM & FWS	- Terminated UDOT's Northern Corridor Highway Right-of-Way as contrary to law	Superseded by 2026 Decision Record
2024 HCP Biological Opinion*	FWS	- For FWS's ESA compliance - Analyzed FWS's issuance of amended 2021 Incidental Take Permit in conjunction with 2020 Amended HCP, <i>excluding</i> Northern Corridor Highway	Remains active
2024 Incidental Take Permit*	FWS	- For Washington County's ESA compliance - Analyzed 2020 Amended HCP, <i>excluding</i> Northern Corridor Highway	Remains active
Decisions Pertaining to Re-Approval of Right-of-Way			
2025 Northern Corridor Biological Opinion*	FWS	- For BLM's ESA compliance - Re-analyzed BLM's issuance of Northern Corridor Highway Right-of-Way and associated actions	Remains active

2026 Northern Corridor EA and FONSI*	BLM	- NEPA analysis re-considering UDOT's Northern Corridor Highway Right-of-Way - Incorporated by reference 2020 FEIS and 2024 SEIS	Remains active
2026 Decision Record*	BLM	- Re-approved UDOT's Northern Corridor Highway Right-of-Way	Remains active
2026 Section 6 Lands Exchange EA and FONSI*	FWS	- NEPA analysis regarding approval for the Utah Division of Wildlife Resources to dispose of lands acquired under ESA Section 6, and modification of the applicable grant to cover replacement lands.	Remains active
2026 Section 6 Land Exchange Approval and Grant Modification*	FWS	- FWS actions to approve the disposal and exchange of Section 6 lands and to modify the applicable federal grant.	Remains active

* Decision is challenged in this lawsuit

LIST OF ACRONYMS

APA	Administrative Procedure Act
BiOp	Biological Opinion
BLM	Bureau of Land Management
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
FONNSI	Finding of No New Significant Impact
FWS	Fish and Wildlife Service
LWCF	Land and Water Conservation Fund
NCA	National Conservation Area
NEPA	National Environmental Policy Act
OPLMA	Omnibus Public Land Management Act
RMP	Resource Management Plan
SEIS	Supplemental Environmental Impact Statement
TLA	State of Utah Trust Lands Administration
UDOT	Utah Department of Transportation
UDWR	Utah Division of Wildlife Resources
UVRRU	Upper Virgin River Recovery Unit

INTRODUCTION

Plaintiffs seek summary judgment on their claims challenging actions by Federal Defendants U.S. Bureau of Land Management (“BLM”) and U.S. Fish and Wildlife Service (“FWS”) to approve the “Northern Corridor Highway,” a four-lane, high-speed highway proposed across public lands set aside for wildlife protection. Plaintiffs ask the Court to hold unlawful and vacate the challenged actions because they violate bedrock environmental statutes.

The public lands at issue are the Red Cliffs National Conservation Area (“NCA”), which Congress established through the 2009 Omnibus Public Lands Management Act (“OPLMA”) to “conserve protect, and enhance” its ecological, wildlife, recreational, and other resources. Those resources include Mojave desert tortoise, a species protected under the Endangered Species Act (“ESA”). Tortoise populations are in steep decline due to threats including roads and other human encroachments, and the area where the highway is proposed within the Red Cliffs NCA includes designated critical habitat and an important high-density tortoise population cluster.

The actions Plaintiffs challenge here represent a rushed second attempt at approving the Northern Corridor Highway. In 2021, after repeatedly denying earlier efforts to construct such a highway, the Department of the Interior granted a federal right-of-way for the highway to the Utah Department of Transportation (“UDOT”). Plaintiffs filed a lawsuit challenging that decision and related actions. The parties ultimately settled that case, which concluded when this Court granted Defendants’ unopposed motion for remand. On remand, Defendants undertook a new environmental review and issued a new decision terminating the right-of-way. Defendants concluded termination was required because of the highway’s adverse impacts on the tortoise and its critical habitat as well as inconsistency with OPLMA’s directives for the Red Cliffs NCA.

A little more than a year later, and following a change in Administration, Defendants

pursued a second attempt challenged here. Through new decisions, BLM and FWS reversed the termination of the right-of-way and again approved the Northern Corridor Highway. Plaintiffs again promptly sued. And because UDOT rushed to commence ground-disturbing construction activities, Plaintiffs moved for a preliminary injunction, which this Court granted.

Plaintiffs are now before the Court at the summary judgment stage and seek judgment as a matter of law on numerous claims. These claims fall into five categories, as detailed below. First are claims regarding violations of OPLMA's mandates for the Red Cliffs NCA. Second is a violation of the Administrative Procedure Act ("APA") through BLM's unacknowledged or unreasoned reversal from its prior decision-making. Third are claims arising under the ESA, due to the agencies' disregard of statutory and regulatory requirements to protect the Mojave desert tortoise. Fourth are claims regarding non-compliance with the Land and Water Conservation Fund ("LWCF") Act and the ESA by permitting highway construction on lands acquired and permanently set aside for wildlife conservation. Fifth, Plaintiffs address legal violations in Defendants' environmental analysis under the National Environmental Policy Act ("NEPA").

FACTUAL AND PROCEDURAL BACKGROUND

I. The Lands and Wildlife at Issue.

A. Red Cliffs Desert Reserve.

The nearly 62,000-acre Red Cliffs Desert Reserve lies north of the City of St. George in southwestern Utah's Washington County. AR142628. Its 1996 designation resulted from Washington County's 1995 Habitat Conservation Plan ("HCP"), designed to protect and aid recovery of the area's Mojave desert tortoise populations. *See* AR142629. The County adopted its 1995 HCP to guide tortoise habitat management and seek FWS-permitted "take" of desert tortoise under ESA Section 10, thereby avoiding liability for unlawful take under ESA Section

9.² AR067549–758. FWS issued the County an Incidental Take Permit (“ITP”), which allowed development in tortoise habitat on non-federal lands outside of the Desert Reserve in accordance with the HCP. AR068419–24. Creation of the Desert Reserve was one of the primary mitigation measures to offset this take. AR067566–67, 067651. Protection of the tortoise is the highest priority within each of the Desert Reserve’s five management zones; Zone 3 of the Reserve was intended to remain roadless. AR067577, 067555, 067651, 067679; *see also Figure 1*.

The HCP’s “approach for habitat conservation in Washington County” also included seeking “Congressional support for establishment of a [NCA].” AR067566; *see also* AR046279 (the 1995 HCP “called for the creation of a [NCA]” to “provide a permanent protection for the desert tortoise after the [FWS] permit expired and/or recovery objections were achieved”).

B. Red Cliffs National Conservation Area.

In 2009, Congress passed OPLMA, permanently protecting a large portion of the Desert Reserve by establishing the Red Cliffs NCA. OPLMA directs BLM “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” within the NCA, as well as to protect the Mojave desert tortoise. 16 U.S.C. § 460www(a)(1).

BLM administers the Red Cliffs NCA, which contains non-motorized recreational trails and two designated Wilderness Areas. AR100131. The area also provides habitat for imperiled native species, including nearly 50,000 acres of designated critical habitat for the tortoise. AR100032. Zone 3 of the Red Cliffs Desert Reserve and NCA is of particular importance for tortoise recovery due to its large size and tortoise numbers. *See* AR142644, 127619.

² Under the ESA, “take” occurs if the species will be harassed, harmed, pursued, hunted, shot, wounded, killed, trapped, captured, or collected. 16 U.S.C. § 1532(19).

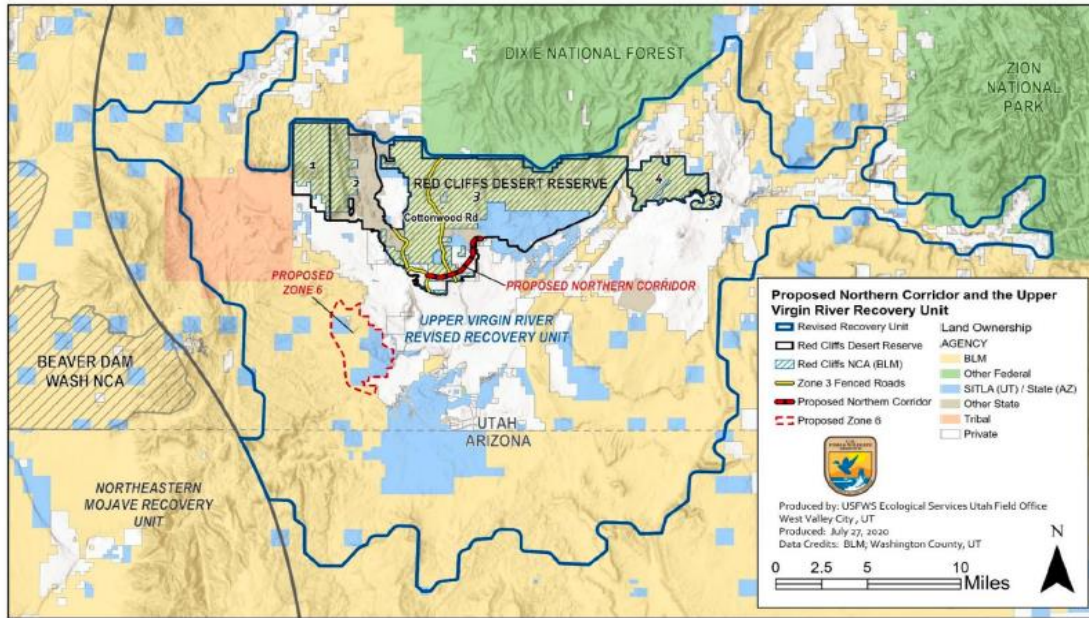


Figure 1. Map of Red Cliffs NCA showing Red Cliffs Desert Reserve, the UVRRU, and the Proposed Northern Corridor Highway and Zone 6. Source: AR142603.

C. Mojave Desert Tortoise.

The Mojave desert tortoise is a long-lived, slow-growing tortoise species. AR100017. Tortoise home ranges vary depending on sex, location, resources, and weather patterns, and can be as large as 220 acres. AR100017, 134409. An individual tortoise may use more than 1.5 square miles for habitat and may venture more than seven miles outside its home range on long-distance forays. AR100017, 134409. Shelter site availability is an important aspect of habitat suitability. AR142620. Tortoises are selective herbivores, preferring native plants; a diet of nonnative plants like cheatgrass does not promote growth of hatchlings. AR100017. The species' long-term persistence is dependent on extensive, connected landscapes. AR142621, 124367.

In 1990, FWS issued a rule protecting the Mojave desert tortoise under the ESA as “threatened.”³ 55 Fed. Reg. 12178 (Apr. 2, 1990). And in 1994, FWS designated critical habitat for the species and published a recovery plan dividing its range into six recovery units. 59 Fed.

³ The term “threatened species” means a species “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

Reg. 5820 (Feb. 8, 1994); AR100032, 142623. The Red Cliffs NCA and Desert Reserve are included within the Upper Virgin River Recovery Unit (“UVRRU”), which encompasses 54,600 acres of contiguous critical habitat, including 46,098 acres within the Red Cliffs NCA.

AR100032. The UVRRU is highly important to the range-wide status of the species. AR088353.

Unfortunately, tortoise in the UVRRU face numerous threats to recovery, including habitat loss and fragmentation, disturbance from roads, urbanization, conversion of native habitats by invasive species, predation, off-road vehicles, and wildfires. *See* AR142631–41. Fires threaten tortoise by degrading or eliminating habitat, including by facilitating invasive species spread, fueling an annual burn-reburn cycle. AR142634–36. Roads exacerbate these patterns by spreading nonnative plants and creating wildfire ignition sources. AR142633, 142658.

The presence of roads, even with exclusion fencing, also harms tortoises by influencing movements and behaviors, fragmenting habitats, and causing direct mortality. AR142631–33, 142656–61, 099510, 129341. The breadth of impact is a function of the size and use of the road: the bigger the road and the heavier its traffic use, the greater the direct and indirect impacts on tortoises. AR099510. Experts recommend that the density of all roads in areas managed for tortoise conservation be limited to 0.6 km per km² or less. AR128625. Within the Red Cliffs NCA and Desert Reserve, pre-Northern Corridor road density is 2.49 km/km². AR128627.

Despite its listing under the ESA, these threats have led to steady declines in tortoise populations. In 2014, a range-wide population estimate identified a 10-year decline of almost 125,000 adult tortoises, representing a nearly 37% population-wide decline. AR100034. Tortoise populations in the UVRRU experienced a 24% decline over this same timeframe. AR100035. Densities of tortoise in the UVRRU are declining by 3.2% per year. AR100036. The UVRRU population in and around Red Cliffs NCA experienced an even more stark decline of 41%

between 1999 and 2019. AR100035–36. In the Red Cliffs NCA, monitoring data by Utah Division of Wildlife Resources (“UDWR”) documented an annualized mortality rate of 26% in 2025. AR132631. Within Zone 3, tortoise densities decreased from 3,409 adults in 2001 to 1,681 adults in 2023, AR142643, below the bare minimum estimated population viability size of 2,000. AR088354. Tortoise experts have recently warned that “[t]he negative population trends in most of the [Tortoise Conservation Areas] for Mojave desert tortoise indicate that this species is on the path to extinction under current conditions.” AR091671.

D. Land Acquisitions Using the LWCF and ESA.

In 1995, approximately two-thirds of the Reserve comprised public lands administered by BLM or by Utah State Parks; the rest was private or owned by the Utah School and Institutional Trust Lands Administration (“TLA”). AR067577–78, 045217–18. The 1995 HCP adopted a strategy to use the Land and Water Conservation Fund (“LWCF”) to acquire remaining private and municipal lands to preserve threatened and endangered species habitat. AR067577–78.

To date, the Department of the Interior has spent tens of millions of LWCF dollars to acquire parcels within Red Cliffs NCA to protect tortoise populations. *See* AR056131, 144899 (showing 15 LWCF acquisitions); AR135021 (showing three more recent LWCF acquisitions); *see also* AR101210, 100144, 102628–715 (maps and other information for each parcel). Prior to 2021, BLM had used over \$20 million from the LWCF to acquire 944.45 NCA acres. *See* AR144694 (857.15 acres acquired pre-2021); AR102628–715, 102629 (showing \$20,734,622.20 spent on LWCF acquisitions pre-2021). And BLM has since acquired at least three more parcels totaling over 87 acres. AR134950. The purpose of the acquisitions was to protect tortoise habitat. *See, e.g.*, AR146112 (acquisitions “for the endangered Mojave Desert tortoise”), AR102640–44 (one parcel’s document noting “Funded By LWCF” for “Supplemental Use/Purpose” of “Des[ert] Tort[oise]”); AR042547 (identifying another parcel as “high priority acquisitions . . . to

enhance opportunities to protect populations of the threatened Mojave desert tortoise and its habitat”); AR102677–80 (same for another parcel); AR102710–15 (same).

Section 6 of the ESA provides another means of wildlife habitat preservation. Section 6 authorizes FWS to provide financial assistance to states through the Cooperative Endangered Species Conservation Fund. *See* 16 U.S.C. § 1535; 50 C.F.R. § 81. This fund includes a grant program that provides funding to state or local governments to acquire land. AR147024. FWS has provided Section 6 grants to UDWR to acquire and protect tortoise habitat, including over 3,000 acres within the Reserve. AR147024. Relevant here, FWS issued “Habitat Conservation Planning Land Acquisition Grant #E-4-L-3,” for UDWR’s purchase of hundreds of acres in Reserve Zone 3 beginning in 2001. *Id.* The grant states that the lands will “be operated . . . as a wildlife preserve for the desert tortoise and other wildlife and biodiversity species[.]” AR038457, 038467.

II. The Northern Corridor Highway.

A. 2016 Resource Management Planning.

In 2016, after a six-year public planning process, BLM approved Resource Management Plans (“RMPs”) for the Red Cliffs NCA and St. George Field Office, governing BLM’s land management decisions within the NCA and surrounding areas. AR088223–383, 047044–158. In doing so, BLM rejected an alternative proposed by Washington County, which was to designate a new utility and transportation corridor in the NCA to accommodate a highway. AR088232. According to BLM, such a “northern transportation route” would not satisfy the conservation purposes of the Red Cliffs NCA for many resource values, including threatened and endangered species, cultural resources, scenic qualities, and recreation uses. *Id.*; *see also* AR088353–64.

FWS agreed with BLM, concluding 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.” AR088360. According to FWS, the impacts from a northern transportation route include increased road-kills, habitat fragmentation, invasive species and fire, human access, predation, and increased noise, which would have “substantial negative impact on the desert tortoise population stability and viability.” *Id.*

B. 2018 Northern Corridor Highway Proposal.

In 2018, UDOT submitted a right-of-way application for the Northern Corridor Highway, a four-lane, high-speed highway crossing approximately 4.5 miles of Reserve Zone 3 and the NCA, including 1.9 miles of BLM lands and Mojave desert tortoise critical habitat. AR099931, 099943. According to UDOT’s application, the purpose of the Northern Corridor was to “reduc[e] congestion, increas[e] capacity, and improv[e] east-west mobility on arterial and interstate roadways.” AR099932; *see also* AR008852 (purpose of highway is “to respond to current and anticipated growth occurring throughout Washington County”).

The route is similar to what BLM rejected in the 2016 RMP process and would run afoul of BLM’s choice to create an “avoidance” area where no new right-of-way was permissible if it would result in take of ESA-listed species. *See* AR088261. So BLM recognized that approval would require RMP amendment. AR099933. Further, Washington County was in the process of renewing its HCP and ITP, and given the highway proposal, the County pivoted to “see if [they] can get more take” of tortoise through the renewal. AR007216. Washington County submitted to FWS an amended HCP (“2020 HCP”) and a renewed ITP application, proposing a new “changed circumstance” provision to accommodate a highway. *See* AR099449–50, 099470–71. Approvals of the highway would trigger the changed circumstance requirements. *Id.*

Defendants prepared an environmental impact statement (“EIS”) analyzing the impacts of UDOT’s proposed right-of-way relative to five other alternatives: a no action alternative, the T-Bone Mesa alignment, the Southern alignment, the Red Hills Parkway Expressway (“Red Hills

Alternative”), and the St. George Boulevard/100 South-One-way Couplet. *See* AR099967. Other alternatives were proposed by members of the public but were not analyzed in detail in the EIS. AR099969–72. For instance, many members of the public supported a Red Hills Parkway I-15 Viaduct/Flyover Connection alternative because it would be less costly, avoid the NCA and tortoise habitat, and reduce traffic. *See* AR000561, 000564, 001782, 002269, 004104, 004816, 004939, 005016, 005040, 005053, 005169, 005203.

The analysis revealed that UDOT’s Northern Corridor alternative would adversely impact each and every Red Cliffs NCA resource OPLMA identified for protection, including sensitive plant species, AR100006; non-ESA-listed special status species, AR100065–67; geology and soils, AR100078–79; paleontological resources, AR100082; wetlands, AR100085–86; historic and cultural resources, AR100125–27; scenic and visual quality, AR100113; and recreation experience, AR100129–30, 100135–37.

The highway alignment would also damage and encumber lands acquired for conservation using the LWCF and ESA Section 6 funds. Indeed, the highway would lie directly over three LWCF-acquired parcels, permanently destroying their conservation resources and tortoise habitat. *See* AR056131, 135021, 144899 (maps). It would also directly or indirectly impact at least 825 acres of ESA Section 6 lands, and a portion would directly overlie and transect the parcels acquired through UDWR’s 2001 Section 6 grant. AR147023–25, 147030.

The highway would also significantly harm wildlife and damage habitat—particularly for Mojave desert tortoise. AR100013–16, 099984–90, 100051–58. Based on the EIS’s chosen impact buffer of 508 meters (1,667 feet), the highway would permanently eliminate 275 acres of tortoise critical habitat and indirectly impact 2,333 acres more, contributing to increased fragmentation of tortoise habitat within the Red Cliffs NCA. AR100049. BLM acknowledged that this buffer would

not capture all indirect impacts, such as increased nonnative species. *See* AR100051, 099984–85 & n.3 (spread of invasive species would extend up to one kilometer from the edge of the highway). As Figure 2 illustrates below, the highway would bisect Zone 3 of the Desert Reserve—where the agencies consider “may be the most important high-density cluster of desert tortoises in the recovery unit.” AR100054, 100035, 100047, 088354. This may cause the tortoise population south of the highway to become non-viable. *See* AR134391.

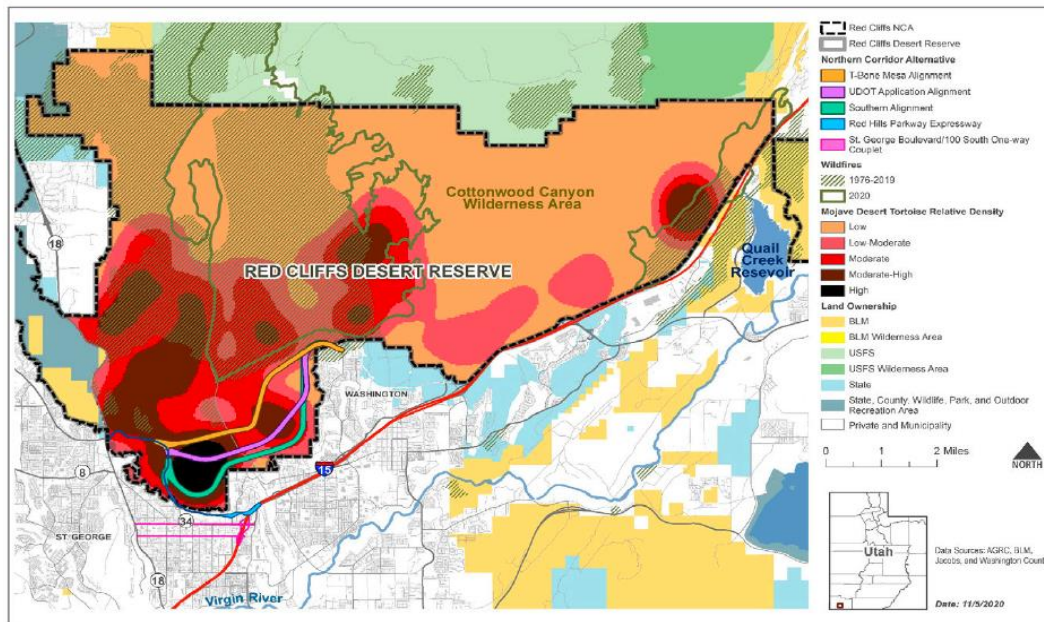


Figure 2. Mojave Desert Tortoise Density in Red Cliffs NCA and Desert Reserve. Source: AR100318.

The highway would harm tortoises directly and indirectly in many other ways, including by facilitating and increasing predation; increasing noise levels that could adversely impact tortoise behavior; increasing outbreaks of disease; disturbing native plants important to tortoise habitat and behaviors; increasing establishment of non-native, invasive plants; and increasing human access to collect tortoises. AR100050–58, 142649–61. These harms would result in injury and mortality, including by directly killing tortoises, causing physical injuries, and reducing reproductive success due to stress and disease. AR100050–58, 142649–61.

The highway would also exacerbate wildfires, with negative implications for tortoise

populations and their habitat. AR142634–38, 142657–58, 130704–07. This would add to the impacts of recent fires in the NCA and Desert Reserve. *See* AR130697, 130704 (2020 wildfires burned 12,437 acres within the Reserve, including 9,019 acres of designated critical habitat, comprising “[s]ome of the Reserve’s most densely occupied tortoise habitat”). In fact, the highway is likely to shorten the burn-reburn cycle, which “may contribute to extirpation of tortoise populations.” AR130705; *see also* AR130865–66 (coupled with wildfire cycle, highway could “impede the recovery of this threatened species in the NCA, Reserve, and UVRU”).

To mitigate these impacts, the agencies relied on the creation of a new “Zone 6” in the Desert Reserve. AR099959. Zone 6 is relatively small and non-contiguous with the existing Reserve and Red Cliffs NCA; it “is unlikely to support an abundance of tortoises on its own.” *See* AR099959, 100057; Figure 1, *supra*. It does not contain tortoise critical habitat. *See* AR142626 (map of critical habitat). Extensive recreational use there, including with motor vehicles, also degrades soil and vegetation and increases predation, among other impacts. AR100057.⁴ While adding Zone 6 to the Reserve may reduce some impacts, *id.*, 49% of it is non-federally managed land, subject to lesser protections, *see* AR134400–01. Zone 6 would also lack the permanent protections that the Reserve lands within the NCA are afforded.

III. Prior Northern Corridor Highway Decisions and Litigation.

A. 2021 Highway Approval and Litigation.

In early 2021, BLM issued a record of decision approving UDOT’s right-of-way application, as well as the associated amendments to the Red Cliffs NCA and St. George Field

⁴ In fact, in June 2026, Washington County proposed a new off-highway vehicle route that would bisect tortoise habitat in Zone 6. *See* U.S. Dep’t of the Interior, BLM, High Desert Trail Draft Environmental Assessment, DOI-BLM-UT-0000-2026-0002-EA (June 2026), available at <https://eplanning.blm.gov/Documents/?id=8ff1436b-363f-f111-88b4-001dd8084607&spid=053c670a-875e-f111-bec6-001dd804183b> (last visited July 23, 2026).

Office RMPs. AR101859. FWS also issued Washington County an amended ITP. AR102847. Plaintiffs filed a lawsuit in this Court challenging Defendants’ decisions based on their violation of environmental and historic preservation laws, including OPLMA, the ESA, the LWCF Act, NEPA, and the National Historic Preservation Act, as well as the APA. *See* First Am. Complaint, *Conserve Sw. Utah v. U.S. Dep’t of Interior*, Case No 21-CV-1506-ABJ (D.D.C.), Dkt. 16.

After Plaintiffs moved for summary judgment, Defendants moved to voluntarily remand these decisions based on BLM’s “legal error” in issuing the right-of-way without complying with the National Historic Preservation Act, as well as “substantial and legitimate concerns regarding its compliance with NEPA,” including a lack of sufficient wildfire analysis. *See* Defs.’ Motion for Voluntary Remand with Partial Vacatur at 20–21, *Conserve Sw. Utah*, Dkt. 53.

Plaintiffs and Defendants also executed a settlement agreement (“2023 Settlement Agreement”) in which Defendants committed to reconsider their decisions. AR142757–59. The 2023 Settlement Agreement provided “that if the new 2024 decision on the [right-of-way] application differs from the 2020 [right-of-way] decision, [BLM] will amend the RMPs to reflect the 2024 decision. Until that additional planning is complete, BLM will not consider or reconsider a similar [right-of-way] application within the NCA.” AR142758.

In November 2023, the court granted the motion for voluntary remand, which triggered execution of the 2023 Settlement Agreement. The court found “substantial and legitimate” Defendants’ “contention that insufficient attention was given to significant wildfire activity.” *Conserve Sw. Utah v. U.S. Dep’t of Interior*, Case No. 21-CV-1506-ABJ, 2023 WL 7922785, at *7 (D.D.C. Nov. 16, 2023). The court remanded the decisions for reconsideration. *Id.* at *9.

B. 2024 Remand Decisions and Highway Termination.

In 2024, BLM and FWS issued new decisions pursuant to the remand order and the 2023 Settlement Agreement, including a Supplemental EIS (“SEIS”) and updated ESA authorizations. The 2024 SEIS examined anew the impacts of wildfires in the NCA and updated other analyses. AR130656. Based on the SEIS’s facts and analysis, BLM terminated UDOT’s right-of-way. *See* AR130863. In an accompanying compatibility determination, BLM found that each of the NCA’s protected resources would be adversely impacted by the highway. AR130795–99.

Defendants concluded that the right-of-way grant “would not comply with [OPLMA’s] mandate that NCA management focus on the conservation, protection, and enhancement of threatened and endangered species that occur in the NCA.” AR130865. Instead, terminating the right-of-way would “comply with [OPLMA’s] mandate to protect the threatened Mojave desert tortoise and its designated critical habitat in the NCA, as the Northern Corridor Highway would not be constructed across 1.9 miles of public land in the NCA.” AR130865. It would also avoid tortoise injury, mortality, translocation, and displacement from the highway. *Id.* Further, it would avoid exacerbating wildfire impacts that could “impede the recovery of this threatened species in the NCA, Reserve, and UVRU.” AR130865–66. BLM thus concluded that its prior authorization was “issued contrary to the law in effect at that time.” AR130863.

BLM identified the Red Hills Alternative, which would upgrade road infrastructure outside of BLM lands, as the “environmentally preferable alternative” because it “would have . . . no direct impacts on the threatened Mojave desert tortoise or its designated critical habitat in the NCA” and would “minimize impacts to the largest contiguous block of designated critical habitat for the Mojave desert tortoise in the NCA with the highest tortoise population density in the NCA.” AR130856. Further, because its decision differed from 2021, BLM committed

(consistent with the 2023 Settlement Agreement) to “undertake land use planning amendments to reflect the 2024 decision. Until that additional planning is complete, BLM will not consider or reconsider a similar [right-of-way] application within the NCA.” AR130852.

FWS issued an updated Biological Opinion (“BiOp”) for Washington County’s HCP (“2024 HCP BiOp”) and an amended ITP (“2024 ITP”). 130841–45.⁵ These documents remain the governing authorization for the County’s take of Mojave desert tortoise on non-federal lands.

IV. Current Litigation.

A. NEPA Analysis and Decision Record.

In October 2025, less than a year after terminating the right-of-way, BLM issued a draft environmental assessment (“EA”) re-considering the Northern Corridor Highway based on supposed “new information” that UDOT provided to “demonstrate[] the technical and economic infeasibility of the Red Hills Parkway Expressway.” AR134920. BLM identified UDOT’s right-of-way alignment as its “preferred alternative.” AR134922. On January 21, 2026, BLM published a final EA and finding of no new significant impact (“FONNSI”). AR134920, 146100–06. BLM also issued a decision record approving the right-of-way, AR146107–19, as well as UDOT’s right-of-way grant, *see* Dkt. 14-16. Reversing its earlier conclusion, BLM asserted the right-of-way is compatible with federal law. AR146110, 146100–06. BLM did not amend the RMPs, as required by its 2024 decision and the 2023 Settlement Agreement, instead leaving the 2021 RMP amendments “in place as approved in 2021.” AR146114–15.

B. ESA Consultation.

To fulfill BLM’s consultation obligations under ESA Section 7, FWS issued an updated BiOp in November 2025, addressing the Northern Corridor Highway (“2025 Northern Corridor

⁵ Plaintiffs were unable to locate the 2024 HCP BiOp in the administrative record and will work with Defendants to complete the record as needed. *See* Dkt. 54, ¶ 141 (answer).

BiOp”) and the impacts of the highway on Mojave desert tortoise and its critical habitat. *See* AR142649–61. In addition to the right-of-way and proposed offset measures, the 2025 BiOp also addressed “FWS’s approval for the UDWR to dispose of lands acquired with [ESA] Section 6 funds.” AR142601. Despite the adverse impacts, FWS concluded that highway construction, operation, and maintenance would not jeopardize the continued existence of the tortoise nor adversely modify designated critical habitat. AR142668–71. FWS issued an incidental take statement authorizing take associated with the highway. AR142671–75.

C. Section 6 Land Exchange.

In conjunction with BLM’s reapproval of the right-of-way, FWS also separately prepared an EA to address effects on lands that UDWR acquired under ESA Section 6 grants. *See* AR147021–44. Under the proposed action, to accommodate the highway, FWS would approve UDWR’s disposal of 47 acres within two Section 6 parcels it acquired in the NCA. AR147027–28. FWS would then approve UDWR’s acquisition from Washington County of 450 acres in Zone 6 to purportedly replace the conservation values lost from the disposal. AR147028. FWS issued its final EA and FONSI regarding this action on February 4, 2026. *See* AR147021–44. And on February 20, 2026, FWS formally approved UDWR’s request. AR147127–28.

D. This Lawsuit.

Plaintiffs promptly filed this action following the 2025 and 2026 decisions noted above, *see* Dkt. 1 (Feb. 4, 2026 Complaint), and filed an amended complaint adding ESA claims, *see* Dkt. 53.⁶ Plaintiffs also moved for (and this Court granted) a preliminary injunction to stop immediate highway construction. Dkt. 37. As detailed below, Plaintiffs are entitled to summary

⁶ Plaintiffs’ standing to bring this action is demonstrated by declarations from members who establish injury-in-fact that is traceable to the challenged actions and redressable by this Court. *See* Dkts. 13-5 through 13-15; *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

judgment on all claims, and a ruling in their favor on any of these claims renders Defendants’ Northern Corridor Highway approval unlawful, warranting vacatur of the challenged actions.

STANDARD OF REVIEW

Summary judgment is appropriate if there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Plaintiffs’ claims arise under causes of action established by the APA and the ESA. The APA’s standards of review apply to each. *Gerber v. Norton*, 294 F.3d 173, 178 n.4 (D.C. Cir. 2002). The court must set aside agency action it finds to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Action is arbitrary and capricious if it is “not reasonable and reasonably explained.” *Ohio v. EPA*, 603 U.S. 279, 280 (2024) (quotation omitted). The agency “must offer ‘a satisfactory explanation . . . including a rational connection between the facts found and the choice made’ and cannot simply ignore ‘an important aspect of the problem.’” *Id.* (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). While the Court’s review of agency decisions is narrow, it must still be “thorough, probing, [and] in-depth.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

ARGUMENT

I. BLM Violated the Omnibus Public Land Management Act.

A. OPLMA Mandates that BLM Manage the NCA for Conservation.

The Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 1088–89 (“OPLMA”), established the Red Cliffs NCA and provided mandatory duties for its management. OPLMA Section 1974 identifies the two purposes of the 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,” and (2) to protect “each” threatened and endangered species in NCA, including the Mojave desert tortoise. 16 U.S.C § 460www(a)(1), (2).

To achieve these purposes, Section 1974 imposes two management mandates. First, BLM “shall manage” the Red Cliffs NCA “in a manner that conserves, protects and enhances the resources of the [NCA]” *Id.* § 460www(e)(1)(A). Second, BLM “shall only allow uses of the [NCA]” that “would further a purpose” for which the NCA was established. *Id.* § 460www(e)(2); *see also id.* § 460www(a). OPLMA imposes a stricter management standard for the NCA than for typical BLM lands, which are governed by a “multiple use” standard. *See* 43 U.S.C. § 1732(a); *id.* § 1702(c), (h) (defining “multiple use” and “sustained yield”).

Section 1977 separately describes obligations related to travel management planning. It provides that the Secretary of the Interior “shall develop a comprehensive travel management plan for the land managed by the [BLM] in [Washington] County.” OPLMA, § 1977(b)(1). In developing that plan, “the Secretary shall— . . . identify 1 or more alternatives for a northern transportation route in the County.” *Id.* § 1977(b)(2).

For the three reasons explained below, BLM’s approval of the Northern Corridor Highway violates OPLMA’s Section 1974 statutory mandates to manage the NCA “in a manner that conserves, protects, and enhances the resources of the NCA” and “protect[s]” Mojave desert tortoise. OPLMA, § 1974(a), (e)(1)–(2).

B. BLM Misinterpreted OPLMA as Permitting a Highway through the NCA.

BLM’s grant of the right-of-way is unlawful first because it was rooted in a fundamental error: BLM’s interpretation that OPLMA permits a highway through Red Cliffs NCA, despite adverse impacts to the values the NCA was created to permanently protect. As OPLMA’s text and the record make clear, that premise is both legally and factually wrong.

1. OPLMA’s Plain Meaning Does Not Allow Approval of a Highway through the NCA.

As a legal matter, OPLMA does not authorize BLM to approve a highway through Red Cliffs NCA. Statutory interpretation “must begin [] with the language of the statute itself” and “is also where the inquiry should end, . . . [if] the statute’s language is plain.” *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Section 1974 imposes a mandate that BLM ensure management and uses of the NCA “conserve, protect, and enhance” its resources and “protect” the Mojave desert tortoise. *See* OPLMA, § 1974(e)(1)–(2); *id.* § 1974(a). That plain language contains no exception to these mandates for commuter transportation. *Compare id.* § 1974(e)(4)–(5) (exceptions for other types of uses, including grazing and wildland firefighting).

Section 1977 provides travel management planning obligations, but the language of this provision lacks any requirement to approve a highway through Red Cliffs NCA or any alteration of BLM’s duties under Section 1974. As Section 1977’s text makes clear, it only requires BLM, through travel management planning, to “*identify . . . a northern transportation route in the County.*” OPLMA, § 1977(b)(2) (emphases added). That text does not require the route to be located within the NCA or on exclusively BLM-managed land. Moreover, nothing in Section 1977 requires the route BLM identifies to be a four-lane, high-speed highway.⁷

OPLMA’s legislative history confirms Congress’s intent to ensure full protection of Red Cliffs NCA and its resources. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 896 (1984) (“We look first to the statutory language and then to the legislative history if the statutory language is

⁷ As Plaintiffs explained in earlier briefing, OPLMA’s plain meaning also does not require BLM to *approve* a route, only to *identify* one. *See* Pls.’ Prelim. Injunction Br. (Dkt. 13-1) at 37–39. Moreover, that route identification obligation falls *within* BLM’s duty to “develop a comprehensive travel management plan.” OPLMA, § 1977(b)(2). BLM has not yet completed this plan despite the passage of nearly 20 years, and the agency provides no discussion or analysis justifying leapfrogging its planning obligation to approve a highway.

unclear.”). In 2006 and 2008, Congress considered and rejected two predecessor bills, S. 3636 and H.R. 5769. A comparison between these bills and OPLMA shows how Congress eliminated any requirement to site a highway through the NCA.

Under the 2006 bill, the NCA’s purposes were “(1) to conserve, protect, and enhance for the benefit and enjoyment of present and future generations the ecological resources, wildlife, endangered species, and recreational resources of the Conservation Area, in accordance with the [1995 HCP and St. George Field Office 1999 RMP]; and (2) to serve the needs of communities in the vicinity of the Conservation Area” Washington County Growth and Conservation Act of 2006, S. 3636, 109th Cong., Title VI §§ 602, 603. Critically, the 2006 bill would have required BLM to “establish on public land . . . a corridor for transportation purposes” and to “evaluat[e], at a minimum . . . a corridor within the Red Cliffs [NCA] . . . ; and a corridor outside the Red Cliffs [NCA].” *Id.*, Title IV § 401. The 2006 bill failed.

The 2008 bill revised key aspects of the 2006 bill. The 2008 bill removed the clause regarding accordance with the 1995 Washington County HCP and 1999 St. George Field Office RMP, and it removed the clause about the “needs of communities” purpose. *See* Washington County Growth and Conservation Act of 2008, S. 2834, 110th Cong., Title III § 302. It also revised the language regarding transportation planning to only require the Secretary to “*identify* 1 or more alternatives for a northern transportation route in the *County*,” removing the previous requirement to *establish* a route on *public land* and to explicitly evaluate a route *through the NCA*. *Compare id.*, Title VI § 602(b) *with* S. 3636 109th Cong., Title VI § 401 (emphasis added).

In a 2008 hearing, Utah Senator Bennett noted “significant changes to the previous proposal” including removal of “the corridor designations for . . . the Northern Corridor that bisected the Red Cliffs Desert Reserve” as well as more generally, “right-of-way authorizations

in areas that are environmentally sensitive.” *Miscellaneous Public Lands Bills: Hearing on S. 934, S. 2833, S. 2834, and H.R. 1374 Before the Subcomm. on Pub. Lands and Forests of the S. Comm. on Energy and Nat. Res.*, 110th Cong. 7–8 (2008). Senator Bennett also made clear that Red Cliffs NCA was established to “permanently protect the desert tortoise.” *Id.* at 6; *see also id.* at 7–8. Other hearing participants noted that “Senator Bennett has agreed not to require any study of a transportation route through sensitive tortoise habitat.” *Id.* at 33.

OPLMA’s statutory language mirrored the 2008 bill. Legislative history confirms that Congress did not authorize a northern transportation route in an “environmentally sensitive” location or where it would harm desert tortoise. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.”). Indeed, BLM’s Acting State Director explained that “a plain reading” of OPLMA does not direct BLM to “approve or otherwise establish a transportation route through the Red Cliffs NCA.” *See* Dkt. 14-22 at 3. It “prohibits such a route through the NCA unless it furthers one of the purposes for which the NCA was established.” *Id.*

2. The Administrative Record Confirms that Red Cliffs NCA Is Not the Only Location for a Northern Transportation Route.

BLM’s interpretation of OPLMA to permit approval of the Northern Corridor through the NCA rests in part on the erroneous belief that “[a]t the time Congress enacted OPLMA, the only BLM-managed lands located north of the city of St. George in Washington County were those lands in the Reserve/Red Cliffs NCA.” *See* AR146111. But that belief is incorrect. As the Dixie Metropolitan Organization commented in 2024, seeking to correct this misunderstanding, “[BLM] manages 41 percent of the land in Washington County (637,550 acres) hundreds of

thousands of which are north of St. George City.”⁸ AR119117. BLM thus removed the sentence from its 2024 SEIS. *See* AR119612 (response to comments); AR130642–791 (Final SEIS). Yet the agency’s 2026 decision reverted to the erroneous assertion. AR146111.

Even if BLM aimed to imply that the only *route-suitable* lands were in the NCA, that is also untrue. For example, a 2010 General Plan from Washington County “identify[d] and recommend[ed] alternatives for a northern transportation corridor in the County.” AR046260. This plan identified four potential routes. At least one was entirely outside the NCA, and one was on only non-federal NCA lands. *See* AR046238 (map with “N Corridor Option 4” north of the NCA and Desert Reserve boundary; “N Corridor Option 1” on non-federal lands); *see also* AR046271 (“Four alternative [Northern Corridor] routes are identified” with “[a]t least one alternative pass[ing] through a portion of the Red Cliffs Desert Reserve established for the protection of the desert tortoise”). Similarly, a “Northern Alignment” that would largely avoid the NCA was evaluated during the 2020 EIS process. *See* AR097349 (map). Thus, even Washington County previously understood that a route need not run through the Red Cliffs NCA, much less through the heart of Mojave desert tortoise critical habitat.

C. BLM’s Decision Violated OPLMA’s Management Mandates for the NCA.

Even if OPLMA did permit the approval of a northern transportation route through the NCA, BLM’s approval of the Northern Corridor here is nonetheless unlawful because this route is irreconcilable with OPLMA’s Section 1974 management mandates. As this Court recognized in its preliminary injunction ruling, BLM “may not exercise [its] *discretion* to approve a route, if doing so would collide with [its] *mandate* to protect the NCA.” Dkt. 36 at 32.

⁸ Red Cliffs NCA comprises fewer than 50,000 acres of BLM-administered land. AR088229.

1. Failure to Conserve, Protect, and Enhance Red Cliffs NCA’s Resources.

The scope of damage the Northern Corridor Highway would cause is irreconcilable with BLM’s mandate to manage the Red Cliffs NCA in manner that “conserves, protects, and enhances” its resources.⁹ OPLMA, § 1974(e)(1). The record illustrates that the highway would have devastating impacts on each of the NCA’s nine protected resources. BLM’s 2020 FEIS documented such “adverse impacts” to sensitive plant habitat, AR100006; “adverse impacts to special status wildlife species,” AR100065–67; disturbance to “sensitive soils, soil crusts, and topsoil,” AR100078; “permanent loss or temporary construction impacts to floodplains and potential [waters of the United States],” AR100085–86; “adverse effects to historic properties . . . cultural resources . . . [and] archaeological sites,” AR100125–27; “adverse[] impact[s]” to “areas with high scenic quality and high visual sensitivity,” AR100113; and “dramatic change to the recreation setting” and “degraded user experience,” AR100135–37. BLM’s 2024 compatibility determination similarly documented adverse impacts on the NCA’s ecological, scenic, wildlife, recreational, cultural, historical, natural, educational and scientific resources. AR130795–99.

The harms to Mojave desert tortoise also run counter to the NCA’s express purpose to protect ESA-listed species. OPLMA, § 1974(a)(2). The highway would bisect the highest tortoise density area within the NCA, AR100049, an area already below the threshold for tortoise population viability, AR088354, and key to the UVRU’s recovery, AR088353, 142644. *See also* AR142661 (“all critical habitat physical and biological features within the [right-of-way]

⁹ Because OPLMA does not define “conserves,” “protects,” and “enhances,” the Court should apply their ordinary meaning. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). *See Conserve*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/conserve> (last visited July 13, 2026) (meaning to “to keep in a safe or sound state”); *Protect*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/protect> (last visited July 13, 2026) (“to cover or shield from exposure, injury, damage, or destruction”; *Enhance*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/enhance> (last visited July 13, 2026) (“increase or improve in value, quality, desirability, or attractiveness”).

will be permanently lost”); AR100051 (indirect effects to tortoise include disturbance from noise and vibrations, human intrusion, trash and toxins, increased predation, nonnative plants, and increased wildfire risk). These impacts “may result in long-term consequences to the conservation of the Mojave desert tortoise.” AR100066; *see also* AR130797 (“The loss of this number of desert tortoise to a single project could adversely affect the survival and recovery of this threatened species in the [UVRU] where overall extrapolated tortoise density estimates have been shown to be declining at a rate of approximately 3.2 percent per year.”).

BLM and FWS have confirmed the inconsistency between these detrimental impacts and OPLMA’s mandates when rejecting route proposals that would bisect the NCA. Most recently, in 2024, BLM rejected the same Northern Corridor route challenged here because it would degrade the NCA’s protected resources. AR130863, 130795–99 (2024 compatibility determination). This decision determined that the Northern Corridor “would not comply with OPLMA’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. AR130865–67, 130863 (route is “inconsistent with the specific legal direction provided in OPLMA for management of the NCA” given the impacts “on Mojave desert tortoise, its designated critical habitat, and historic properties”).

BLM and FWS also rejected similar proposals on multiple prior occasions. When preparing the 2016 RMP, BLM considered a “transportation corridor” proposal but rejected it as failing to “satisfy the conservation purposes of the NCA for many resource values . . . , as developments within the corridor would create significant impacts on these resources.” AR088232; *see also* AR086029 (development of proposed route “would negatively impact a majority of the unique resources that the NCA was created to protect”); AR085994

(“Washington County’s proposed ‘northern transportation route’ multi-lane roadway could adversely modify the tortoise critical habitat by destroying dens and burrows, and native vegetation that provides shelter and nutrition.”). And even before OPLMA, FWS opposed “any new road through Zone 3 of the Red Cliffs Desert Reserve” because it “would compromise the commitments on which the Washington County HCP was based, is likely to compromise the biological integrity of the [UVRU] (already the smallest recovery unit), and may result in an adverse modification of designated critical habitat.” AR045802–03.¹⁰

Given the highway’s adverse impacts on protected resources, BLM’s 2026 approval conflicted with Section 1974’s “conserve, protect, and enhance” mandate and was substantively unreasonable. *See Multicultural Media, Telecom, & Internet Council v. FCC*, 873 F.3d 932, 937 (D.C. Cir. 2017) (“an agency’s exercise of discretion must be both reasonable and reasonably explained”). Moreover, BLM’s 2026 approval did not even attempt to explain how it complied with Section 1974(e)(1)’s mandate. This failure alone renders the decision unlawful. *See Multicultural Media*, 873 F.3d at 936 (agency action unlawful when it did not “adequately explain its exercise of discretion in light of the information before it”).

2. Improper “Use” of the NCA.

The Northern Corridor also fails to satisfy Section 1974(e)(2)’s requirement that “uses” of the NCA must “further a purpose” of the NCA—i.e., to (1) “conserve, protect, and enhance”

¹⁰ These were not the only occasions agency experts opposed a highway through the NCA due to harmful impacts. *See* AR005282–85 (2000 letter noting highway would be “biologically devastating”); AR046056–57 (2006 letter: highway “would significantly impact the threatened desert tortoise”); AR005288–89 (2007 letter: highway would “severely threaten the survival and recovery of the desert tortoise within the recovery unit” and be “incompatib[le] with maintaining the tortoise population within the reserve”); AR046058–65 (2007 letter); AR005291–93 (2011 letter); AR088360 (2015 report: highway “would have significant negative impacts to desert tortoises, their habitat, and the ecological functioning of the Red Cliffs Desert Reserve”).

the ecological, recreational, cultural, educational, and scientific resources of the area; and (2) protect the desert tortoise and its habitat. *See* OPLMA § 1974(a). In its preliminary injunction ruling, this Court preliminarily construed Section 1974(e) as permitting a northern transportation route as a “use” as long as it is consistent with the NCA’s purposes. Dkt. 36 at 29.¹¹

Here, the Northern Corridor violates the NCA’s purposes given the adverse impacts to each of the NCA’s protected resources and Mojave desert tortoise. *See supra* Part I.C; Factual Background Part II.B. Indeed, BLM’s 2024 compatibility determination explicitly found that the right-of-way was *incompatible* with each of the NCA’s resources. AR130795–99.

Tellingly, BLM made no effort to claim that the Northern Corridor will “conserve” or “protect” tortoise populations and habitat or other NCA resources or that the highway is otherwise consistent or compatible with OPLMA’s conserve, protect, enhance mandate. In fact, BLM’s 2026 decision did not even attempt a new compatibility determination. Instead, the agency explained only that the highway would “enhance” the recreation, scenic, and educational resources of the NCA by “provid[ing] a new paved hike and bike path for recreation and scenic views,” “further[ing] the educational purpose of the NCA by including additional interpretative displays,” and providing “new scenic driving opportunities.” *See* AR146111, 146118. BLM cannot launder a four-lane highway through its ancillary features.

The stated purpose of the Northern Corridor right-of-way is to “reduc[e] congestion, increas[e] capacity, and improv[e] east-west mobility on arterial and interstate roadways.”

AR099932. Any bike path, interpretative display, or scenic driving opportunities are entirely

¹¹ Plaintiffs maintain that OPLMA’s plain language is more strict than mere “consistency,” permitting only uses of the NCA that *further* a statutory purpose, but in any case, BLM’s action on the record here can survive neither approach. As noted above, because northern transportation routes could lie outside the NCA, there is no conflict between adhering to the Section 1974 conservation mandate and identifying routes under Section 1977. *See supra* Part I.B.

subsidiary to the highway itself and cannot be used to satisfy Section 1974’s restriction on uses. As this Court recognized, BLM’s explanation is an “unpersuasive (and almost certainly arbitrary and capricious) effort to shoehorn its approval of UDOT’s [right-of-way] application into one of these purposes.” Dkt. 36 at 28. Under BLM’s construction of the statute, it could “permit almost any development, based on little more than a minor recreational or educational add-on, in a region that Congress set aside for conservation.” Dkt. 36 at 30.

Moreover, even if the ancillary features would provide some enhancement, BLM itself concluded that the highway project overall would have a net negative impact on each of these protected resources—including the recreational, scenic, and educational resources. *See supra* Factual Background Part II.B; AR130797 (even with trail, “visitor experience for many users of the NCA would be negatively impacted” by the “sights and sounds of motorized vehicles into an area where hikers, mountain bikers, and equestrians currently enjoy natural quiet and scenic views of undeveloped landscapes”); AR130795 (alteration to scenic values from highway in “what is currently an undeveloped natural landscape” with “increased impacts over time”); AR130799 (proposed interpretative panels would only “somewhat mitigate . . . impacts”).

Because the record demonstrates that the Northern Corridor would cause unacceptable levels of damage to the NCA’s protected resources, approving a right-of-way to construct this highway constitutes an unlawful use under OPLMA. *See Multicultural Media*, 873 F.3d at 936.

D. BLM Failed to Explain How the Northern Corridor Highway Minimizes Impacts to the NCA Relative to Other Viable Routes.

Finally, even if BLM were correct that OPLMA contains sufficient latitude to permit a highway through the NCA, BLM failed to provide a reasonable and reasonably explained factual basis to support *this* highway. BLM asserted that the Northern Corridor Highway is the “best alternative that provides a viable northern transportation route.” AR146116. But that assertion

was ill-explained and wholly inadequate under the APA. *See Env't Health Tr. v. Fed. Commc'ns Comm'n*, 9 F.4th 893, 909 (D.C. Cir. 2021) (a “conclusory and unexplained” basis for a decision is “not the ‘reasoned’ explanation required by the APA”).

BLM has interpreted OPLMA to allow a highway through the NCA if that highway is the best among “more than one viable alternative” that “minimizes impacts on the NCA resources.” AR130864–66 (2024 SEIS). Yet BLM’s current application of that interpretation runs headlong into its own prior conclusions. In 2024, BLM *rejected* the Northern Corridor Highway under this approach because it “would not comply with OPLMA’s mandate” and because a different option, the Red Hills Alternative, “avoids or minimizes impacts on the resources that the NCA was designated by Congress to conserve, protect, and enhance.” *Id.*

BLM reversed course in 2026 and re-approved the Northern Corridor by finding that the Red Hills Alternative was not “technically or economically feasible” and thus not a “viable alternative.” AR146116. There are two problems with that assertion.

First, BLM made no effort to explain how it was defining “viable.” *See id.* BLM claimed simply that the Red Hills Alternative had issues with “technical and economic infeasibility,” *id.*, and its EA described only “technical and economic challenges.” AR134926. “Challenges” are not synonymous with non-viability, as this Court has observed, especially because severity of the challenges is largely uncertain. *See, e.g.*, AR134926–97 (design of highway interchange “*may not even be possible*”; property acquisition and relocation “*may not be technically feasible*”) (emphasis added); *see also* Dkt. 36 at 11–12. At best, they amount to little more than additional administrative burden or increased expense.

Yet as this Court noted, merely being “uncertain, more costly, and administratively challenging” is not the same as being “foreclosed,” and even if OPLMA were construed to let a

transportation route deviate from its conservation mandates, the bar for weeding out impact-minimizing options must be higher than mere hardship. Dkt. 36 at 38; *see also Sinclair Wyoming Refin. Co. v. U.S. EPA*, 887 F.3d 986, 997 (10th Cir. 2017) (“In short, the EPA’s equation of ‘hardship’ and ‘viability’ improperly transforms Congress’s statutory text into something far beyond what Congress plausibly intended.”).¹²

Second, BLM erred by focusing on the purported infeasibility of the Red Hills Alternative instead of the viability of other alternatives. BLM characterized UDOT’s Northern Corridor route as “the *best* alternative,” AR146116 (emphasis added), with no detail about what understanding of viability, impact-mitigation, or slate of potential options was underlying that superlative. There were a host of other alternatives that BLM should have analyzed from a viability standpoint. Five were analyzed during the EIS process. AR099967–68. Many others were “considered but eliminated from detailed analysis,” AR099969–74, despite support from many public commenters, *see, e.g.*, AR000561, 000564, 001782, 002269, 004104, 004816, 004939, 005016, 005040, 005053, 005169, 005203 (supporting flyover alternative as less costly and avoiding the NCA and tortoise habitat while still reducing traffic). As noted above, other routes were proposed as far back as 2010 that qualify as a “northern transportation route,” including one outside the NCA and high-density tortoise habitat. *See* AR046238 (map from 2010 plan proposing four route alternatives); AR086016 (2015 RMP EIS proposing six route options).

BLM never explained why these other alternatives were non-viable or how the Northern Corridor minimizes impacts to the NCA’s resources relative to these other potential routes. BLM never even attempted to explain how or why it concluded that the “northern transportation route”

¹² *See also Viability*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/viability> (last visited July 13, 2026) (defined as “capable of working, functioning, or developing adequately”).

under Section 1977 must be a four-lane, high-speed highway, as opposed to another more modest “route.” In short, BLM failed to provide a reasonable explanation supporting the highway.

II. BLM’s Unexplained Reversal Violated the Administrative Procedure Act.

BLM also violated a core tenet of administrative law by reversing course without acknowledgement or reasoned explanation. “[A]n agency may not depart from a prior policy *sub silentio*,” *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (cleaned up), and when reversing prior conclusions or decision-making, the agency “must at least ‘display awareness that it is changing position,’” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009)). “[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Fox Television*, 556 U.S. at 515. An unexplained inconsistency “renders a changed policy arbitrary and capricious.” *Children’s Hospital Ass’n of Texas v. Azar*, 933 F.3d 764, 773 (D.C. Cir. 2019) (quoting *Encino Motorcars*, 579 U.S. at 222).

BLM’s 2026 decision was an unexplained and unlawful reversal in two ways. First, BLM failed to justify the change from its earlier conclusion that the Northern Corridor violated OPLMA’s “conserve, protect, and enhance” mandate. In 2024, BLM found that “[a]ffirming the UDOT [right-of-way] grant . . . would not comply with OPLMA’s mandate.” AR130865, 130795–99 (2024 compatibility determination). This was in line with earlier decisions that similarly found a highway through Red Cliffs NCA would not “satisfy the conservation purposes of the NCA for many resource values.” AR088232 (2016 RMP decision). Yet when reversing course in 2026, BLM made no new compatibility determination and no attempt to reconcile its earlier determination that the highway was incompatible for all resources. *Compare* AR146107–

19 (2026 decision) *with* AR130795–99 (2024 compatibility determination) *and* AR130864–67 (2024 discussion of compatibility). In fact, BLM failed to even acknowledge its shift.

This failure dooms BLM’s decision here and alone warrants vacatur. In *American Wild Horse Preservation Campaign*, the D.C. Circuit invalidated an agency decision departing from its prior practice without explanation when that prior practice was “well documented in the administrative record” and “reconfirmed repeatedly by two decades of agency practice and official pronouncements.” *Am. Wild Horse Pres. Campaign*, 873 F.3d at 924. The agency’s “failure even to acknowledge its past practice and formal policies . . . let alone to explain its reversal of course in the [latest] decision, was arbitrary and capricious.” *Id.* at 927; *see also West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) (vacating when agency’s “deviation from [its] precedent is not ‘justified either as consistent with precedent or as a considered departure therefrom.’”) (quoting *Williams Gas Processing–Gulf Coast Co. v. FERC*, 475 F.3d 319, 327 (D.C. Cir. 2006)).

Second, BLM’s determination that the Red Hills Alternative was now somehow “non-viable”—a reversal from its 2024 decision—was similarly inadequately explained. In 2024, BLM endorsed the Red Hills Alternative as an alternative route that would avoid or minimize impacts to NCA resources. AR130856. BLM’s 2026 decision reversed this position, finding that the Red Hills Alternative was now “non-viable” based on “new” information showing it “is not technically or economically feasible.” AR146116. As discussed above, BLM never explained its “viability” assessment or whether its new approach was consistent with its previous one. *See supra* Part I.D.

Courts routinely reject unexplained or inadequately reasoned shifts in agency positions. For example, in *Encino Motorcars*, the Supreme Court held unlawful a regulation “that was

issued without the reasoned explanation that was required in light of the Department’s change in position.” 579 U.S. at 222. There, the agency failed to “analyze or explain why the statute should be interpreted” to support its new reading and “did not explain what (if anything) it found persuasive in [public] comments” beyond a few conclusory statements. *Id.* at 224. BLM’s reasoning here—or rather, lack thereof—suffered from the same flaws.

In fact, BLM failed to explain how the “new” information behind its reversal on the Red Hills Alternative was even new. Information regarding asserted technical and economic challenges had been before the agency during its 2024 decision-making process, as Plaintiffs previously described and this Court acknowledged. *See* Dkt. 36 at 39 (“Many of the factors that [BLM] invokes in support of its 2026 [decision] were in the record when [BLM] issued its 2024 [decision].”); *see also* Pls.’ Op. Prelim. Injunction Br. (Dkt. 13-1) at 41; Pls.’ Supp. Resp. (Dkt. 34) at 4–6. Most of the issues are generally inherent to the Red Hills Alternative concept and location and have been long-standing features of the proposed route.

To the extent UDOT raised issues not incorporated into the prior Red Hills Alternative, those stemmed from assumptions about potential changes in design elements. UDOT asserted that it, rather than the county, would be “the probable owner/operator of the roadway,” and that this meant bringing its own design criteria based on the “expressway” label, such as a 60-mph design speed, inflated costs, and interchange layouts that would require different agency consultations. AR132358, 134927. Yet these kinds of issues also arose previously. *See* AR114248–49 (raising “federal and state engineering requirements”); AR114227–29 (raising concerns about the interstate tie-in, Federal Highway Administration consultation, flyover ramp complexities, braided ramp footprints, jurisdictional ownership, and costs); AR121421 (BLM acknowledging concerns about route design feasibility and need for Federal Highway

Administration consultation); AR121849 (BLM acknowledging that federal and state permits would need to be obtained). And such information amounts only to largely *unsettled* questions about route design, rather than conclusive determinations about viability. *See* AR134926–27 (highlighting uncertainty regarding various regulatory and design issues). This was no different than in 2024. AR130866, 130869–70 (noting that Red Hills Alternative analysis was based on “conceptual level of engineering design”); AR121849 (same).

BLM’s failure to acknowledge and grapple with its own previous record renders its decision-making here arbitrary and capricious. *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) (“where the record belies the agency’s conclusion, we must undo its action”) (quoting *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1222 (D.C. Cir. 1999)).

III. FWS and BLM Violated the Endangered Species Act.

A. Endangered Species Act Requirements.

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); 16 U.S.C. §§ 1531–44. Congress intended federal agencies to afford endangered species “the highest of priorities,” *Tenn. Valley Auth.*, 437 U.S. at 174, and “to halt and reverse the trend towards species extinction, whatever the cost,” *id.* at 184.

For federal actions, the “heart of the ESA” is its “Section 7” consultation requirement. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). Section 7 requires federal agencies to ensure actions they authorize, fund, or carry out neither jeopardize the existence of a listed species nor destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). To fulfill Section 7’s mandates, federal agencies must consult with FWS for terrestrial species. *Id.*; *see also* 50 C.F.R. §§ 17.11, 402.01(b). Consultation results in the

preparation of a BiOp, which presents FWS’s analysis of the best available science on the status of the species and how it would be affected by the proposed action. 16 U.S.C. § 1536(b)(3)(A).

FWS regulations define “jeopardy” to mean actions that “directly or indirectly . . . reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. The BiOp must include FWS’s determination regarding whether the action would cause “jeopardy” or “no jeopardy.” 50 C.F.R. § 402.14(h). The ESA also requires BiOps to include a “detailed discussion of the environmental baseline of the listed species,” and to use that baseline to evaluate jeopardy. 50 C.F.R. § 402.14(h). The jeopardy determination must use the best available science, 16 U.S.C. § 1536(a)(2), and must “[a]dd the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species.” 50 C.F.R. § 402.14(g)(4).

Under Section 7, if FWS concludes the action will not jeopardize a protected species or destroy or adversely modify its critical habitat, but it will cause incidental “take” of the species, FWS can authorize that take through an incidental take statement (“ITS”). 16 U.S.C.

§ 1539(a)(1)(B); *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 must articulate: (1) the amount or extent of the incidental take, (2) “reasonable and prudent measures” to minimize the amount or extent of take, and (3) the “terms and conditions (including, but not limited to, reporting requirements)” that the action agency must follow to implement the RPMs. 16 U.S.C.

§ 1536(b)(4)(i)–(iv). Take is permissible if it complies with the ITS terms and conditions and is within the incidental take limit. *Id.* § 1536(o)(2). If take exceeds these limits or conditions, the agency must reinitiate ESA consultation. 50 C.F.R. § 402.14(i)(5).

ESA Section 9 makes it unlawful for any person to cause “take” of a listed species. 16 U.S.C. § 1538(a)(1)(B); *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002). ESA Section 10 creates an exception to the take prohibition; FWS may issue an ITP allowing “take” that is incidental to carrying out 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 impacts of such taking. *Id.* § 1539(a)(2)(B)(ii), (iii).

B. FWS’s Northern Corridor Highway Biological Opinion and Incidental Take Statement Violates ESA Section 7 Requirements.

FWS’s 2025 Northern Corridor BiOp analyzed the effects of BLM’s issuance of the Northern Corridor right-of-way and associated actions on Mojave desert tortoise, and it served as FWS’s authorization of those actions under the ESA. AR142601. The BiOp acknowledged that the highway would cause multiple forms of direct and indirect harm to Mojave desert tortoise and its critical habitat. These include death, injury or stress during translocation and handling required by construction; indirect construction impacts; operational impacts including those from death and injury on the roadway, increases in predation, introduction of invasive weeds and wildfire risk; and harms from the destruction and fragmentation of habitat. AR142652–61.

Despite these impacts, FWS concluded that the proposed action would not destroy or adversely modify designated critical habitat and would not jeopardize the continued existence of the Mojave desert tortoise. AR142669. FWS issued an ITS to authorize the incidental take associated with the highway. AR142671–75. As explained below, FWS’s 2025 BiOp and ITS are unlawful for numerous reasons, each of which requires reversal.

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

The ESA requires FWS to ensure that a proposed action will not result in the “destruction or adverse modification” of designated critical habitat for a species. 16 U.S.C. § 1536(a)(2). Here, FWS acknowledged that the highway would destroy about 275 acres of tortoise critical habitat and would fragment and degrade at least 2,333 acres more. AR142670. Yet FWS concluded that the highway project would not destroy or adversely modify critical habitat, arguing that these nearly 3,000 acres of critical habitat represent only a small fraction of the tortoise’s critical habitat across the recovery unit. *See id.* In support, FWS relied on its 2019 regulatory definition of “destruction or adverse modification,” which limited the prohibition to only cover action that “appreciably diminishes the value of critical habitat *as a whole*.” *See* AR142670 (citing 50 C.F.R. § 402.02; 84 Fed. Reg. 44976 (Aug. 27, 2019)) (emphasis added).

But that regulatory provision has now been vacated as unlawful. In *Center for Biological Diversity v. U.S. Department of Interior*, No. 24-cv-04651-JST, 2026 WL 898264 (N.D. Cal. March 30, 2026), plaintiffs challenged the “as a whole” definition as inconsistent with the ESA’s ban on critical habitat destruction. The court agreed and vacated the regulation, holding that “use of the modifier ‘as a whole’ contradicts the statute.” *Id.* at *18. As the court explained, the approach “impermissibly limits the scope of the Section 7 prohibition.” *Id.* That prohibition is “absolute” under the ESA’s critical habitat scheme, and piecemeal destruction of critical habitat is “one of the very ills the ESA seeks to prevent.” *Id.* at *17 (quoting *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008)). Similarly, because FWS’s BiOp here contradicts the ESA and relied on a rule now vacated as invalid, it must be reversed.

Moreover, FWS compounded this error by ignoring the significance of the specific critical habitat the highway would permanently destroy and degrade, instead viewing it only as an acreage number to compare with habitat at broader scales. This Court has previously held that a BiOp is unlawful if FWS makes “no effort to discuss what [habitat] percentages mean for the [species].” *Nat’l Wildlife Fed’n v. Norton*, 332 F. Supp. 2d 170, 177 (D.D.C. 2004). And as the Ninth Circuit has noted, “focusing 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), *amended* 387 F.3d 968 (9th Cir. 2004). Accordingly, the agency must analyze the importance of impacted habitat areas, however small, to the species’ survival and recovery, before it could conclude that destroying or degrading such areas would not appreciably diminish critical habitat’s value.

Here, FWS failed to grapple with the record’s evidence that the highway would destroy and damage critical habitat of specific and significant importance to the tortoise. The highway would “bisect[] an important high-density area” in the recovery unit. AR142670, 142645 (map). FWS has acknowledged that this area has “the greatest influence on the resilience of the UVRRU.” AR142643–44. And this impacted area contains “maybe the most important high-density cluster of desert tortoises in the recovery unit.” AR100054. Rather than address this importance, FWS based its rationale on the simplistic comparison of raw acreages, *see* AR142670, and then pointed to uncertain efforts to conserve other habitat. FWS rationalized that vague habitat restoration efforts are being “work[ed] toward” elsewhere and that non-critical-habitat areas like the proposed Zone 6 would “continue[] to contribute” to recovery efforts. AR142670–71. Such speculative and conclusory analysis falls far short of the “reasonable and

reasonably explained” basis that the law requires, *Ohio v. EPA*, 603 U.S. at 280, particularly if FWS aims to explain its way around a statutory prohibition.

2. The Jeopardy Analysis for Mojave Desert Tortoise Violated the ESA and APA.

a. *FWS Failed to Adequately Weigh the Implications of the Highway for 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*, 524 F.3d at 933. To prepare this analysis, FWS must first assess “roughly at what point survival and recovery will be placed at risk.” *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 999 (D. Ariz. 2011) (quoting *Nat’l Wildlife Fed’n*, 524 F.3d at 936). Based on that assessment, FWS must “determine whether the proposed action will cause the species to reach that tipping point.” *Id.* at 999 (citing *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010)). The impairment of a species’ recovery prospects alone may constitute jeopardy, *Nat’l Wildlife Fed’n*, 524 F.3d at 932, and it is impermissible for FWS to allow actions that would “deepen the jeopardy” a species faces. *American Rivers v. FERC*, 895 F.3d 32, 47 (D.C. Cir. 2018).

FWS failed these obligations here. Tortoise populations have been in steady decline for years. AR142631, 142622 (declines in four of five recovery units). Annual tortoise mortality steadily occurs at rates higher than needed to maintain a stable or increasing population. *See* AR134435 (chart); AR134425–36. And FWS admits that since adopting the 1994 recovery plan, “[t]hreats facing desert tortoises have been increasing,” and “many recovery actions have not been fully implemented.” AR142623. FWS’s own tortoise expert has warned that “[t]he negative population trends . . . for Mojave desert tortoise indicate that this species is on the path to extinction under current conditions.” AR125708; *see also* AR142642 (mortality risk to juveniles from raven predation may lead to functional extinction). Indeed, in the highway area, there is

presently a “localized decline of adult desert tortoise abundance and density,” and the tortoise population has declined below the threshold FWS considers to be necessary for a “minimally viable population.” *See* AR142643, 142645, 066518.

Faced with this record, FWS concluded the highway is not likely to jeopardize the tortoise, yet FWS failed to determine what levels of harm would tip the Mojave desert tortoise into jeopardy. FWS acknowledged the highway would harm tortoise through lethal crushing, habitat fragmentation, introduction of threats like weeds and fire and predators, and other impacts. AR142649–63. But nowhere did FWS evaluate the implications of adding this additional harm to the already-dire tortoise conditions. FWS failed to articulate whether the tortoise was on a recovery path or not. And without such an assessment, FWS could not satisfy its duty to determine whether the highway may knock the tortoise off a recovery path, or may impermissibly lead it further down the wrong path. *See American Rivers*, 895 F.3d at 47.

Instead, FWS provided mere bullet points saying nothing about what it would take to impair tortoise survival and recovery or where highway impacts stand in relation to that threshold. The bullet points surmise that a small percentage of the total population might be directly injured or killed; that translocated turtles may still contribute to survival and recovery; that culvert passage (the effectiveness of which is unproven¹³) might help alleviate fragmentation; and that vague aspirations for habitat restoration might do some good. *See* AR142669–70. But these explanations are of little value without an assessment of what harm the tortoise population could endure before survival or recovery are impaired.

Courts have routinely held BiOps unlawful for similar reasons. *See, e.g., Def’s of Wildlife*

¹³ “[T]here is evidence to suggest that tortoises utilize culverts; however, the effectiveness of the structures in aiding long-term population health and habitat connectivity is unknown.” AR142632.

v. U.S. Dep’t of Interior, 931 F.3d 339, 354 (4th Cir. 2019) (“failure to account for the species’ already precarious state”); *W. Watersheds Project v. Haaland*, 69 F.4th 689, 711 (10th Cir. 2023) (failure to address “likely contribution to the already-existing [higher mortality than survival] for female bears in the Project area”); *Sierra Club v. Nat’l Marine Fisheries Serv.*, No. DLB-20-3060, 2024 WL 3860211, at *17 (D. Md. Aug. 19, 2024) (“failure to take proper account of evidence of population decline”); *Def’s of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 1005–06 (D. Mont. 2016) (failure to consider harm in relation to small population size). Because FWS similarly failed to assess a jeopardy tipping point here, the BiOp’s jeopardy conclusion was unlawfully rooted in “speculation or surmise,” *Bldg. Indus. Assoc. of Superior Calif. v. Norton*, 247 F.3d 1241, 1247 (D.C. Cir. 2001) (citation omitted), and it must be vacated.

b. FWS Failed to Add Highway Impacts to Baseline Impacts Like Climate Change.

ESA regulations require BiOps to include a “detailed discussion of the environmental baseline of the listed species,” and to use that baseline to evaluate jeopardy. 50 C.F.R. § 402.14(h)(ii). A BiOp’s jeopardy determination must “[a]dd the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species.” 50 C.F.R. § 402.14(g)(4). To do this, FWS must adequately address climate change impacts on ESA-listed species. *Appalachian Voices v. U.S. Dep’t of Interior*, 25 F.4th 259, 271 (4th Cir. 2022). Such a step is “critical to ensure that the action is not analyzed in a vacuum.” *Id.* at 278 (quotation omitted). If FWS fails to properly analyze the environmental baseline, “its no-jeopardy conclusions . . . are necessarily arbitrary.” *Id.*

Here, FWS failed to evaluate the additive impacts of the highway and existing threats, particularly climate change, when concluding the highway would not cause jeopardy. This is problematic since FWS has observed that climate change may significantly threaten Mojave desert tortoise in the future. Climate change will increase the likelihood of future significant

droughts, which inhibit plant growth and limit tortoise forage, increase rates of respiratory disease, induce abnormal behavior like failures to hibernate, and spike mortality. AR142639. Increasing temperatures also threaten to shrink the time tortoises can spend foraging. *Id.* And climate change is a significant factor in increasing habitat degradation, AR142634, and wildfires, AR142666. Despite acknowledging such factors and briefly reciting climate change in a list of cumulative effects, FWS failed to account for climate change’s additive impacts in its jeopardy analysis. *See* AR142669–70.

Courts routinely strike down BiOps that merely acknowledge climate change effects but fail to add these impacts to those from the proposed action. For example, in *Willamette Riverkeeper v. National Marine Fisheries Service*, 763 F. Supp. 3d 1203 (D. Or. 2025), the court held unlawful a BiOp that had evaluated the “serious negative implications” of climate change on a species, but then did not analyze the effects of the proposed project “on top of” the climate change effects. *Id.* at 1237. Similarly, in *Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224 (E.D. Wash. 2016), the challenged BiOp included “a detailed discussion of the effects of climate change,” but the agency failed to consider the effects of climate change “in connection with” its analysis of the effects of the proposed action. *Id.* at 1233–34; *see also W. Watersheds Proj. v. McKay*, No. 22-35706, 2023 WL 7042541 at *2 (9th Cir. Oct. 26, 2023) (climate change discussion was “deficient” because it failed to consider “whether the small frog population could sustain grazing-related impacts on top of potential climate change effects”); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 874 (D. Or. 2016) (biological opinion “fails properly to analyze the effects of climate change, including its additive harm”).

In short, FWS erred by acknowledging that climate change has additive effects but then declining to factor those additive effects into the substance of its jeopardy analysis. FWS’s

failure renders the 2025 Northern Corridor BiOp arbitrary, capricious, and unlawful.

3. FWS's Incidental Take Statement Violates ESA Requirements.

When FWS issues an ITS following a “no jeopardy” opinion, it must identify and adopt “reasonable and prudent measures” to minimize take, as well as “terms and conditions” to implement the reasonable and prudent measures. 16 U.S.C. § 1536(b)(4)(i)–(iv). The reasonable and prudent measures and terms and conditions are “crucial,” serving to “monitor the impact that the approved action has on the listed species in real time.” *Ctr. for Biological Diversity v. Regan*, 734 F. Supp. 3d 1, 51 (D.D.C. 2024), *judgment entered*, 729 F. Supp. 3d 37 (D.D.C. 2024). A failure “to include terms and conditions governing implementation of reasonable and prudent measures is arbitrary and capricious.” *Pacific Shores*, 538 F. Supp. 2d at 258–59 (quotation omitted); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1141 (N.D. Cal. 2006) (finding FWS unlawfully failed to adopt term and condition implementing measures for Mojave desert tortoise). In addition, an ITS must include monitoring and reporting obligations needed to track incidental take and its impacts. 50 C.F.R. § 402.14(i)(4). This requirement “makes clear that [FWS] is responsible for specifying in the statement how the action agency is to monitor and report the effects of the action on listed species.” *Wild Fish Conservancy*, 628 F.3d at 531–32. The Northern Corridor BiOp and ITS fail these requirements.

First, the ITS failed to include terms and conditions to implement all the reasonable and prudent measures. Specifically, FWS adopted *four* reasonable and prudent measures. *See* AR142675 (measures to (1) “use the most recent desert tortoise handling protocols”; (2) “design the Project” to include “passage structures”; (3) dedicate funding and staff to restoration work; and (4) require biological monitoring expertise and monitor tortoise populations during construction). Yet the ITS adopted only *two* terms and conditions, which are untethered to the reasonable and prudent measures: one requiring an annual tortoise translocation report, and one

requiring notification of “post-construction desert tortoise fatalities documented within the [right-of-way].” AR142675. FWS failed to impose terms and conditions implementing the tortoise handling measure, passage structure measure, restoration project measure, or construction-period monitoring measure.

This issue alone renders the ITS unlawful, and the Court should follow *Pacific Shores* and *Center for Biological Diversity v. BLM* and hold that FWS’s failure to implement the reasonable and prudent measures through adequate terms and conditions violates the ESA.

Second, the ITS similarly lacks adequate monitoring and reporting requirements. The ESA’s implementing regulations state that “[i]n order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service *as specified in the incidental take statement.*” 50 C.F.R. § 402.14(i)(3) (emphasis added). In *Wild Fish Conservancy v. Salazar*, the Ninth Circuit invalidated an ITS because FWS’s take limit was “not accompanied by a monitoring and reporting requirement” and thus “failed to establish a meaningful trigger for renewed consultation after the take exceeded authorized levels.” 628 F.3d at 531–32. It is critical that the ITS’s binding terms and conditions relate back to the actual take because “[i]n the absence of a connection between reporting and take,” these requirements “are like two ships passing in the night.” *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 342 F. Supp. 3d 1047, 1066 (D. Mont. 2018).

Here, the ITS lacks enforceable monitoring and reporting requirements tying back to the forms and levels of tortoise take that FWS assessed and authorized. FWS admitted the highway’s construction and operation would take significant numbers of tortoises at different life stages through injury, death, and other harms. *See* AR142673–74. Yet FWS failed to specify in the ITS sufficient monitoring and reporting requirements to track this take. For example, the ITS adopted

limits on lethal take, including a maximum of six adult tortoises killed during construction and a maximum of seven tortoises killed on the highway annually. *See* AR142669. Yet the ITS lacks an adequate mechanism tracking and reporting this take to trigger re-consultation if it is exceeded. FWS merely included a term requiring that it receive reports when tortoise fatalities are “documented” in the right-of-way. *Id.* Nowhere does FWS require monitoring the highway over time to adequately capture any such fatalities. And for non-lethal forms of take, FWS does “not expect UDOT or BLM to track this estimated take.” AR142673. FWS cannot comply with the ESA in this manner.

In sum, the ITS is unlawful because it lacks sufficient terms and conditions to implement take-minimizing measures and lacks adequate monitoring and reporting requirements connecting back to the authorized take as is necessary to establish a meaningful re-consultation trigger.

C. BLM Violated the ESA by Relying on FWS’s Northern Corridor Highway BiOp.

ESA Section 7 imposes a substantive duty on BLM to ensure its actions are not likely to jeopardize the continued existence of any listed species, or destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2); *Nat’l Ass’n of Home Builders v. Def’s 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 BiOp violates an agency’s duties under the ESA. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1127–28 (9th Cir. 2012) (“BLM cannot meet its section 7 obligations by relying on a [BiOp] that is legally flawed.”). For all the above reasons, FWS’s Northern Corridor BiOp is unlawful, and BLM relied on the unlawful BiOp in its decision record. Accordingly, BLM violated its substantive duty under ESA Section 7(a)(2), again requiring reversal. *Id.* at 1127–28.

D. FWS's HCP Incidental Take Permit Violated ESA Section 10 Requirements.

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

1. 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). And courts have held that 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's conclusion that the landowner had minimized and mitigated take impacts had relied upon the 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 it was the Forest Service's actions, and not the applicant's actions, that would provide benefits to the owl. The court agreed, holding that it was unlawful for FWS to rely on third-party mitigation efforts to satisfy ESA Section 10(a)(2)(B)(ii). *Id.* at 1052.

Like in *Klamath-Siskiyou*, Washington County here piggy-backed onto existing third-party tortoise conservation efforts, then claimed that it had minimized and mitigated the impacts of its 2020 HCP. Indeed, the cornerstone of the County's mitigation efforts is the creation and management of the Reserve to promote tortoise conservation. AR114444–45, 130817–19. Yet,

like in *Klamath-Siskiyou*, the County does not own these lands; BLM does. AR130808 (“most of the Reserve land is BLM-administered”), AR126630 (acreage by ownership), AR126679 (map). Nor does Washington County have management authority or obligations over much of the Reserve, which again falls primarily to BLM. *Id.* In fact, FWS admits that these conservation measures were already in place prior to the Amended HCP, yet it credits the County for these pre-existing measures. AR130818 (“the majority of the high-density occupied desert tortoise habitat is protected in the Reserve, which minimizes and offsets impacts to the population”).

This same analysis applies to the creation of Zone 6, which would add 6,813 acres to the Desert Reserve. AR130809. BLM would administer approximately half of the lands in Zone 6, and the other portion is largely owned by the TLA, not the County. *Id.*; *see also* AR100270, 100280 (maps), AR126730. Under *Klamath-Siskiyou*, it is thus improper for FWS to allow the County to piggyback on any conservation measures undertaken on these lands.

The fact that the TLA, the County and others have entered into an agreement “allowing [the TLA’s] unacquired Reserve lands to be managed by the County” does not change this analysis because the TLA is free to walk away from and rescind this agreement. AR041215.¹⁴ Because the TLA’s pledge to allow County land management of its Zone 6 lands for tortoise conservation is freely revocable, it cannot qualify as an enforceable mitigation measure.

In short, FWS cannot permit Washington County to permanently destroy and degrade

¹⁴ In fact, the TLA carefully maintained its ability to abandon any agreement to manage Zone 6 perpetually for tortoise benefit. Early on, FWS took the position “that [TLA] lands in the proposed Zone 6 will need to be protected in perpetuity for [tortoise] conservation and for the HCP to include a specific plan for accomplishing such permanent protection.” AR012239; *see also* AR030369–71 (memo on Zone 6 measures to “remain in effect in perpetuity”). The TLA repeatedly rebuffed this approach. *See* AR031044–45 (rejecting “perpetuity” language); AR042620 (Draft BiOp requiring Zone 6 management for “conservation of desert tortoises in perpetuity”); AR042806 (Later draft BiOp removing “in perpetuity”); AR043023–136 (Final BiOp: no relevant “perpetuity” language).

66,101 acres of tortoise habitat by piggybacking off already-existing conservation efforts and other third-party measures. *See* AR130841–45, 130844, *see also Klamath-Siskiyou*, 99 F.Supp.3d at 1052 (“Applicant[s] seeking to perform actions that would lead to a taking of an endangered or threatened species should not be permitted to obtain incidental take permits by piggybacking off the already-existing conservation efforts by their non-applicant neighbors”). By doing so here, FWS violated the ESA.

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

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”); *see also Ctr. for Biological Diversity*, 2026 WL 898264, at *16 (“[A]n agency does not satisfy its obligation . . . to insure against harm to species or habitat by resting its conclusions on ‘plans’ that are merely proposed and non-binding.”).

Like in *Klamath-Siskiyou*, FWS here relied on 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.” AR130816–18. These measures lack specific obligations to minimize impacts in terms of tortoise take from the 2020 HCP, rely on third parties to acquire the lands, and lack criteria against which to measure compliance. *See Klamath-Siskiyou*, 99 F. Supp. 2d at 1053 (rejecting similar measure to “promote” conservation). Indeed, neither the Amended HCP nor FWS’s Findings and Recommendations provide a reasoned evaluation of the efficacy of these measures, and “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 v. Babbitt*, 15 F. Supp. 2d 1274, 1282 (S.D. Ala. 1998).

FWS also arbitrarily concluded that Washington County would “exclude” covered activities on TLA-owned lands in Zone 6, including land uses and land development activities. AR102074. In truth, the 2020 HCP expressly *permits* a host of covered activities within Zone 6 that FWS admitted may harm tortoise and its habitat—including the construction, operation, and expansion of utilities, access roads, and parking lots. AR126614–15. 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 ESA Section 10(a)(2)(B)(ii), FWS again acted arbitrarily and capriciously. *See Motor Vehicle Mfrs.*, 463 U.S. at 43.

IV. FWS and BLM Unlawfully Undermined Conservation-based Land Acquisitions.

Since 1995, Defendants have used conservation funds available through two federal programs to acquire lands within the Desert Reserve to protect and preserve habitat for the Mojave desert tortoise. BLM has spent over \$20 million through the LWCF to acquire over 900 acres. AR102629. And FWS has issued numerous grants through the ESA’s Section 6 conservation program to acquire over 3,000 acres across the Reserve. AR130723–24.

Despite acquiring these properties specifically to protect Mojave desert tortoise populations and habitat, BLM and FWS permitted the clearing and paving of these conservation lands for the Northern Corridor Highway. In doing so, they violated the land-acquisition statutes.

A. BLM Violated the Land and Water Conservation Fund Act.

1. Under the LWCF Act, Acquisition Purposes Control Post-Acquisition Management.

The Land and Water Conservation Fund Act became law on January 1, 1965. 54 U.S.C. 200301–310; P.L. 88-578; AR 044523-30 (LWCF Act). 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.

AR044523. Congress sought to achieve these conservation and recreation goals by establishing the Land and Water Conservation Fund in the U.S. Treasury, as the primary funding source to acquire conservation land. 54 U.S.C. § 200302; AR 044523-24.

The LWCF Act has both “state-side” and “federal-side” programs, through which state or federal entities acquire and preserve lands. *Id.* Through the state-side program, the Department of Interior provides matching grants to state and local governments for land acquisitions. 54 U.S.C. § 200305; AR 044526-27. Under the state-side program, Congress allowed Interior to permit certain non-conforming uses on lands acquired, and the Secretary may “conver[t]” previously-acquired conservation lands to uses other than conservation. 54 U.S.C. § 200305(f)(3).

The federal-side program is the principal source of funds for federal acquisition of land to achieve the Act’s recreational and conservation purposes. *Id.* at § 200306. For that program, money “appropriated from the Fund for Federal purposes shall . . . be allotted by the President” for enumerated activities only. *Id.* at § 200306(a)(1). These activities include, among others, land acquisition in areas administered by the Department of Interior for recreation; land acquisitions that foster access to federal land for recreational purposes, *id.* at § 200306(2)(A), and land acquisitions for the preservation of threatened and endangered species, *id.* at § 200306(2)(C).

Lands acquired through the LWCF’s federal-side program must remain in federal ownership, and—unlike the state-side program—there is no grant of authority to convert acquired lands to other purposes. *Compare* 54 U.S.C. § 200305(f)(3) (granting authority to convert state-side acquisitions), *with id.* § 200306 (federal-side conversion authority absent); *see*

also id. § 200303 (requiring that funds expended through the LWCF Act “shall be consistent with the requirements for recreational public access for hunting, fishing, recreational shooting, or other outdoor recreational purposes”). Indeed, the purposes informing federal-side LWCF acquisitions “control[] not just the initial acquisition of the lands, but the manner of their development post acquisition.” *Gifford Pinchot Task Force v. Perez*, Case No. 03:13-cv-00810-HZ, 2014 WL 3019165, at *10 (D. Or. July 3, 2014). Thus, to permit actions on lands acquired via the federal-side program, an agency must first determine that proposed uses are consistent with the acquisition purposes. *See Perez*, 2014 WL 3019165 at *10; *see also Cascade Forest Conservancy v. Heppler*, Case No. 3:19-cv-00424-HZ, 2021 WL 641614 (D. Or. Feb. 15, 2021).

2. BLM Violated the LWCF Act by Permitting Lands Acquired for Wildlife Habitat Purposes to be Used as a Highway.

BLM has run afoul of the LWCF Act by permitting lands acquired for tortoise conservation to be turned into a four-lane, high-speed highway. Because this new use is inconsistent with the purposes informing LWCF acquisition of these lands, BLM’s decision is arbitrary and capricious. *Perez*, 2014 WL 3019165 at *10.

In *Gifford Pinchot Task Force v. Perez*, BLM acquired lands adjacent to Mount St. Helens National Volcanic Monument to “aid in the preservation of the integrity of the Green River . . . , and also aid the preservation of the scenic beauty of this area.” *Id.* at *9. Later, BLM proposed to allow exploratory drilling on these lands, and plaintiffs sued, arguing the use was inconsistent with the purposes for which the lands were acquired. *Id.* at *1. BLM argued that the LWCF Act only limited the Secretary’s authority to *acquire* lands for enumerated purposes and that no purpose-consistency requirement attached “after acquisition.” *Id.* at *10. The court rejected BLM’s approach, holding that “the primary purpose for which lands were acquired controls not just the initial acquisition of the lands, but the manner of their development

postacquisition.” *Id.* The court characterized BLM’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.” *Id.* at *11.

Here, like in *Perez*, there is no dispute that BLM has used funds from the federal-side program to acquire 18 separate parcels in the Red Cliffs NCA. *See supra* Part I.D; AR056131; AR144899 (showing 15 LWCF acquisitions); AR135021 (showing three more recent LWCF acquisitions). There is equally no doubt that BLM acquired these parcels for the purpose of protecting tortoise habitat. *See supra*, Factual Background Part I.D. For example, in its justification for one acquisition within Mojave desert tortoise critical habitat, BLM stated:

Acquiring this parcel eliminates the possible threat of development within an area that contains sensitive biological resources, as the BLM would manage designated critical habitat for the threatened Mojave desert tortoise and tortoise populations consistent with the conservation and protection purposes of the Red Cliffs NCA and management goals, objectives, and decisions from the Red Cliffs NCA ROD/RMP.

AR042548–49; *see also* AR042555 (“Management of the acquired lands under the decisions in the Red Cliffs NCA RMP (2016), would help to ensure the long-term preservation of Mojave desert tortoise and their critical habitat.”). BLM also readily admits—as it must—that the highway would directly impact several of these recent LWCF acquisitions, including by being sited directly atop these lands. *See* AR135019 (“[P]rivate lands parcels previously acquired by BLM with LWCF funds would be encumbered by constructing the Northern Corridor under the UDOT [right-of-way] Alignment.”); *see also* AR100143, 056131, 100144, 000323.

Specifically, the Northern Corridor Highway will undermine the purposes guiding BLM’s LWCF-based acquisition of Parcels UTU-77896, UTU-94601, UTU-89254, and UTU-79246. *See, e.g.*, AR100013–16 (“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 [right-

of-way and areas adjacent[.]”); AR134462 (“Construction of the proposed Northern Corridor would cause direct loss of occupied habitat; displacement . . . of individuals; and destruction of burrows . . .”), AR134464 (noting adverse indirect impacts to tortoises from noise, vibrations, and lighting associated with highway); *id.* (concluding that 2,333 acres of occupied habitat and 275 individual tortoises would be indirectly impacted through disturbance).

Thus, BLM violated the LWCF Act by acquiring lands for tortoise conservation and then turning around and permitting those lands to be used for a highway. And the agency cannot excuse this clear legal conflict by arguing that “so few acres will be impacted and the larger purposes for the acquisitions will continue to be met.” AR146112.

First, BLM failed to examine the entire area the highway would impact, instead examining only the acreage in each parcel located directly beneath the highway—i.e., only the area to be fenced off or paved. *See* AR146113 (asserting only that a “small amount of acreage potentially encumbered *within* the [right-of-way] corridor”) (emphasis added). The area of impact, however, is far greater. BLM’s own Biological Assessment acknowledged impacts across a far larger “action area . . . to be affected directly or indirectly by the [highway] and not merely the immediate construction footprint.” AR 134390–91. Yet BLM’s examination of the impacts of the highway on LWCF-acquired lands looked only to impacts that would “directly encumber” LWCF parcels, *see* AR100143, omitting meaningful consideration of the conflict between the LWCF and indirect impacts that would necessarily extend farther, *see* AR100145 (merely incorporating by reference a general acknowledgment that indirect impacts exist). But these indirect effects would diminish the capacity of the lands to fulfill LWCF purposes for both the LWCF parcels overlapping the right-of-way *and* numerous others nearby. *See* AR134391

(map of action area); AR134437 (map of tortoise observations); AR144899 (map of pre-2021 LWCF acquisitions); AR135021 (map of post-2021 LWCF acquisitions).

Second, determining whether a proposed use is inconsistent with the purpose guiding acquisition does not turn exclusively on the relative size and acreage of the impacted area, as BLM asserts. *See* AR146113 (pointing to the “small amount of acreage potentially encumbered”). *Perez* rejected this precise argument. *See Perez*, 2014 WL 3019165, at *16. In *Perez*, the drilling targeted only one-quarter acre among 900 LWCF acres. *Id.* at *1. Despite this small area, the court held that the Forest Service remained obligated to consider impacts on the acquisition purposes, 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, BLM’s refusal to consider the scope and breadth of the direct and indirect impacts of the highway on the wildlife habitat purposes of all affected LWCF parcels—and its decision to authorize land use inconsistent with the acquisition purposes—is unlawful. This Court should follow *Perez*, hold BLM acted contrary to law under the APA, and reverse and vacate the Decision Record. *Id.* at *10; 5 U.S.C. § 706(2)(A).

B. FWS Violated Section 6 of the ESA and the APA.

1. Section 6 Lands Must Be Managed in Perpetuity for Conservation.

Section 6 of the ESA, 16 U.S.C. § 1535, authorizes the Secretary of the Interior to provide financial assistance to states that maintain approved conservation programs for threatened and endangered species. Among the principal purposes of the program is to enable states to acquire and manage habitat necessary for the conservation and recovery of listed species. Section 6(c) authorizes the Secretary to enter into cooperative agreements with qualifying states and to provide financial assistance for conservation activities, including the “the

acquisition of land or aquatic habitat or interests therein” where such acquisition is determined to be necessary to conserve endangered or threatened species. 16 U.S.C. § 1535(c); 50 C.F.R. §§ 81.1–81.15. Lands acquired with Section 6 funds remain impressed with the statutory purpose for which the federal funds were awarded—namely, conservation of endangered and threatened species and the ecosystems upon which they depend.

The statute likewise contemplates ongoing stewardship of acquired lands. Section 6 requires that participating states establish and maintain “adequate and active” conservation programs, 16 U.S.C. § 1535(c), reflecting Congress’s expectation that habitat protection extends into long-term management. Simply acquiring title to property does not satisfy a state’s obligations if subsequent management is inconsistent with or undermines the conservation objectives that justified the federal investment. For example, as FWS has long specified in a “notice of availability” for the grant program: “The proposal must state a commitment to funding for, and implementation of, management of the habitat in perpetuity, consistent with the conservation needs of the species.” AR039557–58.¹⁵ As FWS has long described for HCP Land Acquisition Grants: “The Service provides matching grants to States and territories in support of land acquisition projects that will conserve species habitat *in perpetuity* through fee simple acquisition or the acquisition of permanent conservation easements” (emphasis added).¹⁶

The text of the ESA does not authorize a state agency to dispose of lands acquired through Section 6 funds, and ESA regulations are likewise silent on disposal of Section 6 lands.

¹⁵ Citing U.S. Fish & Wildlife Service, Endangered Species Program Fiscal Year 2019 Cooperative Endangered Species Conservation Fund (Section 6 of the Endangered Species Act) Grant Program Notice of Availability of Federal Assistance, <https://www.fws.gov/endangered/esa-library/pdf/FY19CESCF-Request-for-Proposals.pdf>.

¹⁶ U.S. Fish and Wildlife Service, Habitat Conservation Plan Land Acquisition Grants, <https://www.fws.gov/service/habitat-conservation-plan-land-acquisition-grants> (last visited July 23, 2026).

2. FWS Unlawfully Approved UDWR's Disposal of Section 6 Lands.

FWS approved a proposal from UDWR to “dispose” of its Section 6 lands within the right-of-way and acquire other lands elsewhere—specifically, 450 acres that Washington County already acquired within the proposed Zone 6 area. AR147027–28. FWS premised its approval of the disposal and exchange of Section 6 lands on the newly acquired properties being of “an adequate value of replacement to meet the intended purpose of the grant,” AR147024, and providing “at least the same conservation value as the originally approved grant acquisitions,” AR147027. But FWS’s approach is both legally and factually wrong.

Section 6 does not provide any authority for “disposing” or allowing other uses on lands acquired for permanent habitat preservation for ESA-listed species, and FWS cited no such ESA authority. *See* AR147027. Instead, FWS cited an Office of Management and Budget regulation that covers federal grants for real property as a general matter. *See* AR147027 (citing 2 C.F.R. § 200.311); *see also* 2 C.F.R. § 1402.100 (addressing how the Department of Interior applies those rules). Yet under that regulation, “real property must be used for the originally authorized purpose as long as it is needed for that purpose,” 2 C.F.R. § 200.311(b), and disposition of the property is only allowed when it is “no longer needed for the originally authorized purpose,” *id.* § 200.311(d). There is no record evidence that FWS or UDWR established that the Section 6 lands are no longer needed as tortoise habitat, nor could they given the perilous state of Mojave desert tortoise populations and habitat. *See* AR147027–28, 147032. Thus, this regulation does nothing to permit the disposal of the Section 6 lands here.

And FWS also erred in considering the conservation values lost and gained in the land swap. First, FWS grossly undercounted the losses through the disposal of UDWR’s Section 6 properties. FWS has acknowledged that wildlife impacts from the highway can extend up to 1 kilometer—meaning “a total of 825 acres of Section 6 lands that could be directly or indirectly

impacted” by the highway. AR130726; 147030–31. That figure well exceeds the 450 acres UDWR proposed to acquire in replacement. When responding to comments on its underestimation of the value lost, FWS wholly ignored impacts outside the narrow right-of-way corridor UDWR would dispose, touting the exchange of that mere 47 acres for 450 replacement acres as a “ratio of greater than 9:1.” AR147116.¹⁷ This blinkered assessment of the disposal impacts was arbitrary and capricious and failed to adequately consider the extent of the lands damaged and conservation values that would need to be replaced.

Second, FWS over-assessed the conservation value in the acquired 450 acres. FWS never wrestled with the relative habitat values of the disposed of and acquired lands, which are starkly different. The 450 acres of acquired lands are “affected by recreation and trail braiding is extensive throughout the area.” AR147037. Such extensive motorized and unmotorized trail impacts degrade the habitat value of these lands for Mojave desert tortoise. AR100057. The lands to be disposed, by contrast, represent the highest-quality tortoise habitat—designated critical habitat which FWS has found essential for the conservation and recovery of the tortoise. *See* AR142626 (map of critical habitat). FWS failed to even consider such differences.

FWS also misapprehended the development risk in the acquired properties relative to the Section 6 lands lost. As Plaintiffs pointed out in comments to the agency, *see* AR146234, the lands that UDWR proposed to acquire would be transferred from Washington County, which purchased them from the TLA in 2021. Yet when Washington County acquired the subject properties, it did not acquire the full bundle of property rights—the TLA retained significant exceptions and reservations, including rights to coal, oil and gas, and mineral development;

¹⁷ Elsewhere, FWS discussed an impact range for tortoise at 508 meters (totaling 337 affected acres). AR147032. As addressed in detail in Part V.B.2 below, this choice of impact area analysis underappreciates the scope of the highway’s harms, in contradiction with the record.

rights to develop and extract “sand and gravel located in or on the Property”; rights to all the sub-surface resources and to access and use the Property to develop them; and “an access and utility easement across the property as may be necessary and reasonable to access other lands administered now or in the future by [TLA].” *See* AR147049–50. Thus, the conservation value of the land that UDWR proposed to acquire and protect is undercut by the limited nature of the property interest at issue and the ongoing risk of development and degradation.

Because FWS’s analysis and approval of the Section 6 land exchange artificially inflated the value of the acquired lands and underplayed the value of the critical habitat to be disposed, its decision was arbitrary and capricious. This Court must hold unlawful and set aside the EA, FONSI, and actions approving UDWR’s land exchange and grant modification.

V. BLM Violated the National Environmental Policy Act.

A. NEPA Requires a “Hard Look” at Environmental Impacts Prior to Action.

NEPA “declares a broad national commitment to protecting and promoting environmental quality.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). Its “action-forcing” procedures serve two goals: meaningful public participation and informed agency decision-making. *Id.* at 349. To accomplish these objectives, NEPA requires federal agencies to evaluate the reasonably foreseeable environmental effects of their actions through “detailed study.” 42 U.S.C. §§ 4332(2)(C)(i)–(ii), 4336. If the action will have “reasonably foreseeable significant effect on the quality of the human environment,” the agency must prepare an “environmental impact statement” (“EIS”). *Id.* § 4336(b)(1). If the reasonably foreseeable effects are not “significant,” or if the significance of such effects is unknown, the agency may prepare an “environmental assessment” (“EA”), which may conclude with a Finding of No Significant Impact (“FONSI”) or a determination that an EIS must be prepared. *Id.* § 4336(b)(2). These analyses require taking a “hard look” at “every significant aspect of the environmental

impact of a proposed action.” *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978). Agencies must also “ensure the professional integrity, including scientific integrity, of the discussion and analysis in an environmental document” and “make use of reliable data and resources.” 42 U.S.C. § 4332(2)(D)–(E).

Here, BLM issued a 13-page EA and corresponding FONNSI incorporating its prior 2020 FEIS and 2024 SEIS. *See* AR134918–31; AR146100–06. These NEPA analyses were unlawful in multiple ways, however, including by inadequately examining the highway’s noise impacts; using an inadequate indirect impacts analysis area; and failing to consider significant new data showing the precarious state of tortoise populations in Zone 3 of the Desert Reserve and NCA.

B. BLM Failed to Take a Hard Look at Direct and Indirect Impacts.

1. Inadequate Noise 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). Critically, this assessment must occur *before* an agency takes action. *See Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm’n*, 896 F.3d 520, 523 (D.C. Cir. 2018) (“[NEPA] does not permit an agency to act first and comply later”).

The record shows that increases in noise levels—including noise from cars driving on highways—can have significant adverse impacts to wildlife and other resources, including the Mojave desert tortoise. AR100020, 100060. Noise and vibration adversely impact desert tortoise behavior, communication, and hearing. AR100020; AR100014 (“Noise from construction of the highway would disturb wildlife in the vicinity and potentially cause reproductive failure for

species breeding nearby.”); AR088357 (FWS report noting that “any evaluation of a northern transportation route through the Red Cliffs Desert Reserve should consider the potential effects of road noise to desert tortoise and other wildlife species”). Noise also adversely impacts people, diminishing benefits they derive from quiet landscapes. *See, e.g.*, Dkt. 13-9, ¶¶ 6–10; Dkt. 13-10, ¶¶ 11–12, 14–16; Dkt. 13-15, ¶ 11 (declarants describing harms from noise); AR086028 (“noise associated with a multi-lane highway . . . could discourage recreational users”).

Here, the FEIS predicted that there would be a “noticeable change in noise levels” in and around the highway as well as temporary noise impacts associated with highway construction. AR100172–73, 100575. But BLM fell far short of its NEPA obligations by failing to model or otherwise analyze anticipated changes in background noise levels. Indeed, for the Northern Corridor Highway alternative, the agency failed to prepare any analysis, stating only that the “design details needed to model projected noise are not available” and that if the alternative was “selected and design advances, noise modeling would be conducted.” AR100172. BLM then noted that noise impacts may be significant enough to require abatement measures like continuous barriers, but that these may not even be seen as feasible, and the agency simply offered to think about such problems in a later “separate project analysis.” AR100173.

By deferring meaningful noise analysis, BLM foreclosed the public’s understanding of the breadth and scope of the likely impacts caused by the highway.¹⁸ This violated NEPA’s central purpose requiring an agency to look before it leaps. *Robertson*, 490 U.S. at 349 (“NEPA

¹⁸ The FEIS failed to even consider potential noise impacts to the neighboring Green Springs community, even though commenters repeatedly requested this analysis. *See* AR100172–74; AR018299 (residents’ comment expressing concern over noise impacts from highway); AR018854 (comments urging adequate noise analysis); AR020622 (State of Utah commenting on lack of noise analysis).

ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.”); *see also 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 [NEPA’s] disclosure requirement”) (cleaned up).

Further, BLM’s excuse for deferring its analysis was wholly unreasonable. Even if every highway design detail could not be known in advance, the D.C. Circuit has made clear that “NEPA analysis necessarily involves ‘reasonable forecasting,’” and “agencies may sometimes need to make educated assumptions about an uncertain future.” *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017); *see also Gulf v. Burgum*, 775 F. Supp. 3d 455, 481 (D.D.C. 2025) (lack of data compatible with chosen model did not excuse agency from attempting to “reasonably obtain” data suitable for an emissions analysis). Here, BLM was sufficiently aware of the location of UDOT’s right-of-way alignment to predict the effects of an increase in noise from this alternative. Indeed, BLM did just that throughout the EIS in its analysis of other impacts. *See, e.g.*, AR099984 (analyzing “presumed loss of acres of vegetation from the footprint for each alternative”); AR100044 (projecting impacts to desert tortoise suitable habitat); AR100110–13 (estimating visual impacts from different highway alignments). There was no reasonable basis to treat noise impacts any differently.

What minimal noise analysis BLM provided derived from a “Noise Technical Report.” AR100168–69, 100558–77. That report relied on (1) noise measurements from five field locations along existing roads or in dense residential areas; and (2) a figure developed by the National Park Service depicting existing sound levels in Washington County. *See* AR100170; AR100571–73. But the five field locations all lay entirely outside of or only on the edges of the NCA and were in no way representative of the conditions within the roadless heart of the NCA

where the Northern Corridor would be located. *See* AR100573. And although the National Park Service figure purported to depict natural soundscapes (such as in the undeveloped NCA), it lacked any identification of when and where the data were collected. *See* AR100571, 100574.

In the absence of reliable data measuring the existing background noise levels in the current roadless areas of the NCA where the highway is slated to be built, the FEIS thus lacked adequate baseline information. This too is a quintessential NEPA violation. The starting point of any NEPA analysis is the collection and description of adequate baseline data, and an agency acts arbitrarily when it “measure[s] environmental impacts against an improper baseline.” *Marin Audubon Soc’y v. Fed. Aviation Admin.*, 121 F.4th 902, 917 (D.C. Cir. 2024). “The agency’s choice of the baseline for comparison matters a great deal” because “[i]f the baseline is artificially high, the agency might erroneously conclude that even highly disruptive actions will have minimal incremental environmental effects.” *Id.* at 916.

This Court has recognized how the use of inadequate baseline data “undermines the very foundation of the agency’s analysis.” *See Gulf*, 775 F. Supp. 3d at 479–83 (addressing “outdated and misleading data about future oil demand” needed for emissions estimates); *see also Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1079–83 (D.C. Cir. 2016) (invalidating wind project approval due to inadequate and highly criticized geophysical and geotechnical surveys that were insufficient to assess seafloor and subsurface hazards); *Hausrath v. U.S. Air Force*, 491 F. Supp. 3d 770, 789–90 (D. Idaho 2020) (U.S. Air Force violated NEPA by failing to obtain accurate baseline noise data in wildland areas impacted by training overflights). Indeed, “NEPA requires more” than an agency asking the court “to assume the adequacy and accuracy of partial data without providing any basis for doing so.” *WildEarth Guardians v. Mont. Snowmobile Ass’n*, 790 F.3d 920, 927 (9th Cir. 2015).

2. Unreasonably Small Indirect Impacts Analysis Area.

The agencies' NEPA analysis was also invalid because it used an unreasonably narrow indirect impacts analysis area, contrary to record evidence and resulting in an underestimation of tortoise impacts. AR100045. An analysis area must not be arbitrary, and the agency must provide a rational, science-backed explanation for it. *See* 42 U.S.C. § 4332(2)(D)–(E); *Sierra Club*, 867 F.3d at 1368; *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* AR100051. To assess these indirect effects on tortoise habitat and populations, the FEIS defined an analysis area as suitable Mojave desert tortoise habitat within 508 meters (1,667 feet) on either side of the [right-of-way]. AR100045. This buffer was “based on the annual home range size of an adult male tortoise.” AR100045. 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. AR100049, 100052.

But the record undermines this narrow buffer and instead reveals that it significantly underestimates tortoise impacts. The impact of a road is a function of its size and use: the bigger the road and the heavier its traffic, the greater the impacts. AR099510, 088354. For example, the record shows that tortoise impacts 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”); *see also* AR129341 (even with exclusion

fencing, “indirect negative road impacts remain”). BLM did not justify the indirect impacts analysis area against the anticipated size of and amount of traffic to use the highway.

Similarly, other parts of the FEIS acknowledged how the spread of nonnative invasive species would extend up to *one kilometer* from the highway, causing indirect impacts to tortoise populations and habitat far beyond the chosen analysis area. AR099984–85 & n.3. That reach is about twice as far as the chosen 508-meter buffer for the analysis area, yet the FEIS fails to account for these indirect impacts and nowhere attempts to reconcile this discrepancy. For other indirect effects to tortoise, like noise, the FEIS gives no reasonable estimate of how far impacts might extend. *See supra* Part V.B.1. 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.

Courts reject such cramped indirect impacts analyses. For example, in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101 (D.D.C. 2017), the court rejected the agency’s use of a 0.5-mile buffer when it focused only on an oil pipeline’s construction impacts and excluded nearby lands that could be affected by oil spills. *Id.* at 138–39. Similarly, in *Utahns for Better Transportation v. U.S. Department of Transportation*, 305 F.3d 1152, 1179–80 (10th Cir. 2002), the 10th Circuit rejected an agency’s 1,000-foot analysis area for a roadway when the record documented potential wildlife impacts as far as 1.24 miles. *Id.* at 1179–80; *see also Idaho Sporting Cong.*, 305 F.3d at 973 (EIS invalid when agency used home range rather than landscape scale in analysis despite evidence in the record that effects must be addressed at a landscape scale). Here too, because the efficacy of the indirect impacts analysis area is undermined by record evidence and the EIS lacks a rational explanation justifying the smaller area chosen, the agencies violated NEPA.

C. The 2026 EA and FONNSI Failed to Consider New Scientific Data Regarding the Continued Decline of Tortoise Populations.

Finally, the 2026 EA and FONNSI violated NEPA by ignoring key data showing the continued decline of tortoise populations in Zone 3 of the Desert Reserve and NCA. An EA must take a hard look at environmental impacts. *See Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011), *as amended* (Jan. 30, 2012). The record here shows that BLM failed to demonstrate a hard look because the EA ignored relevant scientific information.

Nearly five months before BLM’s final decisions here, UDWR published new Mojave desert tortoise population monitoring data, which documented an annualized tortoise mortality rate of 26% in the Red Cliffs NCA and surrounding areas—the “highest mortality rate recorded during any monitoring year (1998-2024) within the Reserve” (with one exception following an extreme drought year). AR132628–29, 132631. Indeed, this rate “exceeds those reported for most other Mojave desert tortoise populations across the species’ range.” AR134435. Although this information was before BLM, the agency’s EA never examined this new data and made no effort to reassess the highway’s impacts on the tortoise in light of it.

Plaintiffs and others urged BLM to consider the new data. *See* AR140265–67; *see also* AR141520, 141533. BLM refused, asserting that “[n]o additional issues or significant information relevant to environmental impacts that would substantially change the analysis in the existing NEPA documents have been identified.” AR144091, 146102.¹⁹ But the existing documents painted a profoundly different picture of desert tortoise abundance and density. For example, the 2024 SEIS highlighted that 2023 UDWR tortoise sampling found the highest

¹⁹ This conclusion is at odds with BLM’s scientific assessment of the data outside the EA, where it found the elevated mortality “poses a *significant threat* to population stability.” AR134435 (emphasis added); *see also* AR141280 (2025 monitoring “show[s] a significant increase in adult tortoise mortality within Zone 3 compared to other (recent) monitoring years”).

recorded abundance in Zone 3 since 2005 and the “lowest ever mortality rate.” AR130712; *see also* AR118583 (noting that “[s]ince 2009, tortoise populations across the NCA appear to have stabilized and there is no evidence of recent significant declines in tortoise densities”). Thus BLM’s characterization of the present information landscape as identical was inaccurate, and its refusal to address the more recent data in its updated NEPA analysis was unreasonable.

Because the EA failed to analyze the new data and BLM’s conclusion about its irrelevance was unsupported by the record, it is arbitrary and capricious. A “NEPA decision is improper ‘if the agency . . . entirely failed to consider an important aspect of the problem.’” *Comm. of 100 on Fed. City v. Foxx*, 87 F. Supp. 3d 191, 201 (D.D.C. 2015) (quoting *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014)). Moreover, an EA’s “discussion and analysis” must be based on “professional integrity, including scientific integrity,” and “make use of reliable data and resources,” 42 U.S.C. § 4332(2)(D)–(E). For example, in *WildEarth Guardians v. Bucknall*, 756 F.Supp.3d 1017 (D. Mont. 2024), an agency’s EA was invalid when it excluded two years of grizzly bear mortality data and population trends showing an increase in bear conflicts. *Id.* at 1035. Although it acknowledged the upward trend, “the agency’s decision to cut off the data to right before such a significant jump occurred [wa]s both concerning and entirely unexplained in the EA.” *Id.* So too here.

By ignoring up-to-date tortoise population studies in the precise area where the highway would occur, BLM violated its obligations under NEPA and was arbitrary and capricious.

REMEDY

Based on these legal violations, the Court must vacate the relevant agency actions. The APA commands that a reviewing court “shall . . . set aside” unlawful action. 5 U.S.C. § 706(2); *see also United Steel v. Mine Safety and Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (“ordinary practice is to vacate unlawful agency action”). Although courts may sometimes leave

an invalid agency action in place during remand, “the exceptional remedy of remand without vacatur” applies only “in limited circumstances . . . and only if an agency’s error is curable.” *Cigar Ass’n of Am. v. U.S. Food & Drug Admin.*, 132 F.4th 535, 541 (D.C. Cir. 2025) (citations omitted); *see also Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (defining two-part test turning on seriousness of errors and disruptive consequences of vacatur that may only be “interim” if actions could be ratified on remand).

“Because vacatur is the default remedy . . . defendants bear the burden to prove that vacatur is unnecessary.” *Nat’l Parks Conservation Ass’n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019). Defendants cannot meet such a burden here because the above-described legal errors were serious and go to the heart of Defendants’ decision-making. *See, e.g., Humane Soc’y of U.S. v. Zinke*, 865 F.3d 585, 614–15 (D.C. Cir. 2017) (“fail[ure] to address” an important aspect of the problem is a “major shortcoming” warranting vacatur) (cleaned up); *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) (failure to consider statutory limit on agency authority “require[s] vacatur”); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 985 F.3d 1032, 1050–54 (D.C. Cir. 2021) (upholding pipeline vacatur due to NEPA violation); *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 268 (D.D.C. 2015) (finding error “substantial” where the Secretary never “provide[d] a reasoned justification of her position”); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 751 (9th Cir. 2020) (vacating action due to inadequate NEPA and ESA analysis).

CONCLUSION

For the reasons above, Plaintiffs request the Court grant their Summary Judgment Motion and hold unlawful and vacate the 2026 Decision Record, EA and FONNSI; 2026 Land Exchange EA, FONSI, and approval letter; 2025 Northern Corridor BiOp; and 2024 HCP BiOp and ITP.

Dated: July 23, 2026

Respectfully submitted.

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