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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

<p>CONSERVE SOUTHWEST UTAH & RICHARD A. SPOTTS,</p> <p>Appellants,</p> <p>v.</p> <p>BUREAU OF LAND MANAGEMENT,</p> <p>Respondent.</p>	<p>IBLA No. 2021-0121</p> <p>Re: LONG VALLEY ROAD EXTENSION RIGHT-OF-WAY PROJECT, DOI-BLM-UT- C030-2020-0004-EA</p>
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BUREAU OF LAND MANAGEMENT’S ANSWER TO THE STATEMENT OF REASONS

The Bureau of Land Management (BLM), through the undersigned, hereby submits its answer to the statement of reasons (SOR) filed by Appellants Conserve Southwest Utah and Mr. Richard A. Spotts (collectively, Appellants) in the above-captioned appeal of BLM’s November 10, 2020, decision granting the Long Valley Road Extension Right-of-Way. For the reasons set forth below, BLM respectfully requests that the Board affirm the November 10, 2020, decision.

INTRODUCTION

This is an appeal of BLM's November 10, 2020, decision to approve Washington City, Utah's right-of-way application¹ to extend the Long Valley Road in Washington County, Utah.² While Appellants allege that BLM violated NEPA and FLPMA by failing to consider a reasonable range of alternatives, not taking a hard look at impacts associated with the ROW project, and approving a ROW through an ACEC, their disagreement with BLM's decision reflects dissatisfaction with the agency's policy decisions rather than a violation of law.³ As discussed below, the majority of Appellants' claims are unsupported expressions of disagreement and should be dismissed as such because they have provided little support to show that BLM failed to consider substantive environmental questions of material significance. Appellants' claims also fail because they cannot carry their burden of showing that the basis for BLM's decision is unreasonable and unsupported by the AR. Accordingly, BLM's decision to grant the ROW should be affirmed.

¹ While both the EA and DR refer to Brennan Holdings, LLC, and Washington City as co-applicants, it is counsel for BLM's understanding that Washington City was the sole applicant and is the sole holder of the Long Valley ROW. Doc. 7; AR000294 (ROW application form); Doc. 42; AR000925-926 (copy of BLM Serial Register Page).

² On January 19, 2021, BLM lodged a copy of the Administrative Record (AR) with the Board, including an excel spreadsheet listing the document numbers and providing hyperlinks. On February 4, 2021 and March 23, 2021, BLM supplemented the AR with two additional documents on each date. All AR citations include the Document No. and relevant bates number or range for convenience.

³ While the Appellants' SOR contains a statement of standing, Mr. Spotts does not state that he has visited the Project Area or even the larger Warner Ridge/Fort Pearce ACEC or that he intends to return in the future. SOR at 4-5. It is also unclear whether his previous professional work with the listing of the tortoise satisfies the standing requirements. In the SOR, Appellants state that Mr. Butine has been to the Project Area to take photographs in advance of this appeal. *Id.* at 4. However, neither the SOR nor the declaration contain any statement describing Mr. Butine's intent to return to the Project Area or the ACEC. *See* Declaration of CSU/Butine at ¶¶ 25-26. In the declaration, Mr. Butine only states that he frequently cycles *past* the ACEC. *Id.* Therefore, it is not clear that either Appellant has fully demonstrated that their interests will be "adversely affected" by this decision because neither can show both a prior use of the specific lands at issue *and* an intent to use them again the future. *See* 43 C.F.R. § 4.410(a); *see also* *Western Watersheds Project v. BLM*, 182 IBLA 1, 6-8 (2012).

BACKGROUND

Project Description

The proposed Long Valley Road extension right-of-way (ROW project) is part of a Washington City, Utah master planned roadway that will connect the existing Long Valley Road with a planned interchange further south on the Southern Parkway known as Interchange 11 (3650 South). Doc. 45 at AR000944 (Figure 1. Project area overview map). The ROW project will lie adjacent to the recently completed Southern Parkway and it will provide the principal southern access to the planned Trails at Long Valley master community and will provide traffic circulation and utility access to approximately 2,000 residential units located within the subdivision. *Id.* at AR000937. The ROW project will also provide additional traffic circulation to residents of Washington City. *Id.* The ROW project is located on Bureau of Land Management (BLM)-administered land and private land.⁴ *Id.*

On April 29 2019, Washington City, through Brennan Holdings, LLC, submitted a ROW application to the BLM to extend the existing Long Valley Road. Doc. 7; AR000293-309; Doc. 45; AR000937. The application was for a 110 foot wide and 4,877 foot long road. Doc. 45 at AR000942. The applicants' purposes for the ROW are: "(1) to provide the required secondary access route to the proposed Trails at Long Valley master community; and (2) to alleviate future traffic congestion that may be generated by the proposed community." Doc. 44; AR000933. Under the application, the ROW would be constructed through four phases between 2021 and 2025. Doc. 45; AR000942. The first phase involves grading and utility installation during the spring of 2021.⁵ *Id.*

In response to the Applicant's 2019 ROW application, BLM initiated the environmental review process, including the preparation of an Environmental Assessment (DOI-BLM-UT-C030-2020-0004-EA) (the EA) in compliance with the National Environmental Policy Act (NEPA) and formal

⁴ BLM's decision only approves a ROW over federal lands managed by BLM.

⁵ At the time of this filing, it is BLM's understanding that preparatory work for Phase 1 has begun.

consultation with the United States Fish and Wildlife Service (USFWS) under Section 7 of the Endangered Species Act. *Id.* at AR000934-1049. As part of the NEPA analysis, BLM determined that the project area is approximately 93.3 acres (19.7 acres for the ROW and 73.6 acres for a 300' buffer area surrounding the ROW) (Project Area). *Id.* The majority of that acreage, 81.4 acres, is on BLM lands within managed by BLM's St. George Field Office, while the remaining 11.9 acres is on private lands owned by Brennan Holdings, LLC. *Id.* at AR000937-38. In the fall of 2019, BLM convened an Interdisciplinary Team (ID Team) to screen the proposed ROW project and to determine what resources were likely to be impacted if the ROW application was approved. *See* Doc. 45; AR000941; App. A; AR000973-979. Based on the ID Team's screen, BLM identified six resource issues for further analysis: (1) wildlife (excluding USFWS listed species); (2) migratory birds; (3) vegetation (excluding USFWS listed species); (4) threatened, endangered, or candidate plant species (dwarf bear-poppy and Holmgren milkvetch and the threatened Siler pincushion cactus); (5) threatened, endangered, or candidate animal species (Mojave desert tortoise (tortoise)); and (6) the Warner Ridge/Fort Pearce ACEC. *Id.* at AR000954.

The agency's purpose for this project is to respond to the Long Valley ROW application, which would extend the existing Long Valley road and provide principal access and utilities to the planned Trails at Long Valley development to satisfy Washington City's zoning requirements, which require a second point of access for all developments of 30 units or more. AR000937-938. The agency's need is to fulfill its statutory and regulatory obligations regarding ROWs under FLPMA. *Id.* In drafting the environmental analysis, BLM also determined that only two alternatives warranted further analysis: the proposed action and a no-action alternative. *Id.* at AR000942-953. The agency determined that further analysis of any other alternatives was unnecessary because they would not fulfill BLM's purpose and need for the proposed action. *Id.* at AR000953. In support of this conclusion, BLM identified the topographical features around the Project Area, the location of the existing Southern

Parkway, and the planned location of the future 3650 South Interchange as factors that prevented other alternatives from warranting further consideration. *Id.*

The ROW application contained a variety conservation and mitigation measures, which BLM analyzed as part of the proposed action. *Id.* at AR000945-948. The mitigation measures include: (1) erecting tortoise fencing around the Project Area to prevent harm to the dwarf bear-poppies from OHV use in the Warner Ridge/Fort Pearce ACEC and to prevent tortoise from entering the Project Area (*Id.* at AR000945); (2) the creation of a 10-acre exclusion area within suitable occupied tortoise and dwarf bear-poppy habitat (*Id.* at AR000946); and (3) a \$50,000 contribution to the Washington County Habitat Conservation Plan for future dwarf bear-poppy habitat management and protection (*Id.* at AR000947).

BLM's Section 7 Consultation with the United States Fish and Wildlife Service

From the earliest stages of the ROW project, BLM coordinated closely with the USFWS. Once BLM determined that the ROW application would impact federally listed species, the consultation requirements under the Endangered Species Act (16 U.S.C. § 1531, *et seq.*) were triggered. On December 2, 2019, BLM, Brennan Holdings LLC, and Brennan's contractor, Transcon, met with USFWS to initially discuss the ROW project. Doc. 18; AR0000376; *see also* Doc. 45; AR000991-992 (Consultation History). These conversations and coordination continued over the course of the entire project Doc. 45; AR000991-992 (Consultation History). On August 19, 2020, BLM submitted a draft Biological Assessment (BA) to USFWS. *Id.* at AR000990; *see also* Doc. 49; AR001134. On September 25, 2020, BLM formally requested Section 7 consultation and submitted a final BA for the project. Doc. 28; AR000401. In the BA, BLM concluded that the project may affect, but is not likely to adversely affect, Holmgren milkvetch and the Siler pincushion cactus. Doc. 45; AR000990. The agency also determined that the project would not adversely affect critical habitat for tortoise or Holmgren milkvetch. *Id.* at AR000991. On October 29, 2020, USFWS issued a Biological Opinion (BiOp) for the project, which evaluated the impacts from the ROW project to the tortoise and dwarf

bear-poppy. *Id.*; see also Doc. 40; AR000820. In the BiOp, USFWS stated that “it is our biological opinion that the proposed action is not likely to jeopardize the continued existence of the desert tortoise and dwarf bear poppy.” Doc. 45; AR001011. This opinion was based on, in part, mitigation measures designed to protect the tortoise and dwarf bear-poppy such as fencing around the Project Area and limiting the spread of fugitive dust and non-native weeds onto plants or into dwarf bear-poppy habitat. *Id.* at AR0001011-12. USFWS also recognized that, while the ROW project will permanently destroy a small amount of suitable habitat (19.7 acres), much of this will be mitigated by the establishment of a 10-acre exclusion area. *Id.* at AR001012. As a result, USFWS anticipated the ROW will result in an extremely low take of tortoise (0.001 percent) from the larger Upper Virgin River Recovery Unit population. *Id.* USFWS provided a similar rationale for its determination that the proposed action is not likely to jeopardize the dwarf bear-poppy. USFWS stated that the ROW project will not destroy plants but acknowledged that it will destroy 6.33 acres of occupied habitat that contains a seedbank. *Id.* In addition, the loss of the 6.33 acres represents only “2 percent of occupied habitat in the Warner Ridge population and less than 0.002 percent of the rangewide suitable habitat.” *Id.*

A Summary of the applicable provisions from the 1999 St. George Field Office Resource Management Plan

The southern part of the ROW Project Area includes approximately 51.1 acres of the Warner Ridge/Fort Pearce ACEC (ACEC). Doc. 45; AR000961. An ACEC is an administrative designation for areas that “require special management to prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems.” *Id.* (quoting Doc. 1 at AR000081 (AC-01)). BLM created the ACEC under the 1999 St. George Field Office Resource Management Plan (RMP). Doc. 1; AR000082 (AC-03). The ACEC totals 4,281 acres and was designated because it “contains the endangered dwarf bear claw poppy, the threatened siler pincushion cactus, important riparian values along the Fort Pearce Wash, historic sites, and highly erodible soils, all of which are at risk from off-road travel, road proliferation, urban growth, and human

encroachment.” *Id.* In addition to the designation, BLM established certain management prescriptions to protect and improve the values for this ACEC including: “d) Motorized travel will be limited to designated roads and trails. Fencing, barricading, and signing will be employed as necessary to eliminate unauthorized vehicle access and impacts to protected resources.” Doc. 45; AR000940; *see also* Doc. 1 at AR000082 (AC-03(b)). However, a different prescription established the ACEC as a “right-of-way avoidance area.” *Id.*; *see also* Doc. 1 at AR000082 (AC-03(b)). Under the RMP, BLM may grant new ROWs in avoidance areas “only when feasible alternative routes or designated corridors are not available. Measures to reduce impacts to affected resources will be applied based on site specific analysis.” Doc. 1; AR000026 (LD-19). Further, for any actions that may impact federally listed species or their critical habitats, the RMP calls for BLM to engage in Section 7 consultation with USFWS. Doc. 45; AR000940.

A summary of BLM’s NEPA timeline

As previously mentioned, BLM received the ROW application in April 2019. The BLM then convened an ID Team, which completed its initial screen on November 19, 2019. On September 23, 2020, BLM submitted a revised final BA to USFWS. Doc. 28; AR000401. Then, on September 29, 2020, BLM made a draft EA available for a 30-day public comment period, which ended on October 27, 2020. Doc. 45; AR0000969. In the draft EA, BLM stated that “Section 7 consultation with the USFWS regarding listed plan (*sic*) and animal species is on-going. Appendix C will contain the USFWS Biological Opinion when it is completed.” Doc. 39 at AR000853. During that public comment period, BLM received two comment letters, one from each of the Appellants. *Id.* at AR001036. On November 10, 2020, BLM issued its Final EA, Finding of No Significant Impact, and Decision Record granting the ROW, which included the final BiOp as Appendix C.

On December 2, 2020, Appellants timely filed their notice of appeal. Pursuant to the Board’s January 15, 2021 Order, Appellants filed their SOR on February 22, 2021.

STANDARD OF REVIEW

Under the Federal Land Policy and Management Act (43 U.S.C. § 1701, *et seq.*) (FLPMA) and the implementing regulations (43 C.F.R. pt. 2800), BLM has broad discretion to approve or disapprove Title V ROW applications. *See Andrew Vandenberg*, 189 IBLA 287, 289 (2017). With that said, a decision “must be supported by a rational basis which is explained in the written decision and is substantiated by the administrative record accompanying the decision.” *Id.* (internal citations omitted). An appellant challenging the sufficiency of a BLM decision “has the burden of demonstrating that BLM made a material error of law, committed a material error in its factual analysis, or failed to give due consideration to all relevant factors, or that no rational connection exists between the facts found and the choices made.” *Southern Utah Wilderness Alliance*, 194 IBLA 69, 72-73 (2019). The Board will affirm a “BLM decision made in the exercise of its discretionary authority when that decision has a rational basis stated in the decision and is supported by the facts in the record.” *Hawkwood Energy Agent Corp. Venture Energy, LLC*, 189 IBLA 164, 165 (2017).

ARGUMENT

A. BLM’s consideration of the Proposed Action and No Action Alternatives was reasonable and Appellants’ contrary assertion is merely a disagreement.

Appellants claim that BLM failed to consider a reasonable range of alternatives beyond the Applicants’ proposed ROW and a no-action alternative. SOR at 8-14. Specifically, they argue that the agency’s reasons for not considering any other alternatives are “vague and conclusory.” *Id.* at 8-9. Appellants contend that BLM should have considered alternatives that minimize impacts to “federally listed species,” the ACEC, and “that would provide for shorter and less damaging BLM rights-of-way grants, or at least provide a detailed objective explanation for why the [Utah Department of Transportation] proposed 3650 South alignment and future interchange could not be located further north.” *Id.* at 11-12. In the alternative, they argue that BLM failed to provide sufficiently substantive responses for why other alternatives were not considered or infeasible. *Id.* In support of these

arguments, Appellants: (1) assert that BLM's reasons for not considering other alternatives are inadequate; and (2) try to frame meeting minutes from 2019 and the completion of tortoise surveys by Washington County as evidence that BLM intentionally avoided considering other reasonable alternatives. *Id.* at 9-10. These arguments lack merit for three reasons. First, as explained in the EA, no other alternative fulfilled the ROW project's purpose and need and was feasible. Second, Appellants' reliance on the 2019 meeting minutes is misplaced because they are from a pre-application meeting and are consistent with 43 C.F.R. § 2804.10(a). Third, the completed tortoise surveys only show that BLM was aware of another jurisdiction's surveys.

Under NEPA, BLM must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E); *accord* 40 C.F.R. § 1501.2(c).⁶ When BLM prepares an EA, it must include a "brief discussion[]" of these appropriate alternatives and their environmental impacts. 40 C.F.R. § 1508.9(b); 43 C.F.R. § 46.310(a)(4). "Appropriate alternatives are those that will accomplish the project's intended purpose, are technically and economically feasible, and will avoid or minimize adverse environmental impacts." *Kevin Kane*, 195 IBLA 17, 23 (2019). "A rule of reason applies to both the range of alternatives that must be considered and the extent to which each alternative must be addressed." *S. Utah Wilderness All.*, 182 IBLA 377, 390-91 (2012). "Moreover, NEPA does not require that an agency consider a minimum number of alternatives in an EA, and it generally suffices for an agency to consider a no action and proposed action alternative in an EA, particularly if the proposed action will achieve environmental benefits." *Wildlands Defense*,

⁶The Council on Environmental Quality recently promulgated new NEPA implementing regulations which are applicable to NEPA processes that began after September 14, 2020. 40 C.F.R. § 1506.13 (2020). The new regulations however, grant agencies discretion to apply the 1978 regulations to ongoing NEPA processes begun before September 14, 2020. *Id.* Here, BLM initiated the preparation of the ROW project EA prior to that date and continued to conduct its environmental assessment under the 1978 regulations.

192 IBLA 383, 400 (2018). A party's preference for a different alternative "than that adopted by BLM does not render the action taken by BLM erroneous." *Id.*

When evaluating whether BLM has reasonably declined to consider other alternatives, the Board will look at the substance of the Appellants' alternatives and the agency's explanation in order to determine whether BLM's decision not to consider those alternatives was reasonable. *S. Utah Wilderness All.*, 185 IBLA 150, 166 (2014). A reasoned explanation, however brief, for not considering other alternatives in detail receives considerable deference. *Fortification Creek*, 180 IBLA 32,48 (2010). In such an instance, an Appellant carries "the burden to demonstrate, with objective proof, that the alternative not only would achieve the intended purposes of the proposed action at less cost to the environment, but also [is] technically and economically feasible in the particular circumstances of the case." *Id.*

Appellants fail to carry their burden here because BLM provided an adequate explanation for why other alternatives were not considered and Appellants do not provide any objective proof that any of the other alternatives they put forward are less impactful on the environment or more technically or economically feasible. Instead, Appellants' claim is merely a disagreement with BLM's analysis and decision.

BLM's purpose and need for this project are to respond to Washington City's ROW application to provide the access necessary to support a planned development. Doc. 45; AR000938). As stated in the EA, BLM did not consider additional alternatives "[d]ue to the topographical features of the area and the location of the Southern Parkway, including the planned 3650 South Interchange, no other alternative would reasonably meet the purpose and need of the project. . . ." Doc. 45 at AR000953. In response to Appellants' comments on the Draft EA, BLM further explained that no other alternatives "would result in fewer adverse environmental impacts and still meet the purpose and need of the Proposed Action." Doc. 45 at AR001037. The other design changes Appellants argue BLM should have considered are beyond the scope of the EA and the agency's jurisdiction. SOR at 11-12 (shape of

ROW, location of interchanges). The Utah Department of Transportation (UDOT) maintains jurisdiction over the Southern Parkway and has already located the currently planned interchanges. Doc. 45 at AR001037-38 (Response to Comments 1.01 and 1.03). As BLM explained, a change to the currently planned interchange “would require an application from a qualified proponent who would then plan and pay for the interchange.” *Id.* Those changes would also “need to meet UDOT standards and the Southern Parkway Standards for spacing and obtain a permit from UDOT to construct the interchange.” *Id.*

While Appellants may be technically correct that a change in the location of the proposed 3650 South Interchange would require a shorter ROW across BLM lands, their desires do not reflect the reality on the ground. BLM does not have any authority to unilaterally make those changes. Further, it is unreasonable to expect BLM will consider such an alternative when it is inconsistent with the governing jurisdiction’s controlling management plan. *See generally* Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18027 (Mar. 23, 1981) (“2b. Must the EIS analyze alternatives outside the jurisdiction or capability of the agency or beyond what Congress has authorized?”); *see also* Doc. 45; AR001037-039 (Response to Comments 1.01-1.04). Here, Appellants are advocating for an alternative that is outside of BLM’s jurisdiction and inconsistent with UDOT’s ongoing development of the Southern Parkway and Washington City’s 2014 Transportation Master Plan. Doc. 45; AR001037-039 (Response to Comments 1.01-1.04). Additionally, BLM reasonably concluded that the impacts to resources within the Project Area can be mitigated. Therefore, BLM reasonably concluded no other alternatives warrant further analysis.

Appellants also rely on minutes from an October 31, 2019, “kick-off” meeting and the completion of tortoise surveys in 2019 to suggest that BLM never intended to look beyond the proposed and no-action alternatives. *Id.* at 9-10. However, these documents are much ado about nothing. The meeting minutes show an agenda for a 2019 preparatory meeting between Brennan Holdings, LLC, the Applicants’ contractor, Transcon, and BLM that lines out the various steps that needed to occur

between receiving the ROW application and the issuance of the agency's final decision. Doc. 16 at AR000365-373. Contrary to Appellants' suggestion that this meeting was improper because a ROW application had not been submitted yet, the regulations expressly recommend applicants schedule a meeting before filing an application. 43 C.F.R. § 2804.10(a). As evidenced by the minutes, at the time of the meeting, BLM's ID Team had not completed its screen of potential resource issues and the agency had not even fully staffed the project. *Id.* at AR000369. Further, the draft EA was not released until September 29, 2020, almost a full year after this meeting. Therefore, at best, Appellants' argument is speculative because these minutes do not definitively show that BLM did not further consider any other alternatives for the remainder of the NEPA process or that it was unreasonable not to consider any other alternatives.

Similarly, the allegation that the "fix was in" because tortoise surveys were completed in the Fall of 2019 is also misleading. SOR at 9-10. The tortoise surveys were completed by Washington County as part of its ongoing Habitat Conservation Plan and may have informed the ROW application to minimize impacts to the tortoise. While BLM and other stakeholders may rely on those surveys to inform their decisions, BLM does not coordinate when or where they are completed. The meeting minutes reflect this by noting that "Cameron from Washington County is currently compiling the report." *Id.* at AR000370. Again, Appellants' allegation is speculative and does not show that their suggested alternatives were more feasible or less impactful than those considered by BLM. They are also unable to show that the agency failed to consider a substantial environmental question of material significance to the proposed action. As a result, Appellants have failed to carry their burden and the argument fails.

B. BLM Took the Requisite "Hard Look" at the Impacts Associated with the ROW and Reasonably Concluded That There Will Be No Significant Impacts.

Appellants allege that BLM violated NEPA by failing to take a hard look at the cumulative impacts of this ROW project as well as the impacts associated with grazing and fire on certain listed

species within the Project Area. SOR at 14-18; 19-20; 22-23. Specifically, Appellants contend that the agency did not take a hard look at the cumulative impacts the ROW project will have on endangered species and the ACEC. As a result, they allege that the agency's determination that any cumulative impacts will be minor is arbitrary and capricious. They also contend that BLM should have considered certain additional mitigation measures to reduce the impacts associated with livestock grazing and fire and its failure to do so was also arbitrary and capricious.

Appellants' challenge of BLM's decision to approve the ROW Project is based on alleged insufficiencies of the NEPA analyses contained in the Long Valley ROW EA. However, an EA is a "concise public document," and it does not need more than a limited level of analysis and detail to determine whether there would be significant impacts from the proposed action. *Confederated Tribes of the Goshute Reservation*, 190 IBLA 396, 402 (2017) (citing 40 C.F.R. § 1508.9(a), (b); 43 C.F.R. § 46.310(a), (e)). Thus, the Board has long held that its review of an EA's adequacy is "guided by a rule of reason," and that a decision will be upheld when the "record demonstrates that BLM has taken a 'hard look' at the potential environmental consequences of the proposed action." *Id.* at 402-03.

In order to successfully challenge a BLM decision to approve an action analyzed in an EA, an appellant must do more than simply "pick apart a record with alleged errors and disagreements, without connecting those allegations to an affirmance showing that BLM failed to consider a substantial environmental question of material significance." *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332 (2004). Mere expressions of disagreement are not sufficient to meet this burden. *Hawkwood Energy*, 189 IBLA at 165; *see also Colorado Env'tl. Coalition the Wilderness Society*, 165 IBLA 221, 226 (2005). Rather, "an appellant must make an affirmative showing that BLM failed to consider a substantial environmental questions of material significance." *S. Utah Wilderness All.*, 194 IBLA 79, 84 (2019) (internal citations omitted).

Further, BLM is entitled to rely on the technical expertise and conclusions of its experts in assessing the potential environmental impacts of a proposed action. *See S. Utah Wilderness All.*, 158

IBLA 212, 216 (2003) (“The Secretary is entitled to rely on her technical experts. Absent a showing of error by a preponderance of the evidence, a mere difference of opinion will not overcome the reasoned opinions of the Secretary’s technical staff.”) (citing *Susan J. Doyle*, 138 IBLA 324, 327-28 (1997); *Bill Armstrong*, 131 IBLA 349, 351 (1994); *American Gilsonite*, 111 IBLA 1, 30 (1989)). BLM is also entitled to rely on the opinions of its experts and the findings of other agencies. *Salinas Ramblers Motorcycle Club*, 171 IBLA 396, 401 (2007).

Appellants’ hard look claims are nothing more than a disagreement over BLM’s decision to approve the ROW project. They are unable to carry their burden and show that BLM violated NEPA. As an initial matter many of their cumulative impact arguments are waived because they failed to properly raise them below. Further, BLM did properly consider the cumulative impacts associated with general road development in Washington County and, specifically, the Northern Corridor. BLM also reasonably analyzed the impacts to tortoise and the ACEC from livestock grazing and fire and concluded that further mitigation is not required. Therefore, Appellants’ claim lacks merit and the decision should be affirmed.

1. BLM sufficiently identified and considered the ROW’s cumulative impacts.

Appellants allege that BLM’s cumulative impacts analysis for this project and its determination that the cumulative impacts to wildlife and the ACEC will be minor are flawed for two reasons. SOR at 14-18. First, Appellants argue that the EA does not contain an exhaustive list of all past, present, and reasonably foreseeable projects that may impact tortoise and its habitat. *Id.* at 16-17. They identify a long list of “additional causes or stresses” that the agency purportedly failed to consider, including “prolonged drought from climate change, expansion of cheatgrass and other invasive plants that dangerously alter fire ecology, massive past and recent fires that destroyed thousands of acres of wildlife (including tortoise) habitat, illegal OHV route proliferation that degrades and fragments habitat, and a serious tortoise respiratory disease.” *Id.* at 17. They also point to a ROW project in the northern part of Washington County, commonly referred to as the Northern Corridor, and the agency’s

alleged failure to consider the cumulative impacts both projects will have on tortoise. *Id.* Second, Appellants argue that BLM's determination that the cumulative impacts to federally listed species and the ACEC will be minor rests on unsupported conclusions arising from an intentionally narrow focus that ignores external facts showing the tortoise's decline. *Id.* at 17. In support of this argument, Appellants repeatedly offer unsupported statements such as "this analysis ignores the reality that tortoise populations throughout the county are rapidly declining," that the declines are primarily happening on BLM lands, and that the agency is turning a blind-eye by narrowly tailoring the focus of its projects so that it can conclude any cumulative impacts will be minor *Id.* Appellants also argue that BLM has not adequately surveyed for tortoise beyond the Project Area, ignored the conclusions of a contemporary environmental impact analysis, and therefore the agency is uninformed about how the impacts of this project and others may affect tortoise density and connectivity throughout the larger habitat area. *Id.* at 18.

At bottom, while it is clear that Appellants disagree with BLM's conclusions about the cumulative impacts associated with the ROW, the Appellants have failed to carry their burden to show that BLM did not adequately consider a substantial environmental question of material significance. "The level of detail and depth of impact analysis should normally be limited to the minimum needed to determine whether there would be significant environmental effects." 43 C.F.R. § 46.310(e). To successfully challenge a cumulative impact analysis, the appellant must show a specific deficiency in that analysis; "it is not sufficient for an appellant merely to note the existence of other projects without concretely identifying the adverse impacts those projects caused and how the project under review will add to them." *Western Watersheds Project*, 191 IBLA 351, 366-67 (2017) (citing *COG Operating, LLC*, 190 IBLA 49, 72 (2017)). Consequently, "[appellants must demonstrate that, because of geographic proximity [or] other reasons, there is likely to be an interaction between other projects and the proposed project which may result in an enhanced or modified impact that BLM was required to

consider.'" *Id.* at 367 (quoting *Wyoming Outdoor Council*, 147 IBLA 105, 109 (1998)). Appellants have failed to carry this burden.

Contrary to Appellant's claim, BLM took a hard look at the cumulative impacts associated with this ROW project. As explained further below in subsection (a), the majority of Appellants' "obvious additional causes of cumulative impacts" should be waived because they were not properly raised during the public comment period. BLM also reasonably considered the cumulative impacts associated with other road projects and the Northern Corridor before concluding that those impacts will be minor after the considered mitigation measures are implemented.

a. Appellants waived the arguments related to "additional causes or stresses" and additional surveying because they were not first raised during the public comment period.

Appellants' waived its argument related to the agency's alleged failure to consider other "additional causes or stresses" and to conduct tortoise surveys beyond the Project Area because Appellants did not properly raise these considerations in their public comments. *See* AR001054 (public comments from Mr. Spotts); AR001120 (public comments from CSU); Doc. 45; AR001045 (Response to Comment # 3.05). The Board has long held that a party may not raise arguments in the first instance on appeal. *Confederated Tribes of the Goshute Reservation*, 190 IBLA at 407; *see also* 43 C.F.R. § 4.410(c). The reason being:

[This] maintains a logical framework for decision-making within the Department by allowing the initial decision-maker to confront objections to proposed actions before the Board reviews those objections on appeal. We have said that this rule is particularly appropriate in NEPA challenges because it requires parties challenging an agency's compliance with NEPA to structure their participation so that it alerts the agency to the [parties'] position and contentions in order to allow the agency to give the issue meaningful consideration.

Id. (internal quotations and footnotes omitted). Appellants' comment letters only address concerns related to fire and cheatgrass encroachment on tortoise habitat by roads. *See* AR 001054 (public comments from Mr. Spotts); AR001120 (public comments from CSU); Doc. 45; AR001045 (Response to Comment # 3.05). Appellants cannot argue that BLM failed to consider the impacts to tortoise

arising from “prolonged drought from climate change, illegal OHV route proliferation that degrades and fragments habitat, and a serious tortoise respiratory disease” because they were not raised during the public comment period first. SOR at 17. While Mr. Spotts’ letter also contains a passing reference to “tortoise ecology,” it only states that the “EA does not address how this project’s adverse tortoise impacts may affect the overall health of the tortoise population in this southern portion of the county....” AR001054. By itself, this reference is too vague to support the additional list of factors Appellants now assert BLM failed to consider. Similarly, Appellants’ argument that BLM failed to adequately survey for tortoise within the Project Area and the surrounding lands also lacks merit because no concerns related to surveying were raised in the public comments. *Compare* SOR at 18 with Doc. 47; AR001052-55; Doc. 48; AR001118-23. Appellants had opportunity to raise these concerns in the comment letters but did not at the time and they offer no explanation for that omission. Therefore, they have forfeited any right they may otherwise have had to raise these arguments now. *Confederated Tribes of the Goshute Reservation*, 190 IBLA at 407-08.

b. BLM’s cumulative impacts analysis reasonably considered other road projects.

As an initial matter, Appellants’ argument that BLM failed to consider other reasonably foreseeable future actions lacks merit because they do not provide any specific projects that BLM neglected to identify in the EA. SOR at 16-17.

Contrary to Appellants’ argument, BLM did acknowledge other future road projects, including the Northern Corridor specifically, as reasonably foreseeable future actions in Section 4.3.2 of the EA and acknowledged that they will impact wildlife. BLM stated, “[t]he demand for new roads in this region is expected to increase over time, and usage of roads in the area is expected to increase over time. An increase in new roadways may lead to increased effects upon native plant and animal species due to noise and dust and will lead to increased habitat fragmentation in the area.” Doc. 45; AR000967. In its draft BA, BLM also acknowledged other future road development by UDOT and others would

result in habitat fragmentation and the larger loss of endangered species habitat. Doc. 49 at AR001258-259.

While BLM expressly identified the Northern Corridor project as a reasonably foreseeable future action, it is important to recognize that the Long Valley ROW was approved *before* the Final EIS or Record of Decision were issued for the Northern Corridor project by BLM.⁷ The Northern Corridor Draft EIS included a wider range of alternatives and considered different impacts on tortoise and its habitat. At the time BLM issued the Long Valley ROW decision record, the Northern Corridor project was undergoing its own Section 7 consultation process and the Long Valley Road Extension was also included in the cumulative impacts analysis in the draft EIS.⁸ BLM was also reviewing public comments to the Northern Corridor draft EIS and preparing a final EIS for publication.

Beyond characterizing these issues as insufficiently analyzed, Appellants do not make any showing about how or why BLM's analysis is inadequate. Appellants' claim does not satisfy the standards under *Western Watershed Project* or *In re Stratton Hog Timber Sale*. Rather, BLM's limited cumulative analysis meets with the minimum required by 43 C.F.R. § 46.310(e).

c. BLM reasonably concluded that the cumulative impacts to federally listed species and the ACEC are minor.

Appellants' second argument is that the AR does not support BLM's conclusion that the cumulative impacts to tortoise and the ACEC are minor. SOR at 17-18. While Appellants accuse BLM of making "vague and conclusory statements," those types of statements form the very same foundation for their argument. *Id.* For example, Appellants do not point to anything in or outside of the AR to

⁷ The Final Environmental Impact Statement for the Northern Corridor project was published in the Federal Register on November 13, 2020 and the Record of Decision was subsequently signed on January 13, 2021. See "Timeline" available at <https://eplanning.blm.gov/eplanning-ui/project/1502103/550> (*last visited* Mar. 13, 2021).

⁸ *Northern Corridor – Highway Right-of-Way, Issuance of an Incidental Take Permit Draft Environmental Impact Statement and Draft Resource Management Plan Amendments* at 3-179 (Table 3.28-1) (June 2020) available at https://eplanning.blm.gov/public_projects/1502103/200341977/20019327/250025531/DEIS_Vol2_Ch1-4_NorthernCorridor_WashingtonCtyITP.pdf (*last visited* Mar. 19, 2021).

support statements like “this analysis ignores the reality that tortoise populations throughout the county are rapidly declining” and that “much of these declines have and continued to occur on BLM managed lands.” *Id.* at 17. Appellants’ assertion about what is “scientific reality” is only grounded by the assertions in their brief. Their reliance on the analysis in the Northern Corridor Final EIS is misplaced because it postdates this decision. The analysis in the draft Northern Corridor EIS is also distinguishable because it largely relies on designated critical tortoise habitat. As explained in both the EA and BiOp, the Project Area lies within the Upper Virgin River Recovery Unit for tortoise.⁹ Doc. 45 at AR000959; *see also* AR001004; AR001012. However, while tortoise presence was documented in the Project Area, it only includes *suitable* tortoise habitat rather than *designated critical* habitat. *Id.* Instead, the closest critical habitat is five miles north of the Project and separated by Washington City, the Southern Parkway, and Interstate 15. *Id.*

Based on those facts and other analysis in the EA, BLM reasonably concluded that the cumulative impacts to both federally listed species and the ACEC are minor. Doc. 45; AR000967-968. The USFWS concurred in that conclusion for the federally listed species. *Id.* at AR001011 (“it is our biological opinion that the proposed action is not likely to jeopardize the continued existence of the desert tortoise and dwarf bear-poppy.”). Both agencies also analyzed the committed mitigation and conservation measures to inform their respective decisions. As a result, and in the absence of any further substantive input from the Appellants, the agency is not required to provide any further discussion or analysis. Regarding tortoise, BLM disclosed that the direct impact to tortoise with this project is the loss of 19.7 acres of occupied suitable habitat, which includes 14 known burrows, and that this will result in an unknown level of take. Doc. 45; AR00965. Consistent with USFWS protocol,

⁹ BLM acknowledges that USFWS has documented a significant decline of the tortoise population in most recovery units including the Upper Virgin River Recovery Unit where the Project Area is located. Doc. 45; AR001002. However, despite this downward trend, USFWS still concluded that the ROW project will not jeopardize the continued existence of the tortoise. *Id.* at AR001011. More importantly, Appellants have not addressed any of this information in their claim.

the agency also reviewed surveys of a surrounding buffer area, which found 73.6 acres of additional tortoise habitat and 12 additional burrows that would only be indirectly impacted during construction with noise and dust (short term). *Id.* at AR000937; AR000966. BLM also acknowledged that human development is going to continue around the Project Area and that wildlife habitat will be affected and fragmented. *Id.* at AR000967-68. However, it also concluded that the impacts to the values of the ACEC would be minor because the Project Area will only impact 51.1 acres within the ACEC's boundary. *Id.* at AR000967. While the agency acknowledged that human development and use will expand around the Project Area and that will result in habitat loss and disturbance, it also determined cumulative impacts will continue to be minor because, as the land manager, BLM can continue to review future actions as they arise and implement the necessary changes or mitigation to prevent significant impacts. *Id.* at AR000967-968. For these reasons, BLM's determination that cumulative impacts to tortoise and the ACEC will be minor is reasonable. Appellants' arguments offer nothing concrete to dispute this conclusion and so the arguments must be reduced to disagreements that cannot carry their burden.

2. BLM took a hard look at the impacts associated with fire and reasonably concluded that those impacts were minor and that further mitigation was not needed.

Appellants' claim that BLM did not take an adequate hard look at the risks or impacts to fire also lacks merit. SOR at 22-23. While Appellants refer to the impacts of cheatgrass induced fires and how roads only heighten conditions for such fires to occur, they offer nothing to support these bald assertions and hypotheticals. *See Id.* In response to Appellants' public comments, BLM determined that an increase in the likelihood of fire was unlikely because of the "Applicant-committed mitigation and conservation measures." Doc. 45; AR001047. These measures include submitting a detailed weed control plan to BLM before work begins, weed control during construction (including the potential use of herbicides), the use of a weed-free native seed mix to restore any ground disturbance outside of the actual road, and the cleaning of all vehicles and equipment upon entering and exiting the Project Area.

Id. at AR00950. The BLM further requires that the “Applicant will follow BLM regulations pertaining to control of noxious weeds; use of herbicides will comply with the BLM SGFO requirements.” *Id.* These requirements suggest that BLM is aware of the risks that cheatgrass and other noxious weeds pose for fire and habitat competition around the ROW project and that the agency intends to remain vigilant about the issue. BLM also explained that because of the existing Southern Parkway, the agency did not anticipate an increase in fire potential from the construction of the ROW project. *Id.* at AR001047 (Response to 4.01). Further, USFWS acknowledged in the BiOp that wildfires can invite the encroachment of noxious weeds and induce stress on tortoise by degrading or eliminating habitat. Doc 45; AR001002. However, that agency also acknowledged that there is no critical tortoise habitat within the Project Area. *Id.* at AR001004. USFWS concluded that “the Project is not likely to jeopardize the continued existence of desert tortoise.” *Id.* at AR001011. BLM is entitled to rely on these expert opinions to inform its own conclusions. *Salinas Ramblers Motorcycle Club*, 171 IBLA 396, 401 (2007). Therefore, Appellants’ arguments on this issue fails because they have not shown that BLM did not consider the issue or that the agency’s conclusions are unreasonable.

3. BLM reasonably determined that livestock grazing will not have a major impact on tortoise within the Project Area and that no further mitigation analysis is necessary.

Appellants contend that BLM did not take a hard look at the impacts associated with livestock grazing in the Project Area. SOR at 19-20. In support of this contention, they offer three arguments. *Id.* First, BLM did not adequately consider any benefits associated with retiring or reducing livestock grazing in the allotment that contains the Project Area as mitigation. *Id.* Second, the size of a 10-acre exclusion area is inadequate mitigation for impacts to the tortoise. *Id.* at 20. Third, they suggest that a January 2020 email exchange between BLM and USFWS personnel signals that BLM willfully ignored further analysis about the benefits of removing livestock from areas of the allotment outside the Project Area. *Id.* (referencing Doc. 20; AR000379).

Each of Appellants' arguments lacks merit and does not show that BLM's conclusion that livestock grazing will not have a major impact on tortoise within the Project Area was unreasonable. Based on that conclusion, BLM also reasonably determined that further mitigation analysis is not necessary. In response to Appellants' first argument, FWS acknowledged that livestock grazing does degrade habitat and collapse burrows. Doc. 45; AR001002. However, after analyzing the ROW project and the mitigation measures, USFWS still determined that continued grazing in the Project Area will not significantly impact tortoise and BLM reasonably relied on that determination. Doc. 45; AR001008; AR001011-012.

In response to Appellants' second argument, BLM reasonably determined that a 10-acre exclusion area is one adequate mitigation measure for impacts to tortoise from the ROW Project when combined with the longer list of mitigation measures considered by the agency. *Id.* at AR001045 (Response to Comment 3.04); AR000965-966 (referencing and summarizing additional mitigation measures). BLM determined that there is no critical tortoise habitat within the Project Area and that the mitigation measures "would reduce but not eliminate the significance of the effect to the tortoises and their habitat." *Id.* at AR000965-966. As explained in response to the Appellants' comment on this issue, BLM also formally consulted with USFWS about the 10-acre exclusion area, which was included in the BiOp. *Id.* at AR001045 (Response to Comment 3.04). USFWS acknowledged relatively small impact that the ROW Project will have on suitable tortoise habitat within the larger Upper Virgin Recovery Unit and the Sand Mountain Analytical Unit. *Id.* at AR001012. USFWS also stated in the BiOp that BLM's commitment to fence 10 acres of suitable desert tortoise habitat "will help to conserve desert tortoise and its habitat...." *Id.* at AR001008. BLM is entitled to rely on the opinion of the USFWS. As a result, BLM reasonably concluded that no further changes to livestock grazing levels were required.

In response to their third argument, Appellants' attempt to portray an email exchange between the agencies flagging the issue early in the project analysis is a red herring that requires little discussion.

The January 22, 2020, email exchange between USFWS and BLM shows an exchange of ideas between the agencies. However, it is apparent that the further analysis of livestock grazing reduction and or retirement became unnecessary once both agencies determined that sufficient mitigation was already being considered to reduce impacts to the tortoise. Therefore, Appellants' attempt to cast the email in any other light falls flat because it only shows their preference for a different outcome rather than error by BLM. For these reasons, this claim fails.

C. Appellants' mitigation arguments fail because BLM reasonably determined that there are no significant impacts associated with the ROW project.

Appellants contend that BLM failed to consider certain mitigation measures and whether they will further reduce impacts to federally listed species before issuing the DR. In support of this broader contention, Appellants argue that BLM failed to take a hard look at three things: (1) how culverts under highways may reduce adverse impacts to wildlife, especially the tortoise (SOR at 20-22); (2) the proposed acquisition of 18 acres of dwarf bear-poppy habitat as a mitigation measure (*Id.* at 23-24); and (3) how a proposed 10-acre exclusion will provide adequate mitigation (*Id.* at 24-25).

When analyzing failure to consider claims related to mitigation, the Board has "long held that the fact that an appellant prefers that BLM take another substantive course of action does not show that BLM violated the procedural requirements of NEPA." *Wildland Defense*, 192 IBLA at 400. Again, it is Appellants' burden to show that BLM failed to consider a substantial environmental question of material significance to the proposed action. Here, Appellants fail to carry their burden again because BLM considered a long list of mitigation and conservation measures as part of its analysis in determining that the ROW will not result in significant impacts to resources in and around the Project Area. Therefore, BLM was not required to further consider the mitigation measures Appellants are advocating.

1. BLM reasonably considered culvert design and purpose as part of the mitigation for the ROW.

Appellants first argue that BLM did not adequately address their concerns relating to the extension and design of existing culverts under the Southern Parkway. SOR at 21. They argue that the EA and AR lack any consideration of design. Further, Appellants question whether BLM can reasonably conclude that eight extended culverts are adequate to meet the needs of tortoise since BLM has not undertaken any tortoise surveys in the surrounding area. *Id.*

BLM's decision to extend the existing eight culverts from under the Southern Parkway through and under the Long Valley ROW is reasonable because the ROW is adjacent and parallel to the Southern Parkway. Doc. 45; AR000944 (Figure 1, Project area overview map); AR001004 (Response to Comment 3.03). The idea of extending the culverts is a mitigation measure that both BLM and FWS analyzed and that BLM committed to including as a conservation measure for this project. *See id.* at AR000966; *see also* AR001005 (October 2, 2020). BLM determined that "the extension of the Southern Parkway's existing culverts underneath the proposed ROW, would reduce adverse effects...." *Id.* at AR000966. FWS further determined that the culverts were necessary to allow tortoise to maintain "connectivity across the road." *Id.* at AR001005; AR001007. "The BLM and our office will provide the necessary direction for culvert size and construction specifications." *Id.* at AR000996; *see also* AR001044 (Response to Comment 3.03). To the extent Appellants raise the destruction of suitable habitat in other arguments, it makes little sense for BLM to require the addition of other culverts along the ROW that will not align with the Southern Parkway. Under that scenario, tortoise may actually have to travel further between the culverts to reach the far side of either the ROW or Parkway.

- 2. BLM is not required to further analyze the acquisition of 18 acres of dwarf bear poppy habitat because it adopted other mitigation that addresses the same need and the AR shows that the acquisition is no longer a viable option.**

Second, Appellants argue that BLM did not adequately analyze the acquisition of 18 acres of private land to offset impacts to the listed dwarf bear-poppy in the Project Area. SOR at 23-24.

Appellants reference communications in the AR to suggest that BLM should have further pursued this option and analyzed its benefits along with the impacts associated with not acquiring the land. *Id.*

As an initial matter, Appellants are continuing to assert speculation as facts in an effort to mask their disagreements as legal challenges. As this Board has held in *Hawkwood Energy* and other cases, mere disagreements are not enough to overturn BLM's decision, and it is the Appellants' burden to show that BLM has failed to consider a substantial environmental question of material significance.

While Appellants raise a number of issues in support of their argument, they point to nothing in the record that shows that BLM's decision to require a \$50,000 contribution to the Washington County Habitat Conservation Plan as mitigation for impacts to dwarf bear-poppy habitat is unreasonable. SOR at 23-24. In fact, the BiOp documents the reason why the land acquisition was not pursued any further: the potential seller, the State of Utah's School Institutional Trust Land Administration (SITLA), was no longer interested in selling the property. Doc. 45; AR000992 (July 29, 2020); *see also id.* at AR000991 (July 8, 2020, identifying SITLA as a possible seller). Once there was no obvious suitable land to acquire, BLM turned its focus to other forms of mitigation. As described in the EA:

To offset the loss of any occupied habitat, the applicant or other parties, in coordination with the USFWS, will contribute \$50,000 to the Washington County Habitat Conservation Plan (HCP) to be used in dwarf bear-poppy habitat management and protection. For consultation purposes, the USFWS includes a 300-foot buffer surrounding occupied habitat (Figure 2). Based on this determination, 6.33 acres of occupied habitat are included within the actual ROW and will be a part of the committed mitigation (Figure 4).

Id. at AR000947; *see also* AR000997. This mitigation measure shows that BLM has identified a mechanism to mitigate impacts to the dwarf bear-poppy habitat in the Project Area. FWS also adopted this mitigation measure in the BiOp. *Id.* at AR000998. It is unclear how such a monetary contribution will be used in the future, but nothing expressly precludes it from being put towards land acquisition if another opportunity arises. Therefore, any further analysis of alternative mitigation (and speculative) mitigation is unnecessary and Appellants' argument fails.

3. BLM reasonably adopted a 10-acre exclusion area as a mitigation measure for tortoise and dwarf bear-poppy.

Third, Appellants allege that BLM's adoption of a 10-acre exclusion area as a mitigation measure for the impacts to tortoise and dwarf bear-poppy is unsupported by the AR. SOR at 24-25. They question whether the exclusion area is large enough to "be effective in terms of achieving permanent mitigation." *Id.* at 25.

Appellants previously raised this concern during the public comment period. SOR at 24. At that time, BLM explained that as part of the Section 7 consultation, BLM and USFWS worked together to identify an area of suitable habitat for the tortoise and dwarf bear-poppy that was "at-risk" because of unauthorized recreation. Doc. 45; AR001045 (Response to Comment 3.04). The BiOp further explains that 19.7 acres of suitable tortoise habitat will be permanently destroyed by the ROW and that there are more than 333,000 acres of suitable habitat within the Upper Virgin Recovery Unit. *Id.* at AR001012. Given the small impact of the ROW project within the context of the larger Recovery Unit, BLM reasonably relied on the conclusion by USFWS that a 10-acre exclusion area was sufficient to mitigate the impacts of the ROW. *Id.* at AR001008 ("Additionally, the BLM committed to fence 10-acres of desert tortoise suitable habitat to reduce surface disturbances (e.g. grazing, off-highway vehicle use) as a form of mitigation. This will help to conserve desert tortoise and its habitat within the UVR Recovery Unit.").

The impact to dwarf bear-poppy occupied and suitable habitat from the ROW project is also very small. Doc. 45; AR001012 ("The Project will destroy 6.33 acres of occupied habitat that contains a seedbank and 19.7 acres of suitable habitat, representing 2 percent of occupied habitat in the Warner Ridge population and less than 0.002 percent of the rangewide suitable habitat."). In fact, the 19.7 acres that will be permanently destroyed did not contain any dwarf bear-poppy plants at the time the Project was surveyed. *Id.* at AR000956 ("No individual plants were located within the 19.7-acre proposed ROW; however, approximately 6.33 acres of 300-foot occupied habitat buffer is located within the

proposed ROW and will need to be included in applicant-committed mitigation.”); *see also* AR000958 (Figure 4 contrasting the location of known plants in pink with the ROW of in blue cross-hatching). As a result, analysis of a larger exclusion area is not required. BLM’s reliance on FWS’s determination that the 10-acre exclusion area is appropriately sized is reasonable and, in the absence of any contrary information, Appellants’ claim fails.

D. BLM’s decision to grant a ROW through the Warner Ridge/Fort Pearce ACEC is consistent with the applicable RMP and was reasonable under NEPA.

Appellants’ final contention is that BLM’s decision to grant a ROW through the Warner Ridge/Fort Pearce ACEC violates FLPMA and NEPA. SOR at 25-29. Their FLPMA claim rests on the allegation that the ROW is at odds with the 1999 RMP because it will irreparably damage the resources for which the ACEC was established to protect. *Id.* at 28. As a result, BLM cannot approve such an action without first changing the ACEC’s boundaries through an RMP amendment. *Id.* at 29. They further allege that BLM’s decision violates NEPA because the agency did not consider any alternatives that would avoid such impacts to the ACEC. *Id.* at 25-26.

Appellants’ NEPA claim fails because BLM did consider a no-action alternative, which would have the least impact on the ACEC, but the agency rejected it because it did not meet the ROW Project’s purpose and need. Doc. 44 at AR000932. As shown above, BLM reasonably concluded that no other alternatives warranted further consideration or analysis. *Supra* at 8-13.

Appellants’ FLPMA argument is overstated and fails because there are no prohibitions against granting a ROW through the ACEC and the acknowledged impacts to the ACEC are de minimis. As Appellants acknowledge, BLM established the ACEC in the 1999 St. George RMP and also designated it as a ROW avoidance area. SOR at 27-28. The ACEC was established to protect, among other resources, dwarf bear-poppy, which is at risk from “off-road vehicle travel, road proliferation, urban growth, and human encroachment.” Doc. 45; AR000940 (quoting 1999 RMP AC-03). Contrary to Appellants’ argument and underlying public comments, the ACEC was not established to protect

tortoise habitat. *Compare* SOR at 27-28 with Doc. 45; AR000940 (quoting 1999 RMP AC-03). Instead, the RMP has always contemplated new ROWs within the ACEC as long as the agency shows that there are no other feasible alternatives and that mitigation measures will be applied after a site-specific analysis. Doc. 1 at AR000026 (LD-19).

Here, BLM has determined that there are no other reasonable alternatives because of topography and the Project's purpose and need to connect to the Southern Parkway. Doc. 44 at AR000932. As part of the site-specific analysis, BLM analyzed the impacts to both the ACEC and the dwarf bear-poppy. Doc. 45; AR000964-966. BLM discloses that the Project Area includes 51.1 acres of the ACEC, that ACEC values will be lost and that such a loss will be moderate. *Id.* at AR000966. But those impacts are occurring on approximately one-percent of the lands within the ACEC. *Id.* Further, no direct impacts will harm dwarf bear-poppy habitat and it is unlikely that any individual plants will be lost because of the seasonal restriction on when construction may occur. BLM also considered and adopted numerous mitigation measures, which will reduce impacts to the ACEC's values by limiting the travel of dust and motor vehicles from intruding further into the ACEC. *Id.* Appellants' may disagree with BLM's interpretation of the RMP and the purposes of the ACEC, but they have not shown that BLM's decision to grant the ROW violates either FLPMA or NEPA and so this claim fails.

CONCLUSION

For the above stated reasons, BLM respectfully requests that the Board affirm its November 10, 2020, decision granting the Long Valley ROW.

Respectfully submitted this 24th day of March, 2021.

Cameron B. Johnson
Counsel for BLM

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2021, I sent the original copy of this **BUREAU OF LAND MANAGEMENT'S ANSWER TO THE STATEMENT OF REASONS** to the Interior Board of Land Appeals, and copies to Appellants Conserve Southwest Utah and Richard A. Spotts and Respondent BLM as follows:

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