

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Conserve Southwest Utah, *et al.*,)
Plaintiffs,)
v.)
U.S. Department of the Interior,)
Bureau of Land Management, and)
U.S. Fish and Wildlife Service,)
Defendants.)

Case No. 21-CV-1506-ABJ

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This case challenges the decision of the Defendants U.S. Department of the Interior, Bureau of Land Management, and U.S. Fish and Wildlife Service granting a right-of-way for a new four-lane highway—the so-called Northern Corridor Highway—through the Red Cliffs National Conservation Area and Mojave desert tortoise critical habitat; together with related decisions to modify and amend two governing land use plans, and allow the “take” of the threatened Mojave desert tortoise and destruction and adverse modification of its critical habitat.

2. In 2009, Congress created the 45,000-acre Red Cliffs National Conservation Area (Red Cliffs NCA) to protect its world-class ecological, scenic, wildlife, recreational, cultural, historical, natural, educational, and scientific resources. 42 U.S.C. §460www (“Omnibus Public Land Management Act” or “Omnibus Act”). Congress required that Bureau of Land Management (BLM) “shall” limit uses in the Red Cliffs NCA only to those uses that would “conserve, protect, and enhance” these resources. *Id.* § 460www(e).

3. On January 15, 2021, then Secretary of the Interior David Bernhardt approved the issuance of a right-of-way to allow the Utah Department of Transportation to construct, operate, and maintain the Northern Corridor Highway across 2.37 miles of federal public lands within the

Red Cliffs NCA, including public lands containing the densest concentration of Mojave desert tortoise—a species protected under the Endangered Species Act (ESA)—in the entire region.

Secretary Bernhardt also approved two land use plan amendments to allow the Northern Corridor Highway on federal public lands.

4. At about this same time, the U.S. Fish and Wildlife Service (FWS) issued two biological opinions and incidental take statements, and an incidental take permit authorizing the “take” of Mojave desert tortoise and adverse modification and destruction of its critical habitat by the right-of-way, the land use plan amendments, and a habitat conservation plan recently adopted by Washington County.

5. Secretary Bernhardt and FWS’s approvals run headlong into the management mandates of Omnibus Act, together with our Nation’s bedrock environmental and cultural resource laws, including the Land and Water Conservation Act of 1965, National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), and ESA. Indeed, Defendants acknowledge that the Northern Corridor Highway and related decisions will adversely impact the conservation, cultural, and recreational resources within the Red Cliffs NCA, and will cause habitat degradation and destruction leading to the “permanent loss” of 62,960 acres of tortoise habitat.

6. In addition, the Northern Corridor Highway right-of-way is sited immediately over, through, and adjacent to numerous land parcels that BLM acquired with almost \$20 million from the Land and Water Conservation Fund for conservation, endangered species habitat protection, and recreation purposes. Yet, Defendants never examined the impacts of the Northern Corridor Highway on many of these parcels; and Utah Department of Transportation’s planned highway violates the express conservation purposes informing these acquisitions. As a

court recently held, when lands are acquired using monies from the Land and Water Conservation Fund, they must be managed according to the purposes for which they were acquired, and an agency cannot permit a use inconsistent with the acquisition purposes. *Gifford Pinchot Task Force v. Perez*, 2014 WL 3019165, *10 (D. Or. July 3, 2014).

7. Defendants similarly ignored the direct, indirect, and cumulative impacts of the Northern Corridor Highway on local population growth, noise, and other factors; and they never considered the overlapping and cumulative impacts on desert tortoise populations and habitat together with recent fires and other anticipated development in the Red Cliffs NCA.

8. Secretary Bernhardt approved these actions over the objections of the Hopi Tribe and local, regional, and national conservation groups, which repeatedly raised concerns regarding the inadequacy of BLM's consultation over the adverse impacts of the Northern Corridor Highway on cultural and historic properties, and inadequate environmental analysis. Indeed, in his haste to approve the Northern Corridor Highway, Secretary Bernhardt violated the NHPA by approving the Northern Corridor right-of-way without first minimizing and mitigating the acknowledged adverse impacts on cultural and historic resources. In fact, the federal Advisory Council on Historic Preservation—the federal agency charged with implementing the NHPA—concluded BLM's NHPA compliance was “flaw[ed].”

9. Defendants furthermore failed to adequately ensure that BLM and Washington County minimized and mitigated the impacts to Mojave desert tortoise and its critical habitat caused by the Northern Corridor Highway, land use plan amendments, and Washington Country's habitat conservation plan, as required by the ESA. Specifically, Defendants arbitrarily ignored important aspects of the impacts and threats to the tortoise, and failed to analyze the full spectrum of changed circumstances related to the land use plan amendments. Moreover, FWS

conducted a legally insufficient jeopardy and adverse modification analysis, and failed to independently determine reasonable and prudent measures and terms and conditions necessary and appropriate to minimize the take of tortoises and set a numerical limit on the amount of permissible incidental take of Mojave desert tortoise.

10. Secretary Bernhardt's hasty approval of the Northern Corridor right-of-way and associated actions threatens irreparable environmental and other harms by Defendants' unlawful actions, and Plaintiffs seek such emergency, preliminary, or permanent injunctive relief as necessary to forestall such irreparable harms and protect the public interest pending adjudication of their claims.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question). This Court also can provide relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and the Administrative Procedure Act, 5 U.S.C. §§ 553, 702, and 706 (APA).

12. The challenged agency actions are final and subject to judicial review pursuant to 5 U.S.C. §§ 702, 704, and 706.

13. Plaintiffs have exhausted all required administrative remedies prior to filing this lawsuit.

14. Venue in the District of Columbia is appropriate under 28 U.S.C. § 1391(e)(1) because Defendants U.S. Department of Interior and FWS are agencies with their primary offices located in Washington, D.C.; two Plaintiffs are headquartered in this District, and three other Plaintiffs have offices here; and a substantial part of the events and omissions at issue occurred

in this District, including Secretary Bernhardt's approval of the right-of-way and issuance of the amended land use plans.

PARTIES

15. Plaintiff CONSERVE SOUTHWEST UTAH (CSU) is non-profit organization based in St. George, Utah, working to protect the natural resources and quality of life in Washington County, Utah through direct advocacy of conservation and of Smart Growth policies that enable conservation, for the benefit of present and future generations. CSU promotes a vision of vibrant, compact communities, anchored in high-tech, tourism, and outdoor recreation industries, which prioritize conservation and stewardship of land, air, and water resources for the long-term sustainability of both these natural resources and communities. CSU has about 2,500 members and supporters, many of whom live near and recreate in Red Cliffs NCA on a regular basis. Since its inception in 2006, CSU has been a leader in engagement on public lands conservation in southwest Utah, especially in the Red Cliffs NCA. In addition to advocacy, CSU staff has spent thousands of hours and organized thousands of volunteer hours to benefit Red Cliffs NCA on the ground, including invasive species removal, litter pick-up, trail maintenance, habitat restoration, and archaeological site stewardship.

16. Plaintiff CONSERVATION LANDS FOUNDATION, Inc. (CLF) is a non-profit organization headquartered in Durango, Colorado. CLF's organizational purpose is to promote environmental conservancy through assisting the National Landscape Conservation System (also known as the National Conservation Lands) and preserving open space and wilderness. Upon information and belief, CLF is the only non-profit in the country specifically dedicated to establishing and safeguarding National Conservation Lands under the care of the BLM. To fulfill its purpose, CLF works to protect, restore, and expand the National Conservation Lands—

including the Red Cliffs NCA—through education, advocacy, and partnership. CLF maintains regional offices in the District of Columbia and five states.

17. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (Center) is a non-profit corporation headquartered in Tucson, Arizona, with staff and members living and working in Utah. The Center also has an office in Washington, D.C. The Center has approximately 1.7 million members and supporters throughout the United States and the world. The Center's mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health through science, policy, and environmental law. Based on the understanding that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked, the Center is working to secure a future for animals and plants hovering on the brink of extinction, for the ecosystems they need to survive, and for a healthy, livable future for us all. The Center has worked to protect the threatened desert tortoise for well over 25 years through constructive comments on project proposals and land use plans, recovery efforts, and when necessary, litigation.

18. Plaintiff DEFENDERS OF WILDLIFE (Defenders) is a national non-profit conservation organization with more than 1.38 million members and supporters. Defenders is headquartered in Washington, D.C., with offices throughout the country. Defenders focuses in particular on conserving and recovering wildlife species that are listed under the ESA or otherwise recognized as being of conservation concern. Defenders has a consistent track record of working on Mojave desert tortoise conservation issues for well over three decades. Defenders advocates for the Mojave desert tortoise in multiple ways, including through scientific research, engagement in land management planning processes, engagement with solar energy projects

proposed in Mojave desert tortoise habitat, and petitions to government agencies for heightened conservation protections.

19. Plaintiff SOUTHERN UTAH WILDERNESS ALLIANCE (SUWA) is a non-profit organization based in Salt Lake City, Utah. SUWA also has offices in Washington, D.C.; Moab, Utah; and Chicago, Illinois. It has more than 15,000 members from all 50 states and several foreign countries. SUWA's mission is the preservation of the outstanding wilderness and other sensitive public lands at the heart of the Colorado Plateau. SUWA advocates for proper management of these lands, and the associated natural and cultural resources, in their natural state for the benefit of all Americans. SUWA promotes local and national recognition of the region's unique character through research and public education; supports both administrative and legislative initiatives to permanently protect Utah's wild places within the National Park and National Wilderness Preservation Systems or by other protective designations where appropriate; and builds support for such initiatives on both the local and national level.

20. Plaintiff THE WILDERNESS SOCIETY (TWS) is a non-profit corporation incorporated and headquartered in the District of Columbia with approximately 136,000 members. TWS' mission is to unite people to protect America's wild places. Its goal is to ensure that future generations will enjoy the clean air and water, wildlife, natural beauty, opportunities for recreation, and spiritual renewal that pristine forests, rivers, deserts, and mountains provide. For more than three decades, TWS has worked to protect wilderness character lands in Utah. Since 2009, TWS has been actively engaged in the resource management planning process for the Red Cliffs NCA, including meeting with BLM more than 30 times.

21. Plaintiff WILDEARTH GUARDIANS (Guardians) is a non-profit organization headquartered in Santa Fe, New Mexico that is dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the West. Guardians has more than 7,000 members. Guardians advocates for public land management that protects wildlife and their habitat, including the Red Cliffs NCA to protect the Mojave desert tortoise.

22. Plaintiffs each bring this action on their own behalf, and on behalf of their members, staff, and supporters who live and work near the Red Cliffs NCA. Plaintiffs' members, staff, and supporters enjoy viewing and studying wildlife, and recreating in natural environments that they know are inhabited and sustained by diverse wildlife, including the Mojave desert tortoise. Such members, staff, and supporters derive recreational, scientific, aesthetic, inspirational, educational, and other benefits from such use. These uses include hiking, camping, trail running, mountain biking, appreciation of archaeological resources and natural quiet, journaling, birdwatching, ecosystem research, and photography. They regularly enjoy Red Cliffs NCA for these uses and plan to continue doing so.

23. These uses are incompatible with construction and use of the Northern Corridor Highway through the heart of Mojave desert tortoise habitat in the Red Cliffs NCA as approved by Defendants. The Northern Corridor Highway harms Plaintiffs and their members, staff, and supporters, because the highway will destroy wildlife habitat and vegetation and diminish their use and enjoyment of the area, and because they are concerned with protecting the wildlife, plants, scenery, and other natural values of the Red Cliffs NCA, as well as its archeological and cultural resources. Plaintiffs' members, staff, and supporters also enjoy using federal public lands that are wild and not burdened by development such as roads, invasive species, unnatural

structures, and other human developments that mar the landscape, create noise and pollution, fragment and degrade wildlife habitat, and generally detract from a quality natural experience.

24. Plaintiffs and their members, staff, and supporters, as well as their children, grandchildren, and future descendants, will be significantly and irreparably injured by the construction and operation of the Northern Corridor Highway. On behalf of their members, staff, and supporters, Plaintiffs seek to protect the wildlife, scenery, and other natural values of the Red Cliffs NCA from the direct, indirect, and cumulative impacts of the Northern Corridor Highway so that they can continue using and enjoying the area.

25. All Plaintiffs suffer an injury-in-fact because they have all devoted time, energy, and money to protecting public lands and wildlife, and advocating for only responsible management of the Red Cliffs NCA. Plaintiffs have diverted resources from other efforts to pursue their missions and have instead used those resources to submit public comment to the BLM, file administrative objections, and engage with local, state, and federal officials about their concerns with the Northern Corridor Highway.

26. Defendants' violations of the Omnibus Act, Land and Water Conservation Fund Act, NEPA, NHPA, ESA, APA, and other laws in adopting the challenged decisions have injured and will continue to injure Plaintiffs' recreational, aesthetic, scientific, educational, spiritual, conservation, commercial, informational and other interests, and the interests of their staff, members, and supporters. These are actual, concrete injuries caused by Defendants' legal violations, for which judicial review and the relief requested is required to redress. Plaintiffs have no adequate remedy at law.

27. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR is a federal agency responsible for managing about 500 million acres of federal public lands across the

United States. The Department of the Interior, through its sub-agency BLM, is charged with managing the public lands and resources in Red Cliffs NCA, and decides whether to approve activities necessary for road construction on land it administers, including rights-of-way and amendments to resource management plans that allow rights-of-way. Secretary Bernhardt acted on behalf of the Department of Interior in approving the Northern Corridor right-of-way and land use plan amendments challenged here.

28. Defendant BUREAU OF LAND MANAGEMENT is a federal agency within the Department of the Interior. BLM is responsible for managing the Red Cliffs NCA, conducting NEPA and NHPA assessments and procedures, and deciding whether to approve the Northern Corridor Highway right-of-way and related activities such as road construction and Resource Management Plan amendments that allow rights-of-way.

29. Defendant U.S. FISH AND WILDLIFE SERVICE is a federal agency within the Department of the Interior, and is responsible for administering the provisions of the ESA with regard to threatened and endangered terrestrial and freshwater aquatic species, including the threatened and endangered species found in and around the Red Cliffs National Conservation Area and surrounding areas.

LEGAL FRAMEWORK

A. Omnibus Public Land Management Act of 2009

30. In March 2009, Congress passed and President Obama signed the Omnibus Public Land Management Act. Pub. L. No. 111-11, 123 STAT. 991 (2009). Among other provisions, the Omnibus Act created the Red Cliffs NCA. 42 U.S.C. § 460www.

31. The Red Cliffs NCA includes a total of approximately 44,725 acres of public lands in Washington County, Utah.

32. Congress designated the Red Cliffs NCA to “conserve, protect, and enhance for the benefit and enjoyment of present and future generations the ecological, scenic, wildlife, recreational, cultural, historical, natural, educational, and scientific resources of the National Conservation Area.” 42 U.S.C. § 460www(a)(1)(a). Congress also designated the Red Cliffs NCA to protect “each” endangered or threatened wildlife species located within it, including the Mojave desert tortoise. *Id.* § 460www(a)(2).

33. Congress directed that the Secretary of the Interior “shall” manage the Red Cliffs NCA “in a manner that conserves, protects, and enhances the resources of the National Conservation Area,” and Congress directed that the Secretary “shall only allow uses of the National Conservation Area that the Secretary determines would further” the statute’s underlying conservation and cultural purposes, described above. *Id.* § 460www(e).

B. Land and Water Conservation Fund Act of 1964

34. The Land and Water Conservation Fund Act became law on January 1, 1965. 54 U.S.C. §§ 200301–310; Pub. L. No. 88-578. The purposes of the act are:

to assist in preserving, developing, and assuring accessibility to all citizens . . . 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 by (1) providing funds for and authorizing Federal assistance to the States in planning, acquisition, and development of needed land and water areas and facilities and (2) providing funds for the Federal acquisition and development of certain lands and other areas.

Pub. L. No. 88-578. In enacting this statute, Congress sought to facilitate the preservation, development, and accessibility of outdoor recreation resources by providing funds “for the acquisition of land, water, or an interest in land or water within inholdings within . . . areas [that] are primarily of value for outdoor recreation purposes.” 54 U.S.C. § 200306(a)(2)(B)(i)(II).

35. The Land and Water Conservation Fund consists of state-side and federal-side acquisition programs. The state-side program provides matching grants to the States and local governments for the acquisition and development of public parks, outdoor recreation areas, and facilities. *Id.* § 200305. Acquisitions funded through the state-side program must remain in recreation use in perpetuity, unless the Secretary of the Interior approves the conversion of the land to another use, and acceptable replacement lands are substituted. *Id.* § 200305(f)(3).

36. The federal-side acquisition program represents the principal source of funds for federal acquisition of land. *Id.* § 200306. The statute provides that “unless otherwise allotted in the appropriation Act making them available,” appropriations from the fund for federal purposes are to be allotted by the President for certain activities. *Id.* § 200306(a)(1). These activities include land acquisition in recreation areas administered by the Secretary of the Interior for recreational purposes; land acquisition in national park, national forest, and national wildlife refuge system units; and land acquisitions that foster access to federal land for recreational purposes. *See id.* § 200306.

37. Lands and interests in lands acquired through the federal-side acquisition program must remain in Federal ownership, and—unlike the state-side program—there is no allowance for “converting” or using acquired lands for purposes other than those for which they were acquired. *Compare id.* § 200305(f)(3) (explicitly permitting conversion of state-side acquisitions), *with id.* § 200306 (federal-side program) (including no reference to permitting conversion to other uses in the federal-side program). *See also id.* § 200303(c)(3) (requiring that funds expended “shall be consistent with the requirements for recreational public access for hunting, fishing, recreational shooting, or other outdoor recreational purposes”).

38. The purposes guiding the acquisition of lands through the federal-side program “control[] not just the initial acquisition of the lands, but the manner of their development post acquisition.” *Perez*, 2014 WL 3019165 at *10.

C. National Environmental Policy Act

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

40. An EIS must take a hard look at the environmental impacts of a proposed action before reaching a decision and “provide full and fair discussion of significant environmental impacts.” 40 C.F.R. § 1502.1; 42 U.S.C. § 4332(C). An EIS must also “[r]igorously explore and objectively evaluate all reasonable alternatives” and explain why other alternatives were eliminated from detailed study. 40 C.F.R. § 1502.14(a); 42 U.S.C. § 4332(C)(iii), (E).

41. NEPA requires that an EIS analyze the “direct effects, which are caused by the action and occur at the same time and place,” as well as “indirect effects, which are . . . later in

¹ On July 16, 2020, the Council on Environmental Quality issued a Final Rule amending its NEPA regulations, found at 40 C.F.R. Parts 1500-1508. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020) (“CEQ Final Rule”). The CEQ Final Rule became effective September 15, 2020, and applies to any NEPA process begun after September 14, 2020. An agency may choose to apply the regulations to ongoing activities and environmental documents begun before September 14, 2020. Here, BLM applied the Council on Environmental Quality’s NEPA regulations in place at the time the NEPA process was initiated through publication of the Notice of Intent on December 5, 2019.

time or farther removed in distance, but are still reasonably foreseeable” and cumulative impacts, which are those resulting “from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. §§ 1508.7–1508.8.

42. To fulfill NEPA’s public participation goals, federal agencies must assess and consider comments both individually and collectively and properly respond to comments in a final EIS. *Id.* §§ 1502.9(c), 1503.4(a). If an agency “makes substantial changes in the proposed action that are relevant to environmental concerns” or “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts[,]” an agency must issue a supplemental draft and final EIS. *Id.* § 1502.9(d).

43. At the time of its decision, an agency must release a “record of decision” that identifies and discusses all factors that the agency balanced when making its decision and state how those considerations entered into its decision. *Id.* § 1505.2.

D. National Historic Preservation Act

44. NHPA, 54 U.S.C. §§ 300101–320303, formally recognizes historic preservation as an important policy of the United States. Section 106 of the NHPA seeks to protect America’s heritage in part by requiring federal agencies to take into account the effects of their “undertakings” on historic properties. *See* 54 U.S.C. § 306108; 36 C.F.R. § 800.1(a).

45. The Section 106 process entails four basic steps. First, the responsible agency must “determine whether the proposed Federal action is an undertaking . . . and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.” *Id.* § 800.3(a). An “undertaking” is any “project, activity, or program . . . requiring a Federal permit, license or approval.” *Id.* § 800.16(y). A “historic property” is “any prehistoric or historic district, site, building, structure, or object included on, or determined eligible for inclusion on, the National

Register [of Historic Places]” (“National Register”). *Id.* § 800.16(l)(1); 54 U.S.C. § 300308.

46. Second, if the agency undertaking has the potential to affect historic properties, the agency must define the Area of Potential Effects for the action. 36 C.F.R. § 800.4. The NHPA regulations define the Area of Potential Effects as:

the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties . . . The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

Id. § 800.16(d).

47. Third, the agency must make a “reasonable and good faith effort” to identify historic and cultural properties within the Area of Potential Effects. *Id.* § 800.4(b)(1). This effort “may include background research, consultation, oral history interviews, sample field investigation, and field survey.” *Id.* § 800.4(b)(1).

48. Fourth, if the agency finds that eligible properties are present in the Area of Potential Effects, it must assess whether the proposed undertaking may cause adverse effects on the identified historic properties, in coordination with consulting parties. 36 C.F.R. §§ 800.4(d), 800.5. The definition of “adverse effect” is broad: “An adverse effect is found when an undertaking *may* alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.” *Id.* § 800.5(a)(1) (emphasis added).

49. An important part of this so-called “Section 106” review process is consultation with the appropriate State Historic Preservation Officer (SHPO), Native American tribes, and other interested parties, such as Plaintiffs. The Section 106 process concludes with an agency determination of “adverse effect” or “no adverse effect.” *See id.* § 800.5(d).

50. If the agency reaches an “adverse effect” finding, it must notify all consulting parties and invite their views to assess adverse effects. *Id.* If adverse effects cannot be resolved, the process is elevated again to the Advisory Council on Historic Preservation and the head of the agency undertaking the action. *Id.* § 800.7. Until this process is complete, the undertaking in question cannot go forward.

51. An agency may use the NEPA process to comply with Section 106 in lieu of separate procedures set forth specifically for Section 106 consultation if the agency has notified in advance the State Historic Preservation Officer and the Advisory Council, and meets consultation and analysis requirements. *See id.* § 800.8(c).

52. Importantly, if during the preparation of its NEPA analysis the agency concludes that the effects of the undertaking on historic properties are adverse, the agency shall develop and adopt measures to avoid, minimize, or mitigate such effects. *Id.* § 800.8(c)(4).

E. Endangered Species Act

53. The Endangered Species Act, 16 U.S.C. §§ 1531–1544, seeks to conserve the ecosystems upon which endangered and threatened species depend. 16 U.S.C. § 1531(b).

54. Section 7 of the ESA requires federal agencies to ensure that actions they authorize, fund, or carry out neither jeopardize the existence of any listed species nor destroy or adversely modify its designated critical habitat. *Id.* § 1536(a)(2). Jeopardy results where an action reasonably would be expected, directly or indirectly, to 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 the species. 50 C.F.R. § 402.02. Destruction or adverse modification of critical habitat occurs where there is a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. *Id.* The ESA

also prohibits “take” of a species—take is defined to include harassing, harming, wounding, killing, trapping, capturing or collecting a listed species, and harm includes significant habitat modification or degradation. 16 U.S.C. §§ 1538(a)(1), 1532(19); 50 C.F.R. § 17.3.

55. To fulfill the substantive mandates of section 7 of the ESA, federal agencies must consult with an expert agency—FWS or the National Marine Fisheries Service (NMFS), depending on the species at issue. 16 U.S.C. § 1536(a)(2). The consultation results in the preparation of a biological opinion, which presents FWS’s analysis of the best available scientific data on the status of the species and how it would be affected by the proposed action. 16 U.S.C. § 1536(b)(3)(A). Additionally, a biological opinion must include a description of the proposed action, a review of the status of the species and its critical habitat, a discussion of the environmental baseline, and an analysis of the direct and indirect effects of the proposed action and the cumulative effects of reasonably certain future state, tribal, local, and private actions.

56. If FWS finds no jeopardy or adverse modification but determines that the action will result in an incidental take of a protected species, FWS can authorize the take through an incidental take statement or permit. 16 U.S.C. § 1539(A)(1)(b). To qualify for the incidental take permit, an applicant must submit to FWS a habitat conservation plan specifying: (1) the impact which will likely result from the taking; (2) what steps the applicant will take to minimize and mitigate such impacts to the extent practicable and the funding that will be available to implement those steps; (3) what alternatives to the taking the applicant considered and the reasons why the applicant is not employing those alternatives; and (4) other measures that FWS may deem necessary or appropriate for the plan. *Id.* § 1539(a)(2)(A).

57. After allowing for public review and comment, FWS must determine whether: (1) the taking will be incidental; (2) the applicant will, to the maximum extent practicable, minimize

and mitigate the impacts of such taking; (3) the applicant will ensure that adequate funding for the plan will be provided; (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (5) the measures required by FWS enumerated in the conservation plan will be met. *Id.* § 1539(a)(2)(B). If the applicant satisfies these requirements, FWS shall issue the permit. *Id.*

58. This Court has interpreted maximum extent practicable to mean “reasonably capable of being accomplished.” *Union Neighbors United v. Jewell*, 831 F.3d 564, 583 (D.C. Cir. 2016) (quoting *Maximum Extent Practicable*, *Black’s Law Dictionary* (10th ed. 2014)). As such, FWS must ensure that the applicant either will take the steps necessary to fully offset the take or that the applicant demonstrated that alternative conservation measures that would fully offset the take are impracticable and that the proposed measures are practicable. *Id.*; *Gerber v. Norton*, 294 F.3d 173, 184–86 (D.C. Cir. 2002).

59. If FWS determines that the taking of the species will be incidental to the agency action, FWS shall provide the applicant with a written statement: (1) specifying the amount or extent of the incidental taking on the species; (2) identifying reasonable and prudent measures that FWS deems necessary or appropriate to minimize the impact; and (3) adopting terms and conditions that the federal agency or applicant, if any, or both, must comply with to implement the reasonable and prudent measures enumerated by FWS. *Id.* § 1536(b)(4); 50 C.F.R. § 402.14(i)(1).

60. If FWS uses a habitat surrogate to express the amount or extent of anticipated take, it must also describe the causal link between the surrogate and take of the listed species, explain why it is not practical to express the amount or extent of anticipated take or to monitor

take-related impacts in terms of individuals of the listed species, and set a clear standard for determining when the level of anticipated take has been exceeded.

61. Additionally, FWS must include a term and condition to implement each reasonable and prudent measure, as well as certain terms and conditions to allow FWS to gauge compliance with the other terms and conditions. 50 C.F.R. § 17.32; *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 538 F. Supp. 2d 242 (D.D.C. 2008).

62. FWS must independently determine those necessary or appropriate measures to minimize incidental take, and FWS cannot defer to the applicant's proposed measures without independent analysis and justification. *Gerber*, 294 F.3d 173. *Public Emps. for Envtl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 110 (D.D.C. 2014).

63. Even if, after the formal consultation process, FWS issues an incidental take permit, the action agency still must also independently ensure that its actions do not result in jeopardy or adverse modification of critical habitat, *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987); consultation alone does not satisfy an agency's duty under the ESA, *Resources Limited, Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994).

F. Administrative Procedure Act

64. The APA governs judicial review of agency actions and provides a right to judicial review for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. The APA directs courts to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). Agency actions must also be set aside if made "without observance of procedure required by law." *Id.* § 706(2)(D).

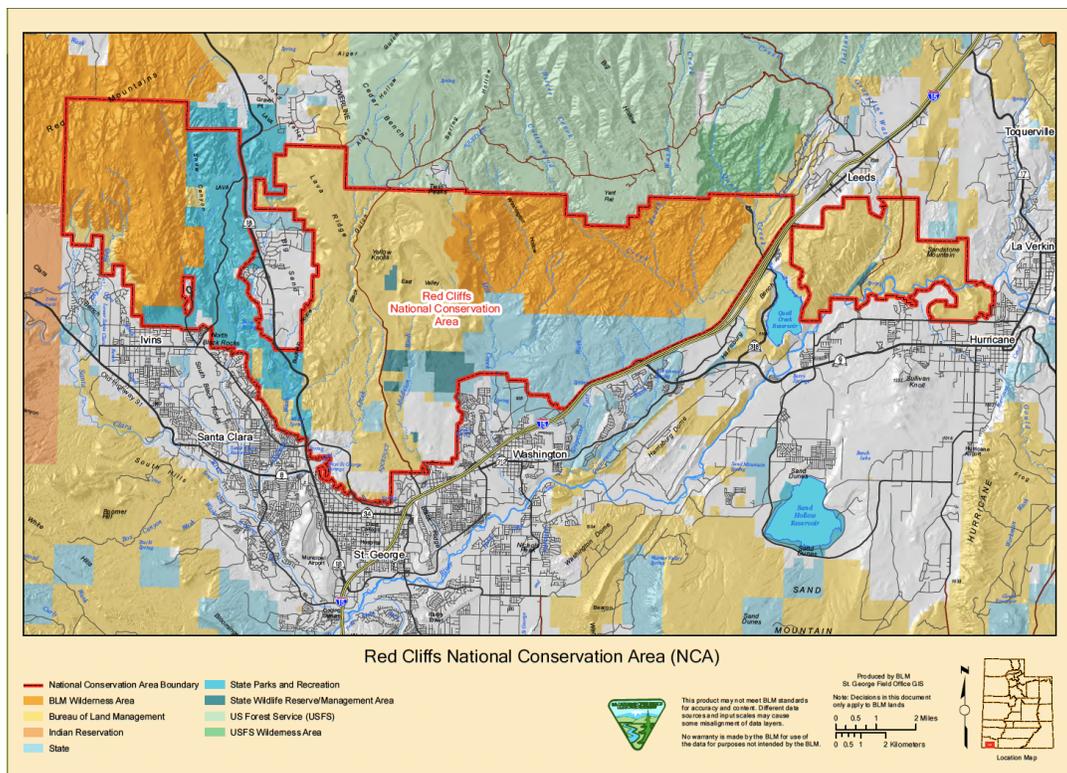
FACTUAL BACKGROUND

A. Red Cliffs National Conservation Area

65. In March 2009, Congress passed and President Obama signed the Omnibus Public Land Management Act. 123. STAT. 991. Among other provisions, the Omnibus Act created the Red Cliffs NCA, which is comprised of approximately 45,000 acres of BLM-administered surface acres, 2,631 acres of private lands, and 13,735 surface acres owned by the State of Utah in south-central Washington County. *Id.* § 1974(a)(1).

66. The Red Cliffs NCA is located in Washington County in the southwestern corner of Utah. BLM administers approximately 629,000 surface acres of public lands in Washington County, and these lands are located at the convergence of the Mojave Desert, Great Basin, and Colorado Plateau. The intersection of these distinct bio-regions creates unmatched cultural, geologic, and ecological diversity.

67. As illustrated on the map below, residential and rural subdivisions, light industrial areas, commercial and retail businesses, and Interstate 15 abut the southern, western, and eastern boundaries of the NCA.



68. Vegetation communities within the Red Cliffs NCA includes mostly desert scrub, which ranges from sparse, mostly bare ground to a moderately dense layer of evergreen or drought-deciduous, broad-leafed shrubs, and/or succulent species adapted to a desert environment. Populations and communities of nonnative, exotic invasive species (including cheatgrass) are coming to dominate some areas within Red Cliffs NCA.

69. Red Cliffs NCA contains nearly 200 miles of non-motorized trails for hiking, mountain biking, horseback riding, and geocaching, and the NCA includes two designated Wilderness areas (Cottonwood Canyon and Cottonwood Forest wildernesses) within its boundaries. In FY 2019, the Red Cliffs NCA hosted nearly 190,000 visitors.

70. The Red Cliffs NCA and public lands in this area also provide important habitat for imperiled native species, like the Mojave desert tortoise, Gila monster, southwestern willow flycatcher, and dozens of bats, songbirds, and other migratory and non-migratory birds. The Red

Cliffs NCA contains nearly 50,000 acres of designated critical habitat for the Mojave desert tortoise.

B. Mojave Desert Tortoise

71. The Mojave desert tortoise is a long-lived, slow-growing tortoise species found across portions of four states to the north and west of the Colorado River, including southwestern Utah, northwestern Arizona, southern Nevada, and southeastern California. Mojave desert tortoises take 13 to 20 years to reach sexual maturity, and their reproduction and growth increases during years with higher precipitation.

72. Tortoise home range varies depending on sex, location, available resources, and weather patterns; male home ranges can be as large as 220 acres and female home ranges may be as little as half that size. During droughts, desert tortoises forage over larger areas, and in a lifetime an individual tortoise may use more than 1.5 square miles for habitat, and may occasionally venture more than seven miles outside of its home range on long-distance forays.

73. Tortoises seek shelter during unfavorable conditions in dug-out burrows, rodent or other animal burrows, and caliche caves; and Mojave desert tortoise may remain inactive during periods of drought. The availability of shelter sites is an important aspect of habitat suitability, and tortoises use these burrows—even when active—during the night and the hottest part of the day. An individual Mojave desert tortoise uses an average of 7–12 different burrows within their home range.

74. Typical tortoise habitat is characterized by scrub brush below 1,677 meters (5,500 feet), where precipitation ranges from 5–20 centimeters, and relatively high diversity of perennial plants. Mojave desert tortoise are selective herbivores. Their diet generally consists of herbaceous perennials and winter annual plants, and they are known to forage on grasses, shrubs

and cacti. Mojave desert tortoise prefer native plants over nonnative plants, so a diet composed of mostly nonnative annual grasses—like cheatgrass (*Bromus tectorum*)—does not promote growth of hatchling tortoises.

75. Current threats to Mojave desert tortoise include loss, disturbance, and fragmentation of habitat from construction projects such as roads, housing and energy developments, conversion of native habitats, and off-road vehicles. Wildfire increasingly threatens Mojave desert tortoise populations and habitat because it degrades or eliminates habitat. Following wildfire, native plant species are often replaced by invasive, non-native species (including cheatgrass), which results in long-term habitat degradation or loss.

76. Moreover, roads increase the spread of nonnative plant species, which is known to reduce desert tortoise forage quality and increase the risk of fire within tortoise habitat. Road vibration, noise, and lights also have potentially significant adverse effects on desert tortoise behavior, communication, and hearing.

77. The placement of roads through tortoise habitat is well understood to harm tortoise by influencing movements and behaviors, fragmenting habitats, and causing direct mortality. The breadth of this impact is a function of the size and frequency of use of the road: the bigger the road and the heavier its traffic use, the greater the direct and indirect impacts of the road on Mojave desert tortoise.

78. Recent studies have shown that the magnitude of this indirect impact—*i.e.*, the road impact zone—can extend out from a 2-lane to 4-lane highway to between 2,150–4,250 meters (7,054–13,944 feet). This zone of impact increased significantly with increasing traffic levels. Tortoise populations have been found to be depressed for up to 4.6 km (2.86 miles) from a roadway.

79. In 1990, FWS designated the Mojave desert tortoise a threatened species under the ESA. *Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Mojave Population of the Desert Tortoise*, 55 Fed. Reg. 12178 (Apr. 2, 1990). The term “threatened species” means “any species which is 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).

80. In 1994, FWS designated critical habitat under the ESA for the Mojave desert tortoise, including six critical habitat units. The Red Cliffs NCA and surrounding area are included within the Upper Virgin River Recovery Unit (UVRRU), which encompasses 54,600 acres including 46,098 acres within the Red Cliffs NCA. Although the UVRRU is the smallest recovery unit in the Mojave desert tortoise’s range, FWS considers this recovery unit of high importance to the range-wide status of the species due to its high population densities of tortoise.

81. FWS divided the UVRRU into 11 geographic analytical units, based on known tortoise occurrences and likely barriers to movement. Five of these analytical units encompass the Red Cliffs NCA, including the Snow Canyon, West Cottonwood, East Cottonwood, Babylon, and small portions of the Cinder Knolls Analytical units. The East and West Cottonwood Units are the biggest of these five analytical units.

82. Threats within the East Cottonwood analytical unit include roads, the potential for development on non-Federal lands within the Red Cliffs NCA, poor habitat connectivity, invasive grasses, and wildfire.

83. In 2014, a range-wide Mojave desert tortoise population estimate identified a decline of almost 125,000 adult tortoises over a 10-year period, which represents a nearly 37% overall population decline. Tortoise populations within the UVRRU experienced a 24.3%

decline over this same timeframe. Densities of tortoise in the UVRRU are declining at a rate of 3.2% per year.

84. The area in and around the Red Cliffs NCA experienced an even more stark population decline of 41% between 1999–2019.

C. Land Acquisitions within the Red Cliffs NCA and Desert Reserve

85. For more than 20 years, the Department of Interior has funded the acquisition of land within the Desert Reserve (as described *infra*) and the Red Cliffs NCA to protect Mojave desert tortoise habitat, recreation, and open space.

86. BLM has used the Land and Water Conservation Fund to acquire fee title or an interest in land (*e.g.*, conservation easement) on at least 15 separate parcels, totaling approximately 832 acres, for a total outlay of nearly \$21 million. The stated purpose for each parcel acquisition was to protect desert tortoise habitat and outdoor recreation within the Red Cliffs NCA.

87. FWS has also funded acquisition of lands in and around the Red Cliffs NCA using federal dollars available through the Cooperative Endangered Species Conservation Fund, which is authorized through Section 6 of the ESA. 16 U.S.C. § 1535. Since 1997, FWS has funded the acquisition of approximately 7,516 acres of private in-holdings within the Desert Reserve by the State of Utah, mostly in the eastern and western portions of the Red Cliffs NCA.

88. From 2004 to 2017, the State of Utah Division of Wildlife Resources received total payments from FWS totaling \$15,841,725 through the ESA Section 6 grants to acquire habitat for the Mojave desert tortoise and other species in and around the Red Cliffs NCA.

89. Under the Cooperative Endangered Species Conservation Fund, the State of Utah must manage each parcel consistent with the objectives of the acquisition, which requires Utah to

manage these lands as “a wildlife preserve for the desert tortoise and other wildlife biodiversity species, . . . and for limited, controlled public access for wildlife viewing.” U.S. Bureau of Land Management & Fish and Wildlife Service, *Final Environmental Impact Statement to Consider a Highway Right-of-Way, Amended Habitat Conservation Plan and Issuance of an Incidental Take Permit for the Mojave Desert Tortoise, and Proposed Resource Management Plan Amendments, Washington County, UT* (Nov. 2020) at 3-94–3-95.

D. 1995 Washington County Habitat Conservation Plan and Incidental Take Permit

90. In December 1995, Washington County Commissioners submitted to FWS a Habitat Conservation Plan for the management of Mojave desert tortoise habitat within Washington County (1995 Habitat Conservation Plan). The conservation measures and strategy in the 1995 Habitat Conservation Plan were intended to preserve and protect portions of Mojave desert tortoise habitat within Washington County, while at the same time allowing growth and development on other portions of tortoise habitat in the county.

91. The central element of the 1995 Habitat Conservation Plan was the creation of a 61,022-acre Red Cliffs Desert Reserve in Washington County (Desert Reserve). Inside of the reserve boundaries all management actions placed protection of the desert tortoise as the highest priority, while outside the Desert Reserve development of desert tortoise habitat was allowed in certain areas. FWS considers the Desert Reserve a fragile cornerstone of the UVVRU.

92. At the time, approximately two-thirds of the lands within the Desert Reserve were owned by BLM or Utah State Parks, and the 1995 Habitat Conservation Plan adopted a strategy to acquire the remaining one-third to provide continuity in habitat. A central acquisition strategy was to use the Land and Water Conservation Fund to acquire private and municipal lands for outdoor recreation, wildlife habitat, and threatened and endangered species preservation.

93. The 1995 Habitat Conservation Plan created five so-called Management Zones, subject to different rules and regulations concerning habitat protections and other conservation measures. Under this plan, Zone 3 was to be managed for the conservation and enhancement of the Mojave desert tortoise, with associated restrictions or prohibitions on livestock grazing, camping, mineral withdrawal, and vehicle travel.

94. The 1995 Habitat Conservation Plan contained other measures designed to minimize “take” of tortoises, including education, translocation, heightened law enforcement presence in the reserve, fencing, passage structures, and other measures.

95. In 1996, FWS issued an Incidental Take Permit for the 1995 Habitat Conservation Plan, which allowed development to occur in desert tortoise habitat on non-federal lands in Washington County. In the Incidental Take Permit, FWS authorized the incidental take of an estimated 1,169 desert tortoises, 12,264 acres of desert tortoise habitat, and 31,282 acres of potential desert tortoise habitat on non-federal lands over a 20-year timeframe. The Incidental Take Permit included an expiration date of March 14, 2016.

E. BLM’s 2016 Resource Management Plan for Red Cliffs NCA

96. In December 2016, after a six-year public planning process, BLM approved the Red Cliffs NCA Resource Management Plan.

97. This plan approved a series of management decisions, including: (a) managing resources to protect and enhance water, geologic, paleontological, vegetation, wildlife, cultural, and scenic resources, while providing for varied recreational opportunities; (b) ensuring ecological integrity of the native vegetation communities is conserved, protected, and restored; (c) managing habitats for federally listed threatened or endangered species so that they are conserved, protected, and restored to support viable populations; (d) managing the open spaces,

natural aesthetics, and scenic vistas of the Red Cliffs NCA so that they are protected for social, economic, and environmental benefits; and (e) managing land use authorizations that further the purposes of conservation, protection, and enhancement of resource values in the Red Cliffs NCA.

98. The resource management plan also directed BLM to acquire non-federal lands within the Red Cliffs NCA to further the area's conservation goals, including "prioritiz[ing] the acquisition of non-federal lands or interests in critical tortoise habitat."

99. In addition, the plan adopted a series of so-called avoidance and exclusion areas within the Red Cliffs NCA. An exclusion area is not available as a location of a right-of-way under any condition. In avoidance areas, BLM must apply heightened protections before locating a right-of-way. Among other things, BLM must consider options for routing or siting a right-of-way outside the NCA, ensure consistency of the right-of-way with the established purpose of the NCA, and authorize new rights-of-way only when the construction and operation of the right-of-way would not result in the take of federally listed species.

100. The plan designated the entire Red Cliffs NCA as a Special Recreation Management Zone, which is an area where the existing or proposed recreation opportunities and recreation setting characteristics are recognized for their unique value, importance, or distinctiveness, especially when compared to other areas used for recreation.

101. The resource management plan divided the Red Cliffs NCA into four Recreation Management Zones, including large portions of the so-called "Front Country" zone. The Front Country Recreation Management Zone is designed to foster high-quality, sustainable non-motorized recreation opportunities, while conserving and protecting other resource values of the Red Cliffs NCA. The Front Country Recreation Management Zone is designated for hiking,

biking, and horseback riding on easily accessible trails and rock-climbing close to the urban interface.

102. In the plan, BLM specifically rejected Washington County's proposed alternative designating a new utility and transportation corridor that could accommodate a concept highway. According to BLM, this "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. BLM concluded that this route would create significant adverse impacts on these resources.

103. FWS agreed with BLM's conclusions, and concluded that "the proposed northern transportation route is inconsistent with the [1995 Habitat Conservation Plan] 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." According to FWS, the impacts from a northern transportation route would 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 within the Red Cliffs Desert Reserve."

G. Initiation of Right-of-Way Decision Process and Draft EIS

104. On September 18, 2018, the Utah Department of Transportation submitted to BLM an application for a right-of-way grant for the Northern Corridor Highway to be located in Zone 3 of the Desert Reserve and Red Cliffs NCA. Utah Department of Transportation's proposed Northern Corridor right-of-way route is nearly identical to the northern transportation route right-of-way that BLM rejected in the 2016 resource management plan and runs right through the most important high-density cluster of desert tortoises in the entire recovery unit.

105. On December 5, 2019, BLM and FWS published a notice of intent to prepare an EIS to review Utah Department of Transportation's application and associated decisions, and opened a public scoping period. BLM received 17,258 submissions from the public during the scoping period—mostly in opposition to the Northern Corridor Highway. Plaintiffs submitted detailed scoping comments, requesting increased protection for the conservation and cultural resources protected under the Omnibus Act, and proposing a series of reasonable alternatives to the Northern Corridor Highway.

106. In June 2020, BLM and FWS issued a Draft Environmental Impact Statement, and sought comment on their proposed alternatives. BLM's proposed action was to issue a 30-year renewable right-of-way grant to the Utah Department of Transportation for the construction, operation, and maintenance of the Northern Corridor highway across BLM-administered lands. According to BLM, the right-of-way would be up to 500-foot wide and would accommodate a 4-lane highway with two 12-foot-wide travel lanes in each direction, 8-foot shoulders, and a 20-foot median. In addition, the Northern Corridor Highway would also include a 10–14-foot-wide trail; communications infrastructure; curbs and gutters, drainage swales, and ditches; and would be posted with a 50-mile per hour speed limit. The Northern Corridor Highway would include at least three major interchanges and intersections, and Utah Department of Transportation's alignment would be approximately 4.3 miles long, of which 2.37 miles would cross BLM lands.²

107. The Draft Environmental Impact Statement considered five alternatives to the proposed Northern Corridor right-of-way, including: two alternative routes within the Red Cliffs NCA (T-Bone Mesa alignment and Southern alignment), two alternatives using existing highway

² At different times, BLM and FWS describe the Northern Corridor Highway as crossing either 1.9 miles or 2.37 miles of BLM lands.

and road infrastructure (Red Hills Expressway and St. George Boulevard/100 South One-way Couplet (Couplet Alternative)), and a no action alternative.

108. In addition, the Draft Environmental Impact Statement examined a series of alternatives for the interrelated and interdependent actions amending the 2016 Red Cliffs NCA Resource Management Plan and St. George Field Office Resource Management Plan. Regarding the 2016 Red Cliffs NCA plan, BLM identified a no action alternative (which would bar issuance of the right-of-way for the Northern Corridor Highway), and two alternatives that would modify the existing 2016 plan to allow for the issuance of the right-of-way.

109. BLM also considered three alternatives to modifying the St. George Field Office Resource Management Plan, including the no action alternative, and two alternatives that would create a so-called Zone 6 to be included in the 2020 Washington County Habitat Conservation Plan for management as a mitigation area for desert tortoise.

110. The Draft Environmental Impact Statement also included FWS's proposal to issue an Incidental Take Permit to Washington County that would authorize the take of Mojave desert tortoises under the 2020 Habitat Conservation Plan, discussed *infra*. The Draft Environmental Impact Statement considered only two alternatives—one alternative denying Washington County's request, and a second alternative adopting and approving Washington County's Habitat Conservation Plan and requested Incidental Take Permit.

111. The agencies received nearly 15,500 public comments on the Draft Environmental Impact Statement, which raised a host of concerns over the impacts of the proposed action on the world-class resources in the Red Cliffs NCA. In particular, Plaintiffs supported the Red Hills Expressway and Couplet Alternatives, noting that Washington County's proposed Northern Corridor Highway fails to protect, conserve, and enhance the resources for

which Congress created the Red Cliffs NCA; harms desert tortoise habitat and population; runs afoul of acquisition purposes under the Land and Water Conservation Fund and Section 6 of the ESA; and undermines cultural resource protections on the Red Cliffs NCA.

H. Recent Fires in Red Cliffs NCA

112. In summer 2020, during the public comment period for the Draft Environmental Impact Statement, four human-caused wildfires burned nearly 15,000 acres within the Red Cliffs NCA, including the Turkey Farm Road Fire (11,995 acres), Cottonwood Trail Fire (1,623 acres), Snow Canyon Fire (800 acres), and Lava Ridge Fire (348 acres). These fires consumed almost 9,000 acres of desert tortoise critical habitat, including more than 2,500 previously unburned acres of critical habitat.

113. In 2020 alone, wildfires burned a total of 19% of critical habitat and 24% of the entire Red Cliffs NCA and Desert Reserve.

114. Some of these wildfires burned very hot, decimating native trees, shrubs, forbs and grasses to ash. Based on the severity of these fires, it is not known how long—if ever—the vegetation will take to return to pre-burn conditions.

115. In addition, 18 human-caused fires burned an additional 234 acres in and around the Red Cliffs NCA and Desert Reserve in 2020.

116. On July 21, 2020, Plaintiffs requested BLM and FWS pause the environmental review of the Northern Corridor Highway and associated actions until the agencies fully assessed and examined the ecological impacts of these fires and complete burned area assessments and response plans. On July 27, 2020, the agencies acknowledged this request, but did not agree to pause the environmental review.

I. Final Environmental Impact Statement

117. On November 12, 2020, BLM and FWS issued a Final Environmental Impact Statement for the Northern Corridor Highway and associated actions. The Final Environmental Impact Statement carried forward the identical alternatives from the Draft Environmental Impact Statement, and again identified Utah Department of Transportation's Northern Corridor route as the proposed action.

118. The Final Environmental Impact Statement disclosed that the Northern Corridor Highway would directly impact native and nonnative vegetation communities, including the complete removal of plants, soil destruction, root compaction, and trampling. It identified probable indirect impacts, including increased spread of nonnative, exotic species up to one kilometer from the Northern Corridor Highway, further exacerbating the fire cycle within the Red Cliffs NCA and Desert Reserve. In total, the Final Environmental Impact Statement determined that issuing the right-of-way would directly harm 299 acres of vegetation and indirectly harm up to 3,991 acres. Full implementation of all actions (including actions permitted under the 2020 Habitat Conservation Plan) would impact over 66,000 acres of vegetation.

119. The Final Environmental Impact Statement also concluded that the Northern Corridor Highway would cause the direct loss of 275 acres of tortoise habitat within the right-of-way and indirectly impact 2,333 acres of habitat, contributing to increasing fragmentation of tortoise habitat within the Red Cliffs NCA. In addition, the Final Environmental Impact Statement concluded that the Northern Corridor Highway would permanently eliminate at least 276 acres of desert tortoise critical habitat, fragmenting and degrading at least an additional

2,619 additional acres of critical habitat, and injuring or killing at least 10% of adult desert tortoises and 50% of juveniles and hatchlings.

120. The Final Environmental Impact Statement concluded that construction of the Northern Corridor Highway would also directly encroach on three parcels acquired through the Land and Water Conservation Fund. The Final Environmental Impact Statement failed to assess the indirect impacts of the Northern Corridor Highway on the other 12 parcels acquired through the Land and Water Conservation Fund.

121. The Final Environmental Impact Statement documented that the Northern Corridor Highway would also encroach on, fragment and degrade lands acquired through Section 6 of the ESA (Section 6 lands), even though these lands are required to be managed as a “wildlife preserve” for the desert tortoise and other wildlife. More specifically, the Final Environmental Impact Statement concluded that Utah Department of Transportation’s proposed Northern Corridor Highway route would result in the violation of the conservation goals on three parcels of Section 6 lands, and the violation of the terms and conditions of the acquisition grant agreements.

122. The agencies did not identify any transfer or replacement lands—as required under Section 6 of the ESA—to offset or mitigate the adverse impacts on these Section 6 lands, and the Final Environmental Impact Statement included no analysis of the ecological values and opportunities of the replacement lands against the existing Section 6 lands degraded by the Northern Corridor Highway.

123. The Final Environmental Impact Statement also concluded that the Northern Corridor Highway would “dramatic[ally] change” the recreational experience and resources within the Front Country Recreation Management Zone, finding that the Northern Corridor

Highway would cause a “stark or obvious visual change to the natural setting,” and “[u]sers would also experience more frequent highway noise,” which could “degrad[e] the user experience, especially non-motorized users [who] may expect a more natural desert setting in the Front Country [Recreation Management Zone].”

124. In addition, the Northern Corridor Highway would cause alteration or closure of portions of six non-motorized, two-track trails in the Red Cliffs NCA, and four proposed single-track and two-track trails.

125. The Final Environmental Impact Statement also determined that granting Utah Department of Transportation’s Northern Corridor Highway right-of-way would adversely affect historic properties located within the Red Cliffs NCA, directly impact cultural resources, and cause permanent or long-term effects to archaeological sites eligible for listing on the National Registry of Historic Preservation.

126. Additionally, the Final Environmental Impact Statement identified a series of other projects in the area—including 11 road and transportation projects, the proposed Lake Powell pipeline, and others—that cumulatively will harm the conservation and cultural resources within the Red Cliffs NCA, including by: adversely impacting the native vegetation communities; increasing the spread of noxious and invasive species; exacerbating the growing threat of wildfire across the landscape; contributing to the incremental degradation and loss of habitat for Mojave desert tortoise; causing the incremental degradation of Section 6 lands, which may negatively affect achievement of the long-term conservation goals informing these acquisitions; causing the demolition or relocation of significant historical and cultural resources, which may undermine the integrity and significance of these resources; and harming recreational uses by limiting access to existing trails, paths, and other recreational opportunities.

127. In the Final Environmental Impact Statement, the agencies acknowledged the recent fires in the Red Cliffs NCA, but claimed that these fires did not represent significant new circumstances warranting a supplemental environmental review because, according to BLM and FWS, these fires are a “common occurrence” on this landscape. The agencies provided no data on the scale, scope, extent and impacts of these fires; burn severity and mapping; desert tortoises killed, injured, or translocated; and other information needed to fully understand the ecological impacts of these fires.

128. In addition, the Final Environmental Impact Statement failed to examine the direct and indirect noise impacts of the Northern Corridor Highway, even though the agencies anticipated a noticeable change in noise levels in and around Utah Department of Transportation’s proposed route because this alternative will construct a road in a current roadless area.

129. The Final Environmental Impact Statement also concluded that Plaintiffs’ Red Hills Expressway and Couplet alternatives would meet the objectives informing the Northern Corridor Highway (*i.e.*, reducing congestion, increasing capacity, and improving east-west mobility between State Route 18 and Interstate 15) by using existing highways. In fact, the Couplet Alternative met or exceeded the Northern Corridor Highway in achieving these objectives on six of the eight traffic metrics measured, and the Red Hills Expressway alternative also exceeded the Northern Corridor Highway alternative in achieving the stated objectives. The Couplet Alternative was more cost effective: the Final Environmental Impact Statement estimated costs for the Couplet Alternative of between \$22–\$33 million, whereas the Northern Corridor Highway alternative would run between \$81–\$123 million. The Final Environmental

Impact Statement identified the costs of the Red Hills Expressway alternative as between \$97–\$146 million.

130. Finally, although Utah Department of Transportation’s Northern Corridor Highway route is located immediately adjacent to private residences in the Green Springs Development, the Final Environmental Impact Statement never examined the impacts of the highway on these homes and residents, including human health and safety impacts, traffic noise, litter, air and light pollution, quality of sleep, and quality of life.

J. NHPA Section 106 Consultation

131. BLM used the NEPA process to simultaneously comply with its NHPA Section 106 obligations.

132. The Final Environmental Impact Statement adopted an Area of Proposed Effect, which is a geographic area within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, equal to a 700-foot-wide corridor overlaying the right-of-way. The Final Environmental Impact Statement failed to offer any explanation for its delineation of the Area of Potential Effects, and the agencies’ own evidence demonstrates that this area does not fully account for the likely direct and indirect impacts of the Northern Corridor Highway.

133. To identify historic and cultural properties within the Area of Potential Effects, BLM conducted no new cultural resource investigations and undertook no independent analysis; instead, BLM relied on existing and dated cultural resource inventories. According to these data, only about 50% of the area had been previously surveyed, locating and identifying 862 prehistoric, historic and multi-component sites, and fully locating and identifying 388 historic properties eligible for inclusion on the National Registry of Historic Places.

134. The Final Environmental Impact Statement concluded that construction of the Northern Corridor along Utah Department of Transportation's proposed route would result in adverse effects to these historic properties causing permanent or long-term effects through physical damage or alteration resulting in the loss of information important in history and prehistory contained within the sites.

135. In addition, the Final Environmental Impact Statement concluded that construction along the proposed route would result in direct impacts to a prehistoric petroglyph panel, which would diminish the integrity of the property's significant historic features.

136. On June 8, 2020, the Cultural Preservation Offices for the Hopi Tribe contacted BLM to request that BLM deny Utah Department of Transportation's right-of-way application. The Tribe indicated that the area subject to the application and land use plan amendments contains cultural resources significant to the Tribe, and that BLM's undertaking would adversely affect these resources. The Tribe requested a hard-copy of the Draft Environmental Impact Statement, and requested BLM initiate or fund a Hopi Traditional Cultural Properties study and analysis.

137. Upon information and belief, BLM never responded to this correspondence, failed to send the Draft Environmental Impact Statement to the Hopi Tribe, and never funded or initiated the requested cultural study.

138. On October 5, 2020, the Hopi Tribe again reached out to BLM, again requesting a copy of the Draft Environmental Impact Statement and associated cultural resource information. The Tribe reiterated its request for the initiation of a Hopi Traditional Cultural Properties study.

139. Upon information and belief, BLM never responded to this correspondence, failed to send the Draft Environmental Impact Statement to the Hopi Tribe, and never funded or initiated the requested cultural study.

K. Record of Decision

140. On January 13, 2021, then Secretary of Interior Bernhardt signed a Record of Decision completing the NEPA and NHPA consultation process, and Secretary Bernhardt approved the amendments to the Red Cliffs and St. George Field Office resource management plans. On this same day, Secretary Bernhardt approved the issuance of a right-of-way for construction, operation, and maintenance of the Northern Corridor Highway along Utah Department of Transportation's preferred route.

141. In the Record of Decision, BLM asserted that it would continue the Section 106 consultation process to resolve any adverse effects to historic properties. Upon information and belief, BLM has yet to complete its Section 106 consultation and resolve its adverse effects determination.

142. Upon information and belief, Federal Defendants invoked the current COVID-19 pandemic and emergency to expedite preparation, consideration, and adoption of the Northern Corridor Highway right-of-way, issuance of the incidental take permit, and amended resource management plan for the Red Cliffs NCA and St. George Field Office.

L. Washington County's 2020 Restated and Amended Habitat Conservation Plan, Biological Opinion, and Incidental Take Permit

143. At this same time, Washington County submitted to FWS an application for an incidental take permit. The requested incidental take permit would authorize take of the desert tortoises for an additional term of 25 years, associated with the Restated and Amended Washington County Habitat Conservation Plan (2020 Habitat Conservation Plan).

144. Washington County adopted and approved the final 2020 Habitat Conservation Plan in or around October 2020. In the 2020 Habitat Conservation Plan, Washington County proposed to provide additional ESA coverage for a variety of human activities causing habitat loss on 66,301 acres of potentially-suitable and occupied tortoise habitat in Washington County, including 200 acres of designated critical habitat within the Desert Reserve.

145. The 2020 Habitat Conservation Plan does not identify the 200 acres of critical habitat with the Desert Reserve where this take will occur, and provides no information regarding location, ownership, number of affected parcels, or other information. The 2020 Habitat Conservation Plan notes only that these 200 acres are currently non-federal lands within the Desert Reserve.

146. In the 2020 Habitat Conservation Plan, Washington County identified a series of conservation measures to be implemented by Washington County, BLM, FWS, Utah Department of Natural Resources, Utah School and Institutional Trust Lands Administration, and Ivins City (collectively, Washington County and Partners) to ostensibly benefit desert tortoise, including expanding land acquisitions in and around the Desert Reserve; additional fencing, expanded law enforcement and community education and outreach; development protocols inside and outside the Desert Reserve; recreational management; and pre-construction desert tortoise clearances.

147. Additionally, in response to the approval of the Northern Corridor Highway through Zone 3 of the Desert Reserve, the 2020 Habitat Conservation Plan identifies conservation measures to be implemented by Washington County and Partners, including tortoise underpasses along Cottonwood Springs Road; wildfire restoration and other voluntary measures; a new mitigation zone (i.e., Zone 6) in the Desert Reserve, as well as fencing installation, recreation reduction, and grazing permit changes in Zone 6.

148. On January 12, 2021, FWS issued a Biological Opinion and Incidental Take Statement for the Amended Washington County Habitat Conservation Plan (Habitat Conservation Plan Biological Opinion), concluding that implementing the 2020 Habitat Conservation Plan will not jeopardize the continued existence of Mojave desert tortoise or adversely modify tortoise critical habitat. FWS based this conclusion on its finding that Washington County’s conservation measures—in particular the protection of Zone 6 and conservation measures such as the tortoise clearance and passage structures—would completely offset the take of tortoise by the Northern Corridor Highway and the 2020 Habitat Conservation Plan.

149. FWS found that the implementation of the 2020 Habitat Conservation Plan with the construction of the Northern Corridor Highway would take 2,633 tortoises, including 351 adult desert tortoises (or about 8% of the desert tortoises in the UVRU). FWS failed to discuss the impact of vehicular traffic on desert tortoise, which best available science shows are especially vulnerable to noise and vibrations from vehicle traffic, even though expected traffic volume is up to 22,000 trips per day.

150. FWS concluded that implementation of the 2020 Habitat Conservation Plan with the construction of the Northern Corridor Highway will not jeopardize Mojave desert tortoise populations, but FWS failed to examine and explain its “no jeopardy” determination, particularly in light of the recent and documented collapse of tortoise populations. As noted, Mojave desert tortoise populations within the Desert Reserve have declined 41% since 1999, overall desert tortoise populations are down 37% between 2004 and 2014, and populations are collapsing 3.2% annually. Moreover, tortoise populations are currently 44% lower than the minimum abundance target—*i.e.*, the minimum number of tortoises—set by the FWS for recovery in 1994. And, FWS

asserts that the implementation of the 2020 Habitat Conservation Plan and Northern Corridor Highway will “take” an additional 2,633 tortoises. In its analysis, FWS failed to explain roughly at what point survival and recovery of Mojave desert tortoise will be placed at risk, and FWS cannot reasonably determine that implementation of the 2020 Habitat Conservation Plan and the Northern Corridor Highway will not jeopardize desert tortoise.

151. Furthermore, FWS concluded the 2020 Habitat Conservation Plan and the highway would result in the permanent loss of 62,960 acres of Mojave desert tortoise habitat, including 633 acres of undeveloped designated critical habitat outside the Desert Reserve and 200 acres of critical habitat within the Desert Reserve. This represents 19% of the estimated desert tortoise habitat in the UVRU. FWS fails to explain how the loss of 19% of desert tortoise habitat in a unit does not constitute destruction or adverse modification.

152. FWS similarly failed to examine or consider the impacts of additional roads and/or development enabled by the construction of the Northern Corridor Highway, even though both biological opinions acknowledge that roads are the primary threat to Mojave desert tortoise populations and BLM acknowledges in the final environmental impact statement the potential for additional development and roads. In fact, FWS acknowledges that future development in Washington County will likely accelerate the degradation of habitat intactness, which in turn would hinder genetic exchange and species survival.

153. As mentioned *supra*, FWS in part relies on the addition of Zone 6 to offset the anticipated loss of Mojave desert tortoise habitat by the 2020 Habitat Conservation Plan and the Northern Corridor Highway. Zone 6 is non-contiguous with the Red Cliffs NCA and Desert Reserve; it is relatively small (6,813 acres); it does not contain designated critical habitat for the tortoise; and it is unlikely to support an abundance of tortoises on its own, according to BLM.

Moreover, Zone 6 is extensively used by motorized and non-motorized recreationists (including for firearms shooting and dispersed long-term camping, among others), and impacts from recreational use include additional trails and roads, degraded soil and vegetation, and increased raven predation. Despite these findings, FWS concluded that Washington County's commitments to establish, protect, and manage Zone 6 would fully offset the loss of Mojave desert tortoise habitat intactness and connectivity. FWS never explains, discusses, or assesses how the creation of a 6,813-acre Zone 6—which is already degraded – can reasonably be expected to fully and completely offset the adverse impacts flowing from the permanent destruction and modification of fully 62,960 acres of potentially-suitable and occupied tortoise habitat in Zone 3 expected to be lost due to the project.

154. FWS also relied on the installation of passage structures under Cottonwood Springs Road in Zone 3 to offset the take of Mojave desert tortoises due to habitat fragmentation, even though the benefit of these structures is unproven and speculative. According to Washington County and FWS, the proposed passage structures are needed to offset the degradation of tortoise habitat and genetic connectivity in the most important high-density tortoise areas in Zone 3 of the Desert Reserve caused by the construction of the Northern Corridor Highway. Washington County intends to provide \$150,000 to fund and provide technical assistance for the construction of additional passage structures. In finding that this funding will help offset the take of desert tortoise, FWS claimed that passage structures put in place since the issuance of the 1995 Habitat Conservation Plan have minimized and mitigated expected habitat fragmentation. Contrary to this claim, though, FWS found that though some use of culverts by tortoise has been documented, it needed more data to evaluate the effectiveness of the existing passage structures. As such, FWS does not have data to support its

claim that funding for the new passage structures will offset takings resulting from the 2020 Habitat Conservation Plan; instead, FWS relies on unproven and speculative conservation measures.

155. Despite the uncertainties in the efficacy of Washington County’s preferred conservation measures, FWS did not evaluate any alternatives to the proposed mitigation measures that would have provided for a greater offset of the take by the 2020 Habitat Conservation Plan. Similarly, even though the 2020 Habitat Conservation Plan identified eight changed circumstances— “changes in circumstances affecting a species or geographic area covered by [a Habitat Conservation Plan] that can reasonably be anticipated by [Habitat Conservation Plan] developers and the [FWS] and that can be planned for”—FWS only analyzed the possible impacts and responses for four changed circumstances.

156. Finally, FWS did not adopt a numerical limit on the take of Mojave desert tortoises in the Incidental Take Statement for the 2020 Habitat Conservation Plan, even though the ESA requires FWS to include a trigger to identify when the level of authorized take is exceeded and the agency must reinitiate consultation. Furthermore, FWS failed to adequately explain why it could not identify a numeric value of take, especially when its prior 1996 incidental take statement did so and FWS has sufficient population data needed to support a numeric threshold on non-lethal take. Instead, FWS used habitat loss as a surrogate for the take of desert tortoise. FWS did not, though, articulate a rational connection between its habitat surrogate and the take of desert tortoise.

157. The day after FWS issued the Habitat Conservation Plan Biological Opinion, FWS separately recommended issuance of an Incidental Take Permit allowing the “incidental

take” of Mojave desert tortoise in and around the Desert Reserve as discussed in the 2020 Habitat Conservation Plan.

158. The very same day—i.e., January 13, 2021—FWS issued and approved a 25-year Incidental Take Permit to Washington County (2021 Incidental Take Permit), as proposed under the 2020 Habitat Conservation Plan.

159. In short, the 2021 Incidental Take Permit reiterated the findings in the 2020 Habitat Conservation Plan Biological Opinion, and concluded that: (1) the taking associated with implementation of the Habitat Conservation Plan will be incidental; (2) Washington County will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (3) Washington County will ensure that adequate funding for the 2020 Habitat Conservation Plan will be provided; (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (5) no other measures are necessary or appropriate for the purposes of the Habitat Conservation Plan.

M. Northern Corridor Highway Biological Opinion and Incidental Take Statement

160. Also on January 12, 2021, FWS issued a separate Biological Opinion and Incidental Take Statement for the Northern Corridor Highway Project (Northern Corridor Highway Biological Opinion), concluding that constructing, operating, and maintaining Utah Department of Transportation’s Northern Corridor right-of-way will not jeopardize the continued existence of Mojave desert tortoise or adversely modify tortoise critical habitat.

161. In its Northern Corridor Highway Biological Opinion, FWS admitted that the Northern Corridor Highway will directly and permanently destroy at least 276 acres of desert tortoise critical habitat, indirectly modify and harm 2,619 acres of critical habitat, and permanently impede tortoise movement between 1,340 acres of critical habitat south of the

highway and the rest of the Desert Reserve. FWS did not determine, as the ESA requires, whether construction, operation, and maintenance of the Northern Corridor Highway would destroy or adversely modify critical habitat; instead, FWS concluded that the expected loss of desert tortoise designated critical habitat would not diminish the value of critical habitat “as a whole”—an analysis which has no statutory support and circumvents FWS responsibilities under the ESA.

162. In determining the impacts of construction, maintenance, and operation of the Northern Corridor Highway, FWS only examined impacts out to 508 meters on either side of the highway, instead of a distance supported by best available science; and FWS failed to analyze impacts of traffic volumes and consider the impact of additional roads and/or development enabled by the construction of the highway.

163. FWS also admitted that construction of the Northern Corridor Highway will injure or kill fully 10% of adult tortoises and 50% of juvenile and hatchlings in the impact area, and ongoing maintenance and operation of the highway will further take 210 tortoises at all life stages. In reaching its “no jeopardy” determination, however, FWS failed to explain roughly at what point survival and recovery of Mojave desert tortoise will be placed at risk from the highway, and, in the absence of this assessment, FWS cannot reasonably determine that construction, operation, and maintenance of the Northern Corridor Highway will not jeopardize desert tortoise.

164. In the Incidental Take Statement for the Northern Corridor Highway, FWS adopted without independent analysis or discussion the Utah Department of Transportation’s four so-called reasonable and prudent measures to minimize the adverse impacts flowing from the Northern Corridor Highway, including: (a) requiring updated tortoise handling and

translocation protocols; (b) designing the highway to minimize desert tortoise fragmentation and facilitate tortoise dispersal by constructing passage structures; (c) dedicating funding and staff toward targeting successful habitat restoration annually in the Red Cliffs NCA; and (d) ensuring biological monitoring expertise on the site throughout project construction and development.

165. But FWS's Incidental Take Statement failed to include any terms and conditions governing implementation of these four measures; instead, FWS included only two terms and conditions, including: (a) requiring BLM submit to FWS a handling and translocation report; and (b) requiring BLM to report to FWS any post-construction desert tortoise fatalities on the Northern Corridor Highway within 72 hours of discovery of the fatalities. The Incidental Take Statement contained no term and condition regarding implementation of the design, funding, and staffing measures described above.

166. On May 24, 2021, Plaintiffs served on Defendants a notice of intent to sue under Section 11 of the ESA, identifying a series of legal infirmities in the biological opinions, the incidental take permit and incidental take statements supporting the Northern Corridor Highway and 2020 Habitat Conservation Plan, and requesting Defendants come into compliance with the ESA.

167. On July 23, 2021, FWS sent Plaintiffs a response to the notice letter, which failed to address or examine most of the claims in the notice letter.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Northern Corridor Right-of-Way and Red Cliffs NCA Resource Management Plan Amendments: Violation of the Omnibus Public Lands Management Act and APA)

168. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

169. This First Claim for Relief challenges Defendants' violation of the Omnibus Act,

which requires the Secretary to manage the Red Cliffs NCA “in a manner that conserves, protects, and enhances the resources of the National Conservation Area.” 42 U.S.C. § 460www(e)(1)(A). This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

170. Secretary Bernhardt’s approval of the Record of Decision and issuance of a right-of-way grant to Utah Department of Transportation on BLM-administered lands within the Red Cliffs NCA fails to conserve, protect, and enhance the ecological, scenic, wildlife, recreational, cultural, historic, and natural resources within the Red Cliffs NCA, including by, *inter alia*:

- a. permanently eliminating at least 276 acres of desert tortoise critical habitat, fragmenting and degrading at least 2,619 additional acres of critical habitat, and injuring or killing at least 10% of adult desert tortoises and 50% of juveniles and hatchlings within the Northern Corridor right-of-way;
- b. causing direct and indirect harm to general wildlife species within the Red Cliffs NCA, including both direct habitat loss and on-going habitat degradation and fragmentation;
- c. directly and permanently harming the native vegetation communities within the Red Cliffs NCA, and promoting the spread of exotic invasive species (and, thus, exacerbating the potential for future wildfires) across the Red Cliffs NCA;
- d. causing adverse effects to historic properties, causing permanent or long-term adverse effects to archaeological sites, and directly adversely impacting a prehistoric petroglyph panel within the area of Utah Department of Transportation’s Northern Corridor right-of-way;

- e. causing long-term, adverse visual impacts to areas within the Red Cliffs NCA of high scenic quality and high visual sensitivity;
- f. degrading the recreational and user experience across the Front Country Recreation Management Zone by creating a dramatic and stark change to the existing recreational experience, and negatively impacting access and use of existing and proposed non-motorized trails; and
- g. increasing noise levels by constructing, operating, and maintaining a four-lane highway, scheduled to carry up to 22,000 vehicle trips per day, including in an area where no roadway currently exists.

171. In addition, Defendants' approval of the Northern Corridor Highway right-of-way as consistent with the requirements of the Omnibus Act represents an arbitrary, unexplained, and unsupported reversal in agency position, especially because BLM reached the opposite conclusion in the 2016 Resource Management Plan.

172. For the foregoing reasons, the Court should hold that Defendants' approval and grant of a right-of-way authorization to Utah Department of Transportation and adoption of the Red Cliffs Resource Management Plan amendments through the Record of Decision is arbitrary, capricious, an abuse of discretion, and not in accordance with law under the Omnibus Public Land Management Act and the APA, and therefore must be reversed, set aside, and vacated under the APA, 5 U.S.C. § 706(2)(A), (D). These challenged actions have caused or threaten serious prejudice and injury to the rights and interests of Plaintiffs and their supporters, members, and staff.

WHEREFORE, Plaintiffs pray for relief as requested below.

SECOND CLAIM FOR RELIEF

**(Northern Corridor Right-of-Way and Red Cliffs NCA Resource Management Plan
Amendments: Violation of the Land and Water Conservation Fund Act and APA)**

173. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

174. This Second Claim for Relief challenges Defendants' violations of the Land and Water Conservation Fund Act, which requires Defendants to manage lands acquired through the Land and Water Conservation Fund in a manner consistent with the purposes informing the acquisition. 54 U.S.C. §§ 200301–310; Pub. L. No. 88-578; *see also Perez*, 2014 WL 3019165 at *10. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

175. As noted above, BLM acquired 15 parcels within the Red Cliffs NCA using the Land and Water Conservation Fund, for the purposes of protecting and preserving habitat for the Mojave desert tortoise and recreational opportunities. In approving the construction, operation, and maintenance of the Northern Corridor Highway on lands acquired through the Land and Water Conservation Fund, Defendants have undermined the purposes guiding these acquisitions, including by, *inter alia*:

- a. promoting the spread and expansion of nonnative plant species outside the immediate right-of-way, which is known to reduce desert tortoise forage quality and increases the risk of fire within tortoise habitat;
- b. promoting habitat fragmentation and physical barriers to movement which may reduce habitat connectivity, significantly decreasing gene flow among tortoise populations and potentially increasing genetic isolation;
- c. increasing vibration, noise, and lights, which are known to have potentially significant detrimental effects on desert tortoise behavior, communication and

- hearing, and may affect tortoise foraging, breeding and sheltering behavior, leading to poor health, reduced breeding success, or increased risk of mortality;
- d. increasing vulnerabilities of desert tortoises to effects of ground-disturbing activities, including crushing, entombing in burrows and dens, increased vandalism and collection, and fragmenting habitats, and causing direct mortality;
 - e. increasing human activity in and around tortoise habitat, which may facilitate expansion of raven and coyote populations into areas impacted by the Northern Corridor Highway, causing increased predation on tortoise; and
 - f. degrading the recreational and user experience across the Front Country Recreation Management Zone by creating a dramatic and stark change to the existing recreational experience, and negatively impacting access and use of existing and proposed non-motorized trails.

176. For the foregoing reasons, the Court should hold that Defendants' approval and grant of a right-of-way authorization to Utah Department of Transportation and adoption of the Red Cliffs Resource Management Plan amendments through the Record of Decision is arbitrary, capricious, an abuse of discretion, and not in accordance with law under the Land and Water Conservation Fund Act and the APA, and therefore must be reversed, set aside, and vacated under the APA, 5 U.S.C. § 706(2)(A), (D). These challenged actions have caused or threaten serious prejudice and injury to the rights and interests of Plaintiffs and their supporters, members, and staff.

WHEREFORE, Plaintiffs pray for relief as requested below.

THIRD CLAIM FOR RELIEF

(Northern Corridor Right-of-Way, Red Cliffs NCA & St. George FO Resource Management Plan Amendments: Violation of NEPA and APA)

177. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

178. This Third Claim for Relief challenges Defendants' violations of NEPA, 43 U.S.C. §§ 4321 *et seq.*, and its implementing regulations, 40 C.F.R. §§ 1500 *et seq.*, in approving the Record of Decision, granting the Northern Corridor right-of-way, and approving the Red Cliffs NCA and St. George FO Resource Management Plan amendments. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

179. As alleged in more detail above, NEPA requires that federal agencies take a "hard look" at all direct, indirect, and cumulative impacts of their proposed actions, using high-quality information, accurate scientific analyses, and scientific integrity. Defendants violated these requirements by relying on the Draft Environmental Impact Statement and the Final Environmental Impact Statement that failed to take a "hard look" at the impacts of the Northern Corridor Highway and associated Resource Management Plan amendments, including by, *inter alia*:

- a. failing to fully examine and disclose the direct impacts of the Northern Corridor Highway, including the impacts of increased noise on the Mojave desert tortoise and other wildlife, as well as the scenic and recreational resources within the Red Cliffs NCA and the adjacent community of Green Springs;
- b. failing to fully examine and disclose the indirect impacts of the Northern Corridor Highway on the Mojave desert tortoise and other wildlife, as well as the ecological, scenic, recreational, cultural, historic, and natural resources within the Red Cliffs NCA; and instead relying on cramped indirect analysis areas that

- ignored the full scope of the impacts of the Northern Corridor Highway and associated actions;
- c. failing to fully examine and disclose the possible growth-inducing impacts of constructing the Northern Corridor Highway, including possible residential and/or commercial development on private, State, and municipally-owned lands in the eastern portions of the Red Cliffs NCA;
 - d. failing to fully examine and disclose the cumulative impacts of constructing, operating, and maintaining the Northern Corridor Highway; and
 - e. failing to establish accurate baseline data on the impacts of recent wildfires on Mojave desert tortoise populations and habitat, as well as burgeoning non-native and invasive vegetation communities across the Red Cliffs NCA.

180. For the foregoing reasons, the Court should hold that the Final Environmental Impact Statement violated NEPA and that Defendants' approvals of the Northern Corridor Highway right-of-way and the Red Cliffs NCA and St. George Field Office Resource Management Plan amendments based on the inadequate Final Environmental Impact Statement are arbitrary, capricious, an abuse of discretion, not in accordance with NEPA and the APA, and therefore must be reversed, set aside, and vacated under the APA, 5 U.S.C. § 706(2)(A), (D). These challenged actions have caused or threaten serious prejudice and injury to the rights and interests of Plaintiffs and their supporters, members, and staff.

WHEREFORE, Plaintiffs pray for relief as requested below.

FOURTH CLAIM FOR RELIEF
**(Northern Corridor Right-of-Way & Red Cliffs NCA Resource Management Plan
Amendments: Violation of NEPA and APA)**

181. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

182. This Fourth Claim for Relief challenges Defendants' violation of NEPA and its implementing regulations due to their refusal to prepare a supplemental environmental impact statement to examine the impacts of four major wildfires in the Red Cliffs NCA (Turkey Farm Road, Cottonwood Trail, Lava Ridge and Snow Canyon fires) on Mojave desert tortoise populations and habitat, native and non-native vegetation communities, and other resources within the Red Cliffs NCA. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

183. NEPA requires an agency to prepare a supplemental environmental impact statement when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(d)(1)(ii). As discussed *supra*, after BLM issued its Draft Environmental Impact Statement, four major wildfires burned nearly 15,000 acres within the Red Cliffs NCA, and 18 human-caused fires burned an additional 234 acres within the Red Cliffs NCA.

184. The available information shows these fires burned nearly 9,000 acres of tortoise critical habitat, including nearly 2,500 acres that were previously unburned. In total, in 2020 alone, wildfires burned a total of 19% of critical habitat and 24% of the entire Red Cliffs NCA and Desert Reserve.

185. Yet, Defendants refused to prepare a supplemental environmental impact statement to consider the impacts of these fires on desert tortoise populations and habitat, native and non-native vegetation communities and other resources across the Red Cliffs NCA. Indeed, the agencies refused to even consider, cite, or examine BLM's own initial review of tortoise mortality associated with the Cottonwood Trail Fire, which found the remains of 14 tortoises incinerated in the fire across just 618 surveyed acres.

186. The impacts of these wildfires in and around the Red Cliffs NCA and Desert Reserve will likely be amplified based on the breadth and scope of non-native, invasive species already taking hold in the Red Cliffs NCA. Given this significant new information, Defendants were required to prepare and circulate a supplemental environmental impact statement prior to adopting the Record of Decision.

187. Accordingly, the Court should hold that Defendants' Record of Decision approving the Northern Corridor Highway right-of-way and the Red Cliffs NCA Resource Management Plan amendments without first preparing a supplemental environmental impact statement was arbitrary, capricious, an abuse of discretion, not in accordance with NEPA and the APA, and therefore must be reversed, set aside, and vacated under the APA, 5 U.S.C. § 706(2)(A), (D). These challenged actions have caused or threaten serious prejudice and injury to the rights and interests of Plaintiffs and their supporters, members, and staff.

FIFTH CLAIM FOR RELIEF

(Northern Corridor Right-of-Way, Red Cliffs NCA & St. George FO Resource Management Plan Amendments: Violation of the NHPA and APA)

188. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

189. This Fifth Claim for Relief challenges Defendants' approval and issuance of the Northern Corridor right-of-way, and Red Cliffs NCA and St. George Field Office Resource Management Plan amendments for violating of the NHPA and its implementing regulations, which require federal agencies to complete Section 106 consultation prior to approving a federal undertaking. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

190. Issuance of the Northern Corridor right-of-way and the Red Cliffs NCA and St. George Field Office Resource Management Plan amendments constitute undertakings pursuant

to the NHPA that have the potential to affect historic properties.

191. Defendants' Section 106 processes for the Northern Corridor right-of-way and the Red Cliffs NCA and St. George Field Office Resource Management Plan amendments violated the NHPA in the following ways, each of which is a distinct and separate violation of law:

- a. the Area of Potential Effects for the Northern Corridor right-of-way and the Red Cliffs NCA Resource Management Plan amendments was arbitrarily defined and excluded many historic properties that could be affected by the undertakings;
- b. Defendants failed to make a reasonable and good faith effort to identify historic properties within the Area of Potential Effects prior to approving and issuing the Northern Corridor right-of-way and the Red Cliffs NCA Resource Management Plan amendments;
- c. Defendants failed to resolve prior to issuing the Record of Decision their determination that construction, operation, and maintenance of the Northern Corridor Highway will adversely affect cultural and historic properties within the Area of Potential Effects; and
- d. Defendants failed to complete their Section 106 responsibilities before reaching a final decision on the Northern Corridor right-of-way, and Red Cliffs NCA and St. George Field Office Resource Management Plan amendments recorded through the January 2021 Record of Decision.

192. Each of these failures was arbitrary, capricious, an abuse of discretion, and a violation of law, and these failures, in turn, prevented BLM from taking further steps required under the NHPA, such as identifying avoidance or mitigation measures.

193. For the foregoing reasons, the Court should hold that Defendants' approval and

grant of the Northern Corridor right-of-way, and the Red Cliffs NCA and St. George Field Office Resource Management Plan amendments is arbitrary, capricious, an abuse of discretion, and not in accordance with law under the NHPA, APA, and their implementing regulations. These challenged actions have caused or threaten serious prejudice and injury to the rights and interests of Plaintiffs and their supporters, members, and staff.

WHEREFORE, Plaintiffs pray for relief as requested below.

SIXTH CLAIM FOR RELIEF
**(2020 Habitat Conservation Plan Biological Opinion and Incidental Take Statement:
Violation of ESA § 7 and APA)**

195. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

196. This Sixth Claim for Relief challenges FWS's approval and issuance of the biological opinion and incidental take statement for the 2020 Habitat Conservation Plan for violating Section 7 of the ESA and its implementing regulations, which require FWS to ensure that major federal actions do not jeopardize the survival of a protected species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1). This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

197. FWS's biological opinion and incidental take statement for the 2020 Habitat Conservation Plan violate Section 7 of the ESA and APA in the following ways, each of which is a distinct and separate violation of law:

- a. FWS failed to adequately examine the direct, indirect, and cumulative impacts of the 2020 Habitat Conservation Plan;
- b. FWS failed to examine the growth-inducing impacts of the Northern Corridor highway together with the actions and authorizations permitted under the 2020 Habitat Conservation Plan within and outside the Red Cliffs NCA;

- c. FWS failed to assess and analyze the impacts of four of the eight changed circumstances;
- d. FWS's "no jeopardy" conclusion is arbitrary and capricious because FWS failed to examine and explain at what point survival and recovery of the Mojave desert tortoise will be placed at risk, and, FWS cannot reasonably determine that implementation of the 2020 Habitat Conservation Plan will avoid "jeopardy" absent this assessment;
- e. FWS's determination that implementing the 2020 Habitat Conservation Plan, together with the construction, operation, and maintenance of the Northern Corridor highway, will not adversely modify or destroy tortoise critical habitat is arbitrary and capricious; and
- f. FWS failed to independently examine and review the adequacy and efficacy of the Washington County's proposed reasonable and prudent measures and terms and conditions.

198. Each of these failures is arbitrary, capricious, an abuse of discretion, and a violation of law, and these failures, in turn, prevented FWS from taking further steps required under the ESA to ensure the proposed actions neither jeopardizes the survival or recovery of the Mojave desert tortoise, nor destroy or adversely modify its critical habitat.

199. Accordingly, the Court should hold FWS's Biological Opinion and Incidental Take Statement for the 2020 Habitat Conservation Plan arbitrary, capricious, an abuse of discretion, not in accordance with ESA and the APA, and therefore must be reversed, set aside, and vacated under the APA, 5 U.S.C. § 706(2)(A), (D). These challenged actions have caused or

threaten serious prejudice and injury to the rights and interests of Plaintiffs and their supporters, members, and staff.

WHEREFORE, Plaintiffs pray for relief as requested below.

SEVENTH CLAIM FOR RELIEF
**(Northern Corridor Highway Biological Opinion and Incidental Take Statement:
Violation of ESA § 7 and APA)**

200. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

201. This Seventh Claim for Relief challenges FWS's approval and issuance of the biological opinion and incidental take statement for the Northern Corridor Highway for violating Section 7 of the ESA and its implementing regulations, which require FWS to ensure that major federal actions do not jeopardize the survival of a protected species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1). This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. § 706.

202. FWS's Northern Corridor Highway Biological Opinion and incidental take statement violate Section 7 of the ESA and APA in the following ways, each of which is a distinct and separate violation of law:

- a. FWS failed to adequately examine the direct, indirect, and cumulative impacts of the Northern Corridor Highway;
- b. FWS failed to examine the growth-inducing impacts of the Northern Corridor Highway within and outside the Red Cliffs NCA;
- c. FWS's "no jeopardy" conclusion is arbitrary and capricious because, *inter alia*, FWS failed to examine and explain at what point survival and recovery of the Mojave desert tortoise will be placed at risk, and, FWS cannot reasonably

determine that construction, operation and maintenance of the Northern Corridor highway will avoid “jeopardy” absent this assessment;

- d. FWS’s determination that the construction, operation, and maintenance of the Northern Corridor Highway, together with implementing the 2020 Habitat Conservation Plan, will avoid adverse modification and destruction of tortoise critical habitat is arbitrary and capricious;
- e. FWS failed to conduct a legally sufficient adverse modification analysis, and arbitrarily concluded that the Northern Corridor Highway would not diminish the value of desert tortoise critical habitat “as a whole,” instead of determining whether the project would destroy or adversely modify the species’ critical habitat; and
- f. FWS failed to independently examine the adequacy of the Utah Department of Transportation’s preferred reasonable and prudent measures, and further failed to identify and adopt terms and conditions governing implementation of two of these measures.

203. Each of these failures was arbitrary, capricious, an abuse of discretion, and a violation of law, and these failures, in turn, prevented FWS from taking further steps required under the ESA to ensure the proposed actions neither jeopardizes the survival of the Mojave desert tortoise nor destroys or adversely modifies its critical habitat.

204. Accordingly, the Court should hold that FWS’s Biological Opinion and Incidental Take Statement for the Northern Corridor Highway are arbitrary, capricious, an abuse of discretion, not in accordance with ESA and the APA, and therefore must be reversed, set aside, and vacated under the APA, 5 U.S.C. § 706(2)(A), (D). These challenged actions have caused or

threaten serious prejudice and injury to the rights and interests of Plaintiffs and their supporters, members, and staff.

WHEREFORE, Plaintiffs pray for relief as requested below.

EIGHTH CLAIM FOR RELIEF
(2021 Incidental Take Permit: Violation of ESA § 10 and APA)

205. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

206. This Eighth Claim for Relief challenges FWS's violation of Section 10 of the ESA by issuing and approving the 2021 Incidental Take Permit without first minimizing and mitigating to the maximum extent practicable the impacts of the 2020 Habitat Conservation Plan and the Incidental Take Permit on the Mojave desert tortoise.

207. Under Section 10 of the ESA, FWS may only issue an incidental take permit if FWS determines, *inter alia*, that the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the incidental taking. The plain language of the statute requires that the applicant, not a third party, minimize and mitigate the taking's impacts.

208. FWS erred in issuing a Section 10 Incidental Take Permit to Washington County for the following reasons, *inter alia*

- a. FWS failed to consider any alternative to adopting the Washington County Habitat Conservation Plan that included increased mitigation or conservation measures; instead, FWS relied on Washington County's assessment of the reasonableness of mitigation measures;
- b. FWS unlawfully relied upon and credited third-party conservation measures to minimize and mitigate the impacts of the 2020 Habitat Conservation Plan on the Mojave desert tortoise;

- c. FWS unlawfully concluded that the 2020 Habitat Conservation Plan minimizes and mitigates impacts to the tortoise to “the maximum extent practicable,” because, according to FWS, the impacts of the 2020 Habitat Conservation Plan will be fully offset. This conclusion finds no support in the record here—in fact, FWS earlier concluded that the conservation measures will offset some of the fragmentation impact but not all. FWS never explains this about face, and fails to offer any analysis or justification supporting his abrupt change in position.

209. Accordingly, the Court should hold FWS’s Incidental Take Permit arbitrary, capricious, an abuse of discretion, not in accordance with ESA and the APA, and therefore must be reversed, set aside, and vacated under the APA, 5 U.S.C. § 706(2)(A), (D). These challenged actions have caused or threaten serious prejudice and injury to the rights and interests of Plaintiffs and their supporters, members, and staff.

WHEREFORE, Plaintiffs pray for relief as requested below.

NINTH CLAIM FOR RELIEF:

Northern Corridor Right-of-Way, Red Cliffs NCA & St. George FO Resource Management Plan Amendments: Violation of ESA § 7(a)(2) and the APA

210. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

211. This Ninth Claim for Relief challenges BLM’s failure to fulfill its duties under the ESA to ensure against jeopardy and take of the Mojave desert tortoise by relying on FWS’s flawed biological opinions. 16 U.S.C. §§ 1536(a)(2), 1538. This claim for relief is brought under the ESA’s provision for judicial relief. 16 U.S.C. § 1540.

212. Under ESA § 7(a)(2), each federal agency must ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of the

designated "critical habitat" of the species. 16 U.S.C. § 1536(a)(2). To assist agencies in complying with this provision, ESA § 7 and the implementing regulations set out a detailed consultation process for determining the biological impacts of a proposed activity. 16 U.S.C. § 1536; 50 C.F.R. Part 402.

213. By relying on the flawed Northern Corridor Highway Biological Opinion and 2020 Habitat Conservation Plan Biological Opinion, which suffers from several legal flaws as described *supra*, BLM has not ensured that its Record of Decision, approved resource management plan amendments, and right-of-way grant are not likely to jeopardize the survival and recovery of the species, in violation of section 7 of the ESA, which is reviewable under 16 U.S.C. § 1540. These violations have caused or threaten serious prejudice and injury to the rights and interests of Plaintiffs and their members and staff.

WHEREFORE, Plaintiffs pray for relief as set forth below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court grant the following relief:

(1) Order, adjudge, and declare that Defendants violated the Omnibus Public Land Management Act, the Land and Water Conservation Fund Act, the National Environmental Policy Act, the National Historic Preservation Act, and the Administrative Procedure Act, and/or their implementing regulations in adopting the Record of Decision, approving and granting the Northern Corridor right-of-way, and approving the Red Cliffs NCA and St. George Field Office Resource Management Plan amendments;

(2) Order, adjudge, and declare that Defendants Northern Corridor Highway Biological Opinion and Incidental Take Statement, Habitat Conservation Plan Biological Opinion and Incidental Take Statement, and the 2021 Incidental Take Permit violated the

Endangered Species Act and implementing regulations, and the Administrative Procedure Act;

(3) Reverse, hold unlawful, set aside, and vacate the issuance of the Record of Decision, Northern Corridor right-of-way, and the Red Cliffs NCA and St. George Field Office Resource Management Plan amendments;

(4) Reverse, hold unlawful, set aside, and vacate the issuance of the 2020 Habitat Conservation Plan Biological Opinion;

(5) Reverse, hold unlawful, set aside, and vacate the issuance of the Northern Corridor Highway Biological Opinion;

(6) Reverse, hold unlawful, set aside, and vacate the issuance of the 2021 Incidental Take Permit;

(7) Enter such preliminary and/or permanent injunctive relief as Plaintiffs may specifically request hereafter;

(8) Award Plaintiffs their reasonable costs, litigation expenses, and attorney's fees associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. §§ 2412 *et seq.*, the Endangered Species Act, 16 U.S.C. § 1540(g), and/or all other applicable authorities; and/or

(9) Grant such other and further relief as the Court deems just and proper.

Dated: July 27, 2021

Respectfully submitted,

/s/ Todd C. Tucci
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July 2021, I electronically filed the foregoing FIRST AMENDED COMPLAINT with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing (NEF) to the following persons:

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