

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

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

Plaintiffs,

v.

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

Defendants,

and

UTAH DEPARTMENT OF TRANSPORTATION  
and WASHINGTON COUNTY, UTAH,

Intervenor-Defendants.

No. 1:21-CV-01506-ABJ

**DECLARATION OF MATT HOGAN**

I, Matt Hogan, declare as follows:

1. I am the Regional Director of the U.S. Fish and Wildlife Service (Service) Region 6, an agency of the U.S. Department of the Interior, located in Denver, Colorado. In my capacity as Regional Director, I report directly to the Deputy Director of the Service and to the Secretary of the Interior for the administration of the Endangered Species Act (ESA), 16 U.S.C. § 1539, including issuance of incidental take permits (ITP).
2. The desert tortoise is an arid land reptile associated with desert scrub vegetation. Tortoises are long-lived and grow slowly, requiring 13 to 20 years to reach sexual

maturity, and have low reproductive rates. Extensive development throughout the species' range has resulted in habitat loss. In addition, wildfires kill or injure desert tortoises through direct burning, dehydration, and smoke inhalation and indirectly through loss of forage, change in hydrology, and damage to soil and burrows. Climate change, disease, invasive species, predation, collection, grazing, and vehicle traffic are also threats to the desert tortoise.

3. The Service listed the desert tortoise populations north and west of the Colorado River in Arizona and Utah (excluding the Beaver Dam Slope population) as endangered under an emergency rule on August 4, 1989 (54 Fed. Reg. 42270 (Oct. 13, 1989)). Subsequently, the entire Mojave population of the desert tortoise west of the Colorado River in California and Nevada, and north of the river in Arizona and Utah, including the Beaver Dam Slope, was listed as a threatened species on April 2, 1990 (55 Fed. Reg. 12178 (Apr. 2, 1990)).<sup>1</sup> The Service designated critical habitat for the desert tortoise on February 8, 1994, encompassing over 2,428,114 hectares (6,000,000 acres) in portions of the Mojave and Colorado Deserts (59 Fed. Reg. 5820 (Feb. 8, 1994)), including much of the Red Cliffs Desert Reserve (Reserve). The population within Utah occurs at the northernmost fringes of the species' range.
4. In 1995, Washington County finalized a Habitat Conservation Plan (HCP) for Mojave desert tortoise. The Service issued an ITP in 1996 in response to Washington County's HCP and application for an ITP. The ITP was supposed to expire in 2016, but in 2015, Washington County submitted an application to renew their ITP. In March 2015, the Service responded back to Washington County that the County could continue activities

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<sup>1</sup> The threatened listing also included a special rule that extended the general prohibitions (prohibitions against take under ESA section 9) to the desert tortoise, codified at 50 CFR § 17.42(e).

under the 1996 ITP while the Service reviews the application and that the Service may request new or supplemental information to support the application, which led to the 2020 amended HCP.

5. The Reserve was established under the 1995 Washington County HCP to mitigate the effects of growth and development on desert tortoise in Washington County, Utah. The Reserve was divided into five zones to facilitate targeted management. Zone 3, termed the “Core Zone,” is located roughly centrally in the Reserve. The zone was to be managed for the preservation and enhancement of the Mojave desert tortoise, with various recommended restrictions on recreation, grazing, mineral withdrawal, and vehicle access. The Reserve contains some of the highest densities of desert tortoises throughout the species' range and highest rates of juvenile production. In 2009, Congress designated the 39,564 acres of Bureau of Land Management (BLM) lands in the Reserve as the Red Cliffs National Conservation Area (NCA) and required the NCA to be conserved, protected and enhanced for wildlife and natural resources, including desert tortoise.
6. The 2020 Amended HCP was based on the 1995 HCP with some changes and updates and continued to rely on the basic tenets of the 1995 HCP Conservation Program. In addition to establishing the Reserve, the 1995 HCP Conservation Program established the Habitat Conservation Advisory Committee to oversee administration of the HCP and advise the County Commission on issues related to endangered species. It also established a Technical Committee and provided a funding mechanism to support monitoring and mitigation elements for permanent habitat conservation. The 2021 ITP for the 2020 HCP covers a variety of otherwise lawful activities that would cause habitat

loss on 66,301 acres of potentially suitable and occupied desert tortoise habitat in the County.

7. The Service and BLM jointly prepared an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) for four decisions in Washington County, Utah. The draft EIS public comment period started June 12, 2020, for a 90-day comment period and the final EIS was released on November 13, 2020, for a 30-day comment period. The Service used the EIS for the proposed Federal action of issuing an ITP in response to Washington County, Utah's 2020 amended HCP application. BLM also used this EIS to determine whether to grant the Utah Department of Transportation's (UDOT) Federal Land Policy and Management Act Title V right-of-way (ROW) application through Reserve Zone 3 and amend the St. George Resource Management Plan (RMP) and the Red Cliffs RMP. The ROW is a changed circumstance in the 2020 amended HCP and 2021 ITP.
8. The Service conducted an intra-Service consultation under section 7(a)(2) of the ESA, analyzing effects to listed species from the implementation of the 2020 Amended HCP and issuance of an ITP for the County. The Service also conducted ESA section 7(a)(2) consultation with BLM to analyze the effects of the BLM's proposal to grant the ROW.
9. The Records of Decision (ROD) were jointly issued by BLM and FWS on January 13, 2021, and includes the following decisions: (1) the BLM decision adopting the amendments to the Red Cliffs NCA RMP; (2) the BLM decision approving the issuance of the ROW grant on BLM-administered lands to UDOT for a divided four-lane highway through the NCA (the Northern Corridor); (3) the BLM decision approving the



amendments to the St. George Field Office RMP; and (4) the Service's decision to issue an ITP to Washington County, Utah.

10. There were four fires that burned within Reserve Zone 3 towards the end of 2020. The Lava Ridge Fire burned 348 total acres completely within suitable desert tortoise habitat in Reserve Zone 3. The Turkey Farm Road Fire burned 11,995 total acres (6,688 acres within suitable tortoise habitat in the Reserve). The Snow Canyon Fire burned 799 total acres (145 acres within suitable tortoise habitat in the Reserve). The Cottonwood Trail Fire burned 1,623 total acres (1,369 acres within suitable tortoise habitat in the Reserve).
11. Extensive monitoring from July to September 2020 for tortoise impacts was conducted in areas impacted by the Cottonwood Trail Fire. Biologists from the BLM observed 14 dead tortoises (5 adult and 9 juvenile) in the approximately 600-acre survey area whose cause of death was directly attributable to fire. Additionally, their survey documented opportunistic predation by a woodrat on a fire-injured individual who was too weak to defend itself. If mortality patterns were similar across all the 2020 fires, we could estimate a total loss of approximately 70 adults and 125 juveniles due to the 2020 fires. Adult mortality is especially impactful given desert tortoises' ecological strategy of long-lived adults with low reproductive capacity.
12. The Service has substantial and legitimate concerns that the Final EIS and ITP ROD did not fully consider the extent of four wildfires that occurred in the Reserve in 2020 before the ROD was signed. These wildfires were likely significant new circumstances that required further analysis of the impacts associated with the wildfires through supplemental NEPA. The Service is concerned that it did not adequately analyze the wildfires' impacts to both the desert tortoise and its habitat in light of the new fire regime

and the rise of non-native vegetation in desert tortoise habitat. The Service is also concerned that the public did not have an opportunity to comment on this new information before the ITP ROD was signed as required under NEPA. This necessitates a remand of the ITP ROD for supplemental analysis.

13. In particular, the Service is concerned that the Final Environmental Impact Statement (FEIS) lacks sufficient analysis about (1) the trend in the increasing frequency and extent of wildfires in the Mojave Desert; (2) the rise of non-native/exotic and invasive vegetation in post-burn areas; and (3) the impacts increased fire and new non-native/exotic and invasive vegetation has on desert tortoise.
14. The Service acknowledges that a supplemental analysis about the impacts the 2020 wildfires had on the desert tortoise and its habitat is necessary to better inform the agency's review of Washington County's ITP.
15. Based on the concerns described above, the Service requests that this court remand the ITP so that the Service may further comply with NEPA for the analysis supporting the decision to issue the ITP for the 2020 amended HCP.
16. In addition to addressing the NEPA concerns, the Service may address additional issues in the NEPA analysis raised by Plaintiffs or during public involvement, including a determination as to whether it intends to amend the ITP.
17. The Service will also consider any changes to BLM's actions as a result of the supplemental NEPA analysis. Pending any new decision by BLM, the Service may need to revise the biological opinions for the ROW and the Washington County ITP.
18. The Service recognizes the value and importance of conserving the desert tortoise and working with our conservation partners, Washington County and the State of Utah.

Therefore, we are not seeking to vacate the permit during the remand and will instead address any changes to the permit through 50 C.F.R. § 13.23(b). Following remand, the Service will work closely with Washington County, as the permittee, pursuant to 50 C.F.R. § 17.32 and the HCP Handbook<sup>2</sup>. The Service recognizes that “no surprises” assurances apply to the ITP and accordingly will not require the permittee to commit to additional land, water, or financial compensation. Further, the Service will not impose additional restrictions on the permittee’s use of land, water, or other natural resources beyond what was agreed to in the HCP/ITP without the consent of the permittee.

19. Keeping the ITP in place during the remand will allow development to continue on private land in Washington County. If the ITP is vacated, Washington County would no longer have take coverage for actions described in the 2020 HCP or the actions described in the 1995 HCP that were continued during the ITP evaluation process through 50 CFR § 13.22. Therefore, with vacatur of the ITP, land development (i.e. land clearing and building construction) and other covered activities (e.g., livestock grazing, utility easements, recreation events, mining, drilling, renewable energy development, etc.) occurring on private land within occupied or suitable desert tortoise habitat in Washington County would likely halt until a new ITP is issued, as the Service is unaware of any conservation measures that could be implemented to avoid take of the desert tortoise from covered activities. This would also halt conservation actions under the HCP that contribute to the recovery of desert tortoises in the Upper Virgin River Recovery Unit. Finally, vacating the ITP would likely irreparably damage relationships between the Service and local communities in Washington County.

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<sup>2</sup> The December 2016 HCP Handbook is available at <https://www.fws.gov/media/habitat-conservation-planning-and-incidental-take-permit-processing-handbook>

20. The Service's Utah Ecological Services Field Office has lost several biologists as well as the Field Office Supervisor since completion of the ROD in January 2021. Additionally, the Utah Ecological Services Field Office has a high volume of other existing ESA workload, such as other deadlines to complete court mandated ESA Section 7 consultations and Section 4 listing and status review determinations that it is obligated to complete within the next two years. FWS will be dependent upon BLM for procuring and funding a consultant to assist with completing a Supplemental Environmental Impact Statement (SEIS). It is possible that the contracting process for that consultant will create otherwise unforeseen delays with the proposed schedule below.
21. After BLM makes a new decision on the ROW application, the Service will make a decision on whether to amend and reissue the incidental take permit within approximately 18 months from the time of this court's remand order. This will require the following steps:
  22. First, the Service and BLM must publish a Federal Register notice of intent to supplement the EIS.
  23. Next, the Service and BLM will draft a SEIS to consider the four fires that occurred in the NCA in 2020. The Service and BLM will update any other new information that needs to be considered. This will require extensive coordination between the agencies.
  24. The Service and BLM will publish the Notice of Availability of the draft SEIS for public review and comment.
  25. Next, the Service and BLM will address public comments and edit the SEIS before publishing the Notice of Availability for the Final SEIS, publishing and signing the

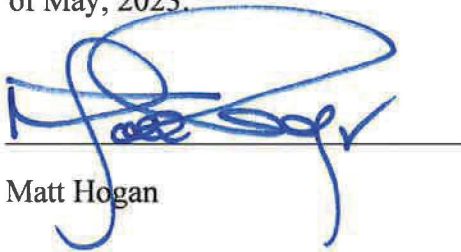


RODs. The Service will evaluate the ITP to determine whether it needs to be amended and will evaluate whether to reinitiate ESA Section 7 consultation for the ROW and ITP.

26. The Service and BLM expect to complete the SEIS and issue new RODs, if appropriate, by approximately November 2024, subject to any unforeseen delays.

Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct to the best of my knowledge.

Executed in Jefferson County, CO, on this 22nd day of May, 2023.



Matt Hogan