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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CONSERVE SOUTHWEST UTAH, et al., *Plaintiffs*, v. U.S. DEPARTMENT OF INTERIOR, et al., *Defendants*, and UTAH DEPARTMENT OF TRANSPORTATION, et al., *Defendant-Intervenors.*	Case No. 1:21-cv-01506-ABJ

MOTION FOR VOLUNTARY REMAND WITH PARTIAL VACATUR

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Federal Defendants United States Department of the Interior ("DOI"), United States Bureau of Land Management ("BLM"), and United States Fish and Wildlife Service ("FWS") request that the Court grant their request for voluntary remand of several decisions associated with a right-of-way grant to the Utah Department of Transportation ("UDOT") in Washington County ("ROW"). Specifically, Federal Defendants seek the following relief: (1) BLM requests voluntary remand and vacatur of the ROW decision and grant; (2) BLM requests voluntary remand of the amendments to the Red Cliffs National Conservation Area Resource Management Plan ("RMP") and the St. George Field Office RMP for further consideration; and (3) FWS requests voluntary remand of the Incidental Take Permit ("ITP") for the Mojave Desert Tortoise ("desert tortoise" or "tortoise"), and the associated biological opinion. On remand, Federal Defendants intend to reconsider these actions and decisions, after further analysis, as discussed below.

At the moment, Plaintiffs take no position on the motion. Plaintiffs will be filing a responsive pleading advising the Court and the Parties of their position. Both Intervenor UDOT and Intervenor Washington County oppose the motion.

INTRODUCTION

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Land Policy and Management Act

Pursuant to the Federal Land Policy and Management Act ("FLPMA"), BLM is charged with managing federal public lands for multiple uses, including protecting environmental, ecological, and recreational values, unless a tract of public land is dedicated to specific purposes by other applicable law. *See* 43 U.S.C. § § 1732, 1702(c); *see also id.* § 1701(a)(7). Under Title V of FLPMA, BLM may grant rights-of-way across public land for various uses, including the

construction of new roads. *Id.* § 1761(a)(6). An entity seeking a ROW must submit an application disclosing the intended use of the right-of-way, plans, and any other information deemed necessary by the Secretary. *Id.* § 1761(b)(1). If approved, a ROW grant should include terms and conditions ensuring that the applicant minimizes potential environmental impacts and complies with relevant federal and state air and water quality standards, among other things. *Id.* § 1765.

B. National Environmental Policy Act

The National Environmental Policy Act ("NEPA") serves the dual purpose of informing agency decision-makers of the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public so that they "may also play a role in both the decisionmaking process and the implementation of that decision." *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To meet the procedural goals of the statute, NEPA requires that an agency prepare a comprehensive environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

C. National Historic Preservation Act

Section 106 of the National Historic Preservation Act ("NHPA") requires federal agencies to consider the potential effects of federal "undertakings" on historic properties. 54 U.S.C. § 306108. Section 106 of the NHPA "is a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (per curiam) (citations omitted). The Advisory Council on Historic Preservation ("Advisory Council") administers the NHPA, *see* 54 U.S.C. § 304101, and has promulgated regulations to govern federal agency compliance with Section 106,

codified at 36 C.F.R. Part 800. The Advisory Council's regulations direct agencies to determine whether a project qualifies as an "undertaking" and is a "type of activity that has the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). The NHPA broadly defines "undertaking" to include "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including – (1) those carried out by or on behalf of the Federal agency; . . . (3) those requiring a Federal permit, license, or approval . . . ." 54 U.S.C. § 300320. If an undertaking is the type of activity with the potential to cause effects on historic properties, then the agency must consult with the State Historic Preservation Office and other consulting parties, including "[d]etermin[ing] and document[ing] the area of potential effects." 36 C.F.R. § 800.4(a)(1); *see also id*. § 800.16(d). The agency also must "consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking," *id.* § 800.2(c)(2)(ii), and must provide such tribes or organizations a reasonable opportunity to identify historic properties and provide input regarding potential adverse effects on such properties. *Id.* § 800.2(c)(2)(ii)(A).

An agency must "make a reasonable and good faith effort" to identify historic properties within the undertaking's area of potential effects. *Id.* § 800.4(b)(1); *see also Summit Lake Paiute Tribe of Nev. v. U.S. Bureau of Land Mgmt.*, 496 F. App'x. 712 (9th Cir. 2012). If the agency finds that historic properties may be affected, it must further consult with all consulting parties. 36 C.F.R. § 800.4(d)(2). The agency then applies the regulatory criteria to determine whether there is an adverse effect, *id.* § 800.5(a), and, if so, engages in further consultation regarding the resolution of any such adverse effects, *id.* § 800.6. In certain circumstances, an agency may negotiate a programmatic agreement with the Advisory Council for compliance with Section

106. *Id.* § 800.14(b). Where a programmatic agreement exists for an agency program, compliance with the agreement serves as compliance with the statute. *Id.* § 800.14(b)(2)(iii).

D. Endangered Species Act

Congress enacted the Endangered Species Act ("ESA") in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species[.]" 16 U.S.C. § 1531(b).

Under Section 7(a)(2), federal agencies must ensure that any action funded, authorized, or carried out by the agency is "not likely to jeopardize the continued existence of any endangered species or threatened species" or to destroy or adversely modify its critical habitat. *Id.*§ 1536(a)(2). The ESA requires that action agencies consult with FWS or the National Marine Fisheries Service ("consulting agency") whenever the agency's action "may affect" a listed species. *Id.*; 50 C.F.R. § 402.14(a). If the action is "likely to adversely affect" listed species or critical habitat, the agencies must engage in formal consultation. *Id.* § 402.14(b)(1). Formal consultation culminates in the issuance of a "biological opinion" by the consulting agency. *Id.* § 402.14(h).

Under Section 9 of the ESA, it is unlawful to "take" endangered species within the United States. 16 U.S.C. § 1538(a)(1)(B). FWS can extend the prohibition against "take" to threatened species. *Id.* § 1533(d); 50 C.F.R. § 17.31. The definition of " 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The regulations define "harm" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation

where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

Section 10 of the ESA allows, however, for the incidental take of listed wildlife species under permit. 16 U.S.C. § 1539(a)(1)(B) (take may be permitted "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity"). To receive an ITP, an applicant must submit a habitat conservation plan ("HCP"). *Id.* § 1539(a)(2)(A); *see also* 50 C.F.R. § 17.32(b)(1). If FWS finds "with respect to a permit application and the related conservation plan" that the taking "will be incidental" and "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild," and that the applicant "will . . . minimize and mitigate the impacts of such taking" and "ensure that adequate funding for the plan will be provided," FWS "shall" issue an ITP. 16 U.S.C. § 1539(a)(2)(B); *see also* 50 C.F.R. §§ 17.22, 17.32 (implementing regulations).

FWS enacted a policy to protect ITP holders once a Section 10 permit is granted, referred to as the "No Surprises" Rule. 63 Fed. Reg. 8859, 8863 (Feb. 23, 1998), codified at 50 C.F.R. § 17.22 and 17.32. This rule provides that, if unforeseen circumstances occur, FWS "will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for the species covered by the conservation plan without the consent of the permittee." 50 C.F.R. § 17.22 and 17.32.

II. FACTUAL BACKGROUND[1]

BLM administers the Red Cliffs National Conservation Area ("NCA"), located in Washington County in southwestern Utah. AR 085601. This area was established by the Omnibus Public Land Management Act of 2009, 16 U.S.C. § 7202, Public Law 111-11, and includes 2,631 acres of private lands and 13,735 surface acres owned by the State of Utah. AR 085598, 085601-02, 088229-30. Washington County, in the southwestern corner of Utah, is located between Salt Lake City and Las Vegas, Nevada. AR 067554.

The desert tortoise is a listed "threatened" species under the ESA and is found across portions of southwestern Utah, northwestern Arizona, southern Nevada, and southeastern California.[2] AR 079412-15, 099303, 100016-18, 101664-66. One purpose of the Red Cliffs NCA involves the protection of the desert tortoise. The public lands of the Red Cliffs NCA comprise approximately 70% of the land base of the approximately 62,000-acre, multi-jurisdictional reserve for the protection of the desert tortoise that includes its designated critical habitat. AR 088230. FWS issued its Desert Tortoise Recovery Plan in 1994 that identified six recovery units throughout the range of the desert tortoise, including the Upper Virgin River Recovery Unit

[1] Plaintiffs filed their Statement of Facts pursuant to Local Civil Rule 7(h)(2) on February 27, 2023. ECF No. 42-1. In light of Federal Defendants' motion to voluntarily remand the agencies' actions at issue, Federal Defendants have not addressed the substance of Plaintiffs' Statement of Facts in the current motion or other separate filing. To the extent that the Court finds it necessary, Federal Defendants deny any fact inconsistent with the facts contained herein and/or their Answer. Federal Defendants believe that Plaintiffs' separate statement of facts is improper under Local Civil Rule 7(h)(2). ECF No. 52. Should the Court order further response, Federal Defendants will promptly file their response to Plaintiffs' Statement of Facts.

[2] In 1990, FWS listed the desert tortoise as a "threatened" species. AR 065449-62. In 1994, FWS designated 6.4 million acres of critical habitat under the ESA for the tortoise, including the critical habitat "recovery units" described below. AR 066397-443, 059158-59.

("UVRRU"), which is all desert tortoise habitat in Washington County except the Beaver Dam Slope, Utah, population. AR 066474, 066505-07.[3]

But the Red Cliffs NCA's establishing act also directed BLM to "develop a comprehensive travel management plan for the land managed by the Bureau of Land Management in the County." Public Law 111-11, Subtitle O, Section 1977, AR 088259 (2016 NCA RMP), 099931 (2020 Final Environmental Impact Statement ("FEIS")). The ROW at issue was issued under this direction. AR 057409, 058984-85. BLM's St. George Field Office administers the Red Cliffs NCA. AR 068815, 085581. Relevant here, the Red Cliffs RMP and the St. George Field Office RMP govern BLM's management decisions within the Red Cliffs NCA and surrounding areas. AR 047044-158; 088223-383.[4] These RMPs address implementation of various management decisions, including the ROW and implementation of measures for the preservation and protection of the desert tortoise. AR 068815.

A. 1995 HCP and 1996 ITP

Washington County prepared an HCP in 1995 for the conservation of desert tortoises in the UVRRU. AR 067554, 101758. The stated purpose of the HCP was to "provide a comprehensive approach to preserving and protecting Mojave Desert tortoise habitat in Washington County, while at the same time allowing controlled growth and development in

[3] The desert population of the UVRRU is notable because it represents the northern-most population of the species, and densities of tortoises are very high in some areas of the unit. AR 066711.

[4] Prior to the actions in the present case, BLM promulgated the first Red Cliffs NCA RMP and amended the existing St. George Field Office RMP in 2016. AR 088222-383 (Red Cliffs Record of Decision ("ROD") and Approved RMP), 047044-158 (St. George Field Office ROD and Approved RMP).

those portions of desert tortoise habitat which are less essential to the species." AR 067555, 067565-66, 067573-76.

The central element of the HCP was the creation of a Mojave Desert habitat reserve in Washington County ("the Reserve"). AR 067577. The Reserve consisted of 61,022-acres,[5] including an area for the desert tortoise critical habitat for management and protection of the desert tortoise and other listed, candidate, and sensitive species. *Id.*, AR 067555, 101758.[6] The reserve was divided into five management zones. AR 067581-067599. Zone 3, in particular, was to be managed for the preservation and enhancement of the tortoise. AR 067588.

Approximately two-thirds of the Reserve is under BLM or Utah State Park management, and the remaining one-third of the land in the Reserve was under private ownership or was administered by the State of Utah School and Institutional Trust Lands Administration ("SITLA"). AR 067577-78, 045217-18. The 1995 HCP adopted a strategy to use the Land and Water Conservation Fund to acquire remaining private and municipal lands for wildlife habitat and threatened and endangered species preservation. AR 067577-78.

In concert with the HCP, Washington County applied for a county-wide ITP to allow take anywhere in the County outside the Reserve. AR 067555, 067604. FWS issued an ITP to Washington County in February 1996. AR 068419. In granting the ITP, FWS found that the formation of the Reserve offset loss of habitat and incidental take of 1,169 desert tortoises from

[5] There have also been Reserve boundary adjustments since 1995, and the Reserve expanded to 62,009 acres before the actions at issue (a net gain of 987 acres). AR 101653.

[6] *See* AR 101653 (history of land acquisition and contributions by Washington County to the formation of the Reserve).

covered activities. AR 068420. The ITP was in effect from March 15, 1996, to March 14, 2016. AR 068420.

B. Northern Corridor Highway ROW

On September 4, 2018, UDOT submitted an application to BLM for a grant of ROW in Zone 3 of the Reserve of the Red Cliffs NCA for the proposed Northern Corridor highway, which would be approximately 5 miles long and cross federal, SITLA, State of Utah, and private lands in Washington County. AR 008849-50. UDOT noted that the issuance of the ROW may necessitate amendments to the Red Cliffs and St. George RMPs and that coordination with FWS would be necessary to evaluate the project's effects and potential mitigation. AR 008849-50, 008853. Federal Defendants agreed and prepared amendments to the Red Cliffs and St. George RMPs consistent with the proposed ROW. AR 000325, 099932-34. In January 2021, FWS issued a biological opinion for the ROW that found the proposed action was not likely to jeopardize the existence of the desert tortoise or destroy or adversely modify its critical habitat. ("2021 ROW Biological Opinion"). AR 101826.

Even after a ROW issues, construction or other ground-disturbing activities may not proceed unless and until Federal Defendants issue a Notice to Proceed. *See, e.g.*, AR 057696 (FEIS) and 059008 (ROD). A Notice to Proceed for this ROW has not yet issued, and no construction or other ground-disturbing activities have occurred.

C. NEPA Review

BLM and FWS jointly undertook NEPA analyses for the ROW application and potential amendments to the ITP and both RMPs. On December 5, 2019, BLM and FWS jointly published in the Federal Register a Notice of Intent to Prepare an Environmental Impact Statement. AR 000326; 84 Fed. Reg. 66,692 (Dec. 5, 2019). On November 12, 2020, BLM and FWS issued the

FEIS for the proposed Northern Corridor highway and associated actions. AR 099892-921 (Vol. 1), 099922-100225 (Vol. 2), 100226-553 (Vol. 3), 100554-101489 (Vol. 4).

D. NHPA Analysis

In its Notice of Intent to Prepare an EIS, BLM communicated to the public that it intended to meet its NHPA Section 106 obligations through the NEPA process for this project. This included establishing the undertakings, identifying and consulting with interested parties, identifying points in the process to seek input from the public, and notifying the public of proposed actions. The agency identified the undertakings as the ROW and the plan amendments to the NCA and St. George Field Office RMPs. Around this time, BLM also began government-to-government consultation with 14 American Indian Tribes and Bands. On December 30, 2019, the Hopi Tribe responded to this initial consultation, stating concerns that the proposed Northern Corridor would adversely impact cultural and natural resources that are significant to the Tribe. AR 100221 (FEIS at 4-3 (4.2.3)). On February 10, 2020, the agency made a presentation about the project to the Paiute Indian Tribe of Utah. *Id.* BLM also consulted with the Utah State Historic Preservation Office, the Utah Division of Wildlife Resources, SITLA, and other interested parties.

In the FEIS, BLM acknowledged that "construction of the Northern Corridor highway … would result in adverse effects to historic properties under Section 106 of [the] NHPA and would directly impact cultural resources under NEPA, causing permanent or long-term effects to NHPA-eligible archaeological sites, through physical damage or alteration resulting in the loss of information important in history or prehistory…." AR 100125 (FEIS at 3-151 (3.14.2.3)). BLM also acknowledged that adopting the ROW alignment in UDOT's application "would result in the most direct impacts to eight cultural resources." *Id*. The BLM ROW also "would result in a

direct impact to a prehistoric petroglyph panel in the [area of potential effects] through the introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features by altering the resources setting, feeling, and association." *Id*.

BLM also stated that, if it decided to issue a ROW, "American Indian Tribes and other consulting parties would have the opportunity to participate in the development of a Memorandum of Agreement that would address the resolution of adverse effects to historic properties, based on the implementation of approved treatments prior to BLM's issuance of a Notice to Proceed to UDOT for construction." AR 100220 (FEIS at 4-2 (4.2.2)).

While BLM committed to developing "mitigation options designed to resolve the adverse effects to the maximum extent possible," AR 100125, however, the agency did not develop those proposed measures in its EIS. The agency also did not establish a binding commitment to implement such measures in its ROD or in a Memorandum of Agreement ("MOA"). Declaration of Gregory J. Sheehan ¶ 6. The ROD reiterated BLM's commitment in the EIS to develop an MOA with American Tribes and other consulting parties to address the resolution of adverse effects to historic properties prior to issuance of a notice to proceed, but no such MOA was prepared prior to BLM's issuance of the ROD. AR 101890 (ROD at 26 (5.3.4)).

On February 12, 2021, BLM received a letter from the Advisory Council, which raised concerns about the BLM's compliance with Section 106 of the NHPA during the Northern Corridor approval process. Sheehan Decl. ¶ 7. The Advisory Council recommended four corrective actions. *Id*.

E. 2020 Amended HCP

In October 2020, Washington County adopted and approved a 2020 Restated and Amended Habitat Conservation Plan that addressed the proposed Northern Corridor ROW's effect on the Reserve. ("2020 HCP"). AR 099432-891. For the Amended HCP, Washington County proposed to mitigate the effects from the Northern Corridor highway to the Reserve through BLM's, SITLA's, and Washington County's establishment and management of a new 6,813-acre reserve, known as "Zone 6" – an area south and west of the Reserve.[7] AR 099592. As part of the proposed action, BLM would manage the public lands in Zone 6 consistent with and as a part of the Reserve for the conservation of desert tortoise. AR 099961. In addition, BLM would further seek opportunities to acquire other lands (SITLA or private) in non-Federal portions of Zone 6 to extend Federal protections throughout Zone 6. AR 099595. BLM and SITLA committed to the establishment of Zone 6 on their lands to offset adverse effects from the highway as part of the changed circumstances for the Washington County HCP, meaning that the establishment of Zone 6 was directly contingent on the approval of the highway Project through the existing Reserve. AR 099592.

In early 2021, FWS issued a Biological Opinion for the 2020 amended Washington County HCP ("HCP Biological Opinion"), concluding that implementing the Amended HCP and ITP would not likely result in jeopardy to the desert tortoise or adverse modification of designated critical habitat. AR 101646-756.

[7] Approximately half of the land for Zone 6 is currently managed by BLM and the other half by SITLA. AR 099959 (FEIS at 2-21 (2.4.2.6)).

F. January 2021 Decisions

On January 13, 2021, BLM issued a ROD that included the following decisions: (1) the decision adopting the amendments to the Red Cliffs NCA RMP; (2) the 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); and (3) the decision approving the amendments to the St. George Field Office RMP. AR 101859 ("BLM ROD"). On this same date, and based on this ROD, BLM issued the ROW grant to UDOT. AR 102813-46. Also on this same date FWS issued its ROD with a decision to issue an ITP to Washington County, Utah. AR 102120 ("FWS ROD").

STANDARD OF REVIEW

A district court has broad discretion to decide whether and when to grant an agency's request for a voluntary remand without vacatur. *See Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 381 (D.C. Cir. 2017).

"'Voluntary remand' is typically appropriate (i) when new evidence becomes available after an agency's original decision was rendered, or (ii) where intervening events outside of the agency's control may affect the validity of an agency's actions." *FBME Bank Ltd. v Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015) (cleaned up). "Even in the absence of new evidence or an intervening event, however, courts retain the discretion to remand an agency decision when an agency has raised 'substantial and legitimate' concerns in support of remand." *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 132 (D.D.C. 2010). "An agency may also 'request a remand (without confessing error) in order to reconsider its previous position.'" *Clark v. Perdue*, No. 19-cv-394 (JEB), 2019 WL 2476614, at *2 (D.D.C. June 13, 2019) (quoting *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436) (D.C. Cir. 2018) (per curiam).

Courts "generally grant" such requests "so long as 'the agency intends to take further action with respect to the original agency decision on review.'" *Util. Solid Waste*, 901 F.3d at 436 (quoting *Limnia*, 857 F.3d at 386); *see Edward W. Sparrow Hosp. Ass'n v. Sebelius*, 796 F. Supp. 2d 104, 107 (D.D.C. 2011) (noting that motions for voluntary remand are "usually granted"). A court will refuse voluntary remand, however, "if the agency's request appears to be frivolous or made in bad faith." *Util. Solid Waste*, 901 F.3d at 436. In addition, the court may refuse voluntary remand upon a showing that "remand would unduly prejudice the non-moving party." *Id.*; *see Am. Waterways Operators v. Wheeler*, 427 F. Supp. 2d 95, 98(D.D.C. 2019).

A court may also grant a voluntary remand with vacatur, albeit under more limited circumstances. Courts in this district have cautioned that such relief is not available without judicial consideration of the merits when an agency seeks vacatur of a final rule. *See Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) (observing, "granting vacatur here would allow the Federal defendants to do what they cannot do under the [Administrative Procedure Act], repeal a rule without public notice and comment, without judicial consideration of the merits"). And some courts in this district have further opined that a vacatur is unavailable under the Administrative Procedure Act absent a finding of unlawful or arbitrary agency action. Notwithstanding those decisions, a court may grant a remand with vacatur where an agency confesses error and the agency action sought to be vacated is not a rulemaking subject to notice-and-comment requirements. In determining whether to remand with vacatur, courts should consider both the seriousness of the challenged action's deficiencies and the likely disruptive consequences of vacatur. *See Allied-Signal, Inc. v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

ARGUMENT

I. The Court Should Grant Federal Defendants' Request for Voluntary Remand and Vacatur of the ROW.

The Court should grant Federal Defendants' request for voluntary remand of the ROW decision. As explained below, Federal Defendants have identified legal errors associated with NHPA compliance, and they have substantial and legitimate concerns about NEPA compliance for the ROW. On remand, Federal Defendants intend to rectify these errors and address these concerns before making any new determination or taking any further actions associated with the ROW. Specifically, on remand, and after rectifying these errors and addressing these concerns, BLM would reconsider UDOT's 2018 ROW application through a new ROD. As part of the voluntary remand, the Court should also vacate the ROW grant, because Federal Defendants have concluded that the identified NHPA errors should be rectified and the supplemental NEPA analysis completed before issuing a ROW grant.

A. Voluntary Remand to BLM is Appropriate Here.

Here, BLM has identified both legal error and substantial and legitimate concerns for the ROW. First, with regard to legal error, Federal Defendants have concluded that BLM failed to properly comply with the NHPA before issuing the ROW. *See* Sheehan Decl. ¶ 3. The NHPA "Section 106" process requires that BLM evaluate whether there are impacts to historical or cultural resources. Furthermore, if there are such impacts, the NHPA's implementing regulations require BLM to make a binding commitment to avoid, minimize, or mitigate the adverse effects in either the ROD or a memorandum of agreement with either the Advisory Council or the Utah State Historic Preservation Office. *See* 36 C.F.R. § 800.8(c)(4). BLM has now concluded that it was legal error for it to issue the ROW without first determining those impacts and, if required, without first making those binding commitments. This legal error alone is sufficient to justify

remand to BLM to allow it to correct this error and then reconsider its associated actions and determination, such as the amendments to the RMPs, ROW, and associated ROD.

Furthermore, a general remand is also appropriate because BLM has identified substantial and legitimate concerns regarding its compliance with NEPA. Specifically, BLM is concerned that the challenged FEIS may lack 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 have on desert tortoise. *See* Sheehan Decl. ¶¶ 9-11. And BLM is concerned that supplemental analysis may be needed to better inform its review of the potential impacts of UDOT's ROW application in light of impacts from wildfires in 2020 to the desert tortoise and its habitat. *Id*. ¶ 12. These concerns independently support BLM's request for voluntary remand here.

On remand, BLM would address the legal errors under NHPA noted above, and would also address these NEPA concerns, and incorporate any new analyses into a new ROW decision. As described below, the new ROW may also inform what, if any, additional actions BLM may take on the amendments to one or both RMPs. At present, BLM estimates that it could complete that supplemental analysis for the ROW by November 2024. *See id.* (describing a timeline for interim steps pertaining to the anticipated Supplemental EIS ("SEIS") process).

Voluntary remand is particularly warranted where the agency seeks to re-examine scientific or technical issues and re-apply its expertise. *See Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, No. 05–3094–CO, 2007 WL 845915, at *5 (D. Or. Mar. 16, 2007) (judicial intervention could deprive agency of "the opportunity to correct any mistakes in the environmental analysis" and to apply its expertise). And courts in this Circuit and others have

recognized that voluntary remand is appropriate in cases involving additional analysis in agencies' permitting decision or additional NEPA analysis. *See Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 24 (D.D.C. 2008) (granting agencies' motion for voluntary remand of a Clean Water Act permit and ESA concurrence letter after recognizing that the agency may conduct additional environmental review pursuant to ESA or NEPA and take action on the permit); *N. Alaska Env't Ctr. v. Haaland,* Case Nos. 3:20-cv-00187-SLG, 3:20-cv-00253-SLG, 2022 WL 1556028, at *4 (D. Alaska May 17, 2022) (finding that remand of a ROW permit was appropriate when the agencies identified deficiencies underlying the original decisions, committed to taking further action with respect to the original agency decision on review, and identified "substantial and legitimate" potential issues, and there was no indication of bad faith); *Friends of DeReef Park v. Nat'l Park Serv.*, No. 2:13–cv–03453–DCN, 2014 WL 6969680 (D.S.C. Dec. 9, 2014) (granting the National Park Service's voluntary remand motion without its admission of error to "reconsider" its approval of conversion of park covenants to a replacement park to confirm whether its approval met requirements under NEPA and the NHPA).

B. Vacatur of the ROW is Appropriate Here.

As noted above, BLM has identified a legal error associated with NHPA compliance. BLM believes that this error needs to be corrected before any ROW can issue or development can proceed. Accordingly, and in light of that clear legal error[8], BLM seeks vacatur of the existing ROW grant.

On remand, as part of its new NEPA analysis described above, BLM will first determine the ROW's adverse effects and, if applicable, how to avoid, minimize, or mitigate those adverse

[8] To the extent "judicial consideration of the merits" is necessary in order to warrant vacatur, *see Nat'l Parks Conservation Ass'n*, 660 F. Supp. 2d at 5, Federal Defendants submit that this clear error warrants a judicial determination on the merits that the ROW decision violated the NHPA.

effects through a binding commitment in either a new ROD or a memorandum of agreement with either the Advisory Council or the Utah State Historic Preservation Office, before issuing any new ROW. After the NEPA analysis is complete and such a determination is made, it is possible that BLM might grant the same or similar ROW; it is also possible that BLM may offer a different ROW consistent with the determined impacts and appropriate binding commitments. Alternatively, it is possible that BLM may deny the proposed ROW if the impacts are such that they cannot be appropriately avoided, minimized, or mitigated. Federal Defendants do not prejudge the outcome, but simply seek to properly address these questions on remand before making any decision on the ROW. Vacatur of the existing ROW would clear the path for the appropriate outcome on remand.

The decision whether to remand without vacatur depends, in part, on whether "'vacating would be disruptive.'" *NAACP v. Trump*, 298 F. Supp. 3d 209, 244 (D.D.C. 2018) (JDB) (cleaned up) (quoting *Radio-TV News Dirs. Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999)). Here, vacatur would not be disruptive because there is no active work on the ground. UDOT has not submitted any final design plans and BLM has not issued a notice to proceed. Therefore, vacating the ROW will not interrupt any active efforts on the ground.

II. The Court Should Grant Federal Defendants' Request for Voluntary Remand Without Vacatur of the Amendments for Both RMPs.

BLM requests remand of the amendments to both RMPs because further consideration of those decisions is warranted. BLM has identified legitimate concerns associated with the underlying NEPA analysis related to the impacts of wildfire on both the Mojave Desert and the desert tortoise. Accordingly, without confessing error, BLM is requesting remand so that it may, as appropriate, review those decisions as it addresses any legal defects and other concerns with the ROW. *Clark*, 2019 WL 2476614, at *2 (quoting *Util. Solid Waste*, 901 F.3d at 436).

In addition to those issues, Plaintiffs have alleged additional NEPA violations and other legal claims related to the amendments to the NCA RMP that may also warrant further or revised analysis to one or both RMPs. The resolution of some, or all, of these issues may also lead BLM to reconsider its decision for one or both RMPs. *Id.* By remanding the RMPs to BLM, the court will help ensure that the agency is confident in its NEPA analysis as it relates to the RMPs. It may also result in some of Plaintiffs' concerns being addressed. For these reasons, BLM asks this Court to remand the two RMP decisions to the agency for further deliberation.

III. The Court Should Remand Without Vacatur FWS's ROD and Associated ITP and 2021 HCP Biological Opinion.

The request for remand of the ROW also impacts the other decisions at issue in this case. As explained below, the Court should remand without vacatur the 2021 approval of the Washington ITP to FWS for reconsideration and further appropriate action. BLM's grant of the ROW was a changed circumstance that FWS directly considered when deciding whether to approve the 2020 Amended HCP and ITP through the 2021 ROD and the 2021 HCP Biological Opinion ("ITP documents"). Vacatur of the ROW would require FWS to re-evaluate the 2020 Amended HCP and ITP; furthermore, the additional analysis anticipated in the SEIS may also bear on FWS's assessment of the amended HCP and ITP.

Re-evaluation of Washington County's 2020 Amended HCP and ITP will also need to factor in BLM's future action on the ROW. Based on this need for additional consideration, and on a "substantial and legitimate" concern in the underlying NEPA analysis, FWS respectfully requests that the Court remand the ITP, FWS ROD, and 2021 HCP Biological Opinion to FWS, but leave the ITP in place while the agency re-evaluates the 2020 Amended HCP and ITP. In light of the prevailing law in this Circuit, this Court should remand without vacatur for the reasons outlined below.

A. The Agency Has Identified "Substantial and Legitimate" Concerns with the Documents Underlying the ITP.

The grounds upon which FWS seeks voluntary remand in this case are reasonable. The remand would, in effect, serve three purposes. First, remand would allow FWS to evaluate the ITP based on BLM's further action on the proposed ROW. Depending on BLM's determination, FWS would need to re-evaluate whether BLM's action affects the desert tortoise or its habitat in ways not considered by the 2021 HCP Biological Opinion. If BLM does not re-approve the ROW and eliminates the formation of Zone 6 in the Reserve, FWS would need to reconsider the amount of take allowed to Washington County in the 2021 ITP.

Second, remand would allow the agency to reconsider Washington County's 2020 Amended HCP and ITP based on the supplemental environmental analysis of the fires and their effects, if any, in the SEIS. Sheehan Decl. ¶ 11. As noted above, both agencies recognize that supplemental NEPA analysis is required because of legitimate concerns about the level of environmental analysis contained in the FEIS. *See* Argument Section I.A, *supra*. And as further explained in the Declaration of Matt Hogan, FWS has identified "substantial and legitimate concerns" in the ITP decision documents wherein the agency did not fully consider the extent of four wildfires that occurred in the Reserve in 2020 and their impacts to both the desert tortoise and its habitat.[9] Hogan Decl. ¶ 10. The impact of these fires could have potential impacts on the desert tortoise that may not have been fully considered in the ITP documents. For one, the FEIS

[9] These fires burned either completely or partially within Reserve Zone 3 in 2020 and included: (1) the Lava Ridge Fire that burned 348 total acres completely within suitable desert tortoise habitat in Reserve Zone 3; (2) the Turkey Farm Road Fire that burned 11,995 total acres (6,688 acres within suitable tortoise habitat in the Reserve); (3) the Snow Canyon Fire that burned 799 total acres (145 acres within suitable tortoise habitat in the Reserve); and (4) the Cottonwood Trail Fire that burned 1,623 total acres (1,369 acres within suitable tortoise habitat in the Reserve). Hogan Decl. ¶ 10.

may have lacked sufficient analysis about the increasing frequency and extent of wildfires in the Mojave Desert, the rise of non-native/exotic and invasive vegetation in post-burn areas, and the impacts of increased fire on non-native/exotic and invasive vegetation on the desert tortoise. *Id*. ¶ 10. And, as a result, the fires may not have been sufficiently considered in the 2021 HCP Biological Opinion. Additionally, FWS is concerned that the public did not have an opportunity to comment on this new information before the ITP ROD was signed. *Id*. ¶ 12; *see also Friends of Animals v. Williams*, --- F. Supp. 3d --- 2022 WL 3714226, at *3, 10 (D.D.C. Aug. 9, 2022) (granting FWS motion for voluntary remand without vacatur to reconsider its "threatened" finding and to solicit notice and comment on these issues).

Third, together with addressing these NEPA concerns and BLM's new action on the ROW application, FWS may address any other issues raised by Plaintiffs or the public during the public involvement period, including a determination as to whether FWS intends to amend the ITP. Hogan Decl. ¶ 16. This public involvement may help resolve or streamline Plaintiffs' issues prior to litigation.

The possible prejudice to Plaintiffs due to a remand of the ITP would be limited. Any issues relating to the information in the SEIS or grant of ITP could be raised by Plaintiffs during public comment and may be addressed before litigation before the courts. And, if Plaintiffs are satisfied with FWS's action on remand, it may obviate the need for further litigation. If Plaintiffs are dissatisfied with FWS's action, they may challenge that action at that time. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998) (Plaintiff "will have ample opportunity later to bring [their] legal challenge" in the context of a future agency action applying the challenged plan "when harm is more imminent and more certain"); *S.C. Wildlife Fed'n v. H.B. Limehouse*, No. 2:06-CV-2528-DCN, 2009 WL 2244210, at *5 (D.S.C. July 27,

2009) (agreeing that defendants' "reevaluation could affect plaintiffs' claims, perhaps even moot[ ] some of them").

Likewise, there would be no prejudice to Intervenor UDOT and limited prejudice to Intervenor Washington County from remand in this case. UDOT was not a party to the ITP and therefore would have no prejudice from the ITP's remand. And, following remand, FWS will work closely with Washington County, as the permittee, pursuant to 50 C.F.R. § 17.32 and the HCP Handbook. Hogan Decl. ¶ 18. FWS also 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. *Id.*; 50 C.F.R. §§ 17.22, 17.32. As described below, Washington County would still be able to use the ITP during the remand period. *See* Argument Section II.B.1, *infra*.

In light of the substantial and legitimate concerns discussed above, remand is appropriate in this case. The grounds upon which FWS seeks voluntary remand in this case are reasonable, and FWS has committed to a reasonable time frame in reassessing the ITP at issue if BLM reissues the ROW. Hogan Decl. ¶ 21. Thus, there is no argument to be made here that FWS's request is frivolous or in bad faith. And such a remand would conserve judicial resources by allowing "'agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete.'" *Util. Solid Waste*, 901 F.3d at 436 (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)); *see also Klamath Siskiyou Wildlands Ctr.*, 2007 WL 845915, at *5 (judicial intervention could deprive agency of "the opportunity to correct any mistakes in the environmental analysis" and to apply its expertise).

For all of these reasons, continued litigation of Plaintiffs' ESA claims would not be productive, and voluntary remand to FWS is appropriate.

B. The Court Should Remand the ITP Without Vacatur, Pending Completion of the Remand.

The court should remand FWS's ROD and associated ITP and 2021 HCP Biological Opinion without vacatur and leave the ITP in place until FWS completes its decision on remand. The decision whether to remand without vacatur depends on whether "'there is at least a serious possibility that the agency will be able to substantiate its decision,' and [whether] 'vacating would be disruptive.'" *NAACP*, 298 F. Supp. 3d at 244. Here, FWS could substantiate its original decision on remand, and vacating the grant of the ITP could have substantial disruptive effect on Intervenor Washington County's economic development and conservation efforts. Accordingly, remand without vacatur is the proper course.

1. There is a serious possibility that FWS may support its ITP decision after remand.

Here, there is a serious possibility that FWS could "substantiate its [original] decision" on remand. For one, FWS has performed a substantial amount of analysis regarding the ITP terms and conditions and there is a serious possibility that, following this updated analysis in the SEIS, FWS will be able to reaffirm its decision to issue the ITP. In particular, even if they were not thoroughly analyzed, the FEIS and 2021 HCP Biological Opinion described the fires occurring in the NCA and management actions in response to these fires. *See*, *e.g.*, AR 099948, 099956, 099958, 102085, 102091. It is likely that FWS could find that any deficiencies in its original analysis for the fires does not alter its conclusion that the ITP will not jeopardize the continued existence of desert tortoise or adversely modify tortoise critical habitat.

Second, the SEIS analysis may not trigger a change to the grant of Washington County's ITP at all.[10] FWS's HCP handbook acknowledges that "[e]ach revision of the HCP, section 7,

[10] Similarly, the ITP may not change if BLM reissues the ROW with substantially the same decision.

NEPA, or other documents or processes established under the HCP will not necessarily result in amending the incidental take permit." AR 088733. And FWS recognizes that the pertinent question in this case is whether to amend the ITP while balancing the agency's restriction from committing the permittee to conditions of its use of land, water, or other natural resources beyond what was agreed to in the HCP/ITP without the consent of the permittee. Hogan Decl. ¶ 18. Thus, any new information obtained from the SEIS or any other issues addressed on remand are not "insurmountable obstacle[s]" for FWS to overcome, and it may be able to substantiate its prior decision. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 98 (D.D.C. 2017) (remanding without vacatur where the court could not find that a report not considered by the agency "presented an insurmountable obstacle to justifying the Corps' prior [environmental analysis]"); *Md. Native Plant Soc'y v. U.S. Army Court of Eng'rs*, 332 F. Supp. 2d 845, 863 (D. Md. 2004) (finding that the agency may be able to justify its decision regarding a general purpose remand of a Clean Water Act permit to justify given the various agencies' reviews of the existing information).

2. Vacatur of the ITP would be disruptive to Washington County's economic development and conservation efforts for the desert tortoise.

Lastly, vacatur of the ITP would have disruptive consequences to Intervenor Washington County's interests in economic development and conservation measures for the protection of the tortoise. Washington County has had an ITP for the tortoise since 1996, which encompasses the entire county. AR 067555, 067604. If the ITP is vacated, the immediate effect is to cease several avenues of economic development in the county, if they result in take of the tortoise, until a new ITP is issued. Indeed, covered activities such as livestock grazing, building construction, recreation events, vehicle use, agricultural land treatments, mining, drilling, firefighting, and renewable-energy development could not occur without separate permitting. AR 099476-77;

Hogan Decl. ¶ 19. Thus, keeping the ITP in place during the remand would ensure that important and essential development continues on land in Washington County. *Id.*; 50 C.F.R. § 13.23(b).

Further, Washington County has committed to several conservation measures under the HCP that would potentially be halted if the ITP is vacated. Of utmost concern is that the County may no longer be able to support and implement clearance and development protocols to reduce take of desert tortoises associated with covered activities on non-federal lands within Washington County. AR 099555-57. In addition, if the ITP were vacated, the County may no longer contribute funding to support land acquisition within the Reserve. AR 099547. This includes offsetting costs associated with real estate transactions involving Reserve land acquisitions (i.e., appraisals, surveys, title searches, recording fees, and the like). If a fire occurs within the Red Cliffs Desert Reserve, the County may no longer dedicate funds budgeted for implementing conservation actions associated with Red Cliffs Desert Reserve Habitat and Fire Management Guidelines to support actions prescribed in an initial restoration plan. AR 099559-60. Further, the County may no longer contribute funds towards treatment of a disease outbreak affecting desert tortoises if one occurs in the Reserve. AR 099605. In addition, SITLA and other partners may no longer move forward with development and management of a conservation area and a conservation area management plan to protect the Central Valley population of Holmgren's milkvetch from development (approximately 42% of the species occurs in this population) or be able to commit to surveys to identify areas within suitable habitat that may be occupied by Holmgren's milkvetch. AR 099572-73. Finally, the County may not install Reserve fencing, pay for law enforcement, conduct community education and outreach, and manage recreation in the Reserve. AR 099442-46.

In sum, the high likelihood that FWS could substantiate its original decision on remand and the devastating disruptive effect on Intervenor Washington County's economic development and conservation efforts weigh heavily in favor of remand without vacatur in this case.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully move this Court to order remand and vacatur of the ROW, remand of the amendments to both RMPs, and remand of the ITP without vacatur.

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Respectfully submitted,

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