

**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; THE
WILDERNESS SOCIETY; WILDEARTH
GUARDIANS,**

Plaintiffs,

v.

**U.S. DEPARTMENT OF THE INTERIOR;
BUREAU OF LAND MANAGEMENT;
U.S. FISH AND WILDLIFE SERVICE,**

Defendants,

and

**UTAH DEPARTMENT OF
TRANSPORTATION and WASHINGTON
COUNTY, UTAH,**

Intervenor-Defendants.

Case No: 1:21-CV-01506-ABJ

**OPPOSITION OF INTERVENOR-DEFENDANT WASHINGTON
COUNTY, UTAH TO FEDERAL DEFENDANTS' MOTION FOR
VOLUNTARY REMAND WITH PARTIAL VACATUR**

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Intervenor-Defendant Washington County (the “County”) opposes Federal Defendants’ Motion for Voluntary Remand with Partial Vacatur (“Motion for Voluntary Remand”). Dkt. No. 53. Federal Defendants ask this Court to grant relief without reaching the merits of Plaintiffs’ claims and over the objections of the County and the Utah Department of Transportation (the “State”). They seek this extraordinary relief even though it would circumvent the lawful procedural requirements for rescission of a Bureau of Land Management (“BLM”) right-of-way grant and suspension or revocation of a Fish and Wildlife Service (“Service”) incidental take permit. Federal Defendants seek this relief though it would undoubtedly prejudice the County and the State that have expended many millions of dollars over the two-and-half year period since BLM and the Service issued the challenged federal agency determinations in reliance on those determinations. And they take a kitchen sink approach to remand, seeking the opportunity to revisit numerous federal agency determinations while offering threadbare arguments that those determinations were unlawful.

In order to minimize duplication, the County hereby joins in the State’s brief in opposition to the Motion for Voluntary Remand. In particular, the County relies on the State’s arguments with respect to BLM’s determinations that are subject to the Motion for Voluntary Remand. At the same time, the County herein sets forth its own arguments with respect to the Service’s determinations that are subject to the Motion for Voluntary Remand.

I. BACKGROUND

This legal action was initiated two years ago when Plaintiffs challenged numerous federal agency determinations and authorizations associated with: (1) Washington County’s effort to renew and update its 1995 Habitat Conservation Plan (“HCP”), culminating in the 2020 Amended HCP and the reissuance of an Incidental Take Permit (“ITP”) in January 2021 by the

Service to the County following review of the Amended HCP and (2) the Northern Corridor Project, a 4.5 mile long parkway crossing approximately 1.9 miles of the Red Cliffs National Conservation Area and authorized by Congress in the Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, §§ 1974, 1977, 123 Stat. 991, 1081-1083, 1088-1091 (Mar. 30, 2009), including a right-of-way grant to the State of Utah to construct the parkway.

A. The 1995 Habitat Conservation Plan and Incidental Take Permit

In 1995, the County prepared a HCP to facilitate development in the County and provide for the conservation of the Mojave desert tortoise (*Gopherus agassizii*, desert tortoise).

AR067557-58; AR099933-34. The Mojave desert tortoise is listed by the Service as threatened under the federal Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.* AR100016. The plan area for the 1995 HCP was the limits of Washington County, Utah. AR067558.

The 1995 HCP’s conservation program was designed to achieve within the County recommendations of the 1994 *Desert Tortoise (Mojave Population) Recovery Plan*. AR067565. The County’s commitments in the 1995 HCP significantly aided the broader, multi-agency goal of creation of the 61,022-acre Red Cliffs Desert Reserve (“Reserve”). AR099901. Creating the Reserve involved actions by the County and its HCP partners to define the Reserve boundary, consolidate approximately 18,609 acres of private or public school trust lands within the Reserve boundary into federal or state ownership, and establish certain land use restrictions protecting the Mojave desert tortoise within the Reserve. AR099467. Other conservation measures occurring either under or collateral to the 1995 HCP included actions to: (1) manage the Reserve for the benefit of the Mojave desert tortoise, such as removing grazing, installing fencing, and eliminating several motorized routes; (2) perform monitoring and research activities; (3) provide education to the public; (4) implement protocols for performing certain types of land use

activities inside and outside of the Reserve; and (5) collect and translocate Mojave desert tortoise from areas subject to land development and other human activities to under-occupied portions of the Reserve. AR067566-AR067567.

The County's commitments in the 1995 HCP supported issuance of an Incidental Take Permit ("ITP") by the Service to the County on March 15, 1996 (the "1996 ITP"). AR068419-AR068424. The 1996 ITP authorized the incidental take of desert tortoise associated with the Covered Activities that included otherwise lawful land use and land development activities across approximately 350,000 acres of non-federal lands outside the Reserve and a specific, very limited set of activities that could occur within the Reserve. AR068421. The 1995 HCP established special administrative procedures for performing Covered Activities in delineated incidental take areas where desert tortoise habitat was either known to be occupied or was deemed potentially occupied, including but not limited to advance notification (with desert tortoise surveys and translocation prior to development) and requiring the HCP Administrator to track the acres that were released for Covered Activities. *Id.*; AR067733-AR067758.

B. The Amended HCP and Incidental Take Permit

The 1996 ITP had a term of 20 years and an expiration date of March 14, 2016. AR068420. Prior to the expiration of the 1996 ITP, the County applied to the Service for renewal of the ITP. AR026428-AR026452. Importantly, the County neither sought to expand the list of Covered Activities in the Amended HCP nor sought to alter the amount of incidental take being authorized. AR099436-AR099437.

In June 2020, BLM and the Service published a draft environmental impact statement ("EIS") that analyzed the potential environmental consequences of both (i) the Service's proposed issuance an ITP for the desert tortoise for specific land use and land development

activities in Washington County and (ii) the BLM's proposed approval of a right-of-way for a short stretch of highway through the Red Cliffs National Conservation Area ("Red Cliffs NCA") and through associated non-Federal lands in the Reserve (*i.e.*, the Northern Corridor) and related amendments to two BLM resource management plans ("RMPs"). 85 Fed. Reg. 35,950 (June 12, 2020); AR098445. In October 2020, after extensive, collaborative work with the Service, the County submitted the Amended and Restated HCP ("Amended HCP") to the Service for renewal and amendment of the 1996 ITP. AR099432-AR099891. With the Amended HCP, the County amended and restated the 1995 HCP and sought a renewed and amended ITP ("Amended ITP") with an additional 25-year term. AR099436. The Amended HCP made certain changes to facilitate continued implementation of the recovery-focused HCP for the Amended ITP term. *Id.* While the Amended HCP reorganized, clarified, and updated the content of the 1995 HCP, the overall intent and basic framework of the 1995 HCP was preserved. *Id.*

Consistent with the Service's regulations governing issuance of permits for incidental take, 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5), in addition to describing Covered Activities and conservation measures intended to minimize and mitigate the impact of incidental take associated with those Covered Activities, the Amended HCP describes "changed circumstances" (as defined in 50 C.F.R. § 17.3) that may occur during the term of the ITP and measures the County will take in response to those changed circumstances and explains the assurances the Service provides to the County with respect to unforeseen circumstances. AR099591-AR099607. The changed circumstances include the potential for exceptional fire and drought as well as the potential for BLM to grant the State the right-of-way for the Northern Corridor and for the State to construct the Project. *Id.* Notably, the Amended HCP does not, under any circumstances, provide incidental take coverage for the Northern Corridor Project (which is covered by a

separate biological opinion and incidental take statement issued by the Service to BLM). Rather, under the changed circumstance that BLM approves the right-of-way for the Northern Corridor, the County would take other steps to ensure that the overall conservation program contemplated in the Amended HCP could be achieved. AR099592.

BLM and the Service issued a Final EIS in November 2020. 85 Fed. Reg. 72,683 (Nov. 13, 2020); AR099892. Then, on January 13, 2021, the Service issued a record of decision (“ROD”) to document its decision to issue a permit to Washington County to authorize the incidental take of the desert tortoise caused by Covered Activities. AR102103-AR102121. At the same time, the Service issued the Amended ITP to the County and approved implementation of the Amended HCP. AR102057-AR102102.

C. The Northern Corridor

In 2018, the State applied to BLM for a right-of-way to construct the Northern Corridor. AR099900. Congress established the Red Cliffs NCA and, in the authorizing legislation for the NCA, expressly instructed the Secretary of the Interior to develop a travel management plan that identifies a “northern transportation route” in Washington County in 2009. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, §§ 1974, 1977, 123 Stat. 991, 1081-1083, 1088-1091 (Mar. 30, 2009). In response to the right-of-way application, after extensive environmental review, the Secretary of the Interior approved the issuance of the right-of-way grant to the State for the Northern Corridor. AR101858-AR101915.

Under State law, the County is mandated to prepare a General Plan to guide development and protect the health, safety, and welfare of its residents. Decl. of Cameron in Supp. of Motion to Intervene (“Rognan Intervention Decl.”) (Dkt. No. 4-2) at ¶ 22. Because the majority of the land in the County is owned by the federal government, its General Plan reflects due

consideration of the interrelationship between the County and the federal agencies that administer such land, including the Bureau of Land Management. *Id.* The General Plan has for over a decade included the Northern Corridor as a major traffic route necessary to the County. *Id.* ¶ 23. Variations of the Northern Corridor have been studied and/or included in various transportation plans, environmental documents, and other studies as an option to provide a connection between the communities of Ivins, Santa Clara, and the western urbanized area of St. George to the west and Washington and Hurricane to the east. *Id.* ¶ 24.

The Northern Corridor will connect Washington Parkway in Washington City to Red Hills Parkway in St. George. AR099943. The Service issued a biological opinion that authorizes incidental take associated with the Northern Corridor Project. AR101757-101856. In addition, the County's Amended HCP prescribes a County response to the Northern Corridor changed circumstance. Specifically, the BLM's approval of the right-of-way triggers the County's obligation to establish, administer, and manage the designation of a new Reserve Zone 6 to achieve the purposes of the conservation program described in the Amended HCP. AR099449-50. This area would therefore be managed as part of the Reserve for the conservation of desert tortoise. *Id.*

II. ARGUMENT

A. It would be improper for the Court to remand Washington County's validly issued Incidental Take Permit

Federal Defendants request remand of the Fish and Wildlife Service's ROD,¹ ITP, and Biological Opinion. Motion for Voluntary Remand, p. 19. They argue that vacatur of the right-

¹ In their First Amended Complaint, Plaintiffs do not include a claim challenging the Fish and Wildlife Service's ROD or request relief with respect to the ROD. Nor do they seek to move for

of-way grant would “require” the Service to re-evaluate the Amended HCP and ITP. But they provide no support for this claim. It is pretextual; there is no such requirement.² Federal Defendants further argue that additional analysis they intend to include in a supplemental environmental impact statement (“SEIS”) “may also bear on” the Service’s assessment of the Amended HCP and ITP. *Id.* Such additional analysis is unnecessary in light of the legal sufficiency of the existing federal agency determinations. In any event, the Service need not, at this point in time, seek remand of the Service’s ROD, the ITP, and the Biological Opinion. If Federal Defendants do prepare a SEIS and, as a consequence, determine it is necessary to take action with respect to the ITP, they can and should do so pursuant to the procedures specified in their own regulations. 50 C.F.R. § 17.22 (procedures with respect to permits for incidental taking of endangered species), 17.32 (procedures with respect to permits for incidental taking of threatened species); 13.27 (procedures for permit suspension); 13.28 (procedures for permit revocation).

Federal Defendants conflate the Service’s actions, muddying the fact that the HCP and ITP do not cover the BLM’s right-of-way grant and that, in fact, the Service issued a *separate* biological opinion and incidental take statement that provides take coverage for BLM’s actions, including the right-of-way grant. AR101757. The Service’s biological opinion for BLM’s grant of right-of-way was distinct from its review of the Amended HCP and ITP that provides take coverage for approved land use and land development activities within the County, but not for

summary judgment with respect to the ROD. Therefore, there is no jurisdictional basis to take action with respect to the ROD.

² In the event that the Service manufactures a basis for the requirement in its reply brief to which Intervenor-Defendants cannot respond, we respectfully request that this Court either strike that portion of the brief or allow Intervenor-Defendants to file a sur-reply to address the issue.

the Northern Corridor. AR099432. While the Amended HCP and ITP do contemplate construction of the Northern Corridor as a potential changed circumstance, they include provisions to assure the County can meet its obligations under the ITP and the ESA irrespective of whether the changed circumstance occurs. This is consistent with the Service's regulations. 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5); *see also* 63 Fed. Reg. 8859, 8868 (Feb. 23, 1998) (the preamble to the final rule addressing changed and unforeseen circumstances stating: "Many changes in circumstances during the course of an HCP can reasonably be anticipated and planned for in the conservation plan..., and the plans should describe the modifications in the project or activity that will be implemented if these circumstances arise").

As we explain below, Federal Defendants have failed to identify bases for the Court to remand the Service's ROD, ITP, and Biological Opinion absent any determination with respect to the lawfulness of those Agency Determinations.

1. There are no substantial and legitimate concerns that warrant remand of the ROD, ITP, and Biological Opinion

Federal Defendants offer three justifications for remand of the Service's ROD, ITP, and Biological Opinion. None are persuasive. First, they contend that "remand would allow [the Service] to evaluate the ITP based on BLM's further action on the proposed [right-of-way]." Motion for Voluntary Remand, p. 20. But the County and the Service already drafted the Amended HCP and ITP, respectively, to assure that, irrespective of whether the right-of-way is granted and the Northern Corridor is constructed, the County could successfully implement all permit requirements in compliance with section 10(a)(1)(B) of the ESA, 16 U.S.C. § 1539(a)(1)(B). *E.g.*, AR099591-AR099593. For example, the Amended HCP includes the following statement with respect to the Northern Corridor:

This Changed Circumstance accommodates the possibility that the proposed Northern Corridor will be approved and constructed across Reserve Zone 3.... However, if the Northern Corridor does not receive these federal agency approvals or if an alternative route for the Northern Corridor that does not result in a new road crossing the Reserve is ultimately selected and approved, then this Changed Circumstance will not be triggered.

AR099592. In its findings and recommendations for issuance of the ITP, the Service makes findings with respect to how the HCP will minimize and mitigate take both with and without the Northern Corridor changed circumstance. AR102071-AR102074. The Service goes on to make the express finding that “the continued intensive management of the Reserve by the County will support the biological values necessary for the viability of desert tortoise population and its recovery ... under the Amended HCP with or without the Northern Corridor changed circumstance.” AR102088. Thus, there is no need to remand the Service’s ROD, ITP, and Biological Opinion even in the event the right-of-way grant is remanded and possibly vacated.

In an effort to support this first justification, Federal Defendants make the perplexing argument that, if the Northern Corridor is not constructed, “[The Service] would need to reconsider the amount of take allowed to Washington County in the 2021 ITP.” Motion for Voluntary Remand, p. 20. But because the Amended HCP was drafted based on the baseline assumption that the Northern Corridor project would not proceed and it was included only as a potential changed circumstance, the Amended HCP need not be revisited in the event that Northern Corridor does not proceed. Any take of listed species that occurs as a consequence of the Northern Corridor is not a Covered Activity under the Amended HCP; rather, it is addressed in the Service’s biological opinion issued to BLM for the Northern Corridor project, including

the right-of-way grant. AR099592 (Amended HCP explaining that the Northern Corridor project would be covered by a separate consultation and not covered by the Amended HCP and ITP), AR101762 (biological opinion for the Northern Corridor project describing the proposed action that was the basis for the consultation between BLM and the Service). Therefore, this contention does not provide a legitimate basis for remand.

Second, Federal Defendants argue that “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.” Motion for Voluntary Remand, p. 20. But Federal Defendants want to have their cake and eat it too, later arguing that “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.” *Id.* at 23. Importantly, they fail to acknowledge that in their First Amended Complaint and Motion for Summary Judgement Plaintiffs do not argue that the Service’s ROD, ITP, and Biological Opinion with respect to the Amended HCP were unlawful because of insufficient analysis of fires and their effects. It would be highly unusual for this Court to grant relief on the basis of claims and arguments Plaintiffs have not presented.

Further, CEQ regulations require an SEIS when: (i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c). In *Marsh v. Oregon Natural Resources Council*, the Supreme Court evaluated whether NEPA required an agency to prepare an SEIS after finalizing the EIS. 490 U.S. 360, 372 (1982) (“[t]he CEQ regulations, which . . . are entitled to substantial deference, impose a duty on all federal agencies to prepare supplements to either draft or final

EIS's if there 'are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.'"); *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 569 n.1 (D.C. Cir. 2016). Consistent with a "rule of reason," the Court stated that an agency need not supplement an EIS every time new information comes to light after the EIS is finalized; rather, the need for supplementation "turns on the value of the new information to the still pending decisionmaking process." *Marsh*, 490 U.S. at 374; *Friends of Eel River v. F.E.R.C.*, 720 F.2d 93, 109 (D.C. Cir. 1983) (The "significant new information" requirement "does not mean that an agency must release and circulate a formal supplemental EIS, or a formal document explaining why the agency believes a supplemental EIS is unnecessary, ever time some new information comes to light. Rather, a reasonableness standard governs.").

Prior to the 2020 wildfires, the DEIS already accounted for and analyzed the effects of wildfires within the study area, including changes to the fire regime (i.e., increased fire severity and frequency and shorter return fire intervals). AR098564. Further, the DEIS analyzed the proliferation of invasive grasses following the fires. AR098564-98565. The DEIS acknowledged that, "[s]ince 1976 there have been 207 fires within the Analysis Area . . . covering 266,196 acres, with 56,672 acres double burned[.]" AR098564.

The DEIS also included discussions of significant historical fires in the analysis area prior to the 2020 fires. *See id.* (lightning in summer of 2005 caused multiple large fires, burning approximately 10,244 acres of desert tortoise critical habitat); *id.* ("15 percent of adult Mojave desert tortoise within Reserve Zone 3 died because of wildfires [in 2005]"). While the FEIS discusses the results of a mortality survey conducted following the Cottonwood Trail fire, which was the only mortality survey conducted post-fire in the Analysis Area prior to publication of the

FEIS, the FEIS discloses that estimated mortality and other related impacts following the 2005 lightning fires were similar in scope. *See* AR100029.

Based on the DEIS discussion of the changes to the wildfire regime, as well as impacts from historical fires in the Analysis Area, the BLM and the Service ultimately concluded that “the 2020 wildfires do not represent a significant new circumstance or information for the consideration of the Federal actions analyzed in this EIS and no supplementation to the current analysis is necessary.” AR100186. The FEIS noted that:

Although the 2020 wildfires in the Red Cliffs NCA and Reserve covered more acreage than most previous years, wildfire has become a common occurrence on this landscape. The growing wildfire trend and its impacts are known issues and they were previously identified and/or analyzed in multiple documents including the Red Cliffs NCA RMP, draft Biological Report (USFWS 2020a), and Draft EIS.

Id. Further, the FEIS reiterates that “fires in 2005 burned approximately 14,356 acres within Zone 3 and within much of the same footprints as the Turkey Farm Road and Cottonwood Trail fires. The DEIS disclosed the extent of the fires as well as the related impacts that were measured afterwards, such as estimated tortoise mortality.” *Id.* Indeed, a draft Biological Report (USFWS 2020a) states “it is highly probable that the Red Cliffs Desert Reserve, Zone 3 will have a large wildfire again.” AR030260.

The record demonstrates that BLM and the Service considered the increasing threat and severity of wildfires, as well as post-fire impacts on the desert tortoise and native vegetation, in

evaluating the impacts of the Northern Corridor project and Amended HCP.³ While including information about the 2020 wildfires in the FEIS, the Agencies concluded that the impacts of the 2020 fires were not outside of the range of effects already discussed and analyzed in the DEIS, and thus supplementation was not required. The about face at this juncture is not based on any newly revealed information. Hogan Declaration, ¶¶ 10-12. It would be improper for this Court to condone Federal Defendants' preference for remand on whim.

Federal Defendants' third and final justification for remand is that the Service "may address any other issues raised by Plaintiffs or the public during the public involvement period, including a determination as to whether [The Service] intends to amend the ITP." Motion for Voluntary Remand, p. 21. This is not a legitimate basis for remand of an otherwise lawful agency determination. And there has been no determination that the Service's ROD, ITP, and Biological Opinion are legally deficient.

2. Vacatur would be improper

Even assuming remand of the ITP and 2021 Biological Opinion was warranted here – it is not – any such remand of the ITP to the Service should be without vacatur. While remand may warrant vacatur, "a court is not without discretion' to leave agency action in place while the decision is remanded for further explanation." *Advocates for Highway Safety v. Federal Motor Carrier Safety Administration*, 429 F.3d 1136, 1151 (D.C. Cir. 2005). As this Court noted in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, whether vacatur is warranted depends on two factors: (1) "the seriousness of the order's deficiencies (and thus the extent of doubt whether

³ The Amended HCP includes wildfire as a changed circumstance and specifically discusses the 2020 wildfires, noting the fire frequency, extent, and intensity has increased over time. AR099602-AR099603.

the agency chose correctly),” and (2) “the disruptive consequences of an interim change that may itself be changed.” 988 F.2d 146,150-51 (D.C. Cir. 1993). Here, not only is there a serious possibility that supplemental analysis will validate the Service’s initial decision with respect to the ITP, but vacatur of the ITP would have severely disruptive consequences on Washington County. Thus, vacatur is not warranted.

B. The alleged deficiencies are not serious.

“The ‘seriousness’ of a deficiency . . . is determined at least in part by whether there is ‘a significant possibility that the agency may find an adequate explanation for its actions’ on remand.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 985 F.3d 1032, 1051 (D.C. Cir. 2021), quoting *Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008). Put differently, this first factor depends on whether “‘there is at least a serious possibility that the agency will be able to substantiate its decision.’” *NAACP v. Trump*, 298 F. Supp. 3d 209, 244 (D.D.C. 2018).

As demonstrated above, and noted in the Motion for Voluntary Remand (*id.* at 23-24), there is a strong possibility that the Service could substantiate its approval of the ITP following any supplemental environmental analysis of recent wildfires and their effects in a SEIS. Federal Defendants already thoroughly analyzed the impacts of wildfires that occurred after the Draft EIS and made revisions to the descriptions of the affected environment and environmental consequences in the Final EIS. *See* AR099938-39 (providing acreage burned for Turkey Farm Road, Cottonwood Trail, and Lava Ridge fires and noting that impacts of wildfire trend had been discussed in the Red Cliffs NCA RMP, draft Biological Report, and Draft EIS); AR099948 (discussing emergency stabilization efforts to respond to Turkey Farm Road Fire and Cottonwood Trail Fire); AR099982 (providing a wildfire update that contained the acreage and

percentages of vegetative species affected by the fire); AR099996 (stating specific acreage of plant suitable habitat burned by the Cottonwood Trail Fire); AR100028 (Final EIS providing analysis of acreage of critical tortoise habitat affected by fires and number of tortoise mortalities because of fires); AR100103 (providing the exact areas and acreage that the three 2020 fires burned); AR100121 (discussing potential damage from fires to NRHP-eligible resources in the NCA”); AR100165-66 (presenting the well-documented wildfire impacts in the Biological Report from the 2020 fires). Indeed, the Final EIS responded to a number of comments related to the wildfire issue, including comments submitted by Plaintiffs. AR100918-27; AR034014-15. In short, the record belies Federal Defendants’ sudden conclusion that supplemental analysis is necessary because there is extensive consideration of the increasing threats posed by wildfires on the desert tortoise and native vegetation. However, given the extensive analysis already done and the conclusions reached, it is a strong possibility that the Service concludes, following any additional analysis in any SEIS, that no change to the ITP is warranted.

C. Vacatur of the ITP would be extremely disruptive.

In addition to the above-stated factors weighing against vacatur of the ITP, vacatur would run afoul of the second prong of the *Allied-Signal* test: vacatur is not warranted because of the disruptive consequences that would result. *See Allied-Signal, Inc.*, 988 F.2d at 150-151. The practical consequences of vacating the ITP are obvious – it would upend the County’s existing land use plans, cast a cloud over the continuing validity of the Amended HCP and ITP, and deny the County the benefit of actions it has already taken in implementing commitments made via the Amended HCP and ITP.

The County prepared the original HCP in 1995 to facilitate development in the County while providing for conservation of the Mojave desert tortoise. AR067557-58. The commitments

in the 1995 HCP supported issuance of the original ITP in 1996. AR068419-24. That 1996 ITP authorized the incidental take of desert tortoise from the UVRRU associated with Covered Activities that included otherwise lawful land use and land development activities across approximately 350,000 acres of non-federal lands outside the Reserve and a specific, very limited set of activities that could occur with the Reserve. AR068421.

The County and the HCP Partners have made substantial progress toward fully implementing the goals and objectives of the 1995 HCP and, in several instances, have exceeded their respective obligations under the 1995 HCP. AR099440. The key feature – the Reserve – has been established and the majority of Reserve land acquisitions have been completed. *Id.* The collaborative effort of the County and the HCP Partners has provided for the establishment, management, and monitoring of the Reserve since approval of the 1995 HCP. *Id.*

The County, as the ITP permittee, committed in the 1995 HCP to implement a variety of conservation measures inside and outside of the Reserve. AR099440; Rognan Intervention Decl. ¶¶ 5-6. These financial commitments have been met in full, resulting in the release of all authorized incidental take for use for the Covered Activities. *See* AR09940.. In fact, implementation of the conservation measures specified in the 1995 HCP have outpaced incidental takings of the Mojave desert tortoise by Covered Activities. *Id.* The County spent 170% of its required financial commitments toward implementing the 1995 HCP and more than 60% of Reserve acquisitions have been completed. In contrast, only 26% of the originally authorized incidental take has been used through 2019. *Id.*

The purpose of the Amended HCP and Renewed/Amended ITP was extension of the County's access to previously authorized, but unused, incidental take of the Mojave desert tortoise for an extended term of 25 years. AR099436. The activities addressed by the Amended

HCP and ITP include otherwise lawful, nonfederal uses or land development activities occurring within Washington County associated with the Upper Virgin River population of the Mojave desert tortoise. AR099436, 99476-99480; Rognan Intervention Decl., ¶ 15. Indeed, one purpose of the Amended HCP and ITP is to allow continued economic growth and development in the Permit Area (Washington County) by extending the 1995 conservation program. Rognan Intervention Decl., ¶ 16.

A primary benefit of the Amended HCP includes continuing the reduction in uncertainty, time delay, and compliance costs for development within the Permit Area that resulted from the enacting the 1995 HCP. This provides substantial economic benefit to Washington County landowners, developers, and other business. Rognan Intervention Decl., ¶ 16. The Amended HCP continues to remove uncertainty associated with the presence of the listed species, which is a major concern and barrier to investment in land development and would also have an adverse impact on the County's tax base. *Id.* Further, the Amended HCP continues the 1995 HCP's time reductions associated with HCP permit processing for land development, both for Washington County and for privately-owned land. *Id.*

Vacatur of the ITP would have severely disruptive impacts. It would upend the conservation program that has been in place for almost 30 years and make it significantly more difficult for private parties and the local government official to undertake the activities covered by the Amended HCP. It would also increase delay and uncertainty associated with the local permitting process. And it would do so despite the fact that the County has expended tremendous resources in meeting its commitments under that 1995 HCP and the Amended HCP.

Further, the County has made millions of dollars of commitments in reliance on the Amended HCP and ITP. Decl. of Cameron Rognan in Supp. of Opp. to Motion to Extend (Dkt.

No. 49-1) (“Rognan Extension Decl.”), ¶ 7. More than two years have passed since Washington County obtained the ITP. The County and other parties have moved ahead with activities permitted by the federal agency determination and authorizations challenged in this action. Rognan Extension Decl., ¶ 8. In fact, in reliance upon the federal agency determinations and authorizations, the County acquired 450 acres of land in Zone 6 of the Reserve for the benefit of the desert tortoise at a cost of \$3.78 million in 2021 alone. Rognan Extension Decl., ¶ 9. Also in reliance on those determinations and authorizations, the County hired four full-time law enforcement personnel to enforce access and use regulations within the Reserve. Rognan Extension Decl., ¶ 10. Additionally, the County has spent over \$2.5 million in HCP-related expenses independent of the Northern Corridor changed circumstance since the ITP was reissued. Rognan Remand Decl., ¶ 6. Moreover, reissuance of the ITP resulted in increased conservation commitments under the Amended HCP, including completion of a new visitor center and efforts related to educational outreach, increased land acquisition for the Reserve of 987 acres, increased budgets for adaptive management, and increased commitments for habitat and fire management. *See* Rognan Remand Decl., ¶¶ 6.A-6.K. Vacatur of the ITP would disrupt these significant investments in desert tortoise mitigation and recovery efforts made in reliance on the ITP, which neither the Service nor this Court have found to be legally deficient in any respect.

In light of the foregoing, remand of the ITP is not warranted. Accordingly, Washington County respectfully requests that the Court deny the Motion. However, if the Court does find

that remand is appropriate, then the Court should exercise its discretion to remand without vacatur of the ITP.

Dated: July 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the United States District Court for the District of Columbia on July 13, 2023, via the Court's CM/ECF system, and that parties and their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

Dated: July 13, 2023

/s/ Paul S. Weiland

Paul S. Weiland