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**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

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

**REPLY IN SUPPORT OF MOTION FOR VOLUNTARY REMAND WITH PARTIAL VACATUR**

## INTRODUCTION

Federal Defendants United States Department of the Interior ("DOI"), United States Bureau of Land Management ("BLM"), and United States Fish and Wildlife Service ("FWS") have moved for voluntary remand of several decisions associated with a right-of-way grant to the Utah Department of Transportation ("UDOT") in Washington County (the "ROW"). *See* ECF No. 53 (the "Motion"). 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. Federal Defendants intend to complete this reconsideration by November 2024, subject to any unforeseen delays. Indeed, in order to meet this schedule, Federal Defendants have already begun work on supplementing their National Environmental Policy Act ("NEPA") analysis in the Final Environmental Impact Statement ("FEIS").

Plaintiffs support this Motion. *See* ECF No. 67 ("Pls.' Resp."). Intervenors, however, oppose the Motion. *See* ECF Nos. 57 ("UDOT Opp'n") and 58 ("Cnty.'s Opp'n"). Intervenors' oppositions are not persuasive. Although Intervenors discuss efficiency, it would be far more efficient for this Court to grant the Motion, which would effectively bring this case to an end, and fully clear a path to allow Federal Defendants the time to correct a fundamental and admitted error, and to address other substantial and legitimate concerns. Federal Defendants have already committed to a November 2024 deadline, *see* Motion 16 and Decl. of Gregory Sheehan

("Sheehan Decl."), ECF No. 53-1 ¶ 12; *accord* Plaintiffs' Response 1, subject to any unforeseen delays, whereas completing summary judgment briefing and argument will likely require almost as much time and, in light of the legal error and concerns raised in the Motion, may only delay an inevitable remand.[1]

Through this requested remand, Federal Defendants may also be able to address the other parties' professed concerns. Even if not, both Plaintiffs and Intervenors would retain the right to raise any remaining concerns after remand. But it is simply too speculative at this time to know whether any such concerns will remain, and such speculative concerns do not provide good cause to deny the Motion now.

**ARGUMENT**

As noted in the Motion, this Court has broad discretion to decide whether and when to grant an agency's request for a voluntary remand without vacatur. *See Limnia v. U.S. Dep't of Energy*, 857 F.3d 379, 381 (D.C. Cir. 2017). Here, the Court would be well within its discretion to allow the voluntary remand requested in the Motion. As this Court has noted, "[e]ven in the absence of new evidence or an intervening event, . . . 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) (quoting *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008)). And 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 Activities Grp. v. EPA*, 901 F.3d

[1] In anticipation of remand and to better ensure meeting the November 2024 deadline, Federal Defendants are preparing to publish a Notice of Intent to begin a supplemental environmental impact statement ("SEIS") in the Federal Register and have already contracted with a NEPA contractor for the SEIS work.

414, 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").

Here, Federal Defendants have identified a legal error associated with the National Historic Preservation Act ("NHPA") compliance because BLM did not make any binding commitments to avoid, minimize, or mitigate impacts to historic properties before issuing the ROW grant, as the NHPA requires. Mot. 15 (citing 36 C.F.R. § 800.8(c)(4)). The Federal Defendants have also expressed substantial and legitimate concerns about the NEPA compliance for the ROW decision and ITP. On remand, Federal Defendants intend to rectify the NHPA error and address their NEPA concerns before making any new determination or taking any further actions associated with the ROW. Specifically, on remand, and after rectifying this error and addressing these concerns, BLM would reconsider UDOT's 2018 ROW application through a new Record of Decision ("ROD"). And FWS will factor in BLM's future action on the ROW to re-evaluate the 2020 Amended Habitat Conservation Plan ("HCP") and ITP while leaving the ITP in place during the re-evaluation period.

Remand is appropriate under these circumstances. Intervenors' arguments to the contrary should be rejected because they misstate Federal Defendants' obligations under the NHPA and NEPA, take an overly narrow view of this Court's equitable authority, and fail to identify any undue prejudice that would flow from the requested relief.

### A. The Court should reject Intervenors' arguments concerning the identified NHPA and the NEPA concerns.

Intervenors first argue that there is no legal deficiency under the NHPA or NEPA – or at least no "serious" deficiency. *See* UDOT Opp'n 7-16, 20 (addressing NHPA); Cnty.'s Opp'n 1 (joining in the UDOT Opp'n); UDOT Opp'n 16-20 (addressing NEPA). But they effectively

concede the NHPA error Federal Defendants have identified. They correctly note that the NHPA "requires" certain procedures "prior to the issuance of any license[.]" UDOT Opp'n 8 (quoting 54 U.S.C. § 306108). And they further note that among these requirements are to both "assess the undertaking's impacts on historic properties" and to "resolve adverse impacts." *Id*. at 9 (citing 36 C.F.R. § 800.5-800.6). Yet Intervenors do not dispute that any adverse impacts have not yet been "resolve[d]." They instead note only that there is a plan in place "to resolve adverse effects *before* undertaking any construction[.]" *Id.* at 11 (emphasis added).

The problem with Intervenors' argument is that it does not address the fundamental point of error identified -- that such resolution would not occur "*prior to* the issuance of any license[.]" *Id.* at 8 (emphasis added) (citing 54 U.S.C. § 36108); *see also id*. at 12 ("NHPA requires . . . that an agency take into account the effect of the undertaking on any historic property before 'the issuance of any license" (internal quotation marks omitted). It makes no difference, moreover, that BLM intended to meet these NHPA requirements "before BLM issues a Notice to Proceed." *Id*. at 8, 12. Intervenors appear to argue that there is no NHPA error because only the Notice to Proceed should be considered the "license" that triggers the duty to resolve adverse effects. But that is not the agency's view, and the agency's interpretation is well supported by relevant case law, which distinguishes between an undertaking, which triggers an agency's obligations under the NHPA, and a notice to proceed, which does not. *See Battle Mountain Band v. U.S. Bureau of Land Mgmt.*, No. 3:16-CV-0268-LRH-WGC, 2016 WL 4497756, at *7 (D. Nev. Aug. 26, 2016) ("Here, the court finds that the Notice to Proceed allowing for construction of the power line, and any subsequent construction of the power line itself, is not an undertaking under the NHPA."), appeal dismissed sub nom. *Battle Mountain Band of the Te-Moak Tribe of W. Shoshone Indians v. U.S. Bureau of Land Mgmt.*, 677 F. App'x 378 (9th Cir. 2017). And the cases cited by

Intervenors do not hold otherwise. *See* UDOT Opp'n 14 (citing *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *3 (D.C. Cir. Feb. 19, 2019); *City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1509 (D.C. Cir. 1994); and *Solenex LLC v. Haaland*, Civil Case No. 13-993 (RJL), 2022 WL 4119776, at *9 (D.D.C. Sept. 9, 2022)). Rather, those cases are consistent with the principle acknowledged by Intervenors "that the courts must take a deferential approach when reviewing an agency's compliance with the NHPA's requirements . . . ." *Id.* at 12. In short, the relevant undertaking in this case is the decision whether to issue a right-of-way grant to UDOT. As described above and in Federal Defendants' motion to remand, BLM had to comply with Section 106 of the NHPA, including compliance with 36 C.F.R. § 800.14(c)(4), *prior* to completing that undertaking (deciding to and issuing the ROW), which it indisputably did not.

Intervenors' arguments regarding the agencies' NEPA concerns similarly miss the mark. Here, they erect a strawman by arguing that the "agency's *duty* to re-evaluate" its NEPA analysis under 40 C.F.R. § 1502.9(d) was not triggered; and they note that courts in such circumstances "uphold an agency's decision not to prepare a supplemental" analysis. UDOT Opp'n 17 (emphasis added). But that is beside the point, because the agencies here have not made any determination under Section 1502.9(d) – they have instead decided to prepare supplemental NEPA analysis as part of a voluntary remand to address the NHPA error identified above. Thus, even if "[r]emand is *unnecessary*," *id*. at 18 (emphasis added), voluntary remand remains *appropriate* in light of the agencies' identification of the NHPA error and other substantial and legitimate concerns. In other words, consistent with one of the fundamental goals of NEPA, the agencies would like to better educate both themselves and the public about the environmental

consequences related to the ROW, and their voluntary decision to do so as part of the broader remand and reconsideration should be respected.

Intervenors next offer a range of reasons that they believe vacatur of the ROW would be inappropriate, including (a) threshold reasons (the court needs to first find error on the merits), (b) legal reasons (the deficiencies are not "serious"), and (c) factual reasons (UDOT would suffer undue prejudice). But none of these asserted reasons should prevent the partial vacatur sought in the Motion.

On this threshold issue, Federal Defendants agree with Intervenors that, to obtain this vacatur of the ROW, the Court will need to make some determination that the identified NHPA error is, in fact, an error. But Federal Defendants disagree with Intervenors that it would be more efficient to make this determination through full summary judgment briefing. Intervenors' oppositions already present their arguments in this regard, and it would clearly be more efficient to resolve this issue now. Indeed, as noted above, Intervenors' oppositions effectively concede the point.

The assertion that the NHPA error is not "serious" similarly fails to effectively oppose the partial vacatur sought in the Motion. Even assuming that the error is not serious, as noted above, that may only relieve the court of a duty to vacate. But it says nothing about BLM's preference to clear the decks for a fresh decision made after the admitted NHPA error is corrected, as well as after the NEPA concerns are addressed through supplemental analysis.

Finally, Intervenors' allegations that they would be unduly prejudiced are not credible because UDOT has not submitted a final plan for BLM's review, and BLM has not issued a

Notice to Proceed.[2] While Intervenors might be able to claim some prejudice, as they would apparently prefer to proceed without this corrective work, they cannot plausibly claim that this prejudice is "undue" in light of the fundamental and admitted error and other identified concerns. In this regard, even if UDOT was correct that the Notice to Proceed should be considered the "license," rather than the ROW grant, this would not help Intervenors oppose the Motion. If the ROW itself is not a license, then vacatur of the ROW sought in the Motion should not cause any undue prejudice under these circumstances. Without a Notice to Proceed, the ROW itself was not affecting "congestion and traffic capacity," and the vacatur of the ROW under these circumstances would not cause any "harmful" or "disruptive consequences." UDOT Opp'n 21.[3] Alternatively, if the agencies are correct that the ROW itself is significant for NHPA purposes, then as noted above Intervenors have effectively conceded legal error sufficient to support the requested partial vacatur.

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[2] Contrary to the County's assertions, the Motion does not seek vacatur of the separate ITP. *Cf*. Cnty.'s Opp'n 13-19.

[3] Intervenors' concerns about further "design work" are similarly misplaced. UDOT Opp'n 23. If UDOT's design work is already sufficient to support a Notice to Proceed, then it can share that information with BLM as part of the supplemental process. Doing so may inform the agency's binding commitments in a forthcoming ROD, and it may be that no further design work is needed even after remand and vacatur of the ROW. But if UDOT's design work is not sufficient to support a Notice to Proceed, then further design work may be needed for that very reason, rather than being attributable to the vacatur of the ROW. This need may further inform BLM's choice about whether to enter into a MOA before issuing a new ROD. Likewise, it does not really matter if "UDOT is ready to enter into an MOA now." *Id*. at 24. Federal Defendants, who are clearly a necessary party to any MOA, failed to enter into an MOA before issuing the ROW and are not yet ready to enter into such an agreement now, and a Notice to Proceed will not issue unless and until the concerns identified by Federal Defendants have been addressed. *See generally* ECF No. 57-3 at Ex A (February 12, 2023 letter from the Advisory Council on Historic Preservation to BLM outlining some procedural flaws including the lack of adequate consultation and a binding agreement). Federal Defendants already considered this when they noted that they expect to have addressed these concerns "by approximately November 2024." *Id*. (internal quotation marks omitted). While Intervenors may wish for something sooner, they have no basis to conclude that "a limited three-month schedule" would be sufficient. *Id*. at 25.

**B. The Court should reject Intervenors' arguments concerning deficiencies in the agencies' analysis of factors affecting the ITP and Amended HCP.**

To the extent Intervenor Washington County contends a remand is unnecessary for the ITP and Amended HCP, Cnty.'s Opp.'n 8-13, those arguments are similarly unpersuasive. FWS has provided several reasons for why remand without vacatur is needed: to allow evaluation of the ITP based on BLM's further action on the ROW, allow consideration of the Amended HCP and ITP based on the SEIS, and allow public involvement for any action taken regarding the Amended HCP and ITP. By keeping the ITP in place while it re-evaluates its decisions, FWS would be able to address its substantial and legitimate concerns while balancing the needs of the Intervenors and minimizing any possible prejudice.

Despite FWS's identification and support for its substantial and legitimate concerns, Intervenor Washington County argues that FWS has failed to identify adequate bases for remand of its ROD, ITP, and Biological Opinion. Cnty.'s Opp'n 8. But these arguments are unsupported. First, Plaintiffs incorrectly assert that FWS has already considered the amount of take allowed in the ITP if the ROW is not constructed. While the Amended HCP and the FWS's biological opinion did analyze incidental take both with and without the Northern Corridor changed circumstance, the ITP itself only authorizes take that would be associated with the ROW issuance, construction, and use. *See* AR 102111. Thus, FWS quantified authorized incidental take using the analysis that assumed the Northern Corridor changed circumstance occurring, including associated mitigation. *See* AR 102108-113.

Second, the County's self-serving argument that the FEIS sufficiently addresses the risk of wildfires in the Red Cliffs Desert Reserve ignores the agencies' expertise and reasonable concerns. Cnty.'s Opp'n 8. Here, the agencies identified shortcomings in the FEIS regarding the wildfires, and pointed to specific issues that were not sufficiently addressed in the original

analysis including 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. Mot. 20-21; Sheehan Decl. ¶¶ 9-11; Decl. of Matt Hogan ("Hogan Decl."), ECF No. 53-2 ¶¶ 10-12. When an agency identifies substantial and legitimate concerns in its own analysis, this Circuit recognizes the preferred route is to allow the agency to correct its own errors rather than wasting both the courts' and parties' resources on unnecessary litigation. *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (granting the EPA's opposed motion for voluntary remand) ("We commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources....").

Finally, Intervenor Washington County makes a circular argument that public involvement is not necessary to address additional issues raised on remand, including possible amendment to the ITP, because the decision was already an "otherwise lawful agency determination." Cnty.'s Opp'n 13. But it bears repeating that FWS believes that this information, and particularly the wildfires' impacts on the ESA-listed desert tortoise, was not fully considered and disclosed for public consideration. Hogan Decl. ¶ 12. The agency's confessed substantial and legitimate concerns that the public was not sufficiently informed of this information or allowed to participate meaningfully in the decision process warrants remand in this case. *See Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 265 (D.D.C. 2015) (explaining that the APA requires disclosure of assumptions critical to an agency's decision to facilitate meaningful comment and an interchange of views).

* * *

At bottom, granting the remand motion would promote judicial and administrative efficiency by effectively ending this litigation and clearing a path for Federal Defendants to correct a fundamental and admitted error, and to address other substantial and legitimate concerns. And while UDOT has questioned this contention, positing that "there is little reason to expect that the remand will satisfy Plaintiffs regarding the seven other claims . . . it has asserted on which the government does not seek remand," UDOT Opp' 6, Plaintiffs have now confirmed that they agree the requested remand is appropriate. Pls.' Resp. 2. The primary parties' consensus presents the most efficient path forward for both the parties and the court because it establishes a reasonably achievable deadline of November 2024, subject to any unforeseen delays, for any new decisions.

Accordingly, Federal Defendants respectfully request that this Court 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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