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,

Defendants.

and

WASHINGTON COUNTY, UTAH,

[Proposed] Defendant-Intervenors.

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

MOTION TO INTERVENE

Washington County of Utah (the "County") hereby moves to intervene as a Defendant in the above-captioned action as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2). Alternatively, the County moves to intervene as a Defendant permissively pursuant to Rule 24(b)(1).

As explained more fully in the attached memorandum of law, the County has protectable interests that will be affected by the outcome of the litigation and those interests may not be adequately protected by those who are already parties to the litigation.

Pursuant to Local Rule 7(j), the County's proposed Answer has been submitted with this motion and is attached as **Exhibit A**.

This motion is based on Rule 24 of the Federal Rules of Civil Procedure, this Motion, the Memorandum of Points and Authorities in Support of Motion to Intervene, the concurrently filed Declaration of Cameron Rognan, the attached proposed Answer, a proposed order, all pleadings and papers on file in this action, and upon such matters as may be presented to the Court at the time of the hearing.

Pursuant to Local Rule 7(m), counsel for the County has conferred with counsel for Plaintiffs and Defendants. On June 24, 2021, counsel for Defendants indicated that they take no position on this motion. Likewise, on June 25, 2021, counsel for Plaintiffs indicated that they take no position on this motion.

Dated: July 1, 2021 Respectfully submitted,

/s/ Paul S. Weiland

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Pursuant to Federal Rule of Civil Procedure 24(a)(2), Washington County of Utah ("County") respectfully moves to intervene as of right in support of the U.S. Department of the Interior ("Interior") and Bureau of Land Management ("BLM") (collectively, "Federal Defendants"). Alternatively, the County respectfully requests this Court allow it to permissively intervene in this matter in accordance with Federal Rule of Civil Procedure 24(b)(1).

Pursuant to U.S. District Court for the District of Columbia Local Rule 7(m), counsel for the County has conferred with counsel for Plaintiffs and Federal Defendants. Counsel for applicant contacted counsel for Plaintiffs and Federal Defendants by telephone. Counsel for applicant spoke with counsel for Plaintiffs on June 25 and with counsel for Defendants on June 24. Both Plaintiffs and Federal Defendants indicated they take no position on the motion at this time.

II. BACKGROUND.

A. The Washington County Habitat Conservation Plan and Incidental Take Permit No. TE036719.

In 1995, the County prepared a Habitat Conservation Plan ("HCP") to facilitate development in the County and provide for the conservation of the Mojave desert tortoise (*Gopherus agassizii*, desert tortoise). Decl. of Cameron Rognan ("Rognan Decl.") at ¶ 5. The Mojave desert tortoise is listed by the U.S. Fish and Wildlife Service ("Service") as threatened under the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq*. ("ESA"). *Id.* The plan area for the 1995 HCP was the limits of Washington County. *Id.*

The 1995 HCP's conservation program was designed to achieve within the County recommendations of the 1994 *Desert Tortoise (Mojave Population) Recovery Plan*. 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"). Rognan Decl. at ¶ 6. 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. *Id.* 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. *Id.*

The County's commitments in the 1995 HCP supported issuance of an Incidental Take Permit (permit number TE036719, the "Original ITP") by the Service to the County on March 15, 1996. Rognan Decl. at ¶ 7. The Original ITP authorized the incidental take of Mojave desert tortoise from the Upper Virgin River Recovery Unit ("UVRRU") 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. *Id.* 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 Mojave desert tortoise surveys

and translocation prior to development) and requiring the HCP Administrator to track the acres that were released for Covered Activities. *Id.*

B. The Amended HCP and Incidental Take Permit.

The Original ITP had a term of 20 years and an expiration date of March 14, 2016. Rognan Decl. at ¶ 8. Prior to the expiration of the Original ITP, the County applied to the Service for renewal of the ITP. *Id.*

In June 2020, BLM and the Service published a draft environmental impact statement ("EIS") that considers whether the Service will issue an ITP for the Mojave desert tortoise for specific land use and land development activities in Washington County in addition to whether the BLM will approve a right-of-way ("ROW") for a highway through the Red Cliffs National Conservation Area ("RCNCA") and through associated non-Federal lands in the Reserve (the "Northern Corridor") and related amendments to two BLM resource management plans ("RMPs"). 85 Fed. Reg. 35,950 (June 12, 2020). 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 Original ITP. Rognan Decl. at ¶ 9. With the Amended HCP, the County amended and restated the 1995 HCP and sought a renewed and amended ITP with an additional 25-year term. *Id.* 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.* The County and its HCP partners have, in good faith, implemented the HCP for more than 24 years in accordance with the terms and conditions of the Original ITP. Rognan Decl. at ¶ 10.

BLM and the Service issued a final EIS in November 2020. 85 Fed. Reg. 72,683 (Nov. 13, 2020). 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. Req. for Judicial Notice and Decl. of Paul Weiland ("RJN"), Ex. B (Record of Decision for the Amended Washington County Habitat Conservation Plan, p. 9). At the same time, the Service issued the Amended ITP to the County and approved implementation of the Amended HCP. Rognan Decl. at ¶ 11.

C. The Northern Corridor.

In 2018, the Utah Department of Transportation ("UDOT") applied to BLM for a ROW to construct the Northern Corridor. Rognan Decl. at ¶ 19. 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 ROW application, after extensive environmental review, the Secretary of the Interior approved the issuance of the ROW grant to UDOT for the Northern Corridor. RJN, Ex. C (Record of Decision for the Northern Corridor Right-of-way, p. 11).

The Northern Corridor will connect Washington Parkway in Washington City to Red Hills Parkway in St. George. *Id.* The County's Amended HCP includes a changed circumstance prescribing a County response to the approval by the BLM of a ROW for the Northern Corridor. Specifically, the BLM's approval of the ROW is treated as a "changed circumstance" pursuant to ESA regulations in response to which the County is obligated to establish, administer, and

manage the designation of a new Reserve Zone 6 ("Zone 6"). *Id.* This area would therefore be managed as part of the Reserve for the conservation of Mojave desert tortoise. *Id.*

On June 3, 2021, Plaintiffs filed suit, challenging BLM's granting of a ROW for the Northern Corridor, together with related decisions to modify and amend two governing management plans.

D. The County's Land Use Plans.

The County has a fast-growing population and is dominated by federal land. State law provides that the County Planning Commission must develop a General Plan to guide physical development of the unincorporated parts of the County. Rognan Decl. at ¶ 22. The County has developed such a General Plan (amended in 2012) that is intended to provide for orderly development within its borders and protect the health, safety, and welfare of its residents. *Id.* While the County does not exercise the same control over federal and that it exercises over non-federal land, the County is nonetheless obliged to engage in land use planning to facilitate orderly use and development on all lands irrespective of ownership. And it must do so at a time when the County is experiencing significant population growth. Because the vast majority of land within the County is owned by the United States and administered by various federal agencies, most notably BLM, the General Plan reflects due consideration of the interrelationship between the County and those federal agencies. *Id.* For example, the General Plan notes: "it is not possible to drive within the county without driving over roads crossing BLM land." *Id.*

As to the Northern Corridor, the General Plan explains that "[t]here are a number of major traffic routes that are necessary to the future of Washington County." Rognan Decl. at ¶ 23. The General Plan identifies the Northern Corridor as one of these necessary routes. *Id.* It states that "[b]y 2030, a Northern Corridor will be ***critical*** to alleviate traffic gridlock in

St. George City to and from large, growing community development along Highway 18." *Id.* (emphasis added).

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 another 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. Rognan Decl. at ¶ 24. In addition to the County's General Plan, such studies include the Dixie Metropolitan Transportation Planning Organization Regional Transportation Plan. *Id.* The highway has also been envisioned as an option to reduce traffic volumes on key corridors such as Bluff Street, Red Hills Parkway, and St. George Boulevard that are currently congested and are expected to experience worse congestion in the future as the County population grows and the associated east-west travel demand increases. *Id.*

The objective of the Northern Corridor is to reduce congestion, increase capacity, and improve east-west mobility on arterial and intersection roadways between State Route 18 (SR 18) and I-15 at milepost 13. Rognan Decl. at ¶ 25. This objective is driven by the current and forecasted population growth within the County, which will continue to increase demand on the transportation network. *Id.* Currently, the existing transportation network between SR 18 and I-15 is not adequate to meet future (2050) travel demand in the northeastern and northwestern areas of St. George based on traffic projections from the DMPO's Regional Transportation Demand Model.

III. ARGUMENT.

A. Legal Standard.

For a proposed defendant-intervenor, the D.C. Circuit Court of Appeals has held that intervention is appropriate if the intervenor meets the requirements of Rule 24 of the Federal Rules of Civil Procedure and has Article III standing. *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 320 (D.C. Cir. 2015) ("*Crossroads*"). That said, the D.C. Circuit takes a "liberal approach" to intervention, consistent with Rule 24's purpose of protecting third parties affected by the litigation. *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967). The D.C. Circuit has explained that "[t]he right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard." *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972). As demonstrated below, the County has Article III standing and is entitled to intervention as a matter of right or, in the alternative, should be granted permissive intervention.

B. The County Has Article III Standing.

The D.C. Circuit requires all prospective intervenors to establish Article III standing: injury-in-fact, causation, and redressability. *Old Dominion Elec. Coop. v. Fed. Energy Regulatory Comm'n*, 892 F.3d 1223, 1232-33 (D.C. Cir. 2018). The standing inquiry for a proposed intervenor turns on whether there is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; which would be traceable to the plaintiff's challenge; and which would be prevented by defeating the plaintiff's challenge. *Crossroads*, 788 F.3d at 316-17 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)) (quotations omitted).

Prior decisions by the D.C. Circuit, "have generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads*, 788 F.3d at 317. "For example, in *Friends of Animals v. Ashe*, the court concluded that private organizations seeking to intervene as defendants demonstrated an injury in fact to support standing (and intervention as of right) when plaintiffs sued the U.S. Fish and Wildlife Service challenging its issuance of permits allowing certain hunting imports to those organizations." *Red Lake Band of Chippewa Indians v. United States Army Corps of Eng'rs*, 338 F.R.D. 1, 4 (D.D.C. 2021) (*"Red Lake Band of Chippewa Indians*"). There, the court concluded that the proposed intervenors had standing because their interest in importation of items allowed by the permits would be prevented if plaintiffs prevailed. *Id.*

Here, the County benefits from the Federal Defendants' granting of a ROW for the Northern Corridor and amendment of certain management plans. The County has an interest in the Northern Corridor due to its importance and relationship to County land use and transportation planning. The General Plan identifies the Northern Corridor as a major transportation route necessary for the future of the County. Rognan Decl at ¶ 23. It states that "[b]y 2030, a Northern Corridor will be ***critical*** to alleviate traffic gridlock in St. George City to and from large, growing community development along Highway 18." *Id.* (emphasis added).

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 another 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. Rognan Decl. at ¶ 24. The highway has also been envisioned as an option to reduce traffic volumes on key corridors such as

Bluff Street, Red Hills Parkway, and St. George Boulevard that are currently congested and are expected to experience worse congestion in the future as the County population grows and the associated east-west travel demand increases. *Id.*

The objective of the Northern Corridor is to reduce congestion, increase capacity, and improve east-west mobility on arterial and intersection roadways between State Route 18 (SR 18) and I-15 at milepost 13. Rognan Decl. at ¶ 25. This objective is driven by the current and forecasted population growth within the County, which will continue to increase demand on the transportation network. *Id.*

Additionally, the County and its HCP partners committed to perform certain actions in response to Federal approval of the ROW for the Northern Corridor. Rognan Decl. at ¶ 20. The Northern Corridor Biological Opinion ("BiOp") acknowledges that the HCP includes HCP partner commitments and mitigation associated with grant of the ROW as a changed circumstance. *Id.* County commitments made in response to this changed circumstance are an effect of the action considered in the BiOp for the Amended HCP and Amended ITP, and include a reduction in the amount of take requested in the Amended HCP, land acquisitions within Zone 6, funding and implementation of certain management actions within Zone 6, additional funding for administration for the Amended HCP and for adaptive management and monitoring activities across the entire Reserve, and funding for the addition of MDT passages beneath Cottonwood Road within Reserve Zone 3. *Id.*

Thus, it cannot be disputed that the County has a cognizable interest in the Northern Corridor. A decision invalidating the Federal Defendants' actions threatens both the County's existing land use and transportation plans, and threatens to deny the County the benefit of the significant funds and efforts it has committed and taken to address the Northern Corridor

changed circumstance. A decision in Plaintiffs' favor would render the fate of the highway and the County's obligations under the Amended HCP and Amended ITP uncertain. These injuries are sufficient to support standing. *See*, *e.g.*, *WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 19 (D.D.C. 2010) (requiring prospective intervenor to "expend additional time and resources, with the ultimate outcome uncertain" constituted injury-in-fact supporting standing); *id.* ("[T]here is little doubt that resolution of this action in Plaintiff's favor would affect [intervenor's] . . . stake in the development of coal mining operations[.]"). Additionally, these injuries are "fairly traceable to the judicial intervention" and a decision in the County's favor would plainly prevent it from incurring the injuries. *See Cnty. of San Miguel, Colo. v. MacDonald*, 244 F.R.D. 36, 44-45 (D.D.C. 2007).

Additionally, the EIS at issue in this litigation was not prepared solely for the Northern Corridor. As explained above, the EIS was also required for National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"), compliance with respect to the Service's action of approving the Amended HCP and issuing an ITP to the County. Thus, a challenge to the EIS that supports approval of the Amended HCP and Amended ITP necessarily implicates the County's interests in those approvals. Indeed, a decision in Plaintiffs' favor could cast a cloud over the continuing validity of the Amended HCP and Amended ITP.

"With respect to intervention as of right in the district court, the matter of standing may be purely academic." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) "[A]ny person who satisfies Rule 24(a) will also meet Article III's standing requirement." *Id.*, (citing *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000)). As discussed below, the County meets the criteria for intervention as a matter of right under Federal Rule of Civil Procedure 24(a)(2).

Accordingly, the County has Article III standing to intervene.

C. The County Is Entitled to Intervention as a Matter of Right.

Federal Rule of Civil Procedure 24(a)(2) sets forth a four-factor test for intervention as of right: "(1) timeliness of the application to intervene; (2) a legally protected interest; (3) that the action, as a practical matter impairs or impedes that interest; and (4) that no party to the action can adequately represent the potential intervenor's interest." *Crossroads*, 788 F.3d at 320; Fed. R. Civ. P. 24(a)(2). Because the County satisfies each of the four requirements under Rule 24(a), as discussed below, it is entitled to intervene as a matter of right in this matter.

1. The County's Motion to Intervene Is Timely.

The timeliness requirement under Rule 24(a) is not a rigid test. The circumstances that should be considered include "time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980). "[T]he requirement of timeliness is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014). Existing parties are generally not prejudiced when a motion to intervene is filed "before the district court ha[s] made any substantive rulings." *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996). Here, no rulings, substantive or otherwise, have been made.

The Motion to Intervene is timely. First, this case is in its earliest stages, as the County's Motion to Intervene has been filed prior to the date that Federal Defendants' answers are due. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) ("*Fund for Animals*") (finding that motion to intervene filed less than two months after complaint filed and before the

Service filed an answer was timely). Second, the County's participation would not prejudice Plaintiffs or Federal Defendants because intervention at this early stage will not delay the case. *See Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008) (finding no prejudice where the motion to intervene was filed before the district court took any action in the case).

2. The County Has Significant Interests in the Subject of this Action.

An applicant seeking to intervene as a matter of right must demonstrate that it has a significant interest relating to the subject of the litigation. Fed. R. Civ. P. 24(a)(2). If a proposed intervenor has Article III standing, then that is sufficient to establish this factor. *Fund for Animals*, 322 F.3d at 732; *Fund for Animals*, 322 F.3d at 735 ("The Court's conclusion that a putative intervenor has constitutional standing is 'alone sufficient to establish . . . [its] interest in the property or transaction which is the subject of the action.'"); *Red Lake Band of Chippewa Indians*, 338 F.R.D. at 5-6. As discussed above, the County satisfies Article III standing requirements.

Moreover, Article III standing considerations aside, for the purpose of Rule 24(a)(2), the interest in intervention is clear where the disposition of a claim in favor of the plaintiffs would directly impact the proposed intervenor's interests. *See Dimond v. D.C.*, 792 F.2d 179, 192 (D.C. Cir. 1986) (finding sufficient interest insurance company sought to intervene in a challenge to a statute setting statutory limitations on insurance company's liability). The D.C. Circuit has interpreted this factor as requiring a court to consider the "practical consequences" of denying intervention when considering a motion to intervene. *Nuesse v. Camp,* 385 F.2d at 702.

The County has an indisputable interest in the validity of the ROW for the Northern Corridor. Congress expressly recognized the County's interest in the Northern Corridor when it directed BLM to, "in consultation with . . . local governmental entities (***including the***

County . . .), and the public, identify 1 or more alternatives for a northern transportation route in the County." Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 1977(b)(2)(A), 123 Stat. 1089 (Mar. 30, 2009) (emphasis added).

Moreover, the practical consequences of granting Plaintiffs their requested relief are obvious – it would upend the County's existing land use plans, cast a cloud over the continuing validity of the County's Amended HCP and ITP, and deny the County the benefit from actions it has already taken in implementing commitments made via the Amended HCP and Amended ITP for the Northern Corridor changed circumstance.

As discussed above, the County has an interest in the Northern Corridor due to its importance and relationship to County land use and transportation planning. The County's General Plan identifies the Northern Corridor as a major traffic route essential to the future development of the County. Rognan Decl. at ¶ 23. It states that "[b]y 2030, a Northern Corridor will be ***critical*** to alleviate traffic gridlock in St. George City to and from large, growing community development along Highway 18." *Id.* (emphasis added).

Further, the EIS at issue in this matter was prepared not just for the Northern Corridor, but also for NEPA and National Historic Preservation Act, 54 U.S.C. §§ 300101 *et seq.* ("NHPA"), compliance related to approval of the Amended HCP and issuance of the Amended ITP. As the applicant for the Amended HCP and Amended ITP, the County has a legitimate interest in upholding the validity of the environmental documentation required for these federal approvals.[1]

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[1] In fact, on May 24, 2021, Plaintiffs sent Federal Defendants and the U.S. Fish and Wildlife Service a "Notice of Intent to Sue For Violations of the Endangered Species Act" that alleged a number of ESA violations related to the Northern Corridor and Amended HCP. The County anticipates that once the required 60-day notice period ends, Plaintiffs will amend their

Finally, the County and its HCP partners committed to perform certain actions in response to federal approval of the ROW for the Northern Corridor. Rognan Decl. at ¶ 20. County commitments made in response to the Northern Corridor changed circumstance are an effect of the action considered in the BiOp for the Amended HCP and Amended ITP, and include a reduction in the amount of take requested in the Amended HCP, certain land acquisitions within Zone 6, funding and implementation of certain management actions within Zone 6, additional funding for administration for the Amended HCP and for adaptive management and monitoring activities across the entire Reserve, and funding for the addition of MDT passages beneath Cottonwood Road within Reserve Zone 3. *Id.*

The County's historical and ongoing interest in the Amended HCP and implementation of its governing land use plans are sufficient to support intervention as of right.

3. The County Will Suffer a Practical Impairment of Its Interests if the Court Rules in Plaintiffs' Favor.

An applicant for intervention as of right must also demonstrate that the litigation "may as a practical matter impair or impede the movant's ability to protect its interests." Fed. R. Civ. P. 24(a)(2). In the D.C. Circuit, courts look to the "practical consequences" of denying intervention. *Nat. Res. Def. Council v. Costle,* 561 F.2d 904, 909 (D.C. Cir. 1977) ("*Costle*"). This factor is satisfied where a judicial decision in the plaintiff's favor would make "the task of reestablishing the status quo . . . difficult and burdensome." *Fund for Animals*, 322 F.3d at 735. "It is not enough to deny intervention under 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Costle*, 561 F.2d at 910. The same is true where

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Complaint to include these additional ESA claims.

the plaintiffs seek relief that would require would-be intervenors to advocate for their interests via burdensome administrative proceedings.

In *County of San Miguel v. MacDonald*, 244 F.R.D. at 44), the court found the interests of trade organization intervenor-applicants to be sufficiently "impaired" by the plaintiff's lawsuit seeking to set aside the Service's "listing not warranted" finding for the Gunnison sage-grouse. Rejecting the plaintiff's arguments that the intervenor-applicants would not be impaired because their lawsuit would not result in an order compelling the defendants to actually list the species, the *San Miguel* court found that if plaintiffs were to succeed in their lawsuit, the time and resources the organizations would spend participating in the administrative process that "they would [have otherwise] ordinarily devote[d] to their businesses" was enough to find that their interests would be impaired. *Id.* at 47.

The County will suffer a practical impairment of its interest if the Court rules in Plaintiffs' favor. First, because BLM granted UDOT the Northern Corridor ROW in January 2021, the County is currently spending contingency funds related to commitments made by the County in the event that the Northern Corridor changed circumstance occurred. Rognan Decl. at ¶ 21. The County's 2021 HCP Budget was approved in 2020 prior to renewal of the ITP and included approximately $3,594,006 in contingency funds for this changed circumstance. *Id.* The County is currently spending these funds for tortoise fencing, retirement of grazing allotments, increased law enforcement, recreation management, additional HCP staff, and habitat restoration. *Id.* The County has expended these resources precisely because of BLM's granting of a ROW for the Northern Corridor, and invalidation of the Project would mean that the County would receive no benefit from the efforts it has already undertaken pursuant to the changed circumstance provision of the Amended HCP. Rognan Decl. at ¶ 26.

Second, if the approval of the ROW for the Northern Corridor is set aside, the regional transportation deficiencies addressed by the County's General Plan and other land use plans would still need to be resolved. Rognan Decl. at ¶ 26. The County would need to invest substantial additional time and funds in revision of its General Plan and in evaluating an alternative to the Northern Corridor. *Id.*

Finally, because the EIS at issue in this litigation was prepared not just for the Northern Corridor, but also for the Service's NEPA and NHPA review for the Amended HCP and Amended ITP, any potential decision in Plaintiffs' favor that would invalidate the EIS necessarily casts a cloud over the legitimacy of the required environmental review and the validity of the Amended HCP and Amended ITP.

Accordingly, invalidation of the Northern Corridor ROW would cause a practical impairment of the County's interests.

4. The County's Interests Cannot Be Adequately Represented by Existing Parties.

Lastly, a party seeking to intervene as a matter of right must "show[] that [the] representation of his interest [by existing parties] 'may be' inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972) (citations omitted). The D.C. Circuit describes this requirement as "not onerous," *Fund for Animals*, 322 F.3d at 735, and "low," *id.* at 736, n. 7. A proposed intervenor should ordinarily be allowed to intervene unless it is clear that a party will provide adequate representation. *Crossroads*, 788 F.3d at 321 (quoting *United States v. Am. Tel & Tel. Co.*, 642 F.2d at 1293).

Federal Defendants cannot adequately represent the County's interests. The Federal Defendants have a duty to represent the interests of the general public across the United States. The D.C. Circuit has often held that the federal government, which is required to represent the

interests of the American people, does not adequately represent the interests of aspiring intervenors seeking to protect a more narrowly tailored set of interests. *See Fund for Animals*, 322 F.3d at 736-37; *see also Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177-78 (9th Cir. 2011) (same). This principle applies here. While the Federal Defendants are charged with representing the interests of the general public across the nation, the County generally has a narrower obligation to represent the more local and specific interests of its residents, including land use and transportation needs, and has certain commitments for management of the Reserve under the Amended HCP and as the permittee for the Amended ITP.

Further, the interests of the Federal Defendants and the County "might diverge during the course of the litigation." *Fund for Animals*, 322 F.3d at 736; *see also WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 997 (10th Cir. 2009) (recognizing that a non-federal actor should not be required to rely on a federal agency to protect its interests, in part because the agency could shift its policy positions during litigation). Therefore, even where "there may be a partial congruence of interests, that does not guarantee the adequacy of representation." *Fund for Animals*, 322 F.3d at 736-37 (granting intervention). This can be particularly true during times of transition between presidential administrations, when the chances of policy shifts are higher. *See, e.g.*, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1107 (9th Cir. 2002) (granting intervention of right to conservation groups, noting the Bush Administration stopped defending challenge to Roadless Rule promulgated by the Clinton Administration), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998) (finding inadequacy of representation in part

because "it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts").

Given the minimal showing necessary to find inadequate representation, the County clearly satisfies the final criterion of Rule 24(a)(2). Accordingly, the Court should grant the County's Motion to Intervene as a matter of right.

D. Permissive Intervention.

In the event this Court does not grant intervention as of right, the Court should permit the County to intervene in this matter pursuant to Federal Rule of Civil Procedure 24(b)(1)(B), which states: "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Subsection (b)(3) provides: "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." District courts have "wide latitude" in deciding whether to grant permissive intervention. *See Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

As set forth above, the County's motion is timely and will not unduly delay these proceedings or prejudice adjudication of Plaintiffs and Federal Defendants' rights. Indeed, Federal Defendants have not even filed their answers, and no rulings, substantive or otherwise, have been made.

Concerning the second factor for permissive intervention, the defenses asserted in the County's Proposed Answer are necessarily the same issues of law the Federal Defendants will likely raise, namely that BLM's granting of a ROW for the Northern Corridor and Amendment of the RMP complied with all applicable legal requirements and are supported by substantial evidence in the administrative record and, therefore, not arbitrary and capricious. These defenses

directly respond to Plaintiffs' claims in their Complaint and, therefore, satisfy the "common question" requirement for permissive intervention.

Accordingly, because the County's timely Motion to Intervene will address similar issues of law and fact, the criteria for permissive intervention are met.

IV. CONCLUSION.

Having demonstrated that the requirements of intervention have been met, the County respectfully requests the Court grant its motion to intervene as of right in this case as a defendant-intervenor. In the alternative, the County respectfully requests this Court grant its request to permissively intervene in this case as a defendant-intervenor.

Dated: July 1, 2021

Respectfully submitted,

/s/ Paul S. Weiland

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on July 1, 2021, via this Court's Notice of Electronic Filing, upon:

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I hereby further certify that a copy of the foregoing document was served by mail on the same date, at my said place of business, copy enclosed in a sealed envelope and was placed for collection and mailing following the usual business practice of my said employer. I am readily familiar with my said employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at Irvine, California, to the addressee listed below:

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