IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSERVE SOUTHWEST UTAH; CONSERVATION LANDS FOUNDATION; CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; SOUTHERN UTAH WILDERNESS ALLIANCE; WILDERNESS SOCIETY and WILDEARTH GUARDIANS, Plaintiffs, v. UNITED STATES BUREAU OF LAND MANAGEMENT AND UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.	No. 1:21-CV-01506-ABJ

MOTION TO INTERVENE

Under Federal Rule of Civil Procedure 24(a) and 24(b), and D.C. District Court Local Rules 7(j), Utah Department of Transportation (UDOT) moves to intervene in this case as of right or for permissive intervention. The reasons for the motion are set forth in the accompanying memorandum of points and authorities and supporting declarations. A proposed order will be filed concurrently with this motion.

Consistent with Local Rule 7(m), undersigned counsel has conferred with counsel of record in this case. Federal Defendants take no position on the motion. Plaintiffs also take no position.

Dated: July 1, 2021

Respectfully submitted,

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UTAH DEPARTMENT OF TRANSPORTATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

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INTRODUCTION

This lawsuit challenges a right-of-way issued by the Bureau of Land Management (BLM) to the Utah Department of Transportation (UDOT) that allows UDOT to build, operate and maintain a new highway that will cross the Red Cliffs National Conservation Area (NCA) administered by the BLM (the Project). Located in Washington County, Utah, the NCA includes approximately 45,000 acres of BLM-administered surface acres.[1] The long-planned road, a four-lane highway that includes a paved hike and bike path, will be 4.5 miles long, with 1.9 miles crossing NCA lands. Known as the "Northern Corridor," it will be built on the northern municipal boundary of the fast-growing St. George area, between State Route (SR) 18 and Interstate 15 at milepost 13. A northern corridor route connecting at these endpoints has been on local transportation plans for more than 30 years, contemplated before and since passage of the Omnibus Public Lands Management Act of 2009, and under serious transportation planning since 2017 in order to accommodate future population growth within Washington County; it will reduce congestion, increase capacity, and improve east-west mobility on arterial and interstate roadways. *See* ROD 1–10.[2]

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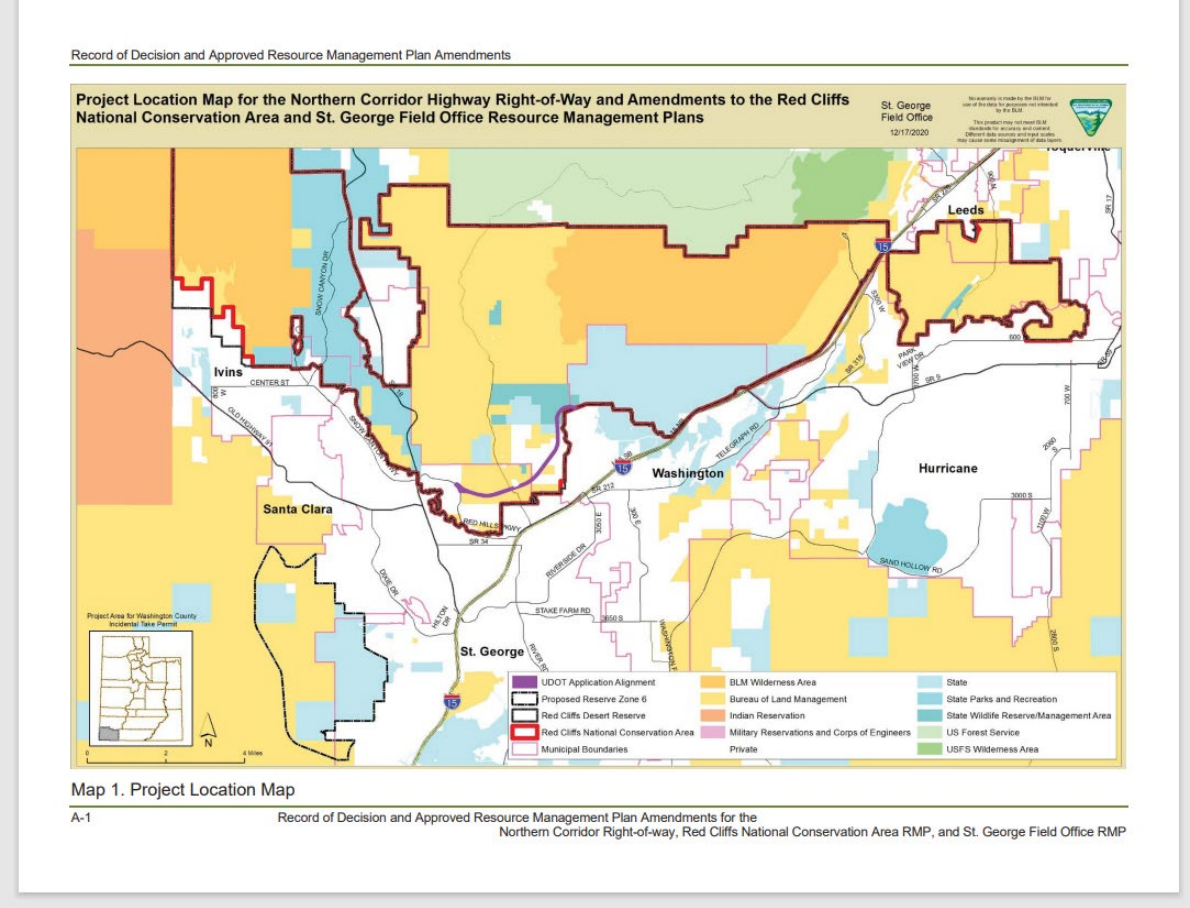
[1] The boundary established for the NCA includes the federally managed land inside the boundary of the Red Cliffs Reserve (Reserve), a multi-jurisdictional land base established in 1996 to protect Mojave desert tortoise that is collaboratively managed by the BLM, the State of Utah, Washington County, and local municipalities. Before Congress designated the NCA, these public lands were managed to support the Reserve, which was established by the 1995 Habitat Conservation Plan (HCP) to offset the development of private lands and the incidental take of Mojave desert tortoise elsewhere in Washington County. The NCA represents 73% of the lands within the larger Reserve. For a more detailed discussion of the Preserve and HCP, see the memorandum in support of intervention filed by proposed intervenor Washington County (ECF No. 4).

[2] Record of Decision and Approved Resource Management Plan Amendments for the Northern Corridor Right-of-Way, Red Cliffs National Conservation Area Resource Management Plan, and St. George Field Office Resource Management Plan (Jan 13, 2021), available at https://eplanning.blm.gov/eplanning-ui/project/1502103/570.



ROD, App. A-1.

UDOT's planning for this road and application for the right-of-way were driven both by current demand and forecasted population growth within the county, which will continue to increase demand on the transportation network. Declaration of Kim Manwill (Manwill Decl.) ¶¶ 9–10. Washington County has grown from a community of 13,669 in 1970 to 138,115 in 2010, and approximately 189,534 currently. Declaration of Naomi Kisen (Kisen Decl.) ¶ 15. The existing transportation network between SR 18 and I-15 is not adequate to meet future (2050) east-west travel demand in the northeastern and northwestern areas of St. George. FEIS ES-3–ES-4.[3] A northern transportation route for the rapidly growing area is necessary to reduce traffic

[3] Final Environmental Impact Statement to Consider a Highway Right-of-Way, Amended Habitat Conservation Plan and Issuance of an Incidental Take Permit for the Mojave Desert

congestion, substantial delays and idling, which is also expected to improve air quality. Manwill Decl. ¶¶ 4, 15.

The need for a transportation corridor north of St. George has long been predicted by state and local officials, who put the road in their transportation plan twenty years ago and sought federal legislation authorizing the corridor more than a decade ago. *See* Manwill Decl. ¶ 7. Some organizations opposed the route, and in 2009, Congress reached a compromise; it passed a law that enshrined some protections for the area by designating it a national conservation area. Omnibus Public Land Management Act of 2009 (16 U.S.C. § 460www; Pub. L. No. 111-11, Title 1, Subtitle O, § 1974) (Omnibus Act). In the same statute, however, Congress made clear that within three years of its passage BLM should identify a northern transportation route within the county for study as part of its required transportation planning, and that it must consult with "State, tribal, and local governmental entities (including [Washington] County and St. George City, Utah)" in doing so. *Id.* § 1977.

The right-of-way challenged in this lawsuit was thus contemplated by the Omnibus Act, itself a product of careful Congressional balancing. The specific right-of-way, before being granted by BLM, was also subjected to comprehensive study and public comment under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, in a process that culminated in a four-volume Environmental Impact Statement (EIS) and Records of Decision (RODs) issued by two different bureaus of the United States Department of Interior as co-lead agencies: the BLM and the United States Fish and Wildlife Service (FWS).[4] To prepare and support the environmental studies associated with the permitting process, the State has already

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Tortoise, and Proposed Resource Management Plan Amendments, Washington County, UT (Nov. 12, 2020), available at https://eplanning.blm.gov/eplanning-ui/project/1502103/570.

[4] *See* https://eplanning.blm.gov/eplanning-ui/project/1502103/570.

spent more than $6.3 million, and has committed an additional $2 million for preparation and finalization of the Plan of Development for the corridor in FY2022 required under the RODs. Manwill Decl. ¶ 14. The Northern Corridor will fulfill a transportation need identified decades ago that UDOT has planned for, studied, and invested millions of dollars to develop.

On June 3, 2021, Plaintiffs filed a legal challenge to the right-of-way in this district—2,000 miles away from the area where the Red Cliffs NCA is located, where UDOT is based, and where the people most directly affected by its outcome reside.[5] ECF No. 1. Because the corridor is vitally important to the State, its residents and its visitors, UDOT, the agency charged with planning for and meeting traffic needs within the State's borders, meets the Federal Rule of Civil Procedure 24(a) criteria for intervention as of right. UDOT seeks intervention to protect its interests as a permittee that has spent years pursuing the challenged right-of-way to meet transportation needs, consistent with its mission; and as an active participant in the extensive NEPA process for the Northern Corridor right-of-way that Plaintiffs claim was inadequate. Because the relief Plaintiffs seek would impair these interests, UDOT is entitled to intervene as of right under Federal Rule of Civil Procedure 24(a). Alternatively, UDOT moves for permissive intervention under Federal Rule of Civil Procedure 24(b).

BACKGROUND FACTS

A. Northern Corridor

Planning for the Northern Corridor has been underway for two decades and has been led by the Dixie Metropolitan Planning Organization (DMPO), the agency responsible for regional

[5] Plaintiffs Conserve Southwest Utah, Conservation Lands Foundation, Center for Biological Diversity, Defenders of Wildlife, Southern Utah Wilderness Alliance, Wilderness Society, and Wildearth Guardians assert causes of action under the Omnibus Public Lands Act of 2009, the Land and Water Conservation Fund Act, and the National Environmental Policy Act (NEPA). ECF No. 1. In addition to this lawsuit, they have also served a 60-day notice of intent to sue under the Endangered Species Act (ESA).

transportation planning in Washington County. FEIS App. J, 2. The DMPO planned for the northern corridor in coordination with the County, the City of St. George, Washington City, City of Ivins, City of Santa Clara, City of Hurricane, UDOT, and other communities in the St. George and Hurricane urbanized area. *Id.* Through transportation plans, environmental documents, and other studies, variations of an additional east-west route north of Red Hills Parkway have been studied 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. *Id.* The highway is necessary 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 Washington County population grows and the associated east-west travel demand increases. *Id.*; *see also* Kisen Decl. ¶ 14. The proposed corridor has been referred to by various names, including the Northern Corridor, Great Northern Corridor, and the Washington Parkway. FEIS App. J, 2.

UDOT has prepared or funded, by itself or with other state and local entities, a number of studies of alignments for the corridor, including but not limited to the following:

- Red Hills Parkway State Route 18 (Bluff Street) to Industrial Road Development Assessment (2009 UDOT);
- Washington Parkway Study: Integration of East-West Transportation Needs with Conservation Objectives for Desert Tortoise in Washington County, Utah (Jacobs and Logan Simpson 2012);
- Washington Parkway Cost/Benefit Study (Horrocks Engineers, 2011);
- Washington County General Plan (amended 2012); and
- DMPO Regional Transportation Plan.

FEIS App. J, 2–3. Some of these studies have focused on environmental impacts, particularly to the Mojave desert tortoise. Others have analyzed the costs of the road relative to its benefits. Like the federal NEPA process, the State transportation planning process affords multiple opportunities for the public to participate. *See* Kisen Decl. ¶ 10 (explaining opportunities).

In connection with the 2018 application for the Northern Corridor right-of-way, UDOT also funded/updated a Highway Alternatives Development Report, which was prepared under the supervision of the federal agencies. FEIS App. J; *see generally* Kisen Decl. ¶ 19 (describing payment of consultant, consistent with CEQ guidance).

B. Congress's Creation of the NCA and Requirement that BLM Identify a Northern Transportation Route.

The Red Cliffs NCA was designated by Congress as part of the Omnibus Act § 1974. The Omnibus Act established the NCA. *Id.* § 1974(c). It provides that the Secretary of the Interior (the Secretary) "shall manage the National Conservation Area (A) in a manner that conserves, protects, and enhances the resources of the National Conservation Area; and (B) in accordance with (i) the Federal Land Policy and Management Act of 1976 . . . ; (ii) this section; and (iii) any other applicable law (including regulations)." *Id.* § 1974(e)(1). The law limits uses to those that "the Secretary determines would further" one of the following purposes: "(1) to conserve, protect, and enhance for the benefit and enjoyment of present and future generations the ecological, scenic, wildlife, recreational, cultural, historical, natural, educational, and scientific resources of the National Conservation Area; and (2) to protect each species that is (A) located in the National Conservation Area; and (B) listed as a threatened or endangered species [under the Endangered Species Act (ESA)]." *Id.* § 1974(e)(2). The Act directs the Secretary to establish a management plan for the NCA after consulting with "appropriate State, tribal, and local governmental entities." *Id.* § 1974(d)(2)(A).

A separate provision of the statute, entitled "Washington County Comprehensive Travel Management and Transportation Plan," also directs the Secretary to develop a comprehensive travel management plan for the land managed by the BLM in Washington County. Omnibus Act, Subtitle O, § 1977. Purposes of the plan include "promot[ing] enhanced recreation and general access opportunities" and reducing conflicts between "motorized recreation" and "the important resource value of public land." The Act requires that:

> [i]n developing the travel management plan, the Secretary shall—(A) in consultation with appropriate Federal agencies, State, tribal, and local governmental entities (including [Washington] County and St. George City, Utah), and the public, identify 1 or more alternatives for a northern transportation route in the County.

Id. § 1977 (b)(2)(a). [6]

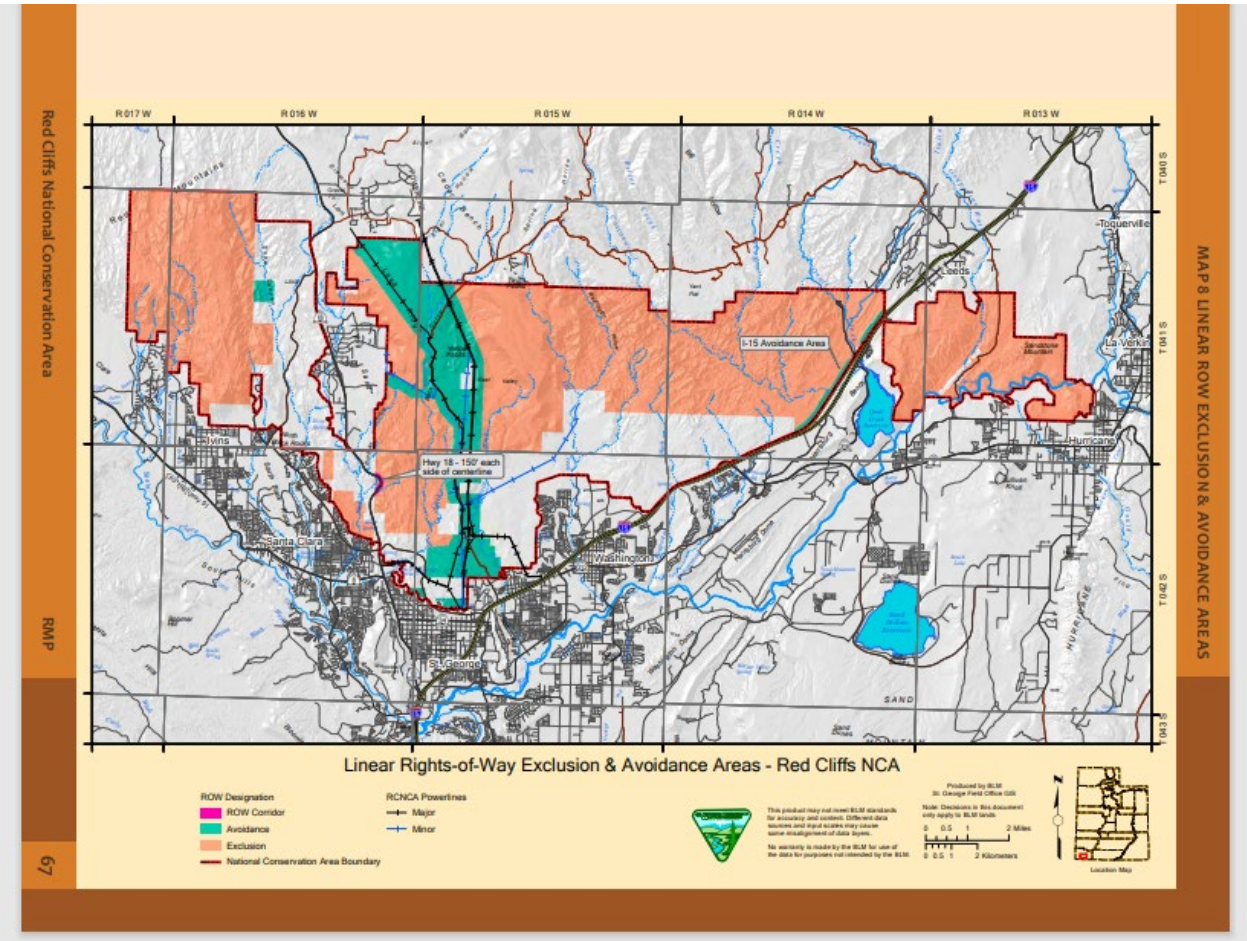
C. BLM's Planning for the NCA.

Consistent with the mandate in Section 1974(d) to establish a management plan for the Red Cliffs NCA, BLM released a Record of Decision and Approved Resource Management Plan in 2016 (Plan). When developing the Plan, BLM considered an alternative that included a designated Northern Corridor in the NCA. However, at that time, BLM did not have a specific ROW application to consider as part of that planning process. Manwill Decl. ¶ 12. Instead, the BLM relied on several conceptual alignments from the Dixie Metropolitan Planning Organization (DMPO) that were based on recommendations from Washington County (which served as a cooperating agency in developing that RMP, recommendations). ROD-10–11. The BLM at that time reasoned—again, without a specific right-of-way application before it—that a 183-acre conceptual right-of-way would not meet a requirement under the Omnibus Act to

[6] Although the Act required BLM to develop the travel management plan within three years, § 1977(b)(1), BLM has not yet done so.

"conserve, protect and enhance" the area's resource values, including ecological and heritage resources.[7] ROD-9.

Although the BLM eventually selected a different alternative that did not include a corridor, the final Plan did create an "avoidance area" that could accommodate a Northern Corridor alignment in the NCA. ROD-11, 30. An avoidance area—in contrast to "exclusion areas," which "are not available for location of [rights-of-way] under any conditions"—is an area identified through resource management planning to be avoided but which "may be available for ROW location with special stipulations." ROD-2, 7, 11, 33.



[7] The ROW challenged in this lawsuit directly encumbers only 122 acres. ROD-11.

RMP ROD at 67.[8]

D. UDOT and BLM's Environmental Analysis of UDOT's Proposed Right-of-Way.

On September 18, 2018, UDOT applied for a right-of-way to construct the Northern Corridor. In its application, UDOT alerted BLM to the possibility that the proposed right-of-way would require an amendment to the 2016 Plan. Washington County had previously applied to the FWS for an Incidental Take Permit (ITP) addressing species listed under the Endangered Species Act of 1973, as amended (ESA), 16 U.S.C. § 1531 *et seq*. The agencies prepared an environmental impact statement and proposed resource management plan amendments (FEIS/Proposed RMPA) to consider both applications by BLM and FWS as co-lead agencies. Through the process documented in the FEIS/Proposed RMPA, the BLM worked closely with the FWS, State of Utah, Washington County, City of St. George, cooperating agencies, and the public to identify multiple alternative northern transportation routes and refine them through additional measures to conserve, protect, and enhance the resources of the NCA.

Throughout the development of the EIS and the Section 7 consultation process, UDOT met frequently with the BLM and FWS to discuss ways in which potential impacts from UDOT's proposed Northern Corridor alignment to Mojave desert tortoise could be further minimized and mitigated beyond the measures identified in UDOT's application. Kisen Decl. ¶ 20. As a result of these conversations, UDOT committed to certain design features that would lessen the impacts created by the road corridor. *Id*. Primary among these design features is the inclusion of under-road passageways that will make the road more permeable for Mojave desert tortoise. *Id*. ¶ 21. BLM, USFWS, and UDOT reviewed and discussed at length the existing

[8] Record of Decision and Approved Resource Management Plan Amendment (2016), available at https://eplanning.blm.gov/public_projects/lup/64251/93617/112945/SGFO-ROD-RMP_Amendment_ePlanning.pdf.

scientific data on passageways and road permeability for tortoise to identify passageway locations, frequency and features that would provide substantial minimization of impacts, while confirming the road can still be constructed from a feasibility and economic standpoint. *Id.* In addition to the inclusion of these passageways, UDOT has also committed to installing and maintaining tortoise exclusion fencing and shade structures along the length of the right of way. *Id.* at ¶ 22. Additional mitigation measures for which UDOT will be responsible include: monitoring, additional maintenance and potential improvements to existing passages under SR-18 to improve tortoise passage at this location, the installation of a minimum of eight interpretive displays along the multiuse trail to provide the public with educational opportunities on Mojave desert tortoise and the NCA, and under road passages for the recreational trails that cross the road. *Id.*

On December 5, 2019, BLM and FWS published a Notice of Intent to prepare an environmental impact statement in the Federal Register, initiating a period for the public to comment on the proposed scope of impacts preliminarily identified by BLM and FWS. 84 Fed. Reg. 66692 (Dec. 5, 2019); ROD-22. A public scoping meeting was held on December 17, 2019 in St. George, Utah. ROD-22, 34. On June 12, 2020, the Notice of Availability for a draft environmental impact statement and resource management plan amendment was published in the Federal Register, initiating a 90-day public comment period. 85 Fed. Reg. 35950 (June 12, 2020); ROD-23. Online public meetings were held on July 16 and 21, 2020. ROD-23, 34. Comments received on the draft documents and BLM's responses are summarized in Appendix O of the FEIS/Proposed RMPA. ROD-34. On November 13, 2020, a Notice of Availability for the FEIS/Proposed RMPA was published in the Federal Register, initiating a 30-day protest period and up to 60-day Governor's Consistency review period. 85 Fed. Reg. 72683 (Nov. 13,

2020); ROD-23. The BLM received 18 protest letters. ROD-23, 34. The BLM separately received confirmation of the Governor's Consistency review on December 1, 2020, pointing out that Washington County has been in need of a viable transportation network for over 20 years. FEIS App. N; ROD-34.

In December 2019, the BLM and FWS initiated government-to-government consultations with 14 American Indian Tribes and Bands that claim affiliation to southwestern Utah, providing a detailed description of the Project and requesting information about sacred sites or places of traditional cultural importance. ROD-25. The BLM presented Project information at the Tribal Council meeting of the Paiute Indian Tribe of Utah on February 10, 2020 and continued to reach out to potentially affected tribes throughout the rest of the process. *Id*. The BLM sent additional information regarding the proposed undertakings to the 14 Tribes and Bands on June 1, 2020. ROD-35. In September 23, 2020, BLM initiated formal consultation with FWS under Section 7 of the ESA regarding the expected impacts to listed species and habitat. ROD-26–27.

The BLM's ROD,[9] approving a right-of-way subject to specified mitigation measures, was signed by Secretary Bernhardt on January 15, 2021. The ROD acknowledged the finding in the 2016 Plan decision that the Northern Corridor considered then was incompatible with the RCA's purposes, but explained that "the BLM has determined that granting a ROW for Alternative 3 appropriately gives meaning to the legislative instructions in *both* Sections 1974 and 1977." ROD-3 & n.1 (emphasis in original). Because the Omnibus Act required BLM to identify, in consultation with state and local authorities, a northern transportation route, and because "the only land managed by the BLM north of St. George in Washington County is

[9] FWS also signed a Biological Opinion and a Record of Decision, which are discussed in greater detail in Washington County's memorandum in support of its motion to intervene.

located within the Red Cliffs NCA," that is where Congress envisioned the corridor. ROD-10. The ROD explained that the approved decisions would in fact further the scenic, recreational, and educational purposes of the NCA. *Id.* at 3 ("…the ROW will enhance these purposes by providing a new paved hike and bike path for recreation and scenic views that will benefit certain members of the public. This path will also further the educational purpose of the NCA by including additional interpretive displays that inform the public about the history and other purposes of the NCA."); *see also* ROD-9 ("The location of the new roadway will allow the public to experience views of the interior of the NCA beyond what is currently only available along Cottonwood Springs Road and a handful of existing unpaved trails."); ROD-9, 16–17 ("The construction of a new 4.5-mile paved hike and bike path along the full length of the ROW will provide recreational access opportunities in an area of the NCA where they do not currently exist. Accessibility for users who are physically unable to use unpaved trails will be enhanced through the availability of the paved hike and bike path and new scenic driving opportunities."); *id.*, App. C, at 18 (trail would be designed to meet standards for Americans with Disabilities Act).

ARGUMENT

Intervention as of right is governed Federal Rule of Civil Procedure 24(a), which provides:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). Permissive intervention is available under Rule 24(b) if the movant can show "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a

claim or defense that has a question of law or fact in common with the main action." *Defs. of Wildlife v. Salazar*, No. CV 12-1833 (ABJ), 2013 WL 12317455, at *1 (D.D.C. Apr. 29, 2013).

In addition to Rule 24(a)'s requirements, in this Circuit, an applicant seeking intervention as of right must also establish that it has constitutional standing under Article III of the U.S. Constitution to participate in the action as of right. *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009); *but see Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (noting that the standing requirement is usually directed at those who invoke the court's jurisdiction, not at those who are seeking to intervene as defendants).

Here, UDOT has satisfied both the Article III standing requirements and the Rule 24 requirements necessary to permit intervention in this lawsuit.

I. UDOT HAS ARTICLE III STANDING TO INTERVENE.

UDOT has constitutional standing under Article III of the U.S. Constitution to participate in the action as the Project applicant that has expended and procured significant sums for preparation and development of the Northern Corridor route and been issued a right of way under the ROD. *Philip Morris USA*, 566 F.3d at 1146. "Where a party seeks to intervene as a defendant in order to uphold or defend agency action, it must establish (a) that it would suffer a concrete injury-in-fact if the action were to be set aside, (b) that the injury would be fairly traceable to the setting aside of the agency action, and (c) that the alleged injury would be prevented if the agency action were to be upheld." *WildEarth Guardians v. Salazar*, 272 F.R.D. 4, 13 (D.D.C. 2010) (citations omitted); *see also Roeder*, 333 F.3d at 233 (finding that a party who satisfies Rule 24(a)'s requirements will also meet Article III's standing requirement). UDOT satisfies the standing requirements.

Sufficient injury-in-fact exists when "a party benefits from agency action, the action is

then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads Grassroots Pol'y Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 317 (D.C. Cir. 2015); *see also Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 12 (D.D.C. 2016) (putative intervenor established standing where relief sought "would injure the [intervenor-Tribe] by overturning a favorable administrative action sought by the Menominee and which benefitted the [Tribe]."). Here, UDOT benefits from BLM's issuance and approval of the Northern Corridor right-of-way authorized in the ROD. If Plaintiffs achieve their requested relief—an order that vacates the ROD, right-of-way and Plan amendments approved in the ROD, Compl. at 47—UDOT would suffer significant harm. The remedies this Court could order range from remanding aspects of the ROD, which would force BLM and UDOT to re-do significant aspects of the permitting process, to vacating the ROD in its entirety, which would strip UDOT of its right-of-way and deprive it of the benefit of decades of planning and millions of dollars in investment. This potential "invasion of a legally protected interest" constitutes an injury sufficient for purposes of standing. *Crossroads,* 788 F.3d at 316. And the injury is "fairly traceable to the setting aside of the agency action" at issue. *Forest County Potawatomi Cmty.*, 317 F.R.D. at 11.

Finally, a resolution of this litigation in UDOT's favor would redress any potential injury to UDOT. If the claims directed at the approval of the ROD and Plan amendments are rejected, then UDOT will not be injured. *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003).

II. UDOT IS ENTITLED TO INTERVENE AS OF RIGHT AS THE HOLDER OF THE CHALLENGED RIGHT-OF-WAY, AND TO PROTECT IMPORTANT PUBLIC INTERESTS THAT ARE AT STAKE IN THIS LITIGATION.

UDOT is entitled to intervene in this action as of right under Federal Rule of Civil Procedure 24(a)(2). Intervention as of right under Rule 24(a)(2) depends on the following four

factors: "(1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties." *Fund for Animals*, 322 F.3d at 731 (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998)) (internal citations omitted). Where standing is established, "courts in this circuit generally take a liberal approach to intervention." *LeBoeuf, Lamb, Greene, & MacRae, LLP v. Abraham*, 205 F.R.D. 13, 18 (D.D.C. 2001).

UDOT's motion is timely and its interests in this litigation are irrefutable: it holds a right-of-way, lawfully obtained after an extensive permitting process and exhaustive environmental, technical, and economic review by state and federal agencies, that permits it to build the Northern Corridor and to address pressing needs of those who reside in or visit the St. George area. Because the litigation bears directly on the right-of-way issued to UDOT and UDOT's ability to develop the right-of-way and accomplish important transportation goals for the St. George area and the State of Utah, which would be thwarted if Plaintiffs were to prevail, UDOT is entitled to intervene as of right.

A. UDOT's Motion is Timely.

To determine whether a motion to intervene is timely, "courts should take into account (a) the time elapsed since the inception of the action, (b) the probability of prejudice to those already party to the proceedings, (c) the purpose for which intervention is sought, and (d) the need for intervention as a means for preserving the putative intervenor's rights." *WildEarth Guardians*, 272 F.R.D. at 12. If a motion to intervene is filed before any substantive progress has been made in the case, it is timely. *See, e.g.*, *Navistar, Inc. v. Jackson*, 840 F. Supp. 2d 357, 361 (D.D.C. 2012) (intervention timely where motion to intervene was filed two and a half

months after the complaint had been filed and less than two weeks after defendants had filed their responsive pleadings); *Alaska Wilderness League v. Jewell*, 99 F. Supp. 3d 112, 122 (D.D.C. 2015) (motion to intervene "arrived very early in the lifecycle of this case").

Under these standards, UDOT's intervention is timely. Plaintiffs filed their complaint less than one month ago, on June 3, 2021. ECF No. 1. Federal Defendants still have another month until their answer is due. Fed. R. Civ. Proc. 4. There have been no responsive pleadings, no dispositive motions, and no scheduling conference. Under these circumstances, intervention will neither prejudice any of the parties nor disrupt the orderly and timely determination of the issues in this case.

Moreover, UDOT is prepared to comply with any reasonable briefing and scheduling requirements this Court adopts; coordinate with the Federal Defendants and other parties to avoid duplicative briefing; and otherwise structure its participation so that the litigation proceeds in orderly fashion and intervention does not complicate case management.

B. UDOT Has a Vital Interest in the Right-of-Way to Build the Northern Corridor.

A court "*must* permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. Rule Civ. P. 24(a)(2) (emphasis added). UDOT initiated the environmental studies for the Northern Corridor, applied for a right-of-way from BLM, and now holds the right-of-way permit for the road. As the Project proponent, the agency was extensively involved in the lengthy environmental review challenged by the Plaintiffs in this case. UDOT will also build and oversee the operation of the road, which fulfills an important goal of the state and regional transportation plans. Finally, because one of Plaintiffs' claims is brought

under a statute that uniquely privileges UDOT as a party with whom consultation is required, it has an interest in litigating how that statute is interpreted.

As shown *supra*, UDOT has planned and budgeted for the Northern Corridor for many years. It has already expended more than $6.3 million, with more committed to final Project design and development, on the environmental analysis associated with the permitting process. Manwill Decl. ¶ 14. The significant investment of time and funds in the Project attests to the Northern Corridor's importance to UDOT. *Forest Cty. Potawatomi Cmty.*, 317 F.R.D. at 11 (granting intervention where "it is undisputed that the Menominee [Tribe] ha[s] attempted for years to develop a gaming facility on land in Kenosha . . . and that the Menominee will continue their efforts in the future."). While the significant funds UDOT has invested are alone sufficient to establish an interest in the granted right-of-way, as a government entity its interest is not purely financial; its transportation plans, designed to balance land use, environmental, and transportation needs, have been promulgated and updated with extensive public participation. Kisen Decl. ¶¶ 5–10, 16–17; Manwill Decl. ¶¶ 7–8, 10. UDOT has a more than sufficient interest in the matter to support intervention.

As the applicant whose right-of-way is being challenged, UDOT has a clear interest in the permit that is the subject of this action. *See, e.g.*, *Friends of Animals v. Ashe*, No. CV 15-0653 (ABJ), 2015 WL 13672461, at *3 (D.D.C. June 12, 2015) ("movants have an interest in the permits at issue, and a decision in their absence would impair their ability to protect that interest."). Intervention is routinely granted under Rule 24(a) in this Circuit to entities whose leases, permits, projects, or other rights are challenged in lawsuits against approving agencies. *See, e.g.*, *WildEarth Guardians*, 272 F.R.D. at 14–15 (mining company had a right to intervene in a lawsuit challenging lease authorizations); *Alaska Wilderness League*, 99 F. Supp. 3d at 122

(trade association had a right to intervene in lawsuit challenging federal regulations that permitted mining exploration activities); *WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 2 (D.D.C. 2017) (states and trade association had a right to intervene in lawsuit challenging oil and gas leases); *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 69–70 (D.D.C. 2006) (hunting organizations had a right to intervene in lawsuit challenging the U.S. Department of the Interior's Endangered Species Act determinations); *Red Lake Band of Chippewa Indians v. U.S. Army Corps of Eng'rs*, No. CV 20-3817 (CKK), 2021 WL 75744, at *3 (D.D.C. Jan. 9, 2021) (granting intervention where intervenor had "'an interest in the permit[ ] at issue,'" and a "'decision in [its] absence would impair [its] ability to protect that interest.'") (quoting *Friends of Animals*, 2015 WL 13672461, at *3).

The nature of Plaintiffs' claims also underscores UDOT's interest in defending the decision. Plaintiffs challenge the EIS and the conclusions that were made pursuant to the NEPA and ESA. *Id.* As indicated, UDOT as the applicant for the right-of-way spent a significant amount of money to complete the necessary environmental studies. *Cf. Wildearth Guardians*, 272 F.R.D. at 18 (granting intervention where state "expended significant time and energy in assisting the Bureau in preparing the EIS"). UDOT's interest in defending its evaluation of environmental impacts of the Northern Corridor as an interested state entity is also sufficient to qualify it for intervention as of right. *Massachusetts v. EPA,* 549 U.S. 497, 519–20 (2007) (holding that States have special solicitude to raise injuries as to their quasi-sovereign interest in lands within their borders.); *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 135–36 (1967) (finding a state's interest in competitive natural gas market sufficient under Rule 24(a)(2)); *Env't Def. Fund v. Costle*, 79 F.R.D. 235, 238–39 (D.D.C.), *aff'd* 12 E.R.C. 1255 (D.C. Cir. 1978) (ruling that an interest of state entities in a NEPA

challenge regarding salinity standards in the Colorado River Basin was sufficient under Rule 24(a)(2)).

Finally, UDOT has a legal interest in this case because both provisions of the Omnibus Act—Section 1974 and Section 1977—accord state entities like UDOT a special status in the statutory scheme. Because Congress has explicitly recognized the State's interests in land management planning in the NCA and transportation planning on BLM lands in Washington County, its interests under the statute are sufficient to warrant intervention. Omnibus Act, § 1974(d)(2)(A) (requiring Secretary to "appropriate State, tribal, and local governmental entities" when developing comprehensive management plan for NCA)); *id.* § 1977(b) (requiring Secretary to "consult[] with appropriate Federal agencies, State, tribal, and local governmental entities" to "identify 1 or more alternatives for a northern transportation route in the County"). *Cf. Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1092 (9th Cir. 2011) ("The consultative process dictated by Congress serves the purpose of permitting the States to participate in the formulation of federal policy in an area of major interest to the States."). In this lawsuit, Plaintiffs seek an interpretation of the Omnibus Act that would disenfranchise UDOT and its constituents, despite the statute's express acknowledgement of the State's interests. UDOT is entitled to intervene to demonstrate why Plaintiffs' preferred interpretation, which would read one of the Act's provisions out of the statute entirely, is incorrect.

C. Disposition of This Action Could Impair or Impede the Interests Of UDOT.

Plaintiffs seek both declaratory and injunctive relief in their Complaint. Compl. at 47, Prayer for Relief ¶¶ 1–3, ECF No. 1. There is little doubt that an adverse disposition of this case could impair or impede UDOT's ability to protect its interest in the Northern Corridor; the animating purpose of Plaintiffs' lawsuit is to overturn BLM's approval of a right-of-way for the Northern Corridor and enjoin construction. That relief, nominally directed at the funding by the

Federal Defendants, would constrain UDOT and would therefore, "*[a]s a practical matter*, impair or impede [*UDOT's*] ability to protect its interest[s]." Fed. R. Civ. P. 24(a)(2) (emphasis added). If the Court were to remand the decision, UDOT would at least be delayed, and possibly prevented, from proceeding with the construction and operation of the Project. In addition, Plaintiffs' Complaint also asserts the need for BLM to prepare a supplemental environmental impact statement. Compl. ¶¶ 150–55. The delay involved in supplemental analysis would be costly: not only would such delay significantly increase Project costs at the expense of taxpayers, but it would delay the realization of UDOT's Regional Transportation system goals. Utah residents would continue to experience transportation system service problems, such as safety (including emergency and safety vehicle delays), congestion, air quality impacts from idling and long wait times in traffic, and adverse impacts to neighborhoods and the local community (e.g., backfill traffic to neighborhoods and surface streets), in addition to business and commerce impacts. Manwill Decl. ¶ 15.

UDOT has expended considerable resources completing the environmental impact studies and navigating the federal approval processes, and it has committed millions of dollars to implementation of the Northern Corridor project approved through that process. The potential for delay posed by this litigation would significantly increase the costs of providing the road's intended benefits at the expense of Utah's taxpayers. Postponement or outright prevention of the Northern Corridor project would also impose non-fiscal costs on UDOT and the Utah residents it serves by depriving them of the benefits of mobility and safety in their transportation system. Furthermore, the Northern Corridor project as currently approved is consistent with the transportation plans of UDOT and the relevant local governments; invalidating the right-of-way would inhibit the implementation of those plans. Manwill Decl.

¶¶ 15, 16; Kisen Decl. ¶ 24. Clearly, this action carries the potential to impair the interests of UDOT to a degree sufficient to justify UDOT's participation in the litigation.

Finally, one of Plaintiffs' claims is premised on an interpretation of the Omnibus Act. Resolution of that question in a manner adverse to the State could impair UDOT's interests through the doctrine of *stare decisis*. This too counsels in favor of intervention. *Me-Wuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, 246 F.R.D. 315, 319 (D.D.C. 2007) ("'*stare decisis* principles may in some cases supply the practical disadvantage that warrants intervention as of right.'") (quoting *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010) ("Safari Club has a strong organizational interest in defending and preserving the NPS's interpretation of the Organic Act and individual national park enabling statutes.").

D. UDOT's Interests are Not Adequately Represented by the Government.

Finally, a prospective intervenor bears the burden of showing that its interests may not be adequately represented by the existing parties. *See Fund for Animals*, 322 F.3d at 735. The burden of making this showing should be treated as minimal. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Government entities are rarely adequate advocates for the interests of third parties. *See Fund for Animals*, 322 F.3d at 736; *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 912–13 (D.C. Cir. 1977); *Crossroads*, 788 F.3d at 321. As this Court has explained, "merely because parties share a general interest in the legality of a program or regulation does not mean their particular interests coincide so that representation by the agency alone is justified." *Am. Horse Prot. Ass'n, Inc. v Veneman*, 200 F.R.D. 153, 159 (D.D.C. 2001). The lack of congruence is apparent here, where the main defendant is the Department of the Interior—"a dual-mission

agency, charged with both protecting the nation's natural resources and developing those same resources." *Alaska v. Jewell*, No. 3:14-cv-00048-SLG, 2014 WL 12521321, at *4 (D. Alaska June 10, 2014) (internal quotation omitted), whereas UDOT's interests are more tailored to the goals of its citizens and their transportation needs.

Here, UDOT's interests are not adequately represented by the federal government. Although the Federal Defendants presumably share UDOT's interest in upholding their decision to authorize the Plan amendment through the approval of the ROD, those mutual litigation goals are no guarantee that the existing parties will zealously represent UDOT's interests. UDOT's interest in the Northern Corridor project differs in many important aspects from the interest of the other defendants. The Federal Defendants' primary interest is to defend the administrative processes by which Northern Corridor approvals and permits were issued. In contrast, UDOT seeks to protect more concrete interests—protection of an issued right-of-way that UDOT holds, implementing the Project that received those approvals, securing the Project's public benefits to the citizens of Utah, and addressing state and local policy and program objectives through the Project's design and implementation. The Northern Corridor not only provides needed transportation infrastructure but also reflects the input of State resource agencies and Utah residents. UDOT is better equipped than the existing parties to explain to this Court both the state and federal processes for planning and approving the Northern Corridor project, and the transportation needs of the region.

Courts have found in many instances that the federal government does not adequately represent the interests of tribal, state, or local governments. For example, this Court found that the State of Wyoming was entitled to intervene to protect its interest in a BLM decision to lease tracts of land for coal mining where the federal agency that granted the leases was named as

defendant. *WildEarth Guardians*, 272 F.R.D. at 18. The Court noted that while the defendants and proposed intervening state had many similar interests, such as ensuring the administrative decision was upheld, their regional and national interests "might diverge during the course of litigation." *Id*. These minor differences, even among aligned parties, were deemed sufficient to grant the state intervenor status. *See id*. at 19–20. Similarly, in a case where an Indian Tribe sought to intervene in an action by a competitor Tribe challenging an administrative decision by the Indian Gaming Commission, this Court found that the Tribe's alignment with the federal agency did not establish adequate representation. *Forest Cty. Potawatomi Cmty.*, 317 F.R.D. at 15. The Court observed:

> the Menominee are concerned with preserving their own rights and opportunities, including their specific economic development goals, both under the IGRA and in their capacities as sovereign entities. . . . The federal government, however, represents the public interest of its citizens as a whole, and would be "shirking its duty were it to advance [a] narrower interest at the expense of its representation of the general public interest." . . . . Accordingly, the Court finds that the Menominee have met the minimal burden of showing that their interests may not be adequately represented by the existing parties in this action.

Id. (citations omitted). *See also Earthworks v. U.S. Dep't of the Interior*, No. CV. 09-01972 (HHK), 2010 WL 3063143, at *2 (D.D.C. Aug. 3, 2010) (potentially inadequate representation shown where "Alaska's interests in the natural resources within state borders and the economic effects on the state of mining regulation are not necessarily represented by federal agencies or private companies"); *Waterkeeper All., Inc. v. Wheeler*, 330 F.R.D. 1, 9 (D.D.C. 2018) (state established potentially inadequate representation where. "as the entity that developed and proposed the program at issue," it was "uniquely positioned to explain to the Court how Oklahoma's current permitting scheme operates, as well as the likely effects of an adverse ruling."); *W. Org. of Res. Councils v. Jewell*, No. CV 14-1993 (RBW), 2015 WL 13711094, at *6 (D.D.C. July 15, 2015) ("The Court agrees with North Dakota that its unique interests in its

own lands, natural resources, regulatory programs, and tax and revenue programs" are "particularized interests that another sovereign state cannot adequately represent."); *W. Watersheds Project v. Interior Bd. of Land Appeals*, No. 1:19-CV-95-TS-PMW, 2019 WL 5191244, at *3 (D. Utah Oct. 15, 2019) ("Here, the State's sovereign, financial, environmental, and socio-economic interests are enough to warrant intervention and directly relate to this case's outcome.").

Courts have also recognized that intervention may be particularly important where the federal government's resolve to defend its decisions through successive levels of judicial review is questionable, such as when the policy priorities in the Executive Branch have changed. *See U.S. House of Representatives v. Price*, No. 1:14-cv-01967-RMC, 2017 WL 3271445 at *2 (D.C. Cir. Aug. 1, 2017); *see also Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001) (federal government's "silence on any intent to defend the [intervenors'] special interests is deafening"); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998) ("[I]t is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts."); *Ctr. for Biological Diversity v. Jewell*, No. CV-15-00019-TUC-JGZ, 2015 WL 13037064, at *3 (D. Ariz. Dec. 2, 2015) ("Arizona further points to the fact that FWS did not initially support AGF's changes to the revised rule or include them in an earlier version of the rule."). In *Price*, the states relied on the federal government's failure to provide assurance that it would vigorously represent the interests of the would-be intervenors. *Price*, 2017 WL 3271445 at *2. The court found that this met the requisite "minimal" showing to meet the adequacy of representation factor for intervention as of right. *Id.*

Finally, UDOT will furnish the Court with a unique, indispensable perspective not otherwise represented by the parties of this case. *See WildEarth Guardians*, 272 F.R.D. at 17.

UDOT has knowledge regarding the background and history of the Omnibus Act, the Red Cliffs NCA RMP planning process, and the Northern Corridor planning process (both state and federal). It will be able to provide legal arguments that might diverge from those presented by the Federal Defendants during the course of litigation. Perhaps most importantly, UDOT now holds a right-of-way for the Northern Corridor and therefore, has significant reliance interests in the right-of-way approval. Because of the many agency decisions at issue in this case, the perspective UDOT brings to the table will be invaluable to the Court. *Guardians v. U.S. Bureau of Land Mgmt.,* No. CV 12-0708 (ABJ), 2012 WL 12870488, at *2 (D.D.C. June 7, 2012) ("The Court agrees that no other party approaches the case from the state's unique perspective.").

III. UDOT'S INTERVENTION ALSO IS JUSTIFIED UNDER THE STANDARDS FOR PERMISSIVE INTERVENTION.

UDOT's intervention is also appropriate under the standards for permissive intervention, under Federal Rule of Civil Procedure 24(b). Rule 24(b)(2) provides that "[u]pon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common." Permissive intervention is discretionary, based on a showing of: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action. *Safari Club Int'l v. Salazar (In re Endangered Species Act Section 4 Deadline Litig.),* 704 F.3d 972, 980 (D.C. Cir. 2013) (citing *E.E.O.C. v. Nat'l Children's Center, Inc*., 146 F.3d 1042, 1046 (D.C. Cir. 1998)).

UDOT's defense of the federal approvals, as evident from the attached proposed answer, necessarily has questions of law and fact in common with those implicated by the Plaintiffs' claims, and the federal agencies' defenses. In addition, as discussed above, UDOT's application to intervene is timely and would not "unduly delay or prejudice the adjudication of

the rights of the original parties." Fed. R. Civ. P. 24(b). Indeed, UDOT has a strong interest in the swift resolution of the case. For these reasons, this Court's exercise of discretion to permit UDOT's intervention would be proper.

CONCLUSION

For the reasons set forth above, UDOT respectfully requests that it be permitted to intervene in this action.

Dated: July 1, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2021, I electronically filed the foregoing with the Clerk of the U.S. District Court for the District of Columbia by using the CM/ECF system. Some parties have not yet noticed their appearance and will not receive electronic notification of the filings. Thus, I have mailed paper copies of these document(s), per LCvR 5.4(d)(2), to the following party:

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