

**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 DEPARTMENT OF THE
INTERIOR; UNITED STATES BUREAU OF
LAND MANAGEMENT; and UNITED STATES
FISH AND WILDLIFE SERVICE,

Defendants,

and

UTAH DEPARTMENT OF TRANSPORTATION
and WASHINGTON COUNTY, UTAH,

Intervenor-Defendants.

No. 1:21-CV-01506-ABJ

PLAINTIFFS' STATEMENT OF FACTS UNDER LCvR 7(h)(2)

Red Cliffs National Conservation Area

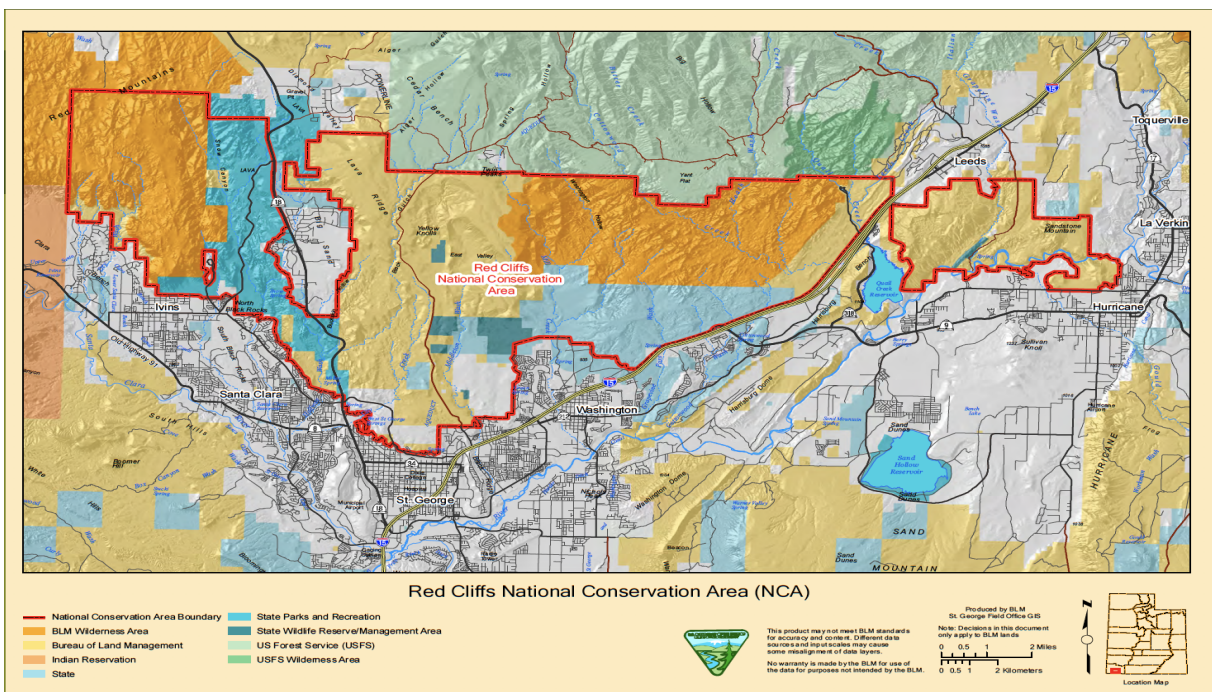
1. In March 2009, Congress passed and President Obama signed the Omnibus Public Land Management Act ("Public Lands Act"). Administrative Record ("AR") 046140-142.
2. Among other provisions, the Public Lands Act created the 61,225-acre Red Cliffs National Conservation Area ("NCA"), located in Washington County in southwestern Utah, which is administered by the Bureau of Land Management ("BLM"). *Id.* AR 085601.
3. Within the boundaries of the Red Cliffs NCA are nearly 45,000 acres of BLM-

managed public lands, 2,631 acres of private lands, and 13,735 surface acres owned by the State of Utah. AR 085601-02, 088229-30.

4. Including the NCA, BLM administers some 629,000 surface acres of public lands in Washington County, AR 085598, 085602, located at the convergence of the Mojave Desert, Great Basin, and Colorado Plateau. AR 085832, 099499. The intersection of these distinct bio-regions creates unmatched cultural, geologic, and ecological diversity. AR 085832-84.

5. The Red Cliffs NCA is known for its spectacular red rock canyons and basaltic lava flows. AR 046963. It is surrounded by the towering Pine Valley Mountains to the north, and includes two designated Wilderness areas (Cottonwood Canyon Wilderness and Cottonwood Forest Wilderness) within its boundaries. *Id.*, AR 085860-61.

6. The NCA is the largest block of undeveloped land contiguous to one of the fastest growing metropolitan areas in the nation. AR 046963. Residential and rural subdivisions, light industrial areas, commercial and retail businesses, and Interstate 15 abut the southern, western, and eastern boundaries of the NCA, as illustrated below. AR 085602, 088230.



7. The south-central portion of the NCA contains large expanses of private and state-owned lands. *See, e.g.*, AR 101789, 101917, 101937, 101657 (noting 665 acres of private lands and 6,426 acres of SITLA-owned land remain in the NCA); AR 102063 (Desert Reserve includes 16,698 acres of non-Federal lands); AR 099545 (land ownership statistics).

8. Vegetation within the Red Cliffs NCA is largely desert scrub, ranging from sparse, mostly bare ground to a moderately dense layer of evergreen or broad-leafed shrubs, and/or succulent species adapted to a desert environment. AR 085844-47. Populations and communities of nonnative, exotic invasive species (including cheatgrass and invasive brome species) are coming to dominate some areas within Red Cliffs NCA. AR 085844-49, 099983-84.

9. The Red Cliffs NCA contains nearly 200 miles of non-motorized trails for hiking, mountain biking, horseback riding, and other recreation, AR 100129-32. It hosted nearly 190,000 visitors in 2019, and 220,725 in 2018. AR 1000023, 059285.

10. The Red Cliffs NCA and public lands in this area provide important habitat for imperiled native species, including the Mojave desert tortoise, Gila monster, southwestern willow flycatcher, and dozens of bats, songbirds, and other migratory and non-migratory birds. AR 085604-05, 085851-58.

11. The Red Cliffs NCA is a major component of the 61,000-acre Red Cliffs Desert Reserve (“Reserve”), an area created under a 1995 Habitat Conservation Plan (“HCP”) to protect in perpetuity the area’s desert tortoise populations and habitat. AR 045213-22, 067652, 005292, 059193, 088230. *See also* Section V, *infra*.

Mojave Desert Tortoise

12. The Mojave desert tortoise is a long-lived, slow-growing tortoise species found across portions of southwestern Utah, northwestern Arizona, southern Nevada, and southeastern California. AR 079412-15, 100016-18, 101664-66, 099303-04.

13. Desert tortoises take 13 to 20 years to reach sexual maturity, and their growth and reproduction increases during years with higher precipitation. AR 100017, 099303.

14. Tortoise home ranges vary depending on sex, location, available resources, and weather patterns; male home ranges can be as large as 220 acres and female home ranges may be as little as half that size. AR 100017, 099304. During droughts, desert tortoises forage over larger areas, and in a lifetime an individual tortoise may use more than 1.5 square miles or 3.8 square kilometers (nearly 1,000 acres), and occasionally venture more than seven miles or 11 kilometers outside of its home range on long-distance forays. AR 100017, 099304, 099288.

15. Desert tortoises seek shelter during unfavorable conditions in dug-out burrows, rodent or other animal burrows, and caliche caves, and may remain inactive during periods of drought. AR 100017. The availability of shelter sites is an important aspect of habitat suitability, and tortoises use these burrows—even when active—during the night and the hottest part of the day. *Id.* An individual Mojave desert tortoise uses an average of 7–12 different burrows within their home range. *Id.*

16. Typical tortoise habitat is characterized by scrub brush below 1,677 meters (5,500 feet), where precipitation ranges from 5–20 centimeters and there is a relatively high diversity of perennial plants. AR 100018. Desert tortoise is a selective herbivore, meaning its diet generally consists of herbaceous perennials and winter annual plants, and they are known to forage on grasses, shrubs and cacti. AR 100017. Desert tortoise prefer native plants over nonnative plants,

so a diet composed of mostly nonnative annual grasses—like cheatgrass (*Bromus tectorum*)—does not promote growth of hatchling tortoises. *Id.*

17. Threats to the tortoise include actions that result in mortality and permanent habitat loss across large areas, such as urbanization and energy projects; and actions that fragment and degrade habitat, such as the proliferation of roads and highways, off-highway vehicle (“OHV”) activity, habitat invasion by nonnative plants, and wildfires. AR 100018-31, 101666-71, 059184-95, 079416-21, 099304-14, 101795-805, 088354-57.

18. Wildfire increasingly threatens desert tortoise populations and habitat because it degrades or eliminates habitat. AR 059186-88, 100027-29, 101798-800. Following wildfire, native plant species are often replaced by invasive, non-native species (including cheatgrass), which results in long-term habitat degradation or loss. AR 059186-88, 100027-29.

19. Moreover, roads increase the spread of nonnative plant species, which is known to reduce desert tortoise forage quality and increase the risk of fire within tortoise habitat. AR 100019-22, 059193-95, 074955-63, 079417-18, 099308-10. Road vibration, noise, and lights also have potentially significant adverse effects on desert tortoise behavior, communication, and hearing. AR 100020, 079556-57, 088353-55.

20. Placing roads through desert tortoise habitat is well understood to harm tortoises by influencing movements and behaviors, fragmenting habitats, and causing direct mortality. AR 099308-10, 100019-21, 088353-55, 099510-11. The breadth of this impact is a function of the size and frequency of use of the road: the bigger the road and the heavier its traffic use, the greater the direct and indirect impacts of the road on tortoises. AR 099308-09, 099510-11.

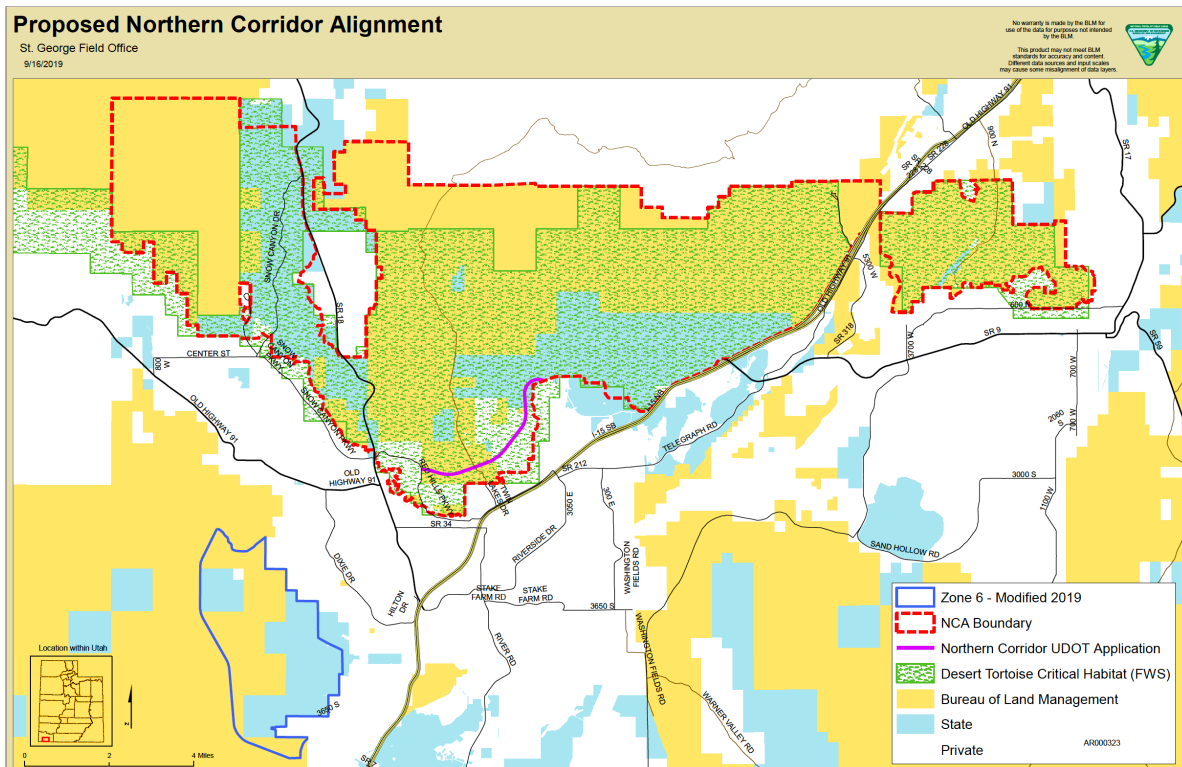
21. Recent studies have shown that the magnitude of this indirect impact from a 2-lane to 4-lane highway—*i.e.*, the road impact zone—can extend out between 2,150–4,250 meters

(7,054–13,943 feet). AR 099308, 088354, 099510-11. The road impact zone grows significantly with increasing traffic levels. AR 099308, 088354, 099510-11. Tortoise populations have been found to be depressed for up to 4.6 km (2.8 miles) from a roadway without exclusion fences. AR 099308, 088354.

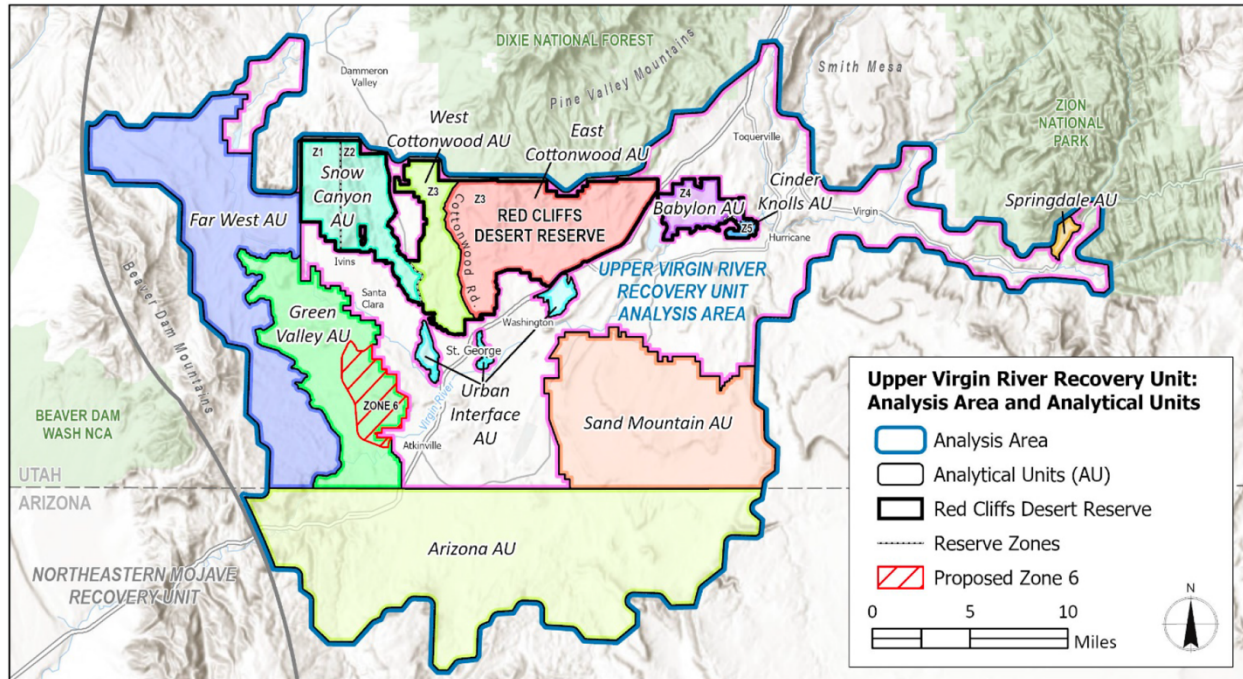
22. In 1990, the U.S. Fish and Wildlife Service (“FWS”) listed the Mojave desert tortoise as a “threatened” species under the Endangered Species Act (“ESA”), because of population and habitat losses and growing threats from these many factors. AR 065449-62.

23. In 1994, FWS designated critical habitat under the ESA for the Mojave desert tortoise, including critical habitat “recovery units.” AR 066397-443, 059158-59.

24. The Red Cliffs NCA and surrounding area lie within the 54,600-acre Upper Virgin River Recovery Unit (“UVRRU”) for the Mojave desert tortoise, including 46,098 acres within the Red Cliffs NCA, as illustrated below. AR 000323, 066440, 099314-21, 100031-34, 100320, 101787-95, 059158-64.



25. Although the UVRRU is the smallest recovery unit in the desert tortoise's range, FWS considers this recovery unit of high importance to the range-wide status of the species due to its high population densities of tortoise. AR 088353, 099316, 100031-32. FWS divided the UVRRU into 11 geographic Analytical Units ("AUs"), based on known tortoise occurrences and likely barriers to movement, as illustrated below. AR 059163, 099316-21, 101790-92.



26. Five of these AUs are within the Red Cliffs NCA, including the Snow Canyon, West Cottonwood, East Cottonwood, Babylon, and small portions of the Cinder Knolls Analytical units. AR 101790-93, 059163-67, 100031-32. The East and West Cottonwood Units are the biggest of these five AUs. AR 101790-93, 059164-67, 100031-32, 059167.

27. Threats within the East Cottonwood AU include roads, the potential for development on non-Federal lands within the Red Cliffs NCA, poor habitat connectivity, invasive grasses, and wildfire. AR 100033.

28. Currently, the East and West Cottonwood AUs support as few as 1,286 adult tortoises, which is below the 2,000-5,000 adult tortoises FWS determined was the minimum

target for a genetically healthy population under the 1994 Recovery Plan. *See* AR 066518, 059238 (population of between 5,000-50,000 tortoises needed for healthy population); AR 101794 (as few as 1,286 adult tortoises in these AUs); AR 059168, 101787 (tortoise populations have “declined significantly” in the UVRRU).

29. In 2014, a range-wide desert tortoise population estimate identified a decline of almost 125,000 adult tortoises over a 10-year period, which represents a nearly 37% range-wide population decline. AR 100034. Tortoise populations within the UVRRU experienced a 24.3% decline over this same timeframe. AR 100034. Densities of tortoise in the UVRRU are declining at a rate of 3.2% per year. AR 101795, 100036, 099323.

30. The area in and around the Red Cliffs NCA experienced a tortoise population decline of 41% between 1999–2019. AR 100035-36. Tortoise populations within the Reserve have dropped more precipitously, totaling more than 50 percent in recent years. AR 099323. In 2020, leading researchers concluded that the tortoise population within Zone 3 of the Reserve—*i.e.*, the area targeted for construction of the proposed approved Northern Corridor highway—has collapsed by 66% in recent years. AR 059284, 059288. Tortoise experts with FWS and the State of Utah have recently warned that “[t]he negative population trends in most of the [Tortoise Conservation Areas] for Mojave desert tortoise indicate that this species is on the path to extinction under current conditions.” AR 091671.

Recent Wildfires

31. Recently, wildfire frequency, extent, and intensity within the UVRRU and the Reserve have increased, and fires are known to have direct and indirect adverse impacts on tortoise. AR 059186-88, 100028-29.

32. In 2005-2006, wildfires burned about 19 percent of tortoise habitat in the UVRRU, while 65 percent of Zone 3 in the Reserve burned between 1993 and 2012. AR 059186.

33. In 2020, four major wildfires burned nearly 25% (15,000 acres) of Red Cliffs NCA, including the Turkey Farm Road, Cottonwood Trail, Lava Ridge, and Snow Canyon fires. AR 059186-87. These fires consumed at least 8,814 acres of tortoise critical habitat, including 2,526 acres of previously unburned habitat. AR 057504, 100318.

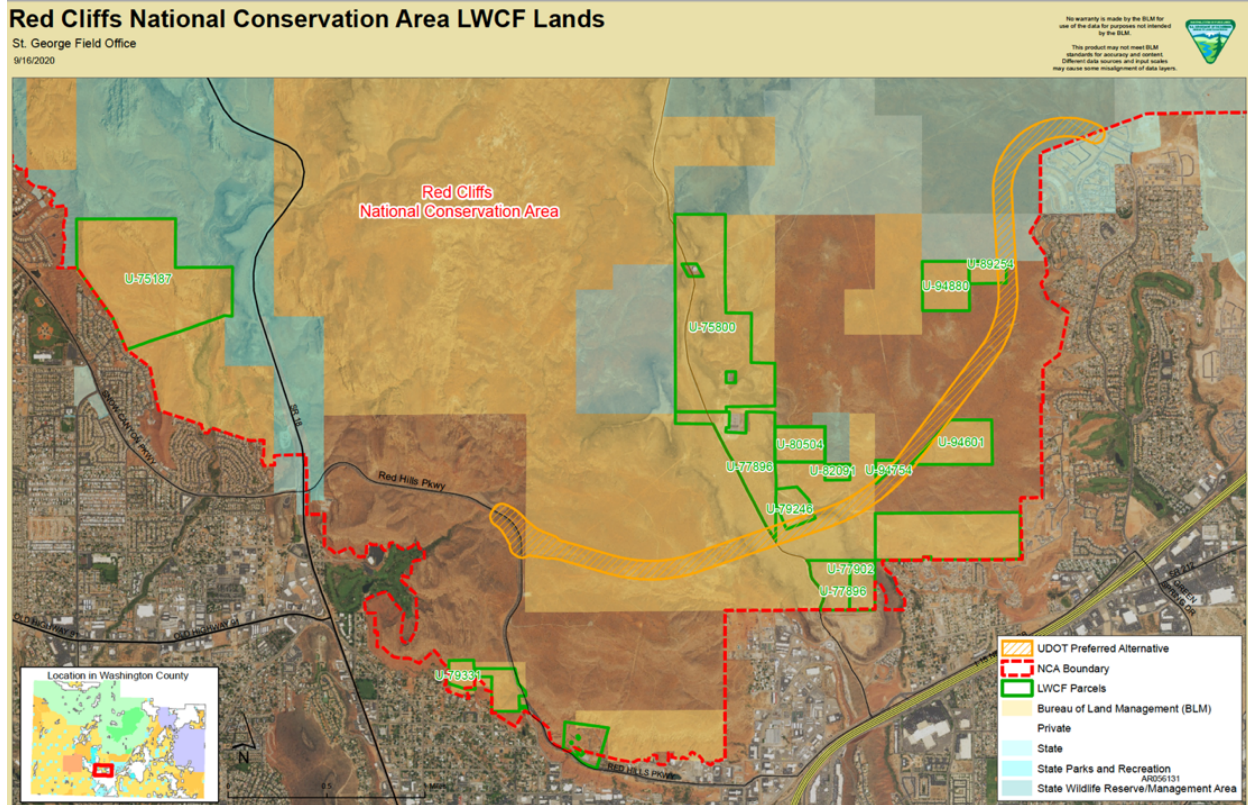
34. These fires transformed the Red Cliffs NCA landscape, and BLM and FWS's staff acknowledged the significance of these recent fires because they "burned very hot and decimated native trees, shrubs, forbs and grasses to ash." AR 042349.

35. These wildfires also had significant impacts on tortoise and its critical habitat, including causing direct mortality to "significant number of tortoises," and BLM concluded the Cottonwood Trail and Turkey Farm fires "will likely have significant population-level effects on tortoises within their respective burn areas." AR 057504, 093887-88, 100318.

36. In light of the scope, extent, and severity of these fires, Plaintiffs and others requested the Department of Interior pause the environmental review of the Northern Corridor highway and associated actions until it fully assessed and examined the ecological impacts of the fires and completed burned area assessments and response plans. AR 030766-72. Interior refused to do so. AR 030985.

Lands Acquired within the Red Cliffs NCA and Desert Reserve Using LWCF Act Funds

37. Since 1997, BLM has used funds under the Land and Water Conservation Fund Act ("LWCF Act") to acquire 15 parcels totaling over 857 acres within the Red Cliffs NCA and Reserve, as illustrated below. AR 100144-45, 102629-715, 056130-31; *see also* AR 042336 (noting "Code 095" delineated an LWCF Act acquisition).



38. According to BLM documents, BLM spent nearly \$21 million since 1997 acquiring these parcels. 102629-715. In each case, the acquisition was to protect Mojave desert tortoise habitat, among other purposes. AR 100144, 102629-715 (BLM Case Recordation showing “PURPOSE” of acquisitions).

39. These and other LWCF Act acquisitions were widely supported, including by U.S. Senators and Representatives, agency leadership, conservation groups, and Washington County. AR 041239-40, 046159-65, 093654-58.

40. The approved Northern Corridor Highway Right-of-Way (“ROW”) is sited directly over three of these parcels, permanently destroying their conservation resources and tortoise habitat. AR 056130-31, 100143-45, 102628-29, 102640-44, 102677-80, 102702-15, 102815, 100349, 100013-16.

41. BLM acquired the first 109.7 acre parcel (U-77896) within the Red Cliffs NCA in 1999 using \$1,703,188 under the LWCF Act. AR 102628-29, 056130-31, 102640-44, 045055, 100144. The purpose of acquiring this parcel was desert tortoise and wildlife habitat acquisition. AR 102640, 100144.

42. BLM acquired the second, approximately 6.3 acre parcel (U-89254), in 2013 within the Red Cliffs NCA using \$1,000,000 under the LWCF Act. AR 102628-29, 056130-31, 102710-15, 100144, 042354-55. BLM purchased this property from the Trust for Public Lands, and it was purchased for desert tortoise and wildlife habitat acquisition. AR 102710, 100144, 046963.

43. BLM acquired the third parcel, approximately 45.46 acres (U-94601) within the Red Cliffs NCA, as part of a larger acquisition in 2019, using \$2,000,000 under the LWCF Act. AR 102628-29, 056130-31, 102677-80, 100144. BLM acquired this parcel “to enhance opportunities to protect populations of the threatened Mojave desert tortoise and its habitat.” AR 042547.

44. In its justification for acquiring Parcel U-0094601, which is located entirely within desert tortoise critical habitat, BLM stated,

Acquiring this parcel eliminates the possible threat of development within an area that contains sensitive biological resources, as the BLM would manage designated critical habitat for the threatened Mojave desert tortoise and tortoise populations consistent with the conservation and protection purposes of the Red Cliffs NCA and management goals, objectives, and decisions from the Red Cliffs NCA ROD/RMP.

AR042548-49. *See also* AR 042555 (“[T]ortoise and designated critical habitat occur on the private land to be acquired. Management of the acquired lands under the decisions in the Red Cliffs NCA RMP (2016), would help to ensure the long-term preservation of Mojave desert tortoise and their critical habitat.”).

1995 Washington County Habitat Conservation Plan and Incidental Take Permit

45. In December 1995, Washington County Commissioners adopted a Habitat Conservation Plan (“HCP”) pursuant to Section 10 of the ESA, to guide management of tortoise habitat within Washington County and avoid liability for unlawful “take” of desert tortoise under ESA Section 9. AR 067549-758. The stated objective of the HCP was to preserve existing ecological values, including the protection and preservation of tortoise populations and habitat. AR 067565-66, 067573-76.

46. The central element to achieve this objective was the creation of the Reserve. AR 067577, 067555. Inside of the Reserve boundaries, the highest priority was the protection of the desert tortoise, while outside the Reserve development of desert tortoise habitat was allowed in certain areas. AR 067577, 067555.

47. FWS considers the Reserve a “fragile cornerstone” of the entire Upper Virgin River Recovery Area, AR 005288-89.

48. The 1995 HCP also created five so-called Management Zones with individualized management regimes, and Zone 3 (which includes the Red Cliffs NCA) was to be managed for the preservation and enhancement of the tortoise, with associated restrictions and prohibitions on livestock grazing, camping, mineral withdrawal, and vehicle travel. AR 067588.

49. The 1995 HCP provided that Zone 3 was to remain roadless, stating:

The largest block of habitat which will remain roadless is within Zone 3 of the reserve which is between the Cottonwood Road, Interstate 15, the Dixie National Forest, and Red Cliffs, an area of approximately 28,147 acres. The next largest block is also within Zone 3, and it is between Highway 18 and the Cottonwood Road north of Skyline Drive, an area of approximately 10,155 acres. These two blocks would constitute an almost roadless reserve area if the Cottonwood Road was gated and only local traffic allowed.

AR 067679.

50. At the time, approximately two-thirds of the lands within the Reserve were owned and managed by BLM or State of Utah State Parks (which manages Snow Canyon State Park), and the other approximately one-third was under private ownership or was owned and administered by the State of Utah School and Institutional Trust Lands Administration (“SITLA”). AR 067577-78, 045217-18. Unlike lands managed as state parks, SITLA-administered lands are managed expressly for the highest return to help support public education, and SITLA has been “especially active and creative in creating development value for its land to seek the highest return possible.” AR 045312.

51. The 1995 HCP adopted a strategy to use the Land and Water Conservation Fund to acquire remaining private and municipal lands for wildlife habitat and threatened and endangered species preservation. AR 067577-78. Washington County noted that acquisition of the remaining private and municipal lands was “needed to make the reserve contiguous and effective.” AR 067577.

52. The 1995 HCP envisioned bringing most of the unacquired non-federal lands into federal ownership through a “mass exchange of nearly all non-federal lands in the Reserve for BLM lands outside of the Reserve in a single transaction.” AR 099546.

53. In February 1996, FWS issued an Incidental Take Permit (“ITP”) to Washington, County under ESA Section 10, which allowed development to occur in tortoise habitat on non-federal lands in accordance with the 1995 HCP. AR 068419-24.

54. Under the 1996 ITP, FWS authorized the incidental take of an estimated 1,169 desert tortoises, 12,264 acres of occupied desert tortoise habitat, and 31,282 acres of potential desert tortoise habitat on non-federal lands over a 20-year timeframe; the ITP included an expiration date of March 14, 2016. *Id.*; AR 067555, 067645.

55. The ITP cited creation of the Reserve as one of the primary mitigation measures and activities to offset the take of 12,264 acres of occupied Mojave desert tortoise habitat. AR 067566-67; AR 067651 (acquisition and management of the reserve to protect Mojave desert tortoise was the “primary mitigation” for allowing take of tortoise).

BLM’s 2016 Red Cliffs National Conservation Area and St. George Field Office Resource Management Plans

56. In December 2016, after a six-year public planning process, BLM issued the Record of Decision (“ROD”) approving the Red Cliffs NCA Resource Management Plan (“RMP”) and St. George Field Office RMP under the Federal Land Policy and Management Act (“FLPMA”), which governs BLM’s management decisions within the NCA and surrounding areas. AR 088223-383 (Red Cliffs ROD and Approved RMP), 047044-158 (St. George Field Office ROD and Approved RMP).

57. The Red Cliffs RMP approved a series of management requirements for the NCA, including: (a) managing resources to protect and enhance water, geologic, paleontological, vegetation, wildlife, cultural, and scenic resources, while providing for varied recreational opportunities; (b) ensuring ecological integrity of the native vegetation communities is conserved, protected, and restored; (c) managing habitats for federally listed threatened or endangered species so that they are conserved, protected, and restored to support viable populations; (d) managing the open spaces, natural aesthetics, and scenic vistas of the Red Cliffs NCA so that they are protected for social, economic, and environmental benefits; and (e) managing land use authorizations that further the purposes of conservation, protection, and enhancement of resource values in the Red Cliffs NCA. AR 088223-383, 088233.

58. The Red Cliffs RMP also directed BLM to acquire non-federal lands within the Red Cliffs NCA to further the area's conservation goals, including "prioritiz[ing] the acquisition of non-federal lands or interests in critical tortoise habitat." AR 088248; AR 088241.

59. In addition, the plan adopted a series of "avoidance" and "exclusion" areas within the Red Cliffs NCA. AR 088231, 088261. An exclusion area is not available as a location of a right-of-way under any condition. AR 088261. In avoidance areas, BLM must apply heightened protections before locating a right-of-way. *Id.*; AR 088272. Among other things, BLM must consider options for routing or siting a right-of-way outside the NCA, ensure consistency of the right-of-way with the established purpose of the NCA, and authorize new rights-of-way only when the construction and operation of the right-of-way would not result in the take of federally listed species. AR 088261-62.

60. The plan also designated the entire Red Cliffs NCA as a Special Recreation Management Zone, which is an area where the existing or proposed recreation opportunities and recreation setting characteristics are recognized for their unique value, importance, or distinctiveness, especially when compared to other areas used for recreation. AR 088233-34, 088256-57, 88378-81.

61. The RMP divided the Red Cliffs NCA into four Recreation Management Zones, including large portions of the so-called "Frontcountry" zone. AR 088257. The Frontcountry Recreation Management Zone is designed to foster high-quality, sustainable non-motorized recreation opportunities, while conserving and protecting other resource values of the Red Cliffs NCA. AR 088257-58. The Frontcountry Recreation Management Zone is designated for hiking, biking, and horseback riding on easily accessible trails and rock-climbing close to the urban interface. AR 088379.

62. In the RMP, BLM specifically rejected Washington County’s proposed alternative designating a new utility and transportation corridor within the NCA that could accommodate a concept highway. AR 088232. According to BLM, this “northern transportation route” would not satisfy the conservation purposes of the Red Cliffs NCA for many resource values, including threatened and endangered species, cultural resources, scenic qualities, and recreation uses. *Id.*; *see also* AR 088353-64. BLM concluded that this route would create significant adverse impacts on protected resources. AR 088232.

63. FWS agreed with BLM, concluding that “the proposed northern transportation route is inconsistent with the [1995 HCP] and NCA because the construction and operation of a multi-lane highway would have significant negative impacts to desert tortoise, their habitat, and the ecological functioning of the Red Cliffs Desert Reserve.” AR 088360. According to FWS, the impacts from a northern transportation route would include increased road-kills, habitat fragmentation, invasive species and fire, human access, predation, and increased noise, which would have “substantial negative impact on the desert tortoise population stability and viability within the Red Cliffs Desert Reserve.” *Id.*

64. This was not the first time federal and state agencies concluded that a road across the Reserve and the Red Cliffs NCA would harm tortoise populations and habitat. In 2000, 2006, 2007, 2011, 2015, and again in 2016, agency scientists concluded that a highway would be “biologically devastating.” AR 005282-85 (2000 letter); AR 046056-57 (2006 letter stating highway “would significantly impact the threatened desert tortoise”); AR 05288-89 (2007 letter stating highway would “severely threaten the survival and recovery of the desert tortoise within the recovery unit” and would be “incompatib[le] with maintaining the tortoise population within the reserve”); AR 046058-65 (2007 letter); AR 005291-93 (2011 letter); AR 088353-64; AR

088360 (2015 report entitled, EFFECTS OF PROPOSED NORTHERN TRANSPORTATION ROUTE ON THE THREATENED MOJAVE DESERT TORTOISE stating a highway “would have significant negative impacts to desert tortoises, their habitat, and the ecological functioning of the Red Cliffs Desert Reserve”); AR 085994 (2016 decision rejecting a county-led proposal to build highway and concluding “Washington County’s proposed ‘northern transportation route’ multi-lane roadway could adversely modify the tortoise critical habitat by destroying dens and burrows, and native vegetation that provides shelter and nutrition.”).

Initiation of Northern Corridor Highway Right-of-Way and 2020 HCP/ITP Decisional Processes

65. On January 29, 2015, Washington County submitted to FWS an application to renew “*Without Changes*” the 1996 ITP. AR 046964-73. This option for renewal is only available if the applicant is “applying to renew or re-issue an existing valid Incidental Take permit without changes.” AR 046973. According to the FWS’ permit application provisions, “[i]f the information in [the applicant’s] current application package on file has changed in a manner that triggers a substantive amendment or a change not otherwise specified in the permit, then [the applicant] must apply for a substantive amendment to [the applicant’s] valid permit. For example, such major changes may include changes in location, activity, amount or type of take, or species to be covered by the permit.” AR 046965.

66. After submitting the application for renewal of the 1996 ITP “*Without Changes*,” Washington County quickly pivoted to “see if [they] can get more take” of tortoise through the renewal process. AR 007216. One way to generate more take, according to Washington County lawyers, was “if Zone 6 is added to the Reserve.” AR 007733 (FWS memo noting “new ideas the county’s attorneys have been discussing such as [u]nlimited take, different ways to recalculate take,” and observing that the county’s attorneys “are certainly good at coming up with creative

ideas for the take”).

67. Despite these substantive changes, Washington County never submitted an amended or modified application for an amended ITP. AR 102061.

68. On September 4, 2018, Utah Department of Transportation (“UDOT”) submitted to BLM an application for a ROW for the proposed Northern Corridor highway to be located in Zone 3 of the Reserve and Red Cliffs NCA. AR 008849-50 (letter dated September 4, 2018); AR 008851-61 (UDOT application dated September 11, 2018); AR 008936-37 (BLM response asserting application “filed” on September 18, 2018).

69. On December 5, 2019, BLM and FWS published a notice of intent to prepare a joint Environmental Impact Statement (“EIS”) under the National Environmental Policy Act (“NEPA”) to evaluate UDOT’s ROW and Washington County’s amended HCP and ITP applications and associated decisions, and opened a public scoping period. AR 047948-50.

70. From the outset, Washington County made clear its desire to have this process completed “by the end of 2020,” and it “continually pushed to have the final decision made during President Trump’s first term,” AR 021282-83. *See also* AR 042013 (BLM and FWS briefing paper noting Washington County and UDOT’s request for “decisions to be made by early January 2021”); AR 024760 (Washington County identifying a “hard deadline to complete entire HCP process and have our incidental take permit issued by the end of [2020]”).

71. In early 2020, the schedule slipped to absorb delays due to funding and other reasons, and on March 16, 2020, BLM proposed to issue the Records of Decision on January 28, 2021. AR 025406; AR 025408 (project schedule approved on March 16, 2020).

72. On April 13, 2020, Washington County reached out to then-Interior Secretary Bernhardt personally, asking for his “direct involvement such that the Record of Decision be

issued by the end of 2020 and at the absolute latest, before the end of President Trump's first term." AR 025534-36.

73. The very next day, Washington County officials again complained about the new schedule, and requested that "[t]he schedule should be changed back or at least moved up two weeks so that the DC review and the signing of the RODs occur before inauguration day 2021." AR 025500-01.

74. On April 24, 2020, the Department of the Interior changed the schedule again, which now called for issuing the Records of Decision up to January 13, 2021. AR 026454

75. BLM and FWS received 17,258 submissions from the public during the scoping period, and Plaintiffs and others submitted detailed scoping comments, requesting increased protection for the conservation and cultural resources protected under the Public Lands Act, and proposing a series of reasonable alternatives to UDOT's Northern Corridor highway proposal. AR 000368-557, 097799-819, 018426-946, 102598-619.

Draft Environmental Impact Statement

76. In June 2020, BLM and FWS issued a three volume Draft Environmental Impact Statement ("DEIS") for public comment. AR 098445-70 (Vol. 1); AR 098471-722 (Vol. 2); AR 098723-9198 (Vol. 3).

77. The DEIS first addressed BLM's proposed action to issue a 30-year renewable right-of-way ("ROW") grant to UDOT for the construction, operation, and maintenance of the Northern Corridor highway across BLM-administered lands. AR 098490. To approve the UDOT proposed ROW, BLM would also need to amend the Red Cliffs NCA and St. George Field Office RMPs, as the ROW would otherwise be in conflict with their directives. AR 098483-84.

78. According to the DEIS, the ROW would be up to 500-feet wide, and

accommodate a 4-lane highway with two 12-foot-wide travel lanes in each direction, 8-foot shoulders, and a 20-foot median. AR 098490-91. In addition, the Northern Corridor highway would include a 10- to 14-foot-wide paved trail on both sides of the proposed highway, communications infrastructure, curbs and gutters, drainage swales, and ditches, and would be posted with a 50-mile per hour speed limit. *Id.*

79. The Northern Corridor highway would include at least three major interchanges and intersections, and its alignment would be approximately 4.3 miles long, of which between 1.75-2.37 miles would cross BLM lands. AR 098490-92. *See also* AR 099943, 101763, 101591.

80. The DEIS considered five alternatives to the proposed Northern Corridor ROW, including two alternative routes within the Red Cliffs NCA (T-Bone Mesa alignment and Southern alignment), two alternatives using existing highway and road infrastructure (Red Hills Expressway and St. George Boulevard/100 South One-way Couplet (Couplet Alternative)), and a no action alternative. AR 098490-93.

81. In addition, the DEIS examined a series of alternatives for the interrelated and interdependent actions amending the Red Cliffs NCA and St. George Field Office RMPs. Regarding the Red Cliffs NCA RMP amendment, BLM identified a no action alternative (which would bar issuance of the right-of-way for the Northern Corridor highway), and two alternatives that would modify the 2016 RMP to allow for the issuance of the ROW. AR 098495.

82. The DEIS also considered three alternatives to modifying the St. George Field Office RMP, including the no action alternative, and two alternatives that would create a so-called Zone 6 to be included in the proposed 2020 Washington County amended HCP for management as a mitigation area for desert tortoise. AR 098508-13.

83. The DEIS also addressed FWS's proposal to issue a new ITP to Washington

County that would authorize the take of Mojave desert tortoises under the proposed amended HCP. AR 098483-84.

84. The agencies received nearly 15,500 public comments on the DEIS, which raised a host of concerns over the impacts of the proposed action on the world-class resources in the Red Cliffs NCA. AR 000558-5215, 018299, 031035. *See also* First Am. Compl. ¶ 111 (ECF No. 16), Answer ¶ 111 (ECF No. 28). Plaintiffs submitted hundreds of pages of detailed comments, raising a series of concerns over the impacts of the proposed action on the world-class resources in the Red Cliffs NCA. AR 034013-344, 032149-316.

85. In addition, the Office of the Governor of Utah submitted comments requesting that “the BLM should better analyze the impacts the proposed alternatives will have on private landowners whose properties will be harmed or impacted by the proposed alternatives.” AR 020628. The letter noted that the “DEIS did little to address the full impacts the proposed routes will have on private property owners.” *Id.*

Final Environmental Impact Statement

86. On November 12, 2020, BLM and FWS issued a four volume Final Environmental Impact Statement (“FEIS”) for the proposed Northern Corridor highway and associated actions. AR 099892-921 (Vol. 1); AR 099922-100225 (Vol. 2); AR 100226-553 (Vol. 3); AR 100554-101489 (Vol. 4).

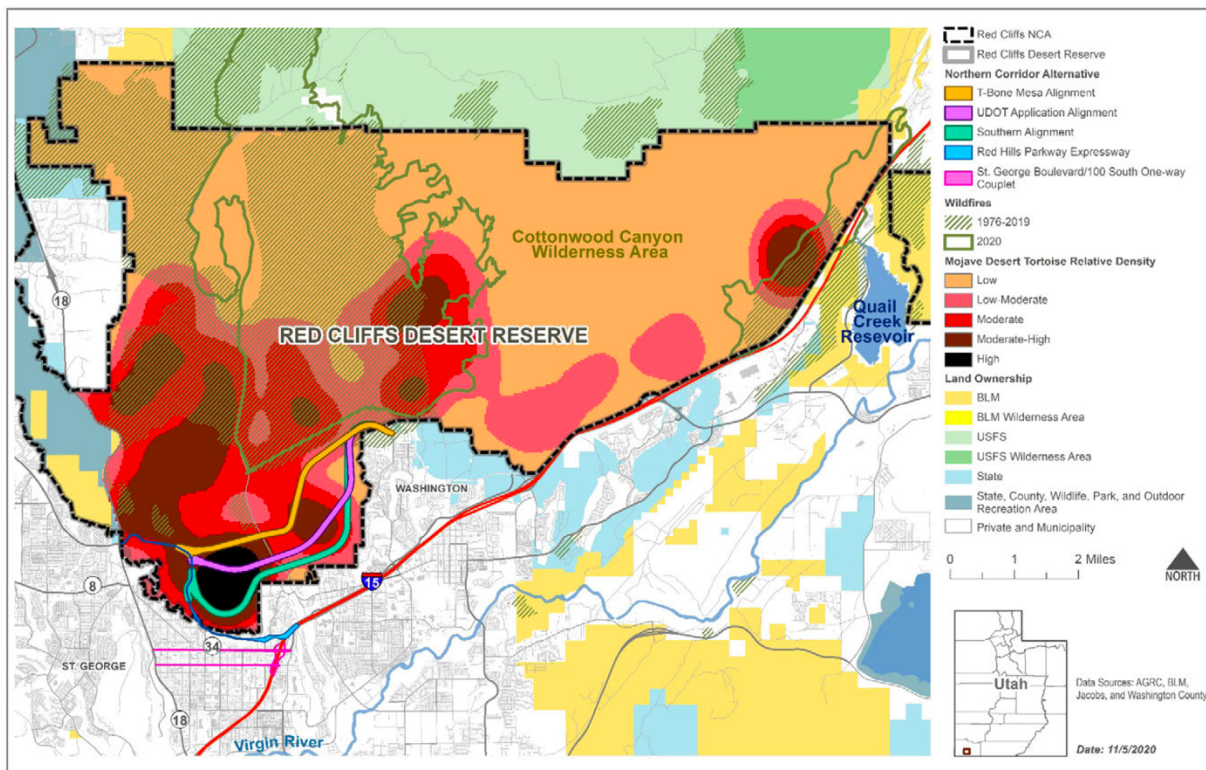
87. The FEIS revealed that the highway would adversely impact each and every natural and ecological resource of the Red Cliffs NCA identified to be protected under the Public Lands Act, including: sensitive plant species, AR 100006; non-listed special status species, AR 100065, 100067; lands acquired using ESA Section 6 funds, AR 100073; geology and soils, AR 100078; paleontological resources, AR 100082; and wetlands, AR 100085-86. *See also* AR

099988-100014 (summarizing impacts to protected resources).

88. The FEIS further acknowledged that the highway would directly and indirectly undermine and harm wildlife and habitat in the Red Cliffs NCA, including desert tortoise populations and designated critical habitat. AR 100013-16, 099984-90, 100051-58.

89. The FEIS concluded that the Northern Corridor highway would permanently eliminate 275 acres of tortoise critical habitat within the right-of-way and indirectly impact 2,333 acres of habitat, contributing to increasing fragmentation of tortoise habitat within the Red Cliffs NCA. AR 100049. The highway would bisect what the agencies consider “maybe the most important high-density cluster of desert tortoises in the [UVRU],” as illustrated below. AR 100318, 100054.

Map 3.5-1. Wildfires, Kernel Density Tortoise Abundance, and Northern Corridor Alignments



90. The impacts of the highway may be even more severe on critical habitat, including “[p]ermanently modifying habitat, losing areas of concentrated tortoise use, disrupting home range and landscape movement patterns, and fragmenting habitat, all within lands specifically identified for the protection and management of tortoises, [which] may result in long-term negative consequences to the conservation of the Mojave desert tortoise.” AR 099347.

91. Washington County itself has acknowledged that “the proposed Northern Corridor would adversely affect the conservation value of the Reserve for the Mojave desert tortoise through a combination of habitat loss and various fragmentation effects that are likely to degrade to some extent the quality or suitability of adjacent habitat.” *See* AR 013048, *see also* AR 007265 (impacts “are likely to have a substantial negative impact on the desert tortoise population stability and viability within the Red Cliffs Desert Reserve”).

92. The FEIS also identified that the proposed highway would adversely impact historic properties and cultural resources in the NCA that are protected by the National Historic Preservation Act (“NHPA”). The FEIS concluded that “[c]onstruction of the [] highway . . . would result in adverse effects to historic properties under Section 106 of NHPA and would directly impact cultural resources under NEPA, causing permanent or long-term effects to . . . archaeological sites.” AR 100125-27.

93. The FEIS similarly concluded that the highway would cause long-term, adverse visual and scenic impacts to the “stunning visual impact of the [Red Cliffs] NCA.” AR 100098-113, 100101; *see also* AR 100113 (concluding the highway “would adversely impact areas with high scenic quality and high visual sensitivity”).

94. The FEIS documented harms to recreational resources, as well, which would cause “dramatic change to the recreation setting” resulting in a “degraded user experience.” AR

100129-140; AR 100135 (finding highway would cause “stark or obvious visual change to the natural setting”); AR 100137.

95. In the FEIS, the agencies acknowledged the recent (2020) fires in the Red Cliffs NCA, but claimed that these fires did not represent significant new circumstances warranting a supplemental environmental review because, according to BLM and FWS, these fires are a “common occurrence” on this landscape. AR 099938. The agencies provided no data on the scale, scope, extent and impacts of these fires; burn severity and mapping; desert tortoises killed, injured, or translocated; and other information needed to fully understand the ecological impacts of these fires. *Id.*; AR 100165-66.

96. In addition, the FEIS failed to fully examine the direct and indirect noise impacts of the Northern Corridor highway, even though the agencies anticipated a noticeable change in noise levels in and around UDOT’s proposed route because this alternative will construct a road in a current roadless area. AR 100172. The FEIS stated that a thorough noise analysis, including consideration of possible mitigation measures, would occur at an undefined later date. *Id.*

97. Although UDOT’s proposed Northern Corridor highway route is located immediately adjacent to private residences in the Green Springs Development, the FEIS never examined the impacts of the highway on these homes and residents, including human health and safety impacts, traffic noise, litter, air and light pollution, quality of sleep, and quality of life. AR 100168-74.

NHPA Section 106 Consultation

98. On February 5, 2020, BLM sought to initiate Section 106 consultation with the State Historic Preservation Officer (“SHPO”) over the impacts of the Northern Corridor highway and associated decisions on cultural properties, as required under the NHPA, 54 U.S.C. §§

300101–320303. AR 43192-95. The SHPO responded on February 10, 2020. AR 043196.

99. On April 17, 2020, BLM continued consultation with SHPO over the impacts of the Northern Corridor highway, including defining the “undertaking” under the NHPA, and seeking concurrence on BLM’s identification of the “area of potential effect.” AR 043604-11. On April 20, 2020, the SHPO responded and concurred. AR 043612.

100. On August 7, 2020, BLM again asked for SHPO’s concurrence, this time on BLM’s identification efforts and determination of eligibility for the Northern Corridor highway. AR 043768-76. In this letter, BLM documented recent archaeological field investigations and inventories recording 13 previously undocumented historic sites and re-recording 16 historic sites, including prehistoric artifact scatters, a petroglyph panel with associated artifact scatter, and other sites. AR 043769. Of these 29 historic sites, BLM determined that 17 are eligible for listing to the National Registry of Historic Places. *Id.* The SHPO concurred on August 26, 2020. AR 043779.

101. On October 5, 2020, after BLM concluded that the highway and associated decisions would adversely affect historic properties, BLM again sought concurrence. AR 037504-05. In response, the SHPO noted this was “an unusual situation,” and “agree[d] that the construction of a new highway, in any alignment, will indeed lead to an adverse effect to historic properties as identified.” AR 038114. Thus, the SHPO “concur[red] with [BLM’s] finding of ‘adverse effect’ for this undertaking.” *Id.*

102. On December 10, 2020, BLM consulted with SHPO, this time over the proposed amendments to the Red Cliffs NCA and St. George Field Office resource management plans, and BLM’s conclusions that these amendments will not result in adverse effects. AR 043793-96, 043787-91. On this same day, SHPO concurred. AR 042802, 043797.

103. Prior to issuing the FEIS, BLM did not resolve its adverse effects determination through the development and evaluation of alternatives or modifications to the highway that could avoid, minimize, or mitigate the adverse effects on historic properties. AR 100124. Instead, BLM claimed only that “adverse effects to historic properties would be avoided through project design or impacts lessened to the extent possible.” *Id.*

104. BLM used the NEPA process to simultaneously comply with its NHPA Section 106 obligations. *See* First Am. Compl. ¶ 131 (ECF No. 16); Answer ¶ 131 (ECF No. 28); AR 102116.

Washington County’s 2020 Amended Habitat Conservation Plan

105. In October 2020, Washington County adopted and approved a 2020 Restated and Amended Habitat Conservation Plan (“2020 HCP”). AR 099432-891. The expressed intent of the 2020 HCP is to create a conservation program for conserving the Upper Virgin River population of Mojave desert tortoise in its native habitat in perpetuity, compatible with the goal of supporting economic growth and development in Washington County, Utah. AR 099528-29.

106. The 2020 HCP acknowledged that between 1995 and 2019—*i.e.*, a timeframe co-extensive with the adoption and implementation of the 1995 HCP—activities permitted under the 1995 HCP and 1996 ITP caused the loss of 16,037 acres of occupied tortoise habitat and 6,785 acres of potential tortoise habitat on non-federal land, totaling a loss of 22,822 acres of tortoise habitat from non-federal lands. AR 099515, 099437; AR 099496 (identifying loss of approximately 22,821 acres of tortoise habitat on non-federal lands).

107. In response to this level of habitat loss, the Desert Tortoise Council, a leading organization of scientists and laypersons, commented:

There is no way to reverse the development that has been authorized throughout Washington County since 1996, so conservation of the Reserve cannot now be

compromised by allowing development of the Northern Corridor. The 22,822 acres of tortoise habitats developed since 1996 have been offset by the conservation of the Red Cliffs Desert Reserve, and more than 500 tortoises (excluding those that were tested positive for Upper Respiratory Tract Disease, which were not translocated) have been displaced in exchange for protecting tortoises within the Reserve. To now undermine that protection by running a freeway through the densest tortoise concentrations in the Reserve is a violation of the 1996 permit's function, which was to provide for conservation and recovery *in perpetuity*.

AR 032148-316, 032160.

108. This loss of tortoise habitat between 1995-2019 within the UVRRU in Washington County swells to approximately 40,000 acres if federally-owned lands are included. AR 099496.

109. In its 2020 HCP, Washington County sought ESA "take" coverage for a variety of human activities causing habitat loss on 66,301 acres of potentially-suitable and occupied tortoise habitat in Washington County, including 200 acres of designated critical habitat within the Reserve. AR 099437.

110. Allowing habitat loss totaling 66,301 acres of suitable and occupied habitat amounts to 21% of all tortoise habitat in the Plan Area, with the Plan Area being the entirety of Washington County, Utah. AR 099438, 099463.

111. This projected take of 66,301 acres of tortoise habitat is in addition to the approximately 40,000 acres of tortoise habitat within the UVRRU in Washington County that has been lost between 1995-2019. AR 099496.

112. Under the 2020 HCP, the County requested authorized incidental take of 14,466 acres of occupied desert tortoise habitat, and 51,835 acres of potential desert tortoise habitat on non-federal lands. AR 099518. The combined 66,301 acres represent the full extent of tortoise habitat occurring on non-federal or Tribal lands in the UVRRU in Washington County outside the Reserve. *Id.*

113. The 2020 HCP did not identify the 200 acres of critical habitat with the Reserve where this take will occur, and provided no information regarding location, ownership, number of affected parcels, or other information. AR 099520-21.

114. The 2020 HCP identified a series of conservation measures to be implemented by Washington County, BLM, FWS, Utah Department of Natural Resources, SITLA, and Ivins City to ostensibly benefit desert tortoise, including expanding land acquisitions in and around the Reserve. AR 099545-47.

115. In total, the 2020 HCP targeted 7,091 acres for acquisition, including 665 acres of unacquired private lands and 6,426 acres of unacquired lands owned by SITLA. AR 099441, 099545.

116. The 2020 HCP reaffirmed that acquiring these lands is the primary responsibility of BLM. AR 099546.

117. The 2020 HCP also identified other measures to be implemented by Washington County and “HCP Partners,” including tortoise underpasses along Cottonwood Springs Road; wildfire restoration and other voluntary measures; a new mitigation zone (i.e., Zone 6) in the Reserve, as well as fencing installation, recreation reduction, and grazing permit changes in Zone 6. AR 099549-61.

2021 HCP Biological Opinion and Incidental Take Permit

118. On January 12, 2021, FWS issued a Biological Opinion for the 2020 amended Washington County HCP (“HCP BO”), concluding that implementing the 2020 HCP will not jeopardize the continued existence of Mojave desert tortoise or adversely modify tortoise critical habitat. AR 101646-756, 101711, 101713.

119. This 2020 HCP BO found that the implementation of the 2020 HCP with the

construction of the Northern Corridor highway would take 2,640 tortoises, including 352 adult desert tortoises, 1,830 juveniles, and 458 hatchlings, which represents eight percent of adult tortoises in the UVRU. AR 101718, 101711.

120. In addition, FWS concluded that implementation of the 2020 HCP would result in the “permanent loss” of 62,960 acres of Mojave desert tortoise habitat, including 633 acres of undeveloped designated critical habitat outside the Reserve and 200 acres of critical habitat within the Reserve. AR101697, 101702, 101719. This represents 19% of the estimated desert tortoise habitat in the UVRU. AR 101726.

121. The HCP BO acknowledged and anticipated the possibility of additional road development in the Reserve, including that “landowners in the Reserve may decide to develop their land.” AR 101708. *See also* AR 101655 (allowable activities within the Reserve include “access roads”), 101709 (“Most road construction and expansions . . . will be associated with private development projects”).

122. On January 13, 2021, FWS issued Findings and Recommendations for the issuance of an Incidental Take Permit associated with the 2020 HCP, which recommended issuance of an ITP allowing the “incidental take” of Mojave desert tortoise in and around the Reserve as discussed in the 2020 HCP. AR 102057-102, 102009.

Northern Corridor Highway Biological Opinion and Incidental Take Statement

123. Also on January 12, 2021, FWS issued a separate Biological Opinion for the Northern Corridor Highway Project (“Highway BO”), concluding that constructing, operating, and maintaining UDOT’s proposed Northern Corridor highway will not jeopardize the continued existence of Mojave desert tortoise or adversely modify tortoise critical habitat. AR 101757-856.

124. The Highway BO admitted that the highway will directly and permanently

destroy at least 276 acres of desert tortoise critical habitat, indirectly modify and harm 2,343 acres of critical habitat, and permanently impede tortoise movement between critical habitat south of the highway and the rest of the Reserve. AR 101808, 101822, 101781, 101810.

125. The Highway BO estimated there are 1,749 adult, 9,095 juveniles, and 2,274 hatchling tortoises in Reserve Zone 3; and 4,306 adult, 22,392 juvenile, and 5,598 hatchling tortoises in the entire UVRU. AR 101827, 101832.

126. The Highway BO also estimated that construction, operation and maintenance of the highway will *kill or injure* 4 adults, 101 juveniles, and 25 hatchlings; *harass* 78 adults, 406 juveniles, and 102 hatchlings; and *harm* 336 adults, 1,903 juveniles, and 476 hatchlings. AR 101830-32.

127. The Highway BO further estimated that use of the proposed highway will *kill or injure* an additional seven tortoises of all life stages annually, totaling 210 tortoises over the 30-year span of the HCP. AR 101831.

128. In sum, the Highway BO anticipated the highway will take¹ 418 adults, 2,410 juveniles, 603 hatchlings, plus an additional 210 tortoises in all life stages. AR 101832.

129. Thus, combining FWS's expected harm, harassment, injury and death to desert tortoise in relation to the Zone 3 and UVRU populations of tortoise, FWS thus anticipates the proposed highway will take 23.9% of adults, 26.5% of juveniles, and 26.5% of hatchlings in Zone 3, *see supra* at ¶¶ 123-129; and 9.7% of adults, 10.8% of juveniles, and 10.8% of hatchlings, in the entire UVRU, *id.* Factoring in the additional 210 tortoises in all life stages, the highway will take fully 27.8% of all tortoises in the Zone 3, and 11.3% percent of tortoises in

¹ "Take" is broadly defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. 1532(19); *see also* 50 C.F.R. § 17.3.

the entire UVRU. *Id.*

130. The Highway BO never addressed the growth inducing impacts of the highway, which pose further threats to desert tortoise populations and habitat. AR 101824-25. For example, the portion of the Red Cliffs NCA targeted for construction of the highway contains large expanses of private and state-owned lands. *See, e.g.*, AR 101789, 101917, 101937, 101654 (noting 665 acres of private lands and 6,426 acres of SITLA-owned land remain in the NCA); AR 102063 (Desert Reserve includes 16,698 acres of non-Federal lands); AR 099545 (land ownership statistics). This area includes the East Cottonwood analytical unit of the UVRU, *see* AR 101791, 100032-33, 100318-321 (maps), and BLM acknowledges that the threats to this unit include “potential for development . . . on non-Federal lands,” AR 100033. In fact, FWS anticipated the possibility of road development in Reserve. AR 101708 (acknowledging that “landowners in the Reserve may decide to develop their land”); AR 101655; AR 101709 (“Most road construction and expansions . . . will be associated with private development projects”).

131. The owners of some of these private lands have already begun planning for the development of these lands, including by identifying existing and future access points, buried water lines, power lines, and sewer connections; and even entering into an agreement to share planning costs for these parcels once the highway is developed. AR 011327, 011329-401. *See also* AR 011391 (“Future access to the immediate area near the subject [property] has been proposed with the eventual construction of the Northern [Corridor highway] across the Red Cliffs [NCA].”). And, the developers have recently contemplated entering into an agreement with adjacent landowners, including SITLA, for a “joint effort to develop a consolidated plan for harmonious development of the properties.” AR 011393.

132. FWS has previously noted the threats to tortoise from “induced growth”

associated with the highway: in response to an earlier highway proposal, FWS noted that it “may cause induced growth on private lands in the Red Cliffs Desert Reserve [a] new highway could result in landowners selling their properties to commercial developers with ensuing land use changes, timing, and rate of change given the current absence of paved access across this area.” AR 088357.

133. Along with the Highway BO, FWS approved an Incidental Take Statement (“ITS”) to authorize this level of take under ESA Section 7 from construction, operation and maintenance of the highway, which adopted four “reasonable and prudent measures” to minimize the impact of expected take, including two dealing with handling, monitoring and reporting; one addressing funding and staff for habitat restoration; and one dealing with minimizing fragmentation by using constructing passage structures. AR 101833.

134. The ITS failed to include any terms and conditions governing implementation of these four measures; instead, FWS included only two terms and conditions, including requiring BLM submit to FWS a handling and translocation report, and to report post-construction desert tortoise fatalities on the Northern Corridor highway within 72 hours of discovery. *Id.*

135. The ITS contained no term and condition regarding implementation of the design, funding, and staffing measures described above. *Id.*

Records of Decision and other Challenged Decisions

136. BLM received 16 protests to its Northern Corridor proposed amendments to the Red Cliffs NCA RMP and St. George Field Office RMP. AR 039070-293, 039750-870, 039871-74, 039875-77, 039888-90, 040043-44, 040045-46. Plaintiffs and others filed a lengthy protest. AR 039534-649.

137. As early as November 16, 2020—i.e., within days of issuing the FEIS, and

months before Federal Defendants issued the final decisions challenged herein—BLM was already circulating to UDOT a draft ROW grant for the Northern Corridor Highway for revision and review. AR 039891.

138. On January 13, 2021, then-Secretary Bernhardt denied or dismissed each protest. AR 102009-10, 039068-69, 039294-301, 102024-56.

139. On January 13, 2021, Bernhardt signed a Record of Decision (“Highway ROD”) completing the NEPA and NHPA consultation process for the Northern Corridor highway and associated amendments to the Red Cliffs NCA and St. George Field Office RMP Amendments. AR 101857-102008, 101859. Through this Highway ROD, Bernhardt approved BLM’s issuance of a ROW for construction, operation, and maintenance of the Northern Corridor highway along UDOT’s preferred route. AR 101857-102008, 101859. The ROD also asserted that BLM would continue the Section 106 consultation process to resolve any adverse effects to historic properties. AR 101890.

140. On this same day, BLM signed and granted a ROW to UDOT to construct, operate and maintain the Northern Corridor highway. AR 102813-46.

141. Also on January 13, 2021, FWS signed a Record of Decision (“HCP ROD”) completing its NEPA process for the 2020 HCP and ITP. AR 102103-102121. FWS acknowledged that issuing the ITP would result in “[s]ignificant modification of habitat [that] will significantly impair breeding, foraging, and sheltering of the desert tortoise, which is likely to result in killing or injury to individuals . . . [and] permanently remove 62,960 acres of desert tortoise habitat.” AR 102111.

142. On January 13, 2021, FWS issued so-called Findings and Recommendations for the issuance of an ITP for the 2020 HCP. AR 102057-102. FWS recommended approval of the

issuance of the ITP. AR 102099.

143. FWS issued and signed the Incidental Take Permit to Washington County under the 2020 HCP also on January 13, 2021. See Plaintiffs' Opening Memorandum in Support of Motion for Summary Judgment, p. xi n. 2, and Att. A.

Dated: February 27, 2023

Respectfully submitted,

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