

Protest Resolution Report

for the

**Proposed Resource
Management Plan
Amendments, Washington
County, Utah, relating to the
Proposed Northern Corridor
Highway Right-of-Way**

January 13, 2021

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Acronyms

AU	Analysis Unit
BLM	Bureau of Land Management
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act of 1976
FWS	U.S. Fish and Wildlife Service
GHG	greenhouse gas
HCP	Habitat Conservation Plan
ITP	Incidental Take Permit
LWCF	Land and Water Conservation Fund
MDT	Mojave Desert Tortoise
NCA	National Conservation Area
NCH	Northern Corridor Highway
NE	Northeast
NEPA	National Environmental Policy Act
OPLMA	Omnibus Public Lands Management Act
POD	Plan of Development
PRMPA	Proposed Resource Management Plan Amendment
RMP	Resource Management Plan
ROD	Record of Decision
ROW	right-of-way
SGFO	St. George Field Office
U.S.C.	United States Code
UDOT	Utah Department of Transportation
USFWS	U.S. Fish and Wildlife Service
UVRU	Upper Virgin River Recovery Unit

Introduction

Upon release of the Northern Corridor Highway (NCH) Final Environmental Impact Statement (EIS) and Proposed Resource Management Plan Amendments (PRMPAs), a 30-day protest period began on November 13, 2020, at which time any person who previously participated in the planning process and had an interest that is or may be adversely affected by the proposed plan could submit a protest on the proposed plan. A protest could raise only those issues that were submitted for the record during the planning process.

All protests had to be in writing and filed with the Bureau of Land Management (BLM), either as a hard copy or electronically via the ePlanning website, by the close of the protest period, which was December 14, 2020. All protest letters sent to the BLM via fax or e-mail were considered invalid unless a properly filed protest was also submitted.

The ePlanning project page contained a tool for submitting a valid protest electronically. The link to the ePlanning project page where a protest could be filed was included in the Notice of Availability for the NCH Final EIS/PRMPAs, related news releases, and Dear Reader letters.

As described in Section 1.4 of the NCH Final EIS/PRMPAs and reflected in the Record of Decision (ROD), the NCH Final EIS/PRMPAs included analysis intended to support three BLM decisions: whether to amend the Red Cliffs National Conservation Area (NCA) Resource Management Plan (RMP); whether to amend the St. George Field Office RMP; and whether to issue a right-of-way (ROW) through the Red Cliffs NCA. The proposed amendments to the Red Cliffs NCA RMP considered in the NCH Final EIS/PRMPAs are planning decisions related to the ROW decision; however, they do not approve, nor do they compel, the issuance of the ROW. The decision to issue the ROW grant is a separate, implementation-level decision supported by the analysis in the Final EIS. Therefore, any submissions related to that implementation decision were dismissed as invalid, including comments related to potential site-specific impacts on the objects and values for which the Red Cliffs NCA was designated, specific design features included in the Utah Department of Transportation's (UDOT's) plan of development, and UDOT's commitments to conduct off-site maintenance actions. These issues are related to the ROW implementation decision and are not subject to protest under BLM planning regulations, but are appealable after the BLM issues a ROD and Approved RMP Amendments.

Sixteen protest letters were received during the protest period. All protests were reviewed in accordance with 43 Code of Federal Regulations (CFR) § 1610.5-2 to determine protest validity. As noted above, submissions with comments related to the approval of the ROW application were not considered valid protests because the ROW approval is an implementation action rather than a planning-level decision. All valid protest issues for the proposed planning decision were then addressed in accordance with 43 CFR § 1610.5-2.

The Secretary and his staff completed an independent evaluation of the proposed Protest Resolution Report and ROD. Following that review, the Secretary approved this Protest Resolution Report and issued a written decision to protesting parties, and this report was posted on the BLM's website. The decision of the Secretary is the final decision of the Department of the Interior.

The protesting party index table, below, shows the list of the letters received during the protest period, the determination of the protest validity, and how each letter was addressed.

Protesting Party Index

Submission No. *	Protester	Organization	Determination
PP-UT-NorthCorridor-21-001	Jayla Burley Wolfe		Dismissed – No Standing
PP-UT-NorthCorridor-21-002	Hal Harmon		Dismissed – No Standing
PP-UT-NorthCorridor-21-003	Jim Reppert		Dismissed – No Standing
PP-UT-NorthCorridor-21-004	Margaret Park		Dismissed – No Standing
PP-UT-NorthCorridor-21-005	Chris LaDage		Dismissed – No Standing
PP-UT-NorthCorridor-21-006	Ingrid Akerblom		Dismissed - Comments
PP-UT-NorthCorridor-21-008	Fred and Lori Armstrong		Dismissed - Comments
PP-UT-NorthCorridor-21-009	John and Mary Jo Vilicich		Dismissed - Comments
PP-UT-NorthCorridor-21-010	Martha Ham		Dismissed - Comments
PP-UT-NorthCorridor-21-011	Richard Spotts		Denied
PP-UT-NorthCorridor-21-012	Pamela Palmer		Dismissed - Comments
PP-UT-NorthCorridor-21-014	Tom Butine	Conserve Southwest Utah/Red Cliffs Conservation Coalition	Denied
PP-UT-NorthCorridor-21-015	April Johnson		Dismissed - Comments
PP-UT-NorthCorridor-21-016	Lisa Rutherford		Dismissed - Comments
PP-UT-NorthCorridor-21-017	TJ Uysal		Dismissed - Comments
PP-UT-NorthCorridor-21-018	Holly Snow Canada		Dismissed - Comments

* There is no submission for PP-UT-NorthCorridor-21-013

Specific information related to the protests received can be found below.

Omnibus Public Land Management Act (OPLMA) Violation

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: In the FEIS, BLM fails to analyze, discuss or explain how the decision to apply for a one-time exception to LAR-13 Criteria E in order to grant a ROW for UDOT’s application alignment adheres to the “conserve, protect, and enhance” standard in OPLMA. In the 2015 Red Cliffs NCA RMP, BLM designated the area where the highway will be routed as a ROW avoidance area. Yet, the FEIS contains no real analysis, discussion or assessment of the impacts of the NCH on conserving, protecting and enhancing the NCA resource values, and further[ing] the purposes of conservation, protection, and enhancement of resource values in the NCA.” Red Cliffs NCA ROD at 64.

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: The NCH NEPA analysis improperly treats the NCA statutory purposes as comparable to other non-NCA issues or resources, and fails to explain how the NCH alternatives would benefit or be consistent with those NCA statutory purposes as required by OPLMA. The NCH NEPA analysis improperly lumps many of the NCA’s statutory purposes in with other non-NCA related issues and resources. This is especially egregious for the Mojave desert tortoise because the NCH NEPA acknowledges many significant adverse impacts from the NCH Alternatives 2, 3, and 4 to tortoises but the NCA statutory purpose of tortoise conservation is not properly reconciled with these impacts in the NCA related analysis. This is a fundamental disconnect. The NCH NEPA admits significant NCH harm to tortoises in the NCA and that tortoise conservation is a NCA purpose. But it does not explain how the NCH Alternatives 2, 3, and 4 would not violate the NCA tortoise conservation purpose. Indeed, BLM relying on promised tortoise mitigation outside of the NCA in Zone 6 does not address or compensate for harm to tortoises inside the NCA.

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: BLM’s FEIS analysis found that the RMP Amendments, which will permit UDOT’s application alignment, would cause adverse impacts to the Red Cliffs NCA’s resource values and objects. The FEIS fails to demonstrate how the highway would conserve, protect or enhance these values, or how the proposed SGFO Amendment and addition of Zone 6 would eliminate impacts to the NCA’s Congressionally-established purposes. BLM’s analysis in the FEIS failed to show that UDOT’s application alignment would conserve, protect or enhance the statutory purposes of the Red Cliffs NCA. In fact, the FEIS found that the highway would cause adverse impacts to the NCA’s resource values and objects. See FEIS at 3-97-99. In the FEIS, BLM attempts to remedy these issues by describing measures that would reduce the adverse impacts of the RMP Amendment to these objects and values, but these measures do not actually conserve, protect and enhance the objects and values of the NCA. Rather, they function as little more than a band-aid for attempting to minimize adverse impacts to the nine resource values protected in the Red Cliffs NCA.

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: the FEIS fails to demonstrate how the SGFO RMP Amendment associated with the proposed addition of Zone 6 to the Red Cliffs Desert Reserve could eliminate impacts to the Red Cliffs NCA’s Congressionally-established purposes...BLM admits that Zone 6 fails to mitigate damage to the objects and values of the Red Cliffs NCA: “While the actions described in the EIS

within proposed Reserve Zone 6 would provide benefits to many of the same resources that would be impacted by potential construction of the Northern Corridor across the Red Cliffs NCA (e.g., Mojave desert tortoise), these actions are not intended as, and should not be implied to be, mitigation of the potential impacts on the objects and values of the Red Cliffs NCA.” Appendix O at 0-494. The FEIS then goes on to discuss additional mitigation measures that must be done if the Northern Corridor alternative moves forward in order to “be consistent with the management requirements for the NCA established in OPLMA.”

Summary:

The BLM’s land use plan amendment violates the Omnibus Public Lands Management Act (OPLMA) because:

- The highway corridor does not conserve, protect, and enhance the objects and values for which the Red Cliffs NCA was enacted.
- The BLM concluded that there would be adverse impacts on the NCA’s resource values and objects that would violate the statutory purposes of the NCA per the OPLMA. For example, the BLM admitted to adverse impacts on Mojave desert tortoise, even though one of the statutory purposes of the NCA is tortoise conservation; and the BLM’s proposed mitigation measures (e.g., inclusion of Zone 6, restoration of habitat and burn scars, and under-road trail passages) are insufficient to offset the adverse impacts anticipated from the highway.

Response:

The Red Cliffs NCA was designated through the OPLMA (16 U.S.C.] 460www; Public Law 111-11, Section 1974, 123 STAT. 1081 (March 30, 2009)), which provides that the purpose of the 45,000-acre NCA is 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 Red Cliffs NCA and to protect each species that is located in the NCA and listed as a threatened or endangered species under the Endangered Species Act (ESA) (16 U.S.C. 460www(a)). Relatedly, Section 1977 specifically directs the Secretary to develop a comprehensive travel and transportation management plan for the land managed by the BLM in Washington County—including the Red Cliffs NCA—within 3 years and requires the BLM to identify one or more alternatives for a northern transportation route in the county, in accordance with the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1701 et seq.) and “in consultation with appropriate Federal agencies, State, tribal, and local governmental entities (including Washington County and St. George City, Utah), and the public” (Public Law 111-11, Section 1974(b), 123 STAT. 1089 (March 30, 2009)).

As the BLM noted previously in the response to comments on the Draft EIS, BLM Manual 6220, *National Monuments, National Conservation Areas, and Similar Designations*, provides guidance for the BLM’s use of NCAs. According to agency policy, the authorized officer will evaluate the proposed corridor allocation and ROW grant for consistency with the protection of the area’s objects and values based on the actions and application of all appropriate conservation and mitigation measures analyzed in the Final EIS. As part of this analysis, the decisionmaker will consider the severity, duration, timing, and direct, indirect, and cumulative effects of the project on the objects and values, including resources such as Mojave desert tortoise and visual resources. If the BLM decisionmaker selects a Northern Corridor alternative that would cross the NCA and determines that an associated amendment to the RMP is warranted, the BLM ROD would indicate how the actions approved by the BLM are consistent with the designating legislation (Final EIS, Appendix O, pp. O-494 to O-495; Manual 6220, p. 1-7). The manual makes it clear that the BLM’s requirements are to analyze the impacts in the National Environmental Policy Act (NEPA) document and document the

BLM decisionmaker's consistency determination in the ROD for the implementation-level ROW decision.

As discussed in Section 1.1 of the Final EIS, OPLMA (Public Law 111-11, Title 1, Subtitle O, Section 1974) presented the BLM with competing statutory purposes for the Red Cliffs NCA, which the BLM has tried to harmonize through this planning process. While Section 1974 designates the NCA with specific purposes, Section 1977 requires that the BLM "identify one or more alternatives for a northern transportation route in the County." At the time Congress enacted the OPLMA, the only BLM-managed lands north of the city of St. George in Washington County were those lands in the Reserve/NCA. Therefore, the BLM understands Section 1977 to instruct the agency to identify and consider a ROW within the NCA. In order to give meaning to both of these sections—to further certain purposes of the NCA, while identifying and fully considering a transportation route in northern Washington County—the BLM concluded that Congress instructed the agency to identify and consider a ROW and permit it to authorize such a route through the NCA—even if it may impact some purposes for which the NCA was designated, because there is no other viable BLM-administered land that can reasonably support a ROW of this size or meet the Applicant's needs in northern Washington County. Each of the BLM's action alternatives would further at least one of the purposes for which the NCA was designated—and the Proposed Plan Amendment would in fact further the scenic, recreational, and educational purposes of the NCA. Moreover, all of the alternatives consider a route over BLM land in the northern part of the county in accordance with Section 1977. Accordingly, the Final EIS/PRMPA is consistent with the statutory direction in the OPLMA, despite the potential for impacts on the Mojave desert tortoise.

As noted above in the introduction, under the BLM planning regulations the protest resolution process only addresses planning-level decisions, not implementation decisions. Therefore, comments related to implementation-level actions, such as the ROW grant, are not protestable and are not addressed here. The BLM included an analysis of impacts on the Red Cliffs NCA's objects and values, which are the purposes Congress identified in the OPLMA as further clarified in the Red Cliffs NCA RMP, in Section 3.18 of the Final EIS (pp. 3-176 to 3-179). To avoid duplication within the document, the NCH Final EIS/PRMPAs states: "The assessment of impacts on the NCA's objects and values, in accordance with BLM Manual 6220, Section 1.6 (C) (2), is included in other resource sections of this EIS. This includes analysis of the severity, duration, timing, and direct and indirect and cumulative effects of the potential Northern Corridor alternatives and associated amendment to the Red Cliffs NCA RMP. Table 3.18-1 provides a reference between the Red Cliffs NCA's objects and values identified in OPLMA and the corresponding EIS resource sections where analysis of the potential effects of the actions analyzed in this EIS can be found." For example, analysis of the impacts on the objects and values identified as "species protection including those identified as threatened or endangered under the ESA" is found in multiple sections: Section 3.2 for vegetative communities including noxious weeds and invasive species, Section 3.3 for special status plants, Section 3.4 for general wildlife, and Section 3.5 for special status wildlife. For additional information specifically addressing adequacy of the impact analysis for special status wildlife, such as the Mojave desert tortoise and Mexican spotted owl, see the section *NEPA – Impacts Analysis – USFWS Threatened and Endangered Species* below in this report.

Regarding the protestor's issue noting the inclusion of Zone 6 to mitigate effects from the ROW in the NCA, the BLM previously noted in its response to comments that the actions described in the EIS within proposed Reserve Zone 6 would provide benefits to many of the same resources that would be affected by the potential construction of the Northern Corridor across the Red Cliffs NCA (e.g., Mojave desert tortoise). However, these actions are not intended as, and should not be implied to be, mitigation measures to offset potential impacts on the objects and values of the Red Cliffs NCA; rather they are intended to meet specific obligations for the Habitat Conservation Plan (HCP) and Incidental Take Permit (ITP) to meet the obligations of Section 10 of the ESA. Additional Northern

Corridor design features and mitigation measures were identified in the Final EIS to protect and conserve the NCA's values (Final EIS, Appendix O, p. O-142). Further discussion of Zone 6 protest issues are provided below under the *NEPA – Range of Alternatives* section.

Therefore, the BLM complied with the OPLMA as detailed above and this protest is denied.

Land and Water Conservation Fund Violation

Individual

Richard Spotts

Issue Excerpt Text: The NCH NEPA fails to acknowledge that the NCH alternatives would not comply with the LWCF law because there is no federal authority to allow LWCF federal side funded acquired parcels to be degraded for non- conservation purposes (as would occur under Alternatives 2,3, and 4). Contrary to BLM's self-serving claims, the LWCF law does not provide BLM with any discretionary authority to approve a project that would directly or indirectly harm the values or purposes for which parcels were acquired with LWCF federal- side funds. While Congress required a mitigation process when conflicts may arise with incompatible uses of LWCF state-side acquired parcels, there is no such process for incompatible uses of LWCF federal-side acquired parcels. Congress clearly intended that those LWCF federal-side acquired parcels be protected in perpetuity. BLM defies logic by asserting that Congress somehow intended that such parcels could be harmed or incompatibly managed with no required mitigation. If BLM's assertion is allowed to stand, it would establish a devastating precedent that would undermine the basic integrity and credibility of past and potential future LWCF federal-side acquisitions. As such, portions of the Alternative 2,3, and 4 NCH alignments would cause such impermissible harm and therefore those alternatives would violate the LWCF law. Therefore, plan amendments to facilitate the NCH under those alternatives are illegal.

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: Agencies cannot Approve an Alternative that Violates the Purposes behind the LWCF Acquisition. BLM's granting of the RMP Amendments, paving the way for an ROW along the UDOT's application route, violates the Land and Water Conservation Fund Act and the Administrative Procedure Act. UDOT's application alignment will pave over - and directly, indirectly, and cumulatively impact these conservation lands. Yet, BLM somehow claims that these LWCF lands acquired for conservation purposes will continue to fulfill wildlife habitat purposes. See FEIS at 3-170. This conclusion is counter-factual and ignores the best available science showing that roads are a threat to Mojave desert tortoise habitat and populations, and that heavily- travelled four-lane highways are particularly anathema to Mojave desert tortoise conservation. See The 2011 Mojave Desert Tortoise Recovery Plan (USFW 2011) which referred to the 1994 Recovery Plan identifying road noise and vibration as having potentially significant effects on the desert tortoise's behavior, communication, and hearing (USFWS 1994). See also "Dominance and Environmental Correlates of Alien Annual Plants in the Mojave Desert, USA" (Brooks and Berry 2006) and "Resistance to Invasion and Resilience to Fire in Desert Shrublands of North America" (Brooks and Chambers 2011) for analysis of how roads increase the spread of nonnative plant species which reduces Mojave desert tortoise forage quality and increases the risk of fire within Mojave desert tortoise habitat. See "Roadside Ecology: Science and Solutions" (Forman and Sperling 2003) for how roads can be a direct source of fire ignition, increased litter, increased presence of predators, and increased toxicants into the environment. See also "Impacts of Vehicle Road Traffic on Desert Tortoise Populations with Consideration of Conservation of Tortoise Habitat in Southern Nevada" (von Seckendorff Hoff and Marlow 2002) for analysis of roadway zone of impact out to 4.6 kilometers.

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: BLM admits that it lacks authority to issue a ROW across lands it does not hold in fee title, and that any ROW for the Northern Corridor Highway will be “inconsistent with the express purpose of the conservation easement,” *id.*, BLM pushes past these limitations by explaining that UDOT has agreed to “make reasonable efforts” to adhere to the conservation easement. But, as BLM admits, it lacks any authority to issue a ROW across lands owned by the City of St. George, irrespective of whether UDOT makes reasonable efforts to adhere to the provisions of the conservation easement. Moreover, BLM cannot hide behind UDOT’s unidentified conservation “efforts,” especially when any efforts or provisions haven’t been subjected to public notice and comment. UDOT failed to release the Final POD [Plan of Development] concurrently with the Final NEPA document, as they committed to doing in the Draft POD released June 11, 2019 at pages 4-5. On November 19, 2020, seven days after the NOI was published in the federal register, BLM finally published UDOT’s November 2020 Draft POD. UDOT has failed to identify or disclose, in the November 2020 Draft POD or otherwise, any conservation efforts designed to adhere to the conservation easement. In short, BLM cannot adhere to its NEPA obligations to fully and finally evaluate the direct, indirect, and cumulative impacts of the Northern Corridor Highway on the conservation values identified in the conservation easement between the City of St. George and BLM by punting this analysis to a third party. See *San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1056 (10th Cir. 2011). BLM has failed in the FEIS to demonstrate how lands acquired with LWCF funds to conserve federally-listed species and critical wildlife habitat will continue to fulfill wildlife habitat purposes if a right-of-way is granted for UDOT’s application route across these lands.

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: In the FEIS, BLM has arbitrarily limited its analysis of the impacts of the RMP Amendments and UDOT’s application alignment on LCWF lands to only a 500-foot corridor on either side of the highway. FEIS at 3-170, Table 3.16-1. As noted in our DEIS comments, there are two problems with this approach. First, BLM cannot limit its analysis only to direct encroachment. Second, BLM needs to fully consider the direct and indirect impacts of constructing the NCH, including the potential impacts on the conservation values for which the lands were acquired. As noted above, these conservation values include habitat for Mojave desert tortoise and other wildlife, open space, as well as aesthetic and recreational values.

Summary:

Alternatives 2, 3, and 4 of the NCH Final EIS/PRMPAs violate the Land and Water Conservation Fund (LWCF) because the LWCF does not provide the BLM with any discretionary authority to approve a project that would directly or indirectly harm the values or purposes for which the parcels were acquired with Federal LWCF funds, and because they would not meet the purpose of conserving wildlife habitat (one of the conservation purposes in the LWCF). The BLM has failed in the Final EIS to demonstrate how lands acquired with LWCF funds to conserve federally listed species and critical wildlife habitat will continue to fulfill wildlife habitat purposes if a ROW is granted for UDOT’s application route across these lands.

The BLM violated NEPA because the agency’s indirect effects scope of analysis is too narrowly defined to include only a 500-foot corridor on either side of the highway, which mischaracterizes the potential impacts on the area’s conservation values, such as conservation of the Mojave desert tortoise. Additionally, the BLM failed to adequately analyze the impacts of the highway on the conservation values identified in the conservation easement between the BLM and City of St. George, and failed to provide sufficient evidence on the efficacy of mitigation measures.

Response:

The LWCF Act of 1965 (54 U.S.C. 200301 et seq.) established a funding source to assist the Federal agencies and States in acquiring certain lands for certain recreation and other conservation purposes. The LWCF has a Federal agency component (54 U.S.C. 200306) and a State and local government component (54 U.S.C. 200305), which have different uses and requirements. For Federal land management agencies such as the BLM, the LWCF may be used to purchase private inholdings to meet certain resource management objectives. For State and local governments, funds from the LWCF may be allocated to a State for the planning, acquisition, and development of needed land and water public outdoor recreation projects. Lands acquired for Federal purposes are administered by the respective Federal land management agency. All lands acquired-in-fee with LWCF funds in the Northern Corridor analysis area are managed by the BLM.

The BLM acquired the parcels in question for the purposes of land tenure consolidation and wildlife habitat acquisition for the endangered Mojave desert tortoise. These acquisitions were made with LWCF funds and consistent with the agency's acquisition authority under section 205 of FLPMA (43 U.S.C. 1715) and the 1996 HCP Implementation Agreement. The BLM's review of the warranty deeds did not reveal any reference to LWCF, limitations on additional encumbrances, or other restrictions on these parcels (Final EIS, p. 3-168). Lands that are acquired pursuant to 43 U.S.C. 1715 are subsequently managed in accordance with the governing land use plan, in this case the Red Cliffs NCA RMP. The Red Cliffs NCA RMP contemplates issuing ROWs over acquired NCA lands (LAR-12). As a result, it appears that there are no statutory or regulatory provisions that expressly prohibit the issuance of a ROW over the NCA lands. Table 3.16-1 in the Final EIS lists the Federal LWCF land parcels identified within the Northern Corridor analysis area and notes the small amount of LWCF acreage with anticipated direct, albeit limited, impacts (7 of the 15 parcels have acreage within the 500-foot corridor alignments). Additionally, Map 3.16-1 displays this information and presents the parcels in the general area of the Northern Corridor alternatives (Final EIS p. 3-170, Appendix B, p. B-80).

Section 3.16.2 of the Final EIS presents the environmental consequences from the Northern Corridor alternatives and states, "[l]ands acquired with LWCF funds by BLM may be encumbered as a result of constructing the Northern Corridor contemplated in Alternatives 2, 3, and 4. Federal and State LWCF lands are already encumbered under the current conditions described in Alternatives 1 and 6. Under Alternative 5, the current encumbrance on Federal LWCF may be expanded" (Final EIS, p. 3-169). Construction of the Northern Corridor could directly encumber a number of parcels the BLM previously acquired with LWCF funds (p. 3-169). Furthermore, Section 3.16.2.3 states, "Potential indirect impacts related to the wildlife habitat on these NCA lands are analyzed in Sections 3.4 and 3.5, visual resources are analyzed in Section 3.13, and recreation and visitor services are analyzed in Section 3.15. No direct or indirect impacts to land tenure consolidation would occur since the underlying land ownership will not change."

The BLM included design features and mitigation measures that would minimize or avoid impacts and encumbrances on LWCF properties. Table 3.1-1 identified resources not addressed in one or more of the alternatives; the LWCF lands were analyzed in the Northern Corridor ROW alternative, were not affected by the proposed Red Cliffs NCA RMP Amendments or Issuance of the ITP to Washington County, and were not present in the St. George Field Office RMP Amendment for Proposed Zone 6. As part of the update to the Final EIS, the BLM reviewed warranty deeds and Section 3.16 includes information on parcel locations, land ownership, existing encumbrances, and potential impacts on properties acquired through Congressional appropriations from the LWCF Act.

The BLM is unaware of any express requirement in the LWCF Act that requires a Federal land management agency to analyze how a planning decision will further the purposes of lands acquired with LWCF funds. However, in Section 3.16 of the Final EIS, the BLM identified and analyzed

impacts on LWCF lands arising from the implementation-level decision regarding issuance of a ROW, in compliance with NEPA. In Sections 3.4 and 3.5, the Final EIS also analyzes potential impacts on wildlife species and habitat, including the Mojave desert tortoise and its designated critical habitat, in close proximity to a road. These sections also analyze the impacts on wildlife and habitat arising from the design features and conservation measures included in the applicant's proposed ROW design. The totality of this analysis supports a conclusion that it is possible for a ROW to be designed through the NCA's ROW avoidance area that only affects a very small portion of lands acquired with LWCF funds, that all practicable means to avoid or minimize environmental harm have been applied, and that the potential limited impacts would not negate the larger purposes for which the lands were acquired.

In addition to the federal parcels, the BLM reviewed the effects of the Northern Corridor ROW alternatives on the City of St. George conservation easement, which was acquired using LWCF funds (parcel UTU-79246, Final EIS, pp. 3-170 to 3-171). The BLM noted that the conservation easement was acquired with LWCF funds and the deed expressly prohibits future development of those lands that are inconsistent with defined conservation values. Furthermore, the BLM acknowledged that it does not have authority to issue a ROW over lands it does not manage and that it is the applicant's responsibility to acquire all necessary grants and permissions for a ROW across other property. Nevertheless, in order to receive a notice to proceed, UDOT would have to demonstrate that the project has obtained all permits, certificates, licenses, or other approvals from other Federal, State, or local government agencies, such that the BLM has reasonable grounds to believe that all legal prerequisites binding upon the BLM have been met (BLM Handbook H-2801-1, Section II.C.1 1).

Therefore, the BLM complied with the LWCF Act as detailed above and this protest is denied.

Endangered Species Act Violation

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: The FEIS acknowledges that “[d]eclines in Mojave desert tortoise populations are...exacerbated by the increasing urban interface with tortoise habitat in the analysis area.” FEIS at 3-231. More people results in great air and water pollution. This, combined with the increasing pervasiveness of invasive nonnative grasses facilitated by increasing levels of GHG (particularly nitrous oxide), feeds extensive fires and results in habitat conversion threatening the integrity of the Reserve and ultimately accelerating the continued decline of Mojave desert tortoise. See id. Amending the RMP clears the way for the NCH, which jeopardizes the population of the threatened Mojave desert tortoise, thereby violating the ESA.

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: BLM says that Zone 6 will enhance connectivity to the Green Valley AU and other units and is likely important for sustaining landscape level conservation of the MDT (e.g., to NE Mojave Recovery Unit). This is all speculation on the part of the BLM as we do not know if Zone 6 is adequate to help bolster landscape connectivity. What we do know is that the affected area of the NCA/Reserve has relatively denser populations of MDT that are essential to the continued health of the UVRU [Upper Virgin River Recovery Unit]. In addition, as described above, the BLM is putting lots of faith into the efficacy of crossing structures to reduce the damage to the MDT and its critical habitat. This faith is misplaced and unsubstantiated with any science showing the efficacy of these structures. The BLM says that the project will not jeopardize the continued existence of the MDT (<1% of all MDT in existence). It will involve the non-lethal take of 368 tortoises and impacts up to 2,333 acres of habitat range wide. However, as described above, the NCH will destroy some of the

most important habitat in the UVRU. The UVRU, if degraded to the point where it cannot support in the long-term MDT, will affect the continued survival of the species (by definition, since each recovery unit is deemed essential). We also note that the BLM is significantly underestimating the loss and adverse effect to critical habitat from the NCH project. See our comments elsewhere on this.

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: the suite of Mojave desert tortoise-specific measures described in Section 2.2.9.1 and Appendix D similarly fail to prevent illegal take of a federally-listed species and adverse modification of critical habitat in a National Conservation Area established to “protect each species that is - located in the National Conservation Area; and listed as a threatened or endangered species on the list of threatened species or the list of endangered species published under Section 4(c)(1) of the Endangered Species Act of 1973 (16 U.S.C. 1533(c)(1)).”

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Issue Excerpt Text: BLM violated NEPA (and the ESA) in failing to make public several key documents necessary to inform the public notice and comment phase of this process, including any Biological Assessment and Biological Opinion on the Washington County HCP and the BLM’s issuance of the NCH ROW, final biological report, 2019 USFWS workshop minutes, and Washington County’s application for an incidental take permit and all associated filings. The failure to timely provide public access to these documents - some of which remain secret to this day - inhibits the public’s ability to provide a significantly more detailed analysis of the UVRU, the full impacts of the proposed “take,” and the conditions of Mojave desert tortoise populations and habitat, and is otherwise crippling the ability to evaluate the effects of the RMP amendments. Their absence violates BLM’s duty under NEPA (and the ESA) to disclose all available information.” See, e.g., 16 U.S.C. § 1539(c) (requiring that “[i]nformation received by the [Service] as part of any [incidental take permit] application shall be available to the public as a matter of public record at every stage of the proceeding”; id. at § 1539(a)(2)(B) (requiring the Service to provide an “opportunity for public comment, with respect to a permit application and the related conservation plan”). See also *Gerber v. Norton*, 294 F.3d 173 (D.C. Cir. 2002) (reversing ITP because the Service failed to disclose ITP application at the earliest possible stage).

Summary:

- (1) The BLM’s preferred alternative and the amendments to the St. George Field Office RMP and the Red Cliffs NCA RMP would allow for authorization of a ROW for the Northern Corridor, the impacts of which would jeopardize the population of the Mojave desert tortoise (*Gopherus agassizii*), a U.S. Fish and Wildlife Service (USFWS) threatened species, and therefore would violate the ESA.
- (2) The BLM violated the ESA and NEPA in failing to make the Biological Assessment and Biological Opinion on the HCP or ROW issuance, the final biological report, the 2019 USFWS workshop minutes, and Washington County’s application for an ITP and associated filings available for public review.

Response:

Section 7(a)(2) of the ESA of 1973, as amended (16 U.S.C. 1531 et seq.) requires that a Federal agency ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated or proposed critical habitat (16 U.S.C. § 1536(a)(2)). Furthermore, the ESA requires that

Federal agencies consult or confer with the USFWS and/or National Marine Fisheries Service, as appropriate, to ensure that the proposed Federal action or activity, including land use plan amendments, is not likely to jeopardize the continued existence of any species listed or proposed to be listed under the provisions of the ESA, or result in destruction or adverse modification of designated or proposed critical habitat (Sec. 1536 (a), Interagency Cooperation, and 50 CFR 402).

- (1) The BLM and USFWS, along with Washington County and UDOT, have coordinated throughout the process of developing the EIS to share information and discuss potential impacts of the PRMPAs on threatened and endangered species and designated or proposed critical habitats. Throughout the process, the USFWS has provided information and input on the proposed action, including recommended conservation measures for listed species. The BLM initiated formal Section 7 consultation for the PRMPAs on September 23, 2020, following the submission of the BLM's Biological Assessment to the USFWS (Chapter 4, p. 4-1). The USFWS and BLM also engaged in informal discussions regarding species and habitats present within the planning area and the likely effects of the BLM's Federal actions, including the ROW applications and potential RMP amendments. Additionally, the USFWS provided the BLM with input on the format and structure of the analysis of impacts on endangered species in order to more closely reflect the organization of the Biological Assessment, while fully disclosing the impacts.

A Biological Assessment is required for "major construction activities" considered to be Federal actions that may significantly affect the quality of the human environment under NEPA and if listed species or critical habitat is present within the action area, or the area in which impacts from the proposed activity would occur (ESA Section 7 Consultation Handbook p. 3-11). Additionally, the Biological Assessment and the Section 7 consultation process will only consider the preferred alternative (proposed action) identified in the NEPA process. Changes to the proposed action during the NEPA process may result in re-initiation of the Section 7 process, if consultation ended prior to finalizing the NEPA alternatives analysis in the Final EIS or due to a later change.

The Final EIS does not include a jeopardy analysis or finding, which is the sole responsibility of the USFWS (USFWS Section 7 Consultation Handbook p. xxii). The USFWS Regional Director, or designee, is the signatory authority for jeopardy or other findings (USFWS Section 7 Consultation Handbook [March 1998], p. 1-4). Analysis of impacts in an EIS and determination of effect during the Section 7 process are described in the BLM NEPA handbook, which states:

A determination under the Endangered Species Act that an action would adversely affect a listed species or critical habitat does not necessarily equate to a significant effect in the NEPA context. The NEPA analysis and ESA effects determinations have different purposes and use slightly different analytical approaches (for example, regarding connected actions, reasonably foreseeable actions, and cumulative effects). (pp. 73–74)

The Final EIS discloses the potential impacts of the proposed alternatives on listed species in Section 3.5.2 of the Final EIS (Chapter 3, pp. 3-69 through 3-94). Impacts are based on analysis of scientifically defensible and publicly available literature, included in the Administrative Record. Conservation measures and design features were developed in coordination with the USFWS, including the use of crossing structures for desert tortoise. The Final EIS states that crossing structures for desert tortoise would be designed based on site-specific conditions and may include additional designs based on studies indicating that bridges or viaducts may be more effective for maintaining connectivity for the species (Final EIS p. 3-79). The efficacy of conservation measures will be analyzed during the Section 7 consultation process, where the USFWS has the authority to require reasonable and prudent measures, or actions determined to be necessary or appropriate to minimize impacts, i.e., amount or extent, of incidental take (USFWS Section 7 Consultation Handbook p. xvii; 50 CFR § 402.02).

As stated in the Final EIS, the BLM will not sign the ROD until the formal Section 7 consultation is complete (Chapter 4, p. 4-2), which is consistent with USFWS requirements (USFWS Section 7 Consultation Handbook p. 4-11, USFWS 1998).

- (2) Under the BLM regulations at 43 C.F.R. § 1610.5-2, only BLM management decisions considered as part of an RMP planning process are subject to protest. Therefore, any comments regarding the Washington County HCP and the issuance of the ROW are not protestable because they do not relate to a BLM RMP management action or allocation. The Section 7 consultation process is, by definition, a Federal agency to Federal agency process separate from the NEPA process and does not have a public participation component. Therefore, the BLM is not required to release the Biological Assessment prepared for Section 7 consultation for public review. Information used in the impacts analysis for the EIS is included in the Administrative Record for the EIS. As part of the Section 7 process, the Biological Opinion may be released once consultation has been completed, which is required to occur prior to issuance of the ROD.

The BLM fully complied with the requirements of the ESA in developing the EIS. For this reason, this protest is denied.

FLPMA – Unnecessary or Undue Degradation

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: FLPMA requires that the Secretary in managing the public lands shall take any action necessary to prevent unnecessary or undue degradation of the lands. 43 U.S.C. § 1732(b). BLM regulations in describing ways to prevent unnecessary or undue degradation specifically include “Attaining the stated level of protection or reclamation required by specific laws in areas such as...BLM- administered...National Conservation Areas.” 43 CFR §3809.415. The RMP Amendments and the subsequent construction of the UDOT’s application alignment is clearly detrimental to the National Conservation Lands System, the Red Cliffs National Conservation Area and its purposes, the Red Cliffs Desert Reserve, the Upper Virgin River Recovery Unit (UVRRU), and the Mojave desert tortoise, and the FEIS acknowledges that there are feasible alternatives located outside of the Red Cliffs NCA. See FEIS Appendix L at 16-17

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: In bifurcating a core Mojave desert tortoise area within Red Cliffs NCA and Reserve that is considered integral to the integrity and viability of the UVRRU and thus to the tortoise range wide, and in ignoring alternatives located outside the Red Cliffs NCA, the UDOT’s application alignment will clearly result in undue and unnecessary degradation on our public lands. Thus, the agencies would violate FLPMA if they were to authorize the ROW for the UDOT’s application alignment.

Summary:

The NCH Final EIS/PRMPAs would allow for authorization of a ROW for the Northern Corridor, the impacts of which would result in unnecessary or undue degradation for the habitat and population of the Mojave desert tortoise, therefore violating the FLPMA.

Response:

Section 302(b) of the FLPMA requires that “in managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” However, Section 102(a)(7) of the FLPMA declares that it is the policy of the United States that management of the public lands be on the basis of “multiple use” and “sustained yield.” Section 103(c) of the FLPMA defines “multiple use” as the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people. These vital resources include fish and wildlife species. Land use planning decisions for an NCA must be consistent with the purposes of the designating statute. The FLPMA provides that the BLM “shall manage the public lands under principles of multiple use and sustained yield...except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law” (43 U.S.C. 1732(a)). The designation of the Red Cliffs NCA by Section 1974 of the OPLMA reserved the lands to protect, conserve, and enhance the purposes for which the area was designated. Similarly, BLM policy directs the agency management of NCAs to be guided by the purposes for which the lands were designated and requires that the BLM utilize science to further those purposes while providing opportunities for compatible public use and enjoyment (Manual 6220, p. 1-6). In making these determinations, the BLM effects analysis must demonstrate that the BLM took a “hard look” at the impacts of the action, including a reasoned analysis containing quantitative or detailed qualitative information. (BLM NEPA Handbook, H-1790-1, 6.8.1.2 Analyzing Effects).

The NCH Final EIS/PRMPAs provides for the balanced management of the public lands in the planning area consistent with the designating language in Sections 1974 and 1977 of the OPLMA, as discussed above in the response to the protest alleging violation of the OPLMA (see response above, p. 4). In developing the NCH Final EIS/PRMPAs, the BLM fully complied with its planning regulations (43 CFR § 1610), the requirements of NEPA, and other statutes, regulations, and Executive Orders related to environmental quality. The NCH Final EIS/PRMPAs identifies appropriate allowable uses, management actions, and other mitigation measures that prevent the unnecessary or undue degradation of public lands. The NCH Final EIS/PRMPAs, itself, does not authorize any use of the public lands that may result in unnecessary or undue degradation. As discussed above, the ROW grant is an implementation-level decision and it is not subject to protest.

Nevertheless, the NCH Final EIS/PRMPAs is consistent with the FLPMA’s mandate to prevent unnecessary or undue degradation through specifically addressing the goals, objectives, and conservation measures needed to conserve Mojave desert tortoise habitat and to address its status as a threatened species listed under the ESA. The BLM’s planning process allows for analysis and consideration of a range of alternatives to conserve, enhance, and restore Mojave desert tortoise habitat and to eliminate, reduce, or minimize threats to this habitat to ensure a balanced management approach. As noted in Section 3.5.2, *Special Status Wildlife*, the BLM has taken a hard look at the potential impacts on special status species, including Mojave desert tortoise, in the NCH Final EIS/PRMPAs and implemented measures to conserve species and their habitats, balanced against its multiple-use mission and consistent with the purposes for which the NCA was designated (Chapter 3, pp. 3-69 through 3-85). The analysis in the NCH Final EIS/PRMPAs evaluates the direct, indirect, and cumulative impacts that may result from the range of management approaches provided by the alternatives in the NCH Final EIS/PRMPAs. The design features and mitigation measures described in Chapter 2 (pp. 2-6 through 2-9) and in Appendix D of the NCH Final EIS/PRMPAs are intended to reduce impacts on Mojave desert tortoise and the Red Cliffs NCA objects and values, as well as minimize or avoid impacts and encumbrances on LWCF properties.

In order to ensure a balanced multiple-use management strategy to address the protection of Mojave desert tortoise while allowing for utilization of resources on the public lands, the BLM and USFWS developed the NCH Final EIS/PRMPAs with involvement from a broad group of cooperating

agencies, including the State of Utah Public Lands Policy Coordinating Office, Washington City, Dixie Metropolitan Planning Organization, City of St. George, City of Ivins, Santa Clara City, and City of Hurricane, as well as through government-to-government consultation with tribal governments and with the State Historic Preservation Officer and consulting parties through the National Historic Preservation Act 106 process (Chapter 4, pp. 4-1 through 4-4). Additionally, the USFWS provided information and input on the proposed action, including recommended conservation measures for Mojave desert tortoise. Formal Section 7 consultation for the PRMPAs was initiated on September 23, 2020, following the submission of the BLM’s Biological Assessment to the USFWS (p. 4-1). The USFWS and BLM engaged in informal discussions regarding species and habitats present within the Action Area and the likely effects of the BLM’s Federal actions, including the ROW applications and potential RMP amendments.

As stated in Section 2.2.7 of the NCH Final EIS/PRMPAs, the BLM’s ROW-processing regulations at 43 CFR § 2800 require that a preliminary Plan of Development (POD) is submitted to the BLM along with the application for a ROW (pp. 2-5 through 2-6). The November 2020 POD includes information about the conceptual design, construction, and maintenance of the project, including construction procedures, environmental requirements, project design criteria, and measures that would be implemented by UDOT to reduce the environmental effects of the project. If the BLM selects a Northern Corridor alternative that crosses the Red Cliffs NCA, the BLM will require the preparation of a Final POD for this alternative before the issuance of a Notice to Proceed with construction. The Final POD would also identify the site-specific application of design features and mitigation measures identified in the ROD. The BLM will also require the application of design features and mitigation measures and would include stipulations, terms and conditions, and Notice to Proceed items to ensure the avoidance of unnecessary or undue degradation of the public lands.

The BLM adequately protected Mojave desert tortoise habitat from “unnecessary or undue degradation” in the NCH Final EIS/PRMPAs. Accordingly, the protest is denied.

NEPA – Purpose and Need

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: BLM must take into account the full provisions of OPLMA, and not just individual sections that support the applicant’s purpose and need. While the FWS’s purpose and need addresses conservation, it fails to disclose the whole story. The Amended HCP is set up in response to the NCH as a Changed Circumstance, thereby failing to minimize and mitigate the impacts anticipated from the taking. See FEIS at ES-3. By failing to identify and balance the agencies’ required consideration of legal obligations to protect the NCA and the species for which it was established, and instead focusing on satisfying the applicants’ request for a highway, the purpose and need statement is too narrowly defined, in a manner that reacts to and is deferential to the applicant’s request at the expense of the agencies’ responsibility to the public interest and established law.

Summary:

BLM’s purpose and need in the Red Cliffs NCA PRMPAs is too narrowly defined and deferential to the applicant’s request, thereby not taking into account the full provisions of the OPLMA and the objects and values for which the area was designated.

Response:

In accordance with NEPA, the BLM has discretion to establish the purpose and need for a proposed action (40 CFR § 1502.13). The BLM must construct its purpose and need to conform to existing decisions, policies, regulation, or law (BLM Handbook H-1790-1, Section 6.2).

The purpose and need may not be so narrow that only one alternative becomes a foreordained outcome, and may not be so broad that an infinite number of possibilities could accomplish the goals of the project.

The BLM established the purpose and need for the Red Cliffs NCA PRMPAs, which are described in Chapter 1 of the Final EIS, to meet its land use planning mandate under the FLPMA (see Section 1.3, specifically Section 1.3.1, p. 1-3; see Appendix O, response to comments A.24-8, p. O-50, and DP-02, p. O-94). The purpose and need considered the provisions of OPLMA Section 1977 and provided the appropriate scope to allow the BLM to analyze a reasonable number of alternatives that represent alternative approaches for managing the public lands in the planning area. The Final EIS text states, “In accordance with and taking into account the provisions of OPLMA and Department of Interior policies, the BLM’s purpose and need for action is to respond to UDOT’s application” (p. 1-3). Additionally, the BLM’s Land Use Planning Handbook (H-1601-1) states, “An applicant may request that BLM amend the land use plan to allow an otherwise nonconforming proposal. If the Field Manager determines that the request is warranted, a plan amendment is initiated” (Sec. VII.B, p. 46). For the reasons explained in the purpose and need statement, the BLM considered the RMP amendment to allow for due consideration of the ROW application. Additionally, because the ROW application triggered the RMP amendment consideration, it was appropriately focused on only those management actions that would need to be modified to allow consideration of the ROW application.

As described in Sections 1.2 and 1.3 of the Final EIS, the Federal agencies’ purpose and need for each action is distinct from the applicants’ interests and objectives. The BLM and USFWS have included the applicants’ interests and objectives in the Final EIS as appropriate. However, the BLM and USFWS have independently developed purpose and need statements and have not constrained them based on the applicants’ objectives.

The EIS evaluates a range of reasonable alternatives, with three action alternatives within the Red Cliffs NCA and two action alternatives that lie predominantly or entirely outside the NCA. These alternatives would meet the purpose and need for Federal actions and represent different approaches to resolving resource conflicts.

The BLM properly established the purpose and need for the NCH Final EIS/PRMPAs. Accordingly, this protest is denied.

NEPA – Range of Alternatives

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: The OPLMA does not require a northern transportation route inside the NCA; it merely has to be inside the county. Highways inside the NCA are not compatible with the purpose and therefore cannot be allowed. This especially true when there are superior viable alternatives outside the NCA. Not addressed in the FEIS 3. None of these studies have engaged the community in dialog about appropriate solutions, and none have studied solutions outside the NCA. These planning activities have not been conducted in good faith. Not addressed in the FEIS.

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: The range of alternatives is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. NEPA requires BLM to “rigorously explore and objectively evaluate” a range of alternatives to proposed federal actions. See 40 C.F.R. §§ 1502.14(a) and 1508.25(c). In the Red Cliffs Conservation Coalition Comments on the Northern Corridor Draft Environmental Impact Statement and Related Management Plans at 113-114, we specifically asked the BLM to provide a range of alternatives for Zone 6 size and configuration and include at least one alternative for Zone 6’s physical footprint that optimizes the conservation and recovery of the Mojave desert tortoise (e.g., captures additional acreage that would enhance landscape scale connections for the Mojave desert tortoise). The BLM in the FEIS considered only one option in the action alternatives for the physical configuration of Zone 6; thus the BLM failed to meet its obligation to consider a range of reasonable alternatives in violation of NEPA.

Summary:

The BLM did not consider an adequate range of alternatives outside of the NCA or an alternative that optimizes the conservation recovery of the Mojave desert tortoise for configuring the footprint of Zone 6.

Response:

When preparing an EIS, NEPA requires an agency to rigorously explore and objectively evaluate all reasonable alternatives and, for alternatives eliminated from detailed study, to briefly discuss the reasons for their elimination (40 CFR § 1502.14(a)). When there are potentially a very large number of alternatives, the BLM may only analyze a reasonable number to cover the full spectrum of alternatives (BLM Handbook H-1790-1, Section 6.6.1 quoting Question 1b, Council on Environmental Quality [CEQ], Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, March 23, 1981).

The BLM must analyze a range of reasonable alternatives, but not every possible alternative, to a proposed action: “In determining the alternatives to be considered, the emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant” (BLM NEPA Handbook, H-1790-1, at 50 [citing Question 2a, CEQ, Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, March 23, 1981]; see also 40 C.F.R. § 1502.14).

The BLM developed a range of reasonable alternatives that meet the purpose and need of the NCH Final EIS/PRMPAs and that address resource issues identified during the scoping period. The NCH Final EIS/PRMPAs analyzed six alternatives (including a No Action alternative), which are described in Section 2.6. The alternatives analyzed in the NCH Final EIS/PRMPAs cover the full spectrum by varying in: (1) degrees of protection for each resource and use; (2) approaches to management for each resource and use; (3) mixes of allowable, conditional, and prohibited uses in various geographic areas; and (4) levels and methods for restoration. Additional alternatives were proposed during scoping and the public comment period for the Draft EIS/RMP Amendments. Section 2.7 of the NCH Final EIS/PRMPAs documents each proposal and justification for its elimination from detailed analysis. Additional detail for some of the proposed ROW alignments within and outside the Red Cliffs NCA is also provided in the *Northern Corridor Highway Alternatives Development Report*, Appendix J of the NCH Final EIS/PRMPAs.

The BLM developed a reasonable range of alternatives for each of the proposed actions, including with respect to the proposed plan amendments, and are described in Sections 2.2, 2.3, 2.4, and 2.5 of the NCH Final EIS/PRMPAs. Section 6.6.3 of the BLM NEPA Handbook provides criteria for eliminating alternatives from detailed analysis, as summarized in Section 2.7 of the NCH Final EIS/PRMPAs. Public and agency input received during the scoping process was taken into consideration during the development of alternatives and can be found in the NCH Scoping Report (August 2020). Additional information related to the scoping process can be found in Chapter 4 of the NCH Final EIS/PRMPAs. Comments received during the public comment period were addressed through responses in Appendix O of the Final EIS and modifications were made to Chapter 2 of the NCH Final EIS/PRMPAs as appropriate (see also Section 1.6, pp. 1-8 to 1-9; changes in the document are indicated with bars on the right side of the page; see Section 2.7 on pp. 2-33 through 2-37 for examples).

Regarding the consideration of an alternative for the Zone 6 footprint, Zone 6 was the County's proposal to address USFWS concerns related to the tortoise impacts in the Reserve and resulted from the County's and USFWS consultations on the HCP. The decision of whether to accept the proposed footprint is wholly within USFWS discretion and the USFWS followed its regulations and policy for how to determine if additional alternatives were needed to address its concerns. To add other footprint options, the USFWS would have needed to find the County's proposal inadequate. It would not have been within the BLM's purview to dictate the size or configuration because it was an element of Washington County's proposed HCP amendment. The County brought Zone 6 forward to the BLM and the agency took it under consideration as a future partner in its implementation if the amended HCP is approved by the USFWS. Although the footprint was not within the BLM's decision space, determining the management actions within the footprint is within the BLM's purview; as such, the BLM developed a range of alternatives around management actions for Zone 6 (see Section 2.7, p. 2-33 and Section 2.7.3, p. 2-37). The potential expansion of the Reserve to include a mix of Federal and non-Federal lands, with the intent that non-Federal lands would be acquired over time, is consistent with the establishment of the original five zones of the Reserve. Section 1.6 of the 1995 Washington County HCP provides the following description: "Place in Federal and State ownership and management a reserve including 38,787 acres of Mojave desert tortoise habitat and an additional 22,235 acres as buffer and other species habitat...Currently, less than two-thirds of this area is under Federal management."

The BLM considered a reasonable range of alternatives in the NCH Final EIS/PRMPAs in full compliance with NEPA. Accordingly, this protest is denied.

NEPA - Impacts Analysis – USFWS Threatened and Endangered Species

Desert Tortoise

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: We would also add it is a substantial over-estimate because modeled habitat is not suitable habitat but rather habitat that has the inherent physical potential to be occupied without consideration of the condition of the habitat. See Red Cliffs Conservation Coalition Comments on the Northern Corridor Draft Environmental Impact Statement and Related Management Plans at 92-94. The DEIS at 3-47 (and the draft biological report at 37) stated that the UVRU had a Mojave desert tortoise population of 4,450 desert tortoises while the FEIS removed that figure and instead relies on the above figure which is over-estimated.

Conserve Southwest Utah/Red Cliffs Conservation Coalition**Tom Butine**

Issue Excerpt Text: Footnote-29 Multiple figures that capture the vulnerability of the desert tortoise population in the UVRRU or the adverse impacts of roads were removed from the FEIS.

Concerningly, at 3-46, BLM removed crucial information on highway impacts to long-term desert tortoise viability that had been included in the DEIS at 3-35: “Adult tortoises located near high traffic roads were at least 30 percent smaller (and below the typical size for sexual maturity) than tortoises associated with lower traffic volumes or no roads (Nafus et al. 2013). A reduction in the average size of individuals may result in lower population growth rates. Overall, these observations may indicate that habitat near roads used by as few as 300 vehicles per day represents sink habitat for desert tortoises (Nafus et al. 2013).” This material was removed from the FEIS without explanation.

Conserve Southwest Utah/Red Cliffs Conservation Coalition**Tom Butine**

Issue Excerpt Text: The Council on Environmental Quality regulations implementing NEPA define cumulative effects as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions.” 40 CFR 1508.7. The FEIS failed to adequately assess cumulative impacts to the Mojave desert tortoise because it relied on a table of possible future projects, with terse descriptions and failed to assess multiple road projects that would adversely impact tortoise habitats in the Red Cliffs NCA and Desert Reserve, the proposed Zone 6, and the larger HCP analysis area, including: the Babylon Road, the extension of Navajo Dr., and the extension of Green Valley Dr.

Conserve Southwest Utah/Red Cliffs Conservation Coalition**Tom Butine**

Issue Excerpt Text: The BLM also relies without basis on the efficacy of crossing structures, perhaps to justify not counting the substantial diminishment of critical habitat quality within the larger road effect zone. See, e.g., FEIS Appendix O at 0-660 (“numerous crossing structures would be included for any of the project alternatives in the Reserve, thereby reducing the effects of fragmentation, including genetic deterioration”). However, discussion found in the FWS Draft Biological Report at 57 on the efficacy of crossing structures belies BLM’s assertion that crossing structures can mitigate impacts to MDT and critical habitat. BLM acknowledges the adverse impacts caused by the UDOT’s application alignment to public lands, including those that are protected in American’s National Landscape Conservation System, but chooses to conclude that these impacts can be mitigated by UDOT’s design features and mitigation measures, even though these measures fail to prevent the take of federally-listed species and the adverse modification of critical habitat. See discussion elsewhere in these comments for why UDOT’s design features and mitigation measures fail to mitigate damage to the Red Cliffs NCA resources and values.

Conserve Southwest Utah/Red Cliffs Conservation Coalition**Tom Butine**

Issue Excerpt Text: Further, we asserted that the BLM was underestimating the amount of critical habitat that would be lost or substantially modified by the NCH through the Reserve. See Red Cliffs Conservation Coalition Comments on the Northern Corridor Draft Environmental Impact Statement and Related Management Plans at 97-99. As the BLM discusses in the FEIS at 3-45 to 3-48, roads cause an array of ecological effects that degrade habitat within a “road effect” zone. The BLM analyzed a road effect zone for the MDT using a road effect zone width of 508 m while the scientific literature points to larger road effect zones. See, e.g., Hoff and Marlow 2002 (road effect zone up to

4. 6 km) and Peaden et al 2015 (“Road-effect zones are one of the most insidious forms of habitat loss that contributes to biodiversity declines globally (Forman and Alexander 1998; Forman et al. 2003). Although roads themselves may comprise only a small portion of land use in many areas, their cumulative impact can extend far beyond their physical footprint. In the present study, road effects on populations extended 5-8 times farther than the widths of the roads themselves.”)

Summary:

The BLM failed to consider and was inconsistent in using the best available information when establishing baseline conditions for threatened and endangered species. Also, the BLM failed to adequately assess indirect and cumulative impacts on the Mojave desert tortoise.

Response:

CEQ regulations implementing NEPA require that agencies use “high quality information” (40 CFR 1500.1(b)). NEPA regulations require the BLM to “[e]nsure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements” (40 CFR 1502.24).

The BLM NEPA Handbook also directs the BLM to “use the best available science to support NEPA analyses, and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed” (BLM Handbook H-1790-1, p. 55). Under the BLM’s guidelines for implementing the Information Quality Act, the BLM applies the principle of using the “best available” data in making its decisions (BLM Information Quality Act Guidelines, February 9, 2012).

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a “hard look” at potential environmental impacts of adopting the PRMPAs. The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

Baseline data for each resource provide the necessary basis to make informed land use plan-level decisions. Section 3.5.1.1, *Affected Environment* (Final EIS, pp. 3-42 through 3-65), identifies the baseline information used for the discussion of the affected environment for the Mojave desert tortoise, including information regarding the tortoise’s life history; types of threats to the species including predation, disease, drought, fire, fragmented and degraded habitats, off-highway vehicle activity, and urbanization among others; studies and information on species translocation; the tortoise’s range and designated critical habitat; and population size, density and trends. The Final EIS also includes the best available population estimate for the Upper Virgin River Recovery Unit (UVRRU), which is based on published USFWS estimates using Utah Division of Wildlife Resources survey data from the Reserve Tortoise Conservation Area and extrapolated to the overall UVRRU (Final EIS p. 3-60). The Final EIS also notes that this is likely an overestimate of population size for the UVRRU (Final EIS p. 3-61). This population estimate for the UVRRU is also consistent with estimates for other Recovery Units to analyze trends in population numbers for the species (Table 3.5-3, Final EIS p. 3-60).

The EIS includes a discussion on impacts on desert tortoises from roadways (pp. 3-45 to 3-48), which discloses potential impact mechanisms and associated supporting documentation, existing roads within the Reserve, and the results of desert tortoise mortality studies on existing roads in the

Reserve. This section also discloses efficacy of fencing and under-road passages for reducing road impacts on the species, and the potential data gaps. The Final EIS further clarifies discussion of impacts from fenced roads from the Draft EIS, which was non-specific regarding impacts on the species from fenced or unfenced roads. Text in the Draft EIS was removed or clarified for studies conducted on unfenced roads because the NCH would be fenced with tortoise exclusion fencing. As such, this section adequately addresses the baseline within the analysis area and potential impact mechanisms from roads.

UDOT, through coordination with the USFWS and BLM, proposed in its revised POD the use of under-road crossing structures as a conservation measure for desert tortoise. Conservation measures are measures defined as part of the proposed action that would reduce, avoid, or mitigate impacts on a resource, in this case, listed species. Crossing structures are proposed to allow for tortoise movement under the proposed NCH. Evaluation of their efficacy in reducing take or adverse modification will be the responsibility of the USFWS through Section 7 consultation. On page 3-5, the Final EIS states:

In accordance with agency policies, the USFWS is using the best scientific and commercial data available to evaluate the Federal actions subject to USFWS review. As part of this analysis, the USFWS is evaluating whether various measures—such as habitat restoration, enhancing or providing for additional passage of Mojave desert tortoise (also referred to as ‘desert tortoise’ or ‘tortoise’) through the Northern Corridor or other existing roadways, and/or other actions that would provide additional conservation or reduce impacts on Mojave desert tortoise— should be included to minimize and mitigate impacts to the Mojave desert tortoise. This analysis could be used by the USFWS to evaluate potential reasonable and prudent alternatives and as it evaluates the Biological Assessment submitted by the BLM as part of the formal ESA Section 7 consultation. Any recommended conservation measures must fall within the jurisdiction of the agency or the applicant. If a Northern Corridor alignment within the Red Cliffs NCA is selected, any conservation measures applied to the selected alignment will be incorporated into the final POD for the roadway.

The BLM chose an analysis area of 508 meters on either side of the proposed alternatives for desert tortoise, based on the average home range size of an adult male tortoise. Direct and indirect impacts on tortoises would occur for those individual tortoises with home ranges that intersect the ROW as well as those tortoises within the area of fragmentation from the ROW buffer south to the Reserve boundary. The BLM quantified direct and indirect impacts on desert tortoise based on the number of acres and anticipated number of tortoises within this area. As noted in Appendix O, *Response to Comments*, the “Von Seckendorff Hoff and Marlow study refers specifically to unfenced roads. The Northern Corridor would be a fenced road, which greatly reduces potential loss of tortoises. Text was revised in the EIS to clarify the discussion between fenced and unfenced roads” (p. O-659). Furthermore, the additional studies noted in the protest’s issue were suggested in Draft EIS comments and, as a result, were not considered in developing the Final EIS. The BLM and USFWS used the best available science; as the remaining studies in the protest issue are not substantively different from the science used in the NCH analysis to describe the baseline conditions and were not raised previously, the BLM dismisses them from further consideration (43 CFR 1610.5-2(a)(2)(iv)).

The discussion of threats in the affected environment provides a thorough listing of other potential impacts with vastly different impact areas. The Final EIS, on page 3-72, acknowledges that “The assumptions and types of impacts and threats discussed for Mojave desert tortoise in Section 3.5.1, apply to this assessment of effect on Mojave desert tortoise and its habitat, and are not reiterated.” The Final EIS further acknowledges that the annual home range is the primary area of the “short-term indirect effects of noise, vibration, and other construction-related disturbances, as well as the continued noise and vibrations from traffic and maintenance of the road. The indirect effects analysis also considers the impacts of fragmentation from the main population within the Reserve Zone 3” (p. 3-71). Section 3.2.2 of the Final EIS addresses the potential impacts of invasive plant species and

includes an analysis area of up to 1 kilometer from the ROW boundary (Final EIS p. 3-11). The analysis areas for the proposed action are already infested with exotic grasses; therefore, additional spread may have little impact on the absolute total cover of exotic invasive grasses in the analysis areas (Final EIS p. 3-12). Changes in habitat quality due to increased invasive species cover would likely be insignificant when compared to the baseline conditions in the analysis area for desert tortoise. Perceptible impacts on desert tortoise would occur from highway noise or light. However, these impacts are associated with the implementation-level decision related to the ROW grant. Impacts from future construction and operation of the road are qualitatively analyzed in the NCH Final EIS/PRMPAs in Sections 3.13, *Visual Resources*, and 3.23, *Noise*. UDOT's POD includes the following design feature to address lighting impacts: "Lighting installation within the ROW would be minimized to only emergency lighting where the roadway crosses the NCA, except where additional lighting is necessary near intersections or other areas that would support safety and proper visibility for vehicles and pedestrians" (Final EIS p. D-5). Should noise impacts attenuate beyond the analysis area or substantially exceed existing conditions/UDOT noise abatement criteria, noise barriers would be evaluated following completion of the Final EIS to reduce impacts on sensitive resources such as the desert tortoise (Final EIS, p. 3-198 through 199).

The BLM must discuss the cumulative effects of the proposed action and the alternatives when preparing an EIS (BLM Handbook H-1790-1, Section 6.8.3). The CEQ regulations define cumulative effects as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions" (40 CFR § 1508.7).

The cumulative impacts area for special status wildlife is defined in Table 3.28-1 (p. 3-222) of the Final EIS. The table of reasonably foreseeable future projects or actions considered in the analysis is reported in Table 3.28-2 on page 3-225 of the Final EIS. These future projects and actions are projections made to predict future impacts and are not considered planning decisions or to be set limits on future agency actions (Final EIS p. 3-224); rather, they present a framework upon which to base analysis of the proposed action against other future actions within the identified analysis area. Babylon Road and Navajo Drive are considered future proposals with no site-specific information or plans for development that would be appropriate to include in a cumulative impacts analysis in the Final EIS and, therefore, were not included in the reasonably foreseeable future actions. The BLM is unaware of any pending proposals or local or regional plans that provide site-specific information regarding Green Valley Drive. The BLM adequately analyzed the reasonably foreseeable actions within the cumulative impacts analysis area.

As demonstrated above, the BLM used the best available information when describing baseline conditions for threatened and endangered species and adequately assessed the indirect and cumulative impacts on the Mojave desert tortoise. Accordingly, this protest is denied.

Mexican Spotted Owl

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: The FEIS Appendix O at O-684 states that "As identified in Table 3.5-1 in the EIS, the only action analyzed in the EIS that could potentially impact the Mexican spotted owl is the HCP amendment. The Mexican spotted owl nesting habitat identified in the EIS is 0.2 mile from non-Federal land that is potentially suitable habitat for the Mojave desert tortoise, so it is part of the analysis area for the HCP, not the Northern Corridor." BLM failed to analyze the indirect impacts of the proposed NCH on Mexican spotted owl nesting habitat. Regardless of where the habitat is located (federal vs. non-federal land) the highway would indirectly impact owl habitat within 0.2 miles of the

highway because of increased traffic noise, litter, predator subsidies, pollution, conversion to cheatgrass- dominated landscapes, increased risk of wildfire, etc.

Summary:

The BLM failed to analyze indirect impacts of the NCH Final EIS/PRMPAs on Mexican spotted owl nesting habitat.

Response:

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a “hard look” at potential environmental impacts of adopting the PRMPAs.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

Section 3.5.1.1 of the Final EIS (p. 3-67) states, “No suitable or critical habitat for the Mexican spotted owl is present in proposed Zone 6 or within the Reserve.” Furthermore, on pages 3-85 and 3-86, the Final EIS clarifies that there is no Mexican spotted owl habitat in areas affected by the RMP amendments or the NCH alternatives; therefore, there would be no direct or indirect impacts on Mexican spotted owl as a result of the planning actions or NCH.

There is no Mexican spotted owl habitat within the analysis area for the NCH Final EIS/PRMPAs; therefore, the BLM did not further analyze impacts on the Mexican spotted owl and its nesting habitat. Accordingly, this protest is denied.

NEPA – Impacts Analysis – ESA Section 6 - Lands

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: However, the FEIS fails to analyze the extent of adverse impacts caused by the RMP Amendments and UDOT’s application alignment because the Agencies have adopted an unreasonable and arbitrary limit, confining the indirect impacts analysis to 508 meter and 1 km buffers (FEIS at 3-95)20. At least twelve Section 6 parcels would be adversely impacted by the highway if indirect impacts were calculated out to 4.6 kilometers. In fact, the FEIS cites studies showing that the magnitude of the road impact zone extends up to 4,250 meters for 4-lane highways, and the zone of impact increased significantly with increasing traffic levels up to fully 4.6 kilometers from the road. FEIS at 3-46.

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: Importantly, the FEIS fails to demonstrate that the Agencies have identified any alternative lands to off-set and mitigate the impacts of the RMP Amendments and UDOT’s application alignment route on these Section 6 lands. BLM cannot meet its NEPA obligations in this manner, and BLM needs to discuss and disclose all relevant information to the public regarding offsetting lands to allow the public reasonable ability to examine and respond. The FEIS has further failed to examine the impacts of waiving the Section 6 agreement between the Service and the State

of Utah and accepting payment for the destruction of these Section 6 lands. Therefore, the Agencies' FEIS is inadequate.

Summary:

The BLM failed to analyze the indirect impacts of the project because of the narrowly defined scope of analysis on ESA Section 6 lands. The BLM also failed to analyze the impacts on ESA Section 6 lands by not identifying any alternative lands to mitigate the impacts of the proposed project.

Response:

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a "hard look" at potential environmental impacts of adopting the NCH Final EIS/PRMPAs. The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action. Additionally, as noted above in the *Introduction*, pursuant to the BLM planning regulations valid protest issues must address planning-level decisions, not implementation decisions. Therefore, comments related to implementation-level actions that are not protestable, such as the ROW grant, are not included here.

Baseline data provide the necessary basis to make informed land use plan-level decisions. Section 3.6.1, *Affected Environment* (Final EIS, pp. 3-94 through 3-95), identifies the baseline information used for analyzing the effects of Section 6 Land Acquisition Grant lands.

Table 3.1-1 clarifies that the Red Cliffs NCA RMP amendments would not affect the ESA Section 6 lands because "ESA Section 6 grants are awarded for non-Federal lands; therefore, no Section 6 lands are present within the NCA." The analysis in Section 3.6 identifies impacts that may result in some level of change to the Section 6 lands from issuance the ROW grant, regardless of whether that change is beneficial or adverse (Chapter 3, Section 3.6, pp. 3-94 through 3-102 in the NCH Final EIS/PRMPAs). For example, the analysis of Alternatives 2, 3, and 4 identifies both direct and indirect impacts, whereas for Alternative 5 the Final EIS only describes indirect impacts related to noise, habitat connectivity, and compromised habitat, and no indirect impacts are anticipated under Alternatives 1 and 6 (pp. 3-96 through 3-102).

The ESA Section 6 lands that may be affected were acquired through HCP Land Acquisition Grants. These grants are intended to support and complement the conservation program associated with the HCP and other stated values in the grants (see Final EIS p. 3-94). As such, the analysis considered indirect or proximity impacts on ESA Section 6 parcels, such as fragmentation, to adequately assess the potential degradation of the parcel's conservation value and, therefore, the adherence to the terms and conditions of the agreement.

Because the ESA Section 6 lands were acquired through the HCP Land Acquisition Grants, any replacement for lost conservation value as the result of impacts on these lands must be negotiated between the Utah Division of Wildlife Resources and USFWS and would depend on the specific impacts associated with the alignment that is approved. To ensure that the affected lands are replaced in accordance with applicable law, the BLM included a mitigation measure, as outlined in Section 2.2.9 of the NCH Final EIS/PRMPAs, that states:

The USFWS would make a determination of the value of all lands that were acquired with ESA Section 6 funding and would no longer serve their intended purpose due to the encumbrance of the approved ROW. In accordance with 50 CFR 80.14 and 2 CFR 200.311, the State of Utah would compensate the USFWS in the form of the transfer of an undivided pro-rated share of real property, replacement with real property of equal value that meets the intended long-term conservation goal, and/or repayment of the grant funds at fair market value. Compensation would be completed using non-Federal dollars and the conditions of compensation are subject to negotiation between the USFWS and the State of Utah.

The BLM complied with NEPA’s requirement to analyze the environmental consequences/impacts on ESA Section 6 lands in the NCH Final EIS/PRMPAs. Accordingly, this protest is denied.

NEPA – Need for Supplementation

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: 23 C.F.R. § 771.30. The particularly devastating fire season in 2020 and its effects on the Red Cliffs NCA and the Mojave desert tortoise population were not considered in this FEIS. Therefore, BLM must produce a supplemental EIS that evaluates the impacts of the UDOT’s application alignment with this up-to-date baseline.

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: The BLM failed to capture accurate baseline conditions for the alternatives analysis, including with respect to post-fire desert tortoise populations and critical habitat condition. The BLM must update desert tortoise density and abundance estimates and critical habitat condition assessments. This information is necessary to evaluate the impact of the UDOT’s application alignment to the desert tortoise and its critical habitat and is necessary to enable a comparison of the alternatives against current conditions. This information is currently missing from the FEIS. Instead, the FEIS relied on a single desert tortoise mortality survey across a mere 618 acres of the 14,765 acres that burned in 2020. The information found in the FEIS at 3-54-55 and 3-190- 191 fails to provide accurate baseline conditions in the Red Cliffs NCA and Desert Reserve.

Summary:

The BLM failed to account for new information that considers the recent fires within the project area and accurate desert tortoise baseline conditions and therefore a supplemental EIS is needed.

Response:

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a “hard look” at potential environmental impacts of adopting the NCH Final EIS/PRMPAs. NEPA only requires agencies to prepare a supplement to a final EIS if the agency makes substantial changes to the proposed action that are relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts (40 CFR 1502.9(c)). “New circumstances or

information” may trigger the need for supplementation if they would result in significant effects outside the range of effects already analyzed (BLM Handbook H-1790-1, p. 29).

The BLM accounted for the effects of recent wildfires, specifically the Turkey Farm Road, Cottonwood Trail, and Lava Ridge fires that occurred after the publication of the Draft EIS/RMP Amendments. As stated in Chapter 1 (p. 1-8), the BLM considered multiple factors to determine if the recent fires warranted the preparation of a supplemental EIS. BLM revised the affected environment and environmental consequences in the Final EIS as a result of recent fires including Sections 3.2, *Vegetation Communities*; 3.3, *Special Status Plants*; 3.4, *Wildlife*; 3.5, *Special Status Wildlife*; 3.6, *Endangered Species Act Section 6 Land Acquisition Grants*; and others listed in Chapter 1 (p. 1-8). The BLM discusses the effects of the recent fires on the affected environment for multiple resources throughout Chapter 3 including specifically on special status species. For example, the Final EIS included *Requests to Prepare a Supplemental Draft EIS to Address Impacts of the 2020 Wildfires* (p. 3-191) to specifically address the concerns raised regarding the impacts of the wildfires that occurred in the Red Cliffs NCA and Reserve in 2020. The BLM added the 2020 wildfire information to the Final EIS analysis and provided analysis regarding changes to the suitability of Mojave desert tortoise habitat and estimated tortoise mortality.

The EIS also addresses impacts from fires in 2020 to the baseline condition on pages 3-54 to 3-55 of the Final EIS. In addition, the EIS includes discussion of the history of fires within the analysis area, including changes to the fire regime (e.g., increased fire severity and frequency and shorter fire return intervals) and proliferation of invasive grasses following fires. The mortality survey discussed in the EIS on page 3-54 was the only mortality survey conducted post-fire in the analysis area prior to publication of the Final EIS. However, page 3-55 discloses estimated mortality and other related impacts following the 2005 fire season when multiple wildfires burned a similar amount of desert tortoise habitat within the Reserve: “It is estimated that 15 percent of adult Mojave desert tortoise within Reserve Zone 3 died because of wildfires that year.” Impacts on tortoise populations in the UVRU from wildfires is also discussed on pages 3-61 and 3-62 of the Final EIS, indicating that while fires have caused mortality within the recovery unit, the population likely remains stable; however, the EIS also notes that the impacts of fires in 2020 on the population is unclear. Combined with discussion on tortoise mortality from previous fires in the analysis area on page 3-55, the EIS adequately describes baseline conditions related to fires for this species within the analysis area and notes the potential impacts of 2020 fires.

The effects of the 2020 wildfire season on the Red Cliffs NCA and the Mojave desert tortoise population were adequately considered in the Final EIS and the impacts of those fires are not outside the range of effects already analyzed. Accordingly, this protest is denied.

NEPA – Impacts Analysis – Noise

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: Yet, in its FEIS, BLM failed to measure, monitor and assess the impacts on ambient noise levels of the RMP Amendment, the subsequent NCH, and the up-to 22,000 vehicle trips per day that are projected to use this highway. First, BLM failed to even assess the background noise levels in the heart of the Red Cliffs NCA and in areas impacted by UDOT’s NCH route. See FEIS at 3- 196, Table 3.23-1; FEIS at App. K, p. 10, Fig. 3 (map of noise measurement locations). More specifically, BLM’s noise consultant established five measurement locations to determine background noise levels, and not one of these monitoring locations was sited on or around UDOT’s NCH corridor, on the undeveloped public lands in the heart of the Red Cliffs NCA, or within designated critical habitat for the desert tortoise. See FEIS, App. K at 10. And BLM provides no

reasoned explanation why its baseline noise data ignored these important areas and resources. In the absence of this baseline data, BLM cannot adhere to NEPA’s “hard look” requirement.

Summary:

The BLM failed to analyze the potential noise impacts of the project on the NCA.

Response:

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a “hard look” at potential environmental impacts of adopting the NCH Final EIS/PRMPAs.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

Section 3.23.2.1 of the NCH Final EIS/PRMPAs states: “A qualitative analysis was determined to be the appropriate level of analysis for assessing potential noise impacts as a result of the planning level decisions to be made under this Final EIS.” The baseline data provide the necessary basis to make informed land use plan-level decisions. Baseline information for the project areas was gathered and analyzed in the *Noise Technical Report* (Appendix K) as well as Section 3.23, *Noise*.

The analysis focuses on the direct, indirect, and cumulative impacts that could potentially result from the amendments and the ROW. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse. Section 2.23.2.2 of the NCH Final EIS/PRMPAs acknowledges that “the most noticeable change in noise levels is anticipated near the T-Bone Mesa Alignment, UDOT Application Alignment, and Southern Alignment because these alternatives propose that a new highway would be constructed in an area where no roadway currently exists.”

This qualitative assessment discloses the estimated comparative impacts to provide a reasoned choice between alternatives. The BLM gathered baseline data from five monitoring locations within the project area as described in the *Noise Technical Report* (Appendix K). Baseline data gathered included areas within the NCA as illustrated on Figure 4 (Appendix K, p. 11). The EIS states that the design details needed to model project noise are not available and cannot be determined before the locations of highway alignment are determined to best avoid sensitive resources. Noise modeling would be conducted based on the selected alignment. As stated in Section 3.23.2.2, if noise modeling identifies future noise levels that substantially exceed existing conditions or UDOT Noise Abatement Criteria, additional measures would be taken based on UDOT’s feasible and reasonable criteria. Any necessary noise mitigation elements would need to be incorporated into the final design of the roadway as described in UDOT’s Final POD prior to issuance of a Notice to Proceed to begin construction (see Section 2.2.9.2)

Additional information regarding potential impacts on the desert tortoise from noise related to construction, traffic, and maintenance of the road are described in Section 3.5.2 of the NCH Final EIS/PRMPAs.

The BLM complied with NEPA’s requirement to analyze the environmental consequences/impacts related to noise in the NCH Final EIS/PRMPAs. Accordingly, this protest is denied.

NEPA – Impact Analysis – National Conservation Area

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: Under NEPA, consideration of indirect impacts also requires an agency to examine additional growth inducing effects of its decisions. See *Utahns for Better Transportation v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1174 (10th Cir. 2002), citing 40 C.F.R. § 1508.8(b) (indirect impacts “may include growth inducing effects”). See also *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517 (9th Cir. 1994). Courts have required this “growth inducing” analysis to be reasonably thorough. See *Laguna*, 42 F.3d at 526. A review of the FEIS establishes that BLM fails to undertake any discussion whatsoever of the potential growth inducing effects of the RMP Amendments, which permit the NCH within the NCA.

Summary:

The BLM failed to analyze the indirect impacts of the project on local growth within the NCA, thereby not fully disclosing the potential impacts on the area’s conservation values.

Response:

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a “hard look” at potential environmental impacts of adopting the NCH Final EIS/PRMPAs. The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The baseline data provide the necessary basis to make informed land use plan-level decisions. The baseline conditions regarding the Red Cliffs NCA are described in Section 3.18, *National Conservation Area*; Section 3.15, *Recreation and Visitor Services*; and Section 3.17, *BLM Transportation and Travel Management*.

Regarding analysis of population growth, as noted previously in the response to comments (Appendix O, p. O-146, response to comment H.65.111), the actions analyzed in the EIS would result in increased development pressure on the non-Federal lands within the Red Cliffs Desert Reserve or NCA. The current non-Federal lands within the Reserve are occupied, designated critical habitat for Mojave desert tortoise and take of Mojave desert tortoise for development purposes on these lands would not be covered under the existing 1995 HCP or Washington County’s Amended HCP. Additionally, current zoning of these properties is not favorable for their development. Development of these lands would require the development of an area- or property-specific HCP and likely also rezoning and/or annexation of the lands.

As described in the EIS, the Northern Corridor alternatives that cross the Red Cliffs NCA are proposed as an urban arterial roadway with intersections only at Red Hills Parkway, Cottonwood Springs Road, and Green Spring Drive. They would not provide additional access points to private, State, or municipal property. NCH Final EIS/PRMPAs Appendix L, *Traffic Analysis Memorandum*, prepared in coordination with the Dixie Metropolitan Planning Organization, evaluates population growth in Washington County. The *Washington County Population* section of the *Traffic Analysis Memorandum* states that heavy growth is expected in Hurricane, St. George’s south block area,

Washington City Fields Area, Santa Clara, and Ivins. The memorandum states that the future growth in Washington County is expected to increase the east-west travel demand across the St. George urbanized area. Alternatives that considered improvements to existing roadways were analyzed in detail in the EIS, including the Red Hills Parkway (refer to Section 2.2.5 of the Final EIS) and the St. George Boulevard/100 South One-way Couplet (refer to Section 2.2.6 of the Final EIS). Potential impacts on the NCA from population growth resulting from the NCH are described in Section 3.15.2.3, *Direct and Indirect Impacts from Alternatives 2, 3, and 4 within the Recreation and Visitor Services*. Additionally, Section 2.2.9 and Appendix D identify mitigation measures, developed by the BLM in coordination with the USFWS, that would conserve, protect, and enhance the objects and values of the NCA and reduce the potential impacts of the BLM issuing a ROW to UDOT for the construction of the Northern Corridor.

The BLM complied with NEPA’s requirement to analyze the environmental consequences/impacts related to the NCH in the NCH Final EIS/PRMPAs. Accordingly, this protest is denied.

NEPA – Response To Comments

Conserve Southwest Utah/Red Cliffs Conservation Coalition

Tom Butine

Issue Excerpt Text: The following table summarizes the comments made on the DEIS and related plans/amendments by major heading as defined in the Comments’ Table of Contents, describing how many were adequately addressed in the FEIS or were deemed not applicable (NA) due to scope of the protest, were not adequately addressed, and were not addressed. In some cases, new issues were introduced in the FEIS.

Summary:

The NCH Final EIS/PRMPAs did not adequately respond to public comments received on the Draft EIS/RMP Amendments.

Response:

The BLM is required to assess, consider, and respond to all substantive comments received (40 CFR § 1503.4). Substantive comments are those that reveal new information, missing information, or flawed analysis that would substantially change conclusions (BLM Handbook H-1601-1, pp. 23–24).

In compliance with NEPA, the BLM considered all public comments submitted on the NCH Draft EIS/RMP Amendments. The BLM complied with 40 CFR § 1503.4 by performing a detailed comment analysis that assessed and considered all substantive comments received. Appendix O, *Responses to Public Comments on the Northern Corridor – Highway Right-of-Way, Issuance of an Incidental Take Permit EIS and Draft RMP Amendments*, of the NCH Final EIS/PRMPAs presents the BLM’s responses to all substantive comments.

In Appendix O, the BLM summarized the issues raised by each comment letter and provided a meaningful response. Section O.3 provides a list of substantive comments received during the 90-day public comment period and the responses to those comments from the BLM and USFWS. As stated in Appendix O, “All comments received have been incorporated into the project record and can be accessed by contacting the BLM Color Country District Office. As described in Sections O.2.1 and O.2.2, all individual comments were given a unique submission number-comment number code (e.g., A.47-76 or 1456-1), comprising submission and comment identification numbers... For often-repeated concerns, summary public concern statements were drafted... All public concern statements

are included in this appendix and have appropriate responses. All individual comments summarized by the public concern statements herein are included in the project record.”

It is important for the public to understand that the BLM’s comment response process does not treat public comments as if they were a vote for a particular action. The comment response process ensures that every comment is considered at some point when preparing the NCH Final EIS/PRMPAs.

The BLM adequately responded to public comments on the NCH Final EIS/PRMPAs. Accordingly, this protest is denied.