RESOLUTION NO. R-2020-2699

A RESOLUTION APPROVING SUPPORTING AGREEMENTS TO THE AMENDED WASHINGTON COUNTY MOHAVE DESERT TORTOISE HABITAT CONSERVATION PLAN

WHEREAS, in January 2015, Washington County applied to renew the 1996 Washington County Mohave Desert Tortoise Incidental Take Permit (1996 Permit) that allows for the development of private property in compliance with the Endangered Species Act;

WHEREAS, on October 20, 2020, Washington County adopted a restated and amended Habitat Conservation Plan (the Plan) which describes how the County intends to work with various entities and individuals to assist in the Mojave desert tortoise recovery efforts and protect private property rights;

WHEREAS, this cooperation is key to the Plan and in some instances involves formal agreements such as:

- Updated interlocal agreements with area municipalities in which they formally support the Plan and their citizens receive the private property protections offered through the county's desert tortoise incidental take permit,
- An implementation agreement that commits federal and state entities to support the Plan, and
- A broad agreement regarding the archeological impacts from the tortoise conservation efforts that clarifies the National Historic Preservation Act's regulatory restrictions are not triggered on private property in Washington County due to the Plan nor the incidental take permit it supports; and

WHEREAS, it is the best interest of Washington County for these agreements to take effect.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNTY COMMISSION OF WASHINGTON COUNTY, UTAH, that Washington County the attached First Amended Interlocal Agreement Supporting the Renewed Mojave Desert Tortoise Incidental Take Permit Issued to Washington County is approved. Individual agreements shall be executed with each area municipality that approves the agreement.

BE IT FURTHER RESOLVED that the attached Implementation Agreement for the Washington County Habitat Conservation Plan (Amended 2020) is approved and shall be executed.

BE IT FURTHER RESOLVED that the attached Programmatic Agreement Among The U.S. Fish and Wildlife Service: Interior Regions 5 and 7, The Utah State Historic Preservation Officer, and Washington County, Utah Regarding the Issuance of an Incidental Take Permit Washington County Utah December 01, 2020, is approved and shall be executed.

BE IT FURTHER RESOLVED that the execution of any other document, necessary for the issuance of the incidental take permit or implementation of the Plan is approved.

(Signature block on following page.)

VOTED UPON AND PASSED BY THE WASHINGTON COUNTY COMMISSION AT A REGULAR MEETING HELD ON THE 15TH DAY OF DECEMBER 2020.

WASHINGTON COUNTY COMMISSION

VICTOR IVERSON, Chairman
Washington County Commission

ATTEST:

Kim M. Hafen, Clerk/Auditor

Commissioner Iverson voted aye
Commissioner Almquist voted aye
Commissioner Cox voted aye

Approved as to Form:

Deputy Washington County Attorney

(196)

Implementation Agreement for the Washington County Habitat Conservation Plan (Amended 2020)

By and Among

Washington County, Utah
United States Fish and Wildlife Service
United States Bureau of Land Management
Utah Department of Natural Resources
Utah School and Institutional Trust Lands Administration
and
Ivins City, Utah

1. Parties

This **Implementation Agreement** ("IA") for the **Washington County Habitat Conservation Plan**, as restated and amended on October 20, 2020, is entered into by and among **Washington County**, Utah ("County"), **United States Fish and Wildlife Service** ("Service"), **Bureau of Land Management** ("BLM"), **Utah Department of Natural Resources** ("UDNR"), **Utah School and Institutional Trust Lands Administration** ("SITLA"), and **Ivins City**, Utah ("Ivins"). In this IA, these entities are referred to collectively as the "Parties" and each individually as a "Party."

2. Recitals

The Parties have entered into this IA in consideration of the following:

A. The Mojave desert tortoise ("MDT," *Gopherus agassizii*) is a species of wildlife listed by the Service as threatened under the Federal Endangered Species Act ("ESA"). The final listing rule applicable to the Upper Virgin River population of MDT became effective on April 2, 1990 (55 Federal Register ["FR"] 12178-12191).

B. Section 9 of the ESA prohibits the unauthorized "take" of endangered wildlife and, by prior regulation still applicable to the MDT, prohibits the unauthorized take of most wildlife listed as threatened on or before September 26, 2019 (50 Code of Federal Regulations ["CFR"] §17.31(a)).

C. The Service issues incidental take permits under Section 10(a)(1)(B) of the ESA authorizing take of endangered or threatened wildlife that is incidental to otherwise lawful and non-federal activities (i.e., an incidental take Original ITP or "ITP"), after opportunity for public comment, if it finds that certain statutory criteria are met by the applicant. To obtain an ITP, an applicant submits to the Service an application that includes, among other things, a Habitat Conservation Plan ("HCP").

D. The County, in collaboration with the Parties and other stakeholders, prepared the Washington County Habitat Conservation Plan finalized in 1995 ("1995 HCP"). The 1995 HCP addressed take of MDT in the Upper Virgin River population incidental to certain otherwise lawful, non-federal land use activities ("Covered Activities") in Washington County, Utah. The regional, cooperative conservation goals were incorporated into the 1995 HCP and it was designed to promote recovery of the MDT in the Upper Virgin River Recovery Unit and meet substantially the applicable recommendations of the Desert Tortoise (Mojave Population) Recovery Plan published by the Service in 1994.

E. In 1996, the Service issued to the County ITP Number 036719 (the "Original ITP",) based on the 1995 HCP.

F. On February 23, 1996, the Parties also entered into a certain Implementation Agreement (the "First IA") regarding the respective commitments and responsibilities for implementing the 1995 HCP.

G. The Parties have implemented conservation measures described in the 1995 HCP that benefit other species in Washington County, Utah, listed as threatened or endangered under the ESA.

H. The expiration date of the Original ITP was March 14, 2016. The County notified the Service of its intent to renew the Original ITP, and applied to extend the Original ITP term on January

30, 2015, in accordance with the provisions for ITP renewal described in the 1995 HCP and Service regulations governing the renewal of ITPs at 50 CFR §13.22.

I. The County seeks a renewal of the Original ITP for an additional duration of 25 years.

J. The reason the County seeks to amend its HCP is to avail non-federal property owners of the previously authorized take, and receive an ITP for MDT for the next 25 years.

K. In cooperation with the Parties and other stakeholders, the County prepared and submitted to the Service in 2020 an amended and restated Washington County Regional Habitat Conservation Plan (the "Amended HCP"), which addresses certain changes in regulation and scientific data that have arisen since the approval of the 1995 HCP. For example, since the approval of the 1995 HCP, the Service has converted to a formal rule the Service's prior "No Surprises" or "Deal-is-a-Deal" Policy (50 CFR 17.22(b)(5)). In addition, the Service has adopted across the range of the MDT new descriptions of potential MDT habitat as well as new estimates of MDT population densities within habitat.

L. For the foregoing reasons, in addition to the requested renewal of the Original ITP, the Service determined that it was necessary to amend in certain, limited respects the Original ITP and, therefore, has issued to the County Incidental Take Permit Number 036719-1 (the "New ITP"), which has the effect of both renewing the term of and amending certain provisions of the Original ITP.

M. The County maintains agreements ("Interlocal Agreements") with most municipalities in Washington County to implement, in part, the fee collection aspects of the Amended HCP, subject to occasional amendment with the mutual agreement of the County and the pertinent municipality.

3. Purposes

The purposes of this IA are:

A. To ensure the cooperative implementation of the Amended HCP by the Parties;

B. To create an agreement by which the State Parties (i.e., Utah Department of Natural Resources and the School and Institutional Trust Lands Administration) rely on and benefit from the incidental take authorization of the New ITP for their Covered Activities as outlined in the Amended HCP; and

C. To describe certain terms not addressed in the Amended HCP, but which are important to the implementation thereof in accordance with the mutual intent of the Parties.

4. Terms Used

Terms used in this IA and specifically defined in the ESA or in the implementing regulations adopted by the Service under the ESA have the same meaning as in the ESA and those implementing regulations, unless this IA expressly provides otherwise. Terms used in this IA and specifically defined in the Amended HCP will have the same meaning as in the Amended HCP, unless this IA expressly provides otherwise. Terms specific to this IA include:

A. "1995 HCP" means and refers to the Washington County Habitat Conservation Plan that was finalized in 1995.

B. "Amended HCP" means and refers to the Washington County Regional Habitat Conservation Plan dated October 22, 2020, having the effect of restating and amending the 1995 HCP for the purposes of supporting the issuance of the New ITP.
C. "BLM" means United States Bureau of Land Management, an agency of the United States Department of the Interior.
D. "Certificate Holder" means a non-federal entity that is a party to an executed Participation Agreement/Certificate of Inclusion with the County for the purposes of the Amended HCP and New ITP.
E. "CFR" means Code of Federal Regulations.
F. "County" means Washington County, Utah, a political subdivision of the State of Utah.
G. "Covered Activities" means the take of MDT associated with lawful, non-federal land use activities as described in the Amended HCP.
H. "ESA" means Federal Endangered Species Act.
I. "First IA" means the agreement signed by the Parties to cooperatively implement the 1995 HCP.
J. "FR" means Federal Register.
K. "HCP" means Habitat Conservation Plan.
L. "IA" means this Implementation Agreement.
M. "Interlocal Agreements" means agreements maintained by the County with most municipalities in Washington County, Utah.
N. "Ivins" means Ivins City, a municipality in Washington County, Utah.
O. "MDT" means the Mojave desert tortoise.
P. The "New ITP" means incidental take permit Number 036719-1 issued by the Service to the County on _____202__, in connection with the Amended HCP and having the effect of renewing the Original ITP.
Q. The "Original ITP" means the incidental take permit Number 036719 issued to the County by the Service in 1996, based on the 1995 HCP.
R. "Party" or "Parties" mean any or all of the signatories to this IA.
S. "Service" means United States Fish and Wildlife Service, an agency of the United States Department of the Interior.
T. "SITLA" means Utah School and Institutional Trust Lands Administration, an agency of the State of Utah.
U. "UDNR" means the Utah Department of Natural Resources, an agency of the State of Utah.

5. Effective Date and Term

A. Previous Agreement Superseded

This IA supersedes and replaces the First IA in its entirety.

B. Effective Date

This IA is executed in conjunction with the issuance by the Service to the County of the New ITP and will become effective immediately upon the Service's issuance of the New ITP to the County.

C. Term of Agreement

This IA shall remain in effect for the term of the New ITP. If the New ITP's term expires and the Service allows the County to continue operating under the New ITP while a renewal is processed or any similar process is allowed where the New ITP's coverage does not lapse but a new, amended, or renewed ITP is not yet in place, then this IA shall remain in effect for the duration of the time the County benefits from the expired New ITP.

6. Assurances and Commitments to Perform and Comply with the Amended HCP

A. Incorporation of Amended HCP

The Amended HCP, in full, is incorporated by reference into this IA for all purposes as if fully set forth herein.

B. Cooperative Effort

In order that the requirements set forth in this IA are fulfilled, each Party hereby acknowledges and accepts its role and responsibilities described in the Amended HCP and this IA, and will perform the actions described in, and otherwise comply with, the Amended HCP. In doing so, each Party may rely on the rights and benefits described in the Amended HCP and this IA, and assurances provided by the New ITP.

C. Conflicts and Control

The terms of this IA and the terms of the Amended HCP shall be reasonably interpreted to be supplementary to and consistent with each other. In the event of any direct conflicts between the terms of this IA and the Amended HCP, the terms of the Amended HCP shall control as to the Service, the County, and Ivins. As to other Parties, the terms of this IA shall control, such other parties not being directly involved in the Amended HCP.

D. Highlighted Commitments

The following commitments contained within the Amended HCP are highlighted for clarity. Only commitments of the County, SITLA, and Ivins constitute required elements of the Amended HCP, as an HCP consists only of actions by the applicant and parties under its jurisdiction or direct control. The following listed commitments are not intended to be complete or exhaustive, but illustrative of the elements of the overall regional approach to conservation of the MDT.

1. Commitments of County
    a. The County commits to administering the HCP.
    b. The County commits to conducting surveys and removal of MDT from certain lands subject to Covered Activities.
    c. The County commits to providing defined financial support to the BLM and UDNR toward acquisition, management (including agreed upon restoration activities), and monitoring actions within the Reserve.

d. The County commits to contributing to adaptive management decisions through participation on advisory and technical committees.
e. The County commits to implementing identified responses to Changed Circumstances.

2. Commitments of SITLA
    a. SITLA commits to allowing its unacquired Reserve lands to be managed by the County for the benefit of the MDT and for allowing the BLM or other Parties to acquire its lands, subject to all applicable State laws, rules, and regulations, and subject to available funding.
    b. SITLA commits to conservation measures for listed plants as outlined in the Amended HCP that allows surveys for Holmgren milkvetch and supports setting aside of acreage as a preserve for Holmgren milkvetch as a Central Valley conservation area.
    c. SITLA commits to allowing conservation measures consistent with BLM, as practicable and as executed by other HCP Partners for listed plant species on SITLA-administered lands in Zone 6 under the Northern Corridor changed circumstance.
3. Commitments of UDNR
    a. UDNR will be responsible for the long-term management (including agreed upon restoration actions) of UDNR lands within the Reserve for the conservation of desert tortoise and other stated values.
    b. UDNR (through its Division of Wildlife Resources [UDWR]) will be responsible for translocating tortoises collected from lands subject to incidental take to other habitat areas and for biological monitoring of MDT and other listed species.
    c. UDNR commits to implementing conservation measures for listed plants.
    d. UDNR commits to contributing to adaptive management decisions through participation on advisory and technical committees.
4. Commitments of BLM
    a. BLM will be responsible for the long-term management (including restoration activities) of BLM administered lands within the Reserve for the conservation of desert tortoise and other NCA values.
    b. BLM commits to contributing to adaptive management decisions through participation on advisory and technical committees.
    c. BLM commits to acquiring available state and private lands within the Reserve for the purposes of land tenure consolidation and wildlife habitat acquisition.
5. Commitments of the Service
    a. The Service commits to providing oversight for compliance with the terms and conditions of the ITP
    b. The Service commits to providing guidance for the translocation program.
    c. The Service commits to contributing to adaptive management decisions through participation on advisory and technical committees.

d. The Service commits to supporting agreed-upon restoration activities as feasible through FWS oversight and involvement in HCP activities.

6. Commitments of Ivins
   a. Ivins commits to contributing to adaptive management decisions through participation on the advisory committee.
   b. Ivins City regulates allowed residential development activities in Reserve Zone 1.

7. Severability Remedies, Enforcement, and Effects of Default

A. Severability

If any part or provision of this IA shall be held invalid or unenforceable by a court having jurisdiction under applicable law, and after exhaustion of all available appeals, said part or provision shall be ineffective only to the extent of such invalidity without in any way affecting the remaining parts of said part or provision or the remaining provisions of the IA. Notwithstanding the foregoing, in the event such invalidity or any rescission pursuant to this section alters the relative balance of benefits of the Parties to the significant disadvantage of a Party, the Parties shall attempt to negotiate a modification of the terms of the IA in order to reestablish the original balance of benefits, and if such agreement is not reached, the disadvantaged Party may rescind the IA.

B. Effect of a Certificate Holder Default

So long as the New ITP remains in effect and a Certificate Holder is in compliance with applicable provisions of the Amended HCP, that Certificate Holder shall be deemed to have with respect to the Certificate Holder's Covered Activity, the full benefits and authorities of the New ITP. In the event that the Service may seek to suspend, terminate, or revoke the New ITP for reasons not the fault of a Certificate Holder, and that Certificate Holder is in compliance with the aforementioned provisions, the Service shall seek to craft a remedy, on a case-by-case basis, that does not affect that Certificate Holder's rights, benefits, and responsibilities under the New ITP prior to suspending, terminating, or revoking the New ITP. If it is not practicable to craft such a remedy and the Service suspends, terminates, or revokes, the New ITP, the Service will process for issuance to any such Certificate Holder an ITP conferring the same rights, benefits, and responsibilities with respect to the Certificate Holder's Covered Activities, without additional requirements or conditions beyond those applicable to the Certificate Holder under the Amended HCP. Additionally, the Service agrees that a breach by a Certificate Holder of its obligations will not be considered a breach by any other Certificate Holder. In the event a Certificate Holder has materially breached its obligations and, after reasonable notice and opportunity to cure, such Certificate Holder fails to cure, remedy, rectify, or adequately mitigate the effects of such breach, then the County or the Service may terminate the Certificate Holder's assurances under the New ITP.

C. Effect of Federal Default

Failure to comply with or perform the applicable commitment and requirements of this IA or the Amended HCP on the part of a Federal Party shall not result in the suspension or

revocation of the New ITP as to any other Parties or any Certificate Holder that is in compliance with the requirements of this IA. Likewise, such a failure will not negatively affect the renewal, amendment, or any other type of extension sought by the applicant.

D. Loss of Original ITP Benefits

The County shall have the right to revoke, terminate, or suspend a Municipal Partner's or Certificate Holder's right to enjoy or have the benefit, rights and privileges under the Original ITP if the Municipal Partner or Certificate Holder does not comply with the terms and conditions of its Interlocal Agreement or Certificate of Inclusion, as applicable. The County shall promptly notify the Service in writing of any action which would provide the basis for such revocation, termination, or suspension.

8. Miscellaneous Provisions

A. Nullification of Agreement

In the event that the New ITP is revoked or terminated without the consent of the Parties, this IA shall be null and void and, in such event, no Party shall be bound by its terms.

B. Preparation by All Parties

This IA shall not be construed as if it had been prepared by any one Party, but rather as if all the Parties had prepared the IA.

C. Notices

Notices provided for herein shall be personally delivered to the person set forth below (or that person's successor as identified by notice as provided herein) or shall be deemed given five days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or such other address of which any Party hereto may from time to time give notice to the other parties:

United States Fish and Wildlife Service

Attention:

United State Bureau of Land Management

Attention:

Utah Department of Natural Resources

Attention:

Utah School and Institutional Trust Lands Administration

Attention:

Washington County, Utah

Attention: Washington County Habitat Conservation Plan
c/o HCP Administrator
111 East Tabernacle Street
St. George, UT 84770
Phone: (435) 634-5759

Ivins City, Utah

Attention:

D. Elected Officials Not to Benefit

No member of, or delegate to, the United States Congress or the governing body of any of the Parties shall be entitled to any share or part of this IA or to any benefit that may arise from it, except as a to be provided incidental take authorization.

E. Availability of Funds

Implementation of this IA and the Amended HCP by the Parties is subject to the requirements of the federal Anti-Deficiency Act, the laws of the State of Utah, and the availability of appropriated funds from each Party respectively. The Anti-deficiency Act prohibits Federal agencies from incurring obligations or making expenditures (outlays) in excess amounts available in appropriations or funds (31 U.S.C. § 1341 (a)(l)). Agencies of the State of Utah are likewise enjoined in Utah Code § 63G-6a-1204 from entering into contracts or incurring obligations that commit funding beyond that appropriated. Therefore, Federal and state agency support of the conservation measures in the HCP is contingent on having sufficient funding over the term of the HCP. The Amended HCP describes funding sources that may be available to the Federal and state Parties for implementing the commitments described herein.

F. No Third-Party Beneficiaries

Without limiting the applicability of rights granted to the public pursuant to the ESA or other applicable law, and except as specifically provided with respect to the Beneficiaries, this IA shall not create any right or interest in the public, or any member thereof, as a third party Certificate Holder hereof, nor shall it authorize anyone not a Party to this IA to maintain a suit under the provisions of this IA. The duties, obligations, and responsibilities of the Parties to this IA with respect to third party beneficiaries shall remain as imposed under applicable provisions of state and Federal law.

G. References to Regulations

Any reference in this IA, the HCP, or the New ITP to any regulation or rule of the Service shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken. Except to the extent required under the No Surprises Rule, actions occurring in the future will comply with all regulations existing at the time an action is taken.

H. Headings

The section headings used in this IA are for the convenience of the Parties and are not intended to be used as an aid to interpretation.

I. Force Majeure

If the Parties are wholly or partially prevented from performing obligations under this IA because of unforeseeable causes beyond the reasonable control of and without the fault or negligence of the Parties (Force Majeure), including, but not limited to, acts of God, labor disputes, sudden actions of the elements, epidemics, or actions of nonparticipating Federal or state agencies or local jurisdictions, the Parties shall be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, and such failure to perform shall not be considered a material violation or breach, provided that nothing in this section shall be deemed to authorize any Party to violate the ESA and provided further that: (i) the suspension of performance is of no greater scope and no longer duration than is required by the Force Majeure; (ii) within forty-five (45) days after the occurrence of the Force Majeure, affected Parties shall give the Service written notice describing the particulars of the occurrence; and (iii) Parties use their best efforts to remedy their inability to perform (however, this section shall not require the settlement of any strike, walk-out, lock-out, or other labor dispute on terms which in the sole judgment of the Parties are contrary to their interest).

J. Applicable Law

With respect to the ESA, other environmental laws, and other applicable Federal laws, the laws of the United States shall govern the construction and interpretation of this IA. With respect to the state laws pertaining to the state Parties, the laws of the State of Utah shall govern the construction and interpretation of this IA. Further, nothing in this IA shall require any Party to: 1) violate any Federal statute or regulation, 2) exceed its legal authority, as defined by applicable statute, regulation, rule, or order lawfully promulgated, or 3) prevent any Federal Party from accomplishing non-discretionary functions pursuant to applicable Federal law.

K. No Waiver

Neither approval of the Amended HCP nor execution of this IA by a Party shall be construed, considered, or deemed to be a waiver of the right to any action, claim, cause of action, or defense available to that Party prior to the execution hereof.

L. Amendment to Implementing Agreement

This IA may be amended only by a writing executed by each of the Parties.

M. No Admission

Neither the application for the New ITP nor the execution of this IA by the Parties shall be construed, considered, or deemed to be an admission by the Parties that any take of any listed species has occurred or will occur in any particular instance.

N. Compliance with Regulations

Nothing in this IA modifies, in any manner, any applicable obligation to seek the approval of the appropriate Federal land manager prior to taking any action associated with implementation of the Amended HCP on Federal lands.

O. Counterparts

This IA may be executed in any number of counterparts. A complete original copy of this IA with all counterpart signature pages attached thereto and all amendments thereto shall be maintained in the official records of Washington County and the USFWS.

P. No Monetary Damages

No Party shall be liable in damages to any other Party or other person for any breach of this IA, any performance or failure to perform a mandatory or discretionary obligation imposed by this IA or any other cause of action arising from this IA.

Q. No Partnership

Except as otherwise expressly set forth herein, neither this IA nor the Amended HCP shall make or be deemed to make any Party to this IA the agent for or the partner of any other Party.

R. Integration

This IA, together with the Amended HCP and the New ITP, constitutes the entire agreement between the Parties. It supersedes any and all other agreements outside those listed, either oral or in writing, among the Parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

S. Successors and Assigns

Unless otherwise terminated in accordance with the provisions hereof, this IA shall, to the extent permitted by applicable law, be and remain binding on the Parties hereto and upon their respective successors and assigns.

9. Signatures

IN WITNESS THEREOF, the Parties hereto have caused this Implementing Agreement to be executed.

United States Fish and Wildlife Service

By: _____

Name: _____

Title: _____

United States Bureau of Land Management

By: _____

Name: _____

Title: _____

Utah Department of Natural Resources

By: _____

Name: _____

Title: _____

Utah School and Institutional Trust Lands Administration

By: _____

Name: _____

Title: _____

Washington County, Utah

By: _____

Name: Victor Iverson

Title: county commission chair

Ivins City, Utah

By: _____

Name: _____

Title: _____